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Transplanting Commercial Law Reform:  
Developing a ‘Rule of Law’ in Vietnam

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A thesis submitted for the degree of Doctor of Philosophy  
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This thesis is entirely my own original work.

John Gillespie

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# Contents

Acknowledgements vi  
Abstract vii  

**Introduction**  
Law Reform by Legal Transplantation 1  

**Chapter One**  
Developing a Legal Transplantation Theory 19  

**Chapter Two**  
A Brief History of Legal Transplantation into Vietnam 61  

**Chapter Three**  
Transforming Socialist Legal Ideology 105  

**Chapter Four**  
Party Leadership: The Separation of Party and State 157  

**Chapter Five**  
Dialogical Influences over Lawmaking 195  

**Chapter Six**  
Implementing Imported Laws 247  

**Chapter Seven**  
Non-State Pressure Groups and Legal Borrowing 313  

**Chapter Eight**  
Conclusion 363  

**Annexes**  
One: Research Sources 383  
Two: Major Commercial Laws Since 1987 391  
Three: Democratic Representation 393  
Four: Sketching Party and State Structures 399  
Five: Cultural and Legal Borrowing Discourses 409  
Six: Vietnamese Relational Transactions 421  

Glossary of Vietnamese Words 433  
Bibliography 439
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Abstract

Against a backdrop of legal globalisation, socialist transforming states such as Vietnam are reconfiguring their legal systems to engineer rapid economic development. Like Japan during the nineteenth century, Vietnam is trying to open up, industrialise and become a world force—in short to catch up with its regional neighbours and the West. Rather than waiting decades to distil commercial law from internal practices, it has decided to develop a legal framework from imported Western commercial laws.

Most theoretical discussions about the transfer of laws among countries concern North American and European experiences with harmonising common and civil law systems. These debates focus on problems arising from political economies and jurisprudence that seem far removed from the issues facing law reformers in Vietnam. This study argues that conventional explanations for the viability of some legal transfers provide misleading criteria for understanding legal transfers in Vietnam. What is needed is a theoretical framework in which to place and analyse how legal transfers interact with legal and social systems in Vietnam.

This study attempts to make sense of Vietnam’s extraordinary history of commercial legal development by devising a set of working postulates that bring the analysis closer to the processes shaping imported laws. It then applies these postulates to a series of case studies to develop a model that explains how legal transplants are adapted and implemented in Vietnam (and other socialist transforming East Asian states).

The first case study assesses ideological resistance to legal transfers and argues that laws can move into incompatible ideological terrain provided they are not actively blocked by the dominant ideology. This is followed by a series of case studies that show how legal transplants are sensitive to the ways legislators, bureaucrats and judges use state power to make and enforce law. The attitudes and processes informing lawmakers and enforcers profoundly influence the meanings given to legal transplants. The final case study demonstrates how non-state pressure groups influence the selection and implementation of foreign laws.

The development of a new interpretive model has been greatly assisted by discourse analysis, which suggests that dialogical exchanges between lawmakers and pressure groups give meaning to imported law. This
analytical approach avoids the limitations associated with conventional state-centred analysis by directing attention towards the regulatory conversations that give meaning to legal transfers. It asks who conducts these conversations, what are they about and how do they advance the regulatory objectives of key players? It suggests that the transfer of laws and ideas have similar effects, because regulatory discourse collapses distinctions between legal prescription and legal description. Further, it allows us to assess what types of conversations are most likely to generate preference convergence and the adoption of imported legal ideas. Discourse analysis also acknowledges the role played by human agency and reminds us that the story of legal borrowing is inextricably bound up with legal development strategies.

This study has revealed the complexity of law reforms based on imported laws. There are simply too many processes and perspectives for one unified theory. The interpretive model proposed in this study is intended to complement and refocus, rather than supplant other theoretical approaches through which legal transfers can be observed. It accounts for the main factors that shape the meanings given to imported laws: dialogical negotiations, effective communication, interpretive communities, strategic agendas and power relationships. As such it can guide researchers towards the processes and exchanges that shape and adapt legal imports into socialist transforming East Asia, especially Vietnam.
Introduction: Law Reform by Legal Transplantation

Since the collapse of the Soviet bloc in the early 1990s, global social, economic and political interconnections have proliferated, stimulating renewed interest by large trading nations and multilateral institutions (e.g. UN, World Bank, WTO and IMF) in international legal harmonisation. In the opinion of global lawmaking elites, financial and trading stability in developing countries require Western legal structures, such as rights-based commercial law, and above all else a procedural ‘rule of law’. Pressure for legal convergence increased when the World Bank attributed the East Asian financial crisis in 1997 to poor laws and governance procedures.

Against this backdrop of legal globalisation, socialist-transforming states in Asia (China and Vietnam) are attempting to use laws and institutions to engineer rapid economic development. Like Japan during the Meiji Restoration (1868) these states are trying to open up, industrialise and become world forces—in short to catch up with their regional neighbours and the West. Again like Japan, rather than waiting decades to distil commercial law from internal practices they have decided to borrow Western commercial law.


5 The term Western legal systems is used to denote Western European countries and former European colonies largely settled by Europeans. Like all broad generalisations, the definition of Western legal systems produces some anomalies. What this term intends to capture is a shared commitment to what Ugo Mattei describes as a professional legal system. Stated in propositional form this means:

* societies are comprised of individuals, voluntary organisations and the state; with clear divisions between state and civil society;
* states resolve conflicts through the application of laws that address autonomous individuals;
* laws are influenced by public participatory process and are consequently widely understood and obeyed; and
* officials are required to base decisions on state policies and laws, rather than political, personal, class, cultural, economic or other extra-legal considerations.
Most theoretical discussion about the transfer of laws among countries concerns North American and European experiences with harmonising among common and civil law systems. These debates concern problems arising from political economies and jurisprudence that seem far removed from the issues facing law reformers in socialist transforming Asia. Despite the growing economic and political importance of this region, legal transfers into socialist-transforming Asia are under-researched and under-theorised. Most writings in this area discuss Japan, and to a much lesser extent South East Asia and China. In comparison, Vietnam has been largely ignored. This is a missed opportunity because this country has absorbed an abundance of imported legal traditions. In successive historical periods—Chinese, French colonial, socialist, and Western commercial—legal ideas have created a layered legal architecture—the new overlaying the old. Moreover, as a country that has straddled the Confucian and South East Asian worlds for centuries, Vietnam provides an interesting counterpoint to legal developments in this region. Vietnam has been selected for further study not only for its rich history of legal borrowings, but also because commercial legal reforms are less than two decades old. Legal borrowing is still fresh in the minds of lawmakers and has not yet become obscured by decades of amendments, reforms and myth-making. It also provides an important case study because the local business environment is diversifying rapidly as foreign investors, domestic private enterprises and household businesses replace state enterprises as the principle vehicles for entrepreneurial activity.


This study argues that we cannot easily recognise Vietnam in conventional theories about legal transplantation. They provide misleading criteria for understanding this phenomenon in developing East Asia. If we are to transcend current ways of thinking it is necessary to find better ways to understand how legal transfer interact with host country systems. What is needed is a theoretical framework in which to place and analyse how legal transfers interact with legal and social systems in Vietnam.

This study will first attempt to make sense of Vietnam’s extraordinary history of commercial legal development by devising a set of working postulates that bring us closer to the processes shaping legal transplantation. It will then apply these postulates to a series of case studies to develop a model that explains how legal transplants are adapted and implemented in Vietnamese (and other developing East Asian) legal and social systems.

What is the nature of legal transplantation?

Legal transplantation is generally understood as the transfer of laws and institutional structures across geopolitical or cultural borders. It can be imposed or voluntary, encompass entire legal systems or single legal principles and integrate similar or different cultures. Within host countries, legal transfers may permeate state and non-state social institutions, or in the case of many developing countries, reside in state law superimposed on indigenous legal structures. It is increasingly linked to international legal harmonisation projects sponsored by large trading nations and international donor agencies.

Legal transfers are not new

For millennia legal systems around the world have developed through legal transfers. Some of the best-documented transplantation occurred during the military expansion of the Roman Empire. Ius civile applied to peculiarly Roman institutions and ius gentium was devised as a kind of universal law of ‘natural reason established among all humankind followed by all peoples’. Distinctions between local, foreign and universal law devised by

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8 The term ‘commercial law’ is used in its broad Western meaning to denote vertical, macro-economic regulation (i.e. fair trade laws) and horizontal, micro-economic regulation of mixed market, business transactions. This construction contrasts with the narrower Vietnamese concept of phap luat kinh te (economic law) encountered in legislation and legal literature. This term denotes the socialist division between transactions dealing with production (economic law) and those concerning daily necessities (civil law).


10 Id. 133.
the Romans underlie the medieval, Roman-Canonic concept of *jus commune* (a common transnational legal regime in Western Europe) and contemporary support for universal human rights and transnational legal harmonisation.\(^1\) Legal transplantation validated and accompanied imperialism in Europe during the Napoleonic conquests and the colonisation of East Asia, Latin America and Africa.

**Whole systems transfers**

The extent of legal transplantation varies enormously. At one extreme the European conquest and colonisation of North America and Australia involved not only the displacement of indigenous populations and cultures, but also re-engineering the natural and built environments. The agricultural economy of northern Europe, including livestock, pasture, plant and tree species, displaced and supplanted indigenous species.\(^2\) In addition to agriculture, colonists transplanted state institutions, religious orders, a mercantile economy and architectural preferences. For colonists surrounded by a facsimile of Europe, borrowing legal systems appeared both plausible and desirable.\(^3\) Conceptual obstacles to imposing foreign laws on indigenous populations were conveniently removed by the *terra nullius* doctrine that denied pre-existing legal entitlements. It was only after independence that a distance in legal perspective from the ‘motherland’ slowly emerged.\(^4\) More recently, extensive legal transplantation took place between West and East Germany following reunification.\(^5\) Not only laws, but also legal personnel including judges, court officials and lawyers from western Germany were seconded to eastern Germany to administer the transplanted Western system.

**Legal transplantation and superpower hegemony**

Large-scale legal transplantation is possible without colonisation or national reunification. During the ‘Cold War’ the USSR and United States used legal transplantation as a weapon

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\(^{13}\) For a discussion linking Western law to colonisation see Peter Fitzpatrick, 1992 *The Mythology of Modern Law*, Routlege, London, 107-111.


in their struggle for military and political supremacy. The nexus between political hegemony and law is well illustrated by legal transfers into the divided Vietnam from 1954 until 1975. As chapter two discusses in more detail, Soviet legal ideas began influencing the early communist moment in Vietnam in the 1920s. Large-scale legal transplantation began after the nation was divided in 1954 and irreconcilable fault lines emerged between the Democratic Republic of Vietnam (DRV) in the North and the Republic of Vietnam in the South.

In the North the Soviet Union became both the institutional model and source of most law. Legal transplantation was comprehensive. The DRV imported an entire political-legal system including ideology, political and legal institutions, codes and procedures. Urban colonial capitalism and village subsistence agriculture was partially transformed into a local version of a Soviet-command economy. Thousands of Vietnamese were sent to Eastern Bloc countries from the 1960s until 1990 to learn the skills needed to manage and implement the imported system.

Although the Republic of Vietnam in the southern half retained much of the French colonial system, from 1954 to 1973 it increasingly succumbed to American legal influence. Inspired by American legal reforms in Japan, Latin America and elsewhere in the ‘free world’, Vietnamese scholars and jurists were sent to the US for legal training and US academic institutions conducted training courses in Vietnam. Following reunification in 1975 Soviet law was transplanted from the victorious North to the South.

After the Soviet Union collapsed US legal hegemony entered a new phase. Francis Fukuyama in his influential book *The End of History and the Last Man*, published in 1992, epitomised the euphoria that greeted the demise of Soviet communism and the perceived victory of Western liberal democracy. As he put it, ‘for a very large part of the world, there is now no ideology with pretensions to universality that is in a position to challenge liberal democracy and universal principles of legitimacy other than the sovereignty of the people’. A decade later his triumphalism seems premature. Chinese and Vietnamese

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communist regimes are still firmly entrenched and various orthodox Islamic organisations are mounting a radical challenge to liberal democratic values.\(^\text{18}\) Undeterred by a growing literature showing the difficulties in transferring commercial law reform across cultural, political and economic borders, there is a largely US discourse that postulates an ‘end of history’ for competing legal systems.\(^\text{19}\) For example, in discussing international corporate governance laws, some authors assert that ‘over time, then, the standard [US] model is likely to win the competitive struggle…’ ‘because no important competitors to the standard model of corporate governance remain persuasive today’.\(^\text{20}\) They dismiss longstanding European corporate governance regimes that privilege worker and stakeholder representation on boards of directors as less economically efficient than the deregulated US model. As a corollary, they assert that the US corporate governance model should become the international standard.

Commentators querying global harmonisation point to evidence that corporate governance regimes in Britain, France and Germany, as well as in East Asia and Latin America, function effectively with different legal, political and economic logics.\(^\text{21}\) They also show that attempts to transplant US corporate governance to the Russian Federation failed to induce corporate accountability and other anticipated benefits.\(^\text{22}\) Further challenging the globalisation thesis, recent comparative studies suggest that after an initial period of convergence, transplanted corporate regimes increasingly diverged from the original template.\(^\text{23}\)

Much legal reform in developing East Asia has been guided since the early 1990s by ‘law and governance’ and legal harmonisation projects.\(^\text{24}\) The current consensus seems to be that

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20 Hansmann and Kraakman, supra 451, 454.


23 See Katharina Pistor et. al., 2002 supra 865-866.

certain legal institutions are conducive to economic growth, such as property and contractual rights and a corporate law regime backed by efficient courts and debt enforcement agencies. International agencies such as the World Bank, Asian Development Bank and national donor agencies (i.e. USAID) are among the most enthusiastic advocates for this new phase of international legal convergence. They support projects that aim to engineer the ‘rule of law’ by perfecting legislative drafting, strengthening legal institutions and providing legal training.

Some commentators attribute the trivialisation of regional economic, cultural and political differences found in legal convergence literature to a conscious strategy by development agencies to disseminate the laws and legal institutions required by liberal capitalism. In discussing attempts by US agencies to influence legal development in Latin America, Yves Dezalay and Bryant Garth pondered why the ‘law and development’ movement in the 1960s is dismissed in American literature as a failure, whereas more recent but equally uninformed projects are considered more successful. They conclude that perceptions about the possibility and desirability of legal transplantation are inextricably bound up in broader contests for political and economic power.

**Legal evolution**

Others contend that legal change is a ‘natural’ Darwinian process in which less developed systems will evolve towards the more mature ones. Since Western legal systems are more systematised than those in East Asia, the logical corollary is that East Asian systems will evolve or converge towards the West. This view has gained prominence with the emergence of globalised culture brought about by increased international communication,

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travel, education and entertainment. It is also hotly contested by those who point to the narrow range of elites participating in globalisation and the many examples of international cultural divergence. Legal evolution takes place when international treaties bind two or more nations to common (generally Western) legal rules in certain areas. Members of the World Trade Organisation (WTO), for example, are required to harmonise their domestic law with a wide range of customs, trading and intellectual property conventions and protocols. Much commercial legislation in developing East Asia, including Vietnam, is drafted with the objective of complying with WTO or other trade agreements. Legal harmonisation projects of this kind are often supported by international donor agencies. Legal harmonisation is further advanced by the globalising influence of private business transactions. According to Lawrence Friedman, businessmen and practising lawyers are the contemporary ‘carriers of transnational law’ and ‘there is a tremendous amount of globalisation in businesses and the economy, and the law follows along’. Globetrotting lawyers, financial advisers and related professions transfer laws to protect capitalist investors throughout the world. Western (primarily Anglo-American) commercial law is also globalised by ‘offshore’ dispute resolution centres.

Pressure for legal evolution is felt strongest in countries that are integrated into American and European global trading, investment and legal networks. Subsequent chapters in this study consider whether Vietnam is receptive to this form of legal transfer.

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35 In 2004 Vietnam’s major trading partners were Japan, Asean countries, European Union and United States. The major investing countries were Singapore, Taiwan, Japan and South Korea. See Vietnam Investment Review, 10 November 2004. Foreign direct investment is a relatively small source of capital. For example
Coming to terms with terms
Confusion can arise when different terms are used interchangeably to denote the transfer of laws. Already various terms have been used that require further clarification. Many terms have no agreed or fixed meaning, but rather reflect contextual nuances. Expressions such as legal harmonisation, unification, borrowing and convergence emphasise the compatibility and co-evolution of legal systems. Other terms, such as legal transplantation, are used to denote the transfer of law or legal systems into host countries.\(^{36}\) When used by theorists such as Alan Watson, transplantation implies that legal ideas have taken root in foreign legal terrain.\(^{37}\) But other writers use this metaphor with more circumspection.\(^{38}\) They distinguish ‘mechanical transplants’, which transfer easily, from organic transplants, which require careful selection and maintenance to flourish in new legal environments. Either way this term reminds us that transplant viability must refer in some way to legal behaviour in the recipient country. Otherwise there is no transplant only an indigenous law containing foreign ideas.

Other terms such as legal imports and borrowing imply that host, rather than donor countries are taking the initiative. A common shortcoming with these terms is that they discount the choices made by human agents that other theorists believe to be crucial to understanding legal transfers.

Gunther Teubner used the term ‘legal irritant’ to avoid what he says is ‘the false dichotomy’ of repulsion or interaction that is the result of thinking with the legal transplant metaphor.\(^{39}\) His term is useful in suggesting that once a law is transferred into a different system it does not automatically displace existing legal meanings and practices. Rather, it triggers a new set of unpredictable choices and outcomes.

Yet as a metaphor ‘legal irritants’ is limited by some conceptual shortcomings. It is suggestive about the processes that occur once law has transferred into a new system, but it says little about how, why and when foreign laws are selected for law reform. David

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Nelken goes further in suggesting that as metaphors ‘legal transplantation’ and ‘legal irritants’ share much in common, since they both ‘direct our gaze mainly to the regulatory problems of trying to use law to change other legal and social orders’. Commentators pay too much attention to the metaphors describing legal transfers. They are after all only suggestive. Since there is little possibility of finding one term that describes all types of legal transfers, this study uses a variety of terms to denote particular stages in the transfer process. As subsequent chapters reveal, since doi moi (renovation) reforms began in Vietnam during the 1980s, commercial legislation has extensively relied on foreign norms, rules and procedures. To describe legal transferring, this study uses the terms legal transplants, imports and borrowing.

Laws not only transfer between countries but also come from the past—from previous social and economic orders and traditions. As subsequent chapters show, Vietnamese legal development is based on cycles of legal transplants, borrowings and adaptations. In successive historical periods—Chinese, French, socialist, and Western—legal rules and principles overlay and intermingle with earlier traditions. The terms legal recycling and internal transplanting are used to capture these processes.

Legal transfers are also enmeshed in what Dezalay and Garth call ‘palace wars’. Words such as contests, mediations and negotiations are used to describe how human agents give legal transfers new meanings. Additional terms like localisation, naturalisation, legal hybrids and blurred legality are used to show that imported ideas are sometimes creatively combined with pre-existing ideas to create new solutions to domestic problems.

If the current trajectory of the Vietnamese international integration continues, it seems likely international legal protocols and doctrines will increasingly influence domestic legal development. Terms such as global law, transnational law and institutional ‘cropping up’ are used to describe the situation where new laws and organisational form are adopted in a number of places simultaneously.

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41 See Yves Dezalay and Bryant Garth, 2001 *supra* 241-256.

Finally, some theorists believe in evolutionary convergence in which legal systems become more alike as societies grow more similar. 43 This debate is beyond the purposes of this study, which primarily focuses on the adaptation and implementation of legal transfers into Vietnam. Nevertheless, terms are used in this study to differentiate 'natural' or unconscious convergence from consciously planned legal change.

Legal transplanting into East Asia

Rather than evolving from indigenous laws and precepts, studies show that commercial legislation in contemporary East Asia was primarily imported from Western legal sources. 44 Though the history of transplantation is as complex as the region, three basic patterns are discernable.

First, Myanmar, Malaysia, Hong Kong and Singapore received English commercial legislation and common law during the period of British colonial rule. 45 Similarly, the Dutch in Indonesia, French in Indochina, and Spanish and Americans in the Philippines imported civil law and jurisprudence. Following independence colonial transplants were amended and substantially revised. For many decades after independence the Indonesian Constitution 1945, for example, retained colonial law provided it did not offend constitutional principles. 46 Though many Dutch laws have been abrogated for political or economic reasons, the civil code of 1847 remains in place. The former British colonies also retained many transplanted English law and legal institutions. Though post-independence political and cultural imperatives have to varying degrees slowly changed both the substance and jurisprudential basis of law in these countries. 47

Second, and contrasting with the colonial experience, legal transplantation elsewhere in the East was a matter of choice. Frequently motivated by a desire to 'catch up' with developed countries, independent East Asian states imitated, by importing, the substantive laws and legal institutions of more economically developed counties. Fearing economic isolation and

43 See Lawrence Friedman, 1996 supra 65, 72-74; Peter de Cruz, 1999 supra 491-492.
44 The Asian Development Bank commissioned the most comprehensive survey. See Pistor and Wellons, 1999 supra 36-52, 56-61.
45 See generally Andrew Harding, 2001 supra 199-219.
political domination, the Japanese during the Meiji Restoration imported European, primarily Prussian civil law and state institutions. As a colonising power, the Japanese later transplanted their laws to Korea and Taiwan. Both China and Thailand were never entirely colonised, but they too imported continental civil law systems.

Third, radically different paths were followed by China and the Indochinese states of Vietnam, Cambodia and Laos following their Marxist-Leninist revolutions. In China’s case Western commercial law was rejected in favour of a socialist legal system imported from the Soviet Union. It was not until Deng Xiaoping’s economic reforms in the late 1970s that the importation of Western commercial laws (sometimes via East Asian countries) resumed.

Legal reforms in Indochina followed a similar trajectory. After the revolutions, French civil laws and legal institutions were replaced with socialist laws and institutions largely derived from the former Soviet Union. With the demise of Soviet influence and subsequent dismantling of central command economic planning, lawmakers in these countries are now attempting to graft imported market legal principles onto administrative systems that retain high levels of state management. Unlike transforming socialist counties in Eastern Europe, command institutions did not entirely collapse, but rather are adapting to market conditions.

Large-scale commercial legal importation did not begin in Vietnam until the Sixth Party Congress in 1986. Lawmakers initially looked to socialist countries for inspiration. They imported, with a few minor changes, non-commercial laws like the Penal Code 1986 and Family Law 1986 from the Soviet Union (see chapter two). Even the first wave of commercial laws, comprising the Law on Foreign Investment 1987, Land Law 1988 and Ordinance on Economic Contracts 1989 were primarily based on Chinese market reforms.

53 The blended of socialist-public law and capitalist private law is especially evident in this Ordinance. For example, it contains provisions designed to regulated command contracts between State Owned Enterprises
Only in areas where China lacked appropriate experience were laws imported from the capitalist West. For example, the Law on Companies 1990 was based on French Law. The next reform period coincided with the formal recognition of a mixed-market economy in the 1992 Constitution. Lawmakers began to borrow directly from Western legal sources. As international economic integration gained momentum after the ratification of the US-Vietnam Bilateral Trade Agreement in 2001, both the pace and extent of commercial legal borrowing increased. Since most Western commercial law was transplanted after 1991, this period (1992-2004) forms the main focus of this study.

This brief overview reveals a legal history in Vietnam that is rich in legal transplants. Laws from the world’s major legal families have been introduced through invasion, colonisation and more recently, voluntary adoption. Just as importantly, Vietnam’s experimentation with market-oriented laws is not yet two decades old. Contrasting with the multiple transfers, overlays and statutory amendments in some other East Asian countries, it is still possible in Vietnam to discuss with lawmakers, foreign donor agencies and domestic lawyers the factors shaping the selection, adaptation and implementation of foreign laws. As such, Vietnamese legal development offers many opportunities to study legal transplantation. The discussion so far raises numerous questions about the processes guiding legal transplantation into Vietnam. For example, with so many layers of legal borrowing is there such a thing as indigenous Vietnamese legal thinking? If there is a Vietnamese legal culture, why is there a need to borrow laws? Does Vietnam have a usable legal past? Put differently, are indigenous norms and business practices useful models to regulate a modern industrial economy? How are legal ideas from the past recycled and integrated with new legal thinking? These questions point to the need for a system of analysis that examines the interaction between legal transfers and local institutions, laws and social processes.

**Conceptualising legal transplantation**

The way we understand law and legal change implicitly influences the way we understand and conceptualise legal transplantation. Legal transplantation debates have conventionally polarised around convergence, divergence and legal evolutionary hypotheses that are grounded on local theoretical and contextual issues. For comparativists such as Rene de Groot, ‘it is likely that the legal systems of the European States will form one great legal and laws reflecting the devolved decision making in market transactions. See Jerome Cohen, 1990 *Investment*
family with uniform or strongly similar rules’.⁵⁴ Others within the same legal tradition caution that legal transplantation is just as likely to produce divergence as convergence in legal practice, because legal transfers do not transmit the ‘whole law’.⁵⁵ Legal evolutionists argue globalisation ‘forces’ legal systems to evolve towards the most ‘efficient’ solutions.⁵⁶ Still others such as Gunther Teubner use autopoietic theory to argue that lex mercatoria has de-coupled from its cultural roots and has created a stateless, globalised commercial law.⁵⁷ The underlying disagreement is whether legal change reflects or correlates to internal social forces—the ‘felt needs of society’.⁵⁸ This debate is preoccupied with law’s ‘relative autonomy’ from society and leaves many questions about how legal transplants interact with domestic laws and institutions unanswered. It also reflects historically conditioned attitudes to law that may not necessarily pertain to other parts of the world. Conventional debates likewise fail to distinguish general trends such as legal convergence or divergence from the various processes shaping the selection, adaptation and implementation of borrowed laws.⁵⁹ By directing attention towards international legal transfers, for example, legal globalisation studies may underestimate the extent to which legal reforms are propelled by domestic legal recycling and transfers within a legal system. Since the global and local co-exist, analysis should also consider bottom-up processes that assist or resist international harmonisation.⁶⁰

Taken together, conventional critiques fail to account for Vietnam’s uneven history of legal borrowing. Given the importance of transplantation to legal development in Vietnam, there is a pressing need for theoretical alternatives that address the processes shaping the transfer of laws across political, cultural and economic borders.

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⁵⁶ See Lawrence Friedman, 1996 supra 65.
⁵⁷ See Gunther Teubner, 1997 supra 3-22. Autopoetic or systems theory as it is sometimes called is discussed in chapter one.
To preview the theoretical discussion in chapter one, a reason given for transplant failures is that transplanted law does not comport with host country conditions. Montesquieu captured the uncertain relationship between imported law and local environmental and social conditions, when he opined that rules of law only coincidentally produce the same behavioral outcomes in different societies. Underlying this view is the belief that laws change and respond to external forces such as the workings of the market, political ideology, and cultural traits like individualism. Others theorists contend that an ongoing process of social differentiation and globalisation has de-coupled laws from social structures. If law is autonomous then legal rules can transplant from society to society with little regard for political, cultural and economic congruence.

Otto Kahn-Freund offered the valuable insight that ‘there are degrees of transferability’ and that viability requires congruent donor and host country sociopolitical structures. Though never fully accepting that laws are non-transferable, he reasoned that since most laws are deeply embedded in their social and institutional matrices ‘we cannot take for granted that rules or institutions are transplantable’. Since all laws have ‘de-coupled’ to some extent from their social roots, he believed that legal transplantation across cultural boundaries was theoretically possible. But as laws have unevenly ‘de-coupled’, some were more likely to transplant than others.

This study needs a methodological framework to guide research and distil specific empirical data into an explanatory model. Three working postulates have been synthesised from the literature to guide research into legal transplantation in Vietnam. According to the first working postulate, transplant viability increases where the ideological content of transplanted laws is compatible with the dominant ideology shaping legal and economic thinking in host countries. According to the second working postulate, transplant viability increases where imported laws comport with host country power-distribution structures. Or as Kahn-Freund put it, transplanted laws are sensitive to the ways legislators, bureaucrats and judges use state power to make and enforce law. The third working postulate suggests that non-state pressure groups influence the selection and implementation of foreign laws.

63 Ibid.
Chapter two briefly describes Vietnam’s long history of legal transplantation. It starts with the transfer of neo-Confucian notions of *li* (moral persuasion and adherence to rituals) and *fa* (rule through laws), which together with Chinese-inspired imperial statecraft formed the central organising principles for the pre-colonial legal system. It then shows why French colonial legality was so easily swept aside by Soviet-inspired revolutionary reforms. The chapter argues that pre-modern moral values conflated with Marxist-Leninism to produce a revolutionary morality that guided state rule until more emphasis was placed on law-based governance during the 1980s. As a consequence, imported Western commercial laws overlay institutional structures and epistemologies that are only slowly responding to right-based market reforms.

Chapter three applies the first working postulate to assess whether Marxist-Leninist state ideology in Vietnam impedes the transplantation of commercial laws. The discussion analyses changes in political-legal ideology in Vietnam and shows that new ideological thinking has flowered under the *nha nuoc phap quyen* (law-based state) doctrine introduced by the 1992 Constitution. It makes the significant finding that conflicting ideologies do not inevitably constrain legal borrowing. In fact some degree of ideological confusion and discord may actually create space for imported ideas. This means that neo-liberal ideals supporting property and contractual rights are not necessarily blocked by Marxist-Leninist ideology that privileges party power over law and state interests over private interests.

Chapter four uses the second working postulate to examine the interdependencies and competition between the party and state. More particularly it explores whether communist party ‘leadership’ over state institutions creates a regulatory context that is inimical to the private rights embedded in imported commercial laws. The chapter concludes that party leadership has the potential to generate legal uncertainty and destabilise imported private commercial rights.

Chapter five applies the second working postulate to determine how state lawmaking structures affect legal transplantation. Case studies contribute the insight that legislative drafters actively interpret and co-opt ideas in the official discourse to achieve strategic objectives. They further suggest the state’s receptiveness to imported legal ideas depends on whether official epistemologies are closed and self-referential, or open and willing to engage imported ideas. In short there is a powerful domestic political, epistemological and structural logic to legal borrowing.
In chapter six the second working postulate is used to assess how state agencies implement imported laws. Case studies show that imported commercial rights are negotiated in three-way contests between elite-level officials, local-level officials and businesses. They are also mediated in courtroom disputes between party, state and private interests. Evidence suggests that dialogical exchanges, between legal officials and entrepreneurs and lawyers advocating commercial rights, are slowly making imported legal ideas the frame of reference for implementing the law.

Chapter seven applies the third working postulate to evaluate how non-state pressure groups exercise leverage over the selection and implementation of foreign laws. Case studies show the ‘whole’ meaning of law is more likely to transfer intact when transplantation takes place between like-minded groups, such as between foreign donors and the foreign educated lawmaking elite in Vietnam. They also reveal a strong correspondence between socioeconomic status and influence over lawmaking. As a corollary, imported laws are increasingly reflecting the interests of powerful pressure groups, leaving politically unconnected entrepreneurs to self-regulate through hybridised relational transactions.

The analysis of legal transplantation into Vietnam concludes that it is not possible to determinatively model legal transplantation. There are simply too many variables to support testable propositions of cause and effect. Nevertheless it was possible to infer from case studies an analytical model to guide further research into legal transplantation. By analysing legal transplantation through state and non-state regulatory conversations, the model avoids the limiting confines of convergence, divergence theories, and globalisation paradigms.
Chapter One
Developing a Legal Transplantation Theory

Introduction
We have seen that Vietnamese legal reformers aspire to ‘catch up’ with neighbouring countries by developing a modern legal system based on Western legal models. In borrowing Western commercial law, they have embarked on a social experiment begun in Japan during the mid-nineteenth century and later copied by China and decolonising East Asian states. Attempts to understand how laws have transplanted into this region and whether they are exciting effective regulatory systems are strongly conditioned by socio-legal theories that propose different ways to assess the ‘fit’ between law and society. For example, what is the connection between law and culture? Can laws evolving in specific historical conditions transfer to different cultural settings? How important is the perceived ‘otherness’ of legal transfers and how is transplant viability determined? This chapter first critiques the theories explaining these issues. It then synthesises a series of working postulates that focus analysis in succeeding chapters on the ideology, state institutions and non-state pressure groups that interact with transplanted law.

Legal transplantation: convergence versus cultural-essentialism
Much work has been done to document and explain the use of legal transplants among Western legal systems. Yet legal theory offers little guidance on the present question—transferring laws from Western to East Asian legal systems. Two main themes are discernable in the legal transplantation discourse. Convergence theorists contend that nation-states are enmeshed in an inevitable and accelerating shift towards internationalisation and globalisation. Ever-increasing telecommunications, urbanisation, international investment and trade are credited with collapsing regional differences that in the past inhibited legal transplantation.¹ Invoking Francis Fukuyama’s ‘end of history’ hypothesis, some writers posit that capitalist commercial laws, especially those of the United States, are so irrefutably superior, they should form the kernel of a global legal

template. The East Asian financial crisis in 1997 reinvigorated this strand of Western legal triumphalism.

From this global vantage point, legal convergence appears both plausible and desirable. Multilateral international organisations, such as the World Bank, United Nations Development Program and Asian Development Bank actively promote 'legal convergence' in some East Asian legal systems including Vietnam (see chapter seven).

The other main theme originates from Montesquieu's skepticism whether laws can traverse cultural boundaries. He opined that laws express the spirit of nations and are consequently deeply embedded in, and inseparable from their geographic, customary and political context. The transfer of laws across cultural boundaries constitutes a 'grand hasard', because laws cannot change manners and customs—they must change themselves.

Both propositions find support in East Asian legal development history. A study of legal reform between 1965 and 1995 in six Asian countries found a discernable shift from local discretionary rules to imported Western commercial legal norms, but concluded that legal imports did not always signal converging legal systems. For example, Malaysia began the survey period with a Western-style legal system, but ended sharply diverging from Western practices in many areas. More perplexingly, the study found evidence of convergence in market-based legal strategies and commercial legislation, but not necessarily in legal institutions. For example, though operating within American-inspired legislative templates, exchange institutions in Japan and Korea functioned as political tools of respective Ministries of Finance. Legal rules, the study speculated, transplant more easily than culturally embedded institutions. At best it was concluded that 'throughout much of Asia's legal history, law

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4 Pistor and Wellons, supra 280-284.


6 Pistor and Wellons, supra 280-284.

7 Id. 281.
preceded economic development, but economic development was an important condition for the acceptance and use of laws.\(^8\)

Despite a general consensus that legal transplantation in East Asia over the last thirty years has had a limited impact, few commentators agree on the reasons why borrowed laws have not easily moved from statutes into society. Some argue it is too early to assess the effectiveness of reforms. Commercial legal reforms began in Vietnam more than 15-years ago, yet as we will see, extensive legal borrowing has not produced a legal environment that remotely resembles regulatory systems in donor countries. Naturally it takes time for law to influence state institutions, households and firms. Moreover, there is a well-recognised gap between law in the ‘books’ and law in ‘practice’ in every jurisdiction. Nevertheless, an explanation for the legal fragmentation and hybridisation observed in Vietnam and elsewhere in developing East Asia requires theoretical alternatives to the unproductive convergence and cultural-essentialist dichotomy.

This chapter argues that two different sets of analytical tools are required to comprehend Western legal transplants into Vietnam. First, many transplantation studies focus on legislative adaptation—what happens in statute books—without considering integration with deeper sociopolitical legal structures.\(^9\) It is well to recall that scholars who stick to doctrinal analysis learn little, for in most cases questions about reception are not legal or doctrinal.\(^10\) What is needed is an analytical approach that looks beyond law as legislative rules and addresses law-in-action—an entire systems analysis.

A second theoretical approach needs to negotiate the extremes of legal convergence and cultural essentialism. It must account for legal fragmentation and hybridisation and guide research by identifying the points of resistance to, and reception of, legal transplants. These analytical systems are complementary. Entire systems analysis explains how codified rules interact with state institutions and non-state norms and practices. Transplantation theory seeks to identify those aspects of host-country legal systems that are distinctive and most likely to engage or resist legal transplants.

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\(^8\) Id. 50.


Entire systems analysis

The relationship between law and underlying social forces is important to analysing legal transplantation. If laws are merely sets of bare propositional statements, as some proponents of large-scale legal transplantation seem to believe, then legal transplantation is comparatively easily, because law is not historically or culturally connected in any meaningful way. If, on the contrary, laws are socially embedded, then their transplantation into different historical or cultural settings appears more difficult. Conflicting theories about legal autonomy and their relevance to legal transplantation are considered in more detail below. It is necessary for the present discussion to find a theoretical framework that explains the interaction between imported statutory norms and underlying social values and practices. Scholars since Marx, Durkheim and Weber have sought ways of analysing the relationship between rules and sociopolitical change. Emphasising different aspects of this nexus, each grand theory created an intellectual framework that situated law in a social matrix comprised of political, economic and philosophic (or religious) traditions. They argued a need to examine the connection between law and society, because in addition to rules, social norms and practices constituted patterns of law. In other words, law comes in packages comprising propositional statements mixed with cultural norms and practices. Entire systems analysis implies there is more to legal transplantation than the technical transfer of legal rules among countries. Legal meanings are not entirely provided by the rule itself; codified rules are not self-explanatory, but take on contextual meanings from host-country state and non-state regulatory systems. If law is culturally embedded, then

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11 This view is most forcefully articulated by Alan Watson, but it is also implicit in the legal support programs funded by many international donors. See Alan Watson, 1996 'Aspects of Reception of Law, 44 American Journal of Comparative Law 335. Also see B. Markesinis, ed., 1994 The Gradual Convergence, Clarandon Press, Oxford.


legal transplantation research should focus on the interaction between legal transfers and host-country legal and social norms, organisational mentalities and habits and practices.\textsuperscript{15} For decades normative theorists have employed the concept of state and non-state regulation to explain how legal rules and social factors combine to shape business activities.\textsuperscript{16} Janet Landa, for example, found that ethnically homogenous Chinese communities used family and relational affiliations as alternatives to state regulations.\textsuperscript{17} Others have stressed inconsistencies and interdependencies between imported codified norms and local norms and practices.\textsuperscript{18} For example, laws introduced in Taiwan to curb anti-social aspects of biaohui (rotational credit groups) ignored informal personalistic bonds ordering informal lending. Rather than controlling biaohui, which remained as popular as ever, the law severed informal links between credit organisers and government officials that had previously constrained infiltration by organised crime.

These studies add the valuable insight that imported codified law and non-state regulatory systems do not exist in parallel systems or ‘traditions’, but rather are mutually constituted. This observation suggests the need to search beyond the narrow ‘family of law’ taxonomies

\textsuperscript{15} In considering the impact of legal imports in Japan, Masaji Chiba devised a legal typology to differentiate ‘official’ law, ‘unofficial’ law and legal postulates. ‘Official laws’ approved by legitimate authorities include, legislation and discretionary power backed by state power. ‘Unofficial law’ comprises underlying community habits and practices ordering human behaviour. It may support or subvert ‘official law’. Unwritten ‘unofficial law’ exists in every social system and is just as important as ‘official law’ in shaping and sustaining long-term commercial and social relationships. ‘Legal postulates’ are those aspects of ideology, religion, cultural practices, habits and mores that mould psychological interpretations of official and unofficial law and in turn deeply influence the repetitive patterns of behaviour constituting institutional structures and practices. He concluded that legislation based on borrowed law overlays—but only occasionally touched—unofficial legal practices and postulates governing most aspects of Japanese daily life. Chiba’s three-level system usefully directs attention away from law as a set of propositional statements towards the whole structure of law. But his distinction between ‘official’ and ‘unofficial’ law and legal postulates sets up conceptual divisions that are difficult to sustain in applied legal research. See Masaji Chiba, 1986 ‘Introduction’, in Masaji Chiba ed., \textit{Asian Indigenous Law: An Introduction to Received Law}, KPI, London, 4-6; M. Chiba, 1989, \textit{Legal Pluralism: Towards a General Theory Through Japanese Legal Culture}, Tokai University Press, Tokyo, 43-46.


used by some comparative lawyers to analyse differences between legal transfers and host countries. We need a conceptual framework in which to place and analyse the interaction between legal imports and social forces in host countries.

**Theorising legal transplantation**

Entire systems analysis suggests the need to delve beneath written laws and examine underlying legal and social patterns. But it does not illuminate the mysterious processes guiding the interaction between legal transplants and host country laws, institutions and social conditions. A methodology is required to inject order and logic by identifying possible sites of reception, hybridisation and rejection. This section summarises and critiques the principal explanations and justifications for legal transplantation. Particular attention is given to theoretical linkages between transplanted law and host-country laws, institutions and social conditions.

**Transplanting natural law**

From Roman times rational, divine, universal and immutable natural laws have justified legal transplantation. Roman jurists equated *ius gentium*, which applied to colonised people, with *ius naturale* (law that should be observed by humanity). They considered ‘universal laws of nature’ capable of linguistic expression through universal legal codes. In the belief that differences between legal systems denied universal human attributes, natural law codes based on Roman morality were superimposed over indigenous cultural beliefs and practices.

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19 In condensing human behaviour into ideal descriptions, legal taxonomies only roughly approach real life. These shortcomings are less apparent in societies where legal discourse is mediated by comparatively well-documented and reasonably transparent, formal and informal mechanisms, such as democratic institutions, media, state corporatist relationships and civil society organisations. Classification is further aided by legal scaffolding that insists on ‘boundaries and boundedness’ and a mythology of law as a mechanism of social integration. But as we shall see, Vietnamese culture does not aspire to universal legal positions and law-like and extra-legal processes are interwoven, making taxonomies difficult to substantiate. For a general description of legal taxonomies see e.g. Ugo Mattei, 1997 ‘Taxonomy and the World’s Legal Systems’ 45 *American Journal of Comparative Law* 5, 6-10’ John Merryman, 1985 *The Civil Law Tradition*, 2nd ed., Stanford University Press, Standford.

Later, until its displacement by rights-based law over the last two centuries, natural law legitimatised European colonisation of non-Christian peoples. According to natural law doctrine all humans had a right to salvation—and colonial laws were in theory not permitted to abrogate indigenous cultural practices and laws. French legal transplantation to Vietnam frequently ignored this tolerant formulation and invested central authorities with power to regulate or prohibit local customs (see chapter two).

Disagreements concerning core human characteristics continue to undermine Western assertions of universal rights. History is full of accounts were putative universal laws have been transmogrified by host-country culture. For example, while adopting the Roman institutions and laws, ninth century Byzantine norms more closely resembled Persian than Western values. The separation of state and church that underpinned Roman law was subverted by the Byzantine mystical belief in\textit{ taxis}\—the changeless, harmonious and hierarchical order of things. This observation moves the discussion closer to recognising that particular legal systems have ideology, culture and practices that may invalidate or disrupt the workings of transplanted laws and institutions.

**Legal evolution**

Contrasting with static and eternal natural law, evolutionary theory links laws to dynamic processes—and most importantly for this discussion—with specific social configurations. In an age of laissez-faire capitalism and colonial empires, early twentieth-century evolutionists like Sir Henry Main recalled Social Darwinist notions that ‘primitive’ legal

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22 Colonial laws were limited to regulating sea travel, trade, settlement, and proselytizing the Gospel. They could only abrogate customs that offended religious practices.


systems evolve into ‘progressive’ Western systems. French administrators invoked a survival of the fittest rationale to justify imposing colonial legality in Vietnam. Later, Max Weber ascribed legal change to private wealth accumulation, freedom of labour, free movement of goods and a social need for a calculable law and rational public administration. Rather than superior virtues, he attributed development in Western legal systems to ‘concrete political factors, which have only the remotest analogies elsewhere in the world’. These attributes were compared with social cultures, especially in East Asia, which had different ideas of what is meant by law.

Building on Weber’s ‘calculable’ and ‘rational’ legal ideal, some contemporary evolutionary theorists narrowly locate modern legal development in ‘rational economic decisions’. Applying neo-liberal economic theory, these theorists contend that rational decision-making is a universal human characteristic that explains all human behaviour. Culture is marginalised in this calculus, because personal values are considered non-comparable.

Robert Cooter, a leading law and economics (the legal analogue of neoclassical economic theory) commentator, posits that ‘economic competition changes products and techniques, which in turn creates new problems of coordination and cooperation. Communities of people solve these problems by developing norms of behaviour ... The state raises some social norms to the level of law’. In short, decision-makers everywhere reach similar conclusions when confronted with equivalent ‘rational’ economic problems.

Most evolutionary writing explains legal transplantation in terms of borrowing by less developed systems to catch up with more comprehensive systems. Sir Henry Maine used Social Darwinism to justify massive legal transplantation from Europe to govern new

31 The term neo-liberal economics refers to a philosophy whose basic units are individuals that make rational decisions according to prevailing circumstances and available information. For a discussion of this philosophy in the context of legal development see Elizabeth Landes and Richard A. Proser, 1978 ‘The Economics of the Baby Shortage’ 7 Journal of Legal Studies, 323; Robert Cooter, 1996 ‘The Theory of Market Modernization of Law’ 16 International Review of Law and Economics 141, 142-146.
32 As Paul Samuelson succinctly put it, ‘goods follow dollar votes and not the greatest good. A rich man’s cat may receive the milk that a poor child needs to remain healthy ... the market mechanism is doing its job putting goods in the hands of those who can pay the most’. Paul Samuelson, 1989 Economics: An Introductory Analysis, 13th ed., McCraw-Hill, New York, 46.
subjects and expatriates in distant colonies. Weber’s more subtle theory recognised the possibility of co-evolution between different cultures. But in finding modern European law complete and rational, he inferred that what existed elsewhere was incomplete and irrational. Drawing on these theories, multi- and bi-lateral donors have encouraged East Asian states attempting to modernise and industrialise their economies to discard irrational indigenous laws and adopt Western-inspired law. The following section speculates that ‘catch-up’ development underlies much legal transplantation to Vietnam.

The law and development movement
Legal evolution confers theoretical respectability to aid agencies reforming developing countries’ legal systems. Starting in the 1950s and reaching a zenith during the United Nations Development Decade (1960s), Western advisers urged developing countries to copy the modern features of developed countries, particularly their legal systems. A donor-assisted wave of Western legal transplants surged into many East Asian countries, until a shift to state intervention policies during the 1970s curbed the appetite for market law.

Rene David’s justification for transplanting a European civil code to Ethiopia typifies legal assistance projects during this period. He opined that the country,

cannot wait 300 or 500 years to construct in an empirical fashion a system of law, which is unique to itself … The development and modernisation of Ethiopia necessitates the adoption of a ‘ready made’ system; they force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations.

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35 See Pistor and Wellons, supra 104-105. The law and development movement can be divided into several distinct categories. The term early law and development refers to writings before the publication of an article by David Trubeeck and Marc Galanter, which radically changed its direction. See D. Trubek and M. Galanter, supra 1080-83.
Much of the early literature guiding the influential ‘law and development’ movement drew selectively from Weber’s theory that causally linked industrial development and legal rationality—one cannot proceed without the other. 37 Theorists of industrialisation further contended that modernising legal rules could only flourish where bureaucracies and community attitudes are supportive; thus political, legal and economic institutions must reform to foster development. 38 Developing countries were urged to copy the ‘modern’ institutional features of Western countries, such as new constitutions, separation of powers, independent judiciaries and free elections. They were also encouraged to adopt the general and autonomous laws brokered by capitalist property relationships. Weber believed that these rules enabled the West to generate the calculability required by modem states and markets. But law and development scholars conveniently ignored Weber’s cautioning that law develops over time by interacting with local socioeconomic environments—processes that induce path-dependent development. 39

As a critic observed, ‘what was being universalised is not democracy, but the capitalist economic system and its attendant form of government’. 40

Informed by ‘Third World’ development failures and a ‘homegrown’ US crisis of faith in the ability of Western law to induce political plurality, two leading ‘law and development’ exponents recanted. In a singularly influential article published in 1974, David Trubek and Marc Galanter accused Western legal assistance of ‘ethnocentricity and naivete’ in assuming that transplanted Western law could be integrated onto host-country institutions and social conditions. 41 In their estimation Western law was infused with particular values and precepts that were not easily received by other societies.

37 While Weber placed economic development within path-dependent historical contexts, his theories have been used by some foreign donors to argue that Western legal development has universal application. For a consideration of Weber’s law and development theories see David Trubek, 1985 ‘Reconstructing Max Weber’s Sociology of Law’ 37 Stanford Law Review 919, 920-926; Sally Ewing, 1987 ‘Formal Justice and the Spirit of Capitalism: Max Weber’s Sociology of Law’ 21 Law Society Review (3) 487, 487-500.


Debates about the crisis in the law and development movement were informed by a broader disenchantment among Western scholars with neo-liberal economic prescriptions for reform. 'Basic Needs' theorists, for example, believed that neo-liberal markets produced hash outcomes because states did not redirect welfare income to the poor. But like neo-liberal theorists, they urged states to make markets work for the poor by eliminating institutional blockages.

Transforming institutionalists presented a more radical challenge to neo-liberalism. They used neo-Marxist, historical materialism to show that capitalist political economies constitute systems of power. If human institutions, rather than economic competition, primarily shaped markets, there were no ‘natural’ or ‘free’ markets. To account for poverty in developing counties, transforming institutionalists needed to explain not only market efficiency, but also class power. They devised various models explaining the action of class power on markets. Some models emphasised the dependency of developing countries on globally dominant economic classes, while others gave indigenous elites more credibility for shaping their own destinies. What united these models was the belief that development theory must focus on the way the legal order shapes institutions and fosters the emergence of elites that used markets for their own ends.

Undeterred by Western theoretical skepticism, interest in neo-classical economic models increased in developing Asia during the 1980s and in socialist-transforming economies (including Vietnam) from the early 1990s. This shift away from self-sufficiency towards export-oriented development re-ignited large-scale legal transplantation. For example, massive transfers of Western commercial law guided Russian officials during the first critical steps of macroeconomic reform in the new regime. A decade later, the Russian legal system was in crisis. As Trubek and Galanter had earlier warned, without substantial local input transplanted Western laws are irrelevant, or worse, incompatible with

44 See Pistor and Wellons, supra 107-108.
indigenous institutions and customary practices. The perceived superiority of Western law, coupled with concerns that local drafting would ‘jeopardise the fragile momentum for reform’ propelled Russia’s disastrous ‘big-bang’ legal reforms.

Learning from development failures, Douglass North famously speculated that transplanted Western commercial laws require compatible dispute resolution fora, debt enforcement and bankruptcy mechanisms. He reasoned from comparative historical research that interest groups, cultural preferences, or even historical coincidence generate institutional inertia that prevent far-reaching change. Even where socially efficient reforms are available, existing institutions continue to shape the processes of socioeconomic change.

His views persuaded legal assistance programs in socialist-transforming Europe and East Asia (including Vietnam) to concentrate resources to refashion (capacity building) institutions into a Western legal mould. As we shall see in subsequent chapters, legal aid programs in Vietnam aim to perfect legislative drafting techniques, strengthen the courts and legal training. Strong theoretical and empirical evidence that laws are not bare sets of prepositional rules and that legal transplants are most likely to produce desired outcomes in culturally compatible countries have not appreciably influenced the thinking of many foreign aid donors.

Legal evolution and transplantation theories

Some theorists within the evolutionary tradition contend that laws mirror path-dependent social forces and legal transplants must comport or ‘fit’ with local political, economic and cultural conditions. Others consider laws relatively independent from outside systems and

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48 The literature in this area is vast but see Cheryl W. Gray and William W. Jarosz, 1995 ‘Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe’ 33 Columbia Journal of Transnational Law 1. Even Alan Watson, who emphasised the autonomy of legal systems recognised that a ‘legal institution, to be meaningful, depends on societal institutions.’ Alan Watson, 1985 The Evolution of Law, John Hopkins University Press, Baltimore 68.


institutions. They claim that autonomous laws, once detached from external social forces, transfer easily between different legal systems and across cultural barriers. Legal autonomy is important to our discussion, because it influences the way law reformers approach legal transplantation. If laws are autonomous, they function relatively independently from social and economic conditions and transfer easily. Semi-autonomous laws, on the contrary, have not fully de-coupled from their social moorings and require careful adaptation to fit the underlying social structures in host countries. Both approaches draw support from the uneven history of legal transplantation.

**Law as culture**

Montesquieu is credited with the belief that law is culturally embedded or coupled. He opined that 'the political and civil laws of each nation ... must be so peculiar to the people for whom they are made; it is a very great accident should those of one Nation suit another'. If laws mirror environmental forces, then legal change is path-dependent, oscillating with historical cycles.

Activists resisting foreign codified laws have been historically attracted to Montesquieu's ideas. Fredrick Karl von Savigny during the early nineteenth century opposed the introduction of codified Roman law by Germanic Princes. The reduction of laws into written codes assisted state centralism, because codification converted decentralised customary norms into state-controlled political weapons. Later, Eugen Ehrlich's polemics against formalised codified law spearheaded political resistance by Transylvanians against remote Austro-Hungarian rulers. By condensing masses of customary detail into texts, codes crystallised and legitimised the ideological boundaries and aspirations of the ruling elite.

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51 Montesquieu, 1749, supra chapter three. Montesquieu believed that history moves in cycles influenced by environmental considerations such as, customs, geography, and climate. See Charles De Secondat Montesquieu, 1977 *The Political Theory of Montesquieu*, selected and translated by Melvin Richter, Cambridge University Press, New York. 52 Invoking a deeply mystical notion of *Volkgeist* (the spirit of the people), von Savigny argued that law is much more than a collection of legal rules, it reflects and expresses an entire cultural outlook, shaping political and legal institutions. His writings opposed the conversion of 'living' traditional law into the fixed, systematic codes. See Frederick Karl Von Savigny, 1986 *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans., Abraham Hayward, Legal Classics Library Birmingham, Alabama, 30-38, 152-153. 53 Codification encouraged German Princes to regard themselves as the sole sources of law and they flooded every aspect of life with regulations. The customary law notion that every thing is permitted unless prohibited transformed into the legislative notion that only things permitted are allowed. This Rechtsstaat lead to sign on road near Baden that read 'It is permitted to travel this road'. See J. Sheehan, 1982 *German Liberalism in the 19th Century*, University of Chicago Press, Chicago, 37.
In the United States, Oliver Wendell Holmes firmly anchored law to society when he wrote: ‘the first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong’. Over the intervening century a broad consensus evolved among legal-sociologists that laws reflect culture. According to Lawrence Friedman’s strong formulation:

As long as the country endures, so will its system of law, coextensive with society, reflecting its wishes and needs, in all their irrationality, ambiguity, and inconsistency. It will follow every twist and turn of development. The law is a mirror held up against life.

A more representative account of the law as culture tradition understands law as changing over time in response to social developments. Laws do not always faithfully reflect society, because they are formulated to serve the interests of certain groups within society. Sometimes laws attempt to engineer the worlds lawmakers would like to inhabit, such as Kemal Ataturk’s modernisation of Turkey in the orderly image of the Swiss civil code.

Laws may lag or precede social change. But ultimately law is coupled to social action.

Transplanting culturally coupled law

Pierre Legrand argues that legal rules may transfer, but legal cultures and meanings do not travel. Like theorists from the ‘law in context’ tradition, he thinks culture provides the wide framework giving meaning and sense to people’s lives. As Susan Silbey put it, ‘law does more than reflect or encode what is otherwise normatively constructed; ... law is part of the

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56 Oliver Wendell Holmes, 1881 *The Common Law*, Little, Brown and Co, Boston 41; also see Gerard Brennan, 1993 ‘Law in Search of a Principle’ 9 *Journal of Contemporary Health Law and Policy* 259, 259. ‘If the law is at odds with the values of society, the law falls into dispute and loses the force it needs to ensure conformity with its precepts’. These views owe much to the work of Karl von Savigny, who proposed that law is inseparable from the spirit of the people (Volksgest).
cultural process that actively contributes in the composition of social relations.  

In short, law and culture act on each other. If laws are culturally specific, 'a crucial element of the ruleness of the rule—its meaning—does not survive the journey from one legal culture to another'. Legrand observed that after transplantation laws might look the same, be administered by similarly configured institutions, but be implemented by officials with radically different legal mentalities or epistemologies. It follows that socially and environmentally untenable legal transplants are not only ineffective or short-lived, they may stimulate destabilising tensions that cause greater problems than those the transplants were intended to rectify. For Legrand this comes about because the legal culture (or the mentalities) in recipient countries reads imported legal texts from new perspectives, reconstructing their original meaning. Compatible legal epistemologies are thus necessary for effective legal transfers. Donor and host country legal cultures must ‘fit’.

Legrand’s claim that cultural differences are unbridgeable fails to account for legal transplantation experiments that proceeded rapidly and smoothly. He assumes that legal epistemologies are slow to change. Some research supports this view, however, there are other examples where basic legal epistemologies changed relatively quickly—within a generation. This implies that some laws are less coupled to social processes than others and are thus more easily transplanted. Recognising the possibility of legal transferability, allows law a limited autonomy.

Legal autonomy

Undoubtedly the most extreme articulation of legal autonomy is found in the works of Allan Watson. His complex arguments are categorised by some commentators into

63 Pierre Legrand, 1997a supra 119.
64 Legal epistemologies are the historically conditioned, deeply rooted attitudes that influence the way officials use law to find reality. See Peter de Cruz, 1999 Comparative Law in a Changing World, 2nd ed., Cavendish Publishing, London, 214-216.
67 Alan Watson’s voluminous writings and shifting interpretations about the relationship between law and society make it difficult to confidently state his position on legal transplanting. For a good synthesis of Watson’s protean utterances see William Ewald, 1995 ‘Comparative Jurisprudence (II): The Logic of Legal
'strong' and 'weak' propositions. The strong Watson maintains that transplants are determined by a small group of professional elites (composed of lawyers) who borrow laws without considering what the social context requires. Processes of change are endogenous, he believes, because 'to a large extent law possesses a life and vitality of its own; there is no extremely close, natural or inevitable relationship between law, legal structures, instruments and rules on the one hand and the needs and desires and political economy of the ruling elite or of members of the particular society on the other hand'. Guided by lawyers, autonomous laws operating beyond the realm of social needs transfer freely across cultural barriers.

Watson’s precise position on legal borrowing is difficult to ascertain. Some passages support the strong position that compatibility between donor and recipient legal systems is unnecessary for successful legal borrowing. Elsewhere he expresses a weaker position where legal traditions and doctrines rather than laws are autonomous or insulated from society. Yet his diverse views come down to three main propositions.

- The growth of law is primarily attributable to continuous recycling and borrowing legal transplants. Most legal development has evolved through historical processes without reference to social, political or economic factors.
- Social needs do not inevitably affect the transferability of borrowed laws.
- The mechanisms regulating legal borrowing are controlled by legal professional elites such as legal drafters, judges and jurists.

Watson has written voluminous historical studies seeking to demonstrate the first proposition that legal borrowings are the ‘most fertile’ source of legal change in the Western world. The gradual acceptance of Roman law in Europe, for example, began when Germanic tribes in the second and third centuries borrowed Roman laws and was
completed when twelfth century European scholars received the legal *Digestes* compiled by Roman jurists under Justinian (527-565 CE).

To support the second proposition, Watson attributes successful cross-cultural borrowing to the gradual separation of law from everyday culture. If laws ever reflected the spirit of peoples and nations, a long-term process of social differentiation and internationalisation has de-coupled this linkage, making law ever more remote as it becomes a sophisticated regulator of commerce. Distancing occurs every time lawmakers borrow legal principles from within their own legal system—by analogy—or from other systems. Once divorced from society, laws can successful transplant between politically, culturally and economically different countries.

The third proposition arises from Watson’s belief that professional lawyers can imitate and adopt laws without using social, political and economic realities to justify their legal opinions. According to Watson, lawyers borrow what seems comfortable, familiar and prestigious from the legal tradition in which they were trained. Legal reasoning is highly abstract, remote in appearance from social factors, and has a life of its own.

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72 See generally, Alan Watson, 1996 *supra* 335.


74 For example, French speaking African countries do not borrow English law and former English colonial borrow from common law countries. See Alan Watson, 1996 *supra* 335; Alan Watson, 1985 *supra* 95-96. Also see Gianmria Ajani, 1995 ‘By Chance and Prestige: Legal Transplants in Russia and Eastern Europe, 43 *American Journal of Comparative Law* 93, 115-116.

75 For Watson:
Though insisting that law is not part of culture, Watson says that ‘legal development is determined by their [sic. lawmakers’] culture; and social, economic, and political actors impinge on legal development through their consciousness’. In other words, law is culturally coupled to the ‘elite groups who in a particular society have their hands on the levers of legal change’. Beyond this professionalised sphere law has de-coupled from cultural influences.

Watson’s theories only address one part of the legal transplantation puzzle. They examine why elites select foreign laws, but say little about the effects imports have on social change—the implementation and reception of borrowed law. Gunther Teubner also maintains that laws have largely (though not entirely) de-coupled from their social moorings. Despite sharing analogous views about legal autonomy, Teubner’s theoretical explanation for reaching this conclusion could hardly differ more from Watson’s vague historicism. Teubner reasons through autopoiesis theory, a complex cluster of ideas based on biological research into self-replicating organic sub-systems. ‘Autopoieses’ arose from investigations into ‘homeostasis’, which are natural biological states kept stable by complex systems of information and control, such as the chemical messages in cells. Humberto Maturana generalised a systems theory to explain homeostasis in the biological world, but also raised the intriguing question whether the dynamics of human society are also determined by autopoiesis. Taking up this inquiry, Niklas Luhmann used autopoiesis to explain why people within institutions such as companies, political bodies or universities create their own kind of reality and meanings.

Law develops by transplanting, not because some such rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over lawmaking and they observed the (apparent) benefits which could be derived from it. What is borrowed that is to say, is very often the idea.


Alan Watson, 1985 supra 118.


Nelken points out that when Watson’s work is stripped of its anti-mirror theory polemic, it only differs from mirror theorist in the ease with which he thinks laws can transplant. See David Nelken, 2001a, ‘Towards a Sociology of Legal Adaptation’, in David Nelken and Johannes Feest eds., Adapting Legal Cultures, Hart Publishing, Oxford, 12-15.


Id. 118.

In his estimation communication takes the place of metabolic pathways in creating autopoiesis within human social systems. Virtually the whole of society is fragmented into institutions that use language to communicate in their own way and perceive reality from their own perspective. Society is divided into functionally differentiated social systems with each subsystem undergoing autopoietic development. The legal sub-system is no exception. It too is constructed by particular sets of self-referential and self-reproducing discourses. Teubner has taken from autopoiesis theory the notion that legal sub-systems have decoupled from other social sub-systems. Viewed from this perspective, laws transfer easily between legal sub-systems, because lawyers in different countries understand each other.

But in contrast to Watson’s free-wheeling understanding of legal transplantation, Teubner thinks that legal sub-systems are influenced by external ‘perturbations’, which, if constantly repeated, will shape the way legal thinking evolves. Legal transplants thus act like ‘legal irritants’ in host-country legal systems. They ‘unleash an evolutionary dynamic in which the external rule’s meaning will be reconstructed and the internal context will undergo fundamental change’.

**Limited or bounded legal autonomy**

Otto Kahn-Freund contributed the important insight that ‘there are degrees of transferability’. He agreed with Watson that it is naïve to speak of law mirroring society, but unlike Watson he believed that legal autonomy is highly selective. Kahn-Freund reasoned that because most laws are deeply embedded in their social and institutional matrices ‘we cannot take for granted that rules or institutions are transplantable’. Yet, he did not fully accept that laws are non-transferable.

In Kahn-Freund’s estimation transferability depends on the interconnectedness between transplanted laws and host-country political, legal, economic and cultural institutions. At one end of a continuum, a ‘flattening out of economic and cultural diversity’ meant that some laws de-coupled from society and were relatively easy to transplant. At the other end, laws ‘designed to allocate power, rule-making, decision-making, above all, policymaking...”

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83 Teubner, 1998 *supra* 12.
84 Id. 6.
87 Otto Kahn-Freund, 1974 *supra* 7-11.
power' remained deeply embedded in social institutions, and were consequently unlikely to take root in foreign legal terrain.

Writing before the collapse of the Soviet Union, he unsurprisingly considered the gulf between communist and non-communist political-legal ideology a significant (but not insurmountable) barrier to legal transplanting. When comparing East and West Germany, for example, he observed that practical problems of housing, town planning and pollution were similar, but different political and legal paths were followed in brokering solutions to these issues. First, the political role of law differed. Contrasting with Western inalienable rights, normative laws in East Germany were treated as instruments to implement party policy. Second, the regulatory matrix differed. Public law exercised through bureaucratic discretion supplanted and subordinated private rights in East Germany. Robust administrative courts checked these processes in the West. Third, in the divided Germany, non- or quasi-state organisations such as trade unions and employer associations assumed quite different roles in making and maintaining laws and legal institutions.

Kahn-Freund claimed that the environmental, socioeconomic and cultural impediments to transferability posited by Montesquieu have lessened in importance over time, while political elements have gained significance. He advised anyone contemplating transplanting Western commercial laws into communist systems, to ascertain whether the legal imports owed their creation to Western legal and sociopolitical power structures and whether these or functionally equivalent structures exist in the communist country. This inquiry is especially pertinent to our study, for as subsequent chapters demonstrate, law reform in Vietnam has superimposed a Western legislative template over enduring socialist institutions.

Kahn-Freund's ideas about legal transferability are scattered in fragments throughout his writings. For the purposes of analytical clarity this study has condensed and synthesised them into three propositions:

• All laws are to some extent de-coupled from their sociopolitical moorings, making legal transplants across sociopolitical boundaries a theoretical possibility.
• Since laws de-couple to varying degrees, some are more likely to survive the journey than others.

88 Some Western laws were successfully transferred into communist Eastern Europe. See G. Ajani, 1995 supra 93-117.
Sociopolitical institutional factors determine the degree of coupling between law and society; they are the political role of law, the distribution of state power, and pressure from non-state institutions.

Comparing and contrasting the theories of Legrand, Watson, Teubner and Kahn-Freund

Though portrayed as adversaries by some commentators, Legrand, Watson and Kahn-Freund occupy different positions on the same theoretical continuum. Legrand is theoretically closest to Marx and Weber’s deterministic link between law and the ‘felt social needs’, while Kahn-Freund and especially Watson lean towards legal autonomy. Their theoretical approaches to legal autonomy induce different analytical positions concerning legal transplantation.

In treating laws as cultural artifacts, Legrand attributes non-transferability to disjunctions between donor and host-country legal epistemologies, myths and narratives. Occupying the other end of the same theoretical continuum, Watson asserts that autonomous laws readily transfer between globalised legal elites, and only encounter resistance from organised pressure groups. Yet he admits ‘some degree of correlation must exist between law and society …[though] legal rules by no means accurately reflect the needs and desires of society …’. Legrand and Watson disagree about the extent to which host-country culture affects legal transferability, but agree that congruence is important in some social spheres such as professional legal culture.

Teubner’s autopoietic theory stands outside the sociological tradition in which Watson and Legrand work. For this reason it has generated numerous fresh insights into legal transplantation that are not available using conventional legal sociology. Yet for reasons outlined below, autopoietic theory is considered unsuited as a general theoretical framework. Nevertheless, a version of discourse analysis that draws some notions from

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89 He believed that industrialisation, urbanisation, and global communications had ‘flattened’ some of Mostesquieu’s inhibiting factors. Kahn-Freund, 1974 supra 9.
91 See Alan Watson, 1978 supra 313, 321.
autopoietic theory and some from linguistic theory is used in this study to overcome shortcomings in conventional sociological analysis.

Kahn-Freund proposed a general theoretical architecture to guide research into legal transplantation. He considered Watson’s analysis incomplete, because it did not fully account for resistance between donor and host-country political, economic and legal systems. Rectifying this oversight, he sought to identify the power structures and social groups within host countries that most commonly interact with imported law. Rather than a fully realised analytical theory, Kahn-Freund’s propositions resemble a collection of associated ideas. His analytical architecture is suggestive: transferability is affected by political structures, cultural precepts and organised pressure groups. Unfortunately these middle-level propositions are too abstract to provide a methodology for exploring legal borrowing. For example, it is difficult to compare the political role of law, if political values differ between and within donor and host countries. To refine and refocus Kahn-Freund’s open-ended analysis, this study has turned to insights from Legrand, Watson, Teubner and other theorists.

Synthesising a transplantation methodology

Kahn-Freund’s approach to legal transplanting is reducible to a two-step process. The first step ascertains the relationship between legal transplants to sociopolitical precepts and structures in donor countries. The second step assesses legal transferability by comparing the congruence between sociopolitical precepts and structures in donor and host countries.\(^92\)

Political and legal ideology

Kahn-Freund first asked whether the political role of law is compatible between donor and host countries. Does law depend on a particular mode of production (i.e. capitalism or socialism), a particular relationship between ideology and law (i.e. the rule of law) or a particular system of political accountability (i.e. democracy or mono-party socialism)? He argued that political ideas radically alter the operation of otherwise similar political structures. For example, Marxist-Leninist and democratic liberal states both use legislative

\(^{92}\) See Kahn-Freund, 1974 supra 11.
organs to crystallise state policy into law, but different political orientations excite wildly divergent views regarding the role and content of law.  

One way of comparing the role of law in different countries is to consider the compatibility between political-legal ideology in donor and host countries. Ideology assists cross-country comparison by stripping complex patterns of political thought down to core issues concerning the aspirational role of law. Recent socio-legal research has shown that political-legal ideology influences the adoption and implementation of borrowed laws. For example, Yves Dezalay and Bryant Garth argue that the ideological contests underlying the power struggles or ‘palace wars’ among Latin American elites shaped the selection and adaptation of borrowed laws.  

In searching for reasons why the public accepts legal and political institutions that clearly benefited elites, Antonio Gramsci deduced that law is both ideologically constructed and a bearer of ideology. Contemporary socio-legal theorists have expanded Gramscian ideology to encompass contested areas or frames of reference through which people think and act. Rather than concealing reality, elites maintain power by using ideology to make

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93 For example, the politicisation of state apparatus permitted in Marxist-Leninist legal systems is incompatible with Western liberal mythology that the ‘rule of law’ requires the separation of party and state. Kahn-Freund wrote that: ‘[p]roblems such as those of housing, of town planning, of pollution may be no different in Russia or Spain or South Africa from what they are in this country [Britain] or the United States, but the procedure of arriving at a solution, the form of discussion, and the role of the individual in that discussion are different.’ Otto Kahn-Freund, 1974 supra 11. 
95 Influenced by Lenin’s proposition that legal systems are integral to and characteristic of capitalism, many early Marxist writers emphasised the oppressive and coercive nature of law. As a Marxist, Gramsci worked through the Marxist base–superstructure metaphor and consequently located clusters of social interests, the way people make sense of the world, in and around economic relations. Marx’s preoccupation with commodity relationships is not, however, a pivotal aspect of Gramsci’s theories. They apply equally well to a broad range of social and psychological ordering phenomena, such as gender, race and social interests. Others argue that Gramsci’s theories presuppose legal systems that oscillate between coercion and consent according to struggles between capital, labour and the state. Alan Hunt in particular believes that hegemony results in an ‘undesirable bifurcation in our approach to law’ since the relationship between coercion and consent is not adequately established.’ But this claim is part of a general criticism of legal theory: that it fails to account for the complex relationship between law and social change. See Alan Hunt, 1982, ‘Dichotomy and Contradiction in the Sociology of Law’, in P. Beirne and R. Sharlet eds., Marxism and Law, Oxford University Press, Oxford, 87-88. 
laws and institutional processes appear natural, normal and right.\textsuperscript{97} Ideology has the 'capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live'.\textsuperscript{98} Gramscian theorists argue that dominant ideologies contain the rules and precepts used by elites to justify and maintain their control over sociopolitical structures. A survey conducted by the International Finance Corporation in Vietnam, for example, disclosed strong causal links between official ideological antipathy to the private sector and popular opinion.\textsuperscript{99} Even entrepreneurs were convinced that the state sector is intrinsically superior.

Gramsci believed that the public makes sense of their world through locally generated ideologies comprised of assumptions about politics, economics, religion, work, leisure and the nature of reality.\textsuperscript{100} Local or 'bottom-up' ideologies incorporate some aspects of the dominant ideology and manufacture others from precepts and practices in the local setting. As Therborn put it, 'ideologies actually operate in a state of disorder ... ideologies operate, constantly being communicated, competing, clashing, affecting, drowning, and silencing one another in social processes of communication'.\textsuperscript{101} It follows that the acceptance of political and legal solutions to social problems starts with people and institutions as they are, with their notions of right, wrong, justice and appropriate commercial behaviour, in short with their ideologies.\textsuperscript{102}

Gramscian theory assists our inquiry in three ways. One, if state ideologies are comprised of competing precepts, legal transplants must comport with, or at least not be blocked by,


\textsuperscript{98} Robert Gordon, 1984 'Critical Legal Histories' 36 \textit{Stanford Law Review} 65, 108. The literature in this area is vast and full of controversy. Most commentators agree that in Western democratic states legal legitimacy rests in part on public acceptance of the rule by law ideology. However, some legal sociologists have argued that public acceptance of the dominant legal ideology is inversely proportional to popular knowledge about law in action. This view does not necessarily negate the first proposition, it merely suggests a considerable law-practice gap. See Muthiah Alagappa, 1995 'The Anatomy of Legitimacy', in M. Alagappa ed., \textit{Political Legitimacy in South East Asia}, Stanford University Press, Stanford, 11-14; A. Sarat, 1975 'Support for the Legal System: An Analysis of Knowledge, Attitudes, and Behavior' 3 \textit{American Politics Quarterly} 3, 5-15.


the dominant ideological stream. Two, viable transplants require ideologies in host
countries that make imported legal principles appear fair and acceptable to state officials
and societal interest groups. For example, core capitalist precepts such as property and
contractual rights require a dominant ideology that makes private resource allocation
appear fair and reasonable. Three, and following from the second point, Gramsci's
theory opens the discussion to the possibility that central elites and the public (or discrete
communities) have competing ideological outlooks concerning the efficacy and desirability
of transplanted law. For example, chapter seven argues that elite state officials in Vietnam
support liberal market-entry rules, whereas middle-level officials are ideologically opposed
to facilitative regulation. Gramscian ideological theory is considered more fully in chapter
three.

State power-distribution
Kahn-Freund also believed that transplanted laws are sensitive to the ways legislators,
bureaucrats and judges use state power to make and enforce law. Most nation-states
possess similar political-legal institutions such as parliaments, courts and executive
agencies. But macro-organisational frameworks say little about internal power-distribution
structures. What makes state institutions distinctive are the rules, precepts and habits
residing inside and outside formal structures that guide the distribution of state power. Experience from the Russian Federation, for example, suggests that imported laws
promoting legal equality between state and private actors were initially blocked by pre­
existing administrative, criminal and economic legislation promoting state allocation.
Reforms that repealed incompatible legislation did not facilitate imported rules, because
state officials implemented imported laws with deeply engrained socialist attitudes to

102 See Gramsci, 1971 supra 321.
103 See Barrett McCormick, 1999 'Political Change in Vietnam: Coping with the Consequences of Economic
Reform', in Anita Chan et. el. eds., Transforming Asian Socialism: China and Vietnam Compared, Allen and
Unwin, Sydney 164-169. Also see Paul Ricoeur, 1994 'Althusser's Theory of Ideology, in Gregory Elliott ed.,
104 See Kahn-Freund, 1974 supra 12.
105 Gianfranco Poggi, 1978 The Development of the Modern State: A Sociological Introduction, Stanford,
Stanford University Press, 1; also see James March and Johan Olsen, 1989 Rediscovering Institutions: The
106 See Gianmaria Ajani, 1995 supra 93.
private property.\textsuperscript{107} For similar reasons, American competition laws are difficult to replicate in culturally different European jurisdictions.\textsuperscript{108}

These studies suggest that legal transplants are extraordinarily sensitive to variations in legal culture. Effective legal transplantation not only requires structurally equivalent institutions, but also officials who are informed by a similar legal culture. Put another way, different legal cultures invest similar legal rules with different meanings.\textsuperscript{109} Even where borrowed laws appear technically and contextually neutral, once assimilated into different legal cultures they adopt host-country characteristics.

The term 'legal culture' is used to mean the 'specific way in which values, practices, and concepts are integrated into the operation of legal institutions and the interpretation of legal texts'.\textsuperscript{110} Since ideology and culture both shape worldviews, conceptual distinctions are rather arbitrary. But for the purposes of our study, ideology is considered to influence thinking at a deep aspirational level, while legal culture also operates at an intermediate and more changeable level.\textsuperscript{111} Unlike ideology, legal culture comprises both ideals and concrete processes and habits.

A difficulty with using legal culture as a comparative methodology is its inherent vagueness. It is so 'broad [that] it could encompass almost any phenomenon'.\textsuperscript{112} Scholars have long debated a suitable universal definition with only marginal success. Friedman, himself an advocate of cultural analysis, conceded that legal culture is 'an abstraction and a slippery one'.\textsuperscript{113} In mature legal systems like the United States, which have well-defined legal doctrines and processes, legal culture makes limited sense. In cultures like Vietnam—

\begin{footnotesize}
\begin{enumerate}
\item According to Carol Rose, laws based on 'capitalist property have a kind of moral and cultural infrastructure that we may have mistakenly thought was simply natural, whereas in fact it is learnt through sustained commercial practice'. Carol Rose, 1996 'Propter Honoris ResPECTum: Property As the Keystone Right?' 71 Notre Dame Law Review 329. Also see Thomas Waelde and James Gunderson, 1994 supra 347.
\item See Spencer Weber Waller, 1997 'Comparative Competition Law as a Form of Empiricism' 23 Brooklyn Journal of International Law (2) 455, 461-464.
\item See e.g., Roman Tomasic, 1994 'Company Law and the Limits of the Rule of Law in China', 4 Australian Journal of Corporate Law 487.
\item John Bell, 1995 'English and French Law—Not So Different?' Current Legal Problem, 63; also see Susan Silbey, 1992 supra 41.
\item See Hoecke and Warrington, supra 534-535. Also see Pierre Legrand, 1996 supra 54-56.
\item 'Culture' is a term that is repeatedly used without meaning much of anything at all, a vague gesture toward a dimly perceived ethos...'. S. Greenblatt, 1997 'Culture' in F. Lentricchia and T. McLaughlin eds., Critical Terms for Literary Study, University of Chicago Press, Chicago, 225.
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where law is less socially defined—analysis does not progress far without also considering other sources of legitimacy and authority.

A related concern is that within common borders, it is no longer as clear as it once seemed that central representations of culture universally reflect core cultural values. Some theorists, such as Gunther Teubner, argue that it no longer is possible to talk about ‘the totality of society’, since wider cultures have ‘fragmented [into a] multiplicity of discourses which “today” constitute society’. Although he was describing social differentiation in Western countries, his general thesis resonates in Vietnam, where highland-lowland and urban-rural divides fragment legal values. If core national values are difficult to ascertain, transnational cultural comparison becomes increasingly more complex and demands an analytical approach that searches for cultural difference in the diverse sub-systems the constitute societies.

One way to harness legal culture for our study is to focus on its capacity to shape world views. As Legrand noted, legal culture orders perceptions of reality, moulding the ‘right way’ to think and act. Kahn-Freund made a similar observation when he asserted that civilian lawyers mainly argue from principle, while common law lawyers use precedent. Each tradition predisposes legal argument towards different realities. What differs are mentalities or epistemologies, rather than legal doctrines and practices. In other words, it is in part the epistemological assumptions regarding rationality, efficiency and merit that make legal systems distinctive.

**Using discourse analysis to assess the adaptation and implementation of borrowed laws**

We need a framework in which to place and compare different epistemological understandings about imported laws. Discourse analysis is promising because legal transplantation is largely (though not entirely) a discursive process. Communication is vital to the selection, formulation and implementation of foreign laws. Understanding regulatory conversations has the potential to furnish insights into the epistemological

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settings and 'inner life' of those processes. Discourse analysis provides a set of tools to analyse language and communication and assess whether officials involved in legal borrowing are likely to learn from foreign ideas.

In studies of law, discourse analysis is a relatively recent theoretical development. The central propositions underpinning discourse analysis are that 'communicative interaction produces meaning, and that understanding is situated. Put differently, shared epistemological and tacit understandings used in conversations convey legal meaning. Meaning is inter-subjective, in the sense that shared understandings are largely (though not entirely) generated within epistemologically compatible social or organisational groups. For example, lawyers trained in common law statutory interpretation techniques are likely to reach similar conclusions about the meaning of particular laws. More generally the way people interpret laws or legal practices is determined by their knowledge of technical languages, epistemological conventions and tacit understandings about law.

Discourse analysis shares with Gramscian theory the notion that there are no meta-ideologies (or meta-discourses). Ideological regions and discourses compete with each other. Their point of departure is that discourse analysis includes non-aspirational communication. According to discourse theorists, social behaviour can only be interpreted by exploring the meanings that gives rises to action. Meaning is not something that is discovered, but rather it is constructed through discourse and other forms of expression. For the purposes of this study discourse is taken to mean 'all forms of spoken interaction,'

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119 For a discussion showing the links between legal culture and regulations see E. Meidinger, 1987 ‘Regulatory Culture: A Theoretical Outline’ 9 Law and Policy 355.
120 It is beyond the purposes of this study to survey this highly contested area, rather, we shall focus on the principle claims made about the relationship between discourse and social practices and show how they illuminate legal transplantation. For a general review of law and communication see David Nelken, 1996 ‘Law as Communication: Constituting the Field’ in David Nelken ed., Law as Communication, Dartmouth, Aldershot, 3-30.
formal and informal, and written texts of all kinds', especially political, economic, moral, cultural and legal modes of communication. As previously mentioned, Teubner used Luhmann’s autopoiesis theory to circumvent methodological problems with conventional socio-legal approaches to legal transplantation. Luhmann contributed the valuable insight that through a process of functional differentiation social discourse has fragmented into 'discrete discursive systems'. He argues that legal, economic and ethical discourses have become so self-referential that they understand their environments from internal frames of reference. This novel way of understanding law shows how epistemological assumptions in different discourses have fragmented the meaning of law and suggests reasons why laws do not easily transplant. While agreeing with his central premise, many discourse theorists believe that Luhmann’s ‘discrete discursive systems’ overstates epistemological divisions within society. They argue that a limited role for human agency and a lack of space for social interaction constrains the capacity for Luhmann’s theory to explore the conflicts and negotiations that shape laws. As a corrective, they propose a less divided world where regulatory discourse exists in ‘semi-autonomous’, rather than ‘fully-discrete’, sub-systems. Although Jurgen Habermas is clearly influenced by Luhmann’s systems theory, he is careful to avoid a holistic analysis of society. For him ‘law is not a narcissistically self-enclosed system’, but rather a non-generalised phenomenon that waxes and wanes in rhythm to changes in social discourse.

127 Habermas maintains that it is primarily through rational argument that members of society form the mutual understanding necessary to build the compromises that legitimise state enforcement of law. Legitimisation becomes blocked when permitted forms of public debate are based on unqualified traditions, meta-physical beliefs, or ideology. Where discourse is less constrained, the contests and compromises needed to legitimise law collapse the gaps between state and societal values. See Jurgen Habermas, 1996 Between Fact and norms: Contributions to a Discourse Theory of Law and Democracy, Polity Press, Cambridge, 461. Also see Jurgen Habermas, 1987 The Theory of Communicative Action, vol. 2, trans. T. McCarthy, Beacon Press, Boston, 164-197.
‘Semi-autonomous’ discourse makes sense of law from internal frames of reference as well as from precepts that are selectively drawn from other discursive ‘modes’. Discourse is ‘semi-autonomous’ in the additional sense that it is not directly determined by social conditions (i.e. mirror theory). What makes discourse modes distinctive is their orientation towards particular ways of ordering reality. Each discourse mode has its own criteria or codes (epistemologies) for prioritising the relevance and value of external information. Groups simultaneously discussing the same law from different ‘modes’ may reach contradictory conclusions. For discourses to effectively convey legal meanings, they must share common or compatible criteria or modes of thinking. Discourse analysis is used in this study, because it suggests reasons ‘why different legal cultures (and epistemologies) invest similar legal rules with different meanings’.

There is another shortcoming with Teubner’s use of autopoietic (discrete discursive systems) theory to analyse legal transplantation. David Nelken noted that in discrete discursive systems the ‘legal mode’ of thinking has reified from other social forces to the extent that it is primarily concerned with differences between legality and illegality. Nelken believes that this narrow conceptualisation can hardly account for the rich and varied legal epistemologies that Legrand (and others) believe profoundly influence legal transplantation.

To some extent Nelken’s criticism presents a caricature of Luhmann and Teubner’s understanding of autopoietic theory. Teubner in particular recognises that most regulatory conversations are conducted in more than one mode of thought. The difficulty for Nelken is that ‘autopoietic theory would seem to be unable to recognise differences between legal discourses in different cultures except as differences between law and other social

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129 See Legrand, 1997 supra 119. Also see Susan Silbey, 1992 supra 41.
131 See M. King 1993 ‘The Truth about Autopoiesis’ 20 Journal of Law and Society 218, 224. Teubner’s approach to discourse theory is influenced by Jurgen Habermas and Michel Foucault and he cannot be easily characterised as an Autopoietic theorist.
communications’. Analytical problems might arise where what is considered legal in one culture differs radically from what passes for legal discourse in another society.

The ‘semi-autonomous’ understanding of discourse analysis adopted in this study circumvents this problem. It acknowledges that a wider range of epistemological criteria shapes legal discourse then the legal-illegal criterion proposed by Luhmann. If discourse analysis is to assist this study it must be capable of contrasting and comparing differences in legal, and other kinds of thinking about legal transplants. It needs to recognise that discourse modes are not entirely self-referential and that they communicate (albeit imperfectly) with another. Otherwise there are few points of intersection between transplanted law and domestic regulatory conversations.

Discourse analysis offers a promising technique to dissect regulatory conversations about legal transplantation into constituent modalities. For example, it is instructive to know whether foreign donors promoting legal transplantation think in a binary legal language that shares few points of reference with the political or nationalistic thinking informing Vietnamese approaches to law (see chapters five and six). It further suggests that officials controlling the levers of state power in recipient countries are most likely to learn from imported laws that are expressed in a cognisable mode. Applied flexibly and reflectively, discourse analysis will sensitise the study to the ways Vietnamese conceptualise transplanted law as something that does (or does not) or should (or should not) work.

In addition discourse analysis suggests that communication is constitutive, since it builds common epistemic approaches to borrowed law. This understanding brings human agency and interpretation into play. Whether or not a legal transfer takes root depends on how it is interpreted. Communication is not passive, it aims to achieve certain objectives. Human agents use discourse for their own strategic purposes, raising the possibility that different groups within recipient countries may organise to support or resist imported laws.

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132 Id. 285. Nelken’s objection arises from a broader concern that if legal subsystems are autonomous from other social processes, how do they adapt and change to reflect non-legal ideas and practices?

133 See M. King 1993, supra 223-224.
Organised interest groups

Kahn-Freund identified the pressure exerted by organised interest groups as the third main factor conditioning legal transferability. Kahn-Freund identified the pressure exerted by organised interest groups as the third main factor conditioning legal transferability.134 Social power structures not only influence legal transplantation in and through political systems, they also operate through non-state groups that support or oppose borrowed law. Writing about the transplantation of labour laws from the United States to Britain, he observed that the relationship between employer associations and unions strongly affected legal implementation.135 Extra-legal collective bargains between capital and labor act as ‘collective lawmaking’, these struggles eventually develop normative codes that ‘crystallise customs’. Capital and labour interest groups decide whether to accept or resist borrowed labour law, Kahn-Freund argued, by reference to this body of ‘crystallised customs’ or ‘unofficial law’.136 As players in the public arena, he believed that non-state interest groups such as economic, religious, cultural and charitable organisations influence lawmakers, and by extension legal borrowing. It follows that legal rules that rely on interest groups for support are particularly sensitive to legal transplantation.

Both Kahn-Freund and Watson recognised the important role non-state groups play in influencing the meaning of legal imports.138 Where they differ is in Kahn-Freund’s

134 See Kahn-Freund, 1974 supra 12-14.
135 Id. 3 18. Also see Lorraine McDonough, 1992 supra 507.
137 The cooperative relationships formed between states, employers and unions are termed state corporatism. For a detailed description see chapter four. Also see H. J. Wiarda, 1996, Corporatism and Comparative Politics, E. Sharpe, New York, 47-55.
138 Watson refocused Kahn-Freund’s broad propositions by identifying the sites where non-state interest groups are most likely to influence imported laws. He thought that ‘pressure force’ (the influence exerted by interest groups favouring legal importation) is determined by the social and economic status of those advocating legal reform. ‘Felt needs’ are the social or economic objectives that ‘pressure forces’ want to emphasise in borrowed laws. For example, foreign investors in Vietnam constitute a ‘pressure force’ that demanded the adoption of Western corporate concepts such as ‘authorised’, ‘issued’ and ‘paid-up’ capital. In this case the ‘felt needs’ were the desire to reduce bureaucratic regulation over foreign investment capital contributions. In this case the ‘felt needs’ were the desire to reduce bureaucratic regulation over foreign investment capital contributions. According to Watson, ‘opposition forces’ come into play where legal change threatens organised interests groups. He thought that ‘pressure forces’ were in reality more vocal than ‘opposition forces’, because those advocating change are generally better organised and resourced than broadly based groups disadvantaged by legal change. Consider the introduction of tax concessions for foreign investors in the Vietnamese Foreign Investment Law 1987. Tax concessions benefited well-organised and articulate foreign investors (the pressure force), but disadvantaged numerous poorly organised and politically isolated domestic private businesses (opposition forces). See Watson, 1978 supra 324. Also see Phillips Fox, 2001 ‘Vietnam Legal Update’, unpublished newsletter, April, 7. Interviews concerning the introduction of the Law on Foreign Investment 1987 with Luu Van Dat, Adviser to the Minister of Trade, Hanoi October 1997.
insistence that non-state groups are unlikely to support laws that conflict with underlying ‘crystallised customs’ or ‘rules of the game’. Taking this argument further, relational theorists have convincingly demonstrated that non-state ‘rules of the game’ shape the development and implementation of law. Simple ‘one-shot’ transactions require little ongoing cooperation and generally conform to standard contractual offer and acceptance legal doctrines. Long-term transactions, on the contrary, need sustained organisational cooperation through relational networks that bind contracting parties.

Research in Asia shows that relational networks are a potent regulatory force. For example, in explaining the divergent forces shaping production in Japanese and American companies, Aoki identified a matrix of market institutions governing information systems, financial arrangements, corporate governance, industrial relations, contracting networks and cross-shareholding. These relational configurations were considered every much as responsible for determining the rules of the game as transplanted American company laws and legal institutions.

Many of the disparate threads of relational theory are brought together in the notion of ‘production regimes’. The sociologist Michael Burawoy coined the term to explain how manufacturing processes influence workplace ideology and politics. His central argument is that production relationships are more than economic acts that shape material products, they also influence subjective perceptions about economic and legal institutions. By organising production through markets, they determine incentives and constraints, in other words the ‘rules of the game’. Laws designed to operate in specific ‘market frameworks’, it

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follows, are unlikely to induce similar economic behaviour in new markets governed by different ‘rules of the game’.

It is beyond the scope of our study to directly compare Western commercial laws with Vietnamese ‘production regimes’. Instead, the study will examine the influence of pressure forces on imported laws. It will then, as a secondary consideration, examine underlying ‘production regimes’ to explain why some social groups support and others rejected imported rules (see annex five). This analysis moves the discussion closer to understanding whether the transferability of law is connected to underlying social demand.

An analysis of pressure forces promises valuable insights into transplant viability. It broadens the discussion beyond state power by suggesting that successful legal transplants must negotiate the conflicting claims made by host-country interest groups. It also shows that over time some borrowed laws come to resemble the interests of well-organised pressure groups. By linking pressure groups to particular types of production regimes, it also suggests that support for imported laws is a function of economic conditions. As economic conditions change, the social need for imported laws may also change. Finally it offers a way to explain uneven or fragmented reception where borrowed laws are used by some social groups, but not by others.

**Working postulates**

We have seen that the interrelationship between legal transplants and host-country ideologies, epistemologies and pressure groups is complex, diverse and variable. Thus, no claim is made for a general theory explaining the viability of legal transplants. Rather, three working postulates have been synthesised from the preceding discussion to guide our investigation to the likely sites of interaction between legal transplants and institutions, precepts and practices in host countries.

1. Political-legal ideology: Transplant viability increases where the ideological content of imported laws is not inconsistent with the dominant official ideology in recipient countries. Contests between official and unofficial ideologies produce layered or fragmented reception patterns in host countries.

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143 Personalistic relationships regulate commerce in every society, what distinguishes societies is the composition of relationships. See Milhaupt, 1996 *supra* 4-5; Boaventura de Sousa Santos, 1985 ‘On Modes of Production of Law and Social Theory’ 13 *Journal of Sociology and Law* 299, 320-339.
2. Power-distribution: Legal transplants are sensitive to the ways legislators, bureaucrats and judges use state power to make and enforce law. The mentalities and processes informing lawmakers and enforcers profoundly influence the meanings given to legal transplants.

3. Pressure groups: Dialogical exchanges between lawmakers and non-state pressure groups influence the meanings given to imported law. Pressure groups are more likely to communicate unconventional or controversial ideas to lawmakers in relatively unmediated discursive environments.

The working postulates provide an analytical methodology that is applied in subsequent chapters as a heuristic guide to evaluate legal transplantation into Vietnam.  

**Methodological problems with the working postulates**

**Comparative analysis and observer bias**

In assessing the transferability of laws across cultural and political boundaries, transplantation analysis carries the risk of investing foreign (to the observer) subject matter with the significance it enjoys in the observer’s country of origin. Cultural attribution or ‘legal orientalism’ obscures historical and cultural differences between Western assumptions about legal transplantation and host-country precepts and practices. For example, many legal development projects sponsored by foreign donors in East Asian developing countries evince observer bias by assuming that legal systems will eventually evolve a type of Western formal legality. Echoing colonial practices in which European law was a prime instrument and justifier of imperialism, contemporary cultural attribution...

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144 'Arms length' scientific testing is difficult to conceive, much less execute without clear legal and social theories linking law with social consequences. For a discussion about the shortcomings of comparative legal theory see Mauro Cappelleti et al eds., 1986 *supra* 19; Mark Van Hoecke and Mark Warrington, 1998, *supra* 495-513.


became noticeably more strident and triumphal following the collapse of Eastern European communism and the corresponding increase in discourse promoting globalisation.

At another theoretical extreme, cultural essentialism denies the possibility of meaningful comparative study. All societies place different emphasis on social activities, products and precepts, making cross-cultural comparison problematic—and according to some untenable. Standard Western cultural assumptions about what constitutes legally reasonable behaviour, for example, may appear entirely unreasonable in other cultures. The dilemma is illustrated by attempts to find a universal definition of law. Most working definitions presuppose differentiated political and legal institutions, ignoring the possibility of law-like processes in undifferentiated customary societies and non-state legal systems.

In rejecting essentialism, Edward Said considered ‘it is an inadmissible contradiction ... to build analyses of historical experience around exclusions, exclusions that stipulate, for instance, that only women can understand feminine experience, only Jews can understand Jewish suffering, only formerly colonial subjects can understand colonial experience.’ ‘Cultures,’ he argued, ‘are not impermeable ... never just a matter of ownership, of borrowing and lending with absolute debtors and credits, but rather of appropriations, common experiences, and interdependencies of all kinds among different cultures.’ Barry Hooker made a similar observation about the ‘interaction and accommodation’ between Oriental and Occidental laws shaping ‘much of the historical jurisprudence of South-East

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147 Arguments about the nature of culture, whether it exists, is important and worth preserving, cut across the literature. See Lila Abu-Lughod, 1991 ‘Writing Against Culture’, in Richard Fox, Recapturing Anthropology: Working in the Present University of Washington Press, Seattle 137; Guyora Binder, 1991 ‘What’s Left?’ 69 Texas Law Review 1985, 2035-40 (deconstructionalists argue that cultural identity is an authoritarian tool used to subdue heterogeneous cultural threads); contra Susan Silbey, supra 39; Claude Levi-Strauss, 1986 ‘Today’s Crisis in Anthropology’, UNESCO Courier, May 56 (cultural difference between and within societies is in flux, constantly converging and diverging).


150 Pre-modern societies are predominately status-based, where personal obligations are a function of age, race, sex, caste and religion. These societies are largely ordered by obligations, rather than broad categories of personal rights. Legal relations remain undifferentiated from other social activities and are usually performed by non-legally specialised personal. See Ugo Mattei, 1997 supra 19-40.


Asia’. Some even suggest a positive role for comparativists, who are credited with detecting the hidden legal rules and assumptions taken for granted and hence unseen by those working within particular systems.

The position taken in this study is that no matter how careful, observers cannot escape their cultural preconceptions. Put differently, ‘the inseparability of the knower from the known means the inevitable participation of the knower in the known’. This interconnection does not absolve observers from attempting to identify and minimise cultural attribution.

Some attempts to minimise cultural attribution have used convoluted methodologies requiring observers to self-consciously disclose the political, cultural and moral basis of their investigation. Yet as Ziauddin Sardar sardonically observed, ‘in striving to give a voice to the “other”, postmodernist cultural relativism only listens through the ears of conventional Western thought’.

Various steps are available to reduce or at least identify cultural preconceptions. For Pierre Legrand, ‘comparison must not have a unifying, but a multiplying effect: it must aim to organise the diversity of discourses around different (cultural) forms and counter the tendency of the mind towards uniformisation’. Gunter Frankenburg argues for ‘distancing and differencing’ in comparative law. He locates legal comparison in broad historical settings by asking the question: how do processes work within their own social context? As Owen Barfield reminds us: ‘One way or another, what matters is coming to realise that the way we habitually think and perceive is not the only possible way, not even a way that has been going on very long. It is the way that we have come to perceive’.

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154 See e.g. R. Sacco, 1995 ‘Mute Law’, 43 American Journal of Comparative Law 455.

155 John Lukas, 2002 At the End of an Age, Yale University Press, New Haven, 209.

156 Lawrence Friedman observed over fifty years ago, ‘those lawyers, who are unconscious of their legal theory, are apt to do more harm than their more conscious colleagues. For their self-delusion makes it psychologically easier for them to mould the law in accordance with their beliefs, and even prejudices, without feeling the weight of responsibility that burdens lawyers with greater consciousness of the issues at stake’ W. Friedman, 1941 ‘Legal Theory and the Practical Lawyer’ 103 Modern Law Review 103, 103-104.


159 Pierre Legrand, 2001 supra 67.


recognising the impossibility of cultural neutrality and, more importantly, by using an analytical framework that accommodates differences and similarities, subtleties are less likely to be dismissed as outmoded thinking, misunderstandings or simply unimportant.

Assessing transplant viability

One of the main conceptual difficulties with assessing legal transplantation is determining the criteria for success. Is success measured by transferring a legal provision into a host-country’s legislation? Must transplants induce behavioural change of the kind contemplated by donor or host-country lawmakers? Or is it sufficient for legal transplants to act as catalysts for change, stimulating behaviour modifications in ways unforeseen by lawmakers?

The idea of success assumes that laws have measurable goals. For Watson most legal transplants are viable, simply because legal borrowing is a major source of law reform around the world. Legrand, on the contrary, argues against an instrumental understanding of legal transplants because it conveys the misapprehension that law is about social engineering. He argues that legal transfers should be treated as narratives rather than instruments. Though reaching different conclusions, both theoretical approaches agree that transplant viability must refer in some way to legal behaviour in the recipient country. Otherwise, by definition, there is no transplant only an indigenous law with foreign provisions or an institution with a foreign name.

To some extent viability is determined by the timeframe in which transplantation has been observed. Watson has written extensively about the progress of Roman law into Europe. This process took centuries. From this magisterial perspective most transplants appear to have naturalised and merged into indigenous thought. The following chapter, for example, shows how Chinese legal thought transformed the central organising principles in imperial Vietnam during the fifteenth and nineteenth centuries.

Other theorists work with much shorter timeframes. For example, Legrand has mostly written about civil and common law borrowings in the context of the European integration, a transformation measured in decades rather than centuries. From this vantage point, transplants appear to overlay, without substantially altering, deeply entrenched epistemological assumptions.
The conclusion drawn from these disparate approaches is not that transplant viability is simply a function of time, but rather that time-scales influence perspectives about transplantation. For example, Watson’s and Legrand’s theories produce the same results whether they are applied to short- or long-term transplantations. Legrand construes resistance to Roman law as evidence of serious discrepancies between legal transplants and indigenous epistemological assumptions. While Watson believes that European Community legal convergence is well-advanced.

A related issue is determining from whose perspective transplant viability should be assessed. Conventional legal theory, exemplified by the work of H L A Hart, presumes that laws exist as external propositions until internalised to inform the experience and perception of individuals. By implication legal transplants are ineffective until individuals choose to internalise them. A difficulty with focusing on individual choice is that consent need not be given to the norms embedded in rules, but rather to the processes and forms of legal power. It is interesting to speculate, for example, to what extent elderly and poorly educated Vietnamese farmers comprising 75 per cent of the population respond to borrowed law according to individual choice or habit, pragmatism and expediency. Studies conducted elsewhere show that respondents generally have meagre knowledge of the law they supposably internalised. What little they know is often derived through membership of organisations or groups.

Further complicating the study, a legal important may appear viable for one social group but unviable from another perspective. By challenging established patterns of behaviour, imported laws have the capacity to create winners and losers. For example, imported Western corporate laws support business practices followed by foreign investors, but they have the potential to disrupt domestic family-oriented business structures (see annex six). For foreign investors legal transplants appear authentic and useful, but for domestic entrepreneurs they frequently seem inauthentic and imposed. As Roger Cotterell observed, ‘the way law is conceptualised … colours the way that the success (indeed, the very possibility) of legal borrowing is judged’.

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165 Roger Cotterrell, 2001 supra 79.
It follows that legal transplantation cannot be assessed from an outside ‘objective’ position. What constitutes successful legal borrowing is contested and negotiated at many points and there will be multiple perspectives about transplant viability. In fact what constitutes success is something that is fought over, since it determines whether foreign legal solutions can leave behind their sense of inauthenticity and become localised. For the purposes of this study what constitutes a successful legal transfer depends on how it is interpreted by the receiving culture.

Do transplants induce social change?

Another difficulty with evaluating legal transplantation is determining whether foreign laws have induced social change. Some theorists search for empirical measures to find evidence for social change of the kind contemplated by laws. A recent study compiled an index based on perceptions of the ‘rule of law’, judicial independence and anti-corruption reforms, to quantify changes in social legality induced by legal transfers. Such studies are vulnerable to the criticism that it is as difficult to find causal links between transplants and social change as it is to quantify subjective notions like legality. In simplifying complexities in the real world empirical measures miss the complex array of moral, religious and social pressures that shape attitudes to laws. It is never clear whether behaviour that appears to comply with a particular rule is brought about by legal rules. A further difficulty with causality is that the human mind intrudes into any account of human behaviour. As discourse theorists remind us what happens is inseparable from what people think happens. While not abandoning faith in the possibility that law induces social change, this study assumes laws are not self-executing and their effectiveness is inextricably bound up in sociopolitical matrices. For these reasons this study is not directly concerned with finding causal relationships between legal imports and behavioural change.

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167 Since the early 1970s a group of American scholars devised a series of empirical studies that ask the question, is law achieving a reasonable resolution of the social problem it purports to address? Many theorists involved in legislation ‘implementation research’ concluded that social change is governed by too many variables and competing interests to find causal connections. Other factors like moral pressures, religious beliefs, habits or customs may explain the behaviour. Unravelling legally induced change from other social factors is especially problematic in counties like Vietnam experiencing rapid social change. See William H. Clune and R. E. Lindquist, 1981 ‘What “Implementation” Isn’t: Towards a General Framework for Implementation of Research’, Wisconsin Law Review 1044, 1045-1051.
in host countries and only indirectly addresses the question ‘is there social change of the kind contemplated by laws?’.

Methodological problems with assessing transplant viability

Most studies about transplant viability are positivist. They treat knowledge about law as social facts to be discovered, rather than processes that adjust the meaning of imported law among state officials and the public. This positivist-orientation makes empirically testable propositions about what matters in legal transplantation appear feasible and desirable. Despite their reassuring empiricism, statistical studies frequently miss the richness of regulatory processes. This is a critical failing if the working postulates are correct, and the meaning of law is largely (though not exclusively) found in ideological and communicative processes. Empirical studies at best inform observers that certain imported laws induce varying levels of compliance. Unfortunately the statistical data required for this type of analysis is generally unavailable in Vietnam.

Compounding the problem, there is little critical analysis of legal reforms, especially legal transplantation, in the Vietnamese literature. As a consequence, this study has drawn information from the abundant descriptive literature in Vietnam about the interaction between law, state ideology and institutional/market structures. Despite tight government controls over legal research, it has been possible to conduct hundreds of interviews and focus groups with Vietnamese officials, lawyers, academics and entrepreneurs. Together with archival material, it has been possible to construct from social-survey research many richly textured, in-depth case studies that assess legal transplantation in Vietnam (for more details about research methods see annex one).

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168 See e. g. Daniel Berkowitz et al, supra 180-188; Philip M. Nichols, 1997 ‘The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code’ 18 University of Pennsylvania Journal of International Law (4) 1235, 1255-1270.

169 For example, empirical studies usually assume equivalence in cultural responses to law. A recent study sought to rank the viability of legal transplants in over forty countries by comparing ‘legality’. This highly subjective notion was deduced from perceptional indexes about the ‘rule of law’, judicial effectiveness, low corruption, low risk of contract repudiation and low risk of government expropriation. What the perception indexes did not disclose is whether ‘legality’ is a product of cultural discord, political power struggles, administrative abuses, innovative adaptations of imported law, legal pluralism, or some combination thereof. See Daniel Berkowitz et al, supra 180-188.
Conclusion

The working postulates offer promising ways to guide research towards the sites of interaction between imported laws and Vietnamese institutions, processes and discourses. Gramscian ideological theory sensitises our analysis to the political contests shaping legal reception. An examination of power structures opens the discussion to contests between elite and local attitudes to imported law. Finally, a study of special interest groups directs analysis towards the dialogical exchanges between state and non-state groups that shape the meaning of imported laws.

The working postulates imply that comprehensive legal borrowing across political, economic and cultural boundaries is likely to excite fragmented and uneven legal compliance. This preliminary assessment presents a dilemma for Vietnamese lawmakers attempting to develop a market-oriented legal system. Either the entire sociopolitical structure must change to reflect the institutional environment in donor countries or more plausibly, transplantation will induce layered or fragmented legal compliance.

By steering a middle course between the extremes of legal convergence and relativistic theories, the working postulates provide a conceptually plausible means of exploring uneven legal transplantation. Since transplant viability is primarily ascertained from ideological, institutional and discursive perspectives, the analysis avoids difficulties associated with the internalisation of law by individuals and causal explanations for legal compliance. The working postulates are flexibly applied in the following chapters to assess how Vietnamese ideologies, state institutions and special interest groups influence the meanings attributed to legal transplants. Since they act as heuristics, rather than rigid theoretical templates, some postulates are more relevant to particular case studies than others. Our inquiry begins in the next chapter by examining the history of legal transplantation to Vietnam.
Chapter Two
A Brief History of Legal Transplantation into Vietnam

Introduction
Before considering contemporary legal borrowing into Vietnam, it is necessary to consider the past. A theme underlying this chapter is that contemporary mental habits and perceptions are ‘the end product of repeated action in the past, of prolonged behaviour in the past’. Thus the historical patterns of legal transplantation have a bearing on the way contemporary lawmakers think about legal borrowing. The purpose here is not to attempt the impossible and present the legal history of Vietnam in a chapter, but rather to introduce the main ideas and processes that have contemporary relevance.

