As we saw in chapter three, party moral and political discourse is bound up in its own self-referential criteria. Party ideological units and the political education system inculcate this discourse. In tandem they have created an ‘interpretive community’ that shares common epistemological assumptions about the nature of political and legal problems and the most effective solutions. Once party ‘leadership’ is conceived as a moral good or an essential source of political power, it is difficult for party leaders to accommodate or learn from imported PAR notions that argue for the separation of party and state. For example, much party discourse uses *a priori* notions of good and bad that portray party leadership as an immutable moral good. By implication legal ideas aiming to separate party and state are morally bad. The ideal, much less the institutional reality of constitutionalism, is unlikely to take hold until legal modes of thinking that privilege the ‘rule of law’ over political policy gain more credence in party and state discourse. The following chapters argue that legally binding obligations under international trading treaties, in concert with *nha nuoc phap quyên* discourse, are gradually making a procedural ‘rule of law’ that governs economic (but not political) relations appear social useful, even desirable.

**Party leadership and legal borrowing**

Kahn-Freund speculated that if political parties monopolise state power, laws will invariably reflect their interests. His observation raises two questions: how does party ‘leadership’ in Vietnam influence legal borrowing; and would the constitutionalisation of political power stabilise the meaning of imported commercial laws?

We have seen that ‘party leadership’ has the capacity to fine-tune the meaning of law. Party political and moral discourse frequently provides the secondary rules that give meaning to open-ended rights-based laws. For example, in determining the meaning of ‘healthy market’ competition, party ‘policy regimes’ (*che do chinh sach*) regulate the effectiveness of imported contractual and property rights. They also play a decisive role in ‘fine-tuning’ the meaning of market behaviour for the purposes of the Competition Law 2004.\(^{142}\)

If party ‘policy regimes’ were stable and transparent, they could coexist with, even augment, a procedural ‘rule of law’. But polycentric decision-making within the party

\(^{142}\) Chapter Five of the Competition Law prohibits ‘unhealthy’ market behavior. This subjective notion is difficult to clearly define and will be interpreted by state officials according to ‘policy regimes’ (*che do chinh sach*).
produces protean and opaque policy guidelines. It also generates different policy and legal interpretations across factional lines and between central and local authorities (see chapters five and six).

Different policy positions profoundly influence the meanings given to private commercial rights. In chapter three we saw that party factions are divided over key ideological issues such as whether entrepreneurs can do anything not expressly forbidden by law; whether ‘state economic’ managers can use prerogative powers to override private rights; and whether international legal harmonisation compromises national sovereignty.

A final question remains; can commercial legal transplants flourish in a society ‘led’ by the party? The point is often made that borrowed commercial legal systems have effectively transplanted to illiberal party-dominated countries such as Singapore and Malaysia. But there are substantive differences between these regimes and Vietnam. They have no equivalent to the elaborate mechanisms that implement party ‘leadership’ in Vietnam. More importantly, the political elite in these countries largely leaves the implementation of policy to comparatively depoliticised and professionalised state institutions. Subsequent chapters explore whether effective legal transplantation requires the party to dismantle party ‘leadership’.

Conclusion

Our discussion commenced with Kahn-Freund’s observation that anyone transferring Western laws to communist regimes should search for functionally equivalent legal structures and processes. Although Vietnam has the institutional trappings of a constitutional state, ‘party leadership’ guides, directs and occasionally displaces the state. Party discourse is antagonistic or at best ambivalent to imported PAR arguments that effective governance requires a separation of party and state. There is some evidence, especially in the economic arena, that the party is cautiously devolving lawmaking power to the state. Subsequent chapters continue this discussion by considering how far this process has proceeded and whether (if at all) the transformation affects legal borrowing.

We have also seen that ‘party leadership’ uses resolutions and internal secretive *quan triet* (comprehensive) instructions to shape the meaning of borrowed commercial laws. This process exposes imported laws to the vicissitudes of party decision-making. At the same time, the party uses state corporatism to co-opt and ‘manage’ public responses to state laws, and to regulate market activities.

In sum, ‘party leadership’ has the potential to produce highly contextual outcomes for borrowed law. In some circumstances party policy may support borrowed law, and shield lawmakers from public opposition. In other circumstances, party policies may generate highly fragmented and protean interpretations of legal imports. To the extent party leadership generates legal uncertainty, it is antithetical to a procedural ‘rule of law’ that could stabilise and preserve imported private commercial rights.

The following chapters build on this preliminary assessment by considering whether market-access treaties, transplanted ideas and bottom-up social pressures can persuade the party to accept a procedural ‘rule of law’ in the economic arena. The next chapter assesses the relative influence exerted by the discursive narratives that shape the selection and adoption of foreign commercial laws. Chapter six investigates how central and local discourses guide the way state institutions interpret and apply imported property and contract rights. While chapter seven explores whether those outside the party and state have a voice in influencing imported laws and progress towards a ‘rule of law’.

---


194
Chapter Five
Discursive and Strategic Lawmaking

Introduction
In Kahn-Freund’s estimation the mentalities and processes informing lawmaking profoundly influence the selection and adoption of legal transplants. The meanings ascribed to imported laws may change when lawmakers in recipient countries do not fully comprehend the norms and tacit assumptions underlying these laws or the processes in which they operate. Even when the foreign regulatory context is well understood, lawmakers may borrow laws for strategic reasons based on political expedience, familiarity, prestige or legal fashion, rather than compatibility with the recipient legal system.

Commercial law reform in Vietnam is a fertile ground to test Kahn-Freund’s observations, because lawmakers steeped in the Soviet-legal tradition are importing rights-based legal norms to regulate the mixed-market economy. Our inquiry needs a framework in which to explore the epistemological assumptions and strategies influencing the selection and adoption of foreign laws in Vietnam. As previously mentioned, discourse analysis is a useful tool, since lawmaking largely (although not exclusively) relies on communicative processes (see chapter four). By imagining lawmaking as the ‘contact zone’ between different modes of exchange, discourse analysis offers insights into the ways lawmakers transform political, economic and moral discourse into legislative questions of legality and validity.

This chapter considers the ways ‘official’ party and state discourses influence the selection and adaptation of foreign law. Distinctions between ‘official’ and ‘unofficial’ discourse are somewhat artificial in Vietnam because as previously noted, mass organisations and state corporatism blur the boundaries between state and society. For our purposes ‘official’ discourse is taken to mean ideas generated by party cadres and state employees that are

---

2 The term lawmaking is used broadly to denote any processes that transforms regulatory knowledge into state laws, rules and processes.
communicated through party and state organisational channels and publications. Though highly influential, ‘official’ discourse is not the only source of ideas shaping lawmakers. Chapters six, and especially seven, explore how entrepreneurs influence drafting committees and legislative deliberations in the National Assembly.

This chapter begins by examining the different discursive narratives informing legal borrowing. After mapping the ideas and epistemological assumptions guiding lawmakers, the chapter next uses a series of case studies to examine how legislative drafters and National Assembly delegates strategically use the ‘official’ discourse to select and adapt the meanings of borrowed laws. It asks the question: what factors make some foreign ideas appear more appropriate than others? The discussion concludes that lawmakers rarely passively follow discursive ideas, but rather they strategically use borrowed ideas to advance institutional interests.

**Legal borrowing discourse**
Chapter three showed that cultural and legal compatibility seemed relatively unimportant to lawmakers during the 1960s and 1970s, because they were convinced that Vietnamese society was evolving into a transcultural socialist utopia. Unreflective borrowing is not a viable option for contemporary lawmakers importing Western rights-based law into a socialist-inspired political-legal system. Yet as the following section suggests, most discourses informing contemporary lawmakers de-emphasise the need to reconcile imported commercial norms and practices with local conditions. Four analytical threads run through contemporary legal discourse about legal borrowing (for a detailed analysis see annex 5). First, party writers depict a national culture (van hoa dan toc) based on essentialised kinh traditions, surrounded by layers of received external influences. Like articles of faith, certain Vietnamese cultural institutions such as ancestral

---

4 This definition does not include views privately expressed (outside official business) by party and state officials through mass organisations, state-authorised associations and directly in the press, or the views of those outside the party and state. Chapter seven discusses the complex issue whether mass organisations and state-authorised associations are permitted to express ‘unofficial’ views.
6 See Le Truyen, 2003 ‘Ho Chi Minh’s Thoughts on Unity’ Nhan Dan, reproduced in 9 Vietnam Law and Legal Forum (108) 10-11. Also see Do Huy, 2003 ‘Achievements of Building and Developing a New Culture 196
links to the mythical Au Lac kings, Red River Delta villages and independence from foreign invaders are placed within the traditional core. Other deeply embedded cultural traditions, particularly those derived from colonial and foreign sources, are relegated to the periphery of the imagined cultural identity. This politically constructed identity is rarely explicitly invoked, though it exerts a strong influence over attitudes towards legal imports. For example, the Legal Research Institute (*Vien Nghien Cuu Khoa Hoc Phap Ly*), a body attached to the Ministry of Justice, conducted extensive research to identify ‘core’ Vietnamese socio-legal norms. This project was strongly influenced by the belief that Vietnam has a usable legal past that can be codified into contemporary laws. It also recalled the ‘Asian values’ thesis that nation states can withstand ‘negative’ global pressures, maintain social stability and preserve elite power by asserting core ‘traditional’, mainly Confucian, moral values.

Researchers failed to find meaningful ways of importing traditional norms (*duc tri*) and laws (*phap tri*) based on pre-industrial village life into a legal system serving an educated, internationally integrated mixed-market society. The project provided legislative drafters with insufficient contextual information to ascertain whether pre-modern Vietnamese norms and laws could regulate contemporary life. It nevertheless created a general impression that laws in East Asian countries are more compatible with Vietnamese conditions than Western laws.

---


8 The project was initiated by the Minister of Justice, Nguyen Dinh Loc, to overcome some of the problems experienced by drafting committees in reconciling borrowed law with Vietnamese conditions. Interview, Duong Thi Thanh Mai, Deputy Director of the Institute of Law Research, Ministry of Justice, Hanoi, March 1999.


10 Interviews Bui Thi Mai Lan, Department of Civil Law, member of Civil Law Drafting Committee, Ministry of Justice, Hanoi, March, April, 1999. It should be noted that foreign researchers have shown that a wide gap existed between imperial ideology, including laws, and socio-economic practice during pre-colonial Vietnam. See Nola Cooke and Li Tana, eds., 2004 *Water Frontier: Commerce and the Chinese in the Lower Mekong Regions, 1750-1880*, Rowman and Littlefield, Lanham, USA.

11 Some legal commentators are clearly influenced by this work and now speculate that ‘Confucian values and faith’ may augment and strengthen imported law see Pham Duy Nghia, 2005 ‘Confucianism and the
Second, most commentators use a narrow technical legal analysis that avoids assessing the relevance of foreign laws to local conditions. They treat legal imports as technical fragments that can be reassembled without reference to underlying institutions and practices. There are undoubtedly practical reasons for basing legal analysis on ‘black letter law’, such as poorly developed comparative law and research skills. But never far below the surface is the concern that since law reflects party policy, contextual analysis may offend the party-line and policies. Political constraints are enforced by administrative penalties that prohibit state employees from criticising party and state policy.

Third, some writers have reconfigured Marxist-Leninism to make legal borrowing from capitalist countries a theoretical possibility. Dao Tri Uc, for example, is strongly influenced by Chinese Marxist theorists, who insist that ‘laws have their relative independence and influence on the economic system’. By abandoning orthodox class-based theory that insists on causal links between working class interests and law, he concluded that progressive and counter-progressive laws are determined not necessarily by their class origins, but rather by whether they eventually become generally acceptable and promote the national interest. This reformulation gives lawmakers a theoretical licence to borrow laws from capitalist countries without modifying core Marxist-Leninist axioms such as party paramountcy.

Four, a few commentators have quietly replaced Marxist-Leninism with Western sociological theory that embeds borrowed law in a broad discursive context. Pham Duy


13 Article Six of the Ordinance on Public Employees 1998 (as amended) requires state employees (including academics) to ‘[s]trictly abide by the Party’s lines and policies, and the State’s policy and law’.

14 Ordinance on State Employees 1998 (as amended).


16 To illustrate this point he gave the example of the nineteenth century German Civil Code, which, in addition to ‘progressive’ social values, also contained ‘counter-progressive’ marriage and divorce laws
Nghia, for example, took from Weber the notion that imported laws should correspond to social conditions in recipient countries. He argues that ‘mechanical copies’ (sao chep may moc) of Western law are generally incompatible with domestic economic and cultural conditions and are thus difficult to ‘bring into effectiveness’ (đom hoa ket trat). But since legal borrowing is the only way to rapidly develop a commercial legal system, he concludes that lawmakers should devote more resources to reconciling foreign laws with local conditions.

These variegated narratives suggest continuity and change in contemporary attitudes to legal borrowing. In some areas legal discourse has borrowed and assimilated rights-based thinking; in other areas it has recycled decades old Soviet ideas. The receptiveness of these narratives to imported ideas seems to depend on whether they are influenced by epistemological criteria that are closed and self-referential, or are open and willing to engage imported ideas. Epistemologies determine the types of imported ideas that seem familiar and acceptable to legal commentators.

The epistemologies regulating the entry of new knowledge into political discourse about party paramountcy have undergone the least change. Most commentators presented Marxist–Leninism and the thoughts of Ho Chi Minh as infallible and eternal truths, creating a self-referential discursive environment that conditions lawmakers to search for laws from similar ‘political systems’ (he thong chinh tri).

Even sacrosanct political epistemologies are not immune to change. Some commentators have selectively drawn ideas from Ho Chi Minh’s eclectic thoughts and ‘nha nuoc phap quy’en’ (law-based state) discourse to reinvent attitudes to non-socialist ideas. Dao Tri Uc, for example, replaced ‘working class’ interests with the national interest, a reformulation that enables lawmakers to bypass class theory and select laws from capitalist countries. This change in the epistemological settings is eroding many of the conceptual barriers that prevented pre-doí mòi lawmakers from borrowing laws from non-socialist systems.

recycled from a past era. Analogising from this point, he proposed that some Vietnamese imperial laws became the social norms of later generations. See Dao Tri Uc, 1995 supra.

17 See Pham Duy Nghia, 2002 supra 50-54.
18 See Dao Tri Uc, 2002 supra 24-26.
19 See Dao Tri Uc and Le Minh Thong, 1999 ‘Su Tiep Nhan Cac Gia Tri Phap Ly Phuong Dong va Phuong Tay Doi Voi Su Phat Trien Cac Tu Tuong Phap Ly Viet Nam’ (Reception of Oriental and Occidental Legal Values in the Development of Vietnamese Legal Ideology) Nha Nuoc va Phap Liat (5) 3-10.
Marxist-Leninist ‘scientific’ infallibility is also being worn down by the infiltration of Weberian socio-legal thinking that places law in a social matrix. Some commentators have smuggled ‘rule of law’ ideas into legal discourse to challenge the instrumental view that law exists to implement party policy. This new thinking not only has the potential to open legal thinking to borrowed ideas, it may also encourage lawmakers to examine the compatibility of legal transplants to local cultural and political ‘realities’.

As we saw in chapter three, economic ideas are also mounting a powerful challenge to closed political thinking. Longstanding prohibitions against trading with capitalist economies have given way to international economic integration policies that encourage lawmakers to harmonise domestic commercial law with international trade agreements. Imported neo-liberal legalism, which underpins international commercial law, openly challenges socialist ‘state economic management’ principles.

Finally, lawmaking discourse is not conducted in a hermetically sealed intellectual environment. Law reform everywhere comprises a set of conscious strategies by competing social agents to structure state power. Consequently, our analysis needs to consider the context of lawmaking. Are imported legal ideas systematically filtered through party ideals? Do legal drafters enlist imported ideas to support particular institutional priorities in ‘palace wars’? How relevant are theoretical approaches to legal borrowing compared to familiarity with, and the prestige of imported ideas? The next section uses a series of case studies to examine how specific institutional contexts mediate the discursive influence over legislative drafting committees.

A contextual analysis of lawmaking

Our discussion has portrayed lawmaking as an orderly process where lawmakers filter imported ideas through the dominant themes in the ‘official’ discourse. This portrayal underestimates human agency. To acquire the force of law someone must enact borrowed ideas into domestic legislation.

---

20 See Yves Dezalay and Bryant G. Garth, 2002 The Internationalization of Palace Wars, University of Chicago Press, Chicago, 246-250.
200
Brian Tamanaha, and others advocating ‘interpretivist’ approaches to discourse analysis, argue that application and context also shape legal meaning.\(^{21}\) As Clifford Geertz reminds us ‘law is local knowledge not placeless principle’.\(^{22}\) In other words, the meaning of words is never fixed, and varies according to the context in which the words are used. The meaning of legal ideas resides in their discursive representation and their strategic use. To understand how legislative drafting changes the meaning of legal imports it is thus necessary to consider the strategies and interpretive positions adopted by lawmakers. Alan Watson brought human agency into the lawmaking calculus by considering strategic reasons for adopting foreign laws. He used the term ‘transplant bias’ ‘to denote a system’s receptivity to a particular question outside law, which is distinct from an acceptance based on a thorough examination of possible alternatives.’\(^{23}\) The acceptability of law is determined by the prestige commanded by particular legal systems, together with linguistic and other accessibility factors.\(^{24}\) He also believed the ‘inertia’ or ‘the general absence of a sustained interest on the part of society and its ruling elite to struggle to adopt the most satisfactory rule’, inhibits transferability.\(^{25}\) Cost and potential political instability generated by legal change sometimes discourage legal elites from borrowing foreign laws. This study examines the proposition that legal ideas are not only adopted because they are good, but also because they are effectively communicated across cultural boundaries and possess authority and prestige. A series of case studies is used to examine how institutional contexts shape the selection and adaptation of borrowed laws.

**Translating foreign legal terminology**

Before turning to legislative drafting, it is useful to consider the role terminology plays in legal borrowing. Borrowed laws are not just ideas; they come encoded in foreign (to Vietnamese legal drafters) languages. Ideally, drafters must not only understand foreign


\(^{24}\) For example, he thought that common law principles are disorganised, incomplete and narrowly address specific issues and, as a consequence they are not as attractive to legal drafters as codes, which are highly organised and conceptual complete.
legal terminology, they must also find Vietnamese words or phases that import legal meanings without stripping away and/or adding too many new normative concepts. Studies about legal terminology provide insights into the contribution words make to building legal identities and outlooks.  

The reception of foreign legal terminology into Vietnamese is not a recent phenomenon. Ta Van Tai asserts that most governmental and legal terms used during imperial times were borrowed from Chinese sources. Widespread familiarly with imported Chinese legal thinking was restricted by the use of Chinese and nom (modified Chinese) characters in official discourse. Although literacy levels in pre-modern Vietnam were high by regional standards, fewer than 60,000 literati could read official laws and proclamations written in these characters. Many legal terms were eventually translated into the more widely understood quoc ngu (Romanised script). Nevertheless, after the revolution, few lawmakers understood Chinese and nom characters with sufficient fluency to acquire a deep knowledge of pre-modern legal thinking.

Linguistic barriers also impeded the naturalisation of French colonial laws. With the exception of the Code de Annamite 1922, which mixed French law with an abridged Nguyen Code, French colonial authorities made little effort to translate French legal documents into quoc ngu (see chapter two). French was not only the legislative language, but also legal training was conducted in French and superior courts enforced the law in French.

In order to establish a socialist legal system, the DRV in 1959 forbade the use of French legal terminology and purged French-trained officials with questionable loyalties. Ho Chi Minh next led a campaign to transpose complex Chinese-Vietnamese legal words into

---

25 See Watson, 1978 supra 331.
28 Many, though not all, Chinese legal terms were translated into nom for official writings. Interview Tran Thi Tuyet, Institute of State and Law, Hanoi, March, 2001.

202
everyday Vietnamese terms familiar to the masses. Cadres working in villages found that Chinese-Vietnamese words used to translate Soviet legal terms caused confusion among the people, because this terminology was associated with mandarins and feudal regimes. Establishing a Vietnamese legal lexicon proved difficult. Chinese-Vietnamese words described many basic legal notions, such as *luat* (law), *phap che* (legality), *quyen* (right), *lam don thinh xin* (petition) and *hinphat* (penalty). Legal terms of Vietnamese origin, on the other hand, lacked precision and were treated more like aphorisms than technical terms. Legal officials gradually reverted back to using Chinese-Vietnamese terms. For example they changed *nghia vu*, the Vietnamese terms for obligation, back to the original Chinese-Vietnamese term *trai vu*. Other Vietnamese terms such as *phat vit* (punishment) appeared in official legal documents, while legal officials continued to use the Chinese-Vietnamese word *che tai* in regulatory conversations. Adding to the confusion some terms acquired different meaning in different discourses. The Sino-Vietnamese term *phap che*, for example, was used in legal discourse to translate the Soviet concept of legality, but in political discourse it reverted to its pre-modern meaning—to ‘ensure legal compliance’ through mass moral education campaigns.

By the 1980s most Chinese-Vietnamese legal terms had acquired Soviet legal meanings. This process took place through the association of Chinese-Vietnamese terms with Soviet legal ideas expressed in party policies and resolutions, legal education and organisational language. Over time party leaders also came to accept that legal officials needed their own technical language containing terms that were not in everyday use. Soviet-inspired legal meanings were soon disrupted by a new wave of legal borrowing. Rather than importing foreign legal words directly into the local language—a practice

---

32 Evidently Pham Van Dan wrote the main text used in the campaign. The use of Vietnamese legal terms was considered an urgent patriotic duty (*tinh dan toc*). See Dinh Gia Trinh, 1965 ‘May Y Kien Ve Tinh Dan Toa’ va Tinh Khoa Hoc Cua Thuat Luat Hoc—Nhan Xet Phe Phan Ve Mot So Thuat Ngu Thong Dung’ (*Nationalistic and Scientific Use of Legal Terminology: Criticisms of Common Legal Terms*) *Tap San Tu Phap* (3) 24-26.
33 The following conversions were unsuccessful: replacing the Chinese-Vietnamese term *thu dac* (to acquire) with the Vietnamese *lau duoc*; replacing the Chinese-Vietnamese *thu ly* (to accept a petition) with the Vietnamese *nhan xu ly* (to accept a case); and replacing the Chinese-Vietnamese *khang cao* (to appeal) with the Vietnamese *chong an* (to protest a judgment).
adopted in some other South East Asian countries—Vietnamese legal officials preferred local adaptations. Four processes are underway.

First, terms with Soviet legal meanings are gradually acquiring a new significance from their association with market transactions. The changing meanings of *luat* and *phap che* have already been discussed. Superior legislation frequently uses technical Chinese-Vietnamese terms to import foreign legal ideas, whereas subordinate legislation enacted by ministries to implement the law often contains more non-technical Vietnamese words. This discrepancy is attributable to a general lack of precise legal terms and a conscious decision to use simple terms that are understood by low-level administrative officials. Informants connected to foreign donor projects say that the Ministry of Justice has resisted attempts to compile an ‘official’ legal lexicon. They ascribe this reluctance to internal struggles between the National Assembly, Ministry of Justice and Supreme People’s Courts to control the meanings given to legal terms. As discussed below, these institutional contests amplified the fragmentation of legal discourses.

Second, some Chinese-Vietnamese legal terms that were discredited because of their association with capitalist law in the Republic of Vietnam have been rehabilitated. For example, the word *khe uoc* is now commonly used to describe commercial agreements. The Civil Code also uses many Chinese-Vietnamese legal terms to describe complex contractual and civil obligations, such as *vat dac dinh* (distinctive object) in Article 186 and *nghia vu lien doi* (joint obligation) in Article 304. Other legal terms have become unfashionable because they are considered too closely associated with Soviet legal thinking. The Hanoi Law University, for example, changed its name from *Dai Hoc Phap Ly* to *Dai Hoc Phap Luat*, because *phap ly* was used to describe legal processes in the command economy.

Third, where there are no equivalent local terms, drafters have literally translated imported foreign terms into Vietnamese. For example, *cong ty me-con*, which translates as mother-child company, was coined to describe holding-subsidiary companies for the amended Law on State Owned Enterprises 2003.³⁶

³⁶ Drafters writing the Competition Law have invented many new Vietnamese words to import complex Anglo-American anti-trust doctrines into Bill. For example, the word *ban hang da cap* is used to describe multi-level marketing (sales into networked industries).
Fourth, foreign grammar and syntax are also influencing the way the Vietnamese language is used to discuss legal issues. Take, for example, the UNDP-sponsored Legislative Framework Report drafted by the Law Department at the Ho Chi Minh National Political Academy and Ministry of Justice in 1998. The Vietnamese version of the report was translated into English by a Canadian-trained official working for the Ministry of Justice. Ministry officials decided that the English version more clearly expressed the intentions of the original authors and translated the English version back into Vietnamese. Not only were the legal terms more precise in English, but the English syntactical structures more clearly linked legal ideas in logical patterns. This practice further distances legal discourse from the everyday language.

In suggesting that recycled words retain traces of their original meaning, entomological studies imply that legal thinking lags behind reforms based on imported legal ideas. Chinese-Vietnamese legal idioms, for example, retained mandarin overtones long after they had been redeployed to serve socialist legality. Decades later socialist meanings are still evident in legal terms recycled in rights-based legislation. The following discussion examines how lawmaking changes the meaning of legal imports.

Legislative drafting

The starting point for understanding how context influences legal borrowing is identifying the institutional agents that select and adapt foreign laws, and determining whether particular lawmaking practices privilege certain types of ideas.

Soviet lawmaking

Once social relations stabilised in the DRV during the 1960s, more importance was attached to developing technically proficient legislation. Soviet law professors teaching at the Hanoi judicial training school introduced drafting techniques. But most legislation was imported from Soviet and other Eastern bloc countries with few concessions to local

---

[37] Interview Ngo Van Thau, 2001 supra. A series of articles appearing in the journal of the Supreme Court (Tap San Tu Phap) during the 1960s introduced Soviet legal drafting techniques to Vietnam. See e.g. Pachakop, 1964 ‘Van De Xay Dung Bo Luat Dan Su O Lien Xo’ (Drafting the Civil Code in the Soviet Union), Tap San Tu Phap (2), 20, 20-24; I. A. Speranski, 1963 ‘Mot So Van De Ve Viec Xay Dung Bo Luat Hinh Xo Viet’ (Some Issues about Drafting the Criminal Code of the Soviet Union) Tap San Tu Phap (8), 28, 28-31. The legal committee in the Uy Ban Khoa Hoa Nha Nuoc (State Committee on Science) also conducted legal research. See Pham Van Bach, 1994 ‘Cong Tac Nghien Cuu Luat Hoc’ (Law Research Activities), in Nghien Cuu Nha Nuoc va Phap Quyen (Studies about State and Legality), Truth Publishing Hanoi, 20-25.
conditions.38 Even statutes regulating areas such as crime, where a rich body of local law already existed, closely followed Soviet templates.39

Where suitable socialist models were unavailable, lawmakers codified party resolutions. Legislation of this kind retained much of the original political language and syntactical structure. For instance, Decree No. 182 on Socialist Collective Mastery Rights of Workers and State Officials in State-Owned Enterprises 1979 codified Resolution No. 10 on Collective Mastery issued by the Central Committee of the CPV in 1979, by copying most of the original language, headings and organisational structure. There was no attempt to change the hortative political language into legal norms and prescriptive rules.40 Similar political language appeared in the Statute on Higher-Level Agricultural Producer Cooperatives, an extremely important regulatory instrument.41 It consolidated a series of party resolutions and subordinate regulations, but did not convert political passages exhorting farmers to comply with khau hieu (political slogans) into legal standards prescribing legitimate forms of behaviour. Echoes of pre-modern lawmaking are also discernible in state resolutions that presented detailed reports about specific social problems and then proposed solutions.42 In short, Vietnamese laws either recycled Soviet legal ideas or codified party resolutions and state reports. It did not occur to lawmakers that they should transform political exhortations and pragmatic solutions into legal norms and rules.

