THE LONDON-LEIDEN SERIES ON LAW, ADMINISTRATION AND DEVELOPMENT

by:
Penelope (Pip) Nicholson

Borrowing Court Systems

The Experience of Socialist Vietnam

Martinus Nijhoff Publishers

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For my mother and father, Judith and Ian Nicholson

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PREFACE

On one view I first began thinking about this project, if not the publication, in 1992 when I journeyed to Hanoi, Vietnam to escape the frustrations of legal practice. Subsequently, I spent the late 1990s completing a doctorate that took as its subjects: legal change, socialist dispute resolution Vietnamese style, and the challenges of investigating both topics. This book reflects my current thinking on each of these three issues.

In the years since submitting, I have discovered that increasingly more people are interested in the issues of legal change – and that its treatment has become correspondingly more complex as commentators take up the practical, the ideological and the theoretical dimensions of the comparative study of legal change. This book offers one reading of legal change where the donor and recipient of a legal transplant share a political ideology: socialism. Because of the historical case-study undertaken, it also offers a unique opportunity for a considered retrospective analysis.

ACKNOWLEDGEMENTS

My friends in Vietnam have spent a great deal of time advising me on materials and sourcing documents. I thank those who helped me gain access to materials not on the public record and shared their 'kitchen' stories. Without these relationships this book would have faltered.

The enthusiastic Asian law scholars at the Asian Law Centre at the University of Melbourne have, as usual, been a source of inspiration and much humour. In particular, I thank Professor Tim Lindsey, the Asian Law Centre's Director and Dr Sarah Biddulph. In addition, I thank Professor Malcolm Smith for his encouragement and support over the years on this and many related projects.

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Special thanks are due to all those who, with Professor Tim Lindsey, read various drafts: Professors John Gillespie, Andrew Harding, Cheryl Saunders, Mark Sidel and Veronica Taylor; together with Graham Hassall, Ross Jones, Stephen McLeish and John Waugh.

I also benefited from the generosity of the University of Melbourne and the Australian Federation of University Women, both funding necessary research trips. Further, the Law School at the University of Melbourne has made time available for me to complete this book and this is much appreciated.

I thank my research assistants, Nguyen Hien Quan, Chi Ha, Kerstin Steiner, Connal Parsley and Simon Pitt for assisting me to update and edit materials. No detail was too irritating for them, and for that I am very grateful. To Sandra Pyke: 'thank you for the index.'

Any errors are mine.

Although my mother is not here to see this publication, I dedicate this book to her memory, which leaves my father the task of reading it. To my siblings, Bridget, Jill and Mark, 'thank you', as always.

I remain deeply grateful to Stephen for travelling with the researcher and her research.

Finally, I very much enjoyed the support of the two editors of this series, Professor Jan Michiel Otto and Dr Martin Lau. Together with Lindy Melman, Bea Timmer and Leonieke Aalders at Martinus Nijhoff, this group ensured working on this publication was a pleasure.

List of Tables, Diagrams and Maps

Preliminary Notes

DRVN

Throughout this study the term DRVN will be used to refer to the Democratic Republic of Vietnam. The word 'Vietnam', rather than Viet Nam, will be used reflecting the English version of the nation's name. Where the term 'Vietnamese' is used it refers either to the whole of Vietnam before 1945 or to the north of the country until its division in 1954, where it refers to the part of Vietnam north of the seventeenth parallel (also known as the DRVN). In the final chapter, Vietnam refers to a unified Vietnam.

Names

Full citations of Vietnamese names will follow the usual ordering, placing the surname first and reversing the order used in Western countries. Names are not preceded by Vietnamese kinship terms.

The majority of those interviewed wish to remain anonymous and so pseudonyms have been used, e.g. 'Van'.

Quotations

The spelling, grammar and punctuation of material extracted in this study, appears as it does in the original. Given the idiosyncratic nature of much of the translated material, 'sic' has not been used.

Sources

Where primary material is located most conveniently in a secondary source, the full citation is given along with the source. Where materials were sourced in the Vietnamese language and where citation is to the Vietnamese text '(in Vietnamese)' appears in the reference, and the full citation in Vietnamese and English is located in the bibliography.

Language

The Vietnamese terms for key institutions and concepts are supplied when the term is first used. A glossary of terms is set out at Appendix 3.

ABBREVIATIONS

BC	*Bao cao*, (report of the Supreme People's Court)
CP	*Chinh phu* (government)
CPV	Communist Party of Vietnam
DRVN	Democratic Republic of Vietnam
FBIS	Foreign Broadcasting Information Service
FLPH	Foreign Languages Publishing House
GMT	Greenwich Mean Time
HCTP	*Hanh chinh tu phap* (Ministry of Justice relating to administration of justice)
JPRS	Joint Publications Research Service
LCT	*Lenh cua chu tich nuoc* (Order of the Chairman /President)
NC/PC	Legislation Department of the Ministry of the Interior
NQ	*Nghi quyet* (resolution)
Pres.	President of either the Socialist Republic of Vietnam or the Democratic Republic of Vietnam
RSFSR	Russian Socialist Federative Soviet Republic
RVN	Republic of Vietnam
SCNA	Standing Committee of the National Assembly
SL	*Sac lenh* (previously translated as Order, now called a Decree)
SPC	Supreme People's Court (*toa an nhan dan toi cao*)
TANDTC	*Toa an nhan dan toi cao*, (Supreme People's Court)
TSTP	*Tap san tu phap* or *Justice Journal*, the Supreme People's Court Journal
TT	*Thong tu* (circular)
TTg	*Thu tuong* (Prime Minister official)
TVQH	*Thuong vu quoc hoi* (Standing Committee of the National Assembly)
UBKC	*Uy ban khang chien hanh chinh* (War Administration Committee)
USSR	Union of the Soviet Socialist Republics
VCP	Vietnam Communist Party
VFF	Vietnam Fatherland Front
VWP	Vietnam Workers' Party

INTRODUCTION: ROOTS AND ROUTES

This is a story of origins, of "roots"-and also of "routes."

Harold Berman[1]

Diverse voices attest to the Democratic Republic of Vietnam's legal borrowing from the Soviet Union. As the first Chief Judge of the Supreme People's Court wrote in 1961:

> Law must be built on the basis of the line and policy of the Party, employing the judicial experience of the past 15 years and with reference to the social sciences of the friendly countries – mainly the Soviet Union.[2]

In 1961 Soviet jurists also commented on legal change between the two countries:

> Making use of the historical experience in the development of the judicial institutions and the legal procedure of the Soviet Union and other socialist states, the DRVN has secured the genuinely democratic principles for the administration of justice on constitutional foundations.[3]

Less senior judges also commented on the interconnection between socialist countries and concluded that indeed the USSR's influence was greatest on the development of the Vietnamese courts:

> The influence from Russia was much greater than China, although some researchers went to China.[4]

Finally, international comparatists have written on the role of the Soviet Union in the development of the DRVN's legal institutions.[5]

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1 Harold J. Berman, 1983, p. v.
2 Chief Judge of the SPC, BC April 1961, pp. 9-10 (in Vietnamese).
3 V. Kolesnikov, 1961, pp. 36-40, JPRS 4940.
4 Interview by the author with retired DRVN Judge, Hanoi, 20 September 1999.
5 See for example: Chris Osakwe, 1977, pp. 155-217; George Ginsbergs, 1979, pp. 187-201; John Gillespie, 1994, pp. 325-377; Mark Sidel, 1997(1), pp. 356-389.

Given the weight of evidence suggesting that the DRVN relied on the Soviet court experience when introducing a system of courts, this study explores how borrowed legal institutions transform. More particularly, the study asks 'did the shared political orientation of the DRVN and USSR result in similar legal institutional development, or if different dispute resolution evolved, why?' By analyzing the DRVN legal borrowing of a Soviet-style court system, it is possible to see how significant shared political orientation might be to a legal transplant.[6] It also enables analysis of the role of other factors such as legal culture, history and culture more generally in the import of a foreign court system.[7]

Some Vietnamese, particularly lawyers of today, see the Vietnamese court system as unique to Vietnam. This perception does not acknowledge that Vietnam borrowed from the USSR when establishing a system of courts, nor does it explain the historic statutory similarity in constitutions, laws and decrees, the training of Vietnamese jurists by Soviet experts and the development of a shared view of jurisprudence.

The efficacy of legal borrowing has resurfaced as an issue in Vietnam since the adoption of *doi moi* (renovation) policies in 1986.[8] Since this time many foreign lawyers[9] have advised the Vietnamese on how best to remodel legal institutions and laws to give effect to the transition to a socialist-oriented market economy (*kinh te thi truong theo dinh xa hoi chu nghia*).[10] The raft of foreign legal advice, including the import of foreign legal models, means that identifying what factors affect legal borrowing is highly relevant to the contemporary Vietnamese legal reform context. The majority of the models for current legal reform emanate from capitalist economies, most of which are situated in multi-party states. This study provides an opportunity to identify to what extent political or other factors affect the transplant of legal systems within the Vietnamese context because the issue of political difference does not dominate.

What follows is a tale of court development: looking at the extent to which the Vietnamese court experience mirrored or diverged from the Soviet precedent.

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6 For those interested in the legal system of the Republic of Vietnam see: Major General George. S. Prugh, 1975, pp. 15-39; Vincent Sherry, 1973, pp. 272-405; Frank G. O'Neill, 1969; Ministry of Justice and Legal Administration Branch USAID, 1967; Department de la Justice, 1962.

7 For an earlier and abridged version of this argument see, Penelope (Pip) Nicholson, 2007 (1).

8 *Doi moi*, which is most often translated as renovation, refers to the series of reforms commenced by the Vietnamese government in 1986. These include: promoting private investment by both domestic and foreign investors; reducing state subsidies; returning land to households and phasing out state-coordinated collective farming; removing price controls; devaluing the local currency; reducing state subsidies; and revising interest rates. Melanie Beresford, 1997, pp. 189-192.

9 See http://www.undp.org.vn/undp/prog/index.htm for a listing of current United Nations Development Program legally-focused aid projects in Vietnam. Last visited 31 July 2006.

10 *Doi moi* is not a transition to a market economy per se. The 1992 Vietnamese Constitution explicitly states that Vietnam is in transition to a socialist-oriented market economy. See *Constitution of the Socialist Republic of Vietnam*, 1992, Article 15.

The study enables conclusions to be drawn about the impact on transplantation of laws of shared political values and ideals. It is also a story of the development of Vietnamese courts from their inception in 1945 to the unification of the country in 1976. And in the final chapter the story of the Vietnamese courts is brought into the twenty-first century with an analysis of court-focused, reforms undertaken in the last ten years. Ultimately the question is how did the Soviet-inspired court system operate in the DRVN? Therefore this is a study of roots and routes: of change and continuity; of influence and autonomy.

Methodologically this is also a study incorporating tradition and choice. On the one hand it draws on the traditions of comparative law. On the other it asks what it means to be a comparatist in the post-modern era. How these dilemmas present and how they are resolved form a substratum to the major narrative.

To assume that discourse about the construction of the Vietnamese legal system after 1945 was conducted exclusively between the USSR and Vietnam is simplistic.[11] But this research focuses on the extent of Soviet rather than Chinese influence, and this needs to be explained. As set out in later chapters, in 1945 the Vietnamese introduced courts (although perhaps not a court system) which were refined and developed over time. The Chinese also introduced a system of courts in the early 1930s, which was also revised over time. However, where the Vietnamese story of court development is one of gradual ordering and increasing legalism, the Chinese narrative is one of ordering and then dismantling.[12] Whereas Vietnam arguably committed itself to constructing a centrally run court system through the 1960s and early 1970s, the Chinese saw what they had built in the 1940s and 1950s collapse during the Anti Rightist Campaigns launched in 1957 and the Cultural Revolution (1966-1976).[13] In addition, China's differences with the Soviet Union resulted in a move from the Soviet model of dispute resolution, arguably by the end of the 1950s.[14]

As a result, in the period after the Vietnamese land reforms of 1953-56 China's relative prominence as an adviser on Vietnamese court reform receded. For example, Vietnamese jurists interviewed did not mention Chinese legal education of judges after 1956.[15] There are very few articles on Chinese law included

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11 The socialist Vietnamese political elite were variously trained in the USSR and China. Huynh Kim Khanh, 1982. The dynamism of Soviet-Chinese-Vietnamese relationship is well documented. See for example: Donald S. Zagoria, 1967; P.J. Honey, 1963.

12 Susan Finder, 1993, p. 146. Finder suggests that judges and court staff began returning to courts from the countryside in China in 1972. Cai Dingjian, 1999, p. 2. Dingjian notes that 'the courts and the procurate systems were both eliminated' during the mid to late 1960s. Fan Gang and Xin Chunying, 1998, p. 3. After the launching of the Anti-Rightist Campaign of 1957 these commentators describe the system of law in China as 'nothing more than a figurehead'. Compare with Chao-chuan Leng, 1967, pp. 63-66. Leng argues that from 1958 onwards there was a 'frequent use of informal procedures and apparatus to administer justice in the China mainland' after 1958, but this study does not report on the work of the courts after the mid-1960s.

13 Susan Finder, 1993, p. 146.

14 Chao-chuan Leng, 1967, pp. 80, 97, 101.

15 See Chapter 6, p. 125.

in the Vietnamese legal jurisprudence produced by the Supreme People's Court.[16] Finally with the advent of the Cultural Revolution the Chinese court system was officially abolished in the late 1960s and not re-built until 1979.[17] Therefore in the development of the Vietnamese court system as a whole, the influence of China necessarily receded. The Soviet, rather than the Chinese, experience is adopted as a result during the relevant period: 1945 (independence of the DRVN) to 1976 (Unification of Vietnam).[18]

However, there are points during that period where the Chinese experience is relevant. For example, the Chinese involvement in the Vietnamese land reforms between 1953 and 1956 will be considered briefly to see how it may illuminate the development of Vietnamese courts.[19] If this were a study of the Vietnamese land courts (*toa an dac biet*) then China's influences would be the primary comparative example.[20] However, the land courts existed for only three years of the period under scrutiny and never formed a part of the official court system. To the extent that this experience is a formative influence, it will be considered.

Further, Chinese politics and policies have influenced Vietnam for several thousand years. There have been many historical and cultural links between China and Vietnam and the scholarship that considers Chinese culture (in its broadest sense including legal and political cultures) and its interpretation of socialism/communism may illuminate a study of the Vietnamese court system. In addition, research that looks at the cultural differences between China and the Soviet Union offers insights into the Vietnamese treatment of Soviet influence.[21] These issues will be taken up in chapter ten, which will examine what other influences affected the development of the Vietnamese court system.

The Soviet Union (and, within that, the Russian Republic) was the first entity to set up a socialist legal system. As the root of socialist legal development it is assumed, not unreasonably, that it would be considered by Vietnam and China when establishing their own legal systems.[22] There is little doubt that Vietnam took advice from the USSR on the development of its courts. There is also evidence that China modelled legal developments on the USSR.[23] The Soviet

16 See Chapter 6, p. 119-123.
17 Cai Dingjian, 1999, p. 2.
18 The issue of periodization is canvassed in Chapter 2, p. 38.
19 Christine White, 1981. White traces the participation of Chinese advisers within land court activity. Bui Tin, 1995, pp. 27-32. Bui Tin alleges that Ho Chi Minh took advice from Chinese officials and was prepared to compromise his own views of fairness to implement the Chinese-led policy.
20 These were called special courts set up by Law No. 150 SL to hear cases against landlords. Excellent research has been done on these courts by Christine White, 1981. Many other scholars have also looked at the issue of the land reform and the role of the courts in redistributing land. See: Edwin Moise, 1983, pp. 70-92; Edwin Moise, 1983, pp. 234-236; Phuong Tran, 1965, pp. 153-197; J. Price Gittinger, 1959, pp. 113-126.
21 See for example the work of Alice Erh-Soon Tay, 1990, pp. 155-169.
22 Jan F. Triska (ed.), 1969.
23 Chao-chuan Leng, 1967, pp. xii, 25, 27, 45, 80, 175-176. Leng argues, based on

experience presents itself as the parent of subsequent legal development in the DRVN and China and therefore is the appropriate focus for a comparative study of socialist influences on the Vietnamese system of dispute resolution.

Finally, there is evidence of substantial communication about courts and legal training between the DRVN and USSR. When defining legal terms in the Vietnamese Supreme People's Court's journal after 1959, Russian dictionaries were used.[24] Classes for newly appointed judges were in the main funded by the USSR and taught by Soviet jurists.[25] Vietnamese judges were sent to the USSR to undertake legal studies.[26] In addition, Soviet scholarship existed which examined the Vietnamese court system and its reforms.[27] When combined with similar legislation to establish courts, all of these connections attest to a strong exchange between the Soviet Union and Vietnam with regard to court work, at least from the establishment of the formal court system in Vietnam in 1959. It is for these reasons that it is suggested that, especially during the latter period of the study, the USSR was the dominant role model for Vietnamese court development.

Chapter one considers the relevance of the body of literature usually referred to as 'comparative law', to contemporary comparative legal scholarship. In terms of theory, chapter one argues that it is essential to connect society and law in comparative analysis; and that a failure to do this provides a reading of law, but not of law in action. Drawing on recent debates within comparative law, this first chapter provides a definition of legal culture and argues its significance to the study of Vietnamese courts. The chapter asserts that just as the reconceptualization of comparative law does not eschew the connection between society and law, comparative lawyers involved in legal transplantation and the analysis of transplanted systems need to reaffirm this connection.

Methodologically, this chapter argues that dispute resolution bodies existed in both the DRVN and USSR and that therefore this comparative study can proceed.

As shall be demonstrated in chapters two to six, Vietnamese writers suggest that 'Marxism-Leninism (was applied) in a creative manner to the concrete conditions prevailing in Vietnam'.[28] These chapters provide a study of the evolution of Vietnamese Soviet-influenced courts.

Chinese sources, that the Chinese did borrow heavily from the USSR when constructing their legal system. Fan Gang and Xin Chunying, 1998, p. 4. Gang and Chunying state that 'During the decade of 1950-60, legal education in China was totally under the guidance of Soviet experts'. See also Perry Keller, 1994, pp. 719-724.

24 See Chapter 6, p. 125.

25 See Chapter 6, p. 124.

26 See Chapter 6, p. 124-125.

27 George Ginsbergs provides a summary of this scholarship. George Ginsbergs, 1973, pp. 659-676, 980-988.

28 Truong Chinh, 'How has our Party applied Marxism-Leninism in Viet Nam?' Speech at cadres' conference to mark the 150th birthday of Karl Marx in 1968, 1994, p. 554.

To enable a comparison of Soviet and DRVN courts, chapters seven and eight provide a study of the core features of the Soviet system of dispute resolution over this period. Chapter nine then compares the two systems and concludes that, while the DRVN system indeed reflected its Soviet parent, it diverged from the model, with the result that courts reflected significant indigenous influences.

Chapter ten explores Vietnamese legal culture and concludes that Vietnam's Confucian legacy and to a lesser extent Chinese legalism[29] affected the operation of Soviet-style courts in the DRVN. More significantly, the elevated position of moralism and the lesser significance of law in the DRVN result from a combination of the Confucian legacy and socialist morality.[30] It is argued that this particular feature of Vietnamese legal culture most distinguished Vietnamese courts from their Soviet parents. Other factors explaining the differences between the Soviet and DRVN court systems include the original motivations for adopting socialism, French colonialism, the Vietnamese war, the nature of bureaucracy, the role of legal education and the legal traditions of each country.

It is contended in the penultimate chapter that legal culture has a significant impact on how borrowed legal institutions change. The similarity in political orientation of the USSR and the DRVN over the period of this study appears to contribute to the take-up of the transplant, but it is not sufficient to protect against substantial permutation. This study outlines some lessons that can be drawn from the Soviet- DRVN transplant. In particular, the significance of legal culture to legal transplants is highlighted, while also suggesting that the DRVN's comprehensive adoption of the Soviet model reflected their congruent political systems.[31]

By way of postscript, the final chapter explores contemporary Vietnamese courts, particularly in light of the spate of reforms visited upon them since 2000. Here the complexity of the contemporary expectations of Vietnamese courts comes to the fore coupled with the contests between dynamic and static characterizations of institutional change. The transplanted court system is no longer under the sole influence of socialist models. The Vietnamese courts now respond to such diverse interests and influences as the Communist Party of Vietnam, foreign investors and bilateral and multilateral donors, not to mention endogenous calls for reform from both within and beyond the Party elite. While this publication argues that the Vietnamese court system was conceived and constructed

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29 Alexander Barton Woodside, 1971, pp. 152-158; M.B. Hooker, 1978, pp. 73-94; Nguyen Ngoc Huy and Ta Van Tai, 1986; Nguyen Ngoc Huy et al., 1987, pp. 4-41; Mark Sidel, 1997(1), pp. 356-362.

30 Kenneth Young Professor of Sino-Vietnamese History at Harvard University, Professor Hue-Tam Ho Tai, delivered a lecture at Harvard University in March 1996 in which she reportedly linked Vietnam's Confucian tradition and its socialist legal one, arguing that together they enshrined the supremacy of the state. See Mark Sidel, 1997(1), p. 360. Contact with Professor Hue-Tam Ho Tai in December 1998 confirmed that the lecture notes to which Sidel refers would not be published. See also Shaun Kingsley Malarney (1997) and Pham Duy Nghia (2002), pp. 1-30.

31 See Chapter 1, pp. 13-19 for a discussion of legal culture.

as a political institution, it is being reshaped today, producing at least in part, a self-managing institution under Party leadership. And while the breadth and pace of reform is striking, so too is the institutional inertia evident in the face of pressures for change. The last chapter reiterates the mediating force of local practice and legal culture on transplanted laws.

The appendices provide additional contextual materials. Appendix one describes the sources and how they are used. In particular, it explains how oral history informs this study. Appendix two provides a brief history of modern Vietnam and appendix three is a glossary of relevant Vietnamese-English legal terms. Appendices four and five contain lists of Vietnamese and Soviet legislation relied on. Appendix six outlines the French-introduced legislative scheme for Vietnam. Appendix seven plots the increasing role played by the Supreme People's Court in generating implementing legislation.

The working hypothesis of this book is that the Soviet model of court system was introduced to and fostered in the DRVN. This study enables interesting questions to be asked about the transplantation of legal systems between socialist countries and Soviet hegemony. Did Vietnam's adoption of the Soviet-inspired legal system result in similar court systems in the RSFSR and DRVN? Or did Vietnam's system evolve differently, despite its shared roots? And how does the answer to these questions illuminate the transplantation of court systems?

Part One
Comparative Law, Transplantation and Courts

CHAPTER 1
COMPARATIVE LAW IN A POST-MODERN WORLD

Comparison complicates. [....] If one thing is clear, it is that there is no single key to comparative legal studies.

Roderick Munday[1]

The threshold issue when exploring a 'foreign legal system' in the twenty-first century is whether comparative legal studies offers a legitimate and useful approach to the study of legal systems. More particularly, can comparative law offer a framework to assist with the study of the Soviet and Vietnamese court systems, and concurrently enable a discussion of whether the DRVN system replicated or changed the Soviet model?

This chapter debates the relevance of comparative law to post-modern cross-cultural legal studies via several inquiries. First it asks 'what is comparative law today and what is its connection with a study of legal culture?' The current trend among some scholars for a distinctive study of Asian legal systems is noted, and the question asked how this body of scholarship relates to developments within comparative law more generally. Comparative lawyers' concern about the viability of legal borrowing and what affects borrowed institutions are also canvassed. Further, post-modern legal scholarship and its linkage to comparative law is explored. In conclusion, a characterization of Soviet and Vietnamese dispute resolution institutions is undertaken to demonstrate that these institutions can be studied comparatively.

I. What is Comparative Law?

At the outset it must be accepted that a person from a given culture can write about another culture.[2] To confine commentary to a situation where the author is culturally (or geographically) connected to his or her subject would prevent

1 Roderick Munday, 2003, p. 26.

2 An earlier version of the material in this part has been published. See Penelope Nicholson, 1999, pp. 300-329. Hooker notes that commentators allege that 'outsiders' are incapable of analyzing Islamic law. M.B. Hooker, 1986, p. 14.

a range of valuable and insightful work being done, some of which is valuable precisely because undertaken by 'others'.[3]

For example, this study spends some time on an exploration of why it is that policy is so important in the context of the Soviet and Vietnamese legal systems.[4] Vietnamese jurists writing about their own system treat this issue in less detail. For those commentators, the intermingling of law and policy is an integral part of their legal system: it is a part of the natural mix of their legal cultures by the mid twentieth century.[5] For an outsider (particularly a Western one educated in capitalist and democratic norms) this is at once intriguing and challenging. Highlighting this vital aspect of the Vietnamese legal system is simply to explore it as different (from one researcher's experience). As Vivian Grosswald Curran puts it:

> Difference, however, is equally as foundational a concept as identity, because it is only by illustrating difference that identity is possible, and neither has meaning outside of a comparative paradigm. Any definition, explanation or constitutive description depends on the existence of an other, such that the concept of any *a* is meaningless without the concept of a *non-a*.[6]

However, the question remains how a Western researcher can produce sensitive and acute research on a foreign legal system.

The first issue is whether comparative law offers an appropriate theory and methodology for a Western researcher to study a foreign (in this case Asian) legal system. A debate exists whether comparative law is a methodology (meaning only a process – perhaps descriptive or perhaps juxtaposing different legal systems) or a theory that includes a 'foundational frame for the study of critical comparativism'.[7] Some have suggested that there is no single definition for comparative law and it must be seen as a generic term that can be further classified into various types.[8] The purposes to which comparative law can be put are diverse and the approaches are just as many and varied.[9]

However, in recent times a division has emerged between functionalist comparative law and those arguing comparative legal studies is substantially different

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3 Compare this with the view taken by Chiba that much of the writing by Westerners on Japan is 'superficial' and lacks a real understanding of Japanese culture. Masaji Chiba, 1997, p. 82.

4 See Chapter 4, pp. 89-92.

5 This was not the universal position of Vietnamese jurists. See discussion of *Nhan van Giai pham* affair in Chapter 2, p. 42. Since Vietnam began construction of a legal system to assist with the introduction of a socialist–oriented market economy, Vietnamese lawyers have also commented more on the difference between policy-based and law-based states. See for example Ngo Ba Thanh, 1993, pp. 108-113 and Nguyen Nhu Phat, 1997, pp. 398-400.

6 Vivian Grosswald Curran, 1998, p. 47.

7 Pierre Legrand, 1995, p. 263. See generally H.C. Gutteridge, 1949, Reprinted 1971, pp. 1-10.

8 Rahmatulla Khan, 1971, p. 4.

9 Roger Cotterrell, 2003, pp. 135-136; Michele Graziadei, 2003, pp. 100-127 and Lawrence Rosen, 2003, pp. 494-496.

from traditional functionalist approaches.[10] Graziadei characterizes functionalist comparative approaches as those that compare laws and institutions fulfilling the 'same function', which of itself presupposes that that legal systems face and resolve the same problems.[11] Further, functionalist methods claim that this universal conception of law can be 'unpacked' through empirical studies where facts and case-studies are used to ascertain the operation of laws in different locations.[12] This attitude to comparison is rightly problematized. Such an approach silences the variety and differences between legal systems, both through its underlying assumptions and its method.[13]

Those who critique functionalism echo the long-standing call for comparative lawyers to deal more thoroughly with the connection between law and society.[14] More recently, studying law and its connections to society has been reformulated as an argument that comparatists ought to study legal culture rather than laws.[15] This assumes the interconnection between law and society in all its political, social, economic and cultural dimensions. It explicitly rejects an exclusive study of laws per se (statutes, judicial decisions) and requires a study of 'law in action' or 'patterns of law'.

If comparative law is read as assuming a relationship with social norms, it has to be seen as having a theoretical foundation.[16] In effect, having been conceived within a broader framework, by definition comparative law is not limited to a process, but reflects a philosophy that links law, state, politics and economics. Comparative law cannot be conceived as merely a methodology, enabling the study of different laws, but must admit and consider the connection between law and society.

However, the legal culture approach within comparative law has been differently articulated.[17] For example, Cotterrell and Tan argue that the solution might be to mix legal analysis with sociological inquiry.[18] As Cotterrell puts it:

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10 See Munday and Graziadei (eds), 2003. Zweigert & Kötz are cited as the quintessential functionalist comparative lawyers, by all contributors taking up this issue in the aforementioned publication. See for example, Munday, Graziadei, Legrand and Rosen.

11 Michele, Graziadei, 2003, pp. 102-108.

12 *Ibid.*

13 *Ibid*. Graziadei, offers a more sustained critique than is needed here of the problematic nature of functionalism. See also Legrand, 2003.

14 See for example Lawrence Friedman, 1969(1), pp. 29-44; Lawrence Friedman, 1969(2), pp. 11-64; John Henry Merryman, 1977, pp. 457-491.

15 Mark Van Hoecke and Mark Warrington, 1998, pp. 496-516; Vivian Crosswald Curran, 1998, pp. 59-66, 83-92; Ugo Mattei, 1997, pp. 10-15; Poh-Ling Tan (ed.), 1997, pp. 1-12; Lawrence Friedman, 1969(1), pp. 33-35.

16 Lawrence Friedman, 1969(1), pp. 31-33; Mark Van Hoecke and Mark Warrington, 1998, pp. 496-498; Janet Ainsworth, 1996, pp. 39-42; Gunter Frankenberg, 1997, pp. 259-274; and Gunter Frankenberg, 1985, pp. 440-455.

17 There are very many comparatists writing on the merits and problems of legal culture today. See for example, David Nelken and Johannes Feest (eds), 2001, Roderick Munday and Pierre Legrand (eds), 2003, and Mark Van Hoecke (ed.), 2004.

18 Roger Cotterrell, 2003, pp. 148-151 and Poh-Ling Tan, 1997, p. 9. See also Reza Banakar and Max Travers (eds), 2005.

> The social milieux of regulation needs to be understood systematically, empirically and interpretatively in their detail and complexity.[19]

In the context of Asia, Tan adopting Friedman, argues the need for an exploration of legal culture that comprizes a study of the structural, cultural and substantive aspects of laws in that culture.[20] Tan defines the structural components of a legal system as the legal institutions and the forms and processes that inhere to such bodies; the laws themselves and judgments; and the cultural dimension in terms of the culture and values affecting the indigenous population and their perception of the legal system and society as a whole.

Again looking at the 'legal culture' debate from within Asia, Chiba argues that students of foreign legal systems need to explore three dichotomies: official and unofficial law; indigenous law versus transplanted law; and legal rules versus legal postulates.[21] According to Chiba, this approach enables Western comparatists to interpret foreign legal culture (which he defines as legal pluralism).[22] Chiba argues that if Western lawyers are not required to analyze less formal aspects of legal systems, their jurisprudential background causes them to miss the diverse forms of law that exist in foreign legal cultures.

Van Hoecke and Warrington, while not writing of the challenges of exploring the legal systems within Asia, offer a particularly compelling analysis of legal culture, because they take up the issue of how to define it in great detail. They call for legal culture to be approached in three ways. At the outset the 'legal systems have to be located in the context of the large cultural families on a world scale: African, Asian, Islamic and Western'.[23] Following this classification, comparative law is then best employed within each of these families, provided it is structured around six main themes: 'conception of law; the theory of valid legal resources; the methodology of law; the theory of argumentation; the theory of legitimation of the law; the generally accepted basic ideological values and principles'.[24] At the third level, technical comparison of laws is possible when comparing legal systems that are located within the same cultural family and share 'paradigmatical theories'.

All of these approaches to legal culture address, albeit differently, the tension between formal and informal laws. They also each try to tease out the differences between customary law and 'introduced' or more recent legal norms. However the centrality of culture, as it is more generally conceived, has received different treatment. Cotterrell argues that it is not possible to adduce one universal definition of legal culture, rather, that it is important to situate and define legal culture in light of the study to be undertaken.[25] Chiba chooses to let legal cul-

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19 Roger Cotterrell, 2003, p. 151.
20 Poh-Ling Tan, 1997, pp. 9-10. See also Lawrence Friedman, 1969(1), pp. 34-35.
21 Masiji Chiba, 1989, pp. 131-140, 173-180.
22 *Ibid.*
23 Mark Van Hoecke and Mark Warrington, 1998, pp. 505-506, 532-533.
24 *Ibid.*, p. 533.
25 Roger Cotterrell, 2003, 152.

ture emerge from his analysis. In contrast, Tan prefers to deal with the perception of culture and legal culture in the final stages of her comparative analysis while adopting a sociological approach throughout. Van Hoecke and Warrington require a cultural labelling of a legal system arising from religious, philosophical, political and geographic considerations at the outset. This is then followed by a programmatic study, which they argue will distil legal culture.

As noted, this last approach tackles the difficult question of 'what is legal culture?' Further, how can it be distinguished from 'culture' in its everyday meaning used to refer to the artistic and intellectual life of a society?[26] This definitional challenge must be taken up before the usefulness of current conceptions of comparative law can be resolved. Because the argument thus far suggests that comparative law is enhanced by the analysis of legal culture, definitions of culture and legal culture are required, if only for the purposes of this study.

Culture in its everyday usage is associated with 'artistic or intellectual development'.[27] This restrictive focus does not assist legal studies. As most comparative lawyers note, when comparatists use the term legal culture it most often connotes an anthropological definition of the term, such as that provided by Hildred and Clifford Geertz who define culture as 'ideas, beliefs and values' that form a 'conceptual frame-work' or 'pattern'.[28] More particularly, contemporary comparative lawyers invoke Geertz's idea of 'thick' description as the benchmark for legal culture-based comparative legal studies.[29]

As Hoecke and Warrington argue, a definition of legal culture can combine the study of law and legal institutions with analysis of jurisprudence, legal history and the relationship between law and society: not merely in structural or institutional terms but also via an understanding of the role law plays in society and the perception of law held by the community.[30] So, it cannot merely be a study of law and lawyers and their institutions, but also an analysis of the role and relevance of these to the wider community: both from the legal and community perspectives.[31]

There are, however, three criticisms of the Van Hoecke and Warrington formulation of legal culture. First, the inherent dangers of cultural labelling are acknowledged; the use of cultural labels risks simplification of diversity and perpetuation of assumptions.[32] In regard to Asia-focused legal research, there

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26 *Oxford Dictionary*, 1993, p. 568.
27 *Ibid*.
28 Hildred and Clifford Geertz, 1975, pp. 2-3.
29 Roger Cotterrell, 2003, pp. 147-150; M. Lasser, 2003, pp. 226-231. And more often than not this is done implicitly. See for example, Pierre Legrand, 2003, pp. 250-256, 279.
30 This is similar to Chiba's notion of legal postulates – or norms, values and ideals that inform law. Masiji Chiba, 1989, pp. 131-140, 173-180. See Mark Van Hoecke and Mark Warrington, 1998, pp. 513-515. See also Lawrence Friedman, 1969(1), pp. 31-33.
31 Lawrence Friedman, 1969(1), pp. 31-33.
32 Lawrence Rosen, 2003, provides a damning account of the classification of legal systems and the fallacies and misinformation this process perpetuates, pp. 499-500.

exists a sustained critique arguing against the grouping of Asian legal systems as one and casting them as 'oriental'.[33] Further, grouping the legal systems of Asia together ignores the diversity of influences experienced as a result of Western colonization. The colonizers of Asia, the French, Dutch, English and Spanish, brought with them distinctive legal traditions and, as a result of which, their legacies vary greatly.[34]

Van Hoecke and Warrington define Asian legal culture by differentiating it from Western legal traditions and characterizing it as neither 'individualistic' nor 'rationalist', but reflective of its Confucian (and collectivist) roots.[35] As Taylor has pointed out:

> Apparently unifying 'traditions', such as Confucianism, are also frequently invoked to assert similarities across Asian legal systems, but they tend to dissolve into something much less comprehensive once differences of time, setting, subject and geography are calibrated.[36]

In this study 'Asian' is used as a geographic reference only. It refers to those countries between China and Japan in the north and Indonesia in the south, and the Philippines in the east and India in the west. The term is not used, as it is by Van Hoecke and Warrington, to assume a Confucian legacy.

Secondly, and flowing directly from the first critique, it is fraught to attempt a universal definition of legal culture.[37] The primacy that Van Hoecke and Warrington ascribe cultural labelling arises because of their valiant attempt at a comprehensive definition of legal culture. If this were not their project, there would be no need to adopt a taxonomy of countries as part of the definition of legal cultures.

Thirdly, where Van Hoecke and Warrington use the term 'law', this formulation will not. Law has a specific meaning when used by Western commentators and to assume that 'law' has the same meaning, in other cultures as it does in the West prejudges the inquiry.[38] In particular, when Western-trained comparatists talk of 'law', they presuppose what Mattei would call a 'professional' system of law, rather than any notion of law as a moral code or political institution.[39]

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33 Edward Said, 1978; and with regard to law see Veronica Taylor (ed.), 1997, pp. 48-54. Taylor and Pryles also point out that a variety of factors affect transactions and not all of these are cultural: V. Taylor and M. Pryles, 1997, p. 12.

34 M.B. Hooker, 1975. Hooker identified the interaction between existing legal systems and received laws – particularly those introduced by colonial administrations. See also Marc Galanter, 1981, pp. 1-47. Galanter talks of the interplay between formal laws and indigenous laws within the American context.

35 Mark Van Hoecke and Mark Warrington, 1998, p. 506.

36 Veronica Taylor, 1997, p. 57.

37 Roger Cotterrell, 2004, argues that the exploration of 'legal culture' needs to be structured and reflective of communities to 'help unravel the complexities of law-culture traditions', p. 12.

38 M.B. Hooker, 1986, p. 10; M.B. Hooker, 1978, pp. 98, 118-119.

39 Ugo Mattei, 1997, pp. 23-27.

Here legal culture is cast to include context. More particularly, what are the philosophical/religious, historic, cultural, linguistic and geographical factors affecting this regulation or institution? Legal culture encompasses: the sources upon which state governance is based; the articulation and bases of state authority and legitimacy; and the ideological orientation and values of the state as expressed by laws, policies or ideological or ethical pronouncements. It also captures community perceptions of formal law and legal institutions and normative moral or ideological tenets that may replace or mediate legalism. In effect, the study of legal cultures cannot be confined to law, but also refers to the Vietnamese/Soviet contexts in which the courts operate. Here it is argued that the innate dynamism of law mirrors, at least in part, its various connections to society; the perceptions of society and the dialogues between community and legal elites are vital in shaping and framing legal culture.[40] This is arguably an articulation of comparatists calls to analyze and explore legal systems within a law and society framework.[41]

In recent times the concept of legal culture has been condemned as too vague to be of any utility in the study of foreign legal systems. Both Glenn and Cotterrell have robustly critiqued the utility of legal culture as a subject of comparative legal investigation.[42] Glenn argues that legal culture has operated as a smokescreen enabling scholars to claim to explore 'multiple laws' without really debating how and why. Or put another way, 'culture is too crude as an epistemological instrument'.[43] Cotterrell reflects that more 'precise instruments of analysis' might assist including 'knowledge, belief, art, or technology, or tradition, or even....ideology.'[44] In essence, the debate about the utility of legal culture turns on whether it is sufficiently explained and adequately defined.

In this study, legal culture is defined and the definition adopted specifically includes ideology as a tenet vital to an interpretation of the Vietnamese and Soviet socialist legal systems. It is suggested that this degree of specificity goes some way to meeting the concerns raised by each of these scholars.

Another option, when attempting cross-cultural legal studies, is to abandon comparative law for other disciplinary approaches or undertake multidisciplinary studies. This assumes that comparative law deals inadequately with the complexities of what law is and produces only limited understandings of other legal systems. Other disciplines such as anthropology, sociology, ethnography and post-colonial studies are then used to strengthen, or indeed replace, comparative work.

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40 In the context of Europe, M. Lasser, 2003, suggests that legal culture could be construed as a study of legal professional groups as a way of moderating the confusion introduced by legal culture, pp. 228-229.

41 There are numerous examples of legal studies where law is considered in context. See for example: Harold J. Berman, 1963; Hildred and Clifford Geertz, 1975; Masaiji Chiba, 1989; Mark Sidel, 1997(1).

42 Roger Cotterrell, 2004, pp. 1-14 and Patrick H. Glenn, 2004, pp. 7-20.

43 Patrick H. Glenn, 2004, p. 11.

44 Roger Cotterrell, 2004, p. 20.

Relatively few attempts have been made to analyze how the approach of other disciplines to cross-cultural legal studies adds to a legal study, except by experts in those 'other' disciplines.[45] Instead, when lawyers set out to borrow from other theories and methodologies, it does not necessarily result in a different methodological or theoretical approach.[46] In the context of comparative studies of Asian legal systems, only infrequently have lawyers attempted an articulated multi-disciplinary methodological framework.[47]

For example, if differently conceived, the present research could have drawn on the methodologies of anthropologists. If this study had been characterized as a study of an ethnic group and its relationship to legal institutions, the research could have proceeded on the basis that such a study is not culture-bound, nor does it 'arbitrarily carve out from human culture a segment…but conceives and studies human culture as an inter-related whole'.[48] Pospisil suggests that modern anthropology is a powerful methodology to study any foreign culture and in its contemporary application allows the researcher to ponder the individual in context and not just an ethnic group.

In its attempt to move from a Western perception of law in foreign countries, the Pospisil thesis is very attractive. But challenges remain for a lawyer who is not an anthropologist to give effect to such ideals. Further, adopting an anthropological approach does not guard against the legal researcher's preconceptions moulding or even dominating the study. Nevertheless an anthropological approach to foreign legal research assists the researcher to look for indigenous 'meanings' and readings of the foreign legal system.[49]

For instance, if a Western lawyer writes about the Vietnamese courts of 1959, it is quite likely that he or she will check for the presence of the rule of law. Instead anthropologists might advocate that it is better to look to see how government or ruling is actually done.[50] In the present study this requires

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45 See John Henry Merryman, David S. Clark and Lawrence Friedman, 1979, pp. 1-19. The works of Pospisil and Knafla are just two examples of scholars arguing for particular approaches to researching foreign legal systems. Knafla argues that lawyers need to borrow from anthropologists. Pospisil, an anthropologist, argues anthropology is an incisive tool to uncover a foreign legal system. Louis Knafla, 1994, pp. 220-250; Leopold Pospisil, 1971. See also Roger Cotterrell, 2003.

46 For example, the excellent paper by Christopher Osakwe on the common core of socialist constitutions identifies the need for contextual analysis of constitutions but does not do so. This is perhaps fair in a paper giving a synopsis of all socialist constitutions and their salient features, but it is also representative of a larger trend where lawyers call for contextual analysis but do not provide it. Christopher Osakwe, 1977, pp. 155-217.

47 For an example of a comparative lawyer's study seeking to undertake a multi-disciplinary study see Poh-Ling Tan (ed.), 1997, p. 9. Tan argues that the collection of essays in *Asian Legal Systems: Law, Society and Pluralism in East Asia* attempt to explore various Southeast Asian legal systems using 'a methodology which synthesizes the techniques of the sociological approach and the comparativists'.

48 Leopold Pospisil, 1971, p. x.

49 Clifford Geertz, 1973, p. 5.

50 See for example, Leopold Pospisil, 1971; Louis Knafla, 1994, pp. 220-250.

the researcher to have an open mind when exploring how dispute resolution is handled. In other words there must be a laying down of preconceptions and a preparedness to read the situation without exporting one's own understanding of law into it.

The new comparative law, which anticipates that legal culture and not just law will be studied, has learnt from other disciplines. This is not to say that the methodologies are the same, but that a study of legal culture requires a study of 'law ways' rather than just laws, and to this extent both approaches share common aims.[51] Ultimately it is 'thick' description of legal milieux that is attempted here, 'mindful' of Cotterrell's exhortation for systematic, empirical and interpretative legal research.[52]

II. Comparative Law and Legal Reform: Law and Development

In addition to debates about how to analyze foreign legal systems, comparative lawyers have long been concerned about how to reform systems of law and legal institutions. As noted, comparatists articulate the need to study law and its relationship with society via a study of legal culture. Further, they propose various means by which the law and society connection can be explored. The question remains whether comparative lawyers preoccupied by legal reform have adopted these developments in cross-cultural legal studies. Comparative lawyers participating in the law and development movement in the 1960s and 1970s initially largely ignored the relationship between law and society – assuming the American legal system could be exported to assist with the development of other legal systems. In contrast, the comparatists debating the transplantation of laws have demonstrated a more nuanced approach to the place of law in society and consequently to the challenges of law reform. As Kahn-Freund wrote:

> My concern is not with comparative law as a tool of research or as a tool of education, but with comparative law as a tool of law reform.[53]

'Law and development' can be characterized as a movement or academic discipline concerned to foster development of laws and legal institutions in developing countries via the export of Western (American liberal) models of law and legal institutions. Law and development theorists traditionally assumed that law, as it is conceived in the West, had a part to play in fostering economic growth, either through the development of a market economy (the contemporary paradigm that encourages transplantation of laws) or within the industrialization and modernization of economies after World War Two.[54] It was first clearly

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51 Clifford Geertz, 1973, p. v.
52 Roger Cotterrell, 2003, p. 151.
53 Otto Kahn-Freund, 1974, pp. 1-27 and republished in Otto Kahn-Freund, 1978, p. 294.
54 Elliot M. Burg, 1977, pp. 492-530 and John H. Merryman, 1977, pp. 457-491. In the 1950s and 1960s Western law was exported particularly to Africa and Latin

articulated in the sixties, including by H.C.L. Merillat and Alan Watson, and largely predicated on more general conceptions of modernization theory and later dependency theory.[55]

In short, when 'law and development' first caught the comparative lawyers' imagination,[56] it postulated that exporting Western notions of law, as they reflected broader notions of political development such as rationalization, nation building, democratization and mobilization, would ultimately produce more enlightened and fairer civil societies. In particular, these 'developing' nations would develop clearer respect for individual rights (including rights to trade) than was usually the case.[57] This approach linked law and development to the theories of Max Weber and his attempts to explain modernization.[58] In addition, some have argued that law and development was part of an explicit anti-communist agenda.[59]

'Law and development' theory imploded in the mid-1970s as a result of a critique that characterized the movement as colonialist, ethnocentric and evolutionist.[60] The critique argued that the model adopted for legal development was the American liberal paradigm, which relies on the rule of law, and that it was fallacious to export this as a universal panacea for the problems faced by legal systems of the developing world. As one group of American scholars put it in 1979:

> The law and development movement was largely misdirected, and its decline was the result of more or less tacit recognition that it was ineffectual, if not harmful, as technical assistance and peripheral as scholarship.[61]

America with the expectation that it would facilitate greater flows of capital and investment that would, in turn, bolster the economies of these poorer continents. See for example, Alan Watson, 1996, pp. 335-351; Alan Watson, 1976, pp. 79-84. For an example of a classic statement of the role of law and development see H.C.L. Merillat, 1966, pp. 71-78. Traditionally, law and development was also expected to foster political reform by introducing protection for individual rights, particularly to autocratic or communist states where there was one party rule. Foreign advisers did not always explicitly express the connection between such transplantation and the peaceful evolution of Western style democracy. Elliot M. Burg, 1977, pp. 492-530 and John H. Merryman, 1977, pp. 457-491.

55 Brian Z. Tamanaha, 1995, pp. 471-477.

56 There is an argument that law and development 'practitioners' were often active, introducing legal transplants, rather than reflecting on their work. Per Bergling, 1999, p. 17.

57 Brian Z. Tamanaha, 1995, pp. 471-472. See also Thomas Franck, 1972, pp. 767-801. Franck also writes of the inevitable evolution of societies although seeing it as possible for developing nations to pass through what he terms unification, industrialization and social welfare at the same time and not necessarily consecutively as he argued was the American experience.

58 Lawrence Friedman, 1969(2), pp. 18-21; David Trubek, 1972, pp. 11-16.

59 David Trubek and Marc Galanter, 1974, pp. 1085-1086.

60 *Ibid.*, pp. 1079-1083.

61 John Henry Merryman, David S. Clark and Lawrence M. Friedman, 1979, p. 18.

The reasons advanced for the failure of this paradigm reflected the post-modern critique of law emerging in America by the mid 1970s.[62] It has been correctly suggested that the law and development 'crisis' is very much a reflection of the wider rethinking of assumptions that has eventuated in our post-modern world. As Tamanaha puts it:

> Those who came to age when the crisis was in full swing experience it much differently. They learned from the beginning that ideals were less than perfect and less than perfectly realized, and that science did not have all the answers. Thus, there is no feeling of betrayal or irretrievable loss if ideals are tainted or a theory does not 'work out' in the real world. Neither event would lead to a crisis – it would merely suggest more work needs to be done.[63]

The underlying flaw identified in the 'law and development' movement[64] is that its early writings largely eschewed the connection between law and society.[65] For this reason the main proponents of 'law and development' were able to argue for the export of American law, without analysis of its suitability.

Arguably the law and development movement's implosion was not as complete nor as comprehensive as Trubeck and Galanter articulated.[66] Today there are numerous multilateral and bilateral donors rushing to 'assist' so-called developing or transitional countries construct legal systems.[67] Projects involving legislative drafting and education and training flourish under the auspices of 'good governance' and transition.[68] However, perhaps the re-emergence of 'faith' in legal reform to support, or even foster, economic and social change is less about the export of American liberalism and more about the export of a generic capitalist-democratic legal order that concurrently gives effect to Western-conceived universal human rights. This debate does not need to be taken up

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62 Brian Z. Tamanaha, 1995, p. 475. Tamanaha links the critique offered by Trubek and Galanter to the Critical Legal Studies (CLS) movement more generally. He argues that the movement highlighted the weaknesses within the American legal system, such as its entrenching of class; and that this had the effect of challenging any right to export American notions of law and society abroad. For examples of CLS writing see David Trubek, 1977, p. 527; M. Horowitz, 1977. For a discussion of the CLS movement generally see Roberto Unger, 1983.

63 Brain Z. Tamanaha, 1995, p. 485.

64 It has been pointed out that the word 'movement' reflects the tendency to missionary zeal of its early proponents: William Neilson, 1999, p. 3.

65 David Trubek and Marc Galanter, 1974, pp. 1087-1088; John Henry Merryman, 1977, p. 483; John Henry Merryman, David S. Clark and Lawrence M. Friedman, 1979, pp. 12-13, 18-19; Compare with those writing on modern law and development initiatives where legal development is debated within a cultural context. For example, Timothy Lindsey, 1999, pp. 176-188.

66 David Trubek and Marc Galanter, 1974.

67 For an example of the wide-ranging projects underway in Vietnam, see the list of current United Nations Development Program legal reform projects *see* http://www.undp.org.vn/undp.org.vn/undp/prog/index.htm last visited 31 July 2006.

68 Both these terms are highly ambiguous. Good governance for whom and transition to what being just two of the obvious questions.

here. It is sufficient to note that some contend that law and development has been, in effect, reborn.[69]

III. Comparative Law and Legal Reform: Transplanting Legal Systems

Unlike law and development, transplantation of laws is an attempt to shift laws and institutions across borders: including where the politics of the donor and recipient vary and where neither party is a Western liberal democracy. For example, where the move is from one socialist state to another, it is possible to argue a legal transplantation has occurred. But it is not possible to characterize the borrowing as an exercise in law and development. This is because law and development studies are expressly connected to the spread of Western liberal legal systems that support capitalist democracies.[70]

This study assumes a shifting of Soviet-inspired legal institutions into the DRVN. The issue is whether Vietnam's socialist legal system, given the same socialist roots, replicates or diverges from the Soviet precedent and what might explain how the received laws and doctrine altered. As a result, the focus of this study is not the debates by comparative lawyers about whether transplantation of laws and legal institutions is possible.[71] It is assumed that they are possible, although not necessarily completely and without transformation. Instead, this study briefly visits the term 'transplant', the DRVN-USSR policy context and the factors affecting transplanted legal institutions to position the ensuing analysis.

Transplanting can take very many different forms and therefore is also capable of many meanings. It can encompass the export of legislation wholesale to a country or it may reflect borrowing of parts of laws. Essentially to transplant is to 'remove or reposition…to transport to another country'.[72] In the legal context it involves introducing laws or legal institutions from one environment in

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69 See for example, David Kennedy, 2003, pp. 345-433 who argues that comparative work today is contaminated by its politics – the politics of modernization premised upon globalization. See also David Trubek and Alvaro Santos (eds), 2006.

70 In the contemporary context, legal reform insights shared between China and Vietnam are exercises in reform dialogue where neither party is a Western liberal democracy.

71 For example, Pierre Legrand originally argued an avowed distrust of transplants: 'At best, what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words'. In more recent work, he admits that transplantation is common and what is needed is analysis of legal change that does not privilege sameness, but rather celebrates the discord and diversity within systems: a negative dialectics of comparative law. Compare this with the optimism of Alan Watson who maintained that 'successful borrowing could be made from a very different legal system, even from one at a much higher level of development and of a different political complexion'. Pierre Legrand, 1997, p. 120; Pierre Legrand, 2003, pp. 240-242; Alan Watson, 1976, p. 79.

72 *The New Shorter Oxford English Dictionary*, 1993, p. 3373.

another.[73] Transplanting can, however, also be between states within countries. Transplanting can occur between parties with divergent legal cultures or within similar legal cultures.

In recent times, literature on transplantation has been grappling with the relevance of social systems theory in explaining transplantation of laws.[74] In particular, Gunther Teubner's work adapts the theory of the autopoiesis of legal systems to explain legal change.[75] Put crudely, he characterizes law as a dynamic, but independent social sphere, that is constructed and shaped by the dialogue within it and the dialogue between the legal sphere and other related spheres. He suggests that, in this concurrently globalizing and fragmented world, that law exists as an autonomous sphere engaging with, or coupling, with such other autonomous spheres as science, economics and technology to name just three.[76] He contends that at most what can be introduced when introducing a law into a new site is a 'legal irritant'.[77]

The 'irritant' then undergoes unpredictable changes and manifests in its new location.[78] Various scholars have debated the metaphors adopted and their significance, with Nelken correctly arguing that focusing on metaphors ignores the more fundamental debates about the challenges of importing and exporting legal models and how best to interpret change.[79]

Cotterrell argues that systems theory, may be useful in interpreting legal system patterns, but that it does not assist with the design and undertaking of empirical research, especially if that research involves a foreign legal culture.[80] He is particularly troubled with the characterization of the relationship between law and society that Teubner's application of systems theory produces, preferring to leave that to be discovered through empirical research.[81] As he states:

> The postulates of autopoiesis theory do not so much guide empirical research as explain conclusively how to interpret anything that this research may discover. Comparatists and (most) legal sociologists might well want to ask why the particular discursive character of law that autopoiesis theory insists on must be taken as the starting-point for analysis.[82]

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73 For example, the introduction of the *Statute Francaise* (French Laws) to Vietnam is an unequivocal incident of transplantation. It resulted in the import of a body of French law into the south of Vietnam – old CochinChina – in 1864 (later introduced into the north and centre of the country in 1884). M.B. Hooker, 1978, p. 157.

74 See for example, Niklas Luhmann, 1995, Gunther Teubner, 1998 and Jiří Přibáň and David Nelken (eds), 2001. In the context of Asia see Richard Mitchell, Sean Cooney, Timothy Lindsey and Zhu Ying (eds), 2002 and Luke Nottage, 2001.

75 For a sustained discussion of the autopoietic social theory and law see Jiří Přibáň and David Nelken (eds), 2001.

76 Gunther Teubner, 1998, pp. 11-32.

77 *Ibid*.

78 *Ibid*.

79 See David Nelken, 2001, pp. 272-279, 287.

80 Roger Cotterrell, 2003, pp. 145-147.

81 *Ibid.*, p. 147.

82 *Ibid*.

In large part Nelken agrees.[83] He argues that the legal culture approach enables an empirical inquiry leaving space for those who wish subsequently to adopt a discourse theory analysis to do so.[84] By not prejudging the law-society connection, as Nelken argues the autopoietic theory does, legal culture offers a way to explore transplants, which does not explicitly commit to Western conceptions of law. Nelken correctly states that:

> there may be some danger in autopoietic theory being insufficiently reflexive about the extent to which its ideas about legal culture are shaped by the legal culture in which it was created.[85]

This study rejects autopoietic theory as a paradigm by which to explore legal transplantation, particularly when that transplantation is between socialist states.[86] It is contended that to date, it assumes a formal legal system operating in a capitalist economy.[87] Neither of these fundamental assumptions exist in the present study and each heralds significant implications for the role and place of law.

As the world leader in the construction of socialism the USSR devoted considerable resources in all fields (economic, agricultural and military, for example) to poorer states constructing socialism.[88] This reflected the broader international and security issues of the period.[89] This activity was not covert. The international Communist movement explicitly argued for the spread of communism and its institutions worldwide.[90] The Soviet court model can be seen as a part of the USSR's broad package of assistance to countries embracing

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83 David Nelken, 2001, p. 166.

84 *Ibid*.

85 *Ibid.*, p. 289.

86 Teubner develops his theory of the autopoiesis of law in the context of European capitalist states and European Union harmonization debates. See for example, Gunther Teubner, 1998.

87 Compare with Sean Cooney, Timothy Lindsey, Richard Mitchell and Zhu Ying (eds) 2002. This edited collection of papers explores the utility of discourse theory in examining labour law changes in Asia.

88 Carlyle A. Thayer, 1989, pp. 35-36. Thayer points out that in 1955 Ho Chi Minh visited both the People's Republic of China and the USSR and obtained generous aid packages from both. From the USSR the DRVN gained a non-refundable line of credit of US$100 million. Georges Boudarel, 1980, p. 145. Boudarel reports that in 1955-1957 the USSR provided $119.5 million in aid, but by 1958-1960 it had provided $159 Million. Over this same period Chinese aid had halved. Bernard Fall, 1956, pp. 57, 87. Fall reports that the DRVN secured US$500 million from the Soviet bloc in 1954. In 1960 Ho Chi Minh again secured aid from the Soviet Union. See also P.J. Honey, 1963, pp. 77-79, 121-124. All these sources of aid data would include a component for military aid. Soviet aid continued after the war. See Robert C. Horn, 1987, pp. 28-30.

89 The commitment from both China and the USSR to provide the DRVN with military assistance began early in the DRVN conflict with France and was continued at varying levels throughout the war. See previous footnote and Carlyle A. Thayer, 1989, pp. 35-36; Bernhard Fall, 1956, p. 87; Georges Boudarel, 1980, p. 145.

90 Rodger Swearington and Hammond Rolph, 1967, pp. 14-28; Charles B. McLane, 1966.

socialism. In addition and over the longer term the USSR looked to emerging socialist states as potential trading partners and it was seen as beneficial for those states to have similar political and legal systems.[91] From this point of view, USSR legal assistance reflected a sort of communist 'law and development'; an inverted and competing alternative to the US-inspired movement.

For the DRVN it was important to establish appropriate institutions based on the existing levels of knowledge of socialist systems.[92] As explained below, the USSR was the most established model and therefore its guidance was sought.[93] In addition, given the relative economic stability and resources of the USSR, there were many cost savings for the DRVN in accepting aid from it in the establishment of its emerging legal system.[94] The DRVN would also have seen the usefulness of integrating its system with those of other countries sharing like values and ideals. The legal assistance the DRVN received from the USSR was part of the larger dynamic relationship between the DRVN and its other socialist friends.[95]

In contrast with law and development initiatives, comparative lawyers, and particularly Kahn-Freund in the 1970s, argued that legal reform, via transplantation, was inextricably linked to society and that therefore the impact societal factors would have on transplants must be analyzed.[96] In 1974 Otto Kahn-Freund suggested that it was political factors that have 'greatly gained in importance' when one assesses the prospects of success of a legal transplant.[97] Kahn-Freund talked of the 'the political factor in terms of principle rather than of institutions'.[98] In particular, he looked at the differences between the communist and non-communist world, the various democracies and the 'role which is played by organized interests in the making and in the maintenance of legal institutions'.[99]

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91 Carlyle A. Thayer, 1989, p. 36. Thayer cites a 1955 USSR-DRVN trade agreement worth US$50 million.

