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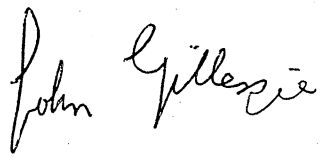
# **Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam**

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April, 2005

A thesis submitted for the degree of Doctor of Philosophy  
of The Australian National University



This thesis is entirely my own original work.

A handwritten signature in cursive script that reads "John Gillespie". The signature is written in dark ink and is positioned above the printed name.

John Gillespie

April, 2005



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## **Acknowledgements**

I wish to thank the many Vietnamese officials, academics, lawyers and entrepreneurs who have generously assisted with this study. I am particularly grateful to the state officials who have patiently explained the complex and puzzling world of legal drafting and legislative enactment and to the judges and court officials who have discussed the development of legal reasoning. This study would have been inconceivable without the active support and encouragement of lawyers from Baker and McKenzie, Freehills, Leadco, Investconsult, N H Quang and Associates, Philips Fox, Vilaf and Vision and Associates. A special thank to Bui Bich Lien and Nguyen Hung Quang for their friendship and support.

Finally I am indebted to Ben Kerkvliet and David Marr for their careful reading and many insightful comments about this study. I also thank Jo for her love and encouragement.

## Abstract

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

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

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

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

The development of a new interpretive model has been greatly assisted by discourse analysis, which suggests that dialogical exchanges between lawmakers and pressure groups give meaning to imported law. This

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

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

# Introduction: Law Reform by Legal Transplantation

Since the collapse of the Soviet bloc in the early 1990s, global social, economic and political interconnections have proliferated, stimulating renewed interest by large trading nations and multilateral institutions (e. g. UN, World Bank, WTO and IMF) in international legal harmonisation.<sup>1</sup> In the opinion of global lawmaking elites, financial and trading stability in developing countries require Western legal structures, such as rights-based commercial law, and above all else a procedural 'rule of law'.<sup>2</sup> Pressure for legal convergence increased when the World Bank attributed the East Asian financial crisis in 1997 to poor laws and governance procedures.<sup>3</sup>

Against this backdrop of legal globalisation, socialist-transforming states in Asia (China and Vietnam) are attempting to use laws and institutions to engineer rapid economic development. Like Japan during the Meiji Restoration (1868) these states are trying to open up, industrialise and become world forces—in short to catch up with their regional neighbours and the West.<sup>4</sup> Again like Japan, rather than waiting decades to distil commercial law from internal practices they have decided to borrow Western commercial law.<sup>5</sup>

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<sup>1</sup> See Gunther Teubner, 1997 "'Global Bukowian': Legal Pluralism in the World Society' in Gunther Teubner ed., *Global Law Without a State*, Dartmouth, Aldershot, 1-11; Geoffrey Hainsworth, 1999 'Globalization the Asian Way and Dichotomous Development' in Geoffrey B. Hainsworth ed., *Globalization and the Asian Economic Crisis*, Center for Southeast Asian Research, Institute of Asia Research, University of British Columbia, 3-39. Functional analysis of law almost invariably concludes that laws must converge. See e.g., Michael King, 1997 'Comparing Legal Cultures in the Quest for Law's Identity', in David Nelken ed., *Comparing Legal Cultures*, Dartmouth, Aldershot, 132; Peter De Cruz, 1999 *Comparative Law in a Changing World*, 2<sup>nd</sup> ed., Cavendish Publishing, London, 488-494.

<sup>2</sup> See generally Ugo Mattei, 2003 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance', 3 *Global Jurist Frontiers* (1) <[www.bepress.com/gj/frontiers](http://www.bepress.com/gj/frontiers)>. Also see David Sanger, 1999 'U.S. is the "800 pound Gorilla"—Global Power Encounters Envy and Mistrust', *International Herald Tribune*, 19 July, 1.

<sup>3</sup> See Asian Crisis Home Page <[www.stern.nyu/globalmacro/](http://www.stern.nyu/globalmacro/)>; Home Page Second Global Law and Justice Conference; <[www4.worldbank.org/legal/ljrol/](http://www4.worldbank.org/legal/ljrol/)>.

<sup>4</sup> See Masaji Chiba, 1997 'Japan' in Pho-Ling Tan ed., *Asian Legal Systems*, Butterworths, Sydney, 99-108.

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

- societies are comprised of individuals, voluntary organisations and the state; with clear divisions between state and civil society;
- states resolve conflicts through the application of laws that address autonomous individuals;
- laws are influenced by public participatory process and are consequently widely understood and obeyed; and
- officials are required to base decisions on state policies and laws, rather than political, personal, class, cultural, economic or other extra-legal considerations.

Most theoretical discussion about the transfer of laws among countries concerns North American and European experiences with harmonising among common and civil law systems. These debates concern problems arising from political economies and jurisprudence that seem far removed from the issues facing law reformers in socialist transforming Asia. Despite the growing economic and political importance of this region, legal transfers into socialist-transforming Asia are under-researched and under-theorised. Most writings in this area discuss Japan, and to a much lesser extent South East Asia and China.<sup>6</sup> In comparison, Vietnam has been largely ignored.<sup>7</sup> This is a missed opportunity because this country has absorbed an abundance of imported legal traditions. In successive historical periods—Chinese, French colonial, socialist, and Western commercial—legal ideas have created a layered legal architecture—the new overlaying the old. Moreover, as a country that has straddled the Confucian and South East Asian worlds for centuries, Vietnam provides an interesting counterpoint to legal developments in this region. Vietnam has been selected for further study not only for its rich history of legal borrowings, but also because commercial legal reforms are less than two decades old. Legal borrowing is still fresh in the minds of lawmakers and has not yet become obscured by decades of amendments, reforms and myth-making. It also provides an important case study because the local business environment is diversifying rapidly as foreign investors, domestic private enterprises and household businesses replace state enterprises as the principle vehicles for entrepreneurial activity.

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See Ugo Mattei, 1997 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' 45 *American Journal of Comparative Law* (5) 12-40; also see Mark Van Hoecke and Mark Warrington, 1998 'Legal Culture, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' 47 *International and Comparative Law Quarterly* 495, 495-513.

<sup>6</sup> See e.g. Masaji Chiba, 1986 'Introduction', in Masaji Chiba ed., *Asian Indigenous Law: An Introduction to Received Law*, KPI, London, 4-6; M. Chiba, 1989 *Legal Pluralism: Towards a General Theory Through Japanese Legal Culture*, Tokai University Press, Tokyo; Christopher Ford, 1996 'The Indigenization of Constitutionalism in the Japanese Experience' 28 *Case West Reserve Journal of International Law* 17-56; Luke Nottage, 2001 'The Still-Birth and Re-Birth of Product Liability in Japan' in Johannes Feest and David Nelken eds., *Adapting Legal Cultures*, Hart Publishing, Oxford, 141-145. There is also some commentary about South East Asia. See e. g. Andrew Harding, 2001 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"' in Johannes Feest and David Nelken eds., *Adapting Legal Cultures*, Hart Publishing, Oxford, 199-220; Jianfu Chen, 1999 'Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China' in Kanishka Jayasuriya ed., *Law, Capitalism and Power in Asia*, Routledge, London, 69, 76-86.

<sup>7</sup> Penelope Nicholson has discussed the transplantation of Soviet law, but not Western commercial law into Vietnam. See Penelope Nicholson, 2000 'Borrowing Court Systems: The Experience of the Democratic Republic of Vietnam, 1945-1976' unpublished Ph.D. Thesis, University of Melbourne. For a discussion about commercial transplantation into Vietnam see John Gillespie, 2002 'Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam' 51 *International Comparative Law Quarterly* 641; John Gillespie, 2003 'Receiving Bankruptcy Law into Vietnam' 11 *Asian Pacific Law Review* (1) 81.

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

This study will first attempt to make sense of Vietnam's extraordinary history of commercial legal development by devising a set of working postulates that bring us closer to the processes shaping legal transplantation.<sup>8</sup> It will then apply these postulates to a series of case studies to develop a model that explains how legal transplants are adapted and implemented in Vietnamese (and other developing East Asian) legal and social systems.

### **What is the nature of legal transplantation?**

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

### **Legal transfers are not new**

For millennia legal systems around the world have developed through legal transfers. Some of the best-documented transplantation occurred during the military expansion of the Roman Empire.<sup>9</sup> *Ius civile* applied to peculiarly Roman institutions and *ius gentium* was devised as a kind of universal law of 'natural reason established among all humankind followed by all peoples'.<sup>10</sup> Distinctions between local, foreign and universal law devised by

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

<sup>9</sup> See Ellen Goodman, 1995 *The Origins of the Western Legal Tradition*, Federation Press, Sydney, 131-136.

<sup>10</sup> Id. 133.

the Romans underlie the medieval, Roman-Canonic concept of *jus commune* (a common transnational legal regime in Western Europe) and contemporary support for universal human rights and transnational legal harmonisation.<sup>11</sup> Legal transplantation validated and accompanied imperialism in Europe during the Napoleonic conquests and the colonisation of East Asia, Latin America and Africa.

### **Whole systems transfers**

The extent of legal transplantation varies enormously. At one extreme the European conquest and colonisation of North America and Australia involved not only the displacement of indigenous populations and cultures, but also re-engineering the natural and built environments. The agricultural economy of northern Europe, including livestock, pasture, plant and tree species, displaced and supplanted indigenous species.<sup>12</sup> In addition to agriculture, colonists transplanted state institutions, religious orders, a mercantile economy and architectural preferences. For colonists surrounded by a facsimile of Europe, borrowing legal systems appeared both plausible and desirable.<sup>13</sup> Conceptual obstacles to imposing foreign laws on indigenous populations were conveniently removed by the *terra nullius* doctrine that denied pre-existing legal entitlements. It was only after independence that a distance in legal perspective from the 'motherland' slowly emerged.<sup>14</sup> More recently, extensive legal transplantation took place between West and East Germany following reunification.<sup>15</sup> Not only laws, but also legal personnel including judges, court officials and lawyers from western Germany were seconded to eastern Germany to administer the transplanted Western system.

### **Legal transplantation and superpower hegemony**

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

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<sup>11</sup> See Rene David, 1971 'The International Unification of Private Law', in *International Encyclopedia of Comparative Law*, Tubingen, vol II, ch. 5.

<sup>12</sup> See Tim Flannery, 2001 *The Eternal Frontier*, Text Publishing, Melbourne, chapters 24-25.

<sup>13</sup> For a discussion linking Western law to colonisation see Peter Fitzpatrick, 1992 *The Mythology of Modern Law*, Routledge, London, 107-111.

<sup>14</sup> See Elizabeth Mensch, 1982 'The History of Mainstream Legal Thought', in David Kairys ed., *The Politics of Law: A Progressive Critique*, Pantheon Books, New York, 19-26.

<sup>15</sup> Norbert Horn, 1991 'The Lawful German Revolution: Privatization and Market Economy in a Re-Unified Germany' 39 *American Journal of Comparative Law* 725.

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

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

Although the Republic of Vietnam in the southern half retained much of the French colonial system, from 1954 to 1973 it increasingly succumbed to American legal influence.<sup>16</sup> Inspired by American legal reforms in Japan, Latin America and elsewhere in the 'free world', Vietnamese scholars and jurists were sent to the US for legal training and US academic institutions conducted training courses in Vietnam. Following reunification in 1975 Soviet law was transplanted from the victorious North to the South.

After the Soviet Union collapsed US legal hegemony entered a new phase. Francis Fukuyama in his influential book *The End of History and the Last Man*, published in 1992, epitomised the euphoria that greeted the demise of Soviet communism and the perceived victory of Western liberal democracy. As he put it, 'for a very large part of the world, there is now no ideology with pretensions to universality that is in a position to challenge liberal democracy and universal principles of legitimacy other than the sovereignty of the people'.<sup>17</sup> A decade later his triumphalism seems premature. Chinese and Vietnamese

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<sup>16</sup> Very little is written about US legal involvement in the Republic of Vietnam. These comments are largely based on interviews with Nguyen Ngoc Bich, an American trained partner in IMAC Attorneys, HCMC April 1999, August 2000. Also see Le Tai Trien, 1973 'Republic of Viet-Nam', in Viktor Knapp ed., *National Reports*, J. C. B. Mohr, Tubingen, R-1.

<sup>17</sup> Francis Fukuyama, 1992 *The End of History and the Last Man*, H. Hamilton, London, 45.

communist regimes are still firmly entrenched and various orthodox Islamic organisations are mounting a radical challenge to liberal democratic values.<sup>18</sup>

Undeterred by a growing literature showing the difficulties in transferring commercial law reform across cultural, political and economic borders, there is a largely US discourse that postulates an 'end of history' for competing legal systems.<sup>19</sup> For example, in discussing international corporate governance laws, some authors assert that 'over time, then, the standard [US] model is likely to win the competitive struggle...' 'because no important competitors to the standard model of corporate governance remain persuasive today'.<sup>20</sup>

They dismiss longstanding European corporate governance regimes that privilege worker and stakeholder representation on boards of directors as less economically efficient than the deregulated US model. As a corollary, they assert that the US corporate governance model should become the international standard.

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

Much legal reform in developing East Asia has been guided since the early 1990s by 'law and governance' and legal harmonisation projects.<sup>24</sup> The current consensus seems to be that

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<sup>18</sup> Some commentators argue that the Chinese communist party is inherently unstable, but this view is certainly not universally held. See Shiping Zheng, 1997 *Party vs. State in Post-1949 China: The Institutional Dilemma*, Cambridge University Press, Cambridge, 263-266.

<sup>19</sup> Modernisation theory defines development as a process of convergence towards Western economic and legal institutions. See e.g. Brian Cheffins, 1999 'Current Trends in Corporate Governance: Going from London to Milan via Toronto' 10 *Duke Journal of Comparative and International Law* 5; Henry Hansmann and Reinier Kraakman, 2001 'The End of History for Corporate Law' 89 *Georgetown Law Review* 439.

<sup>20</sup> Hansmann and Kraakman, *supra* 451, 454.

<sup>21</sup> See Curtis J. Milhaupt, 1996 'A Relational Theory of Japanese Corporate Governance: Contract Culture and Rule of Law' 37 *Harvard International Law Review* (1) 3; Thomas J. Andre, 1998 'Cultural Hegemony: The Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany' 73 *Tulane Law Review* 69; Katharina Pistor et. al., 2002 'The Evolution of Corporate Law: A Cross-Country Comparison' 23 *University of Pennsylvania Journal of International Economic Law* 791.

<sup>22</sup> See Bernard Black et al, 2000 'Russian Privatisation and Corporate Governance: What Went Wrong?' 52 *Stanford Law Review* 1731, 1752-1757.

<sup>23</sup> See Katharina Pistor et. al., 2002 *supra* 865-866.

<sup>24</sup> See Katharina Pistor and Philip Wellons, 1999 *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995*, Oxford University Press, Oxford, 63-112.

certain legal institutions are conducive to economic growth, such as property and contractual rights and a corporate law regime backed by efficient courts and debt enforcement agencies.<sup>25</sup> International agencies such as the World Bank, Asian Development Bank and national donor agencies (i.e. USAID) are among the most enthusiastic advocates for this new phase of international legal convergence.<sup>26</sup> They support projects that aim to engineer the 'rule of law' by perfecting legislative drafting, strengthening legal institutions and providing legal training.

Some commentators attribute the trivialisation of regional economic, cultural and political differences found in legal convergence literature to a conscious strategy by development agencies to disseminate the laws and legal institutions required by liberal capitalism.<sup>27</sup> In discussing attempts by US agencies to influence legal development in Latin America, Yves Dezalay and Bryant Garth pondered why the 'law and development' movement in the 1960s is dismissed in American literature as a failure, whereas more recent but equally uninformed projects are considered more successful.<sup>28</sup> They conclude that perceptions about the possibility and desirability of legal transplantation are inextricably bound up in broader contests for political and economic power.

### Legal evolution

Others contend that legal change is a 'natural' Darwinian process in which less developed systems will evolve towards the more mature ones.<sup>29</sup> Since Western legal systems are more systematised than those in East Asia, the logical corollary is that East Asian systems will evolve or converge towards the West. This view has gained prominence with the emergence of globalised culture brought about by increased international communication,

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<sup>25</sup> New Institutional Economic theorists such as Douglass North and Joe Stiglitz have been especially influential in reshaping multilateral development projects. See Douglass North, 1995 *The New Institutional Economics and Third World Development*, Routledge, London, 17-27; Joe Stiglitz, 1999 'Whither Reform? Ten Years of the Transition', unpublished paper, Annual World Bank Conference on Development Economics, Washington, D C, 18-30 April.

<sup>26</sup> A review of law-related developments in East Asia published by the Asian Development Bank suggests that most commercial law reforms are funded and supported by multilateral donors (primarily the UNDP, World Bank and Asian Development Bank) as well as numerous bi-lateral donors. See Asian Development Bank, *Bulletin on Law and Policy Reform* published from 1995 until 2002.

<sup>27</sup> See Douglas Branson, 2001 'The Very Uncertain Prospect of "Global" Convergence in Corporate Governance' 34 *Cornell International Law Journal* 321.

<sup>28</sup> See Yves Dezalay and Bryant Garth, 2001 'The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars' in Johannes Feest and David Nelken eds., *Adapting Legal Cultures*, Hart Publishing, Oxford, 241-256.

travel, education and entertainment. It is also hotly contested by those who point to the narrow range of elites participating in globalisation and the many examples of international cultural divergence.<sup>30</sup>

Legal evolution takes place when international treaties bind two or more nations to common (generally Western) legal rules in certain areas.<sup>31</sup> Members of the World Trade Organisation (WTO), for example, are required to harmonise their domestic law with a wide range of customs, trading and intellectual property conventions and protocols. Much commercial legislation in developing East Asia, including Vietnam, is drafted with the objective of complying with WTO or other trade agreements. Legal harmonisation projects of this kind are often supported by international donor agencies.

Legal harmonisation is further advanced by the globalising influence of private business transactions.<sup>32</sup> According to Lawrence Friedman, businessmen and practising lawyers are the contemporary 'carriers of transnational law' and 'there is a tremendous amount of globalisation in businesses and the economy, and the law follows along'.<sup>33</sup> Globetrotting lawyers, financial advisers and related professions transfer laws to protect capitalist investors throughout the world. Western (primarily Anglo-American) commercial law is also globalised by 'offshore' dispute resolution centres.<sup>34</sup>

Pressure for legal evolution is felt strongest in countries that are integrated into American and European global trading, investment and legal networks. Subsequent chapters in this study consider whether Vietnam is receptive to this form of legal transfer.<sup>35</sup>

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<sup>29</sup> See Lawrence Friedman, 1969 'On Legal Development' 24 *Rutgers Law Review* (11), 26-64. For an evolutionary account of legal reform in post-communist Russia see Gianmaria Ajani, 1995 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' 43 *American Journal of Comparative Law* 93-99.

<sup>30</sup> See David Nelken, 2001 'Towards a Sociology of Legal Adaptation', in Johannes Feest and David Nelken eds., *Adapting Legal Cultures*, Hart Publishing, Oxford, 31-35.

<sup>31</sup> See Lawrence Friedman, 1996 'On the Merging Sociology of Transnational Law' 32 *Stanford Journal of International Law* 65, 70-72.

<sup>32</sup> See David Trubek, Yves Dezalay, Robert Buchanan and John Davis, 1993 *Global Restructuring and the Law: The Interantionalisation of Legal Fields and the Creation of Transnational Arenas*, *Working Papers on the Political Economy of Legal Change*, Madison No. 1, University of Wisconsin, Madison, Wisconsin; John Merryman and David Clark, eds., 1978 *Comparative Law: Western European and Latin American Legal Systems: Cases and Materials*, Bobbs Merrill, Indianapolis, chapters 10 and 11.

<sup>33</sup> Lawrence Friedman, 1996 'Borders: On the Emerging Sociology of Transnational Law' 32 *Stanford Law Review* 65, 67. Also see Yves Dezalay and Bryant Garth, 1996 *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, University of Chicago Press, Chicago, 6.

<sup>34</sup> Dispute resolution centres have internationalised the American Uniform Commercial Code, as well as international commercial dispute resolution rules. Yves Dezalay, 1990 'The Big Bang and the Law' in M. Featherstone ed., *Global Culture*, Sage, London, 6-8.

<sup>35</sup> In 2004 Vietnam's major trading partners were Japan, Asean countries, European Union and United States. The major investing countries were Singapore, Taiwan, Japan and South Korea. See *Vietnam Investment Review*, 10 November 2004. Foreign direct investment is a relatively small source of capital. For example

### Coming to terms with terms

Confusion can arise when different terms are used interchangeably to denote the transfer of laws. Already various terms have been used that require further clarification. Many terms have no agreed or fixed meaning, but rather reflect contextual nuances. Expressions such as legal harmonisation, unification, borrowing and convergence emphasise the compatibility and co-evolution of legal systems. Other terms, such as legal transplantation, are used to denote the transfer of law or legal systems into host countries.<sup>36</sup> When used by theorists such as Alan Watson, transplantation implies that legal ideas have taken root in foreign legal terrain.<sup>37</sup> But other writers use this metaphor with more circumspection.<sup>38</sup> They distinguish 'mechanical transplants', which transfer easily, from organic transplants, which require careful selection and maintenance to flourish in new legal environments. Either way this term reminds us that transplant viability must refer in some way to legal behaviour in the recipient country. Otherwise there is no transplant only an indigenous law containing foreign ideas.

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

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

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

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money remitted by overseas Vietnamese in 2004 constituted 50 per cent of FDI. See Author Unknown 2004 'Viet Kieu Remittances become Key Capital Channel' *Dau Tu Chung Khoan* 23 August, 20, trans., Development Vietnam, Intellasia News Service, 25 August, 46.

<sup>36</sup> See Alan Watson, 1993 *Legal Transplants: An Approach to Comparative Law*, 2<sup>nd</sup> ed., University of Georgia Press, Athens Georgia, 21.

<sup>37</sup> See Allen Watson, 1985 *The Evolution of Law*, John Hopkins University Press, Baltimore.

<sup>38</sup> See e. g. Otto Kahn-Freund, 1974 'On the Uses and Misuses of Comparative Law' 37 *Modern Law Review* 1-27.

<sup>39</sup> Gunther Teubner, 1998 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' 61 *Modern Law Review* (1) 11, 12.

Nelken goes further in suggesting that as metaphors 'legal transplantation' and 'legal irritants' share much in common, since they both 'direct our gaze mainly to the regulatory problems of trying to use law to change other legal and social orders'.<sup>40</sup>

Commentators pay too much attention to the metaphors describing legal transfers. They are after all only suggestive. Since there is little possibility of finding one term that describes all types of legal transfers, this study uses a variety of terms to denote particular stages in the transfer process. As subsequent chapters reveal, since *doi moi* (renovation) reforms began in Vietnam during the 1980s, commercial legislation has extensively relied on foreign norms, rules and procedures. To describe legal transferring, this study uses the terms legal transplants, imports and borrowing.

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

Legal transfers are also enmeshed in what Dezalay and Garth call 'palace wars'.<sup>41</sup> Words such as contests, mediations and negotiations are used to describe how human agents give legal transfers new meanings. Additional terms like localisation, naturalisation, legal hybrids and blurred legality are used to show that imported ideas are sometimes creatively combined with pre-existing ideas to create new solutions to domestic problems.

If the current trajectory of the Vietnamese international integration continues, it seems likely international legal protocols and doctrines will increasingly influence domestic legal development. Terms such as global law, transnational law and institutional 'cropping up' are used to describe the situation where new laws and organisational form are adopted in a number of places simultaneously.<sup>42</sup>

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<sup>40</sup> See David Nelken, 2001 'Beyond the Metaphor of Legal Transplants?: Consequences of Autopoietic Theory for the Study of Cross-Cultural Legal Adaptation' in Jiri Priban and David Nelken eds., *Law's New Boundaries: The Consequences of Legal Autopoiesis*, Ashgate, Aldershot, 269-275.

<sup>41</sup> See Yves Dezalay and Bryant Garth, 2001 *supra* 241-256.

<sup>42</sup> See Nils Brunsson, 1998 'Homogeneity and Heterogeneity in Organizational Forms as the Result of Cropping-up Processes' in Nils Brunsson and Johan Olsen eds., *Organizing Organizations*, Fagbokforlaget, Oslo, 265-275

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

### **Legal transplanting into East Asia**

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

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

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

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<sup>43</sup> See Lawrence Friedman, 1996 *supra* 65, 72-74; Peter de Cruz, 1999 *supra* 491-492.

<sup>44</sup> The Asian Development Bank commissioned the most comprehensive survey. See Pistor and Wellons, 1999 *supra* 36-52, 56-61.

<sup>45</sup> See generally Andrew Harding, 2001 *supra* 199-219.