What little has been written about Vietnamese legal history suggests that legal transplantation into Vietnam is not a new phenomenon. Vietnamese lawmakers and citizens have been grappling for centuries with questions such as selecting culturally appropriate foreign law and adapting local institutions. A good starting point in tracing imported ideas and practices is understanding the who, when, how and why of legal change. Who imported law? What was the sequencing of legal borrowing? What were the sources of borrowed law? What institutions and practices were influenced? What part did ideology, state institutions and social structures play in these transformations? In examining centuries of legal borrowing our discussion considers the grand social forces shaping law, such as social movements, revolutions and significant individuals. Yet this chapter is primarily descriptive in nature. In subsequent chapters the focus shifts to contemporary borrowing and finding explanations for the puzzles and anomalies in the patterns of legal transfer.

1 See Owen Barfield, 1979 History, Guilt, and Habit, Wesleyan University Press, Middletown, Conn., 74.
Legal borrowing in the pre-modern legal system

The period of Chinese domination

The recorded history of legal borrowing in Vietnam begins with the Chinese domination in 111 BC. Small proto-states with differentiated state and social power structures emerged before this period. But formal legal rules were undifferentiated from cultural precepts, state institutions were fused with personal rule and specialised legal institutions and written laws were unknown.

More than any other external source, Chinese political-legal ideas influenced Vietnamese legal thinking and practices. Chinese ideas and practices came to Vietnam with the invading Han Dynasty armies in 111 BC. For one thousand years (111 BC-938 AD), first under the Han Dynasty (206 BC-220 AD) and later under the Tang Dynasty (589-907 AD), Chinese scholarship, political theories, religious values, family structures and bureaucratic practices indoctrinated and moulded, though never entirely supplanted, indigenous Vietnamese outlooks.

Commentators disagree about the extent to which Chinese political-legal thinking penetrated and transformed indigenous Vietnamese precepts and practices. Some contemporary nationalistic texts read history backward to demonstrate an indigenous cultural core. These writings implausibly maintain ‘the regulations, customs and habits of

3 Reflecting an uncomplicated political economy, administrative structures were unspecialised. There were three levels of social organisation. Regional kings ruled fifteen tribal areas (bo) headed by hereditary chieftains (lac truong). Each bo was further divided into rural communes headed by bo chinh (commune leaders). Apart from demanding tribute and labour for rice irrigation works and defence, the kings and Lac Tuong evidently had little influence over communes.

Kings used personal power, rather than specialist administrative apparatus to regulate political, military and religious matters. Without a written language, social rules were recorded in oral customary rules celebrated in legends and songs. Many customs and rituals were common to other Southeast Asian peoples, such as burial in earthenware jars, the betel nut cult, ritual boat racing, rain making festivals, and residual matriarchal practices. Written laws and specialised political and legal institutions did not emerge until after the Han Chinese invasion. Vietnamese legal historians seem more convinced than their Western counterparts that state-like characteristics developed among the Viet tribes before Chinese annexation in 111 BC. See e. g. Dinh Ngoc Vuong, 1995 ‘The State and Law in the Hung Kings Period’ 1 Vietnam Law and Legal Forum (9) 31, 31-33; Nguyen Ngoc Huy and Ta Va Tai, 1987 The Le Code: Law in Traditional Vietnam, Ohio University Press, Athens, Ohio, 4, cf. Charles Higham, 1989 The Archaeology of Mainland Southeast Asia: from 10,000 B.C. to the fall of Angkor, Cambridge University Press, Cambridge.

4 Although 111 BC is generally given for the Chinese annexation of Vietnam, the rebel Chinese state of Nan Yueh incorporated Au Lac from 207 BC. See Nguyen Ngoc Huy and Ta Va Tai, 1987 supra 4.


6 See e.g. Phan Huy Le, 1991 ‘The Vietnamese Traditional Village: Historical Evolution and Socio-Economic Structure’ Vietnam Social Sciences (1) 39, 40-43; Phan Huy Le, 1994 ‘The Problem of Democracy in
Vietnam still prevailed, as they had existed long before after one thousand years of Chinese domination. Some Western writers are more circumspect and believe fewer qualitative cultural differences survived Chinese annexation.

During centuries of Chinese domination several factors conspired to preserve local practices. The Chinese ruled urban centres leaving ethnic Vietnamese in control of villages and communes. Language barriers prevented most villagers from gaining a deep understanding of Chinese culture and few Vietnamese completed the classical Confucian training required for social advancement. Further limiting local access to Chinese culture, Chinese rulers evidently modified transplanted Confucian canon to suit local conditions.

Legalism (fa) rather than humanistic moral persuasion (li) was considered more appropriate for the resistive and morally unperfected indigenous population. Nevertheless, over ten centuries of Chinese domination transplanted Confucian, Buddhist and Taoist religious values, transformed elite outlooks and indirectly influenced village thinking. That the early Vietnamese imperial regimes both resembled and differed from the...
Chinese template implies that sinic influence stimulated indigenous values, producing local political-legal adaptations.

**Receiving Chinese legal thinking in Imperial Vietnam**

Following independence from China (939) the Ly dynasty (1009-1225) is characterised as a period of national development in which Buddhism challenged the rather weak Confucian hierarchical structures. Though Confucianism gained more prestige during the Tran dynasty (1225-1400), it was not until the watershed Le (1428-1788) dynasty and later Nguyen (1802-1945) dynasty that rulers borrowed extensively from Tang and Ming dynasty laws and bureaucratic processes. It is argued that Chinese transplants eventually produced an elite political-legal culture more inline with Chinese than earlier Ly and Tran dynastic practices.

Confucianism was not the only political-legal thinking shaping indigenous approaches to law—but it exerted the most profound influence over political-legal thinking and practices. The following section traces the reception of Confucianism across Vietnamese dynasties.

**Building a political-legal system**

Following independence, it was not until the Ly and Tran dynasties that recognisably Vietnamese governance structures took shape. After a thousand years of domination,

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14 Tran Thai Tong, the first emperor in the dynasty, wrote ‘We have to transmit the great teachings of Buddha to the world through the Great Sage’. Reproduced in Author Unknown, 1960 *Ving Su Luoc* (A Summary of Vietnamese History), *Van Su Dia*, 167-174.

Chinese knowledge was the natural cultural and legal reference point. The most important cultural import was the ‘reduction of religions into the same source’ (*tam gia o dong nguyen*), which syncretically blended Confucianism, Mahayana Buddhism and Taoism.16

Buddhist teachings that emphasised spiritual liberation through ethical conduct and discipline initially came to Vietnam from India, however, Mahayana Buddhism (via China) came to dominate.17 Taoism privileged the natural order, charting a passage to ‘the way’ through mysticism. It rapidly became interwoven with indigenous animist spirit cults and rituals. When combined with Confucian beliefs, the ‘reduction of the religions into the same source’ provided numerous ethical permutations and combinations to syncretistically reinterpret and consolidate Chinese governance practices.

Vietnamese rulers experimentally infused sinic beliefs with indigenous cultural elements like animistic spirits and popular Buddhism, self-consciously forging a distinctive indigenous identity.18

Contrasting with China, where the Confucian canon was treated as an all-encompassing source of political, social and moral authority, Ly and Tran officials used Confucian texts as persuasive precedents for guiding state policy. The moral and historical precepts that gave coherence and context to the canon were often ignored. As Wolters opined, ‘they localised the Confucian corpus by fragmenting it and detaching passages, drained of their original contextual meaning, in order to appropriate fragments at their discretion and fit them into the context of their own statements’.19

Vietnamese rulers abandoned eclectic borrowing and began systematically to adopt Chinese neo-Confucian governance principles within a century of Emperor Tran Minh Tong declaring in the early 1330s:

> Our forefathers, since the very beginning of the Dynasty, established their own system of law and did not follow the Sung laws and institutions. Each of the Northern and

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19 O. Wolters, 1979a, *supra* 435, 437. Also see David Marr where he wrote ‘the elite in Vietnam tended to detach Chinese thoughts and practices from their original contexts. Such idealization, among other things, allowed them to range across the full span of Chinese history, picking and choosing whatever met their fancy
Southern countries [China and Vietnam] is sovereign within its sphere and does not need to follow each other's law.\textsuperscript{20} Le and especially Nguyen emperors thought political-legal alternatives to neo-Confucianism, such as Buddhism, were incapable of managing a sophisticated irrigated rice economy and resolving interminable imperial succession disputes.\textsuperscript{21} In order to control fractious aristocratic-oligarchies, Le rulers needed to consolidate power in an elite bureaucracy separated from old noble families.\textsuperscript{22} Confucian social hierarchies backed by a Chinese-style bureaucratic legal system provided a proven centralising model.\textsuperscript{23} In addition to the technical superiority of, and prestige commanded by, Chinese law, Nguyen emperors during the nineteenth century were attracted to sinic governance models as a means of counteracting increasing Western influence. Some high officials in the Nguyen court had fled the Ming dynasty. Their mixed Chinese-Vietnamese ancestry and their sinic cultural outlook facilitated highly sophisticated legal and institutional borrowing from China.\textsuperscript{24}

\textsuperscript{20} Quoted in Nguyen Ngoc Huy and Ta Van Tai, 1987 \textit{supra} 14.
\textsuperscript{23} It is interesting to note that precisely the same tactic was used by the Qin dynasty in early Chinese history. See John King Fairbank and Merle Goldman, 1998 \textit{China: A New History}, Belknap Press, Cambridge Mass. 55-56.
\textsuperscript{24} It should be noted that Vietnamese educated in Chinese schools during the Ming occupation in the early fifteenth century were instrumental in borrowing Sung-Confucian ideology and governance practices for the first Le dynasty rulers. See J. K. Whitmore, 1977 ‘Chiao-chih and Neo-Confucianism’ \textit{4 Ming Studies} 51, 51-91. For a discussion concerning the Nguyen dynasty connections with China see John R. Clammer, 1981 ‘French Studies on the Chinese in Indochina: A Bibliographical Survey \textit{12 Journal of South East Asian Studies} 15, 17-18.
Legal borrowing

From the Le dynasty onwards, Vietnamese emperors applied a Sino-Vietnamese version of virtue rule (duc/nhan tri) and legal rule (phap tri). These principles rested on imported beliefs such as the ‘Heavenly Mandate’ (Thien Menh) and the cultivation of virtuous conduct through the five cardinal relationships. As David Marr observed, ‘Ethical cement for this structure was supplied by a set of cardinal virtues, the number eventually stabilising at five: “benevolence” (nhan), “righteousness” (nghia), “ritual” (le), “knowledge” (tri) and “sincerity” (tin).’ Confucian scholars deduced moral principles from everyday life rather than from interpretations of sacred revealed texts. They believed that if men were persuaded by education, social pressure and virtuous example to live morally, laws were unnecessary.

In practice, however, legalist (phap gia) thinking intertwined with virtue rule (duc tri) and played a prominent role in pre-modern governance. Counterbalancing Confucian humanism, legalist thinking promoted by Confucian scholars such as Hsun-tzu saw state law as a means of codifying though certainly never replacing virtue-rule. Imperial rulers saw no inconsistency in championing virtue-rule, while controlling social behaviour with draconian penal laws (phap tri) and a strong administrative apparatus. That legalist thinking influenced Le and Nguyen rulers is seen in the meticulous attention given to developing legal codes and administrative structures. Many provisions in the


26 The five cardinal relationships were those between ruler and subject, father and son, husband and wife, elder and younger brother, and older and younger friend. See generally D. Bodde and C. Morris, 1967 Law in Imperial China, University of Pennsylvania Press, Philadelphia, 19-23.


Trieu Hinh Luat (Le Dynasty Penal Code), popularly called the Bo Luat Hong Duc (Hong Duc Code), were either borrowed directly from, or substantially influenced by, the Tang Code and Ming Codes. Yet the Code contained many provisions that were not found in the Chinese legal texts. They included provisions compensating landowners for unauthorised government appropriation, private encroachment on land and fraudulent sales. In vitiating contracts for fraud and duress, and forbidding market manipulation and usury, the Code intervened in village commerce in ways never countenanced by Chinese law. Imperial interest in market regulation suggests that the Le dynasty in Vietnam was not as anti-mercantile as the Tang and Ming dynasties in China.

Locally developed legislative provisions were not confined to commerce and also reflected differences between Vietnamese and Chinese village and family structures. Contrasting with Chinese practices, village officials, rather than family heads, compiled the population registers used to assess taxation and corvée. The Code also adjusted gender rights to preserve the higher status women enjoyed in Vietnamese society. Married women, for example, were entitled to reclaim their contributions to matrimonial estates after their husbands’ death.


31 Of the Code’s seven hundred and twenty two articles, two hundred were either directly borrowed from, or substantially influenced by the Tang Code and seventeen were borrowed from the Ming Code. See Ta Van Tai, 1982 ‘Vietnam’s Code of the Le Dynasty (1428-1788)’ 30 American Journal of Comparative Law (3) 523, 525. For an authoritative discussion about possible drafting dates see Nguyen Ngoc Huy and Ta Van Tai, 1987 supra 21-29. Contemporary Vietnamese research seems to draw on the Ta Van Tai’s work. See e. g., Legal Research Institute, 1999 Mọt So Van Ve Phap Luat Dan Su Viet Nam Tu The Ky 15 Den Thoi Phap Thuoc, (Some Issues about Civil Vietnamese Law Since the 15th Century until French Colonization), Vien Khoa Phap Ly (Legal Research Institute), Hanoi.

32 Provisions deviating from the Chinese legal template are thought to have originated from Ly and Tran dynasty Codes articles designed to reflect kinship, agricultural and commercial practices indigenous to northern Vietnam. This assertion is speculative, since few Ly and Tran dynasty legal provisions are extant. The argument largely rests on the observation that the wording of some of these provisions employs terminology and refers to administrative institutions dating from earlier periods. See Ta Van Tai, 1982 supra 530-531; Nguyen Ngoc Huy and Ta Van Tai, 1987 supra 19-29; Nguyen Viet Huong, 1996 ‘King Lê Thanh Tong and the “Hong Duc” Code’ 2 Vietnam Law and Legal Forum (21) 29, 29-22.

33 Most of the contractual provisions of the Le Code concerned freedom of consent, unfair trade practices, and market price manipulation (Article 576). A considerable number of provisions in the Le Code, such as articles 388-400, were devoted to the rules of inheritance; these were designed to maintain the stability of the family unit. Nguyen Ngoc Huy and Ta Van Tai, 1987 supra 19-29.

34 Whitmore, 1984 supra 304.

Legal borrowing reached a zenith with the Nguyen Dynasty. The *Hoang Viet Luat Le* (Laws and Decrees of Imperial Viet), completed by Emperor Nguyen Gia Long in 1815, slavishly copied the Ching Code. Of its three hundred and ninety eight articles all but one were either identical to or closely based on Ching Code articles. It strengthened the criminalisation of neo-Confucian morality and removed most indigenous provisions found in the Le Code. Despite careful borrowing, subtle changes in meaning occurred during the translation of Chinese provisions into Vietnamese *nom* characters.

There is little discussion in documents from the period about the practical implementation of law. Commentaries stress the merits of virtue rule (*duc tri*) over legal rule (*phap tri*). But rulers used the law in tandem with virtue rule to secure specific objectives. Mandarins were encouraged to base their decisions on written law. The Nguyen Code, for example, required mandarins to cite the relevant legal sources when pronouncing a sentence. In theory, even emperors could not change written laws without following amendment procedures.

The problem for mandarins was finding the penalty most suited to a case through either precedent or analogy. Problems arose in the numerous instances where provisions in the Codes and edicts did not directly relate to the facts in particular cases. In these circumstances, mandarins in the *Bo Hinh* (Justice Board) followed the Chinese practice and collected case commentaries to assist court decision-making. Case law was not binding and there was little attempt to categorise a system of doctrine and principles. Legalist jurisprudence had a rich ‘case law’, but no consistent means of drawing on accumulated experiences. It is argued in chapter six that this contextual approach to justice is evident in contemporary courts.

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37 The Nguyen Code was less concerned with pragmatic social arrangements like contracts and land rights as the Le Code. It also brought women’s inheritance rights more into line with Chinese practices. See Woodside 1971, supra 38-41.

38 Most records before the Le Dynasty were destroyed, and from the 15th century onwards mandarin scholars had a vested interest in promoting orthodox neo-Confucianism. Personal communication David Marr, September, 2001.


40 Nguyen Code article 380. See Ta Van Tai, 2001 supra 133.

41 See Ta Van Thai, 2001 supra 133.
Where analogy failed, catchall provisions allowed mandarins to criminalise ‘doing what should not be done’, or those ‘committing wicked acts’. It did not matter that such behaviour was not otherwise proscribed by statute.42 Behind these provisions lay a concern to maintain moral order notwithstanding gaps and contradictions in the written law. This practice gave considerable regulatory power to the Confucian literati. By setting the moral tone of virtuous behaviour, the literati-infused written law with normative and contextual meaning.

Written law was not intended to have autonomous authority. Indeed the people were not expected to know the law. Like China, no clear divisions separating legality and morality were possible or desirable. The Vietnamese term *thoa dang* describes the situational validity of law and morality.43 *Thoa dang* encouraged decision-makers to syncretistically select from moral and ethical sources (especially the ‘reduction of religions into the same source’) to find ethical solutions to specific problems.44 Exogenous normative sources such as laws were not considered absolute, universal or immutable, but rather alternate sources of guidance. Decision-making processes were expected to personalise rational rules. Outcome-orientated decision-making attempted to generate harmony by blending competing moral and social precepts. Legal rules were in the process subordinated to moral and pragmatic expediencies. Many Vietnamese homilies support this conclusion. For example, *’mot bo cai ly khong bang mot ty cai tinh’* (a granary of reason does not equal a little bit of feeling) and law is the lowest form of morality.

In sum, virtue rule and legal rule co-existed and were intertwined. Legal rules and procedures were widely used to implement imperial policy and deliver justice to the people. But they were used instrumentally to secure particular outcomes. The normative content of law resided more in the writings of the Confucian literati than in legal codes. This meant that imperial rule relied on personal interaction and virtue-rule much more than abstract

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42 ‘Whoever commits an act that should not be done shall be condemned to penal servitude or exiled for a major wrong and demoted or fined for a minor one.’ Le Code, article 642; Nguyen Code, article 351.
43 These comments are based on interviews with a Vietnamese sociologist and literary critic who specialises in state-village relations. Interviews Hoang Ngoc Hien, Sociologist, Nguyen Du School of Creative Writing, Hanoi, June 21, 1998, April, September 1999, August 2000.
44 Nguyen Van Huyen vividly described syncretic thinking in villages:

In this jumble of spiritual things, the cult of ancestors and the cult of the village patron can be distinguished. The great majority of the people in the country have a very flexible and very soft popular religion characterised by a certain number of practices, some related to Confucianism, others to Taoism or to Buddhism, that are automatically obeyed on different occasions in life.

rules and processes. State-sponsored norms were situational rather than universally relevant. Their primary purpose was to make the punishment fit the crime and social status; and preserve Confucian social hierarchies.

**Borrowing administrative practices**

Vietnamese rulers also looked north for administrative structures and practices. Le dynasty rulers reformed the bureaucratic examination system to reemphasise that elite advancement lay through deep knowledge of Chinese language, literature and governmental practices. They also replaced indigenous counsellors (Te Tuong) with the Chinese Six Board governance structures and added a meritocratic Chinese-style civil service examination (thu si) recruitment to aristocrat recruitment (nhiem tu). Those implementing imperial rule (mandarins) were recruited for their loyalty to the emperor (relatives) and knowledge of neo-Confucian canon. Le rulers vigorously proselytised neo-Confucian ethical codes. Writings, public discussions and petitions reviling the prestige and moral authority of senior mandarins were criminalised.

The Nguyen dynasty took sinic borrowing a step further by mimicking Ching dynasty governance in every conceivable manner. More than the Le dynasty, the Nguyen emperors believed that Ching morality and institutions were complex and interrelated, and tinkering with established practices carried the risk of system failure. The ensuing literal application of Ching law led Vietnamese rulers to endow some sinic institutions with powers and functions only countenanced on paper in China. A few terse words of

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45 Just how closely Vietnamese bureaucratic responsibilities corresponded to Chinese patterns is difficult to ascertain as records from this period are not extant. But civil service examinations ensured that about 40 per cent of the Imperial Government at any one time were selected from low borne villagers. See Alexander Woodside, 1998 supra 215-219; Tran Thi Tuyet, 1995 ‘The State and the Law under the Ly Dynasty (1009-1225)’, 2 Vietnam Law and Legal Forum (16) 26, 26-28.
47 Le Code, article 136 reproduced in Nguyen Ngoc Huy and Ta Van Tai, 1987 vol II.
48 See Alexander Woodside, 1971 supra 60-110.
prescription in Chinese codes did not disclose sociopolitical constraints designed to limit institutional power in China’s larger and more complex administrative system.\(^49\)

The breakdown of social order during this period suggests that unreflective ideological borrowing can be politically and socially counterproductive. Cultural adjustments were at best haphazard. Vietnamese rulers tolerated some redundant Chinese organisational structures and humoured disgruntled mandarins unwilling to relinquish past practices, by giving new Ching institutions old Vietnamese bureaucratic titles.\(^50\)

At a deeper level, Insun Yu opined that ‘Vietnamese law was basically concerned with the maintenance of the ruler’s position, rather than with implementing the ultimate social ethics of Confucianism’.\(^51\) Perhaps more than their Chinese contemporaries, Le and Nguyen rulers used criminal law as an instrument of state building.\(^52\) But whether this implies qualitative differences between Vietnamese and Chinese political-legal thought is an open question.

Localising Chinese political-legal thinking

It is also possible that private writings may eventually reveal a diverse and even heterodox range of views that is largely missing from official accounts.\(^53\) But surviving records written by the literati portray Vietnam as an orthodox neo-Confucian state.\(^54\) Looking back at the nineteenth century, Confucian scholar Phan Khoi thought ‘it can be said that each Chinese and each Vietnamese breathes all his life a Confucian atmosphere, drinks the

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\(^{49}\) For example, the Nguyen Emperors worried about the excessive power Ching codes appeared to invest in Grand Secretaries and constructed Vietnamese institutions to avoid this imaginary problem. See Woodside, 1971 *supra* 87-89.


\(^{51}\) Imported rules were used to control competing noble families. Insun Yu, 1990 *Law and Society in 17th and 18th Century Vietnam*, Asiatic Research Center, Korea University, Seoul, 89-104.

\(^{52}\) The Le Code in particular, proscribed many more moral violations than the Tang Code. Filial piety was strengthened, for instance, by provisions that criminalised law suits against grandparents, parents and brothers. The Le Code also imposed more severe penalties for equivalent moral infractions than its Tang or Ming counterparts. The difference is clearest with crimes challenging imperial paramountcy. The Le Code also contained more provisions that criminalised plotting against the emperor and bureaucrats than the Ming and Ching Codes. See Nguyen Ngoc Huy and Ta Van Tai, 1987 *supra* 56-68; cf. Fu-mei Chang Chen, 1970, ‘On Analogy in Ching Law’ 30 *Harvard Journal of Asiatic Studies* 212.

\(^{53}\) In 1487 Tran Phong, a high ranking official, was condemned to death by Emperor Le Thanh Tong for criticising the adoption of Ming laws and institutions. See Nguyen Ngoc Huy and Ta Van Tai, 1987 *supra* 25.

Confucian milk, eats the Confucian rice, and lives until his death in the Confucian ritual cycle'.

In contrast to China, where scholars (within politically sanctioned limits) vigorously debated the official canon, strict controls over imported information inhibited scholarly debate and ideological development in Vietnam. By prohibiting Vietnamese scholars from forming private contacts with their Chinese counterparts, Nguyen rulers restricted unauthorised interpretations. Nevertheless some discussion occurred, because Confucian literati were expected to renew and reinvigorate neo-Confucian morality and political governance through discussion and criticism. For example, Nguyen Truong To, a prominent mandarin during this period unsuccessfully petitioned the Nguyen Dynasty to introduce more procedural certainty into court cases to promote litigants' rights. But mandarins were prohibited from publicly contradicting the elite ideology, which was more in tune with Chinese philosophy than Vietnamese realities.

Some commentators attribute this unreflective adaptation of Chinese political-legal thought to the Nguyen rulers’ mistaken belief that villagers like the elite, unreservedly accepted neo-Confucianism. Others theorise that Nguyen rulers thought indigenous legal provisions in the Le Code reflected northern precepts and practices not necessarily pertaining to the Nguyen heartland in central and southern Vietnam. Whatever the reason, Chinese political-legal thought was imported with little recorded discussion and dissent by Nguyen dynasty literati. In surveying the Vietnamese literary canon from this period, David Marr estimated 'the Vietnamese author devotes 95% of his presentation to the teachings of Confucius and disciples, perhaps interlarded with examples of superior men in China, then allocates at most five per cent to Vietnamese thinkers or role models'. Imported Chinese law not only interacted at an elite level, it also influenced village thinking. At the end of the fifteenth century when the Le Dynasty reached the peak of its

56 See Woodside, 1971 supra 231-233. This does not explain why imperial-drafting committees did not attempt to localise imported rules.
57 Also see Alexander Woodside, 1998 supra 221-222.
58 Pham Duy Nghia, 2003 ‘Noi Doanh Nhan Tim Den Cong Ly’ (Where do Entrepreneurs Go for Justice)
Nghien Cuu Lap Phap (3), 45-54.
power, court-appointed mandarins played an important role in administering villages.\(^62\) By the time Gia Long tried to reassert central power over villages in the early nineteenth century, independent-minded local authorities resisted centralisation. Subsequent attempts by other members of the Nguyen Dynasty to implement their vision for an orderly and morally homogenous Confucian society conflicted with relatively flexible, loosely structured village organisations.\(^63\) The familiar injunction *phep vua thua le lang* (the laws of the emperor give way to the customs of the village) implies some degree of village resistance to imperial political-legal thinking.

The Gia Long Code reflected the higher degree of autonomy enjoyed by villages, as it required the mandarin bureaucracy (*quan vien*) to only deal with village-based Councils of Notables (*hoi dong tien chi*) and not with their constituent members.\(^64\) This limited interaction impeded the penetration of Chinese legal principles imported into the Gia Long Code from entering village life. Rules that restricted female inheritance, for example, never entered popular village practice.\(^65\) At the same time indigenous spirits and cultural beliefs both limited and commingled with imported Chinese culture. It also suited those with the least to gain from Confucian hierarchies to emphasise comparatively egalitarian Mahayana Buddhism principles.\(^66\)

Though local religious and cultural precepts undoubtedly moderated the penetration of imported laws and institutions into villages, elite ideology influenced some local practices.\(^67\) The Le Dynasty and especially the Nguyen Dynasty codes established a legal architecture that enmeshed village (*xa*) leaders and family heads into the state system. The most substantial criminal penalties, which punished violations of the five-relationships (*ngu

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61 See David Marr, 1998 *supra* 14-17.
63 See Woodside, 1971 *supra* 60-66, 94-98.
64 See e.g., Gia Long Code, articles. 64-72 (1812-1945); P. L. F. Philastre, 1909 *Le Code Annamite*, (reprint 1967), 335-357.
65 Many of the Le Code provisions that regulated commerce and women's inheritance were treated by the population as customary rules during the Nguyen dynastic period. See Nguyen Ngoc Huy and Ta Van Tai, 1987 *supra* 475-489; Nguyen Ngoc Huy and Ta Van Tai, 1986 *supra* 488-489.
luent), reached into village and family life. Crimes by wives against husbands and especially by children against parents (filial piety hieu) were considered more heinous than offences against social inferiors.69

As morally superior ‘first knowers’ mandarins were obliged to inculcate Confucian doctrines to those slower to understand.70 They vetted village conventions (huong uoc) and rules (huong le) to ensure compliance with the neo-Confucian orthodoxy.71 But in practice their influence was limited. Central-level mandarins rarely visited villages and the local literati practised non-orthodox versions of Confucianism. Contradictions in Confucianism between loyalty to ruler and family further compounded elite-village dichotomies.

A loose coupling between law and village society permitted local values and practices to operate at variance to imported neo-Confucian ideology.72 Provided local particularities did not directly challenge imperial authority, taxation, corvee and conscription, limited self-government was permitted.

Yet village autonomy was more a function of imperial forbearance than a formal legal doctrine. Emperors, for example, issued edicts regulating large provincial markets and market chiefs (trum cho) were appointed by mandarins to maintain central laws.73 In recognising practical limits to their power, Vietnamese rulers only extended control to

68 Ruler-subject, father-son, husband-wife, elder brother-younger brother and friend-friend.
69 See Pham Diem, 1999 ‘Criminal Offences Under Ancient Laws of Vietnam’ 5 Vietnam Law and Legal Forum (58) 27, 27-29; Pham Diem, 1999, ‘Relationships Between Parents and Children under Vietnam’s Ancient Laws’ 6 Vietnam Law and Legal Forum (63) 29, 29-30. The ten heinous crimes were plotting high treason (an attempt on the emperor’s life), plotting grave insubordination (desecrating imperial ancestral temples and palaces), plotting treason (working for an enemy state), wicked insubordination (attempts to kill grandparents, parents or actually killing senior male relatives), inhumanity (killing three people in one family), stealing articles from the emperor, lack of filial piety, discord (bat muc)(plotting to kill or sell relatives), disloyalty (killing an active official) and incest. Le Code, article 2.
72 The center and periphery were strongly bound by patronage networks. As a colonial adage said ‘If a man becomes a mandarin, his whole lineage can ask favors of him’ (Mot nguoi lam quan, ca ho duoc nho). Many of the approximately two thousand mandarins serving at any one time breached criminal provisions by bending central rules to advance family and local interests. See Woodside, 1971 supra 178-179.
larger centres, leaving village rituals and customs to regulate everyday commerce.\textsuperscript{74} Conflicts arising from business deals and contracts were mediated by village elders, neighbourhood and merchant associations and families operating outside the state judicial hierarchy.\textsuperscript{75} Official dispute resolution exposed disputants and by extension their families and village to loss of proper virtue and not infrequent demands for bribes.\textsuperscript{76} Due process ultimately remained an imperial prerogative. Emperors could and did intervene where and whenever they desired. The imperial legal system remained reified—far above the contingencies of daily life. Village and family heads were enmeshed in the imported state system only in so far as they were held accountable for upholding Confucian hierarchies.\textsuperscript{77} Center-local dualism of this kind was not uniquely Vietnamese—similar patterns existed in China.

**Summary**

For Alexander Woodside, ‘Vietnamese borrowing from China exhibited the usual variegated patterns of acculturation in which some institutions and objects spread rapidly from one society to another, some spread more slowly, and some do not spread at all or are rejected’.\textsuperscript{78} Nguyen rulers believed that effective neo-Confucian virtue-rule (duc tri) required the wholesale adoption of Chinese ideology, governmental organisations and political-legal culture and eclectic borrowing risked organisational disunity. They thought that borrowing a complete system would minimise incompatibility between foreign and indigenous cultural precepts. The voluntary large-scale political-legal borrowing by Le and Nguyen rulers was unprecedented in other pre-colonial East Asian countries (with the

\textsuperscript{74} Ibid.


\textsuperscript{76} For a discussion of the use of mandarins to resolve intractable land disputes see Woodside, 1971 supra 155-56. In both China and Vietnam mandarins were widely considered by emperors and subjects alike as corrupt. For example, approximately ten percent of the articles in the Vietnamese Quoc Trieu Hinh Luat (Dynastic Penal Laws) of the Le Dynasty were devoted to penalties applied to corrupt mandarins. Popular folk tales were full of accounts of cunning villages out witting villainous officials. See Ta Van Tai, 1988 The Vietnamese Tradition on Human Rights, Institute of East Asian Studies, Berkeley, 204; Pierre Poivre, 1993 ‘Journey to Cochinchina’in Li Tana and Anthony Reid eds., Southern Vietnam under the Nguyen, Data Paper Series, Institute of Southeastern Studies, Singapore, 68, 74-75; George F. Schultz trans., 1994 Vietnamese Legends, Nha Xuat Ban The Gioi, Hanoi, 116-117.

\textsuperscript{77} The Emperor was equated to a father and villagers were his sons. For a discussion about Confucian social control see Bodde and Morris, 1967 supra 299-315; also see Neil Jamieson, 1993 Understanding Vietnam, University of California Press, Berkeley, 38-40.

\textsuperscript{78} Woodside, 1971 supra, 81.
possible exception of Korea) and foreshadowed the wholesale importation of the Soviet political-legal system centuries later. 79

After intense indoctrination over the centuries imported neo-Confucian political-legal beliefs came to order many facets of elite and village life. What were once alien ideas and practices had through a process of acculturation and hybridisation become sino-Vietnamese virtue-rule, moral precepts and legal rules and practices. But imported ideas were not evenly adopted and longstanding elite-village dichotomies persisted.

Dao Duy Anh observed in 1937 that Chinese influence only diminished when it become apparent that the Confucian model offered few effective responses to Western imperialism. 80 There is convincing evidence that the breakdown in neo-Confucian virtue-rule during the late nineteenth century coincided with French colonial administration and is ascribable to a cultural clash between neo-Confucian and village thinking. 81

The French colonial period: 1862-1945

The shift from pre-modern to colonial rule in Vietnam demonstrates there are rarely clear lines marking the end of one area and the beginning of another. Colonial rule officially began when the Nguyen Emperor, Tu Duc, signed a treaty ceding three provinces to the French in 1862. 82 The French made Cochin China (Southern Vietnam) a colony in 1862 and Annam (Central Vietnam) and Tonkin (Northern Vietnam) became mandated territories in 1884 under the notional leadership of the Nguyen emperors.

Transplanting French colonial legal thinking

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French transplantation theories

French colonial authorities used the pluralistic ‘legal collaboration’ policy to mould the interaction between French and neo-Confucian political-legal thought. Legal collaboration permitted the metropolitan French legal system to co-exist with a modified pre-colonial imperial and village administration in Annam and Tonkin. The metropolitan and indigenous systems were never equal because royal edicts were ineffective unless endorsed by the French Resident-Superieur.

Legal collaboration contradicted French legal theory (positivism), which insisted that legislation was the exclusive legal voice in French territories. By allowing French law to co-exist with another legal system (indigenous law), legal collaboration diminished colonial sovereignty.

Contrasting with colonisation policies in colonie de peuplement (settlement colonies) like Algeria, where one legal system regulated everyone, a complex ‘conflict of laws’ regime existed in Vietnam. Collaboration policy permitted indigenous law to regulate village life provided it did not compromise public order. In theory two different legal systems—one stacked upon the other—co-existed within the same geopolitical borders.

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84 Colonial policy took from assimilation theories the objective that ‘colonial peoples were to absorb French culture so that they might become Frenchmen and French citizens; the colonies were to become overseas parts of France.’ K. E. Robinson, 1950 ‘The Public Law of Overseas France since the War’, 32 Journal of Comparative Legislation and International Law 37, 37.

85 At first the French limited their interference with imperial law making to ameliorating harsh punishments, such as decapitation, and torture. Later imperial powers were reduced to ceremonial protocols. See Nguyen The Anh, 1985 supra 153-154. For a description of political interaction between French officials and the Hue court see Marr, 1971 supra 47-48.


87 French settlers were entitled to purchase freehold land, which was governed by the laws of Metropolitan France. Islamic rules as interpreted by colonial officials, applied to Moslem Algerians. See Hooker, 1975 supra 204-214.

French law was not uniformly applied throughout Vietnam. In Cochin-China Vietnamese could voluntarily elect to be bound by French law, but voluntary election was only possible in the Centre and the North in a narrow range of circumstances. Except in the case of inconsistency, the pre-colonial Vietnamese imperial codes were deemed to apply to the Vietnamese and Chinese, by virtue of Arrête, Chef Du Pouvoir Exécutif de la Republique Française, 23 August, 1871. See Hooker, 1979 supra 167-180. Also see Martin Murray, 1980 The Development of Capitalism in Colonial Indochina (1870-1940), University of California Press, Berkeley, 160.

88 Barry Hooker argues that legal pluralism is a difficult concept in French law, which relies on acts of state (i.e. nationality) to determine whether individuals belong to a particular legal systems. If two legal systems co-exist national sovereignty is theoretical abrogated. See Hooker, 1975 supra 247.
French law governed disputes between French citizens and the indigenous population.\(^{89}\) Vietnamese living in Cochin-China and Tonkin (but not Annam) could voluntarily articulate disputes into the French system. The laws of France automatically extended to Cochin-China and large urban centres (such as Hanoi, Hai Phong and Tourane) except where they conflicted with local administrative arrangements.\(^{90}\) Elsewhere the French preserved a modified version of pre-colonial governance.\(^{91}\) Imperial cooperation was considered vital to colonial ambitions, since it confined local resistance within imperial and village organisational structures. Rule through local authorities was especially pronounced in Annam, where the Nguyen Emperors maintained imperial government structures (six central boards, provincial and local administrators) staffed by court-appointed mandarins.\(^{92}\) Mandarins enlisted sentimental loyalties *trung quan* (loyalty to the king) to legitimise neo-Confucian rule.

**Implementing colonial rule**

Over time tensions emerged between the centralising aspirations of French colonial rulers and local indigenous practices.\(^{93}\) In Cochin-China the French were forced to regulate villagers, because mandarins refused to collaborate with the colonial regime.\(^{94}\) French-appointed village chiefs filtered administrative orders and central edicts regulating the *estate-civil* (registry system), tax collection and education programs through neo-Confucian precepts.\(^{95}\) It was not until the early 1920s in Tonkin and 1942 in Annam that French authorities attempted to strengthen control over village administrators with ‘model’ village conventions.\(^{96}\) As Martin Grossheim noted, French attempts to democratise village

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\(^{90}\) Interview Ngo Van Thau, Former Professor of Judicial Training School, Hanoi March 2001.

\(^{91}\) The application of French law is complex and changes over time. An abridged version of the Gia-Long Code applied in Cochin China until it was replaced by a hybrid French Civil Law and indigenous Code in 1883. Pre-Colonial law applied in much of Tonkin and all of Annam until the hybrid law replaced it in 1931 and 1936 receptively. See Hooker, 1975 supra 232-233.


\(^{93}\) See Hooker, 1975 supra 246-248 (French law cannot easily co-exist with customary law).

\(^{94}\) See 1969, supra 78-79. Non-cooperation is also attributable to local resistance to French assimilationist policies practised at this time.

\(^{95}\) See Osborne, 1969 supra 85-87.

authorities and reduce the corrupt power of village notables in Tonkin brought chaos to village administration. Colonial authorities eventually acknowledged their failure to transplant democratic accountability and during the 1940s sought to restore the authority of village notables.

Rural administrative reforms replaced the ancient Councils of Dignities (Hoi Dong Ky Muc) with Councils Representing Family-Lineages (Hoi Dong Toc Bieu). Rather than strengthening French control, attempts to reconfigure village structures produced new bodies lacking the credibility and capacity to project French influence. Strong corporate village structures that had once moderated the behaviour of village officials degenerated under colonial proxies, allowing unprecedented levels of corruption, nepotism and patron-clientism.

Implementing transplanted law

Colonial law could hardly have differed more from indigenous virtue-rule and asymmetric legal hierarchies. Revolutionary ideals infused French law with notions about ‘mankind’s natural, inalienable and sacred rights’. These ideals translated into commercial rights governing sanctity of contract, private property, free enterprise and separate legal categories for administrative, criminal, commercial and civil law. French law also manifested liberal ideology promoting legal equality, positive liberty (only laws can remove liberty), religious freedom, public expression and, most importantly, the notion that private rights check public power.

Like other colonising powers (for example, the Dutch in the East Indies), colonial authorities used law primarily to maintain social order and serve French commercial interests. They imported commercial laws (including contracts, land titling, hypothecques and company laws) required to regulate transplanted capitalist institutions. Since

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97 Martin Grossheim, 2004 supra 70-73.
99 According to one commentator, those who accepted office ‘far too often took advantage of their positions to achieve mutual gain.’ Osborne, 1969 supra 71, 87. Also see James Scott, 1976 The Moral Economy of the Peasants, Yale University Press, New Haven, 184.
102 In 1864 French legal codes were promulgated in the colony of Cochin-China (southern Vietnam). Company law was applied throughout Vietnam, because it was thought that no indigenous laws were suitable for ‘modern commercial organisations’. See Hooker, 1979 supra 157-154. Unlike the pre-colonial diem
imported commercial law only applied to Europeans and assimilated Vietnamese, incongruities with indigenous commercial practices were considered irrelevant. In 1880 a committee, largely Vietnamese in composition, was convened to draft a civil code for Cochin-China that reflected indigenous social and commercial practices. Drawing extensively from the Le and Nguyen Codes, the draft-civil code contained legal principles embodying customary practices that were set in a legal framework cognisable to French legal theory. Even this modest reform offended colonial sensibilities, since aspects of Vietnamese legal culture were considered repugnant to ‘civilised practice’. A compromise Decree issued in October 1883 amalgamated French Civil Code provisions with indigenous provisions governing marriage, divorce, inheritance and patrimony. Colonial policy initially encouraged field officers to use the Nguyen Code to resolve village disputes. Without comprehending the role of legal codes in neo-Confucian governance, officials tried to generate individual rights and obligations from penal provisions designed to sanction moral violations. Coming from a civil law tradition where legal codes contained generally applicable principles, colonial officials unsuccessfully searched the Nguyen Code for legal abstraction. For example, in the important area of land regulation, the French attempted to use pre-colonial dia bo tax registers to create legally binding land boundary registers. The policy of investing customary land boundaries with legal precision, failed to convert loose cultural assertions into abstract legal rights. Officials eventually conceded that the Code lacked sufficient specificity to extend legal principles by analogy to case facts. French attitudes were discussed in a colonial report that concluded ‘the Annamite legislator, in fact, instead of posing general principles and drawing deductions from them as required, foresees the various possible hypothetical situations and regulates these in a manner which is almost exclusive’. The replacement of an inferior translation of the Nguyen Code with Philastre’s detailed commentaries did not solve the problem. The new draft also lacked jurisprudential


103 Similar laws were enacted in Tonkin (1931) and Annam (1936). See Dao Tri Uc and Le Minh Thong, 1999 supra 12-15.

104 See Nguyen Duc Nhan, supra 76; Nguyen Ngoc Huy and Ta Van Tai, 1986 supra 465-468.


guidelines. French officials failed to comprehend that in neo-Confucian legal systems state power was projected through the discretionary application of moral principles, rewards and punishments more than statutory rules. Efforts to apply the Nguyen Code to criminal behaviour were eventually abandoned and the French Penal Code replaced the Nguyen Code first in Cochin-China, and later in Amman and Tonkin.\(^{107}\) Tentative steps to integrate French law into an indigenous framework continued in the 1930s with the translation of a simplified version of the French Civil Code into Vietnamese.\(^ {108}\) A Vietnamese Commercial Code was eventually enacted in 1943.

Following the establishment of the Law College at the Hanoi University in 1933, Vietnamese bureaucrats, judicial officers and lawyers studied French law in greater numbers.\(^ {109}\) In Cochin-China, French trained Vietnamese assumed judicial posts in increasing numbers and courts applied rules of procedure and evidence that gave lawyers an active role. Local courts in Tonkin, and especially Amman remained strongly influenced by pre-colonial procedures and attitudes that de-emphasised legal reasoning.\(^ {110}\) Legal study and research virtually discontinued under the Japanese occupation and during the subsequent independence struggle.\(^ {111}\)

In the decades after partition of Vietnam in 1954 much French law and legal education continued in the South.\(^ {112}\) For example, the *Cour dʼAppelle Saigon* increasingly analysed and qualified traditional commercial practices.\(^ {113}\) The Republic of Vietnam repeatedly amended French colonial law to reconcile imported legality with local social and economic

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\(^{107}\) With the transfer of government from the military to civil authorities in 1879, the Nguyen Code was replaced by a modified French Penal Code. The French Code was introduced in Tonkin 1917 and in Annam in 1933.


\(^{109}\) Some prominent Vietnamese, such as Phan Van Truong, traveled to France for a legal education before the Faculty of Law commenced instruction. See Virginia Thompson and Richard Adloff, 1947 ‘The Cultural Institutions of Indochina Today’ *6 The Far Eastern Quarterly* (4) August, 418; Stephen Young, 1979 ‘Vietnamese Marxism: Transition in Elite Ideology’ *19 Asian Survey* 770.


practices. Following the adoption of Soviet law in the North during the 1960s, the influence of French law rapidly declined. French legal influence ceased in the South after reunification in 1975 (see discussion below).

**Adopting imported law**

Transplanted French commercial laws rarely touched the lives of most Vietnamese. Only a small number of Vietnamese ever elected to submit property disputes to French law, and even then only for domestic, family or inheritance disputes. Most Vietnamese remained remote from the colonial economy. As Jamieson observed ‘a mere handful of [French] men exerted near total influence over the entire financial and economic structure of Vietnam’. The indigenous Vietnamese population contributed less than one per cent of the capital and nine per cent of the workforce to the colonial industrial economy. The strong sense of community in villages meant that most commercial transactions, including disputes, were resolved without reference to colonial law.

Not all Vietnamese remained remote from imported rights-based law. A small merchant class acquired knowledge of French law, mainly to deal with colonial officials, French plantation owners and shipping companies. Especially in commercially oriented Saigon, anti-mercantile attitudes slowly gave way to commodity capitalism and rights-based law. French legal ideals envisaged an orderly and predictable world in which some progressive Vietnamese wanted to live. Indeed by the 1930s French officials

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114 Interviews Pham Duy Nghia, Lecturer, Law Faculty, National University, Hanoi September, 2000, March 2003; Interview Ngo Van Thau, supra.
115 See Hy V. Luong, 1992 Revolution in the Village, University of Hawaii Press, Honolulu, 55-79.
116 See Stephen Young 1979 supra 772.
117 See Jamieson, 1993 supra 91.
119 See Nguyen Ngoc Huy and Ta Van Tai, 1986 supra 493.
120 Vietnamese who participated in the colonial economy as plantation owners or operators of commercial establishments such as rice mills, printing presses, and textile weaving factories, together with those who owned houses in the rapidly expanding urban centres, would have found themselves increasingly regulated and expected to understand French law.
121 Milton Osborne makes that point the two different elites emerged, a bureaucratic elite in the North and commercial elites in the South. See Osborne, 1969 supra 276; Marr, 1981 supra 122-123.
122 In discussing attempts to reconcile traditional and French culture Nguyen Tuong Tam editorialised that: Each side has its good points and its bad points, and it is not yet certain where morality lies. But when the old civilization is brought out and put into practice before our very eyes, we are dissatisfied with
complained about the growing number of legal disputes initiated by Vietnamese in Cochin China. David Marr speculated that some people realised that laws could be used as weapons to secure advantage and conflicts arose under colonial rule that were not easily resolved by family and village mediation.123

The independence movement

By the early twentieth century the independence movement turned from neo-Confucianism to European intellectual sources for inspiration.124 Prominent intellectuals like Phan Boi Chau and Phan Chu Trinh borrowed French legal concepts to propose an independent Vietnamese state based on a constitutional monarchy.125 Though organising their ideas around imported doctrines, they stressed that laws must suit local conditions. For others, contradictions between the harsh implementation of colonial law and its lofty idealism (liberty, equality and fraternity) excited radical opposition to the imported political-legal system.126 Examples abounded where French justice failed to match ideological principles. The lenient sentence given to a French plantation owner charged in 1930 with murdering a Vietnamese labourer convinced many that they could not trust colonial courts.127 By questioning the impartiality of liberal legalism, revolutionaries and nationalists portrayed the colonial legal system as alien and imposed, serving foreign rather
than indigenous interests. Selectively appropriating neo-Confucian beliefs, revolutionary writers constructed a local legal ideology that stressed the moral superiority of the independence movement. This synthesis of neo-Confucian virtue-rule with Marxist-Leninism is considered in chapter three.

By the close of French rule a layered pattern of legal borrowing emerged. Imported political-legal ideas remained confined to small colonial enclaves, while neo-Confucian and village values dominated the rural landscape. French colonial policy institutionalised legal boundaries that separated those living in the colonial and indigenous worlds.

Transplanted political-legal ideas and practices functioned comparatively well where French-trained jurists applied them to those inhabiting the colonial world. But cultural misunderstandings and a determination to implement the mission civilisatrice impaired the application of colonial law to the indigenous population. By locating state power in normative rules, French rule undermined the moral authority of neo-Confucian literati over village officials and the rural population. Village regulation faltered because it increasingly lacked the moral authority required for virtue-rule.

Legal borrowing following independence

Just as pre-colonial ideas continued under French rule, there was no clear line marking the end of the colonial area and the beginning of the socialist period. Vestiges of the colonial legal apparatus remained for over a decade after the 1946 Constitution declared Vietnam independent of French rule. These continuities caution against periodising legal change according to constitutional reforms. Although this approach enjoys the virtue of simplicity, the 1946, 1959, 1980 and 1992 constitutions reflect, more than herald, legal change.

The analysis of legal borrowing has been divided into four periods that correspond to the main stages of legal development disclosed in interviews, legal articles and communist

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party policy. The first period started during the early stages of the independence struggle during the 1920s, when imported Marxist-Leninist ideas competed with Western liberal philosophies to form the intellectual basis of popular resistance. The second period commenced in the mid-1940s with the declaration of independence and the formation of state apparatus in the Democratic Republic of Vietnam (DRV) (Viet Nam Dan Chu Cong Hoa). The third period coincided with the consolidation of communist power following the French defeat and the declaration by the Party Congress in 1958 to socialise (or more precisely to Sovietise) the legal system. Early signs of a fourth reform period emerged during the Fifth Party Congress in 1982, but it was not until the Sixth Party Congress in 1986 endorsed a doi moi (renovation) policy that legal borrowing shifted from Soviet to Western liberal sources. Naturally these periods are only indicative guides. It will become clear that the history of legal change resists neat categorisation. Our purpose is to provide a framework in which to discuss legal borrowing following independence.

The early independence struggle (1920-1945)

The shift to socialist thinking among many of Vietnam's anti-colonial leaders did not precisely coincide with the decline of neo-Confucian rule or disenchantment with Western philosophy and science. Its timing and origin is much more complex. By 1920 Ho Chi Minh was attracted to the Communist Third International, 'almost a decade before other Vietnamese had any reliable exposure to Marxist-Leninism'. Other early Vietnamese independence leaders received their training in Moscow in the 1930s and were attracted more towards Stalinist then Maoist ideology. Revolutionary pamphlets circulating in colonial prisons prompted French authorities in the 1930s to complain that prisoners went into jails knowing nothing of Marxism, but emerged committed Marxist revolutionaries.

130 In a mechanistic sense, all legislative change flows from communist party initiatives, but this statement begs the question what influences communist party policy. For a discussion about this possibility see Benedict J. Tria Kerkvliet, 1995 'Village State Relations in Vietnam: The Effect of Everyday Politics on Decollectivization' 54 Journal of Asian Studies (2) 402-405.
131 It is important to note that Marxist-Leninism was not the only foreign ideology used to counter French colonialism. See the discussion concerning struggles between the Indochinese Communist Party and non-communist Vietnamese nationalist during the anti-colonial struggle during the 1930s and 1940s. Jamieson, supra 176-213.
134 David Marr believes that materials studied included Fredrick Engles 'Anti-Duhring' (State and Revolution) and 'Fundamental Principles of Marxist-Leninism'.
There was much more to the early independence struggle than the importation of Marxist-Leninist thinking. ‘By the late 1920s, however, a new generation of intelligentsia were rejecting Pham Quynh’s reasoning in favour of a new vision of millions of plain people, the previously passive Thuy Kieus of Vietnam, pulling together, organising, struggling and defeating the seemingly impregnable colonial system.’\textsuperscript{135} There was a rapid increase in Vietnamese writings exploring new ways of being Vietnamese. In 1933 alone, 27 permits for \textit{quoc ngu} (the Romanised Vietnamese alphabet) newspapers and journals were granted.\textsuperscript{136} Much of this writing sought to reconcile and naturalise colonial cultural and political thinking with local values and practices. Although it is estimated that less than five per cent of the population read these publications, through indirect means this reorientation of Vietnamese culture slowly spread.

The intellectual leaders of the Indochinese Communist Party (ICP) (\textit{Dong Duong Cong San Dang}), such as Pham Van Dong, Truong Chinh and Vo Nguyen Giap, dismissed discourse about what it meant to be Vietnamese in a modern world as middle-class sentimentality.\textsuperscript{137} To the communists the real social issues concerned the misery inflicted by colonisation and developing strategies to raise class-consciousness and mobilise resistance. By the 1940s Truong Chinh, as secretary-general of the ICP, lead a cultural attack on the new thinking in Vietnamese literature.\textsuperscript{138} As a committed communist he believed that Marxist-Leninist ideology provided the single correct path to national independence, social justice and prosperity. The ICP formed front organisations such as the National Salvation Cultural Association of the Vietnam Independence League (\textit{Viet Nam Doc Lap Dong Minh}) to publish clandestine newspapers that made Marxist-Leninism appear meaningful to urban intellectuals.

Writings from the period indicate that Soviet thinking on anti-colonialism was initially welcomed more than Marxist-Leninist legal and economic theory.\textsuperscript{139} The ‘Political Thesis’ promulgated by the ICP in 1930, contained more Soviet anti-imperialist and anti-feudalistic

\textsuperscript{135} Marr, 1981 \textit{supra} 155. Pham Quynh selectively drew from European sources to construct an elitist social commentary that argued for the continued relevance of Confucianism. Thuy Kieu is a female literary character from a poem written by Nguyen Du in the early 19\textsuperscript{th} century that exemplified traditional Confucian moral virtues such as passivity and toleration of injustice.

\textsuperscript{136} These publications joined the dozens of papers and journals already in publication. See Neil Jamieson, 1993 \textit{Understanding Vietnam}, University of California Press, Berkeley Cal., 102.

\textsuperscript{137} Id. 156-159.


sentiments than socialist theory.\textsuperscript{140} This priority reflected the belief that socialist revolutions first required decolonisation.

Like the incipient Chinese Communist Party, the ICP received literature and ideological support from the Soviet Comintern.\textsuperscript{141} At least initially, Ho Chi Minh harboured doubts whether the road to socialism prescribed by the Comintern applied in Asian conditions.\textsuperscript{142} By the 1940s, however, the ICP proclaimed that socialist-directed nationalism (path-dependent change) was a means to a socialist end, rather than an objective in its own right.\textsuperscript{143} Soviet strategy emphasised the international revolutionary aspects of the anti-colonial struggle. During the 1950s, after the declaration of independence in 1945, the party moved closer to Chinese communism and its fixation on radical class-based land reform.

Creating an independent state apparatus (1945-1959)

Although institution building assumed a secondary priority to prosecuting war against France, the incipient government enacted the 1946 Constitution, which established the institutional trappings of a democratic state (president, legislature, executive and courts). The Constitution reflected the political heterogeneity of the Vietnam National Alliance Front (\textit{Lien Hiep Quoc Gia Viet Nam} or \textit{Lien Viet}).\textsuperscript{144} Western ‘rule of law’ notions


\textsuperscript{142} Ho Chi Minh wrote in 1924 ‘the economic structure of Indo-China, and I can say, also India and China, does not resemble the one in Western society….Marx has built his theory on a certain philosophy of history, but the history of whom? History of Europe. And what is Europe? Europe is not the whole of mankind.’ Ho Chi Minh, 2000 \textit{Ho Chi Minh’s Collected Works}, National Politics Publishing House, Hanoi, 465-467.


\textsuperscript{144} The Preamble borrowed from Abraham Lincoln’s Gettysburg Address the famous recital ‘for the people, by the people etc’. See Constitution 1946, articles 22, 31, 43, 52, 63; also see Bernard B. Fall, 1960 ‘Constitution-Writing in a Communist State: The New Constitution of Vietnam’ 6 \textit{Howard Law Review} 157, 158-159. Even though it was not expressed in the 1946 Constitution, the economic policy of the Indo-Chinese
promised inalienable, universal private rights, while Soviet ‘people’s power’ imagery
required party leaders to implement the ‘will of the working classes’.\textsuperscript{145} The Constitution
also supported Western liberal notions of equality before the law, democratic rights to vote,
procedural justice and property rights at the same time it followed socialist ideology
(discussed in chapter three) in placing these rights beyond the reach of the courts. Further
complicating the ideological mixture, Western liberal notions were interwoven with neo-
Confucianism. For example, article 7 not only granted Vietnamese citizens equality before
the law, it also qualified participation in government affairs according to each person’s
‘abilities and virtues’, a reference to neo-Confucian self-perfection.

The 1946 Constitution was drafted at a time of political compromise between communist
and nationalists in the independence movement.\textsuperscript{146} Communist leaders within the National
Front for Independence (Viet Minh) were content to raise national reunification above class
politics, provided ‘state revolutionary power’ remained under communist control.\textsuperscript{147}
Vietnamese commentators later explained that the Central Committee of the Party in 1941
decided for strategic purposes to operate through the Viet Minh.\textsuperscript{148} The political exigencies
of maintaining a broadly constituted anti-colonial coalition and deflecting external criticism
from the French and Nationalist China constrained the use of overtly revolutionary rhetoric
in the 1946 Constitution. As a consequence, this document resembled the US Constitution
more than the Soviet Constitution (1936).\textsuperscript{149}

\textsuperscript{145} Writing in 1949, Ho Chi Minh placed constitutional rhetoric, such as ‘for the people, by the people’, in a
socialist context. He asserted that ‘the character of the State is the fundamental issue of the Constitution. It is
the question of the class content of the administration. To whom does the administration belong, and whose
interests does it serve?...Our State is the democratic people’s State founded on the basis of the worker-
peasant alliance under the leadership of the working class.’ See Song Thanh, 1995 ‘President Ho Chi Minh
Laid the Foundation for a Law-Governed State’ 1 Vietnam Law and Legal Forum (9) 3, 6.

\textsuperscript{146} See Pham Van Dong, 1952 May Van De Cot Yeu cua Chinh Quyen Dan Chu Nhan Dan Viet Nam, (Some
Crucial Aspects of the People’s Democratic Regime in Viet Nam) Ban Chap Hanh Trung Uong, Hanoi, 7-19.
Also see Bernard Fall, 1956 The Viet-Minh Regime Government and Administration in the Democratic

\textsuperscript{147} Although the ICP officially disbanded, it continued to operate and organise through the Viet Minh. See
Tran Thi Tuyet, 1997, ‘The Young State Prepares for the Anti-French Colonialist War of Resistance (1946-

\textsuperscript{148} See Pham Van Bach and Vu Dinh Hoe, 1984 ‘The Vietnamese Constitutions’ 1 International Review of
Contemporary Law 105, 106.

\textsuperscript{149} Ho Chi Minh approvingly recalled Lenin when he said ‘one should make a compromise with bandits if it
was advantageous to the revolution.’ See Ho Chi Minh, 1994 ‘Political Report at the Second National
Congress of the Viet Nam Workers Party 1951’ reproduced in Ho Chi Minh: Selected Writings (1920-1969),
Though raising expectations, the Constitution had little bearing on the way the DRV functioned during the next decade. This story is revealed in decrees, circulars and party (chu thi) instructions. For more than a decade after independence the DRV continued using French colonial civil laws, land registration and selected taxes. Colonial laws that conformed to the 'principles of Vietnam’s independence and democratic republican form of government' were used to fill the gaps in the embryonic legal system.

New administrative and judicial structures were established. A ministry of justice (Bo Tu Phap), for example, was established at the central level. People’s Councils and their unelected executives arms called Administrative Committees (Uy Ban Hanh Chinh) were formed by decree in November 1945 to regulate provinces (tinh), districts/communes (huyen/xa) and wards (phuong). The provisional government of the DRV sought continuity in public administration and instructed state employees (cong chuc) to remain in their positions. For example, despite sensitivities concerning colonial land practices, French registration procedures used by the Hanoi cadastral department remained under the new regime. Yet as one staff member later reflected, ‘as party members we knew what to do to preserve loi ich cua nha nuoc (state benefit)’. Many court procedural rules were initially based on modified French provisions. Military courts (toa an quan su) and regional courts (toa an khu vuc) operating in liberated zones used simplified French court procedural rules and the Civil and Criminal Codes of Tonkin, and Annam. These courts were established as an interim measure to restore social order and try those accused of endangering national security. Courts were rearranged to reflect administrative divisions in the government structure (central, provincial and district levels), rather than the French system that was based on first instance, appeal and review courts.

150 Order No. 97 22 May 1950 issued by Ho Chi Minh declared the temporary retention of Colonial laws such as the Civil Land Law of Tonkin, Civil Code of Annam and an abridged version of the Civil Law in Cochinchina, except where they were inconsistent with the 'revolutionary spirit'. See Hoang The Lien, 1994, ‘On the Legal System of Vietnam’ 1 Vietnam Law and Legal (1) 33, 34.
154 See Fall, 1956 supra 30.
155 Interviews Ngo Van Thoa, supra.
Order No. 13 on the Organisation of Courts and the Status of Judges 1946 confirmed these arrangements.

In 1951 the communist party reemerged into the open by forming the Vietnamese Workers’ Party (VWP) (*Dang Lao Dong Viet Nam*).\(^{156}\) Party cells mirrored and penetrated state and social organisations. By this time ‘Party branches made all significant decisions and conveyed them to local government units, which in any event came to be composed largely of party members.’\(^{157}\)

Imported Chinese thinking on land reform and socialist political consciousness was also gaining momentum.\(^{158}\) DRV policy began to shift from preserving colonial legality and property rights towards state-owned industries, nationalisation and redistribution of land belonging to French ‘imperialist aggressors’ and ‘reactionary’ landlords. Special People’s Courts (*Toa an nhan dan dac biet*) were established to administer the Land Reform Law 1953. Courts comprising one professional judge supported by lay advisers (middle and poor peasants (*trung ban co nong*)) implemented class-based land allocation policies.\(^{159}\)

According to popular accounts, courts were arbitrary and violent; their function was to further revolutionary reform rather than resolve disputes.\(^{160}\) Legislative changes in 1950 encouraged defendants to select lay representatives over legally trained advocates. Writing about revolutionary justice, Fall concluded that ‘trials, particularly those of enemies of the state, are held on a completely informal basis, with the public supplying most of the arguments as well as a good part of the final judgement’.\(^{161}\)


\(^{157}\) Marr 2004, *supra* 47.


\(^{159}\) ‘All unlawful activities of traitors, reactionary landlords, dishonest and cruel village tyrants that happened before the mobilisation of the masses can be exposed by farmers and where farmers seek adjudication, then they shall be adjudicated and punished.’ Decree 264-TTg Regulating in Detail Order 149, 150 and 151 of 12 April 1953, 11 May 1953, article 1.


\(^{161}\) Bernard Fall, 1956 *supra* 30.
The shift away from colonial legality accelerated when the Supreme Court prohibited the use of French colonial laws and practices in 1959.162 This was followed in the early 1960s with the purge of French-trained legal personnel.163 Most lawyers were viewed with suspicion, because they were educated in the French legal system and had sworn allegiance to the French colonial government.164 A few French-trained lawyers proved their revolutionary loyalty and were permitted to work in the new government. The campaign against colonial-legalism extended to a comprehensive purge of sino-Vietnamese legal words that were tainted by their association with the colonial regime.165 Even legal training was de-emphasised and tertiary level study did not resume until after reunification in 1976.166

With French legalism reviled as bourgeois and oppressive, the party and state ruled primarily through party resolutions, administrative edicts and virtue-rule (duc tri).167 Inspired by Ho Chi Minh’s teachings, legal writers of the period valued moral education (giao duc) more highly than laws and legal enforcement.168 They believed that moral criticisms enabled violators to realise their mistakes and minimised recidivism. For example, writers argued that the primary purpose of law was to educate officials to ‘hate our enemies, love the working people and guide against waste and corruption’.169 It did not matter whether party morality was formally legislated, since officials and the public was expected to follow party invocations as if they were law. As we shall see in chapter three,

162 See Circular Ministry of Justice, 10 July 1959.
164 Documents discussing personnel changes following the prohibition of French law in 1959 are classified. But informants say that with few exceptions only French trained personal who were party members were permitted to remain in sensitive legal positions in the courts, ministries, land administration and legal practice. Cadres were careful to avoid using legal terms that invoked French legalism. Interviews Le Kim Que, supra; Phan Huu Chi, Former Advisor to the Minister of Justice, Hanoi, February 1994.
167 See Pham Duy Nghia, supra 49-50.
169 Nguyen Duy Trinh, 1956 ‘Phat Trien Che Do Dan Chu Nhan Dan va Bao Dam Quyen Tu Do Dan Chu Cua Nhan Dan’ (Developing the People’s Democratic Regime and Ensuring People’s Liberties and Democratic Rights) Hoc Tap (3) 23, 26-32.
much of the new thinking came from the Soviet Union and China, however, the imperatives of war and revolution also shaped legal thought.

Some cadres, like Nguyen Huu Dang, lamented the decline of Western legalism during this period:

Our contempt for bourgeois legality has reached such proportions that, for many of us, it has turned into contempt for legality in general. It is so because our long and arduous resistance has made us used to settling problems in a family atmosphere, according to our personal preferences. We have been used to replacing law with ‘viewpoint’ (lap truong). 170

Outspoken criticism of this kind, which briefly flourished during the Nhan Van- Giai Pham period, did not resurface. 171 Instead, those advocating legalism were required to debate law reform within the Legal Studies Group (To Luat Hoc) under the auspices of the Social Sciences Division of the State Sciences Committee. 172 Although this group included non-communist intellectuals and ‘leading voices of legal reform’ their concerns rarely surfaced in published articles, much less party policy (see chapter three).

Building a socialist legal system (1959-1986)

By the late 1950s Soviet technical advisers called for the methodical substitution of ancient customary and colonial rules with ‘rational, progressive socialist legislation’. 173 The Fourteenth Party Plenum in 1958 announced a three-year economic plan aimed at developing and transforming the economy along socialist lines. 174 Truong Chinh argued the need to ‘strengthen proletarian ideology, fight all forms of bourgeois ideology, criticize

171 During the mid 1950s a Vietnamese version of the Chinese ‘one hundred flowers’ campaign took place. The dissident magazines Nhan Van (Humanism) and Giai Pham (Beautiful Literary Work) led the way in directly criticising the lack of ‘freedom and democracy’, ‘legality’ and ‘human rights’. See Boudarel, supra 165; Russell Heng Hiang Khng, 2000 ‘Of the State, For the State, Yet Against the State’, unpublished Ph.D thesis, Australian National University.
172 Mark Sidel cites Vu Dinh Hoe (previously Minister for Justice and a non-communist lawyer) and Tran Cong Truong as leading figures campaigning for legal reform. See Mark Sidel, 1997 ‘Some Preliminary Thoughts in Contending Approaches to Law in Vietnam, 1954-1975’, Association of Asian Studies, unpublished paper, 14-16. David Marr also notes that Nguyen Manh Tuong was influential until he lost power in 1957. Personal communication September 2004.
petty-bourgeois ideology and do away with all vestiges of feudal and other erroneous ideologies’.\footnote{See Truong Chinh, 1994 ‘Forward Along the Path Charted by Karl Marx’, in Truong Chinh Selected Works, The Gioi Publishers, Hanoi, 565.} This embrace of Marxist-Leninist orthodoxy required constitutional amendments to remove rhetorical references to liberal democracy in the 1946 Constitution. Ho Chi Minh played a leading role. He informed the National Assembly in 1959 that the new constitution should reflect the ‘leadership of the working class over the people’s democratic State’.\footnote{Ho Chi Minh, 1959 supra 217.} This organisational ideal required the importation of socialist political-legal doctrines and institutions designed to justify and maintain party supremacy. Although the preamble of the VWP Statute identified the Soviet Union and China as the ideological and institutional models for the party and state, by the late 1950s Ho Chi Minh (and others) were urging the party to rely on Soviet support.\footnote{See C. Brandt, B. Schwartz and J. K. Fairbank, 1952 A Documentary History of Chinese Communism, Harvard University Press, Cambridge, Mass., 422, 422-428; Ho Chi Minh, 1954 ‘Report to the 6th Plenum of the Viet Nam Workers’ Party Central Committee’, July 15, 1954, reproduced in Ho Chi Minh Selected Writings (1920-1969), supra 181-182. Also see Woodside, 1999 supra 26-29; P. J. Honey, 1962 ‘The Position of the DRY Leadership and the Succession to Ho Chi Minh’ 9 The China Quarterly (January-March) 24, 27-34.} But this was a complex political period and overall the party tilted towards China, until moving closer to the Soviet Union in the mid-1960s.\footnote{See Russell Heng Hiang Khng, 2000 supra. Also see Dang Phong and Melanie Beresford, 1998 Authority Relations and Economic Decision-Making in Vietnam: An Historical Perspective, Nordic Institute of Asian Studies, Copenhagen, 40-41.} This shift is reflected in the legal literature. Articles published in Tap San Tu Phap (Justice Review) from 1961-1970 regularly mentioned Marx, Engles, Lenin, Soviet legal scholars and occasionally Stalin, but never discussed Mao Zedong or other Chinese authorities.\footnote{The author surveyed the following Tap San Tu Phap articles: 1961 volumes 3, 4, 6, 11 and 12; 1962 volumes 2, 3 and 6; 1963 volumes 2, 3, 6, 8 and 11; 1964 volumes 2, 4 and 7; 1965 volumes 3 and 8; 1970 volume 3.} Conflict with China in 1979 further reduced the influence of the Maoist model and public support for sinic reforms. Nevertheless, the Party Institute for Research on Marxist-Leninism continued covertly collecting and analysing information on Chinese economic reforms.\footnote{See Phong and Beresford, supra 86-87.}

As the most developed socialist state, Soviet laws and legal institutions were preferred as a model to ‘strengthen the role of law’.\footnote{See Nguyen Duy Trinh, 1956 supra 29-32. The First Party Congress in September 1951 instructed legal cadres to ‘build up the law’, but little was done until the Second and Third Party Congresses. See Hoang Quoc Viet, 1962 ‘Viec Xay Dung Phap Che Xa Hoi Chu Nghia va Giao Moi Nguyen Ton Trong Phap Luat’ (Building-Up Socialist Legality and Educating People to Respect Laws) Hoc Tap (6) 14, 14-15.} The 1959 Constitution incorporated for the first time Soviet political-legal ideology such as phap che xa hoi chu nghia (socialist legality),
tap trung dan chu (democratic centralism) and lam chu tap the (collective mastery) (discussed in chapter three). Legal officials active during this time recall that Soviet legal theory and doctrines were preferred to the more radical Maoist approach to governance.182 While retaining some of the French-inspired touches of the 1946 Constitution, the 1959 Constitution formalised the socialist political-legal structure.183 The ‘leading role’ (vai tro lanh dao) of the party was not as clearly articulated as in the later 1980 and 1992 Constitutions, nevertheless Soviet ‘democratic centralism’ was formally acknowledged as the main organisational principle (see chapter three).184 A Supreme Court and procuracy were established along Soviet lines and the National Assembly was remodelled on the Supreme Soviet.185 Eventually, as economic production was brought under centralised planning, the DRV imported from the Soviet Union an entire legal system based on socialist economic laws and legal institutions. Most contemporary party-state institutions remain largely unchanged from this period (see chapter four).

Following reunification in 1975, Northern laws and political-legal institutions were transplanted to the South.186 They not only replaced the Southern, French-derived laws and institutions, but Northern officials were seconded to run the Southern legal apparatus.187 Most Southern and French-trained lawyers either fled the country or were incarcerated in ‘re-education camps’.188 Either way, their knowledge of Western commercial law became redundant in the victor’s socialist legal system.

Although most legal knowledge flowed south, there is evidence that the 1980 post-reunification Constitution took some account of Southern approaches to legality. For example, this Constitution, for the first time, provided for the establishment of a lawyer’s

182 Interviews Phan Huu Chi, supra; Ngo Van Thau, supra. See generally, Ha Lan, 1953 Tham Gia Phat Dong Quan Chung Cai Cach Ruong Dat Da Thay Doi Tu Tuong Toi, (Change in Mentality Brought About by Encouraging People to Participate in Land Reform), Nha Xuat Ban Su That, (Truth Publishing), 5-34; also see P. J. Honey, 1962 supra 30-34.
184 Constitution 1959, article 4.
185 See Bernard Fall, 1960 supra 284.
187 These comments are based on interviews with Trieu Quoc Manh, Former Chairman of the Ho Chi Minh Bar Association, Ho Chi Minh City, April 1991. Also see Decree No. 1/SL/76 on the Organisation of the Peoples Courts and People’s Procuracy in the Newly Liberated Zones, Provisional Revolutionary Government 15 March 1976; Tran Cong Tuong, 1977 ‘Legal Official Comments on Unified Enforcement of Laws’ VNA 8 April 1977, reproduced in FBIS East Asian Daily Reports (71), 13 April 1977, K5-K6.
188 State documents pertaining to the treatment of Southern lawyers after 1975 are still classified. This information is based on anecdotal accounts gleaned from individual lawyers. Interviews Nguyen Ngoc Bich, Partner IMAC, Ho Chi Minh City, July 1998, April 1999.
organisation. Decree No 115-CP on Foreign Investment Decree issued in 1977 was also
drafted with Southern assistance.189 Having defeated the United States and the Republic of
Vietnam, the DRV’s socialist legal system appeared entrenched for decades to come.

**Post 1986 doi moi reforms: Western liberal influences**

Questions were raised during the Fifth National Congress of the Communist Party of
Vietnam (CPV) (Dang Cong San Vietnam) in 1982 as to whether revolutionary ideology
should continue dominating state institutions.190 By this time it was becoming increasingly
difficult to blame a stagnant domestic economy on external enemies. Reformers argued for
a separation of the party from the day-to-day running of the government, and regulation
through law, rather than party edict. The ‘Party Report on Economic Guidelines and Tasks’
stated that ‘the power to rule the state must be reflected in the systems of laws. The law, as
it is boiled down, is the institutionalisation of the party line and polices. But there must be
no confusion among the line, policies and law’.191

Little was done, however, until the Sixth National Congress of the CPV in 1986. By this
time rampant inflation, falling production, a vibrant informal economy and the booming
economies of Vietnam’s capitalist neighbours could no longer be ignored.192 Party leaders
feared that unless Vietnam rapidly expanded its industrial and technological sectors the
economy would fall further behind those of its neighbours, ultimately compromising CPV
legitimacy and national sovereignty.193 According to this account, the political impetus for
change came from the internal failure of the command economy, the loss of Soviet aid and

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189 The Decree failed to attract Western investment and most foreign capital was contributed as Soviet
development assistance. Interview Nguyen Xuan Oanh, former Vice President Republic of Vietnam, Ho Chi
Minh City, March 1991. Also see Tang Thi Thanh and Trai Le, 1979 ‘The Foreign Investment Code of the
Regulation of Foreign Trade and Investment’ 6 International Trade Law 24.

190 Official political changes sought to institutionalise and contain spontaneous social changes during the
1970s. See Adam Fforde, 1999 ‘From Plan to Market’, in Anita Chan et. al. eds., Transforming Asian
Socialism: China and Vietnam Compared, Allen and Unwin, Sydney 43, 44-63; Tu Tuan Anh, 1994

191 See Circular No. 3831/TP on Some Immediate Work to be Done by the Judiciary
Sector to Implement the 5th Party Congress Resolution, Ministry of Justice, first reproduced in
Phap Che Xa Hoi Chu Nghia (Socialist Legality) (2) April 1982, 8-10, 15, trans., JPRS-1978 25
January 1983, 90.

192 Do Muoi discussed the reasons for doi moi industrialisation and modernisation policies in his ‘Political

193 See Central Committee CPV, ‘Resolution on Industrialisation from the Central Committee Seventh Party
pressure to cooperate with multilateral agencies (i.e. UNDP, World Bank, and Asian Development Bank) and integrate with regional associations like ASEAN. Some Western commentators have posited that in addition to pursuing ‘catch-up’ development, Vietnamese policy makers were struggling to control a vibrant non-state domestic economy. A spontaneous market co-existed and intertwined the state command economy. The commercial incentives for private production and distribution were extremely potent. By 1986 officials reported that less than 40 per cent of manufactured consumer goods passed through state-controlled trading networks. According to this narrative, economic reforms were a gradual, pragmatic response to the ‘spontaneous’ market. A weak state struggled to maintain relevance by legally recognising ‘bottom up’ economic reforms.

By the early 1990s doi moi (renovation) reforms promoted three policy objectives:

- transform Vietnam’s highly centralised economy based on state ownership of the means of production, into a multi-sectored economy where the ‘leading role’ is reserved for State-Owned Enterprises (SOEs) regulated by ‘socialist-oriented market mechanisms’ (co che thi truong theo dinh huong xa hoi chu nghia);
- normalise social and economic transactions through legal, rather than ideological and moral apparatus; and
- pursue an ‘open door’ (mo cua) policy that fosters cooperation and trading relationships between Vietnam and other countries.

Economic reforms

Though initially countenancing political reforms, doi moi later mainly stressed economic development. Abandoning decades of central economic planning, the state began devolving

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decision-making power to managers of SOEs and private enterprises.\footnote{198} By 1989 central economic planning was largely replaced by a kind of state capitalism, euphemistically called the ‘socialist oriented market economy’ (nen kinh te truong theo dinh huong xa hoi chu nghia).\footnote{199} Party leaders theorised that it had been a mistake to bypass capitalism and ‘state-guided market mechanisms’ (co che thi truong co su huong dan cua nha nuoc) were a necessary, if temporary, diversion from socialism.\footnote{200} Party economic policy conflated socialism and market ideology into a hybrid described as ‘a socialist-orientated economy under state management on the path to socialism’ (nen kinh te theo dinh huong xa hoi chu nghia co su quan ly cua nha nuoc).

Building a legislative framework

During the Sixth Party Congress in 1986 Truong Chinh argued:

The management of the country should be performed through laws rather than moral concepts. The law is the institutionalisation of Party lines and policies and the manifestation of the people’s will: and it must be applied uniformly throughout the country. To observe the law is to implement Party lines and policies. Management by law requires attention to be paid to lawmaking. It is necessary to step by step supplement and perfect the legal system so as to ensure that the State machinery can be organised and operated in accordance with the law.\footnote{201}

The state vigorously implemented this policy. In the first one-and-a-half decades following doi moi more than double the number of laws and ordinance were enacted than in all the years since the declaration of independence in 1945.\footnote{202} Most legislation has been

\footnote{198} See Nguyen Phu Trong, 1994 ‘In Vietnam Does the Market Economy Require the Party’s Leadership?’ \textit{Tap Chi Cong San} (1) 29-33.
\footnote{200} See Le Minh Tam, 1998 ‘Phap Che Xa Hoi Chu Nghia’ (Socialist Legality), in \textit{Giao Trinh Ly Luan Nha Nuoc va Phap Luat}, (Text Book on State and Law) Nha Xuat Ban Cong An Nhan Dan (People’s Police Publishing), Hanoi, 497, 511-512. For a discussion about by-passing the capitalist stage see Nguyen Khanh Toan, 1964 ‘Nha Nuoc va Phap Quyen: Xa Hoi Chu Nghia va Cong Tac Nghien Cuu Luat Hoc’ (Socialist Law-Based State and Legal Research), in \textit{Nghien cuu Nha Nuoc va Phap Quyen} (Studies about State and Legality), Truth Publishing Hanoi, 7, 17. Some theorists still contend that this was the correct policy. See Dang Xuan Ky, 1999 ‘Thinking Renewal in Industrialisation-Modernisation Period’ \textit{Vietnam Social Sciences} (6) 3, 11.
\footnote{202} From 1986 until 2001 the National Assembly passed 203 legal documents including 5 codes (bo luat), 87 laws (luat) and 111 ordinances (phap lenh). From 1945 until 1985 no codes and only one law was passed. Admittedly, the government promulgated hundreds of sub-ordinate statutes during this period, but this constitutes only a small fraction of the sub-ordinate legislation issued after this date.
commercial in nature, drafted to attract much-needed foreign investment and capital, comply with international treaties and control the domestic economy. Some understanding of size and complexity of the legislative program is conveyed by the list of commercial laws enacted since doi moi set out in annex two.

**Borrowing Western liberal laws**

As the economy shifted from command to mixed-market principles, the state needed laws that regulated the horizontal commercial transactions between autonomous market players. The existing socialist economic laws were considered inappropriate legal models, since they privileged state and collective ownership. Meanwhile, law reform could not wait the decades needed to distill normative standards from domestic commercial practices, which lawmakers considered sub-optimal sources of legal norms.203 Lawmakers began searching for commercial law beyond Vietnam’s borders.

Long the source of legal inspiration, the central planning mechanisms in the Soviet Union no longer provided a suitable ideological and technical model for Vietnam’s mixed-market economy.204 Having begun economic reforms earlier than the Soviet Union, Chinese law was considered a more appropriate model. It influenced the first wave of commercial legislation in Vietnam.205 Although Chinese influence was not mentioned publicly, the Foreign Investment Law 1987, Ordinance on Economic Contracts 1989, Land Law 1988, and other early post-doi moi statutes, borrowed extensively from sinic legal templates.206 China was not the only legal source. In the late 1980s, for example, Vietnamese lawmakers turned to the French for assistance, because the Chinese lacked a suitable company law

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203 Trading practices during the many decades when private commerce was discouraged or suppressed were constructed to evade government regulations and instructions. Interviews Dao Tri Uc, Director Institute of State and Law, Hanoi, July 1998; Phan Huu Chi, supra.

204 See Fforde and de Vylder, supra 46-147.

205 The debt owed to Chinese law has never been officially acknowledged because of historical sensitivities. Reference to the Chinese in the Preamble to the 1980 Constitution, as ‘hegemonic aggressors’ was not removed until a subsequent amendment in 1992. An American article evaluating the Chinese experience with FDI was translated in to Vietnamese in 1989. The original article was written by Jerome Cohen and Stuart Valentine, 1988, ‘Foreign Direct Investment in the PRC; Progress, Problems and Proposals’ 1 Journal of Chinese Law (2) 161. Interview Phan Huu Chi, Former adviser to the Minister of Justice (1986-1992) Hanoi, March 1991, January and February, 1992, February 1993; Interview Nguyen Chi Dung, Director International Department, Office of the National Assembly, Hanoi, 2000.

model (see chapter five). But in general Vietnamese lawmakers believed that similar cultural beliefs, economic structures and, above all else, political ideology made China an appropriate legal source. Western liberal commercial laws borrowed via China were, they believed, already adapted for local conditions.

At this time overt borrowing from Western liberal source was politically and constitutionally unacceptable. First, the ‘open door’ policy adopted under doi moi countenanced imported investment and technology, but not foreign social and political systems. Second, the long-standing tradition of national self-reliance, vindicated by victories in the French and American wars, crystallised into a conviction that legislative solutions lay in homegrown, or at least politically and socially compatible Chinese institutions and strategies. The creed of self-reliance was reinforced by the perception that experimentation with Western political and legal institutions (especially a constitutional court) hastened the demise of communist power in the Soviet Union.

Some lawmakers believed a solution lay in selectively adopting the commercial laws of the former Republic of Vietnam (RV). They argued that like Eastern Europe, Vietnam should draw from pre-revolutionary rights-based civil law to draft a commercial legislative framework. Colonial laws, they noted, were translated into Vietnamese, taught in the Saigon Law School and applied in RV courts by generations of Southern judges and lawyers. The main proponents of this view were French-trained lawyers belonging to the

207 Interview Phan Huu Chi, 1992, supra; Interview Nguyen Chi Dung, 2000, supra.
208 It was not until the 1992 Constitution that the mixed-market economy was formally recognised. In permitting private entrepreneurs to retain profits from market transactions before the 1992 Constitution, the Ordinance on Economic Contracts 1989 and Laws on Enterprises and Companies 1990 were technically unconstitutional.
209 The Party has consistently denied that market reforms required a concomitant shift to political pluralism. Support for this position is drawn from the economic success of mono-party East Asian states, particularly Taiwan and South Korea during their pre-democratic periods of development. There is extensive Vietnamese literature on this issue in the Party’s Theoretical Review Journal Tap Chi Cong San and the Party’s leading daily newspaper Nhan Dan. See e.g., Tran Duc, 1987 ‘Ve Cac Quy Luat Kinh Te Trong Thoi Ky Qua Do Len Chu Nghia Xa Hoi’ (Economic Laws in the Transition Period to Socialism) Tap Chi Cong San, (5) 69, 69-73; Hoang Hao, 1987 Phap Luat va Kinh Te (Law and Economy) Tap Chi Cong San (12), 24, 24-18.
210 Interviews with Luu Van Dat, Legal Advisor Minister of Trade, Hanoi, January, 1990, March, April 1992; Phan Huu Chi, supra and Southern lawyers and advisors such as Nguyen Ngoc Bich, supra and Nguyen Xuan Oanh, supra.
211 For a discussion about this process in Eastern Europe see Paul H. Rubin, 1994 ‘Growing a Legal System in the Post-Communist Economies’ 21 Cornell International Law Journal 20-44.
212 The French left a comparatively well-developed civil law system in the main urban centres, which continued to flourish in the Republic of Vietnam until reunification. Interviews Nguyen Nien, Former Director of the Law Department, Office of Government and Dean, Law School, Hanoi National University. June/July 1995, August 1996, February 1998; Nguyen Xuan Oanh, Former National Assembly Delegate and Legal Advisor, Ho Chi Minh City, February 1992, August 1996. Also see Nguyen Nien, 1976 ‘Several Legal Problems in the Leadership and Management of Industry Under the Conditions of the Present Improvement of
Hoi dong Dan chu va Phap Luat (Council of Democracy and Law) (CDL), a Fatherland Front organisation. They participated in drafting the 1992 Constitution, Civil Code 1995 and Criminal Code 1986. But their influence in shaping the commercial legal framework was constrained by professional and political factors. First, the CDL was primarily composed of criminal and administrative law specialists that lacked commercial expertise. The Hoi Dong Kinh Te Xa Hoi (Council on Economic and Social Affairs), another Fatherland Front organisation made up of Soviet-trained economists, advised the Government on commercial law reform. Second, most CDL members were in their 70s and 80s, retired from public life and had not been active members of the lawmaking community for years. Informants recall that comments sent to line-ministries drafting laws were received as a courtesy to a Fatherland Front organisation, but were then mostly ignored. Third, the adoption of RV and colonial legislation bestowed too much legitimacy on the discredited ancien regimes and undermined the authority of state-society relations based on socialist legality. Fourth, legal drafters in line-ministries objected that French-based law arose out of and was designed to regulate capitalist economic relationships inimical to Vietnam’s ‘socialist-orientated market economy’. The CPV and state were, during the initial stages of reform, careful to avoid importing laws that circumscribed state economic management (quan ly nha nuoc ve kinh te), a socialist organisational practice discussed in subsequent chapters.

As international economic integration gained political momentum, lawmakers increasingly borrowed laws directly from capitalist countries (see chapter five for a detailed discussion). The Law on Business Bankruptcy 1993, Civil Code 1995, Commercial Law 1997 and Enterprise Law 1999, for example, were inspired by legal models supplied by bilateral (primarily Japan, France and Sweden) and multilateral (e.g. World Bank, Asian Development Bank and UNDP) donors. Bilateral and multilateral donors offered divergent, but by no means mutually exclusive visions for legal change. They agreed that

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213 The principal members of this group were Luu Van Dat, the former Director of the Law Department of the Ministry of Trade, Phan Huu Chi, the former Chief Advisor to the Minister of Justice, and Tran Cong Tuong, Head of the Uy Ban Phap Che (Legal Committee), the precursor of the Ministry of Justice.

214 Interview Lien Ngo Van Thau, Former Professor of Judicial Training School, Hanoi, October 2001. Evidently comments given by the Hoi Luat Gia (Association of Lawyers) are accorded even less respect since this organisation lacked the patronage of the Fatherland Front.

formalistic legal frameworks encouraged market predictability and regularity, but Japanese advisors in particular were more sympathetic towards state-directed economic reform and bureaucratic regulatory powers. Multi-lateral donors, on the contrary, championed neo-liberal economic law as a means of keeping the government from interfering with the market (see chapter seven).

Compliance rules under bilateral (e.g. US-Vietnam Bilateral Trade Agreement BTA) and multilateral trade agreements (e.g. AFTA, APEC and especially WTO) have likewise profoundly influenced commercial reforms. For example, as a member of the AFTA free-trade zone Vietnam must reform its tariff regime. While the US-Vietnam Bilateral Trade Agreement binds Vietnam to far-reaching legislative and institutional reforms. Finally foreign investors and lawyers are introducing new doctrines and procedures that assist bureaucrats and judges to implement imported rights-based law.

Conclusion
Vietnam’s contemporary legal system is primarily constructed from local adaptations of laws derived from China, France, the former Soviet Bloc, and more recently from East Asia and Western countries. Together these sources form a complex legal architecture that is based on different systems of knowledge, the new overlaying and interweaving the old. As the history of legal borrowing in Vietnam shows, the state legal system has always reflected the laws of conquerors, colonists and patron-states—national elites have superimposed their ideas on pre-existing habits and practices.

Successive borrowings from the Chinese and French legal systems generated layered reception patterns. New ideas were rapidly adopted and combined with recycled notions by receptive elites. Mandarins in the neo-Confucian world and the indigenous elite in colonial society benefited materially and socially from imported political-legal thinking and practices. Similarly, Soviet and Chinese communist political-legal ideas spread rapidly

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among some members of the independence movement. Within a few decades imported socialism came to dominate legal thinking within the party and state. Imported ideas faced more formidable barriers in entering village life, forcing elites to accommodate some village preferences. It took centuries for neo-Confucian political-legal ideas to infiltrate village practices and even then distinct differences in elite-village thinking persisted. French colonists transplanted a facsimile of French society to provide the institutions and education required to recruit and train indigenous legal officials. Yet even with the benefit of modern transportation and communication, the divide between imported legality and pre-colonial virtue-rule and relational practices proved difficult to traverse. Had Marxist-Leninist revolutionaries not cut it short, perhaps like neo-Confucian rule, French colonial legality might eventually have moved out of urban enclaves into village life.

Marxist revolutionaries faced similar problems in shifting imported socialist legality out of the statute books and into everyday life. But they were much more successful than the French in linking their political and legal ideas with familiar neo-Confucian and village ideas (see chapter three). It is nonsense to look for total continuities. Yet despite profound differences in the sociopolitical context, many commentators have observed a similarity in moral outlook and administrative style between pre-modern mandarins and contemporary socialist-trained officials.219

Historical borrowings are more than merely curiosities, because they generate insights into the mysterious processes conditioning contemporary legal transplantation. But to glibly assume that precepts and traditions continue, overlooks the more difficult question considered in subsequent chapters: how do historical ideas influence contemporary thinking about legal borrowing? The following chapters use the working postulates discussed in chapter one to search for reasons why Western liberal rights-based laws, which were comprehensively rejected by the pre-doi moi ruling elite, have in less then two decades become guiding principles in commercial laws. They also explore how bureaucrats and judges steeped in ideas and practices from the past, transmogrify the meanings attached to imported rights-based laws. Finally the discussion considers non-state support for imported commercial laws. We commence this investigation in the next chapter by using the first

219 Interviews Dao Tri Uc, Director, Institute of State and Law, Hanoi, July 1998. (Dao Tri Uc led a research team investigating ancient Vietnamese law). Also see Alexander Woodside, 1999 supra 23-24, 26-27.
working postulate—laws transfer more easily between counties with compatible political-legal ideologies—to analyse commercial legal borrowing in Vietnam.
Chapter Three: Transforming Socialist Legal Ideology

Introduction

Chapter Two portrayed legal reform in Vietnam as a series of borrowings, with the new overlaying the old. During the most recent cycle, Western commercial laws were superimposed on socialist legal doctrines and institutions. At the same time party leaders were denouncing bourgeois laws as the political tools of capitalism, they were importing Western commercial laws. This apparent contradiction between party ideals and legal imports raises questions about the role ideology plays in the selection and adoption of foreign law. The proliferation of multiple and sometimes contradictory ideas demands an analytical approach that can account for such diversity.

This chapter uses Gramscian ideological theory outlined in the first working postulate (discussed in chapter one) to examine the complex interaction between imported and local legal ideologies. Laws, according to this approach, are more likely to transfer between legal systems with compatible, or at least not incompatible ideological outlooks. Ideological congruence is important, because legal transplants not only transmit ideology into recipient countries; they are also interpreted by local ideologies. This insight gives our study a way to assess the transferability of laws into Vietnam.

After first revisiting Gramscian ideology theory, this chapter outlines the different ideological themes underlying Western commercial laws imported into Vietnam. It next examines historical changes in the dominant ideological themes influencing legal thinking in Vietnam. The chapter then discusses the impact nha nuoc phap quyen (law-based state) ideals have had on longstanding socialist political-legal ideals. It concludes that tension between legal imports and Vietnamese ideology does not necessarily inhibit borrowing, provided the dominant ideological regions do not actively block imports.

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1 In 1994 the Mid Term CPV Conference declared that ‘the character of our laws are different from those of bourgeois laws. Our laws are aimed at developing our nation in accordance with the socialist orientation while the laws of the bourgeois states are aimed at protecting capitalism’. Mid Term Party Resolution, 1994 ‘Sixth Installment of “Basic Contents” of the Hanoi 20-25 Mid Term National Party Conference Resolution’ Saigon Giai Phong, 20 March, 2, trans., FBIS East Asia Daily Report 94-070, 75.
Comparing legal ideologies

When comparing ideologies it is vital to know which similarities and differences are central and which are peripheral to host countries’ elites. Building on Gramsci’s work, Nicos Poulantzas hypothesised that certain ideals (which he termed ‘regions’) consistently influenced ruling elites, state institutions and economic behaviour more powerfully than others. For example, the conversion of feudal serfs into wage earners and the expansion and consolidation of national markets under capitalism required a shift from the religious ideology of feudalism to the politico-legal ideology of capitalism. The new dominant ideology of universal, normative law weakened communitarian values and constrained the monarch’s (or central state’s) prerogative or discretionary powers to appropriate property and disrupt the contractual relations required for investment and labour markets. Dominant ideologies are thus reified from actual structures, activities and values to explain or represent the way societies function.

Poulantzas’s proposition suggests that legal ideologies transfer most easily where they agree or ‘fit’ with the dominant ideological ‘regions’ in host countries. Incongruent domestic ideological signals may undermine the acceptance and credibility of borrowed laws. For example, we saw in chapter two that in the five-years immediately following doi moi, Vietnamese socialist elites were reluctant to borrow models directly from the capitalist West. Contemporary theorists differ from Gramsci in arguing that dominant ideologies are constructed not only from elite views, but also from the precepts governing the conduct of professional, occupational and even minority groups. Local ideologies do not simply reflect the norms and precepts of the dominant ideology, they are constructed from an interaction between these values. Like dominant ideologies, local ideologies are comprised of interwoven strands of political, moral, religious and philosophical thoughts, which shape

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3 Id. 205.
5 Many Western laws that did not directly contest Marxist–Leninist principles were transferred over several decades into communist Eastern European states. See G. Ajani, 1995 ‘By Chance and Prestige: Legal Transplants in Russia and Eastern Europe’, 43 American Journal of Comparative Law 93, 99–101.
ethical perceptions. This observation raises the possibility that borrowed laws may interact
differently with elites and other social groups in Vietnam (see chapters six and seven).

Dominant and local ideologies differ not only in content, but also in function. As Gramsci
demonstrated, elites use legal ideology to strengthen their hegemony over the public. In
manufacturing popular consent, ruling elites use ‘ideological apparatus’, such as the media,
educational institutions and mass organisations, to inculcate a system of values, attitudes,
beliefs and morals. Hegemonic behaviour introduces human agency into ideology theory.
It suggests that Vietnamese elites strategically use ideology to support or discredit foreign
laws.

Finally, a direct comparison between donor and host country ideologies does not always
measure ideological compatibility, because the ideology informing borrowed law may
acquire new meanings during transplantation. For this reason, it is essential to investigate
not only the ideology underlying imported commercial law, but more importantly the way
it is represented within host countries. Before examining legal borrowing, it is necessary to
briefly outline the legal ideology underlying commercial laws imported into Vietnam.

**Western legal ideology**

Certain core ideological concepts unify the diverse Western approaches to capitalism and
commercial regulation. This discourse is predicated on notions about the rule of law. Like
other important ideological concepts such as justice and democracy, debates exist among
and within Western countries about the proper form of the rule of law. There is general

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7 See Antonio Gramsci, 1971 *Selections from Prison Notebooks*, Q. Hoare and G. Nowell-Smith eds.,
‘The Ideology of Law: Advances and Problems in Recent Applications of Ideology to the Analysis of Law’

8 Louis Althusser refined Gramsci’s theories by suggesting the mechanisms used by states to inculcate
dominant ideologies, namely state ‘coercive institutions’, like the police and courts and ideological

9 Drawing on Pashukanis’s writings, some scholars find a single form of law characteristic of capitalist
societies. This does not mean the dominant ideologies in capitalism are uncontested, but rather that there are
forms of law and that certain ideals (such as individualism, equality and private property) legitimise capitalist
social relations. See Piers Beirne and Robert Sharlet eds., 1980 *Pashukanis: Selected Writings on Marxism

Revival’ 77 *Foreign Affairs* (2) 95–106.
agreement, however, that certain core ideas are common to 'rule of law' ideologies. In
democratic liberal states, the 'rule of law' requires government according to normative
social agendas determined by the people through elections, clear divisions separating
political parties and state apparatus, and laws that both impose meaningful restraints on the
state and individuals and promote equality before the law. Though most theorists concede
that these elements are never perfectly realised and sometimes exist in tension with each
other, they also believe that Western rights-based capitalism could not function without the
rule of law.11 This raises the question, what is it about the rule of law that is vital to
capitalism and capitalist laws?

Rule of law theories

Western ‘rule of law’ ideals are divided into procedural and substantive categories—a
distinction that is not always clear.12 Joseph Raz proposed the minimal procedural basis for
the rule of law.13 He argued that laws must be capable of guiding governmental and private
behaviour. Procedural rule of law means more than simply government through law; it also
requires government under law. In democratic liberal societies this means the rule of law
has more to do with duties of governments than duties of citizens—general rules should
control state power. This objective is realised by having a set of rules to direct how the state
is to govern. These rules, typically in the form of constitutional doctrines, have greater legal
authority than political processes.

Procedural versions of the ‘rule of law’ also require legal transparency where laws are
general, clear, specific, prospective, practicable and stable. According to F. A. Hayek,
transparent laws allow people, especially businesses, to plan. He opined:

David Sugerman ed., Legality, Ideology and the State, Academic Press, London 218–219; Roman Tomasic,
Law 487; Oliver Williamson, 1985 The Economic Institutions of Capitalism: Firms, Markets, Relational
equally ... under legal systems containing rules and institutions, which considerably differ from each other at
least from the juridical point of view.’ Max Weber, 1954 Max Weber on Law in Economy and Society,

12 The literature is vast but see Joseph Raz, 1979 ‘The Rule of Law and Its Virtue’, in Joseph Raz ed., The
Ratio Juris (2) 127, 127–142. For a more textured description that locates law in its political, economic and
social context see Kanishka Jayasuriya, 1999 ‘Introduction: Framework for the Analysis of Legal Institutions
in East Asia’, in Kanishka Jayasuriya ed., Law, Capitalism and Power in Asia, Routledge, London; Randall
and Rule of Law in the People’s Republic of China’ 19 Berkeley Journal of International Law (2) 32.
A government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to see with a fair degree of certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.\(^\text{14}\)

Calculability and predictability are the chief ideological objectives of Western commercial law systems.

Substantive versions of the rule of law encompass notions of justice and social good.\(^\text{15}\) As such they are much more deeply embedded in democratic liberal ideals than the procedural rule of law.\(^\text{16}\) For example, a substantive rule of law presupposes the existence of civil or human rights derived from natural law principles. The nature and extent of civil or human rights vary enormously among Western liberal societies and over time, but the basic position is that laws should protect inherent civil rights and liberties such as religious freedom, equality and personal autonomy.

Substantive rule of law is closely allied with capitalism. Locke formulated basic democratic liberal principles during a period of struggle by the bourgeoisie against entrenched aristocratic and church privileges.\(^\text{17}\) As an individualistic political theory it promoted liberty together with the protection of core capitalist rights, property ownership, sanctity of contracts and the corporate veil.\(^\text{18}\) Whether rule of law ideology preceded or was produced


\(^{14}\) F. A. Hayek, 1944 The Road to Serfdom, University of Chicago Press, Chicago, 54.

\(^{15}\) The division between law and equity was an institutional response to the competing demands of predictability and clarity, and responsiveness to social outcomes. See Peter Gable, 1977 ‘Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Thought’ 61 Minnesota Law Review 612–613.


\(^{17}\) Harold J. Lasky, 1997 The Rise of European Liberalism, Transaction, New Brunswick.

by capitalism is unclear; but it is widely believed that without state support for these ideals Western capitalism could not continue in its current form.19

Substantive rule of law ideals also determine the extent to which the procedural rule of law limits government powers. The general principle that citizens are free to do whatever is not prohibited by law is in practice circumscribed by ongoing trade-offs between legal order and liberty. Those advocating neo-liberal legalism, such as Hayek, favour rolling back state involvement in society to a 'night watchman' minimalist role. Neo-liberal legalism opposes government economic and social intervention designed to promote social equality on the grounds that state intervention erodes private liberties by constraining private economic power.

Some contemporary theorists query the contemporary relevance of neo-liberal representations of the ‘rule of law’.20 Jurgen Habermas, for example, argues that legal ideology in the West is fragmenting precisely because Hayekian free-market ideals, which make capitalist laws appear natural and desirable to commercial players, say nothing to those (such as welfare recipients) who are excluded from the exchange values of capitalism.21 The transition from a competitive society based on entrepreneurial capitalism into a corporate society of monopoly capitalism (dominated by cartels and giant multinational enterprises) has further eroded the ideological potency of democratic liberal rule of law.

The conflicting ideological signals sent by the rule of law make ideological comparison between countries difficult. It is necessary to determine which ideological representations accompany transplanted laws.

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19 See David Sugerman, supra 223–230.
Assessing ideological congruence

In order to determine the ideological content of imported law it is necessary to look beyond narrow textual readings. For example, copyright laws rest on property and contract ideology, but the ideological potency of these laws is coupled in the West to broader procedural and substantive notions about the rule of law. This raises the question: what version of the ‘rule of law’ (if any) accompanies legal transplants into Vietnam?

At first glance this inquiry seems highly complex, since rule of law ideas are contested in every Western country. Contractual rights, for example, take on one set of meanings when they are interpreted through Hayek’s neo-liberal economic thinking, which maximises private rights by confining the state to a ‘night watchman’ minimalist role. But they appear less important when viewed through the lens of a redistributive ideology that balances private rights against the public good.

Fortunately for our discussion, the transfer of ideology is closely coupled to the strategies adopted by agents for change. Foreign agents for change in Vietnam, such as donors, investors and international treaty partners, promote a Hayekian, procedural version of the rule of law. Most legal drafting projects funded by foreign donors (especially multilateral donors such as the World Bank, UNDP and ADB) provide legal training and study tours that are designed to inculcate this ideology (see chapter seven). Their principal concern is generating a stable and transparent environment in which businesses can plan their affairs according to law. This idealised representation rarely mentions the intense political and economic contests in Western countries surrounding the meaning of the rule of law. Neither

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22 See F. A. Hayek, 1944 supra 80–111.
24 See generally Yves Dezalay and Bryant G. Garth, 2002 The Internationalization of Palace Wars, University of Chicago Press, Chicago, 246–250.
does it explain why commerce flourishes in highly bureaucratic states like Japan, Korea and Taiwan that are a long way from paradigmatic democratic liberal settings. 26

Although these subtle and complex ideological debates inform Western legal development literature, there is little evidence they influence the way Vietnamese lawmakers understand the relevance of the rule of law to imported capitalist laws. It is possible that through overseas studies or research some Vietnam lawmakers may have acquired a deep understanding of rule of law discourse. Interviews with key members of drafting committees and National Assembly officials suggest, however, that this knowledge does not influence legal borrowing (see chapter five). 27 Perhaps, in time, a more textured representation of the rule of law will inform Vietnamese lawmakers, but for the present, imported commercial laws come packaged in Hayekian rule of law ideology.

Finally, domestic ruling elites and special interest groups selectively co-opt imported and local ideological beliefs to support particular positions (see chapter seven). 28 They invest imported ideals with new meanings to advance rhetorical positions. Subsequent chapters place ideological discourse in a context that is sensitive to the contests between agents for change. The remainder of this chapter first maps the political-legal ideological landscape in Vietnam and then considers whether the dominant ideology is compatible with imported commercial laws.

Importing socialist political-legal ideologies

The capacity of imported ideas to transform elite thinking in Vietnam is well documented. Chapter two showed that Vietnamese rulers during the nineteenth century (and before) borrowed widely from Chinese sources. Later, under French colonial rule, the Vietnamese elite rapidly assimilated European ideologies. David Marr observed that from the 1920s

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27 After reviewing the scholarly literature about the rule of law and conducting hundreds of interviews with Vietnamese officials, lawyers and academics for over a decade, the author is unaware of any Vietnamese in a position to influence lawmakers who are familiar with Western ideological discourses that challenge Hayekian orthodoxies. In comparing Western rule of law with Vietnamese pre-modern notions of legality, prominent Vietnamese scholars based outside Vietnam, such as Ta Van Tai, rely on orthodox versions of the rule of law. See Ta Van Tai, 2001 ‘The Rule of Law in the Traditional Law of Traditional China and Vietnam: Traditional East Asian Legal Practice in the Light of the Standards of the Modern Rule of Law’ Vietnamese Studies (4) 128, 129-132.

Vietnamese intellectuals were well read in Montesquieu, Rousseau and Herbert Spencer, and after the 1945 revolution in Marx and Lenin.\textsuperscript{29} More recently, Alvin Toffler and other post-modernists have influenced policy makers.\textsuperscript{30} Vietnamese leaders have for decades repeated Ho Chi Minh’s aphorism that without ideology the party and state are ‘like a person without wisdom or a ship without a compass’.\textsuperscript{31} Economic progress and development is only considered possible by adhering to state-sponsored ideology.\textsuperscript{32}

The term ‘legal ideology’ makes sense as a category in democratic liberal legal systems that broadly understand (if not universally approve) law’s autonomy from other social spheres. It is less meaningful in Vietnam where, this study argues, law remains largely undifferentiated from political, social and family relations. For this reason, our discussion about legal borrowing in Vietnam links legal ideology with other sources of aspirational thinking such as political and moral ideology. The discussion first traces the origins of three Vietnamese political-legal ideologies—socialist legality (\textit{phap che xa hoi chu nghia}), democratic centralism (\textit{tap trung dan chu}) and collective mastery (\textit{lam chu tap the})—and then evaluates their contribution to the dominant legal ideology. It then examines the epistemological and moral factors shaping the importation of Soviet legal thinking.