92 See Introduction.

93 See Chapter 6.

94 See Carlyle A. Thayer, 1989, pp. 35-36; Georges Boudarel, 1980, p. 145.

95 Interviews by the author with Vietnamese jurists in Hanoi between 1995 and 1999. Ironically, this legal borrowing is not acknowledged among young Vietnamese lawyers today, although it was acknowledged among the older lawyers interviewed for this study. Those lawyers under 40 years of age all said, when asked if there was a linking of the Vietnamese legal development to that of the USSR, that they would have to ask older lawyers. They had not been trained that their system reflected any legal borrowing at all. This is despite the fact that some were teaching in institutions on such matters as state and law where a Western lawyer would anticipate an acknowledgement of legal heritage – in this case Leninism. There are reasons why this is politically significant. With Perestroika, Vietnam has a much more complex relationship with the old USSR and direct reference to it in the legal curriculum would then require an explanation of why there has been a change of policy within Russia. Nevertheless, this particular reading of legal history challenges the idea of law having been transplanted from the USSR to Vietnam.

96 Otto Kahn-Freund, 1978, pp. 294-319.

97 *Ibid.*, p. 300.

98 *Ibid.*

99 *Ibid.*, pp. 304-305.

Conversely, he argued that the 'geographical, the economic and social and the cultural elements have greatly lost in importance'.[100] Kahn-Freund's list is not exhaustive, but suggests factors highly likely to be relevant to the operation of any transplanted law. For example, it is possible that class and religion, to name just two elements, may also have an impact on how received law operates in practice.[101]

Kahn-Freund's definition of 'politics' largely, but not entirely, extends to the definition here of legal culture. As noted, Kahn-Freund refers to who holds and wields power as a part of his definition of politics. Since legal culture here includes how the state or party claims its legitimacy, and the use to which it puts law, the two definitions overlap. As a result, the question is: to what extent does political orientation determine the take up of legal transplants? In other words, there is a threshold issue of political orientation that can be identified and analyzed for its relevance to transplantation. This must be followed by an analysis of legal culture (part of Kahn-Freund's definition of politics) to see how it might affect any transplant. This study therefore aims to tease out the centrality or otherwise of political orientation (socialism) to the receptivity in Vietnam of the Soviet socialist experience. In addition, legal culture is explored to see how it challenges or facilitates the transplant. Further, the study asks whether legal culture is sufficient to explain the take-up or rejection of transplants.

Just as there have been calls for the rethinking of comparative law to include a multidisciplinary approach to legal research and the analysis of law and its place in society (legal culture),[102] so too any analysis of transplanted laws benefits from being situated and analyzed for its implementability and likely impact on an existing legal and social culture.[103] Where that transplantation is historical it is possible to re-visit the record and see how the borrowed legal institution changed. There is therefore a need to link recent theory of comparative law to the transplantation of laws more generally and to Asian laws in particular.[104] This linking is inevitable if law and legal institutions are to be analyzed within a socio-economic and political context.

The ensuing study therefore treats politics and legal culture separately, to the extent that they do not overlap. General political orientation is separated from legal culture as a threshold issue. But having done that, legal culture is defined as set out above as a complex matrix of factors that includes: the conception, implementation and thinking behind regulation; the nature and purpose of legal

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100 *Ibid*.

101 Amy Chua, 1998, pp. 19-21; V. Taylor and M. Pryles, 1997, p. 3.

102 Gunter Frankenberg, 1985; Penelope Nicholson, 1999; Mark Van Hoecke and Mark Warrington, 1998, pp. 495-536.

103 Robert B. Seidman, 1972, pp. 311-342.

104 John Henry Merryman, 1977, pp. 457-491. Merryman explicitly notes that it is comparative law and social change that may operate as a 'favourable rubric' to revive inquiry into the theories relevant to the best aspects of law and development: at p. 483.

institutions and ideology; and the community's perception of laws and their implementing agencies. An additional component of legal culture is how cultural traits, such as philosophical orientation or political ideals, inform or impact upon legal systems.

Classification: Noted but not Embraced

Debates in comparative law about how to classify legal systems rage.[105] Yet it remains unclear what benefits the classification or grouping of legal systems offers when undertaken for its own sake. For example, to classify the world's legal systems as civil or common law systems or oriental or Anglo-American systems seems, as Rosen suggests, an exercise in 'rigidified pigeon holing'.[106] A better approach is perhaps to assess the need for similar or different comparisons for any particular project and then seek out systems that echo or do not manifest those aspects.[107] So for example, in the case of assessing whether a legal transplant from the Soviet Union took root and manifested as in Russia, a natural comparison is Vietnam. As a result, the broader debates about comparison and classifications are not engaged here.

IV. Post-Modernity and Comparative Law

In many respects the criticisms of comparative law that have resulted in the call for a study of legal culture and a new taxonomy for law emanate from the post-modern rethinking of law more generally.[108] However, within the study of law there are many who believe it is an approach that undermines the very foundations of legal rationalism and threatens the rule of law. In the context of a study of law across cultures, when the legal system being analyzed rather than 'law' as previously understood becomes the focus, post-modern scholarship offers particular insights.

First it must be remembered, as Davies points out, that 'post-modernism' is a generic word that describes all sorts of theories.[109] Davies notes that post-modernism is about what is beyond modernism and:

> challenges pre-existing methods of legitimation, and in particular, at the present time, the idea of universal abstract principles of legitimation.[110]

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105 See for example the different approaches of Konrad Zweigert & Hein Kötz, 1998 and Ugo Mattei, 1997.
106 Lawrence Rosen, 2003, p. 500.
107 *Ibid*.
108 For a general discussion of the impact of post-modernity on comparative law see Gunter Frankenberg, 1985, pp. 411-455; and Gunter Frankenberg, 1997, pp. 259-274.
109 M. Davies, 2002, p. 301.
110 *Ibid.*, p. 223.

Post-modernism can be seen as 'a radical questioning of the certainties which underpinned Western institutions since the enlightenment'.[111]

In this vein, Gunter Frankenberg argues that there is a need for 'distancing and differencing' in comparative law and that the comparatist must be self-reflective.[112] This is at least partly supported by those writers who support a reduction in the importance of the traditional process of identifying similarities across legal systems and the substitution in its place of a search for difference.[113] Frankenberg argues that if the author is self-reflective and also not 'legocentric' (meaning not confined to the intra-legal context of the issue under consideration) the result is that difference is allowed to emerge and is not instinctively explained away.[114] Frankenberg concludes that this change would eradicate the fallacies of neutrality to which comparatists have traditionally succumbed. This call for self-reflectivity is not new.[115] Writing in 1986, M.B. Hooker argued that:

> the legal historian is obliged to look at his own assumptions and pre-conceptions (in at least the use of his own technical terminology), especially as to the nature and definition of law.[116]

Frankenberg and Hooker can be distinguished. Hooker's call for self-consciousness requires the researcher to articulate his or her assumptions, whereas Frankenberg calls for a reflective analysis of the range of subjects (parties) that pertain to any study and a deconstruction of the perspective of the interpreter of the legal subject, the author or researcher. In effect, Frankenberg calls for the subjectivities of all players in a study to be investigated, whereas Hooker requires the investigator's approach to be articulated.

Frankenberg's approach offers a post-modern Western analysis of a legal system. Frankenberg uses a comparative analysis of abortion decisions to illustrate his theory that comparative work is flawed. He argues such studies generally fail on three counts. First, the comparatist must avoid characterizing the phenomenon being studied as a legal question. To do so, according to Frankenberg, results in a private-public dichotomy being applied without regard to other dimensions of the study.[117] Secondly, equally important to Frankenberg is the need to allow the 'variety-in-law' to emerge.[118] This step requires the researcher to avoid see-

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111 Gerry Simpson and Hilary Charlesworth (eds), 1995, p. 88.
112 Gunter Frankenberg, 1985, p. 414.
113 Vivian Crosswald Curran, 1998, pp. 67-78, 83.
114 Gunter Frankenberg, 1985, pp. 442, 448.
115 Curran has chosen to characterize the call for self-consciousness about comparative law as 'because the generation of émigré comparatists is retiring and dying (sic), leaving comparative law in the United States to be taught by stop-gap, short-term visiting professors from abroad or by native-born American professors generally bereft of effective foreign-language skills.' Here Curran argues that being not of the cultures being analyzed forces the analyst to reflect on the process of reporting that he or she is undertaking. Vivian Crosswald Curran, 1998, p. 53.
116 M.B. Hooker, 1986, p. 21.
117 Gunter Frankenberg, 1985, p. 450.
118 *Ibid.*, p. 451.

ing similarities and to allow differences, perhaps in political context, to emerge. Finally, Frankenberg suggests there is a need to move from traditional conceptions of legal discourse, such as rights and duties, to the politics of the subject being studied. In the abortion example used by Frankenberg he suggests that the politics of reproduction might be central to a comparative study.

Clearly Frankenberg's approach requires a commitment to self-reflectivity and an acknowledgment of the subject position in the researcher. In addition, the researcher must explore understandings of the participants, institutions and doctrines studied. The difficulty lies in how to succeed in doing such a textured analysis of a country or legal system to which one is foreign. Frankenberg's criticisms of comparatists are persuasive, but when studying a foreign legal system it is hard to conceive of researchers capable of meeting his requirements.

It is helpful to consider an example of the challenge Frankenberg and Hooker pose for the legal comparatist when they call for self-consciousness or self-reflectivity of the researcher. The greatest risk with the comparative approach, when talking of courts, is that the Western court system can be highlighted or cast as the ultimate solution within the scheme of court development[119] – the bench-mark, in effect, for measuring court 'development'.[120] This comes about as a result of applying an unchallenged Western conception of a court as a forum in which individuals can exercise (universal and essential) rights that are integral to the rule of law. This assumption can mean that the system being compared to the Western system is devalued, either explicitly or implicitly.[121] In the context of a study of the Vietnamese court system that seeks to explore the relationship between that system and Soviet dispute resolution institutions, the issue becomes how to frame the inquiry in light of the circulating critique of modernist assumptions and comparative law in particular.

In conclusion, there is fairly wide agreement that there are failings in comparative law, as it is traditionally conceived. Further, and particularly in regard to the analysis of Asian legal systems, there has been a tendency to orientalism and

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119 United Nations Development Program, 1997. This report urges the strengthening of the rule of law in Vietnam. The assumption throughout is that the Vietnamese law courts will only be effectively reformed once there is 'rule of law'. The authors assume that the Vietnamese seek rule of law. Yet there is no apparent attempt to unravel what that means within the Vietnamese context. Compare this with Mark Sidel, April 1992, p. 66. In this report Sidel carefully records what he has been told about the development of law in Vietnam. He does not assume a rule of law paradigm for Vietnamese policy makers, rather he notes that their goal 'is to build a legal framework of laws on which Vietnam can build a market economy, and to recognize the existence of rights beyond state and collective enterprises – extending to entrepreneurs as well'.

120 This is not to say that authors from socialist countries do not engage in an equally loaded analysis of Western systems.

121 For example, although culturally specific notions of constitutionalism arguably contaminate some of the research concerning the Vietnamese Constitution there is detailed scholarship outlining the distinguishing features of socialist legal systems. For example, Mauro Cappelletti and William Cohen, 1979, pp. 21-23.

colonialism within legal scholarship, and other academic disciplines. In particular, there has been a colonialist discourse on the Vietnamese legal system.[122]

Therefore, this study proceeds on the basis that legal culture is vital to exploring the regulation of societies and situating any interpretation of a legal system. Further, any classification of legal systems, unless for a specific purpose, could undermine the meaningful analysis of any relationship law might have with society or with another legal system. It is not necessary here to classify the Vietnamese legal system, or its Soviet parent, beyond noting that the latter arguably fostered the former and that both are investigated during a period when they would self-describe as 'socialist' legal systems.

In addition, there is a need for self-consciousness in relation to characterizations of the legal culture, to avoid the assumptions of the researcher surreptitiously infiltrating, or even dominating, the research.[123] In particular, self-consciousness of the researcher ought to preclude an Anglo-Australian-centricism infiltrating the research. There is a risk of my own training and understanding of law producing just such an Anlgo-Australian focus. This study agrees with Hooker that the self-consciousness of the researcher (articulating any assumptions taken to the study-see below) is fundamental to proceeding with analysis of a foreign legal system.

It may not be possible to lay down the tools of analysis in which one is trained, and therefore the researcher must articulate how she is reading the system so that it is possible to discern the extent to which the reading is structured and reflective of the inquirer's ordering. In many ways this falls short of Frankenberg's preferred complete disavowal of the past and a 'fresh' reading of the foreign. On the other hand when researching beyond one's own culture, even when immersed in another, it is impossible to escape the structure of one's own perceptions and it is submitted that it is better to acknowledge these than to dispute or ignore their existence.

V. Contextualizing Courts?

> Cutting quite across cultural lines, it appears that whenever two persons come into a conflict that they themselves cannot solve, one solution appealing to common sense is to call upon a third for assistance in achieving a solution. So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it.
>
> Martin Shapiro[124]

Turning from comparative law to the subject matter of this book, one cannot assume that courts are significant in other cultures simply because they hold a

122 See Chapter 10, pp. 215-218.

123 This is largely implicit in the insights offered by Tan and Chiba about the need for analysis of legal culture. See Poh-Ling Tan, 1997, pp. 1-13.

124 Martin Shapiro, 1981, p. 1.

central position in some societies. There is a danger in a comparative study of assuming the subject matter exists in a foreign culture because it does in one's own country. Here the subject matter is courts, but is this topic meaningful or valid in the Vietnamese/Soviet context? Or is this study nothing more than the attempt to analyze a legal institution or institutions presumed to exist, but not actually existing in Vietnam or the USSR, other than in the mind of the researcher?[125]

This researcher studied and practised law in Australia. As a result, the comparative lens is Australian. Before moving to see whether 'courts or tribunals' operate in Vietnam or the Soviet Union, it is therefore necessary to establish what those institutions entail in Australia.

In the Australian context, courts are defined as:

> 1. A place where justice is administered. 2. The decision maker or makers who sits in a court.[126]

More importantly, in that context a court is a forum which is reasonably formal, in which the state resolves disputes either between private entities (be they individuals or corporations) or between the state and public or private entities. These courts are made up of legal officers, judges and jurors, who owe particular duties to the court and to the parties that appear before them.[127] Essentially this institution, although so expensive to use as to be beyond the reach of many Australians, is the ultimate source of redress where a legal wrong is perceived.[128] It is viewed as sitting apart from the legislative and executive branches of government and not accountable to the government of the day.[129] Its paramount duty is to interpret and apply the law and to do so without bias.[130]

In more recent times Australia, like many countries in the West, has introduced a range of tribunals to augment the courts. The roles of tribunals vary greatly. Even within Australia, state and federal tribunals have different powers and different responsibilities.[131] One relevant distinction between federal and state tribunals, in the Australian context, is that the latter can exercise judicial powers.[132] Unlike at the federal level, there is no separation of powers affecting state tribunals. Victorian state tribunals therefore operate as an arm of the executive. For example, the Victorian Civil and Administrative Tribunal can exercise judicial power (such

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125 Richard Abel, 1973, pp. 217-347. Abel prefers not to talk of courts but to talk of disputes.
126 Peter Nygh and Peter Butt (eds), 1997, p. 94.
127 Harold J. Berman, 1983, p. 8.
128 Sir Anthony Mason, 1994, pp. 1-3.
129 Sir Anthony Mason, previously Chief Justice of Australia's High Court, points out that the High Court has 'responsibility for judicial review of federal statutes for constitutional validity'. Further, while there is not currently a presumption of parliamentary supremacy, this may emerge over time. Sir Anthony Mason, 1986, pp. 6-7.
130 Sir Anthony Mason, 1992, pp. 6-7.
131 Robyn Creyke, 2000, pp. 124-125.
132 The Commonwealth of Australia Constitution Act, 1901 (Cth.), Chapter 3, Section 71.

as deciding cases involving criminal penalties), provide administrative review, investigate matters, foster the education and training of its members and provide policy advice.[133] Tribunals are also expected to provide a less legalistic forum for the resolution of disputes, which ought to be cheaper and quicker to use.[134]

In both the Vietnamese and Soviet legal cultures bodies exist(ed) that were constituted to resolve disputes. Some of these bodies were more formally established than others; in each case institutions decided cases on behalf of the state/Party. There is a range of differences between the systems of dispute resolution in Australia, the Soviet Union and the DRVN, yet institutions existed between 1945 and 1976 in each country empowered to resolve disputes by making decisions sanctioned by the state – whether called courts or tribunals.

So how is the legal terminology used in this study such as 'court' and 'tribunal' translated and conceived? Hooker gives us a preliminary warning of the dangers of cross-cultural legal analysis when he argues that the use of the word 'law' in pre-colonial Vietnam is misleading.[135] Hooker argues that it overstates the associations of the word 'law' in 'rule of professional law' patterns, and obscures the moral philosophies on which the imperial codes were based.[136]

The Vietnamese word currently translated as 'court' is *toa an*.[137] It is the word used in legislation and translated by Vietnamese as 'court' in the period after 1945. In contrast, the French translated *toa an* as tribunal.[138] The word '*toa*' is a Sino-Vietnamese word that connotes house.[139] The word *an* is translated as case or judgment.[140] Courts are then defined by appending adjectives to the term *toa an*. For example, a civil court in Vietnamese is translated as *toa an dan su*; a criminal court is translated as *toa an dai hinh* or *toa an hinh*; a people's court is translated as *toa an nhan dan*. If the word is translated by referring to its Sino-Vietnamese meaning it becomes the house of cases or house of judgment.[141] So alternatively *toa an kinh te* can be translated as the house of the economic case or the house of economic judgment.

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133 The Commonwealth of Australia Constitution Act, 1901 (Cth.), Chapter 3, Section 71.
134 Justice Murray Kellam, 2000, pp. 147-148.
135 M.B. Hooker (ed.), 1986, p. 6.
136 *Ibid*.
137 Nguyen Dang Thanh (ed.), 1965, p. 131. This is a Vietnamese-French-English Dictionary drawing on legal dictionaries in each of the three languages to determine the meanings of Vietnamese legal terms in French and English. Copy of this held in the Wason collection at the Kroch Library, Cornell University, Ithaca, New York. See also Bui Phung (ed.), 1995, p. 1657.
138 Nguyen Dang Thanh (ed.), 1965, p. 131.
139 This interpretation was offered in discussions with a Vietnamese linguist in Melbourne in 1997.
140 Bui Phung (ed.), 1995, p. 19.
141 Another Sino-Vietnamese word for court is *phap dinh*, where *phap* means law, regulations, judging, execution and *dinh* means house. This word was not prevalent between 1946 and 1975.

The word *toa* also refers to 'official or ceremonial seat, government place, bureau'.[142] It can also be used as a classifier for temples and buildings. The third possible meaning for the word *toa* or *toa an* is law-court, court, court of law/justice.[143] Therefore both the English and Vietnamese terms for court refer to official state institutions empowered to make decisions regarding disputes.[144]

The issue that arises is how differently are courts conceived in these various cultures? In addition, how do these notions coalesce in the Vietnamese consciousness (noting that they will have changed over time)? Technically what in English is today called a court is known as a house in Sino-Vietnamese, and it was described and reformed by the French who referred to *toa an* as tribunal. To complicate matters, Vietnamese law students were variously educated by the French, Chinese and Soviets, all of whom had their own conception of what a court is and does.[145]

The term 'court' is in circulation in Vietnam today as the translation for the words '*toa an*' and, as a result, it is appropriate to use the term here. It is erroneous, however, to assume that the current Vietnamese word for court (*toa an*) correctly encapsulates the English term. In particular, it overstates the legal nature of this institution. Vietnamese courts may in fact have more in common with Australian state tribunals.

Another important distinction here lies in the use in English of the words 'court system' which implies a highly structured hierarchy of courts. In Vietnam, a specific warning by Vietnamese jurists was issued against using the term 'court system' especially to refer to the Vietnamese legal institutions before 1959.[146]

In general terms, the position of a formal court system and its relationship with other government/administrative bodies is central to exploring what it can offer those in dispute. As noted in more detail in later chapters, socialist/political court systems are not separated from the legislature or executive as in most capitalist democratic legal traditions, but instead form a part of the administrative apparatus. They are not infrequently referred to as a part of the machinery of government, existing to implement the policies and laws of the Party/governments. Structurally at least, they reflect a rule of political law.

As will be explained, Vietnam had a range of methods for the resolution of disputes, ranging from informal local private mediation (*to hoa giai*) to hearings at the Supreme People's Court (*Toa an nhan dan toi cao* or highest court) in Hanoi. It will also be demonstrated that the range of dispute resolution mechanisms changed over the period of the study and varied depending on the nature of the dispute.

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142 Bui Phung (ed.), 1995, p. 1657.
143 *Ibid.*, Nguyen Dang Thanh (ed.), 1965, p. 131.
144 *The New Shorter Oxford English Dictionary*, 1993, pp. 532-533.
145 For a discussion of how law is currently taught in Vietnam see Bui Bich Thi Lien, 2005.
146 Interview by the author with 'Van', Hanoi, 4 September 1996.

Therefore although this study uses the term court, it does so on the basis that the 'courts' analyzed in this study are not replicas of Western style courts. But if comparing these courts with Australian legal dispute resolution institutions, *toa an* have more in common with Australian state tribunals.

In conclusion, this study adopts a self-conscious approach to comparative law that seeks not only to consider the institutions for dispute resolution in the DRVN and USSR, but also to situate them within their respective legal cultures, as read by an outsider. Legal history, in particular a post-colonial legal history, is extremely important to the study of these legal cultures. For example, this study will demonstrate that research recognizing the significance of Vietnam's colonial experience greatly illuminates a study of Vietnamese courts.

The single most distinctive feature of this study is that both the source of the court reforms and their new site were socialist countries. Arguably a legal instrumentalism dominated in the USSR, at least until 1976 when the comparison with Vietnam ceases. As will be demonstrated, a complex hybrid of appropriating law instrumentally and through informal mores existed in Vietnam. In short, the political objectives of the two countries, the DRVN and the USSR, while having their differences, were aligned to the extent that each sought to construct socialism. Therefore over a short period of time it is possible to trace Soviet influence in Vietnam and see how it actually affected the establishment of the Vietnamese courts, to the examination of which this study now turns.

Part Two
Dispute Resolution in the Democratic Republic of Vietnam: 1945-1976

Chapter 2
Translating the Vietnamese System of Dispute Resolution: 1945-1959

These are our tasks for this year:

...

2. *To put in order the administrative machinery at all levels from the village upwards. If re-arrangement is made from the base up, and vice versa, we shall naturally achieve success.*

...

We can liken the Party to a power generator, and the above tasks to electric lights. The more powerful the generator, the brighter the lights.

Ho Chi Minh, 1949[1]

On 2 September 1945 Ho Chi Minh climbed on to a stage in Ba Dinh Square and announced that Vietnam was independent. In a speech that focused on the oppression of the Vietnamese by the French, Ho's declaration prompted cheers and shouts from the assembled throng.[2] And so on a hot day in September, with flags flying, Vietnam commenced the tortuous path to statehood: a journey that required the provisional government to retreat to the mountainous jungle areas northwest of Hanoi and wage a guerilla war against the French and their allies.[3] With the decisive victory over the French at Dien Bien Phu in 1954, Ho and his Provisional Government returned to Hanoi and publicly resumed control.[4] Throughout this period Ho Chi Minh and his supporters were simultaneously waging war and constructing a new socialist state.

In 1959, a decision was taken to resume the battle to reunite and liberate the country. This required the resumption of war against the American-led allies in the south. Against this turbulent background, the leadership attempted to 'put in

1 Ho Chi Minh, 'To the Sixth Party of Congress Cadres' in 1949, 1994, pp. 87-88.
2 David Marr, 1995(2), pp. 221-231. Ho Chi Minh was affectionately known in Vietnam as *Bac Ho* or Uncle Ho, reflecting the Vietnamese use of kinship terms before names.
3 David Marr, 1992.
4 *Ibid.*

order the administrative machinery',[5] a part of which involved the establishment of the DRVN's system for the resolution of disputes.

Using the framework outlined in chapter one for the study of foreign legal systems, the links between state institutions and political power are outlined in the first part of this chapter. This enables a reading of the DRVN's attitudes to law and regulation and commences unravelling 'the sources upon which state governance is based; the articulation of state authority; the degree of legitimacy claimed as flowing to the state from law'.[6] As previously discussed, each of these is integral to an inquiry into legal culture. Here they are explored to situate the later study of Vietnamese dispute resolution. In the second part of this chapter the constitutional basis of dispute resolution in Vietnam between 1945 and 1959 is visited and in part three the role of committees in the DRVN between 1945 and 1959 is explored. The next chapter chronicles the emergence of courts.

The decision to divide the story of the Vietnamese court system into two main periods reflects the narrative of court development that emerged in interviews and the structure emanating from the relevant legislation.[7] Essentially these two sources indicate that Vietnamese court history between 1945 and 1976 comprize: the ad hoc court system between 1945 and 1959, and the more formal court structures commencing in 1959. Therefore the first period examined here runs from the inception of the new regime in 1945 until the passing of the new Constitution and new *Law on the Organization of People's Courts* in 1960. The progress of the war is intimately connected with the development of administrative structures, including those for the resolution of disputes, and so the period 1945 to 1959 can be further divided into 1945 to 1954 (when the French were defeated) and from then until the adoption of the new laws mentioned above. As will become clear, the story that will be told does not have a neat beginning, middle and end. Instead the periodization merely offers a useful structure around which to organize the material.[8]

The French contribution to Vietnamese legal institutions is taken up in chapter ten when Vietnamese legal culture more generally is discussed. However, French law was briefly applied by the new administration (via both the committees and courts) to the extent that it was not inconsistent with new policies. For example, the French *Penal Code* of 1917 continued, until repealed, in 1950. The French *Civil Code* of 1931 operated until 1950, although it was continually reinterpreted to reflect 'guiding principles'. These were often issued by Ho Chi Minh to implement the government's new policies.[9] Hence the state's arbiters were

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5 Ho Chi Minh, 'To the Sixth Party of Congress Cadres' in 1949, 1994, pp. 87-88.

6 These factors form a part of the definition of legal culture set out in Chapter I.

7 Compare this with the periodization recommended by the Vietnamese scholar Vu Dinh Hoe. He argues that the first period of Vietnam's constitutional history (and arguably by extension its legal history) should be conceived of as running from 1945 until 1956 and then from 1956 until unification in 1976. Vu Dinh Hoe, 1995, pp. 24-28.

8 *Ibid.* As Vu Dinh Hoe points out constitutional change frequently reflected, rather than heralded, policy changes.

9 Interviews by the author with 'Quang' and 'Tri', Hanoi, 30 June 1997.

to show lenience towards poor debtors facing exploitation from the rich landed classes, or required to give equal status to men and women in family law cases and property disputes.[10] The power of the 1917 French *Criminal Procedure Code* was diminished from 1945 with the introduction of the Military Court.

I. State Institutions and Political Power

> In every basic Party organization, Saturday evenings were reserved for Party activities. Every cell or group would meet to read the party newspaper and conduct criticism and self-criticism sessions. Our thoughts, our awareness, our actions were all called into question. So too were our relationships with our superiors our subordinates, with our peers, friends, family and other soldiers. Our good points and shortcomings were all noted down in a record to promote self-improvement. The aim was to give prominence to the spirit and meaning of the Revolution. Everything for the collective, for the people and oneself for everybody.
>
> Bui Tin[11]

The Party Introduced

As Bui Tin explains, Party activities dominated life, particularly of the leading elite, in northern Vietnam in the 1950s. His depiction of Party meetings is tempered by his statement that 'In fact criticism and self-criticism was just something we had to cope with. There was no sincerity involved'.[12] This description evokes the infiltration of the Party into all aspects of daily life. The compelling question for this study is to what extent this phenomenon created or changed existing conceptions of law.

The interconnection between the Party and the state is complex throughout modern Vietnamese history. The Communist Party of Vietnam traces its roots to 3 February 1930 when Nguyen Ai Quoc (later known as Ho Chi Minh) convened a meeting of the communist groups connected to the Indochina area existing at that time.[13] This Party was renamed the Indochina Communist Party (*dong cong san duong dang*) later in 1930.[14] Various nationalist and political groups were working to free Vietnam from the French throughout this period. Ho Chi Minh brought them together, founding the *Viet Minh* (Vietnam League for Independence) in 1941.[15] In 1945 after the Declaration of Independence the

10 Interview by the author with 'Quang', Hanoi, 5 September 1996.
11 Bui Tin, 1995, p. 40.
12 *Ibid.*
13 William Duiker, 2000, pp. 163-167.
14 The name 'Indochina Communist Party' was adopted in October 1930. Oskar Weggel, 1986, p. 437.
15 William Duiker, 2000, pp. 251-257.

Indochina Communist Party was officially disbanded and replaced by the *Lien Viet* or Vietnam National United Front.[16] In 1951 the Vietnam Workers' Party (*Dang Lao Dong Viet Nam*) was established. It continued as the vanguard of the political system until a further name change in 1976 to the Vietnam Communist Party (*Dang Cong San Viet Nam*). Since inception, the personnel at meetings and congresses essentially remained the same, indicating that whatever the appellation, the core group of leaders identified with the original Indochinese Communist Party continued at the helm.[17]

Governing the actions of the Party was the *Political Thesis of the Indochinese Communist Party*[18] (the *'Political Thesis'*) and from 1951 the more detailed *Statute of the Vietnam Workers' Party*.[19] The *Political Thesis* sets out the policies of the Indochina Communist Party, including ten tasks for the 'bourgeois democratic revolution'.[20] There is no mention of laws or how to implement the tasks. Instead, it appears implicit that Party members would have to instigate the *Political Thesis* where possible.[21]

In 1945 and the ensuing years the overlap between personnel in the Party and in other state institutions such as the local committees and the National Assembly was large.[22] The most senior leaders were the same people for long periods of

16 It is commonly asserted that the Party continued to operate even after its official dissolution in 1945. This position is supported when Tran Thi Tuyet writes in 1997 'in fact it withdrew into secret'. Tran Thi Tuyet, 1997(2), p. 25.

17 Marjorie Weiner, 1959, pp. 397-400.

18 Indochinese Communist Party, *Political Thesis of Indochinese Communist Party*, October 1930, excerpts of which are reprinted in *Vietnamese Studies*, No. 24, 1970, pp. 185-193.

19 See *Statute of the Vietnam Workers' Party*, 1951 (cited in Bernard Fall, 1956, pp. 41-42). See also *Statute of the Vietnam Workers' Party* dated 1960, printed in *Nhan dan*, 15 September, translated by the USA Research Group and published in English in *Vietnam Documents and Research Notes*, No. 103, pp. 58-91 (hereafter the *Statute of the Vietnam Workers' Party*, 1960). See Chapter 4, pp. 87-89 for a discussion of the Vietnam Workers' Party.

20 *Political Thesis of Indochinese Communist Party*, 1930. Examples of the tasks outlined include: to overthrow the French; to set up a worker-peasant government; and to support the USSR and work with other revolutionary governments. The *Political Thesis* called for anti-imperial and anti-feudal sentiment and did not declare a socialist revolution, reflecting the debates raging in Vietnam at this time between those who sought to build a consensus of anti-imperialist patriots working to advance nationalism and those committed to crushing the feudal elite. The land reform debates are an example of the differences of opinion existing within the Party over this issue. See R.B. Smith, 1978, pp. 596-599.

21 For a more detailed discussion of the interrelationship between law and policy in this period see Chapter 4, pp. 89-92.

22 Bernard Fall, 1956, pp. 8-12. Fall analyzes the elections and notes that soon after the election Ho Chi Minh handed his resignation to the National Assembly on the basis that the nationalists had negotiated to allow the French to enter the northern parts of Vietnam via China. Ho was then called upon to form a government of National Union, which he did ensuring that trusted followers went to positions of authority.

time.[23] Ministers were frequently Party members.[24] The Party's position at the apex of decision-making is crucial.[25] By 1951, with the establishment of the Vietnam Workers' Party, writings connect nationalist sentiment to the leadership of the Party – stressing that the Party's leadership enabled progress towards victory.[26] Earlier ambiguity about the nature of the Vietnamese revolution was dispelled, as increasingly Party publications explicitly connected the Party to the international socialist movement.[27]

Law

What role was ascribed to law in this first period of the revolution? In those communist societies where law is recognized as contributing to state management, it is a 'tool' of the Party, used by it to implement its policies.[28] In most Western capitalist societies, law sits independently of the political parties and they are required to act according to law.[29] From a communist perspective, law in capitalist societies is a tool of the bourgeoisie. As is well known, Marx wrote very little about law, and many of the subsequent Marxist analyzes of law have focused on aspects of a legal system (such as its contracts law) rather than a unified theory of law.[30]

Arguably Ho Chi Minh never anticipated governing without the assistance of law.[31] He wrote of the excesses of colonial court systems,[32] but did not foreshadow a society without law or legal institutions.[33] Ho Chi Minh argues convincingly that the French were able to maintain one law for the Vietnamese and another for their own subjects.[34] Ho's trenchant criticisms of the French administration

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23 Roy Jumper and Marjorie Weiner Normand, 1964, p. 479.
24 Bernard Fall, 1956, pp. 11-12. For example Vu Dinh Hoe, Minister for Justice, was a Party member according to Fall.
25 Over the period of this study, 1945 to 1976, four Party Congresses were held: in 1930, February 1951, in September 1960 and in April 1976. Analyzes of each are provided by William Duiker, 2000.
26 An excellent example of how the newly formed Vietnam Workers' Party took credit for winning victories over French and Japanese troops can be found in Ho Chi Minh's 'Political Report to the Second National Congress of the Vietnam Workers' Party', February 1951, 1994, pp. 101-129.
27 Bernard Fall, 1956, p. 41.
28 As we shall see, at different moments in history, various communist regimes have had different attitudes to the usefulness of law. See discussion of role of law in Soviet Union in Chapter 7, pp. 147-152. See also Harold J. Berman, 1963; Adam Fforde, 1986; John Gillespie, 1999.
29 Harold J. Berman, 1963, pp. 7-10.
30 Eugene Kamenka, 1983, pp. 49-52. See also Chapter 7, pp. 147-152.
31 This contrasts with the position in the USSR where during the early days of the revolution legal philosophers conceived of law withering away. See Chapter 7, pp. 149-152.
32 Ho Chi Minh, 'On Justice', 1961, pp. 96-102.
33 Nguyen Ngoc Minh, 1985, p. 53.
34 M.B. Hooker, 1978, pp. 153-166.

of justice, described as the scales of justice being permanently skewed against the local population of Vietnam, was not a general critique of law.[35]

Lawyers debated the uses to which the new government put law and legal institutions,[36] these discussions being at their most divided and outspoken during the publication and then banning of the *Nhan Van* (*Humanity*) and *Giai Pham* (*Beautiful Literary Work/Masterpiece*) periodicals. These two publications circulated in 1956 and contained some extremely direct critiques of the uses to which law had been put by the Viet Minh leadership. For example, three categories of critique were undertaken by *Nhan Van*: freedom and democracy; legality, human rights and the strengthening of institutions; and opening up in all (legal) fields of thought and research.[37] Those that spoke out on these issues did so without circumlocution or delicacy, as demonstrated by the following passage:

> It is the absence of legislation that favours abuse of power and authoritarianism.[38]

This extract is taken from an article dealing with the errors of the land reform campaign and the 'contempt for legality' prevailing, so it was being argued, in Vietnam at this time.[39]

The government was exhorted to put a stop to these musings; the request that the publications be closed down was printed in the official newspaper:

> We demand that the authorities take definite measures against *Nhan Van*. The souls of the young students are still as pure as a white page inscribed with beautifully bright pictures of our regime, our future and our happiness. We want to be given healthy thoughts and are determined to oppose anything which stands in the way of our advancing steps.[40]

By 1960 the Party closed down these publications and a series of trials ensured that the major players were incarcerated.[41]

The principle of democratic centralism (*nguyen tac tap trung dan chu*) perhaps best explains the organizational basis of the DRVN shortly after the revolution.[42]

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35 Ho Chi Minh, 'On Justice', 1961, p. 96.

36 Mark Sidel, 1997(2).

37 Georges Boudarel, 1990, p. 165.

38 *Ibid*., pp. 165-166. Here Boudarel is quoting from an editorial written by Nguyen Huu Dang in the fourth issue of *Nhan Van* published in November of 1956.

39 *Ibid*.

40 *Nhan dan*, 1956, Hanoi, 13 December reprinted in Hoa Mai (ed.) *The Nhan Van* Affair, pp. 161-162. This material is cited by Robert F. Turner, 1975, pp. 158-159. Turner notes that the article was written by students of the Hanoi–based Nguyen Trai School at the instigation of the Vietnam Workers' Party.

41 Georges Boudarel, 1990, pp. 172-173. Boudarel notes that five main players (Nguyen Huu Dang, Luu Thi Yen, Tran Thien Bao, Phan Tai and Le Nguyen Chi) were tried and that all received periods of imprisonment followed by a period of national indignity, during which they could not leave their homes.

42 Martin Gainsborough, 2003, pp. 40-45 notes that although democratic centralism has been cast as a principle governing appointments it goes beyond this to an overarch-

When describing the features of the newly introduced Vietnam Workers' Party in 1951 Ho Chi Minh writes 'As regards its organization, it adopts the system of democratic centralism'.[43] In short, democratic centralism in Vietnam means that all office holders and Party representatives are elected and each organization is accountable to the higher equivalent body.[44] For example, a District People's Committee is responsible to a Provincial People's Committee and a local court is accountable to the next highest court. Ultimately most organizations are accountable to the Party either via the National Assembly, Ministries or the Party committees at local and regional levels.[45] It is only through such accountability and central control (also referred to as 'iron discipline')[46] that the Party can hope to enforce its policies effectively. This approach is justified on the basis that it enables grass-roots involvement (via election) in the democratic process, but also that once the 'correct' policy has been determined (one that benefits the 'masses'),[47] implementation will be centrally coordinated. Failure to implement according to instruction carries with it censure.[48] In relation to the courts this basic principle was an ideal to which the courts aspired, but implementation was problematic.

However, no separate narrative emerges, from the available sources for the period, explicitly relying on socialist legality (*phap che xa hoi chu nghia*) to connect law, socialism and the new nation.[49] A constitutional lawyer from the

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ing approach to issues of state organization. For a discussion of Soviet democratic centralism, see Chapter 7, pp. 148-149.

43 Ho Chi Minh, 'Political Report at the Second National Congress of the Vietnam Workers' Party' in 1951, 1994, p. 127.

44 *Statute of the Vietnam Workers' Party*, 1960, Article 10. This legislation is referred to here, although it was not introduced until 1960, because it reflects the practices that emerged in the preceding years of the administration. In many cases, as we shall see, formal laws were introduced after a period in which that which was introduced had already been operative.

45 We have seen earlier in this chapter that the Party ceased to exist between 1945 and 1951, but once reformed its membership comprized major office holders such as the President and Prime Minister (Ho Chi Minh) and Ministers. For example, the Ministers of Defence and Foreign Affairs and the Commander in Chief of the Armed Forces were all Party members. See Bernard Fall, 1956, p. 44.

46 Ho Chi Minh, 'Political Report at the Second National Congress of the Vietnam Workers' Party' in 1951, 1994, p. 127. Ho Chi Minh also refers to Stalin's leading role in this regard citing Stalin's argument that 'close control' can help the Party to 'avoid many grave mistakes': see p. 119.

47 *Statute of the Vietnam Workers' Party*, 1960, Preamble. Here the word 'masses' is used because of its use in the statute. However, it will also be used throughout this publication when a reference is made to Vietnamese people who were members of the agricultural or labouring classes. It is an overtly political word used throughout Vietnamese writing to refer to the previously oppressed, but soon to be liberated, classes of Vietnamese society. Use of the word assists the reader to understand the militant political milieu in which this story was unfolding.

48 Truong Chinh, 'The Resistance Will Win' in 1947, *Truong Chinh Selected Writings*, Gioi Publishers, Hanoi, 1994, p. 119.

49 Compare this with the situation in the Soviet Union, Chapter 7.

Hanoi Law University explained in 1998, that the Vietnamese state was based on the twin doctrines of democratic centralism and socialist legality. In Vietnam, socialist legality refers to the binding nature of law, with no definition of what constitutes a valid law, although reflecting Soviet theorizing law was characterized as a part of the superstructure and reflective of the economic base.[50] The result is that political and legal doctrine are inseparable in this context, and that socialist legality requires the subordination of the individual interests in the interest of the collective via the strict application of policy and law, reflecting and enabling an instrumentalist conception of law.[51] These doctrines have currency in Vietnam today, but the regime's supporters during the period 1945 to 1959 propounded an instrumentalist view of law without the explicit theorising about socialist legality.[52]

The perception that law was more commonly viewed instrumentally rather than theoretically (except by its detractors) rests on several commentaries on Vietnamese legal development and the nature of the debates between intellectuals and Party figures over this period. For example, Nguyen Nhu Phat writes:

> The Communist Party of Vietnam is a political party which gained society's almost absolute confidence and is able to call on the support of all people. Moreover, in the first years of the people's democratic system, the distinction between the leadership of the Party and the administration of the state was out of the question because the state could not be present everywhere in the country and secret Party cells had to play the role of the state.[53]

Nguyen, a theorist with the Institute of State and Law, portrays Vietnamese law in the early period of the revolution as reflecting the domination of political expediency and practical considerations; legal jurisprudence was relegated to critique of practice.[54] The *Nhan Van Giai Pham* experience reinforces this perception. As noted previously, some lawyers were critical of the new regime's cavalier disregard for legal process, but without apparently offering a critique of socialist legality.[55] Not surprisingly, the socialist legal debates did not immediately take hold in war-torn Vietnam.

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50 Interview with Nguyen Quoc Hoan, Hanoi, 21 November 1998. Socialist legality requires that all state bodies follow the law, all officials follow the law, people must follow the law and all documents must be consistent with the Constitution. For practical purposes the difference between these principles and the rule of law is that individualism is reviled and legal compliance presupposes acting to serve the collective interest where laws and policies are equally weighted. See also John Gillespie, 2004, p. 150.

51 John Gillespie, 2004, p. 150.

52 Mark Sidel, 1997(2). The understanding that law had a role to play in the revolution seems to have been spoken about by lawyers and politicians, but it is hard to ascertain how it was more generally debated. For a summary of the current debates see John Gillespie, 1999, pp. 124-127 and John Gillespie, 2004, pp. 149-155.

53 Nguyen Nhu Phat, 1997, p. 398.

54 *Ibid.*, pp. 397-412.

55 See above, p. 42.

Before turning to legal sources on dispute resolution in Vietnam, it is important to note that in addition to law and legal institutions the Vietnam Workers' Party utilized internal disciplinary procedures throughout the period of this study.[56] What this means is that the Party was able to 'discipline' those who breached Party rules without using the criminal justice system.[57] Depending on who committed the breach, usually either the local Party Standing Committee or its Discipline Committee would determine the case.[58] Various penalties could be invoked, including re-education, administrative detention in jails or house arrest.[59] These matters are implicitly dealt with by the Party's Statute of 1960 when it talks in chapter ten of Party discipline.[60] Certainly other historians of the period and an autobiography note that shortly after the 1945 Declaration of Independence a period of arbitrary violence ensued, one commentator going so far as to liken it to the Soviet experience of 'war communism'.[61] This means that although the ensuing study illuminates the Vietnamese court experience, running parallel to this were the internal machinations of the Party disciplinary machine. These quite obviously directly impact on courts given court personnel are often Party members and this will be discussed where relevant.

II. Constitutional and Legislative Sources

> Without this unity we would be like "an orchestra in which the drums played one way and the horns another." It would not be possible for us to lead the masses and make revolution.
>
> Ho Chi Minh, 1958[62]

According to the Constitution of 1946, bodies with legislative authority included the National Assembly, its Standing Committee and the President and Ministers, individually and acting together as the Council of Ministers.[63] The Constitution

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56 Interview by the author with 'Phong', 12 December 2000. See also Hoang Van Chi, 1964, 97-98, 114-138. Chi provides a critical evaluation of the campaigns and training procedures of the new government.

57 Interview by the author with 'Phong', 12 December 2000.

58 *Ibid*.

59 *Ibid*. Duong Thu Huong, author of *Paradise of the Blind* and other novels, experienced this treatment when she was expelled from the Vietnam Communist Party in 1989 and imprisoned for seven months in 1991. Ever since she has periodically suffered house arrest. Duong Thu Huong, 1993, pp. 268-270. See also Robert Templar, 1998, pp. 184-185.

60 *Statute of the Vietnam Workers' Party*, 1960, Chapter 10.

61 For historical accounts of the arbitrary killings and detention see Marr, 1995(1), pp. 234-240; for memoirs see Bui Tin, 1995, pp. 36-37. Bernard Fall commented on the extent of arbitrary violence in 1945: Bernard Fall, 1956, pp. 41-42.

62 Ho Chi Minh, 'On Revolutionary Morality' in 1958, 1994, p. 195.

63 *Constitution of the Democratic Republic of Vietnam*, 1946, Articles 23, 31, 36, 52. Throughout this study the author relied on the Foreign Languages Publishing House's 1995 publication of the four Vietnamese Constitutions.

allowed local authorities to make decisions.[64] Inconsistencies between lower level decisions and central orders were anticipated in the Constitution of 1946, which expressly provided that local agencies had to act according to the directives of higher or central agencies.[65] Nevertheless, regionalism flourished and the lofty ideals of the 1946 Constitution faced substantial challenges. In fact the National Assembly sat in 1946 and not again until 1953.[66] Instead it is generally agreed that the senior level committees were responsible for a great deal of legislative activity. As Fall puts it, 'decentralized democratic government' might better describe the political and administrative structures at this time.[67]

The use of the word 'democratic' is extensive in the Vietnamese 1946 Constitution and legal and political commentary.[68] In Vietnam the term 'democratic' is used as a collective sentiment to connote the political freedom of the people.[69] It identifies a collective freedom from oppression by colonial masters and bourgeois elites. Yet the term is also used to signify individual freedoms such as freedom of speech, opinion, association, religion, residence and inviolability of the home.[70] There is a tension between these two notions of democracy. On the one hand it is a principle that works to the advantage of the collective and on the other hand it empowers individuals to act against either the state or each other.

In practice the principle of Party leaders making decisions in the interests of the collective has dominated.[71] Individualism was reviled as one of the three enemies of the state: 'individualism goes counter to collectivism: collectivism and socialism will certainly prevail while individualism will surely disappear.'[72]

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64 *Ibid.*, Article 59.

65 The requirement that subordinate agencies act according to the directives of higher agencies was expressly set out in the *Statute of the Communist Party of Vietnam*, 1960 at Article 10. See also Chapter 4, pp. 87-89.

66 Bernard Fall, 1956, p. 28.

67 *Ibid.*, p. 30.

68 The term appears in the Preamble of the *DRVN Constitution*, 1946 and in the country's name, 'The Democratic Republic of Vietnam'. The first section of the publication *Achievements of the Democratic Republic of Vietnam*, 1949, p. 3 is entitled 'Establishing Democracy'.

69 See Preamble of the *DRVN Constitution*, 1946. Pham Van Bach and Vu Dinh Hoe, 1984, pp. 105-118, talk of there being three principles to build democracy in 1946: the unification of Vietnam, the safeguarding of democratic freedoms and establishing a strong and enlightened people's power.

70 *DRVN Constitution,* 1946, Article 10 (freedom of speech, press, association and meeting, belief and residence and travel), Article 11 (right to freedom of residence and unopened mail) and Article 12 (right to own property); Vietnam Delegation in France Information Service, 1949, p. 3.

71 See Nguyen Nhu Phat, 1997, p. 397. The land campaigns are just one example of this. During the period of land redistribution each Vietnamese citizen was still entitled to own a land use right, but doing so was contingent upon a collective decision that such a person was appropriate to hold land. Article 7 of the *DRVN Constitution* of 1946 points out that all Vietnamese citizens are equal before law according to their 'own abilities and virtues'.

72 Ho Chi Minh, 'On Revolutionary Morality' in 1958, 1994, p. 195.

The Party claims its legitimacy as the enlightened people's power, working in the interests of the collective, because it has 'the vanguard of the working class as its guide and mainstay'.[73]

The articles of the 1946 Constitution concerned with People's Councils (*hoi dong nhan dan*) and People's Committees (*uy ban nhan dan*) indicate their main characteristics while again leaving the detail to be developed later. The main feature for a country where elections had never been held was that all People's Councils 'shall be elected by universal and direct suffrage'.[74] In turn the councils were to elect Administrative Committees. Article 59 assumes that local government will implement central government policies, while also having responsibility for 'problems' in its own locality. The balance of this chapter (dealing with committees) and the next chapter (considering courts) demonstrate how the new administration was unable to implement the constitutional provisions: in each case unconstitutional institutions were introduced and implemented.[75]

The four Vietnamese Constitutions of 1946, 1959, 1980 and 1992 are the ultimate Party policy documents.[76] A comparison of the preambles is illuminating, as it highlights shifts in policy.[77] For example, the Constitution of 1946 is politically inclusive and does not declare a revolutionary or communist agenda.[78] Vietnamese commentators describe it as heralding the first revolution of Vietnam: the democratic revolution.[79] The Constitution of 1959, on the other hand, is overtly communist, positioning Vietnam within the family of socialist nations and announcing the communist revolution.[80]

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73 Pham Van Bach and Vu Dinh Hoe, 1984, p. 107.

74 *Constitution of the DRVN*, 1946, Article 58.

75 Bernard Fall, 1960, p. 161, makes the point that the DRVN's own English language publications make clear that the 1946 Constitution was never fully implemented.

76 One Vietnamese scholar describes the 1946 Constitution thus: 'It systematizes the line of the Communist Party of Vietnam in the period of the people's national democratic revolution. It lays the foundation for the worker peasant state': Nguyen Ngoc Minh, 1985, p. 57.

77 Vietnamese legal researchers attach great significance to the Constitutions and their preambles and they are used to assist with understanding the lessons of history at the relevant point in time. Examples of Vietnamese analysis where the preamble is analyzed to explain the Government's policy objectives include: Phung Van Tuu, 1994, pp. 23-25; Ngo Ba Thanh, 1993, p. 91; Nguyen Ngoc Minh, 1985, pp. 51-65; Pham Van Bach and Vu Dinh Hoe, 1984, pp. 105-118. Unlike in the Anglo-American tradition, preambles are not used to assist with statutory construction in determining the meaning of particular sections or articles. D.C. Pearce and R.S. Geddes, 1996, is just one example of scholarly evidence of the highly technical role legislation plays in the Australian court system.

78 For a discussion of the drafting of the 1946 DRVN Constitution see R.B. Smith, 1978, pp. 575-576.

79 Nguyen Ngoc Minh, 1985, pp. 51-65; Pham Van Bach and Vu Dinh Hoe, 1984, pp. 105-108.

80 In 1980 a new Constitution was proclaimed marking the unification of the country in 1976. It speaks of one nation and the need to export socialism to the south of the country. The 1992 Constitution marks the adoption of the policy of *doi-moi* or renovation policies by the Communist Party of Vietnam in 1986. As such it welcomes

Turning first to the new administration's foundation document, the 1946 Constitution, the preamble indicates that the government wished to build a national power free from the rule of colonialists.[81] It includes a call 'to defend the integrity of our territory, win back total independence and rebuild the country on a democratic foundation'.[82] The government is described as 'marching forward on the path of glory and happiness, in the same rhythm as the world progressive movement'.[83] This is a reference to the link between revolution in Vietnam and other socialist/communist regimes. Democracy is defined as 'The union of all people irrespective of race, sex, class or religion'.[84] This is the government's assurance that there is room for all types of people under the new government. The description of the people as a 'union' suggests that there will be one common interest. Ho Chi Minh clarified the meaning of 'union' when he announced at the Second Party Congress that the first task of the Party was 'to create unity of mind in the whole Party and among the entire people as regards the new situation and the new tasks'.[85]

The preamble's treatment of the role for law is ambiguous. The juxtaposition of socialist/communist conceptions of the role for law and liberal democratic notions of the rule of law creates uncertainty. For example, the 1946 Constitution guarantees the 'rights of democratic freedom' and in the next line the 'establishment of a strong and enlightened people's power'.[86] These statements highlight a tension in defining the political milieu: the first outlines the possibility of individual democratic rights while the latter requires the revolutionary leadership to implement the will of the masses. Alternatively, the reference to democratic rights might be interpreted as a call for freedom to speak on behalf of the masses and to liberate labour from the yoke and language of the bour-

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economic renovation, speaks of Vietnam's role in the international (and not necessarily socialist) community, while also noting that the interests of community outweigh those of individuals.

81 The nationalistic agenda of the new government is also reflected in calls for independence. Historians of the period argue that Ho Chi Minh deliberately failed to declare communist objectives, at this stage, wanting to maximize the appeal of the revolution both internationally and domestically by predicating its moves at least in part on nationalism. If this is the case, the constitutional preamble is consistent with these objectives. Perhaps it is also an extension of the line adopted at the Declaration of Independence occurring on 2 September 1945 where, it is argued, Ho Chi Minh was positioning himself to attract the support of both Western and socialist leaders. Certainly David Marr notes that the use of independence in the 1945 Declaration echoed the use of 'independence' in the 1776 American Declaration of Independence and the 1791 French Declaration of Independence. However, Ho Chi Minh's independence day speech also referred at length to Vietnam's colonial past. See also *Constitution of the DRVN*, 1946, Preamble p. 11; and David Marr, 1995(2), pp. 221-231.

82 *Constitution of the DRVN*, 1946, Preamble, p. 11.

83 *Ibid*.

84 *Ibid*.

85 Ho Chi Minh, 'Political Report at the Second National Congress of the Vietnam Workers' Party' in 1951, 1994, p. 181.

86 *Constitution of the DRVN*, 1946, Preamble, p. 11.

geois elite. The language reflects the tight line the regime was walking between nationalism and communism at this time.

III. Regional Dispute Resolution: The Committees

The Proposed Committee Structure

Vietnam has a long tradition of local administration.[87] Since 1945, committees existed in various forms, initially as People's Councils and Administrative Committees and then as liberation committees or revolutionary committees.[88] On 22 November 1945 the situation was formalized with the promulgation of Order 63 *On the Organization of People's Councils and Administrative Committees*.

As the war between Vietnam and France escalated, the committees were reorganized. War Administration Committees were introduced (*uy ban khang chien hanh chinh*) which decided which committees continued to operate and when elections, if any, would be held. With the defeat of the French at Dien Bien Phu in 1954 the government reviewed its committee structures and introduced a new law in 1957. The main changes were the reintroduction of People's Councils and elections to office.[89]

While English language scholarship exists that studies the development of committees,[90] here they are discussed only to the extent that they made quasi-judicial decisions – whether because they are part of a wider scheme for dispute resolution, or because they can be characterized as offering mediation (*to hoa giai*), or simply because they had influence over courts.[91]

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87 George Ginsbergs, 1962, p. 174 and David Marr, 2004, pp. 28-53. See also Chapter 10, pp. 218-219.

88 It is important to remember that ad hoc decision–making did not commence in 1945. David Marr notes, basing his findings on a reading of Tran Huy Lieu et al., 1960, *The August Revolution: General Insurrection in Hanoi and Various Localities*, 2 Vols., Hanoi, Su Quoc, that executions followed mass meetings where votes where taken in 1945 before the Vietnam Workers' Party declared Vietnam's independence. David G. Marr, 1995(1), pp. 213, 235. R.B. Smith, 1978, pp. 579-581 and George Ginsbergs, 1962, p. 175. Smith points out that the establishment of a formal committee structure was an essential precondition to running effective elections. Ginsbergs notes, from research based on Soviet sources, that these informal committees which were officially recognized and charged to implement the revolution in April of 1945, 'were not only organs of insurrection but provisional organs of State power as well'. Here Ginsbergs quotes A.G. Budanov, *Gosudarstvennyi stroi Demokraticheskoi Respubliki Vietnam* (*State Structure of the Democratic Republic of Vietnam*), Moscow, 1958, p. 29.

89 For a discussion of the changes introduced see: Bernard Fall, 1956, pp. 24-30; George Ginsbergs, 1962, pp. 174-204; George Ginsbergs, 1963 (Part 2), pp. 195-202.

90 Bernard Fall, 1956, pp. 24-30; George Ginsbergs, 1962, pp. 174-204; George Ginsbergs, 1963 (Part 1), pp. 211-230; George Ginsbergs, 1963 (Part 2), pp. 195-210.

91 For a discussion of courts in this period, see Chapter 3.

Order 63 established two types of 'state organs: People's Councils and Administrative Committees (*uy ban hanh chinh*)'.[92] These organs of the government were introduced at the commune (*xa*) and provincial (*cap tinh*) levels. At the precinct or district (*huyen*) level and also at the administration division level (*cap ky*) an Administrative Committee existed, but no council. This Order was consistent with articles 57 to 62 of the 1946 Constitution.

In effect what was introduced was a system of local administration that was hierarchical and reflected geo-political constraints.[93] Local administration at the lowest level, the commune or *xa*, enabled the new government to spread its policies and processes at the grassroots. A commune ordinarily comprized several households and *xa* is sometimes translated as village. The next level, the district level, comprized several communes and its size varied. The province level was made up of several districts and reflects fairly large areas both in terms of land and population. As a result of the war, Vietnam was divided into administrative zones, that in turn reflected who was in control. As shall emerge, those War Administration Committees responsible for each zone wielded considerable authority, and some have suggested they were in fact de facto governments.[94] The table below sets out the structure introduced by Order 63.

1. Levels of Local Government in the DRVN

Vietnamese term	Level	Organization introduced
Xa	Commune	People's Council elected by the people, which then elects an Administrative Committee.
Huyen	Precinct/district	Administrative Committee elected by the Commune's People's Council.
Cap tinh	Provincial	People's Council elected by the people, which then elects an Administrative Committee.
Cap ky	Administrative division	Administrative Committee elected by groups of provincial People's Councils.

Where a People's Council was elected, it then elected an Administrative Committee from among its members.[95] The Order sets out the criteria for voters and candidates. A sub-committee of the Administrative Committee, at the commune level, made up of the President, Deputy President and Secretary of the Administrative Committee,

92 Order 63, dated 22 November 1945, *On the Organization of People's Councils and Administrative Committees*, Article 1.
93 See generally David Marr, 2004, pp. 40-53.
94 Bernard Fall, 1956, p. 30.
95 Order 63, dated 22 November 1945, *On the Organization of People's Councils and Administrative Committees*, Article 1.

operated as a decision-making body with regard to legal matters (called the Standing Committee or *ban thuong vu*). This committee had the power to conciliate every dispute and to fine people when it determined a nuisance had been committed.[96]

At the other levels, the Administrative Committees had various powers that affected decision-making, but initially did not have the authority actually to resolve disputes and impose penalties.[97] As a result of the lack of judges, however, an interim measure was introduced in 1946 empowering the Administrative Committees to act judicially.[98] District Administrative Committees could act as District Courts and Provincial Administrative Committees as Provincial Courts.[99] In addition, a District Administrative Committee had the authority to intervene in a decision of a Commune's Administrative Committee and a Provincial Administrative Committee could review the work of a District Administrative Committee. The Administrative Committees of the district and provincial levels also had authority to oversee the actions of professional bodies.[100] In addition, they were responsible for managing police teams to ensure that security was adequate.[101]

The significance of Order 63 for the purpose of propaganda should not be understated. Vietnam had never elected representatives in its long and often bitter history. Enshrining the principle of universal suffrage in the Constitution can be read as promoting the role of the people in local government. In the state-sanctioned history entitled *The Long Resistance* it was the only legislation relevant to decision-making and administrative reform mentioned.[102] Yet the core aspect of these bodies – their election – was rarely actually implemented. The introduction of the War Administration Committees drastically reduced the significance of local committees and it was only after the defeat of the French that elections were effectively introduced.

The responsibility for regulating these committees was shared between the Ministry of Justice and the Ministry of the Interior, the involvement of the latter indicating the political nature of their duties. Indeed, given the close controls instituted by the government, in terms of elections and discipline of members, over both the People's Councils and the Administrative Committees, these bodies

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96 *Ibid.*, Article 75. In 1946 this Committee became the Communal Justice Board (*ban tu-phap xa*) when Order 13 *On the Organization of Courts and the Status of Judges* was introduced. Order 13 dated 24 January 1946 *On the Organization of Courts and the Status of Judges*, Articles 2-6.