<sup>46</sup> See Timothy Lindsey, 1997 'Paradigms, Paradoxes and Possibilities: Towards an Understanding of Indonesia's Legal System', in Veronica Taylor ed., *Asian Laws Through Australian Eyes*, Law Book Company, Sydney, 96-103; Charles Himawan, 1997 'Indonesia', in Pho-Ling Tan ed., *Asian Legal Systems*, Butterworths, Sydney, 223-233.

<sup>47</sup> See e.g. Khoo Boo Teik, 1999 'Between Law and Politics: the Malaysian Judiciary since Independence', in Kanishkha Jayasuriya ed., *Law, Capitalism and Power in Asia*, Routledge, London, 205.

political domination, the Japanese during the Meiji Restoration imported European, primarily Prussian civil law and state institutions.<sup>48</sup> As a colonising power, the Japanese later transplanted their laws to Korea and Taiwan.<sup>49</sup> Both China and Thailand were never entirely colonised, but they too imported continental civil law systems.<sup>50</sup>

Third, radically different paths were followed by China and the Indochinese states of Vietnam, Cambodia and Laos following their Marxist-Leninist revolutions. In China's case Western commercial law was rejected in favour of a socialist legal system imported from the Soviet Union. It was not until Deng Xiaoping's economic reforms in the late 1970s that the importation of Western commercial laws (sometimes via East Asian countries) resumed.<sup>51</sup>

Legal reforms in Indochina followed a similar trajectory. After the revolutions, French civil laws and legal institutions were replaced with socialist laws and institutions largely derived from the former Soviet Union. With the demise of Soviet influence and subsequent dismantling of central command economic planning, lawmakers in these countries are now attempting to graft imported market legal principles onto administrative systems that retain high levels of state management.<sup>52</sup> Unlike transforming socialist counties in Eastern Europe, command institutions did not entirely collapse, but rather are adapting to market conditions.

Large-scale commercial legal importation did not begin in Vietnam until the Sixth Party Congress in 1986. Lawmakers initially looked to socialist countries for inspiration. They imported, with a few minor changes, non-commercial laws like the Penal Code 1986 and Family Law 1986 from the Soviet Union (see chapter two). Even the first wave of commercial laws, comprising the Law on Foreign Investment 1987, Land Law 1988 and Ordinance on Economic Contracts 1989 were primarily based on Chinese market reforms.<sup>53</sup>

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<sup>48</sup> For Japanese legal history see Masaji Chiba, 1986 'Three-Level Structure of Law in Contemporary Japan, The Shinto Society', in Masaji Chiba ed., *supra* 301-313.

<sup>49</sup> Dae-Kyu Yoon, 1997 'Korea', in Pho-Ling Tan ed., *Asian Legal Systems*, Butterworths, Sydney, 165; Taysheng Wang, 1997 'Taiwan', in Pho-Ling Tan ed., *Asian Legal Systems*, Butterworths, Sydney, 131-132.

<sup>50</sup> See Jianfu Chen, 1999 *Towards and Understanding of Chinese Law, Its Nature and Development*, Kluwer Law International, The Hague.

<sup>51</sup> See Pitman Potter, 1999 'The Chinese Legal System: Continuing Commitment to the Primacy of State Power', *The China Quarterly* (159) 673, 674-678; Carol Jones, 1994 'Capitalism, Globalisation and Rule of Law: An Alternative Trajectory of Legal Change in China', 3 *Social and Legal Studies* 195, 204-210.

<sup>52</sup> See John Gillespie, 1997 'Bureaucratic Control of Business Regulation in Vietnam', in Veronica Taylor ed., *Asian Laws Through Australian Eyes*, Law Book Company, Sydney, 391-398.

<sup>53</sup> The blended of socialist-public law and capitalist private law is especially evident in this Ordinance. For example, it contains provisions designed to regulated command contracts between State Owned Enterprises

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

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

### **Conceptualising legal transplantation**

The way we understand law and legal change implicitly influences the way we understand and conceptualise legal transplantation. Legal transplantation debates have conventionally polarised around convergence, divergence and legal evolutionary hypotheses that are grounded on local theoretical and contextual issues. For comparativists such as Rene de Groot, 'it is likely that the legal systems of the European States will form one great legal

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and laws reflecting the devolved decision making in market transactions. See Jerome Cohen, 1990 *Investment*

family with uniform or strongly similar rules'.<sup>54</sup> Others within the same legal tradition caution that legal transplantation is just as likely to produce divergence as convergence in legal practice, because legal transfers do not transmit the 'whole law'.<sup>55</sup> Legal evolutionists argue globalisation 'forces' legal systems to evolve towards the most 'efficient' solutions.<sup>56</sup> Still others such as Gunther Teubner use autopoietic theory to argue that *lex mercatoria* has de-coupled from its cultural roots and has created a stateless, globalised commercial law.<sup>57</sup> The underlying disagreement is whether legal change reflects or correlates to internal social forces—the 'felt needs of society'.<sup>58</sup> This debate is preoccupied with law's 'relative autonomy' from society and leaves many questions about how legal transplants interact with domestic laws and institutions unanswered. It also reflects historically conditioned attitudes to law that may not necessarily pertain to other parts of the world. Conventional debates likewise fail to distinguish general trends such as legal convergence or divergence from the various processes shaping the selection, adaptation and implementation of borrowed laws.<sup>59</sup> By directing attention towards international legal transfers, for example, legal globalisation studies may underestimate the extent to which legal reforms are propelled by domestic legal recycling and transfers within a legal system. Since the global and local co-exist, analysis should also consider bottom-up processes that assist or resist international harmonisation.<sup>60</sup>

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

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*Law and Practice in Vietnam*, Longman, Hong Kong, xii-xiii, 1-2.

<sup>54</sup> Rene de Groot, 1992 'European Education in the 21<sup>st</sup> Century', in Bruno de Witte and Caroline Forder eds., *The Common Law of Europe and the Future of Legal Education*, Kluwer Law and Taxation Publishers, Maastricht, 54.

<sup>55</sup> See Pierre Legrand, 1997 'The Impossibility of 'Legal Transplants' 4 *Maastricht Journal of European Comparative Law* 111, 119.

<sup>56</sup> See Lawrence Friedman, 1996 *supra* 65.

<sup>57</sup> See Gunther Teubner, 1997 *supra* 3-22. Autopoietic or systems theory as it is sometimes called is discussed in chapter one.

<sup>58</sup> See Ugo Mattei, 1994 'Efficiency in Legal Transplants: An Essay in Comparative Law and Economics' 14 *International Review of Law and Economics* 3, 4.

<sup>59</sup> See Wolf Heydebrand, 2001 'From Globalisation of Law to Law under Globalisation' in Johannes Feest and David Nelken eds., *Adapting Legal Cultures*, Hart Publishing Oxford, 129-132; Gunther Teubner, 1997 *supra* 3-38.

<sup>60</sup> See B. de Sousa Santos, 1995 *Towards a New Common Sense*, Routledge, London; W. E. Scheuerman, 1999 'Globalisation and the Fate of Law' in D. Dyzenhaus ed., *Recrafting the Rule of Law*, Hart Publishing, Oxford, 243-266.

To preview the theoretical discussion in chapter one, a reason given for transplant failures is that transplanted law does not comport with host country conditions. Montesquieu captured the uncertain relationship between imported law and local environmental and social conditions, when he opined that rules of law only coincidentally produce the same behavioral outcomes in different societies.<sup>61</sup> Underlying this view is the belief that laws change and respond to external forces such as the workings of the market, political ideology, and cultural traits like individualism. Others theorists contend that an ongoing process of social differentiation and globalisation has de-coupled laws from social structures. If law is autonomous then legal rules can transplant from society to society with little regard for political, cultural and economic congruence.

Otto Kahn-Freund offered the valuable insight that 'there are degrees of transferability' and that viability requires congruent donor and host country sociopolitical structures.<sup>62</sup> Though never fully accepting that laws are non-transferable, he reasoned that since most laws are deeply embedded in their social and institutional matrices 'we cannot take for granted that rules or institutions are transplantable'.<sup>63</sup> Since all laws have 'de-coupled' to some extent from their social roots, he believed that legal transplantation across cultural boundaries was theoretically possible. But as laws have unevenly 'de-coupled', some were more likely to transplant than others.

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

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<sup>61</sup> See Montesquieu, 1749 *De L'Esprit des Droits*, (The Spirit of Laws), Livre I Gallimard, Paris, reprint J. P. Mayer & A. P. Kerr eds 1970, chap 3.

<sup>62</sup> See O. Kahn-Freund, 1974 'On Uses and Misuses of Comparative Law' 37 *Modern Law Review* 1, 6, 7-11, 27; Otto Kahn-Freund, 1978 'Common Law and Civil Law-Imaginary and Real Obstacles to Assimilation', in Mauro Cappelletti ed., *New Perspectives for a Common Law Europe*, Sijhoff, Leyden 160.

<sup>63</sup> Ibid.

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

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

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

Chapter five applies the second working postulate to determine how state lawmaking structures affect legal transplantation. Case studies contribute the insight that legislative drafters actively interpret and co-opt ideas in the official discourse to achieve strategic objectives. They further suggest the state's receptiveness to imported legal ideas depends on whether official epistemologies are closed and self-referential, or open and willing to engage imported ideas. In short there is a powerful domestic political, epistemological and structural logic to legal borrowing.

In chapter six the second working postulate is used to assess how state agencies implement imported laws. Case studies show that imported commercial rights are negotiated in three-way contests between elite-level officials, local-level officials and businesses. They are also mediated in courtroom disputes between party, state and private interests. Evidence suggests that dialogical exchanges, between legal officials and entrepreneurs and lawyers advocating commercial rights, are slowly making imported legal ideas the frame of reference for implementing the law.

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

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



## Chapter One

# Developing a Legal Transplantation Theory

### Introduction

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

### Legal transplantation: convergence versus cultural-essentialism

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

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<sup>1</sup> These views are summarised in K. Pistor and P. Wellons, 1999 *The Role of Law and Legal Institutions in Asian Economic Development 1960-1995*, Oxford University Press, Oxford, 14, 36-40.

template.<sup>2</sup> The East Asian financial crisis in 1997 reinvigorated this strand of Western legal triumphalism.

From this global vantage point, legal convergence appears both plausible and desirable.

Multilateral international organisations, such as the World Bank, United Nations Development Program and Asian Development Bank actively promote 'legal convergence' in some East Asian legal systems including Vietnam (see chapter seven).

The other main theme originates from Montesquieu's skepticism whether laws can traverse cultural boundaries.<sup>3</sup> He opined that laws express the spirit of nations and are consequently deeply embedded in, and inseparable from their geographic, customary and political context. The transfer of laws across cultural boundaries constitutes a '*grand hasard*', because laws cannot change manners and customs—they must change themselves.

Both propositions find support in East Asian legal development history. A study of legal reform between 1965 and 1995 in six Asian countries found a discernable shift from local discretionary rules to imported Western commercial legal norms, but concluded that legal imports did not always signal converging legal systems.<sup>4</sup> For example, Malaysia began the survey period with a Western-style legal system, but ended sharply diverging from Western practices in many areas.<sup>5</sup>

More perplexingly, the study found evidence of convergence in market-based legal strategies and commercial legislation, but not necessarily in legal institutions.<sup>6</sup> For example, though operating within American-inspired legislative templates, exchange institutions in Japan and Korea functioned as political tools of respective Ministries of Finance.<sup>7</sup> Legal rules, the study speculated, transplant more easily than culturally embedded institutions. At best it was concluded that 'throughout much of Asia's legal history, law

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<sup>2</sup> See e. g. B. Black and R. Kraakman, 1996 'A Self-Enforcing Model of Corporate Law' 109 *Harvard Law Review* (8) 1911, 1911-1982; Henry Hansmann and Reinier Kraakman, 2001 'The End of History for Corporate Law' 89 *Georgetown Law Journal* (2) 439, 445-468. See generally Francis Fukuyama, 1992 *The End of History and the Last Man*, Free Press, New York.

<sup>3</sup> See Montesquieu, 1749 *De L'Esprit des Loix*, (The Spirit of Laws), Livre I Gallimard, Paris, reprint, J. P. Mayer & A. P. Kerr eds., 1970, chap 3. For similar views see Pierre Legrand, 1995 'Comparative Legal Studies and Commitment to Theory' 58 *Modern Law Review* (3) 262, 263-273; Tahirih V. Lee, 1993 'Risky Business: Courts Culture, and the Market Place' 47 *University of Miami Law Review* 1335, 1338 (transplanted law has the capacity to create 'chaos' if it is designed to address different cultural problems).

<sup>4</sup> Pistor and Wellons, *supra* 280-284.

<sup>5</sup> See e. g. Khoo Boo Teik, 1999, 'Between Law and Politics: the Malaysian Judiciary Since Independence', in Kanishka Jayasuriya ed., *Law, Capitalism and Power in Asia*, Routledge, London, 205-232.

<sup>6</sup> Pistor and Wellons, *supra* 280-284.

<sup>7</sup> *Id.* 281.

preceded economic development, but economic development was an important condition for the acceptance and use of laws.<sup>8</sup>

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

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

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

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<sup>8</sup> Id. 50.

<sup>9</sup> See Pierre Legrand, 1996 'European Legal Systems are not Converging' 45 *International Comparative Law Quarterly* 52, 56.

<sup>10</sup> See Mark Ramseyer, 1990 'Doctrine of Rents in Japan: A Comment on Professors Osaka and Nakamura' 53 *Law and Contemporary Problems* (2) 29.

## Entire systems analysis

The relationship between law and underlying social forces is important to analysing legal transplantation. If laws are merely sets of bare propositional statements, as some proponents of large-scale legal transplantation seem to believe, then legal transplantation is comparatively easily, because law is not historically or culturally connected in any meaningful way.<sup>11</sup> If, on the contrary, laws are socially embedded, then their transplantation into different historical or cultural settings appears more difficult. Conflicting theories about legal autonomy and their relevance to legal transplantation are considered in more detail below. It is necessary for the present discussion to find a theoretical framework that explains the interaction between imported statutory norms and underlying social values and practices.

Scholars since Marx, Durkheim and Weber have sought ways of analysing the relationship between rules and sociopolitical change.<sup>12</sup> Emphasising different aspects of this nexus, each grand theory created an intellectual framework that situated law in a social matrix comprised of political, economic and philosophic (or religious) traditions.<sup>13</sup> They argued a need to examine the connection between law and society, because in addition to rules, social norms and practices constituted patterns of law.<sup>14</sup> In other words, law comes in packages comprising propositional statements mixed with cultural norms and practices. Entire systems analysis implies there is more to legal transplantation than the technical transfer of legal rules among countries. Legal meanings are not entirely provided by the rule itself; codified rules are not self-explanatory, but take on contextual meanings from host-country state and non-state regulatory systems. If law is culturally embedded, then

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

<sup>12</sup> For a summary of these social context theories see J Kelly, 1992 *A Short History of Western Legal Theory*, Clarendon Press, Oxford; P Stein, 1980 *Legal Evolution: The Story of an Idea*, Cambridge University Press, New York.

<sup>13</sup> See generally the definition of social organisation in M. Rheinstein ed., 1954 *Max Weber on Law in Economy and Society*, Free Press, New York.

<sup>14</sup> See e. g. Lawrence Friedman, 1969 'Legal Culture and Social Development' *Law and Society* 29, 29-42; Pierre Legrand, 1995 *supra* 263-273; Ugo Mattei, 1997, 'Taxonomy and the World's Legal Systems' 45 *American Journal of Comparative Law* 5, 6-10.

legal transplantation research should focus on the interaction between legal transfers and host-country legal and social norms, organisational mentalities and habits and practices.<sup>15</sup> For decades normative theorists have employed the concept of state and non-state regulation to explain how legal rules and social factors combine to shape business activities.<sup>16</sup> Janet Landa, for example, found that ethnically homogenous Chinese communities used family and relational affiliations as alternatives to state regulations.<sup>17</sup> Others have stressed inconsistencies and interdependencies between imported codified norms and local norms and practices.<sup>18</sup> For example, laws introduced in Taiwan to curb anti-social aspects of *biaohui* (rotational credit groups) ignored informal personalistic bonds ordering informal lending. Rather than controlling *biaohui*, which remained as popular as ever, the law severed informal links between credit organisers and government officials that had previously constrained infiltration by organised crime. These studies add the valuable insight that imported codified law and non-state regulatory systems do not exist in parallel systems or 'traditions', but rather are mutually constituted. This observation suggests the need to search beyond the narrow 'family of law' taxonomies

<sup>15</sup> In considering the impact of legal imports in Japan, Masaji Chiba devised a legal typology to differentiate 'official' law, 'unofficial' law and legal postulates. 'Official laws' approved by legitimate authorities include, legislation and discretionary power backed by state power. 'Unofficial law' comprises underlying community habits and practices ordering human behaviour. It may support or subvert 'official law'. Unwritten 'unofficial law' exists in every social system and is just as important as 'official law' in shaping and sustaining long-term commercial and social relationships.

'Legal postulates' are those aspects of ideology, religion, cultural practices, habits and mores that mould psychological interpretations of official and unofficial law and in turn deeply influence the repetitive patterns of behaviour constituting institutional structures and practices. He concluded that legislation based on borrowed law overlays—but only occasionally touched—unofficial legal practices and postulates governing most aspects of Japanese daily life. Chiba's three-level system usefully directs attention away from law as a set of propositional statements towards the whole structure of law. But his distinction between 'official' and 'unofficial' law and legal postulates sets up conceptual divisions that are difficult to sustain in applied legal research. See Masaji Chiba, 1986 'Introduction', in Masaji Chiba ed., *Asian Indigenous Law: An Introduction to Received Law*, KPI, London, 4-6; M. Chiba, 1989, *Legal Pluralism: Towards a General Theory Through Japanese Legal Culture*, Tokai University Press, Tokyo, 43-46.

<sup>16</sup> See Stuart Macaulay, 1963 'Non-Contractual Relations in Business: A Preliminary Study' 28 *American Sociology Review* 55; 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; Robert Cooter, 1996 'Decentralised Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant' 144 *University of Pennsylvania Law Review* 1643.

<sup>17</sup> See Janet Landa, 1981 'A Theory of the Ethnically Homogeneous Middleman Group: An Institutional Alternative to Contract Law' 10 *Journal of Legal Studies* 349.

<sup>18</sup> See Jane Kaufman Winn, 1994 'Relational Practices and the Marginalization of Law: A Study of the Informal Financial Practices of Small Businesses in Taiwan' 28 *Law and Society Review* 193, 224-229; Frank K. Upham, 1994 'Relational Practices and the Marginalization of Law' 28 *Law and Society Review* (2) 241; Carol Jones 1994 'Capitalism, Globalisation and Rule of Law: An Alternative Trajectory of Legal Change in China' 3 *Social and Legal Studies* 195; Robert Ellickson, 1991 *Order Without Law: How Neighbors Settle Disputes*, Harvard University Press, Cambridge, Mass.; Eric Prosner, 2000 *Law and Social Norms*, Harvard University Press, Cambridge, Mass.

used by some comparative lawyers to analyse differences between legal transfers and host countries.<sup>19</sup> We need a conceptual framework in which to place and analyse the interaction between legal imports and social forces in host countries.

## Theorising legal transplantation

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

## Transplanting natural law

From Roman times rational, divine, universal and immutable natural laws have justified legal transplantation. Roman jurists equated *ius gentium*, which applied to colonised people, with *ius naturale* (law that should be observed by humanity).<sup>20</sup> They considered 'universal laws of nature' capable of linguistic expression through universal legal codes. In the belief that differences between legal systems denied universal human attributes, natural law codes based on Roman morality were superimposed over indigenous cultural beliefs and practices.

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

<sup>20</sup> See Barry Nicholas, 1962 *An Introduction to Roman Law*, Clarendon Press, Oxford, 54-59; Ellen Goodman, 1995 *The Origins of Western Legal Tradition: From Thales to Tudors*, Federation Press, Sydney, 131-139.

Later, until its displacement by rights-based law over the last two centuries, natural law legitimatised European colonisation of non-Christian peoples.<sup>21</sup> According to natural law doctrine all humans had a right to salvation—and colonial laws were in theory not permitted to abrogate indigenous cultural practices and laws.<sup>22</sup> French legal transplantation to Vietnam frequently ignored this tolerant formulation and invested central authorities with power to regulate or prohibit local customs (see chapter two).

Disagreements concerning core human characteristics continue to undermine Western assertions of universal rights.<sup>23</sup> History is full of accounts where putative universal laws have been transmogrified by host-country culture. For example, while adopting the Roman institutions and laws, ninth century Byzantine norms more closely resembled Persian than Western values.<sup>24</sup> The separation of state and church that underpinned Roman law was subverted by the Byzantine mystical belief in *taxis*—the changeless, harmonious and hierarchical order of things.<sup>25</sup> This observation moves the discussion closer to recognising that particular legal systems have ideology, culture and practices that may invalidate or disrupt the workings of transplanted laws and institutions.

## Legal evolution

Contrasting with static and eternal natural law, evolutionary theory links laws to dynamic processes—and most importantly for this discussion—with specific social configurations.<sup>26</sup> In an age of laissez-faire capitalism and colonial empires, early twentieth-century evolutionists like Sir Henry Main recalled Social Darwinist notions that ‘primitive’ legal

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<sup>21</sup> See Michael Barry Hooker, 1986 *The Laws of South East Asia*, vol. II Butterworths, Singapore, 28-47. See generally H. McCoubrey, 1987 *The Development of Naturalist Legal Theory*, Croom Helm, London.

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

<sup>23</sup> For a discussion concerning contemporary debates about core human attributes see J. M. Finnis, 1980 *Natural Law and Natural Rights*, Clarendon Press, Oxford, 103-126; L. Amede Obiora, 1998 ‘Reconstituted Consonants: The Reach of a “Common Core” Analogies in Human Rights’ 12 *Hastings Journal of International and Comparative Law* (4) 921, 930-934, 943-954. Some commentators concede that human rights arose from Western legal ideology, but rather implausibly argue that the ideal has subsequently become a universal value. See Margaret Ng, 1995 ‘Are Human Rights Culture Bound?’, in Michael C. Davis ed., *Human Rights and Chinese Values*, Oxford University Press, Hong Kong, 65.

<sup>24</sup> See Ellen Goodman, 1995 *The Origins of Western Legal Tradition: From Thales to Tudors*, Federation Press, Sydney, 139-145.

<sup>25</sup> See Norman Davies, 1997 *Europe: A History*, Pimlico, London, 246-250.

<sup>26</sup> See Peter Stein, 1980 *Legal Evolution: The Story of an Idea*, Cambridge University Press, Cambridge, 22-28; Ronald Lindley Meek, 1976 *Social Science and the Ignoble Savage*, Cambridge University Press, Cambridge.

systems evolve into 'progressive' Western systems.<sup>27</sup> French administrators invoked a 'survival of the fittest' rationale to justify imposing colonial legality in Vietnam.<sup>28</sup> Later, Max Weber ascribed legal change to private wealth accumulation, freedom of labour, free movement of goods and a social need for a calculable law and rational public administration.<sup>29</sup> Rather than superior virtues, he attributed development in Western legal systems to 'concrete political factors, which have only the remotest analogies elsewhere in the world'.<sup>30</sup> These attributes were compared with social cultures, especially in East Asia, which had different ideas of what is meant by law.

Building on Weber's 'calculable' and 'rational' legal ideal, some contemporary evolutionary theorists narrowly locate modern legal development in 'rational economic decisions'.<sup>31</sup> Applying neo-liberal economic theory, these theorists contend that rational decision-making is a universal human characteristic that explains all human behaviour. Culture is marginalised in this calculus, because personal values are considered non-comparable.<sup>32</sup>

Robert Cooter, a leading law and economics (the legal analogue of neoclassical economic theory) commentator, posits that 'economic competition changes products and techniques, which in turn creates new problems of coordination and cooperation. Communities of people solve these problems by developing norms of behaviour ... The state raises some social norms to the level of law'.<sup>33</sup> In short, decision-makers everywhere reach similar conclusions when confronted with equivalent 'rational' economic problems.

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

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<sup>27</sup> See Henry Maine, 1917 *Ancient Law*, J. M. Dent, London.

<sup>28</sup> See John De Francis, 1977 *Colonialism and Language Policy in Viet-Nam*, Mouton, The Hague, 119-121.

<sup>29</sup> See David M. Trubek, 1972 'Max Weber on Law and the Rise of Capitalism' *Wisconsin Law Review* (3) 720, 731-746; Sally Ewing, 1987 'Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law' 21 *Law and Society Review* 487, 488-493.

<sup>30</sup> See Max Weber, 1968 *Economy and Society*, Bedminster Press, New York, 695-699.