**Socialist legality (\textit{phap che xa hoi chu nghia})**

It was not until the Second Congress of the Vietnam Workers Party (\textit{Dang Lao Dong Viet Nam}) in September 1951 that legal cadres were instructed to ‘build up socialist law’.\textsuperscript{33} Previously, officials in the incipient Democratic Republic of Vietnam (DRV) characterised

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\textsuperscript{30} See Vo Thu Phuong, 1992 ‘Thang Tram Quyen Luc’ (Power Shift) \textit{Tap Chi Cong San} (4) 63, 63–64 (discusses Toffler’s book ‘The Third Wave’ published in 1980 about a new technological revolution that would enable African and Asian countries to bypass the stages of industrial development. This and subsequent books by Toffler have been translated into Vietnamese).


\textsuperscript{32} See Marr, 1981 \textit{supra} 320; Thaveeporn Vasavakul, 1995 \textit{supra} 357–389.

legality according to the French civil law concept *phap che dan chu* (democratic legality). 34
The Third Party Congress in 1960 adopted Soviet *sotsialisticheskai zakonnost* (socialist legality) doctrine, which translated as *phap che xa hoi chu nghia* in Vietnamese. 35
Prominent legal writers such as Dinh Gia Trinh considered economic conditions in people’s democracies like the DRV insufficiently evolved to sustain Soviet-style socialist legality. 36
Eventually the Soviet view prevailed and Vietnamese lawmakers during the early 1960s accepted that legality was equivalent in people’s democracies and socialist republics. Once this decision was made, the importation of Soviet socialist legal ideology dramatically increased. 37
Although chapter two shows that some socialist legal ideas originated from China, by the 1970s and 1980s Vietnamese writers unreflectively equated socialist law with Soviet law.

Socialist legality is defined in Vietnamese writings as a tool of proletarian dictatorship (*chuyen chinh vo san*) employed to defeat enemies, protect the revolution and the collective democratic rights of people to organise, and manage and develop the command economy. 38
It has four basic elements: (1) class-based legality, (2) socio-economic planning, (3) protecting citizens’ rights and, (4) ‘legal enforceability’ (*tinh chat cuong che*).

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34 See Author Unknown, 1957 ‘Sinh Hoat Dan Chu Cua Nhan Dan Ta Ngay Cang Phat Trien’ (Democratic Activities of Our People have been More Developed) *Hoc Tap* (9) 1, 1–2.
35 See Tran Hieu, 1971 25 Nam Xay Dung Nen Phap Che Viet Nam (25 Years of Building Vietnamese Legality), Nha Xuat Ban Lao Dong, Hanoi, 108.
36 As editor of the Supreme Court journal *Tap San Tu Phap*, Dinh Gia Trinh was a prolific and influential writer. See Dinh Gia Trinh, 1961 ‘May Y Kien Dong Gop Ve Van De Bao Ve Phap Che’ (Some Opinions on the Protection of Legality) *Tap San Tu Phap* (3) 20, 20–21. Article 9 of the 1959 Constitution supports Dinh Gia Trinh argument where it states ‘the Democratic Republic of Vietnam is advancing step-by-step from people’s democracy to socialism’.
**Class-based legality**

The class element is derived from the Marxist theory that worker-controlled societies require legal systems that reflect proletariat aspirations. The connection between law and class is explained by the familiar metaphor that law is part of the 'superstructure', which reflects the 'will of the ruling class' (y chi giai cap thong tri) and its domination over the means of production.\(^{39}\) According to Marx's historical materialism, underlying 'relations of production'—slavery, feudalism, bourgeois and socialist economic systems—created different types of law. Socialist law developed by prohibiting private ownership of the 'means of production'.\(^{40}\) Marx thought that laws based on non-economic forms of social interaction produced fragmented self-interest. Since it is impossible to satisfy the needs of all members of society, he argued law should reflect the 'prevailing mode of production of class society'.

In socialist states, laws reflect the 'will of the working class'. They are enacted by the state to maintain and protect a political, economic and social regime that benefits the working class.\(^{41}\) Using Lenin's language, socialist legality is a mechanism to further working-class rule through 'proletarian dictatorship' (chuyen chinh vo san).

Opaque class rhetoric obscured the precise relationship between party 'policy' (chinh sach) and legal ideals. Three syllogistic principles are, nevertheless, discernible in party writings.\(^{42}\) First, as the leader and defender of working-class interests, the party is the executive committee of the ruling class and directs their 'dominant will' (y chi troi thuong). Secondly, class-leadership gives the party a monopoly to formulate policy that binds everyone. Thirdly, since law reflects the 'dominant will', party policy is considered the 'soul and spirit' (linh hon) of the law.\(^{43}\)

The conflation of party policy and law enabled the party and state to use law as a 'management tool' (cong cu quan ly) to adjust or balance (dieu chinh) social


\(^{41}\) These views are expressed in the writings of Truong-Chinh, a leading pre-doi moi Vietnamese communist party theorist. See Truong Chinh 1994 supra 208–211 (discussing the Communist Manifesto base-superstructure concept that 'the ideas of each age have always been the ideas of its ruling class').

\(^{42}\) See Vu Duc Chieu, 1974 supra 40–41.
relationships—a practice allowing the substitution of policy for law. The ‘superiority of political expediency, of which the party was the sole judge, over law’ gradually transformed party paramountcy into the dominant ideal.44

Planning as law

Further complicating socialist legality, state plans (ke hoach nha nuoc) were also treated as legal instruments.45 Inspired by Lenin’s observation that ‘politics is the mirror of the economy’, theorists posited that the ‘objectives and methods of economic activities must be based on the political task and must support this task’.46 As mentioned in chapter two, the party and state during the 1950s began replacing market planning with administrative planning. Especially after the Fourth VWP Congress in 1976, state economic planning became the primary tool of ‘state economic management’ (quan ly kinh te nha nuoc).47

Devised in the Soviet Union to link state planning and economic production in command economies, ‘state economic management’ unified political and economic leadership in the state.48 State economic management was also regarded as part of the class revolution to protect the working class from exploitative capitalism. Calls by legal commentators in the 1970s to legalise and systematise command planning with an economic code were rejected by party leaders, who argued that ‘state economic management’ was needed to fine tune the economy with prerogative powers.49

43 Id. 40.
45 The Party Central Committee decided in 1960 that state plans had the force of an ordinance and they required ratification by the National Assembly. See Hoang Quoc Viet, 1974 supra 42–43.
46 See Le Thanh Nghi, 1975, Mot So Van De Co Ban Trang Quan Ly Kinh Te Xa Hoi Chu Nghia (Several Basic Matters on Socialist Economic Management) Nhan Xuat Su That (Truth Publishing House) Hanoi, 15, 45.
49 The term ‘prerogative’ is used because these powers often had no statutory basis. See generally Hoang Quoc Viet, 1973 Tang Cuong Phap Che Xa Hoi Chu Nghia Trong Cong Tac Quan Ly Xi Nghiep, (Strengthening Socialist Legality in Management Enterprises) Nha Xuat Ban Su That, Hanoi, 8–12; Le Thanh Nghi, 1975 supra; Pham Thanh Vinh, 1964 ‘Tinh Chat Phap Lenh Trong Ke Hoach 5 Nam Lan Thu Nhat (1961–1965)’ (Command Nature of the First Five Year Plan- 1961–1965), in Nghien Cau Nha Nuoc va Phap Quyen (Studies about State and Legality), Nha Xuat Ban Su Hoc (Historical Studies Publishing House), 120.
The state used ‘plans’ to control essential production materials (*tu lieu san xuat chu yeu*). The ‘legal position of the parties in economic law [was] defined by their rights and obligations under the law, the plan, or economic contracts.’

According to Nguyen Nhu Phat:

planning was the main instrument used by the state to administer the national economy. Planning would always prevail over law. Any conflict between law and planning would be resolved in ‘favour’ of planning. Generally speaking the law was only a subsidiary instrument while the policy and resolutions passed by the party, administrative commands and planning documents were the main instruments in governing economic activities.

Plans also possessed a ‘party nature’ (*tinh dang cong san*) that ‘organically linked’ the party’s economic line with economic regulation. Ultimately, state economic management was considered ‘organically linked to the [party’s] economic line, economic positions and economic plan’.

**Protecting citizens’ rights**

During the early 1960s Vietnamese jurists dutifully copied Soviet legal ideology that aimed to give citizens greater civil rights following Stalin’s terror. Though stressing the importance of protecting citizens from state abuses, Vietnamese writers refashioned citizen rights into a general moral duty of cadres to maintain ‘the line with the people’ (*duong loi quan chung*). Commentators noted that unlike the Soviet Union, Vietnamese social conditions were not remotely receptive to rights-based legality, especially at a time when the nation was preparing for war with the South. By the 1970s, Vietnamese literature

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50 Id. 43.
55 Interviews Nguyen Nhu Phat, Director Center for Comparative Law, Institute of State and Law, Hanoi, June, July 1998.
reflected the more authoritarian Soviet mood and shifted the focus away from citizens' rights towards state economic controls.\(^{56}\)

**Legal enforceability or the ‘character of coercion’** (*tinh chat cuong che*)

Writings also stressed that law has coercive force. Legal violations were considered revolutionary betrayals and violations of 'state discipline' (*ky luat nha nuoc*). Quoting Lenin, Vietnamese commentators wrote that 'only the slightest violation of the law, the slightest loss of social order provides a loophole to be immediately taken advantage of by the enemies of the working people.'\(^{57}\) State officials and citizens were exhorted to 'respect and comply with the law' (*phaí tôn trong va thuc hien phap luat*).\(^{58}\) Legal enforceability, or literally the 'character of coercion' (*tinh chat cuong che*), distinguished law from other social norms lacking 'public power' (*quyen luc cong*).

Reflecting the positivist origins of socialist legality, legal authority emanated from the constitution, National Assembly legislation and subordinate legislation promulgated by other state bodies.\(^{59}\)

To summarise, socialist legality was an extreme manifestation of legal positivism. It persuaded lawmakers to disregard customary rules or natural rights outside the party and state orbit.\(^{60}\) It invested the party and state with prerogative powers to substitute policy for law. Laws in Vietnam, as a corollary, were understood as 'management tools' (*cong cu quan ly*) to realise party policy. Law facilitated but never constrained state power.

\(^{56}\) Citizen's rights were considered in the context of protecting state economic interests from violations. See e.g. Pham Van Bach, 1970 'Le Nin Voi Van De Phap Che Xa Hoi Chu Nghia' (Lenin and Socialist Legality) *Tap San Tu Phap* (3) 9–16.


\(^{58}\) See Vu Duc Chieu, 1974 *supra* 156–161; Le Minh Tam, 1998 *supra* 497–503


\(^{60}\) 'Socialist legality, likewise, is always the *modus operandi* of the socialist state and cannot become an impediment to the realisation of its historical tasks.' This passage is quoted from an English language version of a Soviet text entitled 'The Theory of the State and Law', which was translated into Vietnamese and widely circulated in legal training institutions. See Nguyen Nhu Phat, 1998 *supra*. Also see S. A. Golunskii and M. S. Strongovich, 1940 *The Theory of State and Law*, The Institute of Law of the USSR, Academy of Sciences, Moscow, trans., 1951 *Soviet Legal Philosophy*, Harvard University Press, Cambridge Mass., 393.
Democratic centralism (*tap trung dan chu*)

In addition to socialist legality, the DRV imported Soviet political-legal organisational ideals that defined party-state power sharing. Democratic centralism (*tap trung dan chu*), as conceptualised by Lenin, was an organisational principle binding party and state. A facsimile of the doctrine appeared in the political report delivered by President Ho Chi Minh to the First National Congress of the Vietnamese Workers Party in 1951. By the time it was formally adopted in the 1959 Constitution it had matured into a two-pronged ideology that encouraged popular participation in state activities within a centralised party and state structure.

Party documents do not reflect the diversity of views about the adoption of democratic centralism. Instead, they asserted that centralised power corrected the problems of ‘regionalism’ and ‘departmentalism’. Only a hierarchically organised, disciplined party could deliver the social and bureaucratic unity required for command economic planning.

Article 10(f) of the VWP Statute 1960 explained the meaning of ‘centralism’:

Individual Party members must obey the Party organisations. The minority must obey the majority. Lower organisations must obey higher organisations. Party organisations throughout the country must obey the National Delegates’ Congress and Central Executive Committee.

Discussion primarily took place in the central committee. Once a decision was made ‘democratically’ all members were bound to promote and enforce it. Local party

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63 Evidently some members of the *To Luat Hoc* (Legal Studies Group) opposed democratic centralism fearing it would reduce the role of legal codification and increase the authority of party prescription. Interviews Nguyen Nhu Phat, 1998 * supra*.


66 Id. 33. Also see Le Duy Vau, 1956 ‘The Nao La Phat Huy Tap The va Dan Chu Dung Muc?’ (How to Satisfactory Expand Collectivity and Democracy?) *Hoc Tap* (2) 70, 70–72.
committees and state organs were expected to ‘cooperate and show solidarity to the party-line’.

Pham Van Dong extended democratic centralism principles to state organisations.67 Central state organs were strictly required to obey National Assembly legislation and plans, while provincial authorities were obliged to implement central-level directives.68 Democratic centralism validated party leadership (su lanh dao cua dang) within state and society.

The second arm of democratic centralism was based on Lenin’s assertion that democracy is only possible where the working class ‘centralises power in their hands’.69 Socialist democracy (dan chu xa hoi chu nghia) was understood in two ways. Theorists argued that popularly elected legislatures (National Assembly and provincial people’s councils) should supervise state power on behalf of the people.70 Socialist democracy also encompassed Lenin’s revolutionary view that elected parliamentarians in bourgeois representative democracy had appropriated the people’s democratic rights. He believed that in between elections the working class had comparatively few opportunities to participate in government by influencing political decision-makers through ‘lobbying’ (chay lo thu tuc) and popular demonstrations. ‘Proletarian dictatorship’ (chuyen chinh vo san) better safeguarded democratic rights by allowing the ‘ruling class’ to directly supervise state organs through their proxies: the communist party and mass organisations.

Introduced from the Soviet Union (via China) in the 1950s, proletarian dictatorship in the Vietnamese context meant worker and peasant dictatorship over state power.71 Proletarian

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68 Article 4 of the 1959 Constitution promoted democratic centralism as the fundamental state organisational principle. Decree No. 94 CP August 27, 1962, provided guidelines on the allocation of management power on economic and cultural fields for administrative commissions at provincial levels. This decree contained the guidelines for implementing democratic centralism principles set out in the Law on the Organisation of Peoples’ Councils and Administrative Commissions 1962. See generally Ho Chi Minh, 1994 *supra* 228.

69 Vietnamese writers cited V. I. Lenin in *Nha nuoc va Cach Mang* (State and Revolution), Chapters Two and Three. Lenin proposed that the working class should centralise power in their hands and power should be distributed on the basis of democracy. This ideology gave political and social meaning to democratic centralism. See Dinh Gia Trinh, 1964 *Nghien Cuu Nha Nuoc va Phap Quyen*, (Studies about State and Legality), Nha Xuat Ban Su Hoc (Historical Studies Publishing House), 90–92.

70 Dinh Gia Trinh, 1964 *supra* 91-94.

interests were privileged when state organs faithfully implemented external party resolutions and internal directives from party affairs sections (ban can su dang). The party was the nucleus of the entire managerial system of society, it existed both inside and outside the state (see the discussion in chapter four).

Theorists syllogistically reasoned that since everyone worked for society, and state and collective ownership over social production was 'for the people', then membership of society constituted a form of democracy. Far removed from democratic liberal ideals, such as constitutionally conferred citizen rights, socialist democratic rights were derived through collective membership of society. Community standards (revolutionary morality) were at least as important as normative laws in establishing acceptable behaviour patterns. As a party slogan declared, 'democracy does not mean doing anything you want' (dan chu khong co nghia la duoc lam tat ca nhung gi minh muon), which was understood to mean that self-interest must give way to collective interests.

Collective mastery (lam chu tap the)

The ideas that eventually coalesced into the 'collective mastery' (lam chu tap the) doctrine appeared in party publications from the 1950s onwards. They drew from Lenin the belief that true democracy is only possible where workers exercise mastery over the economy, and from Mao, the use of mass-mobilisation campaigns. Vietnamese leaders were captivated by Mao's radical vision of engineering social reform through mass-mobilisation, long after Stalinist jurists rejected it as 'the old twaddle about the mobilisation of socially active workers'.

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72 These bodies are discussed in more detail in chapter four. See Phong and Beresford, 1998 supra 47-49.
74 The Soviet doctrine that genuine democracy and democratic rights are only possible under socialist ownership formed a consistent theme in Vietnamese legal writings. See e.g. Nguyen Duy Trinh, 1956 'Phat Trien Che Do Dan Chu Nhan Dan va Bao Dan Quyen Tu Do Dan Cua Nhan Dan' (Developing the People's Democratic Regime and Ensuring People's Liberties and Democratic Rights) Hoc Tap (3) 23, 24.
75 For example, most of the Leninist notions of socialist democracy appeared in the report prepared by Pham Van Dong for the Second VWP National Congress in 1951. See Pham Van Dong, 1952 May Van De Cot Yeu cua Chinh Quyen Dan Chu Nhan Dan Viet Nam (Some Crucial Aspects of the People's Democratic Regime in Viet Nam) Ban Chap Hanh Trung Uong, (Party Central Committee Publishing) Hanoi, 7-19.
Party General Secretary Le Duan discussed collective mastery during the 1960s and 1970s, but the doctrine gained momentum during the euphoria surrounding reunification in 1975, which made utopian social transformation, seem possible. Le Duan's Politburo colleagues, who used the terms interchangeably, both tenets rather nebulously promoted people's power through collective ownership. According to party theorists the path to collective mastery lay in eliminating conflict between the state and individuals. This aim is evident in the party slogan: 'The important target of the revolution is to strengthen the unification between politics and the spirit of the entire people' (tăng cường sự thống nhất về chính trị và tinh thần toàn dân). In classless societies collectivism was supposed to replace individualism, enabling people to live harmoniously without the laziness, individualism, selfishness and corruption associated with the 'old society' (xa hội cũ).

Collective mastery aspired to nothing less than a utopian 'social organisation in which all social, economic, political and cultural relations are built into organised and standardised systems, habits and ways of life'. This ideal world would produce model 'socialist men'

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80 See Le Duan, 1979 Nhan Dan Lao Dong Lam Chu Tap The la Suc Manh, la Luc Day Cua Chuyen Chinh Vo San (The Labouring People Hold Collective Mastery which is the Force Driving Proletarian Dictatorship), Speech given by Le Duan, Hanoi, 2 April, 1979.

Collective mastery rejected civil society or individual space outside state and collective orbits as bourgeois individualism. As a corollary, the doctrine was hostile to private legal rights.

In sum, collective mastery championed parallel approaches to governance. One strand distributed state power through complex party-state interrelationships; the other aimed to promote proletarian dictatorship through popular participation in state machinery. Either way, the doctrine ultimately championed party fiat over legal formalism (state rule through law).

Taken together socialist legality, democratic centralism and collective mastery produced four core socialist political-legal ideals. First, law is not above the state, but rather emanates from the state. Second, the party and state possess prerogative powers to substitute policy for law. Law facilitates but never constrains state power. Third, the central ‘party leads’ (dang lanh dao) the state and society (party paramountcy). Fourth, individual rights give way to the collective public good.

Importing socialist political-legal thought

Paradoxically, party leaders imported socialist law (Chinese and Soviet) with few concessions to local conditions. They ignored their own warnings against unreflective borrowing. Truong Chinh denounced ‘gulping down raw other people’s culture, parrot-fashion learning, or the mechanical introduction of a foreign culture into our own without taking into account the particularities and concrete conditions of the country and its people’. Ho Chi Minh wrote in 1924: ‘Marxism is to be revised with respect to its historical basis, and to be consolidated by the ethnology of the East.’ He also believed

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84 This statement referred to French colonial culture. Trung Chinh, 1994 ‘Marxism and Vietnamese Culture’ report delivered at the Second National Culture Conference, July 1948, reproduced in Truong Chinh Selected Writings, supra 251.
'we are not like the Soviet Union; they have different habits and customs, history and geological conditions. We can take another road to socialism.' 86

By the 1960s Soviet legal ideology effectively displaced pre-socialist legal thinking from Vietnamese ideological discourse. Firsthand observers such as George Ginsburgs noticed that party resolutions and scholarly writings presented Soviet legal ideology as official thinking. Officials involved in legal reforms during the 1960s and 1970s also confirmed that socialist political-legal ideology was conceptually isolated from the domestic political morality espoused by Ho Chi Minh. 87 David Marr likewise identified a duality in Vietnamese thinking. At the same time party leaders slavishly borrowed Soviet ideology, they ‘endorsed the idea of a timeless Vietnamese spirit, and fashioned their own approved pantheon of immortal Vietnamese heroes’. 88

It is important to understand why party leaders ignored their own advice and imported Soviet law with few concessions to local conditions, because the ideals, precepts and contingencies shaping this process offer glimpses into the factors influencing the dominant legal ideology in contemporary Vietnam.

Adapting socialist legal ideology

The party’s reluctance to localise imported ideology is partially attributable to Marxist–Leninist hostility to the notion that culture plays a role in determining the characteristics of legal systems. Historical materialism emphasised economic influences over law, but did not incorporate an ‘Asiatic’ mode of production (East Asian rice-growing economies) into Marxist–Leninist theories about the legal ‘superstructure’. 89 This left Vietnamese theorists with a choice: uncritically apply Marx’s Eurocentric legal theory to Vietnam or comprehensively rethink Marxist theory in the context of ‘Asiatic’ production. Like the

86 Id. 23.
88 Marr, 1981 supra 362.
89 Marx believed that since Asiatic societies were largely village-based, the level of civilisation was too low to maintain the types of voluntary organisations that induced social change in Europe. Static Asian societies had no history and needed to receive capitalism from European colonisers before they were capable of transforming themselves into socialist societies. See Shlomo Avineri, 1969 ‘Introduction’, in Shlomo Avineri ed., Karl Marx on Colonialism and Modernization, Doubleday, New York, 6–16.
Chinese, they adopted a Maoist land reform program, but applied the Soviet legal template to other social spheres. ⁹⁰ Marx also followed a well-established European intellectual tradition that depicted Asian societies in undifferentiated ways as ‘barbarians’ or ‘semi-barbarians’, portrayals that generated socialist antipathy to neo-Confucian and ‘feudal’ culture. ⁹¹ Truong Chinh evinced this orientalist thinking when he blamed the ‘Asian mode of production’ for backward economic and social conditions in Vietnam. He vilified traditional cultural precepts as ‘unscientific’, promoting ‘superstition, idealism, mysticism, bungling, carelessness, all those habits that are irrational or retrograde’. ⁹² Vietnamese leaders sought a ‘new-democracy culture’ (tan dan chu) based on ‘rational, progressive socialist legislation’. ⁹³

Party leaders considered the Soviet Union the most advanced socialist state and as a corollary the most appropriate development model. They thought the Soviet ‘proletarian culture’ should link the working classes in different countries. National cultural barriers based on ‘Asiatic’ and ‘feudal’ modes of production were supposed to dissolve in the face of this unifying force. ⁹⁴ For similar reasons they primarily, although not exclusively, drew legal inspiration from the Soviet Union rather than China or Eastern European countries.

The adaptation of imported ideology to local conditions was further constrained by ethnocentric Soviet jurists, who encouraged ‘satellite’ nations to ‘build socialism’ through imitation, rather than experimentation. In his exhaustive review of Soviet commentaries on Vietnamese legal development, George Ginsburgs attributed the reluctance to localise legal borrowings to political policy. ⁹⁵ He wrote that:

⁹⁴ Truong Chinh, 1948 ‘Marxism and Vietnamese Culture’ report delivered at the Second National Cultural Conference, July 1948, reproduced on Truong Chinh Selected Writings, 1994 supra 264–266.
academic exploration of the distinctive attributes of socialist experimentation in the countries of the Soviet bloc became both safe and fashionable—as long, of course, as the main accent remained on the common heritage and the disparities were treated either as necessary tactical adoptions to ‘objective conditions’ or components in a pragmatic region-wide search for better solutions to existing socialist problems. 96

Vietnamese officials working in the legal sector during the 1960s recalled that law reform aimed to transplant ‘proletarian culture’, and Soviet advisers discouraged local adaptation as ‘extreme nationalism’ (chu nghia dan toc cuc doan). 97 A reluctance to address local conditions and contemplate deviations from the Soviet legal template is revealed in a series of articles written by Soviet jurists about Vietnamese legal development. 98 They seldom acknowledged, much less analysed, incongruities between imported Soviet ideals and local institutional and cultural conditions.

Debates about the practical realities of introducing a foreign legal system were generally highly abstract and focused on technical issues such as procedural rules affecting Civil and Criminal Codes. 99 The Legal Studies Group (To Luat Hoc) debated and published articles

96 Id. 661. It is noted that by the 1960s and 1970s the ‘many roads to socialism’ doctrine had replaced Stalinist conformity. The emergence of comparative law as a Soviet legal disciple in the early 1960s produced greater methodological sophistication and classification systems that placed Vietnam within the Asian socialist branch of the socialist fraternity. Compared with Eastern European countries, countries in the Asian socialist family received little detailed analysis.


98 See e.g. V. Letsoni, 1963 ‘Nen Tu Phap Cua Nuoc Viet Nam Dan Chu Cong Hoa’ (The Judiciary of the Democratic Republic of Vietnam) Tap San Tu Phap (11) 26, 26–28; Sarogoratsisk, 1961 ‘Vai Tro va Quan He Giua Cuong Che va Thuyet Phuc Cua Phap Luat Trong Thoi Ky Xay Dung Chu Nghia Cong San Tren Quy Mo Rong Lon’ (Roles and Relations between Enforcement and Legal Education in the Communist Period) Tap San Tu Phap (11) 41, 42–57; V. M. Letsnoi, 1961 ‘Viec Bao Dam Phap Che Xa Hoi Chu Nghia’ (Ensuring Socialist Legality) Tap San Tu Phap 12, 32, 32–38; P. Skomorokonop, 1961 ‘Phap Luat Xo Viet Bao Ve Quyen Loi Dan Su’ (How the Soviet Union Protects Civil Rights) Tap San Tu Phap (2) 42, 42–43. In an extensive review of Russian language writings, Ginsburgs found only one article covering ethnic minority rights based on fieldwork and sociological analysis. A. G. Mazaev, 1960 ‘Reshenie Natsionalnogo Voprosa Demo Kraticheski Respublika Vietnam’ (Solution of the Nationality Question in the Democratic Republic of Vietnam) in Demokraticheskaya Respublika Vietnam 1945–1960, Vostochnoi Literatury, Moscow, 141-176, cited in Ginsburgs, 1973 supra 671.

99 The only article from this period that questions the relevance of imported Soviet experiences explores criminal appeal mechanisms. It asserts, without explanation, that Soviet laws and procedures should ‘be consistent with or rooted in Vietnamese law.’ See Ta Thu Khue, 1963 ‘Can Than Trong Trong Viec Ap Dung Kinh Nghiem Lien-Xo Vao Trinh Tu Phuc Tham’, (We need to be Cautious in Applying Soviet Experience in Appellate Procures) Tap San Tu Phap (2) 12, 13–14.
about law reform in the *Luat Hoc* (Jurisprudence) journal. Analysis took place within a Soviet jurisprudential framework that made few references to Vietnamese institutions and practices. As one participant recalled, discussions on technical matters were frequently conducted in Russian. An extensive review of the Vietnamese legal literature over this period has failed to find a single article analysing local political, economic and cultural barriers to Soviet (or Chinese) law and organisational practices.

Finally, Marxist-Leninism promised a socialist utopia built on an infallible scientific methodology. Party leaders promoted the belief that 'Marxist doctrine is omnipotent because it is true. It is complete and harmonious'. As an all-embracing philosophy, the doctrine could only accommodate other viewpoints from a Marxist perspective. Looking back on this period, a Vietnamese commentator observed 'there was a scholastic manner in researching and apply Marxism in Vietnam ... We always considered every position or argument of this doctrine as correct, regardless of practice in Vietnam. Therefore, there was gap between theory and practice.'

By adopting Marxist scientism—a comprehensive search for the fundamental guides to life—Vietnamese leaders created a doctrinaire intellectual environment. Since the party and state determined which class relationships gave rise to legal consequences, legal concepts were by definition limited to subjects approved by the state. Critical analysis of legal ideology challenged Marxist-Leninist infallibility and was politically unacceptable.

Various factors combined to constrain local discourses from reshaping Soviet legal ideology:

- The deterministic link between the economic base and the superstructure discouraged investigation into cultural links between Soviet law and Vietnamese society.
- Soviet legal thinking discredited East Asian economic and cultural practices.
- Socialism promoted a global workers’ culture that de-emphasised regional differences.

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101 Interview Dao Tri Uc, Director Institute of State and Law, Hanoi, July 1998.


• As an holistic ideology Marxist-Leninism only permitted analysis from its own self-referential perspectives.
• Vietnamese were reluctant to offend Soviet providers of economic aid.
• Vietnamese lawmakers reconciled law and society through pragmatic experimentation (learning by doing) rather than theorising.

**Forging a Vietnamese political-legal ideology**

Soviet legal ideology remained remote from everyday life in Vietnam. From its inception, the party conflated pre-modern moral principles with socialist political-legal ideals to legitimise and protect its rule.\(^{104}\) Nguyen Khac Vien famously observed that 'among the great family of Communist Parties, the Vietnamese and Chinese have particularly exhibited more of a moralistic tone than Communist Parties elsewhere.'\(^{105}\) He believed neo-Confucianism and Marxism shared similar frames of reference that transcended doctrinal differences. Common beliefs included 'collective discipline', the 'fulfilment of social obligations' and treating people as 'a totality of their social relationships'. Convergence between Confucianism and socialist ideology occurred in three areas: public needs were exalted over individual interests; rulers had a moral duty to lead society; and law was considered a tool to maintain social order. But some Confucian ideals conflicted with Marxist-Leninist secularism. The imperial 'son of heaven' abdicated in favour of proletarian dictatorship. Socialist materialism actively discouraged supernatural forces and beliefs. In cultural life, the 'new socialist man' replaced morally perfected Confucian literati and socialist equality inverted Confucian class hierarchies.\(^{106}\) Party leaders also conflated neo-Confucian virtue-rule (discussed in chapter two) with democratic centralism to reinforce party leadership (*su lanh dao cua dang*) over state and society.\(^{107}\) Ho Chi Minh frequently stressed the importance of moral leadership by the

\(^{104}\) Vietnamese scholars have calculated that Ho Chi Minh used Confucian and Mencian aphorisms more than one hundred times in his works. See Nguyen Duc Binh, 2001 'The Origin of Ho Chi Minh’s Ideology' *Vietnam Social Sciences* (1) 3, 4.


party. He opined that 'if one does not have morality, one can hardly lead the people however talented one can be.' Party leaders were expected to 'display higher knowledge than ordinary people, must act with lucidity and clear sightedness and must look farther and wider than others.' Once party leaders had attained a higher revolutionary morality—like mandarin 'first knowers'—they were obliged to instruct and guide those with less nhan thuc giai cap (class awareness). Ho Chi Minh put the moral leadership of the party beyond question when he declared that 'the party is morality'.

According to Frances FitzGerald, government for the Vietnamese was not 'merely one organisation among others, but a complete enterprise that comprehends much of what Westerners would consign to personal life and private morality.' Party leaders sought to present 'a picture of the “correct” way of life and show the people what had to be done'. This approach differed from Soviet teachings that acknowledged the role moral teachings play in law enforcement, but rejected the notion that morals could substitute for law. For example, like the Chinese, Vietnamese leaders used model (dien hinh) workers as moral exemplars to demonstrate optimal behaviour in practical ways. Theorists believed that effective governance required the state to infuse personal relationships formed between cadres and the people with tinh cam giai cap (class sentiment or awareness). Those awakened (giac ngo) to class sentiment (or awareness) would respect the party as the highest ‘revolutionary morality’ (dao duc cach mang) authority.

108 Like many other early communist leaders, Ho Chi Minh came to Marxism–Leninism from a Confucian scholarly background. See Nguyen Khac Vien, 1974 supra 45. Many have observed that his emphasis on exemplary behaviour owes more to neo-Confucianism than Marxist–Leninism. See Quang Can, 2001 ‘Some Reflections on Marxist Philosophy in the Perspective of Eastern Culture’ Vietnam Social Sciences (1) 8, 9.
110 Quoted in Song Thanh, 1995 supra 6.
112 Frances FitzGerald, 1972 Fire in the Lake, Random House, New York, 35.
The party manufactured revolutionary morals from traditional and Marxist-Leninist principles as a pragmatic way to bring the party and state closer to the people. Revolutionary morality became a way to mobilise the masses to support the work of the party and state under democratic centralism and collective mastery. It ‘strengthened the unity and single mindedness between politics and the spirit of the whole people’ (tăng cường sự nhật trí về chính trị và tình thần của toàn dân). In short, the party sought legitimacy by portraying itself as a moral exemplar, rather than the defender of legal formalism.

**Revolutionary morality (dao duc cach mang)**

Vietnamese revolutionaries understood that ideology is an important arena for revolutionary practice. They were aware that ideals existing in the colonial and feudal regimes had maintained and reproduced those systems. For them socialist change not only required new Marxist-Leninist ideas, it also needed the delegitimisation or reconfiguration of old ideas.

Many contemporary Vietnamese writers credit Ho Chi Minh with the creation of a new hybrid Confucian-Socialist revolutionary moral creed. Revolutionary morals were never precisely defined, but they embodied the collective mastery principle that individual interests were expected to yield to collective interests. Ho Chi Minh identified self-sacrifice, ‘devoting one’s life to struggling for the Party and revolution’, as the highest moral virtue. Cadres were expected to work for the party, observe party discipline, implement party-lines, put the interests of the party and labouring people first, serve the people, struggle selflessly for the party and display exemplary behaviour. In his estimation  

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116 See Nguyen Khanh Toan, 1964 ‘Nha Nuoc Phap Quyen Xa Hoi Chu Nghia va Cong Tac Nghien Cuu Luat Hoc’ (Socialist Law Based State and Legal Research) in Nghien Cuu Nha Nuoc va phap quyen (Studies about State and Legality), Nha Xuat Ban Su That, Hanoi, 14–15.  
118 See Ho Chi Minh, 1994 supra 198–199.
'individualism' (chu nghia ca nhan) was the enemy of self-sacrifice. It was blamed for every social evil from officiousness and self-importance to corruption and revisionism.\textsuperscript{119} Ngo Van Thau, a professor teaching in the Judicial Training School from the 1960s until the 1980s, remembers that party and state officials were required to interpret laws from five moral perspectives: can (diligence), kiem (thrift), liem (honesty), chinh (loyalty) and chi cong vo tu (social needs first).\textsuperscript{120} These ‘traditional’ values that ‘everyone understood’, assumed different shades of meaning according to their application. For example, diligence and thrift retained their everyday meaning when applied to work practices within the justice system, but honesty, loyalty and ‘social needs first’ transformed obedience to party policy into a moral virtue—‘new wine in old bottles’.\textsuperscript{121} Finally it is important to recall from our discussion in chapter two that virtue-rule co­existed in the administrative system with pre-modern legalist (phap gia) and colonial administrative ideals and practices. Revolutionary values were rarely discussed in the context of theory or ideology, rather they were expressed through what officials did (or did not do). They were treated more as a practical revolutionary guide to realise specific objectives than as a scholarly doctrine.\textsuperscript{122}

The bifurcation between socialist legality and revolutionary morality

The discussion so far implies that socialist legality and socialist organisational principles (i.e. democratic centralism and collective mastery) followed different ideological trajectories. Soviet-trained Vietnamese lawyers imported socialist legality into a reified Soviet-influenced legal environment that rarely engaged the world outside elite legal institutions. This bifurcation is illustrated by the dual meanings given to the Sino-Vietnamese term *phap che*.\textsuperscript{123} It retained its Soviet meaning (legality) in scholarly legal

\textsuperscript{120} Interview Ngo Van Thau, supra.
\textsuperscript{121} David Marr believes that ‘the mere fact that Ho Chi Minh employed such terms as “loyalty”, “humanness” and “virtue” did not make him a Confucian. See Marr, 1981 supra 134.
\textsuperscript{122} ‘If we speak of ideology without speaking of organisations that is mere empty theorising and empty morality without any practical effect. That is the inherent defect of petty-bourgeois intellectuals and Confucian scholars.’ Le Duan, 1994 supra 447. Also see Douglas Pike, 1969 War, Peace and the Viet Cong, MIT Press, Cambridge Mass.
discourse, but reverted in political discourse to its pre-modern legal meaning to 'ensure legal compliance' through mass legal/moral education campaigns.

Circumventing the potent political and epistemological constraints to naturalisation, slowly over time, some Soviet legal ideas acquired Vietnamese nuances. Vietnamese legal personnel, for example, cautiously adjusted Soviet laws to suit Vietnamese legal institutions. As previously mentioned, bureaucrats used party edits and revolutionary morality, rather than laws to govern society. In addition various Soviet procedures were changed to suit the Vietnamese court structure. Judges were also encouraged to 'use reason and sentiment in carrying out the law' (ly va tinh trong viec chap hanh phap luat). This practiced conflated party edicts, laws and local customary practices to produce highly contextualised solutions. In short, acculturation slowly took place through small-scale, localised and pragmatic adjustments, but officials did not meditatively theorise a distinctly Vietnamese legal ideology.

Various factors discouraged lawmakers from fundamentally reconfiguring socialist legality to suit local conditions. Marxist-Leninist theory disassociated law from cultural relationships. It also assumed that a global workers' culture would flatten out regional differences separating socialist countries. Most policy makers presupposed the infallibility of Soviet ideology and believed that society should resemble laws, rather than making laws resemble society. They attributed low levels of compliance with imported socialist laws to incomplete laws, poorly trained legal cadres, low educational levels and a failure to follow party morality, but rarely considered inconsistencies between imported legal ideology and local social conditions. French-trained legal officials, who might have challenged Soviet ideals, were purged from influential positions by the 1960s (see chapter two). A general antipathy to legality is also attributable to residual anti-colonial sentiment.

Contrasting with socialist legality, democratic centralism and collective mastery concepts were deeply interwoven with local political and moral arguments that legitimised party 'leadership'. These doctrines stressed hierarchies and communitarian sentiments that were analogous to, and easily blended with, revolutionary virtue-rule. As organisational

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principles, they influenced party and state institutional structures. Further entrenching their influence, these principles primarily addressed party and state cadres—the group controlling the levers of power.

Given their importance to party legitimacy, the leadership promoted ideals such as party paramountcy, virtue-rule and collective interests much more vigorously than Soviet notions of legality and procedural justice. Though efforts were made to introduce the institutional trappings of a law-based state, such as courts and procuracy, the notion that law should normalise state-society relationships did not gain ideological dominance until after doi moi reforms commenced.

Incompatibilities between laws and political/moral rule did not especially matter in the command economy, where the state mainly used prerogative powers to order society. But they assumed more importance when the Sixth Party Congress in 1986 formally agreed that ‘management of the country should be performed through laws rather than moral concepts’. By this time market forces were already undermining the administrative apparatus used to regulate the command economy. The next section examines how Vietnamese ideological thinking has responded to post-doı moı discourses.

**Renovating socialist legal ideology**

**Importing nha nuoc phap quyen (law-based state)**

After decades of socialist orthodoxy, questions were raised during the Fifth National Congress of the Communist Party of Vietnam (CPV) held in 1982 whether revolutionary ideology should continue to dominate legal thinking. Reformers argued for a separation of the party from the day-to-day running of the government, and regulation through law, rather than moral rule and administrative edict. Little was done until the Sixth National

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127 See Circular No. 3831/TP Concerning Some Immediate Work to be done by the Judiciary Sector to Implement the 5th Party Congress Resolution, 11 June 1982, Minister of Justice.

128 The ‘Party Report on Economic Guidelines and Tasks’ stated that ‘the power to rule the state must be reflected in the systems of laws. The law, as it is boiled down, is the institutionalisation of the party line and policies. But there must be no confusion among the line, policies and law.’ Circular No. 3831/TP on Some Immediate Work to be Done by the Judiciary Sector to Implement the 5th Party Congress Resolution, Ministry of Justice. First reproduced in Phap Che Xa Hoi Chu Nghia (Socialist Legality) (2) April 1982, 8–10, 15, trans., JPRS-1978, 25 January 1983, 90.
Congress of the CPV in 1986 when party leaders gradually accepted that command planning could no longer regulate the emerging mixed-market economy.\textsuperscript{129} In searching for a new form of legal regulation, Vietnamese lawmakers turned once again to the Soviet Union for ideological inspiration.\textsuperscript{130} During the mid-1980s Mikhail Gorbachev introduced a series of constitutional changes designed to formalise economic and social liberalisations (perestroika), without fundamentally disrupting communist party power.\textsuperscript{131} Soviet lawmakers developed a constitutional doctrine—pravovoe gosudarstvo (law-based state)—that proclaimed the supremacy of law and the constitution.\textsuperscript{132} 

Pravovoe gosudarstvo was based on German rechtsstaat (state-law) principles.\textsuperscript{133} Developed in autocratic nineteenth-century Prussia, rechtsstaat promoted the implementation of state policy through legislation. It de-emphasised social customs and precedents derived from sources outside the state that were capable of checking political and bureaucratic power.\textsuperscript{134} Contrasting with Diceyan common law notions of the ‘rule of law’, there were no unwritten legal conventions that the state was powerless to change. Nevertheless, pravovoe gosudarstvo radically departed from the emphasis in socialist legality on party supremacy and legal instrumentalism.\textsuperscript{135}

In a speech delivered to the Seventh Congress of the CPV in 1991, the new General Secretary (Do Muoi) introduced nha nuoc phap quyen (law-based state), a Vietnamese

\begin{itemize}
  \item \textsuperscript{129} This conclusion does not appear in official party writings and is based on interviews with Phan Huu Chi, supra; Nguyen Nhu Phat 1998, supra. Also see Phong and Beresford, supra 86.
  \item \textsuperscript{130} Although numerous party and state bodies were involved in this project, Professor Doan Trong Truyen, Chairman of the National Administrative School (now National Administration Institute) coordinated research. Members of the National Administrative School wrote a comprehensive account of the search for new legal ideologies. See Hoc Vien Hanh Chinh Quoc Gia (The National Administrative Institute), 1991 Ve Cai Cach Bo May Nha Nuoc, (On the Reform of the State Apparatus), The Truth Publishing House, Hanoi.
  \item \textsuperscript{132} The term was first used in the Nineteenth Party Conference in 1988 and was added to perestroika, glasnost and democratsiia as principles of the ‘new thinking’. See Harold J. Berman, 1992 ‘The Rule of Law and the Law-Based State (Rechtsstaat), in Towards the ‘Rule of Law’ in Russia?’, M. E. Sharpe, New York 50–52.
  \item \textsuperscript{133} Id. 46–47.
  \item \textsuperscript{134} A. V. Dicey popularised English understandings of the ‘rule of law’, in which certain basic principles of justice may not be lawfully infringed even by the highest lawmaking authorities. See Albert Vern Dicey, 1959 Introduction to the Study of the Law of the Constitution, 19th ed., Macmillan, London. In the United States jurists added natural rights embedded in federal and state constitutions to the English historical foundations of legality natural. This system entrusted authorities to safeguard constitutions in courts, rather than parliaments.
  \item \textsuperscript{135} The concept of pravovoe gosudarstvo, or rechtsstaat, upon which it is based, asserts that the state is the highest if not the only source of law. The basic form and source of law is legislation, rather than custom and precedent. See H. J. Berman, 1991 ‘Some Jurisprudential Implications of the Codification of Soviet Law’, in
\end{itemize}
adaptation of pravovoe gosudarstvo. Like pravovoe gosudarstvo, nha nuoc phap quyen required stable, authoritative and compulsory law; equality before the law; and the use of law to constrain and supervise the enforcement and administration of law. As the following discussion reveals, the diverse interpretations of nha nuoc phap quyen range along an ideological continuum. At one end the term means little more than a legal formalism in which the party and state rule through law. At the other end it approaches a Hayekian, procedural ‘rule of law’, where the party and state are bound by legal rules. Nha nuoc phap quyen also presupposed a functional separation of party and state. The party was supposed to formulate socioeconomic objectives, leaving state apparatus to enact and implement the party-line (see chapter four).

Unlike their Soviet mentors, Vietnamese legal theorists refused to abandon socialist legality and are endeavouring to create a ‘socialist law-based state’ (nha nuoc phap quyen xa hoi chu nghia). There are various explanations for the party’s cautious adaptation of nha nuoc phap quyen. Some leaders considered the Soviet legal system more legalistic and rule-bound than the Vietnamese system, and believed that constitutionalism would not easily transfer. Whatever the reasons, by juxtaposing socialist legality and nha nuoc phap quyen principles, party leaders set in motion unresolved ideological contests.

Current directions in nha nuoc phap quyen thinking

More a conceptual label for new legal thinking than a coherent ideology, nha nuoc phap quyen is used by theorists as a convenient catch-all to smuggle new ideas into the political-legal ideology. Five main ideals are discernible in nha nuoc phap quyen writings:

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138 The Soviet origin of nha nuoc phap quyen was confirmed during interviews with Nguyen The Quyen, Lecturer, Law University, Hanoi October, 1997; Nguyen Nhu Phat, supra.

139 Interview Nguyen Nhu Phap, supra; Pham Duy Nghia, Lecturer, Law Faculty, National University, Hanoi, September, 2000. For a discussion concerning the different ideological and cultural backgrounds of Soviet and Vietnamese legal thought see Pip Nicholson, 2000 supra 125–140.

140 The literature concerning nha nuoc phap quyen is as confusing as it is large. Since writers rarely acknowledge sources, ideological precepts are frequently thrown together with little explanation, much less
1. Law rather than morality must adjust basic social relationships. Calls for legal formalism periodically appeared in writings about socialist legality, but party paramountcy legitimised the substitution of policy for law. The section below dealing with party paramountcy ascertains whether party paramountcy is conceding ground to *nha nuoc phap quyen* ideals such as legal formalism or a procedural version of the 'rule of law'.

2. State power belongs to the people and is used to elect state bodies. This ideal is consistent with Lenin's assertion that democracy is only possible where the working class 'centralise power in their hands'. The discussion in annex three dealing with democratic representation examines whether new democratic symbolism associated with *nha nuoc phap quyen* reforms is changing longstanding democratic ideals.

3. State organs and citizens 'must respect and act within the law' (*phai ton trong va thuc hien phap luat*). This proposition is consistent with the extreme legal positivism in socialist legality; that is, legal rights emanate from the state. The discussion in annex three about civil rights and in the following sections dealing with economic regulation consider whether *nha nuoc phap quyen* thinking has sensitised the dominant political-legal ideology to the notion that citizens enjoy inherent civil and commercial rights.

4. Legislative, executive and judicial powers are distributed among state bodies *hoc thuyet tam quyen phan lap* (division of powers doctrine). The 1992 Constitution rejected Montesquieu's separation of powers doctrine and retained the socialist organisational principle that unifies (*thong nhat*) and centralises (*tap trung*) state power in the National Assembly. Efforts by *nha nuoc phap quyen* reformers to clarify party and state powers are examined in chapter four.

5. Courts should operate independently of local government organs (people's committees) and should freely exercise judicial discretion in applying the law.

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*141* Vietnamese writers cited V. I. Lenin in *Nha nuoc va Cach Mang* (State and Revolution) chapters two and three. Lenin proposed that the working class should centralise power in their hands and power should be distributed on the basis of democracy. This ideology gave political and social meaning to democratic centralism. See Dinh Gia Trinh, 1964 *supra* 90–92.
Contemporary writers unambiguously call for courts to take centre stage in resolving social grievances, but are less clear about whether justice is done by realising party objectives or following due process. The interplay between socialist legality and nha nuoc phap quyen notions of justice is examined in chapter six.

The ideological contests between socialist legality, democratic centralism, collective mastery and nha nuoc phap quyen are discussed in the following sections about party paramountcy and economic regulation. Movement towards representative democracy and civil rights are discussed in annex three. But first it is necessary to briefly consider the role Ho Chi Minh thought has played in opening discussion about nha nuoc phap quyen.

Ho Chi Minh thought and nha nuoc phap quyen

‘Ho Chi Minh thought’ (Tu Tuong Ho Chi Minh) was added to Marxist-Leninist doctrine (chu nghia Mac-Lenin) as a state ideology in 1991. Legal writers have used Ho Chi Minh’s vague and eclectic teachings as ideological camouflage for new political-legal thinking. Several approaches are evident in this literature. Many writers argue that Ho Chi Minh imported ‘rule of law’ ideals into Vietnam decades before the introduction of nha nuoc phap quyen ideology. Some writers assert that the Revendication du Peuple Annamite (Demands of the Annamese People), sent by Ho Chi Minh (and others) to the Versailles Peace Conference in 1919 to demand constitutional rule for colonised people, demonstrated the party’s longstanding commitment to the principle that law should constrain political power. Ho Chi Minh, they argued, synthesised ‘traditional’ neo-Confucian concepts of Vietnamese humanism—‘love the country, love her people’—with imported notions of

142 During the Seventh Plenum of the Party Central Committee, previously unreleased sections of Ho Chi Minh’s last will were published. Pham Van Dong was one of the first influential party figures to publicly argue that Ho Chi Minh’s thoughts could be used to reinvigorate moribund Marxist–Leninist doctrinal analysis. See Pham Van Dong, 1990 ‘Ho Chi Minh: His Theory and Action’ Vietnam Social Sciences (2) 3, 9–11. Also see Party Resolution No. 7 of 1991, which made Ho Chi Minh thoughts an official ideology.

equality and liberty derived from French Enlightenment thinkers, such as Montesquieu and Rousseau.\textsuperscript{144}

This narrative conveniently ignores Ho Chi Minh’s support for Lenin’s proletariat dictatorship that placed an ‘alliance of the working class with the peasantry’ under party leadership.\textsuperscript{145} It also overlooks the reality of governance under Ho Chi Minh (discussed in chapter two) where party edicts and revolutionary morality displaced colonial legalism. Other writers inventively use Ho Chi Minh thought as a ‘political umbrella’ to smuggle democratic liberal precepts into \textit{nha nuoc phap quyen} discourse, without overtly challenging socialist legality.\textsuperscript{146} Procedural rule of law concepts such as legal ‘transparency’ (\textit{ro rang}) are used to promote legal institutions that constrain state power with law.\textsuperscript{147}

Several writers have bypassed Ho Chi Minh altogether and directly attribute rule of law ideals to European Enlightenment philosophers.\textsuperscript{148} By appropriating the language and thinking of Kant, Locke and Montesquieu, they have taken the first tentative steps away from class-based explanations of law. Since it is not politically acceptable to compare \textit{nha nuoc phap quyen} with Marxist-Leninism without acknowledging the latter’s superiority, they juxtapose democratic liberal and socialist legal ideals, implicitly inviting readers to reach inferred conclusions.\textsuperscript{149}


\textsuperscript{145} In a famous declaration Ho Chi Minh said ‘if the people are hungry, it is the fault of the Party and the Government, if the people are cold, it is the fault of the Party and the Government, if the people are sick, it is the fault of the Party and Government’. Quoted in Thanh Duy, \textit{supra} 26–27; Nguyen Van Tai, 1996 ‘On the State Ruled by Law and a Multipartisan Regime’ \textit{Vietnam Social Sciences} (1) 3, 6.

\textsuperscript{146} Vietnamese writers are well acquainted with Marx, Engels and Lenin’s dismissal of ‘bourgeois’ legality as an exploitative tool. See Dao Tri Uc, 1999 ‘The Principle of Legality and Its Presentation in the Criminal Code of Vietnam’ \textit{Tap Chi Cong San} (8) 40, 40–41; Nguyen Duy Quy, 1993 \textit{supra} 10–11.

\textsuperscript{147} Le Hong Hanh, 1998 \textit{supra} 322–323.

\textsuperscript{148} See e.g. Nguyen Duy Quy, 1994 ‘The Question of Building a State of Law in Vietnam’ \textit{1 Vietnam Law and Legal Forum} (2) 32, 33.

\textsuperscript{149} For an example of this type of writing see Institute of State and Law, 1998 \textit{Giao Trinh Ly Luan Nha Nuoc va Phap Luat} (Text Book on State and Law), Nha Xuat Ban Cong An Nhan Dan, Hanoi. For a more open discussion about the ‘rule of law’ see Author Unknown, 1996, \textit{Nhung Van De Ly Luan Co Ban Ve Nha Nuoc va Phap Luat} (Basic Theoretical Issues about State and Law), Nha Xuat Ban Chinh Tri Quoc Gia (National Political Publishing House), Hanoi.
Party paramountcy and *nha nuoc phap quyen*

There is an ongoing struggle in the dominant ideology in Vietnam between *nha nuoc phap quyen* ideology and party paramountcy. *Nha nuoc phap quyen* discourse promotes a regulatory ideal where the party confines itself to policy formulation, leaving the state apparatus to rule through law. The 1992 Constitution appeared to formalise this principle by placing party organisations under the law.\(^{150}\) One way to ascertain whether legal formalism (rule through law) or a more comprehensive procedural ‘rule of law’ has entered the official political-legal ideology is to examine the ideals the party invokes to legitimise its paramountcy. A shift away from class or moral assertions of legitimacy towards legal imagery signifies changes in the official political-legal ideology.

Class-based ideology

In Marxist–Leninist ideology party paramountcy arose from the party’s role in defending the ‘ruling-class’ (*giai cap thong tri*). To realise this objective the party could use prerogative rights to substitute political power for law. Official representations of law remain firmly anchored to this class-based ideology. Dao Tri Uc, a prominent legal scholar, recently reaffirmed the class basis of law:

> Legality (*phap che*) in general is the way to organise society, to put social life into the order that fits with the will of the ruling class. If laws are the legalised will of the ruling class, arising from the contemporary needs and social condition of the ruling class, legality must be understood as the process to put that will into real life, making it reality. Thus, for us, legality has the same meaning as the need to institutionalise the requirement that state administration and social administration benefit the working people.\(^{151}\)

Recalling Marxist ‘scientism’, this story-line first asserts that Marxist-Leninism and Ho Chi Minh thought are infallible, eternal truths. It then applies this *a priori* ‘truth’ to show that law reflects the ‘will of the ruling class’ (*y chi cua giai cap thong tri*).\(^{152}\) As the executive

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\(^{150}\) Previous constitutions in 1959 and 1980 placed the party under the constitution, but not law.


\(^{152}\) Both Ho Chi Minh and Truong Chinh placed the Marxist base (mode of production) determines the superstructure (ideals, culture and law) metaphor at the center of state ideology. See Song Thanh, *supra* 6; Truong Chinh, 1994 *supra* 540–546.
committee of the ‘ruling class’, the party decides which laws ‘benefit the working people’—a formula that justifies party paramountcy.\(^{153}\)

As private entrepreneurs and foreign investors acquire greater economic importance in the mixed-market economy, class-based imagery appears increasingly implausible. To meet this challenge, party leaders have been forced to expand the ranks of the ‘working class-peasant’ alliance. The 1992 Constitution initially added intellectuals to the ruling class to form the ‘cooperation of workers, peasants and intellectuals’ (lien minh giia cap cong nhan voi giai cap nong dan va tang lop tri thuc).\(^{154}\) More recently, the ruling class was further enlarged to include the ‘interests of the entire people’ (toan the quan chung nhan dan), including entrepreneurs.\(^{155}\) The final class barrier collapsed when the Party Central Committee in 2002 officially permitted party members to engage in private business. The recruitment of former class enemies into the ‘ruling class’ is undermining the ideological potency of class-based justifications for party paramountcy.\(^{156}\)

**Moral credibility (uy tin)**

Party paramountcy has always rested on more solid foundations than Marxist-Leninist class theory. As Stephen Young observed, ‘Vietnamese invest true authority with those who posses the quality of uy tin (moral credibility).’\(^{157}\) Historically, party theorists used the uy

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\(^{153}\) For example, Nguyen Van Tai argues that ‘the party line is the manifestation of the political goal and fundamental interests of the whole society and the most important base for the political orientation of law.’ Nguyen Van Tai, 1996 ‘On the State Ruled by Law and a Multapartein Regime’ *Vietnam Social Sciences* (1), 3, 7.


\(^{155}\) Article one of the Constitution 1992 added intellectuals to the ‘peasant and worker alliance’. Only ‘socialist intelligentsia were considered part of the ‘ruling class’ in the Constitution 1980 (article 3). Also see Le Hong Hanh, 1998 *supra* 324–325. Pham Xuan Nam, 2002 ‘Some Preliminary Ideas on the Change of Social Structure and Classes in Viet Nam During the Transition to a Socialist—Oriented Market Economy’ *Vietnam Social Sciences* (6) 31, 39–40; Central Committee, 2001 ‘The Communist Party of Vietnam Central Committee’s Political Report to the 9th National Party Congress’, Chapter VIII.

\(^{156}\) The 9th Party Congress decided that the main ‘target of class struggle in the present context is to carry out successfully national industrialisation and modernisation in the socialist orientation.’. See Nguyen Phu Trong, 2004 *Viet Nam on the Path of Renewal*, The Gioi Publishers, Hanoi 148.

tin conferred by the ‘working class’ cause or ‘revolutionary mandate’ to justify party paramountcy. 158

Although the Sixth Party Congress called for the replacement of moral rule with a law-based state, some party leaders continue to invoke ‘revolutionary ethics’ to make party ideals appear universal, rational and desirable. There are unceasing efforts to portray the party as infallible—a moral exemplar. Reprising Ho Chi Minh’s assertion that the ‘party is morality’, Tran Xuan Truong more recently declared that ‘our party is civilisation’. 159

Nguyen Phu Trong, a member of the politburo, grandiloquently described the party as ‘the intellect, the honour, the conscience of our time; the party is the embodiment of the wisdom, quality, the quintessence of the nation.’ 160

But once again, class cooperation is unsettling longstanding conventions. If the party protects—even creates—markets for entrepreneurs, it loses the legitimacy generated by protecting working class interests. Attempting to negate this impression, party theorists find imaginative, but ultimately unconvincing reasons why private enterprise in Vietnam is non-exploitative. For example, some theorists assert that private capital is ‘a waiting room for socialism’. 161 Party leaders have also attempted to generate uy tin by portraying party cadres as professional economic managers. As market outcomes displace socialist goals as a source of party legitimacy, it is uncertain how much longer revolutionary ideals will support party claims to moral credibility.

Representations of moral credibility have also been seriously tarnished by the involvement of party members in corruption scandals. Following doi moi reforms, the leadership sought to restore party legitimacy by revitalising party and state apparatus. Nguyen Van Linh, the party secretary, led a campaign that by 1991 had disciplined 127,000 party and state cadres


159 Tran Xuan Truong, 2002 ‘Our Party is Morality, Civilisation’, Tap Chi Cong San 3 February, tapchicongsan-online <www.tapchicongsan.org.vn>.


and expelled a further 78,200 members. Despite subsequent purification campaigns, systemic corruption remains the most serious threat to party legitimacy and claims to paramountcy.

The party has been more successful in generating legitimacy by appealing to patriotic and nationalist sentiments. Invoking the ancient preoccupation with building and defending the country, the Seventh Party Congress in 1991 nominated modernisation and industrialisation as national goals. As revolutionary imagery loses its potency the party increasingly seeks legitimacy by delivering and sharing economic prosperity. Party leaders promote reciprocal obligations in which the party takes care of the people and in return the people must obey their leaders. This thinking is demonstrated in a resolution issued by the Fifth Plenum of the Central Committee of the CPV in 2002: ‘when we protect the legitimate rights of the employees and employers of the private economy, the Party and the State have shown great care to them, and they will in turn come to realise their responsibility to comply with the Party and State policies.’

Party ideology has long emphasised complementarities between modern and traditional values. Invoking nostalgic visions of wholesome village traditions, writers portray the party as defender and definer of core social customs and values. Manufactured cultural values are reproduced in popular films like ‘Thuong Nho Dong Que’ (Our Beloved Countryside) depicting serene village culture and morals providing refuge from the ‘whirlwind of the market economy’. Party resolutions select from a wide range of ‘traditional’ values to reinvent the ‘national identity’ (ban sac dan toc) in a mixed-market economy. Traditional

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165 See e.g. Editorial, 1994 ‘For the Cause of Industrialising and Modernising the Country’ Nhan Dan 30 April, 1, 4, trans., FBIS East Asia Daily Report 94–128, 74–75; Vu Son Thuy, 1997 ‘New Year Discussion on Economic Issues’ Tuan Bao Quoc Te 26 February, 1, 2, trans., FBIS East Asia Daily Report 97–103.
166 See Resolution on Continuing Renovating Mechanism and Policies to Encourage and Facilitate Development of the Private Economy, CPV Central Committee, 2 March, 2002.
167 The literature is extensive in this area, but see Le Thi, 1999 The Role of the Family in the Formation of the Vietnamese Personality, The Gioi Publishers, Hanoi, 140–146; Pham Ngoc Quang, 1995 ‘Van Hoa Chinh Tri Voi Tu Cach La Mot Pham Tru Cua Chinh Tri Hoc’ (Cultural Politics as a Category of Politics) Nha Nuoc va Phap Luat (1) 14.

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values include ‘well-established’ historical values, especially patriotism, national independence; collective values that unite individuals, families, communities and the homeland; kindness, tolerance, appreciation of nghia tinh dao ly (compassion and reason), diligence, creativity and modesty.

In sum, the party attempts to legitimise its paramountcy over law by connecting moral values and Marxist-Leninist ideology. This is a dynamic process. The class struggle is giving way to nationalism, developmentalism and essentialised Confucian and traditional values as the main sources of party legitimacy. The moral values have changed, but not legitimacy through morality.

**Democratic centralism**

Contrasting with changes in the moral justification for party paramountcy, democratic centralism has remained virtually unaltered by nha nuoc phap quyen ideals. In an internal letter addressed to the Politburo in 1996, Prime Minister Vo Van Kiet complained that party leadership structures were no longer relevant to post-doí moi economic management. He argued that in the new economy the party should extend more autonomy to executive and juridical agencies, a decentralisation that would replace democratic centralism with constitutionally configured state structures—a procedural ‘rule of law’.

Most Politburo members joined to defeat his proposal. They feared that party’s leadership over the state (especially the army) would dissolve without democratic centralism. The 1996 Party Statute retained democratic centralism as the central organisational ideal.

According to longstanding party beliefs ‘democratic centralism is an inherent doctrine of the communist party, reflecting the particularities and characteristics of the working class, expressing the exigencies of the communist party and ensuring its strength and leadership.’

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171 Nguyen Phu Tong, 1990 *Nguyen Tac Tap Trung Dan Chu Phai Chang Da Loi Thoi?* (Is the Principle of Democratic Centralism Outdated?), Nha Xuat Ban Su Phat, Hanoi, 44. At a seminar conducted by the Editorial Board of *Tap Chi Cong San* (Communist Review) in 1990, papers given by the Chief Editor, Nguyen Dang Quang, referred exclusively to Marx and Lenin to explain the contemporary meaning of socialist democracy.
coordinate state structures and ‘manage’ (quan ly) the ‘socialist-oriented’ market (see chapter four). By blurring distinctions between political policy and law, the doctrine ultimately undermines the legal formalism promoted by nha nuoc phap quyen ideology.

Legal formalism
Chapter two argued that market forces and international treaty obligations are increasingly requiring the party and state to regulate society through laws and legal processes. There are mixed signals that party leaders are seeking legitimacy by portraying themselves as the protectors of legal formalism or even a procedural ‘rule of law’. The Prime Minister, for example, has invoked this imagery by calling for transparent laws and processes to regulated businesses. A fairer tax collection, regulation of market failures and credible dispute resolution mechanisms generate respect from groups engaged in the state-regulated economy such as SOEs, large private companies and foreign investors (see annex six). Politburo Resolution No. 8 NQ-TW on Forthcoming Principle Judicial Tasks 2002 addressed a much broader audience by directing state authorities to gave citizens more procedural protection from abuses in the criminal justice system (see chapter six). Party rhetoric, however, is routinely undermined by criminal trials orchestrated to show due process in action. In the Minh Phung corruption trial, for example, two hundred witnesses were called during a 67-day trial. More recently, in Nam Cam’s corruption trial, 155 defendants faced 24 different types of criminal charges in a trial that lasted more than two months. In both cases carefully stage-managed images showing exhaustive investigations and rigorously tested evidence were subverted when party prerogative powers favoured high-ranking party and state officials. Due process was further compromised in the Nam Phung trial.


172 Nguyen Phu Tong, 1990 supra. Also see Nguyen Phu Trong, 2004 supra 182-187

173 See Nguyen Nham, 1997 supra.

174 See Vo Chi Cong, 2002 ‘Thay Gi Ve Cong Tac To Chuc va Quan Ly Can Bo Qua Vu An Truong Van Cam’ (What can be Seen About Organising and Managing Cadres Through the Truong Van Cam Affair) Tap Chi Cong San on-line, September, <www.tapchicongsan.org.vn>.


Cam case when the procuracy and police attempted to intimidate Nam Cam’s lawyers with criminal charges.177

These cases illustrate the ongoing tension in the political-legal ideology between nha nuoc phap luat ideals such as legal formalism and a procedural ‘rule of law’ and party paramountcy. Party leaders have not accepted that party policy needs state legislation to acquire coercive force.178 As the following discussion suggests, movement towards a ‘rule of law’ encounters conflicting ideological objectives. Most party leaders believe that a procedural ‘rule of law’ will erode party power, but at least some within the party are convinced that ‘rule of law’ ideals (such as legal certainty, transparency and due process) are needed to deliver modernisation, industrialisation and ultimately economic prosperity.

**Economic regulation**

More than any other factor, the mixed-market economy has changed political-legal ideology in Vietnam. Following doi moi reforms in 1986, the state has increasingly borrowed foreign laws and procedures to regulate the mixed-market economy and secure membership of international trade agreements. Especially since the mid-1990s, the pace and depth of legal borrowing has increase as the state struggles to harmonise its domestic laws with market-access treaties such as the US-Vietnam Bilateral Trade Agreement (BTA) and WTO.

Legal harmonisation poses an ideological dilemma for a party that does not countenance inherent civil rights, much less a democratic liberal substantive ‘rule of law’. In order to attract foreign investment and benefit from market-access treaties, the party is under pressure to create a legal system that facilitates private commercial rights. But such a system will give entrepreneurs legal weapons that check party and state powers. This section explores the ideological struggles informing commercial law reforms.

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178 In 1996 party paramountcy was reaffirmed in the Party Statute—‘the Party rules and uses the State as a tool to manage society’. See Party Statute 1996, articles 41–43.
The ideological transition to a ‘socialist-oriented market economy’

After more than a decade of economic reforms, party theorists still rather confusingly refer to a ‘market economy following a socialist orientation’ (*nen kinh te thi truong theo dinh huong xa hoi chu nghia*). Vague terminology accommodates different views about the appropriate role for ‘state economic management’ and ownership in the economy. It is beyond our purposes to explore this complex literature, but several ideological themes emerge in writings about the transitional period (*thoi ky qua do*) to a mixed-market economy.

Especially after *doi moi* reforms began in 1986, party ideology incrementally changed from outright hostility to qualified support for private entrepreneurs. Article 15 of the 1992 Constitution formally recognised a mixed-market economy and ‘private capitalist’ production, but specified state ownership as the key economic sector. The Eighth Party Congress reaffirmed this formula in 1996 and publicly lauded the positive economic contributions made by the private sector. By the Ninth Party Congress in 2001, party leaders ‘encouraged the extensive development of the private capitalist economic sector’. The Prime Minister, Phan Van Khai, recently raised the ideological status of private enterprises further by telling entrepreneurs that ‘your success in the marketplace is no less glorious than a victory on the battlefield’. Yet support for private sector development does not necessarily signal movement away from socialist legality and ‘state economic management’. Some commentators argue that imported property, contract and company law rights are permitted only insofar as they support party socioeconomic policies. Viewed from this perspective, private economic rights are valued for stimulating private production and developing the national economy,

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179 See Luu Ha Vi, 1997 *supra* 1–4; Nguyen Phu Trong, 1994b ‘Market Economy and the Leadership of Role of the Party’ *Tap Chi Cong San* (1) 29–33. Some commentators thought that private capital, market price mechanisms and SOE privatisation are ‘a waiting room for socialism’ and ‘the marriage of a private sector and a “socialist orientation” is one of convenience, not true love.’
but they have not altered key ideological preferences for state ownership and ‘state economic management’.

Three ideals are struggling to dominate ideological approaches to economic regulation. They are neo-liberal economic regulation, international legal harmonisation and ‘state economic management’.

**Neo-liberal legalism**

Proponents of neo-liberal legalism draw from Hayek the notion that markets require facilitative legislative frameworks administered by reactive state institutions such as courts—a procedural rule of law. This regulatory ideal limits state intervention to correcting market pathologies and deregulating state licensing. Neo-liberal legalism is clearly evident in legal reforms proposed by the Comprehensive Legal Needs Assessment Report:

- Citizens may do everything not expressly prohibited by law.
- The ‘state must not do anything, except that which is expressly permitted by law’.
- Citizens should have increased powers to ‘know, discuss and check’ state power.

There is little discernible support for neo-liberal economic ideas in Vietnamese legal literature. A small number of legal academics contend that ‘state economic management’ compromises liberal market rights such as freedom to conduct authorised business activities. Though they remain skeptical as to whether sweeping economic deregulation is an appropriate economic model for a poor country with increasing economic inequality.

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184 This view is most strongly advocated by some economists working in CIEM. Interviews Nguyen Dinh Cuong, Director of the Enterprise Department, CIEM, July 2002, March 2003; Also see Le Dang Doanh, 1999 ‘Enterprise Law-A Must for Further Development of Multi-Sectorial Economy’ 5 *Vietnam Law and Legal Forum* (56) 11–13.

Many writers support a Marxist or Keynesian view that states should proactively redistribute wealth according to need. They agree with neoliberalism that facilitative law encourages market stability and predictability, but believe that economic growth requires ‘Rhine capitalism’ combined with proactive state economic regulation. A balance is struck between these conflicting regulatory ideals by giving ‘state economic management’ an ongoing role in controlling large state-owned enterprises and micro-managing the private sector, while promoting legal rights to protect entrepreneurs against state abuses. The unifying theme in these economic models is support for a procedural ‘rule of law’ that protects private commercial rights.

**International legal harmonisation**

International legal harmonisation has profoundly influenced legal thinking. By the mid-1980s, party leaders concluded that central planning, trade with Eastern bloc countries and import replacement strategies could not produce the economic growth experienced by Vietnam’s neighbours. In 1986 the party adopted an ‘open door’ (mở cửa) policy that cautiously opened the economy to foreign trade and investment from capitalist countries.

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186 Martin Gainsborough argues that neo-liberal economic ideas have not deeply penetrated the thinking of senior state officials in Ho Chi Minh City—the leaders commonly regarded as the most pro-market in Vietnam. See Martin Gainsborough, 2004 ‘Ho Chi Minh City’s Post-1975 Political Elite: Continuity and Change in Background and Belief’ in Benedict J. Tria Kerkvliet and David Marr eds., Beyond Hanoi: Local Government in Vietnam, Institute of Southeast Asian Studies, Singapore, 271-277.


More recently, the Politburo issued Resolution No. 7-NQ/TW on International Economic Integration 2001, which instructed the party and state to ‘initiate international economic integration’ to expand markets, import capital and technology and advance industrialisation and modernisation.\(^{190}\)

We saw in chapter two that legal borrowing from Western countries began soon after the Sixth Party Congress. But it was not until the Vietnamese government began preparing to enter the WTO in 1995 that the initial caution gave way to large-scale importation.\(^{191}\) Government officials now acknowledge that membership of market-access treaties requires Vietnam to harmonise its commercial legal system with investment and trading rules prevailing among member countries.\(^{192}\) Treaty accession rules place Vietnamese lawmakers under pressure to not only harmonise substantive law, but also create a procedural version of the ‘rule of law’ that makes private commercial rights credible.

Most government sources uncritically promote international economic integration.\(^{193}\) Numerous studies purporting to show that integration has improved domestic economic growth and reduced poverty are used by the government to argue that any loss of national

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\(^{190}\) Also see CPV Central Committee, 2001 ‘2001-2010 Socio-Economic Development Strategy’, 9\(^{th}\) National Party Congress, chapter IV, part 4.

\(^{191}\) Tran Thu Hang, 1999 ‘Vietnam’s Trade in the Course of International Integration’ *Vietnamese Studies* (2) 121. Entry into a bilateral trade agreement (BTA) with the United States in 2001 in some ways overshadowed WTO entry, which is currently scheduled for 2006. The BTA contained most WTO entry conditions and some additional provisions requiring Vietnam to change institutional structures to improve administrative review over ‘state economic management’ and broaden market access for foreign legal practitioners. See Resolution No. 48/2001/QH10 on the Ratification of the Agreement between the Socialist Republic of Vietnam and the United States of America on Trade Relations, Annex F.


> The concept of proactive international economic integration must be instilled in the development and completion of the legal system of Vietnam in all fields, from law making and implementation, to legal education and dissemination. Vietnam’s legal system should not only reflect the specific features of this country, but also must meet international standards in order to be able to help Vietnam perform her international commitments based on the principles of national independence, self-determination and socialist orientation.

sovereignty caused by legal harmonisation is more than offset by the economic benefits.\(^{194}\)

In tandem with this ideological campaign, some government leaders entrench market liberalisations in treaty provisions that are not easily unwound by those who continue to oppose market reforms.\(^{195}\)

Contradicting the government’s neo-liberal rhetoric, some party members attribute legal harmonisation to economic necessity rather than an ideological shift towards free trade or the ‘rule of law’. Nguyen Tan Dung, a Politburo member, cautions that harmonisation and globalisation will erode national sovereignty.\(^{196}\) Foreign competition may compromise the leading role of SOEs as ‘an important managerial force and macro instrument for the state to orient and regulate the economy’.\(^{197}\) Such views are heavily coloured by nationalism and deeply ingrained notions of ‘self-sufficiency’ (phat huy noi luc: literally to promote internal strengths). Those advocating self-reliance ultimately believe that the erosion of national sovereignty outweighs the putative benefits of international trade and investment.\(^{198}\)

Those arguing from this nationalistic standpoint, call for the state to reassert its sovereignty over legal harmonisation. They oppose attempts to introduce a procedural rule of law, because legal accountability may undermine the party’s prerogative powers to ensure that laws reflect the Vietnamese ‘national identity’. Party paramountcy safeguards the law and prevents the legal system from becoming a dependent variable in a globalised legal system (see chapter four).


\(^{195}\) Speech by Vo Tri Thanh, Director, Department of Policy Analysis and Developmental Research, Central Institute of Economic Management, ‘Vietnam Update Conference, Australian National University, Canberra, December 2003.

\(^{196}\) Nguyen Tan Dung, 2002 ‘Building a Socialist-Oriented Independent and Sovereign Economy’, \textit{Quan Doi Nhan Dan} 13 September, 3; reprinted in 9 \textit{Vietnam Law and Legal Forum} (98) 18.

\(^{197}\) Nguyen Tan Dung, 2002 \textit{supra} 20.

Despite these broadly based concerns, international legal harmonisation has been a powerful force in overcoming ideological resistance to imported rights-based law. Qualified party support for international harmonisation was put beyond doubt by the Legal Sector Development Strategy, which prioritised the legislative reforms required to comply with the BTA and WTO.\(^{199}\)

**State economic management**

‘State economic management’ still dominates party ideology.\(^{200}\) Reconfigured from its origins in the socialist command economy, the doctrine now stresses the compatibility between socialism and mixed-market economies—‘commodity production is not the opposite of socialism’.\(^{201}\) It has even moderated its antipathy to private entrepreneurs. But at the same time the Fifth Plenum of the Party Central Committee in 2002 endorsed private sector development, it also reconfirmed the need to place the ‘socialist-oriented market economy under state management and senior state officials’.\(^{202}\)

In ideological terms this means that private commercial rights should remain ‘under state management’.\(^{203}\) "‘State economic management” is needed to ensure that resource allocation complies with party socioeconomic objectives … It ensures stable growth and efficiency for the economy, particularly social equality and progress. No one else but the state can reduce the gap between the rich and poor, the towns and the countryside, industry and agriculture and among regions in the country."\(^{204}\) Party leaders also support ‘state economic management’ to ensure that entrepreneurs do not accumulate too much wealth in

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\(^{201}\) Vu Son Thuy, 1997 ‘Interview With Politburo Standing Board Member Nguyen Tan Dung, Head of the CPV Central Committee Economic Department: New Year Discussion on Economic Issues’, Hanoi Tuan Quoc Te 16 February, 1-2; Pham Xuan Nam, 2002 supra 32–34.


\(^{204}\) See Mai Huu Thuc, 2001 supra 24.
the mixed-market economy. In short, the party supports the use of extra-legal or prerogative powers countenanced by ‘state economic management’, to augment the taxes and macroeconomic levers that control wealth distribution.

The impact of market ideals on the political-legal ideology

Two antagonistic legal ideologies co-exist within party discourse. Some party leaders support a narrow a procedural ‘rule of law’ that implicitly contradicts the socialist instrumental thinking underlying ‘state economic management’. Yet the notion that laws should circumscribe state power has not broadened into a general principle that constrains party paramountcy.

It is intriguing to speculate why some party leaders are prepared to countenance a limited procedural ‘rule of law’ in the economic arena, while remaining implacably opposed to substantive civil and democratic rights that could challenge party paramountcy. Kanishka Jayasuriya labels this phenomena ‘economic constitutionalism’. He notes that elsewhere in South East Asia (e.g. Singapore and Malaysia) illiberal rule and a procedural rule of law are ideologically reconcilable—even symbiotically beneficial. The rule of law regularises commerce and centralises power in state bodies, while party prerogative powers depoliticise the commercial arena by limiting special interest groups hostile to economic producers (e.g. consumer associations taking product liability actions).

Even ‘economic constitutionalism’ faces considerable hurdles in shaping the dominant ideology in Vietnam. More than two decades after doi moi reforms began, most within the party agree that laws should regularise private commercial transactions, but very few are prepared to endorse the ‘rule of law’ notion that entrepreneurs are permitted to do anything not expressly prohibited by law. The dominant view is that laws do not have an

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205 Some Vietnamese research institutions and mass organisations were commissioned in 1999 by the Central Party Committee to determine whether entrepreneurs were developing into a political class. They concluded that a separate class was developing. But government regulators and SOEs that dominate key economic sectors could control its spread. Interview Vu Duy Thai, Vice Chairman & Secretary, The Hanoi Associations of Industry and Commerce, (member of the Central Committee of the Fatherland Front) Hanoi, April 1999; September 2000.

206 Some commentators argue that party leaders stand to benfit from legal rights that protect property rights. Others suggest that party leaders are concerned that once ‘rule of law’ ideas are established for commercial transactions, they could migrate into the political arena. Interview officials from the Office of the National Assembly, November 2002, March 2004, Hanoi.

207 See Kanishka Jayasuriya, 1999 ‘The Rule of Law and Governance in the East Asian State’ 1 The Australian Journal of Asian Law (2) 107, 119–121. Also see Surain Subramaniam, 2001 ‘The Dual Narrative
autonomous role beyond party policy. As a consequence, laws are subordinated to the
prerogative powers underlying 'state economic management' and party paramountcy.
Contests between the 'rule of law' and 'state economic management' profoundly affect the
way the party and state regulate the economy. For example, decades after commercial
rights were introduced it is still unclear in what circumstances (if any) private rights prevail
over the 'state benefit' (loi ich cua nha nuoc). This debate is taken up in subsequent
chapters dealing with the selection and implementation of foreign commercial rights.

Mapping the dominant political-legal ideology

Poulantzas's contention that different ideological regions compete to form the dominant
ideology sits comfortably with Vietnam's contested ideological landscape. Four
ideological regions—socialist legality, *nha nuoc phap quyen*, democratic centralism and
collective (or people's) mastery—strive for political and legal stability, but differ radically
in the steps they prescribe to realise this common objective.

The shift in party imagery away from class theory towards developmentalism and
international legal harmonisation opened ideological space for new legal concepts. Rather
then directly confronting deeply entrenched socialist ideals, reform-minded party and state
leaders smuggled 'rule of law' ideas into *nha nuoc phap quyen* ideology. They also
strategically used legal harmonisation treaties to entrench private commercial rights and
backed legal reforms to create institutions that are capable of delivering stable, authoritative
and compulsory law; equality before the law; and the use of law to constrain and supervise
legal enforcement and administration. Under their guidance a procedural 'rule of law' is
making inroads into socialist legality, which for decades legitimised a ritual observance of
legal formalism. Public affirmations of the 'rule of law' are no doubt also intended to
secure support from foreign and domestic investors.

The 'rule of law' is encountering strong ideological resistance from central and especially
provincial party and state officials. The central issue is whether the *nha nuoc phap quyen*

of "Good Governance": Lessons for Understanding Political and Cultural Change in Malaysia and Singapore’
23 Contemporary Southeast Asia (1) 65.
209 See Yves Dezalay and Bryant Garth, 2001 The Import and Export of Law and Legal Institutions:
International Strategies in National Palace Wars', in David Nelken and Johannes Feest eds., *Adapting Legal
and neo-liberal ideology can displace ‘state economic management’ thinking that is deployed to oppose deregulatory reforms (see chapter six). Rule of law ideas compete with party paramountcy, nationalism and rent seeking in making private commercial rights appear plausible and desirable to state officials. This task is especially difficult where the legislative framework is largely constituted by imported rules, which to many state officials appear alien and imposed.

An ancillary question is whether ‘rule of law’ ideals unleashed in the economic arena will eventually spill over to constrain party and state power in other social realms. A runaway ‘rule of law’ seems unlikely, since procedural versions of the rule of law promote transactional certainty but lack a transcendent political morality that is capable of ordering other social relationships. The Hayekian notion that contractual relationships generate human dignity is unlikely to resonate in Vietnamese communitarian society. Kanishka Jayasuriya’s ‘economic constitutionalism’ suggests a more probable ideological trajectory where illiberal rule and a procedural rule of law are ideologically compatible.

In contrast to rapid changes in economic legal thinking, there has been glacial progress towards a ‘rule of law’ in the organisational principles (collective mastery and especially democratic centralism) that underpin party paramountcy. One possible explanation for this uneven ideological change is that epistemological barriers have isolated legal thinking from underlying social values and even geopolitical considerations. Party theorists and elite lawyers sustained socialist legality in a semi-autonomous ideological discourse conducted behind the walls of academic institutions and superior courts. As a mere surface adaptation, socialist legality lacked political and social roots and changed relatively quickly when elite lawyers were exposed to ‘rule of law’ ideology.

Socialist organisational principles (democratic centralism and collective mastery), on the other hand, were woven into the fabric of revolutionary morality. As such they were directly responsible for legitimising and organising party paramountcy. Party leaders only feel safe in experimenting with new ideologies where ‘the CPV remains the political force leading the whole system … and reforms of the political system did not touch the decisive point that the CPV has the sole leading role.’

Unwavering support for party paramountcy has prevented ‘rule of law’ ideals from penetrating collective mastery and socialist democracy ideology. Official publications

\[210\] National Administration School, 1991 *supra* 11–19.

154
promote political stability and economic growth over democratic representation and civil liberties. Movement towards representative democracy seems unlikely unless the party values and supports democratic pluralism. Or more plausibly, political and social stresses convince party leaders that democratic processes produce the most effective outcomes to intractable social problems (discussed in chapter seven).

Chapter seven argues that without support from special interest groups outside the party and state orbit, rule of law ideology lacks persuasive power. As Roberto Unger showed, law’s relative autonomy from political morality was only possible because democratic liberal societies recognised the voluntary association of equal, rational individuals willing to confer minimum powers on states to preserve basic liberties. Ideological hegemony is generated and reproduced by public discourse sponsored not only by the state, but also by professional associations, media, businesses, religious organisations and trade unions. Vietnam does not necessarily require the same configuration of non-state interests to legitimise the ‘rule of law’, but it does require relatively unmediated forums in which non-state voices can make imported commercial laws appear plausible and natural.

Conclusion

An all-encompassing ideology, state organisational structures and economic system accompanied legal borrowing from the Soviet Union and China half a century ago. Legal ideals operated in a socialist context that gave them meaning and legitimacy. In contrast, Western commercial laws have been imported with little of the ideology and institutional trappings of a capitalist system. To make matters worse, pre-existing socialist legality, democratic centralism and collective mastery ideals are antagonistic to imported commercial rights and the ‘rule of law’.

The rapid entry of imported commercial laws into Vietnam suggests, however, that conflicting ideologies do not inevitably constrain legal borrowing. During the transitional

period the party is preserving ideals (such as party paramountcy, democratic centralism and 'state economic management') that give coherence and stability to existing institutional structures. At the same time, they are experimenting with new nha nuoc phap quyen ideas to facilitate international legal harmonisation and to regulate the mixed-market economy. The resulting ideological tensions do not necessarily inhibit legal borrowing. In fact some degree of ideological confusion and discord may actually create space for imported ideas. Provided the dominant ideological regions do not actively block imported ideas from entering institutional thinking, the lack of a congruent ideology does not prevent legal borrowing. The dominant ideology admits a range of conflicting and incompatible ideals.

Western liberal experience suggests that commercial laws perform best in a 'rule of law' environment that stabilises economic relations, makes officials accountable and efficiently resolves disputes. Nevertheless there are different levels of commitment to ideology. The rule of law is not an all-or-nothing concept and may eventually evolve into a more fully conceptualised form in Vietnam. It is argued in subsequent chapters that the social demand for law strongly determines whether imported laws find ideological support. Equally, democratic liberal versions of the 'rule of law' are not necessarily the only or even the best ways to facilitate commercial development in Vietnam.

The discussion suggests that like previous cycles of legal borrowing, imported commercial legal ideas have rapidly entered, but not dominated, the political-legal ideology. It remains unclear to what extent 'rule of law' ideals remain mere ideas or have taken root in the discourses shaping institutional and social thinking. Put differently, does the dominant legal ideology make a procedural 'rule of law' (at least in the commercial arena) appear natural and desirable to party and state officials? A more textured understanding of legal thinking needs to look beyond surface ideas to consider the discourses that generate, maintain and transmit ideology. To this end, the next three chapters examine how party and state institutions select and implement foreign commercial laws.
Chapter Four
Party Leadership: The Separation of Party and State

Introduction

The discussion in chapter three about the ‘rule of law’ and Vietnamese political-legal ideology, assessed legal transferability from a reified perspective. Ideology comprehends law as a depersonalised ‘thing’ or ‘it’. This approach is useful in comparing broad state and societal ideals (or aspirations), but conceals power structures and organisational practices shaping the formulation and implementation of law.

The second working postulate, discussed in chapter one, deepens our understanding of legal borrowing by suggesting that the ways legislators, bureaucrats and judges use state power influences the meanings given to legal transplants. As laws transfer among different power-distribution structures they acquire different meanings. For this reason, Kahn-Freund cautioned anyone transferring Western laws to communist regimes to search for functionally equivalent legal structures and processes.

This chapter takes up his recommendation. It explores how (if at all) ‘party leadership’ (su laanh dao cua dang) over state institutions in Vietnam affects legal transplantation. The discussion builds on the theory considered in chapter one, by explaining how discourse analysis can evaluate the different narratives that shape the selection and implementation of foreign laws. It then briefly contrasts state organisational ideals in Western liberal counties with party leadership over state structures in Vietnam. Bound up in this inquiry is the perplexing question whether the party, more than the state, is the main location of lawmaking power in Vietnam.

The discussion next evaluates progress towards separating the function and roles of party and state in Vietnam. It concludes that where party policy is in sympathy with imported commercial norms, borrowed law is likely to move rapidly into the state system. But polycentric power structures in the party and state undermine legal certainty, transparency and movement towards a procedural ‘rule of law’ that could preserve imported commercial rights.

Subsequent chapters apply these findings by asking the vital questions: how (if at all) ‘party leadership’ influences the importation of law? Is the separation of party and state a
necessary precondition for commercial rights-based laws and a procedural rule of law?
How does the substitution of party policy for legal norms change the meaning of imported laws?

**Discourse analysis**

A structural comparison between Western liberal and Vietnamese state institutions tells us little about differences in the formulation and implementation of law. Everywhere modern states have similar institutional configurations such as legislatures, executives and courts. What makes state institutions distinctive are the mentalities (or epistemologies) and habits residing inside and outside formal structures (see chapter one). Institutional epistemologies guide the distribution of state power.¹ They order the institutional assumptions about the rationality, efficiency and merit of foreign laws.

Chapter one showed that discourse analysis offers a promising framework for evaluating epistemological assumptions. It has the potential to assist our understanding of legal borrowing in three respects. First, it provides a way of assessing whether communication conveys meaning. Second, it locates legal meanings in ‘interpretive communities’ that share common epistemological assumptions about the meaning and function of law. Three, it shows that legal meanings are never closed because they change to reflect the strategies of state and non-state parties. These interpretive tools are used to open the discussion to the possibility that foreign and local discourses may shape legal transplants in different ways.

**Communicating meaning**

According to ‘semi-autonomous’ discourse analysis discussed in chapter one, social groups think primarily, though not exclusively, through specialised ‘modes’ of thought. Groups interpret law according to the ‘discourse mode’ that is uppermost in people’s minds. In ‘legal mode’, people primarily interpret issues according to their legal validity.² In ‘political

mode' groups largely perceive laws in terms of power—do they advance or hinder specific
goals? Groups thinking in 'economic mode' generally view commercial laws as imposing a
cost or benefit, whereas groups pondering laws in 'moral mode' usually think in terms of
right and wrong.

This technique enables us to assess how effectively ideas have been communicated between
imported regulatory and domestic regulatory conversations. Foreign donors describing legal
transplants in 'legal mode', for example, are unlikely to successfully communicate Western
liberal legal concepts to Vietnamese regulators primarily thinking in 'political' mode.
Effective transplantation requires compatible epistemological grammar.

In reality few conversations are conducted entirely in one 'discourse mode'. For example,
lawmakers discussing imported law may in the same conversation swap from 'legal mode'
to 'political mode' to 'economic mode'. Most discourse theorists recognise this possibility
and reject the functional differentiation of society into 'discourse modes' advocated in
Luhmann's autopoiesis theory (see chapter one). They argue instead that discourse
analysis provides a technique that dissects conversations and ascertains whether
interlocutors share common understandings about the nature of legal problems and the most
appropriate legal solutions. It is important to add that discourse analysis must be flexibly
and reflectively applied to ensure that Western preoccupations with legal modes of thought
do not obscure the way domestic conversations use non-legal precepts to subtly change the
meanings given to imported laws.

Effective communication not only requires a shared epistemological grammar, but also
relatively unmediated dialogue. Since laws require people or corporations to modify their
behaviour, preference conversion is unlikely in mediated or controlled exchanges.

According to Habermas, dialogue is indispensable for pragmatic reasons. He insists that
'preference conversion' is only generated where a 'real' argument (involving real choices)

3 Legal, economic and political modes differ from moral discourse, since they tend to regulate actions not
mental states. Moral discourse cuts across other discourse modes, justifying consent and compliance. This
distinction is based on Kant's division between law and morality. Law cannot be brought about by law. See
Studies (2) 205-206.


5 People misinterpret other people's interests in their own favour and effective discourse generally requires
the presence of those involved. See Frank I. Michelman, 1996 'Book Review: Between Fact and Norms' 93
Habermas's Legal Theory' 17 Cardozo Law Review 883, 890-891.
is generated and those affected participate cooperatively. Unqualified traditions, metaphysical beliefs and ideology compromise consensus. Effective communication is most likely in unmediated, decentralised and face-to-face exchanges. Though agreeing there are qualitative differences between communication conducted in formal parliamentary debates and gossip among friends, discourse theorists disagree about how to assess the importance of context. This complex debate is beyond our purposes, but it is worth noting the literature mentions a wide range of effective contexts, such as party and state discursive fora, public writing and speeches and even emotional discourse. The question whether these contextual conditions assist ‘preference convergence’ in Vietnam is considered in subsequent chapters.

Interpretive communities

Although there are general levels of shared knowledge within particular societies, major differences can exist regarding the distribution of knowledge. Peter Berger and Tomas Luckmann characterise this fragmentation of knowledge as ‘socially segregated subuniverses of meaning’. Discourse analysis also describes attitudes to law from the standpoint of common responses on the part of institutions or groups. There is a stock of knowledge and epistemologies commonly available to groups that collectively guide their responses. Social groups bring different bodies of knowledge and understandings to the

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6 Studies of effective organisational change have shown that direct communication in open and unconstrained fora, enhances the exchange of values. See John M. Orebell et. al., 1988 ‘Explaining Discussion-Induced Cooperation’ 54 Journal of Personality and Social Psychology 811, 817-818; Edger Schein, 1988 Process Consultation, Addison-Wesley, Reading, Mass., 72-73.
interpretation of law. Common responses to law suggest that certain groups function as interpretive or epistemological communities.

There is no fixed definition about what constitutes interpretive communities. Most theorists agree, however, that members of interpretive communities share both common epistemological and tacit understandings about the meaning of law. According to Alfred Schutz most assertions and propositions that constitute this knowledge are ‘just taken for granted until further notice’. With the possible exception of certain religious or tribal groups, most interpretive communities are rather heterogeneous in their use of language and ideas to construct legal meanings. For example, legal professions in Western liberal democracies exhibit diverse and highly contested views. Rather than identifying interpretive communities by their level of mutuality, theorists believe it makes more sense to mark out boundaries between communities. Factors that differentiate communities include different validity claims, epistemologies and tacit understandings. This is a negative definition that assesses differences in the dominant ‘modes’ of thinking between those inside and outside interpretive communities.

Psychological studies also suggest that individuals are not the only or even most important sites of legal cognition. Some demonstrate that group interaction (socialisation) strongly mediates individual psychological perceptions, and it is these shared understandings that form social and institutional structures. Cultural studies similarly conclude that law primarily operates by influencing shared modes of thought (epistemologies), rather than acting on individual conduct in specific instances. In other words, social thought is not the sum total of all individual thought, society also thinks through ‘interpretive communities’.

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16 The literature is vast but see Susan Silby, 17 ‘Making a Place for a Cultural Analysis of Law’ 17 Law and Social Inquirer 39, 41.
Discursive strategies

‘Interpretivist’ approaches to discourse analysis stress that the meaning of language is not fixed, it varies according to the context in which it is used.\(^\text{18}\) Put differently, the meaning of legal ideas resides in their use. Social actors can deploy language and interpretations in strategic ways. They may unknowingly or deliberately invest borrowed ideas with new meanings to secure particular advantages. This strategic dimension is highly relevant to legal transplantation, since it highlights the role played by state institutions, international organisations, lawyers and entrepreneurs in shaping the meaning of law. Dezalay and Garth claim the legal transfers show ‘the triumph of personal connections’.\(^\text{19}\) To understand how borrowed legal ideas change legal meaning, it is necessary to consider the strategies and interpretive positions adopted by legal officials and pressure groups seeking to influence the meaning of borrowed laws (see chapter seven).

The relevance of discourse analysis to Vietnam

In using discourse analysis as an interpretive tool, cultural differences between Western and Vietnamese communication must be acknowledged. Without this adjustment, discourse analysis simply projects Western assumptions about ‘rational’ discourse onto a radically different socio-legal landscape.

Discourse analysis minimizes (without eliminating) cultural attribution, because it focuses attention on Vietnamese understandings about law. As a preliminary assessment, the study posits that the range of discourse modes does not change significantly across cultures. Like Westerners, Vietnamese deliberate law from political, legal, moral and economic perspectives. What differs is the importance attached to particular narratives about law and the way different narratives borrow ideas from each other. For example, subsequent chapters show that legal modes of thought are much more closely allied to political ideas in Vietnam than is the case (or is acknowledged) in Western legal discourse. One possible consequence explored in this chapter, is that the importance attached in Western discourse to separating legal and political modes of thought may not easily transplant into Vietnam.


It is likely that face-to-face communication is more persuasive than written sources in Vietnam, and that deeply engrained ideologies and religious beliefs may block the exchange of ideas. It is less certain that Western distinctions between formal and informal, and equal and unequal communication carry the same epistemological meanings in Vietnam. Subsequent chapters explore situations where effective communication takes place in highly asymmetric fora.

Finally, since discourse analysis is used as research tool rather than an explanatory model, it is applied in different ways throughout this study. In this chapter it is used to trace the different views shaping party 'leadership' and how this organisational principle affects legal borrowing. In later chapters it is deployed to understand how official and unofficial (outside the party and state) discourses shape the selection and implementation of foreign laws.

Before considering how ‘party leadership’ affects legal borrowing, which is the central theme in this chapter, it is necessary to set the stage by briefly reviewing the structural machinery of the party and state.

**Party and state institutional overview**

Vietnam has a unitary state system comprising five arms: National Assembly, President, Government (executive), People’s Courts and People’s Procuracy. As a one party state, the Communist Party of Vietnam (CPV) (*Dang Cong San Vietnam*) both overarches and infiltrates state institutions. Though the state is not autonomous from the party, as we shall see, the party is not monolithic and is itself influenced by state organs. This section briefly introduces the main party and state organs (for a more nuanced discussion see annex four).

Any discussion about the state makes little sense without first discussing the role of the CPV, which is the ‘force leading the state and society’. The party is led by the politburo, which functions like an executive committee deciding important policy and legal issues on a day-to-day basis. The central committee formulates long-term socio-economic plans during its two or three plenary meetings each year. In addition, the party has an extensive organisational network mirroring the four state levels: central, provincial/city, district and

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20 Constitution 1992, article 4.
ward/village. As we shall see, behind the facade of unanimity, polycentric power structures generate considerable dissent that must be contained within party organs. Mass organisations have historically been the vehicles used by the party to mobilise public support for socioeconomic campaigns. The Fatherland Front (Mat Tran To Quoc), which acts as an umbrella for other mass organisations, was formed in 1955 to replace the Vietnam National United Front (Mat Dan Toch Thong Nhat). Mass organisations are difficult to categorise according to conventional understandings about state power, since they are not part of civil society, or entirely under state control. They are described in the 1992 Constitution as 'the political base of the people’s administration ... that encourage the people to exercise their rights as masters.' Although some commentators believe mass organisations have traditionally existed as ‘instruments of top-down control, despite playing lip service to being representative of group interests'. It is argued below that some mass organisations are changing their traditional Leninist functions and playing a more state corporatist role.

State power is divided in Vietnam according to the borrowed Soviet ‘concentration-of-power’ (tap trung quyen luc) doctrine that vests ultimate state power in the National Assembly (Quoc Hoi), Vietnam’s supreme legislature. Its importance as a legislative body has undoubtedly increased over the last decade, though real power resides with the government.

The government (Chinh Phu) is constitutionally divided among central (ministries) and local executive bodies (provincial/city, district and village people’s committees). Central authorities devolve (phan bo) power through branch (nganh) and vertical (doc) power

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23 Tran Thi Thu Trang, 2002 ‘Politics in Rural Vietnam: Local Democracy or Local Autocracy?’ unpublished paper, Hanoi, November, 12
24 ‘Concentration of power’ (tap trung quyen luc) is more generally termed ‘concentration of democracy’ (tap trung dan chu) in contemporary legal literature. ‘Quyen luc’ (power) is derived from a Chinese word associated with the government class and became associated in the people’s minds with the upper-class or mandarin powers. Powers centralised in the NA far exceed those countenanced by the Rousseian tradition of parliamentary domination of the state. For example, the Constitution gives the NA powers to abrogate decisions made by central-level state organs (including the Standing Committee of the National Assembly, president, prime minister, government, Supreme People’s Court and People’s Procuracy), where they contravene the Constitution and/or superior laws. Interview Dao Tri Uc, Director Institute of State and Law, Hanoi, February 1998. Also see Vietnamese Constitution 1992, articles 12, 118, 124; Dao Tri Uc, 2001 ‘Xay Dung Nha Nuoc Phap Quyen Xa Hoi Chu Nghia Su Lanh Dao Cua Dang’ (Building Up the Law-Based-State Under the Leadership of the Communist Party) Nha Nuoc va Phap Luat 3-4.
sharing arrangements. Branches function as specialised departments attached to people’s committee’s (uy ban nhan dan) at provincial/city and district/village levels. Some central agencies, such as the police and taxation department have by-passed local governments and operate directly through their own vertically controlled bodies.

Courts are organised to reflect the three main levels of the unitary state. The Supreme People’s Court (Toa An Nhan Dan Toi Cao) is responsible for judicial work (cong tac xet xu), hearing appeals and supervising and reviewing decisions made by provincial courts. It is led by a president and several vice presidents and consists of the Council of Judges (the highest adjudication body) and three Appeals Courts (Toa Thuc Tham). Judges are organised into chambers of courts that specialise in criminal, civil, economic, military and administrative law. At the second hierarchical level, provincial/city courts hear first instance and appellate cases. Over six hundred district level courts comprise the lowest level in the court system, hearing first instance cases in rural huyen districts or urban districts (quan).

The people’s procuracy (kiem sat nhan dan) was established in Vietnam in 1960 as the fifth arm of the state. The Supreme Procuracy vertically controls provincial/city and district/village level branches. Blurring policing and juridical functions, procurators investigate and prosecute criminal violations in the courts, while supervising the legality and enforcement of court decisions. Finally, the president (Chu Tich Nuoc) is the ceremonial head of state, and exercises limited legislative and political powers.

Comparing power-distribution patterns

Many foreign writers assume that the preference convergence required to localise imported laws in Vietnam is most likely to occur in constitutionally determined relationships such as popularly elected legislators, robust judiciaries, the ‘separation of powers’ and effective

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legal constraints to political power. In short, legal transplantation requires democratic institutions and the ‘rule of law’. On most measures, constitutional configurations in Vietnam differ from the democratic liberal template. As we shall see in subsequent chapters, citizens have little say over who stands for elections in the National Assembly (NA), and delegates rarely share sympathies with their constituents and only peripherally influence the way the country is run. Judicial enforcement of statutory rights is unpredictable and frequently compromised by extra-legal political interventions. Moreover, as this chapter argues, the Communist Party of Vietnam (CPV) has only conditionally accepted constitutional constraints to its political power. This critique implies that conditions in Vietnam do not support a democratic liberal ‘rule of law’. It does not explain, however, whether borrowed Western commercial law requires a democratic liberal ‘rule of law’ to function. The wide range of constitutional configurations in Western and Asian countries implies that capitalism can function under many different versions of the ‘rule of law’. Institutions and processes that are unrecognisable as democratic liberal structures may nonetheless support imported commercial legal rights. This chapter explores whether ‘party leadership’ (su lanh cua dang) in Vietnam can accommodate a ‘rule of law’ that allows imported commercial laws to protect and maintain capitalist property rights. In a rapidly changing society, we need to understand the transformative capacity for party and state institutions to regulate a rights-based commercial legal system. Discourse analysis assists our investigation by illuminating the different mentalities and approaches to institutional change.

Separating party and state
In Kahn-Freund’s estimation, political domination of state institutions in communist countries presented a formidable barrier to Western legal transplants (see chapter one). He

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28 It is important not to conflate legal development with linear progress towards a paradigmatic democratic liberal state. See Michael William Dowdle, 2000 ‘Preserving Indigenous Paradigms in an Age of Globalization: Pragmatic Strategies for the Development of Clinical Legal Aid in China’ 24 Fordham International Legal Journal 56.

29 For a discussion about Western constitutionalism see Robert M. Cover, 1982 ‘The Origins of Judicial Activism in the Protection of Minorities’ 9 Yale Law Journal 1287. Some argue that rules are not as important
thought that party 'leadership' over state institutions undermined the neutrality required for a 'rule of law' society. If political processes allowed one group to dominate, then the meaning of legal rules would invariably reinforce their interests.

This section examines the ways party leadership over the state (party paramountcy) in Vietnam influences transplanted commercial law. This investigation commences by contrasting the separation of party and state in Western countries with reforms in Vietnam designed to clarify party and state roles.

**Democratic liberalism and the separation of party and state**

According to democratic liberal theory the separation of party and state is a central pillar of the rule of law. Depoliticised, neutral states are considered necessary to impartially regulate different values and ways of life. Naturally, democratic liberal assumptions about the separation of party and state are not always observed in societies that formally claim to uphold them. From the American Realist Movement in the 1930s onwards, the possibility, even desirability of politically neutral states was subjected to considerable skepticism. Critics showed that bureaucrats and judges, like everyone else, are socialised by prevailing political and moral views.

Most Western theorists agree, however, that a democratic liberal version of the 'rule of law' requires some laws (especially constitutions) to confine the way leaders exercise political power. Without a clear constitutional separation between party and state (constitutionalism), the roles of party leadership, political policy, and law are blurred.

Party 'leadership' in Vietnam raises serious questions about the viability of commercial laws that have been borrowed from systems predicated upon the separation of party and state. Does party leadership displace or subvert the role of law in society? Can the party substitute political policy for legal meanings in borrowed law? Under what conditions will the party leave the formulation and implementation of law to constitutional institutions?

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Answers to these questions in Vietnam are bound up in administrative reforms aiming to clarify party and state functions.

**The evolving meaning of party ‘leadership’ over the state**

Public Administration Reforms (PAR) endorsed by the Seventh Party Congress in 1996, are the latest instalment in a cycle of reforms that for decades have sought clearer party and state relationships in Vietnam.\(^3\)\(^2\) Public Administration Reforms are attempting the Herculean task of retaining party ‘leadership’, while at the same time building a more accountable and transparent administrative system.\(^3\)\(^3\)

The PAR’s overriding objective is taming the bureaucratic juggernaut with laws. Reforms have attempted to streamline administrative procedures, close licensing gateways and enhance accountability through citizen complaint procedures and administrative courts. In tandem with this Weberian agenda, PAR also reaffirms the importance of party leadership and democratic centralism.


The PAR has made numerous recommendations including:
- improving public participation in drafting laws and regulations;
- requiring laws and other legal instruments to only take effect after being published in the Official Gazette (*Cong Bao*);
- replacing discretionary licensing with registration and making information on registrations public;
- improving legislative drafting;
- codifying all laws and other official instruments;
- requiring compulsory publication of court judgements;
- streamlining aspects of the corporate regulatory framework;
- forming a clear distinction between roles, responsibilities and finances of agencies under the Prime Minister; other ministries; agencies under sector ministries; People’s Councils; People’s Committees; and non-state organisations;
- professionalising the civil service, including rationalising salaries, training, with recruitment and promotion grounded on merit; and,
- wide-ranging financial management reforms at both national and sub-national levels of government.
What remains unclear from the official discourse is whether reforms are intended to limit party ‘leadership’ over the state with imported constitutional rules and organisational procedures. Vietnamese have described this approach as creating a ‘neutral’, ‘universal’, ‘administrative’ state, as opposed to a ‘class’ state.\(^ {34}\) Some foreign commentators have gone so far as to suggest that PAR will undermine the formal and informal authority of the party.\(^ {35}\) While others are more circumspect, suggesting instead the party is using the PAR to regain central control over middle level cadres that was lost during previous experiments with decentralisation.\(^ {36}\)

For decades two issues have dominated party and state relationships: does party ‘leadership’ substitute for law and to what extent does state law bind the party?