97 Order 63, dated 22 November 1945 *On the Organization of People's Councils and Administrative Committees*: Article 78 – precinct level; Article 88 – provincial level; and Article 90 – administration division level.

98 Decree of the President dated 18 February 1946, Article 2.

99 *Ibid.*, Article 3.

100 *Ibid.*, Article 78. The Administrative Committee at the communal level also had this power, but there were no courts at the commune level for them to oversee (Article 74 (3)).

101 *Ibid*., Article 78.

102 Nguyen Khac Vien, 1978, p. 129.

were ultimately accountable to the Party.[103] A higher level of an equivalent body could vary the decision of a lower level organ.[104] In addition, the government set up a Special Inspection Section/Department (*ban thanh-tra dac biet*) to oversee all people's committees and state organs.[105]

The Special Inspection Department was given power to receive complaints, whether or not from members of the committee structures, and to determine whether a crime against the state had been committed. The powers were given retrospectively so that transgressions could be reported about matters that pre-dated the Department's existence.[106] In addition, a Special Court (*toa an dac biet*) was established to hear allegations brought by the Special Inspection Department.[107] It comprized the Chairman of the Government (head of the Ministers now known as the Prime Minister) as the Chief Judge and the Minister of the Interior and Minister of Justice as assessors.[108] Although the defendant to such a case had the right to counsel,[109] he or she had no right of appeal and the penalty could include death, (execution to occur within 48 hours).[110] Without doubt, legislation such as this would impact on decision-makers, who would be most careful they had implemented government policy wherever possible.

Revamping Committees in a Time of War

Just several months after the introduction of the local level councils and Administrative Committees, the government fled Hanoi. The eruption of war forced the new administration to merge the Administrative Committees with existing liberation or resistance committees, introducing an unconstitutional system of local administration. This was initially undertaken on an ad hoc basis, but the position was formally ratified in 1947. The new organization was named the Committee for Resistance and Administration also known as the War Administration Committees.[111] These committees were introduced at five levels: village; district; province; zone and inter-zone. The Zonal War Administration Committees, working with Inter-zone Committees where the war allowed communication, were the most powerful.[112] Although province and district committees

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103 Order 63, dated 22 November 1945, *On the Organization of People's Councils and Administrative Committees*, Articles 2-8, 12-18, 22-28, 32-36, 42-47, 52-59.
104 *Ibid.*, Articles 19, 20, 29, 30, 38, 49, 50, 60, 61, 73, 83-85, 94, 95.
105 Order 64, dated 23 November 1945, *Establishing a Special Inspection Department*, Article 1.
106 *Ibid.*, Article 2.
107 *Ibid.*, Article 3.
108 *Ibid.*, Article 4.
109 *Ibid.*, Article 5.
110 *Ibid.*, Article 6.
111 Circular No. 693 dated 25 September 1947 *To Determine the New Interrelationship Between War Administration Committees, Administrative Committees and Justice Departments*; Bernard Fall, 1956, p. 28. See also Tran Thi Tuyet, 1997(1), p. 26.
112 George Ginsbergs, 1962, p. 195. Ginsbergs cites a Russian commentator writing in 1957 in Moscow: O.A. Arturov. See also Bernard Fall, 1956, pp. 45-47.

sometimes continued, they were subservient to zone committees, wielding very little, if any, authority.

The single biggest change introduced as a result of reliance on the War Administration Committees was that the system of elections outlined in Order 63 was not maintained. Instead the President appointed members to the Zonal War Administration Committee on the advice of the Council for National Defence.[113] The War Administration Committee then appointed the delegates to the War Administration Committee at the level beneath it and so on. The result was that members of these committees were sympathetic and loyal to the new government.

The move from a system of democratically elected committees to state-appointed War Administration Committees is invariably attributed to the war:

> Because of the war the communication between zones was very difficult. For example, in times of peace the government would be able to instruct provincial people's committees directly. In war the instruction came from the War Administration Committee because the centre was too far from the provincial people's committee. This is the context of the power of the War Administration Committee.[114]

The quasi-judicial power of the newly introduced committees was enormous. Staffed by highly committed members of the new regime,[115] they were able to advise courts and guide lower level Standing Committees on appropriate decision-making. As 'Tri' points out, the War Administration Committees:

> could participate in decision making. They could express an opinion to the prosecutor about policy or serious crimes. The War Administration Committee can explain their opinion to judges of the zone court and judges could agree or disagree with it. If they disagreed they must have a good reason.[116]

As noted, in 1946 the state passed a decree enabling the Administrative Committees to act as courts. The result was that where War Administration Committees and Administrative Committees merged these new bodies exercized judicial power (if there were no courts). In addition, in 1950 the War Administration

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113 Presidential Decree No. 254 dated 19 November 1948, *On the Organization of Power During the Period of Resistance*. This council was established on 19 August 1948 and comprized the President, and 'key ministers related to the resistance war such as the Defence Minister, the Interior Minister, the Minister of Economy and the Minister of Finance'. See Tran Thi Tuyet, 1997(1), p. 26.

114 Interview by the author with 'Quang', Hanoi, 30 June 1997.

115 Presidential Decree No. 254 dated 19 November 1948, *On the Organization of Power During the Period of Resistance* and interview by the author with 'Tri', Hanoi, 20 September 1996. For example, Do Muoi, Secretary of the VCP from 1991 to 1997, was Chairman of the Inter-Zone Nam Dinh War Administration Committee. See also Bernard Fall, 1956, pp. 42-47. Fall notes that five of the Inter-Zone War Administration Committees had representatives on the Vietnam Workers' Party Central Executive Committee in 1951.

116 Interview by the author with 'Tri', Hanoi, 20 September 1996.

Committees were given the authority to 'lead' specialized bodies, including courts.[117] The new Ordinance specifically provided for court subordination to War Administration Committees, Article one stating that 'The Administrative Committees for Resistance War of different levels are responsible for controlling and leading specialized bodies.'[118] The earlier legislation was replaced and courts were now under the influence of local organs.

It was therefore possible for the War Administration Committees to order the administrative detention of alleged wrongdoers, prosecutions in the Military Court, and pardon or vary sentences according to their perception of any case.[119] The only challenge to their authority at the local level emerged from branch offices of line ministries (central ministries with offices extending to the grassroots level, such as the Ministry of Agriculture), wherever they existed.[120]

Equipped with enormous discretion, the War Administration Committees wielded extraordinary power. This was not lost on the central administration and Ho Chi Minh devoted time to talk to committee members and party cadres on appropriate conduct. Alert to the lack of training of most party officials, the Ministry of Interior sent assistance, in the form of an Assistant-General (*hiep-ly*), to each district and Provincial Administrative Committee in 1946.[121] In 1949 Ho Chi Minh urged all party cadres to 'acquire the four revolutionary virtues: industry, thrift, integrity and uprightness.'[122] He also exhorted committee members at all levels to avoid violating legality, abusing power, corruption, favouritism, sowing discord, and arrogance.[123] This list of possible violations indicates a range of abuses of power open to revolutionary officials. It suggests that the Party was aware of the abuses its members could perpetrate early in its life. Yet the very nature of the warnings, premised as they are on value judgments (how does one prove 'favouritism' or 'sowing discord'?), highlights the difficulties the Party would have in enforcing its code of conduct.

With the end of the war in the North in 1954, the DRVN government faced a dilemma: to return promptly to elected local government or to await the outcome of the national elections called for under the Geneva Agreement[124] and then to reform local government.[125] In the end the latter course was adopted except for

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117 Ordinance No. 103 dated 5 June 1950, *On the Relationship Between War Administration Committees and Other Specialized Bodies*.
118 *Ibid.*
119 George Ginsbergs, 1962, p. 192. See discussion of Military Courts. Chapter 3, pp. 61-64.
120 George Ginsbergs, 1962, p. 192.
121 Bernard Fall, 1956, p. 30.
122 Ho Chi Minh, 'To the 6th Congress of Party Cadres', on 18 January 1945, 1994, p. 89.
123 Ho Chi Minh, 'To the People's Committees in the Whole Country and at All Levels', October 1945, 1994, pp. 59-61.
124 The Geneva Agreement of 1954 provided for the temporary partition of Vietnam and national elections in 1956. See Appendix 2.
125 George Ginsbergs, 1962, p. 195.

the autonomous zones which were the subject of different treatment.[126] Reform did not come to the other zones until 1957.[127] Slowly the War Administration Committees were dissolved and replaced by elected People's Councils and Administrative Committees.

This chapter has outlined Vietnam's emerging socialist legal culture. The new leadership attempted to rely on democratic centralism as an organizing principle, using it to integrate the political leadership of the Committees. In theory, the adoption of democratic centralism entrenched the accountability of Party members from the local to central levels and yet, regional War Administration Committees became increasingly significant, at least until 1954. These committees were responsible for much quasi-judicial decision-making. In particular, the powerful political nature of these committees resulted in their direct influence of the work of the justice committees, courts, the police and the procuracy. It is now time to consider more closely the role of the courts in the resolution of disputes during this period.

126 For a detailed explanation of the Committee structures in the autonomous zones (areas dominated by ethnic minorities in Vietnam), see George Ginsbergs, 1962, pp. 211-230.

127 Law No. 004 dated 20 July 1957, *On Elections to People's Councils and Administrative Committees*.

CHAPTER 3
VIETNAMESE COURTS INTRODUCED: 1945-1959

Courts had independence and within that independence also had good relationships with other organs: the same as today.

Interview with retired Judge[1]

As indicated in the previous chapter dispute resolution in the Democratic Republic of Vietnam during the period 1945 to 1959 was a complicated mix of committees and courts. In this period, courts were introduced and legislation passed to regulate their establishment and operations. However, much of the promulgated law was not implemented. As a result, this chapter highlights the tension between law/policy as it was officially announced and law as it was practised. A story emerges of institution-building, where the foundational policies of the state were being rewritten during a time of war. It will also become apparent that the Vietnamese state sought to create courts that would assist in the construction of socialism: the courts described in this chapter were overtly political institutions.

Building on the general discussion of law and committees provided in the previous chapter, the focus of this chapter is on courts. To a Western researcher a court system comprizes many interconnected parts: its relationship with government, its hierarchy, its staff, its attitude to lawyers and prosecutors and how it resolves the cases before it – both in terms of the procedures it uses and the laws it applies. It is also a part of the wider jurisprudential milieu in which it is located; it has perceptions of the public and is perceived by them. The ensuing discussion reflects this Western analysis by first briefly visiting the constitutional detail that relates to courts. This is followed, in part two, by a discussion of the range of courts introduced by the state. In the final part the institutional culture of the courts is explored. In particular, the role and expectations of court personnel, the role of the courts and the attitudes of the broader population to

1 Interview by the author with 'Tri', Hanoi, 20 September 1996.

the courts are analyzed. The result is that a study of Vietnamese legal culture is commenced.[2]

I. The 1946 Constitution and the Courts[3]

Chapter 6 of the 1946 Constitution has seven articles that set out the duties of judicial bodies in the Democratic Republic of Vietnam.[4] Essentially it states that there shall be a Supreme Court, Courts of Appeal and courts of second and first instance – the genesis of a court hierarchy.[5] Judges are to be appointed and people's assessors are to assist with criminal cases.[6] Ethnic groups can use their language in court and cases are to be public except in 'special circumstances'.[7] Defendants can hire an advocate or defend themselves.[8] Acts of torture and violence are specifically prohibited and judges are called upon to 'obey only the law'.[9] Finally, other organs were prohibited from 'influencing' the work of the courts.[10]

There is a tension about the use of the word 'independence' in Vietnamese politico-legal texts. The only time 'independence' is referred to in the Vietnamese Constitution of 1946 is within the context of independence from colonial power.[11] In Chapter 6, dealing with judicial bodies, judges are exhorted to obey only the law and other agencies are instructed not to interfere with courts.[12] Within the Order establishing the court system of 1946 a provision notes the importance of the independence of the courts from 'administrative organs'.[13] A supplementary circular from the Interior Ministry to the Chairman of the Administrative Committee of the Centre reiterated the independence of judges from administrative committees.[14] As set out in the previous chapter, however, the independence from other organs sought initially by the DRVN leadership was later undercut by increasing the power given to committees until the end of the war in the North in 1954.[15]

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2 It is artificial to suggest that a court study can be as neatly broken down as the topics suggest. The various lines of inquiry interact with, and influence, each other. For example, the criteria for appointing a judge arguably have a direct effect on the role a court plays within any hierarchy. But for the sake of clarity these divides will be maintained.

3 An earlier analysis of this material appears at Nicholson, 1999.

4 *Constitution of the DRVN*, 1946, Chapter 6.

5 *Ibid*., Article 63.

6 *Ibid*., Articles 64, 65.

7 *Ibid*., Articles 66, 67.

8 *Ibid*., Article 67.

9 *Ibid*., Articles 68, 69.

10 *Ibid*.

11 *Ibid*., Preamble. See Chapter 2, footnote 81 for a discussion of the use of the term 'independence' in the DRVN Constitution.

12 *Ibid*., Article 69.

13 Order 13, dated 1 January 1946, *On the Organization of the Courts and the Status of Judges in the DRVN*, Article 47.

14 Circular No. 1000 NV/DL dated 20 March 1946.

15 In particular, see Ordinance No. 103 dated 5 June 1950, which provided that War

To the extent that 'independence' is used in law relevant to the courts in this early period, it is suggested that what is meant is not independence from government, but independence from the old regime and the freedom to implement the will of the masses as it appears in government policies. Certainly one frank commentator within Vietnam, aware of the meaning attributed by Westerners to independence within their court systems, defined the court system within Vietnam as lacking independence.[16] As shall be demonstrated, the Vietnamese court system responds to guidance from the revolutionary leaders and the Vietnam Workers' Party, reflecting the operation of democratic centralism and socialist legal principles.

Some interviewees for this study were troubled by the lack of independence of the courts. 'Tri', a retired judge, talked at length about the independence of the courts and the complex relationships courts developed with other administrative agencies. He indicated that debates about judicial independence existed within the masses until around 1950, when debate receded as a result of the increasing pressures of the war. He also noted that the amendments introduced to Order 13 in 1950 were seen as delivering people's justice. 'Tri' succinctly described the independence of the courts in the following terms:

> Courts had independence and within that independence also had good relationships with other organs: the same as today.[17]

Compare this attitude with that of 'Chi', an advocate in private practice in Hanoi, who was direct about the tension he perceived between independence of the judiciary and a government with absolute control. He stated that the reality for judges was a lack of independence.[18] During this early period 'Chi' explained that 'a member of the Party at district and provincial level should not be on the court, yet usually they are involved with the trial activity'. He went on to say that if they refused to cooperate they would be dismissed.[19] 'Chi' also pointed out that not only was membership of the court connected to the Party, but so too was decision-making. 'Chi' pointed out that Vietnamese court structures were 'illegal under the Constitution'.[20]

Perhaps the differences between the private barrister 'Chi' and an academic 'Minh' best highlight the extent of the debate about courts and their independence. 'Minh' believes courts only eradicated 'bad' people,[21] while 'Tri' believes there

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Administration Committees would 'lead' specialized bodies including courts, and Decree of the President dated 18 February 1946 allowing Administrative Committees to act as courts. See Chapter 2.

16 Interview by the author with 'Tuan', Hanoi, 26 September 1996.

17 Interview by the author with 'Tri', Hanoi, 20 September 1996. This view is supported when contemporary authors write of the earlier period as a time in which morality took precedence over law. See Nguyen Nhu Phat, 1997, p. 400.

18 Interview by the author with 'Chi', Hanoi, dated 5 September 1996.

19 Presumably this is a reference to the Party's internal disciplinary procedures. See Chapter 2, p. 45.

20 *Ibid*.

21 Interview by the author with 'Minh', Hanoi, 12 September 1996.

is an intellectual tension between the rhetoric of independence and one party rule. The former interpretation of courts views their actions according to the morality of what they do: is the court order 'good' or 'bad'? The assessment is based on a personal morality that in turn reflects a commitment to socialism. The latter interpretation analyzes courts in terms of what role they play in the implementation of law: it assesses their conduct as legal institutions. It is not possible to be certain of the extent to which differences in perception of the commentators influences their interpretation. Does an explanation lie in the type of training each received? To what extent have their workplaces and connections to the Party affected their perceptions? Are their perceptions very similar, but do they respond differently because this is an interview with a foreigner, and they cannot be sure how she will use the material? In effect, there was a range of perceptions of Vietnamese courts during the relevant period.

This discussion, however, does not explain whether Article 69, requiring judges to obey only law, resulted in a variant of judicial independence. The reality was that judicial decision makers at this time applied law or policy.[22] In this context, therefore, law has to be defined as the new government's policy, whether generated by legal instrument or policy. In the context of a discussion of judicial independence, this provision would not appear to change the status quo.

In conclusion, the 1946 constitutional provisions are sparse and say very little about the operation of the court system as a whole. However, the provisions stated that:

- There would be a hierarchical court system, the detail of which was as yet undecided or unstated;
- Personnel would be chosen by the government – both judges and assessors;
- The appearance of due process was very important – the right to speak in one's defence, use of ethnic languages, public hearings and no arbitrary acts of violence were all to form a part of the court system; and
- Judges would obey only 'the law'.

The very scarcity of court-related provisions in the 1946 Constitution left their structure and responsibilities to be determined.[23] It reflects the reality of a society at war with very limited resources. As indicated below, the early attention given to courts by the legislature indicates that courts were seen as important in this period. However, the government sought to retain close control over

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22 See discussion of socialist legality in this period in Chapter 2, p. 44.

23 At the same time it is useful to note that the Constitution of the Russian Socialist Federated Soviet Republic, 1918 makes no specific mention of courts at all. It notes that there will be a Commissar of Justice (Chapter 8, Article 43) and that the all-Russian Congress has jurisdiction over 'state legislation, judicial organization and procedure, criminal and civil legislation etc' (Chapter 9, Article 49(n)). In the *Constitution of the Union of the Soviet Socialist Republics* dated 6 July 1923 Chapter IX deals with 'Courts and State Attorney's Office'. This section evokes the later Vietnamese chapter on courts. It deals with appointment and accountability (for five years to the National Assembly respectively) and does little else except to guarantee that one's own language can be used in court.

their establishment and left court detail vaguely expressed in the Constitution, preferring to introduce the details in implementing legislation.[24]

II. Survey of Courts

The major courts established with jurisdiction over civilians during this period were the Military Courts (*toa an quan su*), the regional courts (district and provincial) that had both criminal and civil jurisdiction, and the Special Courts (*toa an dac biet*). The new administration also introduced an Army Court (*toa an binh*) to hear cases involving military personnel; this court is mentioned only for the sake of completeness, but not considered in any detail.[25] In this section the jurisdiction of each of these courts will be briefly introduced.

Tight Control: The Civilian Military Courts and Crimes Against the State

On 13 September 1945 the Military Court of the DRVN was established as the first court in Vietnam. Its legislative basis was Order 33, issued by the Chairman, Ho Chi Minh and representatives of the Ministries of Justice and the Interior.[26] Article 2 explains that:

> Military Courts shall adjudicate all persons who commit mistakes which may prejudice the independence of the Democratic Republic of Vietnam. Except where those convicted are soldiers and officers, they shall be adjudicated by the Armed Forces according to military rules.[27]

In short, the Military Court heard crimes against the state involving civilians. It is to be contrasted with the Army Court established almost a year later on 23 August 1946 to hear crimes against the state committed by members of the

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24 'Tuan' certainly indicated this in an interview with the author on 26 August 1996 in Hanoi.

25 Circular No. 64/TT dated 6 August 1947, *On the Distinction Between the Army and the Military Court*, Part B (2). Put simply, the Army Courts tried military personnel while the Military Courts determined political cases with jurisdiction over civilians as well as military staff.

26 Bernard Fall refers to the Military Courts Martial (*Toa an Quan Phap*). Regrettably Fall did not refer to the number of the Order upon which he relies to describe the Military Courts Martial. It appears that this term refers to the same institution described here as the Military Court. The only difference in his description and the one offered here for Military Courts is that according to Fall the Military Courts Martial could order hard labour. That is not possible according to Order 33, dated 13 September 1945, *Establishing a Military Court*. However, in all other respects including the date of the law to which Fall refers the accounts are the same. Bernard Fall, 1956, pp. 30-33.

27 Order 33, dated 13 September 1945, *Establishing a Military Court*, Article 2.

armed forces.[28] The Ministry of Defence was intimately involved in the administration of the Army Courts. In contrast, the Ministries of the Interior and of Justice administered the Military Courts.

'Crimes against the state' is a very broad basis for jurisdiction, and not surprisingly, clarification was needed. In April 1946 Decree 43 was issued to establish a new body responsible for resolving *where* a case should be heard: the Council for the Definition of Jurisdiction of the Military Courts, the Special Courts and the People's Courts (*hoi dong phan dinh tham quyen giua toa an quan su, toa an dac biet va toa an thuong*). This Council, comprizing the Justice Minister or his/her representative, the Chief Judge and Public Prosecutor of the Appeal Court and a clerk, could be approached by the Interior Minister, the Public Prosecutor of the Military Court or the Public Prosecutor and prosecutors of normal courts.[29]

Order 33 set out the number of Military Courts and their personnel. There were to be four Military Courts in the north of Vietnam, three in the middle, and two in the south: a court was to be located in each of nine administrative zones used at this time to organize state matters.[30] Two additional courts were established in 1947.[31] Essentially the panel was to consist of a chief judge and two assessors: one of the assessors was to be a professional judge, while the judge and the other assessor were to be drawn from the military and political ranks of the Party.[32]

The Military Court was required to hear matters in open court except when it chose to hear a matter privately.[33] Where there was no proximity to a Military Court established under Order 33, local People's Committees were allowed to establish a Military Court to service their district.[34] These locally set-up courts were expected to operate according to the principles set out by Order 33. As noted previously, the War Administration Committees were also to direct prosecutions within Military Courts and had the power to order pardons and variations of sentences. This combination of responsibilities gave the War Administration Committees a significant role because they either acted as the court or directly influenced the Military Courts within their zones.[35]

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28 Order 163, dated 23 August 1946, *On the Organization of the Provisional Army Court*; interview by the author with 'Minh', 12 September 1996, p. 7. It is not clear which body heard matters alleged against military personnel before 23 August 1946. Perhaps until this legislation was passed the Military Courts in fact heard matters against any person – whether military or civilian.

29 Decree No. 43, dated 3 April 1946, *On Setting up in Each Part of the Country a 'Council for the Definition of Jurisdiction of the Military Court, the Special Court and the Normal Court'*, Articles 2, 4.

30 Interview by the author with 'Minh', 12 September 1996.

31 Inter-Circular 41-NV-TP-NgD dated 21 March 1947, *Construction of Two Military Courts in Zone Two.*

32 Order 33, dated 13 September 1945, *Establishing the Military Court*, Article 5.

33 *Ibid*., Article 6.

34 *Ibid*., Article 7.

35 Bernard Fall, 1956, pp. 25-30; see also Chapter 2, pp. 49-55.

The sentences open to the Military Court were acquittal, confiscation of all or a part of the accused's property, imprisonment for between one to ten years, or the death sentence.[36] The Military Court had the power to suspend sentences for up to five years.[37] If a further breach occurred during the period of the suspension the original sentence was activated, but if there was no breach within the period of the suspension, the sentence was cancelled and deemed not to have been passed at all.

In theory, appeals against the death sentence were allowed within the Military Court.[38] No other cases could be appealed. However, as a result of the war it was not always possible to travel or take an appeal to the Chairman of the Government as the Decree required. For example, by the end of December 1945 the Cochinchina People's Committee was given authority to mitigate punishments, acting 'as the 'Chairman of the Government'.[39]

The overall effect of Order 33 was to establish a court system to try civilians for crimes against the state within a system very tightly controlled by the state. The system of appointment of decision-makers[40] and the nature of the matters to be tried by the Military Court indicate that these courts were directed by the revolutionary government (via its War Administration Committees) rather than by arbiters standing beyond the purview of the administration. They appear to have been established and staffed relatively rapidly.[41]

Two of those interviewed for this study were retired judges and both had much to say about the role and function of the Military Court. Both interviewees saw the Military Court as part of the emerging new legal system and expressed the view that it was crucial to the establishment and maintenance of order. 'Tri' explained the introduction of the Military Court on the basis that the old French courts had been destroyed and there was a need for a body that could 'adjudicate crimes'.[42] As 'Quang' put it:

> The First Vietnam Communist Party or government wanted to enforce strictly against the people who were against the Fatherland and therefore the courts were entrusted to protect democracy in society and socialist legislation…The Court shot people against the Fatherland.[43]

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36 Order 33, dated 13 September 1945, *Establishing the Military Court*, Article 4.
37 *Ibid*.
38 *Ibid*., Article 3. An appeal had to be lodged with the 'Chairman of the Government'.
39 Decree No. 77B, dated 24 December 1945, *Entrusting the Cochin china People's Committee to Decide the Mitigation of Punishment*, Article 1. Cochinchina is the southernmost region of Vietnam.
40 See below, pp. 74-77.
41 For example, on 29 September 1945 a Military Court was established at Nha Trang and on 28 December 1945 a Military Court was established at Phan Thiet.
42 Interview by the author with 'Quang', Hanoi, 5 September 1996.
43 *Ibid*. The interviewee, by referring to the Party, is presumably talking of the period after 1951 when the Vietnam Workers' Party had been established. Bernard Fall writes that 'trials, particularly those of enemies of the state, are held on a completely informal basis, with the public supplying most of the arguments as well as a good part of the final judgment'. Evidence, if any, forming the basis of this comment is

These courts were crucial to the new regime, enabling it to enforce support among the general population:

> Together with other law-defending organs, the Military Courts managed to wage a resolute struggle against (*kien quyet dau tranh*) subversive plots and other acts of opposition by the enemy thus making a contribution to the nation's glorious victories in the cause of liberation, unification and the construction and defence of socialism.[44]

It was hoped that by the introduction of the Inter-Zone Military Courts (*toa an quan su lien khu*) in 1950, it would be possible better to review of the work of Military Courts within the zones, such as district and provincial Military Courts.[45] As one retrospective history notes 'a number of things were incorrectly handled and this was hard to identify due to the absence of cross-checking'.[46]

Military Courts were active. They are generally described in official histories as trying 'thousands of cases'. In 1948 one estimate has the Military Courts sentencing 284 people to death and 328 others to life imprisonment.[47] This court was charged with eradicating reactionaries and all indications are that it took its responsibilities seriously, acting according to the new administration's policies throughout this period.

Constructing a New State in a Time of War: Civil and Criminal Courts

On 1 January 1946 the government promulgated Order 13 *On Court Organization*. This Order sets out the court structure for civil and criminal cases at commune, precinct and provincial level and also introduced the Appeal Court of Vietnam (*toa thuong tham*).[48] In addition, it identified who ought to determine what cases and what penalties and rights of appeal existed. The legislation evidences the intention of the Ministries of Justice and the Interior to develop a court system. The legislation itself leaves it for the Minister of Justice to implement enabling legislation.[49] The Ministry of Justice acted and issued most laws relevant to court practice and procedure. However, where the courts' jurisdiction and powers were considered, the Ministry of the Interior was also involved. Despite the

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not included. Bernard Fall, 1956, p. 30.

44 Ngo Van Thanh, 1996, p. 142 (in Vietnamese).

45 Ordinance No. 156, dated 17 November 1950, *Organization of Inter-Zone Military Courts.*

46 Ngo Van Thanh, 1996, p. 139 (in Vietnamese).

47 *Ibid*., p. 137. It is unclear if the number of people sentenced to death was reduced on appeal.

48 Order 13, dated 1 January 1946, *On the Organization of the Courts and the Status of Judges in the Democratic Republic of Vietnam*, Article 35.

49 *Ibid*., Article 45. This Article states that 'All courts that are mentioned in this order shall be set up gradually in localities by a Decree of the Minister of Justice depending on the favourable conditions in each area'.

challenges faced by the courts as a result of the war, Order 13 demonstrates the government's aim to establish locally-based courts staffed by loyal agents.

Order 13 also introduced the Communal Judicial Board (*ban tu phap xa*), the renamed Standing Committee, giving it the same functions and members.[50] This Board was given the power to conciliate all commercial and civil issues, to fine for common nuisances, and to perform the orders of judges of higher courts.[51] This last power extended to searching homes, impounding evidence and arresting and interrogating suspects if ordered to by higher judges.[52] The effect of the extensive powers of the Communal Judicial Board was to make its members both decision-makers and interrogators, with jurisdiction over 'nuisances'.

The issue of overlapping and uncertain jurisdiction existed within all the civilian courts. As noted earlier, Decree 43 established a Council to determine jurisdiction between the Military, Army and People's Courts. In addition, legislation was passed to clarify jurisdictional issues. This legislation distinguished between those areas within French control and those dominated by the *Viet Minh*. For example, Circular 74/PC set out that in French-dominated areas, officials (very broadly defined to include Administrative Committees, their agents, police and military officers) had the power to fine for petty offences and to send those who did not pay the fines within 48 hours to court.[53] Jurisdiction was more clearly set out within *Viet Minh*-controlled zones. For example, village justice committees had authority to mediate minor offences, such as littering or letting off fire-crackers.[54] They could also mediate civil or commercial disputes between 0.5 and 6 dong.[55] At the district level the court could hear criminal cases where the penalty was less than five days imprisonment and civil cases where the amount involved was less than 150 dong.[56]

The reality was that the new administration did not control all of the administrative zones into which the country was broken during the war. Therefore it was not possible to set up courts in all zones. As explained previously, in February 1946 the administration formally empowered the district, provincial

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50 Order 63, dated 22 November 1945, *On the Organization of People's Councils and Administrative Committees*, Article 75. This Commission comprized the President, Deputy President and Secretary of the Administrative Committee. See the discussion of *ban thuong vu* in Chapter 2, pp. 49-55.

51 Order 13, dated 1 January 1946, *On the Organization of the Courts and the Status of Judges in the Democratic Republic of Vietnam*, Article 3.

52 *Ibid*., Articles 4-6.

53 Circular 74/PC dated 29 July 1946. It is unclear which court is referred to here, but presumably whatever courts the new administration had operating in the relevant French-controlled area.

54 *Ibid*.

55 Circular No. 1000 NV/DL, dated 20 March 1946, *Interior Minister's Circular to the Chairman of the Administrative Committee of the Centre.* At this time 0.6 dong could buy 400 grams of rice: interview by the author with 'Minh', Hanoi, 12 September 1996.

56 At this time 150 dong could buy 100 kilos of rice: interview by the author with 'Minh', Hanoi, 12 September 1996.

and commune Administrative Committees, the executives of the local People's Councils, to 'hold the judicial function'.[57] It was possible for the Administrative Committees to delegate this function either to staff or to a judicial sub-committee. Appeals were allowed from the decision of Committees or their delegates by taking the matter either directly to the Secondary/Provincial Court or to the Public Prosecutor of the Appeal Court (*chuong ly tai toa thuong tham*).[58] As noted previously, with the assumption of power by the War Administration Committees, these bodies took over judicial responsibilities where courts did not exist. It is unlikely that appeal rights were often exercised as travel during war-ravaged Vietnam was not easy.

Order 13 was amended on 22 May 1950. These amendments renamed Primary Courts as District People's Courts (*toa an nhan dan (cap) huyen*) and Secondary Courts as Provincial People's Courts (*toa an nhan dan cap (tinh)*)[59] – names these bodies still hold today. An Inter-Zone People's Court (*toa an nhan dan lien khu*) was also established a little later in 1950 to hear appeals from the lower courts.[60] Consistent with the re-assessment of the jurisdiction of all courts, the jurisdiction of the Communal Judicial Boards was expanded to cope with nuisances involving higher fines (5 to 30 dong) and applications for compensation arising out of a nuisance (up to 300 dong).[61]

In an attempt to foster public confidence in courts, the 1950 reforms extended the role of people's assessors (*hoi tham nhan dan* sometimes translated as jurors or lay judges), reiterated the preference for mediation over litigation and allowed appeals. More particularly, people's assessors, were to attend and vote on all criminal and civil matters.[62] The District People's Courts were given a conciliation power to be used in all cases except where it was specifically against the law to conciliate a matter.[63] This change promoted the commitment to conciliation apparent since its introduction as a function of the Commune's Administrative Committees in 1945.[64] Appeals were allowed by the public prosecutor, the defendant and by the victims of criminal activity, the last group able to seek a higher penalty or greater compensation.[65] Vietnam's 1950 *Penal Code* precluded

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57 Decree dated 18 February 1946, Article 1. The copy of this Decree, located in Hanoi, contains no number.

58 *Ibid*., Article 4.

59 Order dated 22 May 1950, *On Amendments to Court System*, Article 1.

60 Ordinance 156-SL dated 17 November 1950, *On the Organization of the Inter-Zone People's Court.*

61 Order dated 22 May 1950, *On Amendments to Court System*, Article 7.

62 *Ibid*., Article 3. This matter was also set out in Part A, Article (2) of Order 85, dated 22 May 1950, *On Reforming Judicial Mechanism and Procedure Law.*

63 *Ibid*., Articles 9-14. Under this Order the Conciliation Council (*hoi dong hoa giai*) had to forward a conciliation report (*bien ban hoa giai*) to whichever court had jurisdiction to hear the matter for approval. Order 85, dated 22 May 1950, *On Reforming Judicial Mechanism and Procedure Law*, Part A, Article 3.

64 See Order 63, dated 22 November 1945, *On the Organization of People's Councils and Administrative Committees*, Article 75.

65 Order dated 22 May 1950, *On Amendments to Court System*, Articles 15-18.

appeals on the basis of a mistrial, leaving subsequent new evidence as the only bases for an appeal.[66]

Land Reform and the Special Courts

The DRVN government also introduced special courts when policy required it.[67] The most renowned of these was the Special People's Court (*toa an nhan dan dac biet*) introduced in 1953 by the Ministries of Interior, Police and Justice and confirmed by the Prime Minister, to implement the land reform policies.[68] These courts were modelled on their Chinese predecessors and Chinese advisers came to Vietnam to assist with the implementation of the land policy.[69] Essentially their brief was to redistribute land from the wealthier landowners to the poor including peasants and concurrently to institute 'clean (*trong sach*) cadres' at the local level.[70] Over time this brief was extended to educating Vietnamese (via show trials and propaganda) about the evils of colonialism and the enlightened thinking of the new regime.[71]

The Special People's Court was empowered to hear and adjudicate claims by the masses, particularly agricultural peasants, against landlords.[72] In May 1953 the legislation of 12 April 1953 was expanded to provide that the previous orders could be applied retrospectively:

> All unlawful activities of traitors, reactionary landlords, dishonest and cruel village tyrants that happened before the mobilization of the masses can be exposed by farmers and where farmers seek adjudication, then they shall be adjudicated and punished…[73]

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66 DRVN Penal Code dated 1950 cited by Bernard Fall, 1956, p. 34. Presumably Fall is referring to the French-introduced Penal Code.

67 Ordinance dated 23 November 1953, *To Establish a Special Court to Hear Cases Against Corrupt Cadres.* Interview by the author with 'Minh', Hanoi, 12 September 1996. This court was established in 1953 to try corrupt cadres.

68 Adam Fforde and Suzanne H. Paine, 1987, p. 35, note that there were two stages to the Land Reform Era. The first focusing only on land redistribution while the latter stage (which followed directly after the first in 1953) included political reorientation as one if its goals.

69 Bui Tin, 1995, p. 23. Bui describes the advice received by the Chinese as a form of indoctrination stating that cadres were 'required to attend lectures' on the subject. He describes them as a 'hurdle we had to jump', at p. 23. See also William Duiker, 2000, pp. 475-491.

70 Pham Quang Minh, 2004, p. 92.

71 For an excellent analysis of the role of the land policies and the part played by the courts see Christine White's doctoral thesis, 1981. Compare Hoang Van Chi, 1964 and D. Gareth Porter, 1972 to witness the extent of the bitter debate about the numbers killed as a result of the land policy. See also Robert F. Turner, 1975, pp. 130-146, Edwin Moise, 1976, pp. 70-92 and John Kleinen, 1999.

72 See Order 150, dated 12 April 1953, *On the Establishment of the Special People's Court.*

73 Decree 264-TTG dated 11 May 1953, *Regulating in Detail the Orders 149, 150 and 151 dated 12 April 1953*, Article 1.

One professional judge and six to ten peasants judged the cases, half appointed by the War Administration Committee, the other half appointed by agricultural cooperatives.[74] Punishments for violations were severe ranging from confiscation of land to the death penalty.[75] The use of beatings and torture during investigation and interviewing was prohibited.[76] There were many allegations that this occurred, although usually in the name of popular justice.[77] Once the mobile court, comprizing one professional judge and medium and poor agricultural peasants (*trung ban co nong ban ve nong nhieu hon rang nong*)[78] had made a decision, this was supposed to be sent to the Inter-Zone War Administration Committee for confirmation.[79]

The Vietnamese press, Asia-based press and eyewitness reports all describe the Land Courts as arbitrary and violent.[80] The Vietnamese press itself reported as early as 1957 that as many as thirty per cent of those condemned during the land reform should not have been.[81] Further, it noted that:

> People were arrested, jailed, interrogated and cruelly tortured; people were executed or shot out of hand and their property confiscated. Innocent children of parents wrongly classified as landlords were starved to death.[82]

It would appear that the relevant decrees, outlining appropriate conduct for hearings, were not implemented.[83] Although the practice varied from village to

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74 Ordinance Number 150 SL, dated 12 April 1953, *On Establishment of Special People's Court,* Article 4.

75 *Ibid*., Article 11 and Decree 264-TTG dated 11 May 1953, *Regulating in Detail the Orders 149, 150 and 151 dated 12 April 1953*, Articles 8, 9.

76 Decree 264-TTG dated 11 May 1953, *Regulating in Detail the Orders 149, 150 and 151 dated 12 April 1953*, Article 10.

77 Wilfred Burchett, 1955, pp. 168-169. Burchett, a communist travelling in North Vietnam in the mid 1950s, provided an eyewitness account of the land courts operating and notes that 'The forms and trappings of justice as known in the western world were absent'. He noted that the accused was usually in a hole in the ground surrounded by an audience.

78 Ordinance Number 150 SL dated 12 April 1953, *On Establishment of Special People's Court,* Article 4 and Decree 264-TTG dated 11 May 1953, *Regulating in Detail the Orders 149, 150 and 151 dated 12 April 1953*, Article 13.

79 Decree 264-TTG dated 11 May 1953, *Regulating in Detail the Orders 149, 150 and 151 dated 12 April 1953*, Article 16. Ordinance 151, dated 12 April 1953, guided decision-makers and the UBKC on appropriate penalties. For example, Article 6 set out one to ten years imprisonment for 'being in collusion with the enemy . . . sabotaging the revolution, killing farmers, officials and government staff'.

80 *Nhan dan*, 13 August 1957, reported by J. Price Gittinger, 1957, p. 118; *South China Morning Post* (Hong Kong), 31 December 1956, reported by J. Price Gittinger, 1957, p. 118; Wilfred Burchett, 1955, pp. 168-169.

81 *Hoc Tap* (Hanoi) 13 March 1957, reported by J. Price Gittinger, 1957, p. 118. Estimates vary on the number killed during the land reform era. Recently Thayer suggested 15,000 may have been killed. Carlyle A. Thayer, 2000.

82 *Nhan dan*, 13 August 1957, reported by J. Price Gittinger, 1957, p. 118.

83 Pham Quang Minh, 2004, pp. 92-93.

village, the effect according to one Western commentator was of mass trials of landlords proceeding virtually uncontrolled.[84]

In 1957, following widespread rural uprisings and criticism against the arbitrary justice of the land reform campaign, the land policy was rescinded. Truong Chinh, who had been a keen supporter of the land reform campaigns, resigned as secretary of the Vietnam Workers' Party.

It may well be the case that many of the reforms introduced in later years reflected an intention not to replicate the excesses of the land trials of this period. The reports of 1948-1954[85] indicated an optimism about the administration of the court system which was lost by the mid to late 1950s. The change in tone reflects criticism of land reform and its erratic decision-making. Of course it is important to recall that throughout this period the Vietnam Workers' Party controlled the press and so in fact the change in tone may not so much reflect criticism of the land reform as seek to guide popular opinion on it.

Duong Thu Huong provides a compelling Vietnamese account of land court trials in her semi-autobiographical novel, *Paradise of the Blind*.[86] Huong, who was born in 1947, served in the Communist Youth Brigade and has written about the China-Vietnam war of 1979. In 1989 she was expelled from the Vietnam Communist Party and in 1991 imprisoned for seven months without trial.[87] She lives in Hanoi, occasionally under house arrest, and her books are banned in Vietnam.[88] This brief biography indicates that Huong is an outspoken author who drew on her recollections of life in Vietnam in the early fifties, and on those of her family and friends. *Paradise of the Blind* is a story of a young Vietnamese girl reflecting on her past and how the revolution impacted on her family. She writes:

> At the entrance to the town was a huge village green, which doubled as a racecourse on festival days. At the time, it had been converted into a makeshift kangaroo court (*truong dau, toa an cua nong dan*),[89] where the landlords, the scapegoat 'model tyrants' from the surrounding villages and communes, were dragged before a jury of peasants to be denounced and judged. The glow of bonfires lit up the sky, eerie curls of smoke illuminating the night.
>
> The air echoed with the sound of fury: Drums beat, bugles sounded the charge, mobs shrieked and guerrilla patrols crisscrossed the road, bayonets

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84 J. Price Gittenger, 1957, pp. 113-126.

85 See for example: *Vietnam News Service*, 1 March 1948; *Vietnam News Service*, 12 March 1948; *Vietnam News Service*, 27 May 1950; *Vietnam News Service*, 7 July 1950; *Vietnam News Service*, 6 January 1951.

86 Duong Thu Huong, 1994. See also, John Kleinen, 1999, pp. 101-102 for interviews on the impact of land reform at a personal level.

87 *Ibid*., pp. 268-270.

88 *Ibid*., pp. 5-9. See also Robert Templer, 1998, pp. 183-189.

89 Duong Thu Huong, 1990, p. 55. In the Vietnamese version of the novel two different terms are used to describe what is translated the once in English as a 'makeshift kangaroo court'.

> glinting at the tips of their rifles. The guerrillas kept their weapons cocked, threatening ready to do battle. Their bayonets reflected in the gleam of their eyes as they glared suspiciously at every passerby. NO LANDLORD WILL SLIP THROUGH OUR NET. That was the new slogan, scrawled in lurid colours across the road.

After this extract the narrator's father flees the village where he has sought refuge as the villagers are too afraid to shelter him. They fear guilt by association.

This extract presents Huong's perception of the land courts. She is writing in the 1990s of events that took place forty years before and she voices a public recollection of the role and drama associated with land courts at this time. The Vietnamese terms encapsulated by the translation 'makeshift kangaroo court' are '*truong dau*' and '*toa an cua nong dan*'.[90] The latter means literally peasants' court and the former refers to a place to meet for a big event, qualified here by suggesting accusations and punishment (*dau*). Therefore the author writes to evoke a gathering in a public space, to condemn and punish. Duong Thu Huong provides an insight into the historical memory of courts. Her depiction of community justice is one of fear and distrust.

A Postscript: Army Courts

Only one other court was introduced over this period: the Army Court. Unlike the committees, military and other civilian courts introduced so far in this chapter, the Army Courts technically only judged offences committed by army personnel, contractors to the army and, on some occasions, by civilians in combat zones caught red-handed. Here the Army Courts are very briefly introduced for the sake of completeness. As they were not established to try civilians, they are not a major focus of this study.

The Provisional Army Court (*toa an binh lam thoi tru*) was introduced on 23 August 1946 to deal with: matters involving soldiers and army officers; cases involving contractors or workers for the army which related to the military (for example a barracks construction worker stealing army supplies); and any person committing a crime within a military organization (for example a nurse assaulting a military prisoner).[91] Two exceptions existed to the first head of jurisdiction. The first was when a 'minor' offence was alleged, where the matter was referred to the Justice Court (*toa an tu phap*).[92] The other operated when a soldier committed a less serious 'normal crime' and his/her commanding officer, rather than the Provisional Army Court, would hear the case.[93] Where

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90 *Ibid*.

91 Order 163 dated 23 August 1946, *On the Organization of the Provisional Army Court*, Article 2.

92 *Ibid*. It is suggested that this mention of the Justice Court is in fact a reference to the Commune Justice Committee.

93 *Ibid*., and Order No. 71 dated 22 May 1946, *On Principles for Land Forces in Vietnam*, Article 49.

two courts potentially shared jurisdiction, such as where a civilian committed a crime against the state that was also a crime against the military, the newly established Provisional Army Court would hear the case.[94]

The major institutional difference between the Military Courts and the Provisional Army Court was that in Army Courts two of the three people hearing the case had a military background. In effect, Army Courts were made up of a judge and two assessors – the judge being either a senior official within the Ministry of Defence or an officer of commander rank, and one of the assessors a member of the military. The other assessor would be a judge appointed to a civilian court who was then also appointed to the Provisional Army Court with the agreement of the Minister of Defence.[95]

Over the period Army Courts at the Front (*toa an binh tai mat tran*) were also introduced. These courts were staffed entirely by military personnel, reflecting the lack of available qualified civilians to try cases arising during combat, when the army was away from villages and civilian communities.[96] In addition Zonal Army Courts (*toa an binh khu*) were established, headed by either a regimental commander appointed as judge by the Minister of Defence or the most senior official within the zone.[97] In 1947 a Supreme Army Court (*toa an binh toi cao*) was established[98] and in 1950 an Inter-Zone Army Court set up again to provide leadership to courts unable to take their appeals to Hanoi as a result of the war.

This study will not consider further details of jurisdiction within the Army Courts nor any other aspects of their operations. Suffice to say these courts were active and ensured that penalties, including the death penalty, were available to the military. There is a suggestion that they were less accountable, on procedural matters, than other institutions. For example, one official history notes that:

> All death sentences were strictly enforced according to the procedure law, right after the trial and at crowded places in order to create the political influence.[99]

By 1950, therefore, a range of courts had been established. Diagram Two (see p. 72) sets out the hierarchy of courts affecting civilians (including the military court) operating by 1950. Diagram Three (see p. 73) summarizes the jurisdiction and membership of civilian courts (excluding the Military Court) in more detail.

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94 Order 163 dated 23 August 1946, *On the Organization of the Provisional Army Court*, Article 3. An attempt was made to clarify further the differences in jurisdiction between the Military and Army Courts in Circular No. 63 TT dated 6 August 1947, *On the Distinction Between the Army Court and the Military Court.*

95 Order 163 dated 23 August 1946, *On the Organization of the Provisional Army Court*, Article 5.

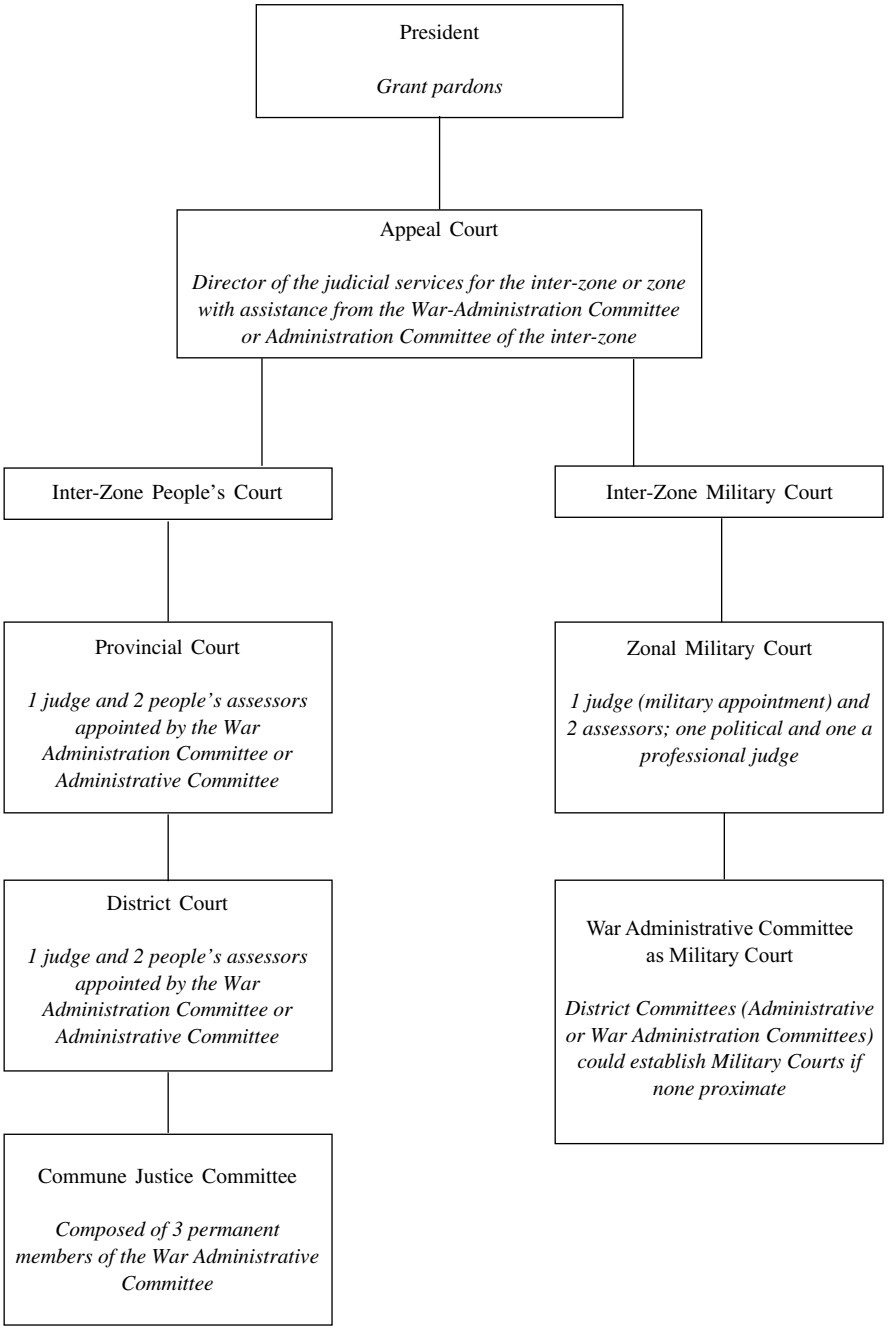
96 Inter Ministry Orders: No. 11 dated 26 December 1946, No. 31 dated 16 February 1947 and No. 60 dated 28 May 1947.

97 Ordinance No. 19, dated 16 February 1947, *Providing for the Organization and Operation of Zonal Army Courts.*

98 Decree No. 45, dated 25 April 1947, *Organization and Operations of the Supreme Army Court.*

99 Ngo Van Thanh, 1996, p. 139 (in Vietnamese).

2. The Civilian Court Hierarchy by the Mid 1950s



3. Civilian Court Jurisdiction and Staff in 1946[100]

Level – Name	**Staff**	**Jurisdiction**
Commune – Communal Judicial Board (*ban tu phap xa*)	• President, Vice-President and Secretary of the Commune's Administrative Committee	• Hear nuisances • Civil and business matters • From 0.5 to 6 Dong – no power to seize goods or property or to imprison • Power to investigate • Detain people and evidence if ordered to by a higher court
District – Primary or First Instance Court (*toa an so cap*) Ministry of Justice to identify where courts were to go	• Judge, clerk and secretaries • Judge to hear cases alone	• Weekly criminal and civil trials
Province – Secondary or Second Instance Court (*toa an de nhi cap*) 3 courts: Hanoi, Haiphong, Saigon	• Judge, prosecutor, inquirer, clerk and secretaries • Two people's assessors to participate in any minor criminal cases • For serious crimes – five members including the Chief Judge of the Secondary Court, two judges (from either the Primary or Secondary Court) acting as people's assessors or two people's assessors, an accuser and the court's clerk	• Weekly civil and criminal trials (minor and serious cases distinguished) • Appeals on minor criminal matters and civil matters
Central – Appeals Court (*Toa Thuong Tham*) Hanoi, Hue and Saigon	• Chief Judge, Chief of Department, Assessors, Deputies of the Chief Judge, Public Prosecutor, Deputies to the Public Prosecutor, Advisers, Senior Clerk, Clerks and secretaries • In criminal cases consists of the Chief Judge and two Deputies acting as assessors, two people's assessors, a prosecutor or adviser with the right to act as accuser, and a clerk • In other cases the Chief Judge will sit with two professional judge assessors	• Appeals heard on either criminal or civil matters • Appeals (from Secondary courts) on serious criminal matters

100 See Order 13 dated 14 January 1946, *On the Organization of Courts*, read with Circular No. 1000 NV/DL, dated 20 March 1946, Interior Minister's Circular to the Chairman of the Administrative Committee of the Centre.

III. Features of the Courts

Court Membership: Judges and People's Assessors

Having sketched the range of courts introduced by the newly established DRVN regime, it is now time to turn to some of the features of these new institutions. The first question with which this section is concerned is: who led the courts and how were they appointed? A discussion follows of the role of the people's assessors and the courts' attitudes to advocates (whether lawyers or not). As will be demonstrated, this period witnessed a reduction in court legalism and a determination by the state to deliver 'popular justice'. The training received by judges and their propagandist activities reflect the state's 'new' politics (pro-worker, anti-landlord, anti-colonialism). These practices also reflect the courts' understanding of their role in the new DRVN as political tools of the state.

Members were appointed to all courts introduced by the DRVN in this period, although the criteria for their appointment varied. For example, a judge and two assessors were appointed to the Military Courts. The political nominee, who was one of the assessors, was appointed by the local People's Committee and the military appointment was made by the local military. The professional (full-time) judge 'shall be assigned by the public prosecutor (*chuong ly*) of the Appeal Court'.[101] The provisions governing appointments indicated a very close connection between Party sympathizers and court personnel, suggesting that ideally the Party controlled who was appointed and that those appointed would be drawn largely from the Party. There was no permanent tenure for appointees. Appointments were to be made every five years, and it was open for the state to reappoint personnel.

In the Primary and Secondary Courts, called District and Provincial Courts from 1950, both judges and prosecutors were originally appointed as judges. Judicial appointments were made and judges were then told whether they would work as judges or prosecutors. There was no separate body or separate criteria for the appointment of judges and prosecutors. The distinctions between prosecuting and judging were minimized.

As noted, Land Courts also had particular types of people appointed to them. According to statute, cases were to be tried by one professional judge and six to ten peasants, half appointed by the relevant War Administration Committee, the other half appointed by agricultural cooperatives.[102] No educational criteria were identified.

In practical terms, the overriding criteria for judicial appointment were 'political dignity and professional skill'.[103] Both of these were adjudged by reference

101 Order 33, dated 13 September 1945, *Establishing the Military Court*, Article 5.
102 Ordinance Number 150 SL, dated 12 April 1953, *On Establishment of Special People's Court*, Article 4.
103 Interview by the author with 'Tri', Hanoi, 20 September 1996.

to an appointee's morality. Ho Chi Minh defined revolutionary moral character in the following terms:

> To devote one's life to struggling for the Party and the revolution. This is the most essential point.
>
> To work hard for the Party, observe Party discipline, and implement Party lines and policies.
>
> To put the interests of the Party and the labouring people before and above one's own interests. To serve the people wholeheartedly. To struggle selflessly for the Party and the people and to be exemplary in every respect.
>
> To endeavour to study Marxism-Leninism and constantly use self-criticism and criticism to heighten one's ideological standard, improve one's work and progress together with one's comrades.[104]

Given that revolutionary morality was fundamental to judicial appointment, judges were effectively expected to be agents of the Party. If they did not act in the interests of the Party they breached the criteria forming the basis of their appointment. 'Quang' points out that French-trained jurists were appointed as judges from 1945, but increasingly revolutionaries were chosen.[105] 'Tri' states that French-trained lawyers, who had been retrained in revolutionary thinking, were used as judges in civilian courts, while 'workers and peasants and political persons were appointed to judge the land law against the land holders who were against the revolution'.[106]

Against this background, judges were officially selected and grouped according to a complex system of classes. For the Appeal and Secondary Courts there were seven classes of judges and five classes of judges operated within Primary Courts.[107] Different requirements attached to the different classes of judge, yet all had to be Vietnamese, of good moral character and not been sentenced in the past.[108] In addition to requiring morality, the Order stipulated age and education as relevant to a judge's suitability for office.[109] But a legal education was not a requirement for all judicial positions. No Primary Court judge needed to have a law degree.[110] All Secondary Court judges ought to have law degrees and in most cases also had to have completed the court test.[111]

It is not clear at what point the stipulated requirements for judges applied, because temporary measures for appointing judges were also set out.[112] The temporary provisions indicated that a judge could be appointed so long as he

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104 Ho Chi Minh, 'On revolutionary morality' in 1958, 1994, p. 198.
105 Interview by the author with 'Quang', Hanoi, 5 September 1996.
106 Interview by the author with 'Tri', Hanoi, 20 September 1996.
107 Order 13, dated 1 January 1946, *On the Organization of the Courts and the Status of Judges* in the Democratic Republic of Vietnam, Article 52.
108 *Ibid.*, Article 53.
109 *Ibid.*, Articles 54, 55.
110 *Ibid.*, Article 55.
111 *Ibid.*, Articles 54, 55.
112 *Ibid.*, Articles 58-64.

or she had completed school or worked as a clerk or middle bureaucrat.[113] The Minister of Justice (for Primary Court judges) or the President (Secondary Court judges) made the appointments,[114] on the advice of a Judicial Appointments Council instructed to scrutinise 'the morality and capacity' of nominees.[115]

From this it appears that professional judges, appointed under the temporary provisions, could be with or without legal training, but needed to have the approval of both a selection council and the Minister of Justice before they could take office. It is implicit that professional judges were to work full-time and their appointment would normally stipulate whether they were to work as prosecutors or judges.

A declaration of judicial loyalty was also required. An oath was administered, which included an undertaking of loyalty to the DRVN government.[116] With the 1950 amendments, Secondary Court judges were no longer required to wear black robes, which had been donned 'according to international practice'.[117] Primary Court judges had no attire stipulated, although a logo was to be incorporated which seems to have continued after 1950. The loyalty requirement suggests that the courts were seen as part of the new government's policy implementation machinery. The removal of the requirement of judicial dress suggests the de-institutionalising of the courts.

Working alongside judges in almost all courts were the newly introduced people's assessors. Originally assessors were listed by the Administrative Committee of the provinces and included the members of the Provincial People's Council who were not lawyers or judges.[118] The responsibility for their selection was later taken over by the relevant War Administration Committee. In addition to requirements to attend or face fines,[119] assessors had to take an oath when appointed indicating that they would be honest, fair, discrete and incorruptible.[120]

Both 'Tri' and 'Quang' stressed the importance of people's assessors to adjudication. Their presence was explained as resulting from an effort on the part of the government to 'extend the power of the Vietnamese citizen'.[121] People's assessors' powers were extended to include voting on civil and commercial matters in 1950. According to 'Quang', this was because the Vietnamese needed to distinguish their courts from those that existed under the French.[122] The major distinction made by 'Quang' was that under the French the courts were elitist and separate from the people, while the new administration sought to bring the

113 *Ibid*., Article 59.
114 *Ibid*., Article 57.
115 *Ibid*., Article 56.
116 *Ibid*., Article 94.
117 *Ibid*., Article 110.
118 *Ibid*., Article 18.
119 Order 13, dated 1 January 1946, *On the Organization of the Courts and the Status of Judges in the Democratic Republic of Vietnam*, Article 22.
120 *Ibid*., Article 25.
121 Interview by the author with 'Quang', Hanoi, 5 September 1996.
122 *Ibid*.

people into the judging process, ensuring that the courts empowered the simple citizen or masses.

A system for the selection of personnel emerges which ensures that people's assessors frequently held office concurrently in a court and in one of the administrative organs of the community. Therefore, despite the constitutional requirement that courts be independent of administrative organs, in fact courts and councils became inextricably intermingled through the sharing of personnel. The same result was also achieved indirectly because the power to appoint judges was controlled by the same Party hierarchy which controlled administrative bodies.