38 Drafters borrowed laws from many Eastern bloc states. But since it came from the original socialist system, Soviet law was considered the most highly evolved. Chinese law influenced early land reforms, but was later considered politically suspect until doi moi reforms in the mid 1980s. Interviews Le Kim Que, supra. Apart from a few writings, articles about Chinese legal conditions did not begin appearing in local journals and the press until 2002 and 2003. Since then they have appeared with increasing frequency. 39 Pham Hong Hai, a member of the committee that drafted the Criminal Code during the mid 1980s says that virtual every provision was borrowed from the Soviet Criminal Code 1960. Interview, Pham Hong Hai, Director, Center of Criminology, Institute of State and Law, Hanoi, August 1996, March 2005. Also see Phuong-Khanh T Nguyen, 1987 ‘The Criminal Code of the Socialist Republic of Vietnam’ 13 Review of Socialist Law (2) 103-120. One of the few laws during this period not to follow the Soviet model was the Marriage and Family Law 1959, which largely drew from Chinese sources. See Chin Kim, 1973 ‘The Marriage and Family Law of North Vietnam’ 7 International Lawyer (2), 440-450 40 See Author Unknown, 1981, Phap Che va Quyen Lam Chu Tap The (Legality and Collective Mastery Rights), Jointly Published Department Legality and Department of Cultural Information in Binh Tri Thien Province, 3-7, 30-61. 41 For a description of the origins and status of the Statute on Higher-Level Agricultural Cooperatives see Adam Fforde, 1984 ‘Law and Socialist Agricultural Development in Vietnam: The Statute for Agricultural Producer Cooperatives’ 10 Review of Socialist Law 315, 315-317. 42 According to Woodside nineteenth century mandarins prepared factual reports for the emperors. The emperors then attached recommended solutions to the reports and proclaimed the consolidated instruments as edicts, See Alexander Woodside, 1971 supra 324.
Contemporary lawmaking

Following *do i moi* reforms in 1986, lawmakers began searching for legal sources beyond the socialist world. Drafting laws for the new economic conditions proved difficult, because lawmakers could no longer assume that borrowed law complied with domestic political imperatives. Since Soviet lawmakers techniques did not show lawmakers how to turn party resolutions into law, the Ministry of Justice drafted the Law on the Promulgation of Legal Documents to improve drafting processes.

According to its preamble, the law was supposed to ‘improve the quality and effectiveness of legislation work, institutionalise in time party-lines and policies, meet the requirements of social management by law and build the law-governed state’. The law also established a lawmaking hierarchy. It invested the NA with power to enact superior legislation (codes, laws and resolutions) and other state bodies were authorised to promulgate subordinate statutes to implement superior legislation. State bodies (including some NA committees), the Fatherland Front and its member organisations and NA delegates were empowered to propose draft legislation to the NA.43

Superior legislation is initiated in two main ways. Most commonly, ministries propose bills to the Standing Committee of the National Assembly (SC).44 Occasionally party and Fatherland Front organisations research and propose bills or amendments to the Central Internal Affairs Commission (CIAC) (*Ban Noi Chinh Trung Uong*). For example, the *Hoi Dong Kinh Te Xa Hoi* (Council on Economic and Social Affairs), a Fatherland Front organisation made up of Soviet-trained economists, proposed some commercial laws (e.g. Company Law) to the Government during the initial stages of law reform. Drafting cannot commence until the Politburo or the Party Central Committee issues a resolution appointing a drafting agency.

Until recently party leaders did not permit NA delegates to both draft and enact superior law. Some party officials argued that NA delegates lacked the ‘professionalism’ (*chuyen nghiep*) required to transform party policy into law, while others were concerned that

---


44 See Law on the Promulgation of Legal Documents 2002, article 22. Tran Dai Hung, Vice Chairman Central Committee of Internal Affairs Information, provided information on party involvement in vetting legislative proposals during an interview in Hanoi November 2002. Subordinate legislation enacted by Government agencies does not need National Assembly approval.
drafting powers might transform the NA into a rival political organ. But in 2004 the Politburo directed the NA Committee on Science, Technology and Environment to draft an Electronic Transactions Law. Since this is the first time a NA body has drafted a law, it is premature to postulate a fundamental change in the party’s approach to legal drafting. The party currently entrusts most drafting to specialised committees attached to government agencies. Other state bodies, such as the Supreme People’s Court and Procuracy occasionally draft bills. Finally, the NA Law Committee, in association with other NA bodies, prioritises the enactment of bills in the NA lawmaking agenda. Legal drafters are constantly reminded that ‘the most important point is to ensure that processes drafting laws and statutes and preparing the State’s plans and policies correctly expresses the Party’s ideology and viewpoint’. Yet this fundamental injunction is difficult to put into practice because party resolutions authorising legislation are generally hortative and contain few substantive instructions. One commentator equated the process to building a house, where policy makers specify the cost of construction and general size and function, but provide no architectural vision. For example, the Party Central Committee instructed the Central Institute of Economic Management (CIEM), a research organisation attached to the Ministry of Planning and Investment, to draft the Law on Business Bankruptcy and the Enterprise Law. In each case, party resolutions authorised the drafting committees to

46 Evidently the Committee lobbied the Politburo for permission to draft the law. But the drafting project has not attracted foreign donor support, because the draft law partially overlaps with the Civil Code and Commercial Law and a forthcoming law dealing with technical aspects of electronic trading. See VN Law Find, 2005 Legal Newsletter, NH Quang & Associates, Hanoi, March, 4.
47 Law on the Promulgation of Legal Documents 2002, article 25 (1). In general, lead agencies are instructed to form a drafting committee, but where the subject matter covers areas regulated by more than one ministry the Standing Committee of the National Assembly establishes the drafting committee.
48 Law on the Promulgation of Legal Documents 2002, articles 25-28. For example, the Fatherland Front drafted the Law on Fatherland Front 1999 and the Women’s Union took a key role in drafting the Family Law.
49 The Law Committee also determines whether the bill should be enacted as a code, law or ordinance. See Law on the Promulgation of Legal Documents 2002, article 22; Interview Nguyen Chi Dung, Center for Information and Library Research Services National Assembly Office, Hanoi 21 October, 1997.
import laws to meet foreign loan conditionalities, without indicating how drafters should reconcile imported rights-based law with ‘state economic management’. Drafting committees usually comprise personnel drawn from the lead ministry and officials seconded from the Ministry of Justice, other relevant ministries, CIAC and Fatherland Front organisations. They are required to ‘review [sic] the institution of law enforcement: evaluating the current legal documents relating to the draft document: conduct surveys to assess the actual situation of the social relations related to its main contents’. Lead agencies decide who to consult and whether (and how) their comments are incorporated into drafts. Information and opinions are collected from interested state agencies, mass organisations and other relevant bodies, but prime ministerial approval is required to use foreign expertise. Working groups of legal experts may provide additional advice where bills contain complex technical issues. Non-state participation in legislative drafting is considered in chapter seven.

Once completed, bills are next submitted to the government for consideration. As meetings occur only two or three days a month, government working agendas are extremely crowded leaving little time to consider the policy ramifications of draft laws. Drafting committees, moreover, are rarely asked to justify their selection of imported and local legal ideas. Memoranda accompanying drafts, generally lack detailed research and assert more than argue the appropriateness of legislative provisions. In short, the selection of foreign legal ideas takes place during the drafting stage and only rarely at the final stages before bills are presented to the NA.

53 For example, the party resolution authorising the Enterprise Law stipulated that it should streamline market entry rules, improve internal management, merger/acquisition and reporting rules. Interviews Le Dang Doanh, Director, CIEM, Hanoi, January 2001, February 2002, March 2004.
54 Law on the Promulgation of Legal Documents 2002, article 29(3).
55 Id. article 26 (1).
57 Id. articles 7-10.
58 See Ngo Duc Manh, 1994 ‘Some Thoughts on the Legislation by the National Assembly’ Nha Nuoc va Phap Luat (4) 8, 13-14.
Party organs make legislative decisions before, during and after drafting committees complete their work. But party agencies do not always provide consistent or coherent instructions. Different allegiances and organisational logics sometimes generate sharp distinctions in the interpretation of official policy by officials from the CIAC, other central party agencies and internal party groups within ministries (see chapter four). Chapter three showed divisions between party organs and state agencies regarding the desirability and utility of international legal harmonisation. Informants report, for example, that CIAC nominees frequently adopted the narrowest and most cautious interpretation of the party’s drafting instructions.

Long delays and numerous drafts generally signal protracted internal party and state consultation and conferral. Informants report that party officials routinely request changes to draft laws once they realise that imported rights-based law shifts decision-making power from state officials to private entrepreneurs. Although these opaque interventions are rarely discussed, much less documented, the case studies considered below should be interpreted in the context of active party involvement in legal drafting.

As we have seen, there are numerous, sometimes conflicting themes in the ‘official’ discourse concerning legal borrowing. Five legislative drafting case studies have been selected to ascertain whether lawmaking processes mediate the ‘official’ discourse in ways that influence the selection and adoption of borrowed laws.

**Case study one: Ordinance on the Transfer of Foreign Technology**

The potency of party-sponsored discourses to influence legal transplantation is well illustrated by the draft Ordinance on the Transfer of Foreign Technology 1988. A member of the drafting committee recalls that the party Central Committee directed the Ministry of Science and Technology to draft an ordinance regulating foreign ‘intellectual property’ (IP) in Vietnam. The Minister appointed Professor Luu Van Dat to head the drafting.

---

60 There are no formal rules governing party involvement in legislative drafting. Interviews with lawmakers indicate, however, that party resolutions authorise state bodies to prepare draft laws. Nominees from the Central Internal Affairs Commission (Bộ Nội Chính Trưng Ông) sit on most drafting committees and controversial provisions are referred to the Politburo for approval before bills are passed to the NA. Interview Tran Dai Hung, Vice Chairman, Central Party Internal Affairs Committee, Hanoi November 2002.


62 This case study is based on interviews with a former official from the Ministry of Science and Technology who participated in drafting the Ordinance on the Transfer of Foreign Technology into Vietnam 1988 and the
committee, which comprised representatives from the Ministries of Science and Technology, Finance, Planning and Justice and the CIAC. As with most commercial drafting committees, academic lawyers and Fatherland Front members were not represented.

Drafters were directed by the party to use ‘state economic management’ licensing to regulate technology transfers by foreigners to Vietnamese parties. Research reports prepared by the drafting committee were written in a highly ideological and discursive language consciously designed to validate the political objectives set out in party resolutions. Drafters did not evaluate the proposed reforms from economic, moral and legal perspectives, because these lines of inquiry may have contradicted the drafting directive. For example, drafters realised that foreign intellectual property (IP) regimes were based on market valuations, but were reluctant to assess the impact of commodified IP rights on the domestic market.

Using information provided by United Nations agencies, drafters based the ordinance on three legal sources. First, Chapter Four of the UNCTAD Draft International Code of Conduct on the Transfer of Technology was imported to regulate mutual obligations, while Chapter Five of the Code provided the rules governing improvements in licensed technology. Second, provisions were also borrowed from the technology transfer laws in China, the Republic of Korea, Malaysia and the Philippines, since these countries were considered culturally similar and economically successful. Third, drafters formed the view that technology transfer laws in some South American countries demonstrated high levels of state control that would facilitate ‘state economic management’.

Unable to research local conditions, drafters selected foreign IP laws largely because they appeared to agree with ‘state economic management’. Vague notions of cultural compatibility were also considered. Without a fully realised drafting methodology, the completed bill consisted of conceptually incompatible imported ideas patched together with


63 ESCAP, UNDP and UNCD provided legal texts from a variety of Western, East Asian and South American countries. Drafters were not given contextual material and were not funded on study tours to examine how laws worked in donor countries. Drafters were trained in former Eastern Block countries and lacked the knowledge required to identify gaps between legal systems in donor countries and the way the market operated in Vietnam.

‘state economic management’ licensing powers. Consistency between legal styles and substantive content was considered relatively unimportant compared with the political directive to preserve ‘state economic management’. Drafters were relatively unconcerned about adjusting imported legal ideas with local precepts and practices. They reserved most energy to ensuring that state officials possessed discretionary powers to reconcile imported private rights to the state interest.

According to informants, Ministry of Science and Technology officials dominated committee meetings. The views of other committee members were only heard on technical issues directly concerning their respective areas of expertise. For example, Ministry of Justice officials were asked to ascertain whether drafts complied with superior legislation, especially the Law on Foreign Investment 1987. The Ministry of Science and Technology, in consultation with party representatives, decided major policy issues, such as the role of ‘state economic management’ in regulating private IP transfers and the criteria used to select foreign regulatory models.

After several drafts, the ordinance was circulated within the government for discussion. This was the first time Ministry of Science and Technology drafters encountered competing visions for regulating technology transfers. Most comments proposed procedural changes designed to advance the regulatory powers of competing ministries, and raised few normative issues. The Ministry of Trade, for example, unsuccessfully complained that the draft did not give regulatory authorities sufficient ‘state economic management’ powers—an argument aiming to secure control over lucrative IP registration processes. Non-state interest groups, such as foreign and domestic entrepreneurs, were not consulted before the draft ordinance was submitted to the Standing Committee of the NA for promulgation.

Lawmakers drafted the ordinance in a highly regulated economy soon after doi moi reforms commenced. At this time, the preservation of ‘state economic management’ and the protection of state-owned enterprises from foreign investors dominated lawmaking discourse. Concerns that restrictive transfer provisions reduced economic efficiency and that propriety rights over IP were culturally inappropriate were glossed over.65

---

Later, when the ordinance was redrafted in the mid-1990s, drafters paid more attention to harmonising domestic regulations with international standards.\textsuperscript{66} Several factors contributed to this change in thinking. Gradual economic liberalisations after the ordinance was enacted in 1988 made the restrictions preventing foreign entities from appointing private sales agents redundant. The Company Law 1990, for example, permitted entrepreneurs to deal with licensed IP. In addition, government leaders stressed that foreign direct investment (FDI) was a critical source of development capital and expressed concerns that overly restrictive technology transfer rules would reduce FDI flows.\textsuperscript{67} In 1993 a member of the drafting committee received a telephone call from Nguyen Dinh Loc (then the Minister of Justice). During a subsequent meeting the minister revealed that the Politburo wanted to convert the redrafted ordinance into a chapter in the Civil Code.

The party thought this would raise the profile of IP law and assuage foreign criticism that Vietnam was not doing enough to protect property rights. Officials from the National Office of Intellectual Property unsuccessfully opposed this initiative by advancing legal arguments that public law provisions in the ordinance were inappropriate for a private law Civil Code.

After the government applied for WTO membership in 1995, drafters at the ministry were directed to codify the Treaty on Trade Related Aspects of Intellectual Property Rights (TRIPS) into domestic law.\textsuperscript{68} Gradually, starting with Decree No. 63 on Procedures for Establishing Property Rights in 1996, followed by Decree No. 54 ND-CP on the Protection of Industrial Property Rights 2000 and Decree No. 13 ND-CP on the Protection of New Plant Varieties 2001, ‘state economic management’ controls over mandatory licensing, transfer prices and licence termination were further relaxed.\textsuperscript{69} Some of the final barriers to

\textsuperscript{66} Foreign investors pressed Vietnamese lawmakers to harmonise the FDI laws with FDI regimes in neighboring countries that had liberalised investment rules to attract FDI. Pressure for change also came from bi- and multi-lateral trade agreements (ASEAN, US-Vietnam Bilateral Trade Agreement and negotiations to enter the WTO).


\textsuperscript{69} Also see Decree No 59 ND-CP on the Abolition of a Number of Licences and Replacement of a Number Licences with Other Methods of Management 2002. See Tran Viet Hung, 2001 ‘Vietnam’s Intellectual Property Policies’ 8 \textit{Vietnam Law and Legal Forum} (88) 8, 8-9; Le Tat Chien, 2001 ‘Major Amendments and
technology transfers were dismantled by Decree No. 11 ND-CP on Technology Transfer 2005, which was issued by the government in time for WTO accession.\textsuperscript{70} The debate about the appropriate location for technology transfer rules resurfaced in discussions in 2005 about the draft law on technology transfers.\textsuperscript{71} This time around legal arguments that specific civil relationships (such as technology transfers) should not be included in the Civil Code, which more appropriately contains basic legal principles, are gaining ground. What is different from the discourse twelve years ago in 1993 is that contemporary arguments invoke ‘rule of law’ ideas, such as legal transparency and doctrinal certainty, to back the need for a discrete law on technology transfers. In other words, legal arguments are beginning to assume a more prominent role in shaping legislative drafting.

To summarise, the Ministry of Science and Technology used its control over the drafting committee to exclude conflicting views from the lawmaking processes. A recent report compiled by the Office of Government concluded that lead drafting agencies routinely use their control over drafting committees to advance sectorial interests.\textsuperscript{72}

Although the ministry presented decisions to the outside world as \textit{nhat tri} (consensus), informants suggest that processes more closely resembled \textit{chap thuan}, an expression that connotes a diversity of opinion coaxed and bullied into unanimous outcomes by those exercising hierarchical and personal power. Rather than manufacturing personal harmony, the main function of collective decision-making was to disseminate information and build intra-ministerial cooperation.

Drafters filtered Western laws through political directives to retain state economic management. They formed the view that East Asian IP laws were more suited to Vietnamese conditions than Western laws. The rapid adoption of foreign IP protocols since

---

\textsuperscript{70} Possibly in contravention of WTO rules, the Ministry of Science and Technology insisted on retaining a seven-year limit on all technology transfers. See Vietnamnet, 2005 ‘Technology Transfer Decree Draws Flak’ \textit{Development Vietnam}, Intellasia News Service, 23 February, 15-16.


2001 is attributable to the increased urgency now attached to international legal
harmonisation following the adoption of the US-Vietnam Bilateral Trade Agreement (BTA)
discussed in chapter three. Although legal arguments initially played a marginal role in
the selection of foreign law and the codification of local precepts, there is evidence that
‘rule of law’ ideas are slowing penetrating lawmakers discourse.

Case study two: Ordinance on Economic Contracts
Debates about amending the Ordinance on Economic Contracts 1989 reveal ongoing
tensions in the ‘official’ discourse between ‘state economic management’ and international
legal harmonisation. During the early stages of doi moi reforms in 1987, the Ministry of
Trade appointed a drafting committee (again led by Luu Van Dat) to prepare an ordinance
regulating contracts governing commercial activities.73

Drafting commenced at a time when the Council of Ministers was still undecided about the
role of state planning. Marxist-Leninist antipathy to private ownership of the ‘means of
production’ was also evident in the Constitution 1980 and articles in the Penal Code 1986
that criminalised private commercial activity.74

The party Central Committee instructed ministry officials to draft an ordinance with three
goals:

- Preserve ‘state economic management’ over the economy.
- Establish contract rules to facilitate autonomous business transactions among state and
private businesses.
- Provide contractual guidance to inexperienced business players.

Drafters realised these objectives by drafting an ordinance that juxtaposed imported
(primarily French) rights-based provisions with ‘state economic management’ provisions
recycled from the Soviet-inspired Decree No. ND 54 CP Regulations on Economic
Contracts 1975. Reflecting the distinction in the command economy between contracts for
profit and personal consumption, only commercial entities with business registration

73 Information concerning the initial drafting of the Ordinance on Economic Contracts 1989 was gleaned from
interviews with two members of the drafting committee: Luu Van Dat, Legal Adviser to the Minister of
Trade, Hanoi, January 1990 and Phan Huu Chi, supra April 1992. Further information was gleaned from
Nguyen Nhu Phat, supra September 1994 and Ha Hung Cuong, Director, International Department, Ministry
74 Constitution 1980, articles 24, 26; Penal Code 1986, article 168.
(SOEs, private firms and cooperatives) were permitted to enter economic contracts. Violators were punished with administrative and criminal penalties.

The distinction between civil and economic contracts replicated administrative divisions in the command economy between contracts regulating production and distribution under Decree No. 217 CD 1987 and civil contracts regulating personal consumption. Drafters preserved this distinction in the belief that 'state economic management' powers over private entrepreneurs would be more difficult to exercise if the ordinance regulated both economic and consumption contracts.

Command economic thinking was also evident in provisions that based economic contracts on the 'state plan' (Article 10) and gave state economic arbitrators powers to intervene and adjust contractual rights (Article 8). Highly prescriptive provisions governed the formal requirements for making economic contracts and even commercial matters such as price, quality and delivery. Luu Van Dat formed the opinion that during the initial stages of economic reforms, Vietnamese businessmen were inexperienced and required detailed guidance. Above all else, he inserted discretionary 'state economic management' powers (especially those governing market entry) to ensure that imported private commercial norms did not diminish the 'state benefit' (loii ich cua nha nuoc).

Despite their misgivings about Vietnamese entrepreneurs, drafters adopted provisions that championed autonomous contractual rights. Article 4 of the ordinance protected signatories from duress; Article 5 introduced the concept of voluntary commercial relationships, and Article 6 guaranteed state protection for contractual promises.

In 1999 the party Central Committee directed the Supreme People's Court to redraft the ordinance. The party selected the Court over the Ministry of Trade (the first drafting

---


76 See Ordinance on Handling of Administrative Violations 2002; Decree No 1-CP Sanctions against Violation of Administrative Regulations in the Field of Trade 1996 (as amended) article 4 (3).

agency) to take advantage of the Court’s accumulated experience in implementing the ordinance. The Court was ordered to make the ordinance more relevant to current economic conditions. Behind this cryptic directive lay an unresolved dispute about the role of ‘state economic management’ in a mixed-market economy.

Members of the drafting committee agreed about the need to amend the ordinance to clarify technical rules defining contractual termination, to remove references to state planning (Article 10) and add provisions regulating new business practices, such as electronic commerce. They disagreed on two issues: should the conceptual distinction between economic and civil contracts be abolished, and should unregistered household entrepreneurs be permitted to enter economic contracts? At issue was the state’s power to proactively determine the type of entrepreneurs permitted to form economic contracts. The Ministry of Justice led the opposition to fundamental change. According to Hoang The Lien, ‘parties to economic contracts should be business persons (i.e. individuals or units that the government has allowed to carry out business). Not all people are allowed to participate in business processes and conduct business activities.’

In other words, divisions between economic and civil contracts are necessary to proactively manage the type of entrepreneurs entering business transactions. Duong Dang Hue, the Ministry of Justice representative on the drafting committee, used class-based arguments to block reforms. He opined that businesses are operated by ‘rich people’ who enjoy many privileges over ‘ordinary citizens’. Breaches of economic contracts have the potential to generate wide-ranging social harm by causing business failure and unemployment. Civil contracts, in contrast, produce highly particularised harm to consumers and families. In short, ‘state economic management’ over market entry is needed to protect the economy and ‘working class’ interests. His views were interesting not only for linking economic management with class divisions, but also in suggesting that new

---

78 Comments regarding the amended Ordinance on Economic Contracts are based on interviews with Nguyen Van Dung, Judge, Economic Division, Supreme Peoples Court, July, August 1999; Phan Chi Hieu, Lecturer Hanoi Law University, Hanoi, September, 1999.

79 See the arguments made by Duong Dang Hue, 2000 ‘Nhung Co So Cua Vice Xay Dung Phap Lenh Hop Dong Kinh Te (Sua Doi)’ (Foundation for Building Up Ordinance on Economic Contracts (Amendment)), Kien Nghi Ve Xay Dung Phap Luat Hop Dong Kinh Te Tai Viet Nam, (Recommendations in Building up the Economic Contract Legislation in Vietnam), Ministry of Justice-UNDP VIE/95/017, Hanoi, 14-19. Also see Duong Dang Hue, 2001 ‘Theories and the Realities Behind the Drafting of Vietnamese Legislation Governing Trade and Commerce’, unpublished paper, Workshop on the draft Ordinance for Economic Contracts, Hanoi, July.
economic thinking, which discarded base-superstructure determinism, had not penetrated the Department of Economic and Civil Law at the Ministry of Justice. Other members of the committee thought that separate economic and civil contractual regimes had outlived the economic conditions in which they arose, but concluded that this legal distinction was too deeply entrenched in the legal system to remove. Only judges on the drafting committee argued for a unified economic and civil contract system. While not opposing ‘state economic management’ as an ideal, they argued that the dual contract system is conceptually confusing.\textsuperscript{81} The Supreme Court Annual Report in 2000, for example, showed that most contractual cases reviewed by higher courts involved procedural irregularities, such as filing actions in the wrong court division. Judges attributed these irregularities to the dual contract system.\textsuperscript{82} Judges also found the dual system troublesome, because it prevented them from using provisions from the comprehensive Civil Code to cover the numerous regulatory omissions and ambiguities in the ordinance and Commercial Law. They maintained that a comprehensive legal framework is required to replace the discretionary provisions in the ordinance that give government agencies powers to proactively ‘manage’ market entry. As a comparatively weak institution, the Supreme Court struggled to leverage its leadership over the drafting committee and mobilise support for a unified contractual system. Representatives from the Ministries of Trade, Justice and Public Security blocked reforms. Tran Huu Huyen, the director of the VCCI Legal Department, encapsulated the dilemma faced by the Supreme Court lawmakers: ‘drafting committees are limited or affected not only by practical concerns and real life experience, but also by the self-defense psychology of the “guardians” who always want to “maximise” the safety of society.’\textsuperscript{83} This is a clear reference to the use of ‘state economic management’ to control private commercial rights. Pressure for Vietnam to harmonise its commercial laws with WTO standards dramatically increased after accession to the BTA in 2001 (see chapter three). WTO rules required the

\textsuperscript{80} Hoang The Lien, 2000 supra 21.
\textsuperscript{82} See Bao Cao Tong Ket, Cong Tac Toa An Nam 2000 (Supreme Court Annual Report 2000), 34, 40.
\textsuperscript{83} The author is a senior lawyer with VCCI and was discussing the need for enterprises to be given a voice in commercial lawyermaking to counteract the state interest. See Tran Huu Huynh, 2002 ‘Roles Played by the Chamber of Commerce and Industry of Vietnam on the Participation in the Formulation and Implementation
abolition of controls over the type of entrepreneurs that could enter economic contracts.\textsuperscript{84} In order to circumvent the stand-off in the Supreme Court drafting committee, the party transferred control over the ordinance to the Ministry of Trade in early 2004.\textsuperscript{85} By March 2004 the third draft of the new Commercial Law proposed the repeal of the ordinance and the incorporation of substantive contractual provisions into the redrafted law.\textsuperscript{86} In compliance with WTO conditionalities, the draft abolished distinctions between types of entrepreneurs and permitted anyone with legal capacity to enter contracts for commercial purposes. But much to the consternation of Supreme Court drafters, the longstanding and confusing distinctions between economic and civil contracts were retained.\textsuperscript{87} It is possible to infer from this case study that political arguments for ‘state economic management’ no longer automatically dominate lawmaking debates. A reform minded group from the Ministry of Trade used the legal argument that as a member of international trading treaties, the state was obligated to give entrepreneurs equal contractual rights.\textsuperscript{88} But their position was ultimately secured by the political argument that the party supports international economic integration.