From the inception of the DRV, party control over state organs generated confusion. Nguyen Nhu Phat wrote:

> In the first years of the people’s democratic system, the distinction between the leadership of the Party and the administration of the State was out of the question because the State could not be present everywhere in the country and secret Party cells had to play the role of the State.\(^ {37}\)

The introduction of Soviet laws and legal instructions during the 1960s reinvigorated attempts to formalise party and state functions.\(^ {38}\) Little was done during the anti-American war (1961-1975), provoking Party General Secretary Le Duan to lament in 1978 that the party was supposed to ‘lead the state, but not replace the state’.\(^ {39}\) Appeals by party leaders for cadres ‘not [to] step on the toes of state organs by interfering in their work’ periodically reappeared in party writings.\(^ {40}\)

\(^{34}\) See Thaveeporn Vasavakul, 1999 *supra* 176.


\(^{39}\) See Le Duan, 1978 *Phat Huy Quyen Lam Chu Tap The Xay Dung Nha Nuoc Vung Manh* (Develop the Rights of Collective Mastery Build a Strong State), Nha Xuat Ban Su That, Hanoi, 91.

After decades ‘building socialist law’, party theorists in the 1970s were still debating whether ‘the party -line and policies are enough and that building the laws will only set self-imposed limits that impede production and work’. In other words, a decision had not been taken to limit party power within constitutional and legal parameters. Party reformers had first to consider whether the party or the legislature should make laws. At the time this distinction was not considered theoretically important, since the party-line, state laws and planning directives were considered interchangeable in socialist legality ideology (see chapter three). It also had little practical relevance, because so few laws were passed by the National Assembly that one commentator opined that ‘in such a situation even a semblance of legality became superfluous or just a formality’. Finally, the question whether party committees or state administrators should run the country rarely surfaced in economic regulation where party leadership was ‘direct, unified and detailed’.

Tentative reforms were evident in the Soviet-inspired 1980 Vietnamese Constitution, which for the first time required the party to operate ‘within the framework of the Constitution’. More profound questions were raised during the Fifth and Sixth Party Congresses (held in 1982 and 1986 respectively) such as whether party edicts should continue dominating state power distribution. Reformers such as Truong Chinh argued for a separation of the party from the day-to-day running of the government. Administrative reforms were intended to ‘overcome resolutely and definitely the longstanding confusion of functions between party and state organs’. Party leaders pondered whether the party should obey laws and abandon rule through edict and virtue, whether party organs should transfer supremacy to the legislature and finally whether the party should surrender control over government administration.

Distancing the party and state: post- *doi moi* discourse

*Nha nuoc phap quyen* (law-based state) reformers called for the party to formulate policy and the state to legislate and implement law. Article 4 of the 1992 Constitution rather nebulously endorsed this ideal by requiring the party to operate ‘within the framework of the Constitution and the law’. Yet as we saw in chapter three, *nha nuoc phap quyen* ideals never displaced support for party paramountcy.

Tensions between political, moral and legal ways of conceptualising party power have recently resurfaced in discourse about the PAR program. Official pronouncements about PAR acknowledge:

the state administrative apparatus in the new situation remains unclear and inconsistent;
many theoretical and practical issues have not been clarified; many policies mapped out under the old mechanism of centralised and bureaucratic management with state subsidies have not been amended or replaced in time.

But they avoid equating party ‘leadership’ over the state to the now discredited command economy. Official discourse instead focuses on improving the capacity of the state to manage the mixed-market economy, while leaving room for different views about party ‘leadership’.

Some party leaders actively promote direct party involvement in running state organs. They oppose legal constraints designed to clarify party ‘leadership’ over the state, believing this will ‘weaken both the Party’s leading role and the State’s managerial role and the people’s right to mastery’. Do Muoi authoritatively argued that ‘life is richer and more complicated than stipulations ... it is not always possible to establish clear demarcation lines between the areas within the competence of the Party and those within the competence of the administration.’ Party leaders insist that ‘the CPV is the political force leading the whole system ... and reforms of the political system should absolutely not touch the

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46 Previous constitutions in 1959 and 1980 placed the party under the constitution, but not law.
48 Decision No. 136/QD-TTg on the Overall Program on State Administrative Reform in the 2001-2010 Period, 2001, Chapter I, point 1.
49 Interview Tran Dai Hung, Vice-chairman, Central Party Committee of Internal Affairs, Hanoi November 2002.
decisive point that the CPV has the sole leading role. According to this narrative, party leadership or paramountcy constitutes an immutable political ideal.

Though portrayed as political theory, party leadership became increasingly important during the 1990s as the government began to acquire significant resources through its control over the burgeoning economy. Never far below the surface in party discourse is the strategic concern that the party will lose relevancy and dominance if it disengages from the state.

Others within the party believe that effective state administration is only possible if party and state responsibilities are constitutionally defined. As previously mentioned, Vo Van Kiet in 1995 sent an internal letter to the Politburo complaining that party ‘leadership’ interfered with the flexible and decentralised state regulation needed in the mixed market.

Riedel and Turley summarised his concerns:

> Party and state functions need to be separated more clearly. The party must cease passing its directives through party committee secretaries and instead pass them through the government chain of command, allowing government officials to take full responsibility for implementation.

Party members calling for reform stop short of demanding an end to party leadership and the depoliticisation of state institutions. Instead, they favour formalised divisions of labour and jurisdictions between party and state organs. Some promote the imported organisational science (khoa hoc to chuc) principle that reducing the number of trung gian (intermediaries) between party and state improves the transmission of party policy to state

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51 Ibid.
53 Political expedience may also be a contributing factor. Some within the party fear that government agencies may eclipse party organs in power and social relevance. Personal communication David Marr, September 2003.
54 These views were gleaned from interviews with officials in the Office of Government, Hanoi, January 2000, November 2002, March 2003.
functionaries. This approach is consistent with Western ‘organisation and management’ theories that promise efficient modern government through a legal-rational, politically neutral Weberian bureaucracy. 58

Discourse of this kind maintains that the party’s long-term interests are served by a clear delineation between political and state power, because differentiated states are more efficient resource allocators. Undifferentiated party and state structures transmit political uncertainties into constantly changing state policies and laws. One consequence is that laws only have a limited autonomy from political policy. Attempts by reformers in 2001 to amend the Constitution to clearly ‘separate state functions’ (hoc thuyet tam quyen phan lap) from ‘party functions’ failed. Economic arguments did not prevail against the political and moral defence of direct party ‘leadership’.

Since much is learnt in Vietnam by observing what is done rather than said, it is useful to next consider how in practice party ‘leadership’ affects nha nuoc phap quyen.

**Party ‘leadership’ over state institutions**

Dang Phong and Melanie Beresford vividly portrayed the party from 1955 until doi moi reforms in the 1980s as simultaneously operating in parallel with and intertwining state organs. 59 Reforms in 1989 began unravelling these linkages by consolidating party supervision over the state into specialised committees (uy ban), commissions (ban) and offices (van phong). 60 Economic policy formulation at the central level, for example, was consolidated into the Economic Commission (Ban Kinh Te Trung Uong) in the Central Party Committee. 61

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61 See Mark Sidel, 1997a *supra* 483-484.
There are tentative signs that the PAR program has cautiously begun to untangle party and state roles. For example, the Central Party Organising Committee (Ban To Chuc Trung Uong), which is responsible for coordinating party and state organs, now only arranges certain state activities. Some commentators construe these reforms as the party refocusing supervision into selected areas and devolving more policy-making power to state organs. Explanations for this transformation focus on the changing decision-making environment. The notion that a small number of central party officials could discuss and decide every policy change was not feasible (if it ever was) in a mixed-market economy. Despite these reforms, most commentators agree that, when so inclined and sufficiently informed, party organs still actively ‘lead’ the state. The following discussion examines the mechanisms used to secure state compliance with party policy.

Both the Constitution and theoretical writings avoid transparent distinctions between the roles and functions of the party and state in Vietnam. Though the principle of party ‘leadership’ over the state is clearly articulated, the mechanisms used to realise this objective are rarely discussed. One method of assessing the extent and depth of party leadership is by examining power sharing between party and state. It is argued that the party uses five principle mechanisms to lead the state: party lines and policies, the nomenkultra, ‘party affairs sections’ (ban can su dang), party moral leadership and mass organisations. But the starting point in this investigation is determining whether party officials are state personnel.

Who are state employees?
Article one of Ordinance on Public Employees 1998 (OPE) (as amended) describes state employees as ‘Vietnamese citizens who are on the State payroll and get paid from the State budget.’ This expansive definition includes those working in the government (i.e. ministries and people’s committees), elected NA delegates, judges, army, police and teachers. It does not mention party members directly, but describes ‘people who are recruited, appointed or assigned regular tasks in political and sociopolitical organisations’

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62 Unfortunately, the informant did not disclose which activities the party now coordinates. Interview with Nguyen San, Politburo member, Hanoi, January 2002.
as state employees. Since the party and mass organisations are the only political organisations permitted in Vietnam, it seems logical that party members paid from the state budget are state employees.

But there are many differences between party and state officials. Party officials are not accountable under the OPE as state officials. Although the state financially supports party organs, party personnel are not treated as state officials.

**Party lines and policies**
Major state decisions are made in conjunction with the politburo. Although the Law on Organisation of the Government makes no mention of party leadership, this omission has little practical relevance as the prime minister and some senior ministers are politburo members. Below this level, the party ‘leads’ the state with resolutions and policy statements.

Contrasting with political policy in democratic liberal countries, CPV policy has coercive force over party and state officials without being enacted into law. Socialist legality (*phap che xa hoi chu nghia*) invests party policy and resolutions with law-like characteristics (see chapter three). Article one of the OPE, for example, requires state employees to obey state law and party resolutions. Article four places the work of state employees under the ‘the uniform leadership of the Communist Party of Vietnam’, while article six requires state employees to ‘strictly abide by the Party’s lines and policies, and the State’s policy and law…’. State employees, whether or not they are party members, face administrative and criminal sanctions for violating either party or state directives.

**Regulation by party directive**

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65 Ordinance on Public Employees 1998, article 1.
Party control over government decision-making is illustrated by the internal rules guiding the powers and functions of Market Management Authorities (ban quan lý thi truong).\(^6^8\) Decree No. 10 on the Tasks and Powers of Market Management 1995 established market control authorities with powers to ‘inspect and control’ and ‘manage’ (quan ly) economic markets.\(^6^9\) They are required to ‘propagate party undertakings and lines as well as state policies and laws’.\(^7^0\) The meaning of regulations and laws (qui dinh phap luat) is determined by internal sub-legal documents (i.e. official letters and internal operational directives) based on ‘policy regimes’ (che do chinh sach) established by party committees. ‘Policy regimes’ contain definitions and standards that fine-tune the implementation of ‘state power’.

Laws make it clear that the overriding purpose of market management is to ‘organise the market ... to promote production development, expand goods circulation according to the law’.\(^7^1\) Numerous sub-legal documents promote thi truong lanh manh (healthy markets) as a regulatory ideal, but provide few practical standards or principles to guide state officials. As a result, the precise meaning of healthy markets is never fixed and changes constantly to reflect nuances in party economic policy.

The rules governing inspection powers are similarly open-ended. Market control authorities are required to ‘observe the law and the working statute on market management’.\(^7^2\) General provisions concerning penalties for violating ‘market management’ rules are contained in the Ordinance on the Handling of Violations of Administrative Regulations 2002. Subordinate rules determine the type of identification and firearms carried, uniforms worn and documentation used by market control authorities. They do not convey practical guidelines determining the scope and nature of ‘state power’.

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\(^6^8\) This case description is based on discussions with two employees of the Hanoi Market Control Board during April 1999 and September 2000.  
\(^6^9\) Decree No 10 1995 gave the Ministry of Trade central powers to direct market control authorities established at the city and provincial level. Decision No 269 TM/QLTT (MoT) on the Organisation and Responsibilities and Rights of the Market Management Authorities 1995 and Decision No 35 Concerning Administration and Market Management Fines, Use of Fire-Arms 30 March 1995 (Ministry of Trade) contains more specific duties and basic powers.  
\(^7^0\) See Decree No. 2 CP on the Development and Management of Marketplaces 2003, article 13.  
\(^7^1\) Decision No 96 TTg Promulgating Regulations on the Responsibility and Relations of Coordination of Activities among State Management Agencies in the Management of the Market and the Fight Against Smuggling and Other Acts of Illicit Trade, 1995 (Prime Minister), article 7.  
\(^7^2\) Decree No 10 on the Organisation and Responsibilities of the Market Management Authorities 23 January 1995, article 6.
To summarise, state officials privy to internal communications derive policy guidance more from political, economic and legal discourse emanating from party sources than from norms and prescriptive rules codified in state legislation. Party communication is ‘self-enacting’ in the sense that it guides party members controlling state apparatus without being formally enacted into state legislation. As discursive law, party communication has the capacity to change the meanings given to normative rules regulating market behaviour imported into superior legislation, such as the Competition Law 2004.

**Party leadership within state institutions**

*Recruitment and promotion*

The nomenkultra (to chuc can bo) system, which was borrowed from the Soviet Union, ensures that party members occupy key lawmaking positions within state institutions. It has no legislative basis. Internal party rules require party and state personnel departments to select appropriate candidates according to criteria established by central party organs. Before state institutions formally confirm appointments, nomenkultra lists are sent for approval to the Central Party Organising Committee (CPOC) (Ban To Chuc Trung Uong).

Informants describing recruitment and promotion procedures within the Ministry of Science and Technology maintain that the CPOC, in consultation with the party committee (dang uy) inside the ministry, selected senior personnel including the minister. The system was structured to enable party members to move easily in and out of senior state positions. In descending order of importance, staff were promoted according to three criteria: political qualifications (pham chat chinh tri), moral qualifications (pham chat dao due) and professional requirements (yeu cau chuyen mon). These highly flexible standards stressed

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74 The Constitution contains vague principles confirming party leadership of state and society that are not mentioned in the OPE. The Party Statute (which in not a legal document according the Law on the Promulagation of Legal Documents 2002) entitles ‘the party to recommend qualified cadres for state agencies ...for selection and employment.’ Party Statute, article 41 (2).

75 Four informants, who had worked for the Ministry of Science and Technology during various periods from the mid 1980s until the late 1990s, were interviewed together in Hanoi, March 1999, April 1999.

76 Author Unknown, 1996 ‘Nhung Van De Ly Luan Co Ban Ve Nha Nuoc va Phap Luat’ (Basic Theoretical Issues about State and Law), Nha Xuat Ban Chinh Tri Quoc Gia (National Political Publishing House), Hanoi, 147-148.
party loyalty demonstrated by knowledge of party rules and policies, and active participation in party social activities, such as singing competitions.

The party is now stressing the importance of recruiting well-educated state officials and some positions are reserved for those with prescribed professional qualifications. In a transition they label ‘statisation’, Phong and Beresford argued that the nomenkular system has declined in importance since doi moi. The CPOC now shares some personnel functions with the Government Committee on Organisation and Personnel (GCOP).

Reflecting the growing importance of meritorious recruitment, the GCOP was upgraded into a ministry in 2002.

Despite the trend towards meritorious recruitment, many party writers call for greater rather than less party control over state recruitment. For example, informants in the Office of the National Assembly question Phong and Beresford’s assertion that the National Assembly, rather than party organs, has the final say over the appointment of ministers. They maintain that NA delegates are briefed about CPOC recommendations before voting to appoint state ministers. Others believe that the slogan ‘hong hon chuyen’ (red is better than expert) still applies, especially for senior positions.

There are also few signs the nomenkular system has weakened at the provincial level. A strong correlation exists between senior party membership and senior people’s committee positions. For example, since 1975 most chairmen of the Ho Chi Minh City People’s Committee have been Central Committee members. This close nexus is replicated at the district level. Sub-district (phuong and xa) officials are not considered public servants and are directly controlled by the next highest party organ.

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78 See Phong and Beresford, 1998 supra.

79 See Do Muoi, 1995 supra 177-178. Also see Mark Sidel, 1997a supra 481, 485.


83 Officials at the phuong and xa levels are not public servants and are not paid directly from the central state budget. As such, they are considered quasi-state and quasi-political offices under the direct authority of higher
The *ly lich* (dossier) system, which comprises secrete files that meticulously record details about all party members, also remain firmly in place. By selectively capturing information, this system gives senior party officials considerable control over the careers of junior officials.

In short, PAR initiatives have introduced public service examinations and meritorious recruitment, but the *nomenkultra* system fills enough key state positions to ensure party leadership over the state. It does not, however, guarantee that the party elite is the state elite. Many party cadres work their entire lives inside one ministry developing institutional attitudes and loyalties that are not easily explained by assuming the party and state invariably share similar objectives and organisational logics.84

*Party affairs sections* (*ban can su dang*)

Although the *nomenkultra* system places party members in state positions, ‘the party exercises its rule through party organisations and not through individual members.’85 ‘Party affairs sections’ (*ban can su dang*) operate at each hierarchical level within every state institution. They ‘lead and motivate members in the organisation; to implement the party-line and policies.’86 This system remains entrenched despite longstanding criticism that it confuses lines of authority and erodes the prestige of state managers.87

Central-level ‘party affairs sections’ generally comprise ministers, vice-ministers and senior department heads.88 They act as intermediaries between party and state, converting broad policy initiatives formulated by central committee commissions into sub-legal internal directives and *quan triet* (comprehensive) instructions. They also report back to the party apparatus. Interview Tran Dai Hung, Vice-chairman, Central Party Committee of Internal Affairs, Hanoi November 2002.

84 See Dang Phong and Melanie Beresford, 1998 *supra* 92-94.
88 These comments are based on interviews with former officials of the Ministry of Science and Technology *supra.*
Politburo and relevant Central Committee organs on government decisions and implementation policies.

For specifics, let us return to the Ministry of Trade case study. The ‘party affairs section’ in the ministry formulated the ‘policy regimes’ (*che do chinh sach*) that guided the implementation of ‘state economic management’ by city/provincial market control authorities. ‘Party affairs sections’ at city/provincial levels further refined ‘policy regimes’ to suit local conditions. In this way the party mediated lawmaking discourse within state institutions.

Democratic centralism, discussed in chapter three, binds central party organs, ‘party affairs sections’ and party members. Party members are enjoined to strictly obey central party resolutions and the ‘monolithic thought and action’ of the party and state. ‘Party affairs sections’ are required to ‘submit themselves to higher-echelon organisations’. The ultimate objective is to ensure that party members remain loyal to party rather than state bodies. As previously noted, this objective is frequently unrealised where party cadres work for long periods within state institutions.

In sum, ‘party leadership’ collapses the binary divisions between party and state contemplated by *nha nuoc phap quyen* reformers. Party paramountcy allows the party to lead the state through resolutions, internal policy directives and the *nomenkultra* system. The party leads from inside and outside the state.

The following discussion turns to the projection of party power through non-state agencies. It suggests that constitutional definitions of the state do not adequately depict the role party moral leadership and mass organisations play in implementing power.

**Party moral leadership**

The party not only projects its power through state organs; it also leads by moral example. Chapter three argued that the party slavishly copied Soviet legal ideology and laws, but

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91 CPV Statute 1996, article 9; also see Do Muoi, 1995 *supra* 178-179.

used ‘revolutionary morality’ to reconcile foreign borrowings with local conditions. By conflating neo-Confucian morals and Marxist-Leninism, the party manufactured a ‘revolutionary morality’ cognisable to a population that was unfamiliar with law-based rule. Morality rule emphasised (and continues to emphasise) ideological and moral homogeneity, strict organisational hierarchies (democratic centralism), advancement through party (nomenkultura) and personal contacts, government by example and intolerance towards non-elite opposition. Though nominally configured as a Leninist organisation, the party functioned as a traditional-Leninist hybrid.93

**Inculcating the correct viewpoint**

The party could not rely on morals alone to induce change. It also needed cadres infused with the correct viewpoint (quan diem dung dan) and mass organisations to mobilise popular support. As ‘superior men’, party members were, and still are, expected to engage in self-improvement. The Party Statute 1996 requires those in senior state positions to ‘constantly study and steel oneself to improve one’s knowledge, working ability, political quality and revolutionary ethics; adopt a wholesome lifestyle; struggle against individualism, opportunism, departmentalism, bureaucracy, corruption, wasteful spending and other negative phenomena.’94

Those aspiring to manage state institutions were (and still are) required to pass through a system of political education that instils the correct moral outlook.95 Ethical standards are maintained by first vetting the political background of party applicants and three generations of their extended families, and second, by inculcating political theory.

Central Committee Resolution No. 210 on Teaching Political Theory and Ideology to Cadres and Party Members 1970 established party theoretical training schools at district, provincial, and central levels. This system continues today. As public employees climb the

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94 Communist Party of Vietnam Statute 1996, article 2 (2). Also see Bui Dinh Bon, 1994 ‘Concentrate Efforts on Successfully Resolving Urgent and Pressing Problems’ *Quan Doi Nhan Dan* 27 June, 1, 4; Editorial, 1997 ‘The Tasks that Need Concentrated Leadership for Fighting Corruption’ *Quan Doi Nhan Dan* 28 January, 1, 3; Editorial, 1997 ‘Curbing and Containing the Scourge of Corruption and Bureaucracy’, *Nhan Dan* 17 January, 1, 7.

95 Vu Oanh, 1994 ‘Great National Unity in the New Situation and Tasks’ *Nhan Dan* 4 February, 3, trans., FBIS East Asia Daily Report 94-043, 69-72; Interview Ngo Van Thau, Former Professor of Judicial Training
state hierarchy they must attend political training courses at middle-level party schools and eventually complete advanced degree courses at the Ho Chi Minh National Political Academy (Hoc Vien Chinh Tri Quoc Gia Ho Chi Minh). In addition to teaching Marxist-Leninist theory and Ho Chi Minh thought, training courses familiarise cadres with the party viewpoint on state policies and laws. The overriding objective is to inculcate standardised moral and ideological principles that promote uniform interpretations.

Cadres equipped with a political education, possess the cognitive tools required to formulate, decode and implement complex and often convoluted party directives and policies. Shared epistemological outlooks and cognitive skills ensure that high-level cadres debate policies in a mutually comprehensible political and moral language. For example, members of legislative drafting committees, discussed in the next chapter, say that party representatives communicate in a symbolic language that contains signals, assumptions and messages that only the initiated can comprehend. Later chapters develop this notion that senior party and state officials belong to an ‘interpretive community’ based on common political and moral ‘modes’ of thought. Shared interpretive outlooks do not always generate common positions, because cadres are also influenced by strategic imperatives. Though as subsequent chapters suggest, the core assumptions shaping this ‘interpretive community’ share few points of reference with the epistemologies underlying imported rights-based legal discourses, especially the ‘rule of law’.

**Virtue-rule**

Virtue-rule, backed by administrative directives, worked well enough in the command economy. But like regulators in eighteenth- and nineteenth-century Europe, some Vietnamese lawmakers are beginning to realise that virtue-rule undermines legal formalism and the transactional certainty required to secure investments in industrialising economies. According to some commentators ‘vestiges of the Confucian conception of government by

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96 Large numbers of party members take part in training courses. See Nguyen Phu Trong, 1999 ‘Effect a New Change in the Study of Political Theory of Cadres and Party Members’ Tap Chi Cong San (November), 7-8, trans., FBIS East Asia Daily Report 1999-0707.

97 Interview Tran Ngoc Duong, Head, State and Law Department, Ho Chi Minh National Political Academy, Hanoi, January, 1997.

virtue (duc tri) make our cadres and people not fully conscious of socialist legality and lack a full understanding of the necessity to apply the law and this prevents the building of a socialist jurisdiction.  

The PAR program is increasingly compelling state employees to behave like Weberian bureaucrats and base their decisions on formally enacted laws rather than moral pronouncements and political expedience. Important PAR initiatives such as regulatory streamlining presuppose an organisational logic in which state power is projected through constitutional institutions (legislature, executive and courts). The conflicting loyalties and values generated by the interplay between revolutionary morality, local political imperatives and imported Western organisational designs profoundly influence the meaning given to rights-based laws (see chapter six).

PAR reforms aiming to separate party and state require immensely complex systemic changes to reconfigure constitutional and extra-constitutional party and state power-sharing arrangements. The transferal of power required to legally circumscribe party ‘leadership’ over the state would unravel constitutional and personalistic institutions built up over several generations. Each stage of reform is likely to excite political conflict over the direction and pace of change.

Party and mass organisations
The party use political slogans to communicate their message to the ‘masses’ that are untutored in cryptic political discourse. Mass-mobilisation campaigns copied from China were used since the early 1950s to rectify social wrongs. Early moral campaigns demanded ‘selfless’ commitment to resisting foreign reoccupation, purged residual French cultural influences (1946-1952), reformed land ownership (1953-1956) and attacked ‘feudalistic property ethics and Confucian morals’. Although mass-mobilisation

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99 Vu Hoa, 1994 ‘The Ideological Heritage of Confucianism is Unimportant’ Vietnamese Studies (1) 71, 74.
102 Oskar Weggel, 1986 supra 415.
campaigns peaked in the 1960s, the party continued to use them during the 1970s and 1980s to 'revolutionise the whole of life' by remodelling society along state-lines. Maoist 'mass line' theory infiltrated socialist democratic (dan chu xa hoi chu nghia) and collective mastery (lam chu tap the) ideology (see chapter three). Mass organisations were enlisted as two-way communication channels—from the lowest to the highest—to give citizens a forum to communicate with the government. The party took ideals distilled from the subtle processes of everyday life, transformed them into moral messages, which were then represented to the masses as if they were their own ideas. Neo-Confucian notions such as deference to moral authority invested social steering of this kind with cultural legitimacy.

Nguyen Khac Vien in 1981 wrote an open letter to the National Assembly exposing collective mastery through mass organisations as a fraud. Rather than furthering democratic participation, he argued that mass organisations maintained party control over social organisations in order to suppress potential political rivals. The party only listened to their own members and were not interested in new and challenging views. As discussed more fully in chapter seven, this depiction holds true today. For example, the party and state support Fatherland Front Buddhist mass organisations, but vigorously suppresses the Unified Buddhist Church (Giao Hoi Phat Giao Thong Nhat) for refusing to promote the party-line. Protestant evangelical groups have also been banned from proselytising ethnic minorities in highland provinces. Contrasting with stringent religious regulation, the party has partially relaxed controls over the formation of entrepreneurial and other non-

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184
political ‘associations’ (hiep hoi), giving them the political space to communicate with lawmakers.

Mass organisations proved highly effective in mobilising popular support for party policies during times of crisis.\textsuperscript{108} Peacetime apathy and the abolition of state subsidies have unquestionably reduced their social leverage. A rapidly ageing membership signals their decline.\textsuperscript{109}

Numerous civic organisations (non-state, volunteer and non-profit) established as state research institutes, non-profit companies and professional associations have filled the void left by declining membership in Fatherland Front (\textit{Mat Tran To Quoc Viet Nam}) organisations.\textsuperscript{110} Attempts by the party’s Commission for Mass Mobilisation to resurrect mass organisations as revolutionary apparatus have been unsuccessful.\textsuperscript{111} There are tentative signs, however, that mass organisations are readjusting their social role.

\textbf{State corporatism}

Research in Vietnam suggests that some mass organisations and quasi-state bodies are transforming from agents of mass mobilisation into members of state-corporatist alliances.\textsuperscript{112} If correct, this shift foreshadows closer cooperation between the party, state and privileged non-state entities (see chapter seven). It could invest local interest groups with strong voices to adjust imported law to suit their particular interests.


\textsuperscript{109} Interviews Nguyen Ngoc Hien, 2000 supra.


State corporatism is understood to mean a pattern of organising state-society interaction that grants representational monopolies to certain groups.\textsuperscript{113} It aims to generate social harmony by incorporating privileged groups into the decision-making structure of the state. When functioning effectively, state corporatism gives the party and state the means to implement policy without resorting to formal legal regulation. Especially in continental Europe, the collaboration of state and non-state interests centralises and monopolises public policy and statutory formulation. Tripartite configurations of state, employer and labour bodies shape much commercial lawmaking.\textsuperscript{114}

State corporatism is not just a Western phenomenon; it has been identified in countries with widely varying political and economic structures, including China, Indonesia and Vietnam.\textsuperscript{115} But the notion of a state-society compact requires rethinking when applied to socialist East Asia, where civil society organisations struggle to operate beyond the party and state orbit.\textsuperscript{116} Philippe Schmitter modified state corporatism to reflect socialist realities by investing social organisations with a limited autonomy to challenge state policy, but not party and state power.\textsuperscript{117}

As mass organisations lose their potency there are reasons for believing that party leaders find state corporatism an attractive adjunct or alternative system of social control. Party Resolution No. 10 on Renovating Mass-Proselytising Work and Truly Developing the

\textsuperscript{112} Interviews Nguyen Ngoc Bich, Director, IMAC Law Office, Ho Chi Minh City, July 1998, April 1999.

\textsuperscript{113} A difficulty with using state corporatism as a descriptor is its conceptional broadness. Unless it is confined in scope, it can apply to virtually any state and non-state configuration. Philippe Schmitter developed a model that removed some conceptual ambiguity by narrowly defining the types of associations that qualify as state corporatist. See generally, Philippe Schmitter and G. Lehmbuch, 1979 \textit{Trends Towards Corporatist Interest Intermediation}, Sage Publications, London; H. J. Wairda, 1997, \textit{Corporatism and Comparative Politics}, M.E. Sharpe, Armonk, NY, 47-55.


\textsuperscript{117} His definition includes quasi-state organisations that are ‘recognised or licensed (if not created) by the state’. Philippe C. Schmitter, 1974 ‘Still the Century of Corporatism?’, in Fredrick B. Pike and Thomas Stich eds., \textit{The New Corporatism: Social and Political Structures in the Iberian World}, University of Notre Dame Press, Notre Dame, 93-94.
People’s Right to Mastery 1990 aimed to co-opt new forms of social organisation excited by the mixed-market economy. Pham Chi Lan, the former vice-president of the Vietnam Chamber of Commerce and Industry (VCCI), put this new approach in context. She described the relationship between the state and private entrepreneurial associations as a ‘partnership’ in which the state assists private firms to follow party and state socioeconomic policy. In return for market information, training and access to state tendering systems, VCCI members are expected to comply with the extra-legal nuances of state socioeconomic policy (see chapter seven).

It is plausible, given the structural similarities between Leninist mass organisations and state corporatist ‘partnerships’, that mass organisations may evolve into hybrid entities. They could give the party leverage over social groups and in return grant members access to state privileges and information. Both structures are designed to persuade specific social groups to follow state policies. Movement in this direction depends on new entrepreneurial elites that have something to gain from party and state policies.

At first glance, the Vietnam General Confederation of Labour (VGCL) (Tong Lien Doan Lao Dong Viet Nam) seems to exhibit some state-corporatist characteristics. Long privileged in Vietnamese political life as the protector of the ‘working class and working people’, in the command economy the VGCL acted as a mass organisation mobilising workers for party causes. It is still required to ‘encourage workers to help build the State and Party’.

The social dynamics that formed the VGCL are changing in the mixed-market economy. Behind the Marxist-Leninist rhetoric that privileges the working class, in practice the CPV is pursuing policies such as equitisation (privatisation) (co phan hoa) and socialisation (xa

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118 See Vu Oanh, 1993 supra 3. Also see Do Muoi’s address to the second national congress of the CPV. Voice of Vietnam, 18 November 1993, trans., FBIS, East Asia Daily Report 93-224, 23.
119 Interview Pham Chi Lan, Vice-president VCCI, Hanoi, March 2003.
hoi hoa) (user-pay systems for health and education) that adversely affect worker interests. In order to remain relevant to its members in the new economic environment, the VGCL is metamorphosing into a labour advocate. It must balance worker interests with party policy that requires labour to moderate adversarial contests that threaten economic development.

The VGCL reconciles these conflicting objectives by organising strikes in foreign-owned enterprises, but rarely in state-owned enterprises. Worker advocacy evaporates, however, where demands conflict with state-sponsored development. For example, it has implemented the party directive commanding ‘more active involvement in encouraging workers to participate in equitisation’, even thought the sale of SOEs invariably leads to lower worker benefits or unemployment.

The party is also experimentally using mass organisations to perform extra-legal regulatory functions. In Vu Oanh’s opinion, ‘the law alone cannot resolve all issues in daily life … mass organisations are needed to settle these social issues.’ Consider the role of the Vietnam Standards and Consumer Protection Association (Vinastas), a mass organisation affiliated with the Fatherland Front. The Ministry of Science, Technology and Environment ‘manages’ Vinastas and associated consumer associations and clubs. Vinastas encourages industry groups to raise production standards and provides one of the few authorised outlets for consumer concerns about product quality and safety. In another

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122 See Decree No. 64 on the Equitisation of State Owned Enterprises 2002. Also see VNS, 2002 ‘State Enterprise Equitisation Process Back on Track with Landmark Decree’ 8 Vietnam Law and Legal Forum (94), 20, 32, Resolution No. 90 CP on the Direction and Policy of Socialisation of Education, Medical and Cultural Activities 1997. The Resolution announces that the state is unable to provide a full range of free social services and the public should accept responsibly for some of these activities.

123 See Tran Dinh Thanh Lam, 1993 supra; Tran Thi San, 1993 supra 4.

124 Campaigns by the VGCL for an increase in the minimum wage were canceled when opposition arose from the Ministry of Planning and Investment. The VGCL fought without success for several years to increase the minimum wage from USD 35 to USD 50. It only succeeded when the MPI was convinced that efforts to attract foreign investment would not be jeopardised. See AFP 1994 ‘Cheap Labor Attracts Influx of Foreign Investors’ trans., FBIS East Asia Daily Report 94-93-043, 8 July 8, 67. Strikes predominately occur in Korean and Taiwanese foreign investment entities, occasionally in SOEs and rarely in Vietnamese private companies. See AFP, 1995 ‘Workers Strike at South Korean Shoe Factory’ in FBIS East Asia Daily Report 95-244 20 December, 77; Voice of Vietnam, 1996 ‘Mistreatment of Workers at Joint Ventures Viewed’ FBIS East Asia Daily Report 96-080 5 April 83-84.


126 Vu Oanh, 1994 supra 3.


guise, it is responsible for guiding consumer consciousness into non-political and non-litigious areas of dissent.

Informants believe that party leaders fear consumer groups will mobilise public opposition to SOEs that produce poor quality goods and services.\textsuperscript{129} Vinastas aims to channel spontaneous consumer resistance expressed through buyer boycotts and public demonstrations into media campaigns organised by consumer magazines such as \textit{Nguoi Tieu Dung} (Consumer) and \textit{Saigon Tiep Thi} (Saigon Marketing) and/or informal dispute resolution meetings with suppliers.\textsuperscript{130} It also uses the media to publicly rebuke recidivists. In this way, Vinastas provides a state-mediated replacement for civil action expressed in demonstrations and litigation.\textsuperscript{131}

Despite growing pluralism within Vietnamese civic organisations, mass organisations do not fit any description of civil society that stresses independence from the state and opposition to state ideology.\textsuperscript{132} Whether the VGCL or Vinatas are too closely bound to the party to qualify as independent social organisations under Schmitter's corporatist model is beyond the purposes of this discussion. What matters is that the party and state are attempting to reinvent mass organisations and quasi-state organisations as extra-legal mechanisms to inculcate official policies and lines. Since social steering of this kind circumvents formal legal rules, it has the capacity to undermine the relevance and meaning of imported laws.

\textsuperscript{129} Interviews Nguyen Van Quy, Assistant Editor, \textit{Tap Chi Thong Tin Quang Cao} (Advertising and Information Magazine), Ho Chi Minh City, January 1997; Vu Kim Hanh, Unofficial Editor, \textit{Saigon Tiep Thi} (Saigon Marketing), Ho Chi Minh City, January 1997.

\textsuperscript{130} Consumer protection associations are permitted to receive consumer complaints and act as mediators to settle disputes between consumers and producers. See Decree No. 69 ND-CP Implementing the Ordinance on Consumer Protection 2001.

\textsuperscript{131} Consumer complaints are dealt with administratively by state authorities. There is no legislation supporting private litigation through the courts. See Ordinance No. 13 PL-UBTVQH10 on the Protection of Consumer Interests 1999; Decree No. 69 CP Detailing the Implementation of the Ordinance on the Protection of Consumer Interests 2001.

Conceptualising the party and state

Some commentators believe that party organs have penetrated state institutions to such an extent that the compound term ‘party-state’ accurately describes state power distribution. Though a fused ‘party-state’ is conceptually convenient, it blurs power-sharing arrangements between party and state organs and conceals attempts by some party leaders to clarify party and state functions. It also infers that party and state interests coincide, obscuring the possibility that they have different substantive agendas and organisational logics.

We have seen that the party in some circumstances functions as a type of political bureaucracy that formulates policy for the state. Like democratic liberal political parties, in this manifestation the party is functionally separate from, and frequently competes with, state institutions. In revolutionary mode the party also functions like a mass organisation infiltrating, managing and controlling state institutions through resolutions, ‘party affairs sections’, the nomenkultra system and morality rule. In this guise, the party ‘uses the state as a tool to manage society’. There are few analogues in Western constitutionally ordered societies for this type of party and state power sharing.

Official images of party ‘leadership’ depict party organs following democratic centralism principles to uniformly control and coordinate state power. Commentators observing party and state machinations share a rather different vision in which parallel systems of party paramountcy and state rule generate confusion and fragmentation. Many accounts have ‘conservative’ and ‘reform-minded’ groups locked in battle. Gainsborough argues that these depictions over-emphasise idealised positions and conflicts more typically revolve around short-term political and economic imperatives. Others believe that regional groupings are the main source of conflict.

In rejecting monolithic explanations for party and state power sharing, Carlyle Thayer located party-power in clusters of interests that have developed in response to social and

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133 See e.g. Gareth Porter, 1993 supra.
134 Nguyen Nham, 1997 ‘Why is the Management of the State by Law Still Weak?’ Quan Doi Nhan Dan (Peoples Army), 13 June, 3, trans., FBIS East Asia Daily Report 97-203.
136 See David Koh, 2001 ‘The Politics of a Divided Party and Parkinson’s State in Vietnam’ 23 Contemporary Southeast Asia (3) 533, 538.
economic change. According to this view, sectoral interests have coalesced around the party's ideological apparatus, the People's Army and state organs. Personnel exchanges and nomenklatura appointments brokered by the Central Party Organising Committee reinforce many sectoral coalitions. Others describe formal and informal sectoral blocs (khoi) that link party and state at every level of government. Sectoral blocs compete to place their members in positions of authority in the party and state. In order to manage conflict and present a united front, the party shrouds the entire politico-economic decision-making processes in secrecy.

Attempts by PAR reformers to constitutionalise party and state relationships generally comes down to how much decision-making power the central party is prepared to legally devolve to state agents. This in turn depends on whether the 'rules of the game' guiding constitutional processes are more effective (from the party's perspective) in resolving social problems than existing processes. This judgement is no doubt grounded in political expedience, but it also rests on the epistemological assumptions guiding party decision-making.


139 See Thaveeporn Vasavakul, 1997 supra 114-117.


As we saw in chapter three, party moral and political discourse is bound up in its own self-referential criteria. Party ideological units and the political education system inculcate this discourse. In tandem they have created an ‘interpretive community’ that shares common epistemological assumptions about the nature of political and legal problems and the most effective solutions. Once party ‘leadership’ is conceived as a moral good or an essential source of political power, it is difficult for party leaders to accommodate or learn from imported PAR notions that argue for the separation of party and state. For example, much party discourse uses a priori notions of good and bad that portray party leadership as an immutable moral good. By implication legal ideas aiming to separate party and state are morally bad. The ideal, much less the institutional reality of constitutionalism, is unlikely to take hold until legal modes of thinking that privilege the ‘rule of law’ over political policy gain more credence in party and state discourse. The following chapters argue that legally binding obligations under international trading treaties, in concert with nha nuoc phap quyen discourse, are gradually making a procedural ‘rule of law’ that governs economic (but not political) relations appear social useful, even desirable.

**Party leadership and legal borrowing**

Kahn-Freund speculated that if political parties monopolise state power, laws will invariably reflect their interests. His observation raises two questions: how does party ‘leadership’ in Vietnam influence legal borrowing; and would the constitutionalisation of political power stabilise the meaning of imported commercial laws?

We have seen that ‘party leadership’ has the capacity to fine-tune the meaning of law. Party political and moral discourse frequently provides the secondary rules that give meaning to open-ended rights-based laws. For example, in determining the meaning of ‘healthy market’ competition, party ‘policy regimes’ (che do chinh sach) regulate the effectiveness of imported contractual and property rights. They also play a decisive role in ‘fine-tuning’ the meaning of market behaviour for the purposes of the Competition Law 2004.142

If party ‘policy regimes’ were stable and transparent, they could coexist with, even augment, a procedural ‘rule of law’. But polycentric decision-making within the party

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142 Chapter Five of the Competition Law prohibits ‘unhealthy’ market behavior. This subjective notion is difficult to clearly define and will be interpreted by state officials according to ‘policy regimes’ (che do chinh sach).
produces protean and opaque policy guidelines. It also generates different policy and legal interpretations across factional lines and between central and local authorities (see chapters five and six).

Different policy positions profoundly influence the meanings given to private commercial rights. In chapter three we saw that party factions are divided over key ideological issues such as whether entrepreneurs can do anything not expressly forbidden by law; whether 'state economic' managers can use prerogative powers to override private rights; and whether international legal harmonisation compromises national sovereignty.

A final question remains; can commercial legal transplants flourish in a society 'led' by the party? The point is often made that borrowed commercial legal systems have effectively transplanted to illiberal party-dominated countries such as Singapore and Malaysia. But there are substantive differences between these regimes and Vietnam. They have no equivalent to the elaborate mechanisms that implement party 'leadership' in Vietnam. More importantly, the political elite in these countries largely leaves the implementation of policy to comparatively depoliticised and professionalised state institutions. Subsequent chapters explore whether effective legal transplantation requires the party to dismantle party 'leadership'.

Conclusion

Our discussion commenced with Kahn-Freund's observation that anyone transferring Western laws to communist regimes should search for functionally equivalent legal structures and processes. Although Vietnam has the institutional trappings of a constitutional state, 'party leadership' guides, directs and occasionally displaces the state. Party discourse is antagonistic or at best ambivalent to imported PAR arguments that effective governance requires a separation of party and state. There is some evidence, especially in the economic arena, that the party is cautiously devolving lawmaking power to the state. Subsequent chapters continue this discussion by considering how far this process has proceeded and whether (if at all) the transformation affects legal borrowing.

We have also seen that ‘party leadership’ uses resolutions and internal secretive *quan triet* (comprehensive) instructions to shape the meaning of borrowed commercial laws. This process exposes imported laws to the vicissitudes of party decision-making. At the same time, the party uses state corporatism to co-opt and ‘manage’ public responses to state laws, and to regulate market activities.

In sum, ‘party leadership’ has the potential to produce highly contextual outcomes for borrowed law. In some circumstances party policy may support borrowed law, and shield lawmakers from public opposition. In other circumstances, party policies may generate highly fragmented and protean interpretations of legal imports. To the extent party leadership generates legal uncertainty, it is antithetical to a procedural ‘rule of law’ that could stabilise and preserve imported private commercial rights.

The following chapters build on this preliminary assessment by considering whether market-access treaties, transplanted ideas and bottom-up social pressures can persuade the party to accept a procedural ‘rule of law’ in the economic arena. The next chapter assesses the relative influence exerted by the discursive narratives that shape the selection and adoption of foreign commercial laws. Chapter six investigates how central and local discourses guide the way state institutions interpret and apply imported property and contract rights. While chapter seven explores whether those outside the party and state have a voice in influencing imported laws and progress towards a ‘rule of law’.

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Chapter Five
Discursive and Strategic Lawmaking

Introduction
In Kahn-Freund’s estimation the mentalities and processes informing lawmaking profoundly influence the selection and adoption of legal transplants.¹ The meanings ascribed to imported laws may change when lawmakers in recipient countries do not fully comprehend the norms and tacit assumptions underlying these laws or the processes in which they operate. Even when the foreign regulatory context is well understood, lawmakers may borrow laws for strategic reasons based on political expedience, familiarity, prestige or legal fashion, rather than compatibility with the recipient legal system.

Commercial law reform in Vietnam is a fertile ground to test Kahn-Freund’s observations, because lawmakers steeped in the Soviet-legal tradition are importing rights-based legal norms to regulate the mixed-market economy. Our inquiry needs a framework in which to explore the epistemological assumptions and strategies influencing the selection and adoption of foreign laws in Vietnam.² As previously mentioned, discourse analysis is a useful tool, since lawmaking largely (although not exclusively) relies on communicative processes (see chapter four). By imagining lawmaking as the ‘contact zone’ between different modes of exchange, discourse analysis offers insights into the ways lawmakers transform political, economic and moral discourse into legislative questions of legality and validity.³

This chapter considers the ways ‘official’ party and state discourses influence the selection and adaptation of foreign law. Distinctions between ‘official’ and ‘unofficial’ discourse are somewhat artificial in Vietnam because as previously noted, mass organisations and state corporatism blur the boundaries between state and society. For our purposes ‘official’ discourse is taken to mean ideas generated by party cadres and state employees that are

² The term lawmaking is used broadly to denote any processes that transforms regulatory knowledge into state laws, rules and processes.
communicated through party and state organisational channels and publications. Though highly influential, 'official' discourse is not the only source of ideas shaping lawmaking. Chapters six, and especially seven, explore how entrepreneurs influence drafting committees and legislative deliberations in the National Assembly.

This chapter begins by examining the different discursive narratives informing legal borrowing. After mapping the ideas and epistemological assumptions guiding lawmakers, the chapter next uses a series of case studies to examine how legislative drafters and National Assembly delegates strategically use the 'official' discourse to select and adapt the meanings of borrowed laws. It asks the question: what factors make some foreign ideas appear more appropriate than others? The discussion concludes that lawmakers rarely passively follow discursive ideas, but rather they strategically use borrowed ideas to advance institutional interests.

**Legal borrowing discourse**

Chapter three showed that cultural and legal compatibility seemed relatively unimportant to lawmakers during the 1960s and 1970s, because they were convinced that Vietnamese society was evolving into a transcultural socialist utopia. Unreflective borrowing is not a viable option for contemporary lawmakers importing Western rights-based law into a socialist-inspired political-legal system. Yet as the following section suggests, most discourses informing contemporary lawmakers de-emphasises the need to reconcile imported commercial norms and practices with local conditions.

Four analytical threads run through contemporary legal discourse about legal borrowing (for a detailed analysis see annex 5). First, party writers depict a national culture (van hoa dan toc) based on essentialised kinh traditions, surrounded by layers of received external influences. Like articles of faith, certain Vietnamese cultural institutions such as ancestral

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4 This definition does not include views privately expressed (outside official business) by party and state officials through mass organisations, state-authorised associations and directly in the press, or the views of those outside the party and state. Chapter seven discusses the complex issue whether mass organisations and state-authorised associations are permitted to express “unofficial” views.


6 See Le Truyen, 2003 ‘Ho Chi Minh’s Thoughts on Unity’ Nhan Dan, reproduced in 9 Vietnam Law and Legal Forum (108) 10-11. Also see Do Huy, 2003 ‘Achievements of Building and Developing a New Culture
links to the mythical Au Lac kings, Red River Delta villages and independence from foreign invaders are placed within the traditional core. Other deeply embedded cultural traditions, particularly those derived from colonial and foreign sources, are relegated to the periphery of the imagined cultural identity.

This politically constructed identity is rarely explicitly invoked, though it exerts a strong influence over attitudes towards legal imports. For example, the Legal Research Institute (Vien Nghien Cuu Khoa Hoc Phap Ly), a body attached to the Ministry of Justice, conducted extensive research to identify ‘core’ Vietnamese socio-legal norms. This project was strongly influenced by the belief that Vietnam has a usable legal past that can be codified into contemporary laws. It also recalled the ‘Asian values’ thesis that nation states can withstand ‘negative’ global pressures, maintain social stability and preserve elite power by asserting core ‘traditional’, mainly Confucian, moral values.

Researchers failed to find meaningful ways of importing traditional norms (duc tri) and laws (phap tri) based on pre-industrial village life into a legal system serving an educated, internationally integrated mixed-market society. The project provided legislative drafters with insufficient contextual information to ascertain whether pre-modern Vietnamese norms and laws could regulate contemporary life. It nevertheless created a general impression that laws in East Asian countries are more compatible with Vietnamese conditions than Western laws.


8 The project was initiated by the Minister of Justice, Nguyen Dinh Loc, to overcome some of the problems experienced by drafting committees in reconciling borrowed law with Vietnamese conditions. Interview, Duong Thi Thanh Mai, Deputy Director of the Institute of Law Research, Ministry of Justice, Hanoi, March 1999.


10 Interviews Bui Thi Mai Lan, Department of Civil Law, member of Civil Law Drafting Committee, Ministry of Justice, Hanoi, March, April, 1999. It should be noted that foreign researchers have shown that a wide gap existed between imperial ideology, including laws, and socio-economic practice during pre-colonial Vietnam. See Nola Cooke and Li Tana, eds., 2004 Water Frontier: Commerce and the Chinese in the Lower Mekong Regions, 1750-1880, Rowman and Littlefield, Lanham, USA.

11 Some legal commentators are clearly influenced by this work and now speculate that ‘Confucian values and faith’ may augment and strengthen imported law See Pham Duy Nghia, 2005 ‘Confucianism and the
Second, most commentaries use a narrow technical legal analysis that avoids assessing the relevance of foreign laws to local conditions. They treat legal imports as technical fragments that can be reassembled without reference to underlying institutions and practices. There are undoubtedly practical reasons for basing legal analysis on ‘black letter law’, such as poorly developed comparative law and research skills. But never far below the surface is the concern that since law reflects party policy, contextual analysis may offend the party-line and policies. Political constraints are enforced by administrative penalties that prohibit state employees from criticising party and state policy.

Third, some writers have reconfigured Marxist-Leninism to make legal borrowing from capitalist countries a theoretical possibility. Dao Tri Uc, for example, is strongly influenced by Chinese Marxist theorists, who insist that ‘laws have their relative independence and influence on the economic system’. By abandoning orthodox class-based theory that insists on causal links between working class interests and law, he concluded that progressive and counter-progressive laws are determined not necessarily by their class origins, but rather by whether they eventually become generally acceptable and promote the national interest. This reformulation gives lawmakers a theoretical licence to borrow laws from capitalist countries without modifying core Marxist-Leninist axioms such as party paramountcy.

Four, a few commentators have quietly replaced Marxist-Leninism with Western sociological theory that embeds borrowed law in a broad discursive context. Pham Duy


13 Article Six of the Ordinance on Public Employees 1998 (as amended) requires state employees (including academics) to ‘[s]trictly abide by the Party’s lines and policies, and the State’s policy and law’.

14 Ordinance on State Employees 1998 (as amended).


16 To illustrate this point he gave the example of the nineteenth century German Civil Code, which, in addition to ‘progressive’ social values, also contained ‘counter-progressive’ marriage and divorce laws.
Nghia, for example, took from Weber the notion that imported laws should correspond to social conditions in recipient countries. He argues that ‘mechanical copies’ (sao chep may moc) of Western law are generally incompatible with domestic economic and cultural conditions and are thus difficult to ‘bring into effectiveness’ (dom hoa ket trai). But since legal borrowing is the only way to rapidly develop a commercial legal system, he concludes that lawmakers should devote more resources to reconciling foreign laws with local conditions.

These variegated narratives suggest continuity and change in contemporary attitudes to legal borrowing. In some areas legal discourse has borrowed and assimilated rights-based thinking; in other areas it has recycled decades old Soviet ideas. The receptiveness of these narratives to imported ideas seems to depend on whether they are influenced by epistemological criteria that are closed and self-referential, or are open and willing to engage imported ideas. Epistemologies determine the types of imported ideas that seem familiar and acceptable to legal commentators.

The epistemologies regulating the entry of new knowledge into political discourse about party paramountcy have undergone the least change. Most commentators presented Marxist–Leninism and the thoughts of Ho Chi Minh as infallible and eternal truths, creating a self-referential discursive environment that conditions lawmakers to search for laws from similar ‘political systems’ (he thong chinh tri).

Even sacrosanct political epistemologies are not immune to change. Some commentators have selectively drawn ideas from Ho Chi Minh’s eclectic thoughts and ‘nha nuoc phap quyen’ (law-based state) discourse to reinvent attitudes to non-socialist ideas. Dao Tri Uc, for example, replaced ‘working class’ interests with the national interest, a reformulation that enables lawmakers to bypass class theory and select laws from capitalist countries.

This change in the epistemological settings is eroding many of the conceptual barriers that prevented pre-doi moi lawmakers from borrowing laws from non-socialist systems.

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17 See Pham Duy Nghia, 2002 supra 50-54.
18 See Dao Tri Uc, 2002 supra 24-26.
19 See Dao Tri Uc and Le Minh Thong, 1999 ‘Su Tiep Nhan Cac Gia Tri Phap Ly Phuong Dong va Phuong Tay Doi Voi Su Phat Trien Cac Tu Tuong Phap Ly Viet Nam’ (Reception of Oriental and Occidental Legal Values in the Development of Vietnamese Legal Ideology) Nha Nuoc va Phap Luat (5) 3-10.
Marxist-Leninist 'scientific' infallibility is also being worn down by the infiltration of Weberian socio-legal thinking that places law in a social matrix. Some commentators have smuggled 'rule of law' ideas into legal discourse to challenge the instrumental view that law exists to implement party policy. This new thinking not only has the potential to open legal thinking to borrowed ideas, it may also encourage lawmakers to examine the compatibility of legal transplants to local cultural and political 'realities'.

As we saw in chapter three, economic ideas are also mounting a powerful challenge to closed political thinking. Longstanding prohibitions against trading with capitalist economies have given way to international economic integration policies that encourage lawmakers to harmonise domestic commercial law with international trade agreements. Imported neo-liberal legalism, which underpins international commercial law, openly challenges socialist 'state economic management' principles.

Finally, lawmaking discourse is not conducted in a hermetically sealed intellectual environment. Law reform everywhere comprises a set of conscious strategies by competing social agents to structure state power. Consequently, our analysis needs to consider the context of lawmaking. Are imported legal ideas systematically filtered through party ideals? Do legal drafters enlist imported ideas to support particular institutional priorities in 'palace wars'? How relevant are theoretical approaches to legal borrowing compared to familiarity with, and the prestige of imported ideas? The next section uses a series of case studies to examine how specific institutional contexts mediate the discursive influence over legislative drafting committees.

A contextual analysis of lawmaking

Our discussion has portrayed lawmaking as an orderly process where lawmakers filter imported ideas through the dominant themes in the 'official' discourse. This portrayal underestimates human agency. To acquire the force of law someone must enact borrowed ideas into domestic legislation.

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20 See Yves Dezalay and Bryant G. Garth, 2002 The Internationalization of Palace Wars, University of Chicago Press, Chicago, 246-250.
Brian Tamanaha, and others advocating ‘interpretivist’ approaches to discourse analysis, argue that application and context also shape legal meaning.21 As Clifford Geertz reminds us ‘law is local knowledge not placeless principle’.22 In other words, the meaning of words is never fixed, and varies according to the context in which the words are used. The meaning of legal ideas resides in their discursive representation and their strategic use. To understand how legislative drafting changes the meaning of legal imports it is thus necessary to consider the strategies and interpretive positions adopted by lawmakers. Alan Watson brought human agency into the lawmaking calculus by considering strategic reasons for adopting foreign laws. He used the term ‘transplant bias’ ‘to denote a system’s receptivity to a particular question outside law, which is distinct from an acceptance based on a thorough examination of possible alternatives.’23 The acceptability of law is determined by the prestige commanded by particular legal systems, together with linguistic and other accessibility factors.24 He also believed the ‘inertia’ or ‘the general absence of a sustained interest on the part of society and its ruling elite to struggle to adopt the most satisfactory rule’, inhibits transferability’.25 Cost and potential political instability generated by legal change sometimes discourage legal elites from borrowing foreign laws. This study examines the proposition that legal ideas are not only adopted because they are good, but also because they are effectively communicated across cultural boundaries and possess authority and prestige. A series of case studies is used to examine how institutional contexts shape the selection and adaptation of borrowed laws.

Translating foreign legal terminology

Before turning to legislative drafting, it is useful to consider the role terminology plays in legal borrowing. Borrowed laws are not just ideas; they come encoded in foreign (to Vietnamese legal drafters) languages. Ideally, drafters must not only understand foreign

24 For example, he thought that common law principles are disorganised, incomplete and narrowly address specific issues and, as a consequence they are not as attractive to legal drafters as codes, which are highly organised and conceptual complete.
legal terminology, they must also find Vietnamese words or phases that import legal meanings without stripping away and/or adding too many new normative concepts. Studies about legal terminology provide insights into the contribution words make to building legal identities and outlooks.26

The reception of foreign legal terminology into Vietnamese is not a recent phenomenon. Ta Van Tai asserts that most governmental and legal terms used during imperial times were borrowed from Chinese sources.27 Widespread familiarity with imported Chinese legal thinking was restricted by the use of Chinese and nom (modified Chinese) characters in official discourse.28 Although literacy levels in pre-modern Vietnam were high by regional standards, fewer than 60,000 literati could read official laws and proclamations written in these characters.29 Many legal terms were eventually translated into the more widely understood quoc ngu (Romanised script). Nevertheless, after the revolution, few lawmakers understood Chinese and nom characters with sufficient fluency to acquire a deep knowledge of pre-modern legal thinking.

Linguistic barriers also impeded the naturalisation of French colonial laws. With the exception of the Code de Annamite 1922, which mixed French law with an abridged Nguyen Code, French colonial authorities made little effort to translate French legal documents into quoc ngu (see chapter two). French was not only the legislative language, but also legal training was conducted in French and superior courts enforced the law in French.30

In order to establish a socialist legal system, the DRV in 1959 forbade the use of French legal terminology and purged French-trained officials with questionable loyalties.31 Ho Chi Minh next led a campaign to transpose complex Chinese-Vietnamese legal words into

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26 See Watson, 1978 supra 331.
28 Many, though not all, Chinese legal terms were translated into nom for official writings. Interview Tran Thi Tuyet, Institute of State and Law, Hanoi, March, 2001.
everyday Vietnamese terms familiar to the masses. Cadres working in villages found that Chinese-Vietnamese words used to translate Soviet legal terms caused confusion among the people, because this terminology was associated with mandarins and feudal regimes. Establishing a Vietnamese legal lexicon proved difficult. Chinese-Vietnamese words described many basic legal notions, such as luat (law), phap che (legality), quyen (right), lam don thinh xin (petition) and hinh phat (penalty). Legal terms of Vietnamese origin, on the other hand, lacked precision and were treated more like aphorisms than technical terms. Legal officials gradually reverted back to using Chinese-Vietnamese terms. For example they changed nghia vu, the Vietnamese terms for obligation, back to the original Chinese-Vietnamese term trai vu. Other Vietnamese terms such as phat vit (punishment) appeared in official legal documents, while legal officials continued to use the Chinese-Vietnamese word che tai in regulatory conversations. Adding to the confusion some terms acquired different meaning in different discourses. The Sino-Vietnamese term phap che, for example, was used in legal discourse to translate the Soviet concept of legality, but in political discourse it reverted to its pre-modern meaning—to ‘ensure legal compliance’ through mass moral education campaigns.

By the 1980s most Chinese-Vietnamese legal terms had acquired Soviet legal meanings. This process took place through the association of Chinese-Vietnamese terms with Soviet legal ideas expressed in party policies and resolutions, legal education and organisational language. Over time party leaders also came to accept that legal officials needed their own technical language containing terms that were not in everyday use. Soviet-inspired legal meanings were soon disrupted by a new wave of legal borrowing. Rather than importing foreign legal words directly into the local language—a practice


\[32\] Evidently Pham Van Dan wrote the main text used in the campaign. The use of Vietnamese legal terms was considered an urgent patriotic duty (tinh dan toc). See Dinh Gia Trinh, 1965 ‘May Y Kien Ve Tinh Dan Toc va Tinh Khoa Hoc Cua Thuat Ngu Luat Hoc—Nhan Xet Phe Phan Ve Mot So Thuat Ngu Thong Dung’ (Nationalistic and Scientific Use of Legal Terminology: Criticisms of Common Legal Terms) Tap San Tu Phap (3) 24-26.

\[33\] The following conversions were unsuccessful: replacing the Chinese-Vietnamese term thu dac (to acquire) with the Vietnamese luu duoc; replacing the Chinese-Vietnamese thu ly (to accept a petition) with the Vietnamese nhan xu ly (to accept a case); and replacing the Chinese-Vietnamese khang cao (to appeal) with the Vietnamese chong an (to protest a judgment).

adopted in some other South East Asian countries—Vietnamese legal officials preferred local adaptations. Four processes are underway.

First, terms with Soviet legal meanings are gradually acquiring a new significance from their association with market transactions. The changing meanings of *luat* and *phap che* have already been discussed. Superior legislation frequently uses technical Chinese-Vietnamese terms to import foreign legal ideas, whereas subordinate legislation enacted by ministries to implement the law often contains more non-technical Vietnamese words. This discrepancy is attributable to a general lack of precise legal terms and a conscious decision to use simple terms that are understood by low-level administrative officials. Informants connected to foreign donor projects say that the Ministry of Justice has resisted attempts to compile an 'official' legal lexicon. They ascribe this reluctance to internal struggles between the National Assembly, Ministry of Justice and Supreme People’s Courts to control the meanings given to legal terms. As discussed below, these institutional contests amplified the fragmentation of legal discourses.

Second, some Chinese-Vietnamese legal terms that were discredited because of their association with capitalist law in the Republic of Vietnam have been rehabilitated. For example, the word *khe uoc* is now commonly used to describe commercial agreements. The Civil Code also uses many Chinese-Vietnamese legal terms to describe complex contractual and civil obligations, such as *vat dac dinh* (distinctive object) in Article 186 and *nghia vu lien doi* (joint obligation) in Article 304. Other legal terms have become unfashionable because they are considered too closely associated with Soviet legal thinking. The Hanoi Law University, for example, changed its name from *Dai Hoc Phap Ly* to *Dai Hoc Phap Luat*, because *phap ly* was used to describe legal processes in the command economy.

Third, where there are no equivalent local terms, drafters have literally translated imported foreign terms into Vietnamese. For example, *cong ty me-con*, which translates as mother-child company, was coined to describe holding-subsidiary companies for the amended Law on State Owned Enterprises 2003.  

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36 Drafters writing the Competition Law have invented many new Vietnamese words to import complex Anglo-American anti-trust doctrines into Bill. For example, the word *ban hang da cap* is used to describe multi-level marketing (sales into networked industries).
Fourth, foreign grammar and syntax are also influencing the way the Vietnamese language is used to discuss legal issues. Take, for example, the UNDP-sponsored Legislative Framework Report drafted by the Law Department at the Ho Chi Minh National Political Academy and Ministry of Justice in 1998. The Vietnamese version of the report was translated into English by a Canadian-trained official working for the Ministry of Justice. Ministry officials decided that the English version more clearly expressed the intentions of the original authors and translated the English version back into Vietnamese. Not only were the legal terms more precise in English, but the English syntactical structures more clearly linked legal ideas in logical patterns. This practice further distances legal discourse from the everyday language.

In suggesting that recycled words retain traces of their original meaning, entomological studies imply that legal thinking lags behind reforms based on imported legal ideas. Chinese-Vietnamese legal idioms, for example, retained mandarin overtones long after they had been redeployed to serve socialist legality. Decades later socialist meanings are still evident in legal terms recycled in rights-based legislation. The following discussion examines how lawmaking changes the meaning of legal imports.

**Legislative drafting**

The starting point for understanding how context influences legal borrowing is identifying the institutional agents that select and adapt foreign laws, and determining whether particular lawmaking practices privilege certain types of ideas.

**Soviet lawmaking**

Once social relations stabilised in the DRV during the 1960s, more importance was attached to developing technically proficient legislation. Soviet law professors teaching at the Hanoi judicial training school introduced drafting techniques.\(^{37}\) But most legislation was imported from Soviet and other Eastern bloc countries with few concessions to local

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conditions.\textsuperscript{38} Even statutes regulating areas such as crime, where a rich body of local law already existed, closely followed Soviet templates.\textsuperscript{39}

Where suitable socialist models were unavailable, lawmakers codified party resolutions. Legislation of this kind retained much of the original political language and syntactical structure. For instance, Decree No. 182 on Socialist Collective Mastery Rights of Workers and State Officials in State-Owned Enterprises 1979 codified Resolution No. 10 on Collective Mastery issued by the Central Committee of the CPV in 1979, by copying most of the original language, headings and organisational structure. There was no attempt to change the hortative political language into legal norms and prescriptive rules.\textsuperscript{40}

Similar political language appeared in the Statute on Higher-Level Agricultural Producer Cooperatives, an extremely important regulatory instrument.\textsuperscript{41} It consolidated a series of party resolutions and subordinate regulations, but did not convert political passages exhorting farmers to comply with \textit{khau hieu} (political slogans) into legal standards prescribing legitimate forms of behaviour. Echoes of pre-modern lawmaking are also discernable in state resolutions that presented detailed reports about specific social problems and then proposed solutions.\textsuperscript{42} In short, Vietnamese laws either recycled Soviet legal ideas or codified party resolutions and state reports. It did not occur to lawmakers that they should transform political exhortations and pragmatic solutions into legal norms and rules.

\textsuperscript{38} Drafters borrowed laws from many Eastern bloc states. But since it came from the original socialist system, Soviet law was considered the most highly evolved. Chinese law influenced early land reforms, but was later considered politically suspect until \textit{doi moi} reforms in the mid 1980s. Interviews Le Kim Que, \textit{supra}. Apart from a few writings, articles about Chinese legal conditions did not begin appearing in local journals and the press until 2002 and 2003. Since then they have appeared with increasing frequency.

\textsuperscript{39} Pham Hong Hai, a member of the committee that drafted the Criminal Code during the mid 1980s says that virtual every provision was borrowed from the Soviet Criminal Code 1960. Interview, Pham Hong Hai, Director, Center of Criminology, Institute of State and Law, Hanoi, August 1996, March 2005. Also see Phuong-Khanh T Nguyen, 1987 ‘The Criminal Code of the Socialist Republic of Vietnam’ 13 Review of Socialist Law (2) 103-120. One of the few laws during this period not to follow the Soviet model was the Marriage and Family Law 1959, which largely drew from Chinese sources. See Chin Kim, 1973 ‘The Marriage and Family Law of North Vietnam’ 7 International Lawyer (2), 440-450.

\textsuperscript{40} See Author Unknown, 1981, \textit{Phap Che va Quyen Lam Chu Tap The} (Legality and Collective Mastery Rights), Jointly Published Department Legality and Department of Cultural Information in Binh Tri Thien Province, 3-7, 30-61.


\textsuperscript{42} According to Woodside nineteenth century mandarins prepared factual reports for the emperors. The emperors then attached recommended solutions to the reports and proclaimed the consolidated instruments as edicts, See Alexander Woodside, 1971 \textit{supra} 324.
Contemporary lawmaking

Following doi moi reforms in 1986, lawmakers began searching for legal sources beyond the socialist world. Drafting laws for the new economic conditions proved difficult, because lawmakers could no longer assume that borrowed law complied with domestic political imperatives. Since Soviet lawmaking techniques did not show lawmakers how to turn party resolutions into law, the Ministry of Justice drafted the Law on the Promulgation of Legal Documents to improve drafting processes.

According to its preamble, the law was supposed to 'improve the quality and effectiveness of legislation work, institutionalise in time party-lines and policies, meet the requirements of social management by law and build the law-governed state'. The law also established a lawmaking hierarchy. It invested the NA with power to enact superior legislation (codes, laws and resolutions) and other state bodies were authorised to promulgate subordinate statutes to implement superior legislation. State bodies (including some NA committees), the Fatherland Front and its member organisations and NA delegates were empowered to propose draft legislation to the NA.43

Superior legislation is initiated in two main ways. Most commonly, ministries propose bills to the Standing Committee of the National Assembly (SC).44 Occasionally party and Fatherland Front organisations research and propose bills or amendments to the Central Internal Affairs Commission (CIAC) (Ban Noi Chinh Trung Uong). For example, the Hoi Dong Kinh Te Xa Hoi (Council on Economic and Social Affairs), a Fatherland Front organisation made up of Soviet-trained economists, proposed some commercial laws (e.g. Company Law) to the Government during the initial stages of law reform. Drafting cannot commence until the Politburo or the Party Central Committee issues a resolution appointing a drafting agency.

Until recently party leaders did not permit NA delegates to both draft and enact superior law. Some party officials argued that NA delegates lacked the 'professionalism' (chuyen nghiep) required to transform party policy into law, while others were concerned that

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44 See Law on the Promulgation of Legal Documents 2002, article 22. Tran Dai Hung, Vice Chairman Central Committee of Internal Affairs Information, provided information on party involvement in vetting legislative proposals during an interview in Hanoi November 2002. Subordinate legislation enacted by Government agencies does not need National Assembly approval.
drafting powers might transform the NA into a rival political organ.\textsuperscript{45} But in 2004 the Politburo directed the NA Committee on Science, Technology and Environment to draft an Electronic Transactions Law.\textsuperscript{46} Since this is the first time a NA body has drafted a law, it is premature to postulate a fundamental change in the party's approach to legal drafting. The party currently entrusts most drafting to specialised committees attached to government agencies.\textsuperscript{47} Other state bodies, such as the Supreme People's Court and Procuracy occasionally draft bills.\textsuperscript{48} Finally, the NA Law Committee, in association with other NA bodies, prioritises the enactment of bills in the NA lawmaking agenda.\textsuperscript{49} Legal drafters are constantly reminded that 'the most important point is to ensure that processes drafting laws and statutes and preparing the State’s plans and policies correctly expresses the Party’s ideology and viewpoint'.\textsuperscript{50} Yet this fundamental injunction is difficult to put into practice because party resolutions authorising legislation are generally hortative and contain few substantive instructions. One commentator equated the process to building a house, where policy makers specify the cost of construction and general size and function, but provide no architectural vision.\textsuperscript{51} For example, the Party Central Committee instructed the Central Institute of Economic Management (CIEM), a research organisation attached to the Ministry of Planning and Investment, to draft the Law on Business Bankruptcy and the Enterprise Law.\textsuperscript{52} In each case, party resolutions authorised the drafting committees to


\textsuperscript{46} Evidently the Committee lobbied the Politburo for permission to draft the law. But the drafting project has not attracted foreign donor support, because the draft law partially overlaps with the Civil Code and Commercial Law and a forthcoming law dealing with technical aspects of electronic trading. See VN Law Find, 2005 \textit{Legal Newsletter}, NH Quang & Associates, Hanoi, March, 4.

\textsuperscript{47} Law on the Promulgation of Legal Documents 2002, article 25 (1). In general, lead agencies are instructed to form a drafting committee, but where the subject matter covers areas regulated by more than one ministry the Standing Committee of the National Assembly establishes the drafting committee.

\textsuperscript{48} Law on the Promulgation of Legal Documents 2002, articles 25-28. For example, the Fatherland Front drafted the Law on Fatherland Front 1999 and the Women's Union took a key role in drafting the Family Law.

\textsuperscript{49} The Law Committee also determines whether the bill should be enacted as a code, law or ordinance. See Law on the Promulgation of Legal Documents 2002, article 22; Interview Nguyen Chi Dung, Center for Information and Library Research Services National Assembly Office, Hanoi 21 October, 1997.


\textsuperscript{51} Interview, Official of National Assembly, Hanoi, March, 1999.

\textsuperscript{52} See Le Dang Doanh, 1999 \textit{supra} 11-13.
import laws to meet foreign loan conditionalities, without indicating how drafters should reconcile imported rights-based law with 'state economic management'.

Drafting committees usually comprise personnel drawn from the lead ministry and officials seconded from the Ministry of Justice, other relevant ministries, CIAC and Fatherland Front organisations. They are required to 'review [sic] the institution of law enforcement: evaluating the current legal documents relating to the draft document: conduct surveys to assess the actual situation of the social relations related to its main contents'. Lead agencies decide who to consult and whether (and how) their comments are incorporated into drafts. Information and opinions are collected from interested state agencies, mass organisations and other relevant bodies, but prime ministerial approval is required to use foreign expertise. Working groups of legal experts may provide additional advice where bills contain complex technical issues. Non-state participation in legislative drafting is considered in chapter seven.

Once completed, bills are next submitted to the government for consideration. As meetings occur only two or three days a month, government working agendas are extremely crowded leaving little time to consider the policy ramifications of draft laws. Drafting committees, moreover, are rarely asked to justify their selection of imported and local legal ideas. Memoranda accompanying drafts, generally lack detailed research and assert more than argue the appropriateness of legislative provisions. In short, the selection of foreign legal ideas takes place during the drafting stage and only rarely at the final stages before bills are presented to the NA.

53 For example, the party resolution authorising the Enterprise Law stipulated that it should streamline market entry rules, improve internal management, merger/acquisition and reporting rules. Interviews Le Dang Doanh, Director, CIEM, Hanoi, January 2001, February 2002, March 2004.
54 Law on the Promulgation of Legal Documents 2002, article 29(3).
55 Id. article 26 (1).
57 Id. articles 7-10.
58 See Ngo Duc Manh, 1994 'Some Thoughts on the Legislation by the National Assembly' Nha Nuoc va Phap Luat (4) 8, 13-14.
Party organs make legislative decisions before, during and after drafting committees complete their work. But party agencies do not always provide consistent or coherent instructions. Different allegiances and organisational logics sometimes generate sharp distinctions in the interpretation of official policy by officials from the CIAC, other central party agencies and internal party groups within ministries (see chapter four). Chapter three showed divisions between party organs and state agencies regarding the desirability and utility of international legal harmonisation. Informants report, for example, that CIAC nominees frequently adopted the narrowest and most cautious interpretation of the party's drafting instructions.

Long delays and numerous drafts generally signal protracted internal party and state consultation and conferral. Informants report that party officials routinely request changes to draft laws once they realise that imported rights-based law shifts decision-making power from state officials to private entrepreneurs. Although these opaque interventions are rarely discussed, much less documented, the case studies considered below should be interpreted in the context of active party involvement in legal drafting.

As we have seen, there are numerous, sometimes conflicting themes in the 'official' discourse concerning legal borrowing. Five legislative drafting case studies have been selected to ascertain whether lawmaking processes mediate the 'official' discourse in ways that influence the selection and adoption of borrowed laws.

Case study one: Ordinance on the Transfer of Foreign Technology

The potency of party-sponsored discourses to influence legal transplantation is well illustrated by the draft Ordinance on the Transfer of Foreign Technology 1988. A member of the drafting committee recalls that the party Central Committee directed the Ministry of Science and Technology to draft an ordinance regulating foreign 'intellectual property' (IP) in Vietnam. The Minister appointed Professor Luu Van Dat to head the drafting...
committee, which comprised representatives from the Ministries of Science and Technology, Finance, Planning and Justice and the CIAC. As with most commercial drafting committees, academic lawyers and Fatherland Front members were not represented.

Drafters were directed by the party to use ‘state economic management’ licensing to regulate technology transfers by foreigners to Vietnamese parties. Research reports prepared by the drafting committee were written in a highly ideological and discursive language consciously designed to validate the political objectives set out in party resolutions. Drafters did not evaluate the proposed reforms from economic, moral and legal perspectives, because these lines of inquiry may have contradicted the drafting directive. For example, drafters realised that foreign intellectual property (IP) regimes were based on market valuations, but were reluctant to assess the impact of commodified IP rights on the domestic market.

Using information provided by United Nations agencies, drafters based the ordinance on three legal sources. First, Chapter Four of the UNCTAD Draft International Code of Conduct on the Transfer of Technology was imported to regulate mutual obligations, while Chapter Five of the Code provided the rules governing improvements in licensed technology. Second, provisions were also borrowed from the technology transfer laws in China, the Republic of Korea, Malaysia and the Philippines, since these countries were considered culturally similar and economically successful. Third, drafters formed the view that technology transfer laws in some South American countries demonstrated high levels of state control that would facilitate ‘state economic management’.

Unable to research local conditions, drafters selected foreign IP laws largely because they appeared to agree with ‘state economic management’. Vague notions of cultural compatibility were also considered. Without a fully realised drafting methodology, the completed bill consisted of conceptually incompatible imported ideas patched together with subsequent redrafting of these provisions into Chapter III, Part 6 of the Civil Code 1995. Interviews Hanoi, March, April 1999, March 2000.

63 ESCAP, UNDP and UNCDC provided legal texts from a variety of Western, East Asian and South American countries. Drafters were not given contextual material and were not funded on study tours to examine how laws worked in donor countries. Drafters were trained in former Eastern Block countries and lacked the knowledge required to identify gaps between legal systems in donor countries and the way the market operated in Vietnam.

‘state economic management’ licensing powers. Consistency between legal styles and substantive content was considered relatively unimportant compared with the political directive to preserve ‘state economic management’. Drafters were relatively unconcerned about adjusting imported legal ideas with local precepts and practices. They reserved most energy to ensuring that state officials possessed discretionary powers to reconcile imported private rights to the state interest.

According to informants, Ministry of Science and Technology officials dominated committee meetings. The views of other committee members were only heard on technical issues directly concerning their respective areas of expertise. For example, Ministry of Justice officials were asked to ascertain whether drafts complied with superior legislation, especially the Law on Foreign Investment 1987. The Ministry of Science and Technology, in consultation with party representatives, decided major policy issues, such as the role of ‘state economic management’ in regulating private IP transfers and the criteria used to select foreign regulatory models.

After several drafts, the ordinance was circulated within the government for discussion. This was the first time Ministry of Science and Technology drafters encountered competing visions for regulating technology transfers. Most comments proposed procedural changes designed to advance the regulatory powers of competing ministries, and raised few normative issues. The Ministry of Trade, for example, unsuccessfully complained that the draft did not give regulatory authorities sufficient ‘state economic management’ powers—an argument aiming to secure control over lucrative IP registration processes. Non-state interest groups, such as foreign and domestic entrepreneurs, were not consulted before the draft ordinance was submitted to the Standing Committee of the NA for promulgation.

Lawmakers drafted the ordinance in a highly regulated economy soon after doi moi reforms commenced. At this time, the preservation of ‘state economic management’ and the protection of state-owned enterprises from foreign investors dominated lawmaking discourse. Concerns that restrictive transfer provisions reduced economic efficiency and that propriety rights over IP were culturally inappropriate were glossed over.65

Later, when the ordinance was redrafted in the mid-1990s, drafters paid more attention to harmonising domestic regulations with international standards. Several factors contributed to this change in thinking. Gradual economic liberalisations after the ordinance was enacted in 1988 made the restrictions preventing foreign entities from appointing private sales agents redundant. The Company Law 1990, for example, permitted entrepreneurs to deal with licensed IP. In addition, government leaders stressed that foreign direct investment (FDI) was a critical source of development capital and expressed concerns that overly restrictive technology transfer rules would reduce FDI flows.

In 1993 a member of the drafting committee received a telephone call from Nguyen Dinh Loc (then the Minister of Justice). During a subsequent meeting the minister revealed that the Politburo wanted to convert the redrafted ordinance into a chapter in the Civil Code. The party thought this would raise the profile of IP law and assuage foreign criticism that Vietnam was not doing enough to protect property rights. Officials from the National Office of Intellectual Property unsuccessfully opposed this initiative by advancing legal arguments that public law provisions in the ordinance were inappropriate for a private law Civil Code.

After the government applied for WTO membership in 1995, drafters at the ministry were directed to codify the Treaty on Trade Related Aspects of Intellectual Property Rights (TRIPS) into domestic law. Gradually, starting with Decree No. 63 on Procedures for Establishing Property Rights in 1996, followed by Decree No. 54 ND-CP on the Protection of Industrial Property Rights 2000 and Decree No. 13 ND-CP on the Protection of New Plant Varieties 2001, ‘state economic management’ controls over mandatory licensing, transfer prices and licence termination were further relaxed. Some of the final barriers to

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66 Foreign investors pressed Vietnamese lawmakers to harmonise the FDI laws with FDI regimes in neighboring countries that had liberalised investment rules to attract FDI. Pressure for change also came from bi- and multi-lateral trade agreements (ASEAN, US-Vietnam Bilateral Trade Agreement and negotiations to enter the WTO).


69 Also see Decree No 59 ND-CP on the Abolition of a Number of Licences and Replacement of a Number Licences with Other Methods of Management 2002. See Tran Viet Hung, 2001 ‘Vietnam’s Intellectual Property Policies’ 8 Vietnam Law and Legal Forum (88) 8, 8-9; Le Tat Chien, 2001 ‘Major Amendments and
technology transfers were dismantled by Decree No. 11 ND-CP on Technology Transfer 2005, which was issued by the government in time for WTO accession.\(^70\)

The debate about the appropriate location for technology transfer rules resurfaced in discussions in 2005 about the draft law on technology transfers.\(^71\) This time around legal arguments that specific civil relationships (such as technology transfers) should not be included in the Civil Code, which more appropriately contains basic legal principles, are gaining ground. What is different from the discourse twelve years ago in 1993 is that contemporary arguments invoke ‘rule of law’ ideas, such as legal transparency and doctrinal certainty, to back the need for a discrete law on technology transfers. In other words, legal arguments are beginning to assume a more prominent role in shaping legislative drafting.

To summarise, the Ministry of Science and Technology used its control over the drafting committee to exclude conflicting views from the lawmaking processes. A recent report compiled by the Office of Government concluded that lead drafting agencies routinely use their control over drafting committees to advance sectorial interests.\(^72\)

Although the ministry presented decisions to the outside world as nhat tri (consensus), informants suggest that processes more closely resembled chap thuan, an expression that connotes a diversity of opinion cajoled and bullied into unanimous outcomes by those exercising hierarchical and personal power. Rather than manufacturing personal harmony, the main function of collective decision-making was to disseminate information and build intra-ministerial cooperation.

Drafters filtered Western laws through political directives to retain state economic management. They formed the view that East Asian IP laws were more suited to Vietnamese conditions than Western laws. The rapid adoption of foreign IP protocols since

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\(^70\) Possibly in contravention of WTO rules, the Ministry of Science and Technology insisted on retaining a seven-year limit on all technology transfers. See Vietnamet, 2005 ‘Technology Transfer Decree Draws Flak’ Development Vietnam, Intellasia News Service, 23 February, 15-16.


2001 is attributable to the increased urgency now attached to international legal
harmonisation following the adoption of the US-Vietnam Bilateral Trade Agreement (BTA)
discussed in chapter three). Although legal arguments initially played a marginal role in
the selection of foreign law and the codification of local precepts, there is evidence that
‘rule of law’ ideas are slowing penetrating lawmakers discourse.

Case study two: Ordinance on Economic Contracts
Debates about amending the Ordinance on Economic Contracts 1989 reveal ongoing
tensions in the ‘official’ discourse between ‘state economic management’ and international
legal harmonisation. During the early stages of doi moi reforms in 1987, the Ministry of
Trade appointed a drafting committee (again led by Luu Van Dat) to prepare an ordinance
regulating contracts governing commercial activities.73
Drafting commenced at a time when the Council of Ministers was still undecided about the
role of state planning. Marxist-Leninist antipathy to private ownership of the ‘means of
production’ was also evident in the Constitution 1980 and articles in the Penal Code 1986
that criminalised private commercial activity.74
The party Central Committee instructed ministry officials to draft an ordinance with three
goals:
• Preserve ‘state economic management’ over the economy.
• Establish contract rules to facilitate autonomous business transactions among state and
  private businesses.
• Provide contractual guidance to inexperienced business players.
Drafters realised these objectives by drafting an ordinance that juxtaposed imported
(primarily French) rights-based provisions with ‘state economic management’ provisions
recycled from the Soviet-inspired Decree No. ND 54 CP Regulations on Economic
Contracts 1975. Reflecting the distinction in the command economy between contracts for
profit and personal consumption, only commercial entities with business registration

73 Information concerning the initial drafting of the Ordinance on Economic Contracts 1989 was gleaned from
interviews with two members of the drafting committee: Luu Van Dat, Legal Adviser to the Minister of
Trade, Hanoi, January 1990 and Phan Huu Chi, supra April 1992. Further information was gleaned from
Nguyen Nhu Phat, supra September 1994 and Ha Hung Cuong, Director, International Department, Ministry
74 Constitution 1980, articles 24, 26; Penal Code 1986, article 168.
(SOEs, private firms and cooperatives) were permitted to enter economic contracts. Violators were punished with administrative and criminal penalties.

The distinction between civil and economic contracts replicated administrative divisions in the command economy between contracts regulating production and distribution under Decree No. 217 CD 1987 and civil contracts regulating personal consumption. Drafters preserved this distinction in the belief that ‘state economic management’ powers over private entrepreneurs would be more difficult to exercise if the ordinance regulated both economic and consumption contracts.

Command economic thinking was also evident in provisions that based economic contracts on the ‘state plan’ (Article 10) and gave state economic arbitrators powers to intervene and adjust contractual rights (Article 8). Highly prescriptive provisions governed the formal requirements for making economic contracts and even commercial matters such as price, quality and delivery. Luu Van Dat formed the opinion that during the initial stages of economic reforms, Vietnamese businessmen were inexperienced and required detailed guidance. Above all else, he inserted discretionary ‘state economic management’ powers (especially those governing market entry) to ensure that imported private commercial norms did not diminish the ‘state benefit’ (loi ich cua nha nuoc).

Despite their misgivings about Vietnamese entrepreneurs, drafters adopted provisions that championed autonomous contractual rights. Article 4 of the ordinance protected signatories from duress; Article 5 introduced the concept of voluntary commercial relationships, and Article 6 guaranteed state protection for contractual promises.

In 1999 the party Central Committee directed the Supreme People’s Court to redraft the ordinance. The party selected the Court over the Ministry of Trade (the first drafting

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76 See Ordinance on Handling of Administrative Violations 2002; Decree No 1-CP Sanctions against Violation of Administrative Regulations in the Field of Trade 1996 (as amended) article 4 (3).

agency) to take advantage of the Court’s accumulated experience in implementing the ordinance. Contrasting with the clear instructions given to the original drafting committee, the Court was ordered to make the ordinance more relevant to current economic conditions. Behind this cryptic directive lay an unresolved dispute about the role of ‘state economic management’ in a mixed-market economy.

Members of the drafting committee agreed about the need to amend the ordinance to clarify technical rules defining contractual termination, to remove references to state planning (Article 10) and add provisions regulating new business practices, such as electronic commerce. They disagreed on two issues: should the conceptual distinction between economic and civil contracts be abolished, and should unregistered household entrepreneurs be permitted to enter economic contracts? At issue was the state’s power to proactively determine the type of entrepreneurs permitted to form economic contracts. The Ministry of Justice led the opposition to fundamental change. According to Hoang The Lien, ‘parties to economic contracts should be business persons (i.e. individuals or units that the government has allowed to carry out business). Not all people are allowed to participate in business processes and conduct business activities.’ In other words, divisions between economic and civil contracts are necessary to proactively manage the type of entrepreneurs entering business transactions.

Duong Dang Hue, the Ministry of Justice representative on the drafting committee, used class-based arguments to block reforms. He opined that businesses are operated by ‘rich people’ who enjoy many privileges over ‘ordinary citizens’. Breaches of economic contracts have the potential to generate wide-ranging social harm by causing business failure and unemployment. Civil contracts, in contrast, produce highly particularised harm to consumers and families. In short, ‘state economic management’ over market entry is needed to protect the economy and ‘working class’ interests. His views were interesting not only for linking economic management with class divisions, but also in suggesting that new

78 Comments regarding the amended Ordinance on Economic Contracts are based on interviews with Nguyen Van Dung, Judge, Economic Division, Supreme Peoples Court, July, August 1999; Phan Chi Hieu, Lecturer Hanoi Law University, Hanoi, September, 1999.
79 See the arguments made by the Duong Dang Hue, 2000 ‘Nhung Co So Cua Vice Xay Dung Phap Lenh Hop Dong Kinh Te (Sua Doi)’ (Foundation for Building Up Ordinance on Economic Contracts (Amendment)), Kien Nghi Ve Xay Dung Phap Luat Hop Dong Kinh Te Tai Viet Nam, (Recommendations in Building up the Economic Contract Legislation in Vietnam), Ministry of Justice-UNDP VIE/95/017, Hanoi, 14-19. Also see Duong Dang Hue, 2001 ‘Theories and the Realities Behind the Drafting of Vietnamese Legislation Governing Trade and Commerce’, unpublished paper, Workshop on the draft Ordinance for Economic Contracts, Hanoi, July.
economic thinking, which discarded base-superstructure determinism, had not penetrated the Department of Economic and Civil Law at the Ministry of Justice.

Other members of the committee thought that separate economic and civil contractual regimes had outlived the economic conditions in which they arose, but concluded that this legal distinction was too deeply entrenched in the legal system to remove. Only judges on the drafting committee argued for a unified economic and civil contract system. While not opposing ‘state economic management’ as an ideal, they argued that the dual contract system is conceptually confusing. The Supreme Court Annual Report in 2000, for example, showed that most contractual cases reviewed by higher courts involved procedural irregularities, such as filing actions in the wrong court division. Judges attributed these irregularities to the dual contract system.

Judges also found the dual system troublesome, because it prevented them from using provisions from the comprehensive Civil Code to cover the numerous regulatory omissions and ambiguities in the ordinance and Commercial Law. They maintained that a comprehensive legal framework is required to replace the discretionary provisions in the ordinance that give government agencies powers to proactively ‘manage’ market entry. As a comparatively weak institution, the Supreme Court struggled to leverage its leadership over the drafting committee and mobilise support for a unified contractual system. Representatives from the Ministries of Trade, Justice and Public Security blocked reforms. Tran Huu Huyen, the director of the VCCI Legal Department, encapsulated the dilemma faced by the Supreme Court lawmakers: ‘drafting committees are limited or affected not only by practical concerns and real life experience, but also by the self-defense psychology of the “guardians” who always want to “maximise” the safety of society.’ This is a clear reference to the use of ‘state economic management’ to control private commercial rights. Pressure for Vietnam to harmonise its commercial laws with WTO standards dramatically increased after accession to the BTA in 2001 (see chapter three). WTO rules required the

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80 Hoang The Lien, 2000 supra 21.
82 See Bao Cao Tong Ket, Cong Tac Toa An Nam 2000 (Supreme Court Annual Report 2000), 34, 40
83 The author is a senior lawyer with VCCI and was discussing the need for enterprises to be given a voice in commercial lawmaking to counteract the state interest. See Tran Huu Huynh, 2002 ‘Roles Played by the Chamber of Commerce and Industry of Vietnam on the Participation in the Formulation and Implementation
abolition of controls over the type of entrepreneurs that could enter economic contracts.\textsuperscript{84} In order to circumvent the stand-off in the Supreme Court drafting committee, the party transferred control over the ordinance to the Ministry of Trade in early 2004.\textsuperscript{85} By March 2004 the third draft of the new Commercial Law proposed the repeal of the ordinance and the incorporation of substantive contractual provisions into the redrafted law.\textsuperscript{86} In compliance with WTO conditionalities, the draft abolished distinctions between types of entrepreneurs and permitted anyone with legal capacity to enter contracts for commercial purposes. But much to the consternation of Supreme Court drafters, the longstanding and confusing distinctions between economic and civil contracts were retained.\textsuperscript{87}

It is possible to infer from this case study that political arguments for 'state economic management' no longer automatically dominate lawmaking debates. A reform minded group from the Ministry of Trade used the legal argument that as a member of international trading treaties, the state was obligated to give entrepreneurs equal contractual rights.\textsuperscript{88} But their position was ultimately secured by the political argument that the party supports international economic integration.

Compliance with treaty conditionalities does not necessarily signify that most members of the drafting committee supported the neo-liberal ideas underlying facilitative regulation. On the contrary, neo-liberal legal arguments were unable to persuade the committee to abolish the Soviet distinctions between civil and economic contracts and further deregulate 'state economic management' powers over entrepreneurs. Nevertheless, the Ministry of Trade group were prepared to use legal and political arguments to support the neo-liberal legalism embedded in international treaty provisions. Many members of this group are Western educated and have acquired an understanding, even sympathy for neo-liberal legalism

\textsuperscript{84} The Minister of Trade indicated that changes to the contractual rules were needed to comply with APEC, Asean, BTA and WTO conditions. See VNS, 2003 'Fast Reform for Commercial Law' \textit{Vietnamnews-online}, <http://www.vietnamnews.vnagency.com.vn/2003-11/06/Stories/04.htm>.

\textsuperscript{85} It is unclear what party agency was involved. Control over economic contracts was transferred to the Ministry of Trade in early 2004. Interview Nguyen Thanh Hung, Vice Director Legal Department, Ministry of Trade 2 March 2004.


\textsuperscript{87} Interview, Nguyen Cuong, Deputy Director Judicial Science Department, Supreme People's Court, Hanoi, March 2004.

\textsuperscript{88} Comments about the Ministry of Trade group supporting the Commercial Law draft were gained from interviews with Nguyen Thanh Hung, Vice Director, Legal Department, Ministry of Trade, Hanoi, March and
through prolonged treaty negotiations (especially for the BTA and WTO) and numerous foreign donor-sponsored study tours and workshops. Although they are not as cohesive and openly identified with neo-liberal ideas as some ministry research institutes (discussed below), they are more prepared than previous Ministry of Trade drafters to use abstract neo-liberal legal thinking to reengineer domestic commercial regulation.

This case study also demonstrated that politically weak state institutions like the Supreme People’s Court struggle to influence the law reform agenda. Yet as the following case studies show, political power is not the only factor shaping lawmaking. Well-researched and argued ideas sometimes prevail.

**Case study three: Drafting the Company Law**

The Politburo in 1988 issued a resolution instructing the Central Institute for Economic Management (CIEM), a research organisation attached to the State Planning Commission, to draft laws regulating private commercial organisations. The resolution stressed the need to order private business activities with ‘state economic management’ discretionary controls. Like the Ordinances on Technology Transfer and Economic Contracts, drafting on the Companies Law (CL) commenced during the early stages of economic reform before private commerce received constitutional approval. Drafters once again resolved tensions between business freedoms and ‘state economic management’ by protecting the state interest.

Company laws based on the French *Droit de société* existed in the North before partition in 1954 and until reunification in the South. By the 1960s the legal system did not countenance a role for private commercial organisations and only recognised SOEs and cooperatives. When drafters commenced work on the CL the official discourse regarded

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90 Information about the draft Company Law was primarily derived from interviews with officials supporting the drafting committee: Nguyen Dinh Cung, Director Macro Regulation Department CIEM, September 1994; March 1999, September 1999; Dang Duc Dam, Vice Director CIEM, December 1996. Further information was gleaned from members of the drafting committee: Luu Van Dat Interview supra; Le Dang Doanh, supra.

91 Since private commerce was officially discouraged in the command economy and line-ministries controlled SOEs with legally binding administrative measures, there was no need for company law. See Pham Thanh Vinh, 1966 ‘The Obligatory Nature of Planning Targets’ 12 Review of Contemporary Law 89-97. Also see Nguyen Ngoc Tuan, et al, 1996 ‘Restructuring of State-Owned Enterprises Towards Industrialization and
companies as colonial and capitalistic artifacts standing outside indigenous experience. There were few domestic laws or institutional practices to guide the drafters.

Articles 4 and 5 of the CL recited provisions in Politburo Resolution No. 16 of 1988 that recognised legal equality for all economic sectors, freedom for private enterprises to conduct business activities and the right to own and bequeath 'the means of production'.

After legalising private business organisations, the drafters set about importing a corporate legal framework. Professor Luu Van Dat (an experienced legal drafter from the Ministry of Trade), backed by French legal advisers, dominated the drafting committee.

The committee first proposed borrowing the company law from the former Republic of Vietnam. Members of the Standing Committee of the National Assembly rejected this initiative. Since the law contained over 300 articles, it was considered too complex for the embryonic market conditions. Perhaps more importantly, the adoption of law from the RV conveyed too much legitimacy on the discredited 'Sai Gon regime'.

Instead the committee based the CL on the French Law No. 66-537 on Commercial Companies 1966. Chapter II of the CL followed the French system of authorising the establishment of companies and specifying charted capital for different industries and services. Chapter III established shareholding companies (cong ty co phan or société anonyme) and Chapter IV created limited liability companies (cong ty trach nhiem huu han or société à Responsabilité Limitée). With a mere forty-six articles the CL was a skeletal facsimile of the 509 provisions in the French Law. Despite its brevity, the CL contained most elements of modern company law. For instance, company members shared profits and losses in proportion to their capital contributions and were not personally liable for company debts (CL, Article 2). Companies were entitled to own property and enter legally binding transactions (CL, Article 12). The CL rather indeterminately separated the functions and powers of members, company officials and employees. Shareholding companies were authorised to issue shares and raise capital from the public and rules-governed company mergers and liquidations. In short, the drafters imported the legal rules...
that enabled entrepreneurs in the Western world to create wealth from the ‘surplus value’ of employees while protecting personal assets from business losses.

Since companies had few roots in domestic trading culture and socialist theory, the ‘official’ discourse had little to say about corporate theory and practice. Contrasting with the vigorous academic debates on corporate law reform in China, Vietnamese reforms passed virtually unchronicled. 94 Most scholarly legal literature was preoccupied with narrow doctrinal issues such as company law terminology, the efficacy of licensing procedures and inconsistencies between corporate and commercial laws. 95

The few changes made to the French legal template are mainly attributable to the drafters’ Marxist critique of capitalist law. 96 For example, drafters varied the French law by giving limited liability companies (with fewer than twelve members) the right to appoint only one director to act on behalf of the company (CL, Article 27 (3)). In Soviet law there was no need for executive directors and boards of directors to represent SOEs, because supervising authorities (Ministries and people’s committees for SOEs) ran SOEs like administrative agencies. 97 Directors acted on administrative instructions from supervising agencies, and, in turn, appointed deputy directors to run specific departments. In an other example, drafters adopted from the French Law a general duty requiring directors and boards of management to account to members for ‘shortcomings in the management of the company including breaches of the charter or the law’ (CL, Article 39). But they thought it was unnecessary to enact interpretive guidelines that would assist members to sue malfeasant directors. In the command economy, supervising authorities used discretionary administrative penalties to discipline wayward SOE directors. In both examples, drafters recycled notions from the Soviet administrative model without considering its relevance to autonomous legal persons.

Interviews suggest that drafters did not fully comprehend the jurisprudential notions of legal personality underpinning the imported law. 98 Instead, they perceived legal personality

94 For an overview of the vernacular literature see Fu Tingmei, 1993 ‘Legal Person in China: Essence and Limits’ 41 American Journal of Comparative Law 261.
95 See generally Duong Dang Hue 1994 supra 20.
96 Interview Phan Huu Chi, supra April 1992.
98 Interviews Luu Van Dat, supra; Phan Huu Chi, supra. The literature concerning Western corporate theory is vast but See J. Stoljar, 1972 Groups and Entities: An Inquiry into Corporate Theory, Australian National 222
in a highly state-centered context as institutions created by law. Natural and legal persons were differentiated along functional lines by highlighting the independence of the latter from the former. Indeed, the struggle in Western legal theory to attribute personal authority to abstract legal bodies did not enter the lawmaking discourse. Without a tradition of natural rights theory and individualism (chu nghia ca nhan) (discussed in chapter three), it did not occur to drafters that corporate rights require a source of legitimacy outside legislative and bureaucratic power. Western legal theory investing companies with natural or human legal capacity to conduct businesses did not transplant with the imported French Law.

The concessionary licensing of companies persisted in Europe until the doctrine of freedom of contract attempted to extend law over the privileged and corrupt power relationships entrenched in late eighteenth-century England. Liberal ideology extolled entrepreneurs as the engines of capitalism and promoted market liberalisation that transformed corporations into vehicles for harnessing capital and risk-taking. Concessionary business licences used by the state to control corporate activities were replaced in England during the mid-nineteenth century, and later in continental Europe, with registration systems that made incorporation inexpensive and freely available to anyone fulfilling routine registration procedures.

Most Vietnamese drafters opposed the liberal, free market ideology underlying the French corporate law, because it contradicted the Marxist concern that companies are the preserve of the capitalist class. Some drafters were familiar, through Soviet literature, with Berle and Means’s classic study ‘The Modern Corporation and Private Property’. They found Marx’s warnings about corporate capitalism echoed in the passage: ‘the corporate system


100 For a detailed discussion about notions of individuality in Vietnam see David Marr, 2000 supra 774–788.


has done more than evolve a norm by which business is carried on. Within it exists a
centripetal attraction which draws wealth together into the hands of fewer and fewer
men.\textsuperscript{104} Analogous views occasionally appeared in newspaper articles.\textsuperscript{105}
Drafters learnt from Chinese legislative experiments conducted in Shenzhen and Shanghai
during the 1980s that ‘state economic management’ could minimise the exploitation and
social harm caused by private companies.\textsuperscript{106} Adopting this approach, they used business
licensing controls to limit the economic sectors in which private companies could operate
(CL, Article 11). Local authorities (people’s committees) were directed to use
capitalisation, education and health permits to proactively guide private capital into state-
sanctioned areas (see chapter six).

Once companies were established, drafters imposed further operational restrictions by
strictly interpreting the legal doctrine of \textit{ultra vires}.\textsuperscript{107} The legal capacity of companies to
conduct business was determined by the ‘rights and obligations’ set out in company
licences. Operational objectives were prescribed with considerable precision by licensing
authorities. General powers to pursue authorised objectives appeared in the CL (Article 12),
but companies were not permitted to expand their business capacity by adopting a
‘shopping list’ of associated and tangential objectives. Administrative and criminal
penalties applied to company officials who strayed beyond the authorised parameters (CL,
Article 44).

Rigorous state management over companies was justified to minimise social harm caused
by exploiting workers’ ‘surplus value’.\textsuperscript{108} Small-scale household businesses employing

\textsuperscript{104} Adolf Berle and Gardiner Means, 1968 \textit{The Modern Corporation and Private Property}, Harcourt, New,
York 18.
\textsuperscript{105} See e.g., Huy Duc, 1997 ‘Bi An Minh Phung’ (Minh Phung Mystery) \textit{Thoi Bao Kinh Te Sai Gon}, (Saigon
Economic Times), 24 April, 36; 38; Author Unknown, 1997 ‘More Arrested as Size of Fraud Case Hits $700’
\textsuperscript{106} Phan Huu Chi interviews \textit{supra}. The National Company Law was not enacted in China until 1993. See
Roman Tomasic and Jian Fu, 1999 ‘Company Law in China, in Roman Tomasic ed., \textit{Company Law in East
\textsuperscript{107} Literally meaning ‘beyond power’, the doctrine implies that companies only have the capacity to form
legal relationships in areas expressly permitted in incorporation documents. For the treatment of the \textit{ultra vires}
doctrine in French law see J. Le Galland P. Morel, 1992 \textit{French Company Law}, 2\textsuperscript{nd} ed., Longman,
\textsuperscript{108} As previously discussed, the division between economic and civil contracts also retained the socialist
distinction between income and non-income producing property.
family members were, on the contrary, considered non-exploitative and consequently were trusted to pursue business opportunities unshackled from business licences. In summary, Vietnamese lawmakers used borrowed and homegrown Marxist critiques of capitalism to filter and adapt the imported French corporate law principles. By the mid-1990s procedural shortcomings in the CL began to constrain domestic investment. Lawmakers began to look beyond Marxist-Leninism for solutions to corporate regulation.

Case Study Four: Drafting the Enterprise Law
In 1995 the Eighth Plenum of the party Central Committee instructed the CIEM to draft a new company law to implement three main reforms: legal equality, market reforms and legal harmonisation. CIEM studied corporate regulation for several years, before forming in 1998 a drafting committee headed by Le Dang Doanh, then the director of CIEM. Departing from past practice, the drafting committee included a representative from the Vietnam Chamber of Commerce and Industry (VCCI), an association representing state and private business (discussed in chapter seven). It was not until the ninth draft in July 1998 that the name of the law changed from Company to Enterprise Law (EL). This change reflected the expanded jurisdiction, which by this stage included partnerships and possibly SOEs and FDI joint ventures.

Legal equality
The party rather nebulously directed CIEM to draft an EL that formalised legal equality among business sectors. Drafters concluded that a uniform company law regulating foreign, state and privately owned entities was the most effective way to achieve this objective. They noted the Civil Code did not conceptually distinguish private domestic corporations from those owned by foreigners or the state. Members of the CIAC monitoring the EL

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110 See Nguyen Trinh Binh, 1995 ‘It is Time to Amend the Law on Companies’ Saigon Giai Phong 3 July, 3.
112 See Decision 37/QD-TTg, 13/1/98. Representatives from the following agencies participated in the drafting committee; CIEM, Ministry of Justice, Office of National Assembly, Ministry of Trade, Ministry of Industry, State Inspection Commission, Economic Commission of the Central Party Committee, and Vietnam Chamber of Commerce and Industry.
114 Interview with members of the Enterprise Law drafting committee, Hanoi, September 1999.
project rejected this legal argument on the basis that a universal company law would compromise the leading role of SOEs. They were also persuaded by the argument that problems with the EL were best rectified before extending the law to foreign investors. Following directions to retain legal divisions based on ownership, drafters retained separate legislative regimes for SOEs, cooperatives and private corporations.\footnote{See Dang Duc Dam, 1997 'Administrative Reform-Changes to Meet the Requirements of the Market-Orientated Economy', in John Gillespie ed., \textit{Commercial Legal Development in Vietnam: Vietnamese and Foreign Commentaries}, Butterworths, Singapore, 483-491.} By insisting on separate legislation, the party effectively preserved the political line enshrined in the Constitution 1992 (Article 15) that the state-owned sector is the ‘foundation of the economy’.


Market reforms

The party also wanted the drafting committee to bring the CL more in line with market reforms. This vague directive was subject to many possible interpretations. By the mid-1990s, the official discourse recognised that private sector investment generated most of the new jobs needed to absorb the rapidly growing population.\footnote{See Dang Duc Dam, 1997 \textit{Vietnam’s Marco-Economy and Types of Companies}, The Gioi Publishers, Hanoi, 49-82.} Government policy had initially favoured foreign investment, which strengthened the politically favoured SOE sector.\footnote{See Le Dang Doanh, 1997 'Foreign Investment and the Macro-Economy in Vietnam’ in V. H. Tran ed., \textit{Economic Development and Prospects in the ASEAN-Foreign Investment and Growth in Vietnam, Thailand, Indonesia and Malaysia}, Macmillan, Basingstoke, 44-86.} But FDI flows concentrated in the main cities, and being relatively capital intensive, they failed to increase employment opportunities significantly. By 1998 FDI had dramatically declined in importance with the investment slump following the East Asian economic crisis. In addition, concerns that the CL might excite a capitalist class opposed to
party paramountcy were seen by members of the CIAC to have been exaggerated. The economic contribution made by private companies was also beginning to erode Marxist antipathy towards the private sector in general.

Informed by neo-liberal economic theory, some economic researchers from the CIEM believed that considerable scope existed to mobilise domestic investment by liberalising ‘state economic management’ provisions in the LC. They thought that the ‘corporate law shirt’ (ao so mi luat cong ty) had not kept up with the ‘economic body’ (co the kinh te) and deregulating market access for companies would increase business investment. Rather than increasing the investment incentives offered to private business, it was decided to enact an EL to remove investment barriers.

CIEM officials working for the drafting committee prepared a report that contained a sustained legal commentary. They collaborated with the VCCI to compile case studies to demonstrate the economic costs generated by legal and administrative barriers to market access (see chapter seven). Arbitrary licensing rules governing education, health and capital requirements, which were designed to proactively exclude unwanted investment, were criticised for failing to distinguish good investments from poor ones. CIEM officials used the evidence to show that business licences increased the time and cost of incorporation and stifled business investment.