Staffing levels were a problem for the new regime.[123] Put simply, there were insufficient judges.[124] The practice of appointing judges to act either as prosecutors or as judges at the secondary (later provincial) level compounded the problem.[125] For example, in many areas there were not enough judges to staff Secondary Court appeals – technically requiring three judges. This arose because one of the three judges would have made the original decision to allow a prosecution and another would have managed the prosecution, leaving only one judge not directly involved in prosecuting the defendant.

To overcome the shortage, workers became District Court judges, and trusted District Court judges became judges in the Provincial Courts.[126] In addition, a single judge would sit with two alternate assessors, neither of whom could vote.[127] Under Order 13, people's assessors were only consulted by the judges in minor criminal cases, but allowed to vote (two out of a panel of five) in serious criminal cases.[128] They had no vote in civil or commercial cases.[129]

The courts did not guarantee legal representation. According to Order 13, lawyers were able to defend clients in Secondary/Provincial Courts and above.[130] This practice was changed by subsequent legislation and the Vietnamese *Penal Code*,[131] which encouraged defendants to select lay people to represent them. Within the criminal jurisdiction of the normal/civilian courts, defence counsel was not encouraged.[132] Fall reports that 'private defence counsels who have accepted

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123 Dang Quang Phuong, 1996, p. 65 (in Vietnamese).

124 *Ibid*.

125 Order 13, dated 1 January 1946, *On the Organization of the Courts and the Status of Judges in the Democratic Republic of Vietnam*, Article 49.

126 Dang Quang Phuong, 1996, p. 65 (in Vietnamese).

127 Circular No. 1528-2/4, undated. The contents of this circular indicate it was passed after 20 April 1946, but before 1950. Technically the word for assessor is *hoi tham nhan dan.* The translation offered for *phu tham nhan dan* is alternate juror or assessor. One assumes an alternate is nominated because he or she did not sit on the original trial.

128 Order 13, dated 1 January 1946, *On the Organization of the Courts and the Status of Judges in the Democratic Republic of Vietnam*, Articles 27, 31.

129 *Ibid*., Article 27.

130 Order 13, dated 24 January 1946, *On the Organization of Courts*, Article 46.

131 Bernard Fall, 1956, p. 34. Fall cites Article 373 of the Vietnamese *Penal Code* dated 1950, Decree 69/SL dated 18 June 1949 and Decree 144/SL dated 22 December 1949 in support of this proposition.

132 *Ibid*. See also Nguyen Hung Quang and Kerstin Steiner, 2005, pp. 191-211.

a case for a fee have been prosecuted themselves for abuse of confidence'.[133] This shift to favour the citizen as advocate over the lawyer reflects a move away from formalism and a commitment to democratise the courts. It may also reflect a distrust of legally-trained professionals.

Judges and people's assessors appear to have weighted the morality and character of the accused, rather than legal argument. For example, Ngo Van Thanh in a history of the Vietnamese Military Courts describes one defendant 'as a henchman and spy' without referring to the section under which he had been charged or what evidence proved his guilt.[134] In this example and others the work of the courts was summarized in evocative and moral language.[135] It would appear that the courts' work involved determining socially acceptable (revolutionary) behaviour rather than testing the legality of particular acts.

The combined effect of these initiatives, appointing differently qualified judges, people's assessors and dispensing with the need for legal counsel, amount to a reduction of the legal nature of courts. The press greeted these 1950 reforms enthusiastically, noting in an article entitled 'Democratization of the Judicial Machinery' that the courts were being brought closer to the people by the increased powers of the people's assessors and the right of individuals to represent themselves. In other words, the courts were presented as open to the public and not legalistic.[136]

To celebrate five years of independence, Vietnam News published a special edition that included one brief paragraph about legal reform. It commenced by saying that 'Justice now has become people's justice'.[137] It explained that 'more jurymen coming from the people than jurists' and the 'simplification of legal procedure' enabled people to come closer to justice. The article ended by proclaiming that:

> The above are the methods and steps the government has resorted to to defend the interests of the people, to increase economic and moral strength of the people in order to stimulate them in performing their military and resistance obligations towards the Fatherland.[138]

This propagandist piece linked justice and revolution: people's power leads to people's justice. The concept of people's justice is then linked to the war on the basis that if people receive rights they will in turn be encouraged to resist and fight the enemy. There is perhaps no more succinct statement of the role of the courts. By 1950 they were a part of the 'resistance war' against the French.

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133 Bernhard Fall, 1956, p. 34.
134 Ngo Van Thanh, 1996, p. 144 (in Vietnamese).
135 See Bernard Fall, 1956, pp. 30-35.
136 *Vietnam News Service*, 7 July 1950, p. 3.
137 *Vietnam News Service*, 2 September 1950, p. 8.
138 *Ibid*.

Cadres and Legal Training

The training of court personnel also reflected the state's commitment to reducing the legal aspects of courts and their work. In an interview, 'Chi' expressed concern about the capacity of both judges and people's assessors. His comments about training were not confined to the pre-1959 period but attached to all moments in the modern history of Vietnamese dispute resolution.[139] He argued that those who are insufficiently trained to work as judges 'fear the responsibility' and therefore 'avoid it (responsibility) by acting for the Party'.[140] It is 'Chi's' view that greater legal training of all legal officers would reduce this problem.

Others commenting on the training offered before 1959, described it as minimal and erratic.[141] 'Tri' pointed out that during this period the Ministry of Justice was responsible for training and it had to delegate that responsibility to the Inter-Zone Courts. He explained that he had to travel from Inter-Zone Court III to Viet Bac to conduct training and described this as 'very hard'.[142] He also pointed out that due to communication difficulties it was not possible to provide advice to isolated judges.

'Quang', who had no French law degree, recalls how he participated in a three-month judicial training course in Hanoi in the early 1950s. Originally participants in the course had to have the secondary certificate, but over time this requirement was abandoned and workers and farmers became judges providing they had the right moral qualities. According to 'Quang', the teachers were revolutionaries trained in law.

The course completed by 'Quang' comprized lessons in Marxist-Leninist theory about state and law. He explained this as educating judges about 'who and what they worked for' and added that if judges 'did not know about this, it was very dangerous'.[143] Whether it jeopardized one's position or undermined the revolution, or both he did not directly answer. The second aspect of the course was an introduction to the policies of Vietnam, 'including a study of the next step of the revolution'.[144] Finally, the course had special instruction on civil and land policies. 'Quang' gave as an example of the civil policies, the eradication of differences in legal status between men and women. He concluded that all people who became judges were re-educated, either to teach other judges or

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139 *Ibid*. 'Chi' claims that in 1996 only about 30% of judges were graduates in law. This, he said, reflected on their capacity to apply law and understand the basic principles that inhere to an independent legal system, and their ability to judge the legality of state acts.

140 Interview by the author with 'Chi', Hanoi, 5 September 1996.

141 Interview by the author with 'Tri', Hanoi, 20 September 1996.

142 *Ibid*. Viet Bac was an autonomous zone located just south of the DRVN's northern border. Inter-Zone III contained Hanoi and its surrounds. Albert E. Palmerlee, 1968, p. 2.

143 Interview by the author with 'Quang', Hanoi, 5 September 1996.

144 *Ibid*.

to adjudicate.[145] He described the training courses as 'very simple, but the law was also simple'.[146]

'Tri's' more critical assessment of the training may lie in the fact that he had experienced a full undergraduate degree in law to equip him to act as a lawyer while he witnessed the development of training that occurred only when possible and over very short periods of time. Thus, although the students felt improved by their instruction, he as a teacher was conscious of its limitations or at least of the contrast between French and revolutionary legal instruction. A further explanation of the different reactions to the issue of training may lie in the fact that 'Quang' evaluated training by its ability to re-educate, whereas 'Tri' was concerned about training in 'legal issues' or 'law'.

Guiding Lower Courts and Propaganda

Training also relates to the role of superior courts in guiding lower courts. At this time, guidance between courts on how to handle cases was largely informal. There was no system of precedent. There was also no publication that systematically disseminated how other courts were resolving cases.[147] As explained in the previous chapter, isolation made it difficult for judges to converse with each other beyond their immediate administrative zone. As a result it was the regional War Administration Committees that most influenced the work of the courts and provided most guidance on how judges ought to handle particular cases.

All those interviewed mentioned the role of the courts in the dissemination of propaganda (*tuyen truyen*).[148] '*Tuyen truyen'* is usually translated as 'propaganda' and can be grouped with the idea of propagating democratic principles (*tuyen truyen nhung nguyan tac dan chu*).[149] In revolutionary Vietnam propaganda was a responsibility shared by all committed reformers to spread the news of revolution and how it would improve the lot of the masses: to talk of new ideas and their connection to a better socialist society. The term 'propaganda' in the Vietnamese context is not negative in any sense.

In the period before 1959, judges were expected to assist by teaching the masses about revolutionary policies, in turn reflecting revolutionary ethics. One example pointed out by 'Tri' involved a basic contract dispute. If the enforcement of a contract unfairly disadvantaged the poorer party to the contract, it was not to be enforced.[150] This basis of decision-making had to be publicized.

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145 The author has not been shown statistics that indicate the extent of training.
146 Interview by the author with 'Quang', Hanoi, 5 September 1996.
147 Compare this with the extensive work undertaken by the Supreme People's Court in later years to publicise the work of the court, outlined in Chapter 6, pp. 126-128.
148 Greg Lockhart, 1989, pp. 93-94. Lockhart includes a discussion of the term 'armed propaganda' concluding that in the 1940s the term *tuyen truyen* came close to 'political indoctrination'.
149 Bui Phung (ed.), 1995, p. 1767.
150 Interview by the author with 'Tri', Hanoi, 20 September 1996.

Hence cases were heard in open court and stories told about how courts decided their cases. Perhaps the most obvious example of the courts' propagandist work was in the Special People's Court (land courts).

Yet despite this apparent commitment to raising the community's awareness of courts, the lay people interviewed who admitted to knowledge of courts for this period did not cite court-based education as the source of their information. One claimed to have knowledge of the courts via the press, citing *Nhan dan* (the official *People's Daily*), *Ha Noi Moi* (*New Hanoi*) and *Cong an Nhan dan* (*Police Newspaper*) as the source of his information. Another claimed familiarity as a result of experience, but was not prepared to enlarge on that for the period 1945 to 1959. The third interviewee claimed to be familiar with the courts because they were introduced to those still at school at the age of 16 (in his case in the year 1954) in the high school curriculum.

Integral to successful propaganda is establishing respect for the spokesperson. Therefore judges were protected and the community was required to respect them. Early in the life of the new administration a circular was passed which stipulated that, 'To maintain an imposing image of the judiciary, headquarters of courts must be in good condition'.[151] This circular went on to require that judges and courts be accommodated in the old French courts, residences of provincial governors and places from which the old colonial masters had wielded their authority. It is unclear whether this was to ensure that the courts were in august buildings or merely to ensure that they were adequately housed.

Judges were also protected. They could not be arrested or imprisoned without the consent of the Minister of Justice. Administrative Committees were particularly asked not to interfere with the work of judges and to respect their freedom.[152] On the one hand this formally established judges as independent of the local Administrative Committees, and ought to have ensured that courts had considerable power at the local level. However, the courts were partly tied to the Administrative Committees as a result of relying on them for basic items such as pencils, stationary and incidental expenditure.[153] Moreover, as noted, committees were given judicial powers in areas where courts had yet to be established. Frequently committees, in particular the War Administration Committee, saw themselves as the primary source of local power, and developed a practice of advising courts, where they existed, how they should decide cases.[154] A tension existed between the requirement of judicial independence and the realities of local government and the connections between courts and administrative organs already discussed.

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151 Circular No. 1000 NV/DL, dated 20 March 1946.
152 *Ibid*.
153 *Ibid*.
154 See Chapter 2, pp. 53-54.

Community and Courts

Some of those interviewed perceived this vulnerability to interference or direction as corruption. For example, 'Chi' saw corruption as an intolerable problem within the Vietnamese court system.[155] As an advocate he saw the courts from his clients' perspective. As a French-trained lawyer he was aware of other legal systems and the theory of how they work. This comparative perspective seems to have produced a harsh critic in 'Chi', although he was committed to the reform of the courts. He believed that better education and the eradication of corruption would have gone a long way to empowering judges to act independently, which in his assessment would have radically improved the Vietnamese court system. The other side of this reform proposal was that the population be educated about law. According to 'Chi' 'most of the population was "blind" to law'.[156]

'Chi's' comments effectively foreshadowed a challenge faced when trying to interview lay people about dispute resolution in Vietnam, especially before 1959. Of the ten lay people interviewed about the court system in 1997, only three claimed any knowledge of courts before 1960. These three interviewees were adamant they would not have used the court system at any time. All three argued it was too costly, referring to the exorbitant bribes demanded by judges as the main expense. Courts were also accused of being too slow to be effective. One of the three also accused mediators of being 'just old men with political thoughts' and of no use in a dispute. Although the sample for this period is tiny and in no way representative, it suggests that the courts were not widely respected and the political nature of the courts was seen as undermining their usefulness to the public.[157]

IV. Conclusion

An examination of this period of Vietnamese court development (1946 to 1959) unearths a conscious and deliberate attempt by the new government to replace the old French court system. The introduction of judges not requiring law degrees, the appointment of people's assessors, the abandonment of formal court dress and the reliance on very basic newly introduced laws all suggest a move away from legal formalism and the embracing of socialist-inspired popular justice. The emphasis on compliance with state policy in relation to land collectivization and the requirement of loyalty also evince a new state direction.

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155 Interview by the author with 'Chi', Hanoi, 5 September 1996. 'Chi' did comment, however, that corruption had increased since the introduction of the *doi-moi* or renovation policies of Vietnam in 1986.

156 *Ibid.*

157 Contemporary research into the Vietnamese courts has looked at the business community's perception of courts and found that in almost all cases businesses would not rely on courts. See Per Bergling, 1999, pp. 122-130; and John McMillan and Christopher Woodruff, 1999, pp. 5-6, 20. See also Chapter 12.

It is possible to discern two influences on the courts at this time: post-colonial institutional development and revolutionary morality. The former is expressed in changes of a nationalist rather than a political nature, while the latter appears in a desire for the courts to assist with the revolution to the benefit of the masses. This required a politicization of the courts. These two influences reflect the wider debates about how best to defeat Vietnam's imperialist enemies – France, Japan and, before 1949, China and then build a new socialist state.

The following lists the key characteristics of the DRVN system of dispute revolution between 1946 and 1959:

1. Committees and courts working for the main political party – the Vietnam Workers' Party. This is indicated by:
   - the appointment of judges and people's assessors by the state via its committees or senior public figures such as the Minister of Justice and the President;
   - the intimate connection between courts and committee structures with committees accustomed to influencing courts where courts existed and able to assume the responsibility of courts where they did not; and
   - the responsibilities courts had to punish traitors and make decisions not adverse to the peasants and workers, both indicating that decisions were to be made in line with government policies.

2. Appearance of popular justice, evidenced by:
   - the increasing use of people's assessors and non-legal adjudicators and
   - the determination of cases in a non-legalistic manner reflecting the application of increasingly simple principles.
   - judges trained by short-term courses with a strong theoretical Marxist-Leninist emphasis.
   - poor communication making central coordination of reforms and changes to policies difficult.
   - evidence of ad hoc decision-making by revolutionaries within the Special People's Courts and more generally.

In conclusion, committees and courts were entrusted to implement a new understanding of law: law premised on advantaging the masses characterized as previously oppressed, that is, the peasants and workers. To this end decision-makers (judges, assessors, committee members) were trained to understand that revolution involves first gaining freedom, followed by a transition to socialism. All conciliators and adjudicators were required to punish traitors and assist the working classes according to anti-feudalistic principles to achieve this 'freedom'.

This system was introduced during an intense and disruptive war. Institutions were regionalized and communication was very difficult. Courts therefore operated as one of the local organs, maintaining complex relationships with other local institutions – most often in a subordinate relationship to the Zone and Inter-Zone War Administration Committees. Courts worked for the new government to institute its policies and priorities. In the next chapter the emergence of an integrated court system and the impact this had on the authority of regional committees is taken up.

Chapter 4
Dispute Resolution between 1959-1976: Changing Relations between Committees and Courts

When they grow up they will have a communist constitution.

Ho Chi Minh[1]

In December 1959 the Democratic Republic of Vietnam introduced its second Constitution, which remained in force until December 1980.[2] A year later in 1960, the Vietnam Workers' Party's Third Congress voted to resume the war against the American-led allies in the south. The leadership sought the unification of the country under socialism and enacted the *Statute of the Vietnam Workers' Party* to regulate Party leadership at all levels.

Reflecting the structure adopted in chapters two and three, in this chapter the relationship between state and law over the period 1959-1976 is discussed. Subsequently the 1959 Constitution and constitutional provisions relevant to courts are explored. Finally, the state's initiatives to curb the authority of the regional War Administration Committees are introduced. The reforms to the court system and the role of courts will be taken up in the next chapter.

I. Relations between State and Law: Dynamic or Constant?

There is a legend, in our country as well as in China, about the magic "Brocade Bag". When facing great difficulties, one opens it and finds a way out. For

1 Ho Chi Minh, Viet Nam News Agency, Radio Broadcast in 1959, Hanoi, 31 December, 1435 GMT, Reprinted in Bernard Fall, 1960(1), p. 168. Fall notes that Ho Chi Minh is said to have made this statement while pointing to a group of children who approached him at the conclusion of his speech presenting the *1959 DRVN Constitution* to the National Assembly.

2 The changes to both the Constitution and dispute resolution-related legislation introduced in 1959 reflected trends evolving before that date and foreshadowed initiatives. The process of drafting new constitutions in Vietnam was involved. Beginning in 1947 a Committee for the Amendment of the Constitution was established and it had to consult widely before putting up each of the revised constitutions for debate. Robert F. Turner, 1975, pp. 194-201.

> us Vietnamese revolutionaries and people, Leninism is not only a miraculous "Brocade Bag", a compass, but also a radiant sun, illuminating our path to final victory, to socialism and communism.
>
> Ho Chi Minh[3]

With the defeat of the French in 1954, state issues associated with the central coordination of policy and law emerged in a more concrete form. Peace, at least in the North, provided the opportunity to establish a national and centrally coordinated administration in the DRVN. At the fourteenth conference of the Party Central Committee, held in 1958, the following were advocated:

> the consolidation of the People's Democratic state and the strengthening of the Party leadership regarding various echelons of the administration, from central to grassroots levels.[4]

As a result, the role of law and the state plan were naturally under the Party's microscope.

The challenge for the new administration was to devise a way by which the government's policies could be implemented. Should it continue disseminating policies via Party cells and mass organizations? Should it turn to a system of courts to enforce laws relevant to the socialist transformation? Or could the state continue to rely on the zone-based administration set up during the war?

Several challenges existed to central coordination whatever its form. The problem of poorly trained cadres (which included legal officers, whether judges or local council members) resulting in a lack of understanding of laws and policies; each contributed to undermine the central administration. Further, the implementation of policy was frequently challenged at the local level by the strong regional administrations that had flourished before the defeat of the French.

It is simplistic to see the tension between the centre and local communities as one of central bureaucrats, unanimous about the direction of policies, and errant and erratic local party cadres. As one analyst points out, the tension between policy development and its implementation is eternal within the Vietnamese Workers' Party and, at least in some senses, it is suggested that the Vietnamese do not expect to see all policy fully realized or implemented:

> Policy non-implementability is a necessary part of this notion of the Socialist Revolution. This does not mean that *some* elements of policy may not be implemented, in some sense, merely that the entire Line cannot be. No ideal can be put perfectly into practice.[5]

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3 Ho Chi Minh, 'The Path Which Led Me To Leninism' April, 1960, 1994, p. 252.
4 Dang Quang Phuong, 1996, p. 66 (in Vietnamese).
5 Adam Fforde, 1986, p. 63.

Formalization of the Party Machine

Reflecting for a moment on the changes in policy direction in the DRVN since 1945, the next President of the Vietnam Workers' Party, Truong Chinh, in 1951 described People's democracy as 'a transitional step towards socialism' explaining that initially the revolution was limited to expressing an anti-colonial sentiment.[6] In such a revolution 'bourgeois democratic' sentiment was allowed. This was later replaced by a struggle led by the working class – a struggle they took up under the leadership of the Party. The first phase of the workers' revolutionary struggle was labelled the 'people's national democratic revolution'.[7] According to Truong Chinh, the only logical conclusion, if the working class and the Party led the people's revolution, was that the initial people's democratic revolution would become a socialist revolution.[8]

This was confirmed at the Third National Party Congress held just under a year later in September 1960, when Ho Chi Minh stated that:

> The Second Party Congress was the Congress of Resistance. This present Party Congress is the Congress of Socialist Construction in the North and of the struggle for peaceful national reunification.[9]

At the Third Party Congress the delegates approved a document entitled the *Statute of the Vietnam Workers' Party* (the *Vietnam Workers' Party Statute*).[10] This was the first codification of the duties and responsibilities of party cadres and of the revolution.[11] Although 'passed' as a public and legal document, this 'law' was actually adopted by a non-elected private body (the Vietnam Workers' Party) that the Constitution does not mention as having legislative authority. However, the preamble to the 1959 Constitution made it unequivocally clear that the Party had the leading role in policy development and national leadership. Regardless of its legal status, this statute should be regarded as a pivotal document setting out the organization and objectives of the Party and its members.[12]

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6 Truong Chinh, *On Vietnamese Revolution, Report of the Second National Congress of the Party, February*, in 1951, 1994, p. 294.

7 *Ibid*., p. 345.

8 *Ibid*. Compare this with the fact that the intelligentsia (many of whom allegedly had bourgeois roots), dominated the Party machinery. In 1953 Fall reports, basing his comments on a Vietnamese publication, that of the 1,855 senior Party positions, 1,365 were held by 'intellectuals or bourgeois as against 351 positions held by members of rural origin and 139 held by workers'. Bernard Fall, 1962, p. 64.

9 Ho Chi Minh, 'Speech Opening the Third National Congress of the Vietnam Workers' Party', 5 September 1960, Bernard B. Fall (ed.), 1960, p. 348.

10 *Statute of the Vietnam Workers' Party*, 1960.

11 After the Party Congress of 1960 there was a spate of press reporting on the duties and responsibilities of Party members. See for example: Nguyen Chuong, 1960, pp. 10-16, JPRS; Song Le, 1960, *Hoc Tap*, p. 64, JPRS 6390; Bui Cong Trung, *Nhan dan*, 2408-2411, 1960, dated October 22, 23, 24, 25 respectively, JPRS 7302.

12 To become a member of the Vietnam Workers' Party a candidate had to be put forward by either two full Party members of one year's standing or by one committee member of the Workers' Youth Group in their basic unit (for example, school or

The significance of the *Vietnam Workers' Party Statute* rests on the fact that it was Party members who held power in local and central government, agencies and ministries.[13] For example, in 1960 only two of the 11 Politburo members did not also hold government positions.[14] In 1972, 12 of the 20 ministers were members of the Central Committee of the Vietnam Workers' Party. Six of these ministers were full members while the other six were alternate members:

> Between them the 17 men who make up the Politburo and party secretariat hold such posts as Prime Minister and five of seven Vice Prime Ministerships . . . and the three top posts of the National Assembly.[15]

Party members formed the pool of people from which most leaders were drawn and therefore the role of the state and its use of law in administering the DRVN were tied to the Party's policies.

In its lengthy preamble the *Vietnam Workers' Party Statute* identified that the Party was organized on the basis of democratic centralism.[16] The objectives of this principle were explained as:

> to develop and raise the revolutionary enthusiasm and creative spirit of the majority of Party members and Party organizations, and on the other hand, to assure uniformity of views and actions inside the Party and maintain Party discipline.[17]

Article 10 of the same statute defined democratic centralism as:

> Individual Party members must obey Party organizations. The minority must obey the majority. Lower organizations must obey higher organizations. Party organizations throughout the country must obey the National Delegates' Congress and the Central Executive Committee.[18]

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factory) and one full Party member. If accepted a candidate was on probation for 9 months if s/he was a worker. If the candidate was not a worker s/he was on probation for a further three months. While on probation the candidates were 'alternate' members, meaning they could participate in discussion, but could not vote on any issues. The Local Party Unit (*chi bo*) decided whether to confirm an alternate candidate as a full member and that decision could be reviewed by a Party committee of the next (higher) level in the hierarchy. See *Vietnam Workers' Party Statute*, 1960, Articles 4-6.

13 See Documents and Research Notes, 1972, pp. 11, 26. Various commentators have also noted the strong continuity of leaderships in the DRVN. See for example Jean Lacouture, 1962, p. 17.

14 *Ibid*.

15 See Documents and Research Notes, 1972, pp. 11, 26.

16 This organizing principle is also reflected in the 1959 Constitution and its inclusion in Article 4 was specifically referred to by Ho Chi Minh in his 'Report on the Draft Amended Constitution' to the National Assembly in 1959. See Ho Chi Minh, 1962, p. 416. Ginsbergs points out that the DRVN was the first communist state to include democratic centralism in its constitution. See George Ginsbergs, 1963 (Part 2), p. 209.

17 *Statute of the Vietnam Workers' Party*, 1960.

18 *Ibid*., Article 10 (f).

If it is accepted that during this period Party members were pre-eminent in senior positions (in courts, in the procuracy and in the National Assembly to take just three examples), the issue that emerges is what did Party members strive to implement? Was it the Party's policy (*chinh sach*) or law (*luat*) or both? What constituted Party policy or law and what relationships existed between these two? These issues did not emerge for the first time in 1959. But with the drive to administer the new socialist state centrally they became more pressing.

Law and Policy[19]

Policy was at least as significant as *luat* (law).[20] For example, law could be used interchangeably with policy.[21] The importance of policy (or the state plan as it was also referred to) cannot be underestimated. As Adam Fforde, an economist who writes extensively about Vietnam and, in particular, its economy, noted:

> the underlying notion of law is not so much that of an immutable order to which all should bow, but rather that of an important element of the way in which the Party Line is implemented.[22]

Policy was the leading doctrine which Party members were expected to follow. Where a conflict between policy and law presented, judges applied policy. As one eminent Vietnamese jurist explains:

> At present the people's courts only apply the new laws of the people's power. In the event of there being no legislative text they follow the principle of analogy or simply the general political line of the revolution.[23]

Nguyen Nhu Phat, a contemporary legal theorist with the Institute of State and Law, expresses a similar view of law in this period when he writes:

> In the old regime, planning was the main instrument used by the state to administer the national economy. That is to say that planning but not law was the main and most important factor. Planning would always prevail over law. Any conflict between the law and the planning would be resolved in 'favour' of the planning. Generally speaking the law was only a subsidiary instrument while the policy and resolutions passed by the party, administrative commands and planning documents were the main instruments in governing economic activities.[24]

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19 For an abridged discussion of these issues see Penelope (Pip) Nicholson, 2001, pp. 38-41.
20 *Statute of the Vietnam Workers' Party*, 1960, Article 10 (f).
21 Le Duan, 'Some Problems of Cadres and Organization in Socialist Revolution' in 1973, 1994, p. 452. Here law is used to refer to economic principles ('objective economic laws').
22 Adam Fforde, 1986, p. 62.
23 Le Kim Que, 1974, p. 99.
24 Nguyen Nhu Phat, 1997, p. 398.

There was not one view of law during this period. The outspokenness of the *Nhan Van Giai Pham* period did not resurface.[25] The Supreme People's Court's publications explicitly condemned it.[26] Instead, this period witnessed the development of a legal studies group (*to luat hoc*) debating law.[27] The legal studies group originally convened under the auspices of the Social Sciences Division of the State Sciences Committee, later forming the genesis of the Institute of State and Law.[28] This group, comprizing scholars and non-communist intellectuals, included 'leading voices for legal reform'.[29]

Policy that was not yet law also provoked discussion, albeit rarely. In 1968, a Vietnamese lawyer wrote of the distinction between law and policy:

> The policies of the Party must go through a process of explanation and elucidation so that the people will understand them clearly, support them and by their self-awareness carry them out. These policies must also pass the National Assembly, the government Council and other government organs before being enacted into law and before being backed by the authority of the government.[30]

The argument that policy be passed as law before being enforceable was not often publicly articulated.[31] It was more usual for the terms 'policy' and 'law' to be used ambiguously or synonymously.[32] For example, during this period the Party's leading role was invoked and publicized through its active self-promotion and by undertaking extensive and well-reported training of Party members – a strengthening of the Party as Truong Chinh described it.[33] Truong Chinh reports that, 'In Party building we stress both ideological and organizational aspects'.[34] In effect, the Party sought to improve its members through training. In 1968 it was explained that all Party cadres were to be educated in the 'four good' principles, including that cadres were to be:

> Good at helping the people in obeying the law and in the implementation of Party and state policies.[35]

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25 See discussion in Chapter 2, p. 42.
26 Editors, *Justice Journal*, Vol. 1, 1964, pp. 1-4 (in Vietnamese).
27 Mark Sidel, 1997(2), p. 14.
28 *Ibid*.
29 *Ibid*., p. 16. In particular, Sidel cites Vu Dinh Hoe (previously Minister for Justice, a non-communist lawyer) and Tran Cong Truong as leading figures campaigning for legal reform.
30 Truong Tan Phat, *Nhan dan*, 26 March 1964, p. 2, JPRS 24571.
31 The tone of the article is legalistic rather than critical. This distinguishes it from the articles published in *Nhan Van* (*Humanity*) discussed in Chapter 2, p. 42.
32 Mark Sidel, 1997(2), pp. 14-22. Sidel describes the activities of the Legal Studies Group (later formalized as a department at the Institute of State and Law) in the 1960s and early 1970s, pointing out that legal scholars debated the role of law throughout the period.
33 Truong Chinh, 'Forward Along The Path Chartered By Karl Marx' in 1968, Speech at a cadres' conference to mark the 150th birthday of Karl Marx, 1994, pp. 529-640.
34 *Ibid*., p. 605.
35 *Ibid*., p. 606. The other three tenets were: good at guiding production work and

This second tenet explains that law was to be obeyed. Concurrently this phrase exhorts Party members to give effect to policy noting that to be legitimate the policy must be generated by the Party or through its machinery, the state's bureaucracy.

Truong Chinh, in the extract above, does not explain what is to happen if law and policy are contradictory. Five years later, Le Duan, then general Secretary of the Communist Party explains that:

> Formerly the Party line and policies penetrated the masses and were implemented through propaganda and agitation work with regard to each person or each group. Today besides these methods which we must apply even more effectively, broadly and adequately, we must also use large-scale organized measures [...]. This can be done only through state laws which reflect the interests and the will of the working people.[36]

This is a call to formalize Party policies as law. Similar statements are increasingly frequent in Vietnam as functionaries call for Party policy to be formalized, documented and then promoted as law. Reflecting on Vietnam's cotemporary legal history a commentator notes 'it seems that for a while we emphasized building a society by means of the "rule of morality" and thus somehow neglected the law'.[37]

Despite a clearer articulation of how the emerging socialist state would be administered (democratic centralism with the Party at the epicentre of politics), the state's policy priorities were variously implemented via laws or policies or both. In effect, the debate about the role of law and policy continued, but law was not necessary to state-sanctioned decision making.[38] Yet over the years 1959 to 1976 a subtle change emerged. It is possible to discern a call for reform that would see law playing a greater role.[39] In effect, socialist conceptions of law were introduced and promoted and, as emerges in the next chapter, the courts had a particular role to play in the construction of socialist legality.

In summary, in this period a clearer commitment to socialism and socialist legality is evident, which has consequences for the role of law.[40] The press and the leadership criticized capitalist legal systems for working only to the advantage of the bourgeois classes.[41] In Vietnam a socialist legal system was endorsed. In

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fighting; good at caring for the masses and integration with them; and good at strengthening the work of the Party.

36 Le Duan, *Some Problems of Cadres and Organization in Socialist Revolution* in 1973, 1994, p. 452.

37 Nguyen Nham, 23 June 1997, p. 3, FBIS-EAS-97-203. For a discussion of these debates extending in to the contemporary period see: John Gillespie, 1999, pp. 124-127 and John Gillespie, 2003, pp. 148-155.

38 Mark Sidel, 1997(2), pp. 14-22.

39 This debate is ongoing in Vietnam. See for example, John Gillespie and Pip Nicholson 2005, (eds).

40 Chapter 6, pp. 115-117 teases out the debates surrounding socialist legality within the court system.

41 For example, Unsigned Article, *Nhan dan*, 18 May, 1961, p. 4, FBIS. See also

theory this would require all party cadres to act according to laws (state-endorsed Party policy). In reality much of the work of the cadres involved the dissemination and application of policy and law, with policy taking precedence. In addition, a dynamic relationship between central policy development and its application at the local level existed. This relationship and its operation in relation to dispute resolution will be explored here and in the next chapter.

II. The Courts and the 1959 Constitution

> The main task of the police, prosecutors' offices and the courts is to repress counter-revolutionaries – enemies of the people and the socialist regime.
>
> Dang Quang Phuong, Judge, Supreme People's Court[42]

Constitutional Change

All the people interviewed about the Vietnamese courts agreed that in 1960 a formal structure was adopted and a system of courts introduced. From the general agreement about the changes introduced by the 1960 *Law on the Organization of People's Courts*, the various interviewees' recollections diverged on the details of that change. In this section the constitutional changes and the package of laws that introduced a new integrated court system over the period 1959-1961 are considered. After these three years there was little significant legislative activity until 1976, although policies affecting the courts varied over time.

In 1959 Ho Chi Minh commented on the 1946 Constitution in the following terms:

> It has completed its mission. It is no longer compatible with the new situation and the present-day revolutionary tasks. That is why we must amend the Constitution.[43]

The 1959 Constitution stated that the transition to socialism in Vietnam was already under way.[44] It also 'guaranteed the material conditions' necessary for the exercise of sovereignty by the people:[45]

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comments made by Ho Chi Minh in 'The Martyrdom of the Negro, American Lynch-Justice' *International Press Correspondence* (Moscow), Vol. 4, No. 60, 2 October 1924, p. 772, cited in Robert F. Turner, 1975, p. 137.

42 Dang Quang Phuong, 1996, p. 66 (in Vietnamese).

43 Ho Chi Minh, 'Report on the Draft Amended Constitution' in 1959, 1962, p. 407.

44 Ho Chi Minh, 'Report on the Draft Amended Constitution' in 1959, 1994, pp. 209-230. The National Assembly adopted the Constitution after circulation and consequent amendment by mass organizations and the Party and then the public on 31 December 1959. It was promulgated on 1 January 1960.

45 Do Xuan Sang, 1974, p. 42.

> The Constitution of 1959, in spirit and in normative content, is the Constitution of the first stage in the period of transition to socialism in North Vietnam, while at the same time it expresses the determination of the Democratic Republic as a national entity to fight for the reunification of the homeland.[46]

The Constitution's preamble connected the victory in the North with the leadership of the Vietnam Workers' Party, a relationship left unstated in the 1946 preamble.[47] This positioned the Vietnam Workers' Party as the only strong nationalist and effective force to lead Vietnam.[48] Details of the success at Dien Bien Phu in 1954 were included and the ongoing struggle in the south with 'the rule of imperialists and feudalists'[49] was articulated. The preamble positions the success of the Vietnamese people of the North within the 'common success of the liberation movement of the oppressed peoples, of the world front of peace and the socialist camp'.[50] In other words the preamble places Vietnam's struggle as a part of the international socialist movement. It also speaks of 'democratic freedoms' and 'democratic revolutions', but it does so within an overt socialist agenda. These terms are now explicitly used within a revolutionary discourse that proclaims socialism as its objective. Vietnam was in transition to socialism: 'The Democratic Republic of Vietnam is advancing step by step from people's democracy to socialism'.[51]

The Constitution of 1959 had only one more article in it concerning courts than the Constitution of 1946. It also included three new articles dealing with the procuracy that directly affected courts. However, all the articles of the earlier Constitution were reorganized, some to include additional provisions. In the 1959 Constitution the first of the eight articles dealing with judicial bodies outlined the structure of the court system. Unlike its predecessor, which referred only to supreme courts, courts of appeal and courts of first and second instance, the 1959 Constitution identified the names of the courts forming a part of the court system. They were the Supreme People's Court, the Local People's Courts[52] and

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46 Pham Van Bach and Vu Dinh Hoe, 1984, p. 110.

47 See Chapter 2, pp. 45–49 and Appendix 2. In 1945 the new leadership did not explicitly declare a communist agenda.

48 By 1960 Party membership was estimated at half a million people nationally. This compared with 20,000 members in 1946 and 168,000 in 1948. See Bernard Fall, 1962, p. 64. Porter cites a different source and suggests the Party only had 400,000 members in 1960, growing to 1.5 million people in 1976. Porter reports that in 1960 Party membership nationally was approximately 3% with the membership heavily concentrated in the North. It is suggested that in 1976 6.3% of the north's population were Party members while only 0.3% of southerners were in the Party. See G. Porter, 1993, pp. 69-70. In 1965 the membership of the Party was estimated at 800,000 or 4.4% of the population of the DRVN. See Harvey Smith et al., 1967, p. 181.

49 *Constitution of the Democratic Republic of Vietnam*, 1959, p. 39.

50 *Ibid*.

51 *Ibid*., Article 9.

52 The term 'Local People's Courts' is a generic one referring to all courts that are neither military or the Supreme People's Court. It includes provincial and district courts.

4. The Constitutional Changes Relevant to the Court System

1946 DRVN Constitution, Chapter 6	**1959 DRVN Constitution, Chapter 8**
Article 63 – Judicial bodies defined	*Article 97 – Judicial bodies defined*
Article 64 – Judges appointed by the government	*Article 98 – Elected judges*
Article 65 – Role of people's assessors limited to minor criminal cases and some general criminal cases	*Article 99 – Assessors with the same power as judges*
Article 66 – Ethnic minorities to use own language in court	Article 102 – Ethnic minorities to use own language in court
Article 67 – Public trials Defence either self-run or undertaken by barrister	Article 101 – Public trials. *No details about who can defend an accused*
Article 68 – Acts of torturing, violence and persecution prohibited	**
Article 69 – Judges shall obey only the law – no interference from other agencies	Article 100 – Judges shall obey only the law - no interference from other agencies
**	Article 103 – Supreme People's Court highest judicial body and it has a supervisory function over lower courts
**	Article 104 – Supreme People's Court responsible to National Assembly
**	Articles 105 – 108 Introduction of the Supreme Organ of Control to ensure the observance of all laws by all people. It is accountable to the National Assembly.

Key

** No equivalent provision in Constitution

Italics Different details within later Constitution in a substantive area addressed by both Constitutions

the Military Courts.[53] In addition, the National Assembly was authorized to set up Special Courts in certain (undefined) cases.

The new Constitution provided for the election of local judges by their local People's Council and Supreme People's Court judges by the National Assembly.[54] This contrasted with the 1946 Constitution that gave the government the power to appoint judges. In the later Constitution, people's assessors were given the

53 *Constitution of the Democratic Republic of Vietnam*, 1959, Preamble, Article 97.
54 *Ibid*., Article 98.

same authority as judges, whereas the Constitution of 1946 gave them power to adjudicate only minor matters, except in criminal matters where their powers were equal to those of judges. Although these provisions are new to the DRVN Constitution they reflect practices that emerged during the previous period.[55]

It is after these first three articles that the order of the provisions changes. The fourth Article of the 1959 Constitution states that 'In administering justice, the courts are independent, and subject only to law'. This provision existed in the 1946 Constitution, but came last in the section relating to judicial bodies. Moving the article forward echoes the reforms undertaken by the Party to restrain the arbitrary decision-making of the Special People's Courts.[56] It indicates the commitment of the government to have courts bound by its authority. To what extent this was actually implemented will be taken up in later sections of this chapter.

As with the Constitution of 1946, defendants were entitled to a defence and to have matters heard in public.[57] Again, ethnic minorities were allowed to use their own languages.

The final two articles of the Constitution of 1959 were not present in the earlier Constitution. Article 103 established the Supreme People's Court as 'the highest judicial organ of the Democratic Republic of Vietnam' and empowered it to supervise the work of inferior courts. The Appeal Court, at least in theory, previously carried out this work.[58] Article 104 required the Supreme People's Court to report to the National Assembly or, when it was not in session, to its Standing Committee. Local People's Courts were to report to Local People's Councils at the appropriate level, while under the guidance of the Supreme People's Court. Democratic centralism resonates through this organizational structure.

As a result of these two new articles there was a major change in both the hierarchy of the courts and their accountability. The old Appeals Courts of the 1950s were replaced by the Supreme People's Court, which was positioned at the apex of the DRVN court hierarchy. Further, the local courts were to be supervised by the Supreme People's Court, a role previously held by the Ministry of Justice, which was formally abolished in 1960.[59] As will become clear in the next chapter, a tension developed as a consequence of the supervising role of the Supreme People's Court and the responsibility for local courts resting with the Local People's Councils.

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55 See Chapter 3, pp. 76–77.

56 See Chapter 3, pp. 67-70, where it was noted that Vietnamese land reform has a bloody history, which the Party itself criticized in the mid 1950s.

57 *Constitution of the Democratic Republic of Vietnam*, 1959, Article 101. In the 1959 Constitution the right of the accused is to a 'defence' while in the earlier Constitution the right was 'to defend himself or to hire a barrister'. *Constitution of the Democratic Republic of Vietnam*, 1946, Article 67.

58 See Chapter 3, pp. 64-66.

59 See Chapter 5. pp. 108-109.

The Procuracy

The 1959 Constitution introduced a centralized procuracy (*kiem sat*) to the DRVN. A form of the procuracy had existed during the war years, having been established in 1946, but its role had been limited to scrutiny and application of correct criminal procedure,[60] while the newly introduced procuracy was also given responsibility for prosecutions. All too frequently in the past procuracies had not been established within the various regions of Vietnam, and therefore, as we saw in the last chapter, judges worked either as judges or as prosecutors.[61] The responsibilities for the new procuracy were later set out in 1960 legislation *On the Organization of the Procuracy*.[62]

In the 1959 Constitution the procuracy was given very wide-ranging powers. It was to 'control the observance of law by all departments of the Council of Ministers, all local organs of state, persons working in organs of state and all citizens'.[63] Again the institution was organized according to principles of democratic centralism, with each level accountable to the next highest level, and the highest level accountable to the National Assembly.[64] As with the courts, the Procurator-General had a term of five years. Instead of regional committees monitoring the implementation of policies, as in the earlier period, the government introduced an institution it hoped would control the observance of laws.

The procuracy also supervised the application of the law by the People's Courts.[65] The procuracy was to supervise the respect of the law 'in the judgments and decisions of people's courts and in the execution of these judgments and decisions'.[66] This power was exercised via the authority of the procuracy to seek review of decisions for perceived error (*giam doc tham*) and to attend meetings of the Judges' Board (also know as the Judges' Council or *hoi dong tham phan*). The procuracy was also empowered to intervene in civil proceedings if it could discern that 'major interests of the state and people' were at stake.[67] Within the courts the procuracy therefore played a double role – working as a prosecutor while also reviewing the work/decisions of the courts. Despite what

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60 Hiroshi Oda, 1987, pp. 1350-1351.

61 Interviews by the author with 'Tri', Hanoi, 20 September 1996 and 'Quang', Hanoi, 5 September 1996; G. Ginsbergs, 1979(1), p. 189. See Chapter 3, p. 77.

62 The following articles discuss the role and function of the procuracy: Le Dich Hieu, 1961, pp. 57-58, JPRS 4914; Phan Huu Chi, 1974, pp. 82-91; and Hiroshi Oda, 1987, p. 1351. Phan Huu Chi explains that the Office of the Procuracy was established by the *Law On the Organization of the Procuracy*, dated 22 July 1960. Oda suggests that in fact a Decree *On the Organization and Tasks of the Procurator General's Office* was introduced in 1959: see Hiroshi Oda, 1987, p. 1351. Le Dich Hieu disputes this, referring to a 1958 resolution on the establishment of the procuracy later formalized and expanded in the 1959 Constitution.

63 *Constitution of the Democratic Republic of Vietnam*, 1959, Article 105.

64 Le Dich Hieu, 1961, pp. 57-58, JPRS 4914.

65 *Ibid*.

66 Phan Huu Chi, 1974, p. 85 citing Article 3 of the Organic Law *On the Organization of the Procuracy* dated 22 July 1960.

67 *Ibid*.

appears to be wide-ranging power, the procuracy could not 'suspend the activity of managerial organs nor directly annul illegal regulations'.[68] It could instead notify them of their alleged breach and if activities could be attributed to the acts of a single person consider instituting criminal proceedings.

Although the law concerning the procuracy and the courts indicates a neat divide of responsibilities, this was not the case. In 1963 a conference of judges was held to discuss a draft bill concerned with the relationship between the courts and the procuracy.[69] Three main issues were canvassed: whether a court can initiate criminal proceedings; the role of the court in investigation of offences; and at what stage the decision of the courts should be made – for instance should it be made at the pre-trial conference or at the trial?

In order better to understand the complex interconnections between the courts and the procuracy it is useful to look at the 1963 conference debates in some detail. The conference decided that courts could determine minor criminal cases brought to their attention by the parties. If an investigation was needed (because the case was not minor), the matter must be referred to the procuracy. The result was that a broad discretion remained with the courts to determine what matters were minor. The conference also agreed that judges must familiarize themselves with cases before trial. Although they were not to contact participants, they were to speak with the procuracy and form a preliminary view of the evidence stopping short of deciding the case at the pre-trial conference with the procuracy. This conference highlighted that, three years after the court and prosecuting systems were substantially reformed, fundamental practices had to be debated, and that difficulties had been experienced in developing uniform practice. In 1968 the Supreme People's Court was still writing that the courts, procuracy and the Interior Ministry should work together.[70]

One commentator points out that the procuracy's centralized supervision function was used extensively in the early sixties. With the escalation of the war, however, increasingly its focus turned to the prosecution of alleged criminal and treasonous behaviour.[71] As the northern part of the country once again found itself fragmented and with regions increasingly isolated, the Party Central Committee issued an instruction 'requiring Party organs on the spot to exercise direct guidance over the local organs of the procuracy'.[72] It would appear that the same Party organs would supervise the activities of the courts. This situation continued until unification.

Courts were therefore enmeshed in the political structure. They were accountable to elected political institutions. The Constitution proclaimed that courts

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68 *Ibid*., p. 86. This power rested with the Inspector-General (*chanh thanh tra*). See Anonymous, *Nhan dan*, 3 December 1960, p. 4, JPRS 8304.

69 Lam Son, *Justice Journal*, No. 5, 1963, pp. 5-7 (in Vietnamese).

70 Chief Justice Supreme People's Court, *Conference Summary*, 1968, p. 29 (in Vietnamese).

71 George Ginsbergs, 1979(1), p. 199.

72 *Ibid*.

be bound by law, but at this stage it was not possible to discern what the law comprized. Nor were the courts in control of determining how the law should be interpreted or applied. The procuracy, working with the Party, had to supervise any legal decision-making undertaken by the courts.[73]

III. Changing the Balance: New Institutions to Assert Central Control

In the last two chapters we saw that the Vietnamese system of dispute resolution comprized powerful committees with decision-making power, particularly the War Administration Committees, and the courts. This later period witnessed a decrease in the role of the committees, with courts becoming the subject of reform. As will become evident, the state sought to curb the power of committees, particularly the War Administration Committees, by increasing the courts' role and the introducing state-run arbitration. This reflected a policy shift which sought to strengthen central control over dispute resolution.

Law No. 004 *On the Elections to People's Councils and Administrative Committees* was introduced in 1957. This law provided for the election of local People's Councils at the district and provincial level and gradually the War Administration Committees were phased out. The People's Councils in turn elected Administrative Committees to operate as their executive. The Constitution of 1959 confirmed this system of local government, with the paramountcy of elections constitutionally enshrined.[74]

The Constitution of 1959 also clarified the sphere of responsibilities of the Councils and Committees, but did not take the opportunity to validate War Administration Committees, as they were gradually dissolving. It provided that the People's Councils, through their executive Administrative Committees, were to have a supervisory role, in particular to oversee the implementation and observance of laws.[75] In addition, the People's Councils had the authority to elect the President of the local People's Court and to recall him or her as necessary.[76] The Administrative Committee was also responsible for appointing and dismissing people's assessors. As under the Constitution of 1946, all local bodies, both Councils and Committees, were accountable to the next highest equivalent body.[77]

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73 United States Mission in Vietnam, 1972, p. 8. This research notes that 'The Constitution is silent on the relationship between the courts and the control organs of the Ministry of Public Security'.

74 *Constitution of the DRVN*, 1959, Articles 80, 81. This article also stipulates that Provincial People's Councils will hold office for 3 years, while at the district level, People's Councils will be elected for two year terms.

75 *Ibid*., Article 82.

76 The Constitution did not ultimately give the People's Council's power to recall judges. This provision was included in drafts of the 1959 Constitution, but not in the final version. See Bernard Fall, 1960(2), p. 285.

77 *Constitution of the DRVN*, 1959, Articles 86, 90.

The Constitution and the relevant election laws fail to reveal that the People's Councils were relatively powerless. They were established to represent and to elect an executive, the Administrative Committee, from among their group. The Vietnam Workers' Party ensured that it had representation on the Administrative Committee, reflecting the fact that the real power at the local level resided with the local branches of the Party.[78] This meant that an annual Congress elected local Party officials and they spread their influence, usually by holding powerful positions in local organizations such as schools, factories, or agricultural cooperatives and having extensive representation on People's Councils and Administrative Committees.

It is possible to reconcile these contradictory characterizations of the role of committees, either as relatively powerless, or as significant elected institutions, by reading their role in light of the principle of democratic centralism.[79] That principle, requiring representatives at every level and subordination of the lower level to the next higher equivalent body, did not envisage that local authorities would wield unfettered power. Rather, while committees emerged from local constituencies, they implemented the will of the next highest body. Ultimately it was hoped that this model would assist to implement central policies, as the chain of command ended at the central Party level.

As a result the People's Councils largely had 'symbolic' importance.[80] This was partly caused by the structure of local government, which had the Administrative Committees making the majority of the significant decisions, and entrenched by the practice of Councils meeting irregularly.[81] Presumably the Councils, despite their irregular meetings, would manage to appoint the Chief Judge (*chan an*, also sometimes translated as 'President') of the People's Court. Since the Vietnam Workers' Party usually had effective control of councils, its influence would have been felt in such appointments.

The ability of local committees to implement laws and pass local level regulations to implement higher laws remained in doubt, especially as the skills level and moral integrity of the Party's own district committees were uncertain.[82] Instead, quite often Party policy was promoted by local Party members working in their local organizations.[83]

The Justice Committee continued throughout this period with power to resolve disputes at the local level. Attempts were made to bring mediation within the auspices of the court system. The Supreme People's Court was given the authority

78 D. Gareth Porter, 1993, p. 72.
79 See above, Chapter 2, p. 43.
80 G. Porter, 1993, p. 79. Porter cites Tan Chi, 'To Realize More Clearly the Role of People's Councils', *Nhan dan*, 24 November, 1962, FBIS-JJ10-13.
81 *Ibid*., p. 80. Here Porter cites Vu Hoan, 'Opinions on how to develop further the effectiveness of People's Councils at all echelons', in *Research about State and Law*, Khoa Hoc (Cultural Studies Publishing House), Hanoi, Vol. 2, 1964, p. 210.
82 Editorial, *Hoc Tap*, No. 8, August, 1967, pp. 9-14. JPRS 42939.
83 Chapter 5 of the *Vietnam Workers' Party Statute*, 1960 makes it clear that all local Party members are expected to implement party policy. See Articles 36-43.

to supervise the work of local conciliation bodies. The Supreme People's Court Journal, of which more will be heard later, makes clear that the work of mediation groups and Communal Justice Committees formed a part of the court's work.[84] This suggests that the courts sought, or were required, tightly to control local initiatives that resolved grass-roots disputes.

From 1964 in the North, additional political groups were established to work at the grass-roots level to resolve differences and safeguard public security.[85] Described as a 'movement for maintaining security and order', local groups worked with local authorities to report on conduct disloyal to the new regime.[86] The teams of volunteers were also charged with educating and supporting citizens better to understand the policies of the new government and where necessary to 'undertake the struggle against counter revolutionaries'.[87] Their formal duty to report alleged crimes to the procuracy or the courts remains unexplored in the press and it seems reasonable to assume that it largely turned on the gravity of the alleged offence and the propensity for the local administration to place such matters in the hands of the 'legal' authorities. This suggests that, by a system of visits and local monitoring of residents within each residential block, local officials could develop profiles of those they suspected and could then elect to lodge formal complaints or resolve matters internally.[88]

In a different context, an arbitration system was introduced to Vietnam in 1963. The first centre for arbitration in Vietnam, the Foreign Trade Arbitration Council (*hoi dong trong tai ngoai thuong*), was established in 1963.[89] This organization dealt only with disputes involving foreign and Vietnamese parties experiencing problems arising in the 'course of their foreign trade transactions'.[90] Essentially it was established to hear contractual disputes between suppliers (state collec-

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84 Supreme People's Court, *Justice Journal*, No. 6, 1961, pp. 1-12 (in Vietnamese). This matter is still being reported on seven years later; see for example Chief Justice of the Supreme People's Court, *Conference Summary,* March, 1968, pp. 21-24 (in Vietnamese).

85 Commune level police were frequently called upon to resolve disputes: interview by the author with 'Tuan', 3 September 1996, Hanoi. Contrast this description with the account given by Nguyen Long and Henry Kendall of oppressive local scouts looking to eradicate perceived enemies of the state. Nguyen Long and Henry Kendall, 1981, pp. 26-29. Here descriptions are offered of informal networks of informants working to keep the ward-level security officers informed about people's movements and any alleged disloyalty.

86 Anonymous, *Thu do Hanoi (Free Hanoi)*, October 1964, p. 1. JPRS 28059.

87 Tran Duy Hung, *Thu do Hanoi (Free Hanoi)*, November 1964, pp. 1, 3. JPRS 28297.

88 Each of the following articles describes in glowing terms the effectiveness on local security and order of the Safeguarding Public Security Campaign: Anonymous, *Nhan dan*, Hanoi, 1964, 7 June, p. 2, JPRS 25487; Anonymous, *Thu do Hanoi (Free Hanoi)*, October 1964, p. 1, JPRS 28059; Tran Duy Hung, *Thu do Hanoi (Free Hanoi)*, November 1964, pp. 1, 3, JPRS 28297.

89 *Statute of the Foreign Trade Arbitration Committee* (promulgated by virtue of 59/CP of 30 April 1963) and the *Rules of Procedure of the Foreign Trade Arbitration Committee at the Chamber of Commerce on the Democratic Republic of Vietnam.*

90 *Statute of the Foreign Trade Arbitration Committee* dated 30 April 1963, Article 2.

tives) and the state or between state bodies. The foreign parties were from other socialist countries. Under the legislation each party could select an arbitrator, or the head of the Council could select two arbitrators, and the arbitrators would, in turn, select a third arbitrator.[91] Every party appearing at arbitration could be represented by a local or foreign lawyer. There was no appeal allowed from arbitration,[92] but in the event that the party ordered to pay refused to do so, an order of the arbitration committee could be registered with the local court and enforced as a judgment of the court.[93]

In addition to the Foreign Trade Arbitration Council, arbitration could be sought from the Vietnamese Maritime Arbitration Council (*hoi dong trong tai hang hai Viet Nam*). This group was established under similar legislation to that establishing the Foreign Trade Arbitration Council, but dealt exclusively with disputes arising between Vietnamese and COMECON Countries.[94] The Vietnam Maritime Arbitration Council heard about ten disputes a year.[95]

The period 1959 to 1976 witnessed the introduction of a range of dispute resolution bodies and the repositioning of existing institutions. Arbitral fora and local security committees to preserve law and order were introduced, while the courts' sought to bring the Justice Committees under their influence. Most significantly the powerful War Administration Committees were gradually disbanded. The next chapter takes up the story of court development. It does so in the context of the Party-State eager to exert its control over regional institutions, often relying on democratic centralism and loyal supporters to do so.

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91 *Ibid*., Article 5.
92 *Ibid*., Article 10.
93 *Ibid*., Article 11.
94 COMECON countries were those within the former Soviet Union and Eastern Europe. COMECON ceased to exist after the break-up of the USSR.
95 Attorney-General's Department of Australia, 1995, p. 20.

Chapter 5
Courts in the Democratic Republic of Vietnam between 1959-1976: The Legislative Scheme and Centralization

> *People's Courts are judicial organs. They have the responsibility of judging every violation of state laws. They handle penal and civil cases. They punish culprits and solve civil disputes among the people. The objective of judging is to protect people's democracy, the social order, public properties, and the legal rights and interests of the people; it is a contribution to the guarantee that the tasks of socialist construction in the North and the struggle for the unification of the country will be victorious.*
>
> *Nhan dan* (People's Newspaper), 1960[1]

From the late 1950s the DRVN government commenced the introduction of a centralized court system: a system coordinated from Hanoi rather than run by the War Administration Committees of the zone or inter-zone. The proposed system comprized two parts: the lower courts and the Supreme People's Courts, with the latter responsible for all management issues.[2] It was hoped that the courts would disseminate centrally determined Party policy rather than respond to regional or local Party leadership.

Initially the legislation is analyzed to ascertain the range of courts and how they were integrated into a system with the Supreme People's Court at its apex. The connections between the courts and other state institutions are also explored in this first section. This chapter concludes that courts were constructed as political institutions, with their primary duty to the political party, the Vietnam Workers' Party. In the next chapter the more complex questions of how the DRVN courts operated and how they were perceived by the public are pursued.

I. Official Sources and the Courts

In the previous chapter the significant constitutional changes of 1959 affecting the courts were explored. In particular, the 1959 Constitution formally introduced

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1 Unsigned article, *Nhan dan*, 11 November 1960, p. 4. JPRS 6972.
2 Interview by the author with 'Van', Hanoi, 4 September 1996.

the Supreme People's Court and formalized the position of the procuracy. The additional package of laws, introduced between 1959 and 1961, form the nucleus of the legislative changes pertaining to courts for this whole period and they need to be read together. They were subsequently amended in 1970 and then largely re-enacted to operate in the South of Vietnam upon unification in 1976. Additional laws deal with the courts within autonomous zones, areas where the population was predominately ethnic, but these shall not form a part of this study.[3]

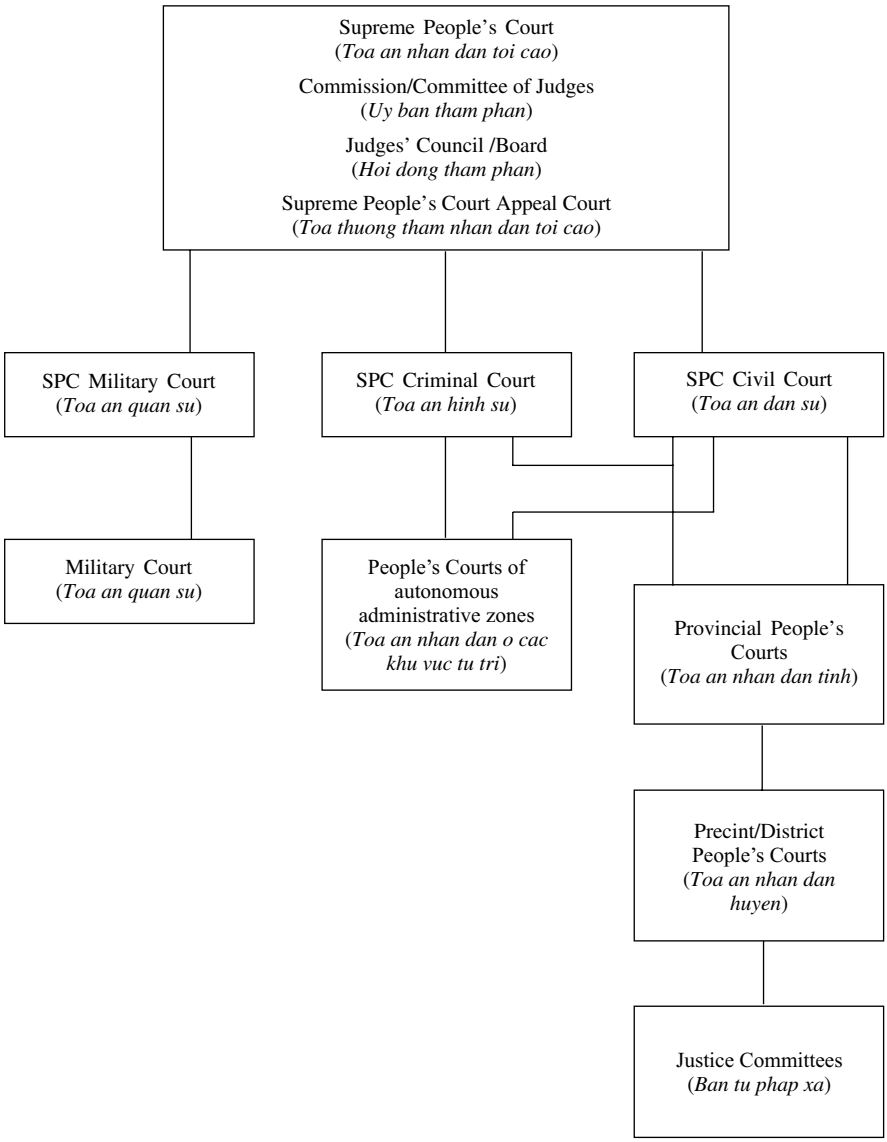
Table 5 below lists the six major legislative enactments concerning court development in the DRVN between 1959 and 1976. The laws established an integrated court system with the Supreme People's Court at its head, providing interim measures until it was in operation. Analyzing these enactments enables a mapping of the primary role and structure of the courts.

