

LEGAL REFORM AND ECONOMIC DEVELOPMENT IN VIETNAM AND CHINA

A COMPARATIVE ANALYSIS

Master of Arts in Law and Diplomacy Thesis

Submitted by Adam Day

29 February 2004

Under the advisement of Professor Louis Aucoin

© 2004 Adam Day

<http://fletcher.tufts.edu>



THE FLETCHER SCHOOL

TUFTS UNIVERSITY

“There is no way a market system can work efficiently in the absence of clear, enforceable laws.”

World Bank Counsel

“In muddy water a stork grows fat.”

Vietnamese proverb

Legal reform and economic development in Vietnam and China: a comparative analysis

Table of Contents

1. Preface	3
2. Introduction	4
3. Overview of Chinese and Vietnamese legal cultures and their influences	14
4. History of Vietnamese Legal Thought	21
5. History of Chinese Legal Thought	27
6. The Internationalization of Chinese and Vietnamese Law	32
7. Judicial Independence in Vietnam	40
8. Judicial Independence in China	46
9. Administrative culture and business in Vietnam and China	49
10. Administrative Law in China and Vietnam	52
11. Economic and Civil Court Reform in Vietnam and China	59
12. The Legal Profession in China	64
13. The Legal Professional in Vietnam	70
14. Conclusion	76
15. Bibliography	85

Preface

Until last year, I had never had the opportunity to visit Asia. Thanks to the generous funding of the Henry Luce Foundation and support of the Asia Foundation, I was able to study legal reform in Vietnam during the summer of 2003. The experience was rich and stimulating, introducing me to a land and culture that I quickly grew to love. I benefited from Chad Bolick and Jonathan Stromseth's faith in my abilities as a prospective Luce fellow and their guidance during my stay in Vietnam. I was also able to meet numerous Vietnamese friends and professionals, as well as ex-pats, all of whom made my stay in the country memorable.

Returning from Vietnam, my interests in transitional economies and legal reform led me to take a course on comparative law with Professor Louis Aucoin at the Fletcher School. Under his advisement, I decided to write my masters' thesis as a comparative law analysis in order to better place the experience and knowledge I gained about Vietnam. My thesis compares China and Vietnam because of their shared political and cultural roots, but also for their differing reform policies and economic performance. Having never been to China, I relied exclusively on desk research to write those sections of the paper. My wife Kate helped with edits and the encouragement to complete my thesis a semester early and my mother Karen weighed in with her always appreciated wisdom and insight. My father Tom, who passed away in 2000, served in the Vietnam War and was a constant presence during my time in the country.

Introduction

The first thing a visitor to Vietnam notices is the traffic chaos. Whether in Hanoi or Ho Chi Minh City, one is subsumed in a deafening torrent of mopeds careening down the streets. At intersections, Vietnamese policemen, wearing tan uniforms, fake Ray-Bans and holding white Billy-clubs, idly scan for traffic violators. It's safe to say that every driver is violating some law—no lights, no paperwork, five people and two pigs on one moped. Without bikes of their own, police rely on traffic congestion to make stops: they swiftly step in front of selected drivers who have little room to turn away. Once off the street, a bribe is negotiated, usually around \$5, more if the driver seems rushed or owns an expensive bike. In Vietnamese, this discussion is called *lam luat*, which literally means “to make law.”¹

That common expression is emblematic of the myriad obstacles that confront Vietnam in adopting a true rule of law. China also faces similar challenges in transforming a largely extralegal society into one governed by more predictable legal institutions. In recent years, both countries have sought to modernize their economies by restructuring their legal systems—all while preserving the mantle of strong, single party, socialist states. The process has proved complex and at times paradoxical. In Vietnam, law “has been called upon both to bring greater pluralism to Vietnamese society and to contain the political instability pluralism can bring.”² While both countries are encouraging the

¹ This is from the author’s observations and conversations with residents of Hanoi and Ho Chi Minh City in 2003, though not from first hand experience.

² Mark Sidel, “Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training,” *UCLA Pacific Basin Law Journal* 11, no. 2 (1993). 223

growth of the private sector, their governments remain ambivalent about the ‘rule of law’ concept in meeting economic development goals.³

This thesis is a comparative analysis of the unusual legal reform dynamics in Vietnam and China. The intent is to explain the function of law in the development of these transitional economies by looking at legal reforms from a political economy and private enterprise perspective. It does not argue for or against a specific theory or policy related to law and development, but rather offers an observational assessment of recent reforms in each country. Vietnam and China are examined in terms of similarities and distinctions in their respective reform efforts. While there is a shared cultural and political heritage hostile to the legitimization of law and commerce, for example, China has progressed more rapidly than Vietnam in implementing legal reforms. Commercial litigation has increased dramatically there, while recent court reforms in Vietnam precipitated a sharp decline in cases. China recently announced its intention to privatize property⁴—a surrender of socialist dogma that Vietnam has so far been unwilling to concede. Yet, both countries struggle with corruption, debt-ridden state factories and banks, vast, extralegal markets and the weak enforcement of court judgments. Their nascent legal professions, while more independent from the state, have accommodated this legal morass instead of setting higher standards of probity. This thesis also contrasts these shared legal challenges with Western conceptions of the rule of law in order to assess whether China

³ For a complete analysis of the components of the Rule of Law as seen from the Western perspective, see Barry M. Hager, *The Rule of Law: A Lexicon for Policy Makers* (Mansfield Center for Pacific Affairs, 2000). China and Vietnam’s ambivalence stems for their political traditions, though there is also a more empirical justification for such skepticism. Law functions well as a state management tool, but not an instrument of economic or political development. See Weber

⁴ Peter S. Goodman, "China Ready to Grant Property Rights," *Washington Post*, December 22, 2003.

and Vietnam are converging on Western legal standards or forging a different ‘rule of law’ model.

The first analytical hurdle that confronts market legal theorists studying Vietnam and China is that the explosive economic growth of these countries began and continues despite dysfunctional court systems and ambiguous private property protections.⁵ This performance is both exceptional and ironic—two of the last remaining communist countries, seemingly bereft of Western development prerequisites such as a rule of law and government transparency, have maintained some of the highest economic growth and poverty reduction rates in the world.⁶ More generally, East Asian development has long stymied Western assumptions about the causal linkages between liberal politics, law and economic growth.⁷ Singaporeans have few political freedoms, but enjoy a comprehensive, corruption-free legal system and robust economic growth. The Philippines has democratic governance, but only modest market development and a weak rule of law. “The East Asia experience could, at its sturkest, mean that high levels of economic performance bear no relation at all to the presence of “modern” or “Western” law.”⁸

Vietnam and China have experienced tremendous growth but have neither liberal political structures nor well functioning legal systems. In Vietnam, legal reforms are

⁵ Adam Fforde, "From Plan to Market: The Economic Transitions in Vietnam and China Compared," in *Transforming Asian Socialism: China and Vietnam Compared*, ed. Benedict J. Tria Kerkvliet Anita Chan, Jonathan Unger (Rowman and Littlefield Publishers, Inc., 1999). 45

⁶ Joseph E. Stiglitz, *Globalization and Its Discontents* (New York: W.W. Norton & Company, 2003). 214

⁷ Kanishka Jayasuriya, "A Framework for Analysis," in *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions*, ed. Kanishka Jayasuriya (London: Routledge, 1999). 1

⁸ Per Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience* (Department of Law, Umea University, Sweden, 1999). 20-21

often a delayed reaction to market trends and “improvements in enterprise performance have usually *preceded* changes in the legal framework.”⁹ Similarly, in China “economic development has not been significantly hampered by the lack in some circumstances of effective enforcement of rights.”¹⁰ Critics of these observations counter that the rule of law is integral to fostering growth, reducing corruption and promoting market stability.¹¹ As a former World Bank General Counsel said: “There is no way a market system can work efficiently in the absence of clear, enforceable laws regarding property and contractual rights and obligations.”¹² These critics argue that however Vietnam and China have managed thus far, long term prosperity will depend on their willingness and ability to transform their societies into ones governed by the rule of law.

The rule of law concept may be widely embraced, but consensus often unravels around which principles and values should be prioritized.¹³ Generally speaking, most advocates identify key components derived from the Western liberalism, going back to John Locke,¹⁴ such as a strong constitution, government bound by its own laws, and an

⁹ Brian Van Arkadie & Raymond Mallon, *Vietnam: A Transition Tiger?* (Asia Pacific Press, 2003). 104 Emphasis added.

¹⁰ Donald Clarke discussing ineffective civil judgment enforcement in China. See Stanley Lubman, "The Future of Chinese Law," *China Quarterly*, no. 141 (1995). 13 Clarke notes that businesses do not have a detrimental reliance on efficient, impartial courts; disputes are handled informally within the context of ongoing business relations.

¹¹ Edgardo Buscaglia, *The Law and Economics of Development: Anti-Corruption Programs and Their Impact on Efficiency and Equity* (Hoover Institution, Stanford University and the University of Virginia Law School, 1999). 2

¹² Ibrahim Shihata, former Vice President and General Counsel to the World Bank, 1991. From Bergling.

¹⁴

¹³ Anders Fogelklou, "Principles of Rule of Law and Legal Development," in *Legal Assistance to Developing Countries: Swedish Perspectives on the Rule of Law*, ed. Per Sevastik (Kluwer Law International, 1998). 38

¹⁴ Locke outlined many principles that would eventually be incorporated into the rule of law lexicon, writing that “the ruling power ought to govern by declared and received laws, and not by extemporary dictates and undetermined resolutions.” John Locke, *The Second Treatise on Civil Government* (1690). 77

independent judiciary, among other features.¹⁵ Animating these principles is the idea that the judiciary acts as check on legislative and executive power by being uniquely disposed to determine what the law is. In the United States, this power of judicial review grew serendipitously from the Supreme Court's landmark *Marbury v. Madison* case—the legal system equivalent of evolving an opposable thumb. But while complementary political circumstances and legal theory have intermingled for two centuries in the West, China and Vietnam have a tradition of Confucianism, Communist ideology and anti-colonialist skepticism that has forged a different understanding of the role of law in society. Here the boundaries of public and private, law and politics, and individual rights and community values blur together in ways that resist foreign prescriptions.

As Stanley Lubman wrote, “because law is the most overtly culture bound of all the disciplines, legal studies of China raise with particular sharpness issues that bedevil all implicitly or explicitly comparative inquiries into Chinese society.”¹⁶ Likewise, in Vietnam, translation of legal terminology creates a guise of commonality with the West that belies significant differences in values. The affinity for “democracy” and “independence” evident in Vietnam’s 1946 and 1992 Constitutions and their Preambles¹⁷ are often miscast as a reflection of Western ideals. The term ‘democratic’ is meant to connote the collective advancement of the revolution and “independent” means independent of an oppressive colonial regime or foreign influence, rather than judicial

¹⁵ Hager.

¹⁶ Lubman. 9

¹⁷ "Constitution of the Socialist Republic of Vietnam," (1992).

independence from the government or the Communist Party.¹⁸ In this sense, studying Vietnamese legal thought through a Western lens can suggest misleading parallels. Even the Vietnamese Constitution, like that of China, is seen as the articulation of the Party's policy direction rather than a legal document; the rights it espouses cannot be the basis of a legal challenge against government actions.¹⁹ Taking correct measure of the indigenous commercial legal culture of China and Vietnam is additionally complicated by the historical exclusion of trade from their legal systems, as well as their tendency to incorporate foreign law nearly verbatim, such as recent transplants of Western economic laws.²⁰

Despite their apparent progress without strong legal institutions, Vietnam and China have embarked on ambitious plans to rebuild their legal systems.²¹ Many Western aid agencies hope that the results of these reforms will be two-fold: first, that better legislative drafting will improve the relevance and economic efficiency of laws²² and, second, that the resolve to implement and enforce these laws will help establish a cultural acceptance of the rule of law. On the latter goal, Westerners may be mistaken in viewing the

¹⁸ Penelope Nicholson, "Vietnamese Legal Institutions in Comparative Perspective: Contemporary Constitutions and Courts Considered," in *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya (London: Routledge, 1999). 301

¹⁹ John Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis," *Stanford Journal of International Law* 30, no. Summer (1994). 333

²⁰ Jianfu Chen, "Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China," in *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya (London: Routledge, 1999). 69

²¹ John Gillespie, "Law and Development in 'the Market Place': An East Asian Perspective," in *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya (London: Routledge, 1999). 118

²² Robert and Anne Seidman of Boston University have done extensive research in the area of legislative drafting. See "Assessing Legislation: A Manual for Legislators," (with Ann Seidman, Nalin Abeysekere & Judy Seidman) at www.bu.edu/law/lawdrafting (2002).

development of the rule of law in Vietnam and China as a constraint on governmental power and the expansion of a rights-based system of law. Eastern donors, principally Japan, and the Vietnamese and Chinese themselves, rather view legal reform through a socialist, corporatist lens that emphasizes state and Party power and the “close co-operation between government and industry, with only a marginal reliance on universal, positive law.”²³ In China, legal reform may be seen as the “the basis for success in economic reform,”²⁴ but it has not led, for example, to the establishment of an independent judiciary. Rule of law is received as *rule by law*—movement to a more efficient, accountable government structure, but not the complete subordination of the Party to the political system it leads. In lieu of transitioning toward democracy, Party leaders find enveloping the political status quo in an economic policy of “indefinite liberalization”²⁵ more attractive.²⁶

But even legal reforms aimed at increasing state control and spurring economic growth have limitations. Vietnam and China confront cultural aversions to law among their citizens, widespread corruption and defiant regional governments. Fewer than 5% of businesses in Vietnam that should be licensed are—the vast majority of employment generation and economic growth exists outside of the state’s legal purview.²⁷ Most

²³ Gillespie, "Law and Development in 'the Market Place': An East Asian Perspective." 119

²⁴ Pitman B. Potter, "Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China," *China Quarterly*, no. 138 (1994). 325

²⁵ Brantly Womack, “Asian Communism: Enigma Variations” (University of Virginia, 1993). See Fforde. 12

²⁶ The expression ‘indefinite liberalization’ refers to co-opting the idea of revolutionary struggle from which the Communist Party gained its legitimacy and applying it to modern economic policy. By insisting that reforms are never finished, the Party can perpetuate the need for its centralized, authoritative rule.

²⁷ John Gillespie, "Bureaucratic Control of Business Regulation in Vietnam," in *Asian Laws through Australian Eyes*, ed. Veronica Taylor (Sydney: LBC Information Services, 1997). 375

businesses still settle disputes without recourse to local or state courts.²⁸ Replacing rule of bureaucracy with a rule of law does create an opportunity to broaden and deepen political power within the state and draw businesses into the formal economy, but it also risks revealing the impotency of these governments, disrupting “the great Chinese political game of feigned compliance.”²⁹³⁰ The common Vietnamese expression, *phep vua thua le lang*, (The king’s law stops at the village gate) writ large to the level of provinces, state-owned enterprises and major cities, underscores the challenge facing government leaders.

In some ways, the issue facing China and Vietnam now is similar to building the legal infrastructure of the European Union. Respect of sovereignty reflects EU members’ aversion to allowing law to trump national political prerogatives and has required a delicate, gradual, flexible and consensus-based approach to reform. Likewise, China’s and Vietnam’s leaders are finding that rule of law is a challenge to the sovereignty of many kings, both big (the Communist Party) and small (line ministries, businesses and regions.) Of course, the lack of a well-established legal system compounds this endeavor.

Appreciating the divide between Western conceptions of the rule of law and the specific cultural and political circumstances of Vietnam and China, it is hard to benchmark their progress against a Western ideal of legality—all the more reason given the apparent irrelevance of the Western model in explaining China and Vietnam’s economic

²⁸ John McMillian and Christopher Woodruff, "Dispute Prevention without Courts in Vietnam," *The Journal of Law, Economics, & Organizations* 15, no. 3 (1999).

²⁹ Lucian W. Pye, "China: Erratic State, Frustrated Society," *Foreign Affairs* 69, no. 4 (1990). 56 See also Lubman.

³⁰ Rule of bureaucracy and rule by law are used interchangeably in this paper. They describe systems of *ad hoc* rule making by individual bureaucrats largely unaccountable to formal legal channels. Rule by law admittedly can comprise a vast administrative state, though the concept implies a consistency of procedure and level of transparency that constrain individual bureaucratic discretion.

successes. In the business offices and government ministries of Vietnam and China, the process of legal reform may appear inchoate, but its idiosyncrasies represent the foundation on which the future legal progress will be made. In this sense, the performance of these legal systems may depend “more on the characteristics of the second-best solutions that emerge, which may involve informal arrangements and behavior which by-pass inappropriate rules and regulations to establish workable ways of maintaining orderly business arrangements even in the absence of certainties implied by the term ‘rule of law.’”³¹

The complexities of this process are typified by the tenuous development of the legal profession in China and Vietnam. Once state cadres, lawyers in both countries have gained a greater degree of autonomy—but instead of being powerful advocates for the development of a legal system they can populate, freedom has left lawyers in a professional purgatory.³² They are largely freed from the state, but consequently are often the object of discrimination, rather than a voice for justice and political reform. Chinese and Vietnamese societies still view dispute settlement organically—there is nothing intrinsically compelling about the law and often a neighborhood committee or local work unit is seen as superior dispute forum to a court.³³ As such, lawyers spend a lot of time justifying their profession and half-debunking myths that they are predatory intermediaries between the state and business interests. Their focus on their immediate

³¹ Mallon. 107 Bergling also writes: “It seems that often the best has not been the enemy of the better. Even less-than-perfect judicial and administrative constructions have helped to sustain credibility and promote private enterprise, thanks to the ideological message they convey. It is also certain that if nothing is done until everything can be done, the entire process would come to a standstill.” 69

³² Based on interviews with lawyers in Hanoi and Ho Chi Minh City in 2003.