The report concluded ‘there is a common opinion in the business community and among [Vietnamese] scholars that the current state management has no clear objective; it is implemented arbitrarily with severe violation of business freedom; it becomes an obstacle

119 Interviews Vu Duy Thai, Member of Central Committee Fatherland Front and Vice Chairman and Secretary, Hanoi Associations of Industry and Commerce, Hanoi, April 1999; January 2001; March 2003.
121 Interviews Dang Duc Dam, Vice Director, CIEM, November 1997; Nguyen Dinh Cung, Director Macro Regulation Department CIEM, March 1999, September 1999.
123 Note, however, that the Law on the Promotion of Business Investment 1994 was amended in 1998 to increase the areas of investment in which private enterprises could apply for preferential tax concessions.
for expansion, diversification and improvement of business activities and efficiency on one hand, and provides opportunities for bribery and corruption on the other hand.\textsuperscript{125} In contrast to the empirical research underpinning market-entry reforms, researchers primarily based other corporate reforms on foreign advice.\textsuperscript{126} It is often difficult to demonstrate causal links between foreign advice and legal change, because the drafting process involves considerable internal (and some external) conferral and consensus. Articles in the EL concerning minority shareholders and directors duties, however, were imported from foreign sources with few concessions to local interests and conditions. Drafters sought guidance about the civil and common law approaches to corporate regulation.\textsuperscript{127} But eventually they were persuaded to draw most ideas from the Canadian and New Zealand corporation laws. In sum, the report shifted the regulatory focus from concessionary ‘state economic management’ to a facilitative approach that allowed capitalism a much freer hand.

Legal harmonisation
Arguments favouring international economic integration were gaining momentum by the mid-1990s. Party instructions to the drafting committee reflected concerns by foreign investors and multilateral organisations, such as ASEAN and APEC, that Vietnam should harmonise the LC with international protocols. Uncertainties surrounding corporate governance rules (directors’ duties and rights of minority shareholders) and winding-up provisions were targeted for reform. The LC also lacked rules governing partnerships, shareholding in limited liability companies and the conversion of limited liability companies into shareholding companies. More fundamentally, foreigners complained that the LC did not treat foreign investment entities like domestic companies. Separate legal regimes had the effect of quarantining foreigners from the domestic market. Investors also argued that legal distinctions between foreign and domestic companies unnecessarily

\textsuperscript{125} CIEM, \textit{supra} 103.
\textsuperscript{127} During a workshop on the draft law during March 1998, lawyers from New Zealand, Canada, Germany, Hong Kong and the USA vigorously debated the relative merits of different company law systems. Interviews David Goddard, ADB Technical Adviser, Hanoi, July 1998.
complicated business transactions and arbitrarily inhibited novel and adaptive ownership structures.\textsuperscript{128}

The first tranche of a USD 100 million Financial Sector Development and Capital Market Loan advanced by the Asian Development Bank (ADB) included conditions that sought to tie the government to a set of harmonisation reforms. The loan stipulated five substantive company law reforms.\textsuperscript{129}

- Abolish market-entry rules and allow companies to enter any lawful area of business.
- Abolish distinctions between domestic, state and foreign enterprises to enable foreigners to incorporate as, and own shares in, domestic companies.
- Clarify the division of responsibilities between corporate managers and members. Specific reforms promoted by foreign consultants included rules governing the division of powers between directors and members, protection of minority shareholders, and more clearly delineated directors’ duties.\textsuperscript{130}
- Regulate dividend payments, mergers and winding up with prescriptive regulation.
- Compel companies to provide accurate and timely information concerning directors, share registries and financial records to a central registrar.

Raymond Mallon, a foreign economic adviser closely connected with the EL project, put the pressures for legal harmonisation in perspective: ‘because of the strong national ownership of reform, policy-based lending was only effective when it was supporting reform measures for which there was already a broad national support.’\textsuperscript{131} The EL, which was eventually enacted in 1999, complied with all the conditionalities imposed by the ADB, except for extending the law to cover foreign investment entities.

\textsuperscript{128} See Nguyen Thanh Binh, 1995 ‘Its Time to Amend the Law on Companies’ Saigon Giai Phong 3 July, 3, 4; Xuan Bao and Nam Hong, 1995 ‘Problems in Implementing the Law on Companies’ Dien Dan Doanh Nghiep (Entrepreneur Forum) 28 September, 11.
In contrast to the CL, which drew heavily from French Law, the EL reflects the influence of Anglo-American legal advisers (discussed in chapter seven). In 134 articles it regulated directors’ duties, disclosure, members’ rights (especially those of minority shareholders), boards of management, inspection boards, dividend payments, conversion among corporate entities, dissolution merger and liquidation. By permitting enterprises ‘to select an industry, line [of business], area and form of investment and take the initiative to broaden the scope and line of business’, Article 7(2) of the EL gave entrepreneurs a right ‘to choose forms of production’.\textsuperscript{132}

Drafters assessed the utility of foreign corporate provisions by comparing what the law purported to do against local requirements. This methodology involved considerable guesswork based on imperfect knowledge about the interaction between law and society in donor countries, and about local demand for corporate regulation. For example, CIEM drafters retained the civil law (French) statutory framework of the CL, while borrowing normative standards from common law countries (primarily Canada, New Zealand and the United States).\textsuperscript{133} They were persuaded by advisers that common law norms are less ‘theoretically embedded’ than civil law provisions and figure more prominently in global trading protocols. Change occurred not only in the selection of legal norms, but also in the use of theory to evaluate the regulatory impact of the EL. CIEM drafters consciously used neo-liberal economic theory to challenge longstanding Marxist political and moral attitudes to entrepreneurs.

Rather than passively following the advice given by foreign advisers, the drafters actively debated and selectively used imported ideas to realise institutional and broader objectives. For example, they rejected foreign legal advice to give companies the legal rights of natural persons, a position evidently opposed by the party. Instead, they drafted article 7 of the EL, which contains a prescriptive list of corporate rights that falls well short of international standards.\textsuperscript{134} CIEM drafters were careful to use foreign knowledge and skills in ways that did not offend the hierarchies and policies in their host institution (MPI).\textsuperscript{135} But over time

\textsuperscript{132} Constitution 1992, article 21.
\textsuperscript{133} Interviews Nguyen Dinh Cung, \textit{supra}.
\textsuperscript{134} See Reiner Kraakman, 1997 \textit{supra} 3.
\textsuperscript{135} For example, article 5 evinces party and perhaps union influence, since it gives party units and labour unions the right to organise within every company.
the perceived success of the EL increased the drafters’ prestige and influence, allowing their ideas to spread further into the organisational hierarchy. 136

As discussed in more detail in chapter seven, it is possible to discern a loosely constituted interpretive community encompassing the CIEM drafters, foreign donors and local consultants and lawyers involved in the drafting project. They shared common understandings about the nature of the problems with the CL and the need to introduce neo-liberal economic solutions to deregulate market entry. Drafters and advisers worked closely together and spoke a mutually comprehensible neo-liberal legal language. This common approach to legal reforms assisted the rapid transfer of complex corporate law doctrines between foreign advisers and local drafters.

Mediating lawmaking discourses

Although CIEM drafters favoured a deregulated approach to market entry, as members of a research institution, they lacked the political power to exclude ‘state economic management’ views from entering lawmaking discussions. 137 CIEM drafters speculated that forces supporting ‘state economic management’, such as the Party Economic Commission, Ministry of Trade and Ministry of Industry would have undermined reforms if their views had been stifled.

Drafters from the Ministry of Industry, for example, argued that licensing provisions were necessary to prevent private transport companies from exploiting the ‘working class’.

Rigorous ‘state economic management’ favoured state ownership and worker entitlements. Ministry representatives also offered the political argument that market liberalisations compromised party paramountcy. CIEM drafters believed these notions were raised as a pretext to preserve discretionary (frequently corrupt) powers over market entry.

Unable to exclude contrary views from lawmaking discussions, CIEM drafters encouraged consultation that exposed other members of the drafting committee to neo-liberal ideas about the economic benefits generated by market deregulation. Although CIEM drafters did not directly challenge ‘state economic management’ ideals, they used empirical evidence to

136 For example, Nguyen Dinh Cung, one of the principle architects of the Enterprise Law was promoted as the Director Enterprise Department in CIEM, and secretary to the Enterprise Enforcement Mission Group (Nhóm Nghiệm Vụ Cuồng Chế Doanh Nghiep), which the Prime Minister convened to prevent reregulation under the EL. Not all the drafters were are successful. Le Dang Doanh, the director of CIEM was demoted some year latter to appease complaints from political forces that lost power under the Enterprise Law. Interviews Le Dang Doanh, supra March 2004.
show that deregulation would stimulate economic development.\textsuperscript{138} In the end well-researched economic and (to a much lesser extent) legal arguments defeated political and moral arguments.

**Case study five: Civil Code**

Work commenced on the Civil Code in 1980.\textsuperscript{139} As the lead agency, the Ministry of Justice formed seven drafting subcommittees, one for each chapter in the Civil Code.\textsuperscript{140} The first draft was primarily based on provisions borrowed from civil codes in the Eastern bloc (principally the Soviet Union).\textsuperscript{141} Following *doi moi* reforms drafters began looking elsewhere for legal sources. Where existing legislation was considered inappropriate for mixed-market conditions, sub-committees were instructed to select provisions from non-socialist sources. Nguyen Dinh Loc (the former Minister of Justice) and other senior government lawyers in the principle drafting committee prepared the final drafts that were sent to the prime minister and Politburo for comment.

Drafters were given vague political instructions to preserve *quan ly nha nuoc ve phap luat* (state management of law), but little guidance regarding the appropriate sources of foreign law. Interviews with members of the drafting committee suggest two factors influenced the selection of foreign laws: the range of laws provided by foreign donor agencies and the

\textsuperscript{137} These observations are based on interviews with Le Dang Doanh, *supra*.
\textsuperscript{138} See CIEM, *supra* 100-101.
\textsuperscript{140} Most information used in this case study was derived from a project conducted by the author with LERES, a research unit attached to the Faculty of Law, Hanoi National University. A series of roundtable discussions were conducted with members of the Civil Code drafting committee in March and September 1999 and August and September 2000. Follow-up interviews with drafters identified the sources of law used for various provisions of the Civil Code. LERES prepared a summary of the legislative sources used in the Civil Code. See LERES, 1999, ‘Sources of Law Used During Drafting Processes of the Civil Code’, (unpublished paper), Hanoi, 1-3.
\textsuperscript{141} Some provisions were recycled from a Decree Amending a Number of Provisions and Institutions in Civil Law, issued 22 May, 1950 by President Ho Chi Minh to socialise the impact of the colonial civil law, which remained in force until 1959. For example, article one of the Civil Code 1995 paraphrased article one of the Decree, which stated ‘civil rights are protected by law when they are used in conformity with the people’s interest’. Articles 135 (2) is clearly influenced by article 13 of the Decree, which states ‘the contracts that
familiarity of drafters with particular types of laws.\textsuperscript{142} Take for example the selection and adaptation of future property rights provisions in the Civil Code. Japanese legal advisers counselled the property law sub-committee that future property rights were required in market economies to give creditors interests over property acquired after the creation of security interests.\textsuperscript{143} They recommended provisions in the Japanese Civil Code as a suitable model. Most members of the property law sub-committee were trained in the German Democratic Republic and understood future property rights from the pre-revolutionary German Civil Code. Future property rights in both the Japanese and German Civil Code 1900 were originally borrowed from the nineteenth century Prussian Civil Code. Trained in the Soviet legal tradition, senior members of the principal drafting committee were unfamiliar with future property rights and rejected the Japanese provisions.\textsuperscript{144} They replaced the Japanese provisions with a conceptually confusing article that gave the state powers to value future earnings generated by foreign investors and guarantee property against uncompensated appropriation.\textsuperscript{145}

Informants believe that the public law emphasis in Soviet legal education failed to acquaint senior drafters with the institutional structures and jurisprudential doctrines needed to comprehend and accept future property rights.\textsuperscript{146} Senior drafters were more familiar with public law principles that made the state an active commercial player. They used Russian to discuss complex technical considerations and felt politically secure in borrowing from the Soviet Civil Code. Future property rights, on the contrary, carried the risk of conveying an advantage to private-sector players.

The principal drafters also selected ideas for their perceived cultural compatibility. They borrowed provisions from the Chinese Civil Code to give the heads of households legal status, in the belief that Chinese morals and family practices were analogous to conditions in contemporary Vietnam. For similar reasons, they recycled some pre-modern Vietnamese practices such as ‘bao lanh bang tin chap’ (preserving prestige or reputation) and leases for

\footnotesize{cause harm to one party due to the exploitation by the other party as the result of an economic gap between the two parties can be invalidated.’}

\textsuperscript{142} Interviews Bui Thi Mai Lan, Civil Law Department, Ministry of Justice, Hanoi, March, April 1999; Tran Huyen Nga, Civil Law Department, Ministry of Justice, March 1999.

\textsuperscript{143} Interviews Muto Shiro, JICA Legal Advocate to the Ministry of Justice, Hanoi, February 1998. Professor Akio Morishima, Sophia University lead the Japanese team advising the Civil Code drafting committee. The Civil Code also drew on Western German law, because members of the property sub-committee read German. See Phan Huu Chi, 1994 ‘Explanation on the Civil Code Sixth Draft’, (unpublished Paper), Hanoi, 14.

\textsuperscript{144} Interviews Bui Thi Mai Lan, \textit{supra}.

\textsuperscript{145} See Civil Code, article 182.
‘thue khoan’ (aggregate) assets. Provisions governing private contracts, property rights and civil obligations were taken from the French Colonial Code de Annamite 1922 and Republic of Vietnam Civil Code on the understanding that these notions had become localised. Other provisions were borrowed from the French and Japanese Civil Codes. But informants estimate that approximately 70 per cent of the articles in the Civil Code were derived directly or indirectly (via Vietnamese reenactments) from the Soviet Civil Code.

In summary, education played a significant role in shaping legal borrowing. It not only conveyed interpretive skills that facilitated legal borrowing, it also inculcated proclivities and biases that made some legal traditions appear more prestigious than others. Even so, legal education only seemed to operate in circumstances where political instructions gave drafters the latitude to select laws from a diverse range of sources. The important role foreign donors play in promoting particular legal educations, ideas and practices is further explored in chapter seven.

This case study also confirms earlier findings that drafters may contemplate the cultural relevance of foreign laws, but lack the methodological tools to assess whether legal imports are compatible with local conditions.

Summary
The case studies show that drafters filtered imported ideas through political, moral and economic concepts more than through legal or culture notions. As international legal harmonisation gained momentum, drafters placed less emphasis on ‘state economic management’ and moved towards (without fully embracing) a facilitative approach to economic regulation. Although lawmakers are still bound by party-sponsored discourses, the range of views within this discourse is rapidly expanding.

146 See Mark Sidel, 1993 supra 230-240.
147 Article 614 of the Civil Code creates a civil right to protect bao lanh bang tin chap. This is a neo-Confucian moral concept that conveys rights that go well beyond the English notions of ‘honour, dignity and reputation’. Articles 503-514 regulate thue khoan assets, which are collections or aggregations of different types of property bundled into common lease agreements. There is no equivalent Western concept.
148 For example, provisions dealing with civil obligations were borrowed from the Republic of Vietnam Civil Code 1972 and provisions governing mortgages, pledges and suretyship were adopted from the Code Annamites 1922.
149 Interviews Nguyen Chi Dung, Director, Library and Information Services National Assembly, Hanoi, April 1999.
With few exceptions legal arguments were unsuccessful in challenging political, moral and economic considerations. Given the dominant instrumental view of law, it is unsurprising that most drafters treated legal discourse as the handmaiden of political and economic imperatives. A fragmented legal grammar and contested legal meanings, themselves symptoms of law’s subordination, also impeded legal conversations. There is a growing awareness among some lawmakers, however, that neo-liberal economic reforms require a procedural ‘rule of law’. The sociological notion that imported laws should correspond to domestic political, economic and social conditions is also slowly entering the lawmaking calculus.

The case studies further demonstrate there is more to legal borrowing than discursive ideas and meanings. The EL drafting project showed that alliances between domestic entrepreneurs and institutions such as CIEM and VCCI legitimised deregulatory arguments. Strong ministries (such as Science and Technology, and Trade) used their powers to exclude or discredit arguments from rival government agencies. Less powerful institutions like the Supreme Court required party intervention to prevail. In short, ‘official’ discourse is mediated by powerful institutional imperatives.

These findings refocus the working postulate that differences in state power structures change the way transplanted laws are interpreted in host countries. They show that drafting agencies draw on ideas from the ‘official’ discourse to select and adapt foreign laws. In addition they demonstrate that the meanings given to imported laws primarily reflect the strategic objectives of the dominant drafting agencies. Yet despite the close links between discourse, power and institutional imperatives, these factors are not mutually inclusive.

150 The author attended a conference organised by the UNDP and Ministry of Justice in 1998 to discuss the emerging commercial legal framework. During the deliberations delegates from the main legal institutions (National Assembly, courts, procuracy, Faculty of Law, Ho Chi Minh Political Academy and legal research institutions) devoted a morning to discussing whether the terms ‘legal framework’ or ‘legal environment’ was the more accurate collective noun for legislation. Resembling medieval scholasticism, they used elaborate arguments about minutiae to demonstrate their proficiency with political-legal concepts and, more importantly, to protect core political ideas in the ‘official’ discourse from scrutiny. Differences also emerged in the terminology used by legal institutions to explain certain legal relationships. As previously mentioned, institutions struggle to control legal definitions and have not agreed to a common legal lexicon. Some delegates used personal anecdotes, aphorisms and references to speeches by prestigious party and state officials to support their arguments.

In comparison to status, legal reasoning played a minor role in analysing and sequencing legal borrowing. Even on the rare occasions when they surfaced, legal arguments relied on highly contextualised principles rather than mutually comprehensible legal precepts and doctrines.

151 This study contests the arguments of some post-Marxists and Foucauldians that there is no distinction between discourse and power relations in a social context.
Finally, the case studies tentatively suggest that imported ideas acquire different meanings within different ‘interpretive communities’. For example, CIEM drafters used empirical research informed by neo-liberal economic views to wear down political resistance to market-entry deregulation. Civil Code drafters reached entirely different conclusions about the suitability and utility of borrowed laws according to their educational background and interpretive positions. Chapter seven explores in more depth the notion that laws transfer most easily between members of ‘interpretive communities’.

Lawmaking discourse in the National Assembly

Once completed, draft laws are submitted to the National Assembly for approval. National Assembly deliberations provide another opportunity for official and local discourses to influence the selection and adaptation of foreign laws. Much depends, however, on the discursive space available to delegates to examine, debate and change draft laws. There is some evidence that delegates are increasingly behaving more like legislators. Debates in the NA have forced amendments to some draft bills (e.g. Press, Labour and Land Laws). 152 National Assembly deliberations have increased in length, there are more full-time delegates, reform projects aim to professionalise NA delegates and the budget and economics committee has more oversight powers. 153

Discourse analysis provides a nuanced way to assess whether NA delegates draw on ideas outside the official discourse to deliberate imported legal provisions.

Constitutional discourse

In mature legal systems constitutional discourse provides the ‘rules of the game’ or ‘secondary coding’ that enables legislators to transform political, economic and moral concepts into statutory language. 154 These ‘codes’ are contained in formal constitutional

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doctrines and informal, but still binding, conventions derived from parliamentary and judicial sources. Constitutional texts establish the broad rules governing power sharing among state agencies and between state and society. Informal constitutional rules and precedents guide legislators in selecting and rejecting legal, economic, political and moral concepts for codification into law. The process of commercial codification, which condenses a large number of particular cases into general principles governing business transactions, is achieved at the expense of relational nuance and richness. Without generally agreed ‘rules of the game’ legislators struggle to agree on what commercial networks and interpersonal relationships are worth preserving and which ones should be rejected. Western constitutional rules provide ‘ground rules’ that enable legislators to agree about the criteria for selecting and adapting commercial laws. This study argues that the Vietnamese Constitution does not perform this function.

Vietnamese constitutions have changed over time to announce and legitimise party policy. Current constitutional settings were developed to organise political power during the early stages of market reforms during the late 1980s. Subsequent amendments have adjusted power-sharing arrangements among state organs to reflect the gathering momentum of the mixed-market economy.

Constitutional reform debates suggest the 1992 Constitution has not yet acquired an independent (from the party) and determining legal role. Analysing articles in Tap Chi Cong San (Communist Review), Mark Sidel showed that contests over state power-sharing arrangements used political and constitutional language. One group argued that the Constitution operates as a political text for realising party policy. It legitimises and formalises power-sharing arrangements decided by party organs, but it does not function as

a legal text that guides delegates in codifying political, economic and moral arguments. Put differently, the Constitution’s meaning is strictly confined to the text. Party leaders insist that constitutional debates take place within a predetermined political context that restricts interaction with public discourses. Nevertheless sensitive political discourse is permitted under the constitutional ‘umbrella’.

A small group (consisting mainly of academic lawyers) advocate radical constitutional change. They argue that the Constitution should evolve beyond its instrumental role and provide legally enforceable standards controlling the exercise of political and state power. For this to happen, they believe that constitutional rules should include not only the Constitution and state laws, but also encompass judgements from a constitutional court, constitutional customs and even natural law (luat tu nhien) principles. In advocating unwritten legal conventions that the state is powerless to change, reformers recognise that effective ‘rules of the game’ must reflect the actual ways delegates negotiate power, not just the structures imposed by the party in legal texts.

There are a few tentative signs discussed in chapter seven that suggest the party is prepared to loosen its monopoly over legal codification and devolve more lawmaking power to the NA. Meanwhile, delegates lack the constitutional ‘ground rules’ to agree among themselves which business networks and interpersonal relationships to privilege with codification and which ones to reject.

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158 Constitutions should conform to ‘realities of life’. Dao Tri Uc, 2001 ‘Ve Nhu Cau, Muc Do Doi Hien Phap Nam 1992 va Quan Diem Xay Dung Nha Nuoc Phap Quyen, (The Needs, the Scope of Revising the 1992 Constitution and the Concept of Law-Based State) Tap Chi Cong San (10) 21-29.
159 Some party leaders blamed the constitutional court introduced by Mikhail Gorbachev for the collapse of the Soviet Community Party. See Dao Tri Uc, 2001 ‘Mot So Quan Diem Co Ban Ve Sua Doi Bo Sung Mot So Dieu Cua Hien Phap 1992’ (Key Points of View on Amendment, Addition to the 1992 Constitution), Nha Nuoc va Phap Luat (9), 6, 6-10. Also see interview Ngo Ba Thanh, Former Chair of the Law Committee, National Assembly, Hanoi, January 1992.
160 See Ngo Huy Cuong, 2001 ‘Luat Hien Phap va Van Hoa Chinh Tri’ (Constitutional Law and Political Culture) Tap Chi Nghien Cuu Lap Phap (1) 29, 30-34; Nguyen Van Thao, 2001 ‘Ve Kiem Tra Tinh Hop Hien Hop Phap Cua Van Ban Phap Luat va Cac Co Quan Tu Phap’ (Checking Constitutional Compliance and the Legitimacy of Legal Documents and the Activities of Judicial Bodies) Bao Khoa Hoc va Phat Trien, September, republished on the National Assembly Webpages.
161 Reformers unsuccessfully argued for a constitutional court in the debates preceding the adoption of the 1992 Constitution and 2001 amendments to the Constitution. See Interview Ngo Ba Thanh, Former Chair of the Law Committee, National Assembly, Hanoi, January 1992. Also see Le Cam, 2002 ‘Cai Cach He Thong Toa An Trong Giat Doan Xay Dung Nha Nuoc Phap Quyen Viet Nam’ (Reform the Court System to Build Up a Law Based State in Vietnam) Tap Chi Nghien Cuu Lap Phap (4) 21, 27; Nguyen Manh Cuong, 2002 ‘Yeu Cau Cua Viec Xay Dung Nha Nuoc Phap Quyen Doi Voi Doi To Chuc va Hoat Dong Cua Cac Co Quan Tu Phap’ (How to Reform Judicial Authorities to Build up a Law-Based-State) Tap Chi Nghien Cuu Lap Phap (10) 30, 35.
Legislative deliberations

Working in a closed epistemological framework, it is unsurprising that delegates devote hours of debate to politically safe technical issues such as the meaning of words used in draft provisions. Occasionally, however, debates erupt in NA sessions when issue-oriented coalitions invoke (usually without success) political rhetoric to block imported laws. For example, 36 per cent of delegates voted unsuccessfully to oppose the ratification of the BTA. Equally large minorities could not stop the Enterprise Law from stripping away local discretionary powers and introducing overly complex corporate governance provisions.

Despite their limited success in plenary sessions, government drafters have a well-founded concern that delegates can mobilise opposition to imported laws. For example, the Ministry of Trade committee drafting a revised Commercial Law in 2004 expressed concern that delegates influenced by SOEs would oppose trade liberalisations required by the BTA and WTO.

In some cases, minority votes have successfully blocked imported legislative provisions. Take for example amendments in 2002 to the Law on the Promulgation of Normative Documents. Ministry of Justice drafters introduced into the bill the imported ‘incorporation doctrine’ that makes treaties ratified by heads of state automatically binding in domestic law. The bill submitted to the NA stated ‘it is necessary to ensure that issued legal normative documents accord with relevant international treaties to which the Socialist Republic of Vietnam is a signatory or party to the extent of its undertakings’.

Some delegates were concerned the ‘incorporation doctrine could compromise national sovereignty’. Rather than addressing the legal arguments presented by Ministry of Justice


164 The Committee organised workshops with key NA delegates before the draft Code was presented to the Standing Committee in September 2004. Interviews Nguyen Thanh Hung, supra.

165 The new article 1 (2)(a) appeared in the draft Law on Amending and Adding to Certain Articles of the 1996 Law on Issuing Legal Normative Documents, dated 30 November 2002. This provision was inserted to comply with provisions in the BTA.

166 See Dinh Ngoc Vuong, 2001 ‘Van De Sua Doi Bo Sung Quy Dinh Cua Hien Phap 1992 Ve Ky Ket Quyet Dinh Viec Phe Chuan GiaNhap Bai Bo Dieu Uoc Quoc Te’ (Problem of Amending and Adding Stipulations
drafters that civil law countries observe the doctrine, they recited passages from the constitutional preamble about Vietnam’s independence struggle to excite nationalistic sentiment against the ‘doctrine’. Soviet international law principles used in Vietnam provided little guidance, because they assess the supremacy of international law on a case-by-case basis according to the ‘economic, sociopolitical development and interests of the nation’. 167

Once conceived as a matter of national sovereignty, delegates could not simultaneously think about adopting treaties in a legal way, as conflicts between different methods of social regulation. In political mode, delegates understood treaty ‘incorporation’ as a power struggle with foreigners. Without constitutional ‘secondary codes’ or precedents to guide them, delegates could not easily convert political arguments about power struggles into legal rules that determined the validity of conflicts between international and domestic law. In the cases considered, delegates invoked political arguments circulating in the ‘official’ discourse to block imported law. Without constitutional ‘rules of the game’, coupled with appropriate legal training, they lacked the conceptual tools to move beyond occasionally blocking imported rules to proposing amendments solidly grounded in underlying social practices.

Decision-making processes in the National Assembly

Before NA delegates are given an opportunity to discuss draft legislation three policy filters focus their deliberations. First, as noted above, government drafting agencies privilege their own interests in draft bills and explanatory memoranda. If the Standing Committee, which has constitutional powers to guide the passage of bills through the NA, agrees with drafting agencies, the range of issues presented for deliberation is highly circumscribed. 168 The

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167 This doctrine is reflected in article 5 of the Ordinance on the Conclusion and Implementation of International Agreements 1998, which requires the NA to deliberate on the ‘political, economic, social and financial impact of treaties’. Also see Doan Nang, 2002 ‘Xu Ly Dung Dan Moi Quan He Giua Phap Luat Quoc Te va Phap Luat Quoc Gia’ (Correct Settlement of the Relationship between International and National Law) Tap Chi Nghien Cuu Lap Phap (5 & 6) 6.

Standing Committee is nominated by and ultimately acts as the agent of the Politburo in the NA. 169

Second, the NA Law Committee, in association with other NA bodies, decides which bills to send to NA delegates for deliberation and which bills to refer to the Standing Committee for promulgation as ordinances. The Law Committee uses this power to refer politically sensitive issues to the Standing Committee for resolution, before, sometimes years later, they are given to NA delegates to enact into law (luat). 170 For example, legislation governing economic contracts, minerals, technology transfers, labour contracts and banking were first issued by the Standing Committee as ordinances.

Third, the Legislative Activities Board (LAB) (Ban Cong Tac Lap Phap) established in 2003 scrutinises draft bills before they are presented to NA delegates. 171 It decides which legislative issues are ‘technical’ (ky thuat) and require further clarification by professional drafters, and which issues concern policy and should be resolved by delegates.

Mediating National Assembly discourse

The Law on the Promulgation of Legal Documents 2002 divides the deliberation of bills into two NA sessions (Article 45b). During the first plenary (hoi truong) session, delegates consider the main policy issues, as determined by the Standing Committee and LAB. The chairman of the NA may refer complex matters to smaller group (thaoluan o to) sessions for consideration. The secretariat of each session summarises the delegates’ opinions, and bills are then amended by the drafting committee to reflect these concerns. But the Standing Committee ultimately decides which opinions should be codified into law. For example, the Standing Committee rejected concerns expressed by many delegates deliberating the Land Law in November 2003 that the expression ‘land is owned by the people but managed by

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170 The Law Committee also determines whether bills should be enacted as codes, laws or ordinances. See Law on the Promulgation of Legal Documents 2002, article 22. Nguyen Chi Dung, Editor of ‘Tap Chi Nghien Cua Lap Phap’ (Legislative Studies), speech given at the ‘Law and Governance: Socialist Transforming Vietnam Conference’, Deakin University and Melbourne University, Melbourne, 12-13 June, 2003.

the state’ should be replaced by the more accurate designation the ‘state owns land’.

Against objections raised by many delegates, it also accepted the drafting committee’s recommendation that for the purposes of taxation and compensation for appropriation, land should be valued close to market rates.

At the second plenary session, the Standing Committee reports whether revised bills have incorporated opinions expressed during the first session. Delegates then vote by simple majority to pass bills into law. Even controversial bills like the BTA (64 per cent) and the Land Law 2003 (85 per cent) were passed by large majorities.

The protocols governing NA deliberations are based on unwritten rules originally derived from the Soviet Presidium. They have changed over several decades to reflect consensus-generating practices and power structures designed to induce policy conformity. According to informants, attempts to codify these rules have failed, because informal and flexible procedures facilitate centralised leadership over deliberations.

The NA chairman opens sessions by restating deliberative parameters established by the Standing Committee. Consider the opening address delivered by the Chairman, Nguyen Van An, to the NA session discussing constitutional amendments in November 2001. After summarising institutional reforms proposed by the Constitutional Drafting Committee (Uy Ban Soan Thao Hien Phap), he instructed delegates to confine discussions to increasing inferior court powers and reducing procuratorial investigation powers. He expressly ruled out broader changes to clarify the relationship between party and state and NA supervision over other state organs.

The chairman also imposed deliberative constraints during the NA session considering the draft Law on the Promulgation of Legal Documents in December 2002. He informed delegates that the party Central Committee required certain amendments to improve legislative ‘results (hieu qua) so as to increase the productivity of the NA’.

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173 Interviews Nguyen Si Dung, supra.

174 Interviews officials Office of National Assembly, supra.

175 See Author Unknown, 2001 'Quoc Hoi Nghe To Trinh Ve Viec Sua Doi Bo Sung Mot So Dieu Cua Hien Phap Nam 1992 va Mot So Thuyet Trinh Bao Cao Bao' Nhan Dan 21 November, 3.

176 Party objectives include: building the law-based-state; developing a market economy; maintaining political stability; increasing legal consciousness among state officials, the public, enterprises and organisations; strengthening democracy and social justice and promoting international economic integration. See Ministry of Justice, 2002 ‘Program on Reforms of Drafting, Promulgating and Enhancing the Quality of Legal Normative Documents’, Ministry of Justice, Hanoi, 1. Also see VNS, 2002, ‘National Assembly First Session to Open 242
Delegates wishing to speak at plenary sessions must give the chairman a written summary before sessions commence. The chairman evidently shapes policy debates by prearranging the order in which delegates speak and limiting speaking time for those presenting unwelcome opinions. For example, less than half of the 32 delegates registered to discuss important amendments to the Land Law in 2003 were given time to speak. Less than 20 to 30 out of almost 500 delegates address the NA during the twice yearly, two-to-three-week sessions. Fewer than ten speakers, mainly from NA Committees (especially the Standing Committee), dominate most sessions.

Well-known delegates command enough popular prestige to enter debates without waiting for approval. During the April 2002 NA sessions Professor Nguyen Lan Dung, a prominent intellectual, questioned the prime minister on the government’s failure to enforce a decree requiring state officials to declare their assets. The NA chairman quickly moved to protect the prime minister by referring the questions to the next plenary session. When the delegates voted against this proposal, the prime minister informed the session that the matter was politically sensitive and under review by the Politburo. This intervention signalled an end to further discussion.

Procedures designed to limit individual discourse in plenary sessions are not as rigorously enforced during smaller group (thao luan o to) sessions. Senior party and state members leading ‘party affairs sections’ (ban can su dang), nevertheless, promote the party’s viewpoint during these sessions. Group reports about draft laws are compiled by the session secretary into ‘forms for requesting delegates’ opinions’ (phieu xin y kien dai bieu).


177 Article 92 of the Constitution gives the Chairman of the National Assembly powers to preside over National Assembly sessions. Also see Ngo Duc Manh, 2002, supra.


179 According to official accounts, the legislation that required state officials to declare assets was deferred ‘to prevent possible instability in agencies and organizations as well as indication of psychological negativity that might follow the declaration of assets by officials.’ See Thoi Bao Kinh Te Saigon, 1998, ‘Assets Declaration: A Positive Anti-Corruption Measure’, trans., FBIS East Asian Daily Report 98-246, 3 September, 2.


181 See Tran Ngoc Duong, 2005 ‘Noi Dung va Phuong Thuc Lanh Dao Cua Dang Doi Voi Quoc Hoi O Nuoc Ta Hien Nay’ (Leadership of the Communist Party Over the National Assembly in Vietnam—Content and Method) Tap Chi Nghien Cua Lap Phap (2) 17-23.
Party leaders quickly and publicly rebuke delegates that express views outside parameters sanctioned by the Politburo. On the rare occasions when significant numbers of NA delegates disagree with central party policy, the Standing Committee holds an ‘internal party vote’ (dang doan quoc noi) to resolve differences. If agreement is not reached, the Politburo makes a determination, which is then communicated to the NA plenary session. The Politburo infrequently exercises its extra-constitutional prerogative to amend legislation already passed by the National Assembly. This informal process is euphemistically referred to as hoan thieu (perfecting) legislation.

To recap, the Constitution provides few ground rules to guide delegates in codifying local ideas to amend imported laws. Most codification takes place in drafting committees. Finally, although the party mediates every stage of lawmaking, the ‘official’ discourse permits lawmakers to oppose legislation proposed by the government.

Conclusions
This chapter commenced by posing the question: what factors make some foreign legal ideas appear more appropriate than others? Three interrelated factors, deduced from the case studies, influence the way legislative drafters select and adapt borrowed law. Additional factors guide lawmaking in the NA.

In the first place, expanded epistemological settings in the ‘official’ discourse permit drafters to borrow laws from a diverse range of sources. This change is most evident where economic discourse, especially international legal harmonisation, has eroded political objections to capitalist laws. Although drafters are not indifferent to incompatibilities between legal imports and local conditions, localisation is hindered by a general reluctance to research issues that may implicitly contradict party directives, poorly developed comparative methodologies and less than optimal understandings of how laws function in donor countries.

Compounding the problem, most legal drafters take an instrumental approach to lawmaking that de-couples imported laws from their social contexts. From this reified perspective,

182 In discussing a NA debate that queried party resolutions the General Secretary Do Muoi insisted that ‘this abnormal state of affairs should resolutely end.’ See Do Muoi, 1995 supra 179.
183 Nguyen Chi Dung, 2003 supra.
184 This power is not publicly acknowledged, however, the final draft approved by the National Assembly occasionally differs from the code or law published in Nhan Dan, the official party newspaper. For example,
legal borrowing appears as uncomplicated as making a series of technical adjustments between legal systems. The distancing of law from reality does not in itself produce poor laws, since laws everywhere function as highly edited maps of reality. Lawmakers produce poor laws because they are reluctant or unable to imagine fictitious worlds in which borrowed legal ideas create new legal solutions for Vietnam’s commercial problems. Foreign laws may provide solutions that do not exist in relational practices. For example, lawmakers drafting the EL imaginatively borrowed deregulatory ideas to open markets to private entrepreneurs. But they missed an opportunity to refashion imported corporate governance provisions to create new legal solutions to local regulatory problems (see annex six).

The second factor influencing legal borrowing is the propensity for drafters to interpret and co-opt ideas in the official discourse to achieve strategic objectives. Powerful state agencies use drafting committees to encode and inculcate certain perspectives or orthodoxies in legislation to secure advantage in ‘palace wars’ with other agencies. Perceptions of legal prestige and fashion, inculcated through education and workplace relations, also predispose drafters toward certain legal sources and styles.

All this indicates there is a powerful domestic political and structural logic to legal borrowing. But in addition, the case studies suggest that in pursing their organisational interests, Vietnamese drafters generally use ideas that conform to the epistemological settings that order ‘official’ discourse. For example, CIEM drafters could not have used neo-liberal economic ideas to wear down ‘state economic management’ arguments, unless ‘official’ epistemological conventions permitted such thinking. Legal drafters cannot simply assert political power; they must play by the ‘rule of the game’ and camouflage self-interest with ideas drawn from the official discourse. CIEM drafters succeeded because they worked assiduously over several years to inveigle neo-liberal legal ideas into the official discourse. In short, although institutional imperatives shape legal borrowing, they are largely conceived and realised within the range of ideas permitted by the ‘official discourse’.

The third factor shaping legal borrowing is the lack of a shared legal grammar. Chinese-Vietnamese terms eventually acquired new and commonly agreed meanings because Vietnamese lawmakers trained in the Eastern bloc invested them with Soviet legal
consequences. The case studies show that a new meta-legal language is yet to emerge among contemporary legal drafters. Instead, legal drafters use a syncretic mixture of pre-modern, Soviet, East Asian and Western ideas that invest imported laws with fragmented meanings.

Evidence suggests, however, that groups or communities of like-minded lawmakers are coalescing around certain key institutions. For example, some researchers at CIEM share common epistemological assumptions, tacit understandings and even educational backgrounds with certain foreign donors. The possibility that 'interpretive communities' linking drafters and foreign donors facilitate legal borrowing is considered in chapter seven.

The first and second factors considered above also apply to lawmaking in the NA. Further research is required to ascertain whether 'interpretive communities' are forming in the NA. But the case studies suggest two additional factors influence legal borrowing in the NA.

First, delegates lack the constitutional 'ground rules' to agree among themselves how to localise imported legal ideas. Delegates use political, economic and moral discourse to occasionally oppose imported laws. This discourse engages with the policy behind the law, but lacks the legal precision required to imaginatively reconfigure imported legal ideas in ways that solve local problems. As a consequence, the fine-tuning that localises legal imports primarily takes place in the administrative and judicial processes discussed in the next chapter.

Second, the party uses procedural rules to mediate NA discussions. These processes limit the interaction between imported ideas and 'official' and 'unofficial' discourse.

Taken together, the case studies imply that the epistemological criteria guiding official discourse establish the ground rules governing legal borrowing. Within these broad parameters, lawmakers pursue institutional and personal objectives and converse in a disjunctive legal discourse that produces fragmented legal meanings. But under the impact of international legal harmonisation external ideas are increasingly taken as the frame of reference for change. The next chapter explores how bureaucrats and judges change the meanings that drafters and legislators invest in borrowed commercial laws.
Chapter Six
Implementing Imported Laws

Introduction

The preceding chapters have shown that Western rights-based laws are imported into Vietnam with few concessions to the needs and aspirations of domestic entrepreneurs. This chapter investigates how ‘official’ and ‘unofficial’ discourses influence the way state institutions interpret and apply borrowed commercial rights. This investigation subsumes a number of more specific inquiries, which are considered sequentially in this chapter. The first inquiry assesses how Vietnamese regulators use discretionary powers to manage (quan ly) imported rights-based laws. The second investigation examines how tensions between central and local discourses allow officials to overcome rigidities in imported legal rights and flexibly respond to local business norms and practices. The third inquiry unravels the meaning of judicial independence and determines whether judges are sufficiently autonomous from external influences to develop a legal discourse that supports imported commercial rights. The chapter concludes that different interpretive structures and conflicting strategic agendas fragment the implementation of imported laws.

Western commercial regulation

In order to grasp how Vietnamese regulators may change the meaning of imported laws, it is necessary to first understand the regulatory environment shaping Western commercial law. Most commentators trace the genesis of property and contractual rights to the codification of mercantile practices in nineteenth-century Europe. Codification aimed to condense vast amounts of information governing transactions into discretionary criteria that regulators could process. It achieved this objective by only officially recognising certain types of commercial rights and obligations. By the second half of the nineteenth century the process had reified to the stage where legal discourse

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1 The distinction between ‘official’ and ‘unofficial’ discourse only makes sense where voices outside the ‘official discourse’ speak with sufficient autonomy (from the party and state) to constitute a conceptually discrete discourse. Otherwise, ‘unofficial’ discourse has nothing to say to the ‘official’ discourse.

2 It should be noted that codification reached its highest expression in continental Europe, first in France and later in the Germany. Although Anglo-American jurisdictions rely more on non-statutory common law, these rules have through doctrinal consolidation come to perform a similar function to legal codes. See Ross, 1998 ‘The Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520-1640’ 146 University of Pennsylvania Law Review 323.
used internal doctrinal rules to distinguish legally recognised and unrecognised commercial transactions. Mature commercial rights emerged when most Western countries moved from comprehensive discretionary regulation towards normative rights-based regulation. As Weber observed, this transformation involved a shift from regulatory particularism to facilitative regulation based on universal legal rights.

According to Weber, stable commercial rights required regulatory systems in which bureaucrats based their determinations on written rules and organisational practices. This decision-making calculus assumed perfect information, high degrees of trust and communication and stable property rights. Scientific managers from the 1930s argued that correct decisions required clear legal rules to circumscribe bureaucratic discretion and minimise government interference with private commercial rights and freedoms. Even so Western regulators to greater or lesser degrees still intervened to correct 'market failures'.

‘Public-choice’ theories developed in the United States during the 1960s devised behavioural models that equated bureaucratic decision-making to entrepreneurial wealth maximisation. They conceded that in real life situations officials work in a ‘bounded rationality’ where some decisions were not based on rules. Deviations from central rules are caused, they thought, by unstable policy settings, organisational pressures, and incomplete or misunderstood information. To remedy the problem, administrative reforms sought to quarantine bureaucrats not only from political patronage, familial and

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3 Western bureaucratic organisational theories drew heavily from Weber’s concern that ‘substantive rationality’ should dominate ‘formal legal rationality’—or put differently, that formal legal rules should control policy flexibility. See Max Weber, 1978 Economy and Society, G. Roth and C. Wittich eds., University of California Press, Berkeley, 657.

248
societal influences, but also from the market place.\(^9\) This prescription fitted comfortably with neo-liberal economic attempts to minimise state interference in the market place.

As we saw in chapter four, the public choice deregulatory paradigm was grafted onto Vietnamese Public Administrative Reforms (PAR). More recently, Vietnam acceded to the US-Vietnam Bilateral Trade Agreement (BTA) in 2001 and intends to join the WTO in 2006. Both treaties presuppose a facilitative regulatory regime that follows a public choice blueprint. For example, they envisage politically neutral state institutions implementing treaty-based norms and rules that enable entrepreneurs to use private legal rights to shape their transactional environment.\(^{10}\) Regulators are only supposed to intervene in market decisions when applying uniform legal principles that apply to everyone.

The following section examines different narratives in Vietnam to understand why imported commercial laws seldom perform the neo-liberal legal function of preserving private property and contractual rights. In the process it examines why Western deregulatory reforms are struggling to reconfigure Vietnamese institutions.

### Changing the meaning of imported law with ‘state economic management’

**Mapping the Vietnamese discretionary legal framework**

Prior to *doi moi* reforms in 1986, most economic production was generated by state and collectively owned entities.\(^{11}\) Following Soviet central-planning, production contracts conformed to planning orders issued by line-ministries and people’s committees, only technical decisions affecting local conditions, such as packaging and delivery, were devolved to production managers.\(^{12}\) By 1989 central-planning mechanisms were effectively dismantled and the state began enacting laws that formally devolved decision-making powers to state-owned enterprises (SOEs) and then eventually to

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\(^{12}\) See Wladimir Andreff, 1993 ‘The Double Transition from Underdevelopment and from Socialism in Vietnam’ 23 *Journal of Contemporary Asia* (4) 515-531.
private households and entrepreneurs. But reforms did not disturb a longstanding belief in ‘state economic management’ (*quan ly kinh te nha nuoc*) discussed in prior chapters.

The introduction of the mixed-market economy created a dilemma for central regulators. They could no longer simply suppress private markets, but they thought imported rights-based law gave market players too much discretionary control over resource allocation. Regulators needed a rights-based legal framework that attracted foreign investors, conformed to international trade agreements and, in addition, conveyed discretionary powers that enabled government officials to ‘manage’ (*quan ly*) the economy.

Commercial regulation everywhere uses state discretionary power to control and guide private legal rights. But this study argues that ‘state economic management’ powers in Vietnam achieve this objective in ways rarely experienced in Western countries. In totality they created a regulatory system that is far removed from the facilitative rights-based system contemplated by neo-liberal deregulatory reforms and international trade treaties. This observation brings us to a central inquiry in this chapter: how do Vietnamese regulatory practices change the meaning of imported commercial rights? Regulators use four mechanisms to ‘manage’ imported legal rights.

- **Subordinate legislation**

As we saw in chapter five most commercial laws passed by the NA lack normative detail. Open-ended drafting techniques used to strip laws of controversial detail in NA debates devolves responsibility for formulating much commercial policy to government agencies. Inferior legislation co-exists with, and frequently contradicts, superior laws in a complicated network of overlapping and criss-crossing similarities and differences.

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This regulatory confusion gives agencies a wide latitude to use subordinate rules to influence the meaning and utility of private legal rights.

- **Discretionary Licensing**
  
  Government agencies at the central level, but especially at the local level, use discretionary licences and permits to circumscribe the permitted range of business transactions and to determine the quality of property rights.

- **Official inspections**
  
  Local-level state agencies use inspections not only to monitor legal compliance, but also as a method of ‘state economic management’.

- **Criminalising private rights**
  
  Administrative and criminal laws give officials powers to transform commercial transactions into administrative or criminal infractions.

Before exploring the techniques officials use to ‘manage’ private rights, it is instructive to briefly consider the mentality guiding regulatory authorities.

**The mentality of state economic management**

There is a well-documented disdain among state officials (especially at the local level) towards entrepreneurs that goes back to pre-modern Vietnam. Encapsulated by the Confucian saying, ‘emphasise agriculture, commerce is peripheral’ (*trong nong mat thuong*), imperial policy prohibited large-scale commercial organisations independent of royal patronage (see chapter two). After independence, Confucian anti-mercantilism fused with Soviet regulatory practices and class theory to profoundly reshape bureaucratic thinking.

Economic production in the command economy resided in dual, but interwoven systems. One system operated as a facsimile of Soviet central-planning.

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ministries and people’s committees regulated production through administrative directives that allocated raw materials according to quantitative planning targets. The other economic system produced spontaneous markets that co-existed with, and infiltrated, state distribution networks. Commercial incentives for unauthorised private production and distribution were extremely potent. Officials estimate that by 1986 less than 40 per cent of manufactured consumer goods passed through state-trade networks.19

Economic duality deeply influenced bureaucratic perceptions of socialist regulation. Class-based morality tolerated small-scale household producers, but demonised large-scale private producers, imbuing bureaucrats with an antipathy to private traders and respect for the state economic sector.20 The state also used incentives—like housing and consumer goods—to reward loyalty to class ideology. Yet at the same time bureaucrats were encouraged to believe that socialist ideology expressed reality, they lived in a world where family and friends profited from private markets. The ensuing ideological ambivalence and cynicism was exacerbated by doi moi reforms that required the guardian of socialism (the state) to defend—even create—markets.

In the command economy bureaucrats used concessionary licences and permits based on state plans to tightly control business activities. After doi moi the state began importing rights-based laws that purported to give entrepreneurs broad commercial freedom to conduct business transactions. In practice, however, the internal architecture of most commercial legislation reflected the tension in the ‘official’ discourse between private rights and proactive concessionary regulation. As we saw in chapter five, lawmakers reconciled these competing objectives by grafting ‘state economic management’ discretionary powers onto imported rights-based laws. The following section uses a series of case studies to ascertain how regulatory authorities use ‘state economic management’ powers to guide imported legal commercial rights.

State economic management and subordinate legislation

The Law on the Promulgation of Legal Documents 2002 explains that National Assembly (NA) legislation determines basic social issues, while the government issues subordinate legislation to implement and concretise superior law. It further noted there is no legal impediment to making superior laws self-executing. A practice has arisen whereby state officials do not observe superior laws until directed to do so by subordinate implementing regulations issued by ministries. By undermining the normative authority of superior law, subordinate legislation can change the meanings ascribed to imported contract and property rights.

For example, it took eight years after the Civil Code 1995 took effect before state agencies passed implementing rules that gave citizens rights to enforce ‘civil obligations’ (tortious actions) for non-contractual loss. Aggrieved citizens in some areas, such as trespass to land and damage caused by pollution, still rely on sympathetic state authorities to remedy breaches of rights stipulated in the Civil Code. Behind the problem is the belief by some party leaders that officials are better equipped to govern than legislators and the concern that tortious rights might give the public too much power to privately plan social space.

In another example, corporate governance provisions in the Enterprise Law 1999 (EL) aiming to protect minority shareholders (article 53) and allow companies to merge (article 108) and wind up (articles 111-112), have remained dormant without implementing regulations. Rather than a desire to frustrate socially disruptive imported rights, the delay in this case is imputed to a low social demand for complex corporate governance provisions (discussed in chapter seven and annex six).

Adding to the regulatory confusion, some subordinate rules alter the meaning of NA legislation. As one commentator put it, ‘the main legal documents are the raw materials used to produce a series of subsequent regulations, but the guiding regulations have

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21 National Assembly laws (luat) concern national and international relations, the economy, society, defense, security, organisation of state apparatus, social relations and citizens' activities. See Law on the Promulgation of Legal Documents (amended 2002), article 20.
22 Ministry of Justice, 2002 ‘Final Report Legal Needs Assessment’, Hanoi, point 2.3.2.
“covered” all these decisions and “replaced” the role of the main documents.\textsuperscript{25} For example, the General Department of Land Management (now part of the Ministry of Natural Resources and Environment) issued a circular in 2000 that permitted SOEs to mortgage land. This contravened the Civil Code, which provides that mortgages should only attach to registered land-use rights.\textsuperscript{26} When questioned about this anomaly, officials explained that the rule only applied where SOEs intended to apply for land-use right certificates, ‘so the spirit of the law was satisfied’.\textsuperscript{27}

A directive issued by the prime minister in 2004 to implement the EL clearly illustrates the use of subordinate legislation to infuse private rights with socioeconomic policy.\textsuperscript{28} Not only did the directive require entrepreneurs to ‘raise their legal understanding and sense of law observance’, they were also instructed to increase ‘efficiency, productivity and competitiveness’ and adopt advanced technologies and market information to exploit foreign markets. As a legally binding instrument, the directive sought to enlist private capital to further the state’s international economic integration policies—a project that is not contemplated in the EL.

The LNA Report concluded that ministries routinely regulate sensitive issues in superior legislation with sub-legal, but highly persuasive administrative rulings such as guidance letters (thông tư huống dan) or dispatches (cong van) (literally official correspondence). Government authorities and courts use these instruments to fine-tune and ‘manage’ (quan lý) rights set out in superior legislation.\textsuperscript{29}

A report written by officials in the Office of Government also found that government agencies use open-textured and opaque drafting techniques to increase their

\textsuperscript{25} Truong Thanh Duc, 1999 ‘Nhưng Bất Cảnh Trong Việc Xây Dựng và Ban hành Văn Bản Quy Phẩm Pháp Luật’ (Defects in Building and Promulgating Legal Instruments) Nha Nuoc va Phap Luat (2) 22, 29.

\textsuperscript{26} Article 728 of the Civil Code 1995 and Decree No. 178 1999 provided that only houses with Land Use Rights are mortgagable. Authorities leniently interpret this rule permitting SOEs to mortgage land rights in the process of being legalised (Inter-Circular No 12 TTLT-NHNN-BTP-BTC-TCDC 2000). Typifying numerous contradictions in the land regime, the Civil Code prohibition was not amended to exempt SOEs.

\textsuperscript{27} Interview Dang Trung Chinh, Legal Expert, General Department of Land Administration, Hanoi, June 2001.

\textsuperscript{28} See Directive No. 27 CT-TTg On Further Stepping Up the Implementation of the Enterprise Law, Encouraging the Development of Small-and Medium Sized Enterprises 2004, article 16. Also see Directive No 47 CT-TTg on Solutions to Raising the Competitiveness of Export Industrial Products 2004, articles 1(a), 2(a).

\textsuperscript{29} The preamble to Resolution No. 38 on Public Administrative Reform 1994, and subsequent public administrative reform instruments accuse line-ministries and provincial peoples committees of reinterpreting the meaning of superior law.
discretionary powers. Vague and inconsistent rules increase the discretionary latitude of government agencies to ‘manage’ business entities.

State bodies responsible for legislative consistency, such as the NA and the Ministry of Justice, lack the resources to evaluate the thousands of subordinate statutes passed by government agencies every year. Until recently, these coordinating bodies did not have access to every sub-law (duoi luat). The Law on the Promotion of Legal Documents 1996 (as amended in 2002) now requires government bodies to lodge copies of statutes with a central database before the legislation comes into force. It also directs drafters to repeal existing statutes to the extent of inconsistency with new legislation. Work by the NA and other bodies to determine whether sub-laws comply with superior legislation may eventually pressure government agencies to enact more consistent legislation. Legislative consistency is also one of the key conditionalities under the BTA. Progress is hampered, however, by the perception within some government agencies that legislative conformity constitutes a political constraint on policy implementation. As we shall see, there is little commitment, especially at the provincial level, to the notion that legislation in unitary states has a ‘single mind’.

State economic management and licensing powers

After doi moi reforms, government agencies used strict licensing powers to control private commercial rights. It will be recalled from chapter five that heavy-handed concessionary (asking-giving) licensing under the Company Law 1990 tightly regulated market entry and business activities. Consider, for example, an application in 1998 to


31 Reforms underway to locate a national legal database at the Ministry of Justice will record all legislation. Without a comprehensive database the Ministry cannot perform its statutory role of consolidating legislation.


33 Incorporation was time consuming and expensive until the EL commenced operation in 2000. For example, Song Thu Ltd, a company established in Ho Chi Minh City to operate a mini-hotel. Incorporation took eight months. During this time promoters submitted 40 documents, requiring 83 official seals and 107 signatures from 26 different official bodies. These comments are based on interviews with Vietnamese legal practitioners. More typically eight to ten documents were required for each of the two stages of incorporation. Accordingly, applicants must attend licensing authorities approximately forty times.
incorporate a musical promotion company by a group of famous artists. The Hanoi People’s Committee rejected the application on the grounds that Decree No. 222-HDBT 1992 did not specify the legal capital required for music promotion companies.\(^{34}\) Adopting a concessionary approach to market entry, the officials contended that ‘since the law does not specifically provide a legal framework for such business activities, it means that people are not allowed to do such business’.\(^{35}\)

The struggle between private commercial rights and ‘state economic management’ is illustrated by deregulatory procedures leading up to the enactment of the EL. The first tentative step towards market-entry deregulation came in a circular issued by the Ministry of Justice, which abolished discretionary powers to determine the health and educational standards for company promoters.\(^{36}\) This reform aimed to minimise rent-seeking and other administrative abuses, without fundamentally dismantling concessionary powers.

The EL introduced more far-reaching liberalisations by notionally replacing some business licences with a simple registration system.\(^{37}\) It permitted private investors to engage in any type of business activity that is not prohibited or licensed by the state. Decree No. 2 ND-CP 2000, implementing the EL, unequivocally provided that ‘to establish an enterprise and to carry out business registration in accordance with the law is the right of the people and of organisations, which shall be protected by the state.’\(^{38}\)

Although the EL brought company formation within the facilitative regulatory orbit, it also invests government agencies with discretionary powers to enact subordinate legislation to regulate and inspect companies. Administrative and criminal penalties punish company officials violating ‘state economic management’ provisions.

By abolishing more than 150 licences and/or certificates (giay phep kinh doanh), the EL stimulated impressive growth in new company registrations.\(^{39}\) Studies show that in


\(^{35}\) This passage is quoted from a letter sent by the Hanoi Peoples Committee to the law firm acting for the artists.

\(^{36}\) Circular No. 5, 10 July 1998, Ministry of Justice and Ministry of Planning.

\(^{37}\) Not all business licences were abolished. Licences remain in key manufacturing, mining, tourism and various import/export sectors. In addition private companies remain barred from economic sectors considered harmful to the public interest, such as national defense (Article 6(1)) and areas reserved for SOEs like telecommunications, transport and rice export. See Cao Mai Phuong, 2003 ‘Enterprise Law has Created Legal Environment for Enterprises’ 10 Vietnam Law and Legal Forum (111) 18.

\(^{38}\) Decree No. 02-2000 ND-CP, on Business Registration, 2000, Article 2 (1); Decision No. 19-2000-QD-TTg on the Revocation of all Types of Licenses Inconsistent with the Provisions of the Law on Enterprises 2000.

\(^{39}\) In 2001 registrations of limited liability companies rapidly increased to 11,121, but the rise in new registrations plateaued in 2002-2004. By way of comparison, from 1991 to 1998 only 12,163 limited liability companies were incorporated under the Company Law. There is some doubt that all the
some localities deregulatory reforms have induced a ‘strong commitment to simple, transparent and abridged transactions between public officials and businesses’\(^{40}\). Reforms have systematised legal rights and given entrepreneurs the freedom to select their own business activities.\(^{41}\) Entrepreneurs report that licensing procedures have by varying degrees reduced the time required to incorporate and have induced a more streamlined ‘work culture’ (\textit{van hoa lao dong}). In short, routine procedures reduced the discretionary space in which officials could infuse private rights with local imperatives. Despite impressive changes, a series of studies indicate that EL reforms have only just begun to transform the deeply engrained concessionary and anti-mercantile mentality among state officials. An investigation conducted by CIEM six months after the EL was enacted found that most corporate regulators were still applying the repealed procedures.\(^{42}\) Twelve months later, the Enterprise Enforcement Mission Group (\textit{Nhóm Nhiệm Vu Cuong Che Doanh Nghiep}), which the prime minister convened to prevent reregulation under the EL, reported that ‘many local authorities still hold on to their powers to issue sub-licences and continue to employ the “ask-favour system” (\textit{co che xin cho}) without regard for the consequences for the business community.’\(^ {43}\)

A UNDP field study conducted in 2003 discovered that some provincial people’s committees used ‘one-door’ registration procedures to establish services companies.\(^ {44}\) These fee-for-service companies used personal links with people’s committee officials to give applicants access to the unpublished nuances of municipal policy. Information of this kind is required to successfully negotiate cryptic business regulations. Other officials used technically illegal sub-licences to reregulate market entry.\(^ {45}\) Before deregulation, food safety inspectors routinely incorporated food hygiene standards into

companies incorporated in 2000 were new businesses. Some already existed and re-incorporated to gain more favourable registration conditions, others were formed for tax avoidance. Nevertheless, deregulation stimulated new investment in companies. Interview Trang Nguyen, Manager MPDF, Hanoi, August, 2004.


41 Entrepreneurs are required to answer standard questions about the proposed company, but officials now lack powers to assess the appropriateness of business decisions.

42 See Quy Hoa, 2001 ‘Dung Lam Kho Doanh Nghiep: Nhí Nai Mot Nam Thi Hanh Luat’ (Do Not Make it Difficult for Business: Reviewing a Year’s Enforcement of the Enterprise Law) \textit{Hoi Khoa Hoc Kinh Te Viet Nam} (43) 9 April, 2; Nguyen Thanh Phu, 2001 ‘One Year’s Implementing the Enterprise Law’ 7 \textit{Vietnam Law and Legal Forum} (78) 15-17.


44 See CIEM, 2003 supra 22. Also see Decision No 181 QD-TTg Promulgating the Regulation on the Implementation of ‘One-Door’ Mechanism in Local State Administrative Agencies 2003.

45 In the first year of its operation 145 licenses were abolished, but not one of the 30 licenses abolished in 2001 was revoked by the responsible government agencies. See Author Unknown, 2002 ‘Enterprise Law Ups and Downs’ \textit{Vietnam Investment Review} 18 February, 3; Quy Hoa, 2001 supra 2. Also see Vietnam Business Forum, 2002 ‘Sub-Working Group on Administrative Reform: Review of Licenses/Permits and Related Issues’, unpublished paper, Hanoi.
business licences. The abolition of business licences embodying these standards exposed consumers to unhygienic services. In response, officials in Ho Chi Minh City began inventing health permits to control standards in food processing firms.\textsuperscript{46}

Employing another strategy, some city-level officials used discretionary powers over public resources to discourage unwanted business activities.\textsuperscript{47} For example, they delayed processing documents, charged excessively for utility tariffs and imposed arbitrary environmental, fire and building controls. Other officials used access to land to ‘manage’ private investment.\textsuperscript{48} Le Quang Chien, a prominent ceramics manufacturer complained ‘my company and thousands of other privates businesses are unable to develop or expand their operations simply because they are not given the land to do so.’\textsuperscript{49} Officials used these regulatory powers to negate or ‘manage’ market entry rights conferred by the EL.\textsuperscript{50}

Deregulatory reforms are only gradually (if at all) changing deeply ingrained concessionary attitudes that discretionary power should proactively regulate company formation. CIEM investigators concluded that an institutional culture that held officials morally, if not legally, responsible for corporate criminality and business failures, perpetuated state economic management thinking. Unofficially, CIEM officials concede that reregulation has much to do with rent-seeking.

\textbf{State economic management and supervisory powers}

In addition to licensing powers, officials use supervisory powers to control private commercial rights.\textsuperscript{51} For decades state authorities used supervisory powers over SOEs to police compliance with socioeconomic plans.\textsuperscript{52} Evidence suggests that authorities are continuing to use supervisory powers to regulate private entrepreneurs in the mixed-
market economy. According to an authoritative CIEM report, 'entrepreneurs feel that the difficulties they face in Vietnam is not to find ways of producing cheap and good products, but coping with inspection agencies and satisfying their requirements.'53

A variety of city/provincial agencies, including market management authorities (chi cuc quan ly thi truong thanh pho),54 economic police (canh sat kinh te) and economic security police (an ninh kinh te) supervise compliance with the EL and associated commercial legislation. Adding to the regulatory web, some ministries and people’s committees conduct specialised inspections. For example, the Ministry of Labour monitors compliance with the Labour Code, the Ministry of Transport inspects company vehicles, traffic police control road safety and the Taxation Department collects and monitors taxation.

Entrepreneurs complain that inspectors do not confine themselves to supervising compliance with standards or practices stipulated in laws, but in addition use their powers to ‘manage’ business activities.55 As discussed in chapter four, market management authorities use discretionary powers to promote thi truong la nh manh (healthy markets).56 The types of activities that constitute healthy markets are continuously changing to reflect nuances in party and state policy. Policy settings are explained to officials in internal sub-legal documents (i.e. official letters and internal operational directives) that reflect ‘policy regimes’ (che do chinh sach) established by party committees. For example, officials in Ba Dinh district market-management group (doi quan ly thi truong) in Hanoi were instructed to encourage similar businesses to group together, because it is difficult to detect illegal activities in geographically dispersed businesses.57 This practice contravenes provisions in the EL allowing entrepreneurs to select their place of business.

Regulators also ‘manage’ entrepreneurs using lam luat (make law), a popular expression describing the misuse of discretion to extract bribes. Consider the attempts by a company in Ngo Thi Nham Phuong (ward) in Hanoi to purchase a receipt book (hoa

53 See Vien Nghien Cuu Quan Ly Kinh Te Trung Uong (Central Institute of Economic Management), 1998 Danh Gia Tong Ket Luat Cong Ty va Kien Nghi Nhung Dinh Huong Sua Doi Chu Yeu (Review of the Current Company Law and Key Recommendations for its Revision), Hanoi, January, 104.
54 Decree No 1 on Administrative Punishment for Economic Actions 1996.
55 See e. g. Cao Cuong, 1998 ‘No More Harassment’ Saigon Times, July 11, 28-29; Nguyen Dinh Tai, 2002 supra 25, 27.
56 This case description is based on discussions with two officials working for the Hanoi Market Control Board during April 1999 and September 2000.
Before agreeing to certify that the company was trading legally, a precondition for the sale of receipt books, the Phuong People’s Committee required a notarised copy of the company’s business lease. Public notaries claimed they lacked the powers to certify leases. Officials then refused to accept the lease without a copy of the lessor’s civil registration and identity card. Without the receipt book the company was not legally permitted to trade.

Other entrepreneurs reported that numerous (five to ten) visits to tax authorities are needed to convince officials to sell receipt books. In one case it took six meetings to persuade a tax official to accept that vice-chairmen, rather than chairmen of local people’s committees, are permitted to certify lease agreements.

Many commentators believe that officials use supervision to extract bribes from entrepreneurs. Inspections evidently reach a climax immediately before Tet (lunar new year). According to an investigative journalist, ‘all difficulties that local authorities or tax officials create for businesses aim to make money. To clear the bureaucracy, businesses often agree to pay bribes. For example, a company reported paying approximately one million dong (USD 70) for one meeting with a tax official to thank them for their hard work.’

**Administrative penalties**

Government agencies use a comprehensive system of administrative penalties to sanction violations of subordinate legislation. Penalties range from fines to custodial sentences for repeat offences. For example, fines of 500,000 dong sanction company officials providing false information to business registration departments. Officials from people’s committees can order administrative penalties and custodial sentences without first seeking permission from judges. As discussed below, there are few opportunities for entrepreneurs to appeal administrative decisions to the courts.

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58 See Manh Quan, 2003 ‘Doan Truong Hau Dang Ky Kinh Doanh’ (The Painful Process of Post-Registration) Thanh Nien, 7 August, 5. For a more general account of the problem see Khai Ly, 2001 ‘Cong Chuc Phai Tap Xin Loi Dan’ (Civil Servants Must Learn to Apologise) Thanh Nien 17 April, 5.
59 Most entrepreneurs contributing to a CIEM study into private businesses reported that state supervision was routinely used to generate rents. See CIEM, 2003 supra; Nguyen Phuong Quynh Trang, 2001 ‘Doing Business Under the New Enterprise Law: A Survey of Newly Registered Companies’ MPDF, Private Sector Discussions 12, 20-21.
60 See Manh Quan, supra.
Criminalising (*hinh su hoa*) commercial activities

Entrepreneurs regard the blurred distinction between administrative and criminal penalties, termed criminalisation (*hinh su hoa*), the most potent weapon in the ‘state economic management’ arsenal. 62 Criminal penalties not only apply to offences described in the Criminal Code 1999, they also extend to administrative violations of commercial regulations. Recidivism and quantitative thresholds transform relatively minor administrative infractions into criminal offences. 63 It is a crime, for example, to intentionally conduct a business without business registration. 64

Criminalisation occurs in two situations: where government agencies (and courts) use criminal powers to resolve commercial problems, and where the regulatory regime is so vague that businesses cannot trade profitably without infringing subordinate regulations. Officials have broad powers to criminalise commercial activities. For example, it is a criminal offence to ‘act against’ (*hanh dong nguoc lai*), though not necessarily breach legislative rules, unpublished ministerial dispatches (*cong van*), and even oral directives given by officials. 65 Take, for example, criminalisation under Decree No. 324 QD-NHNN Promulgating Regulations on Loans for Credit Institutions 1998. The decree makes bank officials criminally liable for ‘lack of responsibility’ (*thieu trach nhiem*) (or negligence) in processing loans. Liability extends not only to fraudulent lending, but also to failing to predict credit risks. 66

The decree was enacted after state bank officials lost approximately USD 280 million in loans to the Minh Phung group of companies in 1997. 67 Although bank officials in that case were charged with misappropriating ‘socialist property’ (*tai san xa hoi chu nghiia*), many commentators believe the officials merely made poor commercial decisions. 68 By

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62 Interviews with lawyers from Hanoi based law firms Investconsult, Vilaf and Leadco, 1999-2005. Also see Tan Duc, 1999 ‘Bo Dieu 164 Cho Doanh Nhan Yen Tam Lam An’ (Revoke Article 164 to Make Businessman Feel Assured in Doing Their Business) *Thoi Bao Kinh Te Sai Gon* (Saigon Economic Times), 20 May, 10, 11.

63 For example, the administrative offences of ‘doing business illegally’ are criminalised on the second and subsequent breach. Criminal Code 1999, article 159. Whereas article 9 of Decree No. 16-CP Regulating Administrative Sanctions in State Management Over Customs 1996 provides that the unlawful importation of certain kinds of goods valued at ten million dong or less constitutes an administrative offence, the importation of goods exceeding that value constitutes a crime.

64 Criminal Code 1999, article 159 (penalties range from one to seven years imprisonment).

65 Criminal Code 1999 article 174 (penalties range from three and twelve years imprisonment).


allowing the state to prosecute bank officials for making commercial decisions, the new provisions have frustrated banking liberalisations designed to increase the availability of loan capital for the private sector.

Officials also use vague and contradictory subordinate rules to criminalise commercial activities. For example, many regulations governing trade promotion (xuc tien thuong mai) do not clearly delineate the boundaries between acceptable and unacceptable advertising and promotion. Entrepreneurs using advertising to increase their market share risk violating discretionary powers that criminalise ‘unhealthy market’ (thi truong phi lanh manh) activities. Market control officials know that many rules are not obeyed and in fact cannot be obeyed if businesses are to remain viable. Opaque rules are useful precisely because they give officials discretionary powers to prevent entrepreneurs from competing with state-owned enterprises, extract bribes and retaliate against political adversaries.69

Nguyen Thi Nghia, a Ho Chi Minh City-based company director, encapsulated the uncertainty surrounding criminalisation when she said:

In principle, ‘intentional contravention’ breaches the law, however, it is very difficult to apply the relevant law in practice. Boi duong (feeding up) customs officers, for example, is obviously an intentional contravention, but we cannot help doing it while operating our businesses. It is very difficult to do business in a vague legal environment that is full of unclear and general provisions. In fact, enterprises cannot exist without ‘intentional contravention’.70

In another manifestation of ‘state economic management’, trade competitors use public security officials to criminalise the activities of their competitors. For example, the public security police in Hai Phong began investigating 19/8 Hai Phong Fertiliser Company in 2001 for manufacturing and selling counterfeit fertiliser.71 The security police alleged the company used a red additive to make the fertiliser resemble a product imported by fertiliser companies owned by the Hai Phong People’s Committee. According to newspaper accounts, several independent state agencies tested the additive and concluded that it contained trace elements required for plant growth. Further, the product was clearly labelled to avoid confusion with the more expensive imported product. Despite this certification, the People’s Committee in 2002 sent 50 police to

70 Tan Duc, supra 10, 11.
close down the factory and arrest the company director. Commentators speculate that
the action was taken to protect the state-owned fertiliser companies from private
competition.\(^{72}\)

In another example, Thai Thang Long, the chairman of a construction company, was
arrested by police in 2001 for allegedly offering bribes and violating the EL.\(^{73}\)
According to lawyers acting for the accused, the charges were manufactured by the
Vinh Long People’s Committee to bankrupt a highly successful private sector company.
Police charged Thai Thang Long with establishing a company for the purposes of
‘swindling and misappropriation’ without producing evidence supporting their
accusation. He was also charged with bribing a state official to unlawfully award
construction contracts. Further investigations revealed, however, that the alleged bribe-
taker lacked the official power to confer such benefits. Finally police charged him with
sub-contracting under a tender agreement, an activity that is not prohibited by the law.
Appeals by the accused to authorities to review his case were unsuccessful.\(^{74}\)

Officials in these cases used criminalisation as a market ‘management’ tool when
private commercial rights did not produce locally acceptable outcomes. Criminalisation
is a potent instrument because it induces a psychology of compliance. Politically
unconnected entrepreneurs are never certain when the exercise of private commercial
rights will offend vague ‘state economic management’ principles and policies.\(^{75}\) The
mere threat of prosecution transforms calculable commercial risk into incalculable
criminal risk, which in turn limits the utility of private contractual and property rights.

Despite efforts to reduce criminalisation, the National Assembly Legal Committee
estimated that over 30 per cent of commercial violations was criminalised (hinh su hoa)
by state officials.\(^{76}\) Further complicating matters, the government’s decision to retain
Article 174, while abrogating other provisions in the Penal Code considered unsuited to
a mixed market, intimates high-level toleration of criminalisation.\(^{77}\)

\(^{71}\) KT-PL, 2001 ‘Hinh Su Hoa De Lam Gi?’ (What is Criminalisation For?) Thoi Bao Kinh Te Viet Nam
16 April, 12.
\(^{72}\) Interview with field officer from the Mekong Project Development Facility, Hanoi February 2002.
\(^{73}\) See Theo Duong Day Nong, 2001 ‘Day Dut Lon Tu Vu An Nho’ (Deep Concern Over a Small Case)
Dau Tu 18 September, 6.
\(^{74}\) Since 2001 there have been no further press reports about this case.
\(^{75}\) See Pham Duy Nghia, 2000 supra 30-42; Tran Vu Hai, 1999 ‘Kinh Te Thi Triuong Va Viec Quy Dinh,
Xu Ly Toi Pham Trong Hoat Dong Kinh Doanh’ (The Market Economy and the Definition of and
Sanctions for Offences in Business Activities) Thoi Bao Kinh Te Sai Gon (Saigon Economic Times) 6
May, 37-38; Tan Duc, 1999 supra 10, 11.
\(^{76}\) See Author Unknown, 1999 ‘Chong Hinh Su Hoa: Moi Dung O Chi Thi Hoi Thao’ (Fighting Against
Criminalisation is only Conducted in Directives and Workshops) Thoi Bao Kinh Te Sai Gon 27 May, 14.
\(^{77}\) The offence of ‘obstructing the implementation of the State’s regulations on socialist transformation’
described in article 164 of the Penal Code 1999 has been abrogated. See Nguyen Dinh Loc, 1999
To summarise, regulators everywhere combine statutory and discretionary powers to control economic activities. Vietnam differs from the Western regulatory approach in the extensive powers given to officials to ‘manage’ statutory commercial rights. The problem for rights-based regulatory reforms is threefold. First, as in any modern state, it is impossible for the central government in Vietnam exercise complete supervision over all subordinate authorities. As result officials at every level must exercise some discretion to implement central laws and policies. But central control over local discretion is frustrated by unclear boundaries between the jurisdictions of different levels of government and between the state and party.

Second, the guidelines giving meaning and utility to imported private rights primarily reside in internal ‘policy regimes’ and instructions. For investors to understand the limits of private rights, they need to form personal (frequently corrupt) relationships with state officials. This process undermines the capacity for formal legal rules to control policy flexibility.

Third, and following from the first point, it is never clear whether officials exercising ‘state economic management’ are grounding their decisions on ‘official’ socioeconomic policies. Uncertainty exists because officials are tacitly permitted in some circumstances to arrogate discretion to regulate, even criminalise otherwise lawful behaviour. In other circumstances the arrogation of power is considered corrupt. The conundrum facing entrepreneurs is knowing whether ‘state economic management’ follows ‘official’ or ‘unofficial’ discourses.

**Interaction between central and local ‘official’ discourses**

It is rarely clear whether officials interpreting private rights are legitimately following ‘official’ discourse or acting contrary to conferred authority (uy quyen) by following ‘unofficial’ discourse. This section examines evidence that central and local levels of government operate in different discursive environments and sometimes reach contrary conclusions about the correct interpretation of imported law.

**Elite-level discourse**

Studies considered below intimate that some elite-level state officials are in sympathy with the rights-based, neo-liberal legal practices advocated by most foreign donors and

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‘Amending and Supplementing the Penal Code-A must in the New Situation’ 6 *Vietnam Law and Legal Forum* (2) 14, 20; also see *Saigon Economic Times*, 1999 ‘Hinh Su Hoa: Khong Phai Tai Luat’
lawyers. Even officials who are unfamiliar with rights-based discourse may, through dialogue with foreign donors, investors and lawyers, come to accept that private commercial rights play a valid role in ordering economic activity. Chapter seven builds on this discussion by considering whether similar (mutually constituted) neo-liberal-oriented interpretive communities are forming between foreign donors and some elite-level lawmakers.

Lawyers acting for large foreign companies routinely form personal linkages to secure relatively unmediated access to high-level state officials. They use imported legal doctrines to explain how tersely worded statutory provisions function in Western or East Asian (typically Singapore or Hong Kong) legal systems. Training courses and study trips are conducted to clarify international practices and show officials how regulators in other systems use laws to balance private and state interests. Lawyers also assist officials to codify legal principles and practices into subordinate legislation. In short, they are beginning to weave a protective web around the private legal rights that secure the interests of capitalist enterprises.

Consider the negotiations over corporate income tax for a large foreign-funded construction project in Phu My Hung near Ho Chi Minh City. A Taiwanese construction firm formed a joint venture in 1993 with a Vietnamese SOE to engage in civil construction (cong trinh dan dung) projects. When the joint venture commenced work on the Phu My Hung apartment project in 2003, the Ministry of Investment and Planning (MPI) increased the tax rate from 10 to 25 per cent. The joint venture successfully persuaded the Ministry of Justice to issue an Official Letter stating that ‘civil construction’ projects include residential apartments.

When the MPI refused to follow the Official Letter and reduce the tax, the Office of Government ordered the Ministry of Finance, MPI and the Ho Chi Minh City People’s Committee to resolve the impasse. According to lawyers acting for the Taiwanese investors, during a series of meetings representatives from some of the state agencies were persuaded that Article 121 of Decree No. 24 Implementing the Foreign Investment

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(Criminalisation is not Due to the Laws) Thoi Bao Kinh Te Sai Gon, 27 May 12-13; KT-PL, supra 12.

78 These observations are based on over 100 interviews and focus group discussions with lawyers from leading domestic Vietnamese law firms, Investconsult, Leadco, Vilaf, and I &L Associates from 2000-2005.

79 Hoang Hai Van, 2004 ‘Bo Tu Phap, UBND TPHCM de Nghi: Giu Nguyen Muc Thue Thu Nhap Doanh Nghiep 10% Cho Lien Doanh Phu My Hung’ (Ministry of Justice and Ho Chi Minh City People’s Committee Propose that Corporate Income Tax Rate Remain at 10 % for Phu My Hung Joint Venture) Thanh Nien-Online 17 February.

80 See Official Letter No. 5 TP PL QT 5 November 2003 Ministry of Justice.
Law 2000 gives foreign investors legal protection against future adverse change. In practice this meant profits generated from construction activities authorised under investment licences are legally exempt from future tax increases. Lawyers argued that the foreign investment law extended protection against tax increases imposed by the MPI.

For six months it seemed that a legalistic interpretation of Decree No. 24 of 2000 would prevail against political arguments used by the MPI to support the tax increase. But in August 2004 the prime minister intervened in the dispute by issuing a decision that forced the Phu My Hung Corporation to pay the 25 per cent tax. Phu My Hung Corporation also dropped a legal action filed in the Ho Chi Minh City administrative court claiming a breach of its investment licences, after the Ho Chi Minh City People’s Committee began investigations for alleged Land Law violations. This case shows that legal arguments are persuasive, but party and state leaders do not hesitate to subordinate private rights when important questions of political and economic policy such as tax revenue are threatened.

More generally, private lawyers form quan he tot dep (good relationships) with state officials, often secured with bribes, to access the ‘official’ discourse required to understand and predict state law. The quality of information received depends on the strength of the relationship. For example, though officials reveal policy nuances to close associates, they only impart the most basic procedural information to others. Officials believe that relationships based on trust and tinh cam (sentiment) reduces the risk that lawyers will use ‘official’ information in damaging ways.

Overtures by lawyers are, nevertheless, rarely welcomed. Officials prefer direct contact with entrepreneurs. They generally perceive lawyers as meddlesome nguoi moi gioi (middle men) that interfere with the personal relationships officials use to ‘manage’ entrepreneurs. Lawyers also believe that officials fear the intervention of legal professionals, who are capable of systematically analysing and challenging the legal authority for state economic management. Corruption is also an important part of the

81 Interviews with lawyers from Vilaf, Hanoi, March 2004.
83 It was not until the passage of the Civil Code 1995 that lawyers were authorised to represent their clients’ interests to state officials.
problem.\textsuperscript{85} It is less profitable for officials to solicit bribes from entrepreneurs when lawyers are present. Rights-based discourse is usually limited to exchanges between lawyers acting for foreign investors and state officials. It aims to protect private rights from political, economic and moral precepts that are hostile towards private entrepreneurs, especially foreign investors.\textsuperscript{86} Foreign companies without effective relational connections rely heavily on contractual and property rights to secure business transactions against interference from the state and competitors.\textsuperscript{87} Lawyers acting for SOEs are more inclined to use political, economic and moral arguments to counter private rights asserted by private competitors. For example, lawyers acting for SOEs involved in the Phu My Hung project convinced the Tax Department that foreign investors, rather than domestic companies, should pay withholding tax. They employed moral arguments that the tax burden was huge and beyond the resources of Vietnamese companies and political arguments that officials should favour state companies. Lawyers occasionally use legal rights to protect SOEs. For example, lawyers acting for a consortium of state banks participating in a syndicated loan, framed the transaction with right-based provisions imported from a standard foreign loan agreement.\textsuperscript{88} The state banks shared the same state supervising authority and could not rely on administrative measures to protect their respective interests. In general lawyers believe their interaction with certain elite-level officials is slowly generating common perspectives about legal meanings and the regulatory responses required to protect legal rights. They discern more willingness by some officials to imagine a decision-making environment in which commercial rights are protected by politically neutral state regulators. Yet once elite interests begin to deploy their resources to change laws that are not in their interests, or come to working arrangements with officials to ignore those parts of a law that impede their interests, the ‘rule of law’


\textsuperscript{86} See Elizabeth Maitland, 2002 \textit{supra} 155-163.

\textsuperscript{87} The legal profession is divided between foreign law firms and sophisticated commercially oriented domestic law firms and numerous small domestic firms engaged in court work and small-scale representations.

\textsuperscript{88} Interview lawyers Vilaf, Hanoi, July 2004.
ideal that makes private rights function begins to dissolve. State intervention such as in the Phu My Hung case further undermines the authority of imported private rights.89

Local-level discourse

Far removed from the neo-liberal legal ideas circulating in elite-level discourse, a more localised set of norms and mentalities informs officials working in people’s committees. As we saw in chapter two, there are historical divides between centre and periphery in Vietnam. Commentators have observed that ancient regionalisms have been amplified by recent cycles of centralisation and decentralisation.90 Following the dismantling of central-planning in the late 1980s middle-level officials in line-ministries (bo chu quan), SOEs and city/provincial people’s committees gradually assumed control over resource allocation.91 As Thaveeporn Vasavakul observed:

Politcs during the period of transition from central-planning was characterised by high local autonomy devolving on middle-level cadres, the expansion of horizontal connections, and the bypassing of existing rules and regulations imposed by the central government.92

Habits learnt over decades have persisted and studies suggest that officials in ministry branch offices and people’s committees routinely use ‘state economic management’ powers to reinterpret and occasionally sabotage central legislation.93

Further intensifying centre-local differences, most local officials have not been exposed to rights-based discourses. Research indicates that market liberalisations are only gradually changing an underlying antipathy to the private sector.94 It further suggests

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93 Irregularities were found in 170 out of 396 land regulations issued by the Ho Chi Minh People’s Committee. See Bao Tram, 1997 ‘Phap Luat Ve Dat Dai: Cuon Chi Can Go Roi’ (Law on Land: A Coil of Thread to be Rearranged) Phap Luat July, 6, 7.
that many local-level bureaucrats are convinced that companies engage in illegal activity, such as tax evasion or forming cong ty ma (ghost companies) to fraudulently raise capital from state banks.\(^9^5\) According to a widely held logic, the private sector is responsible for endemic corruption that has overtaken the transitional market. Robust ‘state economic management’ is seen as a way to promote a ‘healthy’ market and reduce corruption.

Local bureaucrats were primarily recruited for ‘morality and talent’, rather than technical proficiency.\(^9^6\) Their training in universities or ministry-based programs provides a sound grounding in public law concepts underpinning bureaucratic law, especially the central importance of ‘state economic management’, but few of the theoretical tenets of neo-liberal legalism.\(^9^7\) Soviet-style education that places the state at the centre of society, inculcates state officials with an unqualified confidence in their ability and moral mission to manage society and protect the ‘state benefit’ (loi ich cua nha nuoc) against the private sector. A practice termed ‘manage in order to manage’ (quan ly de quan ly) has emerged whereby ‘state economic management’ is treated as an objective in its own right, independent from central socioeconomic or legal imperatives. The criminalisation of otherwise lawful activities is justified by the need to ‘manage’ the economy.

Like their central-level counterparts, local-level officials are also deeply influenced by dialogue, especially negotiations with members of the public. But in contrast to the rights-based discourse promoted by foreign investors and lawyers, local-level discussions (especially at the district and lower levels) revolve around political, economic and moral precepts that blur and de-emphasise commercial rights.\(^9^8\)

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95 See Luu Quang Dinh, 2001 ‘Dung Do Loi Cho Luat Doanh Nghiep’ (Do Not Blame the Enterprise Law) Lao Dong 30 July, 3; Quy Hao, 2001 ‘Dung Lam Kho Doanh Nghiep’ (Don’t Make It Difficult for Business) Dau Tu, 9 April, 3.


98 Foreign and domestic companies are regulated by, and converse with, central and city/provincial level officials. While small-scale household businesses are regulated by, and converse with, district and phuong level officials. See Enterprise Law 1999, article 116(3).
Local-level discourse is typified by the negotiations supporting applications to convert informal land tenure into legal titles. Following the enactment of the Land Law 1993, the state began a campaign to convert informal occupancy into formal land-use rights. It has been remarkably unsuccessful. At current conversion rates it will take decades to legalise urban land.

A distinguishing feature of land management in Vietnam is the extent to which housing has developed ‘informally’—without full conformity to legislative standards. Surveys speculate that more than 85 per cent of urban households live in informal or ‘popular housing’ (nha khong phep) (literally houses lacking authorisation) and 75 per cent of land transactions are informal. Informal housing covers most types of accommodation from luxury villas to squatter settlements and often co-exists in the same geographical space with formal housing. It is used for mixed residential and commercial purposes and approximately 75 to 80 per cent of private entrepreneurs have located their place of business on informal land. In order to gain access to bank loans or lease business premises it is necessary for entrepreneurs to convert informal land tenure into formal land-use rights recognised by the state.

Local urban and regional land officials interviewed during a World Bank mission in 2001 openly opposed central land conversion rules and policies. Centrally enacted land conversion rules were considered unnecessarily restrictive and infused with a highly legalistic approach to property rights. This view was reinforced by government officials.

102 These figures are only estimates. There is no accurate study about informal land use by the private sector. Private sector land use reported in a MPDF/IFC survey suggested that only 13 per cent of businesses used informal land. But these finding are contradicted by findings from donors funding land management projects. See H. Dang and G. Palmkvist, 2001 ‘Sweden-Vietnam Cooperation on Land Administration Reform in Vietnam’ SIDA, Hanoi. The MPDF/IFC study was reported in Tenev Stoyan, et al, 2003, Informality and the Playing Field in Vietnam’s Business Sector, IFC, Washington, 68-69.
103 Interviews Tran Th Ngoc, Vice Director, HCMC Land and Housing Department, HCMC, June 2001; Similar views were gleaned from interviews with Nguyen Cong Vinh, Deputy Director, Nam Long Real Estate Construction Company, Ho Chi Minh City, June 2001; Nguyen An Binh, General Director, RESCO, Ho Chi Minh City, June 2001. Views about the bifurcation between central and local approaches to land management were gained from interviews with Truong Huy San, Land Reporter, Thoi Bao Kinh
reports that blame state policy for the large numbers of ‘unofficial’ land transactions.\textsuperscript{104} Officials also thought the procedural rules contained numerous evidential requirements that were vague and onerous.\textsuperscript{105} And, in addition, conversion procedures were costly, time consuming and imposed an unrealistically high tax burden.\textsuperscript{106} They concluded that informal and formal land is distinguishable in a legal sense only, because formal land has legal titles.

Legal classifications lack authority, because statutes and discretionary powers regulate both informal and formal housing. For example, phuong officials certify informal housing sales and levy land taxes and district officials routinely legalise land occupancy that is unsupported by documents required by statute. In addition police (canh sat) give informal households residency permits and construction departments ‘legalise’ unlawfully constructed houses and additions with fines.\textsuperscript{107} Local officials struggle to bring order to urban development with rules that appear to make arbitrary legal distinctions between informal and formal housing and land. In order to reconcile statutory property rights with local conditions, officials mediate with applicants in a personal and highly contextual language. Arguments concerning legality rarely surface in these negotiations. Even the terminology used by local officials to describe the discretionary processes used to grant conversions is infused with contextual subjectivity. A popular term for discretion (niem tin noi tam) literally means ‘believe in one self’ or was the decision made with ‘good heart’ (tam), compassion (thong cam), sentiment or understanding (tinh cam).

\textit{Te Saigon}, Hanoi, June 2001 and Dinh Van Giap, Director Hai Phong Construction Department, June 2001.\textsuperscript{104} See Hoang Hai Van, 2001 ‘Nha Nuoc Co Chay Theo Thi Truong? (Is the State Running After the Market?) Tuoi Tre, 6 August, 3. A government study detected 1,345 annual cases of wrongful or inappropriate land use conversions, but conceded this figure represented ‘the tip of an iceberg’. See Minh Tam, 1997 ‘Legal Documents on Housing and Land are Too Numerous, Backward But They Still Remain’ \textit{Vietnam Economic Development Review} January 1, 3.\textsuperscript{105} Concerns about land conversion rules have appeared in some press articles. See Van Thong, 1999 ‘House and Land Declaration: Unclear Determination of State Administrative Management’ \textit{Saigon Economic Times} 29 July, 3.\textsuperscript{106} In order to encourage title conversion the government has both reduced land levies and introduced a deferred payment system. Article 7 of Decree No. 38 on the Collection of Land Use Levies 2000 provided that residential land continuously occupied since 1980 is exempted from land levy taxes, residential land occupied after 1980, but before 1993, is subject to a 20 per cent levy, while housing occupied after 1993 is charged a 100 per cent levy. Where financial hardship is demonstrated peoples committees can postpone the payment of land levies for a maximum of ten years. See Circular No. 35 TT-BTC providing Guidelines Implementing Decree 38/2000/ND-CP on Collecting Land Use Fees 2001. The Land Law 2003 did not fundamentally alter these rules. See Hoang Hai Van, 2001 supra 3.\textsuperscript{107} Authorities are acting within their delegated powers in conferring these permits. See Decree No. 51/CP on Residential Management and Registration 1997; Circular No. 6 TT/BNVIV (C13) Providing Guidelines for Decree No 51/CP on Residential Management and Registration 1997 (Ministry of Police).
Local decision-making is portrayed as lam luat (literally ‘make law’). This term has the positive connotation of finding flexible solutions to rigid centrally imposed law and the previously discussed negative implication of inventing laws to extract rents. Officials are also expected to intervene on behalf of family and friends, a practice explained by the frequently invoked proverb, ‘if one of us becomes a mandarin the whole clan gains favours’ (mot nguoi lam quan ca ho duoc nho).

This case study depicts two main discourses shaping local decision-making. Operating in legal mode, central authorities emphasise contract and property rights as defined by law. This is an ambiguous position, because the state has not fully accepted that law is autonomous from, and guides the implementation of, state socioeconomic policy.

Working at the shadowy interface between official and personal obligations, local officials risk losing local authority and trust unless they flexibly apply the law. 

From a local perspective, informality and formality describe regulatory styles, rather than binary legal/illegal cleavages between property rights and unlawful occupation. Local regulation generates shades of informality, each degree of informality attracts different levels of official toleration and ‘legality’. Informal and formal understandings of land tenure function as different facets of the same system. But each discourse sends particular messages to officials about the meaning and relevance of private property rights.

In summary, in the absence of strong systems of accountably, many local officials feel more accountable to the people in their locality than to higher-level authorities and rules. They are consequently reluctant to enforce laws that are locally unpopular. Although more than a few officials, no doubt simultaneously, use their powers to benefit society and themselves.

But improved systems of accountably are only a partial solution to uneven legal enforcement, because local officials are influenced by a different discursive environment to the one informing many elite-level officials. Most local-level officials were domestically educated, have few contacts with foreigners and have little knowledge of Western legal epistemologies. Foreign knowledge and expertise is not the only difference between elite and local officials. The benefits of globalisation appear remote to local officials, especially when international economic integration comes at the cost of facilitative reforms that strip away opportunities to generate living wages. It is difficult to methodologically distinguish rhetoric from conviction, but most local-
level officials interviewed by the author over a ten-year period appeared to sincerely believe in their mission to ‘manage’ entrepreneurs and genuinely worried that reforms aiming to minimise discretionary powers were unworkable in a society unused to private legal rights.

The transformative potential for rights-based discourse

The case studies concerning centre-local discourses intimate that imported commercial rights do not constitute simple binary alternatives between state and private interests. Rights are negotiated in three-way interactions between elite-level officials, local-level officials and businesses. The composition of private commercial rights is partially shaped by the main discursive themes informing these negotiations. Negotiations conducted in legal mode give commercial rights legal consequences that resemble the ‘rules of the game’ in imported laws. Official policies promoting international economic integration further sensitise elite-level officials to imported rights-based doctrines. But as we saw in the context of the EL, not all central-level officials are persuaded by rights-based discourse (see chapter five). In contrast to legal dialogue, negotiations conducted in political or moral mode produce rights that are strongly oriented towards personal relationships and family and community interests.

There is also a strategic dimension to rights formation. From a central perspective, local discretionary regulation is both a hindrance and an advantage. By ‘softening law’ (luat mem) to conform to local ideas and practices, local officials sometimes obstruct central policies and undermine uniform rights-based definitions. Discretionary regulation also forces entrepreneurs to transact in the shadow of bureaucratic rule, a regulatory matrix that produces corrupt alliances and blurred distinctions between public and private rights.

In other circumstances, it suits all levels of government to invest local officials with discretionary powers that technically exceed their statutory authority. This official ambivalence towards legal certainty is illustrated by the prime minister’s comments during a forum with entrepreneurs in 2003. He criticised local officials for their vo cam...
(emotionless) response to businesses. By this he meant that officials should in some circumstances arrogate discretion to overcome rigidities in code-based definitions of commercial rights. Strict adherence to statutory rules reduces dialogue between local officials and small-scale businesses, and, as a corollary, it constrains the creative processes that invest imported rights with locally appropriate meanings. From this regulatory perspective, both codified rights and bureaucratic discretion are used as state management tools—interchangeable mechanisms for producing contextually appropriate market outcomes.

**Changing the meaning of legal rights in the courts**

Bureaucrats are not the only officials that reinterpret the neo-liberal meaning of imported commercial laws. According to Western legal mythology, courts are the primary sites of normative change, because they find the most ‘efficient’ legal solutions to social problems. Even theorists who believe the social importance of judicial pronouncements is exaggerated, concede that courts perform a critical role in making and enforcing binding legal decisions. A fully functioning court system standardises legal meanings and tames the ‘wild growth of normative projections’ in society. In order to perform this ‘rule of law’ function, courts require some autonomy from political and government interference. Yet experience elsewhere shows that courts are the last state institution to gain power over political decision-making. This section explores whether Vietnamese courts have sufficient autonomy to use legal reasoning to make imported commercial rights appear credible and desirable.

Discourse analysis suggests three ways to evaluate the role Vietnamese courts play in localising, stabilising and creating imaginative legal fictions from imported commercial

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110 During the forum the Prime Minister urged local officials to show *tim cam* (sentiment) and understanding in applying the law. These views contrast sharply with the Weberian public service values promoted by the PAR program discussed in chapter four.


rights. One, courts can only make legal rulings on matters before them. Public access to the courts thus has a critical bearing on the types of imported laws that are influenced by judicial rulings. Two, judges require secondary legal sources, such as doctrines and jurisprudence, to apply ambiguous imported laws to local problems. Otherwise they lack the tools to transform everyday disputes into legal disputes. Three, procedural rules influence the way litigants and their legal advisors argue cases and balance competing rights. Research considered below implies that Vietnamese courts play a minor, though increasingly important, role in shaping the meaning of imported law.

**Court access**

Contrasting with the broad discretionary powers government officials have to creatively reimagine imported laws, courts are supposed to confine their judgements to facts raised by litigants. Two factors limit access to courts in Vietnam: one, a social preference for mediation and conciliation minimises adversarial litigation and, two, narrow jurisdictional powers restrict the range of issues referred to courts.

Perceptional factors limit court access in Vietnam. Although French colonisation and Soviet legality profoundly influenced attitudes to litigation, some commentators believe that residual neo-Confucian sentiments remain potent social forces. Chapter two discussed the longstanding emphasis on non-adversarial mediation (*hoa giao*) in Vietnamese society. Commentators contend the people were conditioned into treating law as a punitive instrument, rather than a means of ordering horizontal social transactions. Judicial intervention also signalled personal moral failings. In a recent survey over 41 per cent of respondents cited loss of face and harmony as reasons for avoiding adversarial litigation. Judges and lawyers interviewed also discern a continuing social preference for mediation over litigation.

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According to Supreme Court records for 2002, the annual inflow of cases in the entire court system was approximately 200,000 or 0.00251 cases per person. At this rate court usage in Vietnam is low even by regional standards. Litigation is also unevenly distributed among the different court divisions. In 2002 courts heard 51,461 family cases, 48,168 civil cases, 66,023 criminal cases, 728 labor cases, 728 administrative cases and only 598 economic cases.

Litigation aversion is not unique to Vietnam. Entrepreneurs everywhere are unwilling to jeopardise trading relationships and incur legal expenses in court actions. The difference lies in the social significance attached to court rulings. In the West, courts set commercial standards that influence pre-court negotiations. The general indifference among most Vietnamese entrepreneurs towards legal rights, discussed in annex six, induces a low social demand for law-based dispute resolution.

As the economy grows and larger domestic firms transact more frequently with foreigners (especially those requiring formal contracts), imported legal ‘rules of the game’ may increasingly supplement personal sentimental bonds in ordering commercial exchanges. Yet in the decade economic courts have been operating the number of private firms employing more than 100 staff has increased tenfold, while litigation initiated by domestic entrepreneurs has remained relatively static.

Further reinforcing litigation aversion, is a well-justified public scepticism about the professional competency and impartiality of judges. Surveys rate dishonest and unfair
judges (74 per cent) and unclear legal rules (65 per cent) as the most important reasons for avoiding litigation.\textsuperscript{123} Judges are considered unsympathetic towards the private sector, basing decisions on status as well as bribes, and treating legal rules as convenient, but optional, ways of getting things done. Under questioning by delegates of the National Assembly in 2002, the Chief Judge of the Supreme Court admitted ‘judges in civil cases can make any party win’ (\textit{xu dan su, xu the nao cung duoc}).\textsuperscript{124} The perception of systemic bias, incompetence and corruption influenced more than 90 per cent of private sector respondents surveyed to conclude that courts would not satisfactorily resolve commercial disputes.\textsuperscript{125}

Litigation in Vietnam generates justifiable anxiety that courts will use legal rules to interfere with family and patron-based trading networks. On a rational calculation of their interests, most businesses prefer to use comparatively effective extra-judicial, particularistic routes and means to resolve business disputes. Respondents surveyed in 2004 showed high-levels of satisfaction with dispute resolution by ‘grassroots’ mediation boards comprised of members of neighbourhood councils (\textit{to dan pho}), people’s committee officials and members of the Fatherland Front.\textsuperscript{126} Reflecting the strong preference for conciliation rather than winner-take-all outcomes mediation is a formal pre-condition for cases proceeding to trial.\textsuperscript{127} Judges resolve approximately half of the economic disputes brought to courts each year without formal hearings and legal rules.

When mediation fails, litigants can bring actions in Vietnam’s three-tiered, nation-wide court system. But narrow jurisdictional powers constitute the second major constraint to

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\textsuperscript{124} Interview Nguyen Hung Quang, Lawyer, Leadco, Hanoi, July 2004.

\textsuperscript{125} John McMillan and Christopher Woodruff, 1999 ‘Interfirm Relationships and Informal Credit in Vietnam’ 114 \textit{Quarterly Journal of Economics} (4) 1285-1286. A more recent study about courts in general found that only 35 per cent of respondents thought that courts would fairly and impartially resolve disputes. See UNDP, 2004 \textit{supra} 14-15.

\textsuperscript{126} Approximately 68 per cent of respondents who had used grass-roots mediation were satisfied. See UNDP, 2004 \textit{supra} 16. Also see interviews with business associations that facilitate informal mediation. See Vu Duc Thai, Vice Chairman and Secretary, The Hanoi Associations of Industry and Commerce, (member of the Central Committee of the Fatherland Front) Hanoi, April 1999, February 2000; Nguyen Trung Tuc, Chairman, Vietnam German Entrepreneurs’ Club, Hanoi, 1999, 2000; Pham Thi Thu Hang, Deputy General Director, VCCI (Small and Medium Enterprise Promotion Center) Hanoi, 1998, 1999, 2002. For a discussion about formal arbitration see Nguyen An Hieu, 1997 ‘Mot So Dac Diem cua Phap Luat Ve Trong Tai Trong Tai Phi Chinh Phu O Viet Nam Hien Nay’ (Some Legal Features in Contemporary Non-Government Arbitration in Vietnam) \textit{Nha Nuoc va Phap Luat} (5) 3, 3-7. For a discussion about informal dispute resolution see John McMillan and Christopher Woodruff, 1999 \textit{supra}.
court access. Disputes concerning imported commercial rights are most likely to be taken to economic courts. Despite broad powers to resolve a wide range of contractual, movable-property and company disputes, litigation rates in commercial courts are static at a time when business activity is growing rapidly. Low litigation rates are in part attributable to the comparatively small number of commercial entities, such as SOEs, foreign investment entities and registered enterprises that can bring actions in economic courts. Unregistered household businesses, which comprise by far the largest economic sector, are only permitted to litigate a small range of contractual and leasehold disputes in civil courts. Proposed amendments to the Commercial Law, which are scheduled for enactment in late 2005, may remove the jurisdictional distinction between registered and unregistered entities, giving all commercial entities access to economic courts.

In contrast to the low demand for commercial rights-based litigation, lawyers interviewed believe there is pent-up need for administrative review over bureaucratic decisions. As previously discussed, administrative licences and state inspections, more than any other factor, constrain the profitable exploitation of private commercial rights. Administrative courts have wide powers to review illegal or ultra vires administrative decisions such as licensing, taxation, housing permits and land-use charges that affect commercial activities. Unfortunately for entrepreneurs administrative review is ineffectual. A government report estimated that in a five-year period from 1999 until 2003 approximately 41 per cent of administrative claims were

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128 The number of disputes in economic courts has only marginally increased since the late 1990s. For example there were 552 cases in 1997 the number increased to 1280 in 1999, and then declined, 859 in 2000, 571 in 2001 and 598 in 2002. The number of disputes increased to 868 in 2003 and to 1051 in 2004. Source Bao Cao Tong Ket Cong Tac Nganh Toa An va Phuong Huong Nhiem Vu Cong Tac Toa An (Supreme Court annul reports and plans), 1997, 1999-2004.
129 At the end of 2003 there were approximately 71,000 registered private businesses and 6,000 SOEs. At the same time government sources estimate there were over one million unregistered household or individual businesses. Interview Nguyen Dinh Cung, Director Enterprise Department CIEM, Hanoi, March 2004.
130 It will be recalled from chapter five that economic courts hear economic (for profit) contract, bankruptcy and Enterprise Law litigation and civil court hear civil (personal consumption) contracts and leasehold actions.
131 Much of the increase in cases recorded is due to the large number of actions that are delayed from one year to the next (approximately 30 per cent per year). There were 480 cases in 1999, 539 cases in 2000, 803 cases in 2001, 728 cases in 2002, 1458 cases in 2003 and 1746 cases in 2004. Source Bao Cao Tong Ket Cong Tac Nganh Toa An va Phuong Huong Nhiem Vu Cong Tac Toa An (Supreme Court annul reports and plans), 1999-2004.
133 Of the 728 administrative cases submitted in 2002, less than 20 were resolved by court orders. Interviews with judges in Hanoi during March 2004.
legitimate, but only 800 cases from over 10,000 complaints were filed in administrative courts.\textsuperscript{134}

One reason for low review rates is that judges avoid hearing cases by exploiting inconsistencies between the Law on Complaints and Denunciations 2002 and the Ordinance on Procedures for Settling Administrative Cases 1996 (as amended).\textsuperscript{135} Citizens must first complain internally to administrative agencies before bringing complaints to administrative courts. Although it is no longer necessary to exhaust all internal appeals before transferring complainants to the courts, initial administrative processes filter out numerous cases.\textsuperscript{136} For example, a private businessman seeking compensation from local authorities for expropriating his business during the 1980s eventually sought political intervention by the prime minister to convince the Hanoi Administrative Court to accept his case.\textsuperscript{137}

Further constraining their powers, administrative courts are only permitted to consider decisions that violate or exceed legal authority. They are not authorised to review \textit{intra vires} administrative bias against the private sector or question the constitutionality of laws. Making matters worse, judges lack power to enforce their judgements against officials.

Compared to the moribund administrative and economic jurisdictions, civil litigation has risen from approximately 25,000 cases in 1994 to over 50,000 in 2004. Civil courts have jurisdiction over some areas that concern businesses, such as leases and civil debts. But over 80 per cent of cases pertain to non-commercial matters such as inheritance, civil obligations (tortuous actions) and housing disputes. Most of the growth in civil action has been in this area.

Finally, only parties with standing to sue may bring complaints to courts. This means that judges can only influence the meaning of commercial rights that are contested in disputes; rights that are not germane to the facts are excluded from the courtroom. Social aversion to adversarial dispute resolution, together with narrow jurisdictional powers, limits the numbers of commercial cases reaching the courts. But if the quality


\textsuperscript{135} Ordinance on the Procedures for the Settlement of Administrative Cases 1996 (as amended), article 11. Also see ‘Bao Cao Cua Chanh An Toa An Nhan Dan Toi Cao Tai Ky Hop Thu 6 Quoc Hoi Khoa 10 Ve Cong Tac Toa An’ (Report of the Chief Judge of the Supreme People’s Court at the Sixth Meeting of the Tenth Session of the National Assembly Regarding the Work of Court) No. 67 BC/VP 22 October, 1999.

