The shift away from colonial legality accelerated when the Supreme Court prohibited the use of French colonial laws and practices in 1959.\textsuperscript{162} This was followed in the early 1960s with the purge of French-trained legal personnel.\textsuperscript{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.\textsuperscript{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.\textsuperscript{165} Even legal training was de-emphasised and tertiary level study did not resume until after reunification in 1976.\textsuperscript{166}

With French legalism reviled as bourgeois and oppressive, the party and state ruled primarily through party resolutions, administrative edicts and virtue-rule (\textit{duc tri}).\textsuperscript{167} Inspired by Ho Chi Minh’s teachings, legal writers of the period valued moral education (\textit{gia\textasciitilde{o} duc}) more highly than laws and legal enforcement.\textsuperscript{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’.\textsuperscript{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,

\textsuperscript{162} See Circular Ministry of Justice, 10 July 1959.
\textsuperscript{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, \textit{supra}; Phan Huu Chi, Former Advisor to the Minister of Justice, Hanoi, February 1994.
\textsuperscript{167} See Pham Duy Nghia, \textit{supra} 49-50.
\textsuperscript{168} See Dinh Gia Trinh, 1961 ‘May Y Kien Dong Gop Ve Van De Bao Ve Phap Che’ (Some Opinions on the Protection of Legality) \textit{Ta\textasciitilde{p} San Tu Phap} (3), 20, 23-24.
\textsuperscript{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) \textit{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’ (lấp trưởng).\(^{170}\)

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{175} 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{176} 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{177} 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{178} 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{179} 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{180} As the most developed socialist state, Soviet laws and legal institutions were preferred as a model to ‘strengthen the role of law’.\footnote{181} The 1959 Constitution incorporated for the first time Soviet political-legal ideology such as phap che xa hoi chu nghia (socialist legality),

\footnote{176}{Ho Chi Minh, 1959 supra 217.}
\footnote{178}{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.}
\footnote{179}{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.}
\footnote{180}{See Phong and Beresford, supra 86-87.}
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.\textsuperscript{182} While retaining some of the French-inspired touches of the 1946 Constitution, the 1959 Constitution formalised the socialist political-legal structure.\textsuperscript{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).\textsuperscript{184} A Supreme Court and procuracy were established along Soviet lines and the National Assembly was remodelled on the Supreme Soviet.\textsuperscript{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.\textsuperscript{186} They not only replaced the Southern, French-derived laws and institutions, but Northern officials were seconded to run the Southern legal apparatus.\textsuperscript{187} Most Southern and French-trained lawyers either fled the country or were incarcerated in ‘re-education camps’.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{183} See generally, Bernard Fall, 1960 ‘North Vietnam's Constitution and Government’ 33 Pacific Affairs 284.

\textsuperscript{184} Constitution 1959, article 4.

\textsuperscript{185} See Bernard Fall, 1960 supra 284.


\textsuperscript{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. I/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.

\textsuperscript{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.\textsuperscript{189} Having defeated the United States and the Republic of
Vietnam, the DRV’s socialist legal system appeared entrenched for decades to come.

\textbf{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.\textsuperscript{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’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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 \textit{International Trade Law} 24.

\textsuperscript{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., \textit{Transforming Asian
Socialism: China and Vietnam Compared}, Allen and Unwin, Sydney 43, 44-63; Tu Tuan Anh, 1994

\textsuperscript{191} See Circular No. 3831/TP on Some Immediate Work to be Done by the Judiciary Sector to Implement the
5\textsuperscript{th} Party Congress Resolution, Ministry of Justice, first reproduced in \textit{Phap Che Xa Hoi Chu Nghia} (Socialist

\textsuperscript{192} Do Muoi discussed the reasons for \textit{doi moi} industrialisation and modernisation policies in his ‘Political

\textsuperscript{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 then 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. By 1989 central economic planning was largely replaced by a kind of state capitalism, euphemistically called the ‘socialist oriented market economy’ (nen kinh te thi truong theo dinh huong xa hoi chu nghia). 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. 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 lawmakers. 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.