³³ Ethan Michelson, “How Much Does Law Matter in Beijing?,” in *Law and Society Association Annual Meeting* (Vancouver: 2002). 17

economic welfare, like all other entrepreneurs, has weakened their collective interest in pushing for the political change necessary for the formalization of a unitary, coherent system of law.³⁴

Together, the ambiguity about how the law actually functions, widespread corruption, and the gradualist approach to reform of the Chinese and Vietnamese leadership, have made some observers skeptical of these countries' future development. However seemingly ineffective legal reforms made in the context of a commitment to market liberalism—the success of which anchors the legitimacy of both Communist parties—may be the right balance of pace and policy. As Karl Polanyi said, “the rate of change is often of no less importance than the direction of change itself.”³⁵ The Chinese and Vietnamese often point to the Soviet Union’s collapse and subsequent instability as reason for reform caution in both speed and direction.³⁶

This thesis explores the legal reform experiences of Vietnam and China, with particular emphasis on legal initiatives undertaken after 1992. The intent is to articulate how law is understood and used in these societies as it relates to private enterprise and, more broadly, whether China and Vietnam are on course to achieving a rule of law as defined

³⁴ Ethan Michelson, “Unhooking from the State: Chinese Lawyers in Transition” (University of Chicago, 2003).

³⁵ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1957). 36-37 Polanyi was discussing the inability of the English Parliament to constrain land grabbing by country lords in Tudor England. Whereas some saw the anti-enclosure legislation as a failure, he pointed to its success in slowing the rate of transgressions. The direction of progress may be difficult to guide, but the government’s role in economic life lies in managing the “relative rates of change and adjustment.” The case of China and Vietnam are a mix of private enterprise running beyond the bounds of government control and, conversely, the ability of the government to firmly, and detrimentally, intervene on certain issues.

³⁶ Based on interviews in Hanoi and Ho Chi Minh City 2003.

by the international community. The paper is divided into five main sections. The first discusses the theory and history of law that informs the unique legal culture of each country. These theories are then viewed through the development of Chinese and Vietnamese constitutions and legal reforms from post-independence in Vietnam (1945) and the Communist take over in China (1949) until the present. The second section focuses on each country's transition from a socialist command economy and the role of imported laws and customs in that process. The third evaluates the socialist notion of judicial independence and how it is understood within each society. The fourth looks at administrative culture and its attitude toward business, as well as specific administrative reforms aimed at increasing government accountability. The fifth looks at the role of lawyers in the economic and legal development process. The conclusion focuses on the future uncertainty of legal reform. While China and Vietnam are sailing two of the fastest ships in the world economy, below deck an impossibly productive mutiny prevents these countries from making the rule of law a reason for their success.

Overview of Chinese and Vietnamese legal cultures and their influences

The number of legal influences that inform the current understanding of socialist law in Vietnam and China are extensive. At its base, there is the shared foundation in Confucian thought, a hierachal system of values founded on *li* (ritual), *ren* (benevolence) and *tian* (heaven) in the 4th century B.C. in China. Vietnam was considered a province of China until 939 A.D., and was subsequently ruled for many centuries following Chinese traditions. In Confucianism, *li* is the most important and emphasizes filial devotion and counsels that “society should not be regulated by laws, but by the internalization of

certain ethical principles of conduct on the part of each individual.³⁷ In this sense, the need for law as organizing principle represents a tear in the fabric of Chinese society, whereas Western philosophy places law as the rational foundation for a society's advancement.

These Confucian beliefs evolved into 'Political Confucianism,' which advocated for an emperor and class of beneficent scholars controlling a centralized, bureaucratic state.³⁸ This cultural inheritance proved amenable to the establishment of Communist states that shared an interest in the placing values, policy and obligation above a system of law or rights. In Vietnam, "links between socialism and traditional concepts also allowed the leadership to invoke traditional sanctions for socialist policies."³⁹ Although Confucianism avoided issues of law and commerce, the extent to which its principles were co-opted may have influenced economic success as much as it solidified political power. Japanese Confucianism focused on the value of "strict indebtedness to favors," for example, while Chinese Confucianism emphasized ideas with less economic applicability such as "benevolence."⁴⁰

Neo-liberal economic theory posits that as the size and complexity of a marketplace grows, so too does the need for comprehensive, transparent and reliable legal mechanisms to govern dispute resolution and bankruptcy, among numerous other aspects

³⁷ Bergling. 46

³⁸ Ibid. 47

³⁹ Ibid. 54

⁴⁰ Alexander Woodside, "Exalting the Latecomer State: Intellectuals and the State During the Chinese and Vietnamese Reforms," in *Transforming Asian Socialism: China and Vietnam Compared*, ed. Benedict J. Tria Kerkvliet Anita Chan, Jonathan Unger (Rowman & Littlefield Publishers, 1999). 34 Woodside compares the religious and economic effects of splits in Confucianism to the deviation of European Protestantism from Catholicism.

of business. It assumes a separation of public and private law, constitutionally protected rights and equitable, independent courts. The Chinese and Vietnamese carry a different conception of market rules and state involvement. Max Weber, in his study of Chinese culture, noted that while wealth has always been exalted in Confucianism, its creation was viewed differently than in the West.⁴¹ “Whereas Puritanism objectified everything and turned it into a rational enterprise, all communal action [in China] remained engulfed in and conditioned by purely personal, above all, kinship relations.”⁴² Weber argued that the “political capitalism” seemingly inherent to countries such as China and Vietnam would nonetheless be unable to reach “an advanced level of capital accumulation”⁴³ without attendant changes in their legal cultures.⁴⁴

In Vietnam, French occupation through the 19th and 20th centuries did little to instill a broader reception to the value of law. With Vietnamese collaborators, the French used their power under the pretext of legal mandates to confiscate land and property in order to create a more productive export colony. The exploitative use of law, and the subsequent adoption of the Napoleonic Code, did little to convey an appreciation of the intrinsic value of law to the Vietnamese. The French belief in the universality and superiority of its laws, meant that colonialists, struggling with cultural adversity, were expected to find

⁴¹ John Love, "Max Weber's Orient," in *The Cambridge Companion to Weber*, ed. Stephen Turner (Cambridge University Press, 2000). 178

⁴² Max Weber, *Religion of China: Confucianism and Taoism* (Free Press, 1964). 241

⁴³ Jayasuriya. 9

⁴⁴ Weber cautioned, however, that law was an organizational necessity, but not a causal element of economic development. According to Bergling, “Weber’s analysis underlines the fact that modern law does not produce economic development, it merely helps structure the free market, and that modern law does not bring about political development, it merely supports the centralized bureaucratic state which depends for its legitimacy on a belief that its decisions are rational.” Bergling. 17-18

the right legal answer to any local problem through “simple exegesis”⁴⁵ of the Code. No efforts were made to incorporate or recognize Vietnamese laws or customs. Only a small percentage of elite Vietnamese were directly affected by the French occupation, but the French did found a law school and train legal scholars who would come to power after the country’s independence.

In 1955, the Vietnamese officially threw out most of the French civil law administrative structures and made it illegal to practice traditional or colonial law. The government by then had incorporated the core principles of socialist legal thinking: socialist legality (interchanging policy for law by the Party), democratic centralism (uniform application of policy through a centralized Party-state) and collective mastery (subverting individualism and class). The perpetuation of these doctrines have created a particular conception of law in Vietnam: “First, law is not above the state, but rather emanates from the state. As an extreme manifestation of legal positivism, there is no space in socialist legality for customary rules or natural rights. Secondly, the party and the state possess prerogative powers to substitute policy for law...Thirdly, the central ‘party leads’ the state and society. Fourthly, individual rights give way to the collective good.”⁴⁶ Socialism was originally focused on owning the means of production to safeguard worker interests, but now, with increasing industry privatization⁴⁷ and foreign direct investment, such

⁴⁵ Ibid. 50

⁴⁶ John Gillespie, "Continuity and Change in Vietnamese 'Socialist' Legal Thinking," in *Law and Governance: Socialist Transforming Vietnam Conference* (2002). 7

⁴⁷ In Vietnam, the government still avoids using the privatization or ‘private sector’ terminology. It prefers the term ‘equitization.’

abstraction resists meaningful definition.⁴⁸ “Goals are now becoming accepted as slogans, while their real content is becoming more vague.”⁴⁹

Bergling writes that “the epithet ‘socialist’ serves to legitimize the obligation to obey the law, because unlike a law in a capitalist state, a law in a socialist state is seen to exist in the just interest of all people, and as such should be obeyed.”⁵⁰ It is an emphasis on rule by law, “meaning that state organs are bound by legislation and that citizens are assured that their economic rights will be upheld as long as they follow the rules.”⁵¹ In China, socialist law—not notwithstanding Mao’s contempt—has had a similarly utilitarian value. As Chinese jurist Zhang Youyo wrote about the role of law in China: “Socialist democracy and the legal system [*fazhi*, sometimes translated as ‘Rule of Law’] are inseparable; both of them are [to be used] to consolidate socialist economic bases and to enhance socialist development. At present, they are powerful tools for promoting the Four Modernizations. Neither of them is an end but both of them are means.”⁵² Law is seen as ‘policy plus,’ a more effective tool—by virtue of its seeming rationality and universality—for implementing the goals of the Party.⁵³ As Gillespie concludes, “law facilitates, but never constrains power.”⁵⁴

Despite the surge of new legislation in both countries, the bundling of law-making and interpretative powers remains a crucial element of these socialist governments. The

⁴⁸ Gillespie, “Continuity and Change in Vietnamese ‘Socialist’ Legal Thinking.” 2

⁴⁹ Bergling. 15

⁵⁰ Ibid. 53

⁵¹ Ibid. 103 Abstract

⁵² Chen. 71

⁵³ Ibid. 72

⁵⁴ Gillespie, “Continuity and Change in Vietnamese ‘Socialist’ Legal Thinking.” 7 The same observation is often made of the role of law governing the use of force in the international arena.

virtues of an independent judiciary, the foundation of the rule of law model, have not impressed the Chinese and Vietnamese leadership. Socialist law is an extension of state policy; modifying the law or striking it down is seen as the natural prerogative of the author, whether the government or Party, not an independent entity. In Vietnam, “the judicial system itself often seems to favor compromise, *ad hoc* bargaining and reliance on superior authorities before formalized decision making under law.”⁵⁵ Like water that can simultaneously exist as a solid, liquid and gas at the right temperature and pressure,⁵⁶ power in these countries moves among states—political, legal or coercive—with natural fluidity.

At present, China and Vietnam are both socialist countries with civil law infrastructures. They have no constitutional courts, and administrative law—once completely unaccountable, but now more exposed to individual and business grievances—plays a major role in the management of their societies. Common law influences are increasing both from the importation of commercial codes from the United States, for example, but also in a gradual shift to a more adversarial approach to court hearings that emphasizes the role of lawyers. (This is opposed to the inquisitorial tradition associated with civil law systems, which focuses on the primacy of the state and the judge in the management of court procedure and investigations.) These trends have given China and Vietnam an outward looking legal orientation that sees progress in the mimicry of other legal models rather than the codification of their own commercial customs. In the 1960s, Vietnamese

⁵⁵ Bergling, 160

⁵⁶ This equilibrium is called a triple point. For water, it is at 0.01 Celsius with a pressure of 4.56 mm Hg. It is a rarely observed phenomenon except in skating: the pressure of a single blade turns ice into a slick film of water (with a negligible change in temperature). Two bladed skates, like the Vietnamese suspicion of political pluralism, usually fail to exact enough focused pressure to melt the ice and move forward.

leaders dismissed “indigenous business culture as sub-optimal or non-existent”⁵⁷ in favor of direct legal borrowing from the Soviet Union. Since the 1987 Law on Foreign Investment, its commercial law has also been largely derived from Western and East Asian sources.⁵⁸ To the chagrin of some international observers, legal reform in China and Vietnam seems to mean submitting complex, rights-based foreign laws to the vague exigencies of “socialist legality,” while paying lip service to the importance of developing law with strong “Chinese characteristics”⁵⁹ or “national characteristics” in Vietnam. For example, espoused freedoms of expression or economic activity must always comply with the ‘state’s interest,’ a concept under constant revision by the Party.

The durability of China and Vietnam’s reform strategies is ultimately a matter of trust. If their Parties can fuel economic growth by curbing corruption and arbitrary rule-making, they can preserve the perceived legitimacy of blurring the boundaries of politics, law and business.⁶⁰ If these problems cannot be solved, the fusion of law and politics means that an economic slump or rampant corruption represents a structural failure in the architecture of the political system, not just the policies of the governing party.⁶¹ It would be the failure of the Party apparatus as a benevolent “super family”⁶² in the Confucian sense. Both Parties have come back from the brink of destruction before, but each has

⁵⁷ Gillespie, "Continuity and Change in Vietnamese 'Socialist' Legal Thinking." 20

⁵⁸ Ibid. 12

⁵⁹ Erik Persson, "Bureaucracy and Legal Culture," in *Legal Assistance to Developing Countries: Swedish Perspectives on the Rule of Law*, ed. Per Sevastik (Kluwer Law International, 1998). 238

⁶⁰ In recent interviews in Vietnam, some lawyers opined that the country had reached the limit of economic prosperity capable of being achieved within a corrupt, one-party state. While cautious in public, and largely ambivalent about political activism, some Vietnamese lawyers are increasingly skeptical about the Party’s ability to reform itself—particularly when the current economic boom absolves conservatives’ reluctance to press for further change.

⁶¹ Western political parties just imagine that to be the case.

⁶² Bergling. 48

only partially embraced the spirit of legal reform. For the sake of economic prosperity, they are intent on strengthening the legitimacy of their newly built legal institutions—provided that every chamber has an escape hatch.

History of Vietnamese Legal Thought

In August 1945, Ho Chi Minh led the national uprising that he had been preparing for most of his life. In the power vacuum left by the Japanese capitulation in Indochina and the disarray of the French colonial regime, Ho Chi Minh's Viet Minh (Alliance for the Independence of Vietnam) gained control of the entire country. The following month, the communist revolutionary and ally of the Soviet Union gave his famous Declaration of Independence speech in Ba Dinh Square.⁶³ Perhaps fittingly, he used excerpts from the liberation texts of two enemies Vietnam would subsequently engage and defeat, quoting France's Declaration of Human and Citizen Rights and the United States' Declaration of Independence. Since his days as political activist in Europe in the early 1920s, Ho Chi Minh had believed that after independence, Vietnam would only thrive under a democratic government that respected the rule of law.⁶⁴ After World War I, he had advocated for “reform of the justice system in Indochina by allowing domestic people to enjoy the same legal protection as European people...the replacement of government by

⁶³ Pip Nicholson, "Vietnamese Courts:Party-State and Law," in *CERI-International Conference: The state of the law and rule of law in post doi-moi Vietnam* (Paris, France: 2003, Oct. 6-7). 3

⁶⁴ Scholars still debate the extent of Ho Chi Minh's communist leanings and intended direction of the Vietnamese government in the wake of independence. Whether law and democracy were rhetorical tools for the revolutionary fervor of the time, or foundational beliefs eroded by subsequent political and military events, is an open question. Ibid. 3

order with government by law” and, more empathically, “May the Law—this Holy God—be reigning and a constitution be made for Vietnam.”⁶⁵

After victory in 1945, Ho Chi Minh’s most immediate tasks were a “democratic constitution” and a general election “giving the right to general voting and self-nomination to all citizens reaching the age of eighteen with no discrimination as to sex, wealth, religion, race.”⁶⁶ In January 1946, open elections, which included anti-communist candidates, were held and a multiparty People’s Parliament was elected. By November, Vietnam had adopted its first Constitution.⁶⁷ Given the current attention to rule of law in transitional and post-conflict countries, Vietnam’s experience is notable not only for its expediency, but its pluralistic idealism. The 1946 Constitution purported rights and protections that liberal, Western democracies would easily recognize: Women had equal rights with men. Citizens had freedom of speech, publication, association and meeting; free emigration within and outside the country; free compulsory primary education. The Constitution’s preamble emphasized national independence and friendship with communist states, but not integration. Like the nascent United States’ aversion to entangling alliances, Ho Chi Minh sought to “maximize the appeal of the revolution both internationally and domestically.”⁶⁸

⁶⁵ *Study on Ho Chi Minh's Ideology on State and Law* (Research Institute for Legal Sciences under the Ministry of Justice). 75-76;181. From Nghia

⁶⁶ Ho Chi Minh, *The Urgent Tasks of the Democratic Republic of Vietnam* (Ho Chi Minh's Entire Collection, 1945). From Nghia

⁶⁷ Truong Trong Nghia, *The Rule of Law in Vietnam: Theory and Practice* (Mansfield Center for Pacific Affairs, 2000).

⁶⁸ Nicholson, "Vietnamese Legal Institutions in Comparative Perspective: Contemporary Constitutions and Courts Considered." 312

The revolutionary government had a formal separation of powers, not on the horizontal plane of checks and balances familiar to the West, but an asymmetrical structure that placed the People's Parliament as the highest authority. The Parliament elected the government and the government appointed judges charged to "abide by law alone."⁶⁹ But soon after the establishment of the Vietnamese government, the French invigorated their campaign to reoccupy the country. The period from 1946-1958 was messy and chaotic for Vietnam's institutional development, as security issues eclipsed the ideals laid out in the 1946 Constitution. At a more theoretical level, the Viet Minh's continued fight for survival combined anti-colonialism and the Soviet education of many leaders into a political orientation that considerably reduced the sanctity of the law.⁷⁰ In particular, Soviet and Chinese communist ideology began to infuse the political designs of the Vietnamese leadership. Due to Vietnam's strong political allegiance to the Soviet Union, many Soviet laws and institutions were transplanted directly, only to be unofficially modified or disregarded by the Vietnamese as culture and context required.⁷¹ This interpretive pragmatism has nurtured a culture of "discretionary anarchy"⁷² in Vietnam that often makes the idea of following the letter of the law more foreign than foreign laws themselves.