\textsuperscript{136} Less than 30 per cent of administrative complaints are resolved by state officials under the Law on Complaints and Denunciations 2002 and without a filtering process, courts could be exposed to approximately 10,000 cases each year. Interview Nguyen Cuong, Deputy Director Judicial Science Department, Supreme People’s Court, Hanoi March 2004.
of judicial decision-making improved, it is conceivable that courts may eventually play a more significant role in shaping imported legal rights.

**Judicial decision-making**

Courts differ from government agencies, since they alone are expected to base decisions exclusively on legal reasoning. The Vietnamese Constitution, for example, requires judges to base their decisions on the law alone. Discourse analysis suggests that a primary function of judicial reasoning is to subsume particular cases under general legal rules.  

Legal reasoning transposes social problems into a legal framework. To understand how judges construe imported commercial rights, it is thus necessary to examine the arguments and procedures that shape courtroom discourse.  

Western judges use secondary legal sources, such as jurisprudence, parliamentary debates and academic commentary, to resolve conflicts between competing legal rights. Legal arguments first seek reasons or grounds why legal authority applies to disputes. This generally includes the application of pre-existing principles or doctrines to case facts. Legal arguments next search for redundancies, or reasons why some contextual elements pertaining to the case are irrelevant. They selectively establish connections with past legal findings to ascertain whether it is appropriate to extend protection to the legal rights before the court.  

Vietnamese judges face two major difficulties in moving from a Soviet-inspired instrumental legalism to legal reasoning that transposes commercial disputes into rights-based contests. First, most commentators agree that judicial independence from political interference, together with adherence to some form of separation of powers, is a precondition for rights-based legal reasoning.  

Legal reasoning establishes

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137 See Author Unknown, 2001 ‘Hanoi People’s Committee Sued’, Phu Nu, Ho Chi Minh City, 14 July, 1.  
139 Our discussion is only peripherally concerned with the debate whether legal reasoning gives commercial legal rights the predictability required to order market transactions. ‘Rule of law’ theorists discussed in chapter three place the law at the centre of business decision-making. Other theorists argue that relational factors are highly significant in ordering Western business transactions. See Ian R. Macneil, 1978 ‘Contracts: Adjustment of Long Term Economic Relations Under Classical, Neoclassical and Relational Contract Law’ 72 North Western University Law Review 854, 890-900. In the context of Vietnamese businesses see John McMillan and Christopher Woodruff, 1999 supra 1285-1286.  
141 Notwithstanding the many deviations from Montesquieu’s unrealistic ideal, the separation of powers strongly influences legal formation and implementation in the West. Legal rights rely on the branches of the state overseeing each other to ensure that power is distributed roughly according to constitutional
autonomous (from external inference) epistemological rules that filter non-legal ideas that might disrupt the legal meanings attached to private rights. It also creates a closed epistemology with its own rules and regulations that generate conceptual stability by discouraging judges from using non-legal arguments to rethink established legal meanings.

Second, Vietnamese judges lack secondary legal sources to guide the interpretation of vaguely worded imported rights. Judges in developing legal systems like Vietnam must creatively interpret imported commercial laws to find legal solutions to local problems.\footnote{142}

This discussion explores to what extent autonomy from state and social forces is necessary for Vietnamese courts to use legal rights to mediate political, economic and moral arguments. It also examines the transformative potential for the emergence of law-based legal reasoning and what this means for the implementation of imported commercial laws. It is unclear, for example, whether legal stability is possible, even desirable, in a legal environment in which imported commercial rights require creative localisation to resolve local business disputes.

**Revolutionary notions of judicial independence**

Lenin’s observation that under capitalism ‘judicial powers are an exploitation machine for the bourgeoisie’ combined with the Vietnamese experience of colonial criminal justice to profoundly shape revolutionary courts.\footnote{143} After independence, communist leaders replaced colonial law-based dispute resolution within socialist institutions.\footnote{144}

From 1954 both military courts and the Supreme Court were established as ‘people’s courts to serve as tools (cong cu) employed by the people to implement the proletarian dictatorship’.\footnote{145} Vietnamese courts were expected to: (1) ‘repress counter-revolutionaries and the enemies of the people and socialist regime’, (2) ‘protect public property … ensure the socialist reform of non-socialist economic sectors’, (3) 

\footnotetext[142]{Although most civilian legal systems assert that judges apply rather than interpret statutory law, it is conceded that some interpretation is required to bring law to reality. Highly complex and detailed jurisprudential rules and interpretive techniques have developed to realise this objective. See Martin Vranken, 1997 *Fundamentals of European Civil Law*, Federation Press, Sydney, 194-201.}


\footnotetext[144]{See Dang Quang Phuong, 1999 *Some Sketches of the Establishment and Development of the Peoples Court*, unpublished paper, Hanoi, 1-3.
gaurantee order and socialist security", (4) ‘peacefully settle petty quarrels, conflicts and law suits among the people’, and (5) educate citizens to show loyalty to the Fatherland, observe the law, respect social regulations and fight crime.\textsuperscript{146} Pham Van Bach, the Chief Judge, instructed court personnel during the 1960s that the primary role of the courts was to implement party and state policy.\textsuperscript{147} Courts were accordingly treated as instruments of state rule and Western notions of judicial independence were dismissed as ‘bourgeois’ propaganda.\textsuperscript{148} The 1992 Constitution appeared to end decades of instrumentalism by requiring judges to determine cases according to the law. This tentative step towards judicial independence was qualified by a duty to protect ‘socialist’ legality, the state and the people’s right to mastery.\textsuperscript{149} The Constitution also expected judges to protect the ‘collective rights and the lives, property, freedom, honour and dignity of citizens’.\textsuperscript{150} ‘Nha nuoc phap quyen’ (law-based state) reforms, discussed in chapter three, have encouraged a shift from strict legal instrumentalism to a situation where law is given a relative autonomy from party and state policy. If courts are required to protect party and state interests, what does judicial independence mean—courts are independent from what or whom? If courts are not politically independent can law be relatively ‘autonomous’ from the party and state? Our inquiry conflates these questions by asking whether courts possess sufficient autonomy to interpret imported commercial rights according to legal doctrines, rather than party socioeconomic policies?

\textsuperscript{145} Editors, 1961 ‘To Understand Clearly the Functions and Characteristics of People’s Courts in Order to Implement the New Philosophy of the Spring Rectification Campaign’ \textit{Tap San Tu Phap} (4) 1, 2.

\textsuperscript{146} Circular Letter No 556-TT issued by the Prime Minister on 24 December 1958. See Dang Quang Phuong, supra 11.

\textsuperscript{147} See Pham Van Bach, 1970 ‘Le Nin Voi Van De Phap Che Xa Hoi Chu Nghia’, (Lenin and Socialist Legality) \textit{Tap San Tu Phap} (3) 9-16.

\textsuperscript{148} For a discussion about the role of courts in a socialist system see Le Trung Ha, 1965 ‘Chuyen Huong To Chuc Cua Cac Toa An Nhan Dan Dia Phuong De Dap Ung Voi Tinh Hinh va Nhiem Vu Moi’ (Changes in Local Court to Meet the Requirements of the New Conditions and Requirements) \textit{Tap San Tu Phap} (8) 1, 2.

\textsuperscript{149} See Constitution 1992, article 126. Note the similarity between this article and article 127 in the 1980 Constitution.


282
**Post-doï moi judicial reforms**

Legal reforms in 1992 aimed to reconfigure courts geared for a command economy to resolve rights-based disputes in the mixed-market economy. Attempts were made to centralise court administration by relocating powers to appoint judges from local government to the president. Programs were introduced to professionalise the judiciary through higher education and specialised legal training courses. Reforms also sought to reduce government authority over local courts and give superior courts greater powers to promote law-based decision-making throughout the court system.

Despite improved standards of judicial reasoning and an improved social status for judges, press articles and petitions lodged with the National Assembly during the 1990s increasingly reported false prosecutions, judicial corruption and the criminalising of civil and economic cases. Accusations of corruption within the judicial sector reached a zenith with the arrest of Truong Van Cam (Nam Cam) in December 2001. The indictment alleged complicity between Nam Cam’s criminal gang and high-level officials in the courts and procuracy.

Adding their voice to societal complaints, the donor community also agitated for judicial reform. Their campaign gained momentum following the ratification of the US-Vietnam Bilateral Trade Agreement, which required Vietnamese courts to extend US companies’ and citizens’ rights to protect treaty privileges (see chapter seven). Some state officials sympathetic to neo-liberal legal reforms have also advocated judicial reforms to attract more foreign investment and make rights-based adjudication available to domestic entrepreneurs.

Responding to public and donor pressure, a political report prepared by the party identified a need to restructure courts and further improve the professional capacity of judges. The Politburo incorporated the report’s finding into Resolution No. 8 NQ-TW

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151 For discussions about judicial reform see Le Cam, 2002 ‘Cai Cach He Thong Toa An Trong Giai Doan Xay Dung Nha Nuoc Phap Quyen Viet Nam’ (Reform the Court System to Build Up a Law Based State in Vietnam) *Tap Chi Nghien Cau Lap Phap* (4) 21; Nguyen Manh Cuong, 2002 ‘Yeu Cau Cua Viec Xay Dung Nha Nuoc Phap Quyen Doi Vo Doi Moi To Chuc va Hoat Dong Cua Cac Co Quan Tu Phap’ (How to Reform Judicial Authorities to Build up a Law-Based-State) *Tap Chi Nghien Cau Lap Phap* (10) 30.


on Forthcoming Principle Judicial Tasks in 2002. Resolution No. 8 first criticised aspects of judicial work (cong tac tu phap) and called for strong and stable judicial personnel, clearer organisational structures that minimised inefficiencies and overlapping responsibilities and more systemic analysis and management of problems. It then established four objectives for judicial work:

- strictly follow party policies and lines
- efficiently resolve criminal offences
- allow the people to participate in judicial work
- build strong judicial institutions that defend the party and state.

The Law on the Organisation of the People’s Courts 2002, which implements Resolution No. 8, sends mixed signals about judicial independence. It encourages centralisation of judicial authority by placing inferior courts under the direct administration of the Supreme Court and it protects judicial processes from ‘all acts obstructing judges and/or people’s assessors from performing their tasks’. At the same time, it recycled longstanding instrumental notions that judges should ‘resolutely struggle against persons and acts harmful to the party, the Fatherland and people’. Some of these objectives, such as financial and organisational autonomy, comply with the preconditions for judicial autonomy identified by the International Bar Association. Other objectives, such as party leadership, fixed term appointments, poor remuneration and unclear rules governing judicial appointment, are at variance to an independent judiciary. The next section examines the meaning of judicial independence in Vietnam and how external and internal controls constrain the emergence of legal reasoning.

Party leadership over the courts

155 See Vo Chi Cong, 2002 ‘Thay Gi Ve Cong Tac To Chuc va Quan Ly Can Bo Qua Vu An Truong Van Cam’ (What can be Seen About Organising and Managing Cadres Through the Truong Van Cam Affair) Tap Chi Cong San (9) <www.tapchicongsan.org.vn>.

156 The term cong tac tu phap refers to all the agencies connected with courts, including the procuracy and police.

157 Law on the Organisation of People’s Courts 2002, articles 17, 38, 45 and 46.

158 This injunction was enacted in the Joint Circular No 1/2003/TTLT/TANDTC-BQP-BNV-UBTWMTTQVN Guiding the Implementation of a Number of Provisions of the Ordinance on Judges and Jurors of the People’s Courts 1993, article 2 (c).

Courtroom discourse in Vietnam is poorly researched. But one issue is clear: judicial decision-making is not ‘independent’ (doc lap) from ‘party leadership’ (su lanh dao cua dang). The scope for party involvement in court affairs was outlined in Resolution No. 8: ‘The party shall lead judicial agencies closely in political organisation and personnel matters and ensure that the judicial activities really follow the viewpoints of the party and the law of the state.’ According to party sources, judges should act impartially (khong thien vi) though not independently from party leadership.

The party uses many mechanisms to ‘lead’ judicial decision-making. Like other public employees, judges are required to ‘strictly abide by the party’s lines and policies’. The Supreme People’s Court Annual Report in 2001 placed party resolutions ahead of National Assembly resolutions and laws in the hierarchy of sources judges must follow in resolving cases. For example, economic court judges hearing bankruptcy cases are required to follow internal party rulings not to evict debtors until creditors provide alternate accommodation. These internal rulings qualify creditors’ statutory rights to enforce debt securities with a social obligation.

Recruitment and selection procedures induce judges to follow party policies and directives. First, the nomenkultra system (discussed in chapter four) ensures that over 90 per cent of judges are party members. Second, judges are reappointed (every five years) according to selection criteria that stress ‘loyalty to the motherland’, good moral character, especially honesty and truthfulness, legal knowledge and support for socialist legality. Selection committees generally interpret these highly subjective criteria by

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160 Although the Law on People’s Courts 2002 declares that courts are open to the public, in practice authorisation is required from the presiding judge. Permission is infrequently given to foreigners.
161 The LNA project actively promoted judicial independence by streamlining appeal mechanisms, increasing judicial salaries, promoting open trials and forbidding ‘improper’ intervention into court cases. Significantly, no restrictions on party prerogative powers were contemplated. See Interagency Steering Committee, 2002 ‘Comprehensive Needs Assessment for the Development of Vietnam’s Legal System to the year 2010’, Ministry of Justice, 27. Also see Luu Tien Dung, 2003 ‘Judicial Independence in Transitional Countries’ Working Paper, UNDP Governance Centre, Oslo.
162 Ordinance on Public Employees 1998, (as amended) articles 1(4), 6(2).
164 Interviews Chief Judge of the Civil Court, Ho Chi Minh City Court, June 2001. Decree No. 17 on Mortgages 1999 gives mortgagees powers to auction or enter into possession of mortgaged houses.
165 Creditors are entitled to recover possession or auction debtors’ property. See Decree No. 8 ND-CD, 10 March 2000 and Circular No. 7 TT-NHNN 19 May 2003 State Bank.
166 These comments are based on interviews with judges. Also see Pip Nicholson and Nguyen Hung Quang, 2005 The Vietnamese Judiciary: The Politics of Appointment and Promotion 14 Pacific Rim Law and Policy Journal 1, 14-22.
167 Selection committees comprise deputies from people’s councils, government officials and senior judges. See Law on Organisation of the People’s Courts 2002, articles 37, 40, 41.
assessing whether judges have complied with party policies.\textsuperscript{168} Judges aspiring to high judicial positions are inculcated with the finer points of party ideology and policies at the Ho Chi Minh Political Academy.\textsuperscript{169}

Party groups (\textit{dang bo} and \textit{chi bo}) operating in every court are instructed to raise ideological and political awareness and ensure that judges adhere to the party line.\textsuperscript{170} Judges and court officials attend regular 'party group' meetings to discuss party resolutions pertaining to court work. Senior party cadres lead discussions by repeatedly sensitising judges to the political and social implications of their decisions. Loyalty is assessed during monthly self-criticism (\textit{phe binh tu phe binh}) meetings.

Finally, judicial panels in important cases comprise one judge sitting with two people's assessors. Decisions are made by majority vote. Assessors are non-professional lay representatives appointed by people's councils on the basis of political loyalty and personal reliability.\textsuperscript{171} Some commentators believe the party uses people's assessors to guarantee party leadership in the unlikely event that a judge acquires a predilection for independent decision-making.\textsuperscript{172}

\textbf{Party interference}

Judges interviewed by the author seemed genuinely unclear what the Constitution means by judicial independence.\textsuperscript{173} When asked what is more important, the party-line or law, most responded that in principle there is no conflict since law implements party policy. Though on reflection, many judges added that the party leads courts in understanding the meaning of law.

They understood judicial independence to mean freedom from party 'interference' (\textit{su can thiep}), but conceded the distinction between party leadership and interference is unclear. The difference is significant, because as state officials judges are required to

\textsuperscript{168} According to Item II of Inter-circular No. 05/TTLN of Ministry of Justice and Supreme People's Court Providing Guidelines of the Ordinance on People's Judges and Assessors 1993, 'loyalty to motherland' and 'firmly defending the socialist legality' are partially determined by gradings given in 'political knowledge certificates' (\textit{chung chi trinh do ly tuan chim tri}) issued by national political institutes (\textit{hoc vien chim tri quoc gia}). In practice, however, political institutes, such as the Ho Chi Minh National Political Academy are reluctant to give this kind of blanket certification.

\textsuperscript{169} Interviews Vu Khai Xuong, Chief Judge Administrative Court, Hanoi, October 1997, February 1998.

\textsuperscript{170} Party Central Directive No. 29/CT-TW on the Enhancement of Party Leadership over Law Enforcement Agencies 1993 clearly outlines the leadership role of party committees in the court system.

\textsuperscript{171} Law on People's Courts 2002, article 41.

\textsuperscript{172} See Brian J. Quinn, 2002 \textit{supra} 245-246.

follow party resolutions and lines (leadership), but they are supposed to disregard the
direction of party members. Unsurprisingly judges expressed confusion whether
informal party directives pertaining to particular cases constituted party leadership or
interference.

Take, for example, the party instructions given to the trial judge in the Tang Minh
Phung corruption trial in 1998. Procurators alleged that Tang Minh Phung and
business associates fraudulently misappropriated socialist property by using misleading
property valuations to borrow approximately USD 200 million from state banks.

Lawyers defending Tang Minh Phung claimed the party instructed the presiding judge
to use 'legal analogy' (ap dung phap luat tuong tu) to overcome evidentiary
inconsistencies in the indictment. The crime of fraudulently misappropriating socialist
property required the prosecution to prove that Tang Minh Phung acquired loans by
fraudulently overvaluing the value of his collateral. Rebutting these allegations, the
defence counsel demonstrated that bank officials investigated and confirmed the
accuracy of collateral valuations. Even more damaging to the procurator's case, the
prosecution commenced before a legal obligation to repay the loans arose. If the defense
counsel was correct no misappropriation occurred.

When it became apparent that the defendants might escape conviction if the judge
applied rights-based reasoning the party instructed the judge to overcome evidentiary
deficiencies by applying the doctrine of legal analogy. Under the direction of 'higher
authorities' (a euphemism for the party), the doctrine permits courts to criminalise (hinh
su hoa) otherwise legal behaviour that seriously damages state interests. According to
the defence counsel, the party regarded the economic harm caused by the 'misuse' of
'socialist property' was sufficiently serious to apply the doctrine. This case shows that
in addition to formal resolutions, party leadership extends to informal directions that

174 See Nguyen Nhu Phong and Vu Cao, 1998 supra 1-3; Nguyen Nhu Phong and Vu Cao, 1998 'Ways to
draw State Money', An Ninh The Gioi (63) 27 February 1.
175 Tran Minh Phung used land as collateral. His land valuations took into account the potential
commercial value if the land in Yung Tua was developed into a port facility. This information was known
to the bank. When the port was not constructed the land values decreased. But Tran Minh Phung did not
default and continued servicing the loan. Since the banks did not incur losses there was no legal
justification to call in the loan.
176 Interview, Nguyen Thi Loan, Lawyer, Ho Chi Minh City, October 1999. This aspect of the defense
counsel's argument was not reported in the press. But see John Gillespie, 2001 'Self-Interest and
177 Article 16 of the repealed 1926 Soviet Criminal Code provided that 'if any socially dangerous act is
not directly provided for by the present Code, the basis and limits of the responsibility for it shall be
determined by application of those articles of the Code, which provide for crimes most similar in nature,'
Also see Dinh, Van Que, 1999 Phap Luat Thuc Tien va An Le (Legal Practice and Precedent), Da Nang
privilege political expedience over statutory rights. Recent cases suggest that Resolution No. 8 has not diminished active party leadership in sensitive criminal cases.¹⁷⁸ Lawyers report that party leadership is especially prevalent in sensitive criminal trials, but it occasionally surfaces in commercial contests between private (especially foreign) rights and the national interest. It is difficult to empirically evaluate this perception since court cases are not published. Nevertheless most judges interviewed thought that improper interference occurs where party organs or officials circumvented party decision-making processes and directly pressured judicial officials. This is most likely to happen where assets belonging to the party or party members are in dispute or personal favours are required. Consider, for example, the Vong Thi Landscape Architectural Village (Lang Kien Truc-Phong Canh Vong Thi) case. The Hanoi People’s Committee in 1999 allotted ten hectares of land in the salubrious West Lake suburb in Hanoi to Madam Thuy. According to the allotment conditions, Madam Thuy was supposed to construct a traditional display village for international tourists. Instead, she built a few traditional houses and illegally sold land worth several million USDs to private residential developers. Like Tran Minh Phung, she was charged with fraudulently misappropriating socialist property.¹⁷⁹ Despite a strong prosecution case that included a confession, Madame Thuy was sentenced to a short period of house detention. Lawyers reported seeing the private secretary of Le Kha Phieu, at that time the Party General Secretary, sitting in on the trial. They believe that the presence of the senior party official ‘influenced’ the sentence. Tang Minh Phung, in contrast, received the death penalty from a much weaker prosecution case.¹⁸⁰ Courts, it seems, are not independent from party leadership, which operates both inside and outside courts.¹⁸¹

¹⁷⁸ For example, a judge used legal analogy in a 2004 case to convict defendants charged with circulating counterfeit cheques or notes. Although it was clear that the defendants violated an administrative provision that prevented the commercial sale of VAT invoices, the procuracy did not prove that VAT invoices were legally equivalent to counterfeit cheques or notes, which are negotiable instruments with intrinsic value (Criminal Code 1999, article 181). According to the defense counsels, the defendants were charged with the wrong criminal offence. They believe the trial judge (Nguyen Khac Son) was persuaded by political rather than legal arguments. Ignoring legal defects in the prosecution the judge concluded that the defendants had caused serious loss to the state benefit by eroding the tax base and they should not escape criminal charges. On appeal the Supreme People’s Court upheld the provincial court judgement in February 2005. Case No 57, First Instance Criminal Court, Thai Binh Provincial People’s Court, 8 March 2004. Interview with the defence counsel, Hanoi, March 2005.

¹⁷⁹ Penal Code 1986, article 134.


¹⁸¹ Lawyers also report that party interference is used to prevent the enforcement of judgement debts against party assets. For example, they allege that the party Central Committee directed the Hanoi Justice Department in 1999 not to execute a judgement order issued by the Hanoi People’s Court against the Meritus Westlake Hotel. Together with a Malaysian company, the party jointly owned the hotel, and defaulted on a loan to foreign banks. The Meritus business was sold in 2002 to Sofitel Hotels without the debt being enforced against party assets.
Party leadership is primarily concerned with setting the political and moral tone for judgements.\(^{182}\) It inculcates general principles that favour the state benefit over private interests and national interests over foreign interests. How these principles apply to the facts in specific cases is not always clear to court officials. For example, in an action taken by a SOE in the Hanoi Economic Court in 2003, the judge concluded the state benefit was served by allowing the SOE to recover unlawfully transferred foreign currency.\(^{183}\) Confiscating the money would have compromised the company’s competitiveness against private competitors. Taking a different approach, the procurator argued it was in the state benefit to confiscate and return the currency to state revenue.

In sensitive political trials general political and moral notions about the state benefit are too vague to guarantee desired outcomes. In these cases the party ‘leads’ by giving judges detailed instructions on how to conduct the trials. The extent to which ‘improper’ party interference frustrates private commercial rights in court cases is difficult to gauge.\(^{184}\) But as an informal and covert form of communication, it lacks the sustained influence party ‘leadership’ exerts over judicial discourse.

**Government interference in court decisions**

In the command economy, State Economic Arbitrators used administrative rulings to adjust economic contracts among SOEs.\(^{185}\) With the introduction of private commercial rights during *doi moi* reforms, adjudicators could no longer use administrative measures to resolve disputes. They needed deliberative independence from the government apparatus.

The notion of judicial independence from ‘outside’ forces needs rethinking in Vietnam’s polity, where state power is divided according to the Soviet ‘concentration-of-power’ (*tap trung quyen luc*) doctrine.\(^{186}\) ‘Concentration-of-power’ is best understood as specialisation, rather than separation of powers. Both the government and Supreme Court can, for example, pass legislation and exercise judicial power. Further


\(^{183}\) The action taken by Arteh Tonh Long (the SOE) against a private company is discussed in more detail below.


\(^{186}\) ‘Unity of power’ (*tap trung quyen luc*) or literally ‘concentration of power’ is more generally termed ‘unity of democracy’ (*tap trung dan chu*) in contemporary legal literature.
blurring the distinction between the executive and courts, government agencies have historically funded and managed inferior courts.

Post-doι moi court reforms first sought to untangle the government from the courts by removing the power of local governments to elect judges. They next abolished the administrative resolution of economic disputes and established economic courts in 1994. The National Assembly was given constitutional powers to appoint the Chief Justice of the Supreme Court, while the President appointed other judges. In practice, however, the President lacked the resources and the political will to perform this function and by default local governments arrogated authority to select and appoint judges. This meant that inferior-level judges owed their primary loyalties to local government officials, rather than to the Supreme Court.

Court reforms in 2002 sought to re-centralise power over local courts into the hands of the Supreme Court. Administrative control over court budgets has been transferred from local government authorities and the Ministry of Justice to the Supreme Court. Further strengthening the Supreme Court’s power, the Chief Justice, rather than the President now appoints judges. But central control is qualified by the requirement that the Chief Justice must confer with local people’s councils when appointing and dismissing the chief and deputy chief judges of local courts.

An insight into local government thinking regarding judicial autonomy is provided by the debates surrounding the 2002 judicial reforms. Local governments argued that Supreme Court control would compromise judicial autonomy. Re-centralisation, they argued, would result in unjust decisions if the Supreme Court had an improper understanding of the law. For government agencies, judicial autonomy meant freedom from central legal rulings that frustrated local imperatives. Their arguments not only reveal centre-local tensions, but also indifference towards uniform legal doctrines that generate predicable judicial outcomes.

188 Constitution 1992 articles 84, 103.
189 See Ba Tuan, 2002 ‘De Chanh An TANDTC Co Dieu Kien Bo Nhiem Tham Phan Duoc Xac Thuc Hon’ (Allowing the Chief Justice of the Supreme People’s Court the Ability to Nominate Judges Will Be More Realistic) Phap Luat 19 March, 2.
190 Interview Nguyen Hang, 2002 Deputy Chief Judge Supreme People’s Court(civil division), Hanoi November. Also see Brian Quinn, 2003 ‘Vietnam’s Continuing Legal Reforms: Gaining Control Over the Courts’ 12 Asian-Pacific Law and Policy Journal (4) 431, 439-441.
191 See Law on the Organisation of People’s Courts, articles 45, 46.
192 Law on the Organisation of People’s Courts 2002, article 40.
193 Ba Tuan, 2002 ‘Sua Luat Lieu Co Giam Oan Sai?’ (Will Changing the Law Reduce Problems, Mistakes?) Phap Luat 20 March, 2; D. Hoc, 2002 ‘Phai Dam Bao Tinh Doc Lap Xet Xu Cua Toa An’ (We Must Guarantee the Independence of the Court) Nguo Lao Dong, 20 March, 2.
Senior judges countered these arguments by asserting that government bodies are reluctant to transfer discretionary power to ‘manage’ commercial transactions to the courts.\textsuperscript{194} The following case offers some insights into the way government directives shape judicial interpretations of commercial legal rights.

**Government directives to courts**

There is compelling evidence that local government authorities guide many court decisions. The action by New World Cong Ty against the Nghia Tan People’s Committee illustrates this process.\textsuperscript{195} A dispute arose in 2002 between Nghia Tan People’s Committee (a phuong in Cau Giay District, Hanoi) and New World over a joint venture agreement for an amusement park. Under the joint venture the People’s Committee provided land in return for a fixed profit share set at 7 million dong per month (approximately USD 430). The joint venture did not perform to expectations and after a year the People’s Committee accepted a reduced profit share of one million dong per month.

When the joint venture terminated in 2001, the People’s Committee demanded payment of the profit foregone over the five-year term of the contract. In response New World petitioned the economic division of the Hanoi Provincial Court to declare the contract invalid. It argued that the People’s Committee had waived its contractual right to the profit and the joint-venture agreement was thus void and unenforceable. In the alternative, it argued that the People’s Committee was forbidden by the Ordinance on Economic Contracts 1989 from entering economic contracts and lacked the authority under the Land Law 1993 to lease land.

Disregarding these statutory limitations to the People’s Committee’s private commercial rights, Hoang Huu But (the trial judge) decided that the joint venture agreement was enforceable. The judge relied on a letter from the Cau Giay District People’s Committee confirming that the Nghia Tan People’s Committee was authorised to enter the joint-venture agreement. He reasoned that once instructed to lease the land, the Nghia Tan People’s Committee was legally compelled to ‘obey a higher level’ (tuan theo menh lenh cap tren). In essence, the judge held that a letter from a district People’s Committee overruled central-laws governing the formation of contracts.

\textsuperscript{194} Interviews Do Cao Thang, Chief Judge, Hanoi Economic Court, March 2003; Dang Quang Phuong, Director, Institute for Judicial Science, Supreme Court, Hanoi March 1999, September 1999, February 2000, March 2002.

\textsuperscript{195} This case study is based on information provided in interviews with lawyers working for Leadco during March 2003, July 2004. This firm acted for New World.
Lawyers acting for New World believe that local officials pressured \((sue ep)\) the judge to disregard the law and find for the local government agency. From comments made in court, they speculated that the judge sympathised with phuong officials, who maintained they would lose ‘face’ \((be mat)\) and authority if the government lost the case. The judge also followed general party principles by protecting the state benefit against contractual rights asserted by the private sector.

New World’s lawyers convinced the procuracy that the judge erred in law and the Supreme Court agreed to review the case in 2003. In the meantime, the Supreme Court Judicial Council issued Professional Guidance No. 4, which provides that state agencies, such as the Phuong People’s Committee, can legally form economic contracts.¹⁹⁶ Lawyers did not proceed with the review, because they could not authoritatively establish that Supreme Court professional guidances (which is a sub-legal instrument) are governed by the principle that laws are not retroactive.¹⁹⁷

**Courts rely on government agencies for evidence**

Procedural rules limit the opportunities for litigants to submit evidence in trials and examine witnesses.¹⁹⁸ Litigants also lack interlocutory and freedom of information powers to compel other parties and state authorities to produce evidence. Modest adversarial reforms introduced by the Civil Procedure Code 2004 have given lawyers more opportunities to submit evidence in court.¹⁹⁹ But judges in Vietnam’s civilian legal system still assume the main burden of finding evidence.

Functioning essentially as local government offshoots, courts for decades have relied on government officials to investigate litigants, gather evidence and in many cases determine liability. For example, in a case concerning the compulsory acquisition of a residential house in Hanoi, a district court relied on a report prepared by the Housing and Land Department of Van Phuc District People’s Committee for evidence of occupancy.²⁰⁰ The court accepted the department’s findings of facts, recommendations

¹⁹⁶ This is an example where a professional guidance, which is not a legislative instrument, purported to over state legislation.
¹⁹⁷ See Law on the Promulgation of Legal Documents 1996, article 76.
¹⁹⁸ See Civil Court Procedure Code.
²⁰⁰ The case arose from the compulsory acquisition of a house in Van Phuc District on the outskirts of Hanoi. The Van Phuc District People’s Committee refused to pay compensation, as required under article 2 of Decree No. 90/CP Promulgating Regulations on Compensation for State Recovery of Land for the
of liability and compensation without demur, confining itself to procedural issues and assessing civil damages.

Government control over evidence is also evident in the action by Nguyen Kim-Manh against Pham Loc (Director) and Hang Phim Truyen VN (Film Production Studio VN) for breach of copyright (ban quyen).\(^{201}\) Nguyen Kim-Manh alleged that the defendants infringed his copyright in a novel entitled *Hon Nhan Khong Gia Thu* (literally ‘Marriage Without Registration’) by changing key elements of the story during the adaptation of the novel into a film script. The protagonist in the novel was depicted as an ace fighter pilot, war hero and a complex man struggling against his moral imperfections. Among his many moral transgressions, the protagonist refused to recognise his illegitimate son. Glossing over the moral contradictions between national loyalty and personal betrayal, the film script presented a one-dimensional war story depicting *tinh yeu thuong mai* (commercial love) relationships.

Nguyen Thi Loi, the presiding judge in the Hanoi People’s Court, was asked to determine whether the producer’s obligation to comply with censorship directions overruled the author’s property rights under Article 751 (e) of the Civil Code.\(^{202}\) Censors from the Ministry of Culture and Information requested script changes without specifying which elements of the story were unsuitable for public viewing. The author, Nguyen Kim-Manh, contended that the producers breached copyright by making unnecessary changes.

After establishing that the contract gave the complainant copyright over the film script, the judge called on officials from the Political Bureau of the Airforce and the Censorship Committee from the Ministry of Culture and Information to ascertain whether the script modifications exceeded the changes demanded by the censors. In effect, she allowed government officials to decide the core evidentiary question whether the producers breached copyright by making unnecessary script changes. Lawyers

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\(^{201}\) This case study is based on interviews with Nguyen Thi Loi, Deputy Chief Judge, Civil Division, Hanoi Peoples Court, Hanoi April 1999 and September 1999 and the transcript of the first instance judgment Case No. 41, 16-19 October 1998.

\(^{202}\) Article 751 (e) of the Civil Code gives authors rights to ‘protect the integrity of their work and permit or not permit other persons to alter the content of the work’.

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acting for the author were not permitted to challenge the veracity of evidence submitted
or conclusions based on the evidence, by submitting their own evidence and cross-
examining government officials.

The notion that state officials possess the expertise and knowledge required to assess
liability is deeply embedded in judicial thinking. Judges generally confine themselves to
ensuring that procedural rules are followed and determining the appropriate remedies.
Their deference to higher authorities (cap tren) allows government agencies to perform
judicial functions. Rather than the autonomous judicial decision-making presupposed by
PAR and international treaties (BTA and WTO), government agencies actively
participate in courtroom discourse. They balance competing commercial rights
according to socioeconomic policies and institutional imperatives. It is a process that
transforms court determinations into an extension of ‘state economic management’.

Judicial interference in court decisions

It is a principle of judicial autonomy that judges should apply legal reasoning free from
either external or internal interference. Autonomy from internal interference requires a
decision-making environment in which judges are not compelled to follow instructions
from other judges.

Collegial decision-making

Historically, judicial committees (Uy Ban Tham Phan) comprising superior judges
reviewed all inferior court cases before decisions were announced. The chief judge
also reviewed provincial court decisions in closed sessions (xin y kien lahan dao, literally
‘request leadership’s opinions’). In principle majority decisions prevailed, but in
practice chief judges dictated most outcomes. Although there is no legislative basis
for the practice, lawyers interviewed believe collegial decision-making is still widely
practised as a means of inducing consistency and minimising corruption. Yet by

203 This practice was entrenched by judicial reforms after the 1959 Constitution that aimed to bring
democratic centralism into the court system. During this period chief judges were often the only judicial
officials with law degrees. Interview with judges. Also see Dinh Gia Trinh, 1964 Nghien Cau Nha Nuoc
va Phap Quyen (Studies about State and Legality) Nha Xuat Ban Su Hoc, Hanoi, 104.

204 While giving judicial committees general powers to ‘ensure the uniform application of law’, article 29
of the Law on the Organisation of People’s Courts 2002 does not provide for review before decisions are
made. Lawyers from three Vietnamese law firms (Investconsult, Vilaf and Leadco) nevertheless believe
that the practice continues, giving rise to the popular expression ‘the decision is in the judge’s pocket’ (an
bo tui). Also see Bui Ngoc Son, 2003 ‘Su Doc Lap Cua Toa An Trong Nha Nuoc Phap Quyen’
(Independence of the Court and the Rule of Law) Tap Chi Nghien Cau Lap Phap (4), 43, 48.
encouraging a culture of ‘first decide then try’ (*quyet dinh truoc khi xet xu*), collegial decision-making compromises independent decision-making by inferior court judges.

Supreme Court professional guidance (*chi dao chuyen mon*)

‘Professional guidance’ by the Supreme Court constitutes another type of top-down control. The practice was borrowed from China in the 1950s to unify the application of law by inferior court judges possessing little or no legal training. Professional guidance takes the form of individual rulings made by chief judges in provincial courts or the Judicial Council (*Uy ban tham phan*) in the Supreme Court to resolve legal questions referred by inferior courts. Senior judges justify this practice as a way to further the democratic centralist objective of moderating local improvisation and inducing uniformity in decision-making across the country. It is considered necessary to correct wild improvisation by under-trained and inexperienced inferior court judges. Inferior court judges seek professional guidance to avoid making politically sensitive decisions about new normative practices, disputes involving foreigners and claims against the party and state. Consider the proceedings taken by foreign companies against Vietnamese state-owned banks for failing to honour letters of credit (LCs). Hyosus Hong Kong Ltd sued the Vietnam Commercial Joint Stock Bank (issuing bank) in the Hanoi Economic Court for allegedly breaching Uniform Commercial Credit Practice (UCCP) rules incorporated into the contract of sale. After receiving shipping documents (i.e. bill of lading and manufacturing certificates) stipulated in the contract of sale, the bank refused to honour the irrevocable LC. Lawyers acting for the complainant believed that the Vietnamese buyer, a large SOE owned by the Hanoi People’s Committee, persuaded Hanoi provincial authorities to issue an official letter stating that the SOE and Hyosus Hong Kong LTD were in dispute and instructing the issuing bank to dishonour the LC. According to UCCP rules, issuing banks are only lawfully entitled to dishonour letters of credit when courts have found the seller guilty of fraud.

The complainant lodged a petition with the Hanoi Provincial Court in 1998. Under Vietnamese law, the UCCP rules were incorporated into the economic contract binding

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206 It should be noted that under the UCCP 500 rules developed by the International Chamber of Commerce in 1993, issuing banks are forbidden from dishonoring letters of credit once prescribed shipping documents have been received. See Sheelah McCracken and Anna Everett, 2004 *Banking and Financial Institutions Law*, Lawbook Co. Sydney, 490-498.
Rather than applying the law, the court immediately sought guidance from the Supreme Court ‘Judicial Council’ (Uy ban tham phan). The Judicial Council issued Professional Guidance (chi dao chuyen mon) No. 37/TKT on 18 May 1998 ordering proceedings to stop in this case, and other LC actions pending in different provincial courts. The Professional Guidance made the narrow and technically incorrect argument that LCs are not economic contracts and as such are not justiciable by economic courts. Lawyers for the complainants speculated that the Professional Guidance was used to protect the state benefit by shielding state-owned banks from foreign creditors.

The Judicial Council sought an administrative ruling from the State Bank to determine whether state banks should honour the LCs. Rather than examining secondary legal sources, such as NA debates and academic commentary, the Judicial Council relied on a government agency to determine the detailed rules that guided the application of laws.

Some professional guidance supports private commercial rights by clarifying legal texts, but many others privilege the state benefit. Judges in general follow guidelines given by superior courts, which have a higher legal value than constitutionally superior laws. Since litigants are seldom given ‘professional guidance’ rulings, these instruments only implicitly inform courtroom discourse.

To recapitulate, in stressing broad political and ethical principles, party leadership contrasts with government and judicial influence, which is more tightly focused and case specific. In some circumstances, such as the LC cases, government rulings reflect

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208 For example, the Hyosung Corporation sued the Vietnam Commercial Joint Stock Bank in the Ho Chi Minh City People’s Court in May 1998 for failing to honour an irrevocable LCs. See Kim Chi, 1998 ‘Potential Quicksand’ Vietnam Economic News (33) 18-19.
209 The State Bank (Vietnam’s central bank) promulgated Decision No. 711 25 May 2001 and Decision No. 1233, 26 September 2001 outlining the circumstances in which state owned banks can issue deferred LCs.
210 For another example of a professional guidance advancing the state benefit, consider the action to recover installment payments under a construction contract, taken by Leighton-Hornybrook in 2003 against Melia Hotel Holdings, the owners of the Melia Hotel, Hanoi. Before the trial, lawyers acting for Leighton-Hornybrook held informal discussions with Hoan Huu But, Vice Chief Justice of the Economic Division of the Hanoi People’s Court and the trial judge. According to the lawyers, Hoan Huu But sought professional guidance from the Supreme Court Judicial Council before agreeing to commence the trial. The professional guidance ordered a split 40: 60 decision, because the damage claim was large and both litigants were important foreign investors.

Hoang Huu But found for the construction company, because there was no possible interpretation of rights under the contract to support a split decision. Under the construction contract, once the owner accepted completion, they waived most rights to withhold payments. On appeal, the Supreme Court not only reversed the judgment, but also awarded damages against the building contractor. Later Hoang Huu But was informed that the Supreme Court Judicial Council were
central party directives designed to protect the state benefit. But more typically these rulings aim to secure local political or economic imperatives. Either way government discourse infuses imported commercial rights with state socioeconomic objectives. Professional guidance from the superior courts often has a similar purpose.

**Moral and sentimental discourse in the courtroom**

We have seen that judicial decision-making is guided more by political and economic arguments than by legal reasoning. Judges first attempt to order and evaluate claims from a statutory perspective. But as this section shows, where primary legal texts do not fit the facts, judges not only seek solutions from professional guidance, but also from non-legal social orderings.

In civil cases observed by the author, judges used ‘reason and sentiment in carrying out the law’ (*ly va tinh trong viec chap hanh phap luat*), a practice that developed during the pre-*doi moi* era (see chapter three). They encouraged litigants to argue their case using moral and sentimental language. In disputes over house ownership, for example, claimants based their cases on principles of fairness (*cong bang*) and reasonableness (*hop ly*). A war widow claimed she had a greater ‘social need’ (*nhu cau xa hoi*) for a house than a farmer defending his ownership rights. A local government official invoked the sentiment of *co long tot voi dan* (good heartedness towards the people) to support his claim for possession of a house owned by another villager. A distinct court judge hearing a housing dispute, evaluated evidence according to what was ‘reasonable’ in the circumstances. It was reasonable, even constitutional, he decided for some clan elders to allow land-less relatives to occupy a clan house.

District court judges interviewed believe the legal consciousness of the people is low and judgements based entirely on legal argument lack popular legitimacy. Judges draw from common experiences—moral and sentimental practices—to produce socially acceptable outcomes. Even central authorities recognise a judicial duty to ‘protect the

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211 The author observed five cases in the Vinh Phu Provincial Court in 1994 and three cases in Civil Division of the Hanoi People’s Court in 1998 and one economic case in 2003. Litigation concerned house ownership, although in some cases the distinction between land use rights over vacant land and house ownership was not clearly delineated. Two cases in the Hanoi Economic Court concerning a company law dispute and economic contract were observed in March 2003.

212 The judge made the erroneous argument that the constitution guarantees rights to housing. Unlike the 1980 Constitution, the 1992 Constitution makes housing a personal responsibility. Tu Liem People’s Court, case No. 52/DSST, 2 October 1995.

213 Interviews Tran Thi Hai, Chief Judge, Civil Jurisdiction, Dong Da District Court, Hanoi September 1999, August 2000; Chung Lam, Chief Judge, Hoan Kiem District Court, Hanoi, March 2004.
...gia tri chung (common values) of human beings, though judges are encouraged to model their understanding of 'common values' on party-lines and policies. In the end, morality and sentiment often substitute for legal doctrines and other 'secondary legal' sources that support rights-based outcomes.

Legal argument based on universal standards of right and wrong is more common in superior courts. Judges in the economic divisions in the Supreme and provincial courts sometimes argue from analogy to extend legal principles to the facts of cases. For example, lawyers acting in the previously discussed clan house case on appeal convinced the Hanoi Provincial Court to overturn the district court decision on the grounds that the Land Law 1993 did not recognise social obligations to relatives. But legal argument by no means dominates discourse in superior courts. In cases observed by the author, provincial court judges used political and moral arguments to resolve cases according to the social status of litigants. They pointedly extolled the war records and party and community affiliations of socially prominent litigants to pressure less well-connected parties to settle.

The situationally valid decision-making (thoa dang) applied by many inferior (and some superior) courts further de-emphasises uniform rights-based outcomes. Tracing its origins to pre-colonial dispute resolution practices (discussed in chapter two), thoa dang encourages judges to balance competing claims for redemptive justice against broader considerations derived from 'reality processes' (qua trinh thuc tai). Judgements are valued for the skill shown in selectively applying a wide range of local and imported political, economic, moral and legal values to resolve social problems. The satisfaction of interested parties including the party and state is much more highly valued than consistently following codified legal norms and procedures.

Consider the action by Arteh Tonh Long, (a SOE) against a private company in the Hanoi Provincial Court in 2003. Arteh advanced a foreign currency loan to the private company for the purposes of establishing a wig export business. When the enterprise

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214 Nguyen Manh Cuong, 2002 ‘Yeu Cau Cua Viec Xay Dung Nha Nuoc Phap Quyen Doi Voi Doi Moi To Chuc va Hoat Dong Cua Cac Co Quan Tu Phap’ (How to Reform Judicial Authorities to Build up a Law-Based-State) Tap Chi Nghien Cua Lap Phap (10) 31.
215 Hanoi People’s Court, Case No. 20-PTDS, 31 January 1996.
216 Preferential treatment for 'war-martyrs, soldiers and relations of those who served in the revolution or state officials' is also evident in Presidential amnesties for prisoners. See Duong Phong, 2000 'Amnesty for More than 10,000 to Mark the Big Day,' Vietnam Investment Review 6 March, 11.
217 'Reality processes' include not only contemporary problems such as unemployment, foreign competition, gaps between rural and urban development and housing shortages, but also the historical factors giving rise to these tensions. Interviews with Hoang Ngoc Hien, Sociologist, Nguyen Du School of Creative Writing, Hanoi, June, 1998, April, September 1999, August 2000.
failed, the private company reneged on repaying the loan, arguing that since the agreement violated State Bank regulations, it was unlawful and unenforceable. The trial judge (Tuan Anh) ordered the private company to repay the loan in an out-of-court settlement. If the case had proceeded to trial, the director of Arteh would have been charged with the serious criminal offence of causing losses to socialist property and the foreign currency would have been confiscated. The judge was persuaded by the moral argument that Arteh’s director made one innocent mistake in his otherwise unblemished trading record. In ignoring statutory contractual rules that clearly showed the loan agreement was unlawful, the judge saved the director from a custodial sentence and by returning working capital to a SOE preserved the state benefit.

In this case, imported commercial rights were not considered absolute, universal or immutable, but merely as situationally relevant sources of guidance. Thoa dang solutions generate contextual rather than universal truths.

Case studies considered so far suggest that government and judicial officials remain unconvinced that courts should resolve cases according autonomous legal reasoning. Yet there are signs that the Supreme Court is cautiously formulating secondary legal sources to give inferior courts more autonomy to use legal reasoning to decide commercial disputes.

**Developing secondary legal sources**

The Supreme Court is developing a body of secondary legal sources to assist judges deciding civil and commercial disputes. The Court publishes similar fact case judgements (nghi quyet hoi dong tham phan) that show inferior court judges how laws should be applied in particular circumstances. It also produces an annual report that contains detailed guidelines giving legal solutions to commonly encountered substantive and procedural issues. In addition, the Court is slowly changing professional guidance from top-down instructions given to specific courts, into more generalised rulings applicable to every court.

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218 Brian Tamanaha queries the centrality of law in Western societies and by implication the integrative role of law. See Brian Tamanaha, 1999 'The View of Habermas from Below: Doubts About the Centrality of Law and the Legitimation Enterprise' 76 Denver University Law Review 996-998.

219 The Judicial Council synthesises legal principles from information disclosed by inferior level courts at six-monthly conferences held by the Supreme Court. This practice is derived from Soviet and to a lesser extent Chinese legal theory. These comments are based on a series of interviews with the Supreme Court Judge responsible for ‘professional guidance’ and the annual report. Dang Quang Phuong, Director, Institute for Judicial Science, Supreme Court, Hanoi March 1999, September 1999, February 2000, March 2002.
Annual reports give judges procedural guidelines about examining witnesses and collecting evidence. For example, the Annual Report in 2000 directed administrative court judges to decide cases cautiously in consultation with state bodies. Lawyers interviewed believe that prescriptive rules of this kind can be used to remind judges to follow predetermined procedures. Evidently, most judges lack the skills required to extend the doctrines contained in similar fact cases to particular cases. Drawing and applying legal principles from case summaries requires analytical skills that are in short supply in a judiciary that was trained to strictly follow the party-line and narrow prescriptive rules.

To augment these reforms, the Supreme Court is preparing a judicial handbook that will give inferior court judges broad ethical and procedural advice regarding court cases. It is also publishing and distributing, for the first time, selected economic decisions from superior-level economic courts. Although not legally binding, these secondary sources could become highly persuasive, because they set standards that superior courts may use to review appeals from inferior courts.

Like ‘party leadership’, government directives and judicial guidance, Supreme Court secondary rulings promote party and/or government policies. Where they differ is that secondary rulings have the potential to form legal doctrines that will enable judges to convert political, economic and moral ideas into legal arguments. In time, these reforms may generate a more autonomous decision-making environment in which appropriately trained judges can creatively use legal reasoning to interpret imported commercial rights.

The role of lawyers in courtroom discourse

Before doi moi lawyers were peripheral players in court cases. State authorities appointed lawyers in serious criminal trials, but litigants in civil cases were generally unrepresented. While fewer than 10 per cent of litigants in post doi moi Vietnam retained legal representation, approximately 50 to 60 per cent are represented in

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221 Some lawyers argue, however, that the main purpose of the Supreme Court similar fact cases and other initiatives is to reassert party leadership over autarkic local courts. According to this view ‘secondary codings’ are merely the tool used to realise this objective.

economic cases. Lawyers interviewed believe they are beginning to play a more significant role in promoting legal discourse in economic courts. This development is important to our discussion because economic courts deal more directly with imported private commercial rights than other courts.

It is prudent to understand the movement towards legal discourse within the constraints limiting courtroom discussions. Lawyers report that even in economic courts legal reasoning is rudimentary. For example, judges prefer legal arguments based on subordinate highly prescriptive legislation to arguments grounded in legal principles extracted from superior laws. In fact, judges find ‘official letters’, which are not legally binding, highly persuasive because they convert the party’s and state’s socioeconomic objects into detailed rules.

Where prescriptive rules are vague or irrelevant, judges occasionally listen to arguments based on general legal principles derived from superior-level legislation. For example, some judges are sympathetic to imaginative legal reasoning that extends principles extracted from the Civil Code to the facts in economic cases. It will be recalled from chapter five that since the Ordinance on Economic Contracts 1989 is a transitional instrument drafted shortly after doi moi reforms began, it lacks many legal principles required to resolve contemporary business transactions. To overcome this deficiency some lawyers draw legal principles from the more comprehensive Civil Code, even though these provisions are only supposed to regulate civil contracts. More commonly,

223 Fewer then 2,500 lawyers (luat su) are available to appear in over 230,000 cases per annum. One of the most significant advances in the capacity of lawyers to represent their clients’ interests was the right to organise into bar associations. Although still in their infancy, these organisations have the potential to mobilise resources to champion adversarial court reforms. Although the Constitution 1980 (article 133) first recognised a right for lawyers to organise themselves into an association, it was not until the Ordinance on Lawyers 2001 that legislation was introduced allowing the creation of a national bar association. Implementing regulations have not been issued. See Pham Hong Hai, 2002 ‘Vai Tro Cua Luat Su Trong Hoat Dong To Tung—Thuc Trang va Phuong Huong Doi Moi’ (The Role of Lawyers in Procedures—A Look at Realty and Recommendations for Change) Tap Chi Hghien Cuu Lap (4) 110-116.

224 These comments are based on interviews with lawyers from six Hanoi based law firms (Investconsult, Vision & Associates, Vilaf, N H Quang & Associates, Leadco and Pham Hong Hai & Associates) from 2000-2005.

225 In principle, administrative court decisions are highly relevant because they set the boundaries of state influence over private rights. But as previously mentioned, there have been very few administrative decisions.

226 Interviews Nguyen Van Dung, Economic Division Supreme Court, Hanoi July 1998; Do Cao Thang Chief Judge Hanoi Economic Court, March 2003.
however, judges are unmoved by doctrinal arguments and request ‘professional
guidance’ to clarify the law.

Lawyers representing foreign clients regularly use foreign legal protocols and doctrines
to challenge political modes of thinking. This tactic is most effective where lawyers can
point to an international protocol in a trade agreement that binds Vietnam. Foreign legal
ideas also enter courtroom discourse when judges are required to construe the meaning
of foreign legal documents. It is common practice for judges to request private briefings
from lawyers to explain new legal ideas such as electronic commerce or international
banking law principles.227

Finally, when it is strategically advantageous, lawyers selectively use political
arguments derived from party pronouncements and the Constitution. There is, for
example, a political dimension to international treaty obligations, because the party
supports international economic integration. As an alternate strategy lawyers routinely
enlist political support from foreign embassies to lobby superior courts to follow legal
rights conferred by treaties (especially the BTA) and to resist pressure to favour the
state benefit.228

In the past, court procedures constrained legal argument by tightly controlling lawyers
in the courtroom. Modest procedural reforms giving lawyers more opportunities to
protect their clients, foreshadowed in Resolution No. 8, were primarily aimed at
criminal trials.229 Nevertheless, the Civil Procedure Code 2004 extended limited
adversarial rights to lawyers in economic and civil cases to examine witnesses, test
evidence and present legal arguments. Some commentators have questioned the scope
and depth of these reforms. They argue the code has failed to integrate adversarial
reforms into procedural rules and merely consolidated existing rules favouring the
inquisitorial system.230

It is too early to accurately assess whether procedural changes will overcome deeply
engrained attitudes among judges that lawyers have only a peripheral role in court

227 According to lawyers interviewed, if international protocols are clear, judges may act on the briefing,
but in more complex or sensitive cases judges seek ‘professional guidance’.
228 Ambassadors from the US are particularly active in petitioning superior courts to give US litigants
equal treatment to domestic litigants, as required in the US-Vietnam BTA. Interviews Vietnamese
229 Most official commentaries regarding the implementation of Resolution No. 8 concern criminal
administration. See Opinions, 2004 ‘Judicial Reform Steps in 2004’ Doi Song va Phap Luat trans., 10
Vietnam Law and Legal Forum (114) 30.
230 Nguyen Phu Son, 2004 ‘Bo Luat To Tung Dan Su Can The Hien Tinh Than Cai Cach Tu Phap’ (Civil
Procedure Code Should Express the Spirit of Judicial Reform) Tap Chi Nghien Cuu Lap Phap (4) 24-31;
Pham Hong Hai, 2002 ‘Vai Tro Cua Luat Su Trong Hoat Dong To Tung—Thuc Trang va Phuong Huong
proceedings. In the inquisitorial tradition judges were responsible for framing outcomes that reconciled litigants’ claims to the state benefit and sent ideologically correct educational messages to the people. Reforms that give lawyers rights to advocate their clients’ interests, even if this means opposing state interests, are not regarded sympathetically by most judges.

While they wait for procedural reforms take hold, lawyers continue to use informal processes to increase their leverage in the courtroom. For example, lawyers acting for the founders in the previously discussed Hero Cong Ty case were prevented by the trial judge (Nguyen Thi Hoai Linh) from challenging the court’s flagrant misapplication of the law. In order to encourage the judge to correctly apply the law, the lawyers approached journalists to publish a series of stories exposing the legal irregularities. Recent surveys show that 64 per cent of respondents believe that the press plays a vital role in securing just court decisions. It will be recalled that only 35 per cent of respondents thought judges produce honest and fair outcomes.

The role of procurators in economic court cases

As well as prescribing modest adversarial processes, Resolution No. 8 sought to clarify the investigation, prosecution and supervisory functions of the procuracy. The Ministry of Justice argued the government should assume responsibility for prosecutions, but the National Assembly Standing Committee rejected this proposal. The Law on the Organisation of the People’s Procurators 2002 refocused the procuracy on prosecuting criminal actions and supervising court proceedings (including economic and civil actions). Procurators are also required by statute to appear in non-criminal cases (including economic and civil cases) as a third party to preserve the state benefit

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Doi Moi’ (The Role of Lawyers in Procedures—A Look at Realty and Recommendations for Change) Tap Chi Nghien Cuu Lap (4) 110-116.

231 See Sarogoratsky, 1961 ‘Vai Tro va Quan He Giua Cuong Che va Thuyet Phuc Cua Phap Luat Trong Thoi Ly Xay Dung Chu Nghia Cong San Tren Quy Mo Rong Lon’ (Roles and Relations between Enforcement and Legal Education in the Communist Period) Tap San Tu Phap (11) 41, 42-57; Le Trung Ha, 1965 supra 1, 2.


233 The lawyers alleged that the trial judge calculated the percentage of the company owned by the founders on the current depreciated value of assets they contributed to the company in 1992. This formula contravened the Company Law, which stipulated that ownership should be based on the value of capital contributions at the time the company is formed. Capital contributions become pooled assets owned by the company and are not individually owned by members.

234 UNDP, 2004 supra 18.

(Article 2). According to lawyers interviewed, procurators take this responsibility seriously and routinely support the state interests over private commercial rights.\textsuperscript{236} The Civil Procedure Code 2004 was supposed to give lawyers more opportunities to produce evidence and raise legal arguments to preserve their clients’ legal rights. But adversarial discourse is compromised by the dual functions performed by procurators. In addition to representing the state’s interest, procurators supervise legal compliance within the courtroom and prosecute judges found deviating from the law. Lawyers are convinced that judges are unlikely to treat procurators and lawyers impartially if procurators supervise legality in the courtroom.

\textbf{Courtroom corruption}

The extent to which corruption influences court decisions is difficult to gauge. Lawyers interviewed believe, however, it is a significant problem.\textsuperscript{237} Their anecdotal accounts intimate that at one level corruption is formalised in a range of extra fees charged to process court documents. These small bribes rarely determine outcomes, although they may reduce access to courts by increasing costs.

At another level, bribes frequently modify the way judges assess liability and/or allocate remedies.\textsuperscript{238} Bribes persuade judges to interpret ‘party leadership’, government directives, ‘professional guidance’ and superior legislation in ways that advance particular personal interests. Corruption flourishes where subordinate rules implementing rights-based laws are vague and contradictory. Judges are more reluctant to accept bribes where government regulation is clear or the Supreme Court has issued professional guidance specifying a particular outcome. In these circumstances, corrupt

\textsuperscript{236} In an action by Son Ha Cong Ty against Ha Tinh Industrial Construction Company in the Ha Tinh Provincial Court in 2003, the procurator actively intervened to protect a SOE. The lawyer acting for Son Ha Cong (a private sub-contractor) was prevented from examining the director of Ha Tinh Industrial Construction Company. The procurator countered the lawyer’s complaint that procurators are not supposed to act like defense counsels, by saying that it was his duty to protect state assets against private litigants. The judge accepted the procurator’s recommendation that procurators are not supposed to act like defense counsels, by saying that it was his duty to protect state assets against private litigants. The judge accepted the procurator’s recommendation that the SOE should not pay interest on overdue payments. This ruling disregarded provisions in the Ordinance on Economic Contracts 1989 authorising judges to award penalties in these circumstances. According to the complainant’s lawyer, the judge decided that the state’s interests were served by protecting SOE assets from private claims and preventing assets from being transferred to other provinces. This decision subordinated private contractual rights to the state benefit. This case description is based on interviews with the lawyer acting for Son Ha Cong Ty. The action took place before Judge Nguyen Dinh in September 2003.


\textsuperscript{238} Lawyers interviewed say that judges use their associates as go-betweens to solicit bribes from litigants. A practice has arisen where judges return bribes to loosing parties. For example, Vo Trong Hieu, a judge of the civil division of the Ho Chi Minh City People’s Court, was denounced to the police when he failed to return a bribe solicited from an unsuccessful litigant. See Author Unknown, 2004 ‘Former Judge to
deviation from the 'official' line is difficult to disguise. Lawyers interviewed were uncertain whether corruption supports or hinders imported commercial rights, since bribes are used to both support and oppose legal rights. What is certain is that corruption undermines efforts to base judicial decisions on central rules and legal reasoning. It constitutes yet another extra-legal variable that undermines the predictability and enforceability of imported private commercial rights.

**Judicial interpretations of imported commercial laws**

Three main factors gleaned from the case studies appear to shape judicial interpretations of imported commercial legal rights. The first factor is the epistemological rules judges use to decipher imported laws. 'Party leadership', which is the most hierarchically important source of epistemological rules, persuades judges to privilege the party and state benefit over private interests and to elevate domestic interests above foreign interests. These historically conditioned orientations deeply influence the way judges interpret private commercial rights.

Since the party-line is generally vague and non-specific (except in politically sensitive cases), judges look to subordinate legislation issued by government agencies for prescriptive rules governing the implementation of party and state socioeconomic policies. Further clarification is provided by 'professional guidance'. This epistemological hierarchy discourages judges from using legal reasoning to resolve commercial disputes.

The second factor is that the closed categories of 'legal sources' (*thua nhan luat*) impede the development of judicial reasoning. As we saw in chapter three, for decades socialist legal thinking discouraged legal officials, including judges, from bringing 'official' legal discourse into conversation with local moral and economic norms and practices. This closed epistemology prevented knowledge gained by judges applying Soviet law from percolating up to inform Vietnamese lawmakers.

Contemporary judges are similarly constrained by the 'official' legal discourse from drawing ideas from customary practices and natural 'rights' that could generate creative


239 Judges are required to narrowly rely on party guidelines and *ban hanh luat* (issued law). Interviews with judges *supra*. 

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adaptations of imported commercial laws. Without access to ‘secondary legal’ sources of the kind that inform Western legal doctrines, such as parliamentary debates, sustained academic commentary and legal cases, Vietnamese judges are unable to develop homegrown legal doctrines that naturalise imported commercial rights.

In tandem with ‘official’ decision-making, many judges (especially in the inferior courts) routinely use thao dang (or situational) reasoning to create solutions to commercial problems that did not exist in rights-based law. This practice produces socially acceptable outcomes because it selectively draws ideas from ‘official’ and ‘unofficial’ local discourses to produce highly specific outcomes. Even if higher-level authorities were prepared to learn from this type of redemptive justice, a possibility currently discouraged by democratic centralist thinking, thao dang reasoning generates situationally appropriate outcomes that are not easily transformed into universal legal principles.

The third factor guiding judicial interpretations of imported commercial laws are the processes regulating courtroom discourse. Changes to civil procedural rules in 2004 gave lawyers more opportunities to represent their clients in courts. Even before these reforms were implemented, lawyers in economic courts in particular were slowly bringing judicial deliberations closer to the law. Most lawyers support legal discourse because it provides a set of rules that in some circumstances enables them to protect their clients’ property and contractual rights against private interference, though much less frequently, against state encroachment. They also encourage law-based decision-making because legal processes generate demand for their professional skills. For example, lawyers reported increased demand for their services following a trade dispute with the United States over the export of catfish in 2002.

Counteracting this trend, lawyers are pressured by their clients to use any tactics, including moral and political appeals, press campaigns and even bribery to secure an advantage. By strategically substituting legal reasoning with political and moral arguments, lawyers can erode the original purpose of the imported law, which was to increase transactional efficacy through uniform and predictable legal meanings. The winner takes all mentality in adversarial cases can thereby displace the objective of commercial laws.

240 As discussed in chapters three and five, socialist legality does not recognise customary law. See Le Hong Hanh, 1998 Giao Trinh Ly Luan Nha Nuoc va Phap Luat, (Textbook on Theories of State and Law) Nha Xuat Ban Cong An Nhan Dan (People’s Police Publishing), Hanoi, 291-325.
To conclude, judges currently base most decisions on a combination of party and government directives and corrupt incentives. As a result, the meanings ascribed to imported commercial rights reflect the protean nuances of state policy and personal imperatives more than law-based reasoning. For this to change, judges need to develop secondary legal sources that draw inspiration from domestic commercial precepts and practices. Supreme Court case guidelines and annual reports are tentatively moving in this direction. But a shift from instrumental decision-making to legal reasoning requires a more fundamental change that places legal principles at the apex of the epistemological hierarchy.

Assessing the potential for courts to base decisions on legal reasoning

Chapter three argued that courts during the revolutionary period preformed a largely instrumental role in furthering party and state rule. Courts are now required to follow both party leadership and laws to resolve commercial disputes. What remains unclear is how they will reconcile these sometimes competing instructions. There are two questions to consider: what messages do laws and ‘secondary legal’ sources send to judges about imported commercial rights, and will courts be given (or arrogate) the epistemological independence to use legal reasoning to filter party and government directives?

Several factors militate against the emergence of autonomous judicial decision-making. According to an influential judge, the Supreme Court leadership worries that doctrinal rules will encourage judges to interpret and filter ‘party leadership’ and government directives. This concern recalls the historical suspicion in socialist legal thinking that legal doctrines stimulate autonomous judicial decisions that reorder ‘official’ political, economic and moral ideas. Judicial reasoning would upset the strict hierarchies encouraged by democratic centralism. The development of legal doctrines is further impeded by thao dang or situational judicial decision-making.

It is interesting to speculate in what circumstances the party and government might contemplate an epistemologically independent judiciary. As previously mentioned, in times of rapid change party institutions may search for more effective ways of resolving

\textsuperscript{241} A recent survey showed that over 75 per cent of respondents who had used lawyers valued their role in securing favorable outcomes. The survey did not say whether lawyers used legal arguments to advance their clients’ interests. See UNDP, 2004 \textit{supra} 18.

social problems. Judicial independence may, for example, distance the party from sensitive commercial struggles between foreign and local enterprises and intractable civil disputes over housing and personal debt. It may also reinforce the party’s ideological depiction of Vietnam as a law-based state.

Consider the action by two founders of Hero Cong Ty against the company’s manager. They alleged the manager, in contravention of the Company Law 1990 and Law on Enterprises 1999, used his control over the company seals and records to exclude them from making management decisions and participating in dividend declarations.

The main struggle took place outside the courtroom. Both the founders and manager were well-connected party members and used their influence to manipulate decisions made by district-level party units and city-level people’s committee departments. For example, the founders sought a ruling from a district party committee to direct the Hanoi Company Registration Department to take administrative action against the manager. They also sought police involvement to investigate alleged criminal violations within the company. According to lawyers acting for the founder, the manager used his more powerful party connections to block these initiatives. The people’s committee refused to act, but sent a letter to the Chief Judge of the Hanoi Provincial Court ordering the Economic Court to resolve the dispute. This case is significant in showing that when political processes were unable to resolve a commercial dispute, some party and state authorities sought a judicial solution.

Even if the party encourages greater judicial autonomy, it does not automatically follow that judges will protect imported commercial rights. Like other state officials, judges are immersed in ‘official’ discourses that convey mixed messages about the sanctity of private rights, especially in contests involving the ‘state benefit’. Countervailing ‘official’ narratives, promoting international legal harmonisation, are at the same time encouraging judges to extend equality under the law to foreign and domestic entrepreneurs. The recently enacted Competition Law 2004 codifies these principles.

Scrutiny by the international press and foreign donor community places judges under


244 This case study is based on information provided in interviews with lawyers in Leadco, the law firm acting for the company founders, during March 2003.
further pressure not to exalt state and national interests over private contractual and
property rights.245
Changes to adversarial processes will also give lawyers more opportunities to use
rights-based discourse in the courtroom. Already some lawyers employ imported
doctrinal arguments to show judges how private legal rights function in market
economies. As lawyers gain more procedural power it will become more difficult for
judges to ignore legal arguments and base their decisions on political, moral and
pecuniary considerations.
Current reforms suggest a potential for legal reasoning to develop in commercial and
possibly civil cases. As previously discussed, it suits illiberal regimes in Singapore and
Malaysia to support well-developed commercial courts to promote trade and
investment, but at the same time tightly control judicial autonomy where court decisions
challenge party political power.246 The procedural reforms instigated by Politburo
Resolution No. 8 suggest that party leaders in Vietnam are sensitive to popular
perceptions about judicial impartiality, competence and legal certainty. But there are
few signs the party countenances a form of judicial independence that gives courts
power over political decision-making. As previously noted, courts are generally the last
state institution to gain this type of power.
Conclusion
The previous chapter argued that Vietnamese epistemological conventions are
becoming more open to imported commercial rights. In advocating international
economic integration, party leaders have sensitised the ‘official’ discourse to legal
harmonisation projects sponsored by international trade agreements and donor-funded
legal reforms. For legal drafters immersed in this reified discourse, law reforms based
on legal borrowing appear both desirable and technically feasible. This chapter shows
that attempts to move law out of the statutes books into everyday life is more
complicated. The implementation of imported legal rights has fragmented legal
meanings.
Two main factors account for the complexity in implementing imported laws. The first
factor arises from differences in the loosely structured interpretive communities that
influence legal implementation. Studies showed that regulatory conversations between

245 See Duc Hung, 1998 ‘Golf Battle to be Resolved as president Takes Control’ Vietnam Investment
Review 7 December, 2; Anya Schiffin, 1998 ‘Vietnam Ruling Tests Letters of Credit’ Asian Wall Street
Journal, 11 June, 3.
elite-level government officials and foreign investors and lawyers are changing official attitudes to imported law. These exchanges inform central regulators about how legal rights function in facilitative legal systems.

Like the interpretive communities coalescing around elite-level Vietnamese drafters, considered in chapters five and seven, some central-level regulators are becoming enmeshed in neo-liberal legal thinking. Although the case studies suggest that members converse in a rather heterogeneous assortment of ideas, these communities generally support facilitative regulation that deregulates state economic management powers. Within these communities borrowed ideas are increasingly becoming the frame of reference for implementing the law.

Just as some legal drafters discussed in the previous chapter stood outside foreign-influenced interpretive communities, some central regulators (especially from the Ministry of Transport and Ministry of Culture and Information) show little sympathy for imported facilitative regulation and search for ways to limit private rights with state economic management.

Many local-level officials, principally at the district and phuong (ward) levels, are either isolated from or reject foreign discourses. Steeped in pre-colonial and socialist anti-mercantilism, communitarianism and nationalism, they hardly need reminding to privilege the state benefit over private, particularly foreign commercial rights.

Since courts function differently from other state bureaucracies, judges have been comparatively isolated from foreign-influenced interpretive communities.247 Judges alone are supposed to interpret private rights according to legal rules. They are discouraged from seeking ideas outside laws and authorised ‘secondary legal’ sources such as internal party and state guidelines. Courtroom discourse and foreign donor-funded training courses are among the few areas where judges are exposed to detailed explanations about how imported-rights laws function in market economies. The penetration of rights-based discourse into judicial decision-making is constrained by epistemological rules that privilege party leadership and government polices over law and by toa dang (situational validity) decision-making that treats imported commercial rights as one of many contextually relevant sources of authority. Together these factors have limited the capacity for judges to create new legal fictions from imported laws and

247 With the exception of one provincial level judge in Ho Chi Minh City, no senior economic court judges read English with sufficient fluency to absorb Western legal ideas without the support of foreign educated junior staff.
in the process provide solutions to commercial problems that are unavailable in local precepts and practices.

The second factor to consider is power struggles within and among state agencies. A difficulty with examining legal borrowing solely from a discursive perspective is that key state agencies use ideas strategically to pursue self-interests. For example, central regulators promoting facilitative regulation may benefit through family and friends from rights-based laws. Whereas some line-ministers use state economic management ideas to camouflage institutional rent-seeking. Here the debate is not so much between rival ideas about how best to import legal reforms, but rather between conflicting institutional and personal interests.

Some of the confusion about deregulating entrepreneurial activity is attributable to conflicting political agendas. Although some central policy makers are unquestionably moving to deregulate business licences and inspections, as a matter of political strategy it suits others to retain ‘state economic management’ powers to ensure that private commercial rights support state socioeconomic policies. For example, the prime minister used state inspection powers over land to force Phu My Hung Corp to abandon court action that challenged the state’s right to levy taxes over housing construction. Discretionary powers enable party and state leaders to import commercial legal rights secure in the knowledge that state officials possess the prerogative powers to minimise harm to state interests. The development of a ‘rule of law’ that protects commercial legal rights from administrative action is a central, but rarely debated, issue in Vietnamese law reform.

Power-sharing contests between local government agencies and the Supreme Court are likewise changing the way legal rights are implemented. As the Supreme Court gains control over inferior courts, the interpretation of private legal rights may increasingly follow judicial guidelines rather than government directives. But it is still unclear whether the strict epistemological hierarchies governing legal reasoning will enable courts to develop the legal doctrines required to naturalise imported legal rights. This shift also requires a judiciary that is willing and sufficiently well-trained to use legal doctrines to guide that application of rights-based law to commercial disputes. Although still peripheral players, lawyers are bringing judges into contact with foreign legal

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248 Some party leaders oppose market law reforms that may increase competition and damage family businesses, while others see commercial opportunities in international integration. See Quan Xuan Dinh, 2000 ‘The Political Economy of Vietnam’s Transformation Process’ 22 Contemporary Southeast Asia (2) 360-388; Martin Gainsborough, 2003 supra 98-110.
discourse and neo-liberal legalism in ways that may eventually stimulate local innovation and adaptation.

Chapters four to six examined how commercial laws transplant into state power structures. The next chapter expands this inquiry by considering how social demand for law influences legal transplantation. This discussion focuses on the ways organised pressure groups influence the importation and adaptation of commercial laws.
Chapter Seven

Non-State Pressure Groups and Legal Borrowing

Introduction
Legal harmonisation in Vietnam is changing the market conditions for foreign and domestic businesses. Unlike SOEs, which benefit from close political connections with state authorities, private entrepreneurs (both foreign and domestic) must find other means to persuade lawmakers and regulators to support business practices.¹ This chapter builds on the discussion in chapters five and six about selecting and implementing foreign laws, by investigating how entrepreneurs (foreign and domestic) influence legal meanings.

Studies in democratic liberal societies show that law does not just happen when there is a social need, someone or some group generally presses for statutory reform.² Pressure groups lobby drafting committees and use electoral leverage to correct or ameliorate social and economic problems.³ For Kahn-Freund, the way lawmakers interact with pressure groups strongly influences the selection and adaptation of borrowed laws.⁴ For example, he thought that laws drafted in secret without public consultation are less likely to reflect local contextual concerns than bills exposed to public comment. This chapter uses the third working postulate (discussed in chapter one) to assess how pressure groups influence the meaning of legal imports in Vietnam.

Discourse analysis assists our inquiry by suggesting that pressure groups are most likely to influence the ‘official’ discourse informing lawmakers where communicative channels are relatively unmediated by party and state instigation and coercion. Open discursive environments enable pressure groups to communicate unconventional or controversial ideas and models (unofficial discourse) to lawmakers. This interaction produces the preference convergence required to adapt and localise imported law.

Much literature concerning public participation in lawmaking presupposes a political space (civil society) in which non-state pressure groups can organise and influence lawmakers through unmediated discursive exchanges (deliberative democracy) and elections. But civil society concepts do not readily extend to Vietnam, because as previously discussed, the party and state possess extensive powers to co-opt and suppress ‘unofficial’ discourse (see chapter four). This study takes the position that although public discourse and political space in Vietnam differ significantly from Western conditions, we can derive a conceptual language from civil society analysis that is useful for understanding non-state influence over Vietnamese lawmaking.

The first part of this chapter uses discourse analysis to ascertain whether entrepreneurs (foreign and domestic) can influence legislative drafters through formal and informal organisational structures. In the second part, the discussion explores whether voters (including entrepreneurs) can harness representative processes to influence lawmaking in the National Assembly (NA).

**Influencing legislative drafters**

Habermas, to some extent, initiated thought about discursive lawmaking that takes place outside constitutional processes with the publication in 1962 of his book *Structural Transformation of the Public Sphere*. He considered representative government more as an ideal than a practical reality and explored ways the public can use deliberative pathways to influence lawmakers. Laws (and ultimately democracy) are shaped, he argued, by morals, ethics and pragmatic matters synthesised from exchanges and contests between lawmakers and society—a process he termed ‘communicative rationality’. These deliberative...
exchanges presupposed a political space (civil society) in which pressure groups can organise and lobby lawmakers.\(^9\)

Habermas imagined preference convergence taking place in state-societal interactions that are particular to Western Europe. Nevertheless, research suggests that his ‘communicative rationality’ has heuristic value in Vietnam’s tightly controlled political space. Scholars studying agricultural reforms in Vietnam during the 1960s and 1970s observed that dialogical exchanges between state officials and farmers influenced lawmaking.\(^{10}\) A quiet, sometimes covert process of negotiation and compromise adjusted party policy with notions proposed by groups operating outside constitutional and party mechanisms. This evidence of ‘dialogical lawmaking’ is significant, because it occurred at a time when the party and state vigorously suppressed unauthorised associations and autonomous political space.

Ben Kerkvliet characterised these exchanges as ‘dialogue in the broadest sense of the word, which incorporates communication of contentious ideas and preferences in ways that, in Vietnam, are often indirect and non-verbal’.\(^{11}\) One way of conceptualising Kerkvliet’s ‘dialogical lawmaking’ is by understanding why social groups use extra-constitutional deliberative channels to change law. Kerkvliet showed that party organisations and state lawmakers were unable to cope with widespread resistance to cooperative farming practices. Periods of social and economic transformation placed great stress on institutional

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\(^9\) Habermas located these deliberative exchanges in face-to-face interactions at home, work and coffeehouses, in addition to more formal exchanges in voluntary associations (clubs, professional associations, and unions), issue-oriented movements, and arguments in the media. See Peters, \textit{supra} 104-11.


structures. An effective response to this pressure was to find alternative sources of institutional order—'discursive sources of order'—comprising ideology, epistemologies, organisational practices and other communicative acts that allowed the state to converse with recalcitrant social groups. 'Dialogical lawmaking' enabled state authorities to secure cooperation from farmers in return for limited participation in the lawmaking process. Farmers could not use constitutional or party mechanisms to express their views, because the 'official' discourse (encapsulated in the Statute on Higher-Level Agricultural Producer Cooperatives) prohibited private farm production.12 As Kerkvliet demonstrated, during a decade of informal deliberation, state officials and farmers generated shared understandings (or preference convergence) about the appropriate balance between state and private farm production. Principles extracted from these exchanges slowly gained party consent and eventually crystallised into new regulatory approaches to agriculture such as Party Order CT 100 1980 on household farming production.

Kerkvliet questioned whether the depiction of Vietnam as a 'dominating' or 'state-corporatist' state adequately explained the dialogical exchanges occurring at the periphery of state power.13 If the state formulates policies and laws entirely within the party and state orbit and channels public voices through party-controlled mass organisations how does it respond to ideas that challenge the official discourse? Dialogical studies show that sustained communication between state and society generates the preference convergence required to codify unorthodox or dissenting norms ('unofficial' discourse) into law. This chapter extends this investigation by using discourse analysis to assess whether preference convergence takes place between non-state entrepreneurs and lawmakers.

The emerging influence of pressure groups in Vietnam

Discourse analysis informs us that the communication of unorthodox or dissenting ideas to lawmakers is most likely to succeed in exchanges that are relatively unmediated by the party and state. In some cases (discussed below) individuals communicate directly with lawmakers in unmediated exchanges. But more generally, pressure groups must organise to make their views known. Since lawmakers cannot consult 'the masses', the state

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13 See Kerkvliet, 2001 supra 2-3
encourages pressure groups to express their views through ‘authorised’ associations. The following discussion considers whether business associations operate with sufficient autonomy from the state to contest state policy and convey unconventional ideas and practices to lawmakers.

State recognition of popular participation in lawmaking

In Vietnam, official attitudes to popular participation in lawmaking were influenced by collective mastery (lam chu tap the) and socialist democracy (dan chu xa hoi chu nghia) principles that stressed the need to ‘make the people part of the process’ (duong loi quan chung) (see chapter three). Collectives mastered rejected civil society (xa hoi dan su) or individual space outside state and collective orbits as bourgeoisie individualism. In pre-doai moi society the party insisted that the views of ‘the masses’ should be transmitted through party and mass organisations to lawmakers.

The 1992 Constitution reconfigured socialist democracy by stipulating that the ‘people must know, discuss, act and examine’ (dan biet, dan ban, dan lam, dan kiem tra) (see annex three). Drawing on notions of people’s power that underlie collective mastery principles, the party began to emphasise the need for ‘direct democracy’ (dan chu truc tiep) to encourage the public to become involved in lawmaking. Increased public participation was justified on the basis that it would make laws more efficient by ‘bringing the law into real life’ (dua phap luat vao cuoc song). Various scholars argued that direct democracy would induce ‘people’s sovereignty’ (chu quyen nhan dan) and make ‘laws reflect the

14 See Dinh Gia Trinh, 1961 ‘May Y Kien Dong Gop Ve Van De Bao Ve Phap Che’ (Some Opinions on the Protection of Legality) Tap San Tu Phap (3) 20, 23.
15 See Nguyen Vinh, 1977 ‘Building the System of Socialist Collective Ownership’ Tap Chi Cong San (4) trans., JPRS 69283, June 20, 1977, 28; Le Duan, 1979 Nhan Dan Lao Dong Lam Chu Tap The la Sue Manh, la Luc Day Cua Chuyen Chinh Vo San (The Labouring People Hold Collective Mastery which is the Force Driving Proletarian Dictatorship), Speech given by Le Duan 2 April, 1979; Do Sang and Dac Hanh, 1986 Ve van De: Lam Chu Xa Hoi Chu Nghia bang Nha Nuoc (On the Use of the State to Realise Socialist Collective Mastery), Nha Xuat Ban Phap Ly (Law Publishing House), 11-12.
16 Interviews Phan Huu Chi, former Legal Advisor to the Minster of Justice, Hanoi, April 1992, February 1993; Luu Van Dat, Legal Advisor to the Minster of Trade, September 1994, March 1999.
common will of society' (*phap luat la y chi chung cua xa hoi*). But they also insisted the party should lead public participation by stimulating ‘legal consciousness’ (*y thuc phap luat*) and discrediting ‘false’ opinions and ideologies.

In tandem with direct democracy reforms, the party is cautiously granting social actors, including entrepreneurs, more autonomy from party organisations. Carlyle Thayer wrote in 1995, ‘Vietnam’s market reforms have not only given birth to a legalised private sector, but have led to the revitalisation of groups and associations formed as a result of local initiatives. With the exception of groups which have attempted to engage in overtly political activity, state authority has generally tolerated—if not encouraged—the activities of revitalised organisations and newly formed associations.’

By the late 1990s the proliferating number of associations began to concern party leaders and the Politburo called on state agencies to ensure that associations closely followed party policies. After years of debate and numerous redrafts, Decree No. 88 ND-CP Providing for the Organisation, Operation and Management of Associations was passed in 2003. It attempts to reconcile the party’s desire for associations that promote economic and social development with concerns that non-state organisations may oppose party and state policies.

Article 4 of the Decree rather nebulously instructs state agencies to ‘make favourable conditions enabling associations to operate efficiently in accordance with their character’. A government directive encourages business associations to gather their members’ views on laws and state management and make proposals to responsible authorities. But other provisions in the Decree signal the state’s intention to retain tight control over associations. The Interior Ministry, for example, has discretionary ‘state management’ (*quân lý nhà doan*)

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19 Party leaders began liberalising the conditions governing association with Directive No. 1/CT issued by the Council of Ministers in 1989. Resolution No. 8 on the Reform of the Party’s Mass Mobilisation Work and the Strengthening of the Relationship between the Party and the People, issued by the Party Central Committee on 27 March, 1990. The 1992 Constitution (article 69) further liberalised the political space by granting rights to ‘assemble, form associations and hold demonstrations in accordance with the provisions of the law’.
21 See Chi Thi so 42/CT-TW Cua Bo Chinh Tri ve Viec Cuong Su Lanh Dao Cua Dan Doi Voi To Chuc va Hoat Dong Cua cac Hoa Quan Chung, Ngay 6-10-1998, Directive No. 42/CT-TW on the Strengthening of the Party Leadership in the Organisation and Activities of Popular Associations, issued by the Politburo on 6 October 1998. The Directive called for the establishment of *dang doan* (party boards) in each association.
nuoc) powers to license associations, change association charters, guide nghiep vu (operating skills), evaluate office bearers and control funding sources (Articles 15, 34, 35).

Recent studies suggest that the state exercises its extensive powers over associations selectively.\(^{23}\) Associations supporting state development objectives such as poverty reduction, education and the economy are flourishing. World Values Survey data showed that in 2001 Vietnamese were more likely to belong to mass organisations and associations (2.33 groups), than Chinese (0.91 groups) and Japanese (1.41 groups).\(^ {24}\) Although the state tolerates some spontaneous gatherings and demonstrations, it vigorously suppresses organised pressure for political and civil rights that challenge party and state policies. It is beyond our purposes to speculate whether the liberalisation of popular associations constitutes a ‘creeping pluralism’ that will eventually create a civil society or that changes in state regulation are better explained as pragmatic political responses to social pressure. Evidence supports both contentions.\(^ {25}\) This discussion focuses instead on whether the state permits business associations to negotiate with lawmakers about the selection and adaptation of imported commercial laws.

**Entrepreneurial associations**

The government stresses the need to ‘cooperate and listen closely to the opinions of the business community’.\(^ {26}\) The Law on the Promulgation of Legal Normative Documents 2002 formalised this policy by giving entrepreneurs a right to tham gia (participate) in

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\(^{26}\) Phan Van Khai, 1997 ‘Pho Thu Tuong Phan Van Khai: Chinh Phu Thong Qua Phong Thuong Mai va Cong Nghiep Viet Nam De Cac Doanh Nghiep Hop Tac Voi Chinh Phu Nham Day Nhanh Tien Trinh Doi Moi’ (Deputy Prime Minister Phan Van Khai: The Government Approves the Chamber of Commerce and Industry of Vietnam to Cooperate with the Government to Speed up the Process of Renovation) *Dien Dan Doanh Nghiep* 4 April, 2.
lawmaking. Although Article 3 requires drafting agencies to 'organise public comment' from those affected by draft bills, they retain the discretion whether, and with whom, they should consult.\footnote{Law on the Promulgation of Legal Documents 2002, article 3.}

Selected entrepreneurs are invited to express their views about business laws to the prime minister during annual meetings.\footnote{See Directive No.27 CT-TTg Prime Minister, 2003, article 14.} But for more sustained dialogue with lawmakers, entrepreneurs must join business associations (hiep hoi kinh doanh) or clubs.\footnote{See MPDF, supra 20-25.}

There are no reliable records of the number of business associations, but estimates range from 100 to 200 in 2002.\footnote{See Nguyen Phuong Quynh Trang and Jonathan Stromseth, 2002 'Business Associations in Vietnam: Status, Roles and Performance' MPDF No. 13 Private Sector Discussions, Hanoi, 21.} The proliferating number of business associations conveys the erroneous impression that entrepreneurs interact with lawmakers through many deliberative channels.\footnote{The number of business associations doubled in number between 1999 and 2002. Ibid.} A study conducted by the Mekong Project Development Facility in 2001 challenged this view by showing that entrepreneurs predominately direct their concerns through one umbrella organisation—the Vietnam Chamber of Commerce and Industry (VCCI).\footnote{See MPDF, supra 20-25.}

Participation in lawmaking is further limited by the small number of entrepreneurs that belong to business associations.\footnote{The MPDF report (pages 29-31) showed that large export oriented firms are much more likely to join business associations to gain market information than small firms. Business associations are poorly developed in areas outside the major cities. See CIEM, 2003 'Comparative Provincial Performance in Private Business Development: Some Preliminary Observations from Nine Provincial Case Studies', UNDP VIE01/025, Hanoi, November, 37-38.} Membership is especially meagre in rural provinces.

The VCCI (originally called the Vietcochamber) was established in 1963 primarily to represent the interests of SOEs trading with socialist bloc countries.\footnote{Decree No. 58 CP 26 April, 1963. Interviews Pham Chi Lan, Vice Director VCCI, Hanoi, April 1991, July 1995.} Following market liberalisations in the late 1980s, it was reconfigured as ‘an independent, non-government organisation’ to represent state and private enterprises. During the 1993 National Congress,
Pham Chi Lan, then the vice-president, committed the VCCI to represent the business community and develop ‘an independent and reliable voice of its own’.\(^{35}\)

Though describing itself as an ‘independent’ (doc lap) body, the VCCI is expected to operate ‘with the support and under the supervision of the Vietnamese state’. It retains strong formal and informal linkages with the state. For example, the current chairman is the former Minister of Trade and party Central Committee member, while many staff members have worked with government bodies and are party members.\(^{36}\) Vu Oanh, the Politburo member responsible for mass-mobilisation, confirmed this close relationship when he described the VCCI as the ‘highest representative of the business community and the appropriate instrument for the party and state to gather and guide the business community for all economic sectors of the country in the cause of building the economy’.\(^{37}\) More recently the government directed the VCCI to act as a conduit between government agencies and other business associations.\(^{38}\)

In some respects the VCCI resembles Schmitter’s model of socialist state-corporatism (discussed in chapter four).\(^{39}\) Its management is closely connected with the party and state and 30 per cent of its revenue is contributed by the state.\(^{40}\) It is positioned at the apex of a hierarchical structure that controls regional branches and industry-specific employer


\(^{36}\) Interviews Pham Thi Thu Hang, Deputy General Director, VCCI (Small and Medium Enterprise Promotion Center) Hanoi, March 1999, February 2002.

\(^{37}\) Vu Oanh, 1995 ‘Phong Thuong Mai da Tro Thanh Mot To Chuc Tin Cay de Tap Hop, Van Dong, Giup Do Ho Tro va Bau Ve Loi Ich cac Doanh Nghiep Trong Su Nghiep Kinh Doanh: Bai Phat Bieu cua Dong Chi Vu Oanh Uy Vien Bo Chinh Tri Ban Chap Hanh Trung Uong Cong San Viet Nam tai Hoi Nghi Hoi Dong Quan Tri Phong Thuong Mai va Cong Nghiep Viet Nam Lan Thu VI’ (The Chamber of Commerce has become a Reliable Organisation for Gathering, Mobilising, Assisting and Protecting the Interests of Enterprises in Business Affairs: Speech by Vu Oanh, Meeting of the Politburo of the Communist Party of Vietnam at the Sixth Meeting of the Executive Committee of the Chamber of Commerce and Industry of Vietnam), Dien Dan Doanh Nghiep, 22 September, 12.

\(^{38}\) See Directive No 27 CT-TTg On Further Stepping Up the Implementation of the Enterprise Law, Encouraging the Development of Small and Medium-Sized Enterprises, article 14.


organisations. Associations representing entrepreneurs may join as full voting members, though membership is still overwhelmingly dominated by SOEs. Members are directed to transmit concerns through the VCCI or Fatherland Front organisations such as the Hanoi Association of Industry of Commerce and are discouraged from dealing directly with state organisations. For example, when the Union of Associations of Industry and Commerce (UAIC) in Ho Chi Minh City began to influence local policy making, its leadership was replaced by party appointees. Finally, government drafting committees are required to consult the VCCI and (some Fatherland Front business associations) when drafting commercial legislation.

Although the VCCI structure resembles a state-corporatist body, doubt remains whether it performs the state-corporatist function of recognising and legitimising the interests of entrepreneurs, while preventing these interests from disrupting state policy. What is unclear is whether the VCCI is sufficiently independent from the party and state to advocate views that challenge the lawmaking agenda, including rights-based laws imported to comply with international treaties.

42 SOEs comprise approximately 40 per cent of VCCI’s members by number, but are by far the most economically important group. See Nguyen Phuong Quynh Trang and Jonathan Stromseth, 2002 supra 25-26. Interview Pham Chi Lan, Vice Director VCCI, Hanoi, March 2003. Private sector members include: industry associations (e.g. shipping agents, brokers and bankers) and entrepreneurial associations (e.g. Hanoi Small and Medium Enterprises Council (Hiep Hoi Cac Doanh Nghiep Vua Va Nho Ha Noi), Union of Associations of Industry and Commerce of Ho Chi Minh City (Hiep Hoi Cong Thuong Thanh Pho Ho Chi Minh) and the Hanoi Union of Associations of Industry and Commerce (Hiep Hoi Cong Thuong Thanh Ha Noi).
43 These views are based on interviews with private entrepreneur associations in Hanoi and Ho Chi Minh City (hereafter referred to as the ‘Associations Interviews’). Vu Duy Thai, Vice Chairman and Secretary The Hanoi Associations of Industry and Commerce, (member of the Central Committee of the Fatherland Front) Hanoi, April 1999, February 2000; Nguyen Trung Tue, Chairman, Vietnam German Entrepreneurs’ Club, Hanoi, 1999, 2000; Pham Thi Thu Hang, Deputy General Director, VCCI (Small and Medium Enterprise Promotion Center) Hanoi, 1998, 1999, 2002; Nguyen Hoang Luu, General Secretary, Hiep Hoi Cac Doanh Nghiep Vua Va Nho Ha Noi, (Hanoi Small and Medium Enterprises Council), Hanoi, 1999, 2000; Cao Thi Kim Dung, Information Service Manager, Union of Associations of Industry and Commerce (Hiep Hoi Cong Thuong Thanh Pho Ho Chi Minh), Ho Chi Minh City, 1998, 1999. Also see Hoai Thu, 1999 ‘Bankers’ Club Seeks Solutions’ Vietnam Investment Review, 1 January, 5.
44 The UAIC was formed from the Association of Industrialists (Hoi Cong Ky Nghiep Gia), a body established in 1989 after Politburo Resolution No. 16 1988 enabled ‘national bourgeoisie, small owners and individual producers ‘to establish industrialist associations. When its membership grew to over 1,700 members in the mid 1990s, the Ho Chi Minh City Party Committee replaced the longstanding President with their own candidate. Interviews with Cao Thi Kim Dung, Information Service Manager, UNEDO Project US/VIE/95/004, Ho Chi Minh City, July 1998, March 1999.
The participation of entrepreneurs in legislative drafting

Detailed consultation between the VCCI’s executive and its members about draft legislation primarily takes place within the Advisory Board and Executive Committee. Representatives on this body are drawn from the leadership of the VCCI’s main constituents such as SOEs, Fatherland Front organisations and other business associations. But even this select group complain that consultation periods of two weeks or less are too short to solicit comments from their members. Most draft legislation is now posted on the VCCI’s website for comment. However this initiative has done little to broaden participation in lawmaking, because individual entrepreneurs generally lack the time, skills and resources required for detailed comments. Responses tend to be highly contextualised and based on personal opinion rather than a sustained analysis. As such they lack credibility compared with comments prepared by the Advisory Board and Executive Committee.

VCCI’s involvement in drafting the Enterprise Law (EL) illustrates its role in representing entrepreneurial voices to lawmakers (see chapter five). It had direct access to the drafting committee. The vice-president sat on the steering committee and the head of the legal department was appointed as a member of the drafting committee. A great deal of the information that eventually convinced the drafters to partially deregulate market entry came from research reports prepared by VCCI and CIEM. They needed entrepreneurs to counter arguments made by other members of the drafting committee that proactive market-entry controls were necessary to filter out under-capitalised and otherwise unsuitable enterprises. VCCI organised a series of workshops to collect evidence from its members that demonstrated the proactive market-entry controls generated high compliance costs. As anticipated, case studies revealed that business licensing was costly, inefficient

46 Interview Pham Chi Lan, Vice President of VCCI, Hanoi, March 2003.
47 Interviews Vu Duy Thai, Vice Chairman and Secretary, The Hanoi Associations of Industry and Commerce, Hanoi; March 1999, January 2000, March 2003.
48 Pham Chi Lan sat on the steering committee and Tran Huu Huynh, sat on the drafting committee.
50 There were numerous public consultations leading up to the enactment of the EL in 1999. In February 1998, Vietnamese lawyers attend a workshop to discuss the draft company law. In March 1998 a workshop reviewed the 8th draft of the company law and received assistance from international lawyers from Canada, Germany, Hong Kong, USA and New Zealand. During 1998 the VCCI and CIEM conducted a series of studies and workshops assessing the costs associated with tight market entry controls. Finally in November 1998 the 8th draft was circulated for public comment and in December 1998 the 9th draft was circulated to international consultants for comments. See Raymond Mallon, 2003 ‘Draft case study prepared as input for
and produced some absurd market distortions. CIEM synthesised these findings into an especially influential report that was presented in 1998 to the government and members of the drafting committee. 51

Some entrepreneurs that took part in the workshops revealed in interviews that VCCI staff tightly managed interaction with members of the drafting committee. 52 Participation in the workshops was by invitation only. VCCI officials used pre-determined agendas to control the topics discussed. 53 They also vetted written comments prepared by entrepreneurs. Face-to-face discussion with drafters was equally constrained. Entrepreneurs were given few opportunities to conduct the prolonged discussions needed to convey a nuanced understanding of their views.

Most business associations lacked the resources to prepare their own submissions and relied on the VCCI to accurately portray their views. Vu Duy Thai, a member of the Central Committee of the Fatherland Front and the outspoken vice-chairman of HUAIC, was among the few outside the VCCI to lobby the drafters to liberalise market-entry controls and reduce state inspections of private businesses. 54

Although entrepreneurs supported market-entry deregulation, they were much less enthusiastic about imported corporate governance rules governing complex internal management, statutory reporting, minority shareholder and merger and acquisition rights and obligations. They worried that elaborate, rights-based corporate governance provisions were remote from everyday family-based business organisations (discussed in more detail in annex six). For example, some entrepreneurs thought that increased rights for minority shareholders would disrupt family-based management hierarchies and discourage the practice of granting employees shares. Most entrepreneurs actively opposed new provisions


52 These views are based on the Associations Interviews.


54 Interviews Vu Duy Thai, supra. The Vietnam Lawyers' Association and a few small business associations also participated in formal and informal discussions about the draft legislation and provided written submissions to the Government on the need for reform. Private lawyers actively assisted the Enterprise Law drafting committee. See CIEM, 2000 VIE/97/016 Project Annual Report for 2000: Results and Future Issues, unpublished report, Hanoi.

324
that increased reporting requirements, fearing that disclosure would give the state and business competitors access to sensitive business information and impose additional compliance costs. They reasoned that a complex law would further isolate entrepreneurs from the legal system and confuse poorly trained regulators and judges.

The VCCI ignored opposition from its members and supported complex corporate governance rules. Entrepreneurs interviewed were unsurprised by this lack of consultation, because they did not expect the VCCI to function as a member-directed organisation. Surveys corroborate this view. Entrepreneurs responding to a Mekong Project Development Facility questionnaire in 2002 indicated they were much more likely to join the VCCI and other business associations to network with other businesses (67 per cent), gain market information and access technical training (41 per cent) than rely on the association to lobby lawmakers (15 per cent).56

A senior VCCI official involved in drafting the EL conceded that ‘the collection of opinions from entrepreneurs is not conducted regularly and scientifically’ while ‘opinions contributed by enterprises are not always considered and accepted strictly by drafting committees’.57 More generally, a report prepared by the Office of Government about public participation in legal drafting accused drafting committees of ‘being conservative, refusing to accept comments, generally compartmentalising their thinking and favouring the states’ interests over private interests’.58

It is possible to interpret the EL case study as showing that the VCCI, together with its government allies, took on powerful adversaries to champion greater market access for its private sector members.59 What this account fails to show is that economic arguments favouring private sector development were deeply entrenched in the ‘official discourse’ well before the EL. Starting in 1993 with the draft Law on the Promotion of Domestic Investment, VCCI and CIEM worked together to convince party and state leaders that

55 Informants believe there was little support from domestic members (either private or state owned) for the complex provisions. Interviews Business Associations.
56 Nguyen Phuong Quynh Trang and Jonathan Stromseth, 2002 supra 31.
59 See Stromseth, 2003 supra.
domestic entrepreneurs supported the national economy. They argued that entrepreneurs would only mobilise domestic capital if they were extended the same privileges as those given to the state sector and foreign investors.

Rather than fearlessly championing the interests of their members, the VCCI joined with CIEM and like-minded government agencies drafting the EL in a ‘palace war’ against ministries struggling to retain ‘state economic management’ powers (see chapter five). The VCCI and CIEM selectively represented (dai dien) entrepreneurial views that supported market liberalisation, while ignoring opposition to complex corporate governance provisions. CIEM was persuaded by foreign legal advisers to support uniform corporate governance rules for large and small companies.

The preceding discussion suggests the VCCI has the capacity to convey entrepreneurial concerns to lawmakers during regular meetings with state officials, yet it is unlikely to communicate unorthodox or controversial ideas to lawmakers without the support of powerful allies in the government. Rather than promoting ‘unofficial’ discourse, it takes positions in debates within the ‘official discourse’. These findings are consistent with Jonathan Stromseth’s evaluation of the VCCI as ‘a hybrid system the combines residual aspects of Leninism with emerging elements of corporatism’. Without strong government support, the VCCI lacks the political authority to advocate views from its members that challenge party and state policies.

Narrowly based public consultations for the draft Unified Enterprise Law conducted during 2004 and early 2005 suggest that six years after the EL was enacted, domestic entrepreneurs still remain outside the lawmaking calculus. In collaboration with CIEM, again the lead drafting agency, foreign donors organised public consultations that

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61 According to CIEM officials, the Prime Minster supported increased market access for private business, but economically conservative ministries fought to retain their discretionary powers. Interviews Nguyen Dinh Cung, Director Macro Regulation Department CIEM, March 1999, September 1999, March 2003, March 2004.


63 See Tran Huu Huynh, 2002 supra 4.

64 Stromseth 1998, supra 234.
overwhelmingly focused on concerns raised by foreign investors, donors and law firms.\(^6^5\) Vietnamese entrepreneurs were provided few opportunities to express their opposition to legal reforms that will give foreign investors greater access to domestic markets. During the drafting process the VCCI has been remarkably silent about the growing unease among its members about increased foreign competition that will arise from the Uniform Enterprise Law and other legal harmonisation projects.

**Business discussion fora**

Contrasting with the highly structured and mediated exchanges organised by the VCCI, for a brief period from 1998 until 2001, the Private Sector Forum (PSF) (*Dien Dan Khu Vuc Tu Nhan*) promoted open dialogue among government officials, foreign donors and foreign and domestic investors.\(^6^6\) The PSF was established to ‘improve investment and the business environment for the private sector in Vietnam in order to stimulate economic development, increase employment and improve people’s lives’.\(^6^7\)

During monthly meetings government officials and legal drafters discussed policy in informal unmediated exchanges with domestic and foreign entrepreneurs.\(^6^8\) Entrepreneurs often criticised state policy and advocated reforms to bring commercial laws more in line with local normative practices. Eventually the press began reporting PSF communiqués in which domestic and foreign entrepreneurs joined forces to criticise government policy.

Though domestic and foreign entrepreneurs were united in their opposition to ‘state economic management’ (*quan ly kinh te nha nuoc*), they often disagreed about legal reforms aiming to give foreign investors increased market penetration, such as market liberalisations and fair trade laws. Domestic entrepreneurs pressed lawmakers to incorporate local business practices into law and not to merely to rely on imported models. In July 2001 the government symbolically renamed the Private Sector Forum the Vietnam Business Forum (VBF) (*Dien Dan Doanh Nghiep Viet Nam*) and limited membership to

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\(^6^5\) Three workshops were arranged by the Starr projected funded by USAID and by GTZ funded by the German Government. See generally VNS, 2005 ‘Unified Enterprise Law Coming Soon’ *Viet Nam News*, 18 March, 16, 18.

\(^6^6\) The Private Sector Forum was jointly organised by the Ministry of Planning and Investment (MPI), the International Finance Corporation and World Bank.

business associations. Domestic firms that critically challenged government policy in the PSF were excluded under the VBF rules. In their place quiescent domestic business organisations, such as the Hanoi Business Association (formerly the Young Entrepreneurs’ Club) and Hanoi Association of Small and Medium Enterprises Trade Association, adopted a more conciliatory approach to state policy. Business associations presented a range of views within established policy settings (official discourse). Foreign business associations, however, continued to represent neo-liberal legal views that contested official positions. Each year VBF members appoint a different foreign law firm to chair the forum and assume primary responsibility for critiquing legislation. VBF members, especially foreign law firms, work closely with the foreign donor community to promote neo-liberal legal reforms (discussed below). Discussions between the VBF and the government about the draft Ordinance on Arbitration demonstrate the relatively unmediated interaction between foreign law firms and drafting committees.

A UNDP report in 1999 identified the lack of commercial arbitration independent from the courts as a major impediment to foreign investment. Two years later in 2001 the government began drafting a new arbitration ordinance to comply with US-Vietnam Bilateral Trade Agreement (BTA) conditions. VBF members and foreign donors funded workshops to discuss the bill with the drafting committee. Some government lawyers were

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68 Comments about the Private Sector Forum are primarily based on interviews with Vietnamese lawyers working in Investconsult, Vilaf and Vietbid law firms during February and August 2000, January and March 2001, March 2003 and March 2005.
69 Ibid.
70 American investors and law firms, for example, are grouped together in the American Chamber of Commerce. This organisation is especially assertive, because American interests are given privileged access to lawmakers under the US-Vietnam Bilateral Trade Agreement (BTA). For examples of the organisation’s neo-liberal arguments see AmCham position papers <http://www.amchamhanoi.com/adPositionPapers.htm>.
71 In 2004 there were 25 foreign law firms licensed to practice in Vietnam. See Xuan Binh, 2004 ‘Foreign Lawyer’s Activities in Vietnam: Races Ahead’ 10 Vietnam Law and Legal Forum (114), 32. There are 10 sub-groups in the VBF that specialise in specific areas of practice such as property, tax, administration and labour issues. See Vietnam Business Forum: <www.vietnambusinessforum.org/about_charter.asp>.
74 The Ministry of Justice formed a drafting committee lead by Luu Van Dat and comprised of representatives from the VCCI, MPI, MoT and Supreme People’s Court. Interview VILAF, Hanoi, June, 2002. Also see Bach Quoc An and Lai Thi Van Anh, 2002 ‘BTA’s Impact on Vietnam’s Current Legal System’ 8 Vietnam Law and Legal Forum (91) 16, 17-18.
328
taken on study tours to familiarise themselves with regional practices and legal and economic arguments for non-government arbitration.75

Deliberations were conducted in a mutually comprehensible legal and economic language, which minimised political arguments that might otherwise have transformed discussions into power contests between local and foreign interests. For example, in overcoming government resistance to foreign-appointed arbitrators, foreign advisers reminded drafters that Vietnam was legally obligated under the BTA to provide an ‘international best practice’ arbitration system. Using a similar logic, they also informed drafters that UNCITRAL provisions only give domestic courts limited powers to review arbitration wards. The original Decree No. 116 CP on the Organisation and Operation of Economic Arbitration 1994 allowed litigants to refer arbitral awards to domestic courts for review (Article 31). Finally, foreign commentators stressed the nexus between independent arbitration and flourishing foreign investment in highly successful economies such as Singapore. Most reforms advocated by the VBF were incorporated into the Ordinance on Commercial Arbitration 2003.

In comparison to domestic entrepreneurs, foreign investors enjoy comparatively unmediated contact with lawmakers. Despite periodic complaints by the VBF that neo-liberal legal reforms have not gone far enough, the incremental liberalisation of the economy to foreign investment and the massive importation of rights-based law implies that foreign pressure groups exert considerable influence over lawmaking.

**Foreign donor influence over Vietnamese legal discourse**

Following doi moi reforms lawmakers could no longer rely on Soviet discourse for solutions and they began looking for new sources of inspiration. Few possessed the linguistic skills required to comprehend Chinese legal theory and practice, and at least initially, they considered Chinese thinking unrealised and derivative. Especially since the mid-1990s, however, Chinese legal experience has gained in importance.76

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75 It is common for foreign agencies to gain leverage over members of drafting committees by funding activities such as overseas study tours and workshops. Funding for foreign participation in drafting the new arbitration ordinance was provided by the USAID, which funds the Starr project that assisted the government of Vietnam to implement the US-Vietnam BTA.