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. Most legislation has been

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200 See Le Minh Tam, 1998 ‘Phap Che Xa Hoi Chu Nghia’ (Socialist Legality), in 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 Hoe’ (Socialist Law-Based State and Legal Research), in 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’ Vietnam Social Sciences (6) 3, 11.
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 *do i 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-*do i 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

\(^{203}\) 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.


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.\textsuperscript{207} 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.\textsuperscript{208} 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.\textsuperscript{209}

Some lawmakers believed a solution lay in selectively adopting the commercial laws of the former Republic of Vietnam (RV).\textsuperscript{210} They argued that like Eastern Europe, Vietnam should draw from pre-revolutionary rights-based civil law to draft a commercial legislative framework.\textsuperscript{211} 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.\textsuperscript{212} The main proponents of this view were French-trained lawyers belonging to the

\textsuperscript{207} Interview Phan Huu Chi, 1992 supra; Interview Nguyen Chi Dung, 2000, supra.
\textsuperscript{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.
\textsuperscript{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-dominant period of development. There is extensive Vietnamese literature on this issue in the Party’s Theoretical Review Journal \textit{Tap Chi Cong San} and the Party’s leading daily newspaper \textit{Nhan Dan}. See e.g., Tran Duc, 1987 ‘Ve Cac Quy Luat Kinh Te Trong Thi Ky Qua Do Len Chu Nghia Xa Hoi’ (Economic Laws in the Transition Period to Socialism) \textit{Tap Chi Cong San}, (5) 69, 69-73; Hoang Hao, 1987 \textit{Phap Luat va Kinh Te} (Law and Economy) \textit{Tap Chi Cong San} (12), 24, 24-18.
\textsuperscript{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.
\textsuperscript{211} For a discussion about this process in Eastern Europe see Paul H. Rubin, 1994 ‘Growing a Legal System in the Post-Communist Economies’ \textit{Cornell International Law Journal} 20-44.
\textsuperscript{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 lawmaker 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 (quản lý nhà nước về kinh tế), 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.\textsuperscript{216} 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).\textsuperscript{217} 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.\textsuperscript{218} 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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\textsuperscript{216} Interviews JICA long-term legal representatives Kawazu Shinsuke, Legal Coordinator and Takeuchi Tsutomu, Judicial Expert, Hanoi, January 2002.

\textsuperscript{217} For a description of this neo-liberal legal approach see John Bentley, 1999 'Completion of Viet Nam’s Legal Framework for Economic Development': UNDP Discussion Paper 2, Hanoi, 1-8.

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.  

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 than 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

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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.¹ 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.

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.² 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.³ Dominant ideologies are thus reified from actual structures, activities and values to explain or represent the way societies function.⁴

Poulantzas’s proposition suggests that legal ideologies transfer most easily where they agree or ‘fit’ with the dominant ideological ‘regions’ in host countries.⁵ 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.⁶ 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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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 institutions, like schools and the press. See Louis Althusser, 1984 Essays on Ideology, Verso, London.

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 and Law, Academic Press, London; Roger Cotterrell, 1980 ‘Review of Beirne and Sharlet (eds.) Pashukanis Selected Writings on Marxism and Law’ 7 British Journal of Law and Sociology 317–321.

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. 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. Joseph Raz proposed the minimal procedural basis for the rule of law. 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:


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.\textsuperscript{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.\textsuperscript{15} As such they are much more deeply embedded in democratic liberal ideals than the procedural rule of law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18} Whether rule of law ideology preceded or was produced

\begin{itemize}
\item \textsuperscript{13} See Joseph Raz, 1977 ‘The Rule of Law and its Virtue’ 93 Law Quarterly Review 195.
\item \textsuperscript{14} F. A. Hayek, 1944 The Road to Serfdom, University of Chicago Press, Chicago, 54.
\item \textsuperscript{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.
\item \textsuperscript{17} Harold J. Lasky, 1997 The Rise of European Liberalism, Transaction, New Brunswick.
\end{itemize}
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.\(^{22}\) But they appear less important when viewed through the lens of a redistributive ideology that balances private rights against the public good.\(^{23}\)

Fortunately for our discussion, the transfer of ideology is closely coupled to the strategies adopted by agents for change.\(^{24}\) 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).\(^{25}\) 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


\(^{22}\) 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.  

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).  

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). 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.