Compliance with treaty conditionalities does not necessarily signify that most members of the drafting committee supported the neo-liberal ideas underlying facilitative regulation. On the contrary, neo-liberal legal arguments were unable to persuade the committee to abolish the Soviet distinctions between civil and economic contracts and further deregulate ‘state economic management’ powers over entrepreneurs. Nevertheless, the Ministry of Trade group were prepared to use legal and political arguments to support the neo-liberal legalism embedded in international treaty provisions. Many members of this group are Western educated and have acquired an understanding, even sympathy for neo-liberal legalism.

\textsuperscript{84} The Minister of Trade indicated that changes to the contractual rules were needed to comply with APEC, Asean, BTA and WTO conditions. See VNS, 2003 ‘Fast Reform for Commercial Law’ Vietnamnews-online, <www.vietnamnews.vnagency.com.vn/2003-11/06/Stories/04.htm>.\textsuperscript{85} It is unclear what party agency was involved. Control over economic contracts was transferred to the Ministry of Trade in early 2004. Interview Nguyen Thanh Hung, Vice Director Legal Department, Ministry of Trade 2 March 2004.\textsuperscript{86} Nguyen Thi Thu Ha, 2004 ‘Weak Commercial Law Gets Extra Muscle’ Vietnam Investment Review 24 May, sourced from <www.asia.proquestreferencemedia/pqrasia>.\textsuperscript{87} Interview, Nguyen Cuong, Deputy Director Judicial Science Department, Supreme People’s Court, Hanoi, March 2004.\textsuperscript{88} Comments about the Ministry of Trade group supporting the Commercial Law draft were gained from interviews with Nguyen Thanh Hung, Vice Director, Legal Department, Ministry of Trade, Hanoi, March and
through prolonged treaty negotiations (especially for the BTA and WTO) and numerous foreign donor-sponsored study tours and workshops. Although they are not as cohesive and openly identified with neo-liberal ideas as some ministry research institutes (discussed below), they are more prepared than previous Ministry of Trade drafters to use abstract neo-liberal legal thinking to reengineer domestic commercial regulation.

This case study also demonstrated that politically weak state institutions like the Supreme People’s Court struggle to influence the law reform agenda. Yet as the following case studies show, political power is not the only factor shaping lawmaking. Well-researched and argued ideas sometimes prevail.

**Case study three: Drafting the Company Law**

The Politburo in 1988 issued a resolution instructing the Central Institute for Economic Management (CIEM), a research organisation attached to the State Planning Commission, to draft laws regulating private commercial organisations.\(^8^9\) The resolution stressed the need to order private business activities with ‘state economic management’ discretionary controls.\(^9^0\) Like the Ordinances on Technology Transfer and Economic Contracts, drafting on the Companies Law (CL) commenced during the early stages of economic reform before private commerce received constitutional approval. Drafters once again resolved tensions between business freedoms and ‘state economic management’ by protecting the state interest.

Company laws based on the French *Droit de société* existed in the North before partition in 1954 and until reunification in the South. By the 1960s the legal system did not countenance a role for private commercial organisations and only recognised SOEs and cooperatives.\(^9^1\) When drafters commenced work on the CL the official discourse regarded

---

\(^8^9\) Communist Party of Vietnam Resolution No. 16 of 1988. Phan Huu Chi Interview, *supra*. The drafting committee comprised representatives from line-ministries (such as the Ministry of Trade and Ministry of Heavy Industry), Ministry of Justice and the CIAC.

\(^9^0\) Information about the draft Company Law was primarily derived from interviews with officials supporting the drafting committee: Nguyen Dinh Cung, Director Macro Regulation Department CIEM, September 1994; March 1999, September 1999; Dang Duc Dam, Vice Director CIEM, December 1996. Further information was gleaned from members of the drafting committee: Luu Van Dat Interview *supra*; Le Dang Doanh, *supra*.

\(^9^1\) Since private commerce was officially discouraged in the command economy and line-ministries controlled SOEs with legally binding administrative measures, there was no need for company law. See Pham Thanh Vinh, 1966 ‘The Obligatory Nature of Planning Targets’ 12 *Review of Contemporary Law* 89-97. Also see Nguyen Ngoc Tuan, et al, 1996 ‘Restructuring of State-Owned Enterprises Towards Industrialization and
companies as colonial and capitalistic artifacts standing outside indigenous experience. There were few domestic laws or institutional practices to guide the drafters. Articles 4 and 5 of the CL recited provisions in Politburo Resolution No. 16 of 1988 that recognised legal equality for all economic sectors, freedom for private enterprises to conduct business activities and the right to own and bequeath 'the means of production'. After legalising private business organisations, the drafters set about importing a corporate legal framework. Professor Luu Van Dat (an experienced legal drafter from the Ministry of Trade), backed by French legal advisers, dominated the drafting committee. The committee first proposed borrowing the company law from the former Republic of Vietnam. Members of the Standing Committee of the National Assembly rejected this initiative. Since the law contained over 300 articles, it was considered too complex for the embryonic market conditions. Perhaps more importantly, the adoption of law from the RV conveyed too much legitimacy on the discredited 'Sai Gon regime'. Instead the committee based the CL on the French Law No. 66-537 on Commercial Companies 1966. Chapter II of the CL followed the French system of authorising the establishment of companies and specifying charted capital for different industries and services. Chapter III established shareholding companies (cong ty co phan or société anonyme) and Chapter IV created limited liability companies (cong ty trach nhiem huu han or société à Responsabilité Limitée). With a mere forty-six articles the CL was a skeletal facsimile of the 509 provisions in the French Law. Despite its brevity, the CL contained most elements of modern company law. For instance, company members shared profits and losses in proportion to their capital contributions and were not personally liable for company debts (CL, Article 2). Companies were entitled to own property and enter legally binding transactions (CL, Article 12). The CL rather indeterminately separated the functions and powers of members, company officials and employees. Shareholding companies were authorised to issue shares and raise capital from the public and rules-governed company mergers and liquidations. In short, the drafters imported the legal rules


93 For a detailed discussion about the contents of the Company Law see John Gillespie, 1999 'Corporations in Vietnam' in Roman Tomasic ed., Company Law in East Asia, Ashgate, Aldershot UK, 297-330.

221
that enabled entrepreneurs in the Western world to create wealth from the ‘surplus value’ of employees while protecting personal assets from business losses.

Since companies had few roots in domestic trading culture and socialist theory, the ‘official’ discourse had little to say about corporate theory and practice. Contrasting with the vigorous academic debates on corporate law reform in China, Vietnamese reforms passed virtually unchronicled.94 Most scholarly legal literature was preoccupied with narrow doctrinal issues such as company law terminology, the efficacy of licensing procedures and inconsistencies between corporate and commercial laws.95

The few changes made to the French legal template are mainly attributable to the drafters’ Marxist critique of capitalist law.96 For example, drafters varied the French law by giving limited liability companies (with fewer than twelve members) the right to appoint only one director to act on behalf of the company (CL, Article 27 (3)). In Soviet law there was no need for executive directors and boards of directors to represent SOEs, because supervising authorities (Ministries and people’s committees for SOEs) ran SOEs like administrative agencies.97 Directors acted on administrative instructions from supervising agencies, and, in turn, appointed deputy directors to run specific departments.

In an other example, drafters adopted from the French Law a general duty requiring directors and boards of management to account to members for ‘shortcomings in the management of the company including breaches of the charter or the law’ (CL, Article 39). But they thought it was unnecessary to enact interpretive guidelines that would assist members to sue malfeasant directors. In the command economy, supervising authorities used discretionary administrative penalties to discipline wayward SOE directors. In both examples, drafters recycled notions from the Soviet administrative model without considering its relevance to autonomous legal persons.

Interviews suggest that drafters did not fully comprehend the jurisprudential notions of legal personality underpinning the imported law.98 Instead, they perceived legal personality

---

94 For an overview of the vernacular literature see Fu Tingmei, 1993 ‘Legal Person in China: Essence and Limits’ 41 American Journal of Comparative Law 261.
95 See generally Duong Dang Hue 1994 supra 20.
96 Interview Phan Huu Chi, supra April 1992.
98 Interviews Luu Van Dat, supra; Phan Huu Chi, supra. The literature concerning Western corporate theory is vast but See J. Stoljar, 1972 Groups and Entities: An Inquiry into Corporate Theory, Australian National 222
in a highly state-centered context as institutions created by law. Natural and legal persons were differentiated along functional lines by highlighting the independence of the latter from the former. Indeed, the struggle in Western legal theory to attribute personal authority to abstract legal bodies did not enter the lawmaking discourse. Without a tradition of natural rights theory and individualism (chu nghia ca nhan) (discussed in chapter three), it did not occur to drafters that corporate rights require a source of legitimacy outside legislative and bureaucratic power. Western legal theory investing companies with natural or human legal capacity to conduct businesses did not transplant with the imported French Law.

The concessionary licensing of companies persisted in Europe until the doctrine of freedom of contract attempted to extend law over the privileged and corrupt power relationships entrenched in late eighteenth-century England. Liberal ideology extolled entrepreneurs as the engines of capitalism and promoted market liberalisation that transformed corporations into vehicles for harnessing capital and risk-taking. Concessionary business licences used by the state to control corporate activities were replaced in England during the mid-nineteenth century, and later in continental Europe, with registration systems that made incorporation inexpensive and freely available to anyone fulfilling routine registration procedures.

Most Vietnamese drafters opposed the liberal, free market ideology underlying the French corporate law, because it contradicted the Marxist concern that companies are the preserve of the capitalist class. Some drafters were familiar, through Soviet literature, with Berle and Means’s classic study ‘The Modern Corporation and Private Property’. They found Marx’s warnings about corporate capitalism echoed in the passage: ‘the corporate system


100 For a detailed discussion about notions of individuality in Vietnam see David Marr, 2000 supra 774–788.


has done more than evolve a norm by which business is carried on. Within it exists a centripetal attraction which draws wealth together into the hands of fewer and fewer men.\(^{104}\) Analogous views occasionally appeared in newspaper articles.\(^{105}\)

Drafters learnt from Chinese legislative experiments conducted in Shenzhen and Shanghai during the 1980s that 'state economic management' could minimise the exploitation and social harm caused by private companies.\(^{106}\) Adopting this approach, they used business licensing controls to limit the economic sectors in which private companies could operate (CL, Article 11). Local authorities (people's committees) were directed to use capitalisation, education and health permits to proactively guide private capital into state-sanctioned areas (see chapter six).

Once companies were established, drafters imposed further operational restrictions by strictly interpreting the legal doctrine of *ultra vires*.\(^{107}\) The legal capacity of companies to conduct business was determined by the 'rights and obligations' set out in company licences. Operational objectives were prescribed with considerable precision by licensing authorities. General powers to pursue authorised objectives appeared in the CL (Article 12), but companies were not permitted to expand their business capacity by adopting a 'shopping list' of associated and tangential objectives. Administrative and criminal penalties applied to company officials who strayed beyond the authorised parameters (CL, Article 44).

Rigorous state management over companies was justified to minimise social harm caused by exploiting workers' 'surplus value'.\(^{108}\) Small-scale household businesses employing

---


\(^{105}\) See e.g., Huy Duc, 1997 'Bi An Minh Phung' (Minh Phung Mystery) *Thoi Bao Kinh Te Sai Gon*, (Saigon Economic Times), 24 April, 36; 38; Author Unknown, 1997 'More Arrested as Size of Fraud Case Hits $700’ *Vietnam Economic Review* 13 October, 4.


\(^{107}\) Literally meaning 'beyond power', the doctrine implies that companies only have the capacity to form legal relationships in areas expressly permitted in incorporation documents. For the treatment of the *ultra vires* doctrine in French law see J. Le Galland P. Morel, 1992 *French Company Law, 2nd ed.*, Longman, London, 68-73.

\(^{108}\) As previously discussed, the division between economic and civil contracts also retained the socialist distinction between income and non-income producing property.

224
family members were, on the contrary, considered non-exploitative and consequently were trusted to pursue business opportunities unshackled from business licences. In summary, Vietnamese lawmakers used borrowed and homegrown Marxist critiques of capitalism to filter and adapt the imported French corporate law principles. By the mid-1990s procedural shortcomings in the CL began to constrain domestic investment. Lawmakers began to look beyond Marxist-Leninism for solutions to corporate regulation.

Case Study Four: Drafting the Enterprise Law
In 1995 the Eighth Plenum of the party Central Committee instructed the CIEM to draft a new company law to implement three main reforms: legal equality, market reforms and legal harmonisation. CIEM studied corporate regulation for several years, before forming in 1998 a drafting committee headed by Le Dang Doanh, then the director of CIEM. Departing from past practice, the drafting committee included a representative from the Vietnam Chamber of Commerce and Industry (VCCI), an association representing state and private business (discussed in chapter seven). It was not until the ninth draft in July 1998 that the name of the law changed from Company to Enterprise Law (EL). This change reflected the expanded jurisdiction, which by this stage included partnerships and possibly SOEs and FDI joint ventures.

Legal equality
The party rather nebulously directed CIEM to draft an EL that formalised legal equality among business sectors. Drafters concluded that a uniform company law regulating foreign, state and privately owned entities was the most effective way to achieve this objective. They noted the Civil Code did not conceptually distinguish private domestic corporations from those owned by foreigners or the state. Members of the CIAC monitoring the EL

---

110 See Nguyen Trinh Binh, 1995 ‘It is Time to Amend the Law on Companies’ Saigon Giai Phong 3 July, 3.
112 See Decision 37/QD-TTg, 13/1/98. Representatives from the following agencies participated in the drafting committee; CIEM, Ministry of Justice, Office of National Assembly, Ministry of Trade, Ministry of Industry, State Inspection Commission, Economic Commission of the Central Party Committee, and Vietnam Chamber of Commerce and Industry.
114 Interview with members of the Enterprise Law drafting committee, Hanoi, September 1999.
project rejected this legal argument on the basis that a universal company law would compromise the leading role of SOEs. They were also persuaded by the argument that problems with the EL were best rectified before extending the law to foreign investors. Following directions to retain legal divisions based on ownership, drafters retained separate legislative regimes for SOEs, cooperatives and private corporations.\textsuperscript{115} By insisting on separate legislation, the party effectively preserved the political line enshrined in the Constitution 1992 (Article 15) that the state-owned sector is the ‘foundation of the economy’.

It is interesting to note that in 2004 the party instructed CIEM to commence drafting a unified enterprise law to regulate both foreign and local private entities and SOEs.\textsuperscript{116} Rather than representing a shift in party attitudes towards neo-liberal economic thinking, this change in party policy is more likely to reflect the push for international economic integration. The anti-discrimination rules in the WTO require similar corporate rules for foreign and domestic business entities.

Market reforms
The party also wanted the drafting committee to bring the CL more in line with market reforms. This vague directive was subject to many possible interpretations. By the mid-1990s, the official discourse recognised that private sector investment generated most of the new jobs needed to absorb the rapidly growing population.\textsuperscript{117} Government policy had initially favoured foreign investment, which strengthened the politically favoured SOE sector.\textsuperscript{118} But FDI flows concentrated in the main cities, and being relatively capital intensive, they failed to increase employment opportunities significantly. By 1998 FDI had dramatically declined in importance with the investment slump following the East Asian economic crisis. In addition, concerns that the CL might excite a capitalist class opposed to


party paramountcy were seen by members of the CIAC to have been exaggerated.\textsuperscript{119} The economic contribution made by private companies was also beginning to erode Marxist antipathy towards the private sector in general.\textsuperscript{120} Informed by neo-liberal economic theory, some economic researchers from the CIEM believed that considerable scope existed to mobilise domestic investment by liberalising ‘state economic management’ provisions in the LC.\textsuperscript{121} They thought that the ‘corporate law shirt’ (\textit{ao so mi luat cong ty}) had not kept up with the ‘economic body’ (\textit{co the kinh te}) and deregulating market access for companies would increase business investment.\textsuperscript{122} Rather than increasing the investment incentives offered to private business, it was decided to enact an EL to remove investment barriers.\textsuperscript{123}

CIEM officials working for the drafting committee prepared a report that contained a sustained legal commentary.\textsuperscript{124} They collaborated with the VCCI to compile case studies to demonstrate the economic costs generated by legal and administrative barriers to market access (see chapter seven). Arbitrary licensing rules governing education, health and capital requirements, which were designed to proactively exclude unwanted investment, were criticised for failing to distinguish good investments from poor ones. CIEM officials used the evidence to show that business licences increased the time and cost of incorporation and stifled business investment.

The report concluded ‘there is a common opinion in the business community and among [Vietnamese] scholars that the current state management has no clear objective; it is implemented arbitrarily with severe violation of business freedom; it becomes an obstacle

\textsuperscript{119} Interviews Vu Duy Thai, Member of Central Committee Fatherland Front and Vice Chairman and Secretary, Hanoi Associations of Industry and Commerce, Hanoi, April 1999; January 2001; March 2003.
\textsuperscript{121} Interviews Dang Duc Dam, Vice Director, CIEM, November 1997; Nguyen Dinh Cung, Director Macro Regulation Department CIEM, March 1999, September 1999.
\textsuperscript{123} Note, however, that the Law on the Promotion of Business Investment 1994 was amended in 1998 to increase the areas of investment in which private enterprises could apply for preferential tax concessions.
for expansion, diversification and improvement of business activities and efficiency on one hand, and provides opportunities for bribery and corruption on the other hand.\textsuperscript{125} In contrast to the empirical research underpinning market-entry reforms, researchers primarily based other corporate reforms on foreign advice.\textsuperscript{126} It is often difficult to demonstrate causal links between foreign advice and legal change, because the drafting process involves considerable internal (and some external) conferral and consensus. Articles in the EL concerning minority shareholders and directors duties, however, were imported from foreign sources with few concessions to local interests and conditions. Drafters sought guidance about the civil and common law approaches to corporate regulation.\textsuperscript{127} But eventually they were persuaded to draw most ideas from the Canadian and New Zealand corporation laws. In sum, the report shifted the regulatory focus from concessionary ‘state economic management’ to a facilitative approach that allowed capitalism a much freer hand.

Legal harmonisation
Arguments favouring international economic integration were gaining momentum by the mid-1990s. Party instructions to the drafting committee reflected concerns by foreign investors and multilateral organisations, such as ASEAN and APEC, that Vietnam should harmonise the LC with international protocols. Uncertainties surrounding corporate governance rules (directors’ duties and rights of minority shareholders) and winding-up provisions were targeted for reform. The LC also lacked rules governing partnerships, shareholding in limited liability companies and the conversion of limited liability companies into shareholding companies. More fundamentally, foreigners complained that the LC did not treat foreign investment entities like domestic companies. Separate legal regimes had the effect of quarantining foreigners from the domestic market. Investors also argued that legal distinctions between foreign and domestic companies unnecessarily

\textsuperscript{125} CIEM, supra 103.
\textsuperscript{127} During a workshop on the draft law during March 1998, lawyers from New Zealand, Canada, Germany, Hong Kong and the USA vigorously debated the relative merits of different company law systems. Interviews David Goddard, ADB Technical Adviser, Hanoi, July 1998.
complicated business transactions and arbitrarily inhibited novel and adaptive ownership structures.\textsuperscript{128}

The first tranche of a USD 100 million Financial Sector Development and Capital Market Loan advanced by the Asian Development Bank (ADB) included conditions that sought to tie the government to a set of harmonisation reforms. The loan stipulated five substantive company law reforms:\textsuperscript{129}

- Abolish market-entry rules and allow companies to enter any lawful area of business.
- Abolish distinctions between domestic, state and foreign enterprises to enable foreigners to incorporate as, and own shares in, domestic companies.
- Clarify the division of responsibilities between corporate managers and members. Specific reforms promoted by foreign consultants included rules governing the division of powers between directors and members, protection of minority shareholders, and more clearly delineated directors’ duties.\textsuperscript{130}
- Regulate dividend payments, mergers and winding up with prescriptive regulation.
- Compel companies to provide accurate and timely information concerning directors, share registries and financial records to a central registrar.

Raymond Mallon, a foreign economic adviser closely connected with the EL project, put the pressures for legal harmonisation in perspective: ‘because of the strong national ownership of reform, policy-based lending was only effective when it was supporting reform measures for which there was already a broad national support.’\textsuperscript{131} The EL, which was eventually enacted in 1999, complied with all the conditionalities imposed by the ADB, except for extending the law to cover foreign investment entities.

\textsuperscript{128} See Nguyen Thanh Binh, 1995 ‘Its Time to Amend the Law on Companies’ Saigon Giai Phong 3 July, 3, 4; Xuan Bao and Nam Hong, 1995 ‘Problems in Implementing the Law on Companies’ Dien Dan Doanh Nghiep (Entrepreneur Forum) 28 September, 11.


In contrast to the CL, which drew heavily from French Law, the EL reflects the influence of Anglo-American legal advisers (discussed in chapter seven). In 134 articles it regulated directors’ duties, disclosure, members’ rights (especially those of minority shareholders), boards of management, inspection boards, dividend payments, conversion among corporate entities, dissolution merger and liquidation. By permitting enterprises ‘to select an industry, line [of business], area and form of investment and take the initiative to broaden the scope and line of business’, Article 7(2) of the EL gave entrepreneurs a right ‘to choose forms of production’.  

Drafters assessed the utility of foreign corporate provisions by comparing what the law purported to do against local requirements. This methodology involved considerable guesswork based on imperfect knowledge about the interaction between law and society in donor countries, and about local demand for corporate regulation. For example, CIEM drafters retained the civil law (French) statutory framework of the CL, while borrowing normative standards from common law countries (primarily Canada, New Zealand and the United States). They were persuaded by advisers that common law norms are less ‘theoretically embedded’ than civil law provisions and figure more prominently in global trading protocols. Change occurred not only in the selection of legal norms, but also in the use of theory to evaluate the regulatory impact of the EL. CIEM drafters consciously used neo-liberal economic theory to challenge longstanding Marxist political and moral attitudes to entrepreneurs. Rather than passively following the advice given by foreign advisers, the drafters actively debated and selectively used imported ideas to realise institutional and broader objectives. For example, they rejected foreign legal advice to give companies the legal rights of natural persons, a position evidently opposed by the party. Instead, they drafted article 7 of the EL, which contains a prescriptive list of corporate rights that falls well short of international standards. CIEM drafters were careful to use foreign knowledge and skills in ways that did not offend the hierarchies and policies in their host institution (MPI). But over time

---

133 Interviews Nguyen Dinh Cung, supra.
134 See Reinier Kraakman, 1997 supra 3.
135 For example, article 5 evinces party and perhaps union influence, since it gives party units and labour unions the right to organise within every company.
the perceived success of the EL increased the drafters’ prestige and influence, allowing their ideas to spread further into the organisational hierarchy.\textsuperscript{136}

As discussed in more detail in chapter seven, it is possible to discern a loosely constituted interpretive community encompassing the CIEM drafters, foreign donors and local consultants and lawyers involved in the drafting project. They shared common understandings about the nature of the problems with the CL and the need to introduce neo-liberal economic solutions to deregulate market entry. Drafters and advisers worked closely together and spoke a mutually comprehensible neo-liberal legal language. This common approach to legal reforms assisted the rapid transfer of complex corporate law doctrines between foreign advisers and local drafters.

Mediating lawmaker discourses
Although CIEM drafters favoured a deregulated approach to market entry, as members of a research institution, they lacked the political power to exclude ‘state economic management’ views from entering lawmakers discussing.\textsuperscript{137} CIEM drafters speculated that forces supporting ‘state economic management’, such as the Party Economic Commission, Ministry of Trade and Ministry of Industry would have undermined reforms if their views had been stifled.

Drafters from the Ministry of Industry, for example, argued that licensing provisions were necessary to prevent private transport companies from exploiting the ‘working class’. Rigorous ‘state economic management’ favoured state ownership and worker entitlements.

Rigorous ‘state economic management’ favoured state ownership and worker entitlements. Ministry representatives also offered the political argument that market liberalisations compromised party paramountcy. CIEM drafters believed these notions were raised as a pretext to preserve discretionary (frequently corrupt) powers over market entry.

Unable to exclude contrary views from lawmakers discussing, CIEM drafters encouraged consultation that exposed other members of the drafting committee to neo-liberal ideas about the economic benefits generated by market deregulation. Although CIEM drafters did not directly challenge ‘state economic management’ ideals, they used empirical evidence to

\textsuperscript{136} For example, Nguyen Dinh Cung, one of the principle architects of the Enterprise Law was promoted as the Director Enterprise Department in CIEM, and secretary to the Enterprise Enforcement Mission Group (Nhóm Nhiệm Vu Cuong Che Doanh Nghiep), which the Prime Minister convened to prevent re-regulation under the EL. Not all the drafters were are successful. Le Dang Doanh, the director of CIEM was demoted some year latter to appease complaints from political forces that lost power under the Enterprise Law. Interviews Le Dang Doanh, \textit{supra} March 2004.
show that deregulation would stimulate economic development.\textsuperscript{138} In the end well-researched economic and (to a much lesser extent) legal arguments defeated political and moral arguments.

**Case study five: Civil Code**

Work commenced on the Civil Code in 1980.\textsuperscript{139} As the lead agency, the Ministry of Justice formed seven drafting subcommittees, one for each chapter in the Civil Code.\textsuperscript{140} The first draft was primarily based on provisions borrowed from civil codes in the Eastern bloc (principally the Soviet Union).\textsuperscript{141} Following 	extit{doi moi} reforms drafters began looking elsewhere for legal sources. Where existing legislation was considered inappropriate for mixed-market conditions, sub-committees were instructed to select provisions from non-socialist sources. Nguyen Dinh Loc (the former Minister of Justice) and other senior government lawyers in the principle drafting committee prepared the final drafts that were sent to the prime minister and Politburo for comment.