5. Major Legislative Changes to the Court System between 1959 and 1976

Legislation	Date	Name
Decree No. 300 of the Prime Minister	14.8.1959	Reorganization of the People's Courts of Appeal
Decree No. 381 of the Prime Minister	30.10.1959	Stipulating Obligations of Powers of the Supreme People's Court
Circular No. 92	11.11.1959	Providing Detailed Explanation of the Obligations and Powers of the People's Courts of Appeal in Hanoi, Hai Phong and Vinh
Law	14.7.1960	On the Organization of People's Courts
Order 19 of the President	26.7.1960	Law Promulgating the Law on the Organization of People's Courts
Ordinance of the National Assembly	23.3.1961	On the Organization of the Supreme People's Courts and Organization of Local People's Courts
Order No. 19 of the President	15.1.1970	To Promulgate the Ordinance of 15 January 1970 of the Standing Committee of the National Assembly
Order No. 01/76 of Council of Ministers	15.3.1976	On the Organization of People's Courts and the People's Procuracy

3 Decision No 185/VQ-TVQH-of the SCNA, dated 9 July 1963, *To satisfy the chapter of the People's Committee of Tay Bac Autonomous Zone Comprizing Detailed Regulations for the People's Courts at all levels within Tay Bac Autonomous Zone; Charter Stipulating Particulars of the Organization of People's Courts at all Levels in Viet Bac Autonomous Zone* (Stipulated by the People's Council and adopted by the National Assembly). An autonomous zone refers to regional administration for provinces with large ethnic populations 'which are supposed to help the central administration reconcile national policies with cultural peculiarities of the zone. They are not autonomous': see Vu Van Hoan, 1974, p. 72, cited in Gareth Porter, 1993, p. 79. See also Lam Son, *Justice Journal*, No. 8, 1963, pp. 23-25 (in Vietnamese).

6. The DRVN Court Hierarchy in 1961[4]



4 Order No. 19-LCT, dated 26 July 1960, *Law on the Organization of People's Courts*, Article 2.

II. Structural Centralization: Extending the Reach of the Appeal Courts and People's Courts

The End of the Civilian Military Court

One of the pivotal changes in the 1959 legislation was the abolition of the 1946 Military Court, which had been established to hear civilian acts of treason. The 1946 Army Court was renamed the Military Court and the old Military Court 'vanished' with the People's Courts given jurisdiction to hear charges of civilian acts against the state.[5] This reform indicated the state's will to establish a court system and give it the weighty task of trying treasonous conduct, in addition to its other responsibilities. Such a reform also worked to centralize Hanoi's authority over sensitive trials by disempowering the regional (Military) Courts which had been accustomed to receiving guidance from Regional War Administration Committees. These regional power bases were replaced with an institution over which, at least in theory, the central Party would have ultimate control.[6]

The new Military Court (the old Army Court) continued in operation, but with a different role. It was most active in the South, a reflection of where the military effort was now concentrated. The organization and structure of the Military Court followed the guiding principles in the Constitution of 1959 relevant to courts and the 1960 *Law on the Organization of People's Courts*. While sharing the hierarchical structure of the other courts, the Military Courts were separated from them, hearing only military-specific matters.[7] The Military Court retained courts 'at the front' and regional Military Courts. Final appeals from the Military Court went to the Supreme People's Court ensuring that the Military Court was a part of the newly integrated court system.

A Temporary Court System

In 1959 the regime established Appeal Courts in Hanoi, Haiphong and Vinh. These courts were also mobile if required. Jointly run by the Supreme People's Court and the Ministry of Justice, they were transitional courts, set up to replace the regional courts which had worked in collaboration with regional War Administration Committees.[8] The legislation specifically provides that 'People's Courts of Appeal are no longer directed by a Party cell'.[9] This provision was

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5 Interview by the author with 'Minh', Hanoi, 12 September 1996.

6 Of course the courts were not the only institutions playing a role in security. Administrative powers to detain suspects have always been used in Vietnam. See Chapter 2, p. 45.

7 Order No. 19-LCT, dated 26 July 1960, *Law on the Organization of People's Courts*, Article 2.

8 See Chapter 2, pp. 49-55.

9 Circular 92/TC dated 11/11/1959, Section A.

introduced in an attempt to block the influence of local Party organizations and require courts to turn to the new court hierarchy for advice. The Appeal Courts could advise on prosecution and give opinions when directed by the Supreme People's Court. Their introduction commenced the centralization of the courts, operating as conduits of central policies into the provincial and district court systems. These courts were also given powers to inspect lower court files and judgments 'for study purposes'.[10] A transitional system emerged, instituted for the purpose of leading lower courts and revising their practices. Only over time were the Appeal Courts to be replaced by Provincial People's Courts.[11]

In 1959 a careful divide was set out between the responsibilities of the Ministry of Justice and the Supreme People's Court in relation to the Appeal Courts. The Ministry had responsibility for organization, training, lawyers, defence lawyers, people's assessors, expert witnesses and the promulgation and dissemination of laws.[12] The Supreme People's Court was charged with directing political, professional and personnel issues. This divide was not neat. It retained the Ministry's involvement in court matters, while giving supervision of the judges (the judicial function) to the Supreme People's Court.

The Supreme People's Court Introduced and the Abolition of the Ministry of Justice

Decree No. 381-TT of 1959 established a separate Supreme People's Court, removing it from the auspices of the Ministry of Justice and placing it temporarily under the control of the Government Council.[13] Article one states that the Supreme People's Court will hear first instance and appeal cases where they are under the court's jurisdiction; conduct appeals from lower courts; revise judgments where mistakes or errors are discerned; and re-approve death penalties. In addition the court will study jurisdictional issues and policies; instruct local courts on criminal and civil law issues; monitor lower court trial activity and report on it; and manage court staff. As noted, not only was the Supreme People's Court to hear civil and criminal appeals, it was also to hear appeals from the Military Court.[14]

These provisions empowered the Supreme People's Court to hear appeals on all matters and to review cases where a mistake had been discerned. What was deemed a mistake or error was not defined. This left the Supreme People's Court with a very broad discretion. If the procuracy or parties claimed an error, the court had to determine whether a mistake existed. Its decision affected how

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10 *Ibid*., Section B.
11 *Ibid*.
12 *Ibid*., Section C.
13 Decree No. 381-TT, dated 20 October 1959, *Regulating the Responsibilities and Authorities of the Supreme People's Court*, Article 1.
14 *Ibid*., Article 3.

law/policy was practised and developed. The flexibility about the basis of reviews and appeals potentially enabled extensive Party influence.

In July 1960 the *Law on the Organization of People's Courts* separated the lower courts from the Ministry of Justice and established court accountability to the National Assembly.[15] Lower courts were no longer 'autonomous within military zones' but now a part of an integrated court system with the Supreme People's Court at its head.[16] The implementing legislation was divided into three chapters: the first comprized general principles; the second referred to the authority and organization of People's Courts at all levels; and the final chapter dealt with judges and people's assessors. Details about procedure were not drafted at this stage.[17] Jurisdictional matters were cursorily dealt with, the Law providing simply that People's Courts would hear both civil and criminal matters.[18]

Shortly after these changes the Ministry of Justice was abolished.[19] The procuracy's investigation work came under the supervision of the Ministry of Interior,[20] while the Supreme People's Court assumed supervision of lower courts.[21] Both the procuracy and the Supreme People's Court reported to the National Assembly. It is uncertain why the Vietnamese government determined that court supervision should pass from the Ministry of Justice to the Supreme People's Court. A current Vietnamese judge explains that it was untenable to have two bodies, the Ministry and the Court, supervising courts, but this does not explain why the Ministry effectively lost control to the procuracy and courts.[22] One interviewee explained that a contemporary Vietnamese explanation has it that the Ministry was abolished as a result of not having a Party member at its head.[23] What appears clear is that with the introduction of a 'court system' the Party decided it would have better control if it dismantled 'previous' systems

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15 On 26 July 1960 the President of the Democratic Republic of Vietnam promulgated the *Law on the Organization of People's Courts* to implement the previously passed *Law on the Organization of People's Courts* dated 14 July 1960. 'Quang' explained that in fact the Supreme People's Court had been constituted in 1957 although at that time it was under the auspices of the Ministry of Justice: interview by the author with 'Quang', 5 September 1996, Hanoi. In contrast, Dang Quang Phuong in his paper on the court system is clear that a decision to establish the Supreme People's Court was made in 1958 with the Constitution and laws following that date: Dang Quang Phuong, 1996, p. 66 (in Vietnamese).

16 Interview by the author with 'Quang', Hanoi, 5 September 1996.

17 Pham Van Bach, *Justice Journal*, Vol. 1, 1961, pp. 1-8 (in Vietnamese).

18 Order No. 19-LCT, dated 26 July 1960, *Law on the Organization of People's Courts*, Article 1.

19 *Law on the Organization of the Government Council,* Articles 3, 4, cited in Dang Quang Phuong, 1996, p. 69.

20 *Ibid.*

21 *Ibid.*

22 Mark Sidel, 1992, p. 51. Sidel cites a senior people's court judge who stated that the Ministry of Justice was eliminated because 'the main responsibility of the Ministry of Justice had been to support the courts and since the establishment of the Supreme People's Court there was no need for the Ministry of Justice'.

23 Interview by the author with 'Thai', Hanoi, 21 November 1998.

of accountability. A compelling interpretation of these changes suggests that Vietnam echoed Soviet policy and instigated de facto Ministry of Interior control over courts via their supervision function.[24] This would have been all the more important as a result of giving the People's Courts jurisdiction to hear crimes against the state.[25] Whatever the reason, the result was to increase the role of courts and the Ministry of Interior after 1960.

A senior military figure also characterized as a Party intellectual, Pham Van Bach, was appointed Chief Judge of the Supreme People's Court.[26] Vu Dinh Hoe, the previous Minster of Justice, undertook research work for the Institute of Law under the State's Social Sciences Committee.[27] It is possible that such a change reflected a wider policy of ensuring that French-trained lawyers, such as Vu Dinh Hoe, were placed where they could be more easily monitored and had less authority.

The New Court System

The new *Law on the Organization of People's Courts* amplified the constitutional provisions relating to courts. Both the Constitution and laws established: the requirement of public hearings;[28] the election of judges;[29] the election of people's assessors with rights equal to those of judges;[30] court independence;[31]an accused person's right to defend him or herself or use a lay advocate;[32] and an entitlement to use ethnic languages with translations to be provided as required.[33]

Also consistent with the Constitution, the 1960 legislation stipulated that all people's courts were 'judicial organs of the Democratic Republic of Vietnam'.[34] This again emphasized the move to centralization. For example, Article 1 defined the functions of judicial organs as follows:

> The purpose of the trial is to protect the people's democratic regime, social order, public property and the legitimate interests of the people, contribute

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24 See Vu Dinh Hoe, *Memoirs of Vu Dinh Hoe*, 1994, pp. ix-xi (in Vietnamese). Vu Dinh Hoe the Minister for Justice until the Ministry's abolition in 1960, writes that this reform was 'in accordance with the model of the (former) Soviet state machinery. See Mark Sidel 1997(2), p. 19.

25 See above, p. 107.

26 Mark Sidel, 1997(2), p. 15.

27 *Ibid*., pp. 16-20. Sidel points out that Vu Dinh Hoe, a French-educated lawyer, stands out as a lawyer writing with a 'more comparativist, analytical' approach: p. 20.

28 Order No. 19-LCT, dated 26 July 1960, *Law on the Organization of People's Courts*, Article 6.

29 *Ibid*., Article 5.

30 *Ibid*., Article 11. The rights are equal at trials of first instance, although only judges hear appeals.

31 *Ibid*., Article 4.

32 *Ibid*., Article 7.

33 *Ibid*., Article 8.

34 *Ibid*., Article 1.

> to the course of socialist construction in the North and the work of fighting with the aim of successfully unifying the country.
>
> In all their activities, People's Courts shall educate citizens to be loyal to the Fatherland, and the people's democratic regime, to respect public property, to observe the law voluntarily, to uphold the discipline of labour and principles of social life.[35]

The legislation clearly connected the courts to the political and social life of the DRVN. They were charged with the responsibility of assisting with socialist construction and unifying the country. These two aims were also clearly enunciated in the Constitution, in turn reflecting Party policy. The legislation was also consistent with the 1959 Constitution which stated that the court shall have 'independence' to pursue these goals. Citizens' 'legitimate interests' were also protected, although what they comprized remained largely undefined; except to the extent that all citizens were 'equal before the law'.[36] This provision has to be balanced against the constitutional principle forbidding 'any person to use democratic freedoms to the detriment of the interests of the state and the People'.[37] Further, law itself remained undefined, with no indication whether it included Party policy or not, with the result that its meaning remained unclear.[38] The people's 'legitimate interests' must be read within the context and the policies of the period, namely socialist construction.

Yet despite the connection between the courts and the political and social life of the DRVN, the *Law on the Organization of Courts* did not specifically deal with the role of the Vietnam Workers' Party. The courts' functions and duties were expressed in terms consistent with the objectives set for all state institutions by the *Vietnam Workers' Party Statute*,[39] without actually identifying the relationship directly. The only exception to this was in the legislation establishing the Appeal Courts which, as previously mentioned, specifically stated that the courts were to be independent of Party cells. This difference is best explained by the perceived need to change the inter-relationship between local courts and regional Party organizations: to introduce a system whereby local courts were accountable to the new central, and not the old regional, organs of authority.

The 1960 legislation provided that all decisions could be appealed, except where the Supreme People's Court made the original decision.[40] This appeal process allowed any decision made at a local people's court to be taken on appeal, by either the person affected or the procurator (if it was a criminal matter), to the people's court at the next level.[41] In addition to an appeal against a decision

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35 *Ibid.*
36 *Ibid.*, Article 3.
37 *Constitution of the DRVN*, 1959, Article 38.
38 Compare with Chapter 2, pp. 41-45.
39 Pham Van Bach, *Justice Journal*, Vol. 1, 1961, p. 10 (in Vietnamese).
40 Order No. 19-LCT, dated 26 July 1960, *Law on the Organization of People's Courts*, Article 9.
41 *Ibid.*

by either party involved, judgments containing errors 'shall be re-considered'.[42] As mentioned previously, no definition was offered of 'errors'. When a court became aware of an error made by a lower court or by itself, it was required to be reported to the Supreme People's Court. If a local people's court made the original decision, the re-consideration could be heard by the Supreme People's Court or that court could assign the matter for re-hearing by a lower court. If the Supreme People's Court made the error, then it had to be re-heard by the Committee of Judges, a sub-committee of senior judges based at the same court.

The 1960 *Law on Court Organization* also introduced the Supreme People's Court Judges' Council (*hoi dong toan the tham phan toa an nhan dan toi cao*). The Supreme People's Court Council of Judges examined all death sentences. Before executing the death sentence, a quorum (more than two-thirds of judges) needed to have voted on the issue and more than half of that quorum must have approved the execution.[43] The Chief of the Supreme People's Procuracy had a right to attend meetings of the Judges' Council and if that person disputed the decision to execute, the Council's decision could be taken to the Standing Committee of the National Assembly. In short, political institutions such as the National Assembly, as well as judges, could sanction the death penalty.

In 1961 additional legislation was enacted concerning the jurisdiction and function of the Supreme People's Court Judges' Committee. The Judges' Committee was the highest body with powers to determine cases and guide lower courts on the implementation of laws. It had jurisdiction to hear appeals from the Supreme People's Court of Appeal and to deal with protests by the Chief Judge or Chief Prosecutor working within any division of the Supreme People's Court. In addition, it determined which judges sat in which divisions of the Supreme People's Court. It could also make representations on legal projects (for example draft bills) or seek explanatory statements on matters of policy from the Standing Committee of the National Assembly. This Judges' Committee comprized between 9 and 11 members and was to meet twice a month.[44] Each local people's court at either the district or provincial level was also to have a Committee of Judges.[45] These Committees were to guide lower courts in relation to the application of laws, but also had a reporting function. They were to report to the Supreme People's Court any cases where they detected an error.

This legislation created a court system where, at least in theory, a decision could neither be made without state approval nor go unchallenged.[46] Decisions were made in the first instance by a judge and two assessors. If either party took the matter on appeal, or review was sought for an error, the court comprized

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42 *Ibid*., Article 10.
43 *Ibid*., Article 9.
44 *Ordinance on the Organization of the People's Supreme Court and Local People's Courts*, dated 23 March 1961, Article 2.
45 *Ibid*., Article 10.
46 Compare with *Law on the Organization of Courts and the Status of Judges*, dated 24 January 1946.

three or five judges.[47] The Constitution, the relevant legislation and public commentary suggest people's assessors were central to the masses having faith in the courts.[48] Yet ironically the appeal process placed trust in judges alone. It is interesting to ask if this was because judges had specific legal skills (as might be assumed in Western common law systems) or because they were trusted by the state to deliver favourable judgments. This latter suggestion is based on the fact that judges were more likely than assessors to have received centrally administered judicial training, making them more familiar with Hanoi-based Party policy development.[49]

The courts were accountable to the people in two ways. Judges and assessors of the courts could be removed if, on a complaint by any person, the Chief Judge of the court decided a judge or assessor had failed to be impartial.[50] The term 'failure to be impartial' was not defined. It could mean a failure to listen to both sides or a failure to implement Party policies, thereby demonstrating a capitalist bias.[51] As noted previously, the dominant duty of a Vietnamese judge was to implement the government's policies. Within the Vietnamese court system there was a particular weighting of factors in any case and to exercise judicious impartiality a judge must have demonstrated that he or she sympathized with the revolution. To fail to do this demonstrated either anti-revolutionary or pro-capitalist bias.

At each level of the courts there was a reporting requirement. The Supreme People's Court was meant to report to the National Assembly and, if not in session, to its Standing Committee, while lower courts were meant to report to the appropriate People's Council.[52] In this way the court system was set up to be accountable to both the grass-roots of society and political structures. The extent to which these accountability mechanisms fostered trust will be taken up in the next chapter.

Chapter two of the *Law on the Organization of People's Courts* sets out the jurisdiction of the courts in more detail.[53] Essentially all People's Courts had a

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47 Order No. 19-LCT, dated 26 July 1960, *Law on the Organization of People's Courts*, Article 12.

48 See Chapter 3, p. 76.

49 This skill is referred to as experience by one of the interviewees who noted that judges were used on appeal because they had 'experience'. Interview by the author with 'Quang', Hanoi, 30 June 1997. See also Chapter 6, pp. 124-126.

50 Order No. 19-LCT, dated 26 July 1960, *Law on the Organization of People's Courts*, Article 14.

51 Pham Van Bach, Annex to Vol. 5, 1964, p. 7. Bach writes that cases have been tried 'in line with the law, the policies and the procedures and contributed to the political and ideological education of the people'. He goes on to note that 'all legal cadres of the court, old and new, have been politically and ideologically educated and trained in the revolutionary realities'.

52 Order No. 19-LCT, dated 26 July 1960, *Law on the Organization of People's Courts*, Article 15.

53 *Ibid*., Articles 20, 21. For example, the articles of legislation dealing with the Supreme People's Court are consistent with earlier sections of the act about the power and authority of the Supreme People's Court, namely that it has original and appellate

similar role. Each must try to conciliate civil disputes and arbitrate minor crimes and, where the matters are more serious, hear cases in court.[54] They were also to oversee the operation of local conciliation. Yet again the court system has very extensive and undefined powers.

Between 1961 and 1970 no changes were introduced to the *Law on the Organization of People's Courts*, but on 15 January 1970 the Standing Committee of the National Assembly introduced an amendment. The only difference between the legislation of 1961 and the later amendment was that more judicial appointments could be made. For example, judges could number anywhere between four and eleven in the People's Courts of provinces or cities directly under central control, whereas there had previously been a limit of seven. Further, where previously there could only be three judges in courts in provincial cities, district capitals, or districts, the new provision allowed for up to five.

An integrated court system resulted from these reforms. The Supreme People's Court was meant to supervise lower court decisions through hearing either an appeal or conducting a re-hearing on the basis of a mistake or error. As noted earlier, these powers were extremely broad and certainly not clearly circumscribed by laws. Lower courts and the Supreme People's Court were all meant to be accountable to political organizations – the National Assembly for the latter and People's Councils for the former. All courts had a duty to educate the masses and implement the Party's policy line. Let us now consider the features of the newly introduced court system.

jurisdiction, can review the death sentence and can reconsider judgments where 'errors' have been found. Again, who locates the errors and how they are defined is not enunciated.

54 *Ibid*., Article 16.

Chapter 6
Courts in the Democratic Republic of Vietnam between 1959-1976: Court Culture

> *Ours is a Party in power. Each Party member, each cadre must be deeply imbued with revolutionary morality, and show industry, thrift, integrity and uprightness, total dedication to the public interest and complete selflessness. Our Party should preserve absolute purity and prove worthy of its role as the leader and very loyal servant of the people.*
>
> Ho Chi Minh, 1969[1]

This chapter analyzes Vietnamese court culture between 1959 and 1976. In particular, the role of judges and people's assessors, the extent of legal training, the courts' propagandist role and the public perception of courts are each investigated. The focus is on the period 1960 to 1963 when a great deal of court policy was settled and before the escalation of the war with its consequent disruptions for legal development in Vietnam. The actual work of the courts is analyzed to explore their operations, and not merely their legislated structure. This analysis reflects the definition of legal culture adopted in chapter one; so public perceptions of the courts are also explored. This chapter concludes that despite great efforts by the state to unify and popularise the courts, they remained at the periphery of daily life in Vietnam.

I. Court Membership: Judges and People's Assessors

As previously noted, local judges in the period 1959-1976 were elected: not by general election, but by local People's Councils. The National Assembly elected the Chief Judge of the Supreme People's Court – again an election conducted by elected representatives. The National Assembly Standing Committee appointed other Supreme People's Court judges. Officially People's Councils at the same level as the People's Courts elected the judges to all positions: chief judge,

1 Ho Chi Minh, *Testament of President Ho Chi Minh*, 1969.

deputies, judges and members of the Commission of Judges.[2] The Constitution's 'system for elected judges according to procedure prescribed by law'[3] is therefore to be read to mean an election of judges by existing political institutions rather than an election of judges by the people.

'Revolutionary morality' remained the core requirement for election.[4] But with the advent of greater centralization of the system of courts, it became clear to the central administration that the quality of judges varied a great deal from one area to another and that local councils were not fully aware of the 'concrete work of the people's courts, resulting in poor and unsuitable candidates being elected'.[5] Educating People's Councils about the increased significance of the courts' work and restating the official criteria were seen as effective means of improving the calibre of judicial appointments.[6] In addition, Councils were reminded that they must appoint judicial officers to particular positions within the courts. It was expressly pointed out that judges were not to resolve who would be their Chief Judge or Judicial Committee members.[7] This provision enforced the control of the Party over who would hold the most senior positions within any court.

It is hard to establish a picture of the type of person who became a judge – beyond knowing that the person had to be considered a stable revolutionary by the electing/appointing body.[8] In 1961 Hai Phong City Court was held up as an example, by the Supreme People's Court, of a court comprizing appropriately qualified judges: a former member of the provincial party organ; two members from the boards of trade unions (one from a Haiphong port union and the other from an automobile company); a cadre of the women's union; and a former judge.[9] Only one of the five judges would in all likelihood have been trained

2 Bernard Fall, 1960(2), p. 285. Fall notes that earlier drafts of the 1959 Constitution provided that local councils could recall the Chief Judge at the equivalent level. This provision was not kept; arguably reflecting a move to minimise, at least in theory, the interventions of local committees into the administration of justice.

3 *Constitution of the DRVN*, 1959, Article 98.

4 This requirement is implicit in the various reports of the Chief Judge to the National Assembly where he set out the tasks and responsibilities of the courts' officers. The legislation makes reference to the minimum age of judges and people's assessors (23 years old), but does not restate the moral qualities required. See Order No. 19 LCT, *Promulgating the Law on the Organization of People's Courts*, dated 14 July 1960, Article 25.

5 Le Kim Que, *Justice Journal*, No. 6, 1961, pp. 13-17 (in Vietnamese).

6 *Ibid*.

7 *Ibid*., p. 14. This injunction was included as a result of idiosyncratic behaviour within regional courts, inconsistent with the official policy for the appointment of judges to particular positions.

8 Bui Tin provides perhaps the lengthiest profile in English of a military judge. In his memoir *Following Ho Chi Minh*, at p. 40 he notes that he was made a Military Court judge in 1961. In 1945 Bui Tin left home and joined the resistance, joining the Communist Party several months later: p. xviii. He fought at Dien Bien Phu. In 1961 he was an officer in Military Region No. 4. In that year he was chosen to be chairman of his local Military Council. At this time he became a military judge.

9 *Ibid*., p. 14.

in law (either before or after the revolution) while the remaining judges were social and political figures.

Given the emphasis on revolutionary morality, what became of the small band of French-trained lawyers living in the North of Vietnam? Were they allowed to work as judges or were they in effect 'purged'? From the available sources it is not possible to answer this question definitively. However, if one accepts that revolutionary morality was indeed central to judicial office it would appear that French-trained lawyers had to prove their credentials to remain in office or become judges. As noted in chapter three, 'Quang' indicated that increasingly 'revolutionaries' were made judges. As noted in chapter five, Vu Dinh Hoe, the French-trained Minister for Justice in 1960, went to work in the Supreme People's Court's Institute of Juridical Research after the abolition of the Ministry. In effect Vu Dinh Hoe was demoted.

The first Chief Judge of the Supreme People's Court, Pham Van Bach, was not legally trained, although he was considered a Party intellectual.[10] He was appointed to the Provisional Executive Committee of the Southern Democratic Vietnam Republic in 1945.[11] Chief Judge Bach played a leading role in the guerrilla movement in the South before coming North to Hanoi where he was a member of the State Science Committee with responsibilities for the work of the legal studies group (*to luat hoc* and its successor the *vien luat hoc*). He published throughout the sixties on a range of legal subjects.[12] He remained Chief Judge throughout the period of this study. His appointment reiterates the significance of revolutionary credentials to senior judicial appointment.

Throughout this latter period of court development the courts reported to the National Assembly that they were understaffed.[13] With the unification of the country in 1976, the issue of court staff became critical.[14] The Party decided how many judges would be mobilized to the South to assist with socialist construction in newly unified Vietnam.[15] Reportedly, local northern courts often complained

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10 Pham Van Bach had been head of the guerrilla fighting in the South of Vietnam before his appointment as Chief Judge of the Supreme People's Court: see Bernard Fall, 1962, p. 63. He is not listed as a politburo member or Central Committee member of the Party in 1960. Documents and Research Notes, 1972, pp. 92-93. Compare this with Fall's writing in 1960 which alleges that Pham Van Bach was the head of the procuracy, while Hoang Quoc Viet was the first Chief Judge: Bernard Fall, 1960(2), p. 288.

11 US Department of State, *Political Alignments of Vietnamese Nationalists*, p. 146 (cited by Robert Turner, 1975, p. 40).

12 Mark Sidel, 1997(2), p. 15. Sidel lists Chief Judge Pham Van Bach's publications, which are in addition to his regular reports to the National Assembly on behalf of the courts and comments in the Supreme People's Court's Journal.

13 Chief Justice of the Supreme People's Court, *Conference Summary*, 1968, p. 31 (in Vietnamese); Chief Justice of the Supreme People's Court, *Conference Summary*, 1973, p. 23 (in Vietnamese).

14 Chief Justice of the Supreme People's Court, *Conference Summary*, 1977, pp. 55-56 (in Vietnamese).

15 *Ibid*.

that they were left crippled by lack of personnel.[16] The Supreme People's Court also called for the better training of staff, reporting that court members of lower courts could not handle complex cases.[17]

From 1962 the monthly rate of pay for judicial officers was:[18]

Chief Judge of Provincial Court	100, 110 or 120 Dong
Deputy Chief Judge of Provincial Courts	85, 95, or 105 Dong
Provincial Level Judge	70, 80 or 90 Dong
District Chief Judge	58 to 65 Dong
District Judge	51 to 57 Dong[19]

This pay was supplemented by accommodation, food subsidies, medical care and education for children.[20] Judges were treated like other bureaucrats, receiving a low monthly wage augmented by a living allowance.[21]

Whereas people's assessors had previously been appointed to their positions, they were elected to office from 1959, with the exception of the Supreme People's Court people's assessors, who were appointed by the National Assembly's Standing Committee.[22] These changes entrenched the notion that assessors were representatives of the people and suggests the state's commitment to the people's mastery. In addition, people's assessors were given full voting rights, equivalent to those of judges, in most first instance trials. *Nhan dan* reported in 1961 that 'people's jurymen have the same power as people's justices' and the article celebrated this reform:[23]

> In capitalist countries, judges and magistrates belong to the exploiting class. They are given courts of justice as tools to repress the people and to defend

16 *Ibid.*

17 Chief Justice of the Supreme People's Court, *Conference Summary*, 1967, p. 2 (in Vietnamese).

18 Chief Justice of the Supreme People's Court, *Conference Summary*, April, 1977, p. 56 (in Vietnamese) (citing 66/CB dated 24 May 1962).

19 It is very hard to ascertain the value of the dong, particularly in the north of the country. Estimates on the value of the dong in South Vietnam in 1962 vary from US$1/35 dong to US$1/75 dong. (Source: Responses to a question circulated on Australia Vietnam Science Link on 26 September 2000). These fluctuations partly result from the different rates of exchange. Another source, again responding to the AVSL inquiry, suggested that 1 dong could buy 2.5 kg of rice in 1962.

20 Chief Justice of the Supreme People's Court, *Conference Summary*, 1977, p. 56 (in Vietnamese) (citing 66/CB dated 24 May 1962). Fforde and Paine point out that wages decreased in real terms over the period 1965-1975, with the result that judges, just like others on the state pay-roll, were worse off unless they were able to augment their income. Fforde and Paine suggest that a conservative estimate has households supplementing their income by 17%; this figure takes no account of quasi-legal or illegal sources of additional income: Adam Fforde and Suzanne H. Paine, 1987, p. 94.

21 *Ibid.*

22 *Ordinance on the Organization of the People's Supreme Court and Local Courts* dated 23 March 1961, Articles 16 and 17.

23 Unknown author, *Nhan dan,* 18 May 1961, p. 4, FBIS translation. In this extract the term 'People's Tribunal' is synonymous with 'People's Court'.

> the interests of the exploiting class.... [O]ur justices and jurymen are elected by the people, representing all strata of working people, who are mainly workers and peasants.... With the justices and people's jurymen thus elected our people's tribunals are actually efficient tools of the people's democratic administrative power to serve the interests of the working people and to repress the enemy of the people.[24]

As early as 1961 the state propaganda machine was firmly behind the legal changes introduced at the turn of the decade, and Vietnamese citizens were reminded that this new system was an improvement on 'other' practices. Instead of positioning reforms in terms of nationalist or anti-colonial sentiment as before, the arguments in favour of changes to the appointment and powers of people's assessors were now explicitly connected to the socialist revolution:[25]

> The people's assessors are made up of various nationalities, the majority of whom are workers, peasants directly engaged in production.[26]

Despite the favourable press given to the role of people's assessors, all too frequently there was insufficient time for people's assessors to undertake all their work.[27] This shortage of time was attributed to the fact that assessors were usually also employed as cadres in other organizations.[28] The escalation of the war compounded this problem. The state-controlled press favourably reported the contribution made by people's assessors to the work of courts, while not publicly acknowledging the shortage of them.

II. Leadership and Responsibilities of the Supreme People's Court

Positioning the Supreme People's Court Journal

As noted previously, judges of the DRVN Supreme People's Court were expected to provide leadership to lower courts. From 1960 the Supreme People's Court Journal was central to communication between higher and lower courts.[29] The

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24 *Ibid*. Note that this translation uses the term 'jurymen'. In fact the same article points out that both men and women will be used as jurors and distinguishes the Vietnamese commitment to use women as jurors from the practice of capitalist countries.

25 This argument is still used today although it is also at times accompanied with a critique of their ability to understand and apply the law; see for example Phan Huu Thu, 1999.

26 Pham Van Bach, *Justice Journal*, No. 6, 1961, p. 9 (in Vietnamese).

27 *Ibid*.

28 *Ibid*.

29 The Ministry of Justice previously published the journal, with its first issue in 1954. In its early years it served as a vehicle for the publication of laws and circulars relevant to the operation of the courts and attempted some reporting on judicial conferences. Those responsible for the journal in the 1960s certainly saw the journal of the mid to late 1950s as an inferior publication with almost no discussion of legal development or the role of law. Editors, *Justice Journal*, No. 1, 1964, pp. 1-4 (in Vietnamese).

following analysis of *Tap San Tu Phap (Justice Journal)* and its successor, introduced in 1972, *Tap San Toa an Nhan dan Toi cao (Journal of the Supreme People's Court)* identifies the Supreme People's Court's main responsibilities and challenges in this period.

The publishers of the *Justice Journal* sought to convey the work of the Supreme Court in its journal. The articles in each edition between 1961 and 1964 were organized under the following headings: Editorial; Work Experience; Judging Experience; Exchange of Views; Reference Documents; and Readers Answered. Little time is taken up with law. Rather more time is spent on case-studies and the explanation of policies. The editorial, work experience and judging experience sections each focused on explaining why a court had reached a particular decision or how a difficult case could be resolved. A picture emerges of how the Supreme People's Court's work reflected the Party's policies.

An annual index was published from 1965 and the categorization of articles was more detailed. Editorial comment was retained, followed by comments on areas of substantive law: civil, criminal and family.[30] Organization of the Supreme People's Court and its work remained a subject of comment. Part four of the index referred to 'Procedure and the Enforcement of Judgments', part five was concerned with education, training and propaganda. The journal retained its links with its readers by including a section that responded to their comments and queries.

In the main, the readers of the journal would be court officials or legal cadres (*can bo nganh toa an*).[31] In 1962, the editors convened a discussion at the annual conference to review the work of the courts and to discuss the relevance and usefulness of the journal to the work of judicial personnel (judges and people's assessors). The meeting assumed a continued role for the journal in disseminating case notes and legal developments to officers of the courts.[32] The journal was not on sale to the general public.[33]

"Tasks" of the Court Identified

Since the Supreme People's Court was given responsibility for directing the lower courts, it is necessary to see how the Court conceived its role and function. The Chief Judge, in an article summarizing the Court's Five-Year Plan

30 Each of these branches of law is further defined. Criminal law has the following categories: crimes countering the revolution; crimes violating the state economy and finances (such as speculation or embezzlement); theft; intentional harm to people including manslaughter and murder; violating order and security (including, for example desertion and traffic incidents); and rape. Civil matters are sub-grouped depending on whether they concern ownership or inheritance.

31 Editors, *Justice Journal*, Vol. 1, 1964, pp. 1-4. Journal sales were by subscription and it was not available in shops. See p. 3 (in Vietnamese).

32 Editors, *Justice Journal*, Vol. 5, 1963, pp. 8-10 (in Vietnamese).

33 Editors, *Justice Journal*, Vol. 1, 1964, pp. 1-4 (in Vietnamese).

1961-1965, commenced by referring to the Third Communist Party Congress, held in September 1960. He noted the comments made at that Congress on the relationship between Party and state 'in the transitional stage towards socialism in the North'.[34] Extracted below are the comments the Chief Judge made at the Third Party Congress on the role of both Party and state. He argued that the Party's role in the leadership of the state was paramount:

> To unite the entire people, bring into full play ardent country-loving spirit, traditions of brave fighting and hard working of our people, at the same time to reinforce the solidarity among the socialist countries headed by the Soviet Union, to create favourable conditions for the North to march speedily, strongly and firmly towards socialism, build a comfortable and happy life in the North and consolidate the North as a steady base for the struggle for the country's unification, thus making a contribution to strengthening of the socialist camp and defence of peace in Southeast Asia and the world.[35]

As demonstrated in the case of constitutional preambles, the official documents approved by Party and state invariably commenced their discussion with historical references. In this case the Chief Judge appealed to the masses and more precisely to all nationalistic people who were both brave and industrious. Such an opening made it very hard indeed for any citizen to seek to place him or herself beyond the category of people so defined. It also meant that any person who did not wish to be included in this group could be called a 'traitor' – an especially serious crime in a time of war. Moving from the opening definition of people for whom the state and Party (and, as we shall see, also the courts) worked, the author connected socialism and unification and called for 'speedy, strong and firm' steps to be taken towards the two goals. This comment exhorted all organs and people actively to contribute to unification/socialism.

The Chief Judge reiterated the Third Party Congress' view that the People's Democratic Administration, of which the court was a part, must 'fulfil the historic task of the proletariat's dictatorship'[36] and to that end implement socialist reformation in the areas of agriculture, industry, economic policy and cultural change. Chief Judge Pham Van Bach unequivocally pointed out that 'position, role and political responsibilities of the People's Court are not separable from position, role and political and economic responsibilities of the People's Democratic State'.[37] In turn the state's responsibilities were 'pointed out clearly in the political report of the Party Central Committee'.[38] Here the connection between Party and court is at its most clear. The Chief Judge has drawn the connections so that no reader could be in any doubt that the role of the courts was ultimately to implement state policy.

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34 Pham Van Bach, *Justice Journal*, 1961, pp. 1-8 (in Vietnamese).
35 *Ibid.*
36 *Ibid.*, p. 1.
37 *Ibid.*, p. 2.
38 *Ibid.*

Articles such as this, the Chief Judge explained, are written to assist the court worker to interpret Party policies relevant to the courts. When the author started to talk about 'us' in the article he referred to the reader and the author as one – sharing duties and responsibilities. The Court's journal was circulated to professionals, and so the Chief Judge was able to communicate an expectation of absolute loyalty to the new regime. This was manifest when he instructed staff to share a united view of the role of the courts as political tools of the political authority – the Vietnam Workers' Party.[39]

Having outlined the court's political role the Chief Judge proceeded to connect the court's work with the five-year plan.[40] In short the Chief Judge called for the work of the court to assist the revolution; to defend the social order (which included economic policies); to educate the masses to fight against acts violating the law, policy and disciplines of the state; and to promote the people's democratic legality. This call to arms also stipulated that the role for the courts was to implement state policies as well as state laws.[41]

To implement effectively the party's policies, court officials were told:

> We must be fully aware of the role and effectiveness of the People's Court in contributing to the furtherance of the entire revolutionary work,... apply properly the line and policy of the Party and state, always heighten the People's Court characteristic of true democracy, apply strict basic principles guiding the work of adjudication, organise trials according to the *Law on the Organization of People's Courts* and ensure careful, correct and lawful adjudication which always enjoy sympathy and support of the people.[42]

In this statement, judges and assessors were instructed not only to apply state and Party policies, but also the *Law on the Organization of People's Courts* when organizing trials. This law set out the basic elements of a fair trial, the role of assessors and judges, and the meaning of an open court. The statement suggested that careful and correct adjudication required the judge and people's assessors to apply policies to produce lawful adjudication acceptable to the masses.

Finally, Chief Judge Pham Van Bach pointed out that neither the civil (which includes family) nor criminal laws were sufficiently detailed: 'law-making work becomes imperative for many branches especially for our [Supreme People's Court] branch.'[43] He made the point that a new Constitution had been proclaimed and that the courts were active, but that they must work without procedural laws and, in many cases, substantive laws. Thus it was up to the courts to study policies and propose laws and for the senior court to overview the work of the lower courts.

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39 *Ibid.*
40 *Ibid.*, p. 3.
41 *Ibid.*, p. 5.
42 *Ibid.*, p. 6.
43 *Ibid.*, p. 7.

In summary, this publication explained to court officials that they had to implement state policies and rely on senior courts and training as the basis of understanding those policies. Pham Van Bach reiterated that officials must understand that their work was political and that both the Party and the community must endorse it. The Chief Judge sought to inspire pride in the work of the courts as institutions linked to the fortunes of the war-dominated country. The Supreme People's Court's role was to show leadership, and in so doing, reflect the Party's policies.

Throughout the sixties, a judicial conference was held annually to reinforce the duties and responsibilities of judges. The Supreme People's Court issued a report on the conference's conclusions. The issues raised in the Chief Judge's first Five-Year Plan for the courts, outlined above, were echoed over the years. The central political role of the courts was reiterated.[44] It was the duty of the Supreme People's Court to foster the upholding of socialist legality by lower courts.[45] However, it was pointed out that there was not always agreement among senior judges about what the law ought to say or, where it existed, how it ought to be interpreted.[46]

Summarizing the Supreme People's Court's first five-year plan, a catalogue of responsibilities and duties emerge for the courts generally and the Supreme People's Court in particular: disseminating existing law and policy; making law; supervising the work of lower courts; and propaganda.[47] These objectives were then implemented using a range of techniques as set out in the chart below. The ensuing discussion focuses on each of the tasks identified by Chief Judge Pham Van Bach as central to the court acquitting its responsibilities.

7. Expectations of the DRVN Courts in the 1960s

Supreme People's Court's task identified in its first five-year plan, 1961-1965	**Procedures to implement tasks**
To disseminate existing law and policy within the courts	Training and propaganda/education of personnel
Guiding lower courts	Distribute circulars of the Supreme People's Court; appeal and review work of courts – Supreme People's Court major role – and reporting on the results of this work; Provincial courts also inspect work of district courts
Propaganda	Use of radio, press and campaigns to educate the public

44 Chief Judge of the Supreme People's Court, Editors, *Conference Summary*, 1967, p. 3 (in Vietnamese).
45 *Ibid*.
46 Chief Judge of the Supreme People's Court, *Conference Summary*, 1968, p. 25 (in Vietnamese).
47 Pham Van Bach, *Justice Journal*, No. 1, 1961, p. 8 (in Vietnamese).

III. Disseminating Existing Law and Policy: Education of Court Personnel

The dissemination of law involved both training judges about the relevant law or policy and the education of Vietnamese citizens about new laws. The issue of training judges involved a consideration of formal teaching methods, the role of the Supreme People's Court in leading the dissemination of dispute resolution policy and a consideration of the propagandist work of the court. Each of these aspects of the work of the Supreme People's Court is taken up here, to see first how they trained judges, in the broadest sense of the word, and secondly how they sought to influence and educate the masses.

The training of judges was a responsibility that devolved from the Ministry of Justice to the Supreme People's Court.[48] 'Quang' recalls that in 1960 a Russian group arrived to teach Vietnamese judges how to train other judges. As 'Quang' noted:

> Before the Russians came I was a teacher [of judges]. When the Russian experts came I was also a student. From my new knowledge I went on to train Vietnamese judges.[49]

He recalls that this train-the-trainer program was a two-year initiative. He described the program in these terms:

> The main topic in training is not to talk about law. They teach them about the general policy of resolving cases. They teach them about compassion between the parties.[50]

In addition to the training judges received in Vietnam, students of law first went to the USSR in the early 1960s.[51] However with the advent of Khrushchev's revisionist policies, the Vietnamese government recalled the Vietnamese students.[52] Trainees resumed travelling to the USSR after 1967 and continued throughout the period of the study.[53] Generally the older people were not sent away for additional study.[54] 'Quang' also recalls that education was very important

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48 Interviews by the author with: 'Quang', Hanoi, 5 September 1996; 'Tri', Hanoi, 20 September 1996; 'Van', Hanoi, 4 September 1996. The Court assumed responsibility for training that had previously rested with the Ministry of Justice. See Chapter 5, pp. 107-109.

49 Interview by the author with 'Quang', Hanoi, 5 September 1996.

50 Interview by the author with 'Quang', Hanoi, 30 June 1997.

51 Interview with Phan Huu Thu, Vice-Director of the Judicial Training Centre, Hanoi, 5 May 1999. See on scholarships generally Roy Jumper and Marjorie Weiner Normand, 1964, pp. 507-508.

52 Interview with Phan Huu Thu, Vice-Director of the Judicial Training Centre, Hanoi, 5 May 1999.

53 *Ibid*. Phan Huu Thu advised that over the period 1967 to 1997, 671 Vietnamese students went to the USSR to study: some to Moscow, some to Tashkent (Yzbekistan) and others to Bacu (Azerbaijan).

54 Interview by the author with 'Quang', Hanoi, 5 September 1996. 'Quang' noted

throughout his time at the Supreme People's Court and that many judges spent a great deal of time improving their own knowledge, which required reading both French and Russian texts.[55]

None of those interviewed attended Chinese legal training.[56] Unlike the land reform era between 1953 and 1956 when very many Chinese advisers were involved in assisting the Vietnamese government design and implement reforms,[57] the establishment of a central court system appears to have been completed without significant Chinese involvement but with substantial reliance on Soviet aid and advice. Russian expatriates taught judicial personnel and Russian advisers assisted with the development of a Vietnamese legal vocabulary. On the establishment of the central court system a group of researchers at the Law Study Group of the State Social Sciences Institute devoted time to developing a legal lexicon.[58] This group relied on 'the Russian legal science, which is the most advanced in the world' and eschewed Chinese terminology.[59] In addition, the Supreme People's Court Journal published a range of articles by Soviet authors or about legal challenges within the Soviet Union, especially in 1963.[60] In later years the articles reflected a slightly more diverse comparative approach and went beyond the Soviet Union to include, for example, China and Albania in comparative commentary.[61]

'Tri' explained that after 1959 the Supreme People's Court held seminars on each of the specialized duties of the court. For example, a seminar was held in 1962 on the respective responsibilities of the courts and the procuracy.[62] Other seminars included discussion on the role of the defence, whether by lawyers or lay people, and how defendants ought to use advocates.[63] The reports of these seminars included in the Supreme People's Court's Journal indicate that various policy positions were put, for example that perhaps the Supreme People's

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that after the Vietnam War a lot of young legal cadres went to Poland, USSR, East Germany and Czechoslovakia to study.

55 *Ibid*.

56 Interview by the author with 'Tri', Hanoi, 20 September 1996. 'Tri' pointed out that a delegation had been selected to go to China but the onset of the Cultural Revolution, commencing in the late 1960s, precluded its proceeding. He also noted that sovereignty issues between Vietnam and China blocked any close cooperation between the two countries.

57 Bui Tin, 1995, pp. 27-32. Bui Tin described the land reform policy as a 'mechanistic application of Chinese experience… Admiration of China was widespread at this period because of blind attitudes and a lack of self-confidence': at p. 28.

58 Editors, *Justice Journal* No. 2, 1963, p. 20 (in Vietnamese).

59 *Ibid*., pp. 20-21.

60 See for example: N. Poruxakop, *Justice Journal*, No. 2, 1963, pp. 23-27 (in Vietnamese); I.A. Xperanski, *Justice Journal*, No. 8, 1963, pp. 28-31 (in Vietnamese); Mi.I. Kalinin, *Justice Journal*, No. 9, 1963, pp. 24-25 (in Vietnamese); I.A. Xperanski, *Justice Journal*, No. 9, 1963, pp. 25-28 (in Vietnamese).

61 For example: Tao Quoc Kanh, *Justice Journal*, No. 7, 1964, pp. 19-22 (in Vietnamese); Vu Ta Lan, *Justice Journal*, No. 7, 1964, pp. 20-22 (in Vietnamese).

62 Lam Son, *Justice Journal*, No. 5, 1963, pp. 5-8 (in Vietnamese).

63 Tran Dam, *Justice Journal*, No. 1, 1961, pp. 16-18 (in Vietnamese).

Court could run its own investigations into cases and then that a senior judicial (and presumably Party) spokesperson within the court would pronounce what the correct approach was. This would no doubt reflect what had been agreed between the most senior Party and court personnel (whether judges or assessors is unclear) before the actual meeting.

IV. Guiding Lower Courts

The Supreme People's Court issued guidelines for lower level courts to explain how cases ought to be adjudicated. 'Tri' indicated that the guidelines were issued either as circulars or as statements promulgating the decisions of the Court. Instruction No. 772 dated 10 July 1959 of the Supreme People's Court entitled 'On the Discontinuance of the Old Colonial Feudal Laws' is an example of the Court's guiding judicial policy.[64] From the date of the Instruction, only laws of the Democratic Republic of Vietnam were to be applied. Courts unsure of how to act were advised by this document to seek assistance from the Supreme People's Court. Other Instructions include: 'On Deciding Civil Suits Related to the Agricultural Collectivisation Movement';[65] and, in consultation with other ministries, 'On the Condition and Procedures for the Early Release of Convicted Prisoners'.[66]

Senior courts were also able to guide lower courts to produce 'correct' decisions as a result of their review of lower courts.[67] It was left unclear on what basis a decision was deemed correct. Interpreting this function in light of the decree of 1960, it seems that court decisions were evaluated to see whether they protected the people's democratic regime, social order, public property and the legitimate interests of the people, and generally contributed to social-

64 In addition to Vietnamese scholarship, accounts of court change also exist in the old USSR. An example of these is an article by V. Kolesnikov. He offers a critique of the development of the Vietnamese Supreme People's Court stating that the Vietnamese law courts are a part of the family of courts in socialist legal systems. The author points to the development of the courts in the period 1958 to 1960 as evidence of 'a period of building the foundations of socialism in the Democratic Republic of Vietnam' (p. 1 of trans). This article notes that although the Constitution of 1946 referred to the Supreme People's Court, it did not in fact come into existence. This inability to develop a Supreme People's Court is attributed to 'the difficult conditions of the bitter war against foreign interventionist(s)' (p. 2 of trans). Kolesnikov identifies the major change as an integration of the court system, with lower courts no longer directed by both senior courts and local Administrative Committees, but only guided by the Supreme People's Court. V. Kolesnikov, 1961, translated by JPRS.

65 *Ibid*., p. 2 (of trans).

66 *Ibid*., p. 3 (of trans). Instruction dated 11 August 1959, Joint Circular No. 73 published with the Ministry of Justice, Ministry of National Security, the Supreme People's Court and the Procurator General.

67 The author has not been able to obtain copies of these instructions. Instead what is available are the reports contained in the Supreme People's Court's *Justice Journal*, which advises on how to act without having the official title 'Instruction'.

ist construction. Writing comparatively, a Russian commentator portrayed the Supreme People's Court as responsible for 'surveillance of the judicial activity of the local People's Courts'.[68] As noted, these reviews of lower court activity were then reported and widely disseminated. In effect, the decisions were judged against vague criteria and great discretion lay with the reviewer. Bui Tin, writes critically of the insufficiency of legal constraints operating on decision-makers, arguing that this enabled senior Party cadres to abuse their power by seeking to influence court decisions.[69]

The editors of the Supreme People's Court's journal argued that they were charged with the development of 'professional skill' rather than 'political education'.[70] Although the same editors noted that they were 'under the control of the Supreme People's Court Party cell'.[71] Further, the way in which the journal was managed with a deputy judge (*pho chanh an*) working with the Party cell to coordinate and co-edit the publication, ensured Party control. The structure of the journal's leadership makes clear the publication's twin obligations to educate judicial officers in the role of the courts and to spread the Party's policies. The *Justice Journal* itself explains that its articles could be used to train court personnel.[72] In a self-critique of the Journal's performance in 1964 the editors noted they had reported legal developments well. However they asserted that they needed better to explore and explain Marxist-Leninist law and its foundations. In 1965 the journal introduced a section entitled 'Studying legal terms' ('*thuat ngu luat hoc*').[73] This continued the debates previously reported in a section entitled 'Construction of legal terms' ('*xay dung thuat ngu luat*').[74]

In addition to the journal, the annual judicial conference published a report of its proceedings, much of which concerned itself with advice to lower courts on how better to decide cases. Only gradually did this report start to expand its coverage of legal cases, complete with legal arguments and facts, for lower courts. In earlier editions the reporting was more general and less incisive.[75]

At times a very fine line existed between the Supreme People's Court's role of educating judges and its propagandist function. Since propaganda was (and continues to be) seen as a form of education in Vietnam the separation of the

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68 V. Kolesnikov, 1961, (p. 2 of trans).
69 Bui Tin, 1995, pp. 110-111.
70 Editors, *Justice Journal*, No. 7, 1964, p. 3 (in Vietnamese).
71 *Ibid*.
72 *Ibid*., p. 4.
73 Eight articles, dealing with the interpretation of legal terms, were published in 1965. Examples of the terms considered include: accused; defendant; appeal; divorce; separation; regulation; adjudicate. By 1966 the number of articles was reduced to one and it was concerned with war crimes and war criminals.
74 See for example, Editors, *Justice Journal*, No. 10, 1964, pp. 27-29 (in Vietnamese); Editors, *Justice Journal*, No. 7, 1964, pp. 22-23 (in Vietnamese); Editors, *Justice Journal*, No. 7, 1963, pp. 27-29 (in Vietnamese).
75 See for example: Chief Judge of the Supreme People's Court, *Conference Summary*, 1975, pp. 10ff (in Vietnamese); Chief Judge of the Supreme People's Court, *Conference Summary*, 1976, pp. 11ff (in Vietnamese).

two functions was somewhat illusory. Certainly, the didactic tone taken in some of the journal articles was carefully constructed to develop confidence in the courts and equip professional staff to speak in their support. For example, one article reporting on the role of the courts was written in interview style – with a reporter talking to delegates to a judicial conference. The tone of the article was set when the judges were described in these terms:

> Comrade Nguyen warmly dragged me to sit next to him and said to me with a smile
> 'Do you want to interview me?…'
> Then he smiled and patted my shoulders and said
> 'Are you a satisfied reporter? Anyway excuse me.'[76]

This article portrayed judges as accessible, clear and aware of the debates and challenges facing trials when the role of the defence counsel remained at least partly in doubt. The article consistently characterized judges as welcoming and keen to discuss whether legally-trained advocates enhanced court proceedings. Articles such as this were clearly educational; they informed lower level judges of the range of options relating to developing defences for those accused of crimes. The article also perpetuated an impression to lower level judges of the humane and compassionate character of senior judges.

In a different style, the journal also reported major policy initiatives to its readership of lower level judges.[77] In a lead article the editors reported that the Political Bureau (*bo chinh tri*) of the Party had launched a rectification campaign to ensure that cadres, party members and labourers understood what the revolution required of them. In this, all court cadres, whether they be Party members or not, were required to undertake collective and individual self-criticism on four issues: their understanding of the state's mastery and of socialism's collective spirit; views on production; views on industry; and views on the 'speedy, strong and firm advance towards socialism'.[78] Having set the task, the article explained the basic context in which groups were to debate these issues, namely that the:

> People's Courts serve as a tool (*cong cu*) employed by the people to implement the proletariat's dictatorship…The judicial people must therefore be one of the people, must act according to the masses' line, mobilize the people to take part in and support the judicial work.[79]

This article could easily form the basis of local training. Readers could first familiarise themselves with the philosophical basis of its explanation of socialist construction and then, working in groups, analyze how the court's work could be enhanced to meet the challenges of implementing the Party line.

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76 Tran Dan, *Justice Journal*, No. 1, 1961, p. 16 (in Vietnamese).
77 Editors, *Justice Journal*, No. 4, 1961, pp. 1-6 (in Vietnamese).
78 *Ibid*., p. 2.
79 *Ibid*.

V. Propaganda

As explained in chapter three, since inception the courts had a propagandist (*tuyen truyen*) function:

> Together with the task of judging, People's Courts also have the responsibility of educating the people by their action and making everyone loyal to the Fatherland and to obey the people's democracy, respect public properties, and willingly obey the law, labour discipline and socialist livelihood rules.[80]

A part of this educative function was the belief that the courts could play a role in preventing breaches of the law. The parallels with preventative medicine were pointed out to personnel of the courts.[81] Throughout the period of this study, the *Justice Journal* published articles promoting the propaganda work of local courts.[82] In addition, articles reflected the work of the courts in disseminating knowledge of particular legal developments. For instance, the courts were expected to spread the Party's family and marriage policies (law).[83]

The Supreme People's Courts encouraged the use of various strategies to assist the courts in their dissemination role. In particular, courts were encouraged to, and did, hold public hearings (also called mobile courts) in the location where a crime or dispute had arisen. For example, if a crime was committed in the local factory the court would hold its session in the factory in full view of the workers and cadres employed there. It was hoped this policy would have the effect of 'disseminating the education of law and policies of the party and state'.[84] The Chief Judge of the Supreme People's Court reported that in 1964 'the court carried out legal dissemination and education at more than 600 open and mobile courts, before an audience of over 20,000 people and at 7,000 meetings in the districts villages and factories, and agricultural handicraft cooperatives with an audience of 1,800,000'.[85]

The senior courts also gave talks and used the radio to heighten awareness of changes to the law and how this might affect people in their daily lives. For example, in 1962 provincial courts were reported as having held 5,000 meetings, attended by approximately two million people, at which legal issues were explained.[86] In addition to the public hearings, the courts devoted time

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80 Unsigned article, *Nhan Dan*, 11 November 1960, p. 4, JPRS 6972.
81 Editors, *Justice Journal*, No. 6, 1963, pp. 1-2 (in Vietnamese).
82 See for example: Editors, *Justice Journal*, No. 6, 1963, pp. 1-2 (in Vietnamese); Huynh Ngoc Chi, *Justice Journal*, No. 10, 1964, p. 22 (in Vietnamese).
83 Nguyen Dam, *Justice Journal*, No. 4, 1963, pp. 2-4 (in Vietnamese); Bich Hien, *Justice Journal*, No. 9, 1966, pp. 5-7 (in Vietnamese); Ta Thi Minh Tam, *Justice Journal*, No. 11, 1966, p. 26 (in Vietnamese); Nguyen Viet Bac, *Justice Journal*, No. 12, 1966, p. 6 (in Vietnamese).
84 Pham Van Bach, *Justice Journal*, No. 6, 1961, p. 6 (in Vietnamese).
85 Chief Judge Supreme People's Court, *Report on the Activities of the Year 1964 and Directions for the Year 1965 of the People's Court*, Report to National Assembly, 1964, p. 8.
86 Editors, *Justice Journal*, No. 6, 1963, pp. 1-2 (in Vietnamese).

to publishing simple notices that set out the facts of cases and the applicable policies, explaining why courts made the decisions that they did – at least in general terms. In addition over 30,000 leaflets were allegedly published in 1962 to 'publicise the results of important trials'.[87]

The state, via its press, greatly assisted the courts by informing the public about the new legal system. Shortly after the introduction of the centralized court system, a series of articles were run in *Nhan dan*, the People's Daily, to advise the public of the changes.[88] The style of reporting used in these publications varied. When trials were concerned with alleged pro-US spy activity, reports were not only in Vietnamese but also in English.[89] In these reports very little technical discussion of the law occurs. Instead the reports noted that the accused had defence counsel and gave the names of the two people's assessors. The state appears to have been anxious to highlight these aspects of the trial. Newspaper articles also introduced the new court system, setting out its basic structure and personnel, and outlining new laws. The articles emphasized that laws were developed to protect personal freedom.[90] The careful attention to the rights and obligations of the state and its citizens suggests that the central authorities attempted to educate citizens and officials. The press played a similar role in South Vietnam after unification.[91]

Despite a great official commitment to spread knowledge about the work of the court, in 1961 the Court report noted that the challenge of informing the people about the role of the courts was yet to be fully met.[92] Over the period of this study the call to disseminate information about courts and law was made again and again, always with a view to improving the handling of the propaganda function.[93] In 1961 this challenge loomed very large indeed as the new centralized court system, with the Supreme People's Court at its head, was fully established as exclusively responsible for the work of the courts and could not rely on other agencies, such as the Ministry of Justice, for assistance. Since the legal policies were in the main new, and designed to assist with socialist construction, their propaganda function was onerous. As noted, in 1962 vigorous steps were taken to meet this challenge and the court continued to work in this

87 *Ibid*., p. 1.