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Vietnamese intellectuals were well read in Montesquieu, Rousseau and Herbert Spencer, and after the 1945 revolution in Marx and Lenin. More recently, Alvin Toffler and other post-modernists have influenced policy makers. 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’. Economic progress and development is only considered possible by adhering to state-sponsored ideology.

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 (phap che xa hoi chu nghia), democratic centralism (tap trung dan chu) and collective mastery (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 (phap che xa hoi chu nghia)**

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

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30 See Vo Thu Phuong, 1992 ‘Thang Tram Quyen Luc’ (Power Shift) *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).
legality according to the French civil law concept *phap che dan chu* (democratic legality). The Third Party Congress in 1960 adopted Soviet *sotsialisticheskaiia zakonnost* (socialist legality) doctrine, which translated as *phap che xa hoi chu nghia* in Vietnamese. 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. 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. 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. 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 cua 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

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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.\textsuperscript{44}

**Planning as law**

Further complicating socialist legality, state plans (ke hoach nha nuoc) were also treated as legal instruments.\textsuperscript{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’.\textsuperscript{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’ (quản lý kinh tế nhà nước).\textsuperscript{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.\textsuperscript{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.\textsuperscript{49}

\textsuperscript{43} Id. 40.
\textsuperscript{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.
\textsuperscript{46} See Le Thanh Nghi, 1975, *Mot So Van De Co Ban Trong 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.
\textsuperscript{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 Cuu 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’.\(^5\) 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.\(^5\)

Plans also possessed a ‘party nature’ (*tinh dang cong san*) that ‘organically linked’ the party’s economic line with economic regulation.\(^2\) 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.\(^5\) 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*).\(^4\) 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.\(^5\) By the 1970s, Vietnamese literature

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\(^5\) Id. 43.


\(^5\) 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.\textsuperscript{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.’\textsuperscript{57} State officials and citizens were exhorted to ‘respect and comply with the law’ (phai ton trong va thuc hien phap luat).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

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


\[\textsuperscript{58}\text{See Vu Duc Chieu, 1974 supra 156–161; Le Minh Tam, 1998 supra 497–503}\]

\[\textsuperscript{59}\text{See Vu Duc Chieu, 1974 supra 79–80.}\]

\[\textsuperscript{60}\text{‘Socialist legality, likewise, is always the modus operandi of the socialist state and cannot become an impediment to the realisation of its historical tasks.’ This passage is quoted from an English language version of a Soviet text entitled ‘The Theory of the State and Law’, which was translated into Vietnamese and widely circulated in legal training institutions. See Nguyen Nhu Phat, 1998 supra. Also see S. A. Golunskii and M. S. Strongovich, 1940 The Theory of State and Law, The Institute of Law of the USSR, Academy of Sciences, Moscow, trans., 1951 Soviet Legal Philosophy, Harvard University Press, Cambridge Mass., 393.}\]
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 nghiia) 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 tue) and popular demonstrations. ‘Proletarian dictatorship’ (chuyen chinh vo san) better safeguarded democratic rights by allowing the ‘ruling class’ to directly supervised 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 Nghienn Cau 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.


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interests were privileged when state organs faithfully implemented external party resolutions and internal directives from party affairs sections (ban can su dang). 72 ‘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). 73

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. 74 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. 75 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’. 76

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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 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, 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 Coi 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. At the Fourth Vietnam Workers Party Congress in 1976, collective mastery was described as a system where ‘the true and supreme masters are the social community, the organised collective of working people, with the worker-peasant alliance as the core’. The slogan ‘the party is the leader, the state is the manager and people are the masters’ (dang lanh dao, nha nuoc quan ly, nhan dan lam chu) unified party, state and public relationships under collective mastery.

The precise differences between collective mastery ideology and Lenin’s socialist democracy even eluded Le Duan’s Politiburo 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’ (tang cuong su thong nhat ve chinh tri va tinh than cua toan dan). 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 hoi cu).