Drafters were given vague political instructions to preserve 	extit{quan ly nha nuoc ve phap luat} (state management of law), but little guidance regarding the appropriate sources of foreign law. Interviews with members of the drafting committee suggest two factors influenced the selection of foreign laws: the range of laws provided by foreign donor agencies and the

\textsuperscript{137} These observations are based on interviews with Le Dang Doanh, \textit{supra}.

\textsuperscript{138} See CIEM, \textit{supra} 100-101.


\textsuperscript{140} Most information used in this case study was derived from a project conducted by the author with LERES, a research unit attached to the Faculty of Law, Hanoi National University. A series of roundtable discussions were conducted with members of the Civil Code drafting committee in March and September 1999 and August and September 2000. Follow-up interviews with drafters identified the sources of law used for various provisions of the Civil Code. LERES prepared a summary of the legislative sources used in the Civil Code. See LERES, 1999, ‘Sources of Law Used During Drafting Processes of the Civil Code’, (unpublished paper), Hanoi, 1-3.

\textsuperscript{141} Some provisions were recycled from a Decree Amending a Number of Provisions and Institutions in Civil Law, issued 22 May, 1950 by President Ho Chi Minh to socialise the impact of the colonial civil law, which remained in force until 1959. For example, article one of the Civil Code 1995 paraphrased article one of the Decree, which stated ‘civil rights are protected by law when they are used in conformity with the people’s interest’. Articles 135 (2) is clearly influenced by article 13 of the Decree, which states ‘the contracts that
familiarity of drafters with particular types of laws. 142 Take for example the selection and adaptation of future property rights provisions in the Civil Code. Japanese legal advisers counselled the property law sub-committee that future property rights were required in market economies to give creditors interests over property acquired after the creation of security interests. 143 They recommended provisions in the Japanese Civil Code as a suitable model. Most members of the property law sub-committee were trained in the German Democratic Republic and understood future property rights from the pre-revolutionary German Civil Code. Future property rights in both the Japanese and German Civil Code 1900 were originally borrowed from the nineteenth century Prussian Civil Code. Trained in the Soviet legal tradition, senior members of the principal drafting committee were unfamiliar with future property rights and rejected the Japanese provisions. 144 They replaced the Japanese provisions with a conceptually confusing article that gave the state powers to value future earnings generated by foreign investors and guarantee property against uncompensated appropriation. 145 Informants believe that the public law emphasis in Soviet legal education failed to acquaint senior drafters with the institutional structures and jurisprudential doctrines needed to comprehend and accept future property rights. 146 Senior drafters were more familiar with public law principles that made the state an active commercial player. They used Russian to discuss complex technical considerations and felt politically secure in borrowing from the Soviet Civil Code. Future property rights, on the contrary, carried the risk of conveying an advantage to private-sector players.

The principal drafters also selected ideas for their perceived cultural compatibility. They borrowed provisions from the Chinese Civil Code to give the heads of households legal status, in the belief that Chinese morals and family practices were analogous to conditions in contemporary Vietnam. For similar reasons, they recycled some pre-modern Vietnamese practices such as ‘bao lanh bang tin chap’ (preserving prestige or reputation) and leases for

---

cause harm to one party due to the exploitation by the other party as the result of an economic gap between the two parties can be invalidated.’

142 Interviews Bui Thi Mai Lan, Civil Law Department, Ministry of Justice, Hanoi, March, April 1999; Tran Huyen Nga, Civil Law Department, Ministry of Justice, March 1999.

143 Interviews Muto Shiro, JICA Legal Advocate to the Ministry of Justice, Hanoi, February 1998. Professor Akio Morishima, Sophia University lead the Japanese team advising the Civil Code drafting committee. The Civil Code also drew on Western German law, because members of the property sub-committee read German. See Phan Huu Chi, 1994 ‘Explanation on the Civil Code Sixth Draft’, (unpublished Paper), Hanoi, 14.

144 Interviews Bui Thi Mai Lan, supra.

145 See Civil Code, article 182.
‘thue khoan’ (aggregate) assets. Provisions governing private contracts, property rights and civil obligations were taken from the French Colonial Code de Annamite 1922 and Republic of Vietnam Civil Code on the understanding that these notions had become localised. Other provisions were borrowed from the French and Japanese Civil Codes. But informants estimate that approximately 70 per cent of the articles in the Civil Code were derived directly or indirectly (via Vietnamese reenactments) from the Soviet Civil Code.

In summary, education played a significant role in shaping legal borrowing. It not only conveyed interpretive skills that facilitated legal borrowing, it also inculcated proclivities and biases that made some legal traditions appear more prestigious than others. Even so, legal education only seemed to operate in circumstances where political instructions gave drafters the latitude to select laws from a diverse range of sources. The important role foreign donors play in promoting particular legal educations, ideas and practices is further explored in chapter seven.

This case study also confirms earlier findings that drafters may contemplate the cultural relevance of foreign laws, but lack the methodological tools to assess whether legal imports are compatible with local conditions.

Summary

The case studies show that drafters filtered imported ideas through political, moral and economic concepts more than through legal or culture notions. As international legal harmonisation gained momentum, drafters placed less emphasis on ‘state economic management’ and moved towards (without fully embracing) a facilitative approach to economic regulation. Although lawmakers are still bound by party-sponsored discourses, the range of views within this discourse is rapidly expanding.

146 See Mark Sidel, 1993 supra 230-240.
147 Article 614 of the Civil Code creates a civil right to protect bao lanc bang tin chap. This is a neo-Confucian moral concept that conveys rights that go well beyond the English notions of ‘honour, dignity and reputation’. Articles 503-514 regulate thue khoan assets, which are collections or aggregations of different types of property bundled into common lease agreements. There is no equivalent Western concept.
148 For example, provisions dealing with civil obligations were borrowed from the Republic of Vietnam Civil Code 1972 and provisions governing mortgages, pledges and suretyship were adopted from the Code Annamites 1922.
149 Interviews Nguyen Chi Dung, Director, Library and Information Services National Assembly, Hanoi, April 1999.

234
With few exceptions legal arguments were unsuccessful in challenging political, moral and economic considerations. Given the dominant instrumental view of law, it is unsurprising that most drafters treated legal discourse as the handmaiden of political and economic imperatives. A fragmented legal grammar and contested legal meanings, themselves symptoms of law’s subordination, also impeded legal conversations.\textsuperscript{150} There is a growing awareness among some lawmakers, however, that neo-liberal economic reforms require a procedural ‘rule of law’. The sociological notion that imported laws should correspond to domestic political, economic and social conditions is also slowly entering the lawmakers calculus.

The case studies further demonstrate there is more to legal borrowing than discursive ideas and meanings. The EL drafting project showed that alliances between domestic entrepreneurs and institutions such as CIEM and VCCI legitimised deregulatory arguments. Strong ministries (such as Science and Technology, and Trade) used their powers to exclude or discredit arguments from rival government agencies. Less powerful institutions like the Supreme Court required party intervention to prevail. In short, ‘official’ discourse is mediated by powerful institutional imperatives.

These findings refocus the working postulate that differences in state power structures change the way transplanted laws are interpreted in host countries. They show that drafting agencies draw on ideas from the ‘official’ discourse to select and adapt foreign laws. In addition they demonstrate that the meanings given to imported laws primarily reflect the strategic objectives of the dominant drafting agencies. Yet despite the close links between discourse, power and institutional imperatives, these factors are not mutually inclusive.\textsuperscript{151}

\textsuperscript{150} The author attended a conference organised by the UNDP and Ministry of Justice in 1998 to discuss the emerging commercial legal framework. During the deliberations delegates from the main legal institutions (National Assembly, courts, procuracy, Faculty of Law, Ho Chi Minh Political Academy and legal research institutions) devoted a morning to discussing whether the terms ‘legal framework’ or ‘legal environment’ was the more accurate collective noun for legislation. Resembling medieval scholasticism, they used elaborate arguments about minutiae to demonstrate their proficiency with political-legal concepts and, more importantly, to protect core political ideas in the ‘official’ discourse from scrutiny. Differences also emerged in the terminology used by legal institutions to explain certain legal relationships. As previously mentioned, institutions struggle to control legal definitions and have not agreed to a common legal lexicon. Some delegates used personal anecdotes, aphorisms and references to speeches by prestigious party and state officials to support their arguments.

In comparison to status, legal reasoning played a minor role in analysing and sequencing legal borrowing. Even on the rare occasions when they surfaced, legal arguments relied on highly contextualised principles rather than mutually comprehensible legal precepts and doctrines.

\textsuperscript{151} This study contests the arguments of some post-Marxists and Foucaudians that there is no distinction between discourse and power relations in a social context.
Finally, the case studies tentatively suggest that imported ideas acquire different meanings within different ‘interpretive communities’. For example, CIEM drafters used empirical research informed by neo-liberal economic views to wear down political resistance to market-entry deregulation. Civil Code drafters reached entirely different conclusions about the suitability and utility of borrowed laws according to their educational background and interpretive positions. Chapter seven explores in more depth the notion that laws transfer most easily between members of ‘interpretive communities’.

Lawmaking discourse in the National Assembly

Once completed, draft laws are submitted to the National Assembly for approval. National Assembly deliberations provide another opportunity for official and local discourses to influence the selection and adaptation of foreign laws. Much depends, however, on the discursive space available to delegates to examine, debate and change draft laws. There is some evidence that delegates are increasingly behaving more like legislators. Debates in the NA have forced amendments to some draft bills (e.g. Press, Labour and Land Laws).\textsuperscript{152} National Assembly deliberations have increased in length, there are more full-time delegates, reform projects aim to professionalise NA delegates and the budget and economics committee has more oversight powers.\textsuperscript{153} Discourse analysis provides a nuanced way to assess whether NA delegates draw on ideas outside the official discourse to deliberate imported legal provisions.

Constitutional discourse

In mature legal systems constitutional discourse provides the ‘rules of the game’ or ‘secondary coding’ that enables legislators to transform political, economic and moral concepts into statutory language.\textsuperscript{154} These ‘codes’ are contained in formal constitutional


\textsuperscript{153} The Press Law was amended twenty-seven times. See VNA, 30 December, 1989, trans. FBIS East Asia Daily Report, 2 January, 70. Also see Russell Heng Hiang Khoa, 1993 'Leadership in Vietnam: Pressure for Reform and Their Limits' \textit{Contemporary Southeast Asia} (1) 102.


236
doctrines and informal, but still binding, conventions derived from parliamentary and judicial sources. Constitutional texts establish the broad rules governing power sharing among state agencies and between state and society. Informal constitutional rules and precedents guide legislators in selecting and rejecting legal, economic, political and moral concepts for codification into law. The process of commercial codification, which condenses a large number of particular cases into general principles governing business transactions, is achieved at the expense of relational nuance and richness. Without generally agreed ‘rules of the game’ legislators struggle to agree on what commercial networks and interpersonal relationships are worth preserving and which ones should be rejected. Western constitutional rules provide ‘ground rules’ that enable legislators to agree about the criteria for selecting and adapting commercial laws.\(^\text{155}\) This study argues that the Vietnamese Constitution does not perform this function.

Vietnamese constitutions have changed over time to announce and legitimise party policy.\(^\text{156}\) Current constitutional settings were developed to organise political power during the early stages of market reforms during the late 1980s. Subsequent amendments have adjusted power-sharing arrangements among state organs to reflect the gathering momentum of the mixed-market economy.

Constitutional reform debates suggest the 1992 Constitution has not yet acquired an independent (from the party) and determining legal role. Analysing articles in *Tap Chi Cong San* (Communist Review), Mark Sidel showed that contests over state power-sharing arrangements used political and constitutional language.\(^\text{157}\) One group argued that the Constitution operates as a political text for realising party policy. It legitimises and formalises power-sharing arrangements decided by party organs, but it does not function as


a legal text that guides delegates in codifying political, economic and moral arguments.\textsuperscript{158} Put differently, the Constitution’s meaning is strictly confined to the text. Party leaders insist that constitutional debates take place within a predetermined political context that restricts interaction with public discourses.\textsuperscript{159} Nevertheless sensitive political discourse is permitted under the constitutional ‘umbrella’.

A small group (consisting mainly of academic lawyers) advocate radical constitutional change. They argue that the Constitution should evolve beyond its instrumental role and provide legally enforceable standards controlling the exercise of political and state power.\textsuperscript{160} For this to happen, they believe that constitutional rules should include not only the Constitution and state laws, but also encompass judgements from a constitutional court, constitutional customs and even natural law (luat tu nhien) principles.\textsuperscript{161} In advocating unwritten legal conventions that the state is powerless to change, reformers recognise that effective ‘rules of the game’ must reflect the actual ways delegates negotiate power, not just the structures imposed by the party in legal texts.

There are a few tentative signs discussed in chapter seven that suggest the party is prepared to loosen its monopoly over legal codification and devolve more lawmaking power to the NA. Meanwhile, delegates lack the constitutional ‘ground rules’ to agree among themselves which business networks and interpersonal relationships to privilege with codification and which ones to reject.

\textsuperscript{158} Constitutions should conform to ‘realities of life’. Dao Tri Uc, 2001 ‘Ve Nhu Cau, Muc Do Sua Doi Hien Phap Nam 1992 va Quan Dien Xay Dung Nha Nuoc Phap Quyen, (The Needs, the Scope of Revising the 1992 Constitution and the Concept of Law-Based State) Tap Chi Cong San (10) 21-29.

\textsuperscript{159} Some party leaders blamed the constitutional court introduced by Mikhail Gorbatchev for the collapse of the Soviet Community Party. See Dao Tri Uc, 2001 ‘Mot So Quan Dien Co Ban Ve Sua Doi Bo Sung Mot So Dieu Cua Hien Phap 1992’ (Key Points of View on Amendment, Addition to the 1992 Constitution), Nha Nuoc va Phap Luat (9), 6, 6-10. Also see interview Ngo Ba Thanh, Former Chair of the Law Committee, National Assembly, Hanoi, January 1992.

\textsuperscript{160} See Ngo Huy Cuong, 2001 ‘Luat Hien Phap va Van Hoa Chinh Tri’ (Constitutional Law and Political Culture) Tap Chi Nghien Cuu Lap Phap (1) 29, 30-34; Nguyen Van Thao, 2001 ‘Ve Kiem Tra Tinh Hop Hien Hop Phap Cua Van Ban Phap Luat va Cac Co Quan Tu Phap’ (Checking Constitutional Compliance and the Legitimacy of Legal Documents and the Activities of Judicial Bodies) Bao Khoa Hoc va Phat Trien, September, republished on the National Assembly Webpages.

\textsuperscript{161} Reformers unsuccessfully argued for a constitutional court in the debates preceding the adoption of the 1992 Constitution and 2001 amendments to the Constitution. See Interview Ngo Ba Thanh, Former Chair of the Law Committee, National Assembly, Hanoi, January 1992. Also see Le Cam, 2002 ‘Cai Cach He Thong Toa An Trong Giai Doan Xay Dung Nha Nuoc Phap Quyen Viet Nam’ (Reform the Court System to Build Up a Law-Based State in Vietnam) Tap Chi Nghien Cuu Lap Phap (4) 21, 27; Nguyen Manh Cuong, 2002 ‘Yeu Cau Cua Viec Xay Dung Nha Nuoc Phap Quyen Doi Voi Doi Moi To Chuc va Hoat Dong Cua Cac Co Quan Tu Phap’ (How to Reform Judicial Authorities to Build up a Law-Based-State) Tap Chi Nghien Cuu Lap Phap (10) 30, 35.
Legislative deliberations

Working in a closed epistemological framework, it is unsurprising that delegates devote hours of debate to politically safe technical issues such as the meaning of words used in draft provisions. Occasionally, however, debates erupt in NA sessions when issue-oriented coalitions invoke (usually without success) political rhetoric to block imported laws. For example, 36 per cent of delegates voted unsuccessfully to oppose the ratification of the BTA. Equally large minorities could not stop the Enterprise Law from stripping away local discretionary powers and introducing overly complex corporate governance provisions.

Despite their limited success in plenary sessions, government drafters have a well-founded concern that delegates can mobilise opposition to imported laws. For example, the Ministry of Trade committee drafting a revised Commercial Law in 2004 expressed concern that delegates influenced by SOEs would oppose trade liberalisations required by the BTA and WTO.

In some cases, minority votes have successfully blocked imported legislative provisions. Take for example amendments in 2002 to the Law on the Promulgation of Normative Documents. Ministry of Justice drafters introduced into the bill the imported ‘incorporation doctrine’ that makes treaties ratified by heads of state automatically binding in domestic law. The bill submitted to the NA stated ‘it is necessary to ensure that issued legal normative documents accord with relevant international treaties to which the Socialist Republic of Vietnam is a signatory or party to the extent of its undertakings’.

Some delegates were concerned the ‘incorporation doctrine could compromise national sovereignty’. Rather than addressing the legal arguments presented by Ministry of Justice

---


164 The Committee organised workshops with key NA delegates before the draft Code was presented to the Standing Committee in September 2004. Interviews Nguyen Thanh Hung, supra.

165 The new article 1 (2)(a) appeared in the draft Law on Amending and Adding to Certain Articles of the 1996 Law on Issuing Legal Normative Documents, dated 30 November 2002. This provision was inserted to comply with provisions in the BTA.

166 See Dinh Ngoc Vuong, 2001 ‘Van De Sua Doi Bo Sung Quy Dinh Cua Hien Phap 1992 Ve Ky Ket Quyet Dinh Viec Phu Chuan Gia Nhap Bai Bo Dieu Uoc Quoc Te’ (Problem of Amending and Adding Stipulations
drafters that civil law countries observe the doctrine, they recited passages from the constitutional preamble about Vietnam’s independence struggle to excite nationalistic sentiment against the ‘doctrine’. Soviet international law principles used in Vietnam provided little guidance, because they assess the supremacy of international law on a case-by-case basis according to the ‘economic, sociopolitical development and interests of the nation’.

Once conceived as a matter of national sovereignty, delegates could not simultaneously think about adopting treaties in a legal way, as conflicts between different methods of social regulation. In political mode, delegates understood treaty ‘incorporation’ as a power struggle with foreigners. Without constitutional ‘secondary codes’ or precedents to guide them, delegates could not easily convert political arguments about power struggles into legal rules that determined the validity of conflicts between international and domestic law. In the cases considered, delegates invoked political arguments circulating in the ‘official’ discourse to block imported law. Without constitutional ‘rules of the game’, coupled with appropriate legal training, they lacked the conceptual tools to move beyond occasionally blocking imported rules to proposing amendments solidly grounded in underlying social practices.

**Decision-making processes in the National Assembly**

Before NA delegates are given an opportunity to discuss draft legislation three policy filters focus their deliberations. First, as noted above, government drafting agencies privilege their own interests in draft bills and explanatory memoranda. If the Standing Committee, which has constitutional powers to guide the passage of bills through the NA, agrees with drafting agencies, the range of issues presented for deliberation is highly circumscribed. The

---

167 This doctrine is reflected in article 5 of the Ordinance on the Conclusion and Implementation of International Agreements 1998, which requires the NA to deliberate on the ‘political, economic, social and financial impact of treaties’. Also see Doan Nang, 2002 ‘Xu Ly Dung Dan Moi Quan He Giua Phap Luat Quoc Te va Phap Luat Quoc Gia’ (Correct Settlement of the Relationship between International and National Law) Tap Chi Nghien Cuu Lap Phap (5 & 6) 6.

Standing Committee is nominated by and ultimately acts as the agent of the Politburo in the NA.\textsuperscript{169}

Second, the NA Law Committee, in association with other NA bodies, decides which bills to send to NA delegates for deliberation and which bills to refer to the Standing Committee for promulgation as ordinances. The Law Committee uses this power to refer politically sensitive issues to the Standing Committee for resolution, before, sometimes years later, they are given to NA delegates to enact into law (luat).\textsuperscript{170} For example, legislation governing economic contracts, minerals, technology transfers, labour contracts and banking were first issued by the Standing Committee as ordinances.

Third, the Legislative Activities Board (LAB) (Ban Cong Tac Lap Phap) established in 2003 scrutinises draft bills before they are presented to NA delegates.\textsuperscript{171} It decides which legislative issues are ‘technical’ (ky thuat) and require further clarification by professional drafters, and which issues concern policy and should be resolved by delegates.

Mediating National Assembly discourse

The Law on the Promulgation of Legal Documents 2002 divides the deliberation of bills into two NA sessions (Article 45b). During the first plenary (hoi truong) session, delegates consider the main policy issues, as determined by the Standing Committee and LAB. The chairman of the NA may refer complex matters to smaller group (thao luan o to) sessions for consideration. The secretariat of each session summarises the delegates’ opinions, and bills are then amended by the drafting committee to reflect these concerns. But the Standing Committee ultimately decides which opinions should be codified into law. For example, the Standing Committee rejected concerns expressed by many delegates deliberating the Land Law in November 2003 that the expression ‘land is owned by the people but managed by...”


\textsuperscript{170} The Law Committee also determines whether bills should be enacted as codes, laws or ordinances. See Law on the Promulgation of Legal Documents 2002, article 22. Nguyen Chi Dung, Editor of ‘Tap Chi Nghiên Cuu Lap Phap’ (Legislative Studies), speech given at the ‘Law and Governance: Socialist Transforming Vietnam Conference’, Deakin University and Melbourne University, Melbourne, 12-13 June, 2003.

the state’ should be replaced by the more accurate designation the ‘state owns land’. Against objections raised by many delegates, it also accepted the drafting committee’s recommendation that for the purposes of taxation and compensation for appropriation, land should be valued close to market rates.

At the second plenary session, the Standing Committee reports whether revised bills have incorporated opinions expressed during the first session. Delegates then vote by simple majority to pass bills into law. Even controversial bills like the BTA (64 per cent) and the Land Law 2003 (85 per cent) were passed by large majorities.

The protocols governing NA deliberations are based on unwritten rules originally derived from the Soviet Presidium. They have changed over several decades to reflect consensus-generating practices and power structures designed to induce policy conformity. According to informants, attempts to codify these rules have failed, because informal and flexible procedures facilitate centralised leadership over deliberations.

The NA chairman opens sessions by restating deliberative parameters established by the Standing Committee. Consider the opening address delivered by the Chairman, Nguyen Van An, to the NA session discussing constitutional amendments in November 2001. After summarising institutional reforms proposed by the Constitutional Drafting Committee (Uy Ban Soan Thao Hien Phap), he instructed delegates to confine discussions to increasing inferior court powers and reducing procuratorial investigation powers. He expressly ruled out broader changes to clarify the relationship between party and state and NA supervision over other state organs.

The chairman also imposed deliberative constraints during the NA session considering the draft Law on the Promulgation of Legal Documents in December 2002. He informed delegates that the party Central Committee required certain amendments to improve legislative ‘results (hieu qua) so as to increase the productivity of the NA’.

---

173 Interviews Nguyen Si Dung, supra.
174 Interviews officials Office of National Assembly, supra.
175 See Author Unknown, 2001 ‘Quoc Hoi Nghe To Trinh Ve Viec Sua Doi Bo Sung Mot So Dieu Cua Hien Phap Nam 1992 va Mot So Thuyet Trinh Bao Cao Bao’ Nhan Dan 21 November, 3.
176 Party objectives include: building the law-based-state; developing a market economy; maintaining political stability; increasing legal consciousness among state officials, the public, enterprises and organisations; strengthening democracy and social justice and promoting international economic integration. See Ministry of Justice, 2002 ‘Program on Reforms of Drafting, Promulgating and Enhancing the Quality of Legal Normative Documents’, Ministry of Justice, Hanoi, 1. Also see VNS, 2002, ‘National Assembly First Session to Open 242
Delegates wishing to speak at plenary sessions must give the chairman a written summary before sessions commence.\textsuperscript{177} The chairman evidently shapes policy debates by prearranging the order in which delegates speak and limiting speaking time for those presenting unwelcome opinions. For example, less than half of the 32 delegates registered to discuss important amendments to the Land Law in 2003 were given time to speak.\textsuperscript{178} Less than 20 to 30 out of almost 500 delegates address the NA during the twice yearly, two- to three-week sessions. Fewer than ten speakers, mainly from NA Committees (especially the Standing Committee), dominate most sessions.

Well-known delegates command enough popular prestige to enter debates without waiting for approval. During the April 2002 NA sessions Professor Nguyen Lan Dung, a prominent intellectual, questioned the prime minister on the government’s failure to enforce a decree requiring state officials to declare their assets.\textsuperscript{179} The NA chairman quickly moved to protect the prime minister by referring the questions to the next plenary session. When the delegates voted against this proposal, the prime minister informed the session that the matter was politically sensitive and under review by the Politburo. This intervention signalled an end to further discussion.

Procedures designed to limit individual discourse in plenary sessions are not as rigorously enforced during smaller group (thao luan o to) sessions.\textsuperscript{180} Senior party and state members leading ‘party affairs sections’ (ban can su dang), nevertheless, promote the party’s viewpoint during these sessions.\textsuperscript{181} Group reports about draft laws are compiled by the session secretary into ‘forms for requesting delegates’ opinions’ (phieu xin y kien dai bieu).

\textsuperscript{177} Article 92 of the Constitution gives the Chairman of the National Assembly powers to preside over National Assembly sessions. Also see Ngo Duc Manh, 2002, \textit{supra}.


\textsuperscript{179} According to official accounts, the legislation that required state officials to declare assets was deferred ‘to prevent possible instability in agencies and organizations as well as indication of psychological negativity that might follow the declaration of assets by officials.’ See \textit{Thoi Bao Kinh Te Saigon}, 1998, ‘Assets Declaration: A Positive Anti-Corruption Measure’, trans., FBIS East Asian Daily Report 98-246, 3 September, 2.

\textsuperscript{180} See Legis, 2001 ‘The National Assembly in a Nutshell’ \textit{Tap Chi Nghien Cua Lap Phap} English ed., (1) 60.

\textsuperscript{181} See Tran Ngoc Duong, 2005 ‘Noi Dung va Phuong Thuc Lanh Dao Cua Dang Doi Voi Quoc Hoi O Nuoc Ta Hien Nay’ (Leadership of the Communist Party Over the National Assembly in Vietnam—Content and Method) \textit{Tap Chi Nghien Cua Lap Phap} (2) 17- 23.
Party leaders quickly and publicly rebuke delegates that express views outside parameters sanctioned by the Politburo. On the rare occasions when significant numbers of NA delegates disagree with central party policy, the Standing Committee holds an ‘internal party vote’ (dang doan quoc noi) to resolve differences. If agreement is not reached, the Politburo makes a determination, which is then communicated to the NA plenary session. The Politburo infrequently exercises its extra-constitutional prerogative to amend legislation already passed by the National Assembly. This informal process is euphemistically referred to as hoan thieu (perfecting) legislation.