88 See for example: Broadcast, 20 January 1960, 1424 GMT, JPRS; Unsigned Article, *Nhan dan*, 11 November 1960, p. 4, JPRS 6972; Vu Duc Chieu, *Nhan dan*, 21 November 1960, p. 4, JPRS 6972; Unsigned Article, *Nhan dan*, 3 December 1960, p. 4, JPRS-8304; Unsigned Article, *Nhan dan*, 1 April 1961, p. 3, JPRS 9758; Editors, *Thoi Moi (New Times)*, 26 June 1964, p. 2, JPRS 25801.

89 Here the propaganda agenda is not only to inform Vietnamese citizens about what the consequences of spying are, but also to inform the international community. Broadcast, 20 January 1960, 1424 GMT, JPRS.

90 Vu Duc Chieu, *Nhan dan*, 21 November 1960, p. 4, JPRS 6972.

91 Broadcast, *Saigon Domestic Service*, In Vietnamese, 2 June 1976, 1400 GMT. FBIS 4 June 1976.

92 Pham Van Bach, *Justice Journal*, No. 6, 1961, p. 6 (in Vietnamese).

93 See for example Chief Justice of the Supreme People's Court, *Conference Summary*, January 1972, pp. 4, 20 (in Vietnamese).

area over the period.[94] In 1976 the official policy was that the state could use either persuasive or coercive powers to instil its policies in citizens:

> Our state law is the most important tool in educating and urging the masses to correctly implement state policies and lines and to observe rules concerning public order and activities.[95]

As previously indicated, the Supreme People's Court's worked to educate lower courts and the masses about the new legal system and the Party line. The courts also campaigned on a number of issues, usually responding to local concerns. For example, in 1964 in Ha Tinh, the court allegedly helped 'prevent excessive killing of animals and illegal alcohol making'.[96] In Ninh Binh the Supreme People's Court claimed that court propagandist work reduced gambling and theft. In neither case is there any suggestion of how the court actually helped to reduce these 'social evils', but it reported its success enthusiastically.[97]

It is important to balance the impression that the courts were very powerful, an impression that can result from their own claims concerning the success of their propagandist function, with the reality that often courts were acting on instructions. These instructions were received from senior Party committees and members. So, although courts had responsibilities to implement and disseminate new laws, they carried out these dual functions within a framework of tight Party control. Bui Tin writes in his memoirs that when he worked as a Military Court judge he was told how to determine cases and, having received instruction, the decision was made before the case was heard:

> On the whole the verdicts were strictly according to law, only they were all decided beforehand and handed down to the council of the military region following the principles of the Party leadership which was absolute and supreme.[98]

Providing one of the few retrospective critiques of the role of the courts in this period, Bui Tin also points out that this type of decision-making, made in advance and based on Party direction, was common in Hanoi courts.[99] There is little reason to doubt that this was indeed common practice.[100] In support of this proposition a legal academic noted that the courts were essentially irrelevant to the development of law (or policy) until 1992, after the adoption of *doi moi*

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94 Nguyen Dong, *Hoc Tap*, excerpts of this article read on 10 February 1976 on radio, GMT 1430, FBIS.
95 *Ibid*.
96 Chief Judge of Supreme People's Court, *Report on the Activities of the Year 1964 and Directions for the Year 1965 of the People's Court*, Report to the National Assembly, 1964, p. 8 (in Vietnamese).
97 *Ibid*.
98 Bui Tin, 1995, p. 40.
99 *Ibid*., pp. 110-111.
100 Hiroshi Oda, 1987, p. 1361. Oda argues that the Party guiding judges was common practice in the USSR and China.

(or the renovation policies) commencing in 1986.[101] Party direction of court decisions was consistent with the notion that the courts existed to implement the will of the Party. This was managed by direct accountability to local party organs and through the active role of the procuracy, which vetted and advised on judgments. As the court noted:

> It can be said that during the war of destruction against American Imperialism (1965-1968) the people's courts played an important role and made great contributions to the revolutionary cause in Vietnam.[102]

As noted in chapter two, the Party could discipline its members at any time using internal Party procedures. As a result errant personnel could easily be sanctioned or removed.

VI. Community and Courts

Use of the Courts

It was not possible to locate centrally collated statistics for the earlier period of this study, 1945 to 1959. The statistics used here emanate from two sources: an unpublished Vietnamese history of the court system and data compiled on request by the Supreme People's Court Institute of Juridical Science (T*rung tam thong tin, vien khoa hoc xet xu toa an nhan dan toi cao*).[103] No centrally compiled data existed for criminal cases before 1964 or for civil cases before 1963.[104] Below is a table setting out the number of criminal and civil judgments delivered and the number of criminal and civil cases received nationally from the inception of keeping central data until 1976 when this study ceases. The indications are that this data incorporates all case numbers at the District, Provincial and Supreme Courts.[105]

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101 Interview by the author with Nguyen Nhu Phat, Hanoi, 26 September 1996.

102 Dang Quang Phuong, 1996, p. 6 (in Vietnamese). This article celebrates the fact that in the first half of 1960 people's courts in cities and in provinces directly under central control heard 166 cases against counter-revolutionaries.

103 Official requests for statistics were met with silence. However, an unofficial request for data via a colleague was successful in November 1998.

104 This information was provided informally by a colleague. The informant was based at the Court's Institute of Juridical Science, Hanoi, November 1998.

105 *Ibid.*

8. National Case Numbers in the DRVN[106]

Year	No. of criminal charges laid	No. of criminal cases	No. of criminal judgments	No. of criminal convictions	No. of civil cases	No. of civil cases judged
1963					10069	7746
1964	8785	6549	4362	6698	12862	10451
1965	6227	4207	3205	4799	11660	9790
1966	5682	3800	2987	4223	7800	6600
1967	6412	4083	3174	4936	5231	1230
1968	7979	4740	3351	5581	5035	3724
1969	8243	4714	3752	5429	5578	4567
1970	8774	5240	4011	6634	6531	5364
1971	9748	4831	4454	7410	7304	5470
1972	11056	6597	5167	8488	7739	5917
1973	9828	5766	4458	7484	6428	4960
1974	15681	8147	6570	11731	7510	5869
1975	14569	8064	6715	11785	6264	4460
1976	14942	8607	6999	11951	5635	5470

It is very hard to verify these figures. Commentary on the 1976 civil statistics, however, indicates that in the first nine months of that year a total of 4,061 cases had been lodged.[107] This figure is broadly consistent with the total provided for that year. Civil statistics indicate that the number of cases that resulted in a judgment was less than the total number received. A possible reason is that cases were either resolved or abandoned. It is unclear whether these figures include appeal numbers.

Only in 1963, 1964 and 1965 did the annual number of civil judgments exceed 6,600. In the main, case numbers hovered between 5,000 and 6,000.

This higher number of cases heard earlier in the life of the centrally run civil court has various possible explanations. It may have resulted from cases being on

106 These statistics reflect case numbers for the whole of Vietnam. Presumably this reference to national statistics actually refers to statistics where the DRVN government had control of the area and therefore for most of this period refers to the number of cases dealt with in the North.

107 Unknown Editors, 1996, p. 27 (in Vietnamese).

hold pending the establishment of a central court system. It may have reflected a decrease in the number of appeals. Alternatively, the decrease in litigation may be explained by user dissatisfaction with the courts. This latter explanation is challenged by the consistency of numbers of cases over the succeeding years. One would expect numbers to continue to trend downwards if users were dissatisfied with courts. It may suggest that the courts were attractive to particular groups which consistently used them, but not to the broader population. Finally, the course of the war may have affected numbers.

Given the total population of the DRVN at this time it appears that few parties resolved their cases in courts. [108] For example, in 1964 there were only 7.1 civil cases per 10,000 of the population and for the twelve-year period 1964 to 1976 this was the highest number.[109] At the lower end of the scale were figures for 1975 and 1976 where there were only 2.6 and 1.1 cases respectively per 10,000 of the population. In general terms the number of civil cases trends downward over the period 1964-1967. There are three possible explanations for this trend. First, it may reflect the unusual pressures exerted by the escalation of the war. Secondly, it may indicate the decreasing importance of the legal system. Thirdly, it may reflect a loss of the public's confidence in courts.

It has also been suggested that the criminal statistics included all appeals.[110] The first column entitled 'Number of criminal charges laid' refers to the total number of cases where a person was charged with a crime by the state. The second column refers only to those cases that proceeded to trial. The third column gives the number of judgments made by all criminal courts nationally, with the final column indicating how many convictions were recorded in any one year. The number of convictions exceeds the number of judgments on many occasions. This resulted from judges convicting one person of more than one crime. The number of criminal cases received by courts and the number of convictions escalated sharply between 1974 and 1976.[111] The increase in the volume of cases and convictions against alleged criminals in southern provinces, as the authority of the DRVN extended, explains this phenomenon.

These statistics do not indicate the number of cases that were dealt with by the Military Courts. Vietnamese scholarship makes general statements that the Military Courts were kept busy.[112] This general proposition is challenged by a specific claim in one court history that between 1961 and 1975 the Military

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108 This claim is made out in Chapter 9 when the DRVN and USSR case numbers are compared. See p. 188.

109 Compare this with 98 per 10,000 of the population in the USSR, see Chapter 9, p. 188.

110 This information was provided informally to a colleague. The informant was based at the Court's Institute of Juridical Science, Hanoi, November 1998.

111 For example, between 1974 and 1976 the number of convictions exceeds, by an additional 3000 per year, the total number of convictions in any of the nine preceding years.

112 Ngo Van Thanh, 1996, p. 137 (in Vietnamese). See also Chapter 3, pp. 61-64.

Court judged 5,000 criminal cases.[113] This is a relatively low number when compared with the number of cases heard in the criminal courts over the same fourteen-year period.[114]

Perception of the Courts

This discussion again confines itself to Vietnamese perceptions of the role of the courts between 1960 and 1976, based on interviews with ten educated, but not legally trained, Hanoians. All those interviewed claimed to know of the existence of courts in general terms and all but three claimed to know of the courts since some time in the sixties. As outlined in chapter three, three interviewees claimed familiarity with the existence of courts before that date.[115] Four of the ten only claimed familiarity with the court system from the mid to late 1960s.[116] This figure appears low given the active promotion of the courts and their work. As noted previously, all the interviewees were based in Hanoi and so it can be suggested that young Hanoians, in their twenties and thirties, remained relatively ignorant of the work of the courts until relatively late in the period.

Four interviewees became aware of the courts' work through radio and newspaper reports.[117] Two others claimed that they were taught about the courts at school and that this was the source of their awareness.[118] Another reported that the People's Committee megaphone system broadcast details about People's Court cases in the streets. The other interviewees recalled the courts for different reasons. One recalled riding past the Supreme People's Court on the way to work. Another cited litigation in 1977 as the basis of information and a third explained attending a mobile court in 1960. It is most likely all would in fact have been taught about courts in the classroom, but their recollections are, not surprisingly, based on events and adult experiences rather than those from school.

The interviewees were asked, more specifically, if they were aware of the work of the Supreme People's Court. Two claimed not to know about it and a further interviewee claimed only to have heard of it in 1986. Six of the ten claimed to know that its role was to hear serious cases and appeals, the other

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113 This is possible when the Military Court has jurisdiction over a matter because the defendant is member of the armed services, yet the nature of the charge alleged is criminal. See Unknown Editors, 1996, p. 28 (in Vietnamese).

114 Between 1964 and 1976 there were never less than 2,987 judgments handed down by the criminal court in any one year. See Table 8, above, p. 133.

115 See Chapter 3, p. 82.

116 Of the ten interviewed, two claimed they became aware of the courts in 1968 and two others claimed knowledge from 1966 and 1965.

117 Four of the ten claimed knowledge of courts was gleaned through radio and newspaper citing in particular that *Nhan dan* was the media source.

118 It was explained that in the middle years of high school the courts were introduced. One of those learning about courts in high school was born in 1938 so the curriculum dealt with this matter as early as the early fifties. It is not clear why others did not recall the courts from their school days as the sample were all educated.

four were uncertain of its role. Not surprisingly, the Supreme People's Court was more remote than the local people's courts, be they district or provincial. This reflected the fact that casework was largely undertaken by the local courts and that it was appeal work and revision work that dominated the time of the senior court.[119] Even scholarly accounts of the developing legal system chose to describe the system in terms of the evolving people's courts rather than to distinguish between lower and higher courts.[120] Certainly most of the press reports about the work of the courts were preoccupied to explain the role of people's courts without separately discussing the Supreme People's Court.[121] The Supreme People's Court's journal was not publicly circulated.

Of the ten interviewed all were adamant that they would not use the courts to resolve their disputes, although only some went on to give reasons for this. Four interviewees indicated that the courts were corrupt, too slow and too expensive.[122]

The group members were also asked if they used local mediation to resolve disputes. Nine said they did not (and would not) use mediation to resolve a dispute. One claimed to have used a local mediation committee for a family matter resulting in the family staying together, which was seen as a good outcome. Three of the interviewees gave reasons for avoiding mediation. One stated that it was easier to resolve disputes on one's own. Another suggested that mediation had been tried and failed and, the third said that mediation committee members were just old men with political thoughts who could not really help to resolve cases impartially. Whatever the reason, there is no doubt that the interviewees did not see state-sanctioned dispute resolution as useful or relevant to their lives.[123]

This small sample echoes Nguyen Nhu Phat's analysis of Vietnamese perceptions of law when he writes, 'Vietnamese people are normally afraid of, avoid and even hate the law.'[124] Chapter ten explains this response to Vietnamese dispute resolution.

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119 Interview by the author with 'Tri', 20 September 1996, Hanoi. 'Tri' stated that the Supreme People's Court did relatively little first instance casework, focusing instead on appeal work.

120 For example, Truong Ton Phat, *Nhan dan*, No. 3649, 26 March 1964, p. 2, JPRS 24571.

121 For example, Hong Chien, *Hoc tap (Study)*, No. 9, Hanoi, September 1961, JPRS.

122 The one person in the group who had been to the courts, although the court experience took place out of the period of this study, explained that he did not get an effective judgment. Despite a court order in his favour, the court never compelled a payment and so he characterized the order as useless.

123 This attitude to the courts is largely born out by more recent studies. For example Bergling reports that of the business people he interviewed in the mid-1990s over 70% said they did not trust the judiciary to 'provide fair and efficient adjudication and enforcement'. Per Bergling, 1999, p. 131. See also John McMillan and Christopher Woodruff, 1999, p. 5, where the authors claim that of 259 interviewed managers of private enterprises based in Ho Chi Minh only 9% thought the court could assist to resolve a dispute.

124 Nguyen Nhu Phat, 1997, p. 401.

VII. Extension to the Republic of Vietnam

With the defeat of the Republic of Vietnam in 1975, a unified and national legal system was introduced. The *Decree of the Council of Ministers on the Organization of the People's Courts and the People's Procuratorates*, dated 15 March 1976, introduced the court system of the north into the south. This legislation was introduced a month before elections for a new National Assembly by the Provisional Revolutionary Government of South Vietnam. It can be distinguished from the DRVN legislation of 1959 on two bases. First, the initial articles in chapter one, concentrating on general principles, are more explicitly revolutionary than those in the 1960 Order. Secondly, this law includes provisions concerning the procuracy. Article 1 states that:

> The People's Courts and the Procuracy have the duty to struggle against crimes and other acts violating the laws and policies of the revolutionary administration, to contribute toward ensuring strict implementation of these laws and policies, to protect the revolutionary administration, to be autocratic against counter-revolutionaries, to expand democracy for the people, to maintain public security and order, protect public property and to safeguard the lives, property and other legal rights of the people.[125]

This is a broad instruction to the courts to punish those not sympathizing with either the policies or laws of the revolutionaries. It is much more explicitly pro-socialism than the equivalent sections of the 1960 Order, when the administration appeared at pains to uphold the law and made no mention of policies at all.[126] In 1959 judges were only instructed to 'adjudicate criminal and civil cases'.[127] The remaining provisions in Article 1 of the 1976 decree are very similar to the earlier 1959 Order. The courts' role is to educate and reform as well as punish, and to educate citizens to be loyal to the Fatherland.[128]

VIII. Conclusion

In this period, post-colonial institutional development receded as a catch-cry for the development of legal institutions and was replaced by an avowed Party loyalty and official commitment to the construction of a socialist state, including a socialist court system. The court was to play a role as enforcer of laws and policies and was also to educate its personnel and the citizens about the content

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125 Decree No. 01/SL/1976 *On the Organization of the People's Courts and the People's Procuratorates*, translated by FBIS, Article 1.

126 Compare with Article 1, *Order on the Organization of People's Courts*, 1960. See Chapter 5, pp. 109-110.

127 Order No. 19-LCT, dated 26 July 1960, *Law on the Organization of People's Courts*, Article 1.

128 Compare Order No. 19-LCT, dated 26 July 1960, *Law on the Organization of People's Courts*, Article 1 with Decree No. 01/SL/1976 *on the Organization of the People's Courts and the People's Procuratorates*, translated by FBIS, Article 1.

of those laws and policies. The statements of the officials and their publications, such as the Supreme People's Court journal, suggest that the courts played a major role in reaching out to the people and explaining the moral language of the new regime.

This perception, however, is challenged by the unofficial view of the court system, reflecting, as it does, relative ignorance of courts. One Vietnamese academic has said that the courts were largely irrelevant to Vietnam until 1992.[129] This commentator also claimed that courts had little relevance to daily life in the DRVN, a statement largely borne out by the small sample interviewed and the statistical evidence of small numbers relying on courts.[130] If the public did not resort to courts, how were disputes in the DRVN resolved? Largely, it seems, between the parties themselves,[131] and even when the state was involved, it seems quite possible that local level police and the use of administrative powers were not uncommon.

Below is a summary of the structure and characteristics of the courts upon the unification of Vietnam:

1. All dispute resolution bodies (committees, courts) working for the Vietnam Workers' Party. This was indicated by:
   - the election to office of judges and people's assessors by the Party-dominated Councils and National Assembly;
   - the numerous statements made by senior judges of the role of the courts as the tool of the state which had at its head the Vietnam Workers' Party.
2. Appearance of popular justice perpetuated by:
   - the election of people's assessors;
   - press reports emphasizing the role of the people's assessors, in particular their equal voting rights with judges in first instance hearings; and
   - mobile courts.
3. Judges trained through seminars, publications and short-term courses with a strong emphasis on constructing a socialist state.
4. Evidence of a determination centrally to control the courts:
   - appeals could be heard by the Supreme People's Court and it had the power to review any decision for a perceived error;
   - the role of the Supreme People's Court in issuing guidelines to lower courts instructing them on how to determine cases;
   - the voice of Supreme People's Court judges clearly heard in reports of conferences as the authorities determining how court-based and policy-based issues were to be resolved; and
   - closure of the Ministry of Justice and establishment of the procuracy.

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129 Interview by the author with 'Tuan', Hanoi, 3 September 1996.

130 This view is supported by interviews conducted in the contemporary period by Bergling and McMillan and Woodruff on public perceptions of courts: see Per Bergling, 1999, pp. 122-130; and John McMillan and Christopher Woodruff, 1999, pp. 5-6, 20.

131 Nguyen Hien Quan, 2006, pp. 155-198.

The centre struggled to gain control of the regional courts. Yet despite an apparent lack of complete control the framework was established for an integrated court system along socialist principles. When the country was reunited, Hanoi was poised to introduce its new system in the South and continue the job of building state institutions without the disruptions of war. The DRVN had undertaken the challenge of introducing a Soviet-style court system. This study now considers the Soviet system of courts to consider the extent to which the DRVN replicated or diverged from the Soviet model.

Part Three
Courts of the USSR and Democratic Republic of Vietnam Compared

CHAPTER 7
THE SOVIET UNION AND ITS COURTS

There developed in the nineteenth century originating from the days of absolute monarchy, the centralized state power with its ubiquitous organs of standing army, police, bureaucracy, clergy and judicature.

Lenin[1]

The focus of this study now shifts to investigate Soviet legal history to enable the comparison of the Soviet and Vietnamese systems of dispute resolution. The first part of this chapter offers a brief introduction to the pre-Soviet system of dispute resolution.[2] The second part introduces a succinct overview of Soviet legal culture, while the third part identifies characteristics of the Soviet court system. The core features of Soviet dispute settlement are summarized in part four.

By 1917 Russia had changed from regionally based principalities to a great empire comprizing diverse ethnic groups, which was largely agricultural. The Mongols had colonized the City State of Kiev (822-1240) in 1238, remaining in power until 1452. Muscovite Russia defeated the Mongols, gradually extending authority and establishing imperial rule in Russia between 1689 and 1917. By the mid nineteenth century Russia was a class-based society where serfs could be traded as chattels, while the elite built law schools and embraced the 'Westernisation' of law.[3] As will become apparent, Russian courts had been reformed several times, never it seems with sufficient success to assuage their vehement critics.[4] Matters at issue were the courts' subservience to elite interests and the class-based approach they took to the resolution of disputes.

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1 V.I. Lenin, *State and Revolution*, International Publishers, New York, 1954, revised translation, p. 36, cited in Samuel Kucherov, 1970, p. 3.

2 Here when the word 'Soviet' is used it refers to the Russian Soviet state and not to its Baltic satellites or Mongolia. For a discussion of the interconnection between the Russian Soviet state and that of the other states in the federation see John Hazard, 1969, pp. 12-18.

3 Harold J. Berman, 1963, pp. 187-225. See also Olympiad Ioffe and Peter Maggs, 1983, pp. 33-34.

4 Samuel Kucherov, 1970, pp. 1-7.

This brief statement of Russian history hides the diversity and drama that accompanied the major moments of Soviet history. It is beyond the purview of this comparative study to detail the nuances of Soviet history, but to enable the comparative study, a selective focus has been adopted, which concentrates on those factors within the saga of the establishment of the Soviet Union, most directly relevant to the development of the Soviet court system.

I. Law and Dispute Resolution under the Tsars

> Through what torments, what anguish our soul had to pass, realizing the impossibility to help justice because of the fetters and nets of the judicial procedure of that time!
>
> I.S. Aksakov[5]

After independence from the Mongols in the latter part of the fifteenth century, the first national Russian law code, the *Sudebnik*, was introduced in 1497 followed by the *Sudebnik* of 1550.[6] Both Codes were concerned with judicial procedure.[7] At the pinnacle of this system was the Grand Prince who could sit as a court of first instance or as the ultimate Court of Appeal.[8] Court documents used in litigation exist from this period.[9] They suggest that court procedure was adversarial, with decision-makers relying largely on oral evidence. On occasion the court would prepare a summary of the evidence presented at the trial and send it to a higher court for its determination. Mention is made of divine justice.[10] This could take the form of casting lots or duels, although the latter were outlawed in 1556.[11] At this time, therefore, state-sanctioned decision-makers determined cases on the basis of contested evidence. The role of lawyers is less clear.

Commentators characterize the publication of the *Sobornoe ulozhenie* in 1648-49 as the 'most substantial and important achievement of medieval Russian law'.[12] This compilation is, according to Butler, a code combining previous Russian legal publications while also reflecting European influence. It is also characterized as the moment of transition from a feudal state to an absolutist one,[13] reflecting the absolute control held by the landlords over their serfs.[14]

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5 Aksakov, I.S. *Sochineniya*, 1860-1886, Vol. IV, pp. 656-657, published in Samuel Kucherov, 1953, p. 4.
6 This is not to say they were the first legal instruments. In Kievan Russia (822-1240), the City State of Kiev passed laws and had a form of dispute settlement where parties could contest matters before a referee. George Dana Cameron III, 1978, pp. 2-3.
7 W.E. Butler, 1983, p. 12.
8 *Ibid*., p. 13.
9 Dewey and Kleimola, *Russian Private Law in the XIV-XVII Centuries*, 1973, cited in W.E. Butler, 1983, p. 14 and Harold J. Berman, 1963, pp. 200-201.
10 W.E. Butler, 1983, p. 14.
11 Harold J. Berman, 1963, p. 201.
12 Nicholas R. Riasanovsky, 1963, pp. 205-207 and W.E. Butler, 1983, p. 16.
13 W.E. Butler, 1983, pp. 16-17.
14 Nicholas R. Riasanovsky, 1963, pp. 205-207.

By 1649 the court system was more elaborate.[15] There were Prince-sponsored courts in which governors presided. These office-holders were selected and employed by the Tsar. In addition, locally elected judges staffed local courts. An appellate system had been developed producing a hierarchy of courts comprizing three levels: the lower courts; the appeal to panels of governors; and, serving as the highest judicial organ, the Boyars' Duma or Council of Notables.[16]

Peter the Great (1689-1725) attempted fundamental reforms: the separation of church and state, and the establishment of the Ruling Senate (1711) and the procuracy (the latter to test the legality of all acts of government departments). The position of the serfs and slaves, however, did not improve. In fact the changes introduced by Peter, and later by Catherine the Great (1762-1796), are characterized as entrenching the powerlessness of these classes, ensuring that they had the status of chattels.[17] Peter also introduced the rules of procedure used in the army to all civil and criminal courts.[18] Despite the ambitious reform agenda the legal system, and in particular its court system, remained autocratic and chaotic.[19]

The system of courts was class-based, with penalties and jurisdiction determined by the class of the accused.[20] There was no trial. Instead the police collected and presented the evidence to the court by way of a written brief.[21] Soviet jurists condemned this system claiming it to be 'a court only in name'.[22] The courts were seen as a forum in which illiterate, state-appointed persons frequently sat as judges and failed to deliver prompt or erudite judgments. In addition, despite numerous codifying commissions, the law remained unclear and confused.[23]

As Kucherov summarizes:

> The secret and inquisitorial proceedings with their doctrine of formal evidence and complexity of courts and procedure, the venality and corruption

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15 Richard Helle (ed.) (trans) 1988. In particular see chapters 10 to 13 (pp. 23-97), which deal with the judicial process for the trials of peasants, court officials and religious figures.

16 Harold J. Berman, 1963, pp. 200-201.

17 *Ibid*., p. 204. Berman explains that as a result of Peter the Great defining slaves and serfs as one group, the landowning classes of imperial Russia were able to treat both slaves and serfs with equal lack of respect. Previously it has only been slaves that could be treated as chattels.

18 George Dana Cameron, 1978, p. 6.

19 E.L. Johnson, 1969, p. 14.

20 Harold J. Berman, 1963, pp. 211-212.

21 The class or level of education of the deposing witness determined the weight attributed to the evidence. For example, the evidence of a churchman was preferred to that of a layman and the evidence of an educated person given preference. E.L. Johnson, 1969, pp. 15-16.

22 Samuel Kucherov, 1953, p. 9.

23 Yet at this time (during the mid to late eighteenth century) Russian scholars were going abroad to study law. Two of these returned from reading law at the Glasgow University to work at the Moscow University that had been founded in 1755. See W.E. Butler, 1983, p. 18; Harold J. Berman, 1963, p. 203; Samuel Kucherov, 1970, pp. 251-259.

> of judges, the complete dependence of the judiciary upon the executive – all of these factors combined to reduce the administration of justice to a mere parody of equity.[24]

Under the rule of Alexander II, between 1855 and 1881, the Russian laws were collected and published, serfs were emancipated and judicial reforms were introduced.[25] The reforms of 1864 required that judges be independent of the executive and enacted a system of appeals. Sitting above the Appeal Courts, and located in the Senate, were two courts of cassation, one for criminal and the other for civil matters. All class-based courts were dissolved except for that dealing with the peasants, known as the *Volost* Court. A system of Justices of the Peace was set up to deal with minor matters, the justices being appointed by the local authorities. Under the reforms the trials were to be public and conducted on the basis of oral evidence. Juries were to be used in serious criminal cases and a professional bar was also established.

These reforms provoked a range of responses, varying from the liberal intellectuals' celebratory – 'What did the Laws of 1864 give to Russia? They gave to our Fatherland what did not exist before – Justice',[26] to the damning – 'An independent court is a judicial republic.... In a state which is to live, there cannot exist two autocracies'.[27] The latter criticism emanated from conservatives, but the future revolutionaries also dismissed the reforms as 'nothing more than a rather poor bourgeois reform'.[28]

The impact of the reforms was diminished by numerous exceptions.[29] For example, where the offence alleged was perceived as connected to an offence for a political purpose there was no trial by jury.[30] When certain offences were alleged against priests or civil servants, juries were made up of class representatives. Also, peasants had to be content with the *Volost* Courts. In sum, by 1917, the state and its legal system were unable to deliver sufficient reforms to satisfy their critics. Both intellectual liberals and the Bolsheviks sought to reform 'class' justice.

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24 Samuel Kucherov, 1953, p. 9. Kucherov refers to the trial of a group of female serfs for the wrongful death of a landowner. The landowner had raped the women for fifteen years before their choking him. Each of the women was ordered 100 lashes while the nobleman of the region certified that the landowner had acted 'as it is fitting for a well-born Russian nobleman'.

25 For a discussion of these reforms see: Samuel Kucherov, 1953, pp. 21-106; E.L. Johnson, 1969, p. 18; Harold J. Berman, 1963, pp. 213-214.

26 Lazarenko, 'Ocherk osnovnykh nachal sudoustroistv Rossii i glavneishikh zap. Yevropeiskikh gosudarstv', pp. 488-489, cited in Kucherov, 1953, p. 104.

27 Katkov, *Moskovskiye Vedomosti*, 1884, No. 316, cited in Kucherov, 1953, p. 101.

28 A. Ya Vyshinksy, 'The Marxist-Leninist Doctrine of the Court and the Soviet Court System' *Essays on Court Structure in the USSR*, 1934, Vol. 2, p. 16, cited in Kucherov, 1953, p. 102.

29 Johnson points out that the Minister of Justice was given power to dismiss judges 'at will' when explaining that the 1864 judicial reforms held some 'objectionable features'. E.L. Johnson, 1969, pp. 18-19.

30 *Ibid.*

II. Soviet Legality

> Law is a political measure, it is politics.
>
> V.I. Lenin[31]

The 1917 Bolshevik revolution heralded a new administration. The Bolsheviks did not take up government with a blueprint for the future administration of the state – especially with regard to legal matters.[32] The revolution signalled that government would be based on Marxist-Leninist principles.[33] Marx and Engels, however, had relatively little to say about law.[34] Therefore the Bolsheviks had to interpret the ideological and theoretical texts of Marx and Engels in light of the practicalities of government. Lenin connected and articulated the relationship between law and politics, commenting in 1916 that 'Law is a political measure, it is politics'.[35] This tension between theory and practice shaped the Soviet legal system.

From the 1920s, Western and Soviet commentators generally characterized the Soviet legal system as connected to politics and policy.[36] Lenin's proclamation that law is politics translates as the 'leadership' of the Communist Party being given 'first place'.[37] Law reflected the policy of the day and where it did not do so literally (due perhaps to an outdated law having not yet been amended), the practice of the day was to implement the policy rather than the law.[38] Where policy and law collided, policy dominated.[39] As Butler has argued:

> Law is, inter alia, policy as well as politics, whether one speaks of law writ large or as a single legislative act; it is a product of political processes, it

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31 V.I. Lenin, 'Concerning a caricature of Marxism and concerning imperialist economicism' *Sochineniia* [Collected Works], 4th edn, Moscow, 1949, p. 36, in John N. Hazard, William E. Butler and Peter B. Maggs, 1977, p. 5.

32 W.E. Butler, 1983, p. 30.

33 The period, 1917 to 1920, is often referred to as war communism. P.I. Stuchka, 1988, p. xiii. See also Z.L. Zile, 1988, pp. 1-34. Zile traces Soviet historiography of this period noting that the term war communism fell into disfavour over time being replaced by a retrospective view of history which recounts a continual construction of communism.

34 M. Cain and A. Hunt (eds), 1979; Paul Phillips, 1980. For a critique of these see Eugene Kamenka, 1983, pp. 50-51. See also O. Oiffe and Peter B. Maggs, 1983, pp. 31-32. Here Oiffe and Maggs summarize what they perceive as the very limited contribution made by Marx and Engels to the discussion of law and Marxism. For a Marxist discussion of the contribution made to jurisprudence by Marx and Engels see V.A. Tumanov, 1974, pp. 39-43.

35 V.I. Lenin, 'Concerning a caricature of Marxism and concerning imperialist economicism' *Sochineniia* [Collected Works], 4th ed, Moscow, 1949, p. 36, in John N. Hazard, William E. Butler and Peter B. Maggs (eds), 1977, p. 5.

36 V.V. Smirnov, 1985, pp. 23-33; W.E. Butler, 1983, p. 30; Olympiad Oiffe and Peter B. Maggs, 1983, p. 94.

37 John Hazard, 1969, p. 19. See also George Brunner in F.J.M. Feldbrugge (ed), 1987, p. 4.

38 W.E. Butler, 1983, p. 30.

39 Kazimierz Grzybowski, 1962, pp. 71-77.

> records a policy judgment or decision, and it transmits that decision to whosoever it is addressed in the form of a normative or legally binding rule.[40]

Put another way, the new regime could have opted to regulate via the passage of laws or by relying on its policies. Or as Oiffe and Maggs write, 'Formal initiative belongs to the agencies and people mentioned in the Soviet Constitution. Actual initiative, which is not even obliquely mentioned until 1936, belongs to the Politburo'.[41]

In addition, all private rights were interpreted against the prevailing public policy[42] and, as will emerge, this included the concepts of democratic centralism and revolutionary or socialist legality.

As in Vietnam, democratic centralism was integral to the Party's control of all policy developments within the USSR.[43] It was introduced by Lenin and has been defined as 'the general electiveness of all Party agencies from the top to the bottom, and the strictest subordination of the same agencies from the bottom to the top'.[44] The principle first made its official appearance in the Party's program of 1906.[45] Here the Bolsheviks used it as the organizational basis of the Party, although it did not make an appearance in the Constitution until the revisions of 1961.[46]

Although democratic centralism is described as an organizing principle, it is not a legal tenet.[47] It is essentially a 'political method' which impacts upon the way a court system, for example, is organized.[48] Democratic centralism allows the Party to expect that its policies will be implemented, for a failure to do so results in censure. In addition, Lenin's network of control agencies (such as the KGB, the procuracy, and the various informal bureaux for trying dissidents) all enabled the Politburo to develop a tight grip on the administration of the Soviet Union.

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40 W.E. Butler, 1983, p. 30.

41 Olympiad Oiffe and Peter B. Maggs, 1983, p. 99. In article 126 of the 1936 Constitution toilers are given a public right to unite.

> Working class and other strata of the toilers unite in the Communist Party of the USSR, which is the vanguard of the toilers in their struggle to strengthen and develop the socialist system and which represents the leading core of all organizations of the toilers, both public and state.

This is the first official statement of the leading role of the Communist Party in the Constitution.

42 Kazimierz Grzybowski, 1962, pp. 104-109.

43 The Vietnamese also relied on democratic centralism. See Chapter 2, p. 43, Chapter 4, pp. 88-89.

44 Olympiad S Ioffe, 1985, p. 22. For a more detailed discussion of democratic centralism and what Ioffe refers to as its reality, centralized democracy, see pp. 21-45.

45 See P. Lavigne, in F.J.M. Feldbrugge, G.P. Van den Berg and William B. Simons (eds), 1985, p. 249.

46 *Ibid*.

47 See Chapter 2, p. 43, Chapter 4, pp. 88-89.

48 See P. Lavigne, in F.J.M. Feldbrugge, G.P. Van den Berg and William B. Simons (eds), 1985, p. 249.

By control of its membership and by its 'iron' discipline, the Communist Party was able to ensure strong leadership.[49] In turn, the fact that Party members held senior government posts ensured that policy was implemented. The leading role played by the Communist Party is set out in the programs of that organization. Whether this is named a law or a policy is not important, as the programs were the ultimate and supreme source of authority.[50] Russian Communist Party Programs, which can be loosely described as policy statements, including the aims of the Party, were adopted in 1903, 1918 and 1961.[51] Where there was a law or policy vacuum, revolutionary zeal and consciousness could be relied upon to assist with the implementation of revolutionary policies.[52]

Russian jurists had a long tradition of jurisprudence and continued this by grappling with the role and place of socialist law.[53] This study does not enter the debates of the role and place of law in socialist societies.[54] However, it briefly chronicles the evolution of Soviet jurisprudence.

At the time of the October revolution, revolutionary consciousness was expected to operate as a source of law and the constraints of formal legalism were to be renounced.[55] In 1918 Stuchka,[56] who was appointed to the Supreme Court of the Russian Republic in 1923, introduced the term 'revolutionary legality' which meant that the law would be strictly applied, but that where it was lacking officials could improvise providing they were consistent with the policies and principles of the government of the day.[57] Stuchka argued that law was a

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49 John Hazard, 1969, pp. 19-33.

50 Osakwe refers to programs as the 'supreme law of the land', on the basis that, providing an action was not inconsistent with the program, it was unlikely to be voided or declared illegal. Actions according to decrees and regulations could be voided if they were inconsistent with the Party program. Osakwe adds that Soviet commentators frequently described the program as the theoretical document and the laws as merely indicators of legislative intent. Chris Osakwe, 1977, p. 160.

51 Harold J. Berman and John B. Quigley (eds), 1969, p. 58.

52 V.N. Kudriavtsev, in William Butler and V.N. Kudriavtsev (eds), 1985, p. 7. Johnson likens revolutionary consciousness to a religion. He asserts that the application and implementation of law is driven by its perceived purpose and this is upheld because jurists believe in the objective. E.L. Johnson, 1969, p. 77.

53 Robert Sharlett, Peter Maggs and Peirs Bierne (eds), 1988, pp. xii-xiii.

54 See for example: Harold J. Berman, 1983, p. 557; Olympiad S. Ioffe, 1985, p. 6; A. Hunt, 1985, pp. 11-37; A. Stone, 1985, pp. 39-67.

55 Hiroshi Oda, in F.J.M. Feldbrugge, G.P. Van den Berg and William B. Simons (eds), 1985, pp. 706-708.

56 P.I. Stuchka (1865-1932) was a Latvian who in the late nineteenth century advocated radical reforms of the political and legal systems of his country. He was Lenin's first Commissar of Justice taking up that post in 1917. Although absent in Latvia through most of 1918-1919, Stuchka returned to Moscow in 1920 and was an active scholar and political figure. In 1921 he wrote *The Revolutionary Role of Law and State*, a text that has been characterized as marking 'the origins of the Soviet Marxist legal theory'. In 1923 he was appointed Chairman of the Supreme Court of the Russian Republic where he remained until his death. See P.I. Stuchka, 1988, pp. ix-xi.

57 Hiroshi Oda in F.J.M. Feldbrugge, G.P. Van den Berg and William B. Simons (eds), 1985, pp. 706-708. Oda points out that there were many competing attitudes to the adoption of revolutionary legality as a guiding principle. Legal nihilism posed one of

class-based phenomenon and that as such it would ultimately wither with the effective construction of socialism.[58] However, in the interim he saw a role for law, albeit within a reinterpreted legal system where coercion and ideological persuasion were important. The courts were required to contribute toward the development of revolutionary consciousness.[59]

Another Soviet commentator has put it this way:

> Revolutionary transformation was quite often accomplished not by way of legislation, but through autonomous revolutionary creative effort of the toiling masses and local Soviet agencies, they being not regulated by decrees but guided by their own revolutionary legal consciousness.[60]

Pashukanis, a leading jurist and teacher of Soviet laws until 1937 when he was denounced and shot, argued that, although law originated as a means by which the elite could administer a state in their own interests, it was in fact 'distinct from other means of class domination by virtue of its role in commodity exchange'.[61] In effect, he argued that law was not a part of the superstructure but an integral part of the economic basis of daily life – be it in family law, labour law or contractual arrangements. Like Stuchka, Pashukanis predicted that law would ultimately wither since once the economic basis of daily life – the contract – was removed and replaced by the centrally coordinated plan, law would lose its relevance.[62]

When it became clear that law was not withering but continuing to play a role in the administration of the state, further debates ensued about the inter-relationship between state and law.[63] The reconstruction of the Soviet state, and with it the changes to the court system, commenced in 1936. Stalin announced that 'We need the stability of laws now more than ever'.[64] The passing of the USSR Constitution in that year signified a change in policy from diminution of

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the challenges as it challenged the existence of any formal legal system. However, the government saw the necessity for having centrally controlled policy implementation, and revolutionary legality was the official policy.

58 P.I. Stuchka, 1988, p. x.

59 Kazimierz Grzybowski, 1962, p. 19.

60 V.N. Kudriatsev, 1985, p. 5. See also Kazimierz Grzybowski, 1962, p. 19.

61 E.B. Pashukanis was the Director of the Institute of Soviet Construction and Law, attached to the Communist Academy, until 1936 and subsequently a part of the USSR Academy of Social Sciences. He was also senior editor of the journal, *Soviet State and Law*, until 1937. Harold J. Berman, 1963, pp. 31, 389-390.

62 Extracts of Pashukanis' writing are located in V.I. Lenin et al., H.W. Babb (trans), 1951, cited in John N. Hazard, 1960, p. 18.

63 Stalinism flourished between 1928-1953. Stalinism can be divided into two periods: the construction of socialism (1928-1936) and the consolidation of socialism (1936-1953).

64 Cited in George Dana Cameron, 1978, p. 26. Compare this with Harold J. Berman's characterization of Stalin's system from the mid-1930s as 'based on a coexistence of law and terror. Law was for those areas of Soviet life where the political factor was stabilized. Terror, whether naked or (as in the purge trials of the late 1930s) in the guise of law, was applied when the regime felt itself threatened': Harold J. Berman, 1963, p. 66.

the role of law to its strengthening and promotion.[65] This came about, according to Stalin, because before disappearance the state had to pass through a phase of strengthening.[66]

With this shift in policy arrived a new age of legal theorizing. Here the dominant voice is usually ascribed to Vyshinskii.[67] In 1933 he coined the term 'socialist legality', replacing the term 'revolutionary legality' while leaving the basic principle of the importance of implementing government policy unchanged. Butler summarizes Vyshinskii's attempt to rationalize a theory of socialist legality as developing a place for law in socialist legal systems and expressing law in 'instrumentalist' terms as the will of the people.[68]

In addition to the evolving jurisprudence on the role of law, complex and overlapping organs of control were developed to oversee and ensure the application of the centrally determined policies.[69] The security forces were an essential element in the imposition of central control. The establishment of the Special Boards by Stalin to ensure that enemies of the state were eliminated is the most extreme example of this. The gradual centralization of the court system also assisted the Party and state with the implementation of their policies.

Following Stalin's death in 1953, Kruschev came to power.[70] The ensuing review of Stalinist practices, and the exposure of the horrors associated with that administration, entailed a review of socialist legality.[71] It was argued that Stalin had acted in breach of socialist legality – the will of the people – in the purges of his administration. The Communist Party of the Soviet Union Congresses of 1959 and 1961 moved Soviet policy from the dictatorship of the proletariat to the construction of communism, a move it was hoped would be completed by 1980.[72] The term 'socialist legality' continued in use,[73] and although the phrase still allowed the 'superiority of political expediency, of which the Party is the sole judge, over law',[74] it was associated with stricter controls and less abuse of power.[75] In practical terms this translated as the Party's determination to reassert its control over the secret police.[76]

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65 This change in policy resulted in a condemnation of the work of the earlier theorists Stuchka and Pashukanis. Pashukanis was shot in 1937 even though he had retracted his theory the previous year. See Harold J. Berman, 1963, p. 390.

66 W.E. Butler, 1983, p. 33.

67 *Ibid*., p. 34.

68 *Ibid*.

69 For an excellent discussion of control mechanisms generally see Leon Boim, Glenn Morgan and Aleksander Rudzinski, 1966.

70 E.L. Johnson, 1969, p. 24.

71 R. Sharlet, 1979, p. 322.

72 W.E. Butler, 1983, p. 35.

73 Socialist legality is not necessarily connected with abuse of power in Soviet writings. See for example, V.M. Chihkhikvadze (ed.), 1969, pp. 266-275.

74 Hiroshi Oda, in F.J.M. Feldbrugge, G.P. Van den Berg and William B. Simons (eds), 1985, pp. 706-708.

75 *Ibid*.

76 R. Sharlet, 1979, pp. 325-326. Sharlet traces the strengthening of the role of law via the Communist Party Congress Documents of 1956, 1961, 1966 and 1971. Harold

This policy shift argued that the Soviet Union was a state for 'all people'.[77] Rather than using law to exclude people from participation in community life (because of their bourgeois ideas or practices), the state was to work inclusively for the good of all.[78] The state relied on a strengthening of socialist legality to implement the policy.[79] In 1956 the Congress resolved that:

> The Congress fully supports the measures effected by the Central Committee to strengthen Soviet legality, to ensure strict observance of the rights of citizens, as guaranteed by the Soviet Constitution, and places all Party and Soviet organs under the obligation of vigilantly guarding legality, of putting an end – severely and decisively – to any manifestation of lawlessness, arbitrariness, or violation of the socialist legal order.[80]

As shall become clear, this policy shift is reflected in changes to the court system introduced shortly after the Congresses of 1959 and 1961.

The abolition of the USSR Ministry of Justice in 1956, and the Ministry of Justice in the Russian Republic in 1963, reflected an intention to streamline court management: no longer was court management split between the courts and the Ministry.[81] Further, the timing of this reform suggests the Ministry's abolition formed a part of the post-Stalin initiatives, and therefore its abolition suggests that it had been tainted in some way.[82] Removing the Ministry removed an intermediary between the Party and the courts and procuracy which had held a lot of influence under Stalin.

In 1964 there was a change in leadership when Brezhnev became secretary of the Communist Party and Kosygin became Premier. Legal procedure was again emphasized in the hope that its continued importance would reassure the community that the Stalin-led abuse of process would not occur again.[83] In 1971 the Ministries of Justice of the Soviet Union and the republics were re-established.

In summary the Soviet legal system's evolution reflected the contested relations between state and law. Law did not wither and die, as anticipated: instead it was increasingly relied upon by the state. Initially, law was used instrumentally. By the mid-1960s this use of law was disavowed and a more process-oriented approach to law conceived. It is now necessary to consider how these debates were played out in relation to courts.

J. Berman, 1963, pp. 70-71. Berman chronicles the changes to criminal law introduced after 1953.

77 Harold J. Berman, 1963, pp. 66-96.

78 V.N. Kudriavtsev, 1985, p. 7.

79 R. Sharlet, 1979, pp. 325-326.

80 *Resolutions and Decisions of the Communist Party of the Soviet Union*, cited in R. Sharlet, 1979, p. 325.

81 George Ginsbergs, 1979(2), p. 42.

82 *Ibid*. Ginsbergs reminds us that the Military Court had reported to the Ministry and suggests this may explain its abolition.

83 At this time the Soviet Union criticized China for a lack of socialist legality. See Chao Chuan Leng, 1967, p. 101.

Chapter 8
Soviet Dispute Resolution

We now need fewer lawyers, more communists.

P.I. Stuchka[1]

The period of Soviet court history under review here runs from October 1917, when the communists came to power, to April 1976 when the DRVN declared Vietnam unified. Over this period the Soviet legal system was dynamic, as was its system of dispute resolution. As shall emerge, after the revolution of October 1917, the traditional Russian legal system was dismantled and redesigned – sometimes on the basis of new principles, sometimes on the basis of old ones.[2]

The period 1917-1976 can be conceived as comprizing three phases of court development. From 1917 to the early 1920s the hope that law would wither (and with it the reliance on the court system) was popularized and embraced. From 1922, the jurisprudence and the court system demonstrated that, although variously named, law and courts were to play a role in the establishment of the socialist state. In particular, they were to assist as tools of the revolution to implement its policies. The courts' usefulness to the Stalinist regime was ultimately epitomized by the purges that relied on special courts, and to a lesser extent criminal courts. The third phase in court development commenced in the early 1950s with the reform of the role of law and the formalization of procedures in courts. Soviet courts and legal culture changed substantially over the period 1917-1976, reflecting wider policy shifts. Yet throughout the period courts remained as instruments of state policy.

This study commences with a discussion of how Soviet courts were conceived, through an analysis of terminology directly relevant to a study of Soviet courts. It shall then briefly consider other dispute resolution bodies existing between

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1 P.I. Stuchka, 1980, p. 22. Here Stuchka refers to an introductory lecture he gave in 1918 to training judges during which he claims he made the quoted statement. See Chapter 7, footnote 56.

2 John Hazard, 1960; Kazimierz Grzybowski, 1962; John N. Hazard, 1969; E.L. Johnson, 1969; John N. Hazard, William E. Butler, and Peter B. Maggs (eds), 1977; W.E. Butler, 1983; Harold J. Berman, 1983.

1917 and 1976. The structure and organization of the courts and the role of legal officers, including the expectations of judges and people's assessors, the basis of their appointment (criteria for and terms of) and removal and how they were trained will be examined. Court decisions and guidelines are considered to see how they illuminate the propagandist and educative roles of courts, noting the relationship the courts had with other state bodies. In particular, the procuracy's relationship with the courts shall be examined. Finally, the volume of cases heard by courts will be examined.

I. Soviet Nomenclature

What does the word 'court' mean in Russia? How is it to be translated? As noted earlier, law and politics were to be as one – a set of norms that would regulate daily social, economic and political life according to communist principles. The Russian term for court is *suzhdenie*.[3] It shares the same root as the words for judgment and judge – *sud*.[4] As with the English definition of court, the Russian term refers to both the place of judging and decision-making and the royal entourage. Oiffe and Maggs, writing in 1983, state that the term does not refer to an informal revolutionary tribunal, but rather to a 'normal trial court of general jurisdiction'.[5] In one sense this is correct. But this interpretation obscures the vital political role courts played in affecting the will of the masses – initially revolutionary dictatorship of the proletariat and later, after Stalin's death, within a more inclusive policy.

Courts are also defined in the Russian consciousness by the institutions that held this appellation in earlier times.[6] Under the new regime courts were revolutionary and were to act as a tool of the state to administer socialist justice or 'class justice'.[7] As one newspaper reported in 1927:

> In our village, Ramenskoe, the policemen were arrested as early as March 1917; the police chief vanished; the village elder, who had held office for twelve years as a protégé of the territorial administrator and was known among peasants as 'the dog' was driven out… and Isafiev, the examining magistrate, also went into hiding. But behold, not so long ago these scoundrels were handling all the peasants' cases in our locality.[8]

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3 This translation and its meaning were discussed by the author with Robert Lagerburg of the Department of European Languages, Arts Faculty, University of Melbourne, in March 2000.

4 *Ibid*.

5 Olympiad Oiffe and Peter B. Maggs, 1983, p. 304.

6 R. Schlesinger, 1962, p. 62.

7 Chris Osakwe, 1977, p. 182.

8 G. Ovchinkin, '*Kak proshel pervyi sud v. Bronnitskom uezde Moskovskoi gubernii*' *Proletarskii sud*, October 25, Nos. 19-20, 1927, p. 40 ('How the First Soviet Court was held in Bronnitsy District of Moscow Province') published in Zigurds L. Zile (ed.), 1992, pp. 93-95.

This article represents the revolutionary view of the Tsarist legal system. In contrast, in the new era courts were to administer laws and policies in the interests of the proletariat. They were not to be separated from the legislature and the executive, but were seen as integral to their functions.

The terms 'lay judge' or 'people's assessors' (*narodnje sassedatelji*),[9] and the term 'professional judge' '*sudya*', described new offices created after 1917. Some translate 'people's assessor' or 'lay judge' as 'juror'. However, this is misleading. It suggests that, as in a Western democratic system where the courts are independent of the legislature and executive, the juror is free to make up his or her own mind albeit with guidance from the judge about the law. In fact, lay judges or people's assessors were appointed to represent the proletariat and to ensure that the courts determined cases in light of the new revolutionary consciousness or revolutionary legality.[10] Although professional judges also had this responsibility, they would have a legal background. Accordingly it was feared they might not fully embrace the new policies with the same fervour as the people's assessors. As a consequence, people's assessors were initially given the authority to reduce a judge's sentence and also to remove a judge from office at any time.[11]

II. Survey of Dispute Resolution Bodies

Soviet courts were only one part of the complex web of dispute resolution institutions over the period 1917 to 1976. If adopting Martin Shapiro's broad definition of a court, 'conflict resolution' by a third party',[12] many institutions that were not called courts effectively served a similar role. Special Boards, Commissions and intra-institutional trials were all forms of dispute resolution in triads. An arbitration system also existed, although its role changed over time.[13] The official court system was merely one of numerous agencies involved in the resolution of differences – whether between individuals or between the state and its citizens. A brief introduction to some other venues of dispute resolution is required to see the court system in its emerging context. In particular, Comrade's Courts, Revolutionary Tribunals, arbitral fora and Military Tribunals deserve introduction.

9 R. Schlesinger, 1962, p. 65.
10 *Ibid*., p. 66.
11 *Ibid*. See Article 29 of the Second Court Decree, dated 18 February 1918.
12 Martin Shapiro, 1981, p. 1.
13 E.L. Johnson, 1969, pp. 216-229; W.E. Butler, 1983, pp. 114-118; Ger P. Van den Berg, 1985, pp. 169-172.

Comrades' Courts

Comrades' Courts were introduced very early after the revolution.[14] They first appeared within the military and were widespread by the middle of 1919.[15] They were also popular within the workplace, used by trade unions to assist with discipline.[16] Comrades' Courts also heard housing disputes. They were common during the 1920s and 1930s, falling into relative disuse during the 1940s.[17] Essentially the principal function of Comrades' Courts was to have individuals tried by their peers and, through this procedure, to educate citizens to develop appropriate conduct within their workplace or community. Censure of inappropriate behaviour was the dominant sanction,[18] although at various times they had more extensive penalties at their disposal including imprisonment and exile.[19] By the late 1920s, decision-makers were elected by a general meeting of workers, and guidance and supervision of the Comrades' Courts lay variously with the Commissar of Justice or the People's Courts.[20] Berman and Spindler point out that by 1931 rural Comrades' Courts were subject to both procuratorial and court supervision, while housing Comrades' Courts were only guided by the People's Courts.[21]

The decline of the popularity of the Comrades' Courts has been attributed to several factors. The advent of World War II saw the reclassification of many petty offences as criminal charges. This curtailed the jurisdiction of the Comrades' Courts and increased the role of the People's Courts.[22] There is also a suggestion that the voluntary support for Comrades' Courts was waning reflecting that 'industrial, residential and rural communities were not eager to maintain these voluntary agencies of group self-discipline'.[23]

The use of Comrades' Courts was revived in the 1950s[24] – a new bill on Comrades' Courts ultimately passed in 1961.[25] The courts were elected bodies

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14 Samuel Kucherov, 1970, pp. 156-177. Harold J. Berman and James Spindler, 1963, pp. 842-910.
15 W.E. Butler, 1983, p. 128.
16 *Ibid*.
17 *Ibid*. Butler alleges Comrades' Courts were widespread with about 45,000 Comrades' Courts existing in 1938. See also Harold J. Berman and James Spindler, 1963, p. 852. Here the authors rely on figures published in the Moscow publication *Sovetskoe Gosudarstov i Pravo (State and Law)*, No. 5, 1959, p. 5. Compare this with E.L. Johnson, 1969, pp. 157-159, who suggests that the courts receded in popularity in the 1930s.
18 Roy Turner, 1979, p. 46.
19 W.E. Butler, 1983, p. 128. The exile power was subject to review if the procuracy felt the penalty too severe.
20 Harold J. Berman and James Spindler, 1963, pp. 851-852.
21 *Ibid*.
22 *Ibid*., p. 853.
23 *Ibid*.
24 There are inconsistencies about when Comrades' Courts were revived. Butler claims they re-entered the scene in 1951, while Johnson states that they were revived in 1959: W.E. Butler, 1983, p. 128 and E.L. Johnson, 1969, pp. 157-159.
25 Harold J. Berman and James Spindler, devote an article to the analysis of each provision of the Statute on Comrades' Courts, 1961, 1963, pp. 842-910.

with judges sitting for a period of two years, although they could be recalled at any time by a vote of those who had originally elected them.[26] Trade union committees, collective farm boards and Soviet Executive Committees held the elections. Berman and Spindler note that the power to elect was presumably accompanied by the power to nominate for election.[27] Essentially Comrades' Courts were 'charged with actively contributing to the education of citizens in the spirit of a communist attitude to work and socialist property, the observance of the rules of socialist community life'.[28] People's Courts were required to hand back jurisdiction for petty offences to the Comrades' Courts.[29] The Comrades' Courts were required to keep records and had the power to summon witnesses. They could seek the assistance of the People's Courts to compel the payment of fines or compensation.[30] It was not possible to appeal a decision of a Comrades' Court although the body that had elected the judges could approach them to reconsider their decision.[31]

Revolutionary Tribunals

Revolutionary Tribunals were established in 1917,[32] to fight counter-revolutionaries and profiteering under the new regime.[33] The Commissar for Justice established its own special department of cassation to hear appeals from the Revolutionary Tribunals.[34] The tribunals were guided 'exclusively by the circumstances of the case and by revolutionary consciousness'.[35] In 1922 the Revolutionary Tribunals were officially disbanded and their jurisdiction transferred to the *Gubernia* Courts discussed later in this chapter.

Cheka Courts

Like the Revolutionary Tribunals, the Cheka Courts emerged in 1917 and were active for several years, officially lasting until 1922.[36] According to Berman these

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26 Roy Turner, 1979, p. 46.
27 Harold J. Berman and James Spindler, 1963, p. 862.
28 Harold J. Berman, 1963, p. 289, citing Article 1 of the *RSFSR Statute on Comrades' Courts*, 1961.
29 Harold J. Berman and James Spindler, 1963, p. 855.
30 E.L. Johnson, 1969, pp. 157-159.
31 Harold J. Berman and James Spindler, 1963, p. 890.
32 R. Schlesinger, 1962, p. 62. See Decree dated 27 November 1917, 1917/50, Article 8. Note that in other court histories this decree is dated 22 November 1917; see for example John N. Hazard, 1960.
33 R. Schlesinger, 1962, pp. 62, 77. For more details about the Revolutionary Tribunals, see the *Statute on Revolutionary Tribunals* dated 12 April 1919, 1919/132.
34 R. Schlesinger, 1962, pp. 63, 77.
35 *Ibid*., p. 77. See Article 25 of the *Statute on Revolutionary Tribunals*, dated 12 April 1919, 1919/132.
36 Harold J. Berman, 1963, p. 31. Cheka stands for Extraordinary Commission for the Struggle against Counterrevolution, Sabotage and Official Crimes. After 1922, when

courts also decided cases according to 'revolutionary conscience'.[37] The Cheka Courts together with Revolutionary Tribunals (see above) enforced 'what was officially called the Red Terror'.[38]

Arbitration

There was a movement to encourage disputants in economic matters to take their differences outside the court system and have them arbitrated.[39] In 1931, arbitration tribunals were established to deal with cases involving state-owned enterprises. These tribunals heard pre-contract and contractual disputes.[40] Arbitration was set up and operated independently of the court system.[41] As the trade between the COMECON countries expanded the jurisdiction to hear inter-country disputes expanded.

Military Tribunals

Military Tribunals always existed within the USSR, to hear cases against members of the armed forces and related civil actions. These actions were initially defined quite broadly to include various offences against the state and its property. In 1953 the jurisdiction of Military Tribunals was reduced with the removal of jurisdiction over civilians unless they were involved in espionage.[42] In 1958 new legislation relevant to Military Tribunals was enacted, confirming a three-tier hierarchy ultimately accountable to the USSR Supreme Court.[43]

III. Bolshevik Optimism: Minimalism and Courts: Civil and Criminal Courts

Turning from the range of dispute resolution bodies to the development of the central court system, the changes to the official policy concerning courts over

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the Cheka Courts were abandoned, other bodies covertly tried and convicted 'traitors': see Berman, footnote 22, p. 391.