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’ (dăng lãnh đạo) 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 ethology 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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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’.\textsuperscript{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

\textsuperscript{86} Id. 23.
\textsuperscript{88} Marr, 1981 supra 362.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{92} Vietnamese leaders sought a ‘new-democracy culture’ (\textit{tan dan chu}) based on ‘rational, progressive socialist legislation’.\textsuperscript{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.\textsuperscript{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.\textsuperscript{95} He wrote that:

\textsuperscript{90} Truong Chinh applied historical materialism analysis to Vietnamese conditions, raising, but never answering the question of whether ‘Asiatic’ modes of production are different from European modes. See Truong Chinh, 1948 ‘Marxism and Vietnamese Culture’ report delivered at the Second National Cultural Conference, July 1948, reproduced on \textit{Truong Chinh Selected Writings}, 1994 \textit{supra} 205-211, 220-221; Truong Chinh, 1968, ‘Forward Along the Path Charted By Karl Marx’, reproduced in \textit{Truong Chinh Selected Writings}, 1994 \textit{supra} 538–541.

\textsuperscript{91} Karl Marx, 1877 ‘Otechestvennyie Zapiski’, reproduced in Shlomo Avineri 1969 \textit{supra} 6. Marx adapted Hegal’s idea that Asian development represents the beginning, and European history the end or pinnacle of social development. See Georg Wilhelm Hegel, 1956 \textit{The Philosophy of History}, J. Sibree trans., Dover Publications, London 103.

\textsuperscript{92} Truong Chinh, 1948 ‘Marxism and Vietnamese Culture’ report delivered to the Second National Cultural Conference, July 1948, reproduced on \textit{Truong Chinh Selected Writings}, 1994 \textit{supra} 251–252.


\textsuperscript{94} Truong Chinh, 1948 ‘Marxism and Vietnamese Culture’ report delivered at the Second National Cultural Conference, July 1948, reproduced on \textit{Truong Chinh Selected Writings}, 1994 \textit{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.\footnote{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 fraternity. Compared with Eastern European countries, countries in the Asian socialist family received little detailed analysis.}

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 nghiia dan toc cuc doan).\footnote{Interviews Le Kim Que, supra; Nguyen Thuc Bao, Former Legal Adviser to Ministry of Agriculture, Hanoi, 11 September 2000.} 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.\footnote{See e.g. V. Letsoini, 1963 ‘Nen Tu Phap Cua Nuoc Viet Nam Dan Chu Cong Hoa’ (The Judiciary of the Democratic Republic of Vietnam) \textit{Tap San Tu Phap} (11) 26, 26–28; Sarogoratsik, 1961 ‘Vai Tro va Quan He Giua Cuong Che va Thuyet Phuc Cua Phap Luat Trong Thoi Ky Xay Dung Chu Nghia Cong San Tron Quy Mo Rong Lon’ (Roles and Relations between Enforcement and Legal Education in the Communist Period) \textit{Tap San Tu Phap} (11) 41, 42–57; V. M. Letsoini, 1961 ‘Viec Bao Dam Phap Che Xa Hoi Chu Nghia’ (Ensuring Socialist Lawfulness) \textit{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) \textit{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 Kraticheskoi Respublika Vietnam’ (Solution of the Nationality Question in the Democratic Republic of Vietnam) in \textit{Demokraticheska Republika Vietnam 1945–1960}, Vostochnoi Literature, Moscow, 141–176, cited in Ginsburgs, 1973 \textit{supra} 671.} 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.\footnote{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 Proceedings) \textit{Tap San Tu Phap} (2) 12, 13–14.} The Legal Studies Group (\textit{To Luat Hoc}) debated and published articles
about law reform in the *Luat Hoc* (Jurisprudence) journal.\textsuperscript{100} 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.\textsuperscript{101} 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’.\textsuperscript{102} 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.’\textsuperscript{103}

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.


\textsuperscript{101} Interview Dao Tri Ue, Director Institute of State and Law, Hanoi, July 1998.