To recap, the Constitution provides few ground rules to guide delegates in codifying local ideas to amend imported laws. Most codification takes place in drafting committees. Finally, although the party mediates every stage of lawmaking, the ‘official’ discourse permits lawmakers to oppose legislation proposed by the government.

Conclusions

This chapter commenced by posing the question: what factors make some foreign legal ideas appear more appropriate than others? Three interrelated factors, deduced from the case studies, influence the way legislative drafters select and adapt borrowed law. Additional factors guide lawmaking in the NA.

In the first place, expanded epistemological settings in the ‘official’ discourse permit drafters to borrow laws from a diverse range of sources. This change is most evident where economic discourse, especially international legal harmonisation, has eroded political objections to capitalist laws. Although drafters are not indifferent to incompatibilities between legal imports and local conditions, localisation is hindered by a general reluctance to research issues that may implicitly contradict party directives, poorly developed comparative methodologies and less than optimal understandings of how laws function in donor countries.

Compounding the problem, most legal drafters take an instrumental approach to lawmaking that de-couples imported laws from their social contexts. From this reified perspective,

---

182 In discussing a NA debate that queried party resolutions the General Secretary Do Muoi insisted that ‘this abnormal state of affairs should resolutely end.’ See Do Muoi, 1995 supra 179.
183 Nguyen Chi Dung, 2003 supra.
184 This power is not publicly acknowledged, however, the final draft approved by the National Assembly occasionally differs from the code or law published in Nhan Dan, the official party newspaper. For example,
legal borrowing appears as uncomplicated as making a series of technical adjustments between legal systems. The distancing of law from reality does not in itself produce poor laws, since laws everywhere function as highly edited maps of reality. Lawmakers produce poor laws because they are reluctant or unable to imagine fictitious worlds in which borrowed legal ideas create new legal solutions for Vietnam’s commercial problems. Foreign laws may provide solutions that do not exist in relational practices. For example, lawmakers drafting the EL imaginatively borrowed deregulatory ideas to open markets to private entrepreneurs. But they missed an opportunity to refashion imported corporate governance provisions to create new legal solutions to local regulatory problems (see annex six).

The second factor influencing legal borrowing is the propensity for drafters to interpret and co-opt ideas in the official discourse to achieve strategic objectives. Powerful state agencies use drafting committees to encode and inculcate certain perspectives or orthodoxies in legislation to secure advantage in ‘palace wars’ with other agencies. Perceptions of legal prestige and fashion, inculcated through education and workplace relations, also predispose drafters toward certain legal sources and styles.

All this indicates there is a powerful domestic political and structural logic to legal borrowing. But in addition, the case studies suggest that in pursing their organisational interests, Vietnamese drafters generally use ideas that conform to the epistemological settings that order ‘official’ discourse. For example, CIEM drafters could not have used neo-liberal economic ideas to wear down ‘state economic management’ arguments, unless ‘official’ epistemological conventions permitted such thinking. Legal drafters cannot simply assert political power; they must play by the ‘rule of the game’ and camouflage self-interest with ideas drawn from the official discourse. CIEM drafters succeeded because they worked assiduously over several years to inveigle neo-liberal legal ideas into the official discourse. In short, although institutional imperatives shape legal borrowing, they are largely conceived and realised within the range of ideas permitted by the ‘official discourse’.

The third factor shaping legal borrowing is the lack of a shared legal grammar. Chinese-Vietnamese terms eventually acquired new and commonly agreed meanings because Vietnamese lawmakers trained in the Eastern bloc invested them with Soviet legal
consequences. The case studies show that a new meta-legal language is yet to emerge among contemporary legal drafters. Instead, legal drafters use a syncretic mixture of pre-modern, Soviet, East Asian and Western ideas that invest imported laws with fragmented meanings. Evidence suggests, however, that groups or communities of like-minded lawmakers are coalescing around certain key institutions. For example, some researchers at CIEM share common epistemological assumptions, tacit understandings and even educational backgrounds with certain foreign donors. The possibility that ‘interpretive communities’ linking drafters and foreign donors facilitate legal borrowing is considered in chapter seven. The first and second factors considered above also apply to lawmaking in the NA. Further research is required to ascertain whether ‘interpretive communities’ are forming in the NA. But the case studies suggest two additional factors influence legal borrowing in the NA. First, delegates lack the constitutional ‘ground rules’ to agree among themselves how to localise imported legal ideas. Delegates use political, economic and moral discourse to occasionally oppose imported laws. This discourse engages with the policy behind the law, but lacks the legal precision required to imaginatively reconfigure imported legal ideas in ways that solve local problems. As a consequence, the fine-tuning that localises legal imports primarily takes place in the administrative and judicial processes discussed in the next chapter. Second, the party uses procedural rules to mediate NA discussions. These processes limit the interaction between imported ideas and ‘official’ and ‘ unofficial’ discourse. Taken together, the case studies imply that the epistemological criteria guiding official discourse establish the ground rules governing legal borrowing. Within these broad parameters, lawmakers pursue institutional and personal objectives and converse in a disjunctive legal discourse that produces fragmented legal meanings. But under the impact of international legal harmonisation external ideas are increasingly taken as the frame of reference for change. The next chapter explores how bureaucrats and judges change the meanings that drafters and legislators invest in borrowed commercial laws.

that were not submitted to National Assembly delegates.
246
Chapter Six
Implementing Imported Laws

Introduction

The preceding chapters have shown that Western rights-based laws are imported into Vietnam with few concessions to the needs and aspirations of domestic entrepreneurs. This chapter investigates how 'official' and 'unofficial' discourses influence the way state institutions interpret and apply borrowed commercial rights.\(^1\) This investigation subsumes a number of more specific inquiries, which are considered sequentially in this chapter. The first inquiry assesses how Vietnamese regulators use discretionary powers to manage (quán lý) imported rights-based laws. The second investigation examines how tensions between central and local discourses allow officials to overcome rigidities in imported legal rights and flexibly respond to local business norms and practices. The third inquiry unravels the meaning of judicial independence and determines whether judges are sufficiently autonomous from external influences to develop a legal discourse that supports imported commercial rights. The chapter concludes that different interpretive structures and conflicting strategic agendas fragment the implementation of imported laws.

Western commercial regulation

In order to grasp how Vietnamese regulators may change the meaning of imported laws, it is necessary to first understand the regulatory environment shaping Western commercial law. Most commentators trace the genesis of property and contractual rights to the codification of mercantile practices in nineteenth-century Europe.\(^2\) Codification aimed to condense vast amounts of information governing transactions into discretionary criteria that regulators could process. It achieved this objective by only officially recognising certain types of commercial rights and obligations.\(^3\) By the second half of the nineteenth century the process had reified to the stage where legal discourse

---

\(^1\) The distinction between ‘official’ and ‘unofficial’ discourse only makes sense where voices outside the ‘official discourse’ speak with sufficient autonomy (from the party and state) to constitute a conceptually discrete discourse. Otherwise, ‘unofficial’ discourse has nothing to say to the ‘official’ discourse.\(^2\) It should be noted that codification reached its highest expression in continental Europe, first in France and later in Germany. Although Anglo-American jurisdictions rely more on non-statutory common law, these rules have through doctrinal consolidation come to perform a similar function to legal codes. See Ross, 1998 ‘The Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520-1640’ 146 University of Pennsylvania Law Review 323.
used internal doctrinal rules to distinguish legally recognised and unrecognised commercial transactions. Mature commercial rights emerged when most Western countries moved from comprehensive discretionary regulation towards normative rights-based regulation.\textsuperscript{4} As Weber observed, this transformation involved a shift from regulatory particularism to facilitative regulation based on universal legal rights.

According to Weber, stable commercial rights required regulatory systems in which bureaucrats based their determinations on written rules and organisational practices.\textsuperscript{5} This decision-making calculus assumed perfect information, high degrees of trust and communication and stable property rights. Scientific managers from the 1930s argued that correct decisions required clear legal rules to circumscribe bureaucratic discretion and minimise government interference with private commercial rights and freedoms.\textsuperscript{6} Even so Western regulators to greater or lesser degrees still intervened to correct ‘market failures’.

‘Public-choice’ theories developed in the United States during the 1960s devised behavioural models that equated bureaucratic decision-making to entrepreneurial wealth maximisation.\textsuperscript{7} They conceded that in real life situations officials work in a ‘bounded rationality’ where some decisions were not based on rules. Deviations from central rules are caused, they thought, by unstable policy settings, organisational pressures, and incomplete or misunderstood information.\textsuperscript{8} To remedy the problem, administrative reforms sought to quarantine bureaucrats not only from political patronage, familial and

---


\textsuperscript{5} Western bureaucratic organisational theories drew heavily from Weber’s concern that ‘substantive rationality’ should dominate ‘formal legal rationality’—or put differently, that formal legal rules should control policy flexibility. See Max Weber, 1978 Economy and Society, G. Roth and C. Wittich eds., University of California Press, Berkeley, 657.


societal influences, but also from the market place. This prescription fitted comfortably with neo-liberal economic attempts to minimise state interference in the market place.

As we saw in chapter four, the public choice deregulatory paradigm was grafted onto Vietnamese Public Administrative Reforms (PAR). More recently, Vietnam acceded to the US-Vietnam Bilateral Trade Agreement (BTA) in 2001 and intends to join the WTO in 2006. Both treaties presuppose a facilitative regulatory regime that follows a public choice blueprint. For example, they envisage politically neutral state institutions implementing treaty-based norms and rules that enable entrepreneurs to use private legal rights to shape their transactional environment. Regulators are only supposed to intervene in market decisions when applying uniform legal principles that apply to everyone.

The following section examines different narratives in Vietnam to understand why imported commercial laws seldom perform the neo-liberal legal function of preserving private property and contractual rights. In the process it examines why Western deregulatory reforms are struggling to reconfigure Vietnamese institutions.

**Changing the meaning of imported law with ‘state economic management’**

**Mapping the Vietnamese discretionary legal framework**

Prior to doi moi reforms in 1986, most economic production was generated by state and collectively owned entities. Following Soviet central-planning, production contracts conformed to planning orders issued by line-ministries and people’s committees, only technical decisions affecting local conditions, such as packaging and delivery, were devolved to production managers. By 1989 central-planning mechanisms were effectively dismantled and the state began enacting laws that formally devolved decision-making powers to state-owned enterprises (SOEs) and then eventually to

---


private households and entrepreneurs. But reforms did not disturb a longstanding belief in ‘state economic management’ (*quản lý kinh tế nhà nước*) discussed in prior chapters.

The introduction of the mixed-market economy created a dilemma for central regulators. They could no longer simply suppress private markets, but they thought imported rights-based law gave market players too much discretionary control over resource allocation. Regulators needed a rights-based legal framework that attracted foreign investors, conformed to international trade agreements and, in addition, conveyed discretionary powers that enabled government officials to ‘manage’ (*quản lý*) the economy.

Commercial regulation everywhere uses state discretionary power to control and guide private legal rights. But this study argues that ‘state economic management’ powers in Vietnam achieve this objective in ways rarely experienced in Western countries. In totality they created a regulatory system that is far removed from the facilitative rights-based system contemplated by neo-liberal deregulatory reforms and international trade treaties. This observation brings us to a central inquiry in this chapter: how do Vietnamese regulatory practices change the meaning of imported commercial rights? Regulators use four mechanisms to ‘manage’ imported legal rights.

- **Subordinate legislation**

As we saw in chapter five most commercial laws passed by the NA lack normative detail. Open-ended drafting techniques used to strip laws of controversial detail in NA debates devolves responsibility for formulating much commercial policy to government agencies. Inferior legislation co-exists with, and frequently contradicts, superior laws in a complicated network of overlapping and criss-crossing similarities and differences.

---


This regulatory confusion gives agencies a wide latitude to use subordinate rules to influence the meaning and utility of private legal rights.

- **Discretionary Licensing**
  Government agencies at the central level, but especially at the local level, use discretionary licences and permits to circumscribe the permitted range of business transactions and to determine the quality of property rights.

- **Official inspections**
  Local-level state agencies use inspections not only to monitor legal compliance, but also as a method of ‘state economic management’.

- **Criminalising private rights**
  Administrative and criminal laws give officials powers to transform commercial transactions into administrative or criminal infractions.

Before exploring the techniques officials use to ‘manage’ private rights, it is instructive to briefly consider the mentality guiding regulatory authorities.

**The mentality of state economic management**

There is a well-documented disdain among state officials (especially at the local level) towards entrepreneurs that goes back to pre-modern Vietnam.\(^{16}\) Encapsulated by the Confucian saying, ‘emphasise agriculture, commerce is peripheral’ (trong nong mat thuong), imperial policy prohibited large-scale commercial organisations independent of royal patronage (see chapter two).\(^{17}\) After independence, Confucian anti-mercantilism fused with Soviet regulatory practices and class theory to profoundly reshape bureaucratic thinking.

Economic production in the command economy resided in dual, but interwoven systems. One system operated as a facsimile of Soviet central-planning.\(^{18}\) Line-

---


\(^{17}\) During the early colonial period a tiny group of indigenous literati embraced entrepreneurialism. See David Marr, 1981 *Vietnamese Tradition on Trial 1920-1945*, University of California Press, Berkeley, 122-123. Also see Nguyen Thua Hy, 2002 *Economic History of Hanoi in the 17th, 18th and 19th Centuries*, National political Publishing House, Hanoi, 221-270.

ministries and people’s committees regulated production through administrative directives that allocated raw materials according to quantitative planning targets. The other economic system produced spontaneous markets that co-existed with, and infiltrated, state distribution networks. Commercial incentives for unauthorised private production and distribution were extremely potent. Officials estimate that by 1986 less than 40 per cent of manufactured consumer goods passed through state-trade networks.\(^\text{19}\)

Economic duality deeply influenced bureaucratic perceptions of socialist regulation. Class-based morality tolerated small-scale household producers, but demonised large-scale private producers, imbuing bureaucrats with an antipathy to private traders and respect for the state economic sector.\(^\text{20}\) The state also used incentives—like housing and consumer goods—to reward loyalty to class ideology. Yet at the same time bureaucrats were encouraged to believe that socialist ideology expressed reality, they lived in a world where family and friends profited from private markets. The ensuing ideological ambivalence and cynicism was exacerbated by doi moi reforms that required the guardian of socialism (the state) to defend—even create—markets.

In the command economy bureaucrats used concessionary licences and permits based on state plans to tightly control business activities. After doi moi the state began importing rights-based laws that purported to give entrepreneurs broad commercial freedom to conduct business transactions. In practice, however, the internal architecture of most commercial legislation reflected the tension in the ‘official’ discourse between private rights and proactive concessionary regulation. As we saw in chapter five, lawmakers reconciled these competing objectives by grafting ‘state economic management’ discretionary powers onto imported rights-based laws. The following section uses a series of case studies to ascertain how regulatory authorities use ‘state economic management’ powers to guide imported legal commercial rights.

**State economic management and subordinate legislation**

---


The Law on the Promulgation of Legal Documents 2002 explains that National Assembly (NA) legislation determines basic social issues, while the government issues subordinate legislation to implement and concretise superior law.\textsuperscript{21} The previously discussed Legal Needs Assessment (LNA) observed widespread inconsistencies between these regulatory sources.\textsuperscript{22} It further noted there is no legal impediment to making superior laws self-executing. A practice has arisen whereby state officials do not observe superior laws until directed to do so by subordinate implementing regulations issued by ministries. By undermining the normative authority of superior law, subordinate legislation can change the meanings ascribed to imported contract and property rights.

For example, it took eight years after the Civil Code 1995 took effect before state agencies passed implementing rules that gave citizens rights to enforce ‘civil obligations’ (tortious actions) for non-contractual loss.\textsuperscript{23} Aggrieved citizens in some areas, such as trespass to land and damage caused by pollution, still rely on sympathetic state authorities to remedy breaches of rights stipulated in the Civil Code. Behind the problem is the belief by some party leaders that officials are better equipped to govern than legislators and the concern that tortious rights might give the public too much power to privately plan social space.\textsuperscript{24}

In another example, corporate governance provisions in the Enterprise Law 1999 (EL) aiming to protect minority shareholders (article 53) and allow companies to merge (article 108) and wind up (articles 111-112), have remained dormant without implementing regulations. Rather than a desire to frustrate socially disruptive imported rights, the delay in this case is imputed to a low social demand for complex corporate governance provisions (discussed in chapter seven and annex six).

Adding to the regulatory confusion, some subordinate rules alter the meaning of NA legislation. As one commentator put it, ‘the main legal documents are the raw materials used to produce a series of subsequent regulations, but the guiding regulations have

\textsuperscript{21} National Assembly laws (luat) concern national and international relations, the economy, society, defense, security, organisation of state apparatus, social relations and citizens’ activities. See Law on the Promulgation of Legal Documents (amended 2002), article 20.

\textsuperscript{22} Ministry of Justice, 2002 ‘Final Report Legal Needs Assessment’, Hanoi, point 2.3.2.


\textsuperscript{24} Interview Nguyen Nhu Phat, Director, Center for Comparative Law, Institute of State and Law, Hanoi, June 1998. Personal communication David Marr, January 2005.
“covered” all these decisions and “replaced” the role of the main documents.\(^{25}\) For example, the General Department of Land Management (now part of the Ministry of Natural Resources and Environment) issued a circular in 2000 that permitted SOEs to mortgage land. This contravened the Civil Code, which provides that mortgages should only attach to registered land-use rights.\(^{26}\) When questioned about this anomaly, officials explained that the rule only applied where SOEs intended to apply for land-use right certificates, ‘so the spirit of the law was satisfied’.\(^{27}\)

A directive issued by the prime minister in 2004 to implement the EL clearly illustrates the use of subordinate legislation to infuse private rights with socioeconomic policy.\(^{28}\) Not only did the directive require entrepreneurs to ‘raise their legal understanding and sense of law observance’, they were also instructed to increase ‘efficiency, productivity and competitiveness’ and adopt advanced technologies and market information to exploit foreign markets. As a legally binding instrument, the directive sought to enlist private capital to further the state’s international economic integration policies—a project that is not contemplated in the EL.

The LNA Report concluded that ministries routinely regulate sensitive issues in superior legislation with sub-legal, but highly persuasive administrative rulings such as guidance letters (thong tu huong dan) or dispatches (cong van) (literally official correspondence). Government authorities and courts use these instruments to fine-tune and ‘manage’ (quan ly) rights set out in superior legislation.\(^{29}\)

A report written by officials in the Office of Government also found that government agencies use open-textured and opaque drafting techniques to increase their

\(^{25}\) Truong Thanh Duc, 1999 ‘Nhung Bat Cap Trong Viec Xay Dung va Ban Hanh Van Ban Quy Pham Phap Luat’ (Defects in Building and Promulgating Legal Instruments) Nha Nuoc va Phap Luat (2) 22, 29.

\(^{26}\) Article 728 of the Civil Code 1995 and Decree No. 178 1999 provided that only houses with Land Use Rights are mortgageable. Authorities leniently interpret this rule permitting SOEs to mortgage land rights in the process of being legalised (Inter-Circular No 12 TTLT-NHNN-BTP-BTC-TCDC 2000). Typifying numerous contradictions in the land regime, the Civil Code prohibition was not amended to exempt SOEs.

\(^{27}\) Interview Dang Trung Chinh, Legal Expert, General Department of Land Administration, Hanoi, June 2001.

\(^{28}\) See Directive No. 27 CT-TTg On Further Stepping Up the Implementation of the Enterprise Law, Encouraging the Development of Small-and Medium Sized Enterprises 2004, article 16. Also see Directive No 47 CT-TTg on Solutions to Raising the Competitiveness of Export Industrial Products 2004, articles 1(a), 2(a).

\(^{29}\) The preamble to Resolution No. 38 on Public Administrative Reform 1994, and subsequent public administrative reform instruments accuse line-ministries and provincial peoples committees of reinterpreting the meaning of superior law.
discretionary powers. Vague and inconsistent rules increase the discretionary latitude of government agencies to 'manage' business entities.

State bodies responsible for legislative consistency, such as the NA and the Ministry of Justice, lack the resources to evaluate the thousands of subordinate statutes passed by government agencies every year. Until recently, these coordinating bodies did not have access to every sub-law (duoi lat). The Law on the Promulgation of Legal Documents 1996 (as amended in 2002) now requires government bodies to lodge copies of statutes with a central database before the legislation comes into force. It also directs drafters to repeal existing statutes to the extent of inconsistency with new legislation. Work by the NA and other bodies to determine whether sub-laws comply with superior legislation may eventually pressure government agencies to enact more consistent legislation. Legislative consistency is also one of the key conditionalities under the BTA. Progress is hampered, however, by the perception within some government agencies that legislative conformity constitutes a political constraint on policy implementation. As we shall see, there is little commitment, especially at the provincial level, to the notion that legislation in unitary states has a 'single mind'.

State economic management and licensing powers

After doi moi reforms, government agencies used strict licensing powers to control private commercial rights. It will be recalled from chapter five that heavy-handed concessionary (asking-giving) licensing under the Company Law 1990 tightly regulated market entry and business activities. Consider, for example, an application in 1998 to

---

30 Office of Government, 2003 'Study Report to Improve the Quality of Laws and Ordinances Drafted by the Government to be Submitted to the NA and the NA Standing Committee', unpublished report, Working Delegation No. 804, Hanoi, December. For example, Circular 01/2003/TTLT-BCN-BTNMT dated 29/10/2003 Guiding the Transfer of State Administration Functions Over Mineral Resources From Industrial Bureaus (So Cong Nghiep) to the Bureau of Environmental Resources (So Tai Nguyen Moi Truong) of Provinces and Central Cities, gives the provincial land and environment departments control over exploiting and processing minerals. But government Decree 55/2003/ND-CP Providing Functions, Obligations, Rights and Organizational Structure of Ministry of Industries gave this power to the Ministry of Industry.

31 Reforms underway to locate a national legal database at the Ministry of Justice will record all legislation. Without a comprehensive database the Ministry cannot perform its statutory role of consolidating legislation.


33 Incorporation was time consuming and expensive until the EL commenced operation in 2000. For example, Song Thu Ltd, a company established in Ho Chi Minh City to operate a mini-hotel. Incorporation took eight months. During this time promoters submitted 40 documents, requiring 83 official seals and 107 signatures from 26 different official bodies. These comments are based on interviews with Vietnamese legal practitioners. More typically eight to ten documents were required for each of the two stages of incorporation. Accordingly, applicants must attend licensing authorities approximately forty times.
incorporate a musical promotion company by a group of famous artists. The Hanoi People’s Committee rejected the application on the grounds that Decree No. 222-HDBT 1992 did not specify the legal capital required for music promotion companies.\textsuperscript{34} Adopting a concessionary approach to market entry, the officials contended that ‘since the law does not specifically provide a legal framework for such business activities, it means that people are not allowed to do such business’.\textsuperscript{35} The struggle between private commercial rights and ‘state economic management’ is illustrated by deregulatory procedures leading up to the enactment of the EL. The first tentative step towards market-entry deregulation came in a circular issued by the Ministry of Justice, which abolished discretionary powers to determine the health and educational standards for company promoters.\textsuperscript{36} This reform aimed to minimise rent-seeking and other administrative abuses, without fundamentally dismantling concessionary powers.

The EL introduced more far-reaching liberalisations by notionally replacing some business licences with a simple registration system.\textsuperscript{37} It permitted private investors to engage in any type of business activity that is not prohibited or licensed by the state. Decree No. 2 ND-CP 2000, implementing the EL, unequivocally provided that ‘to establish an enterprise and to carry out business registration in accordance with the law is the right of the people and of organisations, which shall be protected by the state.’\textsuperscript{38} Although the EL brought company formation within the facilitative regulatory orbit, it also invests government agencies with discretionary powers to enact subordinate legislation to regulate and inspect companies. Administrative and criminal penalties punish company officials violating ‘state economic management’ provisions.

By abolishing more than 150 licences and/or certificates (giay phep kinh doanh), the EL stimulated impressive growth in new company registrations.\textsuperscript{39} Studies show that in

\textsuperscript{34} Interviews Nguyen Tien Lap, Vice Director, Investconsult, Hanoi, March 1999, November 2002, March 2005.
\textsuperscript{35} This passage is quoted from a letter sent by the Hanoi Peoples Committee to the law firm acting for the artists.
\textsuperscript{36} Circular No. 5, 10 July 1998, Ministry of Justice and Ministry of Planning.
\textsuperscript{37} Not all business licences were abolished. Licences remain in key manufacturing, mining, tourism and various import/export sectors. In addition private companies remain barred from economic sectors considered harmful to the public interest, such as national defense (Article 6(1)) and areas reserved for SOEs like telecommunications, transport and rice export. See Cao Mai Phuong, 2003 ‘Enterprise Law has Created Legal Environment for Enterprises’ 10 Vietnam Law and Legal Forum (111) 18.
\textsuperscript{38} Decree No. 02-2000 ND-CP, on Business Registration, 2000, Article 2 (1); Decision No. 19-2000-QD-TTg on the Revocation of all Types of Licenses Inconsistent with the Provisions of the Law on Enterprises 2000.
\textsuperscript{39} In 2001 registrations of limited liability companies rapidly increased to 11,121, but the rise in new registrations plateaued in 2002-2004. By way of comparison, from 1991 to 1998 only 12,163 limited liability companies were incorporated under the Company Law. There is some doubt that all the
some localities deregulatory reforms have induced a ‘strong commitment to simple, transparent and abridged transactions between public officials and businesses’.

Reforms have systematised legal rights and given entrepreneurs the freedom to select their own business activities. Entrepreneurs report that licensing procedures have by varying degrees reduced the time required to incorporate and have induced a more streamlined ‘work culture’ (van hoa lao dong). In short, routine procedures reduced the discretionary space in which officials could infuse private rights with local imperatives. Despite impressive changes, a series of studies indicate that EL reforms have only just begun to transform the deeply engrained concessionary and anti-mercantile mentality among state officials. An investigation conducted by CIEM six months after the EL was enacted found that most corporate regulators were still applying the repealed procedures. Twelve months later, the Enterprise Enforcement Mission Group (Nhóm Nhiệm vụ Cường chế Doanh nghiệp), which the prime minister convened to prevent reregulation under the EL, reported that ‘many local authorities still hold on to their powers to issue sub-licences and continue to employ the “ask-favour system” (co che xin cho) without regard for the consequences for the business community.’

A UNDP field study conducted in 2003 discovered that some provincial people’s committees used ‘one-door’ registration procedures to establish services companies. These fee-for-service companies used personal links with people’s committee officials to give applicants access to the unpublished nuances of municipal policy. Information of this kind is required to successfully negotiate cryptic business regulations.