37 *Ibid.*

38 *Ibid.*

39 John N. Hazard, 1960, pp. 9-10.

40 Harold J. Berman, 1963, pp. 131-144. Berman explains that a pre contract dispute arises when parties that have been ordered to contract with each other in general terms cannot agree on the details of the contract.

41 Although the arbitration tribunals operated outside the court system, such tribunals were not necessarily different from courts in all respects. See E.L. Johnson, 1969, pp. 219-220, in which he outlines the similarities and differences between Soviet arbitration and courts.

42 Harold J. Berman, 1963, p. 70.

43 F.J.M. Feldbrugge revised by G.P. van den Berg, in F.J.M. Feldbrugge, G.P. Van Den Berg and William B. Simons (eds), 1985, pp. 510-511.

the period 1917-1976 was reflected in changes within their hierarchies, staff and responsibilities. In particular, during the first period after the revolution jurists anticipated the increasing irrelevance of law. Hazard argues that the ideal court system envisaged in 1917 was a simple tribunal that would subsequently become redundant.[44] As explained previously, this view did not become the reality. Instead, an increasingly complex system of courts emerged.

The Bolsheviks argued that courts represented the failures of the past,[45] and that the revolution would close all courts without replacing them.[46] In fact, the early policy of the reformers was to dismantle the courts, professional bar and departments responsible for bringing prosecutions and replace them with simple tribunals. There was to be a return to community resolution of disputes with senior and respected village elders taking responsibility for upholding basic and principled community life.[47] Ultimately, it was argued, these tribunals would also wither away as they would have established the parameters of socially acceptable actions and the villagers would regulate themselves without any need for the all-powerful hand of the state.

Notwithstanding early policies, courts continued to operate, although under difficult circumstances. In Moscow, for example, old courtrooms were barricaded and alternative venues had to be located. Litigants refused to stand in court and there was a 'hum' as waiting litigants talked loudly, at times drowning out the hearings themselves.[48] The old Tsars' courts were abandoned and replaced by local courts.[49] This meant the dismantling of the three-court hierarchy of the general and commercial courts. In addition, the two special lower courts, the *Volost* Court and the Justice of the Peace Courts, were replaced.

The new system comprized Local Courts, introduced in 1917, and District Courts introduced in 1918.[50] The Local People's Court was conceived as similar to the old Justice of the Peace Courts, although it was to be staffed by 'professional' judges. Judges were to be people available to work full-time in the courts, although without necessarily having legal qualifications. Cases were to be heard by one professional judge and two lay judges or people's assessors. The Court's jurisdiction was limited to civil cases involving less than 3,000 rubles and criminal matters where the penalty was no more than two years' imprisonment.[51] A panel was established to choose people's assessors who could be trusted to hold that office.[52]

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44 John Hazard, 1960.
45 See also P.I. Stuchka, 1988, p. xi.
46 John N. Hazard, 1960, p. 2.
47 *Ibid*., William E. Butler and Peter B. Maggs, 1977, p. 56.
48 John N. Hazard, 1960, pp. 1-3.
49 Samuel Kucherov, 1953, pp. 43-50.
50 John N. Hazard, 1960, pp. 6-7; E.L. Johnson, 1969, p. 31. The three decrees instituting the initial reforms to the court system are dated 22 November 1917, 30 January 1918 and 20 July 1918.
51 John N. Hazard, 1960, pp. 6-7.
52 *Ibid*., p. 6.

The District People's Courts, introduced in 1918, were to hear all other cases.[53] Three professional judges and four lay judges heard civil cases, and in criminal cases a bench of twelve judges sat, chaired by one of the court's professional judges. Again the term 'professional' is used here to mean full-time rather than to connote any legal education.[54]

The decisions of the newly introduced Local and District Courts were to have been supervised by the Supreme Judicial Control. Before this came into effect, however, the Court of Cassation replaced that body.[55] The Cassation system meant that there could be a 'review of the record, without the calling of witnesses and the verification of documents'.[56] In the case of the local courts, a congress of all the judges at that level could review the record. A retrial was not possible. At the district level a retrial could be ordered if the reviewing body, comprizing a group of district level judges appointed to the panel of review for one year terms, decided that there had been an error which had produced an unjust result.[57] The courts were intimately connected with the legislature. When the Court of Cassation determined there had been an error of law, it notified the legislature which in turn was asked to issue a new law.

The establishment of the Local and District Courts was not smooth. They were introduced at different times in different provinces and, in the meantime, some provinces established their own courts.[58] There were debates about what qualifications should be held by the decision-makers, with a sharp divide between those urging legal skills and those deeming them unnecessary. There was also confusion among litigants as to the applicable law and the basis of decision-making.[59] Further, it was unclear what role lawyers were to play in this new system and what assistance the courts were to receive from prosecuting agencies or the police.[60]

On 20 July 1918 the third decree relevant to the courts was proclaimed. It increased the jurisdiction of the local courts and diminished that of the district courts. Decrees were passed about court costs and about procedural matters.

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53 *Ibid*., p. 10.

54 *Ibid*.

55 R. Schlesinger, 1962, p. 67. See Decree dated 18 July 1918 cited by Schlesinger.

56 John N. Hazard, 1960, p. 10.

57 John N. Hazard, 1960, p. 11 and R. Schlesinger, 1962, pp. 68-71.

58 John N. Hazard, 1960, p. 7; R. Schlesinger, 1962, p. 62. Schlesinger talks of the old justices of the peace having often been liberal intellectual types many of whom were appointed to the new courts.

59 V.N. Kudriatsev, in W.E. Butler and V.N. Kudriatsev (eds), 1985, p. 5. Kudriatsev notes that the Decree No. 1 relevant to the courts allowed judges to apply old law, unless it was inconsistent with the new regimes policies. A year later, according to Kudriatsev, decisions makers could only apply Soviet laws, and where they were lacking decision were to be made according to 'socialist legal consciousness'.

60 It is beyond the scope of this study to look in any depth at the work of defenders and prosecutors within the Soviet court system and the body of commentary that has emerged dealing with these subjects. See for example: Leon Boim, Glenn Morgan, Aleksander Ruszinki, 1966; John N. Hazard, 1960, pp. 217-243; George Dana Cameron III, 1978; John Quigley, in Albert Schmidt (ed.), 1990, pp. 519-525.

The District Court had been established with basic procedural powers while the local courts had not received any guidance on this issue at all. With the passing of legislation relevant to procedural steps, local judges were able to initiate their own legal inquiries where they believed a breach of the law to have taken place.[61]

Then on 30 November 1918, *The Law on the People's Courts* declared that a new system, the People's Courts, were the only courts in the USSR. The People's Courts were to be an expanded version of the earlier Local People's Courts. This attempted to perpetuate the perception that there was only one court system – even if it comprized different courts within it. The District People's Courts were to be disbanded by the beginning of February 1919.[62] This new court system was not to apply old law, but to resolve matters according to the laws of the new regime. A judge and two lay assessors were to hear less serious criminal cases and civil cases. More serious criminal cases were to be heard by six lay assessors assisting a single judge.[63] By 1921, a method of appeals had been introduced, thus effectively reintroducing the previously abolished District People's Courts. A department of the Commissariat of Justice (known in the West as the Minister for Justice) had the authority to hear and determine appeals.[64]

A great tension in court reform appears in the extent to which local courts were to be treated as autonomous decision-makers within local communities or agents of the new regime to inform and educate the masses of the new political consciousness.[65] This issue dominated the annual congresses of 1920, 1921 and 1922. Hazard identified the following issues as preoccupying the delegates: the centralization compared with the autonomy of the courts (which arose in debates over the interpretation of laws, the revolutionary consciousness of judges and the role of law in post-revolutionary Russia); the need for professional as opposed to lay judges; one court system or several; how to select and appoint judges; and how to manage appeals.[66] The debates led quickly to yet further reform.

IV. A Court System Proclaimed: Civil and Criminal Courts

In 1922 the *Judiciary Act* was passed. This Act summarized the changes adopted at the Fourth Congress of Persons Involved in the Administration of Justice. It introduced six new courts – the Provincial People's Courts (*Gubernia* Courts), the Soviet Supreme Court, the Supreme Court of the Republic,[67] the Labour

61 John N. Hazard, 1960, p. 29.
62 E.L. Johnson, 1969, pp. 32-33.
63 *Ibid*., p. 33.
64 *Ibid*.
65 John N. Hazard, 1960, pp. 64-77.
66 *Ibid*., pp. 152-156.
67 The models for integrating socialist courts into a federated system are not central to this study. States within the Soviet Union came to model their courts on the Soviet legislation and experience. For a description of the Federal Supreme Court see John

Court and two types of Military Courts.[68] This reflected a compromise between establishing new autonomous courts and retaining a court system. The old Local People's Courts were retained and generally referred to as People's Courts. These courts were still to hear basic civil disputes and less serious criminal charges. Maintaining the status quo, the bench was to comprise one professional judge and two lay judges.

The Provincial People's Courts or *Gubernia* Courts, were part of the same court system, to hear more serious criminal cases and civil cases. They were also charged to take up the work of the old Revolutionary Tribunals that had been dissolved earlier in the year.[69] In many of the trials that were to come before these courts a professional judge could sit alone. Hearing cases without people's assessors present was not entirely new,[70] but it was significant that judges sitting alone were entrusted to hear complex civil cases and crimes against the state.[71] The aims of such reforms may have been the development of a new more skilled judiciary.[72] People's assessors were not abandoned, but their role was restricted to participating where the provincial court's original jurisdiction was being exercised.[73] When the court sat as a court of appeal from cases originating in the local people's court three professional judges were to sit. The bulk of matters would continue to be tried in Local People's Courts.[74]

Certain jurisdictions were subject to particular arrangements. For example, the Provincial Court was to have a specialist session for labour matters. It comprized a professional judge and two lay judges – one representing labour and the other the state's Labour Affairs Department.[75] In addition, a Military Court and a Court for Military-Transport were introduced. These courts were under the control of the Commissar of Justice and operated without the assistance of lay judges. Despite their names, they had jurisdiction over military personnel and civilians where those civilians committed acts against the state such as espionage, refusal to comply with military service, refusal to perform certain acts for the state and theft from state stores.

N. Hazard, 1960, pp. 209-214. For a description of the court structures of the Ukraine see, pp. 83-93, 254-258, 364-369.

68 *Ibid*., pp. 64-77.

69 R. Schlesinger, 1962, p. 121.

70 Since 1918 professional judges had been allowed to hear basic divorce cases and consent matters. In 1921 a single judge had been able to take pleas of guilty. See John N. Hazard, 1960, p. 186.

71 To ascertain the jurisdiction for the new provincial courts it is necessary to consult the procedural laws for the relevant codes – such as criminal, civil etc. These matters were not set out in the actual *Judiciary Act*. See John N. Hazard, 1960, p. 188.

72 R. Schlesinger, 1962, p. 121.

73 John N. Hazard, 1960, p. 189.

74 Johnson reports that in 1960 94% of cases proceeded in the local people's courts: E.L. Johnson, 1969, p. 124.

75 These lay judges, unlike the other lay judges within the court system, did not rotate, but sat permanently within the labour court.

The introduction of the Russian Supreme Court in 1922 involved the return to an official court hierarchy. Its introduction represented an acknowledgement that the legal system could not rely on a simple system of tribunals, as had been hoped in the early days of the revolution when central courts were abolished. The Russian Supreme Court was organized in colleges, indicating divisions of the court where particular areas of expertize were practised. Examples of these colleges included civil, criminal and military.[76] In addition, there were colleges to hear disciplinary actions against judges and a college for first instance trials.

A significant innovation was the introduction of a plenum of the thirty judges of the Court that could issue 'interpretations' or guiding explanations of the codes and of procedural points.[77] The Supreme Court was linked to both the Commissar of Justice and the Prosecutor as both these agencies had representatives attending plenum meetings. Where the Prosecutor disagreed with the plenum, he or she could take the matter up with the state Central Executive Committee.

Within the Supreme Court there was also a presidium, a body comprizing the president, deputy-president and the head of each college. This unit could make all administrative decisions and determine matters of court policy.[78] As Hazard points out, this type of structure within the court system fundamentally altered the 1918 view of courts as non-hierarchical and staffed by 'the people'. Giving court officers responsibility to determine and then oversee the implementation of legal policy reflected the state's need for greater control and accountability within the court system.

The Supreme Court had original jurisdiction as well as powers to hear appeals and review cases. Original jurisdiction existed over both civil and criminal cases. In some cases a matter could be assigned to a provincial court. For example, where a case was referred by either the Central Executive Committee or the plenum of the Supreme Court, the Supreme Court could refer the matter to a lower court for hearing. Where certain senior officials stood accused of crimes, the Supreme Court could not refuse to hear the case.[79] This situation applied in both civil and criminal matters, although the criteria defining who would be a defendant or litigant at first instance in the Supreme Court varied.

The structure of the courts was to remain constant through the early years of Stalin's administration,[80] although their power was eroded – in particular by the establishment of commissions or tribunals to hear particular matters.[81] In

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76 John N. Hazard, 1960, pp. 200-201.

77 *Ibid*., p. 201. Hazard points out that this new Supreme Court was different from the pre-existing Senate. That body had been empowered to interpret any law whatsoever. The modern plenum could only advise on the meaning of substantive laws and procedural points.

78 *Ibid*.

79 *Ibid*., p. 203. Defendants within this category included a member of the people's Commissars, a member of the Supreme Court of the Republic and members of advisory councils of any of the various commissariats.

80 E.L. Johnson, 1969, pp. 43-44.

81 W.E. Butler, 1983, p. 46.

1934, for example, Stalin introduced Special Boards.[82] These were located in the Commissariat for Internal Affairs, to try those involved in crimes against the state, and the Board was free to act without the restrictions of the court system.[83] There were no appeals or reviews from these Boards.[84]

In 1936 a new Constitution was proclaimed which included provisions relating to the courts, including the election of judges, the use of two people's assessors and one judge and a national language for use in the courts.[85] These principles were also reissued in the *Law on Court Organization* dated 1936.[86] During World War Two the court system officially continued, but regional Military Tribunals were established if an area was at war. Ordinary courts were simply renamed Military Tribunals.[87]

The Show Trials

A study of Stalin's purges and show-trials is beyond the purview of this study. It suffices for the purposes of this analysis to note that during the 1930s Stalin orchestrated a series of high-profile trials publicizing the state's treatment of 'errant' personnel.[88] These were not simple trials of locals deemed to lack revolutionary zeal. For example, the Moscow trials held between 1936 and 1938, involved the staged trial of various past leaders of the communist movement.[89] Legal argument was integral to these trials, with one of the state's leading advocates conducting the prosecution.[90]

V. A Post-Stalin Revision of Courts

As noted, after Stalin's death in 1953, a series of reforms were initiated to strengthen the role of socialist legality. Berman mentions nine particular reforms he characterizes as changing the role of courts and socialist legality.[91] In particular, he notes the extension of the powers of the procuracy and courts.[92]

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82 These were abolished in September of 1953 although this fact was not announced until 1955: W.E. Butler, 1983, p. 53.
83 *Ibid*.
84 *Ibid*.
85 *Constitution of the RSFSR*, confirmed on 21 January 1937 as amended to 1 October 1968, Chapter 10, translated in Harold J. Berman and John Quigley, 1969, pp. 50-52.
86 This replaced the 1924 *Fundamental Principles on Court Organization*.
87 W.E. Butler, 1983, p. 94.
88 Robert C. Tucker and Stephen F. Cohen (eds), 1965, pp. IX-XLVIII.
89 *Ibid*., p. XI. Tucker points out that among those charged in 1936 were five of the men that Stalin had suggested would be suitable to lead the Soviet Union, namely Trotsky, Zinoviev, Kamenen, Bukharin, and Paitakov.
90 *Ibid*. For example, in the 'Great Purge Trial' of 1938, Vyshinsky acted as prosecutor.
91 Harold J. Berman, 1963, pp. 70-71.
92 *Ibid*., p. 70. See also *Law On Court Organization of the RSFSR*, confirmed on 27

Concurrently the security police were deprived of their investigative function and Military Courts lost jurisdiction over civilians to People's Courts.[93] In addition, numerous loopholes enabling abuse of process were closed. For example, the definition of counterrevolutionary was tightened.[94] Although who made decisions remained constant (each case being presided over by one judge and two people's assessors), the role of the courts was changed by strengthening the relationship between courts and procuracy.

A symbol of these changes was the abolition of the Commissar of Justice in the USSR in 1956 and in the RSFSR in 1963. The Commissar had previously had substantial influence over the courts with representation on the Supreme Court Plenum, the body empowered to guide lower courts on the interpretation of codes. With the abolition of the Justice Ministry, the plenum was only made up of judges and procuracy officials and consequently only judges and procurators, under the influence of the Party, affected the development of court policy.[95]

A similar court hierarchy existed after the post-Stalin reforms to the court system, with the result that it comprized district and regional courts and the Supreme People's Court. Judges and people's assessors staffed these bodies. The structure set out in the 1959 legislation continued for the remainder of the period of this study.

VI. Features of Soviet Courts

Appointment and Removal of Legal Officers

According to the laws of 1918, judges were nominated by local government organizations and appointed by executive committees of the provincial governments. The criterion for selection was political consciousness, which needed to be evidenced by having worked in a proletarian organization such as a trade union or Party organization.[96]

The Provincial Executive Committee (the regional government committee largely comprizing Party members) managed the appointment to the Provincial Courts, introduced in 1922, on the advice of the Provincial People's Courts and the People's Commissariat of Justice.[97] In this respect the 1922 Act removed the power of appointment of judges from the local bodies and gave it to the central authorities. The professional judges were required to have worked for three years as a judge at the lower level. Lay judges (or people's assessors) were to

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October 1960 as amended to 29 June 1968 in Harold J. Berman and John Quigley, 1969, pp. 216-234.

93 *Ibid.*

94 Harold J. Berman, 1963, p. 71.

95 R. Sharlet, 1979, pp. 321-323.

96 John N. Hazard, 1960, pp. 50-51.

97 *Ibid.*, p. 191.

be 'representative': 50% working class; 35% peasants and 15% military.[98] They were to be selected from lists drawn up by representatives of trade unions and prosecutors, council members and judges at the provincial level. Finally, lay judges in the Provincial Court were to have served as people's judges[99] at the Local Court for a period of two years.[100] Judges of the Supreme Court were appointed and dismissed by the Central Executive Committee.

As a result of the legislative changes of 1959, judges were elected by secret ballot for five-year terms and assessors for two-year terms. At the local level, judges were elected by all those eligible to vote, while at the higher levels legislative organs elected them. The election was held in theory, rather than in fact, as usually the number of nominated candidates equalled the number of vacancies.[101] A general meeting of workers, employees and peasants elected people's assessors for a two-year term.[102]

As noted previously, those responsible for electing/appointing judges could remove them at any time at their discretion. Clearly there was no judicial independence. But this ability to remove judges went far beyond that. It indicated that judges were agents of the communities in which they lived and of the central government. Where a judge disappointed either of those communities, in particular the Party, he or she could no longer expect to hold office.

Training and Expectations of Court Personnel

There was a shortage of legally qualified judges in the early days of the revolution[103] because the state chose not to employ lawyers associated with the earlier regime, preferring to rely on the moral orientation of its appointees. To this end publications were distributed advising judges, for example, how to take evidence. These publications were simply written in a 'fatherly fashion'.[104] In one such publication the issue of revolutionary consciousness was addressed in the following terms:

> A lively imaginative development must occur in new social relationships, but of course, not by some direct route, but rather through trial and error, and in consequence there appears a new legal consciousness, that is, an internal conviction, first of a few individuals, and later of a group, and then a whole class, and finally of all mankind.

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98 *Ibid*., p. 194.

99 A people's judge is one who has served as a President of the local people's court: R. Schlesinger, 1962, p. 121.

100 John N. Hazard, 1960, p. 194.

101 E.L. Johnson, 1969, p. 125.

102 *Law on Court Organization of the RSFSR*, dated 27 October 1960, Article 20, reprinted in William B. Simons (ed.), 1980, p. 1227.

103 Berman states that in 1949 thirty per cent or more had no legal education: Harold J. Berman, 1963, p. 300.

104 John N. Hazard, 1960, p. 31. Here Hazard refers to a text written by Stuchka in 1918 entitled *Narodnyi sud v. voprosakh I otvietakh*, published in Moscow.

> This revolutionary legal consciousness must become a standard of the people's judges especially entrusted with the confidence of the people and of their lay judges, as they decide what given old law or custom must be considered abrogated or changed. It is obvious that this process will give rise to some even undesirable lack of stability, that it will necessitate a vacillation in law, but the task of the highest organs of the workers' – peasants' government concerned with following this matter is to discern everything correctly and to establish it so that it becomes fixed and to introduce it into new laws which will reflect in desirable manner the changes from the past.[105]

This extract indicates the significance of moral or revolutionary consciousness along with the reduced significance of law. Judges are exhorted to understand the new standard for the judging of disputes, which is 'revolutionary legal consciousness'. Further, they are told not to be conservative and maintain the status quo, but to be courageous and feel their way to enlightened legal thinking, reflecting the new order. By 1957 Berman notes that 93.9% of judges were members of the Communist Party. This figure attests to the Party's commitment to ensure control of courts.[106]

The Second World War and the purges of Stalin exacerbated the existing lack of judges.[107] Johnson quotes sources suggesting that in 1947 a third of judges had no legal training at the time of their election.[108] Although judges without qualifications were required to undertake a correspondence course, they could still rely on a prosecutor to guide them.[109] By the 1960s the lack of law graduates had receded as a problem due to the extensive training the state had undertaken.[110] The Soviet administration at no stage disbanded law schools, although the curriculum was reoriented to reflect changing doctrines concerning state and Law.[111]

There was a general requirement in the 1960s that Local People's Court judges had worked for a social organization for at least two years and be over twenty-five years of age. District Court judges also needed to have worked at the lower level courts for a period of time. The criteria for selection indicated that the judge was first and foremost to be a citizen familiar with and prepared to uphold the tenets of the new state. The ability to deal with legal issues came second to experience and a record of understanding the policies of the Bolshevik government and the strength or commitment to apply them.

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105 John N. Hazard, 1960, p. 32. Hazard quotes Stuchka, Commissar for Justice, in a 1918 publication entitled *Narodnyi sud v. voprosakh I otvietakh*, Moscow. See Chapter 7, footnote 56, for a brief biography of Stuchka.

106 Harold J. Berman, 1963, p. 301.

107 Olympiad Ioffe and Peter Maggs, 1983, p. 303.

108 Johnson, 1969, p. 126.

109 *Ibid*.

110 Berman states that by 1959 nearly all judges had either higher or intermediate legal qualifications: Harold J. Berman, 1963, p. 301. See also Samuel Kucherov, 1970, pp. 263-312.

111 Harold J. Berman, 1963, pp. 46, 172, 328. Law schools' popularity waned during the height of Stalinism, but they were resurrected in the post-Stalin era.

Court Decisions and Guidelines: Their Propagandist and Educative Roles

In addition to issuing directives about the law, the Supreme Court heard appeals from lower courts and could give guidance on the interpretation of particular legislation. The work of the plenum (a sub-committee of the Supreme Court) when it issued a 'guiding explanation' was distinguished from the work of the Supreme Court hearing appeals and interpreting legislation. The plenum held this power from 1922, when it was established, until its abolition in 1938.[112] In 1957, with the adoption of the *Statute on the Supreme Court of the USSR*[113] and, in 1960 with the adoption of the *Law on Court Organization of the RSFSR*, the plenum and presidium were officially revived as a part of the Supreme Court and its work recommenced to include the direction and supervision of the work of lower courts.[114]

The 'guiding explanation work' of the plenum is sometimes referred to as the passing of decrees,[115] or otherwise as 'something between a decree and a law report'.[116] Some commentators argue that the directives were also the basis of judge-made law operating in what is usually described as a civil law system free of a system of precedent.[117]

Courts could also hear appeals and review the work of lower courts. The procuracy and courts could seek review of cases where they perceived an error.[118] Generally it was the presidium of a court that carried out the reviews.[119] Appeals were also heard by the presidium. On appeal a decision could be upheld, quashed, have another order substituted, or be subjected to a new investigation. The courts' decisions in particular appeal cases were also distributed to lower courts to guide them, but not to bind them, in the resolution of similar cases.

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112 1938 *Law on Court Organization of the USSR and of the Union and Autonomous Republics* (cited in Harold J. Berman and John B. Quigley (eds and trans), 1969, p. 214.

113 1957 *Statute on the Supreme Court of the USSR* in William E. Butler (ed. and trans), 1978, pp. 225-228.

114 John N. Hazard, William E. Butler and Peter B. Maggs, 1977, pp. 47-49; Harold J. Berman and John B. Quigley (eds and trans), 1969, p. 221; *Law on Court Organization of the RSFSR*, Article 26.

115 D. Barry and Carol Barner-Barry, 1974, pp. 69-83.

116 E.L. Johnson, 1969, p. 84.

117 *Ibid.* Johnson argues that the courts developed the law of contributory negligence. He notes that the *Civil Code* of 1922 was silent about the reduction of damages where the plaintiff had in fact contributed to his or her own loss and yet that this principle of contributory negligence was applied.

118 There were two differences between an appeal and a review. First a ten-day time limit applied to all appeals, while a review could be brought only after the decision had come into effect. Secondly, the only parties that could take a case on review are the procuracy and the President or Deputy President of a District or the Supreme Court.

119 Butler, 1983, p. 97.

Courts had an important educational role. The aim was for judges not only to educate the parties coming before the court in any case, but to educate the general public about the role of law in communist society.[120] According to Vyshinskii 'the Soviet court participates in the historic venture of the construction of a Communist society'.[121] Berman sees this role as different from a propagandist function, which had as its aim the dissemination of law or 'legal upbringing'. He notes that the word for the educational role of law (*vospitatel'naia rol'prava*), for which the judges were at least partly responsible, is 'derived from the same root as *pitanie* or food'.[122] The educational role for law:

> extends also to the nurturing of moral values, political values, and, indeed all the values which the Soviet state seeks to foster. Soviet legal norms, procedures and institutions are intended to shape attitudes and beliefs generally and to help create a 'new type of man'. This is not supposed to be merely a by-product of law but its ultimate *raison d'etre*.[123]

To fulfil this role, judges were expected not only to decide cases before them, but to look at the reasons for such a case arising and make recommendations that may avoid such issues resurfacing. The role of social organizations in the initiation and conduct of court hearings is also alleged to have contributed to the educational role of court hearings.[124] Courts could elect to hear evidence 'on circuit'. Here, the venue was used to publicize the issues before the court with a view to educating those who attended. For example, cases were heard in factories and in apartment houses so that those whom such issues might touch could see how the law and its agents the judges and people's assessors, acted. This type of education was supplemented by the work of the Comrades' Courts, which as noted, existed within organizations, such as housing blocks, to resolve disputes.

Relationship with Procuracy

The institution of the procuracy (*prokuratura*) has a long tradition in Russia.[125] It was used in the eighteenth century 'when it served as an arm of the executive in supervising the legality of the actions of the executive machinery'.[126] In

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120 Harold J. Berman, 1963, p. 299.
121 Vyshinskii, in 1950, *Teoria sudebnykh dokazatelstv v. sovetskom prave 25*, in Kazimierz Grybowski, 1962, p. 119.
122 Harold J. Berman, 1974, p. 1.
123 *Ibid*., p. 2.
124 *Ibid*., p. 3. This extends to social organizations being able to act as prosecutors or defenders in court.
125 Founded in 1722 by Peter the Great, Berman notes the two functions of prosecution and supervision were always linked, although with the reforms of 1864 the emphasis moved to the prosecution function: Harold J. Berman, 1963, pp. 240-241.
126 R. Beerman, in F.J.M. Feldbrugge, G.P. van dan Berg & William B. Simons (eds), 1985, p. 623.

1922, after the abolition of the Russian procuracy, a revolutionary procuracy was instituted, working initially within the Commissar of Justice. In 1923, another group of procurators was attached to the USSR Supreme Court, although without any authority within the republics.[127] In 1936, the system of procuracies was centralized with state procuracies accountable to the USSR procuracy.[128]

The first role of the procuracy was to review the constitutional validity of all laws of the state.[129] Where subordinate legislation was involved, it had to review the laws to establish whether they were consistent with superior laws. Where they were deemed invalid the procuracy could alert the equivalent higher agency to the perceived invalidity of the lower law.[130]

In relation to the courts, the procuracy also had a special function. It was the organization that instituted investigations into most alleged crime, appointing the investigating magistrate. Once the case was heard the procuracy could appeal against the decision and the procuracy's arguments had to be heard before the Appeal Court could make a determination.[131] In short, the procuracy was charged with testing the legality of judicial as well as administrative acts.[132] Although it had no power to invalidate any act, it could prosecute the official responsible, if that person could be held liable for a particular offence.

Berman characterizes the procuracy as the fourth arm of government, noting that it was not able to review the actions of the highest of Soviet agencies. In effect Berman calls the procuracy the 'eye of the state' arguing that it was not above the state.[133] It kept an eye on the courts and, where a court wished to diverge from the recommendations of the procuracy, it required a good reason. As a Soviet jurist explained:

> A most important distinction between the court and the other organs of the Soviet state, including the procurator's office, is that it pronounces judgment . . . on behalf of the whole Soviet state as a whole, and not just on behalf of the bench in question.[134]

This explains why the procuracy influenced courts. The courts were the communicators of state-endorsed decisions in trials, and the procuracy was intimately involved with reaching those decisions.

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127 *Ibid.*

128 The USSR Procuracy-General was appointed for a period of seven years and that office holder in turn nominated the Procurators-General of the Republics, regional and local levels: Harold J. Berman, 1963, p. 243.

129 See *Statute on Procuracy Supervision*, dated 1 August 1922, cited in Harold J. Berman, 1963, p. 242.

130 Harold J. Berman, 1963, p. 238.

131 *Ibid.*, p. 239.

132 This is not to say that all cases must be decided in accordance with the opinion of the procuracy. The procuracy 'has no administrative power of its own (except the power to indict for crimes), but can only set the machinery of other agencies in motion in order to correct errors of their subordinate branches': *Ibid.*, p. 245.

133 *Ibid.*, p. 247.

134 L. Grigoryan and Y. Dolgopolov, 1971, p. 315.

Statistics

There are various works that consider the available statistical data on the Soviet court system, despite the many challenges to their collection and analysis.[135] In chapter nine the issue of comparability will be addressed and a comparison of the Soviet civil and criminal court statistics with those from the DRVN will be undertaken.[136] For ease of reference, the available statistics concerned with the Soviet court experience will be included in the next chapter.

VII. Conclusion

Far from having cases resolved by simple tribunals, as was the original stated intention of the Bolsheviks in 1917, the Soviet court system became a complex hierarchy of courts, which the central administration sought to control. This control was manifest in the appeals process and in the appointment of judges and people's assessors increasingly better-educated in revolutionary ethics. The Supreme Court's review power further entrenched its influence over regional courts.

Initially the reforms undertaken were designed to militate against a popular perception of a centrally coordinated court system. Reacting to the revolutionaries' condemnation of courts as dominated by class interests, and their arbitrary decision-making (for example, the Cheka Courts and Stalin's Boards), the state sought to portray the new courts as community-based and responsive to the people. The court system had to challenge the perception it was working against the interests of the proletariat. The introduction of the people's assessors – an innovation that was essentially maintained throughout this period although their role was diminished over time – was crucial to connecting the courts to the people. People's assessors were also an important link between judges and administrators and local governments. The new system's accessibility (for example, via the mobile nature of Comrades' Courts and mobile courts each of which heard matters on location) was also fostered to promote the connection between community and courts.

Below is a summary of the structure and characteristics of Soviet courts by the mid-1970s:

1. All dispute resolution bodies working for the Party. This is indicated by:
   - election to office of judges and people's assessors by the Party-dominated executive bodies at regional level (effectively appointment as numbers of candidates often matched the number of vacancies);
   - statements made by state leaders and jurists about the role of the courts as the tool of the state which had at its head the Party; and

135 Ger P. van den Berg, 1985, pp. 1-5.
136 See Chapter 9, pp. 184-189.

- extensive power of Comrades' Courts to act to implement socialist ideology.

2. Appearance of popular justice perpetuated by:
   - notional election of people's assessors; and
   - mobile courts and Comrade's Courts.
3. Evidence of a determination to control the courts centrally:
   - appeals heard by the Supreme People's Court with power to review any decision for perceived error; and
   - role of the Supreme People's Court in issuing guidelines to lower courts instructing them how to determine cases.
4. Establishment of state-run universities to teach socialist/political law, ensuring that judges were trained in socialist ethics, morality and law.

The Soviet court system between 1917 and 1975 was important in the development and implementation of its government's policies,[137] although, throughout this period, it was not a crucial foundation for the implementation of policy. At various stages, particularly at the height of the Stalinist era, other agencies were given more wide-ranging powers to determine cases – particularly those involving crimes against the state.

It is now time to return to the Vietnamese court experience and see how it reflects or denies the Soviet socialist legacy.

137 The dynamic nature of the court system extends beyond the period of the study. More recent studies of the work of the courts in the USSR include, for example: Louise Shelley, 1987, pp. 199-216; Hiroshi Oda, 1992, pp. 239-248; Gordon Smith, 1996.

Chapter 9
Similarities and Differences between the Soviet Court Model and the Vietnamese Court Experience

This chapter offers a synthesis of the studies undertaken in preceding chapters, in which the particular court systems of the USSR and Vietnam have been outlined, to identify the similarities and differences between the two systems. The next chapter explains why particular aspects of the respective court systems of the USSR and Vietnam are either similar or different, before taking up the question, in chapter eleven, of what is learnt from this experience.

The comparison of the court system of the DRVN with that of the USSR comprizes several parts reflecting the approaches undertaken in earlier chapters. First, the relationship between state and law in Vietnam and Russia are visited enabling the subsequent comparison of courts within a political and jurisprudential framework. Secondly, the respective constitutional provisions relevant to courts are juxtaposed. In addition, the relationships between the courts and the Ministries of Justice and procuracies in each country are considered. In the third part the relevant laws on the organization of courts, are compared, enabling the overall structure and chronology of the respective court systems to be mapped and analyzed with a view to establishing their positions in the mid 1970s. Part four considers how the courts related to other dispute resolution bodies. In part five the personnel and structure of the court systems are considered, followed in part six by an analysis of the qualifications required of judges. Part seven considers the appeals and review systems of the courts to see how they might resemble or differ from each other. This is coupled with scrutiny of the leadership role of the highest courts (education and guidance of lower courts). Part eight explores Soviet and Vietnamese court statistics to see how the use of the courts by the public within each country compares. The conclusion analyzes the differences and similarities that have become apparent over the course of the chapter.

I. Vietnamese and Russian Socialism and Law

The Party and Law

By the 1960s both countries seem to have a similar conception of law and state. In both the DRVN and the Russian Republic democratic centralism was

adopted as an organizing principle that entrenched the subordination of lower bodies to the leadership of higher bodies. In both cases the Party provided state leadership and was the institutional authority that the principle of democratic centralism supported.

In both Vietnam and the Soviet Union the respective Communist Parties led the state. As a consequence, courts existed to implement the will of the state, which the Communist Party represented. In each case, Party policy and law were equally applied and where they conflicted Party policy prevailed.

There appears ultimately to have been substantial agreement about the interaction between law and politics and a common understanding that law was a tool of their respective revolutions.[1] An example emerges from the *Law on the Organization of People's Courts* which was introduced in both Vietnam and Russia in 1960. When read together with the respective Constitutions (see below), this legislation implicitly positions the courts as part of the state's political apparatus. In each case courts were to account to the national parliaments, with judges elected for five year terms. A second example that points to the connection between politics and law is that each state moved quickly to introduce a revolutionary tribunal/court to try persons who had allegedly committed crimes against the state. These bodies were characterized as serving the revolution by eradicating or punishing those who opposed change. Therefore in both countries legal institutions form a part of the political machinery being used for overtly political purposes.

Not only were the court systems similarly positioned with regard to their relationship with the state (and Party), but in each country the courts were expected to implement the rule of political law. In short, each court system was morally re-oriented to facilitate socialist/communist policies. They operated in a system where policy was as important as law, and where courts were expected to implement both.

Jurisprudential Debate

As noted previously, Soviet jurisprudence analyzed the role of law in the transformation of society from its earlier bourgeois roots to socialism.[2] On the other hand, the Vietnamese official legal commentary not infrequently emerged from political writings rather than from jurisprudential analysis seeking a place for law within the new regime.[3] This is not to say that the role of law was not debated in Vietnam. It was. Rather, the form of the debate was different in each of the two countries. In the Russian Republic there was a scholarly debate within legal

1 See earlier discussion in Chapters 2, 4 and 7 of the role of state and law.
2 See Chapter 7.
3 Perhaps one exception to this was the writing in the journals *Nhan Van* and *Giai Pham* in the late 1950s. As noted, this excursus into legal theorising was quashed by the state. See Chapter 2, p. 42.

circles about the role of law; originally commentators suggesting its role would diminish, and then arguing for a greater role for law in state building. Vietnamese lawyers, on the other hand did not have these debates, instead arguing what role law should play, assuming it had a role, in the transformation of the state.

II. Constitutions and Courts within the Soviet Union and Vietnam

Each state within the Soviet Union had its own court system with the Supreme Court of the Union of Soviet Socialist Republics (USSR) at its head. A study was made of the court system of the Russian Federated Socialist Republic (Russian Republic or RSFSR) and this focus continues in the remainder of this chapter. Given the connection between constitutional reform in the USSR and the Russian Republic it is not possible to read the Russian constitutional provisions relevant to courts in isolation.[4] As a result both have been considered to see how they are reflected in the DRVN's constitutional provisions relating to courts.[5]

In 1945 when Vietnam introduced its first constitution, the existing Soviet model was the USSR 1936 Constitution and the equivalent Constitution of the Russian Republic.[6] At this time the provisions of the DRVN Constitution were relatively sparse while the Russian and Soviet laws were more detailed. However three of the seven articles dealing with courts in the 1946 DRVN Constitution directly reflected the earlier Soviet and Russian constitutions.[7] These provisions dealt with use of ethnic languages in courts, public hearings and right to defence counsel and the requirement that judges obey only the law. Although the names of courts were different, each constitution established a court hierarchy. This left only the Vietnamese provisions relevant to the appointment of judges

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4 The Soviet Union and the Russian Republic each had several constitutions over the period 1917-1975. The first constitution of the RSFSR, dated 10 July 1918, was also the first Soviet socialist Constitution. The USSR introduced its first constitution on 6 July 1923 and it was formally ratified on 31 January 1924, its introduction causing the amendment of the RSFSR Constitution of 1918. Constitutional reform was undertaken at both the central and state level in 1936/37 and 1977/78.

5 Throughout this discussion of the USSR and RSFSR Constitutions I relied on the English language translations of the 1936/37 Constitutions of the USSR and RSFSR amended to 1968 published in Harold J. Berman and John B. Quigley (eds), 1969. Unable to locate an English language translation of the 1936/37 versions of these Constitutions, they were obtained in Russian on microfiche and Robert Lagerberg (of the Russian Language Department of the University of Melbourne) provided translations. In relation to the 1918 Russian Republic's Constitution see *Soviet Laws being the Constitution of the Russian Socialist Federative Soviet Republic*, The Socialist Party of Victoria, Melbourne, 1919.

6 The 1936 USSR Constitution deals with the issue of courts and the procuracy in some detail, as does the 1937 RSFSR Constitution. This latter change reflects the transfer to the union republics of the power to adopt legislation on court organization and on civil and criminal law and procedure. At this time there was no Chinese Constitution or Organic Law to which the Vietnamese could refer.

7 Articles 66, 67 and 69 of the DRVN Constitution of 1946 were almost entirely consistent with the prior Soviet and Russian Constitutions of 1936/1937.

(Soviet judges were to be elected) and the prohibition on torture as unique to the Vietnamese Constitution.

By 1959, with the passage of Vietnam's second constitution, there was remarkable congruence between the Soviet, Russian and Vietnamese constitutional provisions relevant to courts.[8] The role of law more generally was also similarly positioned within each constitution.[9] With regard to courts, each of the DRVN and USSR constitutions provided that the Supreme Courts sat at the apex of a hierarchical court system and had to supervise the work of lower courts.[10] In addition, each constitution provided that judges would be elected and that people's assessors would have the same power as judges.[11] The only differences were that the DRVN 1959 Constitution specifically stated that the Supreme People's Court was accountable to the National Assembly and that the courts were independent, which contrasted with the USSR provision stating that judges were independent. It is unclear whether this distinction indicated a different approach with regard to independence. It appears that in each state the courts were subservient to political forces, whatever the constitutional provisions.

In both the RSFSR and the DRVN Ministries of Justice were abolished at about the same time.[12] As earlier discussion of this has indicated it appears that the Ministries were abandoned in favour of a strengthening of the role of courts and the procuracy. In both Vietnam and Russia the increased powers that were given to Supreme Courts, made the Ministries of Justice redundant. It is also evident in both countries that removing the Ministries of Justice increased the role of the Ministry of Interior, under which the procuracies were established, thereby strengthening the role of law.

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8 The Chinese Constitution of 1954 also closely foreshadows the Vietnamese 1959 Constitution. The biggest difference is that that the Chinese judges are not elected. Further, that they held office for four years, rather than five years as the Vietnamese judges do. The third point of difference is that the Chinese 1954 Constitution does not provide for public hearings with a right to self-defence, nor does it provide for any right to use one's own language. The points of commonality shared by the Vietnamese and Chinese (and not by the Soviets) lie in the provisions noting the accountability of the Supreme People's Court to the National Assemblies of the two countries and that judges are not independent rather that courts are, although as already noted above it remains unclear whether this latter distinction is significant. *Constitution of the People's Republic of China* dated 20 September 1954, reprinted in Jan F. Triska (ed.), 1969, pp. 108-122.

9 See Chapters 2-4 in each Constitution in which there is a discussion about how law is defined within each state. Essentially law refers not only to laws passed by legislatures, but also to Party policies.

10 *Constitution of the DRVN*, 1959, Articles 97, 103; and *USSR Constitution*, 1936, Articles 102, 104.

11 *Constitution of the USSR*, 1936, Articles 102-104, 107-111, 113-117; and *Constitution of the DRVN*, 1959, Articles 97-99, 101-103, 105-108.

12 As noted previously, the Soviet and Russian Ministries of Justice were disestablished in 1956 and 1963 respectively. See Chapter 7, p. 152 and Chapter 8, p. 165. The DRVN Ministry of Justice ceased to exist in 1960. See Chapter 4, p. 95.

In addition, in both countries the procuracy evolved as the body governing the implementation of law and in each case a delicate relationship existed between the procuracy and the courts. The DRVN took longer to introduce the office of the procuracy.[13] Although there are variations of type and timing between these organizations within each of the countries, both the DRVN and RSFSR introduced procuracies invested with the authority to review the work of the courts. In short it seems the Vietnamese borrowed heavily from the Soviet model when establishing its procuracy.[14]

III. Courts and Legislation

In light of the comments made in the previous sections about the role of law in each of the DRVN and the USSR/RSFSR, it is interesting to pause and consider the legislative texts of these two states. This does not involve an analysis of the substantive provisions (see below), but rather a reflection on the structure and drafting styles of the respective laws. The example taken is the 1960 *Law on the Organization of People's Courts* of the DRVN and Russia.

The structure of the Russian and Vietnamese laws, dealing with the organization of People's Courts, mirror each other. In each country the law is broken into chapters dealing with the following matters in turn: general duties and responsibilities; the position of subordinate courts;[15] the role of the Supreme Court; the enforcement of decisions; and finally the issue of judicial responsibility.[16]

Within each legal concept encapsulated within the Russian and Vietnamese laws different terms are used and provisions are differently ordered, but in the main the actual laws are substantially similar. For example, each law explains that trials are aimed at the protection of the people's democratic regime, public property, order and the legitimate interests of people although these requirements

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13 The first *Law in the Organization of the Procuracy* was introduced to the DRVN in 1960, although since 1946 there had been an organ, charged with reviewing the application of criminal procedures particularly within the courts, often referred to as the procuracy. See Chapter 4. Compare with the Soviet experience outlined at Chapter 8.

14 As noted, the procuracy has a very strong tradition in the Soviet Union. See Chapter 8, pp. 169-170. The first Chinese law relevant to a socialist procuracy was the *Organic Law of the People's Procurates of the People's Republic of China,* adopted by the first session of the First National People's Congress on 21 September 1954. It also shows a striking resemblance to its Soviet counterpart.

15 The RSFSR law has more sections dealing with subordinate courts as there are more types of courts subordinate to the Supreme Court in that state. It deals with the courts of autonomous zones, territories and regions.

16 The *Organic Law of the People's Courts of the People's Republic of China* dated 21 September 1954 has a structure that is not entirely consistent with the Soviet and DRVN laws. For example, it does not have a chapter dealing with the Supreme Court, nor a chapter on enforcement, choosing instead to have fewer chapters and broader groupings of topics. See *Organic Law of the People's Courts of the People's Republic of China* dated 21 September 1954, reprinted in Albert Blaustein (ed.), 1962, pp. 131-143.

are in different articles in each law.[17] Each law also includes a provision that a court must educate the citizens to be loyal to the state, albeit that again this provision is located in different articles in each law.[18]

There is also a tendency in the Vietnamese law to have several concepts within one article, whereas the Russian law tends to keep each concept discrete by placing it in a separate article. For example, the opening articles of the Russian law deal with: Article 1 – Judicial system; Article 2 – Goals of justice; and Article 3 – Tasks of the courts. The DRVN law has one article to cover all of these topics with each point set out in a different paragraph. To a Western lawyer this indicates a highly ordered drafting style used by the Russian Republic, while Vietnamese drafters are less preoccupied by conceptual grouping.[19] It may be possible to link this back to the different intellectual history of law and legal drafting in each country.[20]

Before 1959 the RSFSR and the DRVN did not embark on court-related reforms at similar times. Instead, each entity was busy with nation building with various moments at which the focus on courts was manifest.[21] However, in 1960 both the DRVN and the RSFSR introduced new Laws on the Organization of People's Courts (analyzed below) – although Vietnam's experience of courts was soon to be greatly affected by the escalation of the war.

Significantly, the context in which law was being developed was different and this is made clear by particular wording adopted within each statute. For example, the opening article of the Vietnamese law reminds the reader that the court has to contribute to socialist construction in the North and the war effort to unify the country. There is no equivalent general statement in the RSFSR law.

It emerges from this overview of the USSR and DRVN dispute resolution structure that by the mid 1970s each had a court system that greatly resembled that of the other. In particular each nation had attempted to introduce systems premised on notions of popular and revolutionary justice. In each state the structures of the courts (hierarchy and relationship with procuracy) reflected an ideal that had the courts implementing the will of the Party, while simultaneously struggling to control regionalism.

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17 *Law on Court Organization of the RSFSR*, dated 27 October 1960, Article 2, reprinted in Harold J. Berman and John Quigley (eds), 1969, pp. 216-217; and *Law on the Organization of People's Courts*, dated 14 July 1960, Article 1.

18 *Law on Court Organization of the RSFSR*, dated 27 October 1960, Article 3, reprinted in Harold J. Berman and John Quigley (eds), 1969, pp. 216-217; and *Law on the Organization of People's Courts*, dated 14 July 1960, Article 1.

19 The Chinese law relevant to courts provides another example of the way in which these provisions can be differently set out. See *Organic Law of the People's Courts of the People's Republic of China* dated 21 September 1954 reprinted in Albert Blaustein (ed.), 1962, pp. 131-143.

20 The Chinese Law on the Organization of People's Courts was differently ordered again. See *Organic Law of the People's Courts of the People's Republic of China* dated 21 September 1954 reprinted in Albert Blaustein (ed.), 1962, pp. 131-143.

21 *Ibid*. The first Chinese law relevant to the courts was the *Organic Law of the People's Courts of the People's Republic of China* adopted on 21 September 1954.

IV. Relationships with other Dispute Resolution Bodies

As noted, courts are only one of the many dispute resolution bodies that exist within any society. The RSFSR and Vietnam were no exception. In Vietnam a committee system developed which preceded the formal establishment of courts. The power of the committees to resolve disputes during the war years of 1945 to 1954 was perhaps not the original or preferred intention of policy makers, but rather a reality that emerged as a result of the war.[22] In contrast, the RSFSR, although at first publicly committing itself to the gradual abolition of courts, made an about-face and gradually introduced a system of courts. In fact, courts and ad hoc tribunals were integral to the absolutism of the Stalin regime. A court system for criminal and civil cases was operative before the Second World War, although it suffered during the war years. The consequence of these respective histories is that both Vietnam and the RSFSR experienced regionalism and autochthonous decision-making in the development of their courts. The fact that Vietnam could view the RSFSR experience before it commenced its own remaking of state institutions perhaps explains why there was never an official policy in Vietnam to abolish courts. By 1959 the disparate experience of courts and committees of the RSFSR and the DRVN was being remodelled in each country.

Both governments introduced revolutionary courts soon after their respective revolutions. In the case of the USSR, the Cheka Courts were also introduced. These bodies were established to try those who committed crimes against the state. Some have described them as ad hoc tribunals: a description that usually arises as a result of damning critiques of the way in which evidence was taken and political considerations weighted. Fall talks of the arbitrary and informal trial of Vietnamese shortly after 1945 and equates it with the period of War Communism in the USSR,[23] but other commentators do not.[24]

In both the RSFSR and the DRVN the function of trying treasonous behaviour gradually shifted across to the criminal court system or was removed to specially set up ad hoc courts such as the Special Courts (or Land Tribunals in Vietnam) and Stalin's Boards.[25] In addition, both states introduced Military Courts to hear crimes committed by military personnel. Each country also made use of the mobile court to take the hearing of cases into the public domain.

On the whole ad hoc dispute resolution bodies and show trials appear to have been more prevalent in the USSR than in Vietnam, although this has to remain a matter of speculation. Stalin's purges, occurring in the early 1930s, largely took place within specially introduced venues, such as the Special Board of the

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22 See Chapter 3, p. 57.
23 Bernard Fall, 1956, p. 41.
24 David Marr, 1995(1), pp. 234-238.
25 The notorious Cheka Courts, largely held to be responsible for the red terror of the early post-revolutionary period, were officially named the Extraordinary Commission for the Struggle against Counter-revolution, Sabotage and Official Crimes. See Harold J. Berman, 1963, p. 31.

Ministry of Internal Affairs.[26] Such institutions were not replicated in Vietnam, and nor arguably were such far reaching purges. For example, the Moscow show trials between 1936-1938 do not appear to have been replicated in Vietnam. The Vietnamese land courts were a form of show trial, but without the reliance on legalism and the trappings of courts evidenced in the Soviet Union.

The Russian Republic also had an extensive system of Comrades' Courts, which although it waxed and waned over the period, played a significant role in the resolution of minor disputes.[27] These bodies relied on peer groups to hear and determine minor cases in various locations, particularly within workplaces, rural collectives and housing blocks.

There is no direct equivalent of this court in Vietnam. It may be possible to characterize the local mediation bodies set up at the village level or War Administration Committee as undertaking to resolve roughly similar types of cases. Yet these Vietnamese institutions were not called courts and not staffed by direct peers (for example, by elected work-colleagues). Similarly Vietnamese mobile courts were not equivalent to Russian Comrades' Courts. A Vietnamese mobile court was a division of a court that went out on location. The courts roved, but were not instituted within local organizations.

Both the RSFSR and the DRVN also had arbitration systems.[28] The first Soviet arbitration system was introduced in 1931 while Vietnam's first arbitral bodies appeared in the early 1960s.[29] The apparent time lag can be explained by the DRVN's large-scale war against France precluding a focus on economic construction until after 1954. In both states the systems of arbitration had broadly similar aims and for the purposes of this study it is sufficient to note that each state sought to have economic disputes removed from the courts and heard in a separate forum.

V. Structure and Membership of the Courts

From 1960, with the passage of the laws on the organization of People's Courts, both the RSFSR and the DRVN officially had elected judges. In the DRVN judges were elected by the relevant legislative body of each level: the National Assembly elected the Chief Justice of the Supreme People's Court and its Standing Committee elected other Supreme People's Court judges. People's Councils elected judges at the district and provincial level. In the RSFSR judges were also elected: at the lowest levels there was, at least in theory, a popular vote, while at the higher levels judges were elected by the relevant legislature. In each case Supreme Court judges were elected for a five-year term.[30]

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26 *Ibid*., pp. 58-63. Berman chronicles the experience of a Soviet engineer within this body.

27 See Chapter 8, pp. 156-157.

28 See Chapter 4 and Chapter 8.

29 *Ibid*.

30 In Vietnam provincial judges were elected for a four year term and district level

In the DRVN, People's Councils elected local people's assessors for a two-year term. If people's assessors were required within the Supreme Court they were appointed by the Standing Committee of the National Assembly on the advice of mass organizations.[31] In the RSFSR, a general meeting of workers, employers and peasants elected People's Assessors, also for a two-year term.[32]

In both cases judges and assessors could be re-elected. This contrasts with the position prior to the reforms of 1960 when judges and people's assessors had been appointed in Vietnam, while the USSR Constitution of 1936 and RSFSR Constitution of 1937 both provided for the election of judges. The possibility of re-election suggests a lack of judicial independence. The effect is to make each judge's future work with the court dependent upon the perception of the work undertaken in the current term. The result is that judges had to demonstrate popular approaches to their work to ensure re-election.

In both Vietnam and Russia it is unclear to what extent the 'elections' were in name only and actually reflected 'managed elections' where the number of candidates mirrored the number of vacancies. In each case, the various sources discussed earlier attest to close Party control of court appointments and relatively high numbers of Party members as judges.[33] It would appear that in each country the Party closely influences who held office in courts.

The procedure for removal of judges and people's assessors was also broadly similar in the two countries after 1960, in that the agencies authorized to remove personnel were similar. However, the grounds for removal were not the same. In the RSFSR, judges and people's assessors could be removed from office either by the body that elected them or by 'by reason of a court judgment passed on them'.[34] Removal for misconduct, conceived of in terms of criminal charges being laid against a judicial officer, was only with the approval of the Presidium of the Supreme Soviet of the RSFSR.[35] In Vietnam, the *Law on the Organization of People's Courts* was silent on the issue of removal for misconduct, although a general statement allowed for the removal of judges by the bodies electing them.[36] The equivalent Vietnamese law does not deal explicitly with the issue of judges or people's assessors facing criminal charges, leaving removal to be

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judges for a three year term. *Law on the Organization of People's Courts*, dated 14 July 1960, Articles 27, 28.

31 *Ordinance on the Organization of the People's Supreme Court and Local People's Courts*, dated 23 March 1961, Articles 16, 17. The peak body representing mass organizations in Vietnam for most of this period was the Vietnam Fatherland Front.

32 *Law on Court Organization of the RSFSR*, dated 27 October 1960, Article 28, reprinted in Harold J. Berman and John Quigley (eds), 1969, p. 222; and *Ordinance on the Organization of the People's Supreme Court and Local People's Courts*, dated 23 March 1961, Article 17.

33 See Chapter 6, pp. 115-116, and Chapter 8, pp. 165-166.

34 *Law on Court Organization of the RSFSR*, dated 27 October 1960, Article 19, reprinted in Harold J. Berman and John Quigley (eds), 1969, p. 219.

35 *Law on Court Organization of the RSFSR*, dated 27 October 1960, Articles 63, 64, reprinted in Harold J. Berman and John Quigley (eds), 1969, p. 234.

36 *Law on the Organization of People's Courts*, dated 14 July 1960, Articles 26-28.

dealt with on a discretionary basis by the electing body. The effect in each case was to enable the discretionary removal of judges by a political body, invariably under Party control.

After 1960, first instance trials in both Vietnam and the Russian Republic were heard before a single judge with two people's assessors: judges and people's assessors held a vote of equivalent value in deciding cases. In each country the inclusion of people's assessors was seen as a way of connecting the court system to the wider community. The inclusion of lay judges, as they were also known, was one of the bases on which courts could hold the name 'people's courts', for indeed representatives of the working people were included in all first instance cases. However, on appeal a case was to be heard by a panel of judges in both countries.[37]

In conclusion, the way in which both USSR and DRVN courts were staffed (both in terms of election of personnel and their removal) was very similar. In each case courts were politicised, reflecting the role they had to play in the implementation of revolutionary policy.

VI. Qualifications of Judges

Law degrees were not prerequisites for judicial office.[38] In both countries judges were first selected for their revolutionary morality, with legal qualifications being acquired after taking up a position of judge, if at all. In the case of Vietnam, law schools did not operate during the war and were not re-established until 1979.[39] In the USSR, law schools continued to operate although with increasing scepticism about their role, until they were repositioned in the late 1930s with Stalin's resurrection of law.[40] From this it appears that the emphasis on legal training was much greater in the Soviet Union than in Vietnam.

As noted previously, Vietnamese jurists travelled to the USSR for legal training, frequently on Soviet scholarships.[41] This resulted in a scholarly and jurisprudential link developing between the two countries, especially as some of those who travelled were there for relatively long periods of time completing doctorates and masters degrees.[42] Frequently those that had been to the Soviet Union, as either postgraduate or undergraduate students, returned to Vietnam to teach in short training courses offered by the various ministries and the courts.[43] There was, therefore, significant Soviet influence on Vietnamese legal development, even though there was not a continuous flow of trainees to the Soviet Union.

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37 *Law on Court Organization of the RSFSR*, dated 27 October 1960, Article 10, reprinted in Harold Berman and John Quigley (eds), 1969, pp. 217-218; and *Law on the Organization of People's Courts*, dated 14 July 1960, Article 1.
38 See Chapter 6, pp. 124-126, and Chapter 8, pp. 166-167.
39 Mark Sidel, 1993, p. 224.
40 Samuel Kucherov, 1970, pp. 251-312.
41 See Chapter 6, p. 124.
42 Mark Sidel, 1994, pp. 166-168; and Mark Sidel, 1993, pp. 227-228.
43 *Ibid.*

VII. Court Hierarchies and Leadership

After defeat of the French in 1954 and with the establishment of the Supreme People's Court, appeals became more practicable in Vietnam. Although the 1946 Vietnamese Constitution talked of a court hierarchy and in particular of one court at its apex, this had not been established. As a result of the war and the exigencies of travel, appeals beyond the provincial level were impossible. Although the war re-emerged to constrain extensive travel for cases, there was more scope for appeals with the establishment of first the temporary Appeals Courts and then the Supreme People's Court, in the late 1950s. In addition to appeals, a court could rehear a matter where either the procuracy or a court believed a decision had been made been made in error by a lower court. These changes contributed to a centralization of approaches to the interpretation of laws. Similarly in the RSFSR, parties were able to appeal or a case could be reheard where the senior court or the procuracy protested about decisions, judgments or rulings of lower courts.[44]

With the abolition of the Ministries of Justice and the establishment of the procuracies, which as noted, occurred a little later in Vietnam than in the RSFSR, appropriate policy for determining cases was largely developed by the courts in consultation with the procuracy. Decisions were frequently, if not always, debated before publication within the court itself and often with the guidance of the Party. Therefore in both countries the courts reflected official policies in their judgments rather than making official policy without reference to any other authoritative source. In effect courts were led by the Party when determining cases and interpreting policies and laws.

The Supreme Courts in each country were also obliged to guide lower courts in the resolution of disputes. Each Supreme Court published its own journal and each was also responsible for issuing circulars or memoranda, either alone or jointly with other agencies, explaining the appropriate ways to interpret certain laws. At least in theory therefore, the Supreme Courts would be keeping the lower courts informed of legal developments and how cases ought to be determined. Neither country characterized this work of the Supreme Courts as the development of a system of precedent. Instead the Supreme Courts were regarded as leading and supervising the work of lower courts.