\textsuperscript{103} Nguyen Thi Doan and Do Minh Cuong, 1999 *Triet Ly Kinh Doanh: Voi Quan Ly Doanh Nghiep* (The Business Philosophy of the Management of Enterprises) Nha Xuat Ban Chinh Tri Quoc Gia, Hanoi, 147.
• 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’ (tang cuong su nhat tri ve chinh tri va tinh than cua toan dan). 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.\footnote{See David Marr, 2000 'Concepts of 'Individual' and 'Self' in Twentieth-Century Vietnam' 34 Modern Asian Studies (4) 769, 774-781.} 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).\footnote{Interview Ngo Van Thau, supra.} 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'.\footnote{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.} Finally it is important to recall from our discussion in chapter two that virtue-rule co-existed 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.\footnote{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.}

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.\footnote{Dinh Gia Trinh, 1965 'May Y Kien Ve Tinh Dan Toc va Tinh Khoa Hoc Cua Thuat Ngu Luat Hoc—Nhan Xet Pho 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, 28-29.} It retained its Soviet meaning (legality) in scholarly legal
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


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 moi 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 polices. 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 (\textit{perestroika}), without fundamentally disrupting communist party power.\textsuperscript{131} Soviet lawmakers developed a constitutional doctrine—\textit{pravovoe gosudarstvo} (law-based state)—that proclaimed the supremacy of law and the constitution.\textsuperscript{132}

\textit{Pravovoe gosudarstvo} was based on German \textit{rechtsstaat} (state-law) principles.\textsuperscript{133} Developed in autocratic nineteenth-century Prussia, \textit{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, \textit{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 \textit{nha nuoc phap quyen} (law-based state), a Vietnamese

\textsuperscript{129} This conclusion does not appear in official party writings and is based on interviews with Phan Huu Chi, \textit{supra}; Nguyen Nhu Phat 1998, \textit{supra}. Also see Phong and Beresford, \textit{supra} 86.

\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 \textit{Ve Cai Cach Bo May Nha Nuoc, (On the Reform of the State Apparatus), The Truth Publishing House, Hanoi.}


\textsuperscript{132} The term was first used in the Nineteenth Party Conference in 1988 and was added to \textit{perestroika, glasnost} and \textit{demokratitsiya} as principles of the ‘new thinking’. See Harold J. Berman, 1992 ‘The Rule of Law and the Law -Based State (Rechtsstaat), in \textit{Towards the 'Rule of Law' in Russia?}, M. E. Sharpe, New York 50–52.

\textsuperscript{133} 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 \textit{Introduction to the Study of the Law of the Constitution,} 19\textsuperscript{th} 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.

\textsuperscript{134} The concept of \textit{pravovoe gosudarstvo}, or \textit{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

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adaptation of *pravo voe gosudarstvo.* Like *pravo voe 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 1991.¹⁴² 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 *Révendition 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.¹⁴³ Ho Chi Minh, they argued, synthesised ‘traditional’ neo-Confucian concepts of Vietnamese humanism—‘love the country, love her people’—with imported notions of

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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 reinvoke 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.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.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 nha nuoc phap quyen discourse, without overtly challenging socialist legality.¹⁴⁶ Procedural rule of law concepts such as legal ‘transparency’ (ro rang) are used to promote legal institutions that constrain state power with law.¹⁴⁷

Several writers have bypassed Ho Chi Minh altogether and directly attribute rule of law ideals to European Enlightenment philosophers.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 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.¹⁴⁹


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, supra 26–27; Nguyen Van Tai, 1996 ‘On the State Ruled by Law and a Multipartisan Regime’ Vietnam Social Sciences (1) 3, 6.

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’ Tap Chi Cong San (8) 40, 40–41; Nguyen Duy Quy, 1993 supra 10–11.

¹⁴⁷ Le Hong Hanh, 1998 supra 322–323.


¹⁴⁹ For an example of this type of writing see Institute of State and Law, 1998 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, 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. 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’ (*giao 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. A5

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 giai giai cap cong nhan voi giai cap dong dan va tang lop tri thuc). A5

More recently, the ruling class was further enlarged to include the ‘interests of the entire people’ (toan the quan chung nhan dan), including entrepreneurs. A5 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.

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 possess the quality of uy tin (moral credibility).’ A5 Historically, party theorists used the uy

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A5 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 Multipartisan Regime’ Vietnam Social Sciences (1), 3, 7.


A5 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.

A5 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.  

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’. 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.  