<sup>31</sup> The term neo-liberal economics refers to a philosophy whose basic units are individuals that make rational decisions according to prevailing circumstances and available information. For a discussion of this philosophy in the context of legal development see Elizabeth Landes and Richard A. Posner, 1978 'The Economics of the Baby Shortage' 7 *Journal of Legal Studies*, 323; Robert Cooter, 1996 'The Theory of Market Modernization of Law' 16 *International Review of Law and Economics* 141, 142-146.

<sup>32</sup> As Paul Samuelson succinctly put it, 'goods follow dollar votes and not the greatest good. A rich man's cat may receive the milk that a poor child needs to remain healthy ... the market mechanism is doing its job putting goods in the hands of those who can pay the most'. Paul Samuelson, 1989 *Economics: An Introductory Analysis*, 13<sup>th</sup> ed., McCraw-Hill, New York, 46.

subjects and expatriates in distant colonies. Weber's more subtle theory recognised the possibility of co-evolution between different cultures. But in finding modern European law complete and rational, he inferred that what existed elsewhere was incomplete and irrational. Drawing on these theories, multi- and bi-lateral donors have encouraged East Asian states attempting to modernise and industrialise their economies to discard irrational indigenous laws and adopt Western-inspired law. The following section speculates that 'catch-up' development underlies much legal transplantation to Vietnam.

### **The law and development movement**

Legal evolution confers theoretical respectability to aid agencies reforming developing countries' legal systems. Starting in the 1950s and reaching a zenith during the United Nations Development Decade (1960s), Western advisers urged developing countries to copy the modern features of developed countries, particularly their legal systems.<sup>34</sup> A donor-assisted wave of Western legal transplants surged into many East Asian countries, until a shift to state intervention policies during the 1970s curbed the appetite for market law.<sup>35</sup>

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

cannot wait 300 or 500 years to construct in an empirical fashion a system of law, which is unique to itself ... The development and modernisation of Ethiopia necessitates the adoption of a 'ready made' system; they force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations.<sup>36</sup>

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<sup>33</sup> Robert Cooter, 1996 'The Theory of Market Modernization of Law' 16 *International Review of Law and Economics* 141.

<sup>34</sup> See generally, Marc Galanter, 1966 'The Modernization of Law' in Myron Weiner ed. *Modernisation: The Dynamic of Growth*, Basic Books, New York, 154; H. L. A. Hart 1961 *The Concept of Law*, Clarendon Press, Oxford 98-99, 189-195; Kenneth L. Karst, 1967 'Law in Developing Countries' 60 *Law Library Journal*, 13, 17; Kanishka Jayasuriya, 1999 'Introduction: A Framework for the Analysis of Legal Institutions in East Asia, in Kanishka Jayasuriya ed., *Law, Capitalism and Power in Asia*, Routledge, London 4-5; Brian Tamanaha, 1995 'The Lessons of the Law and Development Studies' 89 *American Journal of International Law* 470.

<sup>35</sup> See Pistor and Wellons, *supra* 104-105. The law and development movement can be divided into several distinct categories. The term early law and development refers to writings before the publication of an article by David Trubeck and Marc Galanter, which radically changed its direction. See D. Trubeck and M. Galanter, *supra* 1080-83.

<sup>36</sup> Rene David, 1963 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries' 37 *Tulane Law Review* 187.

Much of the early literature guiding the influential 'law and development' movement drew selectively from Weber's theory that causally linked industrial development and legal rationality—one cannot proceed without the other.<sup>37</sup> Theorists of industrialisation further contended that modernising legal rules could only flourish where bureaucracies and community attitudes are supportive; thus political, legal and economic institutions must reform to foster development.<sup>38</sup> Developing countries were urged to copy the 'modern' institutional features of Western countries, such as new constitutions, separation of powers, independent judiciaries and free elections. They were also encouraged to adopt the general and autonomous laws brokered by capitalist property relationships. Weber believed that these rules enabled the West to generate the calculability required by modern states and markets. But law and development scholars conveniently ignored Weber's cautioning that law develops over time by interacting with local socioeconomic environments—processes that induce path-dependent development.<sup>39</sup> As a critic observed, 'what was being universalised is not democracy, but the capitalist economic system and its attendant form of government'.<sup>40</sup>

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

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

<sup>38</sup> See Whitman Rostow, 1990 *Stages of Economic Growth: A Non-Communist Manifesto*, Cambridge University Press, New York.

<sup>39</sup> See David Trubek, 1972 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', 82 *Yale Law Journal* (1) 1 (distinguishes Weber's theories from the law and development movement).

<sup>40</sup> Anthony Chase, 1991 'The Rule of Law and the Capitalist State: Bills of Right in Jeopardy' 65 *St John's Law Review*, 85, 87.

<sup>41</sup> See David Trubek and Marc Galanter, 1974 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' *Wisconsin Law Review* 1062, 1080-83; also see John Merryman, 1977 'Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement' 25 *American Journal of Comparative Law* 457.

Debates about the crisis in the law and development movement were informed by a broader disenchantment among Western scholars with neo-liberal economic prescriptions for reform. 'Basic Needs' theorists, for example, believed that neo-liberal markets produced hash outcomes because states did not redirect welfare income to the poor.<sup>42</sup> But like neo-liberal theorists, they urged states to make markets work for the poor by eliminating institutional blockages.

Transforming institutionalists presented a more radical challenge to neo-liberalism.<sup>43</sup> They used neo-Marxist, historical materialism to show that capitalist political economies constitute systems of power. If human institutions, rather than economic competition, primarily shaped markets, there were no 'natural' or 'free' markets. To account for poverty in developing countries, transforming institutionalists needed to explain not only market efficiency, but also class power. They devised various models explaining the action of class power on markets. Some models emphasised the dependency of developing countries on globally dominant economic classes, while others gave indigenous elites more credibility for shaping their own destinies. What united these models was the belief that development theory must focus on the way the legal order shapes institutions and fosters the emergence of elites that used markets for their own ends.

Undeterred by Western theoretical skepticism, interest in neo-classical economic models increased in developing Asia during the 1980s and in socialist-transforming economies (including Vietnam) from the early 1990s. This shift away from self-sufficiency towards export-oriented development re-ignited large-scale legal transplantation.<sup>44</sup> For example, massive transfers of Western commercial law guided Russian officials during the first critical steps of macroeconomic reform in the new regime.<sup>45</sup> A decade later, the Russian legal system was in crisis.<sup>46</sup> As Trubek and Galanter had earlier warned, without substantial local input transplanted Western laws are irrelevant, or worse, incompatible with

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<sup>42</sup> Gunnar Myrdal, 1968 *Asian Drama: An Inquiry into the Poverty of Nations*, Pantheon, New York.

<sup>43</sup> See Dietrich Reuschemeyer and Peter Evens, 1985 'The State and Economic Transformation' in Peter Evens, Dietrich Reuschemeyer and Theodora Evens eds., eds., *Bring the State Back In*, Cambridge University Press, New York, 44.

<sup>44</sup> See Pistor and Wellons, *supra* 107-108.

<sup>45</sup> See Douglass Webb, 1996 'Legal System Reform and Private Sector Development in Developing Countries' in Robert Pritchard ed., *Economic Development, Foreign Investment and the Law*, Kluwer Law International, London, 56-57; Thomas W. Waelde and James L. Gunderson, 1994 'Legislative Reform in Transition Economics: Western Transplants—Short-Cut to Social Market Economy Status?' 43 *International and Comparative Law Quarterly* 347, 359-367.

<sup>46</sup> See Black, Kraakman et. al. 2000 'Russian Privatisation and Corporate Governance: What Went Wrong?' 52 *Stanford Law Review* 1731.

indigenous institutions and customary practices. The perceived superiority of Western law, coupled with concerns that local drafting would 'jeopardise the fragile momentum for reform' propelled Russia's disastrous 'big-bang' legal reforms.

Learning from development failures, Douglass North famously speculated that transplanted Western commercial laws require compatible dispute resolution fora, debt enforcement and bankruptcy mechanisms.<sup>47</sup> He reasoned from comparative historical research that interest groups, cultural preferences, or even historical coincidence generate institutional inertia that prevent far-reaching change. Even where socially efficient reforms are available, existing institutions continue to shape the processes of socioeconomic change.

His views persuaded legal assistance programs in socialist-transforming Europe and East Asia (including Vietnam) to concentrate resources to refashion (capacity building) institutions into a Western legal mould.<sup>48</sup> As we shall see in subsequent chapters, legal aid programs in Vietnam aim to perfect legislative drafting techniques, strengthen the courts and legal training.<sup>49</sup> Strong theoretical and empirical evidence that laws are not bare sets of prepositional rules and that legal transplants are most likely to produce desired outcomes in culturally compatible countries have not appreciably influenced the thinking of many foreign aid donors.<sup>50</sup>

## Legal evolution and transplantation theories

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

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<sup>47</sup> See Douglass North, 1990 *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, Cambridge, 118-121.

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

<sup>49</sup> See Per Bergling, 1997 'Theory and Reality in Legal Co-operation-The Case of Vietnam', in Per Sevastik ed., *Legal Assistance to Developing Countries*, Kluwer Law International, Dordrecht 64-66; Houngh Phuc Hiep et. al., 1994 'An Introduction to the Vietnamese Legal System', unpublished report, Swedish International Development Agency, 115-118.

<sup>50</sup> Legal advisers employed by donors are hostile to assaults on the theoretical validity of neo-liberalism. The Critical Legal Studies Movement attracts the most criticism for challenging the liberal values underlying conventional legal theory. See Brian Z. Tamanaha, 1995 'The Lessons of Law-and-Development Studies' 89 *American Journal of International Law* 470, 474-477. Also see Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, 2003 'The Transplant Effect' 51 *American Journal of Comparative Law* 163.

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

### Law as culture

Montesquieu is credited with the belief that law is culturally embedded or coupled. He opined that 'the political and civil laws of each nation ... must be so peculiar to the people for whom they are made; it is a very great accident should those of one Nation suit another'.<sup>51</sup> If laws mirror environmental forces, then legal change is path-dependent, oscillating with historical cycles.<sup>52</sup>

Activists resisting foreign codified laws have been historically attracted to Montesquieu's ideas. Fredrick Karl von Savigny during the early nineteenth century opposed the introduction of codified Roman law by Germanic Princes.<sup>53</sup> The reduction of laws into written codes assisted state centralism, because codification converted decentralised customary norms into state-controlled political weapons.<sup>54</sup> Later, Eugen Ehrlich's polemics against formalised codified law spearheaded political resistance by Transylvanians against remote Austro-Hungarian rulers.<sup>55</sup> By condensing masses of customary detail into texts, codes crystallised and legitimised the ideological boundaries and aspirations of the ruling elite.

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<sup>51</sup> Montesquieu, 1749, *supra* chapter three.

<sup>52</sup> Montesquieu believed that history moves in cycles influenced by environmental considerations such as, customs, geography, and climate. See Charles De Secondat Montesquieu, 1977 *The Political Theory of Montesquieu*, selected and translated by Melvin Richter, Cambridge University Press, New York.

<sup>53</sup> Invoking a deeply mystical notion of *Volksgeist* (the spirit of the people), von Savigny argued that law is much more than a collection of legal rules, it reflects and expresses an entire cultural outlook, shaping political and legal institutions. His writings opposed the conversion of 'living' traditional law into the fixed, systematic codes. See Frederick Karl Von Savigny, 1986 *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans., Abraham Hayward, Legal Classics Library Birmingham, Alabama, 30-38, 152-153.

<sup>54</sup> Codification encouraged German Princes to regard themselves as the sole sources of law and they flooded every aspect of life with regulations. The customary law notion that every thing is permitted unless prohibited transformed into the legislative notion that only things permitted are allowed. This *Rechtsstaat* lead to sign on road near Baden that read 'It is permitted to travel this road'. See J. Sheehan, 1982 *German Liberalism in the 19<sup>th</sup> Century*, University of Chicago Press, Chicago, 37.

In the United States, Oliver Wendell Holmes firmly anchored law to society when he wrote: 'the first requirement of a sound body of law is that it should correspond with the actual feelings and demands of the community, whether right or wrong'.<sup>56</sup> Over the intervening century a broad consensus evolved among legal-sociologists that laws reflect culture.<sup>57</sup> According to Lawrence Friedman's strong formulation:

As long as the country endures, so will its system of law, coextensive with society, reflecting its wishes and needs, in all their irrationality, ambiguity, and inconsistency. It will follow every twist and turn of development. The law is a mirror held up against life.<sup>58</sup>

A more representative account of the law as culture tradition understands law as changing over time in response to social developments. Laws do not always faithfully reflect society, because they are formulated to serve the interests of certain groups within society.

Sometimes laws attempt to engineer the worlds lawmakers would like to inhabit, such as Kemal Ataturk's modernisation of Turkey in the orderly image of the Swiss civil code.<sup>59</sup>

Laws may lag or precede social change.<sup>60</sup> But ultimately law is coupled to social action.

### **Transplanting culturally coupled law**

Pierre Legrand argues that legal rules may transfer, but legal cultures and meanings do not travel. Like theorists from the 'law in context' tradition, he thinks culture provides the wide framework giving meaning and sense to people's lives.<sup>61</sup> As Susan Silbey put it, 'law does more than reflect or encode what is otherwise normatively constructed; ... law is part of the

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<sup>55</sup> See Roger Cotterell, 1984 *The Sociology of Law*, Butterworths, London, 28-30.

<sup>56</sup> Oliver Wendell Holmes, 1881 *The Common Law*, Little, Brown and Co, Boston 41; also see Gerard Brennan, 1993 'Law in Search of a Principle' 9 *Journal of Contemporary Health Law and Policy* 259, 259. 'If the law is at odds with the values of society, the law falls into dispute and loses the force it needs to ensure conformity with its precepts.' These views owe much to the work of Karl von Savigny, who proposed that law is inseparable from the spirit of the people (Volkgeist). See Julius Stone, 1966 *Social Dimensions of Law and Justice* Maitland Publications, Sydney, 94-118.

<sup>57</sup> As discussed in greater detail below, Alan Watson is a notable dissenter.

<sup>58</sup> Lawrence Friedman, 1985 *A History of American Law*, 2<sup>nd</sup> ed., Simon and Schuster, New York 12.

<sup>59</sup> K. Lipstein, 1957 'Conclusions' 9 *International Social Science Bulletin* 70, 72.

<sup>60</sup> See Richard Abel, 1982 'Law as Lag: Inertia as a Social Theory of Law' 80 *Michigan Law Review*, 785, 790.

<sup>61</sup> See Pierre Legrand, 1997a 'The Impossibility of Legal Transplants' 4 *Maastricht Journal of European Comparative Law* 111, 119; Pierre Legrand, 1997b 'Against a European Civil Code', 60 *Modern Law Review* 44; Pierre Legrand, 2001 'What "Legal Transplants"', in David Nelken and Johannes Feest eds., *Adapting Legal Culture*, Hart Publishing Oxford, 55-68.

cultural process that actively contributes in the composition of social relations'.<sup>62</sup> In short, law and culture act on each other.

If laws are culturally specific, 'a crucial element of the ruleness of the rule—its meaning—does not survive the journey from one legal culture to another'.<sup>63</sup> Legrand observed that after transplantation laws might look the same, be administered by similarly configured institutions, but be implemented by officials with radically different legal mentalities or epistemologies.<sup>64</sup> It follows that socially and environmentally untenable legal transplants are not only ineffective or short-lived, they may stimulate destabilising tensions that cause greater problems than those the transplants were intended to rectify.<sup>65</sup> For Legrand this comes about because the legal culture (or the mentalities) in recipient countries reads imported legal texts from new perspectives, reconstructing their original meaning.

Compatible legal epistemologies are thus necessary for effective legal transfers. Donor and host country legal cultures must 'fit'.

Legrand's claim that cultural differences are unbridgeable fails to account for legal transplantation experiments that proceeded rapidly and smoothly.<sup>66</sup> He assumes that legal epistemologies are slow to change. Some research supports this view, however, there are other examples where basic legal epistemologies changed relatively quickly—within a generation. This implies that some laws are less coupled to social processes than others and are thus more easily transplanted. Recognising the possibility of legal transferability, allows law a limited autonomy.

## Legal autonomy

Undoubtedly the most extreme articulation of legal autonomy is found in the works of Allan Watson.<sup>67</sup> His complex arguments are categorised by some commentators into

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<sup>62</sup> Susan Silbey, 1992 'Making a Place for a Cultural Analysis of Law' 17 *Law and Social Inquiry* 41. Also see Clifford Geertz, 1983, *Local Knowledge: Further Essays in Interpretive Anthropology*, Basic Books, New York, 167, 175-215.

<sup>63</sup> Pierre Legrand, 1997a *supra* 119.

<sup>64</sup> Legal epistemologies are the historically conditioned, deeply rooted attitudes that influence the way officials use law to find reality. See Peter de Cruz, 1999 *Comparative Law in a Changing World*, 2<sup>nd</sup> ed., Cavendish Publishing, London, 214-216.

<sup>65</sup> See Tahirih V. Lee, 1993 'Risky Business: Courts Culture, and the Market Place', 47 *University of Miami Law Review* 1335, 1338 (transplanted law has the capacity to create 'chaos'); M. Radetzki, 1994 'From Communism to Capitalism in Laos: The Legal Dimension' 34 *Asian Survey* (9) 802.

<sup>66</sup> See Thirih V. Lee, 1993, *supra* 1335-1414.

<sup>67</sup> Alan Watson's voluminous writings and shifting interpretations about the relationship between law and society make it difficult to confidently state his position on legal transplanting. For a good synthesis of Watson's protean utterances see William Ewald, 1995 'Comparative Jurisprudence (II): The Logic of Legal

‘strong’ and ‘weak’ propositions. The strong Watson maintains that transplants are determined by a small group of professional elites (composed of lawyers) who borrow laws without considering what the social context requires. Processes of change are endogenous, he believes, because ‘to a large extent law possesses a life and vitality of its own; there is no extremely close, natural or inevitable relationship between law, legal structures, instruments and rules on the one hand and the needs and desires and political economy of the ruling elite or of members of the particular society on the other hand’.<sup>68</sup> Guided by lawyers, autonomous laws operating beyond the realm of social needs transfer freely across cultural barriers.

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

- The growth of law is primarily attributable to continuous recycling and borrowing legal transplants. Most legal development has evolved through historical processes without reference to social, political or economic factors.<sup>69</sup>
- Social needs do not inevitably affect the transferability of borrowed laws.
- The mechanisms regulating legal borrowing are controlled by legal professional elites such as legal drafters, judges and jurists.

Watson has written voluminous historical studies seeking to demonstrate the first proposition that legal borrowings are the ‘most fertile’ source of legal change in the Western world.<sup>70</sup> The gradual acceptance of Roman law in Europe, for example, began when Germanic tribes in the second and third centuries borrowed Roman laws and was

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Transplants’, 43 *American Journal of Comparative Law* 498-502. Also see Roger Cotterrell, 1997 ‘The Concept of Legal Culture’ in David Nelken ed., *Comparing Legal Cultures*, Dartmouth, Aldershot, 70, 76-84.

<sup>68</sup> Alan Watson 1978, *Comparative Law and Legal Change*, 37 *Cambridge Law Journal* 313, 314-315.

<sup>69</sup> Although Watson argues that there is no *inherent* correlation between law and society, this does not mean that there is *no* correlation.

<sup>70</sup> Watson has authored over fifty books and hundreds of articles chronicling a rich history of legal transplants. See e. g. Alan Watson, 1985 *The Evolution of Law*, John Hopkins University Press, Baltimore, 94; Alan Watson, 1993 *Legal Transplants: An Approach to Comparative Law*, 2<sup>nd</sup> ed., University of Georgia Press, Athens 95; Alan Watson, 1996 ‘Aspects of the Reception of Law’ 44 *American Journal of Comparative Law* 335, 346-350.

completed when twelfth century European scholars received the legal *Digestes* compiled by Roman jurists under Justinian (527-565 CE).<sup>71</sup>

To support the second proposition, Watson attributes successful cross-cultural borrowing to the gradual separation of law from everyday culture. If laws ever reflected the spirit of peoples and nations, a long-term process of social differentiation and internationalisation has de-coupled this linkage, making law ever more remote as it becomes a sophisticated regulator of commerce. Distancing occurs every time lawmakers borrow legal principles from within their own legal system—by analogy—or from other systems.<sup>72</sup> Once divorced from society, laws can successfully transplant between politically, culturally and economically different countries.<sup>73</sup>

The third proposition arises from Watson's belief that professional lawyers can imitate and adopt laws without using social, political and economic realities to justify their legal opinions. According to Watson, lawyers borrow what seems comfortable, familiar and prestigious from the legal tradition in which they were trained.<sup>74</sup> Legal reasoning is highly abstract, remote in appearance from social factors, and has a life of its own.<sup>75</sup>

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<sup>71</sup> Some historians contradict this account, pointing to the struggle against 'corrupting' Roman law still raging five hundred years later during Frederick Karl von Savigny's time. See Eikema Hommes and Jan Van Hendrik, 1979 *Major Trends in the History of Legal Philosophy*, North-Holland Pub. Co., Amsterdam, 198; G. Strauss, 1986 *Law, Resistance and the State: The Opposition to Roman Law in Reformation Germany*, Princeton University Press, Princeton, N.J. For a criticism of Alan Watson's selection of historical facts see William Ewald, 1995 *supra* 489.

<sup>72</sup> See generally, Alan Watson, 1996 *supra* 335.

<sup>73</sup> As highly edited versions of reality, Watson believed that codified laws are easier to borrow than common law or customary rules. This view accords with the civilian legal tradition that is inclined to equate law with legislation. In their reverence for legal codes, civilian lawyers are more prepared than 'rule-skeptical' common lawyers to assume that codified legal principles are transplantable. See Alan Watson, 1985 *supra* 118. Watson was clearly influenced by the way the Napoleonic Code's has transferred among European countries. Like European civilian lawyers, he tends to locate law in legislation. In contrast, common lawyers are more accustomed to complex and vague case law and accordingly pay greater attention to context. See John Merryman, 1978 'On the Convergence (and Divergence) of the Civil Law and the Common Law', in Mauro Cappelletti ed., *New Perspectives for a Common Law of Europe*, Sijhoff, Leyden, 223. Those cautioning against legal transplantation often are familiar with both civil and common law perspectives. See e. g. Pierre Legrand, 1997a *supra* 119; Gunther Teubner, 1998 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences', 61 *The Modern Law Review*, 11; Otto Kahn-Freund, 1974 'On Uses and Misuses of Comparative Law', 37 *Modern Law Review* 1, 27. Also see Ann Seidman and Robert Seidman, 1994 *State and Law in the Development Process*, St Martins Press, New York, 46; Paul Edward Geller, 1994 'Legal Transplants in International Copyright: Some Problems of Method' 13 *Pacific Basin Law Journal* 199, 203-207.

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

<sup>75</sup> For Watson:

Though insisting that law is not part of culture, Watson says that 'legal development is determined by their [sic. lawmakers'] culture; and social, economic, and political actors impinge on legal development through their consciousness'.<sup>76</sup> In other words, law is culturally coupled to the 'elite groups who in a particular society have their hands on the levers of legal change'.<sup>77</sup> Beyond this professionalised sphere law has de-coupled from cultural influences.

Watson's theories only address one part of the legal transplantation puzzle. They examine why elites select foreign laws, but say little about the effects imports have on social change—the implementation and reception of borrowed law.<sup>78</sup>

Gunther Teubner also maintains that laws have largely (though not entirely) de-coupled from their social moorings.<sup>79</sup> Despite sharing analogous views about legal autonomy, Teubner's theoretical explanation for reaching this conclusion could hardly differ more from Watson's vague historicism. Teubner reasons through autopoiesis theory, a complex cluster of ideas based on biological research into self-replicating organic sub-systems. 'Autopoieses' arose from investigations into 'homeostasis', which are natural biological states kept stable by complex systems of information and control, such as the chemical messages in cells.<sup>80</sup> Humberto Maturana generalised a systems theory to explain homeostasis in the biological world, but also raised the intriguing question whether the dynamics of human society are also determined by autopoiesis.<sup>81</sup> Taking up this inquiry, Niklas Luhmann used autopoiesis to explain why people within institutions such as companies, political bodies or universities create their own kind of reality and meanings.<sup>82</sup>

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

Watson, 1978 *supra* 313, 315. Also see Kenneth Pennington, 1997, 'The Spirit of Legal History', 64 *University of Chicago Law Review* 1097, 1110-1112.

<sup>76</sup> Alan Watson, 1985 *supra* 118.

<sup>77</sup> Alan Watson, 1991 *Legal Origins and Legal Change*, Hambledon Press, London, 100.