Other officials used technically illegal sub-licences to reregulate market entry. Before deregulation, food safety inspectors routinely incorporated food hygiene standards into

---

41 Entrepreneurs are required to answer standard questions about the proposed company, but officials now lack powers to assess the appropriateness of business decisions.
44 See CIEM, 2003 supra 22. Also see Decision No 181 QD-TTg Promulgating the Regulation on the Implementation of ‘One-Door’ Mechanism in Local State Administrative Agencies 2003.
45 In the first year of its operation 145 licenses were abolished, but not one of the 30 licenses abolished in 2001 was revoked by the responsible government agencies. See Author Unknown, 2002 ‘Enterprise Law Ups and Downs’ Vietnam Investment Review 18 February, 3; Quy Hoa, 2001 supra 2. Also see Vietnam Business Forum, 2002 ‘Sub-Working Group on Administrative Reform: Review of Licenses/Permits and Related Issues’, unpublished paper, Hanoi.
business licences. The abolition of business licences embodying these standards exposed consumers to unhygienic services. In response, officials in Ho Chi Minh City began inventing health permits to control standards in food processing firms.⁴⁶

Employing another strategy, some city-level officials used discretionary powers over public resources to discourage unwanted business activities.⁴⁷ For example, they delayed processing documents, charged excessively for utility tariffs and imposed arbitrary environmental, fire and building controls. Other officials used access to land to ‘manage’ private investment.⁴⁸ Le Quang Chien, a prominent ceramics manufacturer complained ‘my company and thousands of other privates businesses are unable to develop or expand their operations simply because they are not given the land to do so.’⁴⁹ Officials used these regulatory powers to negate or ‘manage’ market entry rights conferred by the EL.⁵⁰

Deregulatory reforms are only gradually (if at all) changing deeply ingrained concessionary attitudes that discretionary power should proactively regulate company formation. CIEM investigators concluded that an institutional culture that held officials morally, if not legally, responsible for corporate criminality and business failures, perpetuated state economic management thinking. Unofficially, CIEM officials concede that reregulation has much to do with rent-seeking.

State economic management and supervisory powers

In addition to licensing powers, officials use supervisory powers to control private commercial rights.⁵¹ For decades state authorities used supervisory powers over SOEs to police compliance with socioeconomic plans.⁵² Evidence suggests that authorities are continuing to use supervisory powers to regulate private entrepreneurs in the mixed-

⁴⁷ These practices have been observed where legislation does not devolve explicit authority. See Quy Hoa, 2001 supra 2-3.
⁴⁸ Land Law 2003, article 34. (state authorities should only lease land to companies carrying out projects approved by state bodies).
⁵⁰ Even some central level officials are reluctant to embrace liberalisations. Undeterred by losing licenses during the current deregulatory cycle, the Ministry of Information and Culture licenses the performance of folk music to foreigners. See VIR, 2000 Viet Nam Investment Review, 3 March.
⁵¹ The powers and duties of inspection agencies are setout in articles 2-29, 60-63 of the Law on Inspection 2004.
market economy. According to an authoritative CIEM report, 'entrepreneurs feel that the difficulties they face in Vietnam is not to find ways of producing cheap and good products, but coping with inspection agencies and satisfying their requirements.\(^{53}\) A variety of city/provincial agencies, including market management authorities (chi cuc quan ly thi truong thanh pho), economic police (canh sat kinh te) and economic security police (an ninh kinh te) supervise compliance with the EL and associated commercial legislation. Adding to the regulatory web, some ministries and people's committees conduct specialised inspections. For example, the Ministry of Labour monitors compliance with the Labour Code, the Ministry of Transport inspects company vehicles, traffic police control road safety and the Taxation Department collects and monitors taxation.

Entrepreneurs complain that inspectors do not confine themselves to supervising compliance with standards or practices stipulated in laws, but in addition use their powers to 'manage' business activities.\(^{55}\) As discussed in chapter four, market management authorities use discretionary powers to promote thi truong lanh manh (healthy markets).\(^{56}\) The types of activities that constitute healthy markets are continuously changing to reflect nuances in party and state policy. Policy settings are explained to officials in internal sub-legal documents (i.e. official letters and internal operational directives) that reflect 'policy regimes' (che do chinh sach) established by party committees. For example, officials in Ba Dinh district market-management group (doi quan ly thi truong) in Hanoi were instructed to encourage similar businesses to group together, because it is difficult to detect illegal activities in geographically dispersed businesses.\(^{57}\) This practice contravenes provisions in the EL allowing entrepreneurs to select their place of business.

Regulators also 'manage' entrepreneurs using lam luat (make law), a popular expression describing the misuse of discretion to extract bribes. Consider the attempts by a company in Ngo Thi Nham Phuong (ward) in Hanoi to purchase a receipt book (hoa


\(^{53}\) See Vien Nghien Cuu Quan Ly Kinh Te Trung Uong (Central Institute of Economic Management), 1998 Danh Gia Tong Ket Luat Cong Ty va Kien Nghi Nhung Dinh Huong Sua Doi Chu Yeu (Review of the Current Company Law and Key Recommendations for its Revision), Hanoi, January, 104.

\(^{54}\) Decree No 1 on Administrative Punishment for Economic Actions 1996.

\(^{55}\) See e.g. Cao Cuong, 1998 'No More Harassment' Saigon Times, July 11, 28-29; Nguyen Dinh Tai, 2002 supra 25, 27.

\(^{56}\) This case description is based on discussions with two officials working for the Hanoi Market Control Board during April 1999 and September 2000.

from the General Department of Taxation. Before agreeing to certify that the company was trading legally, a precondition for the sale of receipt books, the Phuong People’s Committee required a notarised copy of the company’s business lease. Public notaries claimed they lacked the powers to certify leases. Officials then refused to accept the lease without a copy of the lessor’s civil registration and identity card. Without the receipt book the company was not legally permitted to trade.

Other entrepreneurs reported that numerous (five to ten) visits to tax authorities are needed to convince officials to sell receipt books. In one case it took six meetings to persuade a tax official to accept that vice-chairmen, rather than chairmen of local people’s committees, are permitted to certify lease agreements.

Many commentators believe that officials use supervision to extract bribes from entrepreneurs. Inspections evidently reach a climax immediately before Tet (lunar new year). According to an investigative journalist, ‘all difficulties that local authorities or tax officials create for businesses aim to make money. To clear the bureaucracy, businesses often agree to pay bribes. For example, a company reported paying approximately one million dong (USD 70) for one meeting with a tax official to thank them for their hard work.’

Administrative penalties

Government agencies use a comprehensive system of administrative penalties to sanction violations of subordinate legislation. Penalties range from fines to custodial sentences for repeat offences. For example, fines of 500,000 dong sanction company officials providing false information to business registration departments. Officials from people’s committees can order administrative penalties and custodial sentences without first seeking permission from judges. As discussed below, there are few opportunities for entrepreneurs to appeal administrative decisions to the courts.

See Manh Quan, 2003 ‘Doan Truong Hau Dang Ky Kinh Doanh’ (The Painful Process of Post-Registration) Thanh Nien, 7 August, 5. For a more general account of the problem see Khai Ly, 2001 ‘Cong Chuc Phai Tap Xin Loi Dan’ (Civil Servants Must Learn to Apologise) Thanh Nien 17 April, 5.

Most entrepreneurs contributing to a CIEM study into private businesses reported that state supervision was routinely used to generate rents. See CIEM, 2003 supra; Nguyen Phuong Quynh Trang, 2001 ‘Doing Business Under the New Enterprise Law: A Survey of Newly Registered Companies’ MPDF, Private Sector Discussions 12, 20-21.

See Manh Quan, supra.

Criminalising (hinh su hoa) commercial activities

Entrepreneurs regard the blurred distinction between administrative and criminal penalties, termed criminalisation (hinh su hoa), the most potent weapon in the ‘state economic management’ arsenal.\(^{62}\) Criminal penalties not only apply to offences described in the Criminal Code 1999, they also extend to administrative violations of commercial regulations. Recidivism and quantitative thresholds transform relatively minor administrative infractions into criminal offences.\(^{63}\) It is a crime, for example, to intentionally conduct a business without business registration.\(^{64}\)

Criminalisation occurs in two situations: where government agencies (and courts) use criminal powers to resolve commercial problems, and where the regulatory regime is so vague that businesses cannot trade profitably without infringing subordinate regulations. Officials have broad powers to criminalise commercial activities. For example, it is a criminal offence to ‘act against’ (hanh dong nguoc lai), though not necessarily breach legislative rules, unpublished ministerial dispatches (cong van), and even oral directives given by officials.\(^{65}\)

Take, for example, criminalisation under Decree No. 324 QD-NHNN Promulgating Regulations on Loans for Credit Institutions 1998. The decree makes bank officials criminally liable for ‘lack of responsibility’ (thieu trach nhiem) (or negligence) in processing loans. Liability extends not only to fraudulent lending, but also to failing to predict credit risks.\(^{66}\)

The decree was enacted after state bank officials lost approximately USD 280 million in loans to the Minh Phung group of companies in 1997.\(^{67}\) Although bank officials in that case were charged with misappropriating ‘socialist property’ (tai san xa hoi chu nghia), many commentators believe the officials merely made poor commercial decisions.\(^{68}\) By

---

\(^{62}\) Interviews with lawyers from Hanoi based law firms Investconsult, Vilaf and Leadco, 1999-2005. Also see Tan Duc, 1999 ‘Bo Dieu 164 Cho Doanh Nhan Yen Tam Lam An’ (Revoke Article 164 to Make Businessman Feel Assured in Doing Their Business) Thoi Bao Kinh Te Sai Gon (Saigon Economic Times), 20 May, 10, 11.

\(^{63}\) For example, the administrative offences of ‘doing business illegally’ are criminalised on the second and subsequent breach. Criminal Code 1999, article 159. Whereas article 9 of Decree No. 16-CP Regulating Administrative Sanctions in State Management Over Customs 1996 provides that the unlawful importation of certain kinds of goods valued at ten million dong or less constitutes an administrative offence, the importation of goods exceeding that value constitutes a crime.

\(^{64}\) Criminal Code 1999, article 159 (penalties range from one to seven years imprisonment).

\(^{65}\) Criminal Code 1999 article 174 (penalties range from three and twelve years imprisonment).

\(^{66}\) See Criminal Code 1999, articles 144, 179.


allowing the state to prosecute bank officials for making commercial decisions, the new provisions have frustrated banking liberalisations designed to increase the availability of loan capital for the private sector.

Officials also use vague and contradictory subordinate rules to criminalise commercial activities. For example, many regulations governing trade promotion (*xuc tien thuong mai*) do not clearly delineate the boundaries between acceptable and unacceptable advertising and promotion. Entrepreneurs using advertising to increase their market share risk violating discretionary powers that criminalise ‘unhealthy market’ (*thi truong phi lanh manh*) activities. Market control officials know that many rules are not obeyed and in fact cannot be obeyed if businesses are to remain viable. Opaque rules are useful precisely because they give officials discretionary powers to prevent entrepreneurs from competing with state-owned enterprises, extract bribes and retaliate against political adversaries.\(^{69}\)

Nguyen Thi Nghia, a Ho Chi Minh City-based company director, encapsulated the uncertainty surrounding criminalisation when she said:

In principle, ‘intentional contravention’ breaches the law, however, it is very difficult to apply the relevant law in practice. *Boi duong* (feeding up) customs officers, for example, is obviously an intentional contravention, but we cannot help doing it while operating our businesses. It is very difficult to do business in a vague legal environment that is full of unclear and general provisions. In fact, enterprises cannot exist without ‘intentional contravention’.\(^{70}\)

In another manifestation of ‘state economic management’, trade competitors use public security officials to criminalise the activities of their competitors. For example, the public security police in Hai Phong began investigating 19/8 Hai Phong Fertiliser Company in 2001 for manufacturing and selling counterfeit fertiliser.\(^{71}\) The security police alleged the company used a red additive to make the fertiliser resemble a product imported by fertiliser companies owned by the Hai Phong People’s Committee. According to newspaper accounts, several independent state agencies tested the additive and concluded that it contained trace elements required for plant growth. Further, the product was clearly labelled to avoid confusion with the more expensive imported product. Despite this certification, the People’s Committee in 2002 sent 50 police to

---


\(^{70}\) Tan Duc, *supra* 10, 11.
close down the factory and arrest the company director. Commentators speculate that the action was taken to protect the state-owned fertiliser companies from private competition.⁷²

In another example, Thai Thang Long, the chairman of a construction company, was arrested by police in 2001 for allegedly offering bribes and violating the EL.⁷³ According to lawyers acting for the accused, the charges were manufactured by the Vinh Long People’s Committee to bankrupt a highly successful private sector company. Police charged Thai Thang Long with establishing a company for the purposes of ‘swindling and misappropriation’ without producing evidence supporting their accusation. He was also charged with bribing a state official to unlawfully award construction contracts. Further investigations revealed, however, that the alleged bribe-taker lacked the official power to confer such benefits. Finally police charged him with sub-contracting under a tender agreement, an activity that is not prohibited by the law. Appeals by the accused to authorities to review his case were unsuccessful.⁷⁴

Officials in these cases used criminalisation as a market ‘management’ tool when private commercial rights did not produce locally acceptable outcomes. Criminalisation is a potent instrument because it induces a psychology of compliance. Politically unconnected entrepreneurs are never certain when the exercise of private commercial rights will offend vague ‘state economic management’ principles and policies.⁷⁵ The mere threat of prosecution transforms calculable commercial risk into incalculable criminal risk, which in turn limits the utility of private contractual and property rights.

Despite efforts to reduce criminalisation, the National Assembly Legal Committee estimated that over 30 per cent of commercial violations was criminalised (hinh su hoa) by state officials.⁷⁶ Further complicating matters, the government’s decision to retain Article 174, while abrogating other provisions in the Penal Code considered unsuited to a mixed market, intimates high-level toleration of criminalisation.⁷⁷

⁷¹ KT-PL, 2001 ‘Hinh Su Hoa De Lam Gi?’ (What is Criminalisation For?) Thoi Bao Kinh Te Viet Nam 16 April, 12.
⁷² Interview with field officer from the Mekong Project Development Facility, Hanoi February 2002.
⁷³ See Theo Duong Day Nong, 2001 ‘Day Dut Lon Tu Vu An Ngo’ (Deep Concern Over a Small Case) Dau Tu 18 September, 6.
⁷⁴ Since 2001 there have been no further press reports about this case.
⁷⁶ See Author Unknown, 1999 ‘Chong Hinh Su Hoa: Moi Dung O Chi Thi Hoi Thao’ (Fighting Against Criminalisation is only Conducted in Directives and Workshops) Thoi Bao Kinh Te Sai Gon 27 May, 14.
⁷⁷ The offence of ‘obstructing the implementation of the State’s regulations on socialist transformation’ described in article 164 of the Penal Code 1999 has been abrogated. See Nguyen Dinh Loc, 1999

263
To summarise, regulators everywhere combine statutory and discretionary powers to control economic activities. Vietnam differs from the Western regulatory approach in the extensive powers given to officials to ‘manage’ statutory commercial rights. The problem for rights-based regulatory reforms is threefold. First, as in any modern state, it is impossible for the central government in Vietnam exercise complete supervision over all subordinate authorities. As result officials at every level must exercise some discretion to implement central laws and policies. But central control over local discretion is frustrated by unclear boundaries between the jurisdictions of different levels of government and between the state and party.

Second, the guidelines giving meaning and utility to imported private rights primarily reside in internal ‘policy regimes’ and instructions. For investors to understand the limits of private rights, they need to form personal (frequently corrupt) relationships with state officials. This process undermines the capacity for formal legal rules to control policy flexibility.

Third, and following from the first point, it is never clear whether officials exercising ‘state economic management’ are grounding their decisions on ‘official’ socioeconomic policies. Uncertainty exists because officials are tacitly permitted in some circumstances to arrogate discretion to regulate, even criminalise otherwise lawful behaviour. In other circumstances the arrogation of power is considered corrupt. The conundrum facing entrepreneurs is knowing whether ‘state economic management’ follows ‘official’ or ‘unofficial’ discourses.

**Interaction between central and local ‘official’ discourses**

It is rarely clear whether officials interpreting private rights are legitimately following ‘official’ discourse or acting contrary to conferred authority (*uy quyen*) by following ‘unofficial’ discourse. This section examines evidence that central and local levels of government operate in different discursive environments and sometimes reach contrary conclusions about the correct interpretation of imported law.

**Elite-level discourse**

Studies considered below intimate that some elite-level state officials are in sympathy with the rights-based, neo-liberal legal practices advocated by most foreign donors and

---

"Amending and Supplementing the Penal Code-A must in the New Situation" 6 *Vietnam Law and Legal Forum* (2) 14, 20; also see *Saigon Economic Times*, 1999 ‘Hinh Su Hoa: Khong Phai Tai Luat'
lawyers. Even officials who are unfamiliar with rights-based discourse may, through dialogue with foreign donors, investors and lawyers, come to accept that private commercial rights play a valid role in ordering economic activity. Chapter seven builds on this discussion by considering whether similar (mutually constituted) neo-liberal-oriented interpretive communities are forming between foreign donors and some elite-level lawmakers.

Lawyers acting for large foreign companies routinely form personal linkages to secure relatively unmediated access to high-level state officials. They use imported legal doctrines to explain how tersely worded statutory provisions function in Western or East Asian (typically Singapore or Hong Kong) legal systems. Training courses and study trips are conducted to clarify international practices and show officials how regulators in other systems use laws to balance private and state interests. Lawyers also assist officials to codify legal principles and practices into subordinate legislation. In short, they are beginning to weave a protective web around the private legal rights that secure the interests of capitalist enterprises.

Consider the negotiations over corporate income tax for a large foreign-funded construction project in Phu My Hung near Ho Chi Minh City. A Taiwanese construction firm formed a joint venture in 1993 with a Vietnamese SOE to engage in civil construction (công trình dân dụng) projects. When the joint venture commenced work on the Phu My Hung apartment project in 2003, the Ministry of Investment and Planning (MPI) increased the tax rate from 10 to 25 per cent. The joint venture successfully persuaded the Ministry of Justice to issue an Official Letter stating that ‘civil construction’ projects include residential apartments. When the MPI refused to follow the Official Letter and reduce the tax, the Office of Government ordered the Ministry of Finance, MPI and the Ho Chi Minh City People’s Committee to resolve the impasse. According to lawyers acting for the Taiwanese investors, during a series of meetings representatives from some of the state agencies were persuaded that Article 121 of Decree No. 24 Implementing the Foreign Investment

---

(Criminalisation is not Due to the Laws) Thoi Bao Kinh Te Sat Gon, 27 May 12-13; KT-PL, supra 12.

78 These observations are based on over 100 interviews and focus group discussions with lawyers from leading domestic Vietnamese law firms, Investconsult, Leadco, Vilaf, and I & L Associates from 2000-2005.

79 Hoang Hai Van, 2004 ‘Bo Tu Phap, UBND TPHCM de Nghi: Giu Nguyen Muc Thue Thu Nhap Doanh Nghep 10% Cho Lien Doanh Phu My Hung’ (Ministry of Justice and Ho Chi Minh City People’s Committee Propose that Corporate Income Tax Rate Remain at 10 % for Phu My Hung Joint Venture) Thanh Nien-Online 17 February.

80 See Official Letter No. 5 TP PL QT 5 November 2003 Ministry of Justice.
Law 2000 gives foreign investors legal protection against future adverse change.\textsuperscript{81} In practice this meant profits generated from construction activities authorised under investment licences are legally exempt from future tax increases. Lawyers argued that the foreign investment law extended protection against tax increases imposed by the MPI.

For six months it seemed that a legalistic interpretation of Decree No. 24 of 2000 would prevail against political arguments used by the MPI to support the tax increase. But in August 2004 the prime minister intervened in the dispute by issuing a decision that forced the Phu My Hung Corporation to pay the 25 per cent tax.\textsuperscript{82} Phu My Hung Corporation also dropped a legal action filed in the Ho Chi Minh City administrative court claiming a breach of its investment licences, after the Ho Chi Minh City People’s Committee began investigations for alleged Land Law violations. This case shows that legal arguments are persuasive, but party and state leaders do not hesitate to subordinate private rights when important questions of political and economic policy such as tax revenue are threatened.

More generally, private lawyers form quan he tot dep (good relationships) with state officials, often secured with bribes, to access the ‘official’ discourse required to understand and predict state law.\textsuperscript{83} The quality of information received depends on the strength of the relationship. For example, though officials reveal policy nuances to close associates, they only impart the most basic procedural information to others. Officials believe that relationships based on trust and tinh cam (sentiment) reduces the risk that lawyers will use ‘official’ information in damaging ways.

Overtures by lawyers are, nevertheless, rarely welcomed.\textsuperscript{84} Officials prefer direct contact with entrepreneurs. They generally perceive lawyers as meddlesome nguoi moi gioi (middle men) that interfere with the personal relationships officials use to ‘manage’ entrepreneurs. Lawyers also believe that officials fear the intervention of legal professionals, who are capable of systematically analysing and challenging the legal authority for state economic management. Corruption is also an important part of the

\textsuperscript{81} Interviews with lawyers from Vilaf, Hanoi, March 2004.


\textsuperscript{83} It was not until the passage of the Civil Code 1995 that lawyers were authorised to represent their clients’ interests to state officials.

\textsuperscript{84} Interviews Investconsult, Vilaf and Leadco, from 2000-2005. Also see Chi Mai, 2000 'Business Trade Blows with Municipal Government' Vietnam Investment Review 6 March, 8. (Local officials complain that businessmen avoid direct contact and prefer exchanges through intermediaries).
problem. Foreign companies without effective relational connections rely heavily on contractual and property rights to secure business transactions against interference from the state and competitors. Lawyers acting for SOEs are more inclined to use political, economic and moral arguments to counter private rights asserted by private competitors. For example, lawyers acting for SOEs involved in the Phu My Hung project convinced the Tax Department that foreign investors, rather than domestic companies, should pay withholding tax. They employed moral arguments that the tax burden was huge and beyond the resources of Vietnamese companies and political arguments that officials should favour state companies.

Lawyers occasionally use legal rights to protect SOEs. For example, lawyers acting for a consortium of state banks participating in a syndicated loan, framed the transaction with right-based provisions imported from a standard foreign loan agreement. The state banks shared the same state supervising authority and could not rely on administrative measures to protect their respective interests.

In general lawyers believe their interaction with certain elite-level officials is slowly generating common perspectives about legal meanings and the regulatory responses required to protect legal rights. They discern more willingness by some officials to imagine a decision-making environment in which commercial rights are protected by politically neutral state regulators. Yet once elite interests begin to deploy their resources to change laws that are not in their interests, or come to working arrangements with officials to ignore those parts of a law that impede their interests, the ‘rule of law’

---


86 See Elizabeth Maitland, 2002 supra 155-163.

87 The legal profession is divided between foreign law firms and sophisticated commercially oriented domestic law firms and numerous small domestic firms engaged in court work and small-scale representations.

ideal that makes private rights function begins to dissolve. State intervention such as in
the Phu My Hung case further undermines the authority of imported private rights.  

Local-level discourse

Far removed from the neo-liberal legal ideas circulating in elite-level discourse, a more
localised set of norms and mentalities informs officials working in people’s committees.
As we saw in chapter two, there are historical divides between centre and periphery in
Vietnam. Commentators have observed that ancient regionalisms have been amplified
by recent cycles of centralisation and decentralisation. Following the dismantling of
central-planning in the late 1980s middle-level officials in line-ministries (bo chu quan),
SOEs and city/provincial people’s committees gradually assumed control over resource
allocation. As Thaveeporn Vasavakul observed:

Politics during the period of transition from central-planning was characterised by
high local autonomy devolving on middle-level cadres, the expansion of
horizontal connections, and the bypassing of existing rules and regulations
imposed by the central government.

Habits learnt over decades have persisted and studies suggest that officials in ministry
branch offices and people’s committees routinely use ‘state economic management’
powers to reinterpret and occasionally sabotage central legislation.

Further intensifying centre-local differences, most local officials have not been exposed
to rights-based discourses. Research indicates that market liberalisations are only
gradually changing an underlying antipathy to the private sector. It further suggests

---

89 For a discussion about how state officials use regulatory power to further state and personal interest see
Martin Gainsborough, 2003 Changing Political Economy of Vietnam: The Case of Ho Chi Minh City,
and David Marr eds., Beyond Hanoi: Local Government in Vietnam, Institute of Southeast Asian Studies,
Singapore, 40-49; Thaveeporn Vasavakul, 1997 ‘Sectoral Politics and Strategies for State and Party
Building from the VII to the VIII Congress of the Vietnamese Communist Party (1991-1996)’, in Adam
Fforde ed., Doi Moi: Ten Years After the 1986 Congress, Political and Social Change Monograph 24,
ANU, 88-94.
91 See Adam Fforde and Anthony Goldstone, 1995 Vietnam to 2005: Advancing on all Fronts, Economist
Intelligence Unit, London, 6-9.
ed., Vietnam Assessment: Creating a Sound Investment Climate, Institute of Southeast Asian Eastern
Studies, Singapore, 46-47.
93 Irregularities were found in 170 out of 396 land regulations issued by the Ho Chi Minh People’s
Committee. See Bao Tram, 1997 ‘Phap Luat Ve Dat Dai: Cuon Chi Can Go Roi’ (Law on Land: A Coil
of Thread to be Rearranged) Phap Luat July, 6, 7.
Sector Discussion No. 9, Hanoi, 15-16; Martin Gainsborough, 2004 ‘Ho Chi Minh City’s Post-1975 Elite:
Continuity and Change in Background and Belief’, in Benedict J. Tria Kerkvliet and David Marr eds.,
Beyond Hanoi: Local Government in Vietnam, Institute of Southeast Studies, Singapore, 275-278.
that many local-level bureaucrats are convinced that companies engage in illegal activity, such as tax evasion or forming cong ty ma (ghost companies) to fraudulently raise capital from state banks. According to a widely held logic, the private sector is responsible for endemic corruption that has overtaken the transitional market. Robust ‘state economic management’ is seen as a way to promote a ‘healthy’ market and reduce corruption.

Local bureaucrats were primarily recruited for ‘morality and talent’, rather than technical proficiency. Their training in universities or ministry-based programs provides a sound grounding in public law concepts underpinning bureaucratic law, especially the central importance of ‘state economic management’, but few of the theoretical tenets of neo-liberal legalism. Soviet-style education that places the state at the centre of society, inculcates state officials with an unqualified confidence in their ability and moral mission to manage society and protect the ‘state benefit’ (loi ich cua nha nuoc) against the private sector. A practice termed ‘manage in order to manage’ (quán lý de quan lý) has emerged whereby ‘state economic management’ is treated as an objective in its own right, independent from central socioeconomic or legal imperatives. The criminalisation of otherwise lawful activities is justified by the need to ‘manage’ the economy.

Like their central-level counterparts, local-level officials are also deeply influenced by dialogue, especially negotiations with members of the public. But in contrast to the rights-based discourse promoted by foreign investors and lawyers, local-level discussions (especially at the district and lower levels) revolve around political, economic and moral precepts that blur and de-emphasise commercial rights.