During the 1950s, the legal system was largely comprised of Special Courts to prosecute disloyalty to the regime based on landholding status and Military Courts that tried and

⁶⁹ Nghia. 129

⁷⁰ Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis." 332

⁷¹ Gillespie, "Continuity and Change in Vietnamese 'Socialist' Legal Thinking." 4

⁷² Geoffrey B. Hainsworth, *Is There a 'Culture of Corruption' or 'Discretionary Anarchy' in Vietnam? A Beyond Cynicism View of Criminality, Custom and Pragmatism* (Centre for Southeast Asia Research, University of British Columbia, 1999).

punished traitors of the regime.⁷³ The Vietnamese Workers Party shifted policies often and disrupted long standing practices, such as commercial trading and land holding, all of which made legal interpretation and enforcement either impossible or arbitrary—"an aura of wild improvisation suffused the entire scene."⁷⁴ A retired Vietnamese judge, reflecting on the independence of the courts during this period, put it differently: "Courts had independence and within that independence also had good relationships with other organs. The same as today."⁷⁵ The ad hoc legal system developed under the 1946 Constitution remained until the French capitulated at Dien Bien Phu in 1958 and Vietnam became a divided country. However, the courts' tendency to deliberate with other government branches is a phenomenon that has persisted in all subsequent legal transformations.

The 1959 Constitution emphasized North Vietnam's transition to socialism, more explicitly crediting and aligning the achievements of government with the Vietnamese Workers' Party and focusing on "democratic revolutions" aimed at building a socialist state.⁷⁶ It also set up the architecture for Vietnam's current legal system. In 1960, the Law on the Organization of the People's Court established the Supreme Peoples Court and its lower and appellate courts. The State Prosecutors Office was also formally established at this time. The 1980 Constitution formalized Vietnam's unification and its transformation into a socialist state, both in its duplication of Soviet ideology and the renaming of the

⁷³ Nicholson, "Vietnamese Courts:Party-State and Law." 9

⁷⁴ George Ginsburgs, "The Genesis of the People's Procuracy in the Democratic Republic of Vietnam," *Review of Socialist Law* 5 (1979). See also Gillespie.

⁷⁵ Nicholson, "Vietnamese Legal Institutions in Comparative Perspective: Contemporary Constitutions and Courts Considered." 319

⁷⁶ Ibid. 313

country as the Socialist Republic of Vietnam. Famine, bureaucratic corruption and economic decline in the 1980s eventually forced the Party to reevaluate its governance strategy. Party leaders began to recognize that governance based on moral exhortations and communitarian economic policies was failing.

In 1986, Vietnam embarked on its *doi moi* reform agenda, acknowledging its intention to move toward a market-oriented economy.⁷⁷ The main focus was on economic policy reforms, but in 1989 and 1990 the Party also commissioned numerous studies to reconsider the role of law in the context of the Party and its socialist ideals. The 1991 Seventh Party Congress of the Vietnam Communist Party acknowledged these deliberations in its introduction of '*nha nuoc phap quyen*', or "law-based state."⁷⁸ The Party also dropped its "dictatorship of the proletariat" maxim for the more verbose, though more progressive, "socialist state of the people, by the people, for the people on the basis of the alliance of the class of workers, of the class of peasants and the intellectuals."⁷⁹ The Eighth Party Congress found a more economic phrasing with "Socialist Rule of Law State."⁸⁰ This transformation shares a legal taxonomy with the Russian concept of '*Pravovue gosudarstvo*' and the German principle of '*Rechstaat*' both of which emphasize the state as the only source of law and that the state be bound by its laws.⁸¹ However, the Vietnamese version does not accentuate the depoliticization of the legal system inherent in *Rechstaat*. '*Nha nuoc phap quyen*' literally translates as 'rule of

⁷⁷ Mallon. 72

⁷⁸ Nicholson, "Vietnamese Courts:Party-State and Law." 4

⁷⁹ Nghia. 130

⁸⁰ Ibid. 130

⁸¹ Nicholson, "Vietnamese Courts:Party-State and Law." 5 referencing Gillespie's "Concepts of law in Vietnam: Transforming Statist Socialism," a conference paper presented at Comparative Conceptions of Rule of Law in Asia, Hong Kong, 20-21 June 2002.

law', but is understood more as state legal rights, the obligation to conform to the rules of the Party leadership without differentiating "between the sources of law, their form or content."⁸²

The reassessment of the role of law in Vietnam culminated with the adoption of the 1992 Constitution, a document that in form and substance reflects many of the political values set forth in the 1946 Constitution. However, the 1992 Constitution describes the direction of the Party and relative importance of political institutions more than defining any specific legal reforms.⁸³ The chapter on courts, for example, was kept largely intact from the 1980 Constitution.⁸⁴ The 1992 Constitution did subtly reduce the unchecked power of Party in Vietnam's governance structure, but its influence still infuses all aspects of the legal system. The 1980 Constitution states that "all organizations of the Party operate under the Constitution," while Art. 4 of the 1992 Constitution adds "under the Constitution and the law."⁸⁵ Article 12 of the 1992 Constitution states: "the State governs the society by the law, and continuously strengthens the socialist legality. All state institutions, economic and social organizations, units of the people's armed forces and all citizens shall strictly abide by the Constitution and the law...All activities infringing the interest of the state, [and] legitimate rights and interest of collective or individual citizens, shall be handled in compliance with the law."⁸⁶

⁸² Gillespie, "Law and Development in 'the Market Place': An East Asian Perspective." 124

⁸³ Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis." 335

⁸⁴ Nicholson, "Vietnamese Legal Institutions in Comparative Perspective: Contemporary Constitutions and Courts Considered." 317

⁸⁵ Nghia. 135

⁸⁶ Ibid. 135

However, the Party's legal studies of 1990 emphasized that while 'bourgeoisie' rule of law, with its attendant focus on independence and transparency, grew out of the fight against feudalism, socialist rule of law derives from a desire to advance Vietnamese society and protect the central role of the Party. As the Party has stated: "The Communist Party of Vietnam is the political force leading the whole [political] system...That is an historical inevitability in Vietnam...We do not accept the multiparty or pluralistic concept both theoretically and practically...that explains that a democratic society be identical with the existence of oppositional political parties challenging the leading authority of the communist part...Reform of the political system should absolutely not touch on the fundamental and decisive issue which is the sole leading role of the Communist Party of Vietnam."⁸⁷ Despite this unequivocal tone, in some ways the Party has nonetheless tacitly decided to limit the use of ideological mandates in lieu of law, if only as a mechanism of self-preservation and increased accountability within its country's increasingly diverse marketplace.

History of Chinese Legal Thought

Like the Vietnamese, the Chinese flirted with the appeal of rule of law when the Communists took power in 1949.⁸⁸ The 1954 People's Republic of China (PRC) Constitution established legal institutions and procedures for the consistent application of new laws.⁸⁹ The term 'rule of law' was referenced in these early years, mostly as a way to

⁸⁷ Ibid, *On the Reform of the State Apparatus* (Hanoi: The Truth Publishing House, 1991). See Nghia 131

⁸⁸ Actually, just as Aristotle outlined the virtues of the rule of law in ancient Western history, the concept was discussed in the late Ming and early Qing dynasties as way to extend the protections of law from the emperor's inner circle to all citizens. See Albert H.Y. Chen, "Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law," *UCLA Pacific Basin Law Journal* 17, no. 2&3 (1999/2000). 50

⁸⁹ Potter, 329

formalize party policy, but even this was eventually rejected under Mao Zedong, who went so far as to “praise ‘lawlessness’ as something good and positive for society and humanity.”⁹⁰ The extreme politics of Mao’s Anti-Leftist Campaign, the Great Leap Forward and Cultural Revolution, in addition to the tremendous loss of life, also eliminated any semblance of a legal order in China.

In a departure from the principle of equality before the law expressed in the 1954 Constitution, the Maoist period emphasized a class struggle in which socio-economic status defined one’s legal rights and obligations.⁹¹ Private enterprise was heavily restricted during the Great Leap Forward, briefly given leeway in the early 1960s, and then attacked again during the Cultural Revolution. The rapid response to these policies could be viewed as indication of their popular acceptance, though more likely reflected alternating states of terror and cautious opportunism on the part of entrepreneurs. Throughout this period government policy and law shifted beneath Mao’s commands and fully eradicated any expectation of calculability or protection among private parties.

The turning point came soon after Mao’s death. In 1978 Deng Xiaoping, a Long Marcher and former Secretary General who had been purged from the party for his opposition to the Great Leap Forward, consolidated power and initiated China’s Four Modernizations economic development program. This change in direction, officially announced by Deng at the Third Plenum of the Eleventh Central Committee of the Chinese Communist Party also marked the country’s revived focus on legality. The 1982 Constitution upheld the

⁹⁰ Chen, "Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law." 13

⁹¹ Potter. 330

principle of equality as the Party leadership—now focused on the need to drive development—had concluded the need for class struggle had passed.⁹² This ideological shift had subtle, but profound effects on the understanding of law in China. Judicial decisions now use the concept of legal equality to protect the right to freely conduct business. But Chinese law always comes with a limited warranty. For example, in business the principle of legal equality is understood to be subservient to the principle of labor discipline: the corporate hierarchy in China often creates a rights-free zone for employees—no collective bargaining or organizing is allowed.⁹³ Likewise, the supremacy of state interest always trumps the constitutional grant of legal equality.⁹⁴

Given the political focus on issues of justice and social welfare in China, it is interesting that the shift toward the development of a legal system has strongly emphasized formalism at the expense of fairness or equity.⁹⁵ Following the French Revolution, the French Civil Code evoked a similar focus on literalism and the de-emphasis on judicial legal interpretation that was a reaction to the abusive use of law by the magistrates. In the Chinese case, though, literalism seems strangely both a response to past legal manipulation and the protection of current interests by the same ruling party—all while contorting the core values of the socialist canon. Chinese labor regulations that effectively permit worker exploitation are often maintained on the basis of the strict letter of the law. Most citizens have not seen many immediate benefits from China’s new legal

⁹² Ibid. 335 Potter later observes that in 1986 the government explicitly revealed the existence of growing class inequality in China with its Individual Income Adjustment Tax, which “accounted for income disparities of up to seven times the local median income.”

⁹³ Ibid. 337

⁹⁴ Ibid. 337

⁹⁵ Ibid. 339

conceptions; rather the legal vocabulary paints old double standards with a new luster of legal propriety. For example, the discipline of Party members is conducted outside of the legal system; it is now justified by the use of an ‘inspection system’ that looks like law, but just happens to be above it.⁹⁶

Deng’s revival of legality reached an early nadir when the suppression of the Tiananmen Square riots was justified as a simple violation of the law and necessary imposition of martial law.⁹⁷ This quelled open discussion about the role of law in Chinese society for a brief period. However, in 1992 Deng made his famous visit to several economic zones in southern China and was evidently more enthused by the promises of the market economy. In 1992, the CCP’s 14th Party Congress announced an ambitious program to develop “an adequate legislative framework for a socialist market economy.”⁹⁸ This event galvanized the discussion of legal reform in China among politicians and scholars, though every positive legal trend seems to have an equally strong drawback. Deng emphasized more pragmatism in the legal reform process. “Legal provisions will inevitably be rough to start with...[but] it is better to have some laws than none, and have them sooner than later.”⁹⁹ But the legislation that ensued accumulated like snow, and often was shoveled away just the same. Chinese scholars even discussed the “beneficial breaches of the Constitution” in the cases of granting land use rights and allowing private enterprises to operate before constitutional amendments permitted these actions in 1988.¹⁰⁰ Law

⁹⁶ Ibid.

⁹⁷ Suppression of the Falun Gong in the late 1990s, however, was also done ‘in compliance with the law.’

⁹⁸ Chen, “Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law.” 14

⁹⁹ Chen, “Market Economy and the Internationalisation of Civil and Commerical Law in the People’s Republic of China.” 72

¹⁰⁰ Chen, “Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law.” 37

breaking in furtherance of Party economic policy seems to be a virtuous necessity, but one that reduces consistency or respect for the law. Emphasizing formalism and compliance has been one response, though this has more often been premature or misused, thus perpetuating the impression of law as being oppressive, irrelevant, but seldom useful for Chinese entrepreneurs.

The dark side of the universal enthusiasm in China for the rule of law discourse may be the realization by the Party leadership of just how far the country is from realizing the concept. “Leaders call so strenuously for the rule of law precisely because flagrant violations of the rule of law have been so frequent and extensive.”¹⁰¹ President Jiang Zemin, Deng’s successor, continued market legal reforms, but also emphasized the strict, perhaps selective, application of law to clean up the corruption economic liberalization has spawned. Numerous other problems remain, from defining the legal status of the Party itself to the confusing application of socialist legality on a civil law system of imported commercial laws argued by a rising class of lawyers with the professional disposition of common law practitioners. The law in China—as manifested in courts, contracts, rights and obligations—is increasingly a part of business, much more so than in Vietnam, but it is still limited. It is being wedged between an already operating market economy and the tight political control of the Party, hardly an ideal setting to nurture the idealism inherent in the rule of law concept.

¹⁰¹ Ibid. 40

The Internationalization of Chinese and Vietnamese Law

Convinced of the necessity of legal reform for political legitimization and economic growth, China and Vietnam have become more receptive to incorporating or modifying foreign laws within their domestic legal systems. This trend is partly strategic, as the adoption of Western laws, particularly evident in China, is seen as a way to integrate its economy with its trading partners.¹⁰² The phenomenon of legal transplantation also reflects the political urgency of reform, and the simple lack of government resources to deduce domestic analogs for already drafted foreign laws on investment, competition, and other business issues. As Bergling writes of Vietnam:

“It is cheap and easy to conform to the standard prescription, but costly and difficult to consider the unique premises at hand. This position is especially marked where the political and economic incentives for feedback between legislative initiatives and the situation in the ‘real world’ are weak or absent... While Vietnamese foreign investment laws have been continuously modified to correspond to the expectations of critical investors and foreign commentators, other crucial legal and regulatory instruments, particularly in the area of administrative law, have been afforded much less attention.”¹⁰³

In the late 1970s, China began to rebuild its legal system following Mao’s reign. Since law had been perverted as an arbitrary political tool or simply ignored, the country had little to work with when it began its “open door” policy.¹⁰⁴ By default, it looked outside its borders for inspiration. As Chen writes:

In the West, legal institutions grew up side by side with the market economy in a spontaneous and gradual process of evolutionary change, while in contemporary China, legal as well as economic reforms have been pushed through by the state in a top-down direction... This means that legal modernization in China has to a significant extent been an exercise in legal

¹⁰² Chen, "Market Economy and the Internationalisation of Civil and Commerical Law in the People's Republic of China."

¹⁰³ Bergling. 19

¹⁰⁴ Chen, "Market Economy and the Internationalisation of Civil and Commerical Law in the People's Republic of China." 78

transplant, accompanied by the persistent problem of a gap between local social reality and the imported legal doctrines and norms.¹⁰⁵

Initially, this was a rather surreptitious inquest as there was still strong ideological opposition to foreign elements in Chinese society. Legal transplants were either unattributed or had their adoption justified by the “socialist nature” of the new law.¹⁰⁶ The 1982 drafting of the Constitution followed the detailed study of 35 country constitutions and the adoption, in 1986, of the General Principles of Civil Law, “follows the German model exactly.”¹⁰⁷ In 1987, China decided that it was at a “primary stage” of socialism, and more overtly began importing specific laws as “certain capitalistic aspects were useful for advancing socialism.”¹⁰⁸ Foreign laws are now seen not as ideological threat to class structure, but rather a culturally neutral “scientific management system”¹⁰⁹ that could build the Chinese socialist economy. This pragmatic turn around was actually accompanied by extensive academic and public debates in China, particularly on the adoption of its corporate law reform, while similar enactments occurred in Vietnam “virtually unchronicled,”¹¹⁰ underlining an interesting difference in the political and cultural atmosphere surrounding legal reform in the two countries.