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’. 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

and expelled a further 78,200 members.\textsuperscript{162} Despite subsequent purification campaigns, systemic corruption remains the most serious threat to party legitimacy and claims to paramountcy.\textsuperscript{163}

The party has been more successful in generating legitimacy by appealing to patriotic and nationalist sentiments.\textsuperscript{164} Invoking the ancient preoccupation with building and defending the country, the Seventh Party Congress in 1991 nominated modernisation and industrialisation as national goals.\textsuperscript{165} 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.’\textsuperscript{166}

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 definers of core social customs and values.\textsuperscript{167} Manufactured cultural values are reproduced in popular films like ‘Thương Nhoi Dong Que’ (Our Beloved Countryside) depicting serene village culture and morals providing refuge from the ‘whirlwind of the market economy’.\textsuperscript{168} 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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\textsuperscript{165} See e.g. Editorial, 1994 ‘For the Cause of Industrialising and Modernising the Country’ \textit{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’ \textit{Tuan Bao Quoc Te} 26 February, 1, 2, trans., FBIS East Asia Daily Report 97–103.
\textsuperscript{166} See Resolution on Continuing Renovating Mechanism and Policies to Encourage and Facilitate Development of the Private Economy, CPV Central Committee, 2 March, 2002.
\textsuperscript{167} The literature is extensive in this area, but see Le Thi, 1999 \textit{The Role of the Family in the Formation of the Vietnamese Personality}, The Gioi Publishers, Hanoi, 140–146; Pham Ngoc Quang, 1995 ‘Van Hao Chinh Tri Voi Tu Cach La Mot Pham Tru Cua Chinh Tri Hoc’ (Cultural Politics as a Category of Politics) \textit{Nha Nuoc va Phap Luat} (1) 14.
\end{flushleft}
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-doai 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 That? (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’ (quán lý) the ‘socialist-oriented’ market (see chapter four).\textsuperscript{172} By blurring distinctions between political policy and law, the doctrine ultimately undermines the legal formalism promoted by \textit{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.\textsuperscript{173} 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).\textsuperscript{174}

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.\textsuperscript{175} 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.\textsuperscript{176} 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

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\textsuperscript{173} See Nguyen Nham, 1997 \textit{supra}.

\textsuperscript{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) \textit{Tap Chi Cong San on-line}, September, \texttt{<www.tapchicongsan.org.vn>}. \textsuperscript{175} See John Gillespie, 2001 ‘Self-Interest and Ideology: Bureaucratic Corruption in Vietnam’ 3 \textit{Australian Journal of Asian Law} (1) 13–23.

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

These cases illustrate the ongoing tension in the political-legal ideology between \textit{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.\textsuperscript{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.

\textbf{Economic regulation}

More than any other factor, the mixed-market economy has changed political-legal ideology in Vietnam. Following \textit{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.

\footnotesize{\textsuperscript{177} Nguyen Hung Quang, 2003 ‘Vietnamese Lawyers and the State’, unpublished paper presented at the Law and Governance Conference: Socialist Transforming Vietnam Conference, Deakin University and Melbourne University, 13 June.}

\footnotesize{\textsuperscript{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.’


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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.\(^{184}\) 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.\(^{185}\) Though they remain skeptical as to whether sweeping economic deregulation is an appropriate economic model for a poor country with increasing economic inequality.


\(^{184}\) 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’ *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.\textsuperscript{186}

Other commentators favour an East Asian developmental model.\textsuperscript{187} They agree with neo-liberalism that facilitative law encourages market stability and predictability, but believe that economic growth requires ‘Rhine capitalism’ combined with proactive state economic regulation.\textsuperscript{188} 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.\textsuperscript{189} In 1986 the party adopted an ‘open door’ (\textit{mo cua}) policy that cautiously opened the economy to foreign trade and investment from capitalist countries.

\textsuperscript{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., \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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

\textsuperscript{191} Tran Thu Hang, 1999 ‘Vietnam’s Trade in the Course of International Integration’ \textit{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.


\begin{quote}
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.
\end{quote}

sovereignty caused by legal harmonisation is more than offset by the economic benefits.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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'.\textsuperscript{197} Such views are heavily coloured by nationalism and deeply ingrained notions of 'self-sufficiency' (\textit{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.\textsuperscript{198}

Those arguing from this nationalistic standpoint, call for the state to reassert 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).