76 Few Vietnamese legal commentators admit to being influenced by Chinese legal theory. Informants from the Office of the National Assembly admit privately that Chinese theoretical approaches are now closely monitored and exchanges routinely take place between Chinese and Vietnamese legal institutions. Interviews
From the Law on Foreign Investment enacted in 1987 onwards, every major commercial law has been drafted with foreign donor support. A matrix prepared by the Ministry of Justice (MoJ) for the Legal Needs Assessment (LNA) shows that bilateral and multilateral donors have agreed to provide legal advisers to support the government to draft every commercial bill and most of the non-commercial bills until 2010. The collective effort of foreign donors rivals, and perhaps exceeds, the legal assistance provided by the Soviet Union during the 1960s and 1970s. 

Despite the considerable resources devoted to legal drafting, the ideas communicated by donors are more fragmented and diverse than was the case under Soviet tutelage. One obvious difference is that contemporary legal advice must negotiate a political culture that still largely adheres to Soviet legal thinking (see chapters three and four). A second distinction is that foreign donors exert different kinds of pressure. A third difference is the donor hierarchy: some donors are listened to more closely then others.

**Donor assistance projects**

The French were among the earliest Western donors to provide legal assistance. Given the antipathy many Vietnamese feel towards the French and their colonial legal system (discussed in chapter two), the decision to borrow law from France for the Company Law 1990 warrants closer inspection. One explanation is that Professor Luu Van Dat, the senior legal drafter, was trained in French law at the Faculty of Law, Hanoi University, during the French colonial period. He understood French legal documents and could discuss complex contractual and corporate law principles in French with foreign legal advisers. Few members of the drafting committee understood English or Anglo-American corporate

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with officials from the Office of the National Assembly, Hanoi, October-November, 2002. Vietnamese legal journals (especially Tap Chi Nghien Cuu Lap Phap) and newspapers such as Phap Luat have since the 2002/2003 increasingly published accounts about Chinese legal reforms. See generally Mark Sidel, 1995 ‘The Re-emergence of China Studies in Vietnam’ The China Quarterly (142) 521-540.


79 It is difficult to precisely gauge the level of Soviet legal support, which included tertiary education for hundreds of legal officials. Interviews with Vietnamese educators suggest that Soviet advisors were used for all major draft bills and every senior legal official was expected to have an Eastern Bloc legal education. Interview Nguyen Cuu Viet, Vice Dean, Faculty of Law, Hanoi, Hanoi University, February 1993. According to ADB records, in 2001 approximately USD 35 was committed by donors for legal projects in Vietnam. See ADB, 2001 Bulletin on Law and Policy Reform, Manila, 62-68.
legal principles. As English language proficiency among state officials increased during the 1990s, the French policy of uncompromisingly linking legal assistance to French language training limited their influence.\(^{81}\)

The Japanese, whose legal assistance is funded by the Japanese Bank for International Cooperation and JICA, have closely targeted reforms identified under the ‘New Miyazawa Initiative’.\(^{82}\) The current cycle of assistance aims to support the ‘Investment and Protection Agreement’ signed by Vietnam and Japan in 2003.\(^{83}\) A distinctive feature of the agreement is the conditional linkages between aid and investment plans for specific industries such as the automobile and electronics industries. While the reform program supports neo-liberal legal concerns such as transparent property rights and effective enforcement regimes, it also encourages state institutions to use import tariffs and other government imposts to stimulate industrial development.\(^{84}\) The Japanese legal model is attractive to the Vietnamese, since it offers a compromise between state-directed socioeconomic planning and the neo-liberal legal model advocated by other donors.\(^{85}\)

Japanese legal assistance is highly regarded by Vietnamese recipients. In the first place, the Japanese are the largest bilateral source of funds. But more importantly, their legal system commands prestige because it promotes administrative guidance as a foil to neo-liberal legalism’s preoccupation with inducing market predictability with private commercial rights. Japanese expertise is also valued because it shows Vietnamese lawmakers how to adapt Western commercial treaty law to an East Asian system.

In practice, however, there is little evidence that Japanese drafting projects encourage sensitive localisation of transplanted norms and practices. On the contrary, Vietnamese

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\(^{80}\) These comments are based on numerous interviews with Phan Huu Chi \textit{supra}; Luu Van Dat \textit{supra}.


informants note that Japanese advisers frequently promote legal models based on Japanese laws and legal practices. Finally, generous legal education scholarships make Japanese legal assistance attractive to government agencies.

Other foreign legal projects share a common interest in promoting variations of neo-liberal legal reforms. As the leading donor in the legal sector, the UNDP's approach to legal development epitomises the neo-liberal legal agenda. American-trained lawyers acted as the resident advisers for two of the most important legal projects in Vietnam. They took their inspiration from Hayek's proposition that transparent, universal and predictable legal rules (a procedural rule of law) provide the optimal regulatory environment for entrepreneurs to maximise their self-interest. Hayekian entrepreneurs seek out profit-making opportunities through spontaneous individual action that is primarily (though not

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86 Interviews Bui Thi Mai Lan, Civil Law Department Ministry of Justice, Hanoi, March and April, 1999.
87 Since there are more than fifty foreign funded legal projects in Vietnam some variation in methods and approaches are expected. The UNDP played a coordinating role by assisting the Ministry of Justice to complete and then implement the Legal Sector Development Strategy. Japan, Sweden, the EU, US, Denmark and France support legal education and training initiatives, while the Netherlands, Sweden, Norway, Switzerland, UNDP and Denmark provide assistance for legal aid and legal information dissemination. The Scandinavian countries in particular are deeply concerned with issues of human rights and social democracy. Other donors, such as USAID and AusAID have targeted programs focusing on the development and implementation of commercial laws related to the implementation of the BTA and Vietnam's planned accession to the WTO. The ADB, EU and perhaps the World Bank and are considering large-scale support for court administration. Denmark and JICA have large projects with the courts and procuracy. Foreign non-government organisations, such as the Asia Foundation and Friedrich Ebert Foundation fund small-scale social justice projects.
88 The official position adopted by the UNDP is 'it is not the Programme's nor the UNDP's role to advocate (or even recommend) legislation of particular laws in Vietnam, although it is a fact Vietnam's legal system has strong civil law traditions, due to its historic links with the French system. Rather, the programme will provide Viet Nam with a fund of knowledge relating to laws in the developed legal systems of world economic powers-e.g., the United States, the United Kingdom, France, Germany, The European Community, Australia, Japan, ASEM countries'. See UNDP, 1992 'Legal Reform in Viet Nam' VIE/92/003 12. In practice the UNDP promoted the neo-liberal legal agenda by selectively promoting certain legal models, foreign advisors and policy advise. According to John Bentley, the UNDP Legal Resident Representative from 1994-2002, 'the two most essential elements of a market-orientated legal framework are; (a) a clear, complete definition of property and property rights and (b) a clear, and complete system of contract law'. See John Bentley 1999 'Completion of Viet Nam's Legal Framework for Economic Development', UNDP Discussion Paper 2, Hanoi, 1-8. For similar views see ADB 2004 'Report on Asian Development Bank's Law and Policy Activities in Support of Poverty Reduction', <www.adb.org/Documents>.
89 For eight years John Bentley was the senior UNDP legal resident advisor. During this period he directed two legal projects culminating in the LNA, which shaped the commercial legal framework. Theodore Parnell, also an American trained lawyer, led a joint UNDP-DANIDA project from 1996-1999 providing technical assistance to the Supreme Peoples Courts, Supreme People's Procuracy and Office of the National Assembly.
90 See F. A. Hayek, 1944 The Road to Serfdom, University of Chicago Press, Chicago, 54. Following from Reagan's and Thatcher's economic policies developed in the early 1980s, contemporary neo-liberalism advocates a procedural 'rule of law' in which reactive, politically-unaccountable institutions like courts are given the primary role in redressing market failures. It is ideologically opposed to state management through
exclusively) guided by external state rules. Non-state relational norms and ethno-religious and sentimental factors that regulate Vietnamese businesses, by implication, are considered unbounded, inefficient and potentially anarchic. Other influential multilateral donors such as the World Bank, Asian Development Bank and most bilateral donors treat this neo-liberal version of the rule of law as the a priori concept that should guide legal interventions in Vietnam.91

**Promoting neo-liberal economic ideology**

To some extent the ascendancy of neo-liberal legal thinking over other legal models (such as the Japanese approach) mirrors a broader hegemony propelled by American political, economic and military supremacy.92 Conditions attached to loans for structural development under the Comprehensive Poverty and Growth Strategy aimed to promote the neo-liberal legal agenda.93 For example, ADB structural adjustment loans stipulated many of the changes adopted by the Enterprise Law (see chapter five). Previous chapters have discussed how neo-liberal legal ideology deeply influenced the Legal Needs Assessment prepared by the MoJ and much legislative drafting.94 Studies considered in preceding chapters, moreover, show that foreign donors have gained leverage to promote the neo-liberal legal agenda due to Vietnam’s commitment to international market-access treaties, especially the BTA and, shortly, the WTO.

Donors promote neo-liberal legal ideals through legal drafting projects. Take for example International Finance Corporation (IFC) support for the draft Decree No. 165 Implementing Articles of the Civil Code Concerning Secured Transactions. From the outset, informants reported deep divisions in the approaches advocated by the State Bank, the lead drafting

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93 This program was conceived by and is led by the World Bank. It is supported by most multi- and bi-lateral donors in Vietnam. See Irene Norland, Tran Ngoc and Nguyen Dinh Tuyen, 2003 Dealing with Donors: The Politics of Vietnam’s Comprehensive Poverty Reduction and Growth Strategy, Policy Paper 4, Institute of Development Studies, University of Helsinki, Helsinki, 6-9, 21-28.
94 The Aide-Memoire for the LNA project, for example, declared that ‘effective legal systems’ are fair, orderly and respected, creating sound business environments by promoting land transfer, registration, and mortgaging and expanding the coverage and enforceability of commercial contracts. See Government of Vietnam and World Bank, 2000, ‘Aide-Memoire between the Government of Vietnam and the World Bank on Vietnam’s Legal System Development Needs Assessment’, 28 January.
agency, and the IFC. The State Bank made the political argument that foreign creditors should not gain control over ‘land-use rights’ (quyen su dung dat) by foreclosing mortgages.95 If foreign banks use foreclosure procedures to secure property rights (quyen so huu), the State Bank worried they could bypass ‘state economic management’ controls over land transfers.96 In promoting the neo-liberal ideal that property rights should be freely transferable, the IFC challenged the state’s political commitment to state management as a means of safeguarding public assets against foreign domination.

Legal consultants acting for the IFC used economic arguments to support the deregulation of property transfers. In most foreign joint-venture agreements the Vietnamese party (usually SOEs) contributes capital in the form of land-use rights. If foreign banks were permitted to use the joint venture’s land-use rights as collateral, the country-risk premium charged on loans would drop, thereby encouraging more investment. Consultants also argued that the preamble to the Civil Code, which proclaims the principle of legal equality, guides the interpretation of civil relations, such as mortgages. Since Article 349 of the Civil Code allows mortgagees to secure land-use rights, by implication this right should extend to foreign bank branches, which are considered Vietnamese entities.

Informants reported that a pattern emerged in which the drafting committee liberalised property rights during workshop meetings, but ‘higher authorities’ reinserted state management powers when the draft bill was circulated among state agencies for comment. Attempting to break the deadlock, the IFC sent the entire drafting committee to Singapore to prepare a final draft in an environment ‘free from external distractions’. As expected, the final draft reflected the IFC position and Decree No. 165 on Security Transactions 1999 granted foreign creditors rights to secure land. The victory was shortlived because the State Bank subsequently issued a series of interagency circulars restricting the rights of foreign banks to secure land-use rights.97 This position was entrenched in the Land Law 2003.

95 Drafting took place during the East Asian Financial Crisis and the State Bank was also concerned that the Government should maintain control over private borrowings made by SOEs.
96 Land is treated as a special commodity (hang hoa dac biet) or public good and requires state approval to transfer.
Emerging interpretive communities

Previous chapters have intimated that certain legal drafters, donors and consultants are forming discrete interpretive communities. Before considering evidence for this important development, it is worth considering why interpretive communities have the potential to influence legal borrowing. Discourse analysis informs us that communication is influenced by interpretive knowledge and skills.98

Members of regulatory communities have ongoing relationships with each other. In those relationships, they both pursue their own, often inconsistent, interests and struggle to define a shared vision of the collective good. Because they live significant parts of their lives with each other, members of the community frequently influence each other, act with reference to each other, and desire each other’s respect. Therefore, as well as being arenas for the pursuit of pre-existent interests, regulatory communities appear to have the capacity to be ‘constitutive’—that is, to be forums in which appropriate individual and collective behaviour (and interests) are defined and redefined.99

This observation suggests that members of ‘regulatory’ or ‘interpretive’ communities are likely to take similar views about the meaning and social function of particular laws. It further suggests that the underlying meaning of imported laws is much more likely to transfer between members of the same ‘interpretive’ community, than between members of different interpretive communities.

The initial hurdle in transposing foreign ideas into Vietnamese idioms is not unique to law. But legal language differs from ordinary usage, since it requires specific training to understand the doctrinal meanings invested in words. Western linguistic studies draw attention to the lexicality of law (its use of unique words), the high occurrence of mononyms (using words with only one accepted meaning) and the greater incidence of ‘restricted connotations’ (changing the meaning of ordinary words when used in legal conversations).100 These internal meanings are revealed through education and interpretive communities that generate shared understandings.

Foreign donors and investors involved in legislative drafting projects recognise the importance of language and devote considerable resources to ‘capacity building’ projects that inculcate neo-liberal legal ideas through English language training. A review of legal projects in the ADB’s ‘Bulletin on Law and Policy Reform’ published in 2001 revealed that most included sub-programs giving Vietnamese officials English language training, followed by detailed instruction in neo-liberal legal concepts.\(^{101}\) This pattern continues. Most projects back-up short-term in-country courses by strategically selecting Vietnamese officials for masters and Ph.D. training, primarily at Australian, American and English universities.\(^{102}\)

It is difficult to estimate the precise number of Vietnamese exposed to neo-liberal legal discourse, but donors suggest that virtually every legal official at the central level of government has receive some foreign training.\(^{103}\) Hundreds of officials and privately funded students are now returning to Vietnam with Anglo-American post-graduate legal training.

It is implausible to infer a direct correspondence between legal training and the inculcation of neo-liberal legal ideas. Foreign legal ideas are difficult to translate and explain in short-term training programs and they do not enter Vietnamese legal thinking unopposed. As we have seen, there are many discursive streams within Vietnamese legal thinking that actively block or change the meaning of neo-liberal legal ideas.

There is stronger evidence that long-term training, especially if it is conducted in Anglo-American (neo-liberal legal) countries, influences legal thinking. Foreign-trained officials act as conduits between foreign advisers and legal drafting committees. They possess the linguistic and interpretive knowledge needed to present neo-liberal legal ideas in modes of thought that appeal to Vietnamese legal drafters. Officials from CIEM that participated in

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\(^{101}\) Twenty one of the twenty eight legal projects listed for Vietnam involved some form of training for ‘rule of law’ ideas. See ADB, 2001 *Bulletin on Law and Policy Reform*, Manila, 62-68.

\(^{102}\) JICA also provided many scholarships for legal training in Japan. See generally Carol V. Rose, 1998 ‘The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study’ 32 *Law and Society Review* (1) 93, 107. (the stated desire of foreign donors is to promote free trade and foreign investment).

\(^{103}\) This information is fragmented among unpublished project documents held by donor agencies. It is possible to infer from information gleaned by the author in interviews with donor agencies from 2000-2004 that thousands of state officials have receive English language training, hundreds participate in specialised legal English courses and about one hundred each year receive scholarships to study law in American, Australia and Britain each year. Through ‘The Japanese Cooperation to Support the Formulation of Key Government Policies on the Legal System’ Phases I-II, JICA has funded approximately 10 scholarships a year (1996-2002) for English language and advanced legal training (including PhDs) in Japan.
the EL drafting committee, for example, were trained at Australian and British universities in neo-liberal economic and legal theory. ¹⁰⁴

Even long-term legal and economic training does not automatically change legal thinking. Many state officials returning with foreign qualifications discover their superiors are uninterested in, even hostile towards new legal ideas. It might take them years to gain enough status to introduce new ideas into state institutions. Moreover, foreign qualifications are now seen by many as a means of securing political advancement. What seems to matter most is whether workplace ideals and incentives encourage new thinking. Rather than converting to neo-liberal legalism en-mass, there are small but influential cliques within the lawmaking elite in sympathy with this thinking. The strongest evidence for the emergence of neo-liberal interpretive communities is found in the collaborative structures formed between foreign donors/lawyers and certain Vietnamese consultants and state officials. Legal projects inculcate neo-liberal legalism by working closely with a growing number of local legal consultants, who either enjoy close connections with, or are still employed as state officials. ¹⁰⁵ Consultants are frequently foreign educated and well-acquainted with neo-liberal legalism. They also share stylistic similarities with foreign donors. Information in reports prepared by local consultants, for example, is ordered, analysed and presented according to standard donor formulas. Even report writing styles and structures reflect predetermined templates. The stylistic similarities suggest the professionalisation of domestic consultants, where the rhetorical assertion of neo-liberal legal objectives is the substance and stylistic presentations are the output.

The incentive to conform is provided by access to donor funded projects, foreign travel and education. Tendering rules reinforce the stylistic requirements, while friendships and networking with members of foreign donor/investment community provide access to the unwritten ‘rules of the game’. Projects are awarded to consultants that have learnt how to think through neo-liberal legalism.

Working closely with foreign donors and local consultants, a small but influential clique within the lawmaking elite are also becoming enmeshed in neo-liberal-oriented interpretive

¹⁰⁴ For example, Nguyen Dinh Cung, one of the principle architects of the Enterprise Law received an masters degree in economics from the University of Birmingham.

¹⁰⁵ Investment consultant firms such as Investconsult, Galaxy, Leadco, Vietbid and Concetti, work closely with foreign investors and donors in providing research and strategic advice in promoting law reform. Many local law firms such as Leadco derive most of their income from working on donor projects. These comments
These technocrats work in central ministries or central research institutions and are responsible for importing and adapting foreign law to Vietnamese conditions. Many within this group fit Alan Watson’s description of elite ‘globalised’ technocrats familiar with neo-liberal economic and legal thinking. Working closely with foreign legal advisers, they treat legal ideas as technical fragments unconstrained by cultural borders, and evince an unwavering conviction in the capacity of the ‘rule of law’ to induce economic development.

All this suggests that foreign and domestic economists and lawyers involved in drafting commercial laws are forming interpretive communities. These lawmaking clusters should not be thought of as communities in a physical sense, but rather as abstract bonds with the potential to generate cooperation and shared responses to legal borrowing. Government technocrats, donor staff and locally based foreign and domestic consultants know each other, work on the same projects and increasingly share similar educational backgrounds and world views. Common social interests and professional ideas encourage an enclave-like and self-referential approach to policy alternatives. This in turn generates a propensity for foreign-funded projects to exclude or minimise critical legal and political perspectives. Members of these interpretive communities are rather heterogeneous in their use of the language and ideas. As discussed in chapter five, Vietnamese technocrats pursue their own interests and sometimes employ foreign ideas strategically so as not to offend power brokers within their respective state institutions. But in working closely with foreign donors, they are constantly exposed to particular story-lines or narratives about the correct approach to regulatory problems. In providing detailed explanations for solving economic problems, neo-liberal legalism frequently gives these technocrats an edge over lawmakers struggling to make ‘state management’ apply to market conditions. As neo-liberal legalism spreads, members of the interpretive communities gain in status and their ideas spread further into organisational hierarchies.

were gleaned by the author from experience gained while working as a consultant for law reform projects in Vietnam. See annex one for details.

106 Ibid. Others have noted that donor projects in Vietnam are creating a group of technocratic staff in ministries and institutions that have ‘internalised the new development vocabulary’. See Irene Norland, Tran Ngoc and Nguyen Dinh Tuyen, 2003 Dealing with Donors: The Politics of Vietnam’s Comprehensive Poverty Reduction and Growth Strategy, Policy Paper 4, Institute of Development Studies, University of Helsinki, Helsinki, 149.

The extent to which neo-liberal legalism has infiltrated Vietnamese state institutions is probably underestimated.\textsuperscript{108} It often suits both foreign and local interests to downplay the extent of foreign influence, because the spectre of foreign influence is easily used to discredit legal change. Donors also frequently miscalculate the extent of their influence. They mistake what legal reforms are amenable to resolution in the short- to medium-term, and which ones address transactional practices that are so deeply rooted that they are only likely to respond to long-term historical changes such as increased international trade, urbanisation and raising educational standards. This leads them to underestimate their influence in changing attitudes to imported law.

**Informal deliberative exchanges**

**Personal exchanges**

As Kerkvliet reminds us, local voices reach the ears of lawmakers through informal dialogical exchanges. Well-connected local and foreign entrepreneurs bypass formal deliberative fora and communicate directly with lawmakers. Secretive informal pathways to power are naturally difficult to research. Informants describe two types of exchanges. Some wealthy entrepreneurs have formed clubs (\textit{cau lac bo}) in major cities to press claims in regular meetings with state officials.\textsuperscript{109} Discussions are unmediated and generally concern requests for regulatory reforms that secure specific competitive advantages.

Consider the regulation of private banking in Ho Chi Minh City.\textsuperscript{110} Regulators `manage’ bankers by ensuring that the boundaries separating lawful and unlawful activities are never

\textsuperscript{108} The closeness of the collaborations between foreign donors and Vietnamese technocrats is obscured by the reluctance of state officials to appear susceptible to foreign influence. At a personal level, this often means that state officials are reticent to discuss foreign influence over laws and insist on Vietnamese authorship or make vague allusions to internal consensual decision-making diluting foreign input. At an institutional level, Vietnamese agencies attempt to avoid the impression they are captured by one source of advice (especially from America). A preferred strategy is to attract several donors. For example, the US-funded Starr project provided advice during 2003 and 2004 to the Supreme People’s Court about politically sensitive amendments to the Ordinance on Administrative Procedures. Knowing that they would receive essentially the same advice, the Court sought guidance from the more politically neutral DANIDA (the Danish international development agency) to deflect criticism of US interference. These views were gleaned from court staff by the author during a DANIDA funded mission `Identification of a Phase III of the Assistance to Legal Reform in Vietnam’ in March 2004. Informants were unable to identify information that Danish experts might give that was not already provided by American and European experts under the US funded project.

\textsuperscript{109} In Hanoi members of the `Big Ten Club’, comprising the ten most wealthy private entrepreneurs, informally lobby local government officials to change sub-ordinate legislation.

\textsuperscript{110} This case study was gleaned from interviews with officials from the Asian Commercial Bank, Ho Chi Minh City, June 2001.
Contradictory and poorly disseminated State Bank lending provisions and vague bank licensing conditions make it virtually impossible to predict the limits of regulatory power. Compounding the problem, provincial and even central bank officials cannot provide accurate advice, because only ministers and/or deputy prime ministers decide high-level banking policy.

Lacking the political networks available to state-owned banks, private banks are forced to form personalistic relationships with officials to avoid legal violations that may incur criminal penalties. Bankers approach ministerial advisers or other senior bureaucrats obliquely through ‘clubs’ or professional mediators. They lobby ministers to issue official letters that clarify lending practices and convey privileged information that confers a competitive advantage over rivals. Inside information and ‘umbrella’ (o du) protection against interference by provincial/city officials enable select banks to expand their businesses into new profitable areas.

Economically powerful multinational entrepreneurs also negotiate directly with lawmakers. For example, legal advisers acting for BHP Petroleum, a large investor in offshore gas production during the early 1990s, worked directly with lawmakers in PetroVietnam to import international profit-sharing and profit-repatriation principles into Vietnamese law. Foreigner advisers persuaded lawmakers to base profit-repatriation rules on normative practices in the international oil and gas industry. More recently in 2003, Japanese motorcycle manufacturers directly negotiated with the Ministry of Trade to reduce tariffs that had been increased to encourage foreign investors to source more components from local producers.

State officials drafting laws are also exposed to domestic conversations with family and friends. Raymond Mallon observed that contacts between entrepreneurs and lawmakers developed during the initial periods of regulatory change. Many state and party officials had family and friends in businesses and through these connections were personally acquainted with the difficulties faced by entrepreneurs in a legal system run by socialist-trained bureaucrats.

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111 See Duong Xuan Minh, 2001 ‘Viec Hinh Su Hoa Quan Le Giua Ngan Hang va Doanh Nghiep Rat Nang Ne’ (Heavy Criminalisation of Relationships between Banks and Businesses) Dau Tu September, 18, 1-2. (Banks are reluctant to loan money to private sector clients because they fear criminalisation of loan agreements by state inspection authorities).
Communicating with lawmakers through popular resistance to laws

Not only the well-connected find informal ways to influence lawmaking. Take for example, the prolonged social campaign for market-compensation (boi thuong) for land compulsorily acquired by the state. In Marxist-Leninist theory land has no market value because it is owned by the people and managed by the state. As a ‘special’ (dac biet) commodity (public good), land lacks gia tri (value) and gia tri su dung (consumption value). State compensation formula attempted ‘scientifically’ to replicate market prices using indicators such as location and building quality.

Intense competition for housing in Vietnamese cities excited rapid price rises during the 1990s that outstripped compensation paid to those relocated for road and infrastructure development projects. Compensation paid under government valuation formulas was insufficient to purchase properties with equivalent income-generating potential. Community dissatisfaction with compensation was expressed in numerous public demonstrations throughout urban and rural Vietnam. Demonstrations slowed infrastructure projects considered vital for economic development. Villagers living in An Tho village, in Ha Tay Province, for example, opposed the compulsory acquisition of 30 hectares of land to construct the An Khanh Industrial Park. During 2001 and 2002 villagers damaged contraction equipment and prevented local security forces from levelling the site. Development was delayed for three years while residents pressed claims for increased compensation payments. More recently in 2004, 170 households in Ho Chi Minh City

114 In socialist legal theory there are two reasons why land is a special commodity. One, land is treated as a ‘gift of nature’ and it should not become a tradable commodity. Two, land is not a part of the ‘means of production’ and it has an overriding ‘public purpose’ that militates against its use as a commodity. See Tran Quang Huy, 2001 Giao Trinh Luat Dat Dai (Land Law Text Book), Nha Xuat Ban Cong An Nhan Dan, Hanoi, 12-14.
115 Interview Vu Tuan Anh, Inspector, General Department of Land Administration, Inspection Department, Hanoi, March 2001. Also see Author Unknown, 2001 ‘Co Phai Nha Nuoc Chay Theo Thi Truong?’ (Is the State Running after the Market?) Tuoi Tre 2 August, 4; Author Unknown, 2001 ‘Tangle Solving Land Law Enforcement: People Marching Forward, State Stepping Backward’ Tuoi Tre 6 August, 3, 4; Le Vu, 1994 Som Ban Hanh Luat Dan Bu: Mot Doi Hoi Bue Thiet Cua Nguoi Dan (Urgent Need of the People is to have a Law on Compensation Soon) Thanh Nien 19 April, 4.
refused to accept compensation and delayed the construction of a tunnel under the Saigon River.\textsuperscript{118}

In challenging compensation laws, some press articles raised the moral argument that 'it is unfair for the state to keep asking the people to sacrifice themselves for development' to criticise government compensation policies.\textsuperscript{119} Public confidence in state compensation has been further eroded by persistent rumours that party and state officials used convoluted pricing formulas to preferentially compensate their families and friends.\textsuperscript{120}

A foreign adviser to the Ministry of Finance committee reviewing state compensation in 2002 surmised that public demonstrations coupled with unfavourable media reporting convinced members of the Party Central Committee to reconsider long-established socialist pricing formula.\textsuperscript{121} The Seventh Plenum of the Party Central Committee in 2003 recommended amendments to the Land Law that required the government to either compensate land occupants with equivalent land or provide financial compensation at or near market valuation rates. The reforms were enacted in 2004.\textsuperscript{122}

Underlying this reform is a fundamental shift in the way the party conceptualised land. Although the 1980 Constitution nationalised land ownership, it did not extinguish an informal real-estate market that had flourished in Vietnamese cities since colonial times.\textsuperscript{123}

Along with title-by-registration and cadastral mapping, the French introduced the


\textsuperscript{119} See Anh Thy, 2001 supra 6; Hoang Van Minh, 2001 ‘Giai Phong Mat Bang, Di Doi Dan o Da Nang—Mot Cach Lam Tang De Tham Khao’ (Site-Clearance and Population Relocation in Da Nang—A Worthy Measure to be Consulted) \textit{Lao Dong} (Labourer) 15 August, 3.

\textsuperscript{120} Interview Vo Kim Cuong, Deputy Chief Architect, Ho Chi Minh City, June 2001.


\textsuperscript{122} Decree No. 188 ND-CP on Methods to Determine Land Prices 2004.

quintessential capitalist principle that land is a tradeable property right. In giving land a market value, the party replaced the socialist notion that land is a ‘special commodity’ and moved one step closer to recognising land-ownership practices long followed by urban residents. The Land Law 2003 formally sanctioned a real-estate market (articles 42-43, 61).

This case study implies that cumulative popular resistance to socialist-inspired pricing formulas eventually convinced lawmakers to accept land as a commodity. Other factors such as increasing revenue from land tax and land auctions were also influential. These findings show that even in highly mediated public settings popular demands can directly challenge the most sacred tenets in the ‘official discourse’. But preference conversion is usually slow, making popular resistance an inefficient method of localising imported legal norms.

Sentimental communication

Besides reasoning with each other, pressure groups and lawmakers exchange unpleasantries, invoke sentimental imagery and assert their status. Many exchanges are influenced by emotions such as offence, resentment, shame (loss of face), loyalty, respect and self-esteem. In short, public sentiment can influence lawmakers without (or in addition to) reflective discourse.

124 The Torren’s law system of title by registration appears not to have proceeded beyond major urban centers in the north by the time of the Geneva Conference of 1954. See Michael Barry Hooker, 1975 A Concise Legal History of Southeast Asia, Clarendon Press, Oxford, 160; Martin Murray, 1980 The Development of Capitalism in the Colonial of Southeast Asia (1870-1940), University of California Press, Berkeley, 160. It should be noted that ‘communal’ land was transferred in pre-colonial times, but there is no evidence that it became commodified as a property right. See John Adams and Nancy Hancock, 1970 ‘Land and Economy in Traditional Vietnam’ 1 Journal of Southeast Asian Studies (2) 90, 93-94.

125 For a first hand account of the suppression of French-inspired property transactions from 1954-1995, under the imported Soviet land management system, see the history of land management in Hanoi written by Phung Minh, a retired official from the Hanoi Cadastral Department. Phung Minh, 1998, 40 Nam Quan Ly Nha Cua O Ha Noi, (40 Year of Housing Management in Hanoi) unpublished monograph, Hanoi, 1-9.


Emotional and other non-analytical influences on lawmaking are under-theorised and under-researched in every jurisdiction. There are reasons for believing, however, that emotive or sub-verbal communication influences lawmaking in Vietnam. Chapter two informed us that during imperial times written laws and legal discourse were only thought necessary for the morally unperfected. Leadership through moral example has remained influential into modern times.

Kerkvliet depicted exchanges between authorities and farmers in the 1960s and 1970s as a 'nearly imperceptible dialogical give-and-take between what the state stipulated and what villagers did'. Silent or emotive communication is discernable in current exchanges between the government and urban land users. Fewer than 20 per cent of householders in some major urban centres possess registered land-use rights (quyen su dung dat). The other householders assert informal-occupancy rights based on long-term usage or titles issued by French Colonial, Republic of Vietnam and provisional revolutionary authorities.

Chapter six discussed the negotiations between local officials and residents securing access to urban land-use rights. Interviews with residents in Hanoi and Ho Chi Minh City reveal an analogous rejection of state land registration procedures that is communicated sub-verbally through mass popular resistance.

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129 As David Marr observed, 'a king, a father, or an elder brother was supposed to rule primarily by example, cultivating and projecting the inner quality of virtue (duc), not by promulgating an outer system of laws and institutions (phap)'. David Marr, 1981 Vietnamese Tradition on Trial, University of California Press, Berkeley, 58.

130 Benedict J. Tria Kerkvliet, 1999 supra 373.

131 Approximately 80 per cent of residents in Hanoi and 60 per cent in Ho Chi Minh City lack formal land titles. See Duc Tho, 2001 'Secret Market Rankles Property Officials' Vietnam Investment Review 8 October, 5.

132 Information about urban land conversion was gleaned from a series of interviews with land officials (hereafter Land Interviews). Le Nguyen Khai, Director Legislation Department, MoNRE (originally from the General Department of Land Administration), Hanoi, March 1999, January 2000, June 2001, March 2004; Thanh Khuyen, Vice Director, Legislation Department, General Department of Land Administration, Hanoi May 2001; Bui Ngoc Tuan, Deputy Director, Department of Registration and Statistics, General Department of Land Administration, Hanoi, May 2001; Nguyen Hoang Nhan, Chief Planning Division, Ho Chi Minh City Housing Land-Housing Department, Ho Chi Minh City, June 2001; Tran Chi Dung, Vice Director, Urban Planning Institute Ho Chi Minh City, Ho Chi Minh City, June 2001; Vo Kim Cuong, Deputy Chief Architect, Ho Chi Minh City Architect Bureau, Ho Chi Minh City, June 2001; Nguyen Thuc Bao, Former Legal Adviser to Ministry of Agriculture, Hanoi, March 1999, September 2000; Mai Xuan Yen Chief Inspector, Land Administration Department, 27 October 1997.

133 Five focus group interviews with Hanoi and Ho Chi Minh City residents were conducted under the auspices of a World Bank Urban Infrastructure Project in June 2001.
Many residents choose not to legalise their land by applying for land-use right certificates. Residents interviewed invoked moral credibility (uy tin) to justify ‘informal’ claims to land. For example, they said it was wrong for the state to take away ownership rights conferred by French land titles. Or more commonly, they asserted that since their grandfather owned their house it was wrong for the state to interfere in family inheritance by taking away ownership rights. Underlying these concerns is the fear that Soviet-inspired land-use rights will extinguish or diminish ‘informal’ rights.

Most residents thought that informal occupancy already conveyed the advantages of formal titles, such as transfer and security rights, without the disadvantages of transfer fees and land tax. They sell their houses through land brokers, real-estate centres and in real-estate sections in newspapers. The informal market is so well established that many residents interviewed had formed the view that eventually the state would abandon unpopular conversion policies and formally recognise land ownership.

Most residents had no intention of expressly communicating their concerns to authorities. Although some local authorities were in sympathy with ‘informal’ land use, they discouraged residents from lodging formal complaints that directly challenged state ownership over land. Residents also found their subtle, sentimental and moral attachments to land difficult to express in the formal language of petitions. Silent resistance to land titling communicated a message to lawmakers that land laws are morally incompatible with ownership rights claimed under informal land tenure.

Lawmakers responded to large-scale resistance by incrementally changing legislation to make land conversion more attractive. The state initially expanded the types of land tenures

134 A Ministry of Finance study has shown that in 2004 only 30 per cent of land transaction are registered with state authorities. See Author Unknown, 2004 ‘Two-Thirds of Property Informally Sold’ Lao Dong, 1, trans., Development Vietnam, Intellasia News Service, 3 November, 15.

135 A recent study of the HCMC real estate market shows there is only a 3-7 per cent price differential between advertisements for formal land with LURs and informal land. In fact many advertisements do not differentiate between the different types of property rights. Some vendors advertise property as giay to hop le (legal papers), others offer chu quyen it nhan (house ownership papers), and more perplexingly, some advertisements claim both sets of rights. See Annette Kim, 2004 ‘A Market Without the ‘Right’ Property Rights: Ho Chi Minh City, Vietnam’s Newly Emerged Private Real Estate Market’ 12 Economics of Transition (2) 275, 281-287.
that could be legalised into a formal title.\textsuperscript{136} It then reduced the taxes imposed on land conversion from 20 per cent to 2 per cent.\textsuperscript{137}

Despite these concessions to local resistance, the official discourse continues to dismiss moral attachments to popular housing as superstitious or irrational with no place in a modern law-based society.\textsuperscript{138} From a legal perspective, land rights are privileges bestowed by the state and customary or moral land claims have no legitimacy until they are legalised. This strict instrumentalism gives lawmakers little discretionary space to reconcile state laws to moral claims. Paradoxically, the same lawmakers that unwaveringly advocate strict legal positivism in public admit in private that they and their families live in popular housing. In moral mode, they agree with the public that popular housing is an appropriate way to recognise land entitlements.\textsuperscript{139}

This case study demonstrates that through silent resistance residents changed the state’s approach to land registration. Residents enlisted property-rights ideals imported during the colonial period to influence socialist precepts in the ‘official’ discourse. Silent resistance continues, however, because law reforms have addressed economic concerns about the cost of title conversion, rather than the conviction that informal tenure has moral credibility (\textit{uy tin}).

\textbf{Entrepreneurial voices in the media}

Our discussion would be incomplete without mentioning the role of the media in communicating entrepreneurial ideas to lawmakers. Habermas stressed the importance of the press in stimulating public discourse and making lawmakers accountable to popular concerns. Russell Heng has convincingly shown that since \textit{doi moi} reforms began, the


\textsuperscript{137} A land levy charged to legalise informal occupancy was originally applied to every householder. In order to stimulate more interest in conversions, the levy was later abolished for pre-1980 housing and reduced for housing built between 1980 and 1993. More recently, householders have been allowed to defer paying land conversion levies for a decade. Article 7 of Decree No 38 on the Collection of Land Use Levies 2000 provides that residential land continuously occupied since 1980 is exempted from land levy tax, residential land occupied after 1980, but before 1993, is subject to a 20\% levy, while housing occupied after 1993 is charged a 100\% levy. Also see Decree No. 198 ND-CP on the Collection of Land Use Levies 2004.

\textsuperscript{138} See Land Interviews.

\textsuperscript{139} State officials drafting land legislation are socialised by personal interactions with aggrieved landholders. See Land Interviews.
number, diversity and quality of media coverage in Vietnam has dramatically increased.\textsuperscript{140} By 2003 there were over 500 accredited media agencies, with more than 600 publications, 20 online newspapers and over 10,000 media officials.\textsuperscript{141}

There are approximately 10 newspapers specialising in business reporting and many more in-house publications produced by ministries, mass organisations and business associations. Some newspapers give entrepreneurs a public voice, by carrying ‘letters to the editor’ sections and Dien Dan (Forum) sections in which selected topics are discussed and editorialised.

It is beyond our purposes to comprehensively survey the contribution the media make to communicating entrepreneurial concerns to lawmakers. It is sufficient to observe that the party and state control the media.\textsuperscript{142} Only state or Fatherland Front organisations are permitted to own media outlets. The Law on Press 2004 gives the party’s Ban Van Hoa Tu Tuong (Culture and Ideology Commission) and the Bo Van Hoa Thong Tin (Ministry of Culture and Information) comprehensive powers to manage media content.\textsuperscript{143}

In practice, internal policy contractions and uneven enforcement allow adventurous media editors to explore the boundaries of public expression and publish unorthodox or even dissenting views. For example, the press published many of the arguments that challenged core Marxist-Leninist axioms discussed in chapter three.

Party and state agencies use the press in campaigns against rivals. In drafting the EL, for example, CIEM and VCCI initiated a series of articles in Dau Tu (Investment) and Dien Dan Doanh Nghiep (Business Forum) that lauded the contribution domestic investors make to the economy.\textsuperscript{144} Stories in other journals focused on technical reforms to company law or


\textsuperscript{143} In a moment of candor, Nguyen Mai, the former Editor-in-Chief for the ‘Vietnam Investment Review’ recounted in an interview how the party and state censor news stories. See Nguyen Mai, 2001 ‘It’s Our Story and We’re Sticking to It’ \textit{Vietnam Investment Review} 24 September, 3; also see Russell Heng Hiang Khng, 2001 \textit{supra} 213.

\textsuperscript{144} Interviews Nguyen Dinh Cung, \textit{supra}.
criticised the complex ‘state economic management’ provisions that allowed administrative discretion to restrict business investment. 145

The diversity of views expressed in the media highlights a difficulty with conceptually distinguishing ‘official’ and ‘unofficial’ discourse. In some areas the ‘official’ discourse in the media reflects a broad range of unorthodox and dissenting views. According to Russell Heng, certain editors and journalists use their personal initiative to introduce controversial views into the public domain. But without support from party or state factions media outlets are unlikely to run a sustained campaign promoting controversial views from entrepreneurs. It will be recalled that the media did not report entrepreneurial concerns that imported corporate governance provisions were overly complex and unsuited to local management practices.

Summary
The case studies show that politically unconnected private entrepreneurs struggle to communicate unorthodox or controversial concerns to legal drafting committees. Their attempts to localise imported rights-based laws are filtered through imperatives and priorities determined by business associations. They also lack the resources to buy access to lawmakers. Politically well-connected entrepreneurs, on the other hand, benefit from personal (frequently corrupt) unmediated exchanges with lawmakers. The brief flowering of the PSF demonstrates both the demand by entrepreneurs for unmediated access to lawmakers and the unwillingness of the party and state to contemplate open public discussion.

Giving politically unconnected entrepreneurs greater access to lawmakers is only one step towards more inclusive public participation in lawmaking. In addition, entrepreneurs need to distil their highly contextualised transactional practices into the abstract, codified standards understood by lawmakers. 146 Legal drafters discussed in chapter five lacked the skills, willingness and resources to subsume large amounts of local contextual detail under

146 Since 2004 the Vietnamese legal firm Vilaf has provided the MoJ with advice on draft bills. Although this free service may represent domestic entrepreneurial views to the MoJ, most of Vilaf’s clients are foreign investors and SOEs .
a general coding scheme. It is much easier for lawmakers to import and recycle legal norms and procedures than codify rules from the ‘unofficial’ discourse.

Foreign entrepreneurs, in contrast, have significantly more opportunities to influence drafting committees than their small-scale domestic competitors. Together with foreign donors, they have created interpretive communities that spread the neo-liberal legal message into lawmaking institutions. Rather than codifying masses of local detail into legal texts—a process requiring politically sensitive decisions about which transactions warrant codification—many legislative drafters prefer to borrow well-prepared and prestigious foreign legal solutions. This approach is becoming increasingly attractive as market-entry treaties (especially the BTA and WTO) require neo-liberal legal changes to the domestic legal system.

Despite their strong position, foreign entrepreneurs lack the close political connections enjoyed by SOEs. Yet as Adam Fforde has demonstrated, SOEs do not invariably oppose market deregulation and private rights. In some circumstances it suits SOEs and their supervising agencies to support property rights that formalise the defacto privatisation of state assets. SOEs engaged in international trade appreciate well-conceived contract and property law regimes. But in industries where SOEs retain monopolies or compete with foreign investors, they have vigorously opposed neo-liberal legalism. For example, after years of intensive pressure foreign banks have been unable to remove the monopoly SOEs enjoy over lending for land. Foreign investors also ascribe the weak anti-monopoly rules adopted in the Competition Law 2004 to pressure exerted by SOEs and their supervising agencies.

Lacking access to political power, residents resorted to popular resistance to localise Soviet-inspired land laws. They recycled colonial property rights and traditional approaches to housing to oppose Soviet—land-use principles in the ‘official’ discourse. Over time the combined effect of local-level mediation and resistance to formal process forced changes to Soviet-inspired land laws. However, the decades required to convince lawmakers to change the law make popular resistance an inefficient mode of legislative change. It is interesting to speculate whether societies that discourage outspoken complaint are more attuned to non-discursive communication.

Evidence that the state in some circumstances responds to social pressure does not necessarily intimate movement towards deliberative democracy.\textsuperscript{148} Progress in this direction requires a profound change in state toleration of ‘lobbying’ (chay lo thu tuc), demonstrations and ultimately political pluralism.\textsuperscript{149} It is instructive in this regard to contrast the tolerance shown to entrepreneurs and land users with the repression faced by those publicly agitating for democratic and civil rights.\textsuperscript{150}

Since some communicative sites are more effective than others, politically connected local entrepreneurs and foreign investors are the most legally represented groups. One possible outcome is that imported commercial laws may come to reflect elite normative preferences, unless domestic entrepreneurs find other avenues to influence lawmaking.

**Influencing National Assembly delegates**

We have seen that domestic entrepreneurs generally lack the connections needed to influence legislative drafters. If they are to raise their concerns with National Assembly delegates several factors must be considered. Can entrepreneurs use representative processes to communicate with NA delegates? Do entrepreneurs have opportunities to influence outcomes when draft laws are circulated by the NA for public comment? Do NA lawmakers listen to public voices?

\textsuperscript{148} State responses to rural ‘hot spots’, where villagers violently protested land and public finance abuses, exemplify official attitudes to civil rights pressure groups. The state reacted with a mixture of repression and consultation. Far from achieving enduring civil rights through political discourse, the state punished malfeasant village officials to appease public hostility. ‘Hot spots’ usually arise from disputes about the allocation of land use rights and excessive taxation. See AP, 1997 ‘State Media Breaks its Silence on Vietnamese Unrest, Blame Bureaucracy’, Associated Press Release, 9 September; Ben Rowse, 2002, ‘Demonstrators Arrested in Vietnam’s Central Highlands’ Agence France Presse, 6 September.

\textsuperscript{149} See Party Central Committee, 2002 ‘Renovating and Qualitatively Bettering the Grassroots Political Systems’ 8 Vietnam Law and Legal Forum (96) 18.

\textsuperscript{150} The term chay lo thu tuc is used euphemistically to mean ‘lobbying’, but it literally means ‘running around seeking permission or papers’. The original term for ‘lobbying’, van dong conveyed overtones of mass-mobilisation for the party and state.

\textsuperscript{150} Public discussion about democratic pluralism or other political reforms that challenge party paramountcy are forbidden and dissenters are imprisoned. For example, dissident intellectual Ha Si Phu (Nguyen Xuan Tu) was placed under house arrest and threatened with charges of treason for drafting an open letter appealing for more democracy. See Human Rights Watch World Report, Vietnam 2001, <www.hrw.org/wr2k1/asia/vietnam.html>. 
Democratic representation

Chapter three argued that Vietnamese ‘socialist democracy’ sharply contradicts democratic liberal notions of representative government (see annex three). It draws from Lenin the conviction that popular elections, public hearings, referendums and civil society do not adequately secure the people’s control over the state. Lenin rejected Lockean mythology that attributed legislative legitimacy to popular participation or authorship over lawmaking.151 He thought that democratic rights were better safeguarded by ‘proletarian dictatorship’ (chuyen chinh vo san) in which the ‘ruling class’ directly supervised state organs through their proxy—the communist party. This Soviet doctrine that genuine democracy is only possible under socialist ownership and party leadership forms a consistent theme in Vietnamese legal writings.152

Influenced by Soviet perestroyka reforms, Vietnamese leaders in the mid-1980s began critically reassessing lawmaking by the NA.153 They reasoned that orthodox socialist democracy had failed to adequately alert the party to economic and social problems. The NA historically performed a largely passive, ceremonial function, approving and passing laws drafted by the party and state executive. For example, from 1945 until the ‘Five-Year Plan for Legislation’ (1981-1985) the NA only passed one law (luat).154

In order to reinvigorate the NA, Nguyen Huu Tho, a former NA chairman, declared in 1987 that the party would lead the NA through persuasion and unanimous votes would no longer be required on some substantive issues.155 Reforms aimed to give NA delegates more say


152 See e. g. Nguyen Duy Trinh, 1956 ‘Phat Trien Che Do Dan Chu Nhan Dan va Bao Quyen Tu Do Dan Chu Cua Nhan Dan’ (Developing the People’s Democratic Regime and Ensuring People’s Liberties and Democratic Rights) Hoc Tap (3) 23, 24.


over legislation. But the Politburo warned delegates not to ‘take advantage of democracy and openness to distort the truth, to negate revolutionary gains, and to attack the party leadership and state management’. 156

Constitutional changes in 1992 reflected these reforms by juxtaposing democratic symbolism borrowed from the United States, such as the ‘state is of the people, by the people, for the people’ with Leninist notions of democratic centralism (*tap trung dan chu*). In practice the party continued to ‘manage’ democratic rights by controlling the selection of candidates. 157 The Fatherland Front selects candidates to fill predetermined class and ethnic-minority quotas. 158 Party loyalty is rarely an issue, since only ‘politically dependable’ (*co the phu thuoc ve mat chinh tri*) citizens are permitted to run as candidates. 159 Few studies have closely examined what actually happens during elections. 160 There is strong evidence, however, that selection is more important than election.

Electoral processes select delegates that broadly reflect class, occupational and ethnic groups. They also overwhelmingly elect delegates in sympathy with party and state interests. Currently over 90 per cent of delegates are party members, and most are state

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157 Constitution 1992, article 2. See Pham Van Hung, 2001 ‘Tu Tuong Ho Chi Minh Ve Viec To Chuc va Xay Dung Quoc Hoi Thuc Hien Quyen Luc Cua Nhan Dan’ (Ho Chi Minh’s thoughts on the National Assembly as an Institution to Perform People’s Power) *Tap Chi Nghien Cua Luat Phap* (4) 65, 66-69; Hoang Van Nghia, 2003 ‘Dan Chu va Viec Hien Quyen Dan Chu’ (Democracy and the Right to Implement Democracy) *Tap Chi Nghien Cua Luat Phap* (1) 106. In a radical article Vo Tri and Vo Vi argued that effective direct and representative democracy needs freedom of association, speech and religion. See Vo Tri and Vo Vi, 2003 ‘Ve Bai Dan Chu va Viec Thu Hien Quyen Dan Chu’ (Democracy and Improving Democratic Rights) *Tap Chi Nghien Cua Luat Phap* (3) 21-24.
158 Through the Fatherland Front the party ensures a ‘balanced’ representation from members of the ‘class alliance’. For example, peasants must replace outgoing peasant delegates. Interviews Nguyen Si Dung, Director, Centre for Information, Library, and Research, Office of the National Assembly, Hanoi, February 2000; March 2003, March 2004. The number of non-party members has decreased since the 1970s. See The Gioi, 2002 ‘Tenth Legislature of the National Assembly of the Socialist Republic of Vietnam’ *Vietnam’s Urgent Issues* March, 73.
159 In the 1997 elections 663 candidates stood for 450 NA seats. CPV members stood for every seat. Among the 450 winners, 384 were CPV members, only 3 ‘self-nominated’ candidates won seats. In 2002 the percentage of party members remained approximately the same, but ‘self-nominated’ candidates declined. See James Riedel and William Turley, 1999 ‘The Political and Economics of Transition to an Open Market Economy in Vietnam’, Technical Paper No. 152 OECD, Paris 44-45; Report, 2002 ‘Newly Elected National Assembly Holds its First Session’ 8 *Vietnam Law and Legal Forum* (95) 6, 7.

352
officials or members of Fatherland Front organisations. Only 25 delegates or 5 per cent of the total number of delegates work in businesses and just five delegates or 1 per cent of the total number of delegates are private sector entrepreneurs. A proposal to establish an ‘enterprise club’ (cau lac bo doanh nghiep) to advocate entrepreneurial concerns has not proceeded. Some entrepreneurs were concerned that any signs of mobilisation might incite much larger groups hostile to their interests (such as veterans) into forming their own voting caucuses.

Official policy now stresses the procedural trappings of electoral representation. Reforms have increased the number of full-time delegates (from 10 to 25 per cent). Candidates can self-nominate and there are proposals to increase the number of non-party candidates standing for election. Movement towards some version of electoral representation is evident in party efforts to encourage delegates to maintain close contact with their constituents and respond to voters’ concerns. Reform is underway to give delegates access to electoral offices in their electorates. Media scrutiny of NA plenary debates since 1998 has also undoubtedly increased public awareness of the NA as a policy-making body.

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163 Interview Nguyen Tran Bat, Director, Investconsult, Hanoi, March 2004. See Minh Due, 2002 ‘Tieng Noi Doanh Nhan Trong Quoc Hoi’ (Entrepreneurs’ Voice in the National Assembly) Tap Chi Nghien Cuu Lap Phap (12), 14, 15.
164 The assembly is now comprised of almost 500 delegates, only 125 are full time, the rest are part-time and must work to generate a living income. The accumulation of professional skills is also impeded by high turnover rates; only twenty five percent of delegates are re-elected each 5-year term. Interview Nguyen Si Dung, Director, Center for Information, Library, and Research, Office of the National Assembly, Hanoi, February 2000, March 2003. Also see Nguyen Duc Lam, 2002 ‘De Tien Toi Chuyen Nghiep’ (Towards Professionalism in the National Assembly) Tap Chi Nghien Cuu Lap Phap (6) 23, 25-30.
166 Article 97 of the Constitution 1992 requires delegates to ‘maintain close contact with voters, accept their supervision, collect and truthfully reflect their opinions and wishes to the Nation Assembly and concerned state officials, hold periodic meetings with voters and report to them about the progress of petitions.’ Dao Xuan Tien 2005 ‘Responsibilities of Elected Deputies in Dealing with Citizens Complaints and Denunciations’ Tap Chi Nghien Cuu Lap Phap (Legislative Studies Review) (2) 33-37.
167 A press service arranges regular meetings between NA delegates and media outlets and a ‘hot-line’ allows the public to ask delegates questions. See Goran Andersson et. al., 2002 ‘Strengthening the Capacity of the Office of the Vietnam National Assembly’, Sida Evaluation 12/12, Stockholm, 28. Also see Khanh Van, 2002
Public access to National Assembly delegates

Before considering whether delegates listen to voters’ concerns, it is necessary to know whether entrepreneurs can communicate issues to delegates. Even when they are in sympathy with their constituents, delegates do not have adequate resources and staff to investigate and respond to complaints. Recently appointed full-time delegates have more time to correspond, but they are located in Hanoi, far from their constituents in most cases. The rules governing voter interaction with NA delegates are unclear. Delegates meet constituents in gatherings organised by the Fatherland Front during and after elections. Organisers use agendas to control the issues discussed. Individual voters are rarely permitted to debate concrete issues, much less voice concerns outside those contemplated in the agenda. Reports prepared by organisers that summarise proceedings are distributed to interested mass organisations and authorised non-government organisations. It is necessary to ‘read in’ the complex party-state networks discussed in chapter four to understand the ways politically connected groups influence delegates.

Frustrated by tightly controlled and infrequent meetings with delegates, voters express their concerns in petitions. Approximately 20,000 petitions are sent to the ONA People’s Will Department annually. Specialised committees deal with about 45 per cent of petitions and the Standing Committee of the NA deals with the remainder. Rather than sharing information with delegates, the committees forward complaints directly to government agencies for action. Committees then synthesise key issues into reports presented to the NA. Voter concerns are thus filtered many times before they are presented in summary form to delegates.


169 Interviews Nguyen Si Dung, supra.

170 About 40 per cent of complaints concern land and housing and 25 per cent concern court cases. See Andersson, 2002 supra 25. See generally Dao Xuan Tien, 2005 supra 33-37.


172 Approximately 20,000 petitions are sent to the Department for Popular Aspirations (Vu Dan Nguyen). After petitions are screened, about 40 per cent are forwarded to various specialist committees (e.g. Law, Economy and Budget) the remainder are sent to the Standing Committee. Of the 4,000 petitions sent, the Law Committee recommends action in only 200 cases each year. See Andersson, 2002 supra 25. Also see Anonymous, 1998 ‘Text of the National Assembly Standing Committees’ Report on Petitions and Aspirations

354
Discourse theory informs us that effective communication is most likely to occur during sustained discussions (contact zones). In ideal conditions unmediated and balanced (co-equal) communication over prolonged periods induces mutual comprehension and stimulates the transfer of unorthodox and contradictory ideas (‘unofficial discourse’). The highly mediated exchanges between voters and NA delegates lack the sustained and unmediated contact zones considered necessary to effective communication. Evidence suggests that entrepreneurs rarely use these channels to influence imported commercial laws.

**Do lawmakers listen to ‘unofficial’ discourse?**

In promoting ‘direct democracy’, the NA distributes draft legislation for public comment. A central question in determining the effectiveness of public consultation is whether lawmakers believe they have an obligation to not only solicit, but also to reflect ‘people’s opinions’ (lay y kiên nhan dan) in laws. An early draft of the Law Amending the Law on the Promulgation of Legal Documents required drafting agencies to ‘learn from comments to formulate legal normative documents’. In the final draft this positive duty to take community concerns into account was weakened to read ‘studying comments so as to revise the drafts’.

The Law further provides that drafting authorities have discretion to consult to ‘an appropriate extent and in an appropriate manner’. It does not specify who lawmakers should consult, using instead the ambiguous term ‘nhan dan’ (literally the ‘people’). Some commentators interpreted this term as referring to individuals, while others, invoking its socialist meaning, believe it refers to collective comments gathered by mass organisations of Voters’ Nhan Dan, 8 May, 1, 5, trans., FBIS East Asia Daily Report EAS-98-219; Voice of Vietnam, 1994 ‘Voter Present Views’ FBIS East Asia Daily Report 15 June 94-115, 62-64.


174 See Do Muoi, 1992 ‘Xay Dung Nha Nuoc Phap Quyen Thuc Su Cua Dan, Do Dan Va Vi Dan’ (Building up a Law-based State that is Of the People, By the People and For the People) Tap Chi Cong San (10) 3, 5-6.

175 Law on the Promulgation of Legal Documents 1996 (amended 2002), article 62 (3).

176 Law on the Promulgation of Legal Documents 2002, article 3. Informants in the Office of National Assembly say that the public consultation provisions in the revised Law on the Promulgation of Legal Documents 2002 were included at the request of the Starr Legal Project, which was providing the government advice about implementing the US-Vietnam Bilateral Trade Agreement.
and associations. Finally, the law does not require authorities to report back to interlocutors to explain whether their comments have been codified.

A report compiled by the ONA in 2002 concluded that NA committees and government drafting committees were more interested in inculcating state policy than learning from the public. During the survey period from 1996 until 2002, NA committees always consulted state agencies, occasionally discussed bills with Fatherland Front organisations, but rarely with business associations (e.g. VCCI). They sought opinions from SOEs on three occasions and did not consult private entrepreneurs at all. More recently, the draft Civil Procedure Code, which has important implications for commercial litigation, was only circulated to government agencies and state-funded research organisations for comment.

In the first ten years of doi moi (1986-1996) six draft laws were published in Nhan Dan (a national newspaper) for public comment. Although more draft laws are published in newspapers and on websites today, they are rarely accompanied by explanatory memorandums showing how the legal rules are supposed to function in everyday situations. Without contextual information, members of the public (including small-scale entrepreneurs) lack a frame of reference in which to assess and comment on the draft legislation. This task is left to state authorities, mass organisations and large business associations with the resources and expertise needed to understand and contextualise legal language.

For example, a Civil Code draft was published in Nhan Dan in 1995 and over a period of several months comments were invited from provincial authorities, mass organisations and foreign law firms. Members of the Civil Code drafting committee reported that


180 Government drafting committees present the NA with explanatory memoranda, but these documents annotate rather than explain draft legislation. See Office of Government, 2003 supra. Also see Nguyen Tien Lap, 2002 supra 2-4.

181 Interview Nguyen Si Dung, supra March 2004.

182 Comments were coordinated on behalf of the Ministry of Justice by the United Nations Development Programme Resident Legal Advisor. Private correspondence held by the author. See generally Nguyen Dinh
discussions organised by mass organisations were highly mediated, while less than 100 comments were received from the public. They concluded that provisions in the Civil Code were too far removed from everyday life to elicit meaningful comments from the public. In any event, drafters largely disregarded public comments. Boxes containing submissions sent to the drafting committee remained untouched long after the Civil Code was passed by the NA.

In a society where decisions have been guided for decades by democratic centralism, lawmakers unsurprisingly confuse consultation for comment with consultation for approval. Behind the rhetoric promoting direct democracy, some lawmakers disparage the public's capacity to contribute. This means that public consultation is generally ad hoc and falls far short of the sustained and unmediated dialogue required to convey unorthodox or controversial views to lawmakers.

Assessing the transformative potential for the National Assembly to become a representative body

For entrepreneurs to more effectively voice their concerns about imported law, the NA must evolve into a more representative body. To evaluate the potential for this transformation we need to understand in what circumstances the party may voluntarily transfer lawmaking power. Discourse analysis provides an explanation for institutional transformation. In times of rapid change party institutions will search for more effective ways of resolving social problems. For example, faced with falling rural production the party was forced to devolve planing power to peasants during the 1960s and 1970s.

Informants in the ONA speculate that as the pace and complexity of lawmaking increases, the party is struggling to predict the social impact of new laws. The longstanding view that delegates should give legislation the 'people's' consent, without fundamentally revisiting policy, is giving way in the party to an appreciation that delegates should evaluate the social acceptability of legislation. Further progress in this direction depends

Loc, 1995 'Bo Luat Dan Su Co Vai Tro To Lon Trong Viec To Chuc Cuoc Song Cong Dong' (The Civil Code Plays an Important Role in Organising Community Life) Nhan Dan 13 February, 1.

183 Interviews Tran Huyen Nga, Legal Expert Civil Law Department, Ministry of Justice, Hanoi, April 1999; Bui Thi Mai Lan, Department of Civil Law, Ministry of Justice, March, April, 1999.

184 Interviews with officials from the Office of the National Assembly, January, June and November 2002.

185 Interviews Tran Duoc Thuan, Vice Chairman of the ONA, Hanoi November 2002; Nguyen Si Dung, supra.
on party leaders recognising that laws function best when they reflect local concerns. This change is difficult for a party that for decades has equated the phat (spontaneous) debate with losing control and has used democratic centralism to subordinate local discourse.

Even thought the NA is overwhelmingly composed of party members, delegates have different views on laws. Divided loyalties to the central party, regional authorities, workplace relations and family commitments generate fresh insights into social problems. Delegates represent a spectrum of regional and professional interests that are arguably broader (or at least different) from views within party agencies. Delegates show the central party du luan (public opinion) without the political filtering that attenuates information transmitted by party and mass organisations.\textsuperscript{186}

Other informants believe the party lacks the internal deliberative processes needed to resolve turf battles between state organs. They suggest that in order to present a united front the party tends to paper over internal differences. This delays confrontation and the distribution of spoils, making conflict management more difficult. According to this view it suits the party to give the NA powers to resolve certain intractable problems.

Consider the resolution of urban housing disputes. During the late 1950s state authorities commandeered and sub-divided large villas in northern cities to house party and state cadres.\textsuperscript{187} Houses were confiscated (tich thu) from party enemies and requisitioned (trung thu) or acquired (trung mua) from those considered sympathetic to the party.\textsuperscript{188} Wealthy, but non-exploitative owners ‘voluntarily’ relinquished occupation, but not ownership rights, in return for a nominal rent.

Following doi moi reforms the state recognised private ownership of houses.\textsuperscript{189} This reform excited claims by owners who had ‘voluntarily’ transferred occupation rights to the state. By the mid-1990s courts throughout the country were clogged with hundreds of politically sensitive cases seeking orders to evict party and state officials living in privately owned

\textsuperscript{186} See Nguyen Duc Lam, 2002 supra 25-26.


\textsuperscript{189} See Ordinance on Residential Housing 1991.
villas. Although legislation clearly supported the owners’ claims, the courts sought a ruling from government ministries to take action against party and state officials. When government agencies refused to act, the Chief Justice sought direction from the Standing Committee. Party leaders decided that housing issues ‘can only be legally decided by authorities such as the National Assembly and the Standing Committee of the National Assembly, judicial organs themselves cannot determine civil relationships over residential housing.’

Informants believe a dispute arose between the government and city people’s committees over the appropriate formula for balancing ownership and occupation rights. Rather than using party organs to resolve the impasse, the Politburo agreed to transfer the problem to the Standing Committee. Informants say that competing party factions agreed that the Standing Committee provided a ‘neutral’ forum for reconciling central and provincial interests. Unlike the party, the NA’s legitimacy does not depend on presenting a unified front. On the contrary, conflict resolution enhances the NA’s public standing.

In 1998 the Standing Committee issued a resolution ordering ministries, provincial authorities and the courts to recognise certain types of ownership claims. After five years of intense lobbying by party and state officials, the NA in 2003 changed its policy and issued a new resolution that disallowed private claims against land currently used by state agencies.

For discussions about solving housing disputes see Le Cong Son, 1996 ‘Nha So 122 Hong Bang TP Nha Trang: UBND Tinh Khanh Hoa Den Giai Quyet Khieu Nai Cua Dan Theo Luat’ (House No 122 Hong Bang Street Nah Trang City: The People’s Committee of Khanh Hoa Province should Act in Accordance with the Laws) Tuoi Tre 23 June, 2; Tran Quang Minh, 2000 ‘Lay Lai Nha O Vang Chu Ma Ngui Khac Dang Ky Su Dung’ Nhan Dan June <www.nhandan.org.vn/vietnamese/phaplalt/317.html>.

The Standing Committee passed a resolution temporarily stopping courts from hearing housing cases. See Resolution of the National Assembly on the Implementation of the Civil Code 1996, article 4; Circular No. 3/TT-LN Providing Guidelines for the National Assembly Resolution on the Implementation of the Civil Code 1996 (Supreme People’s Court and Supreme People’s Procuracy).

Evidently the Prime Minister wanted to enforce residential ownership rights, whereas people’s committees favoured continued state management to protect existing residents. Many occupants of the villas are senior party and state cadres and their families. These comments are based on interviews with senior officials at the Office of National Assembly, Hanoi January 2000 and February 2002.

National Assembly Resolution No. 58 1998 permitted those holding ‘old regime’ tiles over villas to assert ownership claims against state and non-state residents. After 1959 in the North and 1975 in the South, state agencies, ‘temporarily’ appropriated private land and housing management authorities subdivided large houses into residential apartments.

If this analysis is correct, the party voluntarily transferred policy-making power to the NA, because constitutional rules allowed delegates to discuss complex issues in a comparatively unmediated forum.

Whatever the party’s motives in transferring authority, it is always possible that delegates may arrogate more power for themselves. It is too early in the reform cycle to ascertain whether delegates have accumulated enough policy-making power to compel party leaders to change contentious policies. More plausibly, delegates will expose deficiencies and sensitivities in imported laws that may or may not move party leaders. The transformative pressures discussed may increase the powers of delegates to adjust imported laws to suit local conditions without necessarily making delegates more democratically sensitive to voters.

Conclusion

Consistent with the third working postulate, case studies considered in this chapter show non-state pressure groups influencing the selection and adaptation of foreign laws into Vietnam. Since their capacity to persuade lawmakers primarily depends on social and economic status, evidence suggests that imported laws will eventually come to resemble elite interests. This conclusion has ramifications for the development of a uniform commercial legal system governed by the ‘rule of law’.

Foreign investors benefit from sustained and relatively unmediated access to legislative drafting committees. They have cultivated elite groups of lawmakers and consultants who are broadly in sympathy with the imported neo-liberal legal agenda. The influence exerted by these interpretive communities is evident in the numerous foreign (especially American) rights-based principles that have successfully negotiated the many deliberative processes en route from drafting committees to the NA.

Politically connected local entrepreneurs and state-owned enterprises also enjoy close institutional and personal relationships with lawmakers. Although these interpretive communities are less ideas-oriented than the neo-liberal legal alliances, they have

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196 For example, delegates participating in seminars organised by the Ministry of Justice in 2002 to discuss redrafting the Law on the Promulgation of Normative Documents argued that since the NA represented the people, it should have taken a leading role in the drafting committee.

successfully invoked socialist principles to preserve many state privileges for SOEs and domestic entrepreneurs against imported free market ideals. Small-scale domestic players, on the other hand, do not have unmediated access to lawmakers. They possess few personal networks with lawmakers and are not permitted to form member-directed business associations. Entrepreneurs promoting local ideas or norms that contradict the 'official' discourse must convey their message through public demonstrations and silent communication—communicative channels that are highly mediated and thus inefficient long-term modes of influence.

As the brief flowering of the Private Business Forum demonstrated, some entrepreneurs have an active interest in promoting the local norms underpinning most business transactions. More local participation in lawmaking will generate the preference convergence required to convince lawmakers to codify normative practices that reflect community, rather than elite interests.

The influence exerted by pressure groups also partially corresponds to their need for particular imported laws. Foreign investors want a facilitative legal system to preserve property and contractual rights that have little status in the relational networks used by domestic companies (see annex six). They are generally better organised and resourced and more focused on change than broadly dispersed local entrepreneurial groups, which are ambivalent towards law-based reforms. For example, foreign pressure groups successfully overcame weak domestic opposition to complex corporate governance provisions in the EL. Weak anti-monopoly provisions in the Competition Law 2004 suggest, however, that foreign pressure groups lost the struggle with the Ministry of Trade to limit the market domination of politically connected SOEs.

Domestic entrepreneurs, on the other hand, have few opportunities to communicate their concerns to NA lawmakers. Exchanges between NA delegates and their constituents are highly mediated and unorganised pressure groups lack the resources and expertise to comment on draft laws circulated for public comment. Chapter five showed that although some NA delegates are prepared to oppose imported trade liberalisation laws, they were

198 For detailed examples of the close relationships between SOEs and state bodies see Martin Gainsborough, 2002 supra 16-39; Fforde and de Vylder, supra.
responding to SOE rather than private entrepreneurial concerns. Only a tiny number of NA delegates represent private entrepreneurial interests. Moreover, the devolution of policy-making powers needed for delegates to codify local norms and change the meaning of imported provisions is only (if at all) slowly taking place.

There is some government support for the view that effective laws must comport with local conditions. But it seems unlikely the government will relax tight controls over the formation of independent business associations and allow entrepreneurs to oppose legal harmonisation projects and possibly jeopardise international trade agreements. Highly mediated state-society exchanges are attractive precisely because they quarantine lawmakers from social forces that might oppose socioeconomic goals.201 By limiting participatory democracy and channelling social dissent though state-corporatist business associations and mass organisations, factions within the state can selectively promote or reject local norms that challenge the rights-based rules favoured by foreign investors and some local elites.


201 Note Martin Gainsborough’s argument that even in ‘reform’ minded Ho Chi Minh City, ‘technocratic’ leaders lack sympathy for neo-liberal ideas such as participatory democracy. See Martin Gainsborough, 2004, ‘Ho Chi City’s Post-1975 Elite: Continuity and Change in Background and Belief’, in Benedict J. Tria Kerkvliet and David Marr eds., Beyond Hanoi: Local Government in Vietnam, Institute of Southeast Asian Studies, Singapore, 259, 273-278.
Chapter Eight: Conclusion

This study experimentally applied the three working postulates to bring us closer to the processes shaping legal transplantation. They have shown that laws transfer into Vietnam much like other cultural artifacts, with the exception that as instruments of state power laws are highly sensitive to domestic ideologies and state power-distribution structures. They have further shown that legal transplantation takes place as much through local invention and mediation as through centrally directed legal reform. By allowing us to think about legal transplantation outside the confines of conventional convergence and globalisation theories, the analytical approaches in this study provide a fuller explanation of the contests, negotiations and hybridisations shaping borrowed laws.

This chapter reviews the findings in this study and goes on to address three issues not discussed at length earlier: why conventional theories misdiagnose legal transplantation in Vietnam; whether it is possible to devise an explanatory model for legal transplantation; and is a decentralised concept of law likely to attract support from key government and foreign law reformers in Vietnam?

Analysing legal transplantation through the three working postulates

This study synthesised three working postulates from the writings of Kahn-Freund and other legal theorists to direct research towards the primary sites of interaction between legal transplants and domestic political, social and economic conditions in Vietnam. They are political-legal ideology, the distribution of state power, and pressure from non-state organisations. This section assesses the utility of these postulates by examining how successful they have been in bringing the analysis closer to the processes shaping legal transplantation into Vietnam.

The ideological role of law

Chapter three applied the first working postulate to assess ideological resistance to legal transplants. It found that laws transfer easily where they comport with the dominant ideology in host countries. During the 1960s and 1970s socialist laws and practices were transferred en masse into Vietnam. The dominant Marxist-Leninist state ideology shielded these ideals from competing beliefs and opinions and, as a consequence, legal thinking scarcely changed in decades. Imported socialist organisational ideals, on the
other hand, were more directly concerned with state power. Democratic centralism and collective mastery principles were woven into the fabric of government and used to discredit or revamp old ideas to prevent the reemergence of pre-revolutionary practices. In the process they interacted with local political, economic and social conditions, inducing long-lasting changes.

The importation of Western rights-based laws after doi moi presented an ideological dilemma for party leaders. Private property and contractual rights were incompatible with socialist ideology and had the potential to undermine party paramountcy. Party leaders obscured this conflict by importing nha nuoc phap quyen principles and recycling an eclectic assortment of ideas presented as Ho Chi Minh thought. The new thinking opened ideological space for Western legal rights without discarding socialist orthodoxies.

By juxtaposing socialist and neo-liberal legalism, party leaders set in motion ongoing ideological contests. Unlike the adoption of socialist legality decades early, neo-liberal legal ideas were imported into an incongruent political, economic and legal framework. Rights-based thinking initially struggled against deeply engrained socialist and traditional modes of thought. More recently, international legal harmonisation policies have invested neo-liberal legalism and a narrow procedural rule of law with a limited legitimacy. For example, the idea that entrepreneurs are free to form transactions unless they are specifically prohibited by law has gained ground in some elite circles. Outside the commercial arena neo-liberal legalism has so far made little impact on the socialist axioms that legitimise party paramountcy.

A significant finding is that conflicting ideologies do not inevitably constrain legal borrowing. In fact some degree of ideological confusion and discord may actually create space for imported ideas. The party is preserving democratic centralism, ‘state economic management’ and collective mastery and associated ideals that give coherence and stability to existing institutional structures. But this does not prevent experimentation with imported legal ideals that facilitate international legal harmonisation and economic development. Provided the dominant ideological regions do not actively block imported legal ideals, foreign ideals can enter the official ideology.

Ideological theory has assisted this study to understand changes in the state’s receptiveness to imported ideas. Yet an ideological framework that is predicated on binary opposition between dominant and dominated ideas does not adequately account
for the creative negotiation, hybridisation and metamorphosisation of imported ideas in Vietnam. Case studies suggest that imported legal ideas do not function just as binary alternatives to local thinking, but rather as strategic, unstable and self-transforming social catalysts. Changes in the official ideology do not automatically lead to institutional and social change, because human agents functioning within the constraints of their institutional mentalities and self-interest choose how they respond to ideology. For example, state officials simultaneously invoke rule of law imagery to convince investors that the state protects private commercial rights and to justify religious and criminal laws that subordinate individual interests to the public interest.

In short, ideology operates at too high a level of abstraction to fully explain the transplantation of law. We need another analytical approach that considers the negotiations and contests that generate the preference conversion required to localise imported laws.

**State power distribution**

The second working postulate suggests that legal transplants are sensitive to the ways legislators, bureaucrats and judges use state power to make and enforce law. Attitudes, debates and processes profoundly influence the way lawmakers and regulators select, adapt and implement foreign laws. This study used discourse analysis to understand these regulatory conversations.

Case studies considered in chapter four demonstrate the importance of regulatory conversations in ordering official attitudes to legal imports. They also showed that powerful state agencies use imported legal ideas strategically to encode and inculcate certain perspectives or orthodoxies to secure advantage in ‘palace wars’. Lawmaking debates not only concerned altruistic concerns such as the pace and direction of law reform, but also involved institutional and personal interests.

The case studies suggest that lawmaking resembles an elite-centred model of decision-making, in which the selection and implementation of legal imports is influenced by struggles within political and bureaucratic elites. But they also intimate that the capacity of state institutions to pursue their interests is partially constrained by the epistemologies governing official discourse. For example, as international legal harmonisation gained momentum powerful ministries involved in redrafting the Ordinance on Economic Contracts could no longer use state economic management arguments to preserve their prerogative powers over entrepreneurs. Thus, both regulatory ideas and institutional and personal interests propel legal reforms.
In another important finding certain elite-level legal drafters and regulators are becoming enmeshed in neo-liberal-oriented interpretive communities. These groupings should not be thought of as geographic communities. They are more accurately understood as formal and informal social relationships that have the potential to generate cooperation and shared responses to borrowed law and regulatory practices. Highly visible communities associated with some central-level research institutes and ministries, connect elite-level legal drafters and foreign donors/consultants. Members diagnose regulatory problems from neo-liberal perspectives and draw legal solutions to problems from neo-liberal ideas. Complex legal doctrines transfer rapidly among members, who share similar educational backgrounds and epistemological assumptions about the proper direction for legal reforms. Constantly repeated principles, doctrines and strategies for reform play a central role in constituting and directing the way members select, adapt and implement foreign laws. Within these communities borrowed ideas are increasingly becoming the frame of reference for drafting and implementing laws.

Since members must operate within local political contexts they use ideas strategically. Vietnamese officials, for example, actively debate and selectively follow foreign advice in order to work around political and institutional agendas. But their default setting is neo-liberal legalism. Within the parameters set by political and institutional constraints, they work closely with foreign donors to guide imported neo-liberal laws through the numerous conferral and consensus processes en route to the National Assembly. In the process they must isolate or discredit the assumptions (principally ‘state economic management’) used by other interpretive communities to diagnose problems and formulate regulatory solutions.

Notwithstanding greater professionalism and specialisation within the NA, delegates still lack the skills and constitutional ‘ground rules’ needed to localise imported legal ideas. Since they cannot agree among themselves what local precepts and practices should supplement or replace imported norms, their interventions tend to block specific imported rules without proposing innovative homegrown solutions. Adding to the problem, deliberations in the NA are highly mediated by party organs, inhibiting the sustained debates required to generate preference convergence and codification.

If the party devolves more deliberative power and/or delegates arrogate power for themselves, the NA may become more responsive to local norms and practices. A more proactive legislative body could creatively combine imported legal ideas with general
legal principles distilled from local business transactions. Hybrid laws have the potential to find new solutions to domestic problems.

In the meantime, the fine-tuning that localises legal imports largely takes place in judicial, but especially administrative processes. At an elite-level, dialogue between state officials and lawyers representing large-scale investors is increasingly investing imported commercial rights with law-like consequences. Lawyers show officials how commercial rights function in a market economy. These negotiations and accommodations have changed some subordinate rules, but belief in a procedural ‘rule of law’ that checks state power is largely isolated to neo-liberal interpretive communities.

Local officials are largely (though not entirely) beyond the reach of neo-liberal legal discourse. They use ideas and practices in unofficial discourses to overcome rigidities in central code-based definitions of commercial rights. These highly creative, but frequently unstable and contextual solutions orient rights towards particularistic family and community interests. Norms generated from these accommodations occasionally percolate up to higher-level authorities to inform subordinate legislation that requires less discretion to implement. But more generally, there is little evidence that the negotiations and compromises made at this level are intended to produce anything more than one-off solutions to highly contextualised problems.

Courts currently play a peripheral role in adapting imported laws to local conditions. Legal reforms that confer courts with greater jurisdictional powers and the capacity to develop legal doctrines may give judges more scope to use legal rules to adjudicate commercial disputes. Movement in this direction is evident in the secondary legal sources such as similar fact cases, guidance letters (thong tu huong dan) and judgments developed by the Supreme Court. These doctrines are beginning to give superior court judges more ‘room to manoeuvre’ to creatively combine imported legal ideas with insights gleaned from cases.

Different narratives influence local courts. Judges routinely subordinate the rights-based intent of imported laws to state political and economic imperatives as well as to the corrupt interests of litigants. These ad hoc negotiations engage imported laws with local discourses and overcome rigidities in codified private rights. But these hybrid legal-social solutions are highly contextual and rarely generate broadly applicable legal solutions. Nevertheless, though its progress appears glacial, the studies suggest that centrally formulated legal doctrines will slowly tame local-level improvisation.
Discourse analysis has assisted this study by showing that imported laws do not acquire uniform state-sponsored meanings, but rather, their meanings fragment in myriad regulatory conversations. Studies showed that imported laws come packaged in a neo-liberal legal narrative that communicates effectively with some local interpretive communities, but not with others. The range of discourse modes used to discuss imported law differed little among the interpretive communities, since the groups at different times deliberated laws from political, legal, moral and economic perspectives. What differed was the importance each group attached to particular modes of thinking about law and the receptiveness of these dominant modes to borrowed legal ideas. This finding highlights the capacity for interpretive communities to be constitutive, that is, to function as forums in which individual and collective attitudes and behaviour towards imported laws are defined and redefined. In suggesting that interpretive communities consolidate and standardise legal meanings, discourse analysis also provides glimpses into the processes that naturalise legal imports. Since interpretive communities comprise state and non-state entities, a fuller explanation of legal transplantation needs to take into account non-state pressure groups.

**Pressure groups**

According to the third working postulate, non-state pressure groups influence the selection and implementation of foreign laws. Discourse analysis assisted this inquiry by suggesting that dialogical exchanges between lawmakers and pressure groups influence the meanings given to imported law. Non-state pressure groups are more likely to communicate unconventional or controversial ideas to lawmakers in relatively unmediated discursive environments. Case studies considered in chapters five to seven indicate that preference conversion is most likely to occur within interpretive communities. For example, legal reforms proposed by foreign donors and investors are given a sympathetic hearing by lawmakers operating in neo-liberal-oriented interpretive communities. Directors of SOEs are also members of interpretive communities and can plead for state privileges to regulators steeped in ‘state economic management’ thinking. But politically unconnected entrepreneurs standing outside elite interpretive communities struggle to have their message heard. In Vietnam’s highly mediated public space politically unconnected entrepreneurs cannot form member-directed associations and acquire the relatively unmediated access to lawmakers required to naturalise imported rights-based laws. Even where their interests
coincide with those advocated by elite interpretive communities, small-scale entrepreneurs communicate their views in a political, economic or moral language that is not easily converted into the highly abstract, codified preferences understood by lawmakers.

Preference conversion is possible without formal organisations. Large numbers of people sharing similar ‘interpretive’ attitudes to land valuation and ownership, for example, succeeded in forcing the state to change the legal regime. Popular resistance sends messages to lawmakers that are not easily communicated through state-managed communicative channels. It conveys unorthodox and controversial ideas derived from ‘unofficial’ discourses that directly challenge the epistemological assumptions in the ‘official’ discourse. But sub-verbal communication is an inefficient and long-term path to preference convergence. That it succeeds at all in influencing Vietnamese lawmaking is partially explained by the low social regard for a ‘rule of law’. Ironically, if legalism gains more legitimacy, authorities could more easily discredit popular resistance as socially disruptive and deviant behaviour. In the meantime, mass-regarding ideology (such as collective mastery), which conditions the state to respond to the people, makes the Vietnamese party and state more attuned to popular dissent than many neighbouring developing states.

The case studies suggest that the influence exerted by pressure groups depends on their social and economic status. Unless NA delegates take steps to broaden the application of imported commercial laws, it follows that imported laws will through negotiation and mediation come to represent elite interests. Markets may fragment as entrepreneurs select the most appropriate regulatory regimes. An entrepreneurial elite may follow state laws designed to secure their interests. For politically unconnected entrepreneurs, complex rights-based law are often irrelevant to local commercial needs and transactional experiences. An alien legal system that disregards local relational practices may convince them that rights-based laws bring transactional costs and state scrutiny without compensating benefits. As an alternative strategy, they may selectively follow state laws that convey advantages, but in other circumstances apply relational practices (see annex four).

It is perhaps too early in the reform cycle to assess whether relational structures can compete with, or even complement, imported rights-based law. As the economy grows and domestic firms transact more frequently with foreigners (especially those requiring formal contracts), imported contract and property norms may increasingly supplement personal sentimental bonds in commercial exchanges. Demand for substantive legal
rights is likely to stimulate more interest in a procedural rule of law that checks bureaucratic power and promotes powerful and efficient courts. But progress towards a ‘rule of law’ in the commercial arena depends on the legal fictions derived from imported laws providing more innovative and efficient solutions than discretionary compromises and relational practices. This transformation is unlikely without dialogical engagement between lawmakers and a broad cross-section of domestic entrepreneurs.

Law reform through legal transplantation

Every major commercial law since doi moi has been selected and drafted with foreign legal assistance. Informed by the Hayekian proposition that the ‘rule of law’ is strongly attached to rules and legal institutions, most donor projects aim to create a stable and transparent legal environment that promotes transactional certainty and stability. They also support the role of courts in administering the legal system and checking state power. Case studies suggest limitations to this vision for legal change.

One problem with ‘rule of law’ reforms is that imported commercial norms are not being transformed into the universal norms that are supposed to order Hayekian legal landscapes. For this to happen lawmakers need to reconcile imported commercial norms with a broad range of business transactions. As we have seen this is not happening for a variety of reasons in Vietnam.

Open-ended drafting gives executive bodies wide discretionary powers to adapt imported legal norms to local institutional and transactional conditions. But politically connected SOEs and entrepreneurs influence the substance and application of laws in ways that distance imported norms from most business entities. The unifying aspirations of a ‘rule of law’ are further fragmented by the privileged access SOEs and elite-level entrepreneurs have to the judicial system and judges.

Small-scale entrepreneurs are unlikely to litigate until they trust courts to make decisions about right and wrong. Judicial legitimacy depends on the emergence of ‘secondary rules’ and independence from party and state. It also requires well-trained, impartial judges and mechanisms that efficiently enforce court decisions.

Rather than finding ways to more evenly localise imported laws, most donor projects exacerbate the problem. Working closely with foreign investors and lawyers, donors promote neo-liberal legal solutions based on international trade treaties and legal practice. They consider the local commercial norms and ethno-religious and sentimental factors that regulate most business unbounded, inefficient and potentially anarchic. With few exceptions projects have not considered the social demand for law and
consequently de-emphasise the analytical skills Vietnamese lawmakers need to adjust and naturalise foreign legal imports. Too often donors have sought to quarantine legal imports from local processes that would ‘jeopardise the fragile momentum for reform’. There is considerable scope for donor programs to support a ‘rule of law’ in Vietnam by respecting local commercial norms and practices and supporting lawmaking processes that reflect a broad range of commercial practices and interests. The theoretical realignment needed to bring this about is considered below. In the meantime transplanted commercial laws remain remote from, and frequently incomprehensible to, local political, legal and economic precepts and practices. Finding complementarities between imported and local discourses will greatly enhance the prospects for the development of a ‘rule of law’.

**Rethinking legal transplantation theories**

Our study began with three possible explanations for legal transplantation. Proponents of legal convergence argued that laws have de-coupled from society and can easily transfer across cultural borders. Those arguing for legal divergence focused instead on linkages between laws and their social context and stressed that successful transplants require compatible sociopolitical structures, precepts and practices. From an evolutionary perspective, global interaction between countries induces an inexorable convergence towards the most technically efficient system.¹ Taken together these critiques fail to adequately account for Vietnam’s (and perhaps developing East Asia’s) history of fragmented legal borrowing.

**State-law monist theories**

The way law is conceptualised affects our thinking about legal transplantation. Convergence theories come from a Western liberal legal tradition in which laws are supposed to operate independently from religion, political morality and other social norms.² They substitute an external perspective that sees law’s social connections for an internal perspective that only sees legal rules. This positivist belief that laws are only recognisable according to legal criteria forms the philosophical basis of the neo-liberal

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legal tradition. Some within this tradition have formed the view that laws have decoupled from society and as autonomous technical instruments laws can transfer easily across cultural boundaries.

‘Law in context’ theorists, on the other hand, emphasise the linkages between legal transplants and underlying social values and practices. By focusing attention on how legal transplants are received and implemented by state officials, their methods illuminate the official ideals, epistemologies and practices that shape the way laws are imported. The numerous inconsistencies between legal imports and local institutional conditions lead these theorists to caution against cross-cultural borrowing. Despite their different points of inquiry, both these theoretical traditions perceive legal transplantation as the impact of foreign law on society. They share a historically determined state-law monistic outlook that assesses legal transplantation from state perspectives; do transplants induce uniform state-sponsored meanings and are they implemented by epistemologically compatible state institutions? Their main disagreement regards the impact of transplanted laws on local social conditions. Convergence theorists see few points of interaction between law and society, making transplantation socially easy. Whereas ‘law in context’ theorists see so much interaction that legal transplantation generates too many variables and too much uncertainty to readily succeed.

A major problem in applying state-centred legal theories in Vietnam is uncertainty regarding the boundaries of state power. Case studies not only reveal blurred distinctions between the party and state, but also between central and local authorities. It is frequently unclear whether laws derive meaning from party, state or hybrid state-societal authorities. These vague and protean distinctions problematise a state-centred analysis of legal transplantation.

The myriad perspectives shaping legal borrowing resist categorisation in narrow ways as imported legal instruments impacting on state and society. The case studies suggest that legal borrowing is as much about bottom-up processes as top-down state-directed legal solutions. Exogenous or endogenous change presents a false dichotomy. Legal transplantation is highly negotiated, involving ‘dialogical’ lawmaking between central leaders, provincial authorities, the foreign donor community and local entrepreneurs. Transplantation is more likely to be guided by like-minded state and non-state individuals clustered together in ‘interpretive communities’, than by state officials.
championing reform from the top. It is also guided by alliances (frequently corrupt) between party, state and social forces.

Rather than indicating the failure of transplantation, incoherence, fragmentation and negotiation may be essential components of the transplantation process. But conventional analysis misunderstands the negotiations underlying legal transplantation. A concept of legal borrowing that recognises the central importance of contests and alliances between state and societal forces suggests the need for a new way to conceptualise legal borrowing.

**Legal evolution**

Some case studies supported the contention in legal evolutionary theory that as societies grow more alike legal systems will converge. For example, chapter six showed that foreign and domestic law firms are guiding central-level officials towards international (primarily American) approaches to commercial regulation. Foreign donor agencies sponsor numerous law-reform projects that largely aim to engineer a Western-style rights-based legal system. And above all else, Vietnam’s desire to secure foreign markets has led it to join international treaties that require legal harmonisation with foreign standards and procedures.

A difficulty with evolution theory is the observed degree of differentiation within the Vietnamese legal system. Some parts show convergence and other parts are taking a more idiosyncratic path. There are strong signs of convergence in the shift towards rights-based legislation, yet this change is largely confined to the commercial arena. Even within this arena there is differentiation. Procedural rules governing lawmaking, state regulation and court hearings are more localised than substantive legal rules that reflect foreign sources.

The desire for legal efficiency, which in evolutionary theory propels convergence, does not adequately account for the observed degree of legal differentiation and path-dependent development in Vietnam. We need a fuller explanation that considers the factors that shape local understandings about what constitutes an optimal regulatory system. It needs to explain why substantive laws transfer rapidly among like-minded lawmaking elites, but encounter resistance in local-level state and social institutions. Legal evolution overlooks the communicative barriers to legal transplantation and the

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strategic use of imported ideas for institutional and personal advantage. These are serious shortcomings for a predictive theory.

**Modelling legal transplantation**

Evidence considered in this study suggests it is not possible to deterministically model legal transplantation. From a scientific perspective the transplantation phenomena is unknowable, because the causal links explaining human responses to borrowed laws are (if at all) only cognisable for the most simple transactions. There are simply too many variables to support testable propositions of cause and effect.

Yet it has been possible to gain valuable insights by examining indirect processes such as ideology and communicative action. These processes influence thinking, which in turn shapes approaches to borrowed law. This is causation in heavy disguise.

Of the three working postulates, state power distribution and pressure groups proved the most useful in guiding research towards the sites of interaction between legal imports and local precepts and practices. But this conceptual architecture lacks the means to effectively analyse these regulatory conversations. Our thinking on this problem has been greatly assisted by discourse analysis. It provides a methodology for analysing regulatory conversations, while avoiding the limitations associated with state-centred analysis by directing our attention towards the state and non-state discourses that give meaning to borrowed law. It makes us ask who conducts these conversations, what are they about and how do they advance the regulatory objectives of key players? It suggests that the transfer of laws and ideas have similar effects, because discourse analysis collapses distinctions between legal prescription and legal description. Further, it allows us to assess what types of conversations are most likely to generate preference convergence and the adoption of imported legal ideas. We have seen that legal meanings transfer easily among members of interpretive communities that share similar epistemological and tacit understandings about the regulatory function of law.

Discourse analysis also acknowledges the role played by human agency and reminds us that the story of legal borrowing is inextricably bound up with legal development strategies.

Above all else this study has revealed the complexity of legal transplantation. There are simply too many processes and perspectives for one unified theory. The interpretive model proposed in this study is intended to complement and refocus, rather than supplant other theoretical approaches through which transplantation can be observed. In this way it can guide researchers towards the processes and exchanges that shape and
adapt legal imports into socialist-transforming East Asia (especially Vietnam). For example, there are complementary perspectives in Bourdieu’s ‘legal fields’, legal pluralism’s ‘semi-autonomous social fields’, the functionally complementary ‘estates’ of anthropological plural society models, relational transactions discussed by normative theorists and new institutional theory. An exploration of the compatibility or otherwise of these theories with the proposed model is beyond the scope of this study, though it is one that is needed to advance research in this area.

The interpretive model accounts for the main factors that shape the meanings given to imported laws: dialogical negotiations, effective communication, interpretive communities, strategic agendas and power relationships. As such it can guide researchers towards the processes and exchanges that shape and adapt legal imports in Vietnam. As an analytical tool it has heuristic utility elsewhere in socialist-transforming East Asia.

There are five parts to the interpretive model.

**One: contests and negotiations**

A consistent theme in this study is that contests and negotiations localise imported legal ideas. As previously suggested, rather than signalling transplant failure, mediation is the process through which preference convergence takes place. Dialogue and discord are necessary for legal transfers to enter and influence local regulatory mentalities and practices. In some circumstance these exchanges have creatively used imported ideas to imagine legal solutions to domestic problems that could not be resolved by local precepts and practices. But this proposition tells us little about the types of contests and negotiations that are most likely to generate preference convergence. We need a nuanced way to ascertain what kinds of dialogical exchanges effectively communicate foreign ideas into local contexts.

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Two: discursive and non-discursive communication

Discourse analysis has assisted this study by indicating the types of communication that are most likely to excite preference convergence. The technique of dissecting regulatory conversations into separate discourse modes has revealed how different groups use criteria or codes (epistemologies) to prioritise the relevance and value of imported ideas and laws. It will be recalled that this study used a semi-autonomous approach to discourse analysis to avoid the limitations imposed by Luhmann’s narrow legal-illegal interpretation of legal discourse (see chapter one).

Groups discussing the same law from different modes communicate with difficulty. For regulatory conversations to effectively convey the deep epistemological meanings underlying borrowed law, they must be conducted between interlocutors that share common or compatible criteria or modes of thinking. Case studies showed that laws transferred rapidly between foreign donors and Vietnamese lawmakers sharing a similar legal grammar, educational background and epistemological assumptions. Much was learnt about how regulatory conversations change the meaning of legal imports by assessing whether different discursive modes effectively conveyed ideas about laws. Case studies showed, for example, that neo-liberal-oriented legal drafters using legal arguments struggled to persuade National Assembly delegates and local-level regulators who were influenced by political and nationalist discourses. Yet case studies also showed that the boundaries separating discourse modes are highly porous and contextual. In public discourse, for example, legal drafters use legal arguments, but internally they deploy political, even nationalistic arguments to convince state and party leaders.

All this suggests that lawmakers deliberated laws from political, legal, moral and economic perspectives. What shapes their ultimate views is the importance they attached to particular modes of thinking about law and the receptiveness of these dominant modes to borrowed legal ideas.

A shortcoming with discourse analysis is its search for legal meanings exclusively in regulatory conversations. This constitutes a limitation in societies such as Vietnam where the state strongly mediates public discourse. Case studies showed the importance of sub-verbal discourse and tacit understandings in communicating views across highly asymmetric state-society relationships. For example, silent resistance eventually forced lawmakers to incrementally adjust imported land laws to suit local conditions. Further research is required to assess the capacity for non-discursive factors such as ritual and
symbolism as well as empathetic and sensory communication to influence legal transplantation.\(^5\)

**Three: interpretive communities**

Researchers also need to know who are conducting the regulatory conversations that localise imported law. Rather than individual ‘champions’ leading reform, the regulatory conversations with the most influence over legal imports primarily took place within and among interpretive communities. These groups function as abstract bonds that inform the way foreign donors and Vietnamese lawmakers select and localise foreign laws. The term ‘community’ does not necessarily signify a spatial location or a specific place where particular interpretive positions are followed. Nevertheless, some interpretive positions may cluster around certain state institutions and entrepreneurial groups, such as foreign investors associated with a chamber of commerce.

Imported ideas transplant rapidly among members of interpretive communities, because these groupings generate cooperation and shared epistemological assumptions about the nature of regulatory problems and the appropriate legal responses. Research shows that interpretive communities linking foreign donors and Vietnamese lawmakers are rather heterogeneous in their use of language and ideas. Nevertheless they generated common attitudes and assumptions about neo-liberal legal reforms by repeating particular storylines about the correct approach to regulatory problems.

Rather than identifying interpretive communities by their level of mutuality, it makes more sense to mark out boundaries between communities. Factors that differentiate communities include different criteria for validating imported ideas and different storylines used to inculcate similar views about the optimal forms of regulation. This is a negative definition that assesses differences in the dominant ‘modes’ of thinking and tacit understandings between those inside and outside interpretive communities.

The case studies in chapter seven and annex four demonstrate the decentred nature of legal transplantation. Much self-regulation takes place at the periphery of state regulation. This layered legal architecture in which state and non-state groups co-exist within the same geopolitical space is well described by legal pluralism.\(^6\) A difficulty with this conceptualisation is the inference that law somehow binds these socially

\(^5\) Philip Taylor has shown, for example, that some regulatory conversations in Vietnam are primarily ordered by religious, communal and emotional idioms that are communicated through symbolic, empathic and sensory means more readily than through written and oral messages. See Philip Taylor, 2004 *Goddess on the Rise: Pilgrimage and Popular Religion in Vietnam*, University of Hawaii Press, Honolulu.

diverse groups. Interpretive communities clustered around state institutions are constituted by their relationship with statutorily designated principles and practices. Non-state interpretive communities are more amorphous, because it is less clear what role state law plays in demarcating and securing boundaries. Further research is required to understand the limits to a ‘rule of law’ and transplanted legal norms ordering transactions within non-state interpretive communities.

Four: strategic discourse
Members of interpretive communities use discourse strategically to secure regulatory objectives. They co-opt and modify imported and local statutory norms, epistemologies and tacit assumptions to redefine internal regulatory boundaries and orient interactions with other interpretive communities. In some circumstances imported ideas are used to secure a blueprint for reform. CIEM legal drafters, for example, enlisted support from domestic entrepreneurs to promote market deregulation in the Enterprise Law. In other cases interpretive communities use ideas to camouflage institutional or personal interests. Line-ministries and provincial people’s committees, for example, used ‘state economic management’ ideas to preserve discretionary and frequently corrupt controls over market entry. In both cases shared epistemologies and tacit understandings shaped the way the interpretive community perceived the world, defined its self-interests and devised strategies to realise those interests.  

Five: power relationships order regulatory conversations
A central problem with conventional explanations for legal transplantation is their preoccupation with top-down reforms that locate power in the state. This study has shown that the sites of power acting on legal transfers are dispersed. Power is constituted by social relationships that exist even where the trappings of state power and coercion are absent. An understanding about the polycentric distribution of power is also necessary to correct the assumption in discourse analysis that the transferability of laws is entirely determined by communication.

State power plays a vital role in ordering the significance state and non-state players attach to regulatory conversations about imported laws. For example, interpretive communities associated with lead drafting agencies use state power to promulgate their ideas and modify or suppress opposing views. Power-sharing arrangements between
party and state organs determine which interpretive communities control the selection, codification and regulation of imported laws.

State controls over the formation of business associations, public discussions and electoral representation regulate the influence non-state agencies exert over imported legal change. Well-connected SOEs and non-state entities can consolidate their interests by procuring support from acquiescent state regulators. They use close (frequently corrupt) networks with regulators to harness state power for their institutional objectives. Small-scale entrepreneurs and urban residents, on the other hand, lack the resources to access state power and as a consequence struggle to influence the selection and implementation of imported laws.

Thus, state power has a significant role in influencing legal transplantation. This conclusion is hardly surprising since Marxist-Leninist ideology and state-society power-sharing arrangements place the state at the centre of social life in Vietnam. What is less expected is the diffuse and polycentric nature of state power. Far from a monolithic entity, state power is not unidirectional and responds to social forces seeking to influence the importation of law. While most entrepreneurial practices contain at least an element of state involvement, market power gives some entrepreneurs the capacity to dictate transactional rules that strongly mediate the way imported laws function in the marketplace. Restated in proposition form, there is a loose correlation between power-sharing arrangements within society and the range of interests that imported laws come to reflect.

**Applying the interpretive model in Vietnam**

The search for a new way to understand legal transplantation raises another equally profound question. Although a Western monistic view of law is unable to adequately explain legal transplantation into Vietnam, will the interpretive model provide a more contextually relevant concept of law? The central difference between these approaches is the reliance in the model on a decentred understanding of law. Rather than treating laws as universal instruments, the model locates law in state and non-state regulatory conversations. It also jettisons essentialist notions that laws have substantive meanings.

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7 This finding contradicts Gainsborough’s assertion that ideas are not especially important in securing self-interest. See M. Gainsborough, 2002 ‘Beneath the Veneer of Reform: The Politics of Economic Liberalisation in Vietnam’ 35 Communist and Post-Communist Studies 353, 357.
such as private rights, rule of law or procedural justice. 'Law is whatever people identify and treat their social practices as "law" (or recht, or droit, and so on).'\(^8\)

Rather than treating law as social fact, the model is more concerned with conceptualising social patterns. It rests on two notions. The first is that state regulation acquires social force through preference convergence and consensus. This ties in with the role interpretive communities play in reproducing common understandings about the meaning and role of imported and domestic rules. When enough key players share common understandings certain legal meanings become the authoritative or legitimate way of understanding rules. Relatively unmediated negotiation and deliberation are of paramount importance to the development of consensual understandings about rules. This notion differs from Western liberal 'consensual' explanations for legal compliance. According to H. L. A. Hart, for example, politically neutral legal apparatus generate social cohesion, cooperation and stability, by reconciling conflicting interests between primary and secondary legal rules.\(^9\) Compliance takes place when the secondary rules containing social mores coincide with primary laws (legislation and court rulings, for example).

Contrasting with this approach, the model does not limit law to organisational structures, such as legislatures, courts and lawyers that form the legal apparatus. Since the legal system consists of all social communication with some reference to law, regulation takes place where there is sufficient critical mass for discourse to induce repetitive behavioural change.

The second notion is that the usefulness of law is determined by its capacity to effectively communicate meaning.\(^10\) Since law is what people say it is, law is only useful if it is understood. Thus the main criterion for evaluating the effectiveness of legal transfers is whether they are maintained and reproduced in legal discourse. The content and quality of outcomes generated by the discourse, such as 'rule of law' and


social justice, are only secondary considerations that have meaning to those participating in specific discourses. The model understands laws as comprising pluralistic understandings where the most forceful and compelling narrative determines legal meaning. This notion differs radically from neo-liberal legalism, which invests laws with immutable, universal characteristics.

The conceptual shift in the model from state law to decentred legal discourses will encounter some formidable hurdles if it is to attract support from key government agencies and foreign legal reformers operating in Vietnam. State authorities are unlikely to welcome an analytical approach that invests non-state regulation with legal consequences. The model could hardly differ more from the extreme positivism that informs official Vietnamese legal thinking. It also leads policy makers down analytical pathways that expose the shortcomings in current legal reforms, such as the facile distinctions between legal instrumentalism and deregulation.

Foreign donors and investors promoting a procedural ‘rule of law’ are also unlikely to embrace a decentred understanding of law that recognises non-state property and transactional systems that challenge the universal legal solutions promoted by international trading treaties and legal practice. Foreign human rights groups and local dissidents may also worry that the model devalues universal standards of procedural and substantive justice against which government action is held accountable.

Yet as a descriptor, the model comes close to depicting the way many Vietnamese understand and interact with imported law. It challenges the notion that law is exclusively from the state and recognises that laws may have little connection to the state. It drains laws of intrinsic and immutable normative characteristics. Instead, it treats laws as being inseverable from everyday discussions with their own particular histories and logics. Without a hierarchy of laws, state and non-state rules can be syncretically applied to suit particular contexts. This means that laws have situational rather than universal meanings and deviations from rules remake the rule.

Most importantly for our study, the model offers a way to understand how an imported ‘rule of law’ may function in Vietnam. Everywhere ‘rule of law’ imagery provides a background morality for commercial regulation. But if legal meaning is primarily located in regulatory conversations, a ‘rule of law’ does not have to be strongly attached to formal aspects of law—such as rules and legal institutions. The background values of

a ‘rule of law’ can be realised in other ways that are functionally though not formally equivalent.

The development of a ‘rule of law’ in Vietnam is thus measured by assessing the extent to which imported ideas about legality have stimulated new thinking in state and non-state discourse about uniform, transparent and predicable ways to regulate commercial relationships. The prognosis for Vietnam is that domestic understandings about a ‘rule of law’ will dissolve into a myriad of regulatory conversations that reimagine Western liberal meanings in highly localised contexts. In this fragmented legal landscape, successful commercial regulation will require a combination of state rules with other approaches that are not exclusively or even apparently legal. A unifying ‘rule of law’ is unlikely to emerge until the state relaxes controls over social discourse and allows a broad range of non-state discourses to shape the selection and adaptation of imported commercial laws.
Annex One

Research Sources

Vietnamese Sources

Scholarly literature
A review of Vietnamese language law journals found few scholarly articles analysing law reform and even fewer discussing legal transplanting.\(^1\) The Institute of State and Law (National Centre of Social Sciences and Humanities) publishes a monthly law journal, *Nha Nuoc va Phap Luat*.\(^2\) Each issue contains approximately ten articles of 3,000-5,000 words written by academics and bureaucrats drawn from the Ministry of Justice, Hanoi Law University, Faculty of Law, Hanoi National University and Institute of State and Law.

Articles published in the journal fall into three basic categories. One, senior academic and government officials contribute polemical articles on a wide range of legal issues. With few exceptions, both the content and structure of these articles reflects party resolutions. They generally commence by reciting the achievements and difficulties faced by the party and state. After competing these formalities, the discussion generally turns to perceived ‘negative phenomena’, and invariably concludes that the legal system is incomplete and sub-optimal legal compliance is the fault of poorly trained or truculent officials and low levels of ‘legal consciousness’. The solutions invariably reside in new laws to fill the ‘gaps’, better-trained officials and raising the ‘legal awareness’ of the people. Articles by Professor Dao Tri Uc, the editor of the journal, exemplify this type of formulaic writing.\(^3\) As do many of the articles in *Hoc Tap (Study Review)* and *Tap San Tu Phap* (Court Review), which were used to chronicle the importation of Soviet legality during the 1960s and 1970s in chapter three.

Commencing in 2001, *Tap Chi Nghien Cuu Lap Phap* (Legislative Studies Review), which is published by the Office of the National Assembly, began to cautiously expand

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1 Journals reviewed *Luat Hoc* (Legal Studies); *Vietnam Law and Legal Forum*; *La Revue De Droit Vietnamien* (Vietnamese Law Journal); *Tap Chi Doi Song va Phap Luat* (Life and Law Journal); *Tap Chi Luat Hoc* (Legal Studies Journal); *Tap Chi Nghien Cau Lap Phap* (Legislative Studies Journal); *Tap Chi Phap Luat* – (Law Journal); and *Tap Chi Toa An Nhan Dan* (Court Journal). The author has used Vietnamese assistants to translate some legal texts.