Both China and Vietnam have taken a somewhat atomistic approach to law, believing that the isolation of specific Western laws deemed necessary for market development and regulation can be spliced into their legal culture and take root. Critics of this approach

¹⁰⁵ Chen, "Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law." 20-21

¹⁰⁶ Chen, "Market Economy and the Internationalisation of Civil and Commerical Law in the People's Republic of China." 78

¹⁰⁷ Ibid. 79

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. 81

¹¹⁰ John Gillespie, "Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam," *International and Comparative Law Quarterly* 51 (2002). 652

cite the “law of the non-transferability of law” and say that it is the culture in which a law is originally enacted that gives the law its desired qualities, not just the logic of its language. Nonetheless, this pick-and-choose approach has gained wide currency among both government leaders and multilateral agencies such as the IMF, WTO and World Bank, who seem to share an interest in pursuing “legal harmonization strategies designed to transmogrify domestic capitalist laws (especially those of the United States) into global legal templates. Underlying this vision of global equivalence and convergence is the assumption that legal transplants no longer convey national culture from one society to another, but rather, function as a series of technical adjustments between legal systems.”¹¹¹This policy approach is also very reflective of the broader American belief in the ability of idealism and rationality to overcome any historical impediments to reform.¹¹²

While the incorporation of foreign laws in China and Vietnam has created an appealing facsimile of legal convergence for those advising and involved in the drafting and adoption of these laws, their effects have been disparate. The distance between this philosophy and reality can be seen in Vietnam’s efforts to envelop that 95% of extra-legal private businesses into the formal sector. This began in 1990 with the Company Law and was further modified in 2000 with the Enterprise Law. The Company Law established that investors would share profit and loss proportionally to their investment; shareholders

¹¹¹ Ibid. 643

¹¹² Stanley Hauerwas writes that the U.S attitude is that “we are able to form our government on the basis of principle rather than the arbitrary elements of tradition” and “liberalism provided a philosophical account of society designed to deal exactly with that problem: A people do not need a shared history; all they need is a system of rules that will constitute procedures for resolving disputes as they pursue their various interests.” Stanley Hauerwas, *A Community of Character: Toward a Constructive Christian Social Ethic* (University of Notre Dame Press, 1981). 78

were not personally liable for company debts; companies can enter into legal contracts and own assets, among other basic provisions.¹¹³ The 46 articles of the Company Law were expanded with more technical and comprehensive rules on corporate governance in the 134 article Enterprise Law. Vietnamese government researchers and businesses both feared that the complexity of the Enterprise Law would dissuade managers from participating and stymie ill-trained judges, but foreign aid funding (in excess of \$100 million) conditional on a thorough treatment of corporate law ultimately proved persuasive.¹¹⁴

However the implementation of these corporate governance rules has done little to change the nature of commercial activity or government conduct in Vietnam. Ten years of the Company resulted in only some 26,000 businesses registering and although the elimination of many burdensome licenses in the Enterprise Law drew a spike in registration, this dropped significantly a year after the law's enactment. This trend is in contrast to China, where, in the year following the enactment of its 1993 National Companies Law, registered companies jumped from 486,700 to 1,448,000; accounting

¹¹³ Gillespie, "Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam." 647

¹¹⁴ Ibid. 649. While foreign legal aid can assist governments lacking the capacity to undertake comprehensive legal reforms, the dynamic between donor and recipient can work to minimize the value of reforms. Government researchers and politicians try to get the most funding in exchange for as minimal reforms as possible, while donors seek the opposite. The *Comprehensive Needs Assessment for the Development of Vietnam's Legal System to the Year 2010* (2001). was guided by specific political priorities and the immediate willingness of the international community to fund the project. Putting so much money in front of Vietnamese government researchers produced a voluminous work, but not one that embodied the original spirit of the project. See Per Bergling, "*Grand Assessments*" as Analytical Tools and Political Exercises: The "*Unmibh Judicial System Assessment Program*" and the "*Comprehensive Legal System Needs Assessment*" Compared (University of Victoria: Vietnam Legal Culture Symposium, 2003).

for population differences, eight years after Vietnam's Company Law there were 60% fewer companies than in China one year after its company law went into effect.¹¹⁵

Two-thirds of all large companies in Vietnam (more than 100 employees) are still family run with invested capital from formal channels of less than 10%.¹¹⁶ The main reasons for officially establishing a business has been to protect the investment of family owners as they bring in more non-family employees and/or to facilitate beneficial relations with state bureaucrats. This may seem to support the correlation of market development and legality, but a different explanation may refute this theory. For example, in the Ho Chi Minh City clothing industry, many family businesses incorporated with the Company Law in the 1990s, but by 1998 the trend reversed:

...as the textile market grew in size and competitiveness, the capacity of state officials to influence commercial decision making decreased. This in turn meant that retired officials and others hired to constrain state economic management became less useful, and were eventually jettisoned. Released from the need to protect capital from non-family managers, corporate structures became less beneficial.¹¹⁷

This phenomenon illustrates the misleading effect of imported legal norms on the part of both government bureaucrats and foreign legal aid advisors. What seems like the trappings of commercial legality can in fact be driven by very different considerations than those presupposed by reformers. In the Ho Chi Minh City case, company registration laws intended to facilitate business growth served as a convenient and temporary means of political risk insurance. The formalization of legal relationships was a new strategy in an old game of collusion and antagonism

¹¹⁵ Gillespie, "Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam." 665

¹¹⁶ Ibid.

¹¹⁷ Ibid. 669

between businesses and the government. The reforms may well have been a factor in the advancement of individual companies and the overall success of the clothing industry, but they arguably had a negligible effect on institutionalizing any incentives for legal business incorporation. Again, the utility of law was seen vertically, in its ability to improve state-business relations, rather than as a requirement to compete effectively in the market.

Similar to business incorporation, in the area of contracts, the usual supposition is that as the marketplace grows in complexity, the transaction costs of contracting through informal, social networks become prohibitive. There has been an increase in the formalization of contracts among Vietnamese businesses, but this trend does not directly indicate the development of a rule of law or a legal mindset within the business community. Imported contract forms in Vietnam are not used as they are in the Western economies. Firstly, a written contract in Vietnam does not invoke any credible legal threat if it is violated, since judicial processes are widely seen as burdensome, inconsistent and corrupt.¹¹⁸ A business adversary would more likely smirk, rather than fret, at the threat of a lawsuit. In China, entrepreneurs have attempted to “resist regime intrusion into commercial relationships through contract provisions detailing how specific transactions might be adjusted if changes in governing policies threaten their

¹¹⁸ Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience*. 129

validity or performance.”¹¹⁹ Contracts can actually be a protection from the legal system itself, not a reliance on its benefits.¹²⁰

Despite government exhortations to the contrary, most Vietnamese contracts do not include any mention of dispute resolution or remedies for breach. It is assumed that any issues will be negotiated amicably in order to preserve the business relationship.¹²¹ Securing restitution can be protracted and in a form peripheral to the actual contract, such as assurances of preferential trading terms in the future. Written contracts can help establish facts, but the resolution of disputes is still governed by custom. In many ways, the formalization of contracts represents a gradual codification of Vietnamese *lex mercatoria* — the established practices of businesses operating in a marketplace of dubious legal construction. Another advantage of written contracts for businesses is that, being loosely based on the terms of Vietnam’s new Civil Code and Commercial Law, it affords the imprimatur of legitimacy with lesser known clients and partners. Its function is part documentary and part symbol of status and sophistication among successful firms in Vietnam—like a jacket requirement at a fine restaurant. Although written contracts may never see a court room, their existence conveys a seriousness of purpose and has proved effective in galvanizing informal community sanctions against transgressors.¹²² Larger firms also find contracts and legal terminology useful as a bargaining lever among government ministers. When permitting obstacles are encountered, for example, well

¹¹⁹ Potter, 350

¹²⁰ Potter writes that some contracts stipulate that they are to be rendered null and void if the legal regulations on which they are based are altered by government officials—preferring to have the contract extinguished than adapt to new, often arbitrary requirements.

¹²¹ Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience*. 124

¹²² Ibid. 125

crafted documents can help businesses find a high level ‘sponsor’ to use their legal argument to force a political solution at lower bureaucratic levels.¹²³ Bureaucrats, rarely able to keep apace of the rapidly changing legal and policy environment, are often amenable to being handed reasonable legal justifications, particularly if they provide a bulwark to hide quid pro quos or bribes.

The exact nature of this dynamic varies widely among civil servants and government departments, as the growing complexity of law in Vietnam has made business dealings with the government significantly slower (becoming paralyzed with uncertainty about what the law actually requires) or faster (viewing the law notionally). As one foreign lawyer in Vietnam said, “if you use political connections, then the right calls can turn things around immediately, as opposed to the U.S., where you would be filing endless briefs and motions.”¹²⁴ Throughout all of this, however, the law seems to function as an *ad hoc* supplement to customary business and political transactions that does not change the calculability or enforceability of contracts among unfamiliar parties—ostensibly the main point of formalizing contracts—and actually preserves the fragmented, unequal system of deals and settlements that originally inspired the legal reforms.¹²⁵ Even in areas where law seems to have gained some traction and legitimacy, the results may constitute something far short of the rule of law. In China, the guiding principles in the adoption of foreign laws are instrumentalism, utilitarianism and authoritarianism¹²⁶—a reform philosophy that views government-business issues as a technical problem; imported law

¹²³ Based on interviews by the author in Hanoi in 2003.

¹²⁴ Fred Burke, (Baker & McKenzie lawyer: Ho Chi Minh City Interview, 2003).

¹²⁵ Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience*. 132

¹²⁶ Chen, "Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China." 85

is a set of reigns needed, as the Chinese expression says, because “when riding a tiger it is difficult to dismount.”¹²⁷

Judicial Independence in Vietnam

By any Western yardstick, Vietnam does not have a strong tradition of judicial independence. At the political level, there are strong ties between courts and all government entities. At the ideological level, the Communist Party asks every judge to uphold its interests and the principles of the state above all else. For those wedded to the idea of courts sealed off from external influence, this kind of cross-ventilation in the court room gives them significant misgivings about the ability of judges to process cases independently based on the law. The Vietnamese government has acknowledged the system’s shortcomings and instituted a series of recent reforms in 2000 and 2002. However, the focus on judicial independence is a cautious step in pulling the courts away from the Ministry of Justice, but not intended to curb the courts’ interactions with other branches of government or their ultimate subservience to the dictates of the Communist Party.¹²⁸

In addition to an updated 1992 ordinance, the 2002 Law on the Organization of the People’s Courts and the 2002 Ordinance on Judges and People’s Assessors, the Politburo of the VCP issued Resolution 8, On Forthcoming Principle Judiciary Tasks.¹²⁹

¹²⁷ David Marr and Stanley Rosen, "Chinese and Vietnamese Youth in the 1990s," in *Transforming Asian Socialism: China and Vietnam Compared*, ed. Benedict J. Tria Kerkvliet Anita Chan, Jonathan Unger (Rowman & Littlefield Publishers, 1999). 182

¹²⁸ Nicholson, "Vietnamese Courts:Party-State and Law." 13

¹²⁹ Ibid. 11

Resolutions are the main policy directives of the Vietnamese Communist Party and are intended to guide the subsequent legislative agenda of the National Assembly. Resolution 8 asserts the primacy of the Party in the administration of the courts and all other judicial bodies, such as the police, investigators and prosecutors, while also advocating for the independence of the courts. Gillespie describes the court's position as being under Party leadership, but above Party interference¹³⁰—an elusive line of discretion by any measure.

Following the 1959 to 1960 court reforms, the National Assembly elected the Chief Judge of the Supreme People's Court, and that court's standing committee appointed the remaining Supreme People's Court judges. All other lower court judges were elected by local People's Committees. In later years, the President was given authority to appoint all judges except for the Chief Judge, whom the President nominated for approval by the National Assembly. Recent reforms have restricted Presidential appointments to the Supreme People's Court and given the Supreme People's Court the power to appoint all judges at lower court levels.¹³¹ More than 90% of judges are members of the CPV and Resolution 8 preserves this policy effect. The CPV vets judicial appointments by requiring applicants to submit a 'political theory diploma' that can only be granted by the Party's National Political Academy to Party members or candidates to be members. The purpose of the diploma is to demonstrate that candidates have been "trained in politics and strongly to implement judicial responsibility and to protect against the phenomenon of 'mechanical and simple legalism, non-politics.'"¹³² It is interesting that in civil law

¹³⁰ John Gillespie, "Concepts of Law in Vietnam: Transforming Statist Socialism," in *Comparative Conceptions of Rule of Law in Asia* (Hong Kong: 2002). 26 See also Nicholson.

¹³¹ Nicholson, "Vietnamese Courts:Party-State and Law." 17

¹³² Ibid. 18 citing Nguyen Van Hien in the *People's Court Journal*, 2001

countries generally, a focus on legalism and strict interpretation of law is the expectation of judges, but here is seemingly something to be avoided.

The Party decides which cases to bring to trial and, in some cases, how they will be decided. Nicholson writes that “senior Party functionaries of the court and procuracy usually meet with judges responsible for trials and ‘together’ they resolve how cases are to be determined.”¹³³ Many lawyers in Vietnam describe situations of suspect conduct, procedure or outcome, but it is not always clear to what extent Party interests were relevant or if it was simply bribery among some participants.¹³⁴

In Vietnam, the Supreme Court, State Prosecutor and the Government all have equal constitutional status under the National Assembly.¹³⁵ There is a balance of power, but it functions under the weight of the National Assembly and the Party apparatus. There are three levels of courts: Supreme, Provincial and County with seven types: military, criminal, civil, economic, labor, administrative and an appeals court. Just as the National Assembly sits above the Supreme Court, the Provincial and County Peoples Courts are subservient to their respective Peoples Committees, as well as the Supreme People’s Court. Funding for the lower courts comes from the Supreme Court and the Government. In addition, judges are only appointed to a five year term, open to renewal by consensus of a sub-committee of the local Peoples Committee.¹³⁶ The required unanimity makes judges especially parochial in their outlook. Recent court reforms have also made judges

¹³³ Ibid. 19

¹³⁴ Based on author’s interviews with lawyers in Ho Chi Minh City, 2003

¹³⁵ Brian J.M. Quinn, "Legal Reform and Its Context in Vietnam," *Columbia Journal of Asian Law* 15, no. 2 (2002). 226

¹³⁶ Ibid. 240

personally responsible for legal “correctness” of their decisions. This ostensibly was meant to increase professionalism and accountability, but making judges responsible for a legal system replete with gaps and contradictions may risk increasing their penchant for discretely accommodating private and political interests.

At the central level, Party oversight on legal matters is more overt. Former Vice-Chairman for the National Assembly Phung Van Tuu put it this way: “in order to insure an efficient reform of judicial agencies, the pivotal thing is to further enhance the Party’s leadership over the judicial agencies in all domains: policy making, trial, and the assignment of cadres.”¹³⁷ As Gillespie writes, “Even if the CPV confines its role to the formation of policy, a pure rule of law will still not govern Vietnamese society...Ad hoc Party decision-making is gradually yielding to wide-ranging and often unfettered administrative powers.”¹³⁸ Given the Party’s tenuous ability even to rule Vietnam *by law*, it may understandably fear that rule *of law* would be more anarchical than systematic.

All of these issues have led judges to informally consult relevant ministries and officials as part of a political mediation that precedes, or at times supplants, an objective legal consideration of an issue.¹³⁹ As in most civil law countries, there is no binding precedent of court decisions in Vietnam. In some ways, the purity of this concept is part of the reason for Vietnam’s judicial shortcomings. Although the civil law tradition does not officially rely on precedent, consideration of cases and scholarly opinion forms an

¹³⁷ Ibid. 241 referencing Per Bergling, Legal Reform and Private Enterprise: The Vietnamese Experience, 1999

¹³⁸ Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis." 337

¹³⁹ Quinn. 240

important, informal continuum of thought that looks like precedent in form, if not substance. Vietnam, in contrast, has underdeveloped courts and a poor, or at times non-existent, dissemination of judicial decisions and commentary, leaving courts more horizontally linked to local political interests than to the vertical body of law from which they derive their authority. When the Chief Judge of the Supreme People's Court was questioned by deputies of the National Assembly at a 2001 meeting on the management and legal acumen of lower courts, he suggested, formal court reporting structures notwithstanding, that “the Supreme People’s Court does not manage the Provincial People’s Courts.”¹⁴⁰

However, Vietnam has recently seen an increase in the availability of some court documents, such as Supreme People’s Court’s *The People’s Court Review*, which may have a moderating effect on judicial activities.¹⁴¹ There is also the *Cong Bao*,¹⁴² an often daily compilation of new laws and Prime Ministerial decrees, published by the Vietnam Law & Legal Forum. As is the case in China, the most prominent critics and observers of judicial reform in Vietnam are actually the media, such as the law newspaper *Phap Luat* or business papers, such as the Vietnam Investment Review. While many are now privately owned, every media outlet has an official government department sponsor. Special interests of the private sector and government agencies being what they are, many debates now find their way into the newspapers. There is not any investigative journalism, but in areas of established debate, such as court reforms or specific legal and

¹⁴⁰ Ibid. 241

¹⁴¹ Gillespie, "Law and Development in 'the Market Place': An East Asian Perspective." 129

¹⁴² *Prime Minister Decision on the Program on Law Dissemination and Education*, Cong Bao Official Gazette (Vietnam Law & Legal Forum: 2003). 31

economic policies, the press can be respectfully critical.¹⁴³ By comparison, the Chinese press and scholars have reached a more forthright level of debate, allowing some dissent to bubble up though the cracks of an imperfectly censored press. Editors are sometimes fired and scholars still forced to leave the country, but they have pushed for the autonomy of private law from public law, for example, and “a shift from emphasis on duties to the state to an emphasis on rights against the state.”¹⁴⁴

It should be noted that even with these reforms, the Communist Party of Vietnam’s influence on the courts, for example, can be overstated. Admittedly, the Party is suffused in the state apparatus at nearly all positions from judges to administrators. Even the 10% of judges non-affiliated with the Party must be approved by the Party to be appointed for office. But it is also striking how ill-equipped, or uninterested, the Party is in overseeing the daily operations and cases of its judicial system. Based on interviews with judges and lawyers in Vietnam, Party influence seems less of a cause of arbitrary or incorrect decisions than simply a lack of knowledge or professional support on the part of judges. There is hardly any communication among judges of the same court or among hierarchies of the court.¹⁴⁵ Judges within the Vietnamese court system are like missionaries on island outposts, influenced more by the interests of parties that appear before the court than by collegial or political relationships within the profession itself.

¹⁴³ Based on an interview with an editor of the Saigon Times, as well as meeting with lawyers and business people in Ho Chi Minh City, 2003.

¹⁴⁴ Chen, "Market Economy and the Internationalisation of Civil and Commerical Law in the People's Republic of China." 74

¹⁴⁵ Interview, "Nguyen Van Dung, Retired Supreme People's Court Judge," (Hanoi, 2003).