<sup>78</sup> Nelken points out that when Watson's work is stripped of its anti-mirror theory polemic, it only differs from mirror theorist in the ease with which he thinks laws can transplant. See David Nelken, 2001a, 'Towards a Sociology of Legal Adaptation', in David Nelken and Johannes Feest eds., *Adapting Legal Cultures*, Hart Publishing, Oxford, 12-15.

<sup>79</sup> See Gunther Teubner, 1998 *supra* 11-32; Gunther Teubner, 1997 "'Global Bukowina": Legal Pluralism in the World Society' in Gunther Teubner ed., *Global Law Without States*, Dartmouth, Aldershot, 3-22.

<sup>80</sup> See Humberto Maturana and Francisco Varela, 1980 *Autopoiesis and Cognition*, D. Reidel, Dordrecht, 78-82.

<sup>81</sup> Id. 118.

<sup>82</sup> See Niklas Luhmann, 1985 *A Sociological Theory of Law*, Routledge, London; Niklas Luhmann, 1988 'The Unity of Legal System' in Gunther Teubner ed., *Autopoietic Law: A New Approach to Law and Society*, Walter de Gruyter, Berlin, 21-35.

In his estimation communication takes the place of metabolic pathways in creating autopoiesis within human social systems. Virtually the whole of society is fragmented into institutions that use language to communicate in their own way and perceive reality from their own perspective. Society is divided into functionally differentiated social systems with each subsystem undergoing autopoietic development. The legal sub-system is no exception. It too is constructed by particular sets of self-referential and self-reproducing discourses. Teubner has taken from autopoiesis theory the notion that legal sub-systems have de-coupled from other social sub-systems. Viewed from this perspective, laws transfer easily between legal sub-systems, because lawyers in different countries understand each other. But in contrast to Watson's free-wheeling understanding of legal transplantation, Teubner thinks that legal sub-systems are influenced by external 'perturbations', which, if constantly repeated, will shape the way legal thinking evolves. Legal transplants thus act like 'legal irritants' in host-country legal systems. They 'unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and the internal context will undergo fundamental change'.<sup>83</sup>

### **Limited or bounded legal autonomy**

Otto Kahn-Freund contributed the important insight that 'there are degrees of transferability'.<sup>84</sup> He agreed with Watson that it is naïve to speak of law mirroring society, but unlike Watson he believed that legal autonomy is highly selective. Kahn-Freund reasoned that because most laws are deeply embedded in their social and institutional matrices 'we cannot take for granted that rules or institutions are transplantable'.<sup>85</sup> Yet, he did not fully accept that laws are non-transferable.

In Kahn-Freund's estimation transferability depends on the interconnectedness between transplanted laws and host-country political, legal, economic and cultural institutions.<sup>86</sup> At one end of a continuum, a 'flattening out of economic and cultural diversity' meant that some laws de-coupled from society and were relatively easy to transplant.<sup>87</sup> At the other end, laws 'designed to allocate power, rule-making, decision-making, above all, policymaking

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<sup>83</sup> Teubner, 1998 *supra* 12.

<sup>84</sup> *Id.* 6.

<sup>85</sup> Otto Kahn-Freund, 1974, *supra* 27.

<sup>86</sup> See Otto Kahn-Freund, 1978 'On the Uses and Misuses of Comparative Law' in Otto Kahn-Freund ed., *Selected Writings* Stevens, London, 298-303.

<sup>87</sup> Otto Kahn-Freund, 1974 *supra* 7-11.

power' remained deeply embedded in social institutions, and were consequently unlikely to take root in foreign legal terrain.

Writing before the collapse of the Soviet Union, he unsurprisingly considered the gulf between communist and non-communist political-legal ideology a significant (but not insurmountable) barrier to legal transplanting.<sup>88</sup> When comparing East and West Germany, for example, he observed that practical problems of housing, town planning and pollution were similar, but different political and legal paths were followed in brokering solutions to these issues. First, the political role of law differed. Contrasting with Western inalienable rights, normative laws in East Germany were treated as instruments to implement party policy. Second, the regulatory matrix differed. Public law exercised through bureaucratic discretion supplanted and subordinated private rights in East Germany. Robust administrative courts checked these processes in the West. Third, in the divided Germany, non- or quasi-state organisations such as trade unions and employer associations assumed quite different roles in making and maintaining laws and legal institutions.

Kahn-Freund claimed that the environmental, socioeconomic and cultural impediments to transferability posited by Montesquieu have lessened in importance over time, while political elements have gained significance.<sup>89</sup> He advised anyone contemplating transplanting Western commercial laws into communist systems, to ascertain whether the legal imports owed their creation to Western legal and sociopolitical power structures and whether these or functionally equivalent structures exist in the communist country. This inquiry is especially pertinent to our study, for as subsequent chapters demonstrate, law reform in Vietnam has superimposed a Western legislative template over enduring socialist institutions.

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

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

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<sup>88</sup> Some Western laws were successfully transferred into communist Eastern Europe. See G. Ajani, 1995 *supra* 93-117.

- Sociopolitical institutional factors determine the degree of coupling between law and society; they are the political role of law, the distribution of state power, and pressure from non-state institutions.

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

Though portrayed as adversaries by some commentators, Legrand, Watson and Kahn-Freund occupy different positions on the same theoretical continuum.<sup>90</sup> Legrand is theoretically closest to Marx and Weber's deterministic link between law and the 'felt social needs', while Kahn-Freund and especially Watson lean towards legal autonomy. Their theoretical approaches to legal autonomy induce different analytical positions concerning legal transplantation.

In treating laws as cultural artifacts, Legrand attributes non-transferability to disjunctions between donor and host-country legal epistemologies, myths and narratives. Occupying the other end of the same theoretical continuum, Watson asserts that autonomous laws readily transfer between globalised legal elites, and only encounter resistance from organised pressure groups. Yet he admits 'some degree of correlation must exist between law and society ...[though] legal rules by no means accurately reflect the needs and desires of society ...'<sup>91</sup> Legrand and Watson disagree about the extent to which host-country culture affects legal transferability, but agree that congruence is important in some social spheres such as professional legal culture.

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

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<sup>89</sup> He believed that industrialisation, urbanisation, and global communications had 'flattened' some of Montesquieu's inhibiting factors. Kahn-Freund, 1974 *supra* 9.

<sup>90</sup> For a discussion that treats Watson and Kahn-Freund as adversaries see Steven J. Heim, 1996 'Predicting Legal Transplants: The Case of Servitudes in the Russian Federation' 6 *Transnational Law and Contemporary Problems* 187, 190-192; William Ewald, 1995 *supra* 498-502; Lorraine McDonough, 1992 'The Transferability of Labor Law: Can an American Transplant Take Root in British Soil?' 13 *Comparative Labour Law Journal* 504, 505-508.

<sup>91</sup> See Alan Watson, 1978 *supra* 313, 321.

autopoietic theory and some from linguistic theory is used in this study to overcome shortcomings in conventional sociological analysis.

Kahn-Freund proposed a general theoretical architecture to guide research into legal transplantation. He considered Watson's analysis incomplete, because it did not fully account for resistance between donor and host-country political, economic and legal systems. Rectifying this oversight, he sought to identify the power structures and social groups within host countries that most commonly interact with imported law.

Rather than a fully realised analytical theory, Kahn-Freund's propositions resemble a collection of associated ideas. His analytical architecture is suggestive: transferability is affected by political structures, cultural precepts and organised pressure groups.

Unfortunately these middle-level propositions are too abstract to provide a methodology for exploring legal borrowing. For example, it is difficult to compare the political role of law, if political values differ between and within donor and host countries. To refine and refocus Kahn-Freund's open-ended analysis, this study has turned to insights from Legrand, Watson, Teubner and other theorists.

## **Synthesising a transplantation methodology**

Kahn-Freund's approach to legal transplanting is reducible to a two-step process. The first step ascertains the relationship between legal transplants to sociopolitical precepts and structures in donor countries. The second step assesses legal transferability by comparing the congruence between sociopolitical precepts and structures in donor and host countries.<sup>92</sup>

### **Political and legal ideology**

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

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<sup>92</sup> See Kahn-Freund, 1974 *supra* 11.

organs to crystallise state policy into law, but different political orientations excite wildly divergent views regarding the role and content of law.<sup>93</sup>

One way of comparing the role of law in different countries is to consider the compatibility between political-legal ideology in donor and host countries. Ideology assists cross-country comparison by stripping complex patterns of political thought down to core issues concerning the aspirational role of law. Recent socio-legal research has shown that political-legal ideology influences the adoption and implementation of borrowed laws. For example, Yves Dezalay and Bryant Garth argue that the ideological contests underlying the power struggles or 'palace wars' among Latin American elites shaped the selection and adaptation of borrowed laws.<sup>94</sup>

In searching for reasons why the public accepts legal and political institutions that clearly benefited elites, Antonio Gramsci deduced that law is both ideologically constructed and a bearer of ideology.<sup>95</sup> Contemporary socio-legal theorists have expanded Gramscian ideology to encompass contested areas or frames of reference through which people think and act.<sup>96</sup> Rather than concealing reality, elites maintain power by using ideology to make

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<sup>93</sup> For example, the politicisation of state apparatus permitted in Marxist-Leninist legal systems is incompatible with Western liberal mythology that the 'rule of law' requires the separation of party and state. Kahn-Freund wrote that: '[problems such as those of housing, of town planning, of pollution may be no different in Russia or Spain or South Africa from what they are in this country [Britain] or the United States, but the procedure of arriving at a solution, the form of discussion, and the role of the individual in that discussion are different.' Otto Kahn-Freund, 1974 *supra* 11.

<sup>94</sup> See Yves Dezalay and Bryant Garth, 2001 *supra* 241, 246-257. Also see Mark Van Hoecke and Mark Warrington, 1998 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', 47 *International and Comparative Law Quarterly* 495, 516-519.

<sup>95</sup> Influenced by Lenin's proposition that legal systems are integral to and characteristic of capitalism, many early Marxist writers emphasised the oppressive and coercive nature of law. As a Marxist, Gramsci worked through the Marxist base-superstructure metaphor and consequently located clusters of social interests, the way people make sense of the world, in and around economic relations. Marx's preoccupation with commodity relationships is not, however, a pivotal aspect of Gramsci's theories. They apply equally well to a broad range of social and psychological ordering phenomena, such as gender, race and social interests. Others argue that Gramsci's theories presuppose legal systems that oscillate between coercion and consent according to struggles between capital, labour and the state. Alan Hunt in particular believes that hegemony results in an 'undesirable bifurcation in our approach to law' since the relationship between coercion and consent is not adequately established. But this claim is part of a general criticism of legal theory: that it fails to account for the complex relationship between law and social change. See Alan Hunt, 1982, 'Dichotomy and Contradiction in the Sociology of Law', in P. Beirne and R. Sharlet eds., *Marxism and Law*, Oxford University Press, Oxford, 87-88.

<sup>96</sup> As a facet of neo-Marxist theory, contemporary ideology theory treats law as a type of social relation. Law exists by and through its interaction with other forms of social relations and it is not, as Alan Watson contends, largely autonomous with a life of its own. See Alan Hunt, 1993 *Exploration in Law and Society* Routledge, London 149-150; Maureen Cain, 1983 'Gramsci, The State and the Place of Law', in David Sugerman ed., *Legality, Ideology and the State*, London, Academic Press, 111-115; Alan Hunt, 1985, 'The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law', 19 *Law Society Review* 11, 13-19.

laws and institutional processes appear natural, normal and right.<sup>97</sup> Ideology has the 'capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live'.<sup>98</sup> Gramscian theorists argue that dominant ideologies contain the rules and precepts used by elites to justify and maintain their control over sociopolitical structures. A survey conducted by the International Finance Corporation in Vietnam, for example, disclosed strong causal links between official ideological antipathy to the private sector and popular opinion.<sup>99</sup> Even entrepreneurs were convinced that the state sector is intrinsically superior.

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

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

<sup>97</sup> Contemporary theorists rejected Gramsci's orthodox Marxist belief that ideology is purposely used by the elite to cloak their monopolization of resources. See Pierre Bourdieu, 1977 *Outline of a Theory of Practice*, Richard Nice, trans., Cambridge University Press, Cambridge; Roger Cotterrell, 1997 'The Concept of Legal Culture', in David Nelken ed., *Comparing Legal Cultures*, Dartmouth, Aldershot, 13-32.

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

<sup>99</sup> MPDF, 1999 'Private Companies in Vietnam: A Survey of Public Perceptions', Mekong Project Development Facility, July, Hanoi, 10-16; also see Nhu-Ngoc T. Ong, 2001 'Four Vietnamese Generations: Support for Democracy and Market Economy' unpublished paper, Center for the Study of Democracy, University of California, Irvine Cal. 16.

<sup>100</sup> Most of Gramsci's writings on hegemony are found in Antonio Gramsci, 1971 *Selections from Prison Notes*, Quintin Hoare and G. Nowell-Smith eds., Lawrence and Wishart, London; Antonio Gramsci, 1978 *Selections from Political Writings 1921-1926*, Quintin Hoare ed., University of Minnesota Press, Minneapolis; also see Maureen Cain, 1983 *supra* '98-99.

<sup>101</sup> Goran Therborn 1980 *The Ideology of Power and the Power of Ideology*, NLB, London, 103.

the dominant ideological stream. Two, viable transplants require ideologies in host countries that make imported legal principles appear fair and acceptable to state officials and societal interest groups. For example, core capitalist precepts such as property and contractual rights require a dominant ideology that makes private resource allocation appear fair and reasonable.<sup>103</sup> Three, and following from the second point, Gramsci's theory opens the discussion to the possibility that central elites and the public (or discrete communities) have competing ideological outlooks concerning the efficacy and desirability of transplanted law. For example, chapter seven argues that elite state officials in Vietnam support liberal market-entry rules, whereas middle-level officials are ideologically opposed to facilitative regulation. Gramscian ideological theory is considered more fully in chapter three.

### **State power-distribution**

Kahn-Freund also believed that transplanted laws are sensitive to the ways legislators, bureaucrats and judges use state power to make and enforce law.<sup>104</sup> Most nation-states possess similar political-legal institutions such as parliaments, courts and executive agencies. But macro-organisational frameworks say little about internal power-distribution structures. What makes state institutions distinctive are the rules, precepts and habits residing inside and outside formal structures that guide the distribution of state power.<sup>105</sup> Experience from the Russian Federation, for example, suggests that imported laws promoting legal equality between state and private actors were initially blocked by pre-existing administrative, criminal and economic legislation promoting state allocation.<sup>106</sup> Reforms that repealed incompatible legislation did not facilitate imported rules, because state officials implemented imported laws with deeply engrained socialist attitudes to

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<sup>102</sup> See Gramsci, 1971 *supra* 321.

<sup>103</sup> See Barrett McCormick, 1999 'Political Change in Vietnam: Coping with the Consequences of Economic Reform', in Anita Chan et. al. eds., *Transforming Asian Socialism: China and Vietnam Compared*, Allen and Unwin, Sydney 164-169. Also see Paul Ricoeur, 1994 'Althusser's Theory of Ideology', in Gregory Elliott ed., *Althusser: A Critical Reader*, Blackwell, Oxford 51-60.

<sup>104</sup> See Kahn-Freund, 1974 *supra* 12.

<sup>105</sup> Gianfranco Poggi, 1978 *The Development of the Modern State: A Sociological Introduction*, Stanford, Stanford University Press, 1; also see James March and Johan Olsen, 1989 *Rediscovering Institutions: The Organizational Basis of Politics*, MacMillan, New York, 17-22.

<sup>106</sup> See Gianmaria Ajani, 1995 *supra* 93.

private property.<sup>107</sup> For similar reasons, American competition laws are difficult to replicate in culturally different European jurisdictions.<sup>108</sup>

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

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

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

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<sup>107</sup> As Carol Rose observed, laws based on 'capitalist property have a kind of moral and cultural infrastructure that we may have mistakenly thought was simply natural, whereas in fact it is learnt through sustained commercial practice'. Carol Rose, 1996 'Propter Honoris Respectum: Property As the Keystone Right?' 71 *Notre Dame Law Review* 329. Also see Thomas Waelde and James Gunderson, 1994 *supra* 347.

<sup>108</sup> See Spencer Weber Waller, 1997 'Comparative Competition Law as a Form of Empiricism' 23 *Brooklyn Journal of International Law* (2) 455, 461-464.

<sup>109</sup> See e. g., Roman Tomasic, 1994 'Company Law and the Limits of the Rule of Law in China', 4 *Australian Journal of Corporate Law* 487.

<sup>110</sup> John Bell, 1995 'English and French Law—Not So Different?' *Current Legal Problem*, 63; also see Susan Silbey, 1992 *supra* 41.

<sup>111</sup> See Hoecke and Warrington, *supra* 534-535. Also see Pierre Legrand, 1996 *supra* 54-56.

<sup>112</sup> Lawrence M. Friedman, 1997 'The Concept of Legal Culture' in David Nelken ed., *Comparing Legal Cultures*, Dartmouth, Aldershot, 34-36; A Sarat and T R Kearns, 2001 'The Cultural Lives of Law', in A Sarat and T. R Kearns eds., *Law in the Domains of Culture*, University of Michigan Press, Ann Arbor, 1; C Pennisi, 2001 'Sociological Uses of the Concept of Legal Culture', in *Law in the Domains of Culture*, *supra* 107.

<sup>113</sup> 'Culture' is a term that is repeatedly used without meaning much of anything at all, a vague gesture toward a dimly perceived ethos.... S. Greenblatt, 1997 'Culture' in F. Lentricchia and T. McLaughlin eds., *Critical Terms for Literary Study*, University of Chicago Press, Chicago, 225.

where law is less socially defined—analysis does not progress far without also considering other sources of legitimacy and authority.

A related concern is that within common borders, it is no longer as clear as it once seemed that central representations of culture universally reflect core cultural values.<sup>114</sup> Some theorists, such as Gunther Teubner, argue that it no longer is possible to talk about ‘the totality of society’, since wider cultures have ‘fragmented [into a] multiplicity of discourses which “today” constitute society’.<sup>115</sup> Although he was describing social differentiation in Western countries, his general thesis resonates in Vietnam, where highland-lowland and urban-rural divides fragment legal values. If core national values are difficult to ascertain, transnational cultural comparison becomes increasingly more complex and demands an analytical approach that searches for cultural difference in the diverse sub-systems the constitute societies.

One way to harness legal culture for our study is to focus on its capacity to shape world views. As Legrand noted, legal culture orders perceptions of reality, moulding the ‘right way’ to think and act.<sup>116</sup> Kahn-Freund made a similar observation when he asserted that civilian lawyers mainly argue from principle, while common law lawyers use precedent. Each tradition predisposes legal argument towards different realities. What differs are mentalities or epistemologies, rather than legal doctrines and practices.<sup>117</sup> In other words, it is in part the epistemological assumptions regarding rationality, efficiency and merit that make legal systems distinctive.

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

We need a framework in which to place and compare different epistemological understandings about imported laws. Discourse analysis is promising because legal transplantation is largely (though not entirely) a discursive process.<sup>118</sup> Communication is vital to the selection, formulation and implementation of foreign laws. Understanding regulatory conversations has the potential to furnish insights into the epistemological

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<sup>114</sup> See generally, Oscar Schachter, 1997 ‘The Decline of the Nation-State and its Implications for International Law’ 36 *Columbia Journal of Transnational Law* 7, 8-15.

<sup>115</sup> Teubner, 1998 *supra*, 21.

<sup>116</sup> See David Nelken, 2001b *supra* 282-287.

<sup>117</sup> See Pierre Legrand, 1996 *supra* 60-65.

settings and 'inner life' of those processes.<sup>119</sup> Discourse analysis provides a set of tools to analyse language and communication and assess whether officials involved in legal borrowing are likely to learn from foreign ideas.

In studies of law, discourse analysis is a relatively recent theoretical development.<sup>120</sup> The central propositions underpinning discourse analysis are that 'communicative interaction produces meaning, and that understanding is situated.'<sup>121</sup> Put differently, shared epistemological and tacit understandings used in conversations convey legal meaning. Meaning is inter-subjective, in the sense that shared understandings are largely (though not entirely) generated within epistemologically compatible social or organisational groups. For example, lawyers trained in common law statutory interpretation techniques are likely to reach similar conclusions about the meaning of particular laws. More generally the way people interpret laws or legal practices is determined by their knowledge of technical languages, epistemological conventions and tacit understandings about law.

Discourse analysis shares with Gramscian theory the notion that there are no meta-ideologies (or meta-discourses). Ideological regions and discourses compete with each other. Their point of departure is that discourse analysis includes non-aspirational communication. According to discourse theorists, social behaviour can only be interpreted by exploring the meanings that gives rises to action.<sup>122</sup> Meaning is not something that is discovered, but rather it is constructed through discourse and other forms of expression. For the purposes of this study discourse is taken to mean 'all forms of spoken interaction,

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<sup>118</sup> Anthony Beck, 1994 'Is Law an Autopoietic System?', 14 *Oxford Journal of Legal Studies* (3) 401, 404-415; Gunther Teubner, 1993 *Law as an Autopoietic System*, Blackwell, Oxford, 69; Niklas Luhmann, 1987 *A Sociological Theory of Law* trans., Elizabeth King and Martin Albrow, Routledge, London.

<sup>119</sup> For a discussion showing the links between legal culture and regulations see E. Meidinger, 1987 'Regulatory Culture: A Theoretical Outline' 9 *Law and Policy* 355.

<sup>120</sup> It is beyond the purposes of this study to survey this highly contested area, rather, we shall focus on the principle claims made about the relationship between discourse and social practices and show how they illuminate legal transplantation. For a general review of law and communication see David Nelken, 1996 'Law as Communication: Constituting the Field' in David Nelken ed., *Law as Communication*, Dartmouth, Aldershot, 3-30.

<sup>121</sup> Julia Black, 2002 'Regulatory Conversations' 29 *Journal of Law and Society* (1), 163, 174. Also see J. Paterson and G. Teubner, 1998 'Changing Maps: Empirical Legal Autopoiesis' 7 *Social and Legal Studies*, 451-486; T. A. van Dijk, 1997 'The Study of Discourse' in T. A. van Dijk ed., *Discourse as Structure and Process* Sage, London, 3-20..

<sup>122</sup> See Arthur J. Jacobson, 1989 'Autopoietic Law: The New Science of Niklas Luhmann' 87 *Michigan Law Review* 1647. Also see Gunther Teubner, 1993 *Law as an Autopoietic System*, Blackwell, Oxford, 69.

formal and informal, and written texts of all kinds', especially political, economic, moral, cultural and legal modes of communication.<sup>123</sup>

As previously mentioned, Teubner used Luhmann's autopoiesis theory to circumvent methodological problems with conventional socio-legal approaches to legal transplantation. Luhmann contributed the valuable insight that through a process of functional differentiation social discourse has fragmented into 'discrete discursive systems'.<sup>124</sup> He argues that legal, economic and ethical discourses have become so self-referential that they understand their environments from internal frames of reference.<sup>125</sup> This novel way of understanding law shows how epistemological assumptions in different discourses have fragmented the meaning of law and suggests reasons why laws do not easily transplant. While agreeing with his central premise, many discourse theorists believe that Luhmann's 'discrete discursive systems' overstates epistemological divisions within society.<sup>126</sup> They argue that a limited role for human agency and a lack of space for social interaction constrains the capacity for Luhmann's theory to explore the conflicts and negotiations that shape laws. As a corrective, they propose a less divided world where regulatory discourse exists in 'semi-autonomous', rather than 'fully-discrete', sub-systems. Although Jurgen Habermas is clearly influenced by Luhmann's systems theory, he is careful to avoid a holistic analysis of society. For him 'law is not a narcissistically self-enclosed system', but rather a non-generalised phenomenon that waxes and wanes in rhythm to changes in social discourse.<sup>127</sup>

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<sup>123</sup> See J. Potter and M. Wetherel, 1987, *Discourse and Social Psychology*, Blackwell, London, 7.

<sup>124</sup> See Niklas Luhmann, 1987 'The Unity of the Legal System' in Gunther Teubner ed., *Autopoietic Law: A New Approach to Law and Society*, W. de Gruyter, New York, 12.

<sup>125</sup> See Anthony Beck, 1994 *supra* 404-415; Hugh Baxter, 1998 'Autopoiesis and the "Relative Autonomy" of Law', 19 *Cadozo Law Review*, 1987.

<sup>126</sup> See Anthony Beck, 1994 *supra* 404-415; Hugh Baxter, 1998, *supra* 1987; Robert Post, 1991 'The Relatively Autonomous Discourse of Law', in Robert Post ed., *Law and the Order of Culture*, University of California Press, Berkeley, vii-ix; Alan Hunt, 1993 *supra* 166-167, 320. Habermas also argues for relative autonomy by saying that 'ordinary language' holds together the disparate discursive threads that are specific to each subsystem. See James Bohman, 1994 'Complexity, Pluralism and the Constitutional State: On Habermas's Faktizitat und Geltung' 28 *Law and Society Review* 897, 913-915.