---

95 See Luu Quang Dinh, 2001 ‘Dung Do Loi Cho Luat Doanh Nghiep’ (Do Not Blame the Enterprise Law) Lao Dong 30 July, 3; Quy Hao, 2001 ‘Dung Lam Kho Doanh Nghiep’ (Don’t Make It Difficult for Business) Dau Tu, 9 April, 3.
98 Foreign and domestic companies are regulated by, and converse with, central and city/provincial level officials. While small-scale household businesses are regulated by, and converse with, district and phuong level officials. See Enterprise Law 1999, article 116(3).
Local-level discourse is typified by the negotiations supporting applications to convert informal land tenure into legal titles. Following the enactment of the Land Law 1993, the state began a campaign to convert informal occupancy into formal land-use rights. It has been remarkably unsuccessful. At current conversion rates it will take decades to legalise urban land.

A distinguishing feature of land management in Vietnam is the extent to which housing has developed ‘informally’—without full conformity to legislative standards. Surveys speculate that more than 85 per cent of urban households live in informal or ‘popular housing’ (nha khong phep) (literally houses lacking authorisation) and 75 per cent of land transactions are informal. Informal housing covers most types of accommodation from luxury villas to squatter settlements and often co-exists in the same geographical space with formal housing. It is used for mixed residential and commercial purposes and approximately 75 to 80 per cent of private entrepreneurs have located their place of business on informal land. In order to gain access to bank loans or lease business premises it is necessary for entrepreneurs to convert informal land tenure into formal land-use rights recognised by the state.

Local urban and regional land officials interviewed during a World Bank mission in 2001 openly opposed central land conversion rules and policies. Centrally enacted land conversion rules were considered unnecessarily restrictive and infused with a highly legalistic approach to property rights. This view was reinforced by government

102 These figures are only estimates. There is no accurate study about informal land use by the private sector. Private sector land use reported in a MPDF/IFC survey suggested that only 13 per cent of businesses used informal land. But these finding are contradicted by findings from donors funding land management projects. See H. Dang and G. Palmkvist, 2001 ‘Sweden-Vietnam Cooperation on Land Administration Reform in Vietnam’ SIDA, Hanoi. The MPDF/IFC study was reported in Teney Stoyan, et al, 2003, Informality and the Playing Field in Vietnam’s Business Sector, IFC, Washington, 68-69.
103 Interviews Tran The Ngoc, Vice Director, HCMC Land and Housing Department, HCMC, June 2001; Similar views were gleaned from interviews with Nguyen Cong Vinh, Deputy Director, Nam Long Real Estate Construction Company, Ho Chi Minh City, June 2001; Nguyen An Binh, General Director, RESCO, Ho Chi Minh City, June 2001. Views about the bifurcation between central and local approaches to land management were gained from interviews with Truong Huy San, Land Reporter, Thoi Bao Kinh
reports that blame state policy for the large numbers of ‘unofficial’ land transactions. Officials also thought the procedural rules contained numerous evidential requirements that were vague and onerous. And, in addition, conversion procedures were costly, time consuming and imposed an unrealistically high tax burden. They concluded that informal and formal land is distinguishable in a legal sense only, because formal land has legal titles.

Legal classifications lack authority, because statutes and discretionary powers regulate both informal and formal housing. For example, phuong officials certify informal housing sales and levy land taxes and district officials routinely legalise land occupancy that is unsupported by documents required by statute. In addition police (canh sat) give informal households residency permits and construction departments ‘legalise’ unlawfully constructed houses and additions with fines.

Local officials struggle to bring order to urban development with rules that appear to make arbitrary legal distinctions between informal and formal housing and land. In order to reconcile statutory property rights with local conditions, officials mediate with applicants in a personal and highly contextual language. Arguments concerning legality rarely surface in these negotiations. Even the terminology used by local officials to describe the discretionary processes used to grant conversions is infused with contextual subjectivity. A popular term for discretion (niem tin noi tam) literally means ‘believe in one self’ or was the decision made with ‘good heart’ (tam), compassion (thong cam), sentiment or understanding (tinh cam).

---


104 See Hoang Hai Van, 2001 ‘Nha Nuoc Co Chay Theo Thi Truong? (Is the State Running After the Market?) Tuoi Tre, 6 August, 3. A government study detected 1,345 annual cases of wrongful or inappropriate land use conversions, but conceded this figure represented ‘the tip of an iceberg’. See Minh Tam, 1997 ‘Legal Documents on Housing and Land are Too Numerous, Backward But They Still Remain’ Vietnam Economic Development Review January 1, 3.


106 In order to encourage title conversion the government has both reduced land levies and introduced a deferred payment system. Article 7 of Decree No. 38 on the Collection of Land Use Levies 2000 provided that residential land continuously occupied since 1980 is exempted from land levy taxes, residential land occupied after 1980, but before 1993, is subject to a 20 per cent levy, while housing occupied after 1993 is charged a 100 per cent levy. Where financial hardship is demonstrated peoples committees can postpone the payment of land levies for a maximum of ten years. See Circular No. 35 TT-BTC providing Guidelines Implementing Decree 38/2000/ND-CP on Collecting Land Use Fees 2001. The Land Law 2003 did not fundamentally alter these rules. See Hoang Hai Van, 2001 supra 3.

107 Authorities are acting within their delegated powers in conferring these permits. See Decree No. 51/CP on Residential Management and Registration 1997; Circular No. 6 TT/BNVV (C13) Providing Guidelines for Decree No 51/CP on Residential Management and Registration 1997 (Ministry of Police).
Local decision-making is portrayed as lam luat (literally ‘make law’). This term has the positive connotation of finding flexible solutions to rigid centrally imposed law and the previously discussed negative implication of inventing laws to extract rents. Officials are also expected to intervene on behalf of family and friends, a practice explained by the frequently invoked proverb, ‘if one of us becomes a mandarin the whole clan gains favours’ (mot nguoi lam quan ca ho duoc nho).

This case study depicts two main discourses shaping local decision-making. Operating in legal mode, central authorities emphasise contract and property rights as defined by law. This is an ambiguous position, because the state has not fully accepted that law is autonomous from, and guides the implementation of, state socioeconomic policy.

Working at the shadowy interface between official and personal obligations, local officials risk losing local authority and trust unless they flexibly apply the law.\textsuperscript{108} From a local perspective, informality and formality describe regulatory styles, rather than binary legal/illegal cleavages between property rights and unlawful occupation. Local regulation generates shades of informality, each degree of informality attracts different levels of official toleration and ‘legality’. Informal and formal understandings of land tenure function as different facets of the same system. But each discourse sends particular messages to officials about the meaning and relevance of private property rights.

In summary, in the absence of strong systems of accountably, many local officials feel more accountable to the people in their locality than to higher-level authorities and rules. They are consequently reluctant to enforce laws that are locally unpopular. Although more then a few officials, no doubt simultaneously, use their powers to benefit society and themselves.

But improved systems of accountably are only a partial solution to uneven legal enforcement, because local officials are influenced by a different discursive environment to the one informing many elite-level officials. Most local-level officials were domestically educated, have few contacts with foreigners and have little knowledge of Western legal epistemologies. Foreign knowledge and expertise is not the only difference between elite and local officials. The benefits of globalisation appear remote to local officials, especially when international economic integration comes at the cost of facilitative reforms that strip away opportunities to generate living wages. It is difficult to methodologically distinguish rhetoric from conviction, but most local-
level officials interviewed by the author over a ten-year period appeared to sincerely believe in their mission to ‘manage’ entrepreneurs and genuinely worried that reforms aiming to minimise discretionary powers were unworkable in a society unused to private legal rights.

The transformative potential for rights-based discourse

The case studies concerning centre-local discourses intimate that imported commercial rights do not constitute simple binary alternatives between state and private interests. Rights are negotiated in three-way interactions between elite-level officials, local-level officials and businesses. The composition of private commercial rights is partially shaped by the main discursive themes informing these negotiations. Negotiations conducted in legal mode give commercial rights legal consequences that resemble the ‘rules of the game’ in imported laws. Official policies promoting international economic integration further sensitise elite-level officials to imported rights-based doctrines. But as we saw in the context of the EL, not all central-level officials are persuaded by rights-based discourse (see chapter five). In contrast to legal dialogue, negotiations conducted in political or moral mode produce rights that are strongly oriented towards personal relationships and family and community interests.

There is also a strategic dimension to rights formation. From a central perspective, local discretionary regulation is both a hindrance and an advantage. By ‘softening law’ (luat mem) to conform to local ideas and practices, local officials sometimes obstruct central policies and undermine uniform rights-based definitions. Discretionary regulation also forces entrepreneurs to transact in the shadow of bureaucratic rule, a regulatory matrix that produces corrupt alliances and blurred distinctions between public and private rights.

In other circumstances, it suits all levels of government to invest local officials with discretionary powers that technically exceed their statutory authority.109 This official ambivalence towards legal certainty is illustrated by the prime minister’s comments during a forum with entrepreneurs in 2003. He criticised local officials for their vo cam

(emotionless) response to businesses.\textsuperscript{110} By this he meant that officials should in some circumstances arrogate discretion to overcome rigidities in code-based definitions of commercial rights. Strict adherence to statutory rules reduces dialogue between local officials and small-scale businesses, and, as a corollary, it constrains the creative processes that invest imported rights with locally appropriate meanings. From this regulatory perspective, both codified rights and bureaucratic discretion are used as state management tools—interchangeable mechanisms for producing contextually appropriate market outcomes.

**Changing the meaning of legal rights in the courts**

Bureaucrats are not the only officials that reinterpret the neo-liberal meaning of imported commercial laws. According to Western legal mythology, courts are the primary sites of normative change, because they find the most ‘efficient’ legal solutions to social problems.\textsuperscript{111} Even theorists who believe the social importance of judicial pronouncements is exaggerated, concede that courts perform a critical role in making and enforcing binding legal decisions.\textsuperscript{112} A fully functioning court system standardises legal meanings and tames the ‘wild growth of normative projections’ in society.

In order to perform this ‘rule of law’ function, courts require some autonomy from political and government interference. Yet experience elsewhere shows that courts are the last state institution to gain power over political decision-making.\textsuperscript{113} This section explores whether Vietnamese courts have sufficient autonomy to use legal reasoning to make imported commercial rights appear credible and desirable.

Discourse analysis suggests three ways to evaluate the role Vietnamese courts play in localising, stabilising and creating imaginative legal fictions from imported commercial

---

\textsuperscript{110} During the forum the Prime Minister urged local officials to show *tim cam* (sentiment) and understanding in applying the law. These views contrast sharply with the Weberian public service values promoted by the PAR program discussed in chapter four.


rights. One, courts can only make legal rulings on matters before them. Public access to the courts thus has a critical bearing on the types of imported laws that are influenced by judicial rulings. Two, judges require secondary legal sources, such as doctrines and jurisprudence, to apply ambiguous imported laws to local problems. Otherwise they lack the tools to transform everyday disputes into legal disputes. Three, procedural rules influence the way litigants and their legal advisors argue cases and balance competing rights. Research considered below implies that Vietnamese courts play a minor, though increasingly important, role in shaping the meaning of imported law.

**Court access**

Contrasting with the broad discretionary powers government officials have to creatively reimagine imported laws, courts are supposed to confine their judgements to facts raised by litigants. Two factors limit access to courts in Vietnam: one, a social preference for mediation and conciliation minimises adversarial litigation and, two, narrow jurisdictional powers restrict the range of issues referred to courts.

Perceptional factors limit court access in Vietnam. Although French colonisation and Soviet legality profoundly influenced attitudes to litigation, some commentators believe that residual neo-Confucian sentiments remain potent social forces.\(^{114}\) Chapter two discussed the longstanding emphasis on non-adversarial mediation (*hoa giai*) in Vietnamese society. Commentators contend the people were conditioned into treating law as a punitive instrument, rather than a means of ordering horizontal social transactions. Judicial intervention also signalled personal moral failings. In a recent survey over 41 per cent of respondents cited loss of face and harmony as reasons for avoiding adversarial litigation.\(^{115}\) Judges and lawyers interviewed also discern a continuing social preference for mediation over litigation.\(^{116}\)

---


According to Supreme Court records for 2002, the annual inflow of cases in the entire court system was approximately 200,000 or 0.00251 cases per person. At this rate court usage in Vietnam is low even by regional standards. Litigation is also unevenly distributed among the different court divisions. In 2002 courts heard 51,461 family cases, 48,168 civil cases, 66,023 criminal cases, 728 labor cases, 728 administrative cases and only 598 economic cases.

Litigation aversion is not unique to Vietnam. Entrepreneurs everywhere are unwilling to jeopardise trading relationships and incur legal expenses in court actions. The difference lies in the social significance attached to court rulings. In the West, courts set commercial standards that influence pre-court negotiations. The general indifference among most Vietnamese entrepreneurs towards legal rights, discussed in annex six, induces a low social demand for law-based dispute resolution.

As the economy grows and larger domestic firms transact more frequently with foreigners (especially those requiring formal contracts), imported legal ‘rules of the game’ may increasingly supplement personal sentimental bonds in ordering commercial exchanges. Yet in the decade economic courts have been operating the number of private firms employing more then 100 staff has increased tenfold, while litigation initiated by domestic entrepreneurs has remain relatively static.

Further reinforcing litigation aversion, is a well-justified public scepticism about the professional competency and impartiality of judges. Surveys rate dishonest and unfair

District Court, March 2004; Tran Thi Hai, Chief Judge, Civil Jurisdiction, Dong Da District Court, Hanoi, September 1999. August 2000.


With a population of 76.5 million, there were 600,838 civil cases alone in the Philippines in 2002, or 0.00785 civil cases per person—three times the litigation rate in Vietnam. Litigation rates for western countries are much higher. For example, with a population of 41 million people, there were approximately 1 million civil, commercial and family cases in Spain during 2002, or a litigation rate per capita of 0.0244, almost ten times the rate in Vietnam.

Although relational theorists find aversion to judicial dispute resolution in the West, they also find that few trading relationships of any significance are consummated without legal advice. While judicial hearings are infrequent, courts decisions strongly influence settlement and negotiations between litigants, which proceeds within the ‘shadow of the law’. See generally John O. Haley, 1978 ‘The Myth of the Reluctant Litigant’ 4 Journal of Japanese Studies (2) 366-389.

A survey recently showed that higher income groups (9 per cent) were almost twice as likely to have used the courts than low-income groups (5 per cent). See UNDP, 2004 supra 11.

Large private firms have increased from approximately 100 in 1994 to over 1,000 in 2004. These comments are based on unpublished research shared by Marcus Taussig, Hanoi, March 2004 and March 2005.

Interviews with lawyers from Investconsult, Vilaf and Leadco, Hanoi, and IMAC, Ho Chi Minh City, between 2000-2005 and interviews with Judges. High on the list of concerns is a chronic shortage of experienced commercial judges. Statistics informally provided by the Ministry of Justice officials in 2000 suggest an overall shortage of 1,714 judges. Litigants also complain that judges base their decisions on internal guidelines that are unavailable to creditors and debtors. Also see Pip Nicholson, 2002 ‘The
judges (74 per cent) and unclear legal rules (65 per cent) as the most important reasons for avoiding litigation.\textsuperscript{123} Judges are considered unsympathetic towards the private sector, basing decisions on status as well as bribes, and treating legal rules as convenient, but optional, ways of getting things done. Under questioning by delegates of the National Assembly in 2002, the Chief Judge of the Supreme Court admitted ‘judges in civil cases can make any party win’ (xu dan su, xu the nao cung duoc).\textsuperscript{124} The perception of systemic bias, incompetence and corruption influenced more than 90 per cent of private sector respondents surveyed to conclude that courts would not satisfactorily resolve commercial disputes.\textsuperscript{125}

Litigation in Vietnam generates justifiable anxiety that courts will use legal rules to interfere with family and patron-based trading networks. On a rational calculation of their interests, most businesses prefer to use comparatively effective extra-judicial, particularistic routes and means to resolve business disputes. Respondents surveyed in 2004 showed high-levels of satisfaction with dispute resolution by ‘grassroots’ mediation boards comprised of members of neighbourhood councils (to dan pho), people’s committee officials and members of the Fatherland Front.\textsuperscript{126}

Reflecting the strong preference for conciliation rather than winner-take-all outcomes mediation is a formal pre-condition for cases proceeding to trial.\textsuperscript{127} Judges resolve approximately half of the economic disputes brought to courts each year without formal hearings and legal rules.

When mediation fails, litigants can bring actions in Vietnam’s three-tiered, nation-wide court system. But narrow jurisdictional powers constitute the second major constraint to


\textsuperscript{124} Interview Nguyen Hung Quang, Lawyer, Leadco, Hanoi, July 2004.

\textsuperscript{125} John McMillan and Christopher Woodruff, 1999 ‘Interfirm Relationships and Informal Credit in Vietnam’ 114 \textit{Quarterly Journal of Economics} (4) 1285-1286. A more recent study about courts in general found that only 35 per cent of respondents thought that courts would fairly and impartially resolve disputes. See UNDP, 2004 \textit{supra} 14-15.

\textsuperscript{126} Approximately 68 per cent of respondents who had used grass-roots mediation were satisfied. See UNDP, 2004 \textit{supra} 16. Also see interviews with business associations that facilitate informal mediation. See Vu Duy Thai, Vice Chairman and Secretary, The Hanoi Associations of Industry and Commerce, (member of the Central Committee of the Fatherland Front) Hanoi, April 1999, February 2000; Nguyen Trung Tue, Chairman, Vietnam German Entrepreneurs’ Club, Hanoi, 1999, 2000; Pham Thi Thu Hang, Deputy General Director, VCCI (Small and Medium Enterprise Promotion Center) Hanoi, 1998, 1999, 2002. For a discussion about formal arbitration see Nguyen Am Hieu, 1997 ‘Mot So Dac Diem cua Phap Luat Ve Trong Tai Trong Tai Phi Chinh Phu O Viet Nam Hien Nay’ (Some Legal Features in Contemporary Non-Government Arbitration in Vietnam) \textit{Nha Nguoc va Phap Luat} (5) 3, 3-7. For a discussion about informal dispute resolution see John McMillan and Christopher Woodruff, 1999 \textit{supra}.
court access. Disputes concerning imported commercial rights are most likely to be taken to economic courts. Despite broad powers to resolve a wide range of contractual, movable-property and company disputes, litigation rates in commercial courts are static at a time when business activity is growing rapidly.\textsuperscript{128} Low litigation rates are in part attributable to the comparatively small number of commercial entities, such as SOEs, foreign investment entities and registered enterprises that can bring actions in economic courts.\textsuperscript{129} Unregistered household businesses, which comprise by far the largest economic sector, are only permitted to litigate a small range of contractual and leasehold disputes in civil courts.\textsuperscript{130} Proposed amendments to the Commercial Law, which are scheduled for enactment in late 2005, may remove the jurisdictional distinction between registered and unregistered entities, giving all commercial entities access to economic courts.

In contrast to the low demand for commercial rights-based litigation, lawyers interviewed believe there is a pent-up need for administrative review over bureaucratic decisions.\textsuperscript{131} As previously discussed, administrative licences and state inspections, more than any other factor, constrain the profitable exploitation of private commercial rights. Administrative courts have wide powers to review illegal or \textit{ultra vires} administrative decisions such as licensing, taxation, housing permits and land-use charges that affect commercial activities.\textsuperscript{132} Unfortunately for entrepreneurs administrative review is ineffectual.\textsuperscript{133} A government report estimated that in a five-year period from 1999 until 2003 approximately 41 per cent of administrative claims were


\textsuperscript{128} The number of disputes in economic courts has only marginally increased since the late 1990s. For example there were 552 cases in 1997 the number increased to 1280 in 1999, and then declined, 859 in 2000, 571 in 2001 and 598 in 2002. The number of disputes increased to 868 in 2003 and to 1051 in 2004. Source Bao Cao Tong Ket Cong Tac Nganh Toa An va Phuong Huong Nghiem Vu Cong Tac Toa An (Supreme Court annul reports and plans), 1997, 1999-2004.

\textsuperscript{129} At the end of 2003 there were approximately 71,000 registered private businesses and 6,000 SOEs. At the same time government sources estimate there were over one million unregistered household or individual businesses. Interview Nguyen Dinh Cung, Director Enterprise Department CIEM, Hanoi, March 2004.

\textsuperscript{130} It will be recalled from chapter five that economic courts hear economic (for profit) contract, bankruptcy and Enterprise Law litigation and civil court hear civil (personal consumption) contracts and leasehold actions.

\textsuperscript{131} Much of the increase in cases recorded is due to the large number of actions that are delayed from one year to the next (approximately 30 per cent per year). There were 480 cases in 1999, 559 cases in 2000, 803 cases in 2001, 728 cases in 2002, 1458 cases in 2003 and 1746 cases in 2004. Source Bao Cao Tong Ket Cong Tac Nganh Toa An va Phuong Huong Nghiem Vu Cong Tac Toa An (Supreme Court annul reports and plans), 1999-2004.

\textsuperscript{132} See Resolution No. 3 NQ-HDTP Guiding the Implementation of a Number of Provisions of the Ordinance on Procedures for Handling Administrative Cases 2003, articles 3 and 4.

\textsuperscript{133} Of the 728 administrative cases submitted in 2002, less than 20 were resolved by court orders. Interviews with judges in Hanoi during March 2004.
legitimate, but only 800 cases from over 10,000 complaints were filed in administrative courts.\textsuperscript{134}

One reason for low review rates is that judges avoid hearing cases by exploiting inconsistencies between the Law on Complaints and Denunciations 2002 and the Ordinance on Procedures for Settling Administrative Cases 1996 (as amended).\textsuperscript{135} Citizens must first complain internally to administrative agencies before bringing complaints to administrative courts. Although it is no longer necessary to exhaust all internal appeals before transferring complainants to the courts, initial administrative processes filter out numerous cases.\textsuperscript{136} For example, a private businessman seeking compensation from local authorities for expropriating his business during the 1980s eventually sought political intervention by the prime minister to convince the Hanoi Administrative Court to accept his case.\textsuperscript{137}

Further constraining their powers, administrative courts are only permitted to consider decisions that violate or exceed legal authority. They are not authorised to review \textit{intra vires} administrative bias against the private sector or question the constitutionality of laws. Making matters worse, judges lack power to enforce their judgements against officials.

Compared to the moribund administrative and economic jurisdictions, civil litigation has risen from approximately 25,000 cases in 1994 to over 50,000 in 2004. Civil courts have jurisdiction over some areas that concern businesses, such as leases and civil debts. But over 80 per cent of cases pertain to non-commercial matters such as inheritance, civil obligations (tortuous actions) and housing disputes. Most of the growth in civil action has been in this area.

Finally, only parties with standing to sue may bring complaints to courts. This means that judges can only influence the meaning of commercial rights that are contested in disputes; rights that are not germane to the facts are excluded from the courtroom.

Social aversion to adversarial dispute resolution, together with narrow jurisdictional powers, limits the numbers of commercial cases reaching the courts. But if the quality


\textsuperscript{135} Ordinance on the Procedures for the Settlement of Administrative Cases 1996 (as amended), article 11. Also see ‘Bao Cao Cua Chanh An Toa An Nhan Dan Toi Cao Tai Ky Hop Thu 6 Quoc Hoi Khoa 10 Ve Cong Tac Toa An’ (Report of the Chief Judge of the Supreme People’s Court at the Sixth Meeting of the Tenth Session of the National Assembly Regarding the Work of Court) No. 67 BC/VP 22 October, 1999.

\textsuperscript{136} Less than 30 per cent of administrative complaints are resolved by state officials under the Law on Complaints and Denunciations 2002 and without a filtering process, courts could be exposed to approximately 10,000 cases each year. Interview Nguyen Cuong, Deputy Director Judicial Science Department, Supreme People’s Court, Hanoi March 2004.
of judicial decision-making improved, it is conceivable that courts may eventually play a more significant role in shaping imported legal rights.

**Judicial decision-making**

Courts differ from government agencies, since they alone are expected to base decisions exclusively on legal reasoning. The Vietnamese Constitution, for example, requires judges to base their decisions on the law alone. Discourse analysis suggests that a primary function of judicial reasoning is to subsume particular cases under general legal rules. Legal reasoning transposes social problems into a legal framework. To understand how judges construe imported commercial rights, it is thus necessary to examine the arguments and procedures that shape courtroom discourse. Western judges use secondary legal sources, such as jurisprudence, parliamentary debates and academic commentary, to resolve conflicts between competing legal rights. Legal arguments first seek reasons or grounds why legal authority applies to disputes. This generally includes the application of pre-existing principles or doctrines to case facts. Legal arguments next search for redundancies, or reasons why some contextual elements pertaining to the case are irrelevant. They selectively establish connections with past legal findings to ascertain whether it is appropriate to extend protection to the legal rights before the court.

Vietnamese judges face two major difficulties in moving from a Soviet-inspired instrumental legalism to legal reasoning that transposes commercial disputes into rights-based contests. First, most commentators agree that judicial independence from political interference, together with adherence to some form of separation of powers, is a precondition for rights-based legal reasoning. Legal reasoning establishes

---

137 See Author Unknown, 2001 ‘Hanoi People’s Committee Sued’, Phu Nu, Ho Chi Minh City, 14 July, 1.
139 Our discussion is only peripherally concerned with the debate whether legal reasoning gives commercial legal rights the predictability required to order market transactions. ‘Rule of law’ theorists discussed in chapter three place the law at the centre of business decision-making. Other theorists argue that relational factors are highly significant in ordering Western business transactions. See Ian R. Macneil, 1978 ‘Contracts: Adjustment of Long Term Economic Relations Under Classical, Neoclassical and Relational Contract Law’ 72 North Western University Law Review 854, 890-900. In the context of Vietnamese businesses see John McMillan and Christopher Woodruff, 1999 supra 1285-1286.
141 Notwithstanding the many deviations from Montesquieu’s unrealistic ideal, the separation of powers strongly influences legal formation and implementation in the West. Legal rights rely on the branches of the state overseeing each other to ensure that power is distributed roughly according to constitutional
autonomous (from external inference) epistemological rules that filter non-legal ideas that might disrupt the legal meanings attached to private rights. It also creates a closed epistemology with its own rules and regulations that generate conceptual stability by discouraging judges from using non-legal arguments to rethink established legal meanings.

Second, Vietnamese judges lack secondary legal sources to guide the interpretation of vaguely worded imported rights. Judges in developing legal systems like Vietnam must creatively interpret imported commercial laws to find legal solutions to local problems.142

This discussion explores to what extent autonomy from state and social forces is necessary for Vietnamese courts to use legal rights to mediate political, economic and moral arguments. It also examines the transformative potential for the emergence of law-based legal reasoning and what this means for the implementation of imported commercial laws. It is unclear, for example, whether legal stability is possible, even desirable, in a legal environment in which imported commercial rights require creative localisation to resolve local business disputes.