Judicial Independence in China

In China, similar judicial problems persist despite subtle and significant differences in the evolution of its legal system. The Chinese courts are both more developed and more overtly politicized than in Vietnam. They remain a tool within the state administrative structure, often a way station for disputes before they are officially or unofficially sent to the appropriate parts of government for resolution. After all, only the legislature has the power to draft and interpret laws, and to delegate that power as needed.¹⁴⁶ The great irony of the law making and interpretation process in China and Vietnam is that instead of regulating government action, legal procedures seem to highlight the dysfunctional reporting relationships that lie behind the facade of unified and centralized states. Of course, disputes over jurisdiction and conflicts of law occur within all legal systems, but China seems to lack the willpower and the mechanisms to formalize any solutions.¹⁴⁷

China has a slightly different hierarchy of laws than Vietnam. At the top are laws enacted by the National People's Congress, then laws of state councils and regional Peoples Congresses, then tertiary rules issued by the central and local governments, Ministries and agencies.¹⁴⁸ The Supreme Court and its lower courts are restricted, however, from any interpretative use of that legal hierarchy. The courts have partial authority to review some NPC legislation and otherwise must defer to the issuing government body in all issues of interpretation and jurisdiction. The main function of the courts is to coordinate with other agencies. The Supreme Court has actually become more prolific in issuing

¹⁴⁶ Anthony R. Dicks, "Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform," *China Quarterly*, no. 141 (1995). 87

¹⁴⁷ Ibid. 84

¹⁴⁸ Kanishka Jayasuriya, "Corporatism and Judicial Independence within State Legal Institutions in East Asia," in *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya (London: Routledge, 1999). 194

commentaries and advice to lower courts on the law, but these pronouncements follow from consultations with relevant agencies that guide the substance of its writings.¹⁴⁹ On occasion, however, the Supreme Court has been quite proactive. When the Civil Code was promulgated in 1986, the Court actually issued implementing regulations modifying details of the inheritance law, among other issues.¹⁵⁰ Socialist legality and a civil law tradition make judicial interpretation suspect and judicial law-making seemingly unthinkable, but sometimes bureaucratic coordination means that power flows in different directions—a mixed signal for Western advocates of strengthening the Chinese judiciary. Given the inability of courts to give the Constitution legal effect, its principles do not play a major role in the process of legal interpretation and development.

In China, the Party presence is even more proximate than in Vietnam. In some instances, “party documents and even the personal authority of individuals [have been used] as sources of law.”¹⁵¹ Like Vietnam, there have been attempts to increase the accountability of judges in China. There is not professional liability, but decisions can now be challenged to ensure that judges “with kinship or blood ties shall not take up certain interconnected posts within the Court.”¹⁵² Additionally, there is a ‘political legal’ commission that directly oversees each court—an apparently more active version of the Peoples Committees in Vietnam charged with judicial appointments. The relevance of these commissions in China was in decline from their height in the 1960s until Tiananmen Square, after which they have become more prominent. And, as in Vietnam,

¹⁴⁹ Ibid. 196

¹⁵⁰ Mark Findlay, "Independence and the Judiciary in the Prc: Expectations for Constitutional Legality in China," in *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya (London: Routledge, 1999). 293

¹⁵¹ Jayasuriya, "Corporatism and Judicial Independence within State Legal Institutions in East Asia." 195

¹⁵² Findlay. 292

the Chinese Communist Party and its subsidiary organizations are effectively immune both from direct legal challenge in the court system and from indirect challenges resulting from conflicts among individuals or organizations.¹⁵³

Recent legal reforms have superficially changed these dynamics. In the mid-1980s, the Supreme Court began publishing its own gazette to disseminate its findings from recent cases. This gazette has since expanded into a small publishing niche of contemporary judicial abstracts and court decisions, as well as information pre-dating the Cultural Revolution.¹⁵⁴ This information has opened a window for researchers to understand Chinese legal thinking and ostensibly strengthened the courts authority and the awareness of citizens of its work. However, the practice of seeking conformity with precedent in the civil tradition, even if not being bound by it, remains subservient to institutional pressures in China: “the true power distribution among these entities certainly undercuts severely the extent to which the court can assert the force of precedent in the published cases in the Gazette.”¹⁵⁵

Judicial independence in China is still indiscernible with a Western microscope, but it is nonetheless changing. The legal lexicon central to economic reform is spreading to other areas of society and the courts are increasingly and inexorably on the front lines, adjudicating a wide gamut of issues. “Economic and legal reform are likely to continue to

¹⁵³ Dicks. 96

¹⁵⁴ Ibid. 82

¹⁵⁵ Nanping Liu, "Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court," *Journal of Chinese Law* 5 (1991). 129. See Dicks.

create both the need and the pressure to expand the interpretative power of the Courts, but their current ability to respond to the challenge appears to be restrained.”¹⁵⁶

Administrative culture and business in Vietnam and China

The need for a strong rule of law presupposes a horizontally organized marketplace where businesses compete freely and hold an implicit trust in the state’s legal protection—but not micro-management—of their rights and interests. The East Asian model relies on personal and familial regulation of business ties, however, and emphasizes the vertical relationship between businesses and the state. In this context, Weber’s assertions about the importance of legal infrastructure are less relevant; given a choice between improved rule of law and political connections, most businesses would “more likely demand access to the state in preference to economic calculability.”¹⁵⁷ Much like the Administrative Guidance model found in Japan, government and business interactions in China and Vietnam are often governed by voluntary means that focus on cooperation; law may indirectly facilitate this dynamic, but does not affect its substance.¹⁵⁸

In Vietnam, government bureaucrats, for both personal and cultural reasons, often take a ‘concessionary’ approach to their positions, discriminating against and trying to profit from businesses as they see appropriate. “Soviet style education and ideology placing the state at the center of society, inculcated state officials with an unqualified confidence in their ability and moral mission to manage society...[This] institutional culture that holds

¹⁵⁶ Findlay. 294

¹⁵⁷ Jayasuriya, "A Framework for Analysis." 10

¹⁵⁸ Ibid. 9

officials morally, if not legally, responsible for corporate criminality and business failures perpetuates a state economic management culture.”¹⁵⁹ In this environment, bureaucrats watch entrepreneurs to assure that their business activity conforms to socialist values—trivial rule violations, failure, or (especially) success could trigger administrative actions. “Spasmodic harassment,” labyrinthine licensing procedures and “capricious monitoring and investigation practices” have characterized most businesses’ experience with the government.¹⁶⁰ This bureaucratic culture stems from a fusion of neo-Confucian, anti-mercantilist, and socialist class theory that stigmatizes entrepreneurialism. It embodies the Marxist belief that the law is a “superstructure that [reflects] the will of the ruling class” and needs to be used as a tool to protect workers from the exploitation of capitalists.¹⁶¹

In this legal context, socialist law requires bureaucrats to consider written rules as they are directly applicable, and, where there is uncertainty, to make decisions based on morality and changing party policies. Since the hierarchy of laws and policies is not clearly defined in either Vietnam or China, in cases of apparent non-compliance it is difficult to know if bureaucrats “are acting contrary to conferred authority or are legitimately implementing local policy and morality that contradicts statutory rules.”¹⁶² In some ways, this dynamic represents the EU’s ‘doctrine of margin appreciation’¹⁶³ run amok—a constant deference to local (or even personal) values, which is really no legal

¹⁵⁹ Gillespie, "Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam." 659, 662

¹⁶⁰ Gillespie, "Bureaucratic Control of Business Regulation in Vietnam." 398

¹⁶¹ Gillespie, "Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam." 655

¹⁶² Ibid. 662

¹⁶³ This European legal doctrine defers to local morals and values where they contradict established rights, such as a town banning pornography in violation of free speech rights.

system at all. Increasingly, the values at stake are not socialist, but territorial, as government agencies jockey to preserve or expand their entitlements. As a Vietnamese government researcher commented a year after the implementation of Vietnam's Enterprise Law, "working habit in state administrative bodies of focusing on protection of rights and interests of themselves while leaving difficulties for other agencies or enterprises to face is still relatively popular."¹⁶⁴ In China, a similar, willful interpretative confusion exists at the lower and higher levels of bureaucracy. Chinese Communist Party leaders often float experimental policies that are informally and inconsistently given effect within the legal system and then later have them either codified as law or abandoned, depending on their perceived effectiveness and consequences.¹⁶⁵

The socialist legal mindset means making sure that the right policies are put into effect and order is maintained. With an emphasis on '*rule by law*,' actual legal procedures and the source of laws are penultimate considerations. These values are further complicated by a system that rewards civil servants for compliance with Party policies, but necessitates that most of them, who earn paltry salaries, use their positions to profit from private sector opportunities. But as the transitional policies of each Party blend socialist boilerplate with an implied need for pragmatic reforms, an already tenuously respected legal system has become even more flexible and less coherent. In Vietnam, "the tolerance or discrete encouragement of certain previously illegal practices tilted the system to the degree where the previous notion, that everything which is not permitted is forbidden,

¹⁶⁴ Le Dang Doanh, ed., *The Enterprise Law's Enforcement: Achievements, Challenges and Solutions* (UNDP Vietnam, 2002). 146

¹⁶⁵ Jianfu Chen, "Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China," in *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya (London: Routledge, 1999). 75

changed to a presumption that something formally forbidden could actually be permitted and encouraged.”¹⁶⁶ Likewise, in China “among the first casualties in pursuit of economic growth had been the stability and continuity of law.”¹⁶⁷

Navigating such a system takes a tremendous amount of local knowledge and legal creativity. In some cases, a business’ illegal action can even become the basis for securing a legal claim. As Bergling writes:

A hotel developer with a vacant site in Hanoi’s ancient Hoan Kiem district knew that the special rules for real-estate development that apply in the district made it unlikely that his application to build a hotel would be approved. He was also aware that Hanoi Tourism [a state agency] had become much more restrictive about giving the necessary permission to operate a hotel in this part of the city. The developer therefore took the easier way of registering a trade company to operate on the same location and, immediately after this was complete, filed a petition to change it into a hotel business. Meanwhile, he had started to construct a five-story building that could easily be converted into a hotel. This calculated “crime” resulted in a police investigation and eventually a modest fine. The receipt for the fine could be presented as a “license” to Hanoi Tourism and other concerned agencies to prove that all formal requirements had been met. The desired permission to operate the hotel was then granted.¹⁶⁸

Vietnam and China are struggling to change their legal rules without significantly changing their political culture. They seek the economic efficiency and control of a more comprehensive and precise legal system, but do not want to disrupt the primacy of the Communist Party or the broader government apparatus. This tension is reflected, for example, in the ambiguity of Vietnam’s administrative legal reform nomenclature. The terms ‘socialist legality’ and ‘state economic management’ have been replaced with ‘law-based state,’ a model driven toward what is nearly the antithesis of Marxist-Leninist

¹⁶⁶ Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience*. 61

¹⁶⁷ Chen, "Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China." 72

¹⁶⁸ Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience*. 114-115

theory: private commodity production, economic freedom and market pricing.¹⁶⁹ It is difficult to assess whether the accommodating legal rhetoric that blends Marxism and capitalism is evidence of the solubility of Western legal precepts into Vietnamese and Chinese culture or their simple subordination to existing norms.

Administrative Law in China and Vietnam

The self-serving conflation of law and policy, and the wayward autonomy of government agencies and regions, lie at the center of administrative legal reforms in China and Vietnam. Party allegiance may have once meant that a bureaucrat could take the office cash box home every night without a dollar missing, but these days the accountability of the government apparatus is far less exemplary. Market reforms turned many bureaucrats from seat warmers to gate-keepers of the new socialist economy, which sparked an epidemic of corruption. “At a time when China needed the support of the working masses to change its economic fate, the *danwei*¹⁷⁰ leaders began plundering China under the pretext of helping China to change its old system through structural and economic reform.”¹⁷¹ Citizen and business complaints in both countries rose as administrative meddling occurred with minimal legal justification. The Parties were interested in using legal reforms to mitigate these trends, as well as to impose a greater degree of consistency in the implementation of their policies. However, the emphasis has been largely on compliance and not on the more fundamental problem of delegated law-

¹⁶⁹ Gillespie, "Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam," 655

¹⁷⁰ The *danwei* is a work unit, once central to Chinese society; it managed numerous aspects of public and work life and monitored compliance with Party policy. Its powers and influence have decreased in tandem with the state's control of the economy.

¹⁷¹ Rashid Malik, *Chinese Entrepreneurs in the Economic Development of China* (Westport, CT: Praeger, 1997). 138

making. Nearly all levels of both governments can still issue regulations even, as in China, so called ‘normative documents’ that are not made public, yet considered to have legal effect.¹⁷² This continued multiplicity of law making sources reflects a current lack of control and the inheritance of socialist, bureaucratic thought.

In 1989 China enacted and implemented the Administrative Litigation Law (ALL), which allowed, for the first time in its history, an individual to challenge the legality of specific state actions. In a political and legal culture that asked citizens “to kneel before the shadow of the state,” this appears a significant departure in legal principle. The ALL measure has seen the most activity challenging public security measures; police often use the charge ‘shelter and investigation,’ which has no legal basis, to detain suspects for three months pending the discovery of evidence.¹⁷³ Courts have begun to reverse some of these cases. However, progress has been slow due to the nature of administrative law and the relationship between ministries and the courts. “Dealing with administrative cases puts the judge in direct confrontation with administrative organs” responsible for their appointments and budgets and “it is hard for judicial personnel to ward off [their] influence.”¹⁷⁴ In China, administrative agencies have law-making power that cannot be reviewed by the courts, although there actions are expected not to be *ultra vires* and always be reasonable. The courts can in theory review “concrete actions” of agencies, but not the legality of the rules permitting them.¹⁷⁵ That task is given to the State Council,

¹⁷² Xixin Wang, *Rules of Rules: An Inquiry into Administrative Rules in China's Rule of Law Context* (Mansfield Center for Pacific Affairs, 2000). 85. New reform legislation permitted normative documents to be reviewed for their ‘legality’ in cases, but has not challenged the practice of issuing ad hoc secretive rules (orders, staff memos, or guidelines) by administrative agencies.

¹⁷³ Findlay. 295

¹⁷⁴ Song Bing (1994) from Ibid.

¹⁷⁵ Wang. 77

although the National People's Committee is the legislative branch that delegates rule-making power to agencies. The NPC has never reviewed agency decisions and the State Council only on rare occasions, though it is important to note that no laws outline the criteria for judging an agency's compliance with its own rules.¹⁷⁶

On closer consideration, even this fragmented system unravels further. Unlike other countries, such as the U.S., where lawfully enacted agency rules are given the legal effect of statutes, agency rules are in practice non-justiciable in courts. Given that a vast majority of rules are agency regulations and not general laws passed by the NPC,¹⁷⁷ this has a significant bearing on individuals' and businesses' rights to legal remedy. Somewhat quizzically, China's 1999 Administrative Reconsideration Law allows the People's Courts to refuse to apply an agency's rules if it considers them unlawful. This creates the paradoxical power of a court's lack of authority to review rules, yet be permitted to judge their legality.¹⁷⁸ A partial solution to this problem was to clarify rule-making powers by agencies with the 2000 Legislation Law. But since the 1980 Constitution does not clearly allocate law-making power, any attempt to do so would be ruled unconstitutional by the NPC. Without confronting that issue, the main problem cannot be solved. Articles 72 and 73 of the Legislation Law emphasize that a ministry or agency can only make rules "within the scope of its authority"¹⁷⁹ while nowhere defining the concept. This reform process shows China's efforts, however fitful and vague, to reconcile the need to check administrative autonomy with a fear of excessive judicial

¹⁷⁶ Ibid. 79

¹⁷⁷ Ibid. 71

¹⁷⁸ The Administrative Litigation Law, Article 53. See Ibid. 84

¹⁷⁹ Ibid. 88

discretion. China is comfortably erring on the side of administrative autonomy, but is clearly pushing toward a system of greater consistency and oversight.

The law-making process is actually the one area where the Vietnamese government expresses a plurality of viewpoints. Nearly all levels of the government, ministries, the courts, prosecutors, and provincial and county Peoples Committees issue legal documents with conflicting formal and informal understandings of their relative superiority and applicability. The National Assembly in theory passes the highest laws as it can amend the Constitution and abrogate legislation passed by the Assembly's Standing Committee, the prime minister or his ministries. In reality, the National Assembly meets only two months a year and rarely considers the legality of governmental or ministerial actions,¹⁸⁰ let alone rescind its own older laws that contradict or confuse new laws. Additionally, the prime minister can abrogate legal rules of other ministers or lower level Peoples Committees. Laws, particularly economic regulations, tend to be vague, due to the consensus law-making of most bodies, as well as temporal, due to the ever-changing policy environment of a fast-paced, developing economy.¹⁸¹ This dynamic also increases power struggles—through quasi legal rule making—among economic ministries in an effort to protect their turf.¹⁸²

¹⁸⁰ Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis." 335

¹⁸¹ Despite the monolithic approach of the Communist Party, there is an increasingly divergent range of views concerning economic and legal policy. However, the combination of pluralism and traditional consensus based decision making has maintained or increased the vagaries of legislation. Political accommodations that render laws acceptable mean they often can be used for opposing ends with little interpretative creativity.

¹⁸² Gillespie, "Private Commercial Rights in Vietnam: A Comparative Analysis."