<sup>127</sup> Habermas maintains that it is primarily through rational argument that members of society form the mutual understanding necessary to build the compromises that legitimise state enforcement of law. Legitimation becomes blocked when permitted forms of public debate are based on unqualified traditions, meta-physical beliefs, or ideology. Where discourse is less constrained, the contests and compromises needed to legitimise law collapse the gaps between state and societal values. See Jurgen Habermas, 1996 *Between Fact and norms: Contributions to a Discourse Theory of Law and Democracy*, Polity Press, Cambridge, 461. Also see Jurgen Habermas, 1987 *The Theory of Communicative Action*, vol. 2, trans. T. McCarthy, Beacon Press, Boston, 164-197.

'Semi-autonomous' discourse makes sense of law from internal frames of reference as well as from precepts that are selectively drawn from other discursive 'modes'. Discourse is 'semi-autonomous' in the additional sense that it is not directly determined by social conditions (i.e. mirror theory). What makes discourse modes distinctive is their orientation towards particular ways of ordering reality.<sup>128</sup> Each discourse mode has its own criteria or codes (epistemologies) for prioritising the relevance and value of external information. Groups simultaneously discussing the same law from different 'modes' may reach contradictory conclusions. For discourses to effectively convey legal meanings, they must share common or compatible criteria or modes of thinking. Discourse analysis is used in this study, because it suggests reasons 'why different legal cultures (and epistemologies) invest similar legal rules with different meanings'.<sup>129</sup>

There is another shortcoming with Teubner's use of autopoietic (discrete discursive systems) theory to analyse legal transplantation. David Nelken noted that in discrete discursive systems the 'legal mode' of thinking has reified from other social forces to the extent that it is primarily concerned with differences between legality and illegality.<sup>130</sup> Nelken believes that this narrow conceptualisation can hardly account for the rich and varied legal epistemologies that Legrand (and others) believe profoundly influence legal transplantation.

To some extent Nelken's criticism presents a caricature of Luhmann and Teubner's understanding of autopoietic theory. Teubner in particular recognises that most regulatory conversations are conducted in more than one mode of thought.<sup>131</sup> The difficulty for Nelken is that 'autopoietic theory would seem to be unable to recognise differences between legal discourses in different cultures except as differences between law and other social

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<sup>128</sup> See Angel R. Oquendo, 2002 'Deliberative Democracy in Habermas and Nino' 22 *Oxford Journal of Legal Studies* (2) 189, 205-206.

<sup>129</sup> Pierre Legrand, 1997a *supra* 119. Also see Susan Silbey, 1992 *supra* 41.

<sup>130</sup> See Nelken 2001b, *supra* 282-286. Nelken discussed Teubner's article Teubner, 1998, *supra* 11. Also see Roger Cotterrell, 2001 'The Representation of Law's Autonomy in Autopoiesis Theory' in Jiri Priban and David Nelken ed., *Law's New Boundaries: The Consequences of Legal Autopoiesis*, Ashgate, Aldershot, 90-94.

<sup>131</sup> See M. King 1993 'The Truth about Autopoiesis' 20 *Journal of Law and Society* 218, 224. Teubner's approach to discourse theory is influenced by Jurgen Habermas and Michel Foucault and he cannot be easily characterised as an Autopoietic theorist.

communications'.<sup>132</sup> Analytical problems might arise where what is considered legal in one culture differs radically from what passes for legal discourse in another society.

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

Discourse analysis offers a promising technique to dissect regulatory conversations about legal transplantation into constituent modalities.<sup>133</sup> For example, it is instructive to know whether foreign donors promoting legal transplantation think in a binary legal language that shares few points of reference with the political or nationalistic thinking informing Vietnamese approaches to law (see chapters five and six). It further suggests that officials controlling the levers of state power in recipient countries are most likely to learn from imported laws that are expressed in a cognisable mode. Applied flexibly and reflectively, discourse analysis will sensitise the study to the ways Vietnamese conceptualise transplanted law as something that does (or does not) or should (or should not) work.

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

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

<sup>133</sup> See M. King 1993, *supra* 223-224.

## Organised interest groups

Kahn-Freund identified the pressure exerted by organised interest groups as the third main factor conditioning legal transferability.<sup>134</sup> Social power structures not only influence legal transplantation in and through political systems, they also operate through non-state groups that support or oppose borrowed law. Writing about the transplantation of labour laws from the United States to Britain, he observed that the relationship between employer associations and unions strongly affected legal implementation.<sup>135</sup> Extra-legal collective bargains between capital and labor act as 'collective lawmaking', these struggles eventually develop normative codes that 'crystallise customs'.<sup>136</sup> Capital and labour interest groups decide whether to accept or resist borrowed labour law, Kahn-Freund argued, by reference to this body of 'crystallised customs' or 'unofficial law'.<sup>137</sup>

As players in the public arena, he believed that non-state interest groups such as economic, religious, cultural and charitable organisations influence lawmakers, and by extension legal borrowing. It follows that legal rules that rely on interest groups for support are particularly sensitive to legal transplantation.

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

<sup>134</sup> See Kahn-Freund, 1974 *supra* 12-14.

<sup>135</sup> Id. 3 18. Also see Lorraine McDonough, 1992 *supra* 507.

<sup>136</sup> See A. Flanders and H. Clegg eds., 1954 *The System of Industrial Relations in Great Britain*, Basil Blackwell, Oxford 58, 59; Otto Kahn-Freund, 1948 'Legislation Through Adjudication', 11 *Modern Law Review* 269.

<sup>137</sup> The cooperative relationships formed between states, employers and unions are termed state corporatism. For a detailed description see chapter four. Also see H. J. Wiarda, 1996, *Corporatism and Comparative Politics*, E. Sharpe, New York, 47-55.

<sup>138</sup> Watson refocused Kahn-Freund's broad propositions by identifying the sites where non-state interest groups are most likely to influence imported laws. He thought that 'pressure force' (the influence exerted by interest groups favouring legal importation) is determined by the social and economic status of those advocating legal reform. 'Felt needs' are the social or economic objectives that 'pressure forces' want to emphasise in borrowed laws. For example, foreign investors in Vietnam constitute a 'pressure force' that demanded the adoption of Western corporate concepts such as 'authorised', 'issued' and 'paid-up' capital. In this case the 'felt needs' were the desire to reduce bureaucratic regulation over foreign investment capital contributions. In this case the 'felt needs' were the desire to reduce bureaucratic regulation over foreign investment capital contributions. According to Watson, 'opposition forces' come into play where legal change threatens organised interests groups. He thought that 'pressure forces' were in reality more vocal than 'opposition forces', because those advocating change are generally better organised and resourced than broadly based groups disadvantaged by legal change.<sup>138</sup> Consider the introduction of tax concessions for foreign investors in the Vietnamese Foreign Investment Law 1987. Tax concessions benefited well-organised and articulate foreign investors (the pressure force), but disadvantaged numerous poorly organised and politically isolated domestic private businesses (opposition forces). See Watson, 1978 *supra* 324. Also see Phillips Fox, 2001 'Vietnam Legal Update', unpublished newsletter, April, 7. Interviews concerning the introduction of the Law on Foreign Investment 1987 with Luu Van Dat, Adviser to the Minister of Trade, Hanoi October 1997.

insistence that non-state groups are unlikely to support laws that conflict with underlying 'crystallised customs' or 'rules of the game'. Taking this argument further, relational theorists have convincingly demonstrated that non-state 'rules of the game' shape the development and implementation of law.<sup>139</sup> Simple 'one-shot' transactions require little ongoing cooperation and generally conform to standard contractual offer and acceptance legal doctrines. Long-term transactions, on the contrary, need sustained organisational cooperation through relational networks that bind contracting parties.

Research in Asia shows that relational networks are a potent regulatory force.<sup>140</sup> For example, in explaining the divergent forces shaping production in Japanese and American companies, Aoki identified a matrix of market institutions governing information systems, financial arrangements, corporate governance, industrial relations, contracting networks and cross-shareholding.<sup>141</sup> These relational configurations were considered every much as responsible for determining the rules of the game as transplanted American company laws and legal institutions.

Many of the disparate threads of relational theory are brought together in the notion of 'production regimes'. The sociologist Michael Burawoy coined the term to explain how manufacturing processes influence workplace ideology and politics.<sup>142</sup> His central argument is that production relationships are more than economic acts that shape material products, they also influence subjective perceptions about economic and legal institutions. By organising production through markets, they determine incentives and constraints, in other words the 'rules of the game'. Laws designed to operate in specific 'market frameworks', it

<sup>139</sup> See Stuart Macaulay, 1963 *supra* 55; Ian R. Macneil, 1978 *supra* 890-900.

<sup>140</sup> See e. g. Jane Kauffman Winn, 1994 *supra* 194-204; Harry Williams, 1998 'Property Reform and Legitimacy', 28 *Journal of Contemporary Asia* (16), 159; Robert Cooter and Janet T. Landa, 1984 'Personal Versus Impersonal Trade: The Size of Trading Groups and Contract Law' 4 *International Review of Law and Economics* 15, 16-19; Phillip Lawton, 1996 'Berle and Means, Corporate Governance and the Chinese Firm' 16 *Australian Journal of Corporate Law* (3) 348, 348-350; John O. Haley, 1997 'Relational Contracting: Does Community Count?', in Harold Baum ed., *Japan: Economic Success and Legal System*, de Gruyter: Berlin, 167, 167-180.

<sup>141</sup> See Masahiko Aoki, 1994 'The Japanese Firm as a System of Attributes: A Survey and Research Agenda', in Masahiko Aoki and Ronald Dore eds., *The Japanese Firm: The Sources of Competitive Strength* Oxford University Press, Oxford, 12-22, 27-28; also see Veronica L. Taylor, 1993 'Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan' 19 *Melbourne University Law Review* 352, 270-276.

<sup>141</sup> See C. J. Milhaupt, 1996 'A Relational Theory of Japanese Corporate Governance: Contract Culture and Rule of Law' 37 *Harvard International Law Review* (1) 3.

<sup>142</sup> See Michael Burawoy, 1985 *The Politics of Production: Factory Regimes under Capitalism and Socialism*, Verso, London 5-20.

follows, are unlikely to induce similar economic behaviour in new markets governed by different 'rules of the game'.<sup>143</sup>

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

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

## Working postulates

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

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

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<sup>143</sup> Personalistic relationships regulate commerce in every society, what distinguishes societies is the composition of relationships. See Milhaupt, 1996 *supra* 4-5; Boaventura de Sousa Santos, 1985 'On Modes of Production of Law and Social Theory' 13 *Journal of Sociology and Law* 299, 320-339.

2. Power-distribution: Legal transplants are sensitive to the ways legislators, bureaucrats and judges use state power to make and enforce law. The mentalities and processes informing lawmakers and enforcers profoundly influence the meanings given to legal transplants.
3. Pressure groups: Dialogical exchanges between lawmakers and non-state pressure groups influence the meanings given to imported law. Pressure groups are more likely to communicate unconventional or controversial ideas to lawmakers in relatively unmediated discursive environments.

The working postulates provide an analytical methodology that is applied in subsequent chapters as a heuristic guide to evaluate legal transplantation into Vietnam.<sup>144</sup>

## Methodological problems with the working postulates

### Comparative analysis and observer bias

In assessing the transferability of laws across cultural and political boundaries, transplantation analysis carries the risk of investing foreign (to the observer) subject matter with the significance it enjoys in the observer's country of origin. Cultural attribution or 'legal orientalism' obscures historical and cultural differences between Western assumptions about legal transplantation and host-country precepts and practices.<sup>145</sup> For example, many legal development projects sponsored by foreign donors in East Asian developing countries evince observer bias by assuming that legal systems will eventually evolve a type of Western formal legality.<sup>146</sup> Echoing colonial practices in which European law was a prime instrument and justifier of imperialism, contemporary cultural attribution

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

<sup>145</sup> The term 'legal orientalism' is derived from Edward Said's notion that the 'Orient' is a Western construction based on an attributed reality. See Edward Said, 1991, *Orientalism: Western Connections of the Orient*, Penguin Books, London, 1-28. A ground breaking discussion about 'legal orientalism' appeared in Veronica Talyor, 1997 'Beyond Legal Orientalism', in Veronica Talyor ed., *Asian Laws Through Australian Eyes*, LBC, Sydney 52-60; Teemu Ruskola, 2002 'Legal Orientalism' 101 *Michigan Law Review*, 179, 213-233.

<sup>146</sup> As discussed in chapter seven, many foreign donors presuppose a Weberian legal transformation from particularism to universalism and from substantive to procedural rationality. See Max Weber, 1978 *Economy and Society*, G. Roth and C. Wittich eds., University of California Press, Berkeley, 657.

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

At another theoretical extreme, cultural essentialism denies the possibility of meaningful comparative study. All societies place different emphasis on social activities, products and precepts, making cross-cultural comparison problematic—and according to some untenable.<sup>147</sup> Standard Western cultural assumptions about what constitutes legally reasonable behaviour, for example, may appear entirely unreasonable in other cultures.<sup>148</sup> The dilemma is illustrated by attempts to find a universal definition of law.<sup>149</sup> Most working definitions presuppose differentiated political and legal institutions, ignoring the possibility of law-like processes in undifferentiated customary societies and non-state legal systems.<sup>150</sup>

In rejecting essentialism, Edward Said considered 'it is an inadmissible contradiction ... to build analyses of historical experience around exclusions, exclusions that stipulate, for instance, that only women can understand feminine experience, only Jews can understand Jewish suffering, only formerly colonial subjects can understand colonial experience.'<sup>151</sup> 'Cultures,' he argued, 'are not impermeable ... never just a matter of ownership, of borrowing and lending with absolute debtors and credits, but rather of appropriations, common experiences, and interdependencies of all kinds among different cultures.'<sup>152</sup> Barry Hooker made a similar observation about the 'interaction and accommodation' between Oriental and Occidental laws shaping 'much of the historical jurisprudence of South-East

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

<sup>148</sup> See S. Cohn, 1967 'Some Notes on Law and Change in North India, in P. Bohannon ed., *Law and Warfare: Studies in the Anthropology of Conflict* Natural History Press, New York 155.

<sup>149</sup> See B. D. Santos, 1987 'Law: A Map of Misreading. Towards a Postmodern Conception of Law' 4 *Journal of Law and Society* (3), 279, 282-286; John Griffith, 1986 'What is Legal Pluralism?' 24 *Journal of Legal Pluralism and Unofficial Law* 1, 2-5 (stating that the concept of law based on state power is an ideological myth).

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

<sup>151</sup> Edward Said, 1993 *Culture and Imperialism*, Chatto and Windus, London, 35; also see Michael Barry Hooker, 1986 *Laws of Southeast Asia: the Pre-Modern Texts*, vol. I, Butterworths, London, 1-22.

<sup>152</sup> Edward Said, 1993 *supra* 261-262.

Asia'.<sup>153</sup> Some even suggest a positive role for comparativists, who are credited with detecting the hidden legal rules and assumptions taken for granted and hence unseen by those working within particular systems.<sup>154</sup>

The position taken in this study is that no matter how careful, observers cannot escape their cultural preconceptions. Put differently, 'the inseparability of the knower from the known means the inevitable participation of the knower in the known'.<sup>155</sup> This interconnection does not absolve observers from attempting to identify and minimise cultural attribution.<sup>156</sup>

Some attempts to minimise cultural attribution have used convoluted methodologies requiring observers to self-consciously disclose the political, cultural and moral basis of their investigation.<sup>157</sup> Yet as Ziauddin Sardar sardonically observed, 'in striving to give a voice to the "other", postmodernist cultural relativism only listens through the ears of conventional Western thought'.<sup>158</sup>

Various steps are available to reduce or at least identify cultural preconceptions. For Pierre Legrand, 'comparison must not have a unifying, but a multiplying effect: it must aim to organise the diversity of discourses around different (cultural) forms and counter the tendency of the mind towards uniformisation'.<sup>159</sup> Gunter Frankenburg argues for 'distancing and differencing' in comparative law.<sup>160</sup> He locates legal comparison in broad historical settings by asking the question: how do processes work within their own social context? As Owen Barfield reminds us: 'One way or another, what matters is coming to realise that the way we habitually think and perceive is not the only possible way, not even a way that has been going on very long. It is the way that we have come to perceive'.<sup>161</sup> In

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<sup>153</sup> Michael Barry Hooker, 1986 *supra* 8. Also see Andrew Harding, 2001 'Comparative Law and Legal Transplantation in South East Asia: Making Sense of the "Nomic Din"' in Johannes Feest and David Nelken eds., *Adapting Legal Cultures*, Hart Publishing Oxford, 199.

<sup>154</sup> See e. g. R. Sacco, 1995 'Mute Law', 43 *American Journal of Comparative Law* 455.

<sup>155</sup> John Lukas, 2002 *At the End of an Age*, Yale University Press, New Haven, 209.

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

<sup>157</sup> The literature in this area is vast but see Gunter Frankenburg, 1985 'Critical Comparisons: Re-Thinking Comparative Law' 26 *Harvard International Law Journal* 411, 450-455; William Alford, 1986 'On the Limits to "Grand Theory" in Comparative Law', 61 *Washington Law Review* 948, 950-956.

<sup>158</sup> See Ziauddin Sardar, 1998 *Postmodernity and the Other: The New Imperialism of Western Culture*, Pluto Press, Chicago, 32.

<sup>159</sup> Pierre Legrand, 2001 *supra* 67.

<sup>160</sup> Gunter Frankenburg, 1985 *supra*, 414. Also see Malcolm Smith, 1997 'Australian Perspectives on Asian Law', in Veronica Talyor ed., *Asian Law Through Australian Eyes*, LBC, Sydney 5-16.

<sup>161</sup> Owen Barfield, 1979 *History, Guilt, and Habit*, Wesleyan University Press, 74.

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

### **Assessing transplant viability**

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

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

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

Other theorists work with much shorter timeframes. For example, Legrand has mostly written about civil and common law borrowings in the context of the European integration, a transformation measured in decades rather than centuries. From this vantage point, transplants appear to overlay, without substantially altering, deeply entrenched epistemological assumptions.

The conclusion drawn from these disparate approaches is not that transplant viability is simply a function of time, but rather that time-scales influence perspectives about transplantation. For example, Watson's and Legrand's theories produce the same results whether they are applied to short- or long-term transplantations. Legrand construes resistance to Roman law as evidence of serious discrepancies between legal transplants and indigenous epistemological assumptions. While Watson believes that European Community legal convergence is well-advanced.

A related issue is determining from whose perspective transplant viably should be assessed. Conventional legal theory, exemplified by the work of H L A Hart, presumes that laws exist as external propositions until internalised to inform the experience and perception of individuals.<sup>162</sup> By implication legal transplants are ineffective until individuals choose to internalise them. A difficulty with focusing on individual choice is that consent need not be given to the norms embedded in rules, but rather to the processes and forms of legal power.<sup>163</sup> It is interesting to speculate, for example, to what extent elderly and poorly educated Vietnamese farmers comprising 75 per cent of the population respond to borrowed law according to individual choice or habit, pragmatism and expediency. Studies conducted elsewhere show that respondents generally have meagre knowledge of the law they supposedly internalised.<sup>164</sup> What little they know is often derived through membership of organisations or groups.

Further complicating the study, a legal import may appear viable for one social group but unviable from another perspective. By challenging established patterns of behaviour, imported laws have the capacity to create winners and losers. For example, imported Western corporate laws support business practices followed by foreign investors, but they have the potential to disrupt domestic family-oriented business structures (see annex six). For foreign investors legal transplants appear authentic and useful, but for domestic entrepreneurs they frequently seem inauthentic and imposed. As Roger Cotterell observed, 'the way law is conceptualised ... colours the way that the success (indeed, the very possibility) of legal borrowing is judged'.<sup>165</sup>

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<sup>162</sup> See H. L. A. Hart, 1961 *The Concept of Law*, Clarendon Press, Oxford. 132-137.

<sup>163</sup> See generally Roger Cotterell, 1994 'Introduction: The Law and Society Tradition', in Roger Cotterell ed., *Law and Society* Aldershot, England, xi, xi-xvi.

<sup>164</sup> See Berl Kutchinsky, 1973 'The Legal Consciousness: A Survey of Research and Opinion about Law', in A Podgorecki et. el. eds., *Knowledge and Opinion About Law*, M. Robertson, London, 105.

<sup>165</sup> Roger Cotterell, 2001 *supra* 79.

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

### **Do transplants induce social change?**

Another difficulty with evaluating legal transplantation is determining whether foreign laws have induced social change. Some theorists search for empirical measures to find evidence for social change of the kind contemplated by laws.<sup>166</sup> A recent study compiled an index based on perceptions of the 'rule of law', judicial independence and anti-corruption reforms, to quantify changes in social legality induced by legal transfers. Such studies are vulnerable to the criticism that it is as difficult to find causal links between transplants and social change as it is to quantify subjective notions like legality.<sup>167</sup> In simplifying complexities in the real world empirical measures miss the complex array of moral, religious and social pressures that shape attitudes to laws. It is never clear whether behaviour that appears to comply with a particular rule is brought about by legal rules. A further difficulty with causality is that the human mind intrudes into any account of human behaviour. As discourse theorists remind us what happens is inseparable from what people think happens. While not abandoning faith in the possibility that law induces social change, this study assumes laws are not self-executing and their effectiveness is inextricably bound up in sociopolitical matrices. For these reasons this study is not directly concerned with finding causal relationships between legal imports and behavioural change

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<sup>166</sup> See Daniel Berkowitz et al, 2003 *supra* 182-185; Katharin Pistor, et. al. 2002, 'The Evolution of Corporate Law, 23 *University of Pennsylvania Journal of Internal Economic Law* 791, 799-810.

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

in host countries and only indirectly addresses the question 'is there social change of the kind contemplated by laws?'.<sup>168</sup>

### **Methodological problems with assessing transplant viability**

Most studies about transplant viability are positivist.<sup>168</sup> They treat knowledge about law as social facts to be discovered, rather than processes that adjust the meaning of imported law among state officials and the public. This positivist-orientation makes empirically testable propositions about what matters in legal transplantation appear feasible and desirable. Despite their reassuring empiricism, statistical studies frequently miss the richness of regulatory processes.<sup>169</sup> This is a critical failing if the working postulates are correct, and the meaning of law is largely (though not exclusively) found in ideological and communicative processes. Empirical studies at best inform observers that certain imported laws induce varying levels of compliance. Unfortunately the statistical data required for this type of analysis is generally unavailable in Vietnam.

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

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

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

## **Conclusion**

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

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

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

## Chapter Two

### A Brief History of Legal Transplantation into Vietnam

#### Introduction

Before considering contemporary legal borrowing into Vietnam, it is necessary to consider the past. A theme underlying this chapter is that contemporary mental habits and perceptions are 'the end product of repeated action in the past, of prolonged behaviour in the past'.<sup>1</sup> Thus the historical patterns of legal transplantation have a bearing on the way contemporary lawmakers think about legal borrowing. The purpose here is not to attempt the impossible and present the legal history of Vietnam in a chapter, but rather to introduce the main ideas and processes that have contemporary relevance.

What little has been written about Vietnamese legal history suggests that legal transplantation into Vietnam is not a new phenomenon. Vietnamese lawmakers and citizens have been grappling for centuries with questions such as selecting culturally appropriate foreign law and adapting local institutions. A good starting point in tracing imported ideas and practices is understanding the who, when, how and why of legal change. Who imported law? What was the sequencing of legal borrowing? What were the sources of borrowed law? What institutions and practices were influenced? What part did ideology, state institutions and social structures play in these transformations? In examining centuries of legal borrowing our discussion considers the grand social forces shaping law, such as social movements, revolutions and significant individuals.<sup>2</sup> Yet this chapter is primarily descriptive in nature. In subsequent chapters the focus shifts to contemporary borrowing and finding explanations for the puzzles and anomalies in the patterns of legal transfer.

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<sup>1</sup> See Owen Barfield, 1979 *History, Guilt, and Habit*, Wesleyan University Press, Middletown, Conn., 74.

<sup>2</sup> For a discussion considering the grand narrative of legal adaptation see P. Sztompka, 1993 *The Sociology of Social Change*, Blackwell, Oxford, 255. For a sustained analysis of the way contemporary Vietnamese understand their own history see David Marr, 2000 'History and Memory in Vietnam Today: The Journal Xua & Nay' 31 *Journal of Southeast Asian Studies* (1) 1-25.