\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{197}Nguyen Tan Dung, 2002 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

²⁰¹ Vu Son Thuy, 1997 ‘Interview With Poliburo 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 de-politicise 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

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 benefit 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.

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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.\textsuperscript{211} 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.\textsuperscript{212} 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


\textsuperscript{212} Habermas maintains that it is primarily through rational argument that members of society form the mutual understanding necessary to consent to dominant ideologies. See Jurgen Habermas, 1987 *The Theory of Communicative Action*, Beacon Press, Boston, Vol. 2 164–97; Jurgen Habermas, 1996 *Between Fact and Norms: Towards a Discourse of Law*, Polity Press, Cambridge 426.
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 quyên 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 actual 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’ (sủ lãnh đạo của đảng) 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

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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.³

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).⁴ 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.⁵ 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 Angel R. Oquendo, 2002 'Deliberative Democracy in Habermas and Nino' 22 Oxford Journal of Legal Studies (2) 205-206.


is generated and those affected participate cooperatively.\textsuperscript{6} Unqualified traditions, metaphysical beliefs and ideology compromise consensus. Effective communication is most likely in unmediated, decentralised and face-to-face exchanges.\textsuperscript{7}

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.\textsuperscript{8} 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’.\textsuperscript{9} Discourse analysis also describes attitudes to law from the standpoint of common responses on the part of institutions or groups.\textsuperscript{10} There is a stock of knowledge and epistemologies commonly available to groups that collectively guide their responses.\textsuperscript{11} Social groups bring different bodies of knowledge and understandings to the

\textsuperscript{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.


\textsuperscript{9} Peter Berger and Thomas Luckman, 1966 The Social Construction of Reality, Anchor Books, New York, 75.


\textsuperscript{11} As Alfred Schutz opined ‘we cannot understand an institution without understanding what it means for the individuals who orient their behavior with regard to its existence.’ Alfred Schultze, 1962 The Problem of Social Reality, Collected Papers vol. II, Martinus Nijhoff, The Hague, 10-11.
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.\textsuperscript{12} 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’.\textsuperscript{13} 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.\textsuperscript{14} 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.\textsuperscript{15} Cultural studies similarly conclude that law primarily operates by influencing shared modes of thought (epistemologies), rather than acting on individual conduct in specific instances.\textsuperscript{16} In other words, social thought is not the sum total of all individual thought, society also thinks through ‘interpretive communities’.\textsuperscript{17}


\textsuperscript{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.

\textsuperscript{17} See Gunter Teubner, 1993 Law as an Autopoietic System, trans., Anne Bankowska and Ruth Adler, Blackwell, USA.
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. 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’. 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.

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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 To Chong 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 quyền lực) 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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24 ‘Concentration of power’ (tap trung quyền lực) is more generally termed ‘concentration of democracy’ (tap trung danh chut) 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 Rousseauian 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 112, 118, 124; Dao Tri Uc, 2001 ‘Xay Dung Nha Nuoc Phap Quyen Xa Ho Chi 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 committees’ (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 (vien 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

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’ (sử lãnh chủ dẳng) 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

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. 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.

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.

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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 Hue 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’. 46 Yet as we saw in chapter three, _nha nuoc phap quyen_ ideals never displaced support for party paramountcy.47

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.48

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.49 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’.50 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.’51 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

46 Previous constitutions in 1959 and 1980 placed the party under the constitution, but not law.
48 Decision No. 136/QĐ-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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52 Ibid.
54 Political expediency 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.
55 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 Webersian 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 (ty 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, Politiburo 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 ly thi truong*). Decree No. 10 on the Tasks and Powers of Market Management 1995 established market control authorities with powers to ‘inspect and control’ and ‘manage’ (*quản lý*) economic markets. They are required to ‘propagate party undertakings and lines as well as state policies and laws’. The meaning of regulations and laws (*qui định pháp luật*) is determined by internal sub-legal documents (i.e. official letters and internal operational directives) based on ‘policy regimes’ (*che do chính sách*) 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’. Numerous sub-legal documents promote *thi truong lành mạnh* (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’. 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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68 This case description is based on discussions with two employees of the Hanoi Market Control Board during April 1999 and September 2000.
69 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.
70 See Decree No. 2 CP on the Development and Management of Marketplaces 2003, article 13.
71 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.
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.\(^{73}\) It has no legislative basis.\(^{74}\) 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 Trang 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.\(^{75}\) 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 duc*) and professional requirements (*yeu cau chuyen mon*).\(^{76}\) 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 Promulgation 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 nomenklatura 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 nomenklatura 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.
80 Interviews Officials, Office of the National Assembly, Hanoi, October-November, 2002.
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.  