Vietnam has a long tradition of peasant protests, with groups converging in major cities to denounce land ownership policies in particular. Responding to complaints was difficult since “while the [central] government can complain and cajole, it often finds it difficult to do more than that when a provincial government is unwilling to cooperate.”¹⁸³ An initial law on complaints was passed in 1991, but was uniformly ignored. Vietnam has followed China’s lead by enacting several reforms modeled after the Administration Litigation Law. The 1992 Constitution had established the right to report malfeasance by public officials,¹⁸⁴ but the mechanisms were not in place to actualize this right. However, in 1996, an Administrative Court was established¹⁸⁵ and supported with two laws in 1998: the Law on Complaints and Denunciations and the Amended Ordinance on Procedures for Resolving Administrative Cases. These reforms were as much about improving governance as simply establishing the government’s right to govern. But as with many legal reforms, the 1991 law was not repealed and judges disinclined to grant hearings on complaints could dwell on the inconsistencies. For example, the former law requires those filing complaints to exhaust all internal administrative appeals before suing, while the 1998 laws remove this requirement. Given the sensitivity of the Administrative Courts role, judges have defined their jurisdiction narrowly and few cases have been accepted.¹⁸⁶ Establishing standing in court has additional requirements. The grounds for complaint must be in a written order that proves an official committed an act outside the discretion afforded by his position. Since many commercial issues are discretionary,

¹⁸³ Quinn. 260

¹⁸⁴ Ibid. 259

¹⁸⁵ Nghia. 138

¹⁸⁶ Quinn. 262

rather than permitted, and many decisions are made by informal, oral agreements, this effectively excludes most administrative activity.¹⁸⁷

The low court activity is not from lack of demand however. During the first three days of the administrative courts opening in Ho Chi Minh City, 25 cases were filed, though judges found none that met the required criteria for a hearing.¹⁸⁸ However, there is also self-selection on the part of individuals and businesses who prefer to forgo attempted lawsuits “seeking to preserve relationships and negotiate resolutions.”¹⁸⁹ Another strategic consideration on the part of businesses is that even if the case is accepted and ruled by the Administrative Court, it is binding without appeal and, in an overt overlap of executive and judicial authority, the Prime Minister can request that any decision be reviewed and overturned.¹⁹⁰ For that matter, nearly all administrative decisions by the Prime Minister, such as major foreign investment projects, cannot be reviewed; lower bureaucrats often tap the Prime Minister’s immunity by requesting his office’s signature for less important issues, even if it is not required.¹⁹¹ Like many aspects of legal reform in Vietnam, the law can be a guidepost for other informal shifts in policy. However dysfunctional the Administrative Court is, its existence and tentative reform reflects the government’s awareness of the prevalence of corruption and inefficiency, even if it currently prefers to resolve these issues informally.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid. 264

¹⁸⁹ Ibid. 265

¹⁹⁰ This is the only place in Vietnamese law where the Prime Minister can directly overturn court decisions, though it has not been used to date. See Ibid. 266

¹⁹¹ Gillespie, "Bureaucratic Control of Business Regulation in Vietnam." 374

At the business level, the ability to use administrative law against the government is still fraught with obstacles. The informal links among politicians, police and businesses make lawsuits an unlikely solution to a short term problem at the expense of long-term relationships. For example, police in Ho Chi Minh City will occasionally shut down bars for playing music not authorized by the government, as is required. No bar could attract customers if it complied and no bars do. Suing the police would not be fruitful as the conduct is technically illegal. Paying bribes is the expected solution, which is also officially illegal. The reasons for this predicament are often unrelated; the law simply becomes negotiation by other means. So long as the laws remain incoherent, and their enforcement discretionary, there exists few effective legal mechanisms to confront state interference with economic activity.¹⁹²

Economic and Civil Court Reform in Vietnam and China

One of the overriding goals of legal reform in Vietnam and China has been to facilitate economic development by protecting the legal rights of businesses, enforcing contracts and settling disputes. Comparative studies of law and development in Asia have shown a relationship between economic growth and commercial and administrative litigation.¹⁹³ China in particular witnessed a doubling of civil cases and a quadrupling of commercial cases during the first decade of its economic reform, from 1982 to 1991, an escalation that has continued to the present. Another indicator of success is that China has become the object of a growing salvo of intellectual property litigation as foreign competitors

¹⁹² Based on the author's interviews with lawyers and business owners in Ho Chi Minh City, 2003

¹⁹³ Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience*. 131

charge patent infringement by domestic Chinese firms.¹⁹⁴ However, a curious development of Vietnam's 1992 court reforms, which differs sharply from China's experience, is the decline in court cases. Rapid growth and numerous new laws would presumably increase conflicts and the need for settlement, however flawed the system may be.

Before the 1992 judicial reforms, which included the establishment of an Economic Court, most Vietnamese business disputes were mediated informally or processed at regional Economic Arbitration Centers. These centers were quasi-legal bodies primarily focused on disputes with and among state owned enterprises, but also had the authority to conduct investigations of business activity.¹⁹⁵ 1993 was the last full year of operation for the Centers and they processed 3,000 cases.¹⁹⁶ The Centers were replaced with Economic Courts to hear disputes between businesses, among business management and stock and bond sales. In the first full year of operation, the national case load dropped below 500.¹⁹⁷ The Economic Courts now hear fewer than 1,000 cases a year.¹⁹⁸ The Ho Chi Minh City Economic Court hears approximately 300 cases annually, and this has not increased for several years.¹⁹⁹ Most provincial Economic Courts hear few if any cases a year. The Chinese experience in this area was quite different. During the 1980s, economic courts operated in tandem with established mediation centers. Economic cases rose from 6,132 in 1981 to 332,496 in 1987²⁰⁰ and have continued to rise precipitously. At

¹⁹⁴ Kerry A Dolan, "China's New Suits," *Forbes*, Oct. 27 2003. 70

¹⁹⁵ Quinn. 274

¹⁹⁶ John Gillespie, "Insolvency Law in Vietnam," in *Insolvency Law in Asia*, ed. Roman Tomasic (2000).

¹⁹⁷ Gillespie, "Law and Development in 'the Market Place': An East Asian Perspective." 128

¹⁹⁸ Quinn. 274

¹⁹⁹ Pham Xuan Tho, (Interview. Hanoi, 2003).

²⁰⁰ Potter. 351

the same time, there has been a sharp decline in the voluntary use of mediation bodies. Although China suffers from the same issues of corruption and confusion of laws, it seems to have instilled a greater degree of rights-consciousness and preference for formal adjudication. This is also partially due to increasing reliability of strict interpretive practices on the part of Chinese judges being paired with greater flexibility in the determination of penalties and compensation (at least in the economic area).²⁰¹

There are several possible explanations for Vietnam's shortcomings. First, there is very poor enforcement of judgments. As a Ho Chi Minh City judge said, "We have lots of law, but it is hard to make the law stick."²⁰² Enforcement is the domain of the local People's Committee, so that even if the case was processed "independently" it is given effect by a political body. There is also a heavy reliance on the Vietnamese principle of mediation (*hoa giai*) that pushes parties to settle issues informally outside of the courts. The HCMC judge emphasized this, as he met with parties after reading a case to negotiate a settlement before officially referring the case to a tribunal. However, both these factors were present before the initiation of the Economic Court.

One feature of the Economic Courts that is not conducive to earning the goodwill of private parties is that the People's Office of Supervision and Control has the right to intervene in all cases²⁰³—without needing the permission of the presiding judge²⁰⁴—and can initiate investigations outside the scope of the actual dispute, make criminal charges

²⁰¹ Ibid. 351

²⁰² Tho.

²⁰³ Ibid.

²⁰⁴ Quinn. 278

if necessary, as well as simply making recommendations to the court on the issue at hand. If a minor contract dispute can turn into a criminal investigation of tax evasion, a chilling effect is understandable. Simple corruption is also a deterrent, particularly in courts of lower visibility and case volume, where there are reports “of tacit, unholy alliances among judges and staff that allow the soliciting of bribes from lawyers, plaintiffs and defendants to misplace files, slow down investigations and otherwise affect or obstruct the procedures. What seems like a perverse management system from the outside can be very productive one for those who work within it.”²⁰⁵ More broadly, often the legal training of judges does not equip them to respect new commercial laws; despite a business’ incorporation, a judge may find reason to lift that legal veil and attach personal and family assets to business debt.²⁰⁶ As an indicator of this distance between the law and the general operation of the economy, by 2000 only 64 companies had declared bankruptcy in Vietnam²⁰⁷—six years after the passage of the bankruptcy law—seemingly low in an economy of 80 million people.

For these reasons, as Vietnam’s economy and legal system have grown, there has been decline in the use of the court system. In 1999, Vietnam’s Courts accepted 215,193 cases. That figure fell to 166,630 in 2001—a 23% decrease.²⁰⁸ Looking at data across the 1990s suggests that interest peaked following major reforms, such as the establishment of the Economic Court or the passage of the Civil Code in 1997, but proceeded to diminish in subsequent years. This may be an indication of individuals and businesses willingness to

²⁰⁵ Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience*. 143

²⁰⁶ Gillespie, "Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam." 667

²⁰⁷ Quinn. 278

²⁰⁸ Nicholson, "Vietnamese Courts:Party-State and Law." 22

test new legal fora. “The vast majority of businessmen interviewed claimed that they would not hesitate to refer disputes to formal forums with compulsory authority, e.g. courts, if they were sure that the matter would be handled fairly and expediently.”²⁰⁹ Interestingly, despite the decline in court cases, the Supreme People’s Court has become more prolific in producing legal documents: decisions, circulars, official letters and resolutions that influence regulations and laws effecting businesses. The SPC issued more documents in the 1990s than the preceding 30 years combined.

In 2001, Vietnam embarked on a second wave of court reforms. In October of the previous year, a Hai Phong gangster named Dung Ha was assassinated in Ho Chi Minh City. Truong Van Cam (Nam Cam), a HCMC mafia boss, allegedly ordered the hit to protect his territory. Nam Cam’s subsequent arrest in 2001 unveiled corruption at the top levels of HCMC courts, prosecutors and police. To many, the scandal showed that reform efforts to date were a ruse: the government and courts were little more than a battleground between Party interests and the burgeoning mafia. Hanoi issued a reform plan in short order to structurally solve what may be an intrinsically cultural problem. The primary issue was how to break up the parochialism of the Ho Chi Minh City government apparatus. The new reforms tried to sever the horizontal allegiance of the courts to local People’s Committees and link them more directly to the Supreme People’s Courts by giving the higher court power over appointments and budgeting.²¹⁰

²⁰⁹ Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience*. 130

²¹⁰ Brian Quinn, "Vietnam's Continuing Legal Reform: Gaining Control over the Courts, 2003," Unpublished Manuscript, Stanford University.

However, the centralization of budgets and appointments has required too much administrative footwork. Hanoi still rubber stamps provincial judicial recommendations, since it has no resources to make its own assessment.²¹¹ The powers of the Office of Supervision were also reduced in the new reforms so that it can no longer rule on legality of government actions. Originally intended to enforce adherence of Hanoi's dictates, the Office of Supervision had allegedly been too independently minded in its zeal to intervene in public administrative matters—confirming bureaucrats' fear of giving the courts similar powers. But the Office was given more formal control over local police investigations and it retained the right to intervene in all private civil and commercial disputes. However, if any law works in Vietnam, it is the law of unintended consequences. Although independence is seemingly critical to increased accountability, it is also explains the weakness of certain government branches. Without official financial or political ties to local leaders, the Office of Supervision and, perhaps increasingly the courts, find that much needed local cooperation dissipates. Legal reforms that fail to shift underlying political structures are often ineffective—regardless of the integrity and logic of their design. Given this reality, the Party's political leadership and its power over domestic spending priorities may be a more influential carrot and stick to induce legal reforms than simple reactive modifications of its court system.

The Legal Profession in China

Both China and Vietnam have historically had very few lawyers, managing societal relationships by kinship, custom and politics. But political and economic development has dramatically changed the life of lawyers. This is much more the case in China, where

²¹¹ Ibid.

there has been an explosion of legal activity—now more than three million cases processed annually²¹²—and an exponential growth in its legal workers; Vietnam has marked much smaller gains on a per capita basis. Given the confused interconnections between the government and public and private commercial activity, lawyers could ostensibly be a positive force for change. But this has largely not been the case in China. As Michelson writes, ‘even if entrepreneurs and the state agents on whom they depend are unwittingly and uneasy partners in economic development, it would be more than a stretch to say that lawyer and the *gongjianfa*²¹³ are partners in building a rational legal system.’²¹⁴ Some observers are more apologetic, arguing that in general “lawyers are neither as independent nor society as reliant on formal legality as the ideal might have one believe.”²¹⁵ However, in China the dramatic increases in lawyers and court activity overshadows fundamental problems in the development of a rule of law and the profession itself.

In China, a small cadre of 5,500 lawyers in 1981 has expanded to more than 110,000 thousand.²¹⁶ As may be expected from a formerly planned economy, the Chinese leadership reacted to the growing need to facilitate transactions and monitor legal compliance by focusing on a targeted goal for minting new lawyers—issues of competency were less important. Wary of this new group of professionals, China decided to employ nearly all lawyers in state owned and operated legal offices. These offices

²¹² William R. Alford, "Tasseled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers," *China Quarterly*, no. 141 (1995). 30

²¹³ The Chinese public security bureaus (PSBs), procuracy prosecutors, and the People's Courts, are collectively referred to as the *gongjianfa* organs.

²¹⁴ Michelson, “Unhooking from the State: Chinese Lawyers in Transition”. 355

²¹⁵ Alford. 24

²¹⁶ Randall Peerenboom, *Lawyers in China: Obstacles to Independence and the Defense of Rights* (Lawyers Committee for Human Rights, 1998).

served state-owned enterprises, businesses and individuals at fixed, subsidized rates. The 1980 Provisional Regulation on Lawyers established lawyers as state legal workers expected to uphold the interest of the Party and State over those of their clients.²¹⁷ This applied both in the cities, as well as efforts to send ‘bare-foot’ lawyers into rural areas to facilitate legal work and encourage the operation of local mediation centers.²¹⁸ As formal legal education programs were expanded at undergraduate universities, ad hoc legal training was also instituted in the form of night school and part-time law universities.

At this point, a large part of the Chinese economy was still state managed and lawyers were charged more with resolving administrative debacles rather than independent legal analysis. Officially, the lawyer’s work was not about conflict, but harmony. As one PRC commentator plainly put it: “In a socialist system, the interests of the state, the collective, and the individual are consistent; there is no contradiction between defending the lawful rights and interests of clients on one hand and safeguarding the interests of the state and collective and being loyal to the people’s interests on the other hand.”²¹⁹ Gradually, the Ministry of Justice, in its effort to manage the burgeoning profession within its scope of authority, decided to step back from the direct employment and management of lawyers to assume a ‘macro-administrative’²²⁰ role. More responsibility was given to the All China Lawyers Association in the professional oversight of its members and, since 1992, there has been a rapid growth permitted in co-operative law firms that effectively act as private law firms, some even with foreign branches. The 1996 Lawyers Law further

²¹⁷ Alford. 28

²¹⁸ Ibid. 29

²¹⁹ Ibid.29

²²⁰ Ibid.

expanded the rights and independence of lawyers²²¹ and recently lawyers' uniforms—a red necktie and black robe with a badge that says 'Chinese Lawyer'—have been required in court to convey "uniformity and seriousness."²²²

The reality, however, is that lawyers in China are having an identity crisis. They have been freed as state functionaries, only to find themselves thrown into the hurly burly of a marketplace that is fiercely competitive, political charged and only moderately interested in bringing a higher level of legal propriety to its activity. As Michelson writes:

Formal law is thus forced to compete with dispute forums that are not only extremely popular, but able to operate in a diffuse way over an expansive social terrain. Furthermore, formal law does not appear to operate as a unified institution; it appears fragmented. Lawyers are hired without going to court. Petitions are filed in court without hiring lawyers. Personal injuries and property damage and theft matters are handled in the almost total absence of lawyer and court involvement. Public security organs, courts and lawyers overlap far less than one might assume on the basis of their technical functions.²²³

As state employees, lawyers practiced law in the comfortable illusion of the government's monopoly on law. Now the same state finds lawyers a meddlesome third party in the relationship between government agencies and private businesses. Western NGOs have focused on professional training as the primary ingredient in nurturing the legal profession, but "lawyers, judges, legislators and other judicial personnel have been the targets of misguided efforts to develop expert legal knowledge...[legal knowledge] is, for the most part, irrelevant to the legal process. Legal knowledge cannot equate the

²²¹ Peerenboom.

²²² "Chinese Lawyers Put on Uniforms," *The People's Daily*, January 4 2003.

²²³ Michelson, "How Much Does Law Matter in Beijing?." 17

fundamental power imbalance between state officials and lawyers who have become increasingly marginal over the course of their ‘unhooking’ from the state.”²²⁴

Being “cut off from the iron rice bowl”²²⁵ has put lawyers on the defensive—just another interest group struggling to define a space in China’s vast economic transformation.

“Collectively pursing the elevation of their abysmal political status” would seem logical, but most are thinking about how to make their next paycheck because of stiff competition and usurious taxes and fees levied by the state. Forming local law cartels has been one approach. Entry in some Chinese stock exchanges requires letters, written at a high cost, from a small group of law firms.²²⁶ There are even joint ventures between co-operative law firms and government agencies and even the courts themselves that operate business interests on the side to fund parts of their budgets. Monopolies, of course, are more lucrative than cartels. Deheng, a major law firm in Qingdao, was the object of a petition by rival law firms for activities such as organizing soccer matches between Deheng lawyers and the local People’s Court and advertising the matches to emphasize the “exclusivity of its work”; sponsoring poker games for public security officers and judges who were awarded “prizes”; and locating the law firm in a hotel owned by the People’s Court.²²⁷

For lawyers without the clout of a firm like Deheng, fees are often reduced or swapped in lieu of kick backs and off the books billing. This has made lawyers poster children for the

²²⁴ Michelson, “Unhooking from the State: Chinese Lawyers in Transition”. 356

²²⁵ Ibid. 364

²²⁶ Alford. 34

²²⁷ Michelson, “Unhooking from the State: Chinese Lawyers in Transition”. 365

government's crackdown on tax evasion in the private sector²²⁸—while doing double damage for lawyers' public image as self-interested insiders. The government has tried to introduce a modicum of standards, passing its 1993 Code of Professional Ethics and Discipline for Lawyers, which introduced a complaint hot-line for citizens that did lead to the closure of some co-operatives. But in such a rapidly changing legal and policy environment, standards of conduct can become relative. "If...the function of legal professionals is to reconcile public and private interests, the absence of clear, broadly shared understandings of what these interests are at a time when the contents of the Party's core ideology and of morality itself are increasingly open to contestation and manipulation leaves lawyers without more than a highly personalized basis for framing such reconciliations."²²⁹ These issues have created negatively reinforcing trends as idealistic lawyers abandon the profession, and those that remain are content to try to monetize political capital gained elsewhere. No one seems to have the time or inclination to change course. "If Sun Yat-sen²³⁰ described Chinese peasants as a "loose sheet of sand" for their weak organizational capacity, it was only because he would never know Chinese lawyers of the turn of the century."²³¹

²²⁸ Ibid. 364

²²⁹ Alford. 36

²³⁰ Sun Yat-sen (1866-1925), a physician and revolutionary, is considered a founder of the modern Chinese state.