## Legal borrowing in the pre-modern legal system

### The period of Chinese domination

The recorded history of legal borrowing in Vietnam begins with the Chinese domination in 111 BC. Small proto-states with differentiated state and social power structures emerged before this period.<sup>3</sup> But formal legal rules were undifferentiated from cultural precepts, state institutions were fused with personal rule and specialised legal institutions and written laws were unknown.

More than any other external source, Chinese political-legal ideas influenced Vietnamese legal thinking and practices. Chinese ideas and practices came to Vietnam with the invading Han Dynasty armies in 111 BC.<sup>4</sup> For one thousand years (111 BC-938 AD), first under the Han Dynasty (206 BC-220 AD) and later under the Tang Dynasty (589-907 AD), Chinese scholarship, political theories, religious values, family structures and bureaucratic practices indoctrinated and moulded, though never entirely supplanted, indigenous Vietnamese outlooks.<sup>5</sup>

Commentators disagree about the extent to which Chinese political-legal thinking penetrated and transformed indigenous Vietnamese precepts and practices. Some contemporary nationalistic texts read history backward to demonstrate an indigenous cultural core.<sup>6</sup> These writings implausibly maintain 'the regulations, customs and habits of

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

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

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

<sup>5</sup> For a scholarly study of Vietnamese History, See Keith Taylor, 1983 *The Birth of Vietnam*, University of California Press, Berkeley. Keith Taylor modified some of his early views see Keith Taylor, 1998 'Surface Orientations in Vietnam: Beyond Histories of Nations and Regions' 57 *Journal of Asian Studies* (4) 949.

<sup>6</sup> See e.g. Phan Huy Le, 1991 'The Vietnamese Traditional Village: Historical Evolution and Socio-Economic Structure' *Vietnam Social Sciences* (1) 39, 40-43; Phan Huy Le, 1994 'The Problem of Democracy in

Vietnam still prevailed, as they had existed long before' after one thousand years of Chinese domination.<sup>7</sup> Some Western writers are more circumspect and believe fewer qualitative cultural differences survived Chinese annexation.<sup>8</sup>

During centuries of Chinese domination several factors conspired to preserve local practices. The Chinese ruled urban centres leaving ethnic Vietnamese in control of villages and communes.<sup>9</sup> Language barriers prevented most villagers from gaining a deep understanding of Chinese culture and few Vietnamese completed the classical Confucian training required for social advancement.<sup>10</sup> Further limiting local access to Chinese culture, Chinese rulers evidently modified transplanted Confucian canon to suit local conditions.<sup>11</sup> Legalism (*fa*) rather than humanistic moral persuasion (*li*) was considered more appropriate for the resistive and morally unperfected indigenous population.<sup>12</sup> Nevertheless, over ten centuries of Chinese domination transplanted Confucian, Buddhist and Taoist religious values, transformed elite outlooks and indirectly influenced village thinking. That the early Vietnamese imperial regimes both resembled and differed from the

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Vietnam's Traditions' *Vietnam Social Sciences* (4) 3, 4-10; Dao Tri Uc and Le Minh Thong, 1999, 'Su Tiep Nhan Cac Gia Tri Phap Ly Phuong Dong va Phuong Tay Doi Voi Su Phat Trien Cac Tu Tuong Phap Ly Viet Nam' (Reception of Oriental and Occidental Legal Values in the Development of Vietnamese Legal Ideology) *Nha Nuoc va Phap Luat* (5) 3, 3-15.

<sup>7</sup> Pham Diem, 1995 'A Brief Look at the Rule by Feudal China (from 179 BC to the Xth Century)' 1 *Vietnam Law and Legal Forum* (10) 28, 29.

<sup>8</sup> Most commentators agree the Vietnamese spoken language, local spirit cults and the hierarchical rights of women resisted Chinese influence. See K. W. Taylor, 1995 'Preface' in K. W. Taylor and John K. Whitmore eds, *Essays Into Vietnamese Pasts*, Southeast Asia Program, Cornell University, Ithaca, 5.

<sup>9</sup> Most accounts agree that Chinese annexation of Chiao-Chih Province (occupied Viet Nam) started rather loosely. Initially, political administrators were content to displace heredity Vietnamese chieftains (*lac tuong*) and allow communes (*bo chinh*) and local customs to continue as before. Confucian trained mandarins of Chinese descent eventually occupied important administrative posts down to the district level. See Keith W. Taylor, 1980 'An Evaluation of the Chinese Period in Vietnamese History' 23 *Journal of Asiatic Studies* (1) 146, 146-148; Pham Diem, 1995 *supra* 28-29; Alexander Woodside, 1971 *A Comparative Study of Nguyen and Ch'ing Civil Government in the First Half of the Nineteenth Century*, Harvard University Press, Cambridge, Mass. 7-8. Also see Pham Diem, 1995 *supra* 29.

<sup>10</sup> See Woodside, 1971 *supra* 6-7. The Chinese language and the locally adapted *nom* characters were learnt by Viet monks to study Buddhism. As the only indigenous intellectual class, monks were especially influential during the post-independence *Dinh* and *Ly* dynasties (968-1225).

<sup>11</sup> Interviews Dao Tri Uc, Director, Institute of State and Law, Hanoi, July 1998. (Dao Tri Uc led a research team from the Institute of State and Law that investigated the relevance of ancient Vietnamese law to contemporary conditions (see chapter five).

<sup>12</sup> Fragmentary Chinese writings from the period chronicled local resistance to assimilation policies. Following the suppression of the revolt led by the Trung Trac sisters in 39 AD, Han laws were reinstated over indigenous social practices. Ma Yuan, the Chinese general who suppressed the revolt, cryptically observed that Viet laws differed from Han practices in more than ten ways. Centuries later, Chinese authorities were still discouraging indigenous customs that differed from prescribed marriage practices and attempted to inculcate Confucian filial distinctions between elders and youngsters and husbands and wives. David Marr speculates that the Trung revolt was staged to restore Viet aristocratic privileges removed by the assimilation policy. See David Marr, 1971 *Vietnamese Anticolonialism*, University of California Press, Berkeley, 10.

Chinese template implies that sinic influence stimulated indigenous values, producing local political-legal adaptations.

### **Receiving Chinese legal thinking in Imperial Vietnam**

Following independence from China (939) the Ly dynasty (1009-1225) is characterised as a period of national development in which Buddhism challenged the rather weak Confucian hierarchical structures.<sup>13</sup> Though Confucianism gained more prestige during the Tran dynasty (1225-1400), it was not until the watershed Le (1428-1788) dynasty and later Nguyen (1802-1945) dynasty that rulers borrowed extensively from Tang and Ming dynasty laws and bureaucratic processes.<sup>14</sup> It is argued that Chinese transplants eventually produced an elite political-legal culture more inline with Chinese than earlier Ly and Tran dynastic practices.

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

### **Building a political-legal system**

Following independence, it was not until the Ly and Tran dynasties that recognisably Vietnamese governance structures took shape.<sup>15</sup> After a thousand years of domination,

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<sup>13</sup> That Buddhism came to Vietnam before Chinese intervention is clear. What is unclear is whether Theravada teachings from India or Mahayana teachings from China dominated. Some commentators claim that both teaching were sufficiently similar to have made little practical difference in shaping state and national attitudes. See Cuong Tu Nguyen, 1995 'Rethinking Vietnamese Buddhist History: Is the Thien Uyen Tap Anh a "Transmission of the Lamp" Text?', in K. W. Taylor and John K. Whitmore eds., *Essays into Vietnamese Pasts*, Southeast Asia Program, Cornell University, Ithaca, 81, 113-115; Ha Van Tan, 1992 'Buddhism from the Ngo to the Tran Dynasties', in Nguyen Tai Thu ed., *History of Buddhism in Vietnam*, Social Sciences Publishing House, Hanoi, 100-103, 117-125; Ngo Ba Thanh, 1996 'Influence of Buddhism on Ancient Vietnamese Law and Role of Comparative Law in Contemporary Juridical Science', 2 *Vietnam Law and Legal Forum* (17) 24, 27-28.

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

<sup>15</sup> The literature dealing with the construction of a national identity following Chinese rule is extensive, see e. g. Ester Ungar, 1986 'From Myth to History: Imagined Politics in 14<sup>th</sup> Century Vietnam', in David Marr and A. C. Milner eds., *Southeast Asia in the 9<sup>th</sup> and 14<sup>th</sup> Centuries*, Institute of Southeast Asian Studies, Singapore, 177-186; Keith W. Taylor, 1980 *supra* 146-148 (discusses how the flexible social system of early Vietnam successfully resisted Chinese attempts to transform it into an orthodox sinic patrimonial system); Keith K. Taylor, 1988 'Authority and Legitimacy in Eleventh-Century Vietnam' 12 *Vietnam Forum* 20-59; Nguyen Ngoc Huy and Ta Van Tai 1986, 'The Vietnamese Texts' in M. B. Hooker ed., *The Laws of Southeast Asia: The Pre-Modern Texts*, Butterworths, Singapore, 449-451; Tran Thi Tuyet, 1996 'The State

Chinese knowledge was the natural cultural and legal reference point. The most important cultural import was the 'reduction of religions into the same source' (*tam giao dong nguyen*), which syncretistically blended Confucianism, Mahayana Buddhism and Taoism.<sup>16</sup> Buddhist teachings that emphasised spiritual liberation through ethical conduct and discipline initially came to Vietnam from India, however, Mahayana Buddhism (via China) came to dominate.<sup>17</sup> Taoism privileged the natural order, charting a passage to 'the way' through mysticism. It rapidly became interwoven with indigenous animist spirit cults and rituals. When combined with Confucian beliefs, the 'reduction of the religions into the same source' provided numerous ethical permutations and combinations to syncretistically reinterpret and consolidate Chinese governance practices.

Vietnamese rulers experimentally infused sinic beliefs with indigenous cultural elements like animistic spirits and popular Buddhism, self-consciously forging a distinctive indigenous identity.<sup>18</sup> Contrasting with China, where the Confucian canon was treated as an all-encompassing source of political, social and moral authority, Ly and Tran officials used Confucian texts as persuasive precedents for guiding state policy. The moral and historical precepts that gave coherence and context to the canon were often ignored. As Wolters opined, 'they localised the Confucian corpus by fragmenting it and detaching passages, drained of their original contextual meaning, in order to appropriate fragments at their discretion and fit them into the context of their own statements'.<sup>19</sup>

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

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

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and the Law of the Tran Dynasty' 2 *Vietnam Law and Legal Forum* (18) 28, 28-29. L. Cadiere, 1958 'Religious Beliefs and Practices of the Vietnamese' 33 *Bulletine de la Société des Etudes Indonchinoises* 1-23, I. Mabbett trans., Working Paper 60, Centre for South East Asian Studies, Monash University, 11-20.

<sup>16</sup> See O. Wolters, 1979a, 'Assertions of Cultural Well-being in Vietnam' 10 *Journal of Southeast Asian Studies* 435, 442-443; L. Cadiere, *supra*; Do Thai Dong, 1993, 'Modifications of the Traditional Family in the South of Vietnam', 3 *Vietnam Social Sciences* 77, 80-81.

<sup>17</sup> See Minh Chi, 1992 'Buddhism's Entry into Vietnam and Its Practice During Chinese Control', in Nguyen Tai Thu ed., *History of Buddhism in Vietnam*, Social Sciences Publishing House, Hanoi, 1-15.

<sup>18</sup> See K. W. Taylor, 1988 *supra* 45-49; John K. Whitmore, 1984 'Social Organization and Confucian Thought in Vietnam' 15 *Journal of Southeast Asian Studies* 294, 297-298.

<sup>19</sup> O. Wolters, 1979a, *supra* 435, 437. Also see David Marr where he wrote 'the elite in Vietnam tended to detach Chinese thoughts and practices from their original contexts. Such idealization, among other things, allowed them to range across the full span of Chinese history, picking and choosing whatever met their fancy

Southern countries [China and Vietnam] is sovereign within its sphere and does not need to follow each other's law.<sup>20</sup>

Le and especially Nguyen emperors thought political-legal alternatives to neo-Confucianism, such as Buddhism, were incapable of managing a sophisticated irrigated rice economy and resolving interminable imperial succession disputes.<sup>21</sup> In order to control fractious aristocratic-oligarchies, Le rulers needed to consolidate power in an elite bureaucracy separated from old noble families.<sup>22</sup> Confucian social hierarchies backed by a Chinese-style bureaucratic legal system provided a proven centralising model.<sup>23</sup> In addition to the technical superiority of, and prestige commanded by, Chinese law, Nguyen emperors during the nineteenth century were attracted to sinic governance models as a means of counteracting increasing Western influence. Some high officials in the Nguyen court had fled the Ming dynasty. Their mixed Chinese-Vietnamese ancestry and their sinic cultural outlook facilitated highly sophisticated legal and institutional borrowing from China.<sup>24</sup>

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as Vietnamese, rather than simply aping the current dynasty in power to the north.' David Marr, 1971 *supra* 19.

<sup>20</sup> Quoted in Nguyen Ngoc Huy and Ta Van Tai, 1987 *supra* 14.

<sup>21</sup> See Trung Anh, 1995 'Legal Thought of Vietnam Feudalist Class' 2 *Vietnam Law and Legal Forum* (13) 24, 24-25.

<sup>22</sup> It should be noted that the examination system in Vietnam never fulfilled the objectives of the Le dynasty in controlling the power of noble families. See Alexander Woodside, 1998 'Freedom and Elite Political Theory in Vietnam Before the French' in David Kelly and Anthony Reid eds., *Asian Freedoms: The Idea of Freedom in East and Southeast Asia*, Cambridge University Press, Cambridge, 213-216; David Marr, 2004 'A Brief History of Local Government in Vietnam' in Benedict J. Tria Kerkvliet and David Marr eds., *Beyond Hanoi: Local Government in Vietnam*, Institute of Southeast Asian Studies, Singapore, 29.

It is interesting to note that precisely the same tactic was used by the Qin dynasty in early Chinese history. See John King Fairbank and Merle Goldman, 1998 *China: A New History*, Belknap Press, Cambridge Mass. 55-56.

<sup>23</sup> See Vu Van Vinh, 1999 'Development of Confucianism in the Tran Dynasty and the Struggle of Confucian Scholars against Buddhism at the End of the XIV Century' *Vietnam Social Science* (2) 55, 57-60; John K. Whitmore, 1987 'Foreign Influences and the Vietnamese Cultural Core: A Discussion of the Pre-modern Period', in Truong Buu Lam ed., *Borrowings and Adaptations in Vietnamese Culture*, Southeast Asia Paper No. 25, Center for Asian and Pacific Studies, University of Hawaii, 1, 8-10; R. B. Smith, 1973 'The Cycle of Confucianization in Vietnam,' in W. F. Vella ed., *Aspects of Vietnamese History*, University Press of Hawaii, Honolulu, 6-24.

<sup>24</sup> It should be noted that Vietnamese educated in Chinese schools during the Ming occupation in the early fifteenth century were instrumental in borrowing Sung-Confucian ideology and governance practices for the first Le dynasty rulers. See J. K. Whitmore, 1977 'Chiao-chih and Neo-Confucianism' 4 *Ming Studies* 51, 51-91. For a discussion concerning the Nguyen dynasty connections with China see John R. Clammer, 1981 'French Studies on the Chinese in Indochina: A Bibliographical Survey' 12 *Journal of South East Asian Studies* 15, 17-18.

## Legal borrowing

From the Le dynasty onwards, Vietnamese emperors applied a Sino-Vietnamese version of virtue rule (*duc/nhan tri*) and legal rule (*phap Tri*).<sup>25</sup> These principles rested on imported beliefs such as the 'Heavenly Mandate' (*Thien Menh*) and the cultivation of virtuous conduct through the five cardinal relationships.<sup>26</sup> As David Marr observed, 'Ethical cement for this structure was supplied by a set of cardinal virtues, the number eventually stabilising at five: "benevolence" (*nhan*), "righteousness" (*nghia*), "ritual" (*le*), "knowledge" (*tri*) and "sincerity" (*tin*)'.<sup>27</sup> Confucian scholars deduced moral principles from everyday life rather than from interpretations of sacred revealed texts.<sup>28</sup> They believed that if men were persuaded by education, social pressure and virtuous example to live morally, laws were unnecessary.

In practice, however, legalist (*phap gia*) thinking intertwined with virtue rule (*duc tri*) and played a prominent role in pre-modern governance.<sup>29</sup> Counterbalancing Confucian humanism, legalist thinking promoted by Confucian scholars such as Hsun-tzu saw state law as a means of codifying though certainly never replacing virtue-rule.<sup>30</sup> Imperial rulers saw no inconsistency in championing virtue-rule, while controlling social behaviour with draconian penal laws (*phap tri*) and a strong administrative apparatus.

That legalist thinking influenced Le and Nguyen rulers is seen in the meticulous attention given to developing legal codes and administrative structures. Many provisions in the *Le*

<sup>25</sup> Most contemporary accounts of the early Le dynasty rely on versions of the *Dai Viet Su Ky Toan Thu* (Complete Historical Records of the *Dai Viet*) that were revised during the Mac dynasties to emphasise the benefits of centralising and sinizing under Le Thanh Tong's regime. See John K. Whitmore, 1995 'Chung-hsing and Cheng-t'ung in Texts of and on Sixteenth-Century Viet Nam', in K. W. Taylor and John K. Whitmore eds., *Essays Into Vietnamese Pasts*, Studies on Southeast Asia No. 19, Cornell University Press, Ithaca, 116-136; Nola Cooke, 1994 'Nineteenth-Century Vietnamese Confucianisation in Historical Perceptive: Evidence from the Palace Examinations (1463-1883)' 25 *Journal of Southeast Asian Studies* (2) 277, 277-282, 303, 305.

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

<sup>27</sup> By the nineteenth century, Vietnamese scholars drew inspiration primarily from the writings of Chu Hsi (1130-1200). See David Marr 1981 *Vietnamese Tradition on Trial 1920-1945*, University of California Press, Berkeley 58. Also see Chuong Thau and Phan Ngoc, 1994 'Confucianism in Vietnam Seen from an Historical Tradition' *Vietnamese Studies* (1) 85.

<sup>28</sup> Randall Peerenboom, 1998 'Confucian Harmony and Freedom of Thought' in William Theodore de Barry and Tu Weiming eds., *Confucianism and Human Rights*, Columbia University Press, New York, 234-260.

<sup>29</sup> See Ta Van Tai, 2001 'The Rule of Law in the Traditional Law of Traditional China and Vietnam: Traditional East Asian Legal Practice in the Light of the Standards of the Modern Rule of Law' *Vietnamese Studies* (4) 128, 130-135.

<sup>30</sup> Hsun-tzu lived in pre-imperial China around 300 BC. See Hsun-tzn, 1967 'Human Nature is Evil', in B. Watson trans., and ed., *Basic Writings of Mo Tzu, Hsun Tzu and Han Fie Tzu*, Columbia University Press,

*Trieu Hinh Luat* (Le Dynasty Penal Code), popularly called the *Bo Luat Hong Duc* (Hong Duc Code), were either borrowed directly from, or substantially influenced by, the Tang Code and Ming Codes.<sup>31</sup> Yet the Code contained many provisions that were not found in the Chinese legal texts. They included provisions compensating landowners for unauthorised government appropriation, private encroachment on land and fraudulent sales.<sup>32</sup> In vitiating contracts for fraud and duress, and forbidding market manipulation and usury, the Code intervened in village commerce in ways never countenanced by Chinese law.<sup>33</sup> Imperial interest in market regulation suggests that the Le dynasty in Vietnam was not as anti-mercantile as the Tang and Ming dynasties in China.<sup>34</sup> Locally developed legislative provisions were not confined to commerce and also reflected differences between Vietnamese and Chinese village and family structures. Contrasting with Chinese practices, village officials, rather than family heads, compiled the population registers used to assess taxation and corvee. The Code also adjusted gender rights to preserve the higher status women enjoyed in Vietnamese society. Married women, for example, were entitled to reclaim their contributions to matrimonial estates after their husbands' death.<sup>35</sup>

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New York, 162-163. Also see Randall Peerenboom, 2002 *China's Long March to a Rule of Law*, Cambridge University Press, Cambridge, 28-36.

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

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

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

<sup>34</sup> Whitmore, 1984 *supra* 304.

<sup>35</sup> Le Code, articles 308, 322, 375, 388 and 391. See Tran Thi Tuyet, 2000 'Vietnam's Feudal Laws and the Protection of Women's Interests' 6 *Vietnam Law and Legal Forum* (65) 28, 28-30; Nguyen Viet Huong, 1996 'Quoc Trieu Hinh Luat and the Personal and Property Relations in Feudal Families' 3 *Vietnam Law and Legal Forum* (25) 22, 22-25; David W. Haines, 1984 'Reflections of Kinship and Society under Vietnam's Le Dynasty' 15 *Journal of South Eastern Studies* 307, 309-313.

Legal borrowing reached a zenith with the Nguyen Dynasty. The *Hoang Viet Luat Le* (Laws and Decrees of Imperial Viet), completed by Emperor Nguyen Gia Long in 1815, slavishly copied the Ching Code.<sup>36</sup> Of its three hundred and ninety eight articles all but one were either identical to or closely based on Ching Code articles. It strengthened the criminalisation of neo-Confucian morality and removed most indigenous provisions found in the Le Code.<sup>37</sup> Despite careful borrowing, subtle changes in meaning occurred during the translation of Chinese provisions into Vietnamese *nom* characters.

There is little discussion in documents from the period about the practical implementation of law.<sup>38</sup> Commentaries stress the merits of virtue rule (*duc tri*) over legal rule (*phap tri*). But rulers used the law in tandem with virtue rule to secure specific objectives. Mandarins were encouraged to base their decisions on written law.<sup>39</sup> The Nguyen Code, for example, required mandarins to cite the relevant legal sources when pronouncing a sentence.<sup>40</sup> In theory, even emperors could not change written laws without following amendment procedures.<sup>41</sup>

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

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<sup>36</sup> The 'Hoang Trieu Luat Le', also widely known as the Gia Long Code, contained 398 articles arranged in 22 volumes that precisely followed the structure, legal categories and provisions of the Ching dynasty legal code. See Tran Thi Tuyet, 1997 'The Nguyen Dynasty and its Legislation in the First Half of the 19<sup>th</sup> Century', 3 *Vietnam Law and Legal Forum* (32) 24, 24-25.

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

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

<sup>39</sup> See Pham Diem, 2001 'Judiciary Offences under Vietnam's Ancient Laws' 7 *Vietnam Law and Legal Forum*, (82) 20-21, 32.

<sup>40</sup> Nguyen Code article 380. See Ta Van Tai, 2001 *supra* 133.

<sup>41</sup> See Ta Van Thai, 2001 *supra* 133.

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

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

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

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<sup>42</sup> 'Whoever commits an act that should not be done shall be condemned to penal servitude or exiled for a major wrong and demoted or fined for a minor one.' Le Code, article 642; Nguyen Code, article 351.

<sup>43</sup> These comments are based on interviews with a Vietnamese sociologist and literary critic who specialises in state-village relations. Interviews Hoang Ngoc Hien, Sociologist, Nguyen Du School of Creative Writing, Hanoi, June 21, 1998, April, September 1999, August 2000.

<sup>44</sup> Nguyen Van Huyen vividly described syncretic thinking in villages:

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

Nguyen Van Huyen, 1995 *The Ancient Civilization of Vietnam*, (reprint) The Gioi Publishers, Hanoi, 277-248. Also see O. Wolters, 1979a *supra* 442-43; L. Cadiere, *supra* 80-81.

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

### **Borrowing administrative practices**

Vietnamese rulers also looked north for administrative structures and practices. Le dynasty rulers reformed the bureaucratic examination system to reemphasise that elite advancement lay through deep knowledge of Chinese language, literature and governmental practices.<sup>45</sup> They also replaced indigenous counsellors (*Te Tuong*) with the Chinese Six Board governance structures and added a meritorious Chinese-style civil service examination (*thu si*) recruitment to aristocrat recruitment (*nhiem tu*).<sup>46</sup> Those implementing imperial rule (mandarins) were recruited for their loyalty to the emperor (relatives) and knowledge of neo-Confucian canon. Le rulers vigorously proselytised neo-Confucian ethical codes. Writings, public discussions and petitions reviling the prestige and moral authority of senior mandarins were criminalised.<sup>47</sup>

The Nguyen dynasty took sinic borrowing a step further by mimicking Ching dynasty governance in every conceivable manner.<sup>48</sup> More than the Le dynasty, the Nguyen emperors believed that Ching morality and institutions were complex and interrelated, and tinkering with established practices carried the risk of system failure. The ensuing literal application of Ching law led Vietnamese rulers to endow some sinic institutions with powers and functions only countenanced on paper in China. A few terse words of

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<sup>45</sup> Just how closely Vietnamese bureaucratic responsibilities corresponded to Chinese patterns is difficult to ascertain as records from this period are not extant. But civil service examinations ensured that about 40 per cent of the Imperial Government at any one time were selected from low born villagers. See Alexander Woodside, 1998 *supra* 215-219; Tran Thi Tuyet, 1995 'The State and the Law under the Ly Dynasty (1009-1225)', 2 *Vietnam Law and Legal Forum* (16) 26, 26-28.