2 Other legal journals include; *Tap Chi Doi Song va Phap Luat* (Life and Law Review) (Organisation of Vietnam Lawyers); *Tap Chi Luat Hoc* (Legal Studies Review) Hanoi Law University; *Tap Chi Toa An Nhan Dan* (Supreme People’s Court Review) (Supreme People’s Court); *Vietnamese Law Journal/Revue de Droit* (Vietnam Lawyers Association).

3 See e. g., Dao Tri Uc, 1995 ‘Moi Truong Phap Ly va Phap Luat Cua Su Phat Trien Kinh Te Tai Viet Nam’, (The Legal Environment in Relation to Economic Development in Vietnam), *Nha Nuoc va Phap Luat* (1) 3, 3-7.
boundaries of legal comment. Under the editorship of Nguyen Chi Dung, it carries articles that use non-Marxist-Leninist theories, such as Weberian theory, to explain legal processes. Articles from this journal have been particularly useful in tracing changes in legal and democratic thinking within the National Assembly.

Two, most legal articles annotate rather than analyses legislative reforms. They aim to answer practical legal questions concerning administrative or court procedures, or summarise current legal events such as seminars and treaty obligations.

Three, there is also an on-going series of articles that describe historical and ethnic minority legal practices. This body of work is discussed in annex four.

Articles published in *Luat Hoc* (Jurisprudence) (published by the Hanoi Law University) and *Vietnam Law and Legal Forum* (published by the Vietnam News Agency), though covering the same general subject matter, are rarely as long or theoretically ambitious as articles appearing in *Nha Nuoc va Phap Luat* and *Tap Chi Nghien Cuu Lap Phap*.

Finally, legal textbooks are generally oriented towards university teaching curricula. They are usually highly descriptive and only infrequently use case examples to illustrate legislative principles. A few research monographs have been published. Despite their length, they rarely provide more elaborate arguments or descriptions than legal articles. There are a few exceptions. For example, Dao Tri Uc’s, *Nha Nuoc va Phap Luat Cua Chung Ta Trong Su Nghiep Doi Mai* (1997) runs a sustained analysis of changes to legal theory brought about by economic reforms.4

### Non-scholarly literature

Non-scholarly journals are particularly fruitful sources of information about law, party ideology, business relationships, land use, administrative reform and corruption.

Articles in *Tap Chi Cong San* (Communist Party Review), for example, have been used to trace the evolution of ‘socialist legality’ into the ‘law based state’. Occasionally articles in *Nghien Cuu Ly Luan* (Journal of Theoretical Studies) illuminate the thinking of legal drafters and the causal links between party ideology and governmental attitudes to law. Three economic journals, *Nghien Cuu Kinh Te*, Vietnam Economic Review and Vietnam’s Socio-Economic Development, contain numerous articles concerning business behaviour and economic regulation. Three social science journals, *Xa Hoi Hoc,*

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Vietnam Social Sciences and Vietnam Studies, provide information about social institutions (i.e. families and businesses) and occasionally the interaction between law and society.

Numerous Vietnamese newspapers and journals publish stories chronicling social responses to transplanted law. For example, *Tuoi Tre, Sai Gon Giai Phong, Dau Tu, Thoi Bao Kinh Te Viet Nam, Thanh Nien* and *Sai Gon Tiep Thi* are informative sources about administrative reforms and complaints, court cases, land disputes and business associations. *Nhan Dan* and *Lao Dong* devote space to economic reform debates, such as the meaning of ‘socialist orientated market’ reform, party and administrative reform and corruption. Recent editions of these newspapers are available on-line through the vn-express web site.

Four English language publications, *Vietnam Investment Review, Vietnam News, Vietnam Economic Times* and *Sai Gon Times* often discuss the practical implementations of business laws and are available on searchable databases, such as the vn-express web site.

Finally, articles drawn from the vernacular press on a wide range of issues are translated in the *Viet Nam News*, a mass circulation daily. Similarly, the Foreign Language Information Service (FBIS) provides a searchable database (since 1996) of translated articles selected from the vernacular press. Its usefulness is limited, however, by its preoccupation with issues concerning national security and international relations.

**Non-Vietnamese sources**

A search of the ‘Bibliography of Asian Studies’ on-line data base in March 2005 revealed approximately 170 articles and book chapters about law and law related topic in Vietnam. At the same time the LegalTrac database disclosed about 130 articles. Mark Sidel’s review of foreign legal writings about Vietnam, though slightly out-of-date, still captures the flavour of this type of commentary. Most foreign legal commentaries about Vietnamese law are preoccupied with foreign trade and investment. Articles are primarily written from the doctrinal perspective of legal practitioners and pay little attention to comparative theory or Vietnamese perspectives. Most of the foreign articles discussing law reform were written by authors connected with multi-lateral funding agencies (i.e. the World Bank and UNDP) and unsurprisingly

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Harvard Research Guides to Asian Law; also see Penelope Nicholson, 2003 ‘Vietnamese Bibliography’ 22 *The Legal Reference Services Quarterly* (2/3) 150.

analyse reforms from the perspective of neo-liberal legalism. Other articles locate the discussion of law reform in the wider ‘law and development’ debate.\(^6\) Reports commissioned by funding agencies are especially useful for detailed case studies and empirical data. Information gleaned from these sources has been used to profile state and non-state institutions, legal reform initiatives and businesses responses to imported laws.

In summary, scholarly Vietnamese legal sources provide detailed, if not always intelligible accounts of theoretical issues concerning law and ideology, but few insights into other legal areas. Although non-legal scholarly material rarely directly discusses legal transplantation, it provides valuable insights into social, legal and political processes. Newspapers furnish a broad array of information about social interaction. But their usefulness is limited by political controls that limit critical analysis of legal reforms and the sustained reporting about social problems. Without follow up stories it is difficult to construct coherent cases studies (although investigative journalism is beginning to emerge).

**Legislation**

Every effort has been made to ensure that the most recent legislation (up to March 2005) is cited in the study. Most central level legislation is available in the Official Gazette (*Cong Bao*). Unless otherwise stated, the English language translations of legislation are based on the official English versions of *Cong Bao* published by the Vietnam Law and Legal Forum, a division of the Vietnam News Agency. In some cases commercial legislation has been taken from the ‘Foreign Investment Laws of Vietnam’; a translation of selected legislation published by Phillips Fox, an international legal firm with offices in Hanoi and Ho Chi Minh City. Sub-legal, but highly authoritative ‘official letters’ issued by central ministers are not reproduced in *Cong Bao*. Many ‘official letters’ relating to foreign investment and related matters are translated in the Phillips Fox publication. Finally Baker McKenzie publishes the Indochina Law Quarterly, which provides a comprehensive digests of central (and selected provincial) legislation in Cambodia, Laos and Vietnam.

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Legislation promulgated by provincial authorities is more difficult to obtain. In most cases translated copies were derived from services companies connected with local authorities.

**Interviews**

Due to the paucity of relevant legal literature, much of the information used to construct case studies was gleaned from hundreds of interviews conducted from 2000-2005 with government officials, academics, private lawyers and entrepreneurs. This form of research is both rewarding and difficult.

**State managed legal research**

Decree No. 103/1998/ND-CP on the Management of Legal Cooperation with Foreign Countries (1998) regulates legal research cooperation between Vietnamese and foreign, non-Government organisations, including universities. Not only does the Decree require Government approval for all cooperation projects, research is only permitted in a narrow range of areas that either support approved legal aid projects or addresses topics listed in the National Assembly legislative program. It is unclear whether the Decree extends to ‘unattached’ legal researchers not directly associated with formal research projects. Either way, this provision gives further cause for government employees to exercise caution when speaking on or off the record to ‘unattached’ foreign researchers. Without recourse to foreign funding, it is now virtually impossible to convince legal institutions to sponsor foreign legal researchers. Interviews are as a consequence primarily arranged through donor funded legal projects or via personal connections and cooperative local institutions. These constraints not only limit access to, but also the range of official sources.

Contact has primarily been made through Vietnamese lawyers working in domestic and foreign law firms, researchers in the Supreme Court and academics at the Hanoi Law University and Faculty of Law, Hanoi National University. Informal interviews arranged through mutual friends generally yielded the most precise and critical information. Even unofficial meetings technically breach public service regulations. As a consequence, the names of some state official have not been disclosed. Taken together these constraints made case studies largely self-selecting according to the availability of cooperative informants.

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7 Some interviews were conducted prior to 2000.
Interviews conducted with state officials about bureaucratic corruption illustrate some of the above-mentioned difficulties. Because there are few established methodologies suitable for interviewing officials on sensitive political-legal issues, most of the techniques used were developed by trial and error. Unsurprisingly, it is difficult to persuade officials in unofficial, much less official meetings to discuss corruption. Where questions presupposed legal responsibility, answers were often defensive and uninformative. This reticence was partially overcome when the psychological tone of the questions shifted from accusation to concern (tinh cam). For example, where questions asked about the practical difficulties of implementing laws, some informants illustrated their answers by discussing the types of behaviour that constitute actionable corruption.

In order to understand social attitudes to corruption, it was also necessary to conduct a series of focus group interviews with representative groups of Hanoi residents. Questions were semi-standardised, which means that they consisted of open-ended questions with a flexible design. This method has been particularly useful in comparative interviews, where the same range of information is sought from different informants. Admittedly, quantitative surveys probably limit the risk of cultural bias, however, legal research does not easily lend itself to the types of questions that are susceptible to statistical measurement.

Questions were translated into Vietnamese and interpreters conveyed focus group debates and consensus opinions. For example, informants were asked to place in order of their moral and social reprehensibility, ten types of corrupt behaviour. They were also asked to critically assess three hypothetical state-society relationships.

The importance of flexible interview techniques is further demonstrated by multiple interviews with approximately sixty directors of private companies from March 2004 until March 2005 (see annex six). Some interviews were arranged through personal contacts and others with the assistance of the Hanoi office of UNEDO. Questions were designed to map the congruence between normative and organisational principles in the Enterprise Law and practice on the ground. Questions regarding legal compliance received affirmative responses, which is not surprising. When the same questions were relocated from the particular to the general, most informants changed their responses, suggesting instead widespread disregard for the Enterprise Law. This perception was

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8 There are a number of publications about cross-cultural interviewing techniques. See Henry Ehrmann, 1976 Comparative Legal Cultures Prentice-Hall, Englewood Cliffs, N.J. Most interviews conducted in Vietnamese use the assistance of Vietnamese interpreters.
corroborated by information gleaned from state officials and private lawyers. When knowledge of corporate principles was built into questions, informants either refused to respond or suggested that technical issues were the preserve of other (usually unidentified) company officials. In summary, flexible open-ended questions conveyed the impression that corporation law is both poorly understood and widely disregarded by private companies. A standard questionnaire would have elicited quite different and probably misleading replies.

**Foreign donor supported legal projects**

Much of the information gained about the formulation and implementation of imported laws was gained during a series of donor funded legal projects. They are listed below:

<table>
<thead>
<tr>
<th>Year</th>
<th>Project Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>World Bank, Private Sector Legal Development Identification Project (March).</td>
</tr>
<tr>
<td>1999</td>
<td>Mekong Project Development Facility, (a World Bank research organisation) (September). Researched and wrote a report about the use of ‘state economic management’ by the Vietnamese Government to subordinate private rights in the Company Law 1990.</td>
</tr>
</tbody>
</table>

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9 Interviews with private businessmen have been conducted with the assistance of private lawyers. Official permission to conduct large-scale interviews has been consistently refused.

1994 AIDAB (precursor of AusAID) (June-October): Co-wrote a report surveying legal training in Vietnam and designed a Masters of Commercial Law cooperation program for the Hanoi Law University.
### Annex Two

#### Table of major commercial laws since 1987

<table>
<thead>
<tr>
<th>Law</th>
<th>Dates law approved and last amended</th>
<th>Categories of business entities regulated by the law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreign Investment</td>
<td>Approved 1987, Amended 2000</td>
<td>Joint-venture entities, Foreign owned entities, Business co-operation contracts, Build-operate-transfer projects</td>
</tr>
<tr>
<td>Companies</td>
<td>Enacted 1990, Amended 1994, Replaced 2000</td>
<td>Joint-stock companies, Private limited liability companies</td>
</tr>
<tr>
<td>Law on Corporate Income Tax</td>
<td>Enacted 1997</td>
<td>All business entities</td>
</tr>
<tr>
<td>Law on Value Added Tax</td>
<td>Enacted 1997, Amended 2000</td>
<td>All business entities</td>
</tr>
<tr>
<td>Enterprise Law</td>
<td>Approved 1999, Enacted 2000</td>
<td>All domestic private enterprises and enterprises with less than 30% foreign equity.</td>
</tr>
<tr>
<td>Civil Code</td>
<td>Approved 1995</td>
<td>All business entities</td>
</tr>
<tr>
<td>Commercial Law</td>
<td>Approved 1997</td>
<td>All business entities</td>
</tr>
<tr>
<td>State Enterprises</td>
<td>Approved 1995, Amended 2003</td>
<td>Entities with State invested capital (State corporations, public service enterprises, and business enterprises)</td>
</tr>
<tr>
<td>Co-operatives</td>
<td>Approved 1996</td>
<td>Co-operatives</td>
</tr>
<tr>
<td>Law on Customs</td>
<td>Approved 2001</td>
<td>All business entities</td>
</tr>
<tr>
<td>Law on Credit Institutions</td>
<td>Approved 1997</td>
<td>Banks and other financial institutions</td>
</tr>
<tr>
<td>Bankruptcy Law</td>
<td>Approved 1993, Amended 2004</td>
<td>All registered business entities</td>
</tr>
<tr>
<td>Commercial Law</td>
<td>Approved 1997, Amended 2005</td>
<td>All business entities</td>
</tr>
<tr>
<td>Law on Special Sales Tax</td>
<td>Approved 1998</td>
<td>All business entities</td>
</tr>
<tr>
<td>Law on Export Import Duties</td>
<td>Approved 1991, Amended 1998</td>
<td>All business entities</td>
</tr>
<tr>
<td>Land Law</td>
<td>Approved 1987, New Law 2003</td>
<td>Applies differently to different entities</td>
</tr>
<tr>
<td>Law on Insurance</td>
<td>Approved 2000</td>
<td>All registered business entities</td>
</tr>
<tr>
<td>Law on Petroleum</td>
<td>Approved 1993, Amended 2000</td>
<td>All business entities</td>
</tr>
<tr>
<td>Law on Construction</td>
<td>Approved 2003</td>
<td>All business entities</td>
</tr>
<tr>
<td>Labour Code</td>
<td>Approved June 1994, Amended 2002</td>
<td>Applies (but not equally) to all entities</td>
</tr>
<tr>
<td>Promotion of Domestic</td>
<td>1994, Amended April 1998</td>
<td>All domestically owned business entities</td>
</tr>
<tr>
<td>Law</td>
<td>Dates law approved and last amended</td>
<td>Categories of business entities regulated by the law</td>
</tr>
<tr>
<td>-----------------------------------------------</td>
<td>-------------------------------------</td>
<td>----------------------------------------------------</td>
</tr>
<tr>
<td>Investment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ordinance on the Recognition and Enforcement of Foreign Arbitration Awards in Vietnam</td>
<td>1995</td>
<td>All business entities</td>
</tr>
<tr>
<td>Ordinance on Commercial Arbitration</td>
<td>2003</td>
<td>All business entities</td>
</tr>
<tr>
<td>Competition Law</td>
<td>2004</td>
<td>All business entities</td>
</tr>
</tbody>
</table>
Annex Three
Democratic Representation

Especially after the Seventh Party Congress in 1991, party leaders have increasingly invoked images of popularly elected legislatures and public accountability to depict the National Assembly (NA) as a democratic institution. At a rhetorical level this discourse appeared to signal an ideological shift from orthodox socialist democracy \( (dan \ chu \ xa \ chu \ nghia) \) towards democratic representation. It will be recalled that socialist democracy emphasised Lenin’s proletariat dictatorship over bourgeois notions of popular representation through the ballot box. Revolutionary imagery now co-exists with fashionable democratic symbolism, such as a ‘state of the people, by the people and for the people’ \( (nha \ nuoc \ cua \ dan, \ do \ dan \ va \ vi \ dan) \), which evokes a modern, internationally integrated society.

Contrasting with the revolutionary exuberance of the 1980 Constitution, Leninist terminology only vaguely resonated in the 1992 Constitution. Denoting a shift from class-based rhetoric, the expressions ‘working people’s \( (nhan \ dan \ lao \ dong) \) mastery’ and ‘socialist collective mastery’ \( (lam \ chu \ tap \ the \ xa \ hoi \ chu \ nghia) \) were substituted in the 1992 Constitution with ‘people’s \( (nhan \ dan) \) mastery’. The 1992 Constitution quietly dropped references to proletariat dictatorship, although this concept remained firmly embedded in party literature. Some writers even attempted to reconfigure democratic centralism as a democratic creed. One fatuously concluded that since Ho Chi Minh usually placed the word ‘democracy’ before ‘centralism’ in his writings, the party always promoted people’s freedoms.

Party theorists coined new democratic-sounding terms to replace class-based phraseology. For example, some commentators substituted \( chu \ quyen \ nhan \ dan \)

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1 Papers presented at a scientific forum on democracy in Vietnam, convened by the editorial board of \textit{Tap Chi Cong San} (Communist Review) in 1990, uniformly followed orthodox socialist democracy ideals. The liberal democratic images promoted at the Seventh Party Congress in 1991 were smuggled into party rhetoric under the rubric of Ho Chi Minh thoughts. See e. g. Nguyen Dang Quang, 1991 ‘Fundamental Contents of the Democracy Concept’ \textit{Vietnam Social Sciences} (1) 69–73.

2 The term was formally adopted by an amendment to the 1992 Constitution made by Resolution No. 51 2001 QU10 on Amendments and Supplements to a Number of Articles of the 1992 Constitution of the Socialist Republic of Vietnam, 2001, article 1.

3 The term ‘collective mastery’ appeared 17 times in the 1980 Constitution, but only six times in the 1992 Constitution. Also see Constitution 1992, article 3. Also see article 9 enjoining the Fatherland Front to ‘encourage the people to exercise their rights as masters’.

(people’s sovereignty) for ‘collective mastery’ and ‘people’s mastery’. Others used *phap luat lay chi chung cua xa hoi* (law reflects the general will of society) to replace ‘law reflects the will of the ruling class’.\(^5\) According to these reformulations, ‘the people’s right to mastery is institutionalised into law and carried out in a legal framework.’\(^6\) Collectivism is no longer promoted as the path to self-perfection and a socialist utopia. Instead, people’s mastery symbolises popular participation in state administration through elected candidates and membership of mass organisations.

Some officials working in the Office of the National Assembly believe that democratic imagery is largely (although not entirely) used rhetorically to present a ‘democratic face’ to Western donors sponsoring institutional reforms and foreign and domestic critics.\(^7\) They stress that democratic ideals should be assessed against the party’s insistence that democratic processes in the NA remain under party leadership (see chapter seven).\(^8\) Party leaders have consistently voiced the concern that ‘unlimited’ democracy may excite independence from party leadership.\(^9\) They insist that ‘democracy must go together with order and discipline; democracy must not be developed in an extremist and one-sided manner, and discipline, centralism and unity are not to be belittled.’\(^10\) Official writings reject unlimited democracy as ‘peaceful evolution’ (*dien bien hoa binh*)—an attempt by Vietnam’s enemies to achieve through peaceful means what they could not achieve through force, that is, to remove the party from power.\(^11\)

The transfer of democratic liberal ideology into Vietnam faces considerable opposition from the dominant socialist ideology. It is argued in chapter seven that for state

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\(^5\) See Nguyen Dang Dung, 2001 ‘Phap Luat Khong Chi La Cong Cu Cua Nha Nuoc’ (Law is Not Only an Instrument of the State) *Nghien Cua Lap Phap* (Legislative Studies) 11.

\(^6\) Do Muoi, 1995b *supra* 158, 191. Also see Dao Tri Uc, 2001 ‘Xay Dung Nha Nuoc Phap Quyen Xa Hoi Chu Nghia Duoi Su Lanh Dao Cua Dang’ (Building Up the Law-Based-State Under the Leadership of the Communist Party) *Nha Nuoc va Phap Luat* (7) 3–4.


\(^8\) See Central Committee, 2001 ‘The Communist Party of Vietnam Central Committee’s Political Report to the 9th National Party Congress’, Chapter VIII.


\(^10\) Nguyen Phu Trong, 1996 *supra* 24, 27.

\(^11\) The anti-peaceful evolution campaign began in 1994 and focused on attempts to introduce multiparty democracy and social democratic ideology. See Pham Thanh Ngan, 1998 ‘The People’s Army Improves Its Political Skill and Intellectual Capacity to Successfully Implement the Party’s Line in the New Period’ *Tap Chi Quoc Phong Toan Dan*, February, 6–9, trans., FBIS East Asia Daily Report, 98–85, 26 March.
legislative bodies to acquire more popular legitimacy, political discourse must open to non-party voices. But democratic pluralism is resisted, because it challenges party assertions of moral superiority. As we have seen, the party has historically generated legitimacy by monopolising the formulation of the political morality. Without a political morality supporting effective choice between different outlooks, there is little social pressure on the party to increase representative democracy.

The preceding discussion implies that democratic liberal ideals of representative democracy have not deeply penetrated the dominant political-legal ideology. Party leaders appropriate democratic liberal symbols for political advantage, but political pluralism and multi-party democracy remain inimical to core socialist ideology. Public discourse outside the party-state orbit is discouraged, effectively quarantining socialist democracy ideology from competing ideologies. Chapter seven argues, however, that market forces are compelling the party to experiment with an Asian-style of democracy (or state corporatism) in which authorities bestow favours on social groups in order to participate in lawmaking activities.

Civil rights

The question of how much space governments should allow citizens to pursue personal interests varies among and within all modern states. There are conflicting messages in Vietnamese ideological writings whether the party recognises legal space beyond the party and state orbit. Xa hoi cong dan (citizen society) theory locates legal obligations

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12 In the years immediately following do moi reforms, writers and intellectuals were encouraged to criticise middle level party cadres, question socialist collectivism and even party state relationships. Some cadres suggested multi party democracy. This flirtation with political openness was cut short in 1989 when the collapse of socialism in Eastern Europe threatened party interests in Vietnam. See Ho Anh Thai, 1998 ‘Creative Writers and the Press in Vietnam Since Renovation’, in David Marr ed., Mass Media in Vietnam, Political and Social Change Monograph 25, Research School of Pacific and Asian Studies, Australian National University, Canberra, 59–63. Those promoting representative democracy, such as dissident intellectual Ha Si Phu (Nguyen Xuan Tu), are placed under house arrest and threatened with charges of treason. Ha Si Phu drafted an open letter appealing for more democracy. See Human Rights Watch, 2001 ‘World Report, Vietnam’ <www.hrw.org/wr2k1/asia/vietnam.html>.


14 Le Minh Thong, 2000 supra 1–2.
and civil rights in citizenship. It explicitly rejects the substantive ‘rule of law’ notion that personal legal rights (civil rights) are inherent individual (ca nhan) rights.  

The party and state stress that citizens’ rights are contingent on broader collective or public benefits. Party commentators condemn ‘individualism’ (chu nghia ca nhan) as a source of moral decay. Its origins are attributable to a diverse mix of ‘feudalism’, Western petty bourgeois thought, and even command planning. Individualism is depicted as promoting self-interest to the detriment of ‘collective’ or ‘community’ benefits and eroding community morality. Do Muoi echoed this thinking when he said:

Freedom has its limitation. The limitation is for the righteous benefit of the community, the development and improvement of society. Laws defining citizen rights are not for the benefit of a single person or a group of people. Citizens’ rights and duties are determined by the level of economic development, culture and education. When citizens follow the Constitution and the laws, they are actually enjoying true freedom.  

Responding to rural unrest and foreign criticism, the Party Central Committee issued Decree No. 29 on Grassroots Democracy 1998 to guide the establishment of ‘grassroots democracy’ (dan chu tan goc). It formalised reforms that made village officials more publicly accountable through greater procedural transparency. In establishing disclosure and compliance procedures, ‘grassroots’ democracy seemed to invest individuals, rather than collectives, with civil rights to resolve wrongdoing.

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15 It rejects the notion that natural or customary rights exist outside the party–state orbit. See Le Hong Hang, 1998 Giao Trinh Ly Luu Nha Nuoc va Phap Luat (Text Book on State and Law), Nha Xuat Ban Cong An Nhan Dan, (People’s Police Publishing House), Hanoi, 437.


17 In Vietnam, social control is still widely perceived as a problem of state control. The notion of due process that values the primacy of the individual does not enjoy support at either an elite or local level. See interviews with Phan Huu Chi, supra. Also see Nguyen Chi My, 1989 ‘Chu Nghia Ca Nhan va Cuoc Dau Tranh De Khac Phuc No’ (Individualism and the Struggle Against It) Tap Chi Cong San (6), 36, 37–38; Pham Huy Ky, 1999 ‘Chu Nghia Ca Nhan: Dac Diem Bieu Hien va Bien Phap Khac Phuc’ (The Ways of Avoiding Individualism in Society) Nghien Cuu Ly Luan (Theoretical Studies) (2) 46, 46–48.


Some commentators skeptically dismissed these reforms as *su chung luat* (legal vaccinations) designed to forestall far-reaching change. They argue that the state concessions to social pressure do not necessarily indicate movement towards civil rights. Concessions frequently evaporate once trouble subsides. Progress towards civil rights requires a profound change in state toleration of political ‘lobbying’ (*chay lo thu tuc*), demonstrations and ultimately political pluralism.

According to this account, ‘grassroots’ democracy sanctions spontaneous demonstrations as a safety valve for the release of public frustration, without recognising a state-society compact where public dissent is seen as a legitimate means of influencing government policy. Civil rights are bestowed by benevolent regulators and are not considered inherent or achieved rights. Party leaders only reluctantly (if at all) recognise the possibility that civil rights are generated by autonomous social interaction between the state and social organisations such as religions, workplaces, unions and professional organisations (see chapter seven).

Some academic writers argue for a dialogical relationship between law and social ethics in which each acts on the other. Laws are no longer merely ‘the servants of state policy’, they are ‘tools for organising or constraining public power’ (*tinh phap ly trong viec to chuc quyen luc nha nuoc*). This narrative rejects the extreme legal positivism promoted by socialist legality in favour of the notion that ‘states do not “create” law, they only formalise social principles and conduct’. The final report of the Legal Needs Assessment (LNA), drafted under the auspices of the Ministry of Justice in 2002, went further by advocating the ‘principle that citizens may do everything not expressly prohibited by law’.

It is unlikely this declaration in the LNA signals a fundamental shift in official political-legal ideology, since it was largely conceived by foreign lawyers advising the Ministry

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22 See Hoang Thi Kim Que, 1999 ‘Mot So Suy Nghí ve Moi Quan He Giua Phap Luat va Dao Duc Trong He Thong Dieu Chinh Xa Hoi’ (Some Thoughts on the Relationship between the Law and Ethics in the Social Regulatory System) *Nha Nuoc va Phap Luat* (7) 16–19.
23 Author Unknown, 1996 supra 112–118; Pham Duy, 2000 ‘Phap Luat Thuong Mai Viet Nam Truoc Thach Thuc Cua Qua Trinh Hoai Nhap Kinh Te Quoc Te’, (Commercial Law Faces the Challenges of International Economic Integration), *Nha Nuoc va Phap Luat* (6) 9, 14–15.
24 See e.g. Nguyen Duy Quy, 1994 supra, 33.
25 According to informants from the Centre of Applied Legal Research in the Ministry of Justice, the final LNA report was largely drafted by John Bentley and Theodore Parnell, both were UNDP legal advisors. See Ministry of Justice, 2001 ‘Comprehensive Legal Needs Assessment for the Development of Vietnam’s Legal System from 2001-2010’, unpublished paper, November, Hanoi, 25.
of Justice. The final report of the LNA has not been officially accepted by the Politburo. A highly technical Legal Sector Development Strategy, released by the Ministry of Justice in 2005, does not mention the ‘rule of law’ ideals that were so prominently displayed in the LNA report. **26**

Even progressive legal thinkers, such as Pham Duy Nghia, believe that the official political-legal ideology does not yet accept the notion that ‘we can do anything that the law does not prohibit’ (co the lam tat ca nhung gi luat khong cam). **27** He considered this ideal a ‘melody for the future’ (nu van dieu nhac cua tuong lai). A more representative understanding of civil rights is found in article two of the Civil Code 1995. It protects civil rights in descending order of priority: state, communal (cong cong) and individual. **28**

To recap, civil rights ideals have not displaced the dominant socialist legality ideology in Vietnam. The party vigorously opposes the notion that civil society can shape the ethical basis of legal rights. Socialist political-legal ideology supports party monopolisation of the content and extent of civil rights with a highly positivistic doctrine that only countenances rights emanating from the state. Ideological discourse, moreover, does not support the democratic liberal view that in pluralistic societies no single group or idea should predominate. As a consequence, the party and state do not recognise inherent or socially generated civil rights. **29**

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**26** The LNA reports were sent to the Prime Minster and Politburo for approval in November 2002. After a long silence the party Internal Affairs Committee, incollaboration with state bodies stripped the LNA of its neo-liberal legal context and drafted a narrow legislative agenda called the Legal Sector Development Strategy.

**27** Pham Duy Nghia, 2000 ‘Phap Luat Thuong Mai Viet Nam Truoc Thach Thuc Cua Qua Trinh Hoi Nhap Linh Te Quac Te’ (Commercial Law Faces the Challenges of International Economic Integration) Nha Nuoc va Phap Luat (6) 9-18; Le Minh Thong, 2003 ‘Mot So Van De Phap Ly Cua Qua Trinh Toan Cau Hoa’ (Some Legal Issues on Globalisation) Tap Chi Nghien Cuu Lap (1) 65-75.

**28** The term ‘cong cong’ translates as ‘public’, but is construed as meaning ‘communal’ interests. This interpretation was gleaned from interviews with Bui Thi Mai Lan, Legal Expert, Department of Civil Law, Ministry of Justice, Hanoi, March 1999.

Annex Four
Sketching Party and State Structures

The Communist Party of Vietnam (CPV)

Communist party structures have remained remarkably stable since the late 1940s. Recalling the 1959 and 1980 Constitutions, the 1992 Constitution describes the party as the ‘force leading the state and society’. But there are few other references in the law defining the relationship between the party and state.

The Party Statute 1996, which is not a legal document, organises the internal party structure and provides some basic principles governing party and state relationships. At the central level, the politburo (bo chinh tri) and central committee (uy ban trung uong) lead the party. An extensive branch network mirrors the four state levels: central, city/provincial, district/ village, and ward/commune. The politburo (comprising 18 to 20 persons) makes decisions that bind all party members. Below this level the central committee (comprising approximately 180 persons) meets two or three times a year to formulate detailed policy and resolutions regulating every aspect of Vietnamese society. The central committee acts as a permanent standing committee for the National Congress of Delegates (Dai Hoi Dang Toan Quoc) held every five years. About 1200 representatives are selected from party members to sit in the National Congress. Non-party members are largely excluded from the process.

Numerous committees (uy ban), commissions (ban) and offices (van phong) conduct the daily business of the central committee. Among the most powerful is the Central Organising Commission (Ban To Chuc Trung Uong), which appoints party officials and nominates candidates for senior state positions including the prime minister, ministers, senior judges and procurators. The Central Internal Affairs Commission (Ban Noi Chinh Trung Uong) coordinates and oversees law and security matters for the party, and closely monitors state institutions such as the National Assembly, Supreme People’s

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2 Constitutions preceding the 1992 Constitution described the party as the ‘only force leading society’.
4 See Party Statute 1996, articles 9-17 for a description of the party organisation.
5 See Quan Xuan Dinh, 2000 ‘The Political Economy of Vietnam’s Transformation Process’ 22 Contemporary Southeast Asia (2) 360, 364.
Court, Supreme People’s Procuracy, Ministry of Justice and other key bodies concerned with law and order.  

Party decision-making reflects democratic centralism (tap trung dan chu), the organisational doctrine devised by Lenin to ensure that senior party leaders dominate inferior party branches (see chapter three). Commentators variously describe high-level party decision-making as consensual or nhat tri (unanimity). 

Mass organisations

In contrast to the vague legal relationship governing party and state relationships, the Law on the Vietnam Fatherland Front 1999 clearly delineates the connections between mass organisations and state institutions. While article 6 of the law requires the Fatherland Front to 'promote prominent individuals in various social classes, strata, ethnic groups and religions to mobilise the people to fulfil the political, socioeconomic, national security and defence and external affairs tasks of the state.' Separate mass organisations are formed for each social grouping. Organisations represent people according to age (Youth League and Senior Citizen Organisations), gender (Women’s Union), industries (Bankers Association), workers (Vietnam General Confederation of Labour (VGCL)), employers (Ho Chi Minh City Union of Associations of Industry and Commerce (UAIC)) (Hiep Hoi Cong Thuong Thanh Pho Ho Chi Minh) and farmers (Hoi Nong Dan).

Most (but not all) mass organisations mirror party structures with central, city/provincial and district/village branches. They perform two main functions: ‘motivate the public to implement the party’s lines and policies. At the same time, they must supervise their implementation.’ Party control over mass organisations is maintained by a policy that

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9 Decree No 50/ND-CP Detailing the Implementation of a Number of Articles of the Law on Vietnam Fatherland Front, 2001, articles 2, 5, 21.

10 Law No. 14 QH10 on Vietnam Fatherland Front 1999, article 3.


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only permits party candidates to stand for senior positions and membership of internal ‘party groupings’ (dang doan).  

**Developing state institutions**

The 1946 Constitution based the foundations for the modern Vietnamese state on Western state institutions: a National Assembly, Presidency, Executive and Court structure.  

Soviet influence appeared in the 1959 Constitution, which retained the original Western organisational structure, but added a people’s procuracy (Vien Kiem Sat Nhan Dan). The 1980 Constitution drew more deeply from socialist models. Based on the Soviet Constitution 1977, it adopted the Soviet ‘collective presidency’ and abolished the presidency left vacant since Ho Chi Minh’s death in 1969.  

The new Council of State functioned as head of state and performed many legislative functions devolved in the Constitution to the National Assembly. Even terminology changed to reflect Soviet practices. The Government Council (Hoi Dong Chinh Phu) was given the Soviet designation Council of Ministers (Hoi Dong Bo Truong). In one of the few deviations from the Soviet template, the National Assembly retained powers to approve (and remove) the leaders of state bodies, but it otherwise resembled the Supreme Soviet.  

Later, when Soviet influence declined, the National Assembly adopted a new Constitution in 1992 (the fourth since 1946). Reflecting the increased importance of legislation in post- doi moi society, the new Constitution invested the NA with powers exceeding those given to Soviet and Chinese legislative bodies. It rearranged powers and responsibilities among the five branches of the state (National Assembly, President, People’s Courts, People’s Procuracy and Government (executive). It also re-established

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12 See Communist Party of Vietnam Statute 1996. For a discussion about contemporary party leadership over mass organisations see Nguyen Duc Trieu, 2001 ‘Su Lanh Dao Cua Dang Doi Voi Hoi Nong Dan Viet Nam-Mot Nhan To Quyet Dinh Thang Loi Su Nghiep CNH, HDH Nong Nghiep, Nong Thon’ (The Leadership of the Party towards the Vietnam Peasants’ Association—a Factor Deciding the Victory of Agriculture and Rural Industrialisation and Modernisation’ Tap Chi Cong San (3) 25, 25-28; See Vu Oanh, 1993, supra 3.  
14 See David Lane, 1985 State and Politics in the USSR, Blackwell, Oxford.  
the four levels of state governance: central, city/provincial, district/ village, and ward/commune.

The 'concentration-of-power' doctrine that guides state power distribution is best understood as specialisation, rather than separation of powers. As in democratic liberal countries, specialisation is incomplete and the legislature and government perform overlapping functions (administration, legislation and quasi-judicial). The government, for example, issues significantly more legislation than the NA and performs many quasi-judicial functions such as resolving land disputes and administrative petitions. It is an unrealistically simple constitutional model that sees the legislature only legislating, and the executive only implementing laws. What protects private rights against abuses in democratic liberal countries are checks and balances preventing the accumulation of power in any one state institution. This chapter explores whether the accumulation of power in the party threatens private legal rights in Vietnam. Subsequent chapters investigate how power imbalances between the NA and executive change the meaning of imported law.

The contemporary institutional framework

The National Assembly (Quoc Hoi)

In constitutional theory, state power is unified (thong nhat) and centralised (tap trung) in the National Assembly. It sits as a unicameral body and in principle exercises ultimate constitutional and legislative power. Citizens over the age of 18 elect 500 delegates for five-year terms.

The NA performs three main functions: legislating, supervising other state organs and approving socioeconomic plans and state budgets. Before doi moi reforms it sat infrequently, leaving the Government Council (Hoi Dong Chinh Phu) and ministers to

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17 In discussing the centralisation of NA powers, Nguyen Cuu Viet referred to Vietnamese translations of Montesquieu’s De L’Esprit Des Lois (Thinh Than Phap Luat) published by the Education and Law Publisher, Hanoi University of Social Sciences and Humanities, 1996 and Rousseau’s ‘Social Contract’. Both texts were originally translated during the late colonial period. See generally Nguyen Cuu Viet, 1997 ‘Nhan Thuc Ve Nguyen Tac Tap Quyen va Vai Khia Canh Trong Van De Ve Quan He Giua Lap Phap va Hanh Phap O Nuoc Ta Hien Nay’ (Some Perceptions of the Principles of “Unity of Power” and Few Aspects of the Relationship Between the Legislative and Executive of Bodes of Vietnam Today), Nha Nuoc va Phap Luat (2) 44, 47-49.

18 In 1997 the National Assembly and Standing Committee issued nine laws and ordinances, the Government issued 57 decrees and ministers promulgated 357 sub-ordinate rules. See Truong Thanh Duc, 1999 ‘Nhung Bat Cap Trong Viec Xay Dung va Ban Hanh Van Ban Quy Pham Phap Luat’ (Defects in Drafting and Promulgating Legal Instruments) Nha Nuoc va Phap Luat (2) 22, 24.

19 See Dao Tri Uc, 2001 ‘Xay Dung Nha Nuoc Phap Quyen Xa Ho Chi Nghia Duoi Su Lanh Dao Cua Dang’ (Building Up the Law-Based-State Under the Leadership of the Communist Party) Nha Nuoc va Phap Luat (7) 3-4.

rule through administrative edicts. 21 With the increasing ideological importance of legal formalism (discussed in chapter three) the NA has become a highly active legislature, enacting numerous codes (bo luat), laws (luat) and resolutions (nghi quyet) each year. Best understood as a governing or ruling committee, the NA Standing Committee (SC) controls the NA with broad managerial powers that are reminiscent of the Soviet Presidium—the original model for the SC. 22 For example, the SC is the supreme lawmaking body during NA adjournments. Between 1995 and 1998 the NA passed 23 laws while the SC passed 29 ordinances (phap lenh). The SC determines the legislative agenda, NA sitting times, voting on the removal of NA delegates and no-confidence motions in senior state officials. 23 As discussed in chapter seven, some NA delegates are becoming more responsive to their constituents.

Supervision over other state bodies takes two forms. The NA can overrule subordinate legislation passed by the government, Supreme People’s Court and Supreme People’s Procuracy, though this power is rarely exercised. It also elects the president, vice-president, chairman and vice-chairman of the NA, prime minister, chief justice and chief procurator. 24 The People’s Inspectorate, which is controlled by the NA Standing Committee, investigates legal compliance by state bodies.

President (Chu Tich Nuoc)

Vietnam is one of the few presidential systems in the socialist world. 25 The personal authority of incumbents, more than their constitutional powers, determines presidential authority. After President Ho Chi Minh, incumbents have played a much less prominent role in Vietnamese political-legal life. As head of state, presidents primarily perform honorary and ceremonial duties. Among their few substantive functions, presidents pass ordinances that implement NA legislation, and recommend to the NA the appointment and removal of the vice-president, prime minister, deputy chief justice, supreme court judges, the deputy chief

22 The 1992 Constitution replaced the State Council (modeled on the Soviet Presidium) with the Standing Committee without significantly changing its functions.
23 Law on the Organisation of the National Assembly 2001, articles 7-8, 64, 88. Support from over 25 per cent of NA delegates is required to initiate a vote of no confidence in state officials.
procurator and members of the People’s Inspectorate. Presidents also have ‘overall command of the armed services’.

**Government (Chinh Phu)**
The government is the central executive organ. The 1946 Constitution concentrated state power in an executive organ (government) comprising the president, prime minister and other ministers. The collective governmental model, based on the Soviet Council of Ministers, was introduced by the 1959 Constitution. Despite name changes, this basic structure remained intact until the 1992 Constitution. By this time it was clear that the collective decision-making model, which was designed to manage a command economy, failed to generate the levels of personal responsibility required for market regulation.

Aiming for more transparent lines of authority and accountability, the 1992 Constitution abolished the Council of Ministers (Hoi Dong Bo Truong), replacing it with ‘one leader’—the prime minister—and a cabinet comprising a deputy-prime ministers and ministers (Government Council Hoi Dong Chinh Phu) (Government). Like the president, prime ministers are appointed by, notionally accountable to, and must be members of the NA. They recommend (to the NA) the appointment and dismissal of deputy-prime ministers and Government ministers—further entrenching their pivotal role in the state hierarchy.

The government meets monthly and by majority vote deliberates on a range of responsibilities enumerated in the Law on the Organisation of the Government 2001. The prime minister ‘leads’ the work of the government, and ‘guides and coordinates’ the activities of government members. According to organisational protocols, most important decisions require a majority vote of members in plenary meetings. But in practice decision-making is highly centralised, with the prime minister issuing approximately 20 legal documents every working day. Close decision-making

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26 Constitution article 103, 106; Law on the Promulgation of Legal Documents 2002, article 50.
27 Constitution 1946, article 44.
28 Constitution 1959, article 71.
29 The shift from collective-decision making was also partially connected with the abandonment of collective ownership. Interview Nguyen Chi Dung, Director of International Relations, Office of National Assembly, Hanoi, January 2000.
31 Constitution 1992, article 112.
32 In addition to the Prime Minister, the Government, which was formed in July 2002, has three deputy-prime ministers and twenty-six ministers in charge of twenty ministries and six ‘ministerial level offices’.
linkages between the party and government are suggested by the fact that most ministers are either members of the politburo or the central party committee.

Government duties are distributed to ministries handling discrete portfolios such as foreign affairs, defence, internal security, law and commerce. As well as ministries and 'ministerial-level agencies', there are a number of 'government-affiliated agencies' outside the ministerial structure that function with varying degrees of autonomy.

Central ministries are divided into two categories: 'functional' and 'line'. In theory functional ministries (e.g. State Bank and Ministry of Planning and Investment) have crosscutting powers that regulate activities performed by line-ministries (e.g. Ministry of Trade and Ministry of Public Security). This administrative structure, which consists of parallel functional and coordinating ministries, is a legacy of Soviet command regulation, and as subsequent chapters reveal, it is responsible for many administrative overlaps and regulatory uncertainties.

For much of the anti-American war (1961-1975) the Ministry of Justice (Bo Luat Su now called Bo Tu Phap) was disbanded and its duties were performed by internal state security, police and party groups. It was re-established in 1981 to unify the administration of justice, participate in legislative drafting, disseminate legal information, train lawyers and administer provincial and district level courts. Its power within the government has grown along with the increasing importance of law.

The government issues numerous resolutions (nghi quyet) and decrees (nghi dinh) to administer society. Below this level, the prime minister issues decisions and directives (chi thi) and ministers promulgate circulars (thong tu) to regulate their respective portfolios. In addition, the prime minister can annul legislative instruments passed by ministers and provincial/city level people’s committees that contravene the Constitution and laws.

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34 Constitution 1992, article 109.
36 Circular No. 3831/TP on Some Immediate Work to be Done by the Judiciary Sector to Implement the 5th Party Congress Resolution, Ministry of Justice, first reproduced in Phap Che Xa Hoi Chu Nghia (Socialist Legality) (2) April 1982, 8-10, 15, trans., JPRS-1978 25 January 1983, 88-94. For a more recent statement of powers see Decree on the Organisation of the Ministry of Justice 1993, article 4.
Local government

Vietnam has a unitary system of government, with centralised state authority exercised over local administrations. Prior to doi moi reforms, party committees performed many local government duties. Reforms introduced by the 1992 Constitution and Law on the Organisation of People’s Councils and People’s Committees 1994 aimed to clarify the division of powers among local authorities. People’s councils (hoi dong nhan dan) and people’s committees (uy ban nhan dan) are respectively the elected legislatures and appointed executive bodies. People’s committees are subordinated to the government, but people’s councils are not subordinated to the NA.

Although both people’s councils and people’s committees promulgate subordinate legislation, the real power resides in people’s committees, because they control the budget and administration. They implement state policy through specialised departments (for example, housing and land, industry and health) operating at the city/provincial and district/village levels. According to democratic centralism principles, authority within local government is strictly hierarchical and lines of authority descend from the city/provincial level to lower administrative levels.

In practice party organs dominate decision making in many (but not all) local governments. Many party cadres have positions in people’s councils and committees and the chief of the party committee is usually the deputy chair of the people’s committee at the corresponding level.

The ‘dual accountability’ (song trung truc thuoc) system further complicates the relationship between central and local authorities. Central ministries (e.g. Ministry of Justice) have branch offices (e.g. provincial justice departments) that function as part of the people’s committee machinery. ‘Dual accountability’ is supposed to make local

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37 The 1946 Constitution divided the DRV into four administrative levels: central, cities (thanh pho) and provinces (tinh); urban (quan) and rural (huyen) districts; and urban wards (phuong) and rural communes (xa). Local government grew out of the extensive Viet Minh committees (Viet Nam Doc Lap Dong Minh). Order No. 63 on the Organisation of Peoples Councils and Administrative Committees, November 22, 1945 (issued before the Constitution) devolved legislative power to local authorities (peoples councils) subject to the direction of higher level authorities. See Bernard Fall, 1956 The Viet-Minh Regime: Government and Administration in the Democratic Republic of Vietnam, Greenwood Press, Westport, Conn. 24-29.


40 People’s councils issue resolutions and people’s committees issue decisions and directives.
decision-making more accountable to central law and policy. But as the following chapters show, in practice local branches often owe their primarily allegiance to the people’s committee that housed and recruited them.

True vertical (doc) structures governing central agencies such as the police, military, procuracy, courts and Taxation Department are not subject to the direct control of local governments and arguably more faithfully implement central rules. Regionalism (dia phuong chu nghia), as we shall see, also plays an important role in moderating central political and legal power.

**People’s courts (Toa An Nhan Dan)**

Courts are established at three state levels—central, provincial and district. At the central level, the Supreme People’s Court (SPC) (Toa An Nhan Dan Toi Cao) is the highest judicial body. It performs judicial review (cong tac xet xu) and supervision over decisions made by provincial courts. It is comprised of a chief judge (appointed for a five-year term by the NA) and five deputy chief judges leading the six jurisdictional divisions (in the six jurisdictional areas (criminal, civil, administrative, economic, labour and military). The SPC is further divided into a Judicial Council (Uy Ban Tham Phan) (the highest adjudicator) and three Appellate Courts (Toa Phuc Tham) located in Hanoi, Da Nang and Ho Chi Minh City. In ‘close coordination’ with local people’s committees, the Supreme Court now manages and appoints lower-level judges. By giving the Supreme Court management over subordinate courts, party leaders introduced reforms in 2002 that aimed at increasing judicial independence from the executive branch of government (discussed in chapter six).

At the second hierarchical level, 63 provincial/city courts resolve first instance and appellate cases. Like the Supreme Court, they are divided into six jurisdictional

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41 This system initially evolved from the French colonial system, but by the 1950s it was strongly influenced by Chinese organisational principles. Interview, Nguyen Thuc Bao, Former Legal Adviser to Ministry of Agriculture, Hanoi, September, 2000.
42 See Constitution 1992, article 134. Also see the Law on the Organisation of the Peoples Court 2002, article 2.
43 In November 2002 there were 97 Supreme Court judges. Interview Hoang Khang, Deputy Chief Justice (Civil Law), Hanoi, November 2002.
chambers or divisions. Over 600 district level courts in urban (quan) and rural (huyen) districts comprise the lowest court level. They hear first instance cases concerning civil, economic and criminal cases.

**People’s procuracy (Vien Kiem Sat Nhan Dan)**

The procuracy was established in Vietnam during the 1960s as the fifth branch of the state. Based on a Soviet institution designed to implement democratic centralism, they have no counterpart in Western legal systems. Like courts, procurators are located at three administrative levels (central, city/provincial and district/village) and are vertically administered from the central level down. This top-down organisational structure assists procurators to enforce ‘democratic centralism’ by supervising the legal compliance of courts.

Constitutional reforms in 2001 removed some, but not all the functions given to the procuracy to supervise socialist justice. For example, procurators no longer monitor the legality of state institutions, mass organisations and commercial firms, although they still monitor legal institutions, especially the courts. Powers granted under the socialist legal system to both investigate and prosecute in criminal trials were also retained. Further compromising their impartiality, procurators are required by law to ‘protect socialist legality, the socialist regime, the people’s right to mastery and state property’ ahead of private legal interests. This involves appealing against judgements in civil and economic cases to protect the ‘state benefit’ (loi ich cua nha nuoc).

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46 Law on the Organisation of People’s Courts 2002, article 27. In practice most provincial courts have so few economic and administrative cases there is no specialisation. Interview Do Cao Thang, Chief Judge Economic Court, Hanoi People’s Court, Hanoi, March 2003.


49 See V M Letsnoi, 1961 ‘Viec Bao Dam Phap Che Xa Hoi Chu Nghia’ (Ensuring Socialist Legality), Tap San Tu Phap (11) 45, 47-49.


52 See Pham Hong Hai, 2001 ‘Mot So Y Kien Ve Sua Doi Hien Phap 1992 Lien Quan Toi To Chuc va Hoat Dong Cua Vien Kiem Sat Nhan Dan’ (Some Opinions on Amending the 1992 Constitution Concerning the Organisation and Activities of the People’s Procuracy) Nha Nuoc va Phap Luat (9) 64, 65-66.

Annex Five

Cultural and Legal Borrowing Discourses

Cultural discourse

For centuries Vietnamese intellectuals viewed the interaction among kinh people (ethnic Vietnamese) and foreigners in a cultural framework. Contemporary writers have continued to be fascinated by the role culture plays in social and economic development. Some themes in this highly variegated discourse suggest that attitudes to cultural identity construct the ‘reality’ in which officials approach legal borrowing. They also offer glimpses into the puzzling question whether laws transplant the same way as other cultural artifacts?

Some commentators portray Vietnamese culture as being engaged in dialogue with foreign influences. They claim that during the late nineteenth century most Vietnamese intellectuals treated French culture with disdain. Later, when traditional values proved unable to combat colonial domination, prominent Vietnamese began selectively borrowing imported precepts and practices. Nationalist leaders such as Phan Chu Trinh, and to a lesser extent Phan Boi Chau, were influenced by French legal ideas such as civil rights and constitutionalism. Later still, lessons learnt by Ho Chi Minh in Europe, the Soviet Union and East Asia from 1910 into the 1930s are thought to have revitalised opposition to colonial rule. An enduring dilemma in this narrative is how to preserve the domestic cultural ‘essence’, while benefiting from foreign ideals and practices.

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3 See e.g. Dao Tri Uc and Le Minh Thong, 1999 ‘Su Tiep Nhan Cac Gia Tri Phap Ly Phuong Dong va Phuong Tay Doi Voi Su Phat Trien Cac Tu Tuong Phap Ly Viet Nam’ (Reception of Oriental and Occidental Legal Values in the Development of Vietnamese Legal Ideology) *Nha Nuoc va Phap Luat* (5) 3-10. These views are similar to those expressed by David Marr in David Marr, 1971 *supra* 140–145, 168–170; David Marr, 2000 *supra* 774–788.
During the post-

\textit{doi moi} period, commentators have mainly searched foreign cultures for values that strengthen the domestic economy, paying particular attention to the capacity for ‘Asian values’, especially Confucianism, to stimulate entrepreneurial development (discussed below).\(^5\) A central theme is that culture is not a static entity, but rather ‘it is a type of relationship in which parts from different origins are combined and stuck together until they make an organic unified form’.\(^6\) Some commentators from this tradition attribute Vietnamese with ‘flexible behaviour’ (\textit{ung xu}) that is suited to cultural borrowing and adaptation. The message sent by this discourse to contemporary leaders is that cultural exchanges invigorate and renew domestic political, economic and legal values.\(^7\)

This idea that foreign cultures can strengthen domestic political and economic practices strongly conditions some approaches to cultural borrowing.\(^8\) Those promoting cultural exchanges warn against an exaggerated national identity that inhibits learning from others.\(^9\) Some commentators use empirical data to rebut assertions that globalisation is undermining Vietnamese values.\(^10\) A unifying thread in this discourse is the belief that the usefulness of foreign cultural values should be evaluated according to their capacity to improve Vietnamese social and economic conditions.

Contrasting with this portrayal of Vietnamese culture in dialogue with foreigners, a competing discourse depicts Vietnamese as heroic resisters against foreign domination. As Marxist-Leninism loses heuristic power in the post-

\textit{doi moi} environment, party leaders are searching for a Vietnamese cultural response to triumphant liberal capitalism. To this end they are reconfiguring the ‘Great Unity’ (\textit{dai doan ket}), an imagined unifying set of cultural values first proposed by Ho Chi Minh.\(^11\) Party writings initially

\begin{itemize}
\item Ngoc Hien, 1996 ‘The Strength of Culture and The Development of Culture’ \textit{Vietnam Social Sciences} (5) 28, 31–33.
\item See e.g. Pham Duc Thanh, 2000 ‘Some Ideas about Culture and Development in East Asia’, in \textit{Asian Values and Vietnam’s Development in Comparative Perspective}, National Center for Social Sciences and Humanities, Hanoi, 212–221.
\item See generally Ho Vu, 1998 ‘Hoi Nghi Trung Uong va Cuoc Khung Hoang Trong Khu Vuc’ (Central Committee’s Conference and the Regional Crisis) \textit{Tap Chi Cong San} (11) 20; Pham Duc Thanh, 2001, ‘The Economic, Social and Cultural Impacts of Globalisation on Vietnam’ \textit{Vietnam’s Socio-Economic Development} (28) 36–42.
\item See Le Truyen, 2003 ‘Ho Chi Minh’s Thoughts on Unity’ \textit{Nhan Dan}, reproduced in 9 \textit{Vietnam Law and Legal Forum} (108) 10-11. Also see Do Huy, 2003 ‘Achievements of Building and Developing a New
spoke of a 'new culture' (van hoa moi), by the 1960s this had transformed into 'mass culture' (van hoa quan chung) and later still the term 'socialist culture' (van hoa xa hoi chu nghia) came into use.

Contemporary writings about the 'Great Unity' focus on the potential for 'global' culture, spread by foreign trade, media, Internet communications, cinema and tourism, to erode confidence in local traditions. Borrowed cultural elements are portrayed as tainting or disrupting 'core' Vietnamese values. For example, foreign ideas are blamed for alienating the young from Vietnamese culture, causing them to lose their roots (mat goc) and breeding individualism and consumerism. Party resolutions echo these concerns: 'the market economy, with its tremendous spontaneous power, has encouraged individualism and made the people attach importance to individual interests while forgetting the interests of the community.'

Rather than assessing cultural imports according to their capacity to benefit society, this nationalistic narrative uses politically determined criteria to guide cultural borrowing. As the nation's moral guardians, party theorists select and promote core political and moral ideas that 'protect the “beautiful traditions” (truyen thong tot dep) and values of the country.' The central concern is that 'internal factors must have the leading role in directing the relations with and deciding the choice of external factors.' From this 'reality' technological borrowing appears to be culturally neutral and thus beneficial. Imported norms and institutional structures that may change ‘core’ domestic values are demonised as ‘peaceful evolution’ (dien bien hoa binh)—foreign forces that undermine party and state authority.

**Borrowing from traditional laws**

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15 See Nguyen Duy Quy, 2003 'Phan Dau Vi Mot Nen Van Hoa Viet Nam Tien Tien Dam Da Ban Sac Dan Toe' (Striving for a Vietnamese Culture that is Advanced and Profoundly Imbued with National Identity), *Tap Chi Cong San* (7), 12-14; Le Kha Phieu, 1998 *supra* 1, 5.

16 Pham Duc Thanh, 2001 *supra* 42; Pham Duc Thanh, 2000 *supra* 219–221.
The themes running through cultural discourse informed a research project conducted by the Legal Research Institute (Vien Nghien Cuu Khoa Hoc Phap Ly), a body attached to the Ministry of Justice. Their search for culturally appropriate legal norms was strongly influenced by the ‘Asian values’ thesis that nation states can withstand ‘negative’ global pressures, maintain social stability and preserve elite power by asserting core ‘traditional’, mainly Confucian, moral values. The anti-Western bias evident in the ‘Asian Values’ discourse promoted by Singapore’s Lee Kuan Yew and Malaysia’s Mohamad Mahathir was not as strident in Vietnam, perhaps from concern that it might inadvertently discredit the European roots of Marxist-Leninism. Nevertheless, research conducted by the Legal Research Institute proceeded on the presumption that ‘East Asian’ cultural values produce laws with beneficial economic and social outcomes.

Researchers plundered Vietnam’s pre-modern imperial codes searching for quintessential Vietnamese-Confucian laws. But in treating pre-modern legal norms as autonomous regulatory instruments, they detached these rules from the social, economic and cultural context that gave them meaning. Traditional preference for non-adversarial dispute resolution, for example, was attributed to an autochthonous communalism that discouraged ‘individuality’ and the ‘self’. Pre-modern political and economic constraints on court-based adjudication were ignored.

Researchers also employed a dubious methodology that used prevailing cultural values to assess the contemporary utility of pre-modern legal norms. For example, commentators imagined the early Le Dynasty as a golden age of political-legal innovation during which indigenous commercial practices crystallised into legally

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17 The project was initiated by the Minister of Justice, Nguyen Dinh Loc, to overcome some of the problems experienced by drafting committees in reconciling borrowed law with Vietnamese conditions. Interview, Duong Thi Thanh Mai, Deputy Director of the Institute of Law Research, Ministry of Justice, Hanoi, March 1999.


20 See e.g. Dao Bao Ngoc, 1999 ‘Regional Integration in Asia: From the Perspective of the Interaction between Legal Culture and Legal Regimes’ Nha Nuoc va Phap Luat (7) 30, 32–35.

21 Vietnam Law and Legal Forum have published monthly articles about traditional and colonial law in Vietnam since 1995. For a discussion about the methodology used in the project see Dao Tri Uc, 1995 ‘The Study of Vietnam’s State History and Law’ 1 Vietnam Law and Legal Forum (8) 38, 38–40.
enforceable rights.\textsuperscript{22} This construction misconstrued the stated purpose of the Le Code, which was to reproduce an imported Chinese social order (\textit{tam cuồng}).\textsuperscript{23} To Confucian-trained mandarins close textual readings made limited sense, since legal meaning resided primarily in moral teachings. Appeals to the letter of the law implied a disregard for morality or, worse, moral weakness. Commercial provisions in the Le Code primarily served a public law function—to preserve village harmony—and were never intended to confer horizontally enforceable private rights.\textsuperscript{24}

Despite voluminous writings, researchers failed to find meaningful ways of importing traditional norms (\textit{duc tri}) and laws (\textit{phap tri}) based on pre-industrial village life into a legal system serving an educated, internationally integrated mixed-market society. The project provided legislative drafters with insufficient contextual information to ascertain whether pre-modern Vietnamese norms and laws could regulate contemporary life.\textsuperscript{25} It nevertheless created a general impression that laws in East Asian countries are more compatible with Vietnamese conditions than Western laws. Some legal commentators are clearly influenced by this work and now speculate that ‘Confucian values and faith’ may augment and strengthen imported law.\textsuperscript{26}

\textbf{Technical legal discourse}


\textsuperscript{23} Neo-Confucian morality aimed to penalise moral infractions of neo-Confusion morals, it calibrated penalties according to the social and kinship status of wrongdoers and made family heads liable for family crimes. See John Whitmore, 1984 ‘Social Organisation and Confucian Thought in Vietnam’ \textit{15 Journal of Southeast Asian Studies} 296, 305.


\textsuperscript{25} Interviews Bui Thi Mai Lan, Department of Civil Law, member of Civil Law Drafting Committee, Ministry of Justice, Hanoi, March, April, 1999. It should be noted that foreign researchers have shown that a wide gap existed between imperial ideology, including laws, and socio-economic practice during pre-colonial Vietnam. See Nola Cooke and Li Tana, eds., 2004, \textit{Water Frontier: Commerce and the Chinese in the Lower Mekong Regions, 1750-1880}, Rowman and Littlefield, Lanham.
Hoang The Lien, in his comparative study of legal capacity in European and Vietnamese Civil Codes, provides a typical example of this type of writing.\(^{27}\) He examined the surface text of the legal codes without engaging underlying legal doctrines, much less the political, economic and moral discourses shaping legal preferences. For instance, he compared the legal capacity of companies by examining differences in legal texts, without explaining how these provisions were interpreted in profoundly different legal systems and political economies.

Underlying this unreflective approach to legal borrowing is the concern that independent research may offend party political directives. As Hoang The Lien explained, the ‘objective of jurisprudential research is: to build a scientific and practical base for the implementation of the Resolutions of the Ninth Congress of the Party.’\(^{28}\)

Ironically, party resolutions promoting international economic integration discourage lawmakers from questioning the social and economic utility of borrowing capitalist laws.

The Legal Needs Assessment (LNA) project also followed the technical legal approach, but its was more obviously politically guided.\(^{29}\) The Ministry of Justice commissioned four research teams to assess the utility of Vietnamese laws and legal institutions according to their capacity to realise the socioeconomic strategies adopted by the Ninth Party Congress in 2001.\(^{30}\) Researchers disregarded economic evidence that internal economic integration produces inequitable outcomes and political concerns that legal imports erode ‘core’ Vietnamese cultural values (see chapter three). The Final Report of the Legal Needs Assessment (LNA) unequivocally concluded:

> The concept of proactive international economic integration must be instilled in the development and completion of the legal system of Vietnam in all fields, from lawmaking and implementation, to legal education and dissemination. Vietnam’s legal system should not only reflect the specific

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features of this country, but also must meet international standards in order to be able to help Vietnam perform her international commitments based on the principles of national independence, self-determination and socialist orientation.31

Although the report gave ritualistic acknowledgment to the time-honoured ‘principles of national independence, self-determination and socialist orientation’, it did not attempt to reconcile foreign legal imports with local conditions. To do so might have been construed as opposing party policy on international economic integration. It was politically prudent to treat international legal harmonisation unreflectively as an exercise in technical borrowing between legal systems. In the ‘official discourse’ imported laws were considered autonomous fragments that had de-coupled from their social moorings and could thus transfer easily across political, economic, moral and cultural boundaries. Unofficially, many participants in the project thought that foreign laws were cultural artifacts that required careful adaptation to avoid disrupting domestic values and practices.

Adapting Marxist-Leninist thinking

Socialist law has been so successfully inculcated by party policy, university and professional training courses and workplace practices that many Vietnamese legal officials treat class-based law as indigenous thinking.32 Recycling the decades-old notion that Vietnam belongs to an international socialist family (gia dinh xa hoi chu nghia), many legal officials believe that Soviet law is compatible with Vietnamese precepts because it originated from a similar ‘political system’ (he thong chinh tri).33

30 The four socioeconomic strategies are: establish a rule of law socialist state; develop a legal system that supports a market economy with a socialist orientation; improve ‘democratisation’ and reduce poverty; and actively engage international integration.
32 This observation is based on numerous interviews and discussions conducted by the author with Vietnamese state and private lawyers since 1989. The Soviet legal thinking underpinning the curriculum taught to law students also supports this contention. Fundamental studies in all undergraduate law schools include: Marxist history of Philosophy, Marxist economic and political theory, theories of socialism and the history of the CPV. Legal subjects include Marxist theories of state and law, histories of political-legal theories and international legal development. For a representative discussion showing the Soviet origins of the Vietnamese legal system see Le Honh Hanh, 1998 Giao Trinh Ly Luan Nha Nuoc va Phap Luat, (Themes of State and Law), Nha Xuat Ban Cong An Nhan Dan, Hanoi, 320–326. Le Honh Hanh is Vice-Director of the Hanoi Law University. Also see Mark Sidel, 1993 ‘Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training’ 11 UCLA Pacific Basin Law Journal (2) 221.
33 See e.g. Le Hong Hanh, supra 497–507.
Reasoning from a less theoretically sophisticated position, some commentators say that in the socialist family, the Soviet Union was considered the ‘elder brother’ and ‘family members’ followed what they were told.\(^{34}\) According to this account socialist laws entered an ‘empty house’ and became the dominant legal thinking. In contrast, Vietnamese authorities for decades portrayed rights-based commercial laws as enemies of socialism. For this reason borrowing laws from capitalist systems required careful scrutiny. Following *doi moi* reforms, when the government began to moderate its antipathy to capitalist laws, some legal commentators sought to show that socialist legal theory is not incompatible with imported rights-based property norms.

Dao Tri Uc is the leading theorist in this area. His analysis starts with the Western comparative legal notion that borrowing among the world’s legal families requires lawmakers to consider three structural differences between legal systems:

- ‘legal resources’ (*nguong luat*) or substantive law
- the level of legal adjustment (*nguon phuong phap dieu chinh*) or the way law is used to govern social relationships
- the way the state orders legal relationships.\(^{35}\)

He also developed a methodology to guide lawmakers borrowing laws from outside the socialist world.\(^{36}\) In evaluating the contemporary relevance of the Le and Nguyen Imperial Codes, for example, he wrote ‘one should not jump to the conclusion that the first aspect [norms regulating public interests] is progressive and should be inherited, while the second aspect [laws preserving imperial privileges] is counter-progressive and therefore should not be inherited.’\(^{37}\)

Although he has departed from orthodox class-based theory, Dao Tri Uc has been careful to retain the instrumental role of law. Nevertheless this reformulation of orthodox Marxist-Leninism gives lawmakers a theoretical licence to borrow laws from capitalist countries.

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\(^{34}\) Speech by Duong Dang Hue, Deputy Director, Department of Civil Law, Ministry of Justice, delivered at a workshop on the United States-Vietnam Bilateral Trade Agreement, August 2002.


\(^{36}\) See Dao Tri Uc, 1995 *supra* 38–40.

\(^{37}\) Id. 39.
Le Minh Thong, another prominent legal commentator has filtered Kahn-Freund’s (or Kalm Freund in Vietnamese) ideas through a Marxist prism to devise three factors that should be taken into account when importing foreign laws:

- Ensure that the spirit of the imported law is similar to the dominant (thông tri) legal ideology in the recipient country.
- Determine whether the imported law comes from a legal system that is similar in structure to the way state power is organised in the recipient country.
- Ensure that the imported legal system comports with the dominant production mode in the recipient country.

Unfortunately, Le Minh Thong did not further elaborate his ideas. But it is instructive to note that Kahn-Freund’s neo-Marxist ideas, such as ideology, power structures and production modes, have been highlighted in this narrative, whereas his socio-legal notions that link law to autonomous social processes have been de-emphasized.

Also drawing from external discourses, other theorists have attempted to expand the epistemological repertoire by increasing the narrow range of legal relationships recognised by orthodox Soviet legal taxonomies. Soviet theory received into Vietnam during the 1960s divided law into thirteen independent branches that fall within four general categories: state law, criminal law, administrative law and economic law. It treated law as an instrument to điều chỉnh (adjust) social relationships. The state first classified ‘social relationships’ (quan hệ xã hội) according to shared class characteristics and then enacted laws to regulate social relationships within predetermined ‘independent law branches’ (ngành luật độc lập). Soviet legal taxonomies functioned well enough in a command economy, but now prevent Vietnamese lawmakers from thinking about market laws in conceptually coherent ways.

Soviet finance law taxonomies illustrate the problem. They were developed to classify financial transactions in a centrally planned economy and influence the way legal actors

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38 Le Minh Thong is a researcher at the Institute of State and Law. See Le Minh Thong, 2003 ‘Mot So Van De Phap Ly Cua Qua Trinh Toan Cau Cau Hoa’ (Some Legal Issues on Globalisation) Tap Chi Nghiên Cuu Cao (1), 65–75.


40 The thirteen legal branches are: luật nhà nước (state apparatus); luật hành chính (administrative law); luật tài chính, (finance law); luật đất đai (land law); luật nông trang tap the, (agricultural collective or cooperative law); luật dân sự, (civil law); luật hôn nhân gia đình, (family law); luật hình sự, (criminal law); luật tội phạm hình sự, (criminal procedure law); luật tội phạm dân sự, (civil procedure law); luật lao động, (labour law); luật lao động cai tao, (forcible correction labour law); luật quốc tế, (international law). See Vu Duc Chieu, 1974 Phap Che La Gi? (What is Legality?) Nha Xuất Ban Pho Thong, Hanoi, 54–67.
thought about law. Tendering rules were considered public finance law, because money is paid from the state budget. A similar logic was used to maintain conceptual divisions between economic and civil contracts (discussed below). Lawmakers are accustomed to ‘classifying social relationship into small groups characterised by some common features’.\(^{42}\) They struggle to break free from taxonomic analysis and draft laws with universal legal norms.

Still others theorists use Ho Chi Minh’s eclectic blend of Western, Marxist-Leninist and pre-modern Vietnamese thinking as a ‘political umbrella’ to open legal discussions to ideas beyond the narrow parameters permitted by class-analysis.\(^{43}\) For example, they imported the notion that ‘equitable laws’ (cong bang cua phap luat) (literally the law’s equitability) must balance social interests to challenge the instrumental Soviet notion that law adjusts social relationships. As one writer put it, ‘law should be attached to politics but is not a servant of the state’.\(^{44}\) In other words, laws implement political policy, but are not ‘management tools’ (cong cu quan ly).

New theories blend Marxist thinking with Western concepts that stress linkages between law and culture, especially legal culture (van hoa phap ly).\(^{45}\) For example, some writers echo Durkheim’s ‘collective consciousness’—the notion that if society is an invisible moral environment surrounding individuals, then law is the visible manifestation of ‘community sentiment’ (tinh lang nghia xom).\(^{46}\) Though linking law and broader social forces, they are unwilling to repudiate the Marxist base-superstructure metaphor and embrace an alternative social theory that explores the interdependence between law and society.\(^{47}\) Without taking this final step, their

\(^{41}\) Interview Bui Bich Lien, Lecturer, Hanoi Law University, Hanoi, March 2000.

\(^{42}\) See Duong Dang Hue, 2000 ‘Nhung Co So Cua Viec Xay Dung Phap Lenh Hop Dong Kinh Te (Sua Doi)’ (Foundation for Building Up Ordinance on Economic Contracts (Amendment)), Kien Nghi Ve Xay Dung Phap Luat Hop Dong Kinh Te Tai Viet Nam, (Recommendations in Building up the Economic Contract Legislation in Vietnam), Ministry of Justice-UNDP VIE/95/017, Hanoi, 15.

\(^{43}\) See e. g. Tran Dinh Huynh, 1999 ‘Moi Quan He Giua Tri Luc—Dao Duc—Phap Luat Trong Quan Ly Dat Nuoc Cua Chu Tich Ho Chi Minh’ (Relationship between Intelligence—Morality-Law in Ho Chi Minh Thought on Administration) To Chuc Nha Nuoc (5) 3, 3–5; Le Minh Thong, 2000 ‘Mot So De Ve Nha Nuoc Phap Quyen Trong Boi Canh Viet Nam’ (Some Issues about the Law Based State in the Context of Vietnam), unpublished conference paper, ‘Rule of Law and its Acceptance in Vietnam’, Institute of State and Law, September, 11, Hanoi, 1–2.

\(^{44}\) Author Unknown, 1996 supra 115–116.


\(^{47}\) See e. g. Author Unknown 1996 supra 113–117; Le Minh Tam, 1998 Giao Trinh Ly Luan Nha Nuoc va Phap Luat (Themes of State and Law), Nha Xuat Ban Cong An Nhan Dan, (People’s Police Publishing House), Hanoi, 503.
Theorising lacks the methodological tools lawmakers need to compare imported law with local cultural ‘realities’.

It also means that laws and legal obligations are still viewed through a collective framework. Individual legal rights are considered in negative terms, such as what harm can unconstrained rights cause to the collective good? This discourse is unreceptive to an imported ‘rule of law’ that gives individuals commercial rights that can constrain state action.

Bypassing Marxist-Leninist thinking

In contrast to the previous approaches, several commentators have bypassed Marxist-Leninism and applied Western sociological theory to legal borrowing. This subtle shift in thinking is revealed in as much by what is not said than by explicit arguments. These writers rarely mention Marxist-Leninist formulas and clearly separate political, economic, moral and legal arguments. Unfettered by the base-superstructure metaphor, they are free to conceptualise complex interactions between borrowed law and society.

Some German-trained academic lawyers use Weberian theory to argue that imported foreign commercial laws (du nhap luat kinh te nuoc ngoai) only induce desired behaviour where they are popular with the people (tinh pho thong), well defined (xac dinh on dinh), predictable (co the du doan truoc) and transparent (tinh ro rang). Laws that are incompatible with domestic laws, habits and ‘legal ideology’ (tu duy phap ly), they argue, will not transplant successfully.

Pham Duy Nghia argued that many Western commercial legal norms introduced capitalist political and economic ideals that were incompatible with the small-scale family structures and sentimental bonds that characterise Vietnam’s ‘peasant legal culture’ (nen phap ly nong dan). He illustrated this point with Articles 8 and 9 of the Commercial Law 1997, which imported Western unfair competition and consumer

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48 See Pham Duy Nghia, 2000 supra 11-13; Pham Duy Nghia, 2001 ‘Mot So Anh Huong Truc Tiep Cua Qua Trinh Hoi Nhap Kinh Te Khu Vuc va The Gioi Doi Voi Phap Luat Viet Nam’ (Some Direct Influences of the World’s and Regional Economic Integration into Vietnamese Law) Tap Chi Nghien cuu Lap Phap 2, 3–7; Pham Duy Nghia, 2002 supra 50; Nguyen Nhu Phat, 2005 ‘Minh Bach Hoa Phap Luat va Yeu Cau Dat Ru Doi Voi He Thong Phap Luat Trong Qua Trinh Hoi Nhap Kinh Te Quoc Te’ (Transparent Laws and their Requirement for the Legal System During International Economic Integration) Nha Nuoc va Phap Luat 16-20.

49 These precepts were borrowed from Nguyen Nhu Phat, director of KAS, a Hanoi based German funded legal development agency. Interviews Nguyen Nhu Phat, Director, Center for Comparative Law, Institute of State and Law, June 1998; Pham Duy Nghia, Lecturer, Law Faculty, National University, Hanoi September, 2000, March 2001. See Pham Duy Nghia, 2000, supra 11–13.

50 See Pham Duy Nghia, 2000 supra 17-20.
protection principles that functioned like *khau hieu* (political slogans) in Vietnam’s highly state-directed economy. Nevertheless he contends that legal importation is the only practical means of rapidly enacting the commercial legal framework required for international economic integration. ‘Legal harmonisation’ (*hai hoa phap luat*) is a long-term project requiring the state to devote more resources to researching and reconciling imported precepts with local social conditions.
Annex Six

Vietnamese Relational Transactions

In chapter seven a link was made between domestic social and economic needs and pressure group support for imported commercial laws. This discussion explores this nexus by comparing the transactional matrix in which most domestic Vietnamese entrepreneurs conduct business with the norms underlying imported commercial laws. Recent research has identified a correlation between viable legal transfers and domestic need for particular types of regulation. A survey of law reform in six Asian economics concluded that imported commercial laws only moved from statutes into everyday life when the local economics developed a need for property and contractual rights.¹ These finding suggest reasons why Vietnamese domestic entrepreneurs supported the market access provisions in the Enterprise Law, but were less enthusiastic about complex imported internal management rules. This section examines evidence that domestic demand is a critical factor shaping pressure group support for legal imports.

Relational transactions and production regimes

Kahn-Freund speculated that both economic and non-economic pressure groups, such as unions, employer associations, religious organizations, political parties and family structures, influence and/or contribute to the existence of law.² He went on to hypothesize that laws transplant more readily into environments with similar economic and non-economic pressure groups (see chapter one). As stated in the third working postulate, imported laws are strongly conditioned by the institutional and normative structures ordering pressure groups.

Two institutional and normative structures are considered vital to the maintenance and support of imported commercial laws. Stuart Macaulay and Ian Macneil convincingly demonstrated that non-state relational connections shape the regulatory environment for Western corporations.³ They found that relational connections regulated internal


arrangements between managers, shareholders and employees; market transactions with suppliers, distributors and purchasers.

We also saw in chapter one that 'production regimes' not only shape material products, but also subjective perceptions about the desirability and utility of economic and legal institutions. According to Michael Burawoy, production regimes are comprised of three main components: the role of the state, labor processes and the operation of market organisations. States play both an external regulatory and internal participatory role in production. In addition to laws, states use an array of non-legal regulatory instruments. For example, prior to the introduction of formal regulations in the early 1990s, informal meetings between City of London financiers and government officials pursuant to the London City Code on Takeovers and Mergers controlled corporate merges and acquisitions in London. Evidence suggests that as the voluntary nature of the Code was progressively eroded by legislation, corporate practices began to outwardly conform to the new statutory provisions. An inference drawn from this experience is that:

modes of regulation—corporatist, market or bureaucratic—never exist in pure form in the real world. The practice of regulation is conditioned by a complex range of forces: the object of the activity, the administrative culture in which it occurs, the characteristic of the regulated...Actual modes of regulation are therefore hybrids.

Western regulatory modes are primarily market oriented. We have seen, however, that bureaucratic and state corporatist mechanisms are the primary modes of regulation in Vietnam. For example, state owned enterprises are treated as macro-economic levers to regulate prices and resources in the market place, while trade union and party cells established in companies directly influence commercial decision making. What matters for the third working postulate is whether legal transfers can negotiate differences in the regulatory modes in donor and host countries.

Burawoy informs us that the composition and operation of market support organisations in capitalist economies, such as advertising, insurance and real estate brokers, accountants and lawyers shape production regimes by reducing costs, supplying

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5 Id. Also see Peter Hall and David Soskice, 2000 Varieties of Capitalism: The Changes Facing Contemporary Political Economics, Cambridge University Press, Cambridge.
specialised skills and market information and supporting financial management. Although these institutions are rarely directly mentioned in market laws, their support is vital to the effective operation of property, contract and company laws.

In explaining the divergent forces shaping production in Japanese and American companies, Aoki showed that relational configurations were responsible, along with transplanted American Company laws and legal institutions, for determining the rules of the game. Comparative research examining the adoption of Japanese production methods in Europe have also demonstrated that ‘internal coalitions’ of forces such as ideology, bureaucratic control, information/skills, labour controls and political autonomy hold companies together more than state rules. If the operation of law depends on complementary production regimes, as this research suggests, then it is logical to assume that laws are most likely to successfully transplant among countries sharing compatible production regimes.

Research considered in this discussion suggests that relational contracting is especially important to Vietnamese entrepreneurs, because unlike their Western counterparts, they have only a partially functioning legal system to fall back on. Even where commercial laws protect commercial interests, court cases considered in chapter six demonstrated that the justice system is unpredictable and open to corruption. Research conducted by John McMillan and Christopher Woodruff implied that commercial relationships in Vietnam are formed with little awareness of litigation or legal rules. More recently, a study commissioned by the ADB found a correlation between levels of incorporation and a stable and predictable regulatory environment. Building on this work, the following discussion draws on interviews the author conducted with sixty private companies from March 2004 to March 2005. It argues that Vietnam currently lacks a

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8 See John McMillan and Christopher Woodruff, 1999 ‘Interfirm Relationships and Informal Credit in Vietnam’ 114 Quarterly Journal of Economics (4) 1285, 1286. Though differences between Western and Eastern approaches to law are presumably important constraining factors, company law flourishes in other East Asian states with sub-optimal legal systems. See Pistor and Wellons supra 125-130.


10 Some of the interviews were conducted with the assistance of Vietnamese lawyers (N H Quang and Associates, Vision and Associates and Investconsult), others where conducted with the assistance of research assistants. Companies working in five industry sectors were selected (construction, wood-processing, commodity trading (copper wire), retail sales (car batteries), computer (sales and service).
uniform production regime that makes the complex internal management rules imported into the Enterprise Law (EL) relevant to domestic entrepreneurs.

Summary of company survey

<table>
<thead>
<tr>
<th>Industry sector</th>
<th>Reasons for incorporating</th>
<th>Internal management</th>
<th>Trading relationships</th>
<th>Industry associations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Construction</td>
<td>Required under state tendering rules.</td>
<td>Primarily reflects family structures and relational connections with SOEs involved in tendering transactions.</td>
<td>Personal connections and bribes to secure tendering information and connections with SOEs and tendering authorities.</td>
<td>The industry is too tightly linked with the state to benefit from independent associations.</td>
</tr>
<tr>
<td>Wood processing</td>
<td>Required by local state officials. Avoid inspections by district level authorities.</td>
<td>Primarily reflects family structures.</td>
<td>Mutual benefit and sentimental connections. Price and quality were secondary.</td>
<td>Well developed associations to regulate market prices and control dealings with state authorities.</td>
</tr>
<tr>
<td>Copper wire traders</td>
<td>Required by state authorities. Uncommon in this sector.</td>
<td>Primarily reflects family structures.</td>
<td>Mutual benefit to secure markets with SOEs. But in a competitive urban market prices and quality are paramount.</td>
<td>Limited informal cooperation to control prices at the provincial level and mediate dealings with state authorities.</td>
</tr>
</tbody>
</table>

Studies concerning the construction industry and wood processing industry were conducted in Hanoi and surrounding provinces. The term company refers to enterprises under the Enterprise Law: sole proprietorships (*doanh nghiep tu nhan*), partnership companies (*cong ty hop danh*), limited liability companies (*cong ty trach nghiem huu han*), and joint stock companies (*cong ty co phan*).
Battery traders | Required to obtain VAT receipts. | Primarily reflects family structures. | Price and territorial cartels strictly control trading relationships. | A highly organised and cohesive association maintains a trading cartel and resolves disputes.

Computer traders | Required to import computers and obtain VAT receipts. | Primarily reflects family structures, but approximately half of the companies surveyed had technical specialists in managerial positions. | Price controls loosely regulate tendering transactions with SOEs. Retail sector is highly competitive based on price and quality. | Commercial associations are formed to secure large tenders with SOEs, otherwise there loose associations to control prices.

Limited liability

Considered the cornerstone of Western corporate law, it is argued that limited liability (trach nhiem huu han) provisions in the EL convey few benefits to most Vietnamese entrepreneurs. Limited liability protection lacks commercial significance because creditors in Vietnam rarely sue to recover debts. We saw in chapter six that few private companies initiate economic law actions. On the rare occasions where this happens, judges manufacture reasons to lift the ‘corporate veil’ and make company officials and their relatives personally liable for company debts. Discretionary powers exercised by bankruptcy authorities overseeing creditor’s petitions also severely limit the usefulness of creditor petitions as a debt recovery vehicle. The Bankruptcy Law 2004 has removed some, but not all of these discretionary powers.

12 When deciding whether relatives of those managing insolvent companies have received preferential payments, Asset Liquidation Teams apply article 135(2) of the Civil Code, which provides that where all things are equal, the interests of the weakest economic player (often employee creditors) should prevail. See Decree No. 189 CP Providing Guidance on the Implementation of the Law on Enterprise Bankruptcy 1994 article 32; Interview Nguyen Ngu Phat, Director Center for Comparative Law, Institute of State and Law, June and July, 1998.

In this bureaucratic environment, company laws that insulate personal assets from corporate losses are neither intuitively appealing nor obvious to judges. This is especially true where debtors are state authorities or employees. The Western liberal presumption that the social cost of limited liability is counterbalanced by the ‘utility’ of entrepreneurial investment does not inform judicial thinking. The corporate veil consequentially lacks the legal and moral authority to quarantine shareholder and company officials from creditors.

Finally, limited liability does not protect investors against relational debt collection. Where intermediaries are unable to secure compliance, creditors use social pressure to shame debtors and their relatives into paying. As a last resort, police are paid by creditors to criminalise commercial debts and arrest debtors on fabricated charges. Evidently, quasi-criminal organisations are taking over this business as central authorities encourage police to stay out of commercial transactions. 14

Internal management rules

Ever since the publication of Berle and Means’ influential study about public corporation management, neo-classical scholars have postulated that the modern corporation is the optimal business organisation. 15 Confidence in corporations has endured structural changes where a managerial elite running large public companies displaced individualist, entrepreneurial capitalists as the dominant, economic decision-makers. 16 Though some commentators point to discrepancies between neoclassical corporation theory and economic reality, few doubt that the separation of ownership from professional managers is a central feature of Western corporate organisation. 17

The separation of management from capital was unknown in pre-colonial Vietnamese society. 18 Case studies of early twentieth century companies show little change from traditional organisational structures. Vietnamese-owned ceramic manufacturers during the 1930s, for instance, exhibited few of the long-term (non-family) integrative

14 See McMillan and Woodruff, supra 637-658.
relationships found in Western corporate structures. With the exception of seasonal sub-contractors, firms were structured entirely along familial lines. Village relatives were hired in preference to strangers (non-relatives) and daughters were forbidden from marrying outside the village to protect technical knowledge and business secrets. Hierarchical kinship rules arose out of, and defined interlocking mutual obligations (family sentiment, secrecy and paternalism) that formed the building blocks of commercial organisations.

The company survey indicates that kinship structures have endured socialist and more recently, market forces and continue to bind private business organisations. Survey respondents used proverbs like *gia dinh la trien het* (family first others second) to invoke a social ordering where close family connections formed the bonds generating dependable and trustworthy management structures. When external skills were required, family members turned first to family, and then friends from the same home village, or those with long standing personal ties. Recruitment was often based on common linkages through villages, workplaces, university classes, or military units. In each case, attempts were made to find sentimental attachments that replicated *trung thanh* (loyalty), *tinh cam* (sentiment towards others) and *tin* (trust) binding family members.

Research further suggests that domestic management structures differed from Berles and Means’ bifurcated ownership and management structures. Most internal company structures resembled family hierarchies, with the senior male family member assuming most managerial functions. There was some variation within each sector, but especially between sectors. For example, companies in the wood processing industry most closely resembled family hierarchies, while companies in the computer sales and service sector were closer to the corporate ideal. Respondents explained this difference in terms of labour specialisation. There are few skilled workers in the information technology sector, and company owners are compelled to recruit non-family members into

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The family structure in Vietnam embodied elements blended from neo-Confucian, Buddhist, Taoist and animistic spirit cults. Though Buddhism and spirit cults ameliorated rigid neo-Confucianism, kinship power structures followed imported Confucian patterns. *Hieu* (filial piety) bound children to their parents through *on* (moral debt) and *de* (the relationship between brothers) required the eldest to ‘teach, nurture and protect’ and the younger brother to ‘respect, support and obey’ their elder sibling(s). See Neil L. Jamieson, 1993 *Understanding Vietnam*, University of California Press, Berkeley, 16-18; Hy Van Luong, 1989 ‘Vietnamese Kinship: Structural Principles and the Socialist Transformation in Northern Vietnam’ 48 *Journal of Asian Studies*. (4) 742, 748-49, 753-754.
management positions. But even in this sector, respondents said that they were training family members to replace non-family managers. There were too few large companies (over 100 employees) in the survey to authoritatively show that internal management rules become more creditable when companies outgrow family structures and owners need to employ outside managers. The strategy adopted by the large companies surveyed was to send family members overseas for managerial training. Lawyers working the commercial arena also say there is no automatic demand for corporate laws when companies increase in size. But company laws become important when external trading partners or investors insist on clearly delineated internal management rules. These findings corroborate research conducted by CIEM. This work found that entrepreneurs considered corporate rules separating family and corporate assets impediments to effective commercial organisation. It concluded there were few benefits and numerous disadvantages with legally differentiating family and company assets. Entrepreneurs admitted to withdrawing invested capital to repay personal loans and passing assets among themselves and their companies without regard for legal doctrines. Creative accounting designed to avoid taxation further blurred distinctions between family and company assets. Discrepancies between the way families internally manage their companies and imported corporate rules have been observed elsewhere in East Asia.

Institutional factors influencing incorporation
In addition to relational factors, the company survey showed that state institutional rules and practices strongly influence attitudes to corporate rules. In each sector respondents claimed that they were compelled to incorporate in order to obtain access to government contracts, import licences and VAT receipts. Some entrepreneurs were instructed to incorporate because they were considered to be too large to continue operating as

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household enterprises. Since 2004, it has been compulsory for firms with more than ten employees to incorporate.\textsuperscript{24}

The company survey showed that entrepreneurs in the construction, computer and copper wire industries could not function profitably without forming close relationships with state officials. The strategies used by entrepreneurs depended on the nature of state control over particular industries. For example, the construction industry is dominated by SOEs and most private companies require stable long-term relationships to gain supply contracts to participate in construction tendering. In contrast, private entrepreneurs have much greater control over the cooper-wire market and can develop relationships with state officials on a case-by-case basis. Long-term relationships are cultivated with district-level officials in the locality where the businesses are situated to minimise state interference through over inspection and criminalisation. In this highly relational business environment incorporation conveys benefits and disadvantages that bear little relationship to those supposedly conveyed by corporate law.

| Summary of reasons for company incorporation |  |
| Benefits | Costs |
| Right to legally access broader markets (i.e. trade beyond district) | Greater registration costs |
| Right to legally employ more than 10 workers | Annual registration fee (\textit{thue mon bai}) |
| Stamp (\textit{chop}) for officiating transactions | Requirement to have certified chief accountant |
| Access to VAT receipts | Increased restrictions due to labour contracts |
| Right to set up branch establishments | Some companies report an increased level of discretionary ‘management’ by local authorities |
| Some companies report a more predictable relationship with government authorities | Potential for increased taxes (with move from negotiated to standard tax calculations) |
| Ability to access equity and debt capital | Increased state reporting requirements |

Further support for the survey findings is found in Vietnamese commentaries. Writers acknowledge that the command economy profoundly shaped attitudes ‘that resulted in anti-business philosophies in production and consumption, such as “do whatever you want, the state will be responsible” (\textit{cu lam da co Nha Nuoc chiu}).\textsuperscript{25} State domination

\textsuperscript{24} See Decree No. 109 Guiding Company Registration 2004.
\textsuperscript{25} Nguyen Thi Doan and Do Minh Cuong, 1999 \textit{supra} 99.
of the economy inculcated state regulators with moral mission to micro ‘manage’
private entrepreneurs (see chapter six). It also imbued entrepreneurs with the notion that
the state is central to economic well-being. Thus businesses seek state benefits by
forming relationships with state officials.
In sum, the reasons for incorporating overwhelmingly relate to state benefits given to
corporate entities, rather than intrinsic benefits derived from the corporate form. In most
cases considered similar outcomes could have been achieved if unincorporated
entrepreneurs were given access to state benefits.

Transformative potential for corporate change
Neo-classical company theory predicts that as firms increase in size and market
competition increases, separate management and ownership structures become more
desirable. However, these views are based on corporate development in Western
ideological and cultural settings and do not necessarily obtain in non-Western
developing countries. Studies in Vietnam show that approximately two thirds of large
companies employing more than one hundred workers are family owned and
managed.26 Like small companies, they borrow capital from family and friends; less
then ten percent is derived from long-term bank loans.27 A CIEM survey found that
‘trust’ is overwhelmingly the most important criterion used by informal lenders.28
Collateral and third party guarantees are comparatively uncommon, but capital is in
some cases also raised from informal tie-in arrangements with SOEs. The survey
concluded that ‘the rules of the game in the informal credit market are more favorable
and “more agreeable” than the rules in the formal one’.
Finally, most sales by private companies are made to customers belonging to business
or family networks located in the same city, and frequently in the same neighborhood.29
Taken together these factors imply that even large companies are constructed from, and
primarily rely upon relational connections.

26 From a total of approximately 26,000 companies each employing on average nineteen workers; only
four hundred and fifty employ more than 100 workers. See Dang Phong, 1999 ‘The Private Sector: In
Vietnamese Industry from 1945 to the Present’, in Vietnam’s Undersized Engine: A Survey of 95 Larger
Private Manufacturers, MPDF Discussion Paper No. 9, 47.
27 Id. 50-51. A CIEM survey of private companies found that 54% borrowed from friends and relatives,
the others borrowed from trading partners (informal business associations), employees, veteran and
women’s associations and ‘huo ho’ credit circles. See Nguyen Dinh Tai, 2002 ‘Entrepreneurship in
Vietnam and Promotion of the Private Sector: Some Judgements from a Survey’ Vietnam Socio-Economic
Development (29) 25, 26-30.
28 Ibid.
29 McMillan and Woodruff, supra 1295-1296.
Informants report that occasionally separate legal personality is used as a moral, if not legal, means of quarantining family assets from non-family company managers. This occurs on the rare occasions where companies conduct business in provinces where family-owners lack personal contacts, or where founders commercialising scientific or technical knowledge require non-family business mangers.

At first glance these cases appear to support neo-classical theory, but deeper analysis discloses countervailing trends. Even as markets expand and local technology is commercialised, improved general educational levels (especially in finance and management) have reduced the need for non-family managers in manufacturing companies and, as a corollary, the need to separate management from capital ownership. More significantly, in some economic sectors incorporation has become less important as the market-economy matures.

Consider the clothing industry in Ho Chi Minh City. During the years immediately following the introduction of the CL many family-based clothing manufacturers incorporated. By 1998 the trend had reversed and reliance on company structures, both in terms of new incorporations and formal separation of capital and management, had declined. Informants believe that as the textile market grew in size and competitiveness, the capacity of state officials to influence commercial decision-making decreased. This in turn, meant that retired officials and others hired to constrain state economic management became less useful, and were eventually jettisoned. Released from the need to protect capital from non-family managers, corporate structures became less beneficial.

In summary, incorporation enables Vietnamese entrepreneurs to participate in state controlled monopolies, such as export quotas and construction tenders, but conveys few of the legal benefits enjoyed by Western entrepreneurs, such as limited liability and the separation of management from capital. Many local-level officials steeped in state economic management ideology are unprepared to defend the property and contractual rights that support the vital transformation that makes company law attractive to entrepreneurs. In addition, the special interest groups (such as lawyers, accountants, bankers, and insurers) that create the uniform, transparent markets presupposed by company law have not fully developed in Vietnam. As consequence, rather than structuring their businesses around company law principles, entrepreneurs form

defensive family arrangements and particularistic (frequently corrupt alliances) with state bureaucrats.  

Conclusion
The invention of the legal person was law’s great contribution to Western capitalism. It created the legal fiction that a person with legal rights existed in what was in reality a network of communications between individuals. Our study suggests that in Vietnam there is currently little domestic demand for imported corporate rules. However, law has the capacity to create artificial and fictitious worlds that find solutions to commercial problems that do not exist in the real world. The reflective implementation of foreign corporate law has the potential to create legal fictions that provide flexible and imaginative solutions to domestic Vietnamese problems. But this is unlikely to happen until laws are brought into conversation with local relational practices.

31 In 1994 there were 383 licensed garment makers and after five-years of unprecedented growth in the garment industry there were 241 companies. See Liesbet Steer, 2000 ‘The Private Sector in Vietnam’, unpublished paper, Centre of International Economics, Hanoi, 8.

32 The rise and fall of the Minh Phung textile-empire illustrates the dangers of entrepreneurs using particularistic relationships to reduce risk. See Author Unknown, 1999 ‘Minh Phung and Epco had the Risk of Going Bankrupt from their Establishment’ Saigon Giai Phong, 13 May, 1, 3.
Glossary of Vietnamese words

A. Personal and geographical names:

Âu Lạc  Nguyen Phú Trọng
An Khánh  Nguyen Tấn Dũng
An Nam  Nguyễn Thị Hoài Linh
An Thọ  Nguyễn Thị Lợi
Ba Đình  Nguyễn Thị Nghĩa
Cầu Giấy  Nguyễn Văn An
Dương Đình Huệ  Nguyễn Văn Linh
Đào Duy Anh  Phạm Duy Nghĩa
Đào Trí Úc  Phạm Lộc
Đỗ Mười  Phạm Thị Lan
Đồng Sơn  Phạm Văn Bách
Hà Nội  Phạm Văn Đặng
Hà Tây  Phạm Bởi Châu
Hải Phòng  Phạm Chu Trinh
Hồ Chí Minh  Phạm Văn Hải
Hồng Bàng  Phú Mỹ
Hoàng Thế Liên  Phú Mỹ Hưng
Huế  Tăng Minh Phương
Hưng  Tạ Văn Thái
Lê  Thái Thắng Long
Lê Duẩn  Thực An Dương Vọng
Lê  Tôn Kín
Khả Phiêu  Tự Đức
Lê  Trần
Lê Đăng Doanh  Trần Hữu Huyên
Lê Đức Thọ  Trần Xuân Trường
Lê Quảng Chiên  Trường Chính
Lưu Văn Đạt  Trường Văn Cam
Lý  Ván Lang
Mai Hữu Thúc  Văn Phúc
Năm Cam  Việt
Ngâm  Vĩnh Long
Ngô Thị Nhậm  Võ Văn Kiệt
Ngô Văn Thấu  Võ Văn Kính
Nguyễn  Vũ Oanh
Nguyễn Chi Lan  Vũ Ông
Nguyễn Hữu Thọ  Vũng Tàu
Nguyễn Hữu Dăng
B. Other Vietnamese words and phrases:

An ninh kinh tế
Áo sơ mi luật công ty
Áp dụng pháp luật tương tự
Ban
Ban Cán sự Đảng
Ban Công tác Lập pháp
Ban Kinh tế Trung ương
Ban Nội chính Trung ương
Ban ông, chị, anh
Ban quản lý thị trường
Ban Tổ chức Trung ương
Ban Văn hóa Thông tin
Bàn quầy
Bàn석 bàn tốc
Bảo lãnh bằng tin chap
Bề mặt
Bộ Chính trị
Bộ chủ quản
Bộ hình
Bộ luật
Bộ luật Hồng Đức
Bộ Luật sư
Bộ Tư pháp
Bộ Văn hóa Thông tin
Bồi dưỡng
Bồi thường
Căn
Cập trên
Câu lạc bộ
Câu lạc bộ doanh nghiệp
Cả nhân
Cảnh sát
Cảnh sát kinh tế
Chấp thuận
Chỉ đạo chuyên môn
Chỉ thị
Chạy lo thủ tục
Chế độ chính sách
Chế tài
Chị công vở tư
Chi cục quản lý thị trường thành phố
Chính
Chính phủ
Chính sách

Chính sách chế độ
Chủ nghĩa xã hội
Chủ nghĩa dân tộc cuộc doan
Chủ nghĩa Mác-Lê Nin
Chủ quyền nhân dân
Chủ tịch nước
Chuyên chính việc sản
Chuyên nghiệp
Chợ chính tế
Chợ thị trường có sự hướng dẫn của
Nhà nước
Chợ thị trường theo định hướng xã hội chủ nghĩa
Chợ xin cho
Chợ phân hóa
Công bằng
Công bằng của pháp luật
Công cộng
Công cụ
Công cụ quản lý
Công tác tư pháp
Công tác xét xử
Công trình dân dụng
Công ty
Công ty cơ phận
Công ty ma
Công ty Mẹ-con
Công ty trách nhiệm hữu hạn
Công văn
Con người mới xã hội chủ nghĩa
Cô lòng tốt với dân
Cô thể dự đoán trước
Cô thể làm những gì luật không cấm
Cô thể phụ thuộc về mặt chính trị
Cục Chính trị không quản
Dân biết, dân bán, dân làm, dân kiểm tra
Dân chủ không có nghĩa là được làm tất cả những gì mình muốn
Dân chủ tán gốc
Dân chủ trực tiếp
Dân chủ Xã hội chủ nghĩa
Điển biến hòa bình
Điển dân
Điển dân doanh nghiệp
Diễn đàn doanh nghiệp Việt Nam
Diễn đàn khu vực tư nhân
Dự luật
Độc
dự luật
Du nhập luật kinh tế nước ngoài
Đầu tư
Đặc biệt
Đại diện
Đại hội Đảng toàn quốc
Đại học pháp luật
Đại học pháp lý
Đại đoàn kết
Đạo đức cách mạng
Đạo đức cách mạng
Đảng bộ hoặc Chi bộ
Đảng Công Sản Việt Nam
Đảng Lao Đông Việt Nam
Đảng lãnh đạo
Đảng lãnh đạo, Nhà nước quản lý, Nhà dân làm chủ
Đảng đoàn
Đảng đoàn Quốc hội
Đảng ủy
Diễn hinh
Điều chỉnh
Địa bối
Đưa pháp luật vào cuộc sống
Địa phương
Địa phương chủ nghĩa
Độc lập
Đổi mới
Đổi quản lý thị trường
Đông
Đồng Dương Công Sản Đảng
Đơn hoá kết trái
Đơn vị
Đường lối quản chung
Đức trật
Gia đình Xã hội chủ nghĩa
Giấy phép hành nghề
Giấy phép kinh doanh
Giải cấp thông trật
Giá trị
Giá trị chung
Giá trị sử dụng

Giác ngộ
Giáo dục
Giáo hội Phật giáo thống nhất
Gương mẫu
Hãi hòa pháp luật
Hằng phim truyền Việt Nam
Hành động ngược lại
Hành vi
Hệ thống chính trị
Hiệp hội
Hiệp hội Công thương Thành phố Hồ Chí Minh
Hiệp hội kinh doanh
Hiệu
Hiệu quả
Hình phạt
Hình sự hoặc dòng Bộ trưởng
Hội đồng Chính phủ
Hội nong dân
Hội đồng Đảng chủ và Pháp luật
Hội đồng Kinh tế Xã hội
Hội đồng Kỹ mục
Hội đồng Kinh tế
Hội đồng Tộc biểu
Hội trường
Họn nhân ngoài giá thú
Hồng hoi chuyên
Hoà giải
Hoàn chỉnh
Hoàn thiện
Hoàng Việt Luật lệ
Hoa đơn
Học thuyết Tam quyền phân lập
Học viên Chính trị Quốc gia Hồ Chí Minh
Hợp lý
Hương lệ
Hướng ức
Huyền
Kì luật nhà nước
Kế hoạch nhà nước
Khâu hiểu
Khế ức
Khoa học tổ chức
Khởi
Kiểm
Kiểm điểm
Kinh
Kỹ thuật
Lấy ý kiến nhân dân
Lạc Hồng
Làm chủ tập thể
Làm chủ tập thể Xã hội chủ nghĩa
Làm luật
Làm đơn thỉnh xin
Lệ
Lệ triều hình luật
Liễm
Liên minh giữa giai cấp công nhân với
giai cấp nông dân và tầng lớp trí thức
Liên Việt
Linh hồn
Lời icher của Nhà nước
Luật
Luật học
Luật mèm
Luật tự nhiên
Lý
Lý lịch
Lý và tình trong việc chấp hành pháp luật
Mặt gốc
Mặt trận dân tộc thống nhất
Mặt trận tổ quốc
Mỗi quan hệ tốt đẹp
Một bộ cải li không bằng một tì cải tính
Một người làm quan cả họ được nhờ
Mô câu
Nén kinh tế theo định hướng Xã hội chủ nghĩa có sự quản lý của Nhà nước Nên
kinh tế thị trường theo định hướng
Nên pháp lý nông dân
Nghành luật độc lập
Nghệ thuật
Nghi dinh
Nghi quyết
Nghi quyết của Hội đồng Tham phán
Nghiêm tân
Nghiêm tinh đạo lý
Nghiêm vư
Nghiêm vư liên đối

Người mới giới
Người tiêu dùng
Ngư Luân
Nguyên luật
Nhiều dân
Nhiều dân lao động
Nhiều thục giai cấp
Nhiều trí
Nhiều trí
Nhà không phép
Nhà nước của dân, do dân và vì dân
Nhà nước pháp quyền
Nhà nước pháp quyền Xã hội chủ nghĩa
Niềm tự
Niềm vui nhọc của tương lai
Nhớm niệm vui cùng chế doanh
nghệp
Nhu cầu xã hội
Niềm tin nội tâm
Nóm
Ở dư
Phạm chất chính trị
Phạm chất đạo đức
Phân cách mạng
Phạt vọt
Phải tôn trọng và thực hiện pháp luật
Pháp chế
Pháp chế dân chủ
Pháp chế Xã hội chủ nghĩa
Pháp gia
Pháp lên
Pháp luật là ý chí chung của xã hội
Pháp luật là ý chí chung của xã hội
Pháp lý
Pháp trị
Phạt huy nội lực
Phête bình và tự phê bình
Phệt vua thua lẽ lang
Phieu xin ý kiến đại biểu
Phong Cách Vông Thi
Phương pháp điều chỉnh
Phương
Phương và Xã
Quận
Quận tụ
Quan hệ xã hội
Quan điểm đúng dân
Quan viên
Quá trình thực tại
Quan lý
Quan lý nhà nước
Quan lý để quản lý
Quan lý nhà nước về kinh tế
Quan lý nhà nước về pháp luật
Quản trị
Quốc hội
Quốc nghị
Quy định pháp luật và các chính sách
chế độ
Quyền
Quyền lực công
Quyền sở hữu
Quyền sử dụng đất
Quyết định trước khi xét xử
Rõ ràng
Sao chép máy móc
Sài Gòn Tiếp thị
Sự can thiệp
Sự chung lục
Sự lãnh đạo của Đảng
Sông trong trực thuộc
Sở hữu tập thể
Sức ép
Tạm
Tạm giao động nguyên
Tận dân chủ
Tập san Tư pháp
Tập thể quân chủng nhân dân
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Tập trung dân chủ
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Tăng cường thống nhất về chính trị và
tinh thần của toàn dân
Tình
Tập chí Công sản
Tam cường
Tái san Xã hội chủ nghĩa
Tế tướng
Tết
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Thảo luận ở tổ
Thiên mệnh

Thiếu trách nhiệm
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Thông tư
Thông tư hướng dân
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Thông nhở đồng quê
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Tình cảm
Tình chất đường chẹ
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Tình pháp lý trong việc tổ chức quyền
lực nhà nước
Tình phổ thông
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Tình yêu thương mới
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Tư tưởng Hồ Chí Minh
Tổ chức cán bộ
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Tổng Liên đoàn Lao động Việt Nam
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Trung quận
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Truyện thông tot đẹp
Tuần theo mệnh lệnh cấp trên
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Uy tín
Uy ban
Uy ban Hành chính
Uy ban Nhân dân
Uy ban soạn thảo Hiến pháp
Uy ban Thẩm phán
Uy ban Trung ương
Uy ban xuất bản
Uy quyền
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Văn hóa dân tộc
Văn hóa lao động
Văn hóa mới
Văn hóa pháp lý
Văn hóa quân chủng
Văn hóa Xã hội chủ nghĩa
Văn phòng
Vai trò lãnh đạo
Viện Kiểm sát Nhân dân
Viện Nghiên cứu Khoa học Pháp lý
Việt Minh
Võ cảm
Xã
Xã hội chủ nghĩa
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Xã hội dân sự
Xã hội hoá
Xác định ông định
Xin ý kiến của lãnh đạo
Xử dân sự, xử thế nào cũng được
Xúc tiến thương mại
Yêu cầu chuyển món
Ý chỉ của giải cấp thống trị
Ý chỉ tối thượng
Ý thực pháp luật
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438
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