²³¹ Michelson, "Unhooking from the State: Chinese Lawyers in Transition". 368

Legal Profession in Vietnam

Whereas China heavily promoted lawyers as state agents and then gradually released them from captivity, Vietnam has been more ambivalent towards their role in the legal system. The Vietnamese legal profession was not officially established until a 1987 ordinance on lawyers. There are now approximately 6000 registered Bar Association members²³² in Vietnam, up from around 200 in the entire country a decade ago.²³³ There are 61 city and provincial bar associations in Vietnam,²³⁴ though a vast majority of all lawyers are members of either the Hanoi or Ho Chi Minh City bars. The early 1990s saw a sharp increase in lawyers, but this was blunted in 1995 with a “letter” from the Prime Minister that limited the number of lawyers since their activities were not being adequately managed.²³⁵ This policy was gradually phased out, though membership to the bar remained invitation only on the grounds that there was not a tradition of using lawyers. Others have argued the small size of the bar was the perception of incompetence and fear of competition.²³⁶ In 2002, the Bar Association reformed its charter to allow membership by competitive exam that is evidently fairly administered.²³⁷ These reforms coincided with a new ordinance on lawyers that strengthened the education and training requirements and rights of lawyers. As in China, the Vietnamese Bar Associations operate under the Ministry of Justice and have been at most a cautious voice in the politics of legal reform.

²³² Nguyen Trong Ty, *President of the Hanoi Bar Association* (2003).

²³³ Phan Huu Thu, ed., *Final Report on Assessing the Current Situation and the Needs for Overall Development of the Basic Legal Training System, Legal Professional Training System, and Retraining of Legal Official-Experts in Office up to the Year 2010* (2002). 21

²³⁴ T.F. Scott, *Analysis of the Professional Training Needs of Barristers and Lawyers in Vietnam* (Swiss Agency for Development and Cooperation, 2001). 1

²³⁵ Le Thanh Kinh, "Law & Hr Consulting, Hcmc," ed. Lawyer (2003).

²³⁶ Scott. 1

²³⁷ Based on author's interviews with new lawyers in Hanoi.

In Vietnam there are several kinds of legal professionals. There are *luat su*, who are lawyers, members of the Bar Association, and can represent clients in court. *Luat gia* are lawyers by training, but not Bar members, and can only offer legal consulting services. There are also government lawyers who represent various agencies and ministries. All three groups comprise the membership of the Vietnam Lawyer's Association, a mass organization of the Fatherland Front.²³⁸ (In contrast, China's All China Lawyer Association functions both as a professional and political organization.) Outside of these formal legal positions, there are also *co* (meaning migratory bird) who are brokers or lobbyists. *Co* work with lawyers and government agents, and sometimes the police, to make things happen, legally or otherwise. *Co* have long been a part of Vietnamese society, 'solving' major civil or criminal problems, as well as doing more mundane things, such bypassing the bureaucracy to obtain a marriage license more quickly.²³⁹ An interesting dynamic within the legal profession, is how lawyers and brokers are distinguishing their roles. Lawyers in Vietnam complain vehemently that brokers give people the wrong impression about how the legal system works. Judges and businessmen in turn are quick to cite the low professional standards of lawyers, who themselves often emphasize their lobbying connections more than legal arguments in representing

²³⁸ The business of law in Vietnam is also divided between law office and law firms. Law offices are fully empowered to consult and counsel clients in court, but cannot hire foreigners or merge with foreign firms. Law firms are consulting practices that can't do court work. They can be domestic or foreign owned, either of which would need to hire a Law Office if local courts are involved. Lobbying firms are outside this legal profession and use governmental or police connections to steer things in certain directions. Foreigners can't technically practice Vietnamese law, but in reality do, sometimes with/or using the stationary of a local Law Office.

²³⁹ Based on the author's interviews with legal professionals in Ho Chi Minh City.

clients.²⁴⁰ Within a dysfunctional legal system, lawyers relying strictly on legal procedures find themselves waiting for an infrequent bus—business clients’ are interested in solutions, not test driving a new legal model. A common refrain from Vietnamese lawyers is “I’ve never had any experience with Vietnamese courts. I can’t let my client be a guinea pig.”²⁴¹ There is a difference between doing things properly and doing things legally in Vietnam. The former can increasingly be characterized as legal procedures modified by political consultations—law as guidelines “establishing the rough ambit of bureaucratic discretion”²⁴²—while the latter remains only a theoretical possibility.

Vietnamese lawyers are also hindered by their poor reception by government officials. Well resourced foreign lawyers, generally barred from bribery,²⁴³ can only offer what is effectively private legal tutoring to government officials in exchange for their cooperation with major clients. Problems with ministers are often more semantic than substantive, as one lawyer said, “you want something that is technically and legally rigorous, but has enough play in the language to satisfy political mandates.”²⁴⁴ Vietnamese lawyers often deal with the government at a different level and are caught in a dynamic of paying bribes or being shut out of meetings so that the parties may settle on their own terms.²⁴⁵ As another Vietnamese lawyer said, "officers and members of Peoples Committees don't want lawyers present. They delay meeting times. They won't directly

²⁴⁰ Ibid.

²⁴¹ Dang Xuan Hop, "Lawyer," in *Hanoi*, ed. Phillips Fox Law Firm (2003).

²⁴² Gillespie quoted in Woodruff. 640

²⁴³ American law firms would be subject to the Foreign Corrupt Practices Act, while other Western firms would fall under the weaker OECD convention on corruption.

²⁴⁴ Hop.

²⁴⁵ Tran Vu Hai, Hanoi Law Company, no. Interview. Hanoi (2003).

answer our questions.”²⁴⁶ Lawyers even have a hard time getting the cooperation of their clients. Using the law to settle business disputes can mean exposing family finances and business strategy; Vietnamese businesses are second only to the Communist Party in keeping transparency to a bare minimum. Interestingly, in recent interviews, foreign and domestic lawyers were equally dismissive of each other’s competencies. Vietnamese lawyers thought foreigner lawyers were over-paid consultants that only manage the money and politics of foreign direct investment. Foreigners thought Vietnamese lawyers in general were poorly educated, corrupt and not effective legal counsel. The truth, of course, is that large investment or export projects and local property disputes are effectively dealt with in different legal and political cultures. Foreign lawyers may be required for international legal problems, but they are often viewed as unnecessary players in overcoming domestic legal obstacles. Vietnamese catfish producers best illustrate this dichotomy. During the recent trade flap over catfish exports to the U.S., many Vietnamese exporters retained lawyers to fight the U.S. anti-dumping duties.²⁴⁷ Contrary to the theory that familiarity with law will habituate businesses to take advantage of lower transaction costs and protections, the same exporters resisted any involvement of lawyers in their domestic operations by explaining that there was no need.²⁴⁸

²⁴⁶ Ibid.

²⁴⁷ Often admired for its robust legal system, the U.S. was able to disabuse many Vietnamese businessmen of its high-mindedness by using its trade laws for seemingly obvious political special interests. Furthermore, the U.S. won with a contradictory argument by saying Vietnamese catfish were different from the American variety (and thus needed special labeling calling it *Basa* or *Tra*) yet also the same (and thus justifying steep import taxes to protect U.S. market share). The U.S.’ growing security paranoia, however, does resonate with the Party’s belief in using the law to maintain stability and reduce security threats—probably not the kind of export many Western legal reformists have mind.

²⁴⁸ From interviews with law firms representing catfish exporters in HCMC 2003

Lawyers in Vietnam, like their counterparts in China, spend a lot of time pitching the virtues of law and then find themselves taking a more pragmatic approach to serving client interests. Businesses are unsure how to put a value on legal advice—to them the law sales pitch sounds more like an expensive insurance policy with an indeterminate payout. A major related hurdle is the short-term mindset of the Vietnamese. Law requires an abstract faith in the future—that fees and a piece of paper obtained now will guarantee rights and obligations down the road. Given the country’s recent political history, such a promise understandably fails to resonate. Consequently, investment projects are often on a quick turn around basis and financed and managed entirely by family and political connections. Much more so than China, Vietnam is one community—very few degrees of separation divide all of the economic and political actors—which makes the rule of law premise seemingly less pertinent since these elite personal ties are strengthened in step with economic growth. Vietnamese lawyers are increasingly involved in drafting basic documents and consulting on business strategy, but not with the promise that the law will provide the protections it espouses. That kind of security is still forged in family and political meetings, now catered, so to speak, by the legal profession, but not led. As one lawyer said, “we do all the legal documents and then pass over the package to another [lobbying] firm. There may not be a lot of corruption, just complex relationships that must be negotiated...[As a lawyer], you need to insulate yourself from that process.”²⁴⁹

The nuanced role of lawyers in Vietnam is not at all evident in the structure of the country’s legal education. As in other civil law countries, law is an undergraduate degree in Vietnam, as ubiquitous as a liberal arts major. Few students go on to a legal career,

²⁴⁹ Duyen interview.

however, in part because they are not prepared. The curriculum relies on memorizing legal code, studying political history and listening passively to professors trained in Eastern Europe. Students finish knowing laws that are no longer relevant and lack an understanding of analytical thinking, how to advance a client's interest, or how very different the life of the law—especially in Vietnam—is from the written text.²⁵⁰ But the text itself can be just as dynamic. “There is a huge quantity of law coming out every week,” said one foreign lawyer. “Vietnam is enacting more laws every week than any other country in the world.”²⁵¹ In 1987, there were fewer than 10 commercial statutes in Vietnam; now they number in the thousands.²⁵² The amount of research time needed to adequately answer basic legal questions increasingly out weighs the value and significance of the answer. And reading laws is only half the battle—there is a whole cottage industry in the collection of official letters and other informal political correspondence that is equally important for interpreting the law. Instead of reviewing the sparse public court record, divining legal precedence in Vietnam requires a big Rolodex and private subscription services. Despite these peculiarities and obstacles, many Vietnamese lawyers expressed optimism that reforms which expand their rights in the courtroom, as well as the general focus on legal reform by the Party, will ultimately strengthen their role in society.

²⁵⁰ From interviews with law students and law firms in Hanoi 2003. Law firms indicate that they hire apprentice lawyers for their two year internship prior to taking the Bar based on their perceived potential and then start legal training from scratch.

²⁵¹ Hull interview.

²⁵² Gillespie, "Bureaucratic Control of Business Regulation in Vietnam." 368

Conclusion

A critical assessment of China and Vietnam's reform efforts would suggest that the two countries have undergone a true legal revolution—in the literal sense of returning where they started. In these societies, business relations are still not formed “within the shadow of the law”²⁵³ since court activity is low and the enforcement of judgments is rare.

Economic growth has created a greater diversity of economic and political priorities within each Party, but consensus-based law making obscures the legislative clarity necessary to make the legal system uniform and transparent. The old “rule by bureaucracy” and new “rule by law” often look quite similar. As Gillespie writes of Vietnam:

Factional disagreements are routinely resolved through political compromises that reduce laws to little more than broad hortatory principles. If at all, laws acquire substance and precision from written and unwritten bureaucratic regulations and edicts. One consequence of the delegation of legislative competence is a rapidly proliferating mass of overlapping and uncoordinated quasi-legal subordinate legislation, such as ministerial circulars, People’s Committee decisions and business licenses. In short executive bodies continue to perform the dominant legislative role they enjoyed under the pre-Doi Moi legal system.²⁵⁴

Development and economic opportunities have changed some business perceptions of the law, particularly those competing in certain export markets or caught in intellectual property disputes over brand piracy.²⁵⁵ But the *modus operandi* for many businesses has not changed significantly. As a tourism operator in Ho Chi Minh City said flatly, “the law is not necessary. In all situations, the business can solve a problem directly with the

²⁵³ John McMillian and Christopher Woodruff, "Interfirm Relationships and Informal Credit in Vietnam," *Quarterly J Eco* 4 (1999). 1285

²⁵⁴ Gillespie, "Bureaucratic Control of Business Regulation in Vietnam." 373

²⁵⁵ Vietnam still has a “first to file” rather than a “first to use” copy write policy. This has sparked a wave of opportunism—akin to Internet domain names in the late 1990s—but legal procedures to defend against violations remain weak.

government. It is [more] important to know the secretaries.²⁵⁶ Business relationships are still based on kinship; strangers are distrusted and the language of law—understood as the rough outlines of permissible behavior—is not spoken fluently by businessmen forging ties in *bia hoi*²⁵⁷ on the side streets of Hanoi and Ho Chi Minh City. When disputes occur, businesses are left to the strength of the political and social capital they have invested to find a solution. Collecting bad debts in Vietnam, one business manager said, “is an art which is very difficult to explain.”²⁵⁸

Lawyers have undergone perhaps the greatest transformation in the character and scope of their profession, but it has not yet assumed the importance or level of professionalism hoped for by many observers. The difficulties facing lawyers in China are both symbolic of entrepreneurs’ circumstances in general²⁵⁹ and a barometer for how law is being used in these transitional economies. Faced with hostile governments and an often indifferent client pool, any sense of civic duty on the part of lawyers—essential for raising standards and pushing for change—still comes at too great a cost and risk. In many ways, the economic landscape of China and Vietnam represents a “tragedy of the commons” from a parallel universe—a place where resources and opportunities somehow proliferate even as exploitation, growing social inequity and a lack of collective action would seem to drive the system to a crisis.

²⁵⁶ Ha Quoc Cuong, director, OSCAN Tourism, HCMC, 2003

²⁵⁷ Bia Hoi are local bars with cheap, lightly carbonated beer or rice wine. Vietnamese businessmen prefer to talk business over finger food and copious pints quaffed while sitting on little plastic stools on the sidewalk.

²⁵⁸ Woodruff, "Dispute Prevention without Courts in Vietnam." 642

²⁵⁹ Michelson, “Unhooking from the State: Chinese Lawyers in Transition”. 372

However, corruption in both countries has increased precipitously with the beginning of legal and economic reforms. As one Vietnamese lawyer said, “There is a lot of corruption, more now. Government inspectors will show up at a business without permission.”²⁶⁰ Corruption, as defined by using official powers for personal gain, is the status quo. As another lawyer said, “officially the government prohibits corruption [by judges] and punishes those they find seriously. But all, not most, are involved in corruption. [Punishment] is an internal political scandal.”²⁶¹ Another expressed his frustration this way: “Many times the jury may meet for 15 minutes, and come back and read a 30 minute decision. It is a joke. I speak and no one listens. I have evidence that is not considered. Why should I come to trial? For what?”²⁶² In a society where legal compliance is the exception, it is hard to focus seriously on the law as a standard against which conduct should be judged. As seen from the West, corruption has a morally aberrant character that may not always be appropriate to apply to circumstances of many Vietnamese and Chinese. Of course, there are egregious cases of graft and malfeasance on the part of civil servants and businesses. But as shown in the struggles of lawyers in both countries, however determined and ethical people may be, getting ahead in a transitional economy is difficult, if not impossible, without adapting to the system as it is, rather than as it should be. Socialist doctrine may imply a heightened requirement for legal compliance, but vague or slightly inconvenient laws are still shed like extra clothing on a hot day. By default, lawyers working in a state of “discretionary anarchy” have a job description broader than anything the American Bar Association would endorse.

²⁶⁰ Thieu Anh Duong, lawyer, HCMC

²⁶¹ Dinh interview.

²⁶² Le Thanh Kinh, defense lawyer and former police investigator, HCMC

Commentary on the legal reform process too often falls back on conflicting caricatures and illusions. Bureaucrats are universally corrupt; businessmen are parochial and short-sighted; the Party is crooked, yet omnipotent; and despite this cast of characters, legal reform—as evidenced by the tonnage of new laws and inspiring rhetoric of leaders—is ushering in a new paradigm for economic development. Judging the reform progress is an exercise in assessing how much of each of these stereotypes is false. For example, the Parties are not entirely corrupt, as their leadership realizes that survival equals legitimacy, but nor are they in total control, as they are watching along with the rest of society to see what will happen next. New laws often permit what is already commonplace and governance strategy in both countries seems shaped by the constraints of what is possible, rather than using leadership to transcend obvious impediments.