<sup>46</sup> Although the first mandarin recruitment examination was conducted in 1075 during the Ly dynasty, it was not until the Le dynasty adopted Ming dynasty administrative apparatus that examinations became an important source of recruitment. The examination system described in the Hoang Trieu Luat Le (Royal Court Law) was closely based on Chinese models, nevertheless some commentators doubt that the Vietnamese produced the meritorious outcomes achieved in China. See David Marr, 1998 'Concepts of Statescraft in Vietnam', (unpublished paper) International Conference on Vietnamese Studies, Hanoi, 14-17 July, 12; Whitmore, 1987 *supra* 10; R. B. Smith, 1973 'The Cycle of Confucianization in Vietnam', in W. F. Vella ed., *Aspects of Vietnamese History*, Honolulu, 11-12. For nationalistic accounts that find meritocracy at work see Nguyen Viet Huong, 1998 'Feudal Rules on Recruitment, Selection, Training and Employment of Mandarins' 4 *Vietnam Law and Legal Forum* (47) 25, 25-27; Doa Duy Anh, 1994 'Influence of Confucianism in Vietnam' *Vietnam Studies* (1) 22, 23-24; Tran Thi Tuyet, 1998 'Feudal State Apparatus Structure in Vietnam' 5 *Vietnam Law and Legal Forum* (49) 21, 21-23.

<sup>47</sup> Le Code, article 136 reproduced in Nguyen Ngoc Huy and Ta Van Tai, 1987 vol II.

<sup>48</sup> See Alexander Woodside, 1971 *supra* 60-110.

prescription in Chinese codes did not disclose sociopolitical constraints designed to limit institutional power in China's larger and more complex administrative system.<sup>49</sup>

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

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

### Localising Chinese political-legal thinking

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

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<sup>49</sup> For example, the Nguyen Emperors worried about the excessive power Ching codes appeared to invest in Grand Secretaries and constructed Vietnamese institutions to avoid this imaginary problem. See Woodside, 1971 *supra* 87-89.

<sup>50</sup> See Tran Thi Tuyet, 1997 'Vietnam's Last Kingdom—Its State Structure' 3 *Vietnam Law and Legal Forum* (31) 18, 19; Woodside, 1971 *supra* 69-70.

<sup>51</sup> Imported rules were used to control competing noble families. Insun Yu, 1990 *Law and Society in 17<sup>th</sup> and 18<sup>th</sup> Century Vietnam*, Asiatic Research Center, Korea University, Seoul, 89-104.

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

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

<sup>54</sup> Many accounts are based on Le Van Huu's *Dai Viet Su Ky* (History of Dai Viet). See O. Wolters, 1979 'Historians and Emperors in Vietnam and China, Comments Arising out of Le Van Huu's History', in Anthony Reid and David Marr eds., *Perceptions of the Past in Southeast Asia*, Heinemann Educational Books, Hong Kong, 69-89.

Confucian milk, eats the Confucian rice, and lives until his death in the Confucian ritual cycle'.<sup>55</sup>

In contrast to China, where scholars (within politically sanctioned limits) vigorously debated the official canon, strict controls over imported information inhibited scholarly debate and ideological development in Vietnam.<sup>56</sup> By prohibiting Vietnamese scholars from forming private contacts with their Chinese counterparts, Nguyen rulers restricted unauthorised interpretations. Nevertheless some discussion occurred, because Confucian literati were expected to renew and reinvigorate neo-Confucian morality and political governance through discussion and criticism.<sup>57</sup> For example, Nguyen Truong To, a prominent mandarin during this period unsuccessfully petitioned the Nguyen Dynasty to introduce more procedural certainty into court cases to promote litigants' rights.<sup>58</sup> But mandarins were prohibited from publicly contradicting the elite ideology, which was more in tune with Chinese philosophy than Vietnamese realities.<sup>59</sup>

Some commentators attribute this unreflective adaptation of Chinese political-legal thought to the Nguyen rulers' mistaken belief that villagers like the elite, unreservedly accepted neo-Confucianism. Others theorise that Nguyen rulers thought indigenous legal provisions in the Le Code reflected northern precepts and practices not necessarily pertaining to the Nguyen heartland in central and southern Vietnam.<sup>60</sup> Whatever the reason, Chinese political-legal thought was imported with little recorded discussion and dissent by Nguyen dynasty literati. In surveying the Vietnamese literary canon from this period, David Marr estimated 'the Vietnamese author devotes 95% of his presentation to the teachings of Confucius and disciples, perhaps interlarded with examples of superior men in China, then allocates at most five per cent to Vietnamese thinkers or role models'.<sup>61</sup>

Imported Chinese law not only interacted at an elite level, it also influenced village thinking. At the end of the fifteenth century when the Le Dynasty reached the peak of its

<sup>55</sup> Reproduced in Dao Duy Anh, 1994 'Influence of Confucianism in Vietnam' *Vietnam Studies* (1) 23, 23-24.

<sup>56</sup> See Woodside, 1971 *supra* 231-233. This does not explain why imperial-drafting committees did not attempt to localise imported rules.

<sup>57</sup> Also see Alexander Woodside, 1998 *supra* 221-222.

<sup>58</sup> Pham Duy Nghia, 2003 'Noi Doanh Nhan Tim Den Cong Ly' (Where do Entrepreneurs Go for Justice) *Nghien Cuu Lap Phap* (3), 45-54.

<sup>59</sup> The 'Kham-Dinh Viet-Su Thong Giam Cuong Muc' national history of the mid-nineteenth century reflected a Chinese worldview. See J. K. Whitmore, 1972 'Note: The Vietnamese Confucian Scholar's View of His County's Early History', in Hall and Whitmore eds., *Explorations of Early Southeast Asian History*, vol 1, Cornell University Press, Ithica, NY 193-203.

<sup>60</sup> See Nola Cooke, 1998 'Regionalism and the Nature of Nguyen Rule in Seventeenth-Century Dang Trong (Cochinchina)' 29 *Journal of Southeast Asian Studies* (1) 122, 157-161.

power, court-appointed mandarins played an important role in administering villages.<sup>62</sup> By the time Gia Long tried to reassert central power over villages in the early nineteenth century, independent-minded local authorities resisted centralisation. Subsequent attempts by other members of the Nguyen Dynasty to implement their vision for an orderly and morally homogenous Confucian society conflicted with relatively flexible, loosely structured village organisations.<sup>63</sup> The familiar injunction *phep vua thua le lang* (the laws of the emperor give way to the customs of the village) implies some degree of village resistance to imperial political-legal thinking.

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

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

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<sup>61</sup> See David Marr, 1998 *supra* 14-17.

<sup>62</sup> See Martin Grossheim, 2004 'Village Government in Pre-Colonial Vietnam' in Benedict J. Triak Kerkvliet and David G. Marr eds., *Beyond Hanoi: Local Government in Vietnam*, Institute of Southeast Asian Studies, Singapore, 55-58. There is some evidence that the Catholic minority from the 17<sup>th</sup> century onwards contributed Western ideas about law and government. See Nguyen Khac Kham et. al., 1967 'Bibliography on the Acceptance of Western Cultures in Vietnam for the XV<sup>th</sup> Century to the XX<sup>th</sup> Century' 54 *East Asian Cultural Studies* 225-217.

<sup>63</sup> See Woodside, 1971 *supra* 60-66, 94-98.

<sup>64</sup> See e.g., Gia Long Code, articles. 64-72 (1812-1945); P. L. F. Philastre, 1909 *Le Code Annamite*, (reprint 1967), 335-357.

<sup>65</sup> Many of the Le Code provisions that regulated commerce and womens' inheritance were treated by the population as customary rules during the Nguyen dynastic period. See Nguyen Ngoc Huy and Ta Van Tai, 1987 *supra* 475-489; Nguyen Ngoc Huy and Ta Van Tai, 1986 *supra* 488-489.

<sup>66</sup> See Pierre Poivre, 1993 'Voyage de Pierre Poivre en Cochinchina', Kristine Alilunas-Rodgers trans., in Li Tana and Anthony Reid eds., *Southern Vietnam under the Nguyen*, Institute of Southeast Asian Studies, Singapore, Data Paper Series No. 3 62-78.

<sup>67</sup> See Marr, 1981 *supra* 58-61.

luan), reached into village and family life.<sup>68</sup> Crimes by wives against husbands and especially by children against parents (filial piety *hieu*) were considered more heinous than offences against social inferiors.<sup>69</sup>

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

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

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

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<sup>68</sup> Ruler-subject, father-son, husband-wife, elder brother-younger brother and friend-friend.

<sup>69</sup> See Pham Diem, 1999 'Criminal Offences Under Ancient Laws of Vietnam' 5 *Vietnam Law and Legal Forum* (58) 27, 27-29; Pham Diem, 1999, 'Relationships Between Parents and Children under Vietnam's Ancient Laws' 6 *Vietnam Law and Legal Forum* (63) 29, 29-30. The ten heinous crimes were plotting high treason (an attempt on the emperor's life), plotting grave insubordination (desecrating imperial ancestral temples and palaces), plotting treason (working for an enemy state), wicked insubordination (attempts to kill grandparents, parents or actually killing senior male relatives), inhumanity (killing three people in one family), stealing articles from the emperor, lack of filial piety, discord (*bat muc*) (plotting to kill or sell relatives), disloyalty (killing an active official) and incest. Le Code, article 2.

<sup>70</sup> See Alexander Woodside, 1999 'Exalting the Latecomer State', in Anita Chan et al eds. *Transforming Asian Socialism: China and Vietnam Compared*, Allen and Unwin, Sydney, 23-24.

<sup>71</sup> See Le Hong Son, 1995 'Village Conventions and their Role in Rural Management in Vietnam' 1 *Vietnam Law and Legal Forum* (11) 21, 21-22 (1995); Bui Xuan Dinh, 1985 *Le Lang Phep Nuoc*, (Customary Law and State Law), Law Publishing House, Hanoi, chapter three. Of the 16 articles of the *huong uoc* of the Giap of Nam Thuong, 14 concerned rituals for local religious and village ceremonies. Confucian hierarchies were strictly preserved in these rules. Article one, for example, provided heavy fines for those who failed to stand to show respect for village elders. See The Statute of the Giap of Nam Thuong Bang Liet Commune in Thuong Tin District, reproduced in 1980, *Vietnamese Studies* (61), 209-214. Also see Phan Dai Doan and Bui Xuan Dinh, 2001, 'Three Periods of *Huong Uoc* Development' 7 *Vietnam Law and Legal Forum* (82), 22, 22-24.

<sup>72</sup> The center and periphery were strongly bound by patronage networks. As a colonial adage said 'If a man becomes a mandarin, his whole lineage can ask favors of him' (*Mot nguoi lam quan, ca ho duoc nho*). Many of the approximately two thousand mandarins serving at any one time breached criminal provisions by bending central rules to advance family and local interests. See Woodside, 1971 *supra* 178-179.

<sup>73</sup> See David Marr, 2004 *supra* 30-32; Nguyen Thua Hy, 2002 *Economic History of Hanoi*, National Political Publishing House, Hanoi, 285-286.

larger centres, leaving village rituals and customs to regulate everyday commerce.<sup>74</sup>

Conflicts arising from business deals and contracts were mediated by village elders, neighbourhood and merchant associations and families operating outside the state judicial hierarchy.<sup>75</sup> Official dispute resolution exposed disputants and by extension their families and village to loss of proper virtue and not infrequent demands for bribes.<sup>76</sup>

Due process ultimately remained an imperial prerogative. Emperors could and did intervene where and whenever they desired. The imperial legal system remained reified—far above the contingencies of daily life. Village and family heads were enmeshed in the imported state system only in so far as they were held accountable for upholding Confucian hierarchies.<sup>77</sup> Center-local dualism of this kind was not uniquely Vietnamese—similar patterns existed in China.

### Summary

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

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<sup>74</sup> Ibid.

<sup>75</sup> See Nguyen Duc Nginh, 1993 'Markets and Villages', in *The Traditional Village in Vietnam*, The Gioi Publishers, Hanoi, 352-355; Anthony Reid, 1993 *Southeast Asia in the Age of Commerce 1450-1680*, vol. 2, Silkworm Books, Chiang Mai, 136-138.

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

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

<sup>78</sup> Woodside, 1971 *supra*, 81.

possible exception of Korea) and foreshadowed the wholesale importation of the Soviet political-legal system centuries later.<sup>79</sup>

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

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

## **The French colonial period: 1862-1945**

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

### **Transplanting French colonial legal thinking**

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<sup>79</sup> Note the unsuccessful importation of the Chinese Tang Code to seventh century Japan and the much more successful adoption of Chinese Ch'in rule in Korea. See Masaji Chiba, 1986 'Three-Level Structure of Law in Contemporary Japan-The Shinto Society', in Masaji Chiba ed., *Asian Indigenous Law: In Interaction with Received Law*, KPI, London, 304-307. Also see Dae-Kyu Yoon, 1997 'Korea' in Poh-Ling Tan ed., *Asian Legal Systems*, Butterworths, Sydney, 162-167.

<sup>80</sup> Dao Duy Anh, 1994 *supra* 23-33.

<sup>81</sup> See Truong Huu Quynh, 1994 'Tim Hieu Phap Luat Ve Quan Chuc O Nuoc Ta Phong Kien' (Laws on Mandarins of Our Country in the Feudal Period) *Nha Nuoc va Phap Luat* (5) 3, 6-8.

<sup>82</sup> Three more Vietnamese provinces were ceded to the French in 1867. See Nguyen The Anh, 1985 'The Vietnamese Monarchy Under the French Colonial Rule 1884-1945' 19 *Modern Asian Studies* 147-51; Michael Barry Hooker, 1979 *A Concise Legal History of South East Asia*, Clarendon Press, Oxford 175-185.

## French transplantation theories

French colonial authorities used the pluralistic 'legal collaboration' policy to mould the interaction between French and neo-Confucian political-legal thought.<sup>83</sup> Legal collaboration permitted the metropolitan French legal system to co-exist with a modified pre-colonial imperial and village administration in Annam and Tonkin.<sup>84</sup> The metropolitan and indigenous systems were never equal because royal edicts were ineffective unless endorsed by the French *Resident-Superieur*.<sup>85</sup>

Legal collaboration contradicted French legal theory (positivism), which insisted that legislation was the exclusive legal voice in French territories. By allowing French law to co-exist with another legal system (indigenous law), legal collaboration diminished colonial sovereignty.<sup>86</sup>

Contrasting with colonisation policies in *colonie de peuplement* (settlement colonies) like Algeria, where one legal system regulated everyone, a complex 'conflict of laws' regime existed in Vietnam.<sup>87</sup> Collaboration policy permitted indigenous law to regulate village life provided it did not compromise public order. In theory two different legal systems—one stacked upon the other—co-existed within the same geopolitical borders.<sup>88</sup>

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<sup>83</sup> See Michael Barry Hooker, 1975 *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Law*, Clarendon Press, Oxford, 232-35; S. H. Roberts, 1929 *The History of French Colonial Policy 1870-1925*, (new impression 1963) Frank Cass, London, 64-75; also see Nguyen The Anh, 1985 *supra* 153-155 (discusses reasons for preserving the monarchy under the collaboration policy).

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

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

<sup>86</sup> See Hooker, 1975 *supra* 229-300; Milton Osborne, 1969 *The French Presence in Cochinchina and Cambodia: Rule and Response (1859-1905)*, Cornell University Press, Ithaca, New York, 46, 78-79.

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

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

<sup>88</sup> Barry Hooker argues that legal pluralism is a difficult concept in French law, which relies on acts of state (i.e. nationality) to determine whether individuals belong to a particular legal systems. If two legal systems co-exist national sovereignty is theoretical abrogated. See Hooker, 1975 *supra* 247.

French law governed disputes between French citizens and the indigenous population.<sup>89</sup> Vietnamese living in Cochinchina and Tonkin (but not Annam) could voluntarily articulate disputes into the French system. The laws of France automatically extended to Cochinchina and large urban centres (such as Hanoi, Hai Phong and Tourane) except where they conflicted with local administrative arrangements.<sup>90</sup> Elsewhere the French preserved a modified version of pre-colonial governance.<sup>91</sup> Imperial cooperation was considered vital to colonial ambitions, since it confined local resistance within imperial and village organisational structures. Rule through local authorities was especially pronounced in Annam, where the Nguyen Emperors maintained imperial government structures (six central boards, provincial and local administrators) staffed by court-appointed mandarins.<sup>92</sup> Mandarins enlisted sentimental loyalties *trung quan* (loyalty to the king) to legitimise neo-Confucian rule.

### Implementing colonial rule

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

<sup>89</sup> Id. 199-201, 230-237. Also see Pham Diem, 1997 'The State Structure in French-Ruled Vietnam (1858-1945)' 3 *Vietnam Law and Legal Forum* (33) 27; See Pham Diem, 1999 'Vietnamese Court System Under the French' 5 *Vietnam Law and Legal Forum* (54) 27, 27-30.

<sup>90</sup> Interview Ngo Van Thau, Former Professor of Judicial Training School, Hanoi March 2001.

<sup>91</sup> The application of French law is complex and changes over time. An abridged version of the Gia-Long Code applied in Cochinchina until it was replaced by a hybrid French Civil Law and indigenous Code in 1883. Pre-Colonial law applied in much of Tonkin and all of Annam until the hybrid law replaced it in 1931 and 1936 receptively. See Hooker, 1975 *supra* 232-233.

<sup>92</sup> See Nola Cooke, 1995 'The Composition of the Nineteenth-Century Political Elite of Pre-Colonial Nguyen Vietnam' 29 *Modern Asian Studies* (4) 741; Nguyen The Anh, *supra* 152-155; David Marr, 1971 *supra* 161-162.

<sup>93</sup> See Hooker, 1975 *supra* 246-248 (French law cannot easily co-exist with customary law).

<sup>94</sup> See 1969, *supra* 78-79. Non-cooperation is also attributable to local resistance to French assimilationist policies practised at this time.

<sup>95</sup> See Osborne, 1969 *supra* 85-87.

<sup>96</sup> See Martin Grossheim, 2004 *supra* 55; Le Hong Son, 1995 'Village Conventions and their Role in Rural Management in Vietnam' 1 *Vietnam Law and Legal Forum* (11) 21, 21-22; Bui Xuan Dinh, 1985 *Le Lang Phep Nuoc*, (Customary Law and State Law), Law Publishing House, Hanoi, chapter three.

authorities and reduce the corrupt power of village notables in Tonkin brought chaos to village administration.<sup>97</sup> Colonial authorities eventually acknowledged their failure to transplant democratic accountability and during the 1940s sought to restore the authority of village notables.

Rural administrative reforms replaced the ancient Councils of Dignities (*Hoi Dong Ky Muc*) with Councils Representing Family-Lineages (*Hoi Dong Toc Bieu*).<sup>98</sup> Rather than strengthening French control, attempts to reconfigure village structures produced new bodies lacking the credibility and capacity to project French influence. Strong corporate village structures that had once moderated the behaviour of village officials degenerated under colonial proxies, allowing unprecedented levels of corruption, nepotism and patron-clientism.<sup>99</sup>

### Implementing transplanted law

Colonial law could hardly have differed more from indigenous virtue-rule and asymmetric legal hierarchies. Revolutionary ideals infused French law with notions about 'mankind's natural, inalienable and sacred rights'.<sup>100</sup> These ideals translated into commercial rights governing sanctity of contract, private property, free enterprise and separate legal categories for administrative, criminal, commercial and civil law. French law also manifested liberal ideology promoting legal equality, positive liberty (only laws can remove liberty), religious freedom, public expression and, most importantly, the notion that private rights check public power.<sup>101</sup>

Like other colonising powers (for example, the Dutch in the East Indies), colonial authorities used law primarily to maintain social order and serve French commercial interests. They imported commercial laws (including contracts, land titling, hypothèques and company laws) required to regulate transplanted capitalist institutions.<sup>102</sup> Since

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<sup>97</sup> Martin Grossheim, 2004 *supra* 70-73.

<sup>98</sup> See Dong Hai, 2001 'Huong Uoc (Village Code)—A Distinctive Method of Community Management by the Viet People' 7 *Vietnam Law and Legal Forum* (80) 26, 26-27.

<sup>99</sup> According to one commentator, those who accepted office 'far too often took advantage of their positions to achieve mutual gain.' Osborne, 1969 *supra* 71, 87. Also see James Scott, 1976 *The Moral Economy of the Peasants*, Yale University Press, New Haven, 184.

<sup>100</sup> See J. H. Steart, 1951 *A Documentary Survey of the French Revolution*, Free Press, New York, 113-115.

<sup>101</sup> See generally F.H. Lawson et al, 1967, *Amos and Walton's Introduction to French law*, 3<sup>rd</sup> ed., Clarendon Press, Oxford.

<sup>102</sup> In 1864 French legal codes were promulgated in the colony of Cochinchina (southern Vietnam). Company law was applied throughout Vietnam, because it was thought that no indigenous laws were suitable for 'modern commercial organisations'. See Hooker, 1979 *supra* 157-154. Unlike the pre-colonial *diem*

imported commercial law only applied to Europeans and assimilated Vietnamese, incongruities with indigenous commercial practices were considered irrelevant. In 1880 a committee, largely Vietnamese in composition, was convened to draft a civil code for Cochinchina that reflected indigenous social and commercial practices. Drawing extensively from the Le and Nguyen Codes, the draft-civil code contained legal principles embodying customary practices that were set in a legal framework cognisable to French legal theory. Even this modest reform offended colonial sensibilities, since aspects of Vietnamese legal culture were considered repugnant to 'civilised practice'. A compromise Decree issued in October 1883 amalgamated French Civil Code provisions with indigenous provisions governing marriage, divorce, inheritance and patrimony.<sup>103</sup> Colonial policy initially encouraged field officers to use the Nguyen Code to resolve village disputes. Without comprehending the role of legal codes in neo-Confucian governance, officials tried to generate individual rights and obligations from penal provisions designed to sanction moral violations. Coming from a civil law tradition where legal codes contained generally applicable principles, colonial officials unsuccessfully searched the Nguyen Code for legal abstraction. For example, in the important area of land regulation, the French attempted to use pre-colonial *dia bo* tax registers to create legally binding land boundary registers.<sup>104</sup> The policy of investing customary land boundaries with legal precision, failed to convert loose cultural assertions into abstract legal rights.<sup>105</sup> Officials eventually conceded that the Code lacked sufficient specificity to extend legal principles by analogy to case facts. French attitudes were discussed in a colonial report that concluded 'the Annamite legislator, in fact, instead of posing general principles and drawing deductions from them as required, foresees the various possible hypothetical situations and regulates these in a manner which is almost exclusive'.<sup>106</sup> The replacement of an inferior translation of the Nguyen Code with Philastre's detailed commentaries did not solve the problem. The new draft also lacked jurisprudential

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(credit transaction), the colonial hypothec enabled moneylenders to assume ownership on default. See H. McAleary, 1985 'Diem in China and Vietnam' 17 *Journal of Southeast Asian Studies* 404, 406-407; Hooker, 1979 *supra* 160.

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

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

<sup>105</sup> Decree of 31 July, 1925 and amendment Decree of 23 November, 1926 introduced a 'Torrens Law' system applicable to immovable property in Cochinchina, Annam and Tonkin. See Hooker, 1979 *supra* 160.

<sup>106</sup> G. Durrwell, 1911 *Ma Chere Cochinchine: Trente Annees D'Impresions et de Souvenirs*, Fevrier 1881-1910, Paris, 269, reproduced in Osborne, 1969 *supra* 118.

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

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

In the decades after partition of Vietnam in 1954 much French law and legal education continued in the South.<sup>112</sup> For example, the *Cour d'Appelle Saigon* increasingly analysed and qualified traditional commercial practices.<sup>113</sup> The Republic of Vietnam repeatedly amended French colonial law to reconcile imported legality with local social and economic

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<sup>107</sup> With the transfer of government from the military to civil authorities in 1879, the Nguyen Code was replaced by a modified French Penal Code. The French Code was introduced in Tonkin 1917 and in Annam in 1933.

<sup>108</sup> Interview Ngo Van Thau, *supra* March 2001.

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

<sup>110</sup> See Pham Duy Nghia, 2003 *supra* 46-48.