*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.’  

‘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.’ This system remains entrenched despite longstanding criticism that it confuses lines of authority and erodes the prestige of state managers.

Central-level ‘party affairs sections’ generally comprise ministers, vice-ministers and senior department heads. 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

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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*. 

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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 lawmakers' discourse within state institutions.

Democratic centralism, discussed in chapter three, binds central party organs, ‘party affairs sections’ and party members.\(^89\) Party members are enjoined to strictly obey central party resolutions and the ‘monolithic thought and action’ of the party and state.\(^90\) ‘Party affairs sections’ are required to ‘submit themselves to higher-echelon organisations’.\(^91\) ‘No party members should be allowed to distance themselves from the management of organisations.’\(^92\) 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 *nomenkultura* 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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\(^90\) See Doan Khue, 1998 * supra* 6-9.

\(^91\) 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 emphasis) 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

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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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.  
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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102 Oskar Weggel, 1986 *supra* 415.

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.\footnote{See Yeonsik Jeong, 1997 ‘The Rise of State Corporatism in Vietnam’ 19 Contemporary Southeast Asia, (2), 152, 160-165; Jonathan Ungar and Anita Chan, 1995 ‘China, Corporatism, and the East Asian Model’ Australian Journal of Chinese Affairs (33) 29, 32-37.}

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.\footnote{The letter appeared in a French translation in George Boudarel et. al. eds., 1983 Bureaucratie au Vietnam, l’Harmattan, Paris, 115-119. Also see Carlyle A. Thayer, 1992 ‘Political Reform in Vietnam: Doi Moi and the Emergence of Civil Society, in Robert F. Miller ed., The Developments of Civil Society in Communist Systems, Allen and Unwin, Sydney, 111-112.} 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.\footnote{See Abdelfattah Amor, 1998 ‘Civil and Political Rights: The Question of Religious Tolerance’, Office of the United Nations High Commissioner for Human Rights, Geneva. Also see reports by the New York Based Human Rights Watch group that allege harassment and imprisonment of Buddhist and Catholic clergy organising outside party sanctioned religious organisations. See Human Rights Watch, 2002 ‘World Report, Vietnam’, <www.hre.org/wr2k2/asia11.html>.} Protestant evangelical groups have also been banned from proselytising ethnic minorities in highland provinces.\footnote{See Vo Tan Tai, 2002 ‘False Religion a Smokescreen Hiding Political Reactionaries’ 8 Vietnam Law and Legal Forum (90) 13, 25; Voice of Vietnam, 2003 ‘Communist Party of Vietnam Issues Communiqué on Seventh Plenum’ BBC Monitoring Asia Pacific, 23 January.} Contrasting with stringent religious regulation, the party has partially relaxed controls over the formation of entrepreneurial and other non-
political ‘associations’ (hiệp hội), 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 (Mat Tranh 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 lawmakers.\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

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\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 breadthness. 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. Lehbruch, 1979 Trends Towards Corporatist Interest Intermediation, Sage Publications, London; H. J. Wairda, 1997, 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., 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.\(^{118}\) 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.\(^{119}\) 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.\(^ {120}\) 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'.\(^ {121}\)

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 63-84.


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} Vinatas 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 Tieg 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, Vinatas 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 Tieg 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.\(^{133}\) 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’.\(^{134}\) 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.\(^{135}\) Others believe that regional groupings are the main source of conflict.\(^{136}\)

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 nomenkultra 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 expediency, but it also rests on the epistemological assumptions guiding party decision-making.


139 See Thaveeporn Vasavakul, 1997 supra 114-117.


141 See Martin Painter, 2002 supra; Quan Xuan Dinh, 2000 ‘The Political Economy of Vietnam’s Transformation Process’ 22 Contemporary Southeast Asia (2) 360, 364’ Adam McCarty, 2001 supra.