**Revolutionary notions of judicial independence**

Lenin’s observation that under capitalism ‘judicial powers are an exploitation machine for the bourgeoisie’ combined with the Vietnamese experience of colonial criminal justice to profoundly shape revolutionary courts.143 After independence, communist leaders replaced colonial law-based dispute resolution within socialist institutions.144 From 1954 both military courts and the Supreme Court were established as ‘people’s courts to serve as tools (cong cu) employed by the people to implement the proletarian dictatorship’.145 Vietnamese courts were expected to: (1) ‘repress counter-revolutionaries and the enemies of the people and socialist regime’, (2) ‘protect public property … ensure the socialist reform of non-socialist economic sectors’, (3)


142 Although most civilian legal systems assert that judges apply rather than interpret statutory law, it is conceded that some interpretation is required to bring law to reality. Highly complex and detailed jurisprudential rules and interpretive techniques have developed to realise this objective. See Martin Vranken, 1997 Fundamentals of European Civil Law, Federation Press, Sydney, 194-201.


‘guarantee order and socialist security’, (4) ‘peacefully settle petty quarrels, conflicts and law suits among the people’, and (5) educate citizens to show loyalty to the Fatherland, observe the law, respect social regulations and fight crime.\textsuperscript{146} Pham Van Bach, the Chief Judge, instructed court personnel during the 1960s that the primary role of the courts was to implement party and state policy.\textsuperscript{147} Courts were accordingly treated as instruments of state rule and Western notions of judicial independence were dismissed as ‘bourgeois’ propaganda.\textsuperscript{148}

The 1992 Constitution appeared to end decades of instrumentalism by requiring judges to determine cases according to the law. This tentative step towards judicial independence was qualified by a duty to protect ‘socialist’ legality, the state and the people’s right to mastery.\textsuperscript{149} The Constitution also expected judges to protect the ‘collective rights and the lives, property, freedom, honour and dignity of citizens’.\textsuperscript{150}

‘Nha nuoc phap quyén’ (law-based state) reforms, discussed in chapter three, have encouraged a shift from strict legal instrumentalism to a situation where law is given a relative autonomy from party and state policy. If courts are required to protect party and state interests, what does judicial independence mean—courts are independent from what or whom? If courts are not politically independent can law be relatively ‘autonomous’ from the party and state? Our inquiry conflates these questions by asking whether courts possess sufficient autonomy to interpret imported commercial rights according to legal doctrines, rather than party socioeconomic policies?

---

\textsuperscript{145} Editors, 1961 ‘To Understand Clearly the Functions and Characteristics of People’s Courts in Order to Implement the New Philosophy of the Spring Rectification Campaign’ \textit{Tap San Tu Phap} (4) 1, 2.

\textsuperscript{146} Circular Letter No 556-TT issued by the Prime Minister on 24 December 1958. See Dang Quang Phuong, \textit{supra} 11.

\textsuperscript{147} See Pham Van Bach, 1970 ‘Le Nin Voi Van De Phap Che Xa Hoi Chu Nghia’, (Lenin and Socialist Legality) \textit{Tap San Tu Phap} (3) 9-16.

\textsuperscript{148} For a discussion about the role of courts in a socialist system see Le Trung Ha, 1965 ‘Chuyen Huong To Chuc Cua Cac Toa An Nhan Dan Dia Phuong De Dap Ung Voi Tinh Hinh va Nhiem Vu Moi’ (Changes in Local Court to Meet the Requirements of the New Conditions and Requirements) \textit{Tap San Tu Phap} (8) 1, 2.

\textsuperscript{149} See Constitution 1992, article 126. Note the similarity between this article and article 127 in the 1980 Constitution.

Post-do i mo i judicial reforms

Legal reforms in 1992 aimed to reconfigure courts geared for a command economy to resolve rights-based disputes in the mixed-market economy.\textsuperscript{151} Attempts were made to centralise court administration by relocating powers to appoint judges from local government to the president. Programs were introduced to professionalise the judiciary through higher education and specialised legal training courses. Reforms also sought to reduce government authority over local courts and give superior courts greater powers to promote law-based decision-making throughout the court system.

Despite improved standards of judicial reasoning and an improved social status for judges, press articles and petitions lodged with the National Assembly during the 1990s increasingly reported false prosecutions, judicial corruption and the criminalising of civil and economic cases.\textsuperscript{152} Accusations of corruption within the judicial sector reached a zenith with the arrest of Truong Van Cam (Nam Cam) in December 2001. The indictment alleged complicity between Nam Cam’s criminal gang and high-level officials in the courts and procuracy.

Adding their voice to societal complaints, the donor community also agitated for judicial reform. Their campaign gained momentum following the ratification of the US-Vietnam Bilateral Trade Agreement, which required Vietnamese courts to extend US companies’ and citizens’ rights to protect treaty privileges (see chapter seven). Some state officials sympathetic to neo-liberal legal reforms have also advocated judicial reforms to attract more foreign investment and make rights-based adjudication available to domestic entrepreneurs.\textsuperscript{153}

Responding to public and donor pressure, a political report prepared by the party identified a need to restructure courts and further improve the professional capacity of judges.\textsuperscript{154} The Politburo incorporated the report’s finding into Resolution No. 8 NQ-TW

\textsuperscript{151} For discussions about judicial reform see Le Cam, 2002 ‘Cai Cach He Thong Toa An Trong Giai Doan Xay Dung Nha Nuoc Phap Quyen Viet Nam’ (Reform the Court System to Build Up a Law Based State in Vietnam) Ta p Chi Nghien Cau Lap Phap (4) 21; Nguyen Manh Cuong, 2002 ‘Yeau Cau Cuu Viec Xay Dung Nha Nuoc Phap Quyen Doi Voi Doi Moi To Chuc va Hoat Dong Cua Cac Co Quan Tu Phap’ (How to Reform Judicial Authorities to Build up a Law-Based-State) Ta p Chi Nghien Cau Lap Phap (10) 30.

\textsuperscript{152} For a discussion about the Nam Cam case and court scandals see Author Unknown, 2002 ‘Vietnam Da Xuat Hien Toi Pham Co To Chuc o Trinh Do Cao’ (High-Level Organised Crime Makes Its Appearance in Vietnam), Vnexpress, 15 June; VNS 2003 ‘Crime Boss Faces Court in Nations Biggest Trial’, Vietnamnews-online, 27 February <www.vietnamnews.vnagency.com.au>


\textsuperscript{154} See Vietnamese Party Congress Political Report, 19 April 2001, 35.
on Forthcoming Principle Judicial Tasks in 2002.\textsuperscript{155} Resolution No. 8 first criticised aspects of judicial work (\textit{cong tac tu phap}) and called for strong and stable judicial personnel, clearer organisational structures that minimised inefficiencies and overlapping responsibilities and more systemic analysis and management of problems.\textsuperscript{156} It then established four objectives for judicial work:

- strictly follow party policies and lines
- efficiently resolve criminal offences
- allow the people to participate in judicial work
- build strong judicial institutions that defend the party and state.

The Law on the Organisation of the People’s Courts 2002, which implements Resolution No. 8, sends mixed signals about judicial independence. It encourages centralisation of judicial authority by placing inferior courts under the direct administration of the Supreme Court and it protects judicial processes from ‘all acts obstructing judges and/or people’s assessors from performing their tasks’.\textsuperscript{157} At the same time, it recycled longstanding instrumental notions that judges should ‘resolutely struggle against persons and acts harmful to the party, the Fatherland and people’.\textsuperscript{158}

Some of these objectives, such as financial and organisational autonomy, comply with the preconditions for judicial autonomy identified by the International Bar Association.\textsuperscript{159} Other objectives, such as party leadership, fixed term appointments, poor remuneration and unclear rules governing judicial appointment, are at variance to an independent judiciary. The next section examines the meaning of judicial independence in Vietnam and how external and internal controls constrain the emergence of legal reasoning.

\section*{Party leadership over the courts}

\textsuperscript{155} See Vo Chi Cong, 2002 ‘Thay Gi Ve Cong Tac To Chuc va Quan Ly Can Bo Qua Vu An Truong Van Cam’ (What can be Seen About Organising and Managing Cadres Through the Truong Van Cam Affair) \textit{Tap Chi Cong San} (9) <www.taphichongsan.org.vn>.

\textsuperscript{156} The term \textit{cong tac tu phap} refers to all the agencies connected with courts, including the procuracy and police.

\textsuperscript{157} Law on the Organisation of People’s Courts 2002, articles 17, 38, 45 and 46.

\textsuperscript{158} This injunction was enacted in the Joint Circular No 1/2003/TTLT/TANDTC-BQP-BNV-UBTWMTTQVN Guiding the Implementation of a Number of Provisions of the Ordinance on Judges and Jurors of the People’s Courts 1993, article 2 (c).

\textsuperscript{159} See full text of the International Bar Association standards <www.ibanet.org/pdf/HRIMinimumStandards.pdf>.
Courtroom discourse in Vietnam is poorly researched. But one issue is clear: judicial decision-making is not ‘independent’ (doc lap) from ‘party leadership’ (su lanh dao cua dang). The scope for party involvement in court affairs was outlined in Resolution No. 8: ‘The party shall lead judicial agencies closely in political organisation and personnel matters and ensure that the judicial activities really follow the viewpoints of the party and the law of the state.’ According to party sources, judges should act impartially (khong thien vi) though not independently from party leadership.

The party uses many mechanisms to ‘lead’ judicial decision-making. Like other public employees, judges are required to ‘strictly abide by the party’s lines and policies’.

The Supreme People’s Court Annual Report in 2001 placed party resolutions ahead of National Assembly resolutions and laws in the hierarchy of sources judges must follow in resolving cases. For example, economic court judges hearing bankruptcy cases are required to follow internal party rulings not to evict debtors until creditors provide alternate accommodation. These internal rulings qualify creditors’ statutory rights to enforce debt securities with a social obligation.

Recruitment and selection procedures induce judges to follow party policies and directives. First, the nomenkultura system (discussed in chapter four) ensures that over 90 per cent of judges are party members. Second, judges are reappointed (every five years) according to selection criteria that stress ‘loyalty to the motherland’, good moral character, especially honesty and truthfulness, legal knowledge and support for socialist legality.

---

160 Although the Law on People’s Courts 2002 declares that courts are open to the public, in practice authorisation is required from the presiding judge. Permission is infrequently given to foreigners.

161 The LNA project actively promoted judicial independence by streamlining appeal mechanisms, increasing judicial salaries, promoting open trials and forbidding ‘improper’ intervention into court cases. Significantly, no restrictions on party prerogative powers were contemplated. See Interagency Steering Committee, 2002 ‘Comprehensive Needs Assessment for the Development of Vietnam’s Legal System to the year 2010’, Ministry of Justice, 27. Also see Luu Tien Dung. 2003 ‘Judicial Independence in Transitional Countries’ Working Paper, UNDP Governance Centre, Oslo.

162 Ordinance on Public Employees 1998, (as amended) articles 1(4), 6(2).


164 Interviews Chief Judge of the Civil Court, Ho Chi Minh City Court, June 2001. Decree No. 17 on Mortgages 1999 gives mortgagees powers to auction or enter into possession of mortgaged houses.

165 Creditors are entitled to recover possession or auction debtors’ property. See Decree No. 8 ND-CD, 10 March 2000 and Circular No. 7 TT-NHNN 19 May 2003 State Bank.

166 These comments are based on interviews with judges. Also see Pip Nicholson and Nguyen Hung Quang, 2005 The Vietnamese Judiciary: The Politics of Appointment and Promotion’ 14 Pacific Rim Law and Policy Journal 1, 14-22.

167 Selection committees comprise deputies from people’s councils, government officials and senior judges. See Law on Organisation of the People’s Courts 2002, articles 37, 40, 41.
assessing whether judges have complied with party policies.\textsuperscript{168} Judges aspiring to high judicial positions are inculcated with the finer points of party ideology and policies at the Ho Chi Minh Political Academy.\textsuperscript{169}

Party groups (\textit{dang bo} and \textit{chi bo}) operating in every court are instructed to raise ideological and political awareness and ensure that judges adhere to the party line.\textsuperscript{170} Judges and court officials attend regular ‘party group’ meetings to discuss party resolutions pertaining to court work. Senior party cadres lead discussions by repeatedly sensitising judges to the political and social implications of their decisions. Loyalty is assessed during monthly self-criticism (\textit{phe binh tu phe binh}) meetings.

Finally, judicial panels in important cases comprise one judge sitting with two people’s assessors. Decisions are made by majority vote. Assessors are non-professional lay representatives appointed by people’s councils on the basis of political loyalty and personal reliability.\textsuperscript{171} Some commentators believe the party uses people’s assessors to guarantee party leadership in the unlikely event that a judge acquires a predilection for independent decision-making.\textsuperscript{172}

\textbf{Party interference}

Judges interviewed by the author seemed genuinely unclear what the Constitution means by judicial independence.\textsuperscript{173} When asked what is more important, the party-line or law, most responded that in principle there is no conflict since law implements party policy. Though on reflection, many judges added that the party leads courts in understanding the meaning of law.

They understood judicial independence to mean freedom from party ‘interference’ (\textit{su can thiep}), but conceded the distinction between party leadership and interference is unclear. The difference is significant, because as state officials judges are required to

\textsuperscript{168} According to Item II of Inter-circular No. 05/TTLN of Ministry of Justice and Supreme People’s Court Providing Guidelines of the Ordinance on People’s Judges and Assessors 1993, ‘loyalty to motherland’ and ‘firmly defending the socialist legality’ are partially determined by gradings given in ‘political knowledge certificates’ (\textit{chung chi trinh do ly luon chinh tri}) issued by national political institutes (\textit{hoc vien chinh tri quoc gia}). In practice, however, political institutes, such as the Ho Chi Minh National Political Academy are reluctant to give this kind of blanket certification.

\textsuperscript{169} Interviews Vu Khai Xuong, Chief Judge Administrative Court, Hanoi, October 1997, February 1998.

\textsuperscript{170} Party Central Directive No. 29/CT-TW on the Enhancement of Party Leadership over Law Enforcement Agencies 1993 clearly outlines the leadership role of party committees in the court system.

\textsuperscript{171} Law on People’s Courts 2002, article 41.

\textsuperscript{172} See Brian J. Quinn, 2002 \textit{supra} 245-246.

follow party resolutions and lines (leadership), but they are supposed to disregard the
direction of party members. Unsurprisingly judges expressed confusion whether
informal party directives pertaining to particular cases constituted party leadership or
interference.

Take, for example, the party instructions given to the trial judge in the Tang Minh
Phung corruption trial in 1998. Procurators alleged that Tang Minh Phung and
business associates fraudulently misappropriated socialist property by using misleading
property valuations to borrow approximately USD 200 million from state banks.

Lawyers defending Tang Minh Phung claimed the party instructed the presiding judge
to use ‘legal analogy’ (ap dung phap luat tuong tu) to overcome evidentiary
inconsistencies in the indictment. The crime of fraudulently misappropriating socialist
property required the prosecution to prove that Tang Minh Phung acquired loans by
fraudulently overvaluing the value of his collateral. Rebutting these allegations, the
defence counsel demonstrated that bank officials investigated and confirmed the
accuracy of collateral valuations. Even more damaging to the procurator’s case, the
prosecution commenced before a legal obligation to repay the loans arose. If the defense
counsel was correct no misappropriation occurred.

When it became apparent that the defendants might escape conviction if the judge
applied rights-based reasoning the party instructed the judge to overcome evidentiary
deficiencies by applying the doctrine of legal analogy. Under the direction of ‘higher
authorities’ (a euphemism for the party), the doctrine permits courts to criminalise (hinhsu hoa) otherwise legal behaviour that seriously damages state interests. According
to the defence counsel, the party regarded the economic harm caused by the ‘misuse’ of
‘socialist property’ was sufficiently serious to apply the doctrine. This case shows that
in addition to formal resolutions, party leadership extends to informal directions that

174 See Nguyen Nhu Phong and Vu Cao, 1998 supra 1-3; Nguyen Nhu Phong and Vu Cao, 1998 ‘Ways to
draw State Money’, An Ninh The Gioi (63) 27 February 1.
175 Tran Minh Phung used land as collateral. His land valuations took into account the potential
commercial value if the land in Vung Tua was developed into a port facility. This information was known
to the bank. When the port was not constructed the land values decreased. But Tran Minh Phung did not
default and continued servicing the loan. Since the banks did not incur losses there was no legal
justification to call in the loan.
176 Interview, Nguyen Thi Loan, Lawyer, Ho Chi Minh City, October 1999. This aspect of the defense
counsel’s argument was not reported in the press. But see John Gillespie, 2001 ‘Self-Interest and
177 Article 16 of the repealed 1926 Soviet Criminal Code provided that ‘if any socially dangerous act is
not directly provided for by the present Code, the basis and limits of the responsibility for it shall be
determined by application of those articles of the Code, which provide for crimes most similar in nature.’
Also see Dinh, Van Que, 1999 Phap Luat Thuc Tien va An Le (Legal Practice and Precedent), Da Nang
privilege political expediency over statutory rights. Recent cases suggest that Resolution No. 8 has not diminished active party leadership in sensitive criminal cases.\textsuperscript{178}

Lawyers report that party leadership is especially prevalent in sensitive criminal trials, but it occasionally surfaces in commercial contests between private (especially foreign) rights and the national interest. It is difficult to empirically evaluate this perception since court cases are not published. Nevertheless most judges interviewed thought that improper interference occurs where party organs or officials circumvented party decision-making processes and directly pressured judicial officials. This is most likely to happen where assets belonging to the party or party members are in dispute or personal favours are required. Consider, for example, the Vong Thi Landscape Architectural Village (\textit{Lang Kien Truc-Phong Canh Vong Thi}) case. The Hanoi People's Committee in 1999 allotted ten hectares of land in the salubrious West Lake suburb in Hanoi to Madam Thuy. According to the allotment conditions, Madam Thuy was supposed to construct a traditional display village for international tourists. Instead, she built a few traditional houses and illegally sold land worth several million USDs to private residential developers. Like Tran Minh Phung, she was charged with fraudulently misappropriating socialist property.\textsuperscript{179} Despite a strong prosecution case that included a confession, Madame Thuy was sentenced to a short period of house detention. Lawyers reported seeing the private secretary of Le Kha Phieu, at that time the Party General Secretary, sitting in on the trial. They believe that the presence of the senior party official 'influenced' the sentence. Tang Minh Phung, in contrast, received the death penalty from a much weaker prosecution case.\textsuperscript{180} Courts, it seems, are not independent from party leadership, which operates both inside and outside courts.\textsuperscript{181}

\textsuperscript{178} For example, a judge used legal analogy in a 2004 case to convict defendants charged with circulating counterfeit cheques or notes. Although it was clear that the defendants violated an administrative provision that prevented the commercial sale of VAT invoices, the procuracy did not prove that VAT invoices were legally equivalent to counterfeit cheques or notes, which are negotiable instruments with intrinsic value (Criminal Code 1999, article 181). According to the defense counsels, the defendants were charged with the wrong criminal offence. They believe the trial judge (Nguyen Khac Son) was persuaded by political rather than legal arguments. Ignoring legal defects in the prosecution the judge concluded that the defendants had caused serious loss to the state benefit by eroding the tax base and they should not escape criminal charges. On appeal the Supreme People's Court upheld the provincial court judgement in February 2005. Case No 57, First Instance Criminal Court, Thai Binh Provincial People's Court, 8 March 2004. Interview with the defence counsel, Hanoi, March 2005.

\textsuperscript{179} Penal Code 1986, article 134.

\textsuperscript{180} See Author Unknown, 1999 'The Court of First Instance of Minh Phung-Epco Finished on August 4, 1999, after Three Months of Trial', \textit{Saigon Giai Phong} 5 August, 1.

\textsuperscript{181} Lawyers also report that party interference is used to prevent the enforcement of judgement debts against party assets. For example, they allege that the party Central Committee directed the Hanoi Justice Department in 1999 not to execute a judgement order issued by the Hanoi People's Court against the Meritus Westlake Hotel. Together with a Malaysian company, the party jointly owned the hotel, and defaulted on a loan to foreign banks. The Meritus business was sold in 2002 to Sofitel Hotels without the debt being enforced against party assets.
Party leadership is primarily concerned with setting the political and moral tone for judgements.\textsuperscript{182} It inculcates general principles that favour the state benefit over private interests and national interests over foreign interests. How these principles apply to the facts in specific cases is not always clear to court officials. For example, in an action taken by a SOE in the Hanoi Economic Court in 2003, the judge concluded the state benefit was served by allowing the SOE to recover unlawfully transferred foreign currency.\textsuperscript{183} Confiscating the money would have compromised the company’s competitiveness against private competitors. Taking a different approach, the procurator argued it was in the state benefit to confiscate and return the currency to state revenue.

In sensitive political trials general political and moral notions about the state benefit are too vague to guarantee desired outcomes. In these cases the party ‘leads’ by giving judges detailed instructions on how to conduct the trials. The extent to which ‘improper’ party interference frustrates private commercial rights in court cases is difficult to gauge.\textsuperscript{184} But as an informal and covert form of communication, it lacks the sustained influence party ‘leadership’ exerts over judicial discourse.

**Government interference in court decisions**

In the command economy, State Economic Arbitrators used administrative rulings to adjust economic contracts among SOEs.\textsuperscript{185} With the introduction of private commercial rights during *doi moi* reforms, adjudicators could no longer use administrative measures to resolve disputes. They needed deliberative independence from the government apparatus.

The notion of judicial independence from ‘outside’ forces needs rethinking in Vietnam’s polity, where state power is divided according to the Soviet ‘concentration-of-power’ (*tap trung quyền luc*) doctrine.\textsuperscript{186} ‘Concentration-of-power’ is best understood as specialisation, rather than separation of powers. Both the government and Supreme Court can, for example, pass legislation and exercise judicial power. Further

---


\textsuperscript{183} The action taken by Artech Tonh Long (the SOE) against a private company is discussed in more detail below.

\textsuperscript{184} See Le Tho Binh and Vu Thuong, 1997 ‘Fighting Corruption: In Addition to Energy, Courage is Needed’ *Tuoi Tre* 8 April, 3.


\textsuperscript{186} ‘Unity of power’ (*tap trung quyền luc*) or literally ‘concentration of power’ is more generally termed ‘unity of democracy’ (*tap trung dan chu*) in contemporary legal literature.
blurring the distinction between the executive and courts, government agencies have historically funded and managed inferior courts.

Post-*do i moi* court reforms first sought to untangle the government from the courts by removing the power of local governments to elect judges. They next abolished the administrative resolution of economic disputes and established economic courts in 1994. In practice, however, the President lacked the resources and the political will to perform this function and by default local governments arrogated authority to select and appoint judges. This meant that inferior-level judges owed their primary loyalties to local government officials, rather than to the Supreme Court.

Court reforms in 2002 sought to re-centralise power over local courts into the hands of the Supreme Court. Administrative control over court budgets has been transferred from local government authorities and the Ministry of Justice to the Supreme Court. Further strengthening the Supreme Court’s power, the Chief Justice, rather than the President now appoints judges. But central control is qualified by the requirement that the Chief Justice must confer with local people’s councils when appointing and dismissing the chief and deputy chief judges of local courts.

An insight into local government thinking regarding judicial autonomy is provided by the debates surrounding the 2002 judicial reforms. Local governments argued that Supreme Court control would compromise judicial autonomy. Re-centralisation, they argued, would result in unjust decisions if the Supreme Court had an improper understanding of the law. For government agencies, judicial autonomy meant freedom from central legal rulings that frustrated local imperatives. Their arguments not only reveal centre-local tensions, but also indifference towards uniform legal doctrines that generate predictable judicial outcomes.

---

188 Constitution 1992 articles 84, 103.
189 See Ba Tuan, 2002 ‘De Chanh An TANDTC Co Dieu Kien Bo Nhiem Tham Phan Duoc Xac Thuc Hon’ (Allowing the Chief Justice of the Supreme People’s Court the Ability to Nominate Judges Will Be More Realistic) *Phap Luat* 19 March, 2.
190 Interview Nguyen Hang, 2002 Deputy Chief Judge Supreme People’s Court (civil division), Hanoi November. Also see Brian Quinn, 2003 ‘Vietnam’s Continuing Legal Reforms: Gaining Control Over the Courts’ *Asian-Pacific Law and Policy Journal* (4) 431, 439-441.
191 See Law on the Organisation of People’s Courts, articles 45, 46.
192 Law on the Organisation of People’s Courts 2002, article 40.
193 Ba Tuan, 2002 ‘Sua Luat Lieu Co Giam Oan Sai?’ (Will Changing the Law Reduce Problems, Mistakes?) *Phap Luat* 20 March, 2; D. Hoc, 2002 ‘Phai Dam Bao Tinh Doc Lap Xet Xu Cua Toa An’ (We Must Guarantee the Independence of the Court) *Nguoi Lao Dong*, 20 March, 2.
Senior judges countered these arguments by asserting that government bodies are reluctant to transfer discretionary power to ‘manage’ commercial transactions to the courts.\footnote{Interviews Do Cao Thang, Chief Judge, Hanoi Economic Court, March 2003; Dang Quang Phuong, Director, Institute for Judicial Science, Supreme Court, Hanoi March 1999, September 1999, February 2000, March 2002.} The following case offers some insights into the way government directives shape judicial interpretations of commercial legal rights.

**Government directives to courts**

There is compelling evidence that local government authorities guide many court decisions. The action by New World Cong Ty against the Nghia Tan People’s Committee illustrates this process.\footnote{This case study is based on information provided in interviews with lawyers working for Leadco during March 2003, July 2004. This firm acted for New World.} A dispute arose in 2002 between Nghia Tan People’s Committee (a *phuong* in Cau Giay District, Hanoi) and New World over a joint venture agreement for an amusement park. Under the joint venture the People’s Committee provided land in return for a fixed profit share set at 7 million *dong* per month (approximately USD 430). The joint venture did not perform to expectations and after a year the People’s Committee accepted a reduced profit share of one million *dong* per month.

When the joint venture terminated in 2001, the People’s Committee demanded payment of the profit foregone over the five-year term of the contract. In response New World petitioned the economic division of the Hanoi Provincial Court to declare the contract invalid. It argued that the People’s Committee had waived its contractual right to the profit and the joint-venture agreement was thus void and unenforceable. In the alternative, it argued that the People’s Committee was forbidden by the Ordinance on Economic Contracts 1989 from entering economic contracts and lacked the authority under the Land Law 1993 to lease land.

Disregarding these statutory limitations to the People’s Committee’s private commercial rights, Hoang Huu But (the trial judge) decided that the joint venture agreement was enforceable. The judge relied on a letter from the Cau Giay District People’s Committee confirming that the Nghia Tan People’s Committee was authorised to enter the joint-venture agreement. He reasoned that once instructed to lease the land, the Nghia Tan People’s Committee was legally compelled to ‘obey a higher level’ (*tuan theo menh lenh cap tren*). In essence, the judge held that a letter from a district People’s Committee overruled central-laws governing the formation of contracts.