<sup>111</sup> Interviews Pham Duy Nghia, Lecturer, Law Faculty, National University, Hanoi September, 2000, March 2003; and Ngo Van Thau, *supra*. Also see Pham Duy Nghia, 2001 *Essentials of Vietnam's Business Law*, The Gioi Publishers, Hanoi, 23-25.

<sup>112</sup> For example colonial Order No. 16 Establishing the Rules of Civil and Commercial Procedures 1910; Civil Code (Annam) 1936-1939; and Code of Civil and Commercial Procedures 1912 were translated into Vietnamese in the *Cong Bo Viet Nam Cong Hoa* (Official Gazette of the Republic of Vietnam). They were in use until 1975. See Le Tai Trien, 1973 'Republic of Viet-Nam' in Viktor Knapp ed., *National Reports*, J. C. B. Mohr, Tubingen, R-19-20.

<sup>113</sup> Cases appeared in the journal *Phap Ly Tap San* (Law Review) published in Vietnamese. Interview Quoc Manh, Former Chairman of the Bar Association Ho Chi Minh City, March 1991, April 1992.

practices.<sup>114</sup> Following the adoption of Soviet law in the North during the 1960s, the influence of French law rapidly declined. French legal influence ceased in the South after reunification in 1975 (see discussion below).

### Adopting imported law

Transplanted French commercial laws rarely touched the lives of most Vietnamese.<sup>115</sup> Only a small number of Vietnamese ever elected to submit property disputes to French law, and even then only for domestic, family or inheritance disputes.<sup>116</sup> Most Vietnamese remained remote from the colonial economy. As Jamieson observed 'a mere handful of [French] men exerted near total influence over the entire financial and economic structure of Vietnam'.<sup>117</sup> The indigenous Vietnamese population contributed less than one per cent of the capital and nine per cent of the workforce to the colonial industrial economy.<sup>118</sup> The strong sense of community in villages meant that most commercial transactions, including disputes, were resolved without reference to colonial law.<sup>119</sup>

Not all Vietnamese remained remote from imported rights-based law. A small merchant class acquired knowledge of French law, mainly to deal with colonial officials, French plantation owners and shipping companies.<sup>120</sup> Especially in commercially oriented Saigon, anti-mercantile attitudes slowly gave way to commodity capitalism and rights-based law.<sup>121</sup> French legal ideals envisaged an orderly and predictable world in which some progressive Vietnamese wanted to live.<sup>122</sup> Indeed by the 1930s French officials

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<sup>114</sup> Interviews Pham Duy Nghia, Lecturer, Law Faculty, National University, Hanoi September, 2000, March 2003; Interview Ngo Van Thau, *supra*.

<sup>115</sup> See Hy V. Luong, 1992 *Revolution in the Village*, University of Hawaii Press, Honolulu, 55-79.

<sup>116</sup> See Stephen Young 1979 *supra* 772.

<sup>117</sup> See Jamieson, 1993 *supra* 91.

<sup>118</sup> See J. Chesneaux, 1955 *Contribution a l'Histoire de la Nation Vietnamienne*, Sociale, Paris 74. It is estimated that at the height of the Colonial economy in 1936 no more than 20,000 Vietnamese worked for French firms and approximately 3,000 Vietnamese owned private firms. See Dang Phong, 1998 'Vietnamese Economic Heritage from the French Colonial Period (1859-1945)' *Vietnam's Socio-economic Development* (16) 24-29.

<sup>119</sup> See Nguyen Ngoc Huy and Ta Van Tai, 1986 *supra* 493.

<sup>120</sup> Vietnamese who participated in the colonial economy as plantation owners or operators of commercial establishments such as rice mills, printing presses, and textile weaving factories, together with those who owned houses in the rapidly expanding urban centres, would have found themselves increasingly regulated and expected to understand French law.

<sup>121</sup> Milton Osborne makes that point the two different elites emerged, a bureaucratic elite in the North and commercial elites in the South. See Osborne, 1969 *supra* 276; Marr, 1981 *supra* 122-123.

<sup>122</sup> In discussing attempts to reconcile traditional and French culture Nguyen Tuong Tam editorialised that: Each side has its good points and its bad points, and it is not yet certain where morality lies. But when the old civilization is brought out and put into practice before our very eyes, we are dissatisfied with

complained about the growing number of legal disputes initiated by Vietnamese in Cochinchina. David Marr speculated that some people realised that laws could be used as weapons to secure advantage and conflicts arose under colonial rule that were not easily resolved by family and village mediation.<sup>123</sup>

### The independence movement

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

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the results. We can only continue to hope in Western civilization. Where that civilization will lead us, we do not know. But our destiny is to travel into the unknown, to keep changing and progressing.

Nguyen Tuong Tam, 1932 *Phong Hoa* (18) 20 October, reproduced in Neil Jamieson, 1987 'Relata, Relationships and Context: A Perspective on Borrowed Elements in Vietnamese Culture', in Truong Buu Lam ed., University of Hawaii Center for Asian and Pacific Studies, Southeast Asia Paper No. 25, Honolulu, 130. Also see Hoang Ngoc Hien, 1996 'The Strength of Culture and The Development of Culture' *Vietnam Social Sciences* (40), 28, 31-33.

<sup>123</sup> David Marr, 1981 *supra* 96.

<sup>124</sup> See Marr, 1971 *supra* 185-211; Nguyen Khac Vien, 1974 *Tradition and Revolution in Vietnam*, Indochina Resource Center, Berkeley, 42-43. Also see Dinh Xuan Lam, 1990 'Book Review' *Vietnam Social Sciences* (2) 89, 90-94.

<sup>125</sup> See Dao Tri Uc and Le Minh Thong, *supra* 13-15. For an historical discussion about Phan Boi Chau and Phan Chu Trinh see Marr, 1981 *supra* 15-23; Jamieson, 1993 *supra* 57-65.

<sup>126</sup> See Nguyen Khac Vien, 1994 'Confucianism and Marxism' *Vietnam Studies* (1) 45, 54-55. Ho Chi Minh caustically observed that:

Justice is represented by a good lady holding scales in one hand and a sword in the other. As the greatness of the distance between Indochina and France was so great, so great that, on arrival there, the scales lost their balance and the pans melted and turned into opium pipes and official bottles of spirits, that the poor lady had only the sword left with which to strike. She even struck innocent people and innocent people especially.

Ho Chi Minh, 1961 *Selected Works*, Vol. II, Foreign Languages Publishing House, Hanoi, 96.

<sup>127</sup> See Tran Tu Binh, 1985 *The Red Earth: A Vietnamese Memoir of Life on a Colonial Rubber Plantation*, Trans. John Spragens and David G. Marr eds., Athens, Ohio, Ohio University Press, 42.

than indigenous interests.<sup>128</sup> Selectively appropriating neo-Confucian beliefs, revolutionary writers constructed a local legal ideology that stressed the moral superiority of the independence movement. This synthesis of neo-Confucian virtue-rule with Marxist-Leninism is considered in chapter three.

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

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

## **Legal borrowing following independence**

Just as pre-colonial ideas continued under French rule, there was no clear line marking the end of the colonial area and the beginning of the socialist period. Vestiges of the colonial legal apparatus remained for over a decade after the 1946 Constitution declared Vietnam independent of French rule. These continuities caution against periodising legal change according to constitutional reforms.<sup>129</sup> Although this approach enjoys the virtue of simplicity, the 1946, 1959, 1980 and 1992 constitutions reflect, more than herald, legal change.

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

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<sup>128</sup> See Ho Chi Minh, 'On Justice' in *Selected Works Volume II*, Hanoi, Foreign Languages Publishing House, 96-102.

<sup>129</sup> Vu Dinh Hoe, a Vietnamese legal commentator, advocated a constitutional periodisation from 1945 to 1956 and from 1956 to 1976. This sequencing reflects communist party policy more than constitutional initiatives. See Vu Dinh Hoe, 1995 'Les Quatres Constitutions du Viet Nam' *Vietnamese Law Journal* (2) 24, 24-28.

party policy.<sup>130</sup> The first period started during the early stages of the independence struggle during the 1920s, when imported Marxist-Leninist ideas competed with Western liberal philosophies to form the intellectual basis of popular resistance. The second period commenced in the mid-1940s with the declaration of independence and the formation of state apparatus in the Democratic Republic of Vietnam (DRV) (Viet Nam Dan Chu Cong Hoa). The third period coincided with the consolidation of communist power following the French defeat and the declaration by the Party Congress in 1958 to socialise (or more precisely to Sovietise) the legal system. Early signs of a fourth reform period emerged during the Fifth Party Congress in 1982, but it was not until the Sixth Party Congress in 1986 endorsed a *doi moi* (renovation) policy that legal borrowing shifted from Soviet to Western liberal sources. Naturally these periods are only indicative guides. It will become clear that the history of legal change resists neat categorisation. Our purpose is to provide a framework in which to discuss legal borrowing following independence.

### **The early independence struggle (1920-1945)**

The shift to socialist thinking among many of Vietnam's anti-colonial leaders did not precisely coincide with the decline of neo-Confucian rule or disenchantment with Western philosophy and science.<sup>131</sup> Its timing and origin is much more complex. By 1920 Ho Chi Minh was attracted to the Communist Third International, 'almost a decade before other Vietnamese had any reliable exposure to Marxist-Leninism'.<sup>132</sup> Other early Vietnamese independence leaders received their training in Moscow in the 1930s and were attracted more towards Stalinist than Maoist ideology.<sup>133</sup> Revolutionary pamphlets circulating in colonial prisons prompted French authorities in the 1930s to complain that prisoners went into jails knowing nothing of Marxism, but emerged committed Marxist revolutionaries.<sup>134</sup>

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<sup>130</sup> In a mechanistic sense, all legislative change flows from communist party initiatives, but this statement begs the question what influences communist party policy. For a discussion about this possibility see Benedict J. Tria Kerkvliet, 1995 'Village State Relations in Vietnam: The Effect of Everyday Politics on Decollectivization' 54 *Journal of Asian Studies* (2) 402-405.

<sup>131</sup> It is important to note that Marxist-Leninism was not the only foreign ideology used to counter French colonialism. See the discussion concerning struggles between the Indochinese Communist Party and non-communist Vietnamese nationalist during the anti-colonial struggle during the 1930s and 1940s. Jamieson, *supra* 176-213.

<sup>132</sup> David Marr, 1981 *supra* 317.

<sup>133</sup> See Robert F. Turner, 1975 *Vietnamese Communism: Its Origins and Development*, Hoover Institution Press, Stanford University, Stanford, Cal., 290; William Duiker, 1973 'The Red Soviets of Nghe-Tinh: An Early Communist Rebellion in Vietnam' 4 *Journal of South East Asian Studies* 186, 187-189.

<sup>134</sup> David Marr believes that materials studied included Fredrick Engles 'Anti-Duhring' (State and Revolution) and 'Fundamental Principles of Marxist-Leninism'.

There was much more to the early independence struggle than the importation of Marxist-Leninist thinking. 'By the late 1920s, however, a new generation of intelligentsia were rejecting Pham Quynh's reasoning in favour of a new vision of millions of plain people, the previously passive Thuy Kieus of Vietnam, pulling together, organising, struggling and defeating the seemingly impregnable colonial system.'<sup>135</sup> There was a rapid increase in Vietnamese writings exploring new ways of being Vietnamese. In 1933 alone, 27 permits for *quoc ngu* (the Romanised Vietnamese alphabet) newspapers and journals were granted.<sup>136</sup> Much of this writing sought to reconcile and naturalise colonial cultural and political thinking with local values and practices. Although it is estimated that less than five per cent of the population read these publications, through indirect means this reorientation of Vietnamese culture slowly spread.

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

Writings from the period indicate that Soviet thinking on anti-colonialism was initially welcomed more than Marxist-Leninist legal and economic theory.<sup>139</sup> The 'Political Thesis' promulgated by the ICP in 1930, contained more Soviet anti-imperialist and anti-feudalistic

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

<sup>136</sup> These publications joined the dozens of papers and journals already in publication. See Neil Jamieson, 1993 *Understanding Vietnam*, University of California Press, Berkeley Cal., 102.

<sup>137</sup> Id. 156-159.

<sup>138</sup> See Huynh Kim Khanh, 1986 *Vietnamese Communism, 1925-1945*, Cornell University Press, Ithaca, New York, 272-274. Also see Truong Chinh, 1994 *Selected Writings*, The Gioi Publishers, Hanoi, 207-211.

<sup>139</sup> See e.g. Ho Chi Minh, 1925 'Lenin and the Colonial People' *Krasnui* (2), reproduced in *Ho Chi Minh Selected Writings (1920-1969)*, The Gioi Publishers, Hanoi, 1994, 37-38.

sentiments than socialist theory.<sup>140</sup> This priority reflected the belief that socialist revolutions first required decolonisation.

Like the incipient Chinese Communist Party, the ICP received literature and ideological support from the Soviet Comintern.<sup>141</sup> At least initially, Ho Chi Minh harboured doubts whether the road to socialism prescribed by the Comintern applied in Asian conditions.<sup>142</sup>

By the 1940s, however, the ICP proclaimed that socialist-directed nationalism (path-dependent change) was a means to a socialist end, rather than an objective in its own right.<sup>143</sup> Soviet strategy emphasised the international revolutionary aspects of the anti-colonial struggle. During the 1950s, after the declaration of independence in 1945, the party moved closer to Chinese communism and its fixation on radical class-based land reform.

### **Creating an independent state apparatus (1945-1959)**

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

<sup>140</sup> ICP, 1930 'Political Thesis of Indochinese Communist Party', October, partially reproduced in *Vietnam Documents and Research Notes*, (103), 1970, 58-91. Also see Bernard Fall ed., 1967 *Ho Chi Minh on Revolution*, Praeger, New York, 24; R. B. Smith, 1978 'The Work of the Provisional Government of Vietnam', August-December 1945' 12 *Modern Asian Studies* 596-599.

<sup>141</sup> In a Report to the Second National Congress of the Vietnam Workers Party in 1951, Truong Chinh confirmed that Tran Phu, the first Secretary-General of the IPC drafted the 'Political Thesis' according to resolutions of the Communist International. See Truong Chinh, 1994 *Truong Chinh Selected Writings*, The Gioi Publishers, Hanoi, 343-344. For a comprehensive account of this period see David Marr 1995 *Vietnam 1945: The Quest for Power*, University of California Press, Berkeley, Cal., 473-539. Also see William J. Duiker, 1973 'Red Soviets of Nghe-Tinh: An Early Communist Rebellion in Vietnam' 4 *Journal of South East Asian Studies* 186, 195-196; Arif Dirlik, 1989 *The Origins of Chinese Communism*, Oxford University Press, New York, 266-268.

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

<sup>143</sup> Some revolutionaries considered nationalism a distraction from communist revolution. See Huynh Kim Khanh, 1982, *Vietnamese Communism, 1925-1945*, Cornell University Press, Ithaca, New York, 187-189; Marr, 1971 *supra* 320. By the mid 1930s class-categories resembled orthodox Marxist-Leninist configurations, however, deep engagement with class theory did not emerge until preparation began for the agrarian reform campaigns of 1953-1956. See Pham Van Dong, 1952 *May Van De Cot Yeu cua Chinh Quyen Dan Chu Nhan Dan Viet Nam*, (Some Crucial Aspects of the People's Democratic Regime in Viet Nam) Ban Chap Hanh Trung Uong, (Party Central Committee Publishing) Hanoi, 7-19.

<sup>144</sup> The Preamble borrowed from Abraham Lincoln's Gettysburg Address the famous recital 'for the people, by the people etc'. See Constitution 1946, articles 22, 31, 43, 52, 63; also see Bernard B. Fall, 1960 'Constitution-Writing in a Communist State: The New Constitution of Vietnam' 6 *Howard Law Review* 157, 158-159. Even though it was not expressed in the 1946 Constitution, the economic policy of the Indo-Chinese

promised inalienable, universal private rights, while Soviet 'people's power' imagery required party leaders to implement the 'will of the working classes'.<sup>145</sup> The Constitution also supported Western liberal notions of equality before the law, democratic rights to vote, procedural justice and property rights at the same time it followed socialist ideology (discussed in chapter three) in placing these rights beyond the reach of the courts. Further complicating the ideological mixture, Western liberal notions were interwoven with neo-Confucianism. For example, article 7 not only granted Vietnamese citizens equality before the law, it also qualified participation in government affairs according to each person's 'abilities and virtues', a reference to neo-Confucian self-perfection.

The 1946 Constitution was drafted at a time of political compromise between communist and nationalists in the independence movement.<sup>146</sup> Communist leaders within the National Front for Independence (*Viet Minh*) were content to raise national reunification above class politics, provided 'state revolutionary power' remained under communist control.<sup>147</sup>

Vietnamese commentators later explained that the Central Committee of the Party in 1941 decided for strategic purposes to operate through the *Viet Minh*.<sup>148</sup> The political exigencies of maintaining a broadly constituted anti-colonial coalition and deflecting external criticism from the French and Nationalist China constrained the use of overtly revolutionary rhetoric in the 1946 Constitution. As a consequence, this document resembled the US Constitution more than the Soviet Constitution (1936).<sup>149</sup>

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Communist Party (the precursor to the Vietnamese Workers Party) at this time was unequivocally socialist. See 'Political Theses of the Indochinese Communist Party' October 1930, reproduced in 1970, *Vietnam Studies* (24) 183-91.

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

<sup>146</sup> See Pham Van Dong, 1952 *May Van De Cot Yeu cua Chinh Quyen Dan Chu Nhan Dan Viet Nam*, (Some Crucial Aspects of the People's Democratic Regime in Viet Nam) Ban Chap Hanh Trung Uong, Hanoi, 7-19. Also see Bernard Fall, 1956 *The Viet-Minh Regime Government and Administration in the Democratic Republic of Vietnam*, Greenwood Press, Westport, Connecticut, 39-41.

<sup>147</sup> Although the ICP officially disbanded, it continued to operate and organise through the *Viet Minh*. See Tran Thi Tuyet, 1997, 'The Young State Prepares for the Anti-French Colonialist War of Resistance (1946-1954)' 4 *Vietnam Law and Legal Forum* (38) October 25.

<sup>148</sup> See Pham Van Bach and Vu Dinh Hoe, 1984 'The Vietnamese Constitutions' 1 *International Review of Contemporary Law* 105, 106.

<sup>149</sup> Ho Chi Minh approvingly recalled Lenin when he said 'one should make a compromise with bandits if it was advantageous to the revolution.' See Ho Chi Minh, 1994 'Political Report at the Second National Congress of the Viet Nam Workers Party 1951' reproduced in *Ho Chi Minh: Selected Writings (1920-1969)*, The Gioi Publishers, Hanoi 112; Ho Chi Minh, 1994 'The Party's Line in the Period of the Democratic Front (1936-1939)', reproduced in *Ho Chi Minh: Selected Writings (1920-1969)*, The Gioi Publishers, Hanoi 42-43.

Though raising expectations, the Constitution had little bearing on the way the DRV functioned during the next decade. This story is revealed in decrees, circulars and party (*chu thi*) instructions. For more than a decade after independence the DRV continued using French colonial civil laws, land registration and selected taxes.<sup>150</sup> Colonial laws that conformed to the 'principles of Vietnam's independence and democratic republican form of government' were used to fill the gaps in the embryonic legal system.

New administrative and judicial structures were established. A ministry of justice (*Bo Tu Phap*), for example, was established at the central level. People's Councils and their unelected executives arms called Administrative Committees (*Uy Ban Hanh Chinh*) were formed by decree in November 1945 to regulate provinces (*tin*), districts/communes (*huyen/xa*) and wards (*phuong*).<sup>151</sup> The provisional government of the DRV sought continuity in public administration and instructed state employees (*cong chuc*) to remain in their positions.<sup>152</sup> For example, despite sensitivities concerning colonial land practices, French registration procedures used by the Hanoi cadastral department remained under the new regime. Yet as one staff member later reflected, 'as party members we knew what to do to preserve *loi ich cua nha nuoc* (state benefit)'.<sup>153</sup>

Many court procedural rules were initially based on modified French provisions.<sup>154</sup> Military courts (*toa an quan su*) and regional courts (*toa an khu vuc*) operating in liberated zones used simplified French court procedural rules and the Civil and Criminal Codes of Tonkin, and Annam.<sup>155</sup> These courts were established as an interim measure to restore social order and try those accused of endangering national security. Courts were rearranged to reflect administrative divisions in the government structure (central, provincial and district levels), rather than the French system that was based on first instance, appeal and review courts.

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<sup>150</sup> Order No. 97 22 May 1950 issued by Ho Chi Minh declared the temporary retention of Colonial laws such as the Civil Land Law of Tonkin, Civil Code of Annam and an abridged version of the Civil Law in Cochinchina, except where they were inconsistent with the 'revolutionary spirit'. See Hoang The Lien, 1994, 'On the Legal System of Vietnam' 1 *Vietnam Law and Legal* (1) 33, 34.

<sup>151</sup> Soviet sources indicate that these committees formed the central core of the state apparatus and preformed the dual functions of furthering the revolution and implementing state power. See A. G. Budanov, 1958 *Gosudarstvennyi Stroi Demokraticheskoi Respubliki Vietnam* (State Structure of the Democratic Republic of Vietnam), Moscow, 29; quoted in George Ginsburgs, 1962, 'Local Government and Administration in North Vietnam, 1945-1954 (Part I)' 12 *China Quarterly* 211, 213; Tran Thi Tuyet, 1997, 'Vietnamese State Structure and Law During the Anti-French Colonialist War (December 1946-July 1954)' 4 *Vietnam Law and Legal Forum* (39) 25, 25-27.

<sup>152</sup> See David Marr, 2004 'A Brief History of Local Government in Vietnam' in Benedict J. Tria Kerkvliet eds., *Beyond Hanoi: Local Government in Vietnam*, Institute of Southeast Asian Studies, Singapore, 41.

<sup>153</sup> Interview, Nguyen Thuc Bao, Former Legal Adviser to Ministry of Agriculture, Hanoi, September, 2000.

<sup>154</sup> See Fall, 1956 *supra* 30.

<sup>155</sup> Interviews Ngo Van Thoa, *supra*.

Order No. 13 on the Organisation of Courts and the Status of Judges 1946 confirmed these arrangements.

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

Imported Chinese thinking on land reform and socialist political consciousness was also gaining momentum.<sup>158</sup> DRV policy began to shift from preserving colonial legality and property rights towards state-owned industries, nationalisation and redistribution of land belonging to French 'imperialist aggressors' and 'reactionary' landlords. Special People's Courts (*Toa an nhan dan dac biet*) were established to administer the Land Reform Law 1953. Courts comprising one professional judge supported by lay advisers (middle and poor peasants (*trung ban co nong*)) implemented class-based land allocation policies.<sup>159</sup> According to popular accounts, courts were arbitrary and violent; their function was to further revolutionary reform rather than resolve disputes.<sup>160</sup> Legislative changes in 1950 encouraged defendants to select lay representatives over legally trained advocates. Writing about revolutionary justice, Fall concluded that 'trials, particularly those of enemies of the state, are held on a completely informal basis, with the public supplying most of the arguments as well as a good part of the final judgement'.<sup>161</sup>

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<sup>156</sup> For discussions concerning Chinese assistance with land reform see Truong Chinh, 1954 *Thuc Hien Cai Cach Ruong Dat* (Report to First Party Congress), Dang Lao Dong Viet Nam Xuat Ban (Vietnam Workers Party Publishers), Hanoi, 49-66; also see William J. Duiker, 1977 'Ideology and Nation-Building in Democratic Republic of Vietnam' 17 *Asian Survey* 413, 414-419; Edwin Moise, 1976 'Land Reform and Land Reform Errors in North Vietnam', 49 *Pacific Affairs* 70.

<sup>157</sup> Marr 2004, *supra* 47.

<sup>158</sup> The Fifth Plenum of the Vietnam Workers Party in 1953 based land reform on the Chinese model. See Author Unknown, 1951 *Cai Cach Ruong Dat O Cac Nuoc Dan Chu Nhan Dan*, (Agrarian Reform in Democratic Republic Countries), Truth Publishing, No 5, Liberated Territory; Author Unknown 1961, *Nhung Van De Co Ban ve Dan Phap Cua Nuoc Cong Hoa Nhan Dan Trung Hoa*, (Major Issues in the Civil Code of the Peoples Republic of China), Tap III, Toa An Nhan Dan Toi Cao Xuat Ban, Hanoi.

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

<sup>160</sup> *Nhan Dan*, 13 August 1957, cited in J. Price Gittinger, 1957 'Communist Land Policy' 28 *Far Eastern Survey* (8) 118; Wifred Burchett, 1955 *North of the 17<sup>th</sup> Parallel*, FLPH, Hanoi, 168-169.

<sup>161</sup> Bernard Fall, 1956 *supra* 30.