Likewise, rule of law discourse and even empirical indicators of changing legal behaviors are not necessarily proof that the underlying conception or use of law has changed. The number of lawyers in China has grown precipitously in recent years and law making has made a commensurate jump, but this may be not be reflective of a shift toward the rule of law. As Michelson writes, “just as we should resist the temptation to regard an impressive array of written laws as a reflection of a rational-legal system, when ordinary people enter the lawyer’s office we must resist the temptation to regard this as an indication of growing confidence in the law. Indeed, lawyers reinforce and reproduce existing institutional forms at least as much as they are institutional innovators.”²⁶³ A major impediment to substantive change is actually the correlation of rapid growth with an

²⁶³ Michelson, “Unhooking from the State: Chinese Lawyers in Transition”. 371

endless cycle of reform headlines. “In all of this, perhaps the biggest threat to Vietnam’s success is the internal perception that Vietnam is successful. A satisfaction with the results of current policies supports those who want to continue benefiting from them, even if it is necessary to change these policies to maintain the pace of growth or regain its quality.”²⁶⁴

Actual impact of reforms aside, there have been important differences in sequencing and character of the legal reform movements of China and Vietnam. By the time China began its legal and economic reforms it was in a period of political weakness (from Mao’s destructive legacy) but relative economic strength. Ho Chi Minh’s leadership and integrity are still sacrosanct in Vietnam, but its adoption of Maoist collectivization policies led to near collapse of its economy in the early 1980s. As Sidel writes, “developing internally consistent legislation to serve the economic and political reform process, which (for reasons of pacing) might have been allowed to take five years in China, must be completed far more rapidly in Vietnam, because of Vietnam’s relatively late beginning on the reform process and the economic and demographic pressures the regime faces.”²⁶⁵ The relative size of the countries also resists comparison. Vietnam is more akin to a province within China and benefits and suffers from the tight political and familial networks that control its economy. This, and the more advanced economy of China, may be reasons for the greater traction of legal norms and litigation there, though labeling it a “legal system,” let alone “rule of law,” may be too generous. Analysts are divided on the nature of cross-border legal influence, with many noting that Vietnam’s

²⁶⁴ David Dapice, Viet Nam's Economy: Success Story or Weird Dualism? (UNDP Vietnam, 2003). 16

²⁶⁵ Sidel. 226

reforms more often reflect Taiwanese or other foreign laws than those of mainland China. Others counter that China's economic strength has required Vietnam to bury its political ambivalence and respond to China's reform strategies. The consensus seems to be a "similar but separate"²⁶⁶ model in which each country is reacting to local politics, different economic conditions and shared cultural predispositions toward their conception of law as a development tool.

As the modest impact of court and administrative reforms have illustrated, new rules cause just some of the many ripples in the puddle of politics. Principles that resonate in the West, such as the independence of courts or lawyers as ways to balance power and increase legitimacy, intersect with different forces in Vietnam and China and can produce opposite results. Independence may sometimes establish authority in Vietnam. For example, a well known lawyer in Danang recently was able to successfully defend a business client against police actions in an adjacent province. The client, a commercial jeweler, was arrested for transporting foreign currency after selling gold to a customer. The police retained the cash for departmental use. The lawyer was able to use new laws, and his prominent-yet-outsider status to sway the local political and legal process.²⁶⁷ But such cases remain unusual. Influence is a function of connectedness; anyone, individuals or government agencies, separated from the implied sponsorship of the Party or local interest groups soon find that independence means isolation. Independence assumes the

²⁶⁶ Benedict J. Tria Kerkvliet Anita Chan, Jonathan Unger, "Comparing Vietnam and China: An Introduction," in *Transforming Asian Socialism: China and Vietnam Compared*, ed. Benedict J. Tria Kerkvliet Anita Chan, Jonathan Unger (Rowman & Littlefield Publishers, 1999). 14

²⁶⁷ Danang Interview.

existence of an objective system of law; the paradox is its liability as a force in the creation of such a system.

A decade ago, the law did not matter in Vietnam or China. Now the law has a more present, but unclear status, being neither loose enough to disregard, nor strict enough to require full compliance. Assessing this status is difficult due to the diversity of each society—so much is settled informally; cases of strict legal application are juxtaposed to stories of interpretative farce; campaigns against graft set examples, but are as lasting as a brief squall; written laws are proliferating faster than they are improving; businesses are thriving, but using laws in unexpected ways; business and government transparency remains minimal; the media is delicately critical of legal reform efforts, but public knowledge is fairly ineffective when the public has no direct involvement in the law-making process; and international agencies, particularly in Vietnam, are putting millions of dollars on the table to fund legal training and drafting initiatives intended to cut a clearer path to the rule of law.

But so far legal reforms have not really done what they were intended: spur private enterprise development. Reforms have acted more like movements in a ship's compass, rather than new sails, as many legal theorists might describe the forwarding power of law in a marketplace. Of course, this position, at its extreme, would imply that passivity is the only option. As Alford writes in the context of reforms in the Chinese legal profession, “It is important to recognize that the serious difficulties besetting Chinese lawyers with regard to competence and ethics cannot be isolated from the broader course of legal,

economic and political reform in the PRC, but that recognition also has the potential to be debilitating, for it implies that one should not anticipate extensive improvement in this area without thorough-going, societal wide change. As much the same point can be made about virtually every other dimension of the “reform process,” taken to its logical end this position suggests that nothing can be done until everything is done—which, indeed, would be paralyzing.”²⁶⁸ This realization requires legal reform advocates to take some consolation in the positive symbolism of their failures. Just as old socialist economic policies were detrimental to private enterprise because of their peripheral distortion of markets and consumption, rather than direct effects,²⁶⁹ recent legal reforms have remained distanced from the marketplace, but nonetheless seem to catalyze its activity.²⁷⁰

The experience of China and Vietnam reinforces the cautionary interjection of some reform advocates who emphasize that laws and legal culture depend unavoidably on cultural circumstances. This does not deny the appeal, however, of certain legal and economic policies regardless of local custom. As seen in Vietnam, court reforms can produce a spike in case activity—showing that businesses are interested in the promise of objective dispute fora, only to turn away, disappointed with the results. The crux of the problem facing Vietnam and China is that their legal cultures are tied to history in a way that their economies are not. The forces attendant to globalization—technology, liberalized markets, new business opportunities—tap a universal desire to make money,

²⁶⁸ Alford.

²⁶⁹ Bergling, *Legal Reform and Private Enterprise: The Vietnamese Experience*. 55

²⁷⁰ Compared to the Soviet Union, China and Vietnam were only able to draw in a small fraction of workers into the state apparatus as bureaucrats or state factory workers. (20% in China, and much less in Vietnam. The USSR employed nearly 95% of its citizens. See Anita Chan. 7) This partially explains the difficulty of China and Vietnam in commanding the liberalization and improved regulation of their economies—the state had little control then or now.

while rules and how people think about rules are an inheritance of a very different past.

For this reason, the leadership of China and Vietnam are caught in a strategic bind.

“Many state officials ideologically oppose reforms, or fear the loss of rent seeking opportunities. As a Vietnamese proverb has it, *duc nuoi beo co* (in muddy water storks grow fat.) Still others believe that meaningful reform of an undifferentiated state apparatus cannot proceed without commensurate political change.”²⁷¹

Vietnam and China are now in an era of “enlightened skepticism”²⁷² in which economic growth has led them to reconsider their own traditions, weighing the value of their legal legacy against the rules of the modern marketplace. As Oliver Wendell Holmes wrote, “when you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.”²⁷³ At the present, China and Vietnam are hoping gradual reforms will forestall the need for a wholesale transformation, but, as the imagery suggests, the outcome is not always a conscious choice. Vietnam and China have each maintained more than 7% annual growth rates for the last decade²⁷⁴ and their governments will do whatever it takes to perpetuate this record. Whether it takes a rule of law is a question only their societies can answer.

²⁷¹ Gillespie, "Bureaucratic Control of Business Regulation in Vietnam." 391

²⁷² Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review* 10 (1897).

²⁷³ Ibid.

²⁷⁴ Mallon.189

Alford, William R. "Tasseled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers." *China Quarterly*, no. 141 (1995): 22-38.

Anita Chan, Benedict J. Tria Kerkvliet, Jonathan Unger. "Comparing Vietnam and China: An Introduction." In *Transforming Asian Socialism: China and Vietnam Compared*, ed. Benedict J. Tria Kerkvliet Anita Chan, Jonathan Unger: Rowman & Littlefield Publishers, 1999.

Bergling, Per. *Legal Reform and Private Enterprise: The Vietnamese Experience*: Department of Law, Umea University, Sweden, 1999.

_____. "Grand Assessments" as Analytical Tools and Political Exercises: The "Unmibh Judicial System Assessment Program" and the "Comprehensive Legal System Needs Assessment" Compared. University of Victoria: Vietnam Legal Culture Symposium, 2003.

Burke, Fred. Baker & McKenzie lawyer: Ho Chi Minh City Interview, 2003.

Buscaglia, Edgardo. *The Law and Economics of Development: Anti-Corruption Programs and Their Impact on Efficiency and Equity*. Hoover Institution, Stanford University and the University of Virginia Law School, 1999.

Chen, Albert H.Y. "Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law." *UCLA Pacific Basin Law Journal* 17, no. 2&3 (1999/2000): 125-165.

Chen, Jianfu. "Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China." In *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya, 69-94. London: Routledge, 1999.

_____. "Market Economy and the Internationalisation of Civil and Commerical Law in the People's Republic of China." In *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya, 69-94. London: Routledge, 1999.

"Chinese Lawyers Put on Uniforms." *The People's Daily*, January 4 2003.

Comprehensive Needs Assessment for the Development of Vietnam's Legal System to the Year 2010. 2001.

"Constitution of the Socialist Republic of Vietnam." 1992.

Dapice, David. *Viet Nam's Economy: Success Story or Weird Dualism?* : UNDP Vietnam, 2003.

- Dicks, Anthony R. "Compartmentalized Law and Judicial Restraint: An Inductive View of Some Jurisdictional Barriers to Reform." *China Quarterly*, no. 141 (1995): 82-109.
- Doanh, Le Dang, ed. *The Enterprise Law's Enforcement: Achievements, Challenges and Solutions*: UNDP Vietnam, 2002.
- Dolan, Kerry A. "China's New Suits." *Forbes*, Oct. 27 2003, 70.
- Fforde, Adam. "From Plan to Market: The Economic Transitions in Vietnam and China Compared." In *Transforming Asian Socialism: China and Vietnam Compared*, ed. Benedict J. Tria Kerkvliet Anita Chan, Jonathan Unger: Rowman and Littlefield Publishers, Inc., 1999.
- Findlay, Mark. "'Independence and the Judiciary in the Prc: Expectations for Constitutional Legality in China.' In *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya. London: Routledge, 1999.
- Fogelklou, Anders. "Principles of Rule of Law and Legal Development." In *Legal Assistance to Developing Countries: Swedish Perspectives on the Rule of Law*, ed. Per Sevastik: Kluwer Law International, 1998.
- Gillespie, John. "Private Commercial Rights in Vietnam: A Comparative Analysis." *Stanford Journal of International Law* 30, no. Summer (1994): 325-377.
- _____. "Bureaucratic Control of Business Regulation in Vietnam." In *Asian Laws through Australian Eyes*, ed. Veronica Taylor. Sydney: LBC Information Services, 1997.
- _____. "Law and Development in 'the Market Place': An East Asian Perspective." In *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya, 118-150. London: Routledge, 1999.
- _____. "Insolvency Law in Vietnam." In *Insolvency Law in Asia*, ed. Roman Tomasic, 2000.
- _____. "Concepts of Law in Vietnam: Transforming Statist Socialism." In *Comparative Conceptions of Rule of Law in Asia*. Hong Kong, 2002.
- _____. "Continuity and Change in Vietnamese 'Socialist' Legal Thinking." In *Law and Governance: Socialist Transforming Vietnam Conference*, 1-37, 2002.
- _____. "Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam." *International and Comparative Law Quarterly* 51 (2002): 641-672.

- Ginsburgs, George. "The Genesis of the People's Procuracy in the Democratic Republic of Vietnam." *Review of Socialist Law* 5 (1979).
- Goodman, Peter S. "China Ready to Grant Property Rights." *Washington Post*, December 22, 2003.
- Hager, Barry M. *The Rule of Law: A Lexicon for Policy Makers*. Mansfield Center for Pacific Affairs, 2000.
- Hai, Tran Vu. Hanoi Law Company, no. Interview. Hanoi (2003).
- Hainsworth, Geoffrey B. *Is There a 'Culture of Corruption' or 'Discretionary Anarchy' in Vietnam? A Beyond Cynicism View of Criminality, Custom and Pragmatism*. Centre for Southeast Asia Research, University of British Columbia, 1999.
- Hauerwas, Stanley. *A Community of Character: Toward a Constructive Christian Social Ethic*: University of Notre Dame Press, 1981.
- Holmes, Oliver Wendell. "The Path of the Law." *Harvard Law Review* 10 (1897).
- Hop, Dang Xuan. "Lawyer." In *Hanoi*, ed. Phillips Fox Law Firm, 2003.
- Interview. "Nguyen Van Dung, Retired Supreme People's Court Judge." Hanoi, 2003.
- Jayasuriya, Kanishka. "Corporatism and Judicial Independence within State Legal Institutions in East Asia." In *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya, 173-204. London: Routledge, 1999.
- _____. "A Framework for Analysis." In *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions*, ed. Kanishka Jayasuriya, 1-27. London: Routledge, 1999.
- Kinh, Le Thanh. "Law & Hr Consulting, Hcmc." ed. Lawyer, 2003.
- Liu, Nanping. "Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court." *Journal of Chinese Law* 5 (1991): 107-140.
- Locke, John. *The Second Treatise on Civil Government*, 1690.
- Love, John. "Max Weber's Orient." In *The Cambridge Companion to Weber*, ed. Stephen Turner: Cambridge University Press, 2000.
- Lubman, Stanley. "The Future of Chinese Law." *China Quarterly*, no. 141 (1995): 1-21.

- Malik, Rashid. *Chinese Entrepreneurs in the Economic Development of China*. Westport, CT: Praeger, 1997.
- Mallon, Brian Van Arkadie & Raymond. *Vietnam: A Transition Tiger?*: Asia Pacific Press, 2003.
- Michelson, Ethan. "How Much Does Law Matter in Beijing?" In *Law and Society Association Annual Meeting*. Vancouver, 2002.
- _____. "Unhooking from the State: Chinese Lawyers in Transition." University of Chicago, 2003.
- Minh, Ho Chi. *The Urgent Tasks of the Democratic Republic of Vietnam*. Ho Chi Minh's Entire Collection, 1945.
- Nghia, Truong Trong. *The Rule of Law in Vietnam: Theory and Practice*. Mansfield Center for Pacific Affairs, 2000.
- Nicholson, Penelope. "Vietnamese Legal Institutions in Comparative Perspective: Contemporary Constitutions and Courts Considered." In *Law, Capitalism and Power in Asia*, ed. Kanishka Jayasuriya, 300-322. London: Routledge, 1999.
- Nicholson, Pip. "Vietnamese Courts:Party-State and Law." In *CERI-International Conference: The state of the law and rule of law in post doi-moi Vietnam*, 1-37. Paris, France, 2003, Oct. 6-7.
- On the Reform of the State Apparatus*. Hanoi: The Truth Publishing House, 1991.
- Peerenboom, Randall. *Lawyers in China: Obstacles to Independence and the Defense of Rights*: Lawyers Committee for Human Rights, 1998.
- Persson, Erik. "Bureaucracy and Legal Culture." In *Legal Assistance to Developing Countries: Swedish Perspectives on the Rule of Law*, ed. Per Sevastik: Kluwer Law International, 1998.
- Polanyi, Karl. *The Great Transformation: The Political and Economic Origins of Our Time*. Boston: Beacon Press, 1957.
- Potter, Pitman B. "Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China." *China Quarterly*, no. 138 (1994): 325-358.
- Prime Minister Decision on the Program on Law Dissemination and Education*. Cong Bao Official Gazette. Vietnam Law & Legal Forum, 2003.
- Pye, Lucian W. "China: Erratic State, Frustrated Society." *Foreign Affairs* 69, no. 4 (1990): 56-74.

Quinn, Brian. "Vietnam's Continuing Legal Reform: Gaining Control over the Courts, 2003." Unpublished Manuscript, Stanford University.

Quinn, Brian J.M. "Legal Reform and Its Context in Vietnam." *Columbia Journal of Asian Law* 15, no. 2 (2002): 221-291.

Rosen, David Marr and Stanley. "Chinese and Vietnamese Youth in the 1990s." In *Transforming Asian Socialism: China and Vietnam Compared*, ed. Benedict J. Tria Kerkvliet Anita Chan, Jonathan Unger: Rowman & Littlefield Publishers, 1999.

Scott, T.F. *Analysis of the Professional Training Needs of Barristers and Lawyers in Vietnam*. Swiss Agency for Development and Cooperation, 2001.

Sidel, Mark. "Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training." *UCLA Pacific Basin Law Journal* 11, no. 2 (1993): 221-259.

Stiglitz, Joseph E. *Globalization and Its Discontents*. New York: W.W. Norton & Company, 2003.

Study on Ho Chi Minh's Ideology on State and Law. Research Institute for Legal Sciences under the Ministry of Justice.

Tho, Pham Xuan. , Tribunal President, Economic Court of Ho Chi Minh City: Interview. Hanoi, 2003.

Thu, Phan Huu, ed. *Final Report on Assessing the Current Situation and the Needs for Overall Development of the Basic Legal Training System, Legal Professional Training System, and Retraining of Legal Official-Experts in Office up to the Year 2010*, 2002.

Ty, Nguyen Trong. *President of the Hanoi Bar Association*. 2003.

Wang, Xixin. *Rules of Rules: An Inquiry into Administrative Rules in China's Rule of Law Context*. Mansfield Center for Pacific Affairs, 2000.

Weber, Max. *Religion of China: Confucianism and Taoism*: Free Press, 1964.

Womack, Brantly. "Asian Communism: Enigma Variations." University of Virginia, 1993.

Woodruff, John McMillian and Christopher. "Dispute Prevention without Courts in Vietnam." *The Journal of Law, Economics, & Organizations* 15, no. 3 (1999): 637-658.

_____. "Interfirm Relationships and Informal Credit in Vietnam." *Quarterly J Eco* 4 (1999): 1285.

Woodside, Alexander. "Exalting the Latecomer State: Intellectuals and the State During the Chinese and Vietnamese Reforms." In *Transforming Asian Socialism: China and Vietnam Compared*, ed. Benedict J. Tria Kerkvliet Anita Chan, Jonathan Unger: Rowman & Littlefield Publishers, 1999.