Practical issues such as the war and the challenges of communicating over distances affected the ability of the Supreme Courts in each state effectively to implement their supervision function. It is unclear to what extent this continued as a problem in the Russian Republic, but certainly in the debates about the role of the respective courts in the early 1920s regionalism challenged the central leadership of the courts. The escalating Vietnamese war meant that central leadership of courts was very difficult to implement. In Vietnam, the Supreme People's Court Journal makes clear that errant lower courts were a common

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44 *Law on Court Organization of the RSFSR*, dated 27 October 1960, Articles 24, 50, reprinted in Harold J. Berman and John Quigley (eds), 1969, pp. 221, 229.

problem faced by the Supreme People's Court.[45] By the mid 1960s the Soviet experience of central leadership was more successful.

VIII. Propagandist Role of the Courts

The courts of the RSFSR and the DRVN were charged with educating the people about law and its role in society.[46] This was undertaken in a variety of ways. The propaganda function of the DRVN and RSFSR courts was taken very seriously. Courts made extensive use of the press to publicise their work in both countries. In addition, the use of mobile courts served to educate the general public about how the courts worked and about the law itself. Further, the Russian Comrades' Courts contributed to a public perception of the role of law in the RSFSR.

IX. Soviet and Vietnamese Court Statistics Compared

The comparison of legal statistics is extremely difficult. Just the simple comparison of, for example, criminal cases heard by one particular court over a period of time with an equivalent court of another country, if one can be identified by reference to matters such as jurisdiction (legal and geographic), can be meaningless. In such a simple example two variables – the jurisdiction and the number of appeals – could badly distort any subsequent interpretation. Here the problem of comparison is compounded by the fact that before the early 1960s there was no centralized record of case numbers in Vietnam and subsequently very poor court-related statistical information was kept.[47]

Despite the problems of comparability of case numbers across countries, the exercise is worth undertaking. The availability of considered data about court-related statistics in the Soviet Union is one reason why it is possible. Another is that this analysis is not concerned with the details of litigious behaviour, but rather hopes to see whether one country is less litigious or court-aware than another. Put another way, this inquiry hopes to elicit whether there was more or less court activity in the Soviet Union or Vietnam. An answer to this question enables observations about the role played by courts and law generally within the community.

Vietnamese court-related statistics were set out at the conclusion of chapter six. It is now necessary to compare these with those available from the RSFSR. First criminal case law numbers will be compared, then civil case law numbers. As noted previously, it is not possible to compare either the number of Military

45 See for example, Pham Van Bach, *Justice Journal*, Annex to No. 5, 1964, pp. 9-10.
46 See Chapter 6, pp. 129-132, and Chapter 8, pp. 168-169.
47 See Chapter 6, pp. 132-135.

Court cases or the number of Comrades' Court cases. In the first place Vietnamese data sought about these cases was not forthcoming and secondly it is hard to establish, with any certainty, which Vietnamese court or institution or combination of bodies resolved similar types of cases to the Soviet Comrades' Courts.

In 1961 there were 20,000 people's assessors throughout the DRVN, 4,000 of whom were women.[48] In the Soviet Union there were 550,000 lay assessors in 1966 and 585,000 in 1958.[49] If an attempt is made to compare these figures by calculating the number of people's assessors per 10,000 of the population, it appears that in the DRVN there were 12, while in the USSR there were 28 in 1958[50] and 22 in 1966,[51] the mean of which is 25. This indicates that there were approximately half the number of people's assessors in the DRVN compared to the USSR. Significantly, in both countries people's assessors were appointed to work part-time, as and when required by the courts and possibly the USSR had a greater pool of people's assessors from which appointments to particular cases could be made rather than more courts per se. However, in general terms the figures suggest that fewer people's assessors were required within the DRVN, in turn suggesting fewer hearings per head of the population.

Criminal statistics emanate from Vietnam and the Soviet Union for the period 1964 to 1976 with regard to the sentencing or conviction of crimes.[52] The USSR figures are based on the number of sentences for offences defined as crimes by the Criminal Code over the period.[53] The Vietnamese statistics reflect convictions for crimes against a range of legislative and administrative measures. It is possible with the number of sentences passed within the DRVN nationally for this period to calculate the number of sentences per 10,000 people within the DRVN. Table nine then compares this figure with those provided for the USSR.[54]

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48 Pham Van Bach, *Justice Journal*, 1961, No. 6, p. 9 (in Vietnamese).

49 Ger P. Van den Berg, 1985, p. 251. Unfortunately no figures exist for 1961 the year for which figures are available in Vietnam.

50 *Ibid*.

51 *Ibid*.

52 Although the Soviet Union had a criminal code from 1958, the Vietnamese did not. Instead they relied on a range of legislative instruments, the most significant of which was the *Ordinance on Crimes Against the Revolution* dated 30 October 1967 and applied retrospectively. John Quigley, 1988, p. 351.

53 Ger P. Van den Berg, 1985, pp. 10-11. See also Harold J. Berman and James W. Spindler, 1972.

54 Ger P. Van der Berg, 1985, pp. 9-12. Van den Berg points out that the figures for the number of sentences he provides in Table 1, Number of Sentenced, 1920-1982, are based on three sources of data. RFSFR data published in some detail before World War Two, Soviet comparative work on case numbers for certain years (1928, 1940, 1958-68, 1971 and 1975), and data for criminal case numbers including criminal labour cases form the basis of the figures used here to reflect total sentences per 10,000 of the Soviet population.

The basis of the calculation for the Vietnamese sentence numbers is as follows: the absolute number of convictions divided by the total population, divided by 10,000[55]

For example, 1964 $\frac{18{,}136{,}000}{10{,}000} = 1{,}813.6$

$\frac{6{,}549}{1{,}813.6}$ = 3.6 convictions per 10,000 people

9. Comparison of Criminal Convictions in the USSR and DRVN between 1964 and 1976

Year	USSR[56]	DRVN
1964	26	3.6
1965	23	2.6
1966	31	2.2
1967	32	2.5
1968	28	2.8
1969	31	2.6
1970	33	3.1
1971	33	3.3
1972	29	3.7
1973	35	3.2
1974	36	4.9
1975	33	4.8
1976	31	2.4

This table indicates the number of Vietnamese sentences and convictions is much lower than the number in the USSR. As noted, there may be half the number of courts in the DRVN as in the USSR based on the fact that the number of people's assessors was much lower in the DRVN.[57] However, this does not explain such a radically lower number of cases in the DRVN than in the Soviet Union.

There are several possible explanations for the lower number of cases in Vietnam. The first is that the statistics themselves are incomplete. As explained earlier, obtaining these statistics was very difficult and it is possible that errors

55 Throughout this analysis Vietnam's adult population figures are drawn from General Statistical Office, 1970 (in Vietnamese).
56 These figures are taken from Ger P. Van den Berg, 1985, p. 11.
57 See above, p. 185.

were made when compiling them: either when they were originally compiled or when subsequently retrieved. These are statistics compiled during the Vietnamese war when communication was difficult.

Another possible explanation for the low case numbers is that throughout this period Vietnam was at war, both against the American-led forces and against those within the country who were not prepared to support the new regime. The USSR statistics do not show a decrease during the Second World War, but arguably no real comparison can be made between that situation and Vietnam's civil revolutionary war. During the Vietnam War cases involving army offices were dealt with by the Military Courts, for which there are no annual statistics. Anecdotal Military Court figures do not indicate high numbers were tried by the Military in the 1940s.[58] However, this possible explanation cannot be discounted. Further, it is possible that where anti-state activity was identified those accused were charged informally and dealt with beyond the formal court system. This may have been because there was no appropriate court established or because Party members thought it appropriate to act decisively and quickly rather than formally. There is insufficient evidence to resolve this issue.

The alternative is that as a result of the war, and with the full employment that the army provided, coupled with the overwhelming nature of Vietnamese nationalism, that there were indeed fewer offences brought before the courts. Certainly, Chief Judge Pham Van Bach attributed the falling numbers to: people's heightened levels of political enlightenment; the strengthening of national unity and focus on the civil war; the increased impact of propaganda and ideological education; and the elimination of remnants of the old regime.[59]

When these figures are compared with those of other European socialist countries, Vietnam's figures remain noticeably lower. The other socialist countries in Van den Berg's study are not under 10 per 10,000 as is the case in Vietnam, but hover between 28 and 108 per 10,000.[60] Although these figures do show that a great range is possible, it also shows there is remarkable overall consistency in numbers of criminal cases and sentences among other socialist states.

Between 1969 and 1975 the Vietnamese criminal case numbers trend upwards, in contrast with those of the USSR. This can perhaps be explained by the fact that the criminal courts had jurisdiction to hear cases of treason or offences against the state. As the war escalated prosecutions of these types of offences climbed. The rhetoric with regard to criminal offences in socialist states generally, to the effect that the rate of crime is decreasing, is not sustained for this period in Vietnam, although it was claimed with greater justification from time to time when annual figures declined.[61]

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58 See Chapter 3, p. 64.

59 Harvey H. Smith et al., 1967, p. 386. The authors quote directly from Pham Van Bach relying on extracts from the Judge's report to the National Assembly.

60 Ger P. Van den Berg, 1985, p. 15.

61 Harvey H. Smith et al., 1967, p. 386. Chief Judge Pham Van Bach is quoted as claiming that the number of criminal cases decreased in 1966 from the number filed

Assuming comparable civil jurisdictions, the number of cases filed in both countries can be compared. The number of cases does not include divorce cases.

The basis of the calculation for the Vietnamese civil case numbers is as follows:

the absolute number of cases (excluding divorce cases) divided by the total population, divided by 10,000

For example, 1964 $\frac{18{,}136{,}000}{10{,}000} = 1{,}813.6$

$\frac{12{,}862}{1{,}813.6} = 7.1$ convictions per 10,000 people

10. Comparison of Civil Cases in the USSR and DRVN between 1964 and 1976

Year	USSR[62]	DRVN
1964	98	7.1[63]
1965	92	6.3
1966	88	4.1
1967	81	2.7
1968	77	2.5
1969	76	2.7
1970	75	3
1971	78	3.3
1972	*	3.4
1973	*	2.8
1974	75	3.1
1975	77	2.6
1976	75	#

* Statistics not available

\# 1976 statistics cannot be calculated as population refer to the whole country while court statistics still only refer to the DRVN (or north).[64]

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in 1965. See Chapter 6, pp. 132-135; which confirms this. In 1965, 4,207 criminal cases were received while in 1966 only 3,800 were received.

62 These figures are taken from Ger P. Van den Berg, 1985, p. 146.

63 There is a suggestion that this relatively high number of cases is attributable to the difficulties of solving housing questions for state employees. Chief Justice Supreme People's Court, *Report on the Activities of the Year 1964 and Directions for the Year 1965 of the People's Courts*, 1964, p. 6 (in Vietnamese).

64 Statistics published by the National Publishing House do not include population statistics divided for the north and the south as for the years leading up to and including

Again the number of Vietnamese cases is a small percentage of the number of USSR cases. Further, there is decreasing trend in the total number of civil cases filed with the courts in Vietnam. A possible explanation for this decreasing trend lies in the escalation of the war. However, other factors such as a loss of confidence in the courts, may also explain the diminishing numbers.

This study of USSR and Vietnamese statistics suggests (and it can be read as no more than a suggestion), that the Vietnamese used their courts much less than the Soviets. Explanations for why this might be the case will be sought in the next chapter.

X. Similarities and Differences

Broadly speaking, the court systems of the DRVN and the RSFSR were similarly structured, staffed and guided.[65] Both sat within socialist systems where by the mid 1970s the political orientation was socialist and the duty of the court was to implement socialist legality. In summary, both the DRVN and RSFSR court systems had the following characteristics:

- Party influence controlling both judicial appointments and directing how cases should be resolved;
- Courts utilising both law and Party policy to resolve cases;
- Supreme Courts reporting to National Parliaments;
- No Ministry of Justice operating after the early 1960s;
- Procuracies working closely with the courts;
- Judges elected for five-year terms (or shorter terms for lower courts);
- Re-election of judges;
- Use of appeal system;
- Use of people's assessors to determine all first instance cases;
- People's assessors elected for two-year terms;
- Judges sitting alone resolving appeal cases;
- Both judges and people's assessors having to demonstrate revolutionary morality for appointment;
- Senior courts having a duty to educate/instruct lower courts in law;
- Courts having to educate the masses about the role of law; and
- Arbitration systems operating parallel with court systems.

Yet despite these similarities – and they are significant – closer examination of the Vietnamese system of dispute resolution reveals that the Vietnamese experience diverged from the Soviet precedent in several fundamental ways.

1975. The unification of the country, with the fall of Saigon in 1975, means national population figures for 1976 are for the whole country. See General Statistics Office, 1978, p. 61 (in Vietnamese).

65 For an abridged discussion of similarities and differences see Nicholson, 2006(1).

Perhaps the single largest difference that emerges from this analysis is the different jurisprudential environments in which legal reform was undertaken. The debate by Soviet jurists about the role of law per se as compared with its political tasks was extensive in the USSR while relatively slight in the DRVN. This reflects different legal traditions, but also results from the different context of legal reform. In particular, the fact that Vietnam consulted the Soviet experience of legal reform meant that debates about the role of law, held in the Soviet Union, were not held in Vietnam.

The place of law in the new regimes affected the operation of courts in both countries. This is borne out by the comments made by Chief Judge Pham Van Bach of the Vietnamese Supreme People's Court. He outlined the role of the courts and the understanding of law that those in courts were to apply, which in turn reflected the general place of law within society.[66] While the court experience in the Soviet Union oscillated, Vietnam committed at the outset to a court hierarchy and a role for courts in the implementation of state policy.

The USSR/RSFSR's commitment to legal education also demonstrated a different attitude to the significance of law. In the DRVN law schools were closed. This is not to say that legal education in the USSR continued with the same form and content as before 1917, but rather that the continuing of legal education is itself significant. In effect, the closure of Vietnamese law schools tied the education of Vietnamese lawyers to the USSR. It also meant that judges were rarely law graduates in Vietnam, whereas they were more likely to be legally trained in the RSFSR.

A striking difference between the Russian and Vietnamese legal systems lies in the use of ad hoc courts/tribunals and show trials by the Soviet administration which were not replicated to the same extent in the DRVN. Special Courts were used in Vietnam, but for a relatively short period of time. Although each regime used the courts for political purposes, the extent of the use of purges – relying on courts as instruments of eradication of dissent – varied substantially. Nor did Vietnam replicate Stalin's show trials.

The role of Comrades' Courts also distinguishes the RSFSR system of courts from that located in the DRVN. The latter never introduced Comrades' Courts. Although local mediation committees and Justice Committees could resolve cases at the local level in Vietnam, they did so without being called courts and were never successfully brought within the court system. This indicates that Soviet-style popular or local justice was not exactly replicated in the DVRN.

This study also suggests that case numbers were strikingly different in the USSR and DRVN. Although the statistical data is problematic, it emerges that the Vietnamese were much less court-reliant through the civil war years. The state use of the courts to punish criminal offenders and civilian use of the

66 See Chapter 6, pp. 120-123.

courts to resolve disputes in Vietnam are both a fraction of the equivalent use of courts in the USSR.

The next chapter seeks to explain why the Vietnamese interpretation of the Soviet court system diverged in these ways.

Part Four
The Role of Legal Culture

Chapter 10
Similarities and Differences between Soviet and Vietnamese Court Systems: Unravelling the Causes

Looking at the traditional style of Vietnamese people, it may be seen that Vietnamese people in general are not used to applying the law as an important means to govern social relations. Vietnamese people generally have a very superficial understanding of law and its social function. They normally view law as a tool used for imposing sanctions and penalties and as a tool invented by those who are in power or the high ranking classes of society (this is one of the reasons why 'the custom rules the law').

Nguyen Nhu Phat[1]

The previous chapter identified many similarities and five major differences between the Soviet court model and the Vietnamese court experience. This chapter discusses possible explanations for these similarities and differences, and in so doing draws on history, legal history and the cultural practices of Vietnam, distinguishing these from Russian/Soviet legal culture. Part one of the chapter will seek to explain the identified similarities and part two will consider causes for the differences: jurisprudence; legal education; the use of committees rather than Comrades' Courts; the role of the ad hoc courts (purges) and show trials and the number of cases going to courts.

The explanations offered here will largely draw on Vietnamese history, legal history and cultural and traditional practices. It will become clear that contemporary history and legal history do not offer sufficient explanations. Therefore it is ultimately necessary to contemplate not only analysis of the contemporary period but also a longer view of history to see how each affected the development of the Vietnamese court system. This exploration of Vietnamese legal culture proceeds as a comparative historical study that includes a synthesis of law (broadly defined), politics and institutional development over time to see how they affect and produce legal culture in general and the development of Vietnamese socialist courts in particular. It will be undertaken in light of Vietnam's history as

1 Nguyen Nhu Phat, 1997, pp. 400-401.

a colonized nation: first by China,[2] then by the French and arguably, until the unification of the country in 1976, by a strong American-led Western presence in the Republic of Vietnam.

Examining two court systems by reference to differences and similarities is at once neat and misleading. Any mapping of a court system according to how much it resembles or diverges from another reflects the perception of the researcher. For example, it can be suggested that the Vietnamese courts resemble the Soviet courts in that each of them has one judge and two people's assessors sitting on the majority of first instance cases. Arguably this parallel ignores a range of relationships that might affect the operation of the courts, for example: judges may be in a different relationship with people's assessors in each country or district, which in turn may affect the outcome of particular cases; and prosecutors and defenders may play a different role within each system, therefore challenging any assumption that the actual court hearings are similar. These examples illustrate that structural similarities should not be read as indicating uniform operations. It is necessary therefore to incorporate a broader range of features in the analysis.

I. Similarities

The previous chapter concluded that the Vietnamese and Soviet court systems resembled each other, particularly after 1959, in some fundamental ways. When summarized, the list of similarities set out in chapter nine produces four common features of the Vietnamese and Soviet court systems at this time. First, courts are lead by the Communist Party of each state, while coordinating their activities with the procuracy and reporting to the relevant national parliament. Secondly, elected judges and people's assessors constitute court personnel and to obtain or retain office these staff must demonstrate revolutionary morality. Thirdly, notions of popular justice make people's assessors integral to revolutionary court systems. Fourthly, while avowing the independence of courts, in fact senior courts play a key role in 'guiding' lower courts. Finally, courts have a propagandist function, existing in part, to educate the masses about law and order.

Essentially each court system, the Soviet and Vietnamese, was a tool of the state, rather than sitting apart from it. Courts were charged with the application of policy and laws according to the will of the state, which in each case was largely expressed through pronouncements by the respective communist parties and then recorded in laws/policies. The fact that each court system was accountable to the national parliament indicates that it was never anticipated that the courts would be independent, in the Western sense of sitting apart from the legislature, but rather that the courts would be led by and accountable to the legislatures. The most striking similarity between the Vietnamese and Soviet

2 For a summary of Chinese influence in Vietnam before 939 AD see Keith Taylor, 1983, pp. 297-301.

court systems was therefore their political role as a tool of the state apparatus to implement the will of the state, which in turn, according to rhetoric in both countries, reflected the will of the people.

The Soviet and Vietnamese court systems were similarly structured: similar court officers (judges and people's assessors) elected for similar periods according to broadly similar criteria. In both countries the importance of the people's assessors within the first instance courts was widely publicized. The policy that lay people were integral to what had previously been cast as either elitist (Czarist) or colonialist (French) institutions repositioned the courts as institutions sympathetic to the masses. The fact that cases were to be resolved on the basis of judicial, revolutionary morality added weight to the propaganda that courts were connected with the plight of the average citizen rather than a working professional elite. Courts were introduced as tools of the revolutions and publicly challenged, by local political groups and leaders alike, to represent the will of the people. The perception that judges and people's assessors were elected served to reinforce the idea that courts were connected to the people. The courts responded to the populist challenge by appearing at once patriotic and revolutionary and operating as political institutions at the grass-roots level.

Finally, the courts can be seen as similar in Vietnam and the USSR as a result of their educational function. Not only were courts fora where disputes could be resolved, but also institutions charged with educating people about the role of law and its operation. In particular, the senior courts were to play a leading role in the propagandist work of the courts, in terms of educating lower courts and the wider public. Therefore in each country similar expectations existed that courts publicize appropriate revolutionary conduct and explain the new legal system, although the method for disseminating these new understandings of law diverged.

There are several possible reasons for these similarities, the most obvious of which is that ultimately each state embarked on the construction of socialism according to Marxist-Leninist principles. The construction of socialism did not occur at the same time nor necessarily as a result of the same national pressures, but by the late 1950s each state saw itself as constructing socialism. Within the socialist model adopted by both Vietnam and the Soviet Union, courts were accountable to the national parliament and ultimately to the respective Communist Party leaders. This structure reflected socialist ideology that had law as subservient to the state plan. Law existed to assist with the implementation of Party-settled state development.

The abolition of the Ministries of Justice and the strengthening of the role of the procuracy in each country may also have contributed to Party control of courts. Rather than bureaucrats contributing to the organization and monitoring of court work, the courts became directly accountable to the National Assembly without an intervening set of obligations to a ministry. Like the courts, the procuracy was also accountable to the national legislature. This symmetry in the bodies to which the courts and procuracy reported was established to enable courts and the procuracy to receive similar policy direction.

In earlier chapters the role of democratic centralism was discussed within both the USSR and Vietnam. This principle requires a hierarchy of authority to operate ensuring that lower levels of institutions and personnel account to higher levels. Such a philosophy entrenched accountability and did much to ensure that policies initiated at the central level would be implemented, especially as democratic centralism spread. Later parts of this chapter will take up the argument that, although courts were used to implement political policies in each country, they operated differently within this general view of their function. But the common approach to democratic centralism reinforced the position of the courts as political bodies accountable to the ruling communist parties in Vietnam and the USSR.

Earlier chapters have also canvassed the role ascribed to law in the evolution of the Democratic Republic of Vietnam and the USSR. In both countries socialist legality enabled courts to be used as instruments to implement particular policies, such as the purges of Stalin or the land reforms of the Vietnamese. In each country the courts were intrinsically political institutions. As noted, their primary role was to ensure the implementation of the state's policies (and laws). A core tenet of socialism is that the individual right must not infringe upon the collective right, therefore where a state's policy is settled on the basis that it benefits the wider community, the courts will be required to implement this policy. Military Courts in both countries serve as an example of this, where procedural fairness was compromised, at least from a Western perspective where individual rights are given greater recognition, for the sake of safeguarding the security of the new regime.

Given that the Vietnamese had the Soviet precedent to which to turn in the development of their court system, it is not surprising that there are similarities within the respective court systems. As explained in the introduction, the Soviet Union was the parent of socialist institution-building and as such was consulted by various socialist states, including Vietnam.

The fact that war dominated the Vietnamese domestic agenda for so long meant that Vietnam placed more reliance on learning from the USSR than would have been the case had it been at peace.[3] To some extent the Vietnamese war precluded Vietnam from developing its legal institutions endogenously, instead forcing Vietnam to rely on the experience of its socialist friends, especially when those friends were donating vast sums of aid.[4] By way of illustration, China provided assistance with the land reform campaign.[5]

These explanations for the similarities between Soviet and Vietnamese courts between 1945 and 1976 emanate from the historical and political situation in

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3 Mark Sidel refers to a discussion with the DRVN legal scholar and Minister of Justice until 1960, Vu Dinh Hoe, who stated that legal scholars worked to mobilize support for the war rather than research law: Mark Sidel, 1997 (2), p. 19. The *Research of State and Law Journal* (*Nghien cuu Nha Nuoc va Phap quyen*), introduced in 1966, was not published between 1967 and 1971 (inclusive).

4 See Chapter 1, footnote 88.

5 See Chapter 3, pp. 67-70.

Vietnam and the USSR during the period of the study. Yet they do not all lead inexorably to an explanation of similarity. Some, such as the war, will also be relevant when trying to determine why the Vietnamese court experience diverged from the Soviet model (see below).

Exclusive reliance on contemporary history to hypothesize about court development is therefore superficial. For example, although the construction of socialism in both countries is referred to as pivotal when explaining the similarities between the two court systems, it is also foreshadowed that each state went about constructing socialism within circumstances particular to it. This in turn means that the construction of socialism, although a generally shared aim, was brought about using different policies and approaches. It is therefore simplistic to rely on contemporary history to explain similarities and differences. A longer view of history must be explored and this is undertaken shortly, but first a summary of the differences this chapter ultimately seeks to explain.

II. Positioning Difference

Both Vietnam and the Russian Republic sought to introduce Marxist-Leninist legal systems, but they did so against a background of national debates and national circumstances affecting the role law was to play. The previous chapter identified several differences between the operation of the Vietnamese and Soviet court systems.[6] First, the courts in each state were developed and evolved in diverse jurisprudential contexts. Secondly, each nation differently valued legal education. In the case of Vietnam this resulted in a cohort of 'legal experts' who were not legally qualified. Thirdly, each Party-led government idiosyncratically developed its use of courts, including the role of ad hoc courts and tribunals. For example, there was no replication of the Soviet Comrades' courts in Vietnam. Finally, as noted, courts were much less used in the DRVN than in the former USSR. The following discussion explores reasons for these differences.

Theoretical debates about the role of law did not consider whether law would continue and if so, on what basis. In Vietnam, unlike in the Soviet Union, legal debates turned on the issue of how law was to be conceived, rather than whether it was to have a role. The Soviet rhetoric about the 'withering of law' was absent in the DRVN, as were the debates about the place of law. Instead, there were debates about how the people's democracy was to be interpreted and what weight was to be given to individual and collective interests. It is therefore possible to characterize Soviet jurisprudence as much more searching than its Vietnamese counterpart, which most frequently took a pragmatic view of law. This interpretation may reflect the Western preoccupation with jurisprudential debate; observable in the USSR and less obvious in the DRVN.

This difference in jurisprudence may also reflect that the Soviet communist movement was a class-based revolution, inspired by the perceived injustices of

6 See Chapter 3.

hierarchical and monarchic Russia. This resulted in an intellectual search for the place of law within the new socialist configuration of relations between state and society and the role of economics and law. Within Vietnam the oppression by colonialists was the dominant catalyst for change, resulting in a protracted and bitter war for independence. There is ongoing debate about the extent to which Ho Chi Minh was himself a communist, a debate which indicates the complex ideological context in which laws and legal institutions were evolving in Vietnam.[7]

A further difference between the DRVN and the USSR was the role of legal education. The USSR continued to teach law throughout this period, whereas Vietnamese legal education ceased shortly after 1945. The result was the majority of Vietnamese jurists had no law degree, although they may have benefited from a Soviet-inspired short course. This was in stark contrast with the Russian Republic where the preponderance of judges were legally trained, at least by the mid 1970s. Again, the war may partly explain the different attitudes to legal education. But as will be explained shortly, Vietnamese traditionally relied on Confucian training for state officials, at least until the arrival of the French. With the defeat of the French and closing of their universities, Vietnam was without funds or a clear vision for legal teaching and turned to the USSR to full the vacuum.

The role of courts in the DRVN and Russian Republic also differ. State use of courts was different, the Russian Republic relying heavily on ad hoc courts. The Vietnamese seem to have relied comparatively little on ad hod courts, and in the main used the Special Courts and Military Courts to eradicate political dissent. Being at war over the entire period legitimized the eradication of treasonous behaviour. Dissension did not need to be removed covertly, as in the Soviet Union, as national independence was at stake.

As noted, the Russian Republic relied heavily on its system of Comrades' Courts at various times. The DRVN did not have a direct equivalent. Arguably the Committees offered a similar style of dispute resolution, but their position was never formalized as the Soviet use of Comrades' Courts was, and nor did they continue to wield the same authority after the defeat of the French.

A longer view of Vietnamese legal culture is necessary to explain this distinction. It is suggested that it reflects the different court histories of the two countries. In the Soviet Union courts had been formalized before 1917 and the system included a peasant's court and local courts. In Vietnam traditionally, village elders had mediated civil disputes and resolved how to punish crime. As a result the Vietnamese tradition of informal dispute resolution was more recent. The new government effectively attempted a reinstatement of traditional local committee forms albeit staffed by revolutionaries rather than Confucian-style elders.

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7 See Appendix 2, footnote 11.

Finally, the Vietnamese generally appear to have used courts much less than the Soviets. Even acknowledging all the debates about relying on statistics across cultures, a stark difference in both the volume of courts and the frequency of their use emerges with Vietnamese using courts much less than the Soviets. As previously noted, the Vietnamese war may explain the low numbers, either because courts were too distant to be reached or because Military Courts were used and we have no statistics from those.

Each of these countries had a different experience of war, dramatically affecting national construction. The Soviet Union's experience of World War Two lasted four years and the other wars in which the USSR was involved were also relatively short, unlike the Vietnam War against first the French and then the American-led forces that essentially continued for thirty years. These differences in history within the period under consideration impacted on the court system in each country and may in part explain some of these differences.

Both countries also experienced a form of civil war at the time in which the new regimes were established. Between 1917 and 1920 the RSFSR experienced what many historians refer to as war communism – a period when war was waged on pre-revolutionary attitudes. This period was attended by many of the ravages existing during the Vietnamese civil war, but again its relative brevity ultimately indicates that the USSR did not have an experience of war comparable with that of the DRVN.

It is suggested that the Vietnamese experience of war most distinguishes the modern context in which courts evolved in the two states. War conditions precluded Vietnamese from debating law and its relationship with the state. It also made the establishment of law schools impossible. Similarly, low case numbers may be partly attributable to war.

It is simplistic, however, to attribute all the differences between Vietnamese and Russian courts to the Vietnamese experience of war. Differences in national essence may also have coloured the way in which state authority was exercised and therefore how courts were to contribute to socialist construction. It is therefore necessary to consider a longer view of history to explain the differences between the Soviet and Vietnamese courts.

III. Vietnamese Legal Culture

It is important at the outset, to see how Vietnam's pre-colonial and colonial legal systems were different from the pre-revolutionary legal system of the USSR. A supplementary question is – did the French presence in Vietnam create greater similarities or differences between Russia and Vietnam's legal systems?[8] Foreigners to Vietnam's legal history not infrequently assume that the French introduced an effective 'civil' law system in Vietnam. This

8 The European legal system influenced Soviet legal development. See Harold J. Berman, 1963, pp. 267-273.

assumption needs testing, as it leads to Vietnam and Russia's legal systems being likened to each other (because both are then presumed to be professional, civil law systems) where in fact they might be quite different.

As noted in Chapter I, this study invokes legal culture as a paradigm by which to explore similarities and differences between two socialist states over the period 1845-1976. It does not attempt a broader classification of legal systems, having noted the problems with such an approach.[9] This study analyzes where the two legal systems are similar and where different seeks to explain this without classifying systems according to the traditional 'types' and therefore assuming likeness.[10]

Vietnam's legal tradition reflects a complex weave of indigenous,[11] Chinese, French and Soviet influences resulting in particular attitudes to authority and morality. In Vietnam the interconnection between law and morality is complicated by the fact that the Vietnamese were greatly influenced by Confucian and then Marxist-Leninist thinking.[12] Before turning to consider the philosophical influences on law and its role in society (Buddhism, Taoism and Confucianism), this chapter considers the history of the Vietnamese legal system.

Chinese and Vietnamese Legalism

Chinese influence can be ascribed to two time periods. The Chinese ruled directly in Vietnam for a thousand years (111 BC-938 AD) and largely imported their own legal/administrative doctrines during this time.[13] However, the Vietnamese

9 See Chapter 1, p. 27.

10 Compare this approach with the debate about whether Vietnam had a sophisticated civil law system before the arrival of the French and if so whether it was Chinese in origin or capable of being defined as Vietnamese. Ta Van Tai argues that the Vietnamese legal system, especially as it was developed by the Le dynasty, brought 'into life concepts and rules that could be considered functional equivalents of those in modern Western civil law systems'. Tai argues that its sophistication contributed to the subsequent development of French codes in Vietnam with many of the Vietnamese concepts being retained. In his view there was sufficient difference between the Chinese and Vietnamese codes, at least those of the Le period, to argue that Vietnam had developed its own civil law characteristics (Ta Van Tai, 1982, p. 551). In contrast, others argue that the French legacy in Vietnam was a civil law system – at least in the South. This approach points out that the Vietnamese legal system offered insufficient distinctions between private and public law to be seen as a Western legal system before the arrival of the French (Vu Van Mau, 1963, p. 7). Other commentators have pointed to a raft of supplementary edicts to suggest that the central codes were neither comprehensive nor well implemented. See M.B. Hooker, 1975, pp. 229-231 and M.B. Hooker, 1978, pp. 154-161.

11 Keith Taylor, 1983, p. 264. Taylor correctly points out that it is 'not easy to define what this "indigenous tradition" was in specific terms, for the indigenous content had been transformed during the centuries of Chinese rule'.

12 Mark Sidel, 1997, William Duiker, 2000, pp. 134-136.

13 Nguyen Ngoc Huy and Ta Van Tai, 1986, pp. 436-437; Nguyen Ngoc Huy et al., 1987, pp. 6-7 and Pham Duy Nghia, 2001, pp. 13-17.

emperors from 939 onwards frequently negotiated their control with China – a force to reckon with that constantly threatened Vietnam's independence. In this later period Chinese legal codes were also of importance to Vietnamese legal thinking. There is a body of scholarship analyzing the extent of their influence.[14] It is touched on here in the context of exploring whether a distinct Vietnamese legal tradition existed prior to the arrival of the French and if so how it can be characterized.[15]

The first Vietnamese legal text that exists in its entirety today stems from the Le period (1428-1788).[16] The most significant of the Le's codes was *The Penal Code of the National Dynasty* (*quoc trieu hinh luat*), probably introduced in 1428, but not infrequently revised.[17] This code is often referred to as the *Hong Duc Code*.[18] It established a new code distinct from the *M'ing Code* of China.

As Hooker points out, the most significant similarity between the Vietnamese and Chinese legal texts of this period is that both 'define law in terms of sovereignty and equate the ruler, the state and ethical principle'.[19] Beyond this broad adoption of Confucian principles (see below) into the legal code, the Vietnamese text retained areas where it was quite distinct from its Chinese counterpart. For example, daughters could inherit in Vietnam, and wives could claim on the estates of their deceased husbands.[20] Hooker convincingly argues that to debate the similarities and differences between the Chinese and Vietnamese texts at any length is to miss the reality of state administration at this time.[21] That is

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14 See for example: Nguyen Ngoc Huy et al., 1987; Nguyen Ngoc Huy, 1984, pp. 46-86; Stephen Young, 1976, pp. 1-48; and M.B. Hooker, 1978, pp. 95-109.

15 For an excellent bibliography of pre-colonial Vietnam-related legal commentary and texts see M.B. Hooker (ed), 1986, pp. 555-565.

16 M.B. Hooker, 1978, pp. 95-109. Hooker warns against the use of the word 'law' arguing that it allows particularly Western assumptions to dominate the analysis of the role of pre-colonial Codes.

17 Nguyen Ngoc Huy et al., 1987, pp. 19-23. These authors refer to the very substantial debates that have raged about when in fact the *Hong Duc* Code became law. They expressly reject the arguments that it was either promulgated between 1470 and 1487 or in 1777 or 1767: at pp. 21-23.

18 Hong Duc was one of the reign titles of Le Thanh Tong in use from 1400. See Nguyen Ngoc Huy, 1984, p. 58.

19 M.B. Hooker, 1978, p. 78. See also Nguyen Ngoc Huy et al., 1987, p. 55. For example, protecting the Emperor by high penalties for treason reflected the sovereign's ultimate position.

20 *Ibid*. Hooker points out that there is debate about why these provisions exist, arguing that although suggestions that the Vietnamese state sought to honour the female contribution in wars is interesting, the real cause may be the 'facts of agricultural life', namely that 'women's right to property and control over marital property are an essential part of any general marriage law'. Compare this with Alexander Woodside, 1971, p. 46 where Woodside refers to the folk traditions surrounding the Vietnamese Trung sisters and how it may be that honouring these female warriors is an on-going influence in Vietnamese cultural life.

21 Studies of this type have been meticulously carried out by: Vu Van Mau, *General Notes About Civil Law*, 1961 as referred to in Lan Quoc Nguyen's article*;* Alexander Barton Woodside, 1971, p. 45; Ta Van Tai, 1982, p. 525; Nguyen Ngoc Huy, 1985, p. 27; Lan Quoc Nguyen, 1989, p. 147; Stephen Young, 1976, p. 12. The scholars

to say that both Vietnamese and Chinese states placed supreme authority in the sovereign but beyond this, the application of laws was very much a matter for regional authorities and applicable law, to the extent that it existed, was located in supplementary edicts and decrees.

For the purposes of a study ultimately concerned with the influence of legal history on law and courts in the mid twentieth century, it is also relevant to note that the *Hong Duc Code* reflected a Chinese legalist tradition, as indicated by an emphasis on punishment and the notion of group or collective responsibility.[22]

The Nguyen (1802-1945) dynasty introduced what is now referred to as the *Gia Long Code* in 1812, characterized as a copy of the *Ch'ing Code* of China.[23] Two aspects of the Vietnamese codes are cited as evidence of the similarity between Chinese and Vietnamese legal approaches. In particular, the code was really concerned with acts of moral impropriety or criminal violence that appeared to its framers to be a disruption of the social order. The individual did not bring an action against another person but made a complaint to an officer of government, who then decided whether or not to prosecute.[24]

Hooker cites four factors that support a characterization of Vietnamese law (both the *Hong Duc* and the *Gia Long*) as reflecting Chinese Confucian/legalist attitudes to law:

- An attempt is made to make the punishment fit the crime.
- A person's social status was significant in determining what penalty applied and how matters would be dealt with.
- The law created special classes of person who would be treated differently by the law, for example the sovereign and his family and servants were treated differently from the mass of citizens.
- Where one stood in relation to other family members affected how family affairs would be judged. For example, sex, seniority and intra-familial relationship would be taken into account.[25]

Vietnamese village life left its stamp on Vietnamese law. For example the *Gia Long Code* had no provisions dealing with marriage or inheritance laws.[26] The

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who analyzed the similarities and differences between the *Hong Duc* and the *T'ang* and *M'ing* Codes of China all conclude that in some ways it reflected Chinese influence and in others it remained idiosyncratically Vietnamese.

22 Nguyen Ngoc Huy et al., 1987, p. 55.

23 Possible reasons why the Nguyen dynasty would copy the Chinese Ch'ing Code are: the 'intrinsic' clarity of the *Ch'ing Code*; and it was not as politically fraught to align the dynasty with China as it had been in Vietnam previously. In fact it might be the case that to align oneself with China at this time was politically astute because it gave the appearance of powerful alliances to the West; and there had been a movement of Chinese into the north of Vietnam, many of whom were loyal to the Nguyen and valuable traders and merchants: *Ibid*., pp. 29-31. Hooker gives a summary of the similarities and differences between the Chinese Ch'ing and Vietnamese *Gia Long* Code: M.B. Hooker, 1978, pp. 80-89.

24 M.B. Hooker, 1978, p. 89.

25 *Ibid*., pp. 89-91.

26 Stephen Young, 1976, pp. 1-48.

earlier *Hong Duc Code*, however, had established customs and norms relevant to both marriage and inheritance laws and they continued to operate. This adoption of the codes into village custom reflected the local perception that villages were 'in traditional times semi-autonomous settlements which were at least partly as free from Hue as Chinese villages were of the Ch'ing dynasty in Peking'.[27] This autochthonous application of local custom and law and what had evolved into customary law is encapsulated by the Vietnamese saying '*phep vua thua le lang*' ('The laws of the emperor are less than the customs of the village').[28] This is also explained as a result of the emperor having no intermediate agency intruding into the local level.[29]

Vietnamese Taoism and Buddhism

It is also important to explore the philosophical and moral influences circulating in Vietnam since independence, in particular, Buddhism, Taoism and Confucianism. Buddhism, which teaches liberation resulting from ethical conduct and discipline, has had a lasting influence in Vietnam.[30] In particular, scholars argue that during the Ly dynasty (1009-1225) Buddhism was the prevailing philosophical influence.[31] Scholars claim that Chinese-inspired Confucianism (see below) replaced Buddhism as the dominant moral philosophy by the late fourteenth century.[32] This change is attributed to the peasants rising up against the large feudal and monastic domains and ultimately rejecting the monastic tradition of the Buddhists.[33] Other commentators note that while the Tran (1225-1400) were devout Buddhists, Buddhism itself 'had less influence in the legal field'.[34] Another reading of the Buddhist influence in Vietnam has it remaining active among certain peasant populations, although no longer a major ethical and moral voice in Vietnamese social relations or laws after the mid 1400s.[35]

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27 Alexander Barton Woodside, 1971, p. 153.

28 *Ibid*., p. 154. Another Vietnamese version of the same saying is '*phep vua thua lang*'; see Nguyen Ngoc Huy and Ta Van Tai, 1986, p. 493. Yet as John Kleinen points out this is not to be confused with a reading of villages as integrated communities. Kleinen argues that focus on villages 'has to be sharpened in terms of seeing particular households, individuals with different roles (socio-economic gender) and a complete series of multi-stranded relationships.' John Kleinen, 1999, p. 20.

29 Alexander Barton Woodside, 1976, p. 16.

30 There is debate whether the Chinese or Indians first introduced Buddhism to Vietnam; see Nguyen Ngoc Huy et al., 1987, p. 7. See also Keith Taylor, 1983, pp. 80-84; Ministry of Culture, 1967.

31 Ngo Ba Thanh, 1996, p. 27. In this paper Ngo Ba Thanh argues that Vietnamese clemency developed during the Ly dynasty as a result of Buddhist teachings and that this is in direct contrast with legal developments in China at this time.

32 Nguyen Khac Vien, 1974, p. 21. Vien suggests that Buddhism was receding in the late thirteenth century.

33 *Ibid*.

34 Nguyen Ngoc Huy and Ta Van Tai, 1986, pp. 438-439.

35 *Ibid*., pp. 438-440.

Taoism, which gained popularity in the tenth and eleventh centuries, built on the foundations of animist beliefs found in Vietnamese culture since prehistoric times.[36] Taoism emphasizes 'the way', privileging the natural order and relying on mysticism. With the adoption of Taoism, along with Buddhism, as Vietnamese cultural icons, nationalism became interwoven with the practice of animist-related rituals. Many of these superstitions and religious observances have become mixed with later Vietnamese belief systems to create what today is an amalgam of animism, Taoism, Buddhism, Confucianism and Marxism.[37] There appears little suggestion that Taoism ought to be linked to, or affected, law directly.

Both Taoism and Buddhism may well extend a cultural influence that in turn affects the Vietnamese perception of law, however difficult to identify. For example, the effect of animism generally and Taoism in particular on the entrenching of local village custom and superstition should not be underestimated. These attitudes in turn arguably rendered law less relevant to daily life. Experts have argued that Buddhism receded dramatically as a dominant influence in Vietnamese political and legal life by the late 1400s, although it resonates within the spiritual life of Vietnam today.[38] Vietnamese commentators say that Buddhism and Taoism continue as spiritual influences today, especially within rural communities.[39]

Vietnamese Confucianism

The extent of Confucian influence on daily life and the legal system is hard to determine.[40] There is no single Confucian value system. Different communities, regions, and nation-states have all developed their own understandings of Confucian philosophy and practised their beliefs in various ways over time. In Vietnam there is an extensive body of scholarship looking at what Confucianism might mean for the Vietnamese legal system at different moments in history.[41]

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36 Keith Taylor, 1983, pp. 273, 281, 283, 290-91.

37 Nguyen Van Huyen, 1995, pp. 247-248. See also Keith Taylor, 1983, pp. 80-84.

38 This is not to say that Buddhism has disappeared from Vietnamese society, but even if it plays a role in village and daily life, its effect on legal policy and laws has receded.

39 Nguyen Van Huyen, 1995, pp. 247-248.

40 Some contemporary commentators argue that to assume the relevance of Confucianism stereotypes the Vietnamese legal system as Asian. See for example, Alice Tay and Conita Leung suggest that in Singapore 'Cambridge University and the London School of Economics, not Peking or Shanghai were the birth places of the Singapore People's Action Party's political morality': Alice Tay and Conita Leung (eds), 1995, p. 5. Compare this with Mark Sidel, 1997 (1), p. 360. Yet an attempt must be made to unravel the role Confucianism played in Vietnam, if only because its significance is so frequently alleged. See for example: Mark Sidel, 1997 (1), pp. 360-363; M.B. Hooker, 1975, p. 227; Milton Osborne, 1969, p. 22; John Gillespie, 1994, pp. 325-377.

41 John K. Whitmore, 1987, pp. 49-65; John K. Whitmore, 1984, pp. 296-306; Nguyen

There is also scholarship on whether Confucianism continues in Vietnam today and how it may have changed over the years,[42] and, in particular, how it may have merged or been strategically aligned with Marxist tenets.[43]

Confucianism essentially reflects a weighting of moral over legal systems. In short *le* (*li* in Chinese meaning ritual or code of conduct) is valued over law (*fa* in Chinese or *luat* in Vietnamese). Confucianism has been characterized as the philosophy entrenching the sovereignty of the state.[44] This is echoed by Ennis writing of French perceptions of Confucianism in the mid 1800s, who notes that the Annamites saw the emperor as 'not only a temporal sovereign but also a priest and judge'.[45] The emperor had a mandate from heaven and was therefore responsible for misfortunes that afflicted Vietnam. With the advent of the strong leadership of the Le dynasty (1428-1788), Sung Neo-Confucianism (Confucianism established during the period of the Sung Dynasty in China) became the predominant ideology in Vietnam, particularly among educated elites.[46] Over time village life was increasingly guided by Confucian morals and the legalism of the Le receded.[47]

Nguyen Khac Vien's analysis of Confucianism is an excellent starting point when exploring Vietnamese Confucianism in the pre-colonial, colonial and post-colonial periods.[48] Vien attempts to unravel Confucian thought in Vietnam from the 1400s to the present day and is valuable for present purposes especially because it is written by a Vietnamese scholar from the North of the country who tries to explain the role of Confucianism while being a Marxist of the modern era.[49] Vien writes of the 'essential' components of Confucianism in the following terms:

- tolerance toward others (do not do to others what you would not have them do to you);

Khac Vien, 1989, pp. 67-72; Nguyen Khac Vien, 1974, pp. 15-52; David Marr, 1981, pp. 58-60; Paul Mus, 1952.

42 Nguyen Khac Vien, 1974, pp. 15-52; Esta Ungar, 1-4 July 1998. Some contend that the Vietnamese rejection of Chinese cultural and legal systems reflects an inverse relationship with the strength of the Vietnamese state. When strong, the Vietnamese dynasties evidenced a propensity to adopt the Chinese cultural and ethical traditions and when weak, a reasserting of Vietnam's unique cultural heritage is manifest. See Nguyen Ngoc Huy and Ta Van Tai, 1986, p. 448.

43 John Gillespie, 2004, pp. 149-150. See also, William Duiker, 2000, 134-136, Shaun Kingsley Malarney, 1997, 899-920, Christoph Giebel, 2001, pp. 94-95 and Pham Duy Nghia, 1999, p. 1.

44 M.B. Hooker, 1978, p. 108.

45 Thomas E. Ennis, 1973, pp. 55-58.

46 Nguyen Ngoc Huy and Ta Van Tai, 1986, p. 449; Stephen Young, 1976, p. 7; Nguyen Ngoc Huy, 1985, pp. 27-31.

47 Stephen Young, 1976, p. 43. For example, the 1663 moral code for village life, entitled 'The Path for Religious Improvement', which contained 47 articles 'loaded with Confucian morality', was read to villagers on feast days and enforced by the chief of the village.

48 Nguyen Khac Vien, 1974, pp. 15-52.

49 See also Nguyen Khac Vien, 1989, pp. 67-72.

- knowledge, which enables you to have the right attitude in all situations in life;
- courage to fulfill your obligations; and
- behavior in accordance with rituals.[50]

Rituals are fundamental to the practice of Confucianism. Nguyen Khac Vien notes:

> The word "ritual" has three senses – religious, social and moral. It also signifies ceremonies for worship as well as etiquette observed in social relationships and the worthy behavior each person owes to himself out of self-respect.[51]

Nguyen Khac Vien's analysis reflects his understanding of how Confucianism affected daily life in Vietnam. His is not a theoretical treatise.[52]

An integral part of the virtue required of Vietnamese[53] Sung Neo-Confucianism in the nineteenth century was the observance of:

> Five relationships (*ngu loan*): ruler-subject, father-son, husband-wife, elder brother-younger brother and friend-friend…Personal loyalty (*trung*) was the essence of one, filial piety (*hieu*) the essence of the other. Each concept was surrounded with an elaborate exegesis and historical case law. Nevertheless, a king, a father, or an elder brother was supposed to rule primarily by example, by cultivating and projecting the inner quality of virtue (*duc*), not by promulgating an outer system of laws and institutions (*phap*).[54]

Challenges to Traditional Vietnamese Confucianism

Commentators note that in the late nineteenth and twentieth centuries Confucianism began to be differently appropriated and used for diverging world-views. In particular, Nguyen Khac Vien talks of the argument for the peasant classes, developed by local scholars, that Confucianism was ultimately a humanist philosophy and could not be used to perpetuate the oppression of poorer peoples.[55] The fact that oppression continued, with monarchic ritual and mandarin hierarchies entrenched by Confucian practices, contributed to the attraction of other

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50 Nguyen Khac Vien, 1974, p. 32.
51 *Ibid*., p. 33.
52 *Ibid*., p. xv. Editors David Marr and Jayne Werner distinguish the author's study of Confucianism with that of Paul Mus, 1952. The distinction made is that whereas Mus presented on the 'orthodox mandarin side of these traditional ideas and beliefs in Vietnam' (p. 41), Vien explored an 'intimate perception of traditional values and an understanding of revolutionary change' (p. vx).
53 Milton Osborne, 1969, p. 22. Osborne writes that 'The extent to which the inculcation of Confucian ethics was given a particularly Vietnamese slant is an unanswered question'.
54 David Marr, 1981, p. 58. See also David Marr, 1979, pp. 315-320.
55 Nguyen Khac Vien, 1989, pp. 67-72. In this article Vien argues along similar lines.

ideas, such as science and communism.[56] Vien's thesis, in which he is joined by Milton Osborne and David Marr,[57] is that the political conservatism of Confucianism ultimately forced its rejection. Unable to posit a world-view that could deal with the continuing oppression of those not collaborating with the French, Confucianism was challenged and finally found wanting.

The role the French played in altering the Vietnamese traditional education system cannot be underestimated in the ultimate demise of Confucianism, at least as the official ethical basis for state doctrines regarding social order and social relations. As Nguyen Khac Vien points out educated Vietnamese under colonial rule were 'voiceless before our own people' as a result of attending French-run schools and universities.[58] Other commentators refer to the abolition of the national exam system as leading inexorably to the demise of the Confucian scholar.[59] In particular, the abolition of the exam system (based as it was on classical texts) obviously contributed to the demise of instituted Confucian learning. Others note that the logic and precepts of Confucian thinking were under substantial challenge for failing to deal with Western ideas.[60] It has to be remembered that Confucian thinking was being questioned in China at this time and that Confucianism had never been equated in Vietnam with any 'national essence', unlike in China.[61]

Contemporary Vietnamese scholarship positions Confucianism as one part of an amalgam of 'religious' influences' that permeates daily life in Vietnam. Coupled with Taoism and Buddhism, animism and naturalism, it is characterized thus:

> In this jumble of spiritual things, the cult of ancestors and the cult of the village patron can be distinguished.... The great majority of the people in the country have a very flexible and very soft popular religion characterized by a certain number of practices, some related to Confucianism, others to Taoism or to Buddhism, that are automatically obeyed on different occasions in life.[62]

Hence, although Confucianism receded as the official organizing state doctrine, it remains as a formative influence on the traditions of the household. In particular, the importance of filial piety, or its contemporary equivalent of respect for elders, continues.

The relationship (*quan he*) is extremely important in Vietnamese daily life even today, and this phenonemon grows out of the value placed on relationships by Confucian ethics. The family relationship is the most trusted, but personal relationships are also very significant. Once in a relationship of trust, professional and business relationships may emerge. In the same vein, promotion within

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56 Nguyen Khac Vien, 1974, pp. 41-45.
57 Milton Osborne, 1969, p. 22; David Marr, 1981, p. 60.
58 Nguyen Khac Vien, 1974, p. 45.
59 Nguyen Phuong Lam, 1984, p. 19.
60 David Marr, 1981, pp. 114-115. Marr notes in particular that Vietnamese were tackling science and all the consequences for religion that flowed from its ascension. See also Neil Jamieson, 1991, pp. 14-16.
61 David Marr, 1981, p. 114.
62 Nguyen Van Huyen, 1995, pp. 247-248.

organizations (Party or state bureaucracies for example) will be premised on trust, in turn based on recommendations as to personal morality.[63]

Confucian principles, as explained below, also continue to influence the operation of the bureaucracy. This suggests that it is too simple to argue that once official Confucianism withers, for example by the loss of the exam system and with the introduction of revolutionary zeal as a tenet for promotion, Confucianism's influence is effaced from public life.[64]

To establish the significance of Confucian principles and their relevance to legal texts does not necessarily make clear how Confucianism may have impacted on either the interpretation of the *Hong Duc* or *Gia Long* codes or how relevant the codes may have been to daily life.[65] For example, the hierarchical structure of the family and village are implicit in the imperial codes, but their detail and intricacy is not fully encapsulated.[66] As historians and sociologists have been at pains to point out, Vietnamese daily life was hierarchical and reflected complex interconnected relationships between families and local elites and within families.[67] As argued shortly, this relationship-bound loyalty and ethical system arguably affects the relevance of laws to a society.

A system of Chinese-inspired Confucian-influenced codes emerges, premised on an entrenched hierarchy with the mandarins and the Sovereign at its apex, which moulded perceptions of officialdom and social regulation within Vietnam.[68] In particular these codes, when read in light of the dominant Confucian philosophical tradition of the later fifteenth century, suggest that moral virtue was central to Vietnamese life – more significant than laws and edicts. As one commentator puts it:

> ethical canons were defended not so much by a deeply permeative legal-judicial system which constantly identified and punished offences as by a plethoric ritualism in politics and in family relations – by an abundance of carefully worked out rituals which ought to eliminate immoral conduct ahead of time.[69]

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63 John Gillespie, 2002, pp. 180-181.

64 This study does not address the question of the state's reclaiming of Confucianism in contemporary times. See for example, Christoph Giebel, 2001, pp. 77-108 and Phan Duy Nghia, 2005, pp. 76-90.

65 David Haines, 1984, p. 308.

66 There are a great many examples of work exclusively focused on village and familial life undertaken by both foreign and Vietnamese scholars. See for example: Gerald Hickey, 1958, pp. 59-66; Alexander Woodside, 1976; Peter Frederic Baugher, 1980, pp. 238-245; Neil Jamieson, 1993; Nguyen Van Huyen, 1995.

67 Alexander Barton Woodside, 1976, pp. 112-130.

68 The powerful position of the bureaucracy and its extensive discretionary powers operated from at least the mid fourteenth century. This was at one time sacrosanct, but became less accepted over time as the laws were seen to privilege the undeserving and greedy higher classes. See Stephen Young's discussion of Le Thanh Tong's struggle to have the codes uniformly applied as early as the mid 1400s: Stephen Young, 1976, pp. 15-16.

69 Alexander Barton Woodside, 1976, p. 15.

French Colonialism

It is time now to see how the arrival of the French in the nineteenth century affected the operation of law within Vietnam. This is a story of contending readings of the role of law. On the one hand there exists a rhetoric attesting to the French commitment to and implementation of a civilizing mission (*mission civilisatrice*) affecting the Vietnamese legal system.[70] This is countered by a damning local critique alleging oppression rather than reform as the dominant result of French-initiated legal change, as summarized below.

European missionaries first visited Tonkin, today known as Northern Vietnam, in the mid sixteenth century.[71] In 1625 missionaries were sent to test the response of the locals and their reports led to the sending of further evangelists.[72] The relationship between missionaries and the Vietnamese court oscillated: tolerance, negotiation and rejection. Initially, French Christian evangelism and naval interests were paramount, but commercial interest was also sparked, all three keen to explore the offerings of French-named Cochinchina (southern Vietnam).[73] In 1848 Napoleon III announced his intention to send an expedition to quell uprisings against French missionaries to Cochinchina.[74] On 15 March 1875 a treaty with the imperial court at Hue granted the French sovereignty over Cochinchina. In 1883 the Hue court conceded France had protectorates over both Annam (central Vietnam) and Tonkin (northern Vietnam).[75]

Following the occupation by the French of the south of Vietnam, the country experienced a re-arrangement of its political and legal structures. Generally the French influence on the Vietnamese administration and legal system was strongest in Cochinchina where it had sovereignty. French commercial elites,

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70 See, for example, Peter Baugher, 1980, p. 98. Baugher claims that when drafting the revised civil code for Vietnam the French 'showed a determination to respect Vietnamese law'. Compare with Thomas Ennis, 1973.

71 Thomas E. Ennis, 1973, pp. 13-14 (Republication of the original 1936 text). Ennis refers to the first published account of missionary activity in Tonkin, Rennes, *La nouvelle mission des peres de la Campagnie de Jesus dans la Cochinchine*, 1631.

72 *Ibid*., p. 13.

73 Milton Osborne, 1969, pp. 27, 29.

74 *Le Moniteur Universal*, 14 November 1858 in Thomas E. Ennis, 1973, p. 36 (Republication of original 1936 text): 'The ruthless persecutions of missionaries have brought our warships, on more than one occasion, to the coast of the Annamite kingdom, but their efforts to enter in to relations with the government have been futile. The government of the Empire cannot allow its overtures to be spurned. Therefore, an expedition has been planned.'

75 Nguyen The Anh points out that the fragmentation of Vietnam resulted in a very effective erosion of the King's powers. In particular Tonkin was increasingly under French control, although officially a protectorate. Nguyen The Anh refers to the appropriation of the King's power in 1897 by the *Residents Superieur* of Tonkin enabling them to make all decisions and appoint or dismiss mandarins. Nguyen The Anh, 1985, p. 148. The French position was strengthened when the Chinese were routed from Tonkin and the Yangtze River blocked, an act that ultimately ensured French-Chinese negotiations culminated in the total withdrawal of China from Tonkin: Thomas E. Ennis, 1973, pp. 49-51.

largely based in the South, used commercial law introduced by the French. In the North and centre of the country (Tonkin and Annam respectively), the French gained protectorates. In Tonkin the French presence was felt more strongly than in Annam.

The French role in local administration and law-making varied throughout Vietnam.[76] In Cochinchina a French governor was appointed and by the 1880s French *Chefs de Province* were substituted for local mandarins.[77] In Tonkin a *Resident Superieur* was appointed and that office had local mandarins directly accountable to it. In Annam also, the French appointed a *Resident Superieur*. But the Imperial Court of Annam continued to govern in its own name and work with the Annamite Council of Ministers, although its edicts were ineffective unless accompanied by the *Resident Superieur's* endorsement and the Governor-General's approval.[78] In 1925 Annam's *Resident-Superieur* gained the chairmanship of the Annamite Council. The court system also varied to reflect the fragmented nature of the French administration in Indochina.[79]

The *Nguyen* or *Gia Long Code* only ceased to operate when the French expressly repealed it via the passage of revised civil and criminal codes.[80] Until that time (and it differs in different regions) the *Gia Long Code* was supposed to be applied to Vietnamese nationals.[81] Idiosyncratically, in certain areas the *Le Code* was relied on in preference to the *Gia Long* as it was more complete. In addition, aspects of the *Le Code* had become customary law and, with the French attempt to adopt customary law, the influence of the *Le code* was incorporated. The French adopted various approaches to law in each region and Appendix six summarizes the major legal instruments affecting different classes of people in different regions.[82]

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76 Milton Osborne, 1969, p. 59. Osborne refers to the withdrawal of the Vietnamese mandarins from service in Cochinchina as the 'critical event that shaped developments' in that region. It left the French in an awkward position. They could only rule either with the use of French personnel or by reliance on Vietnamese collaborators. This confusion contributed, according to Osborne, to the general chaos of the early occupation of the south and to the variation in French control throughout this region.

77 M.B. Hooker, 1975, p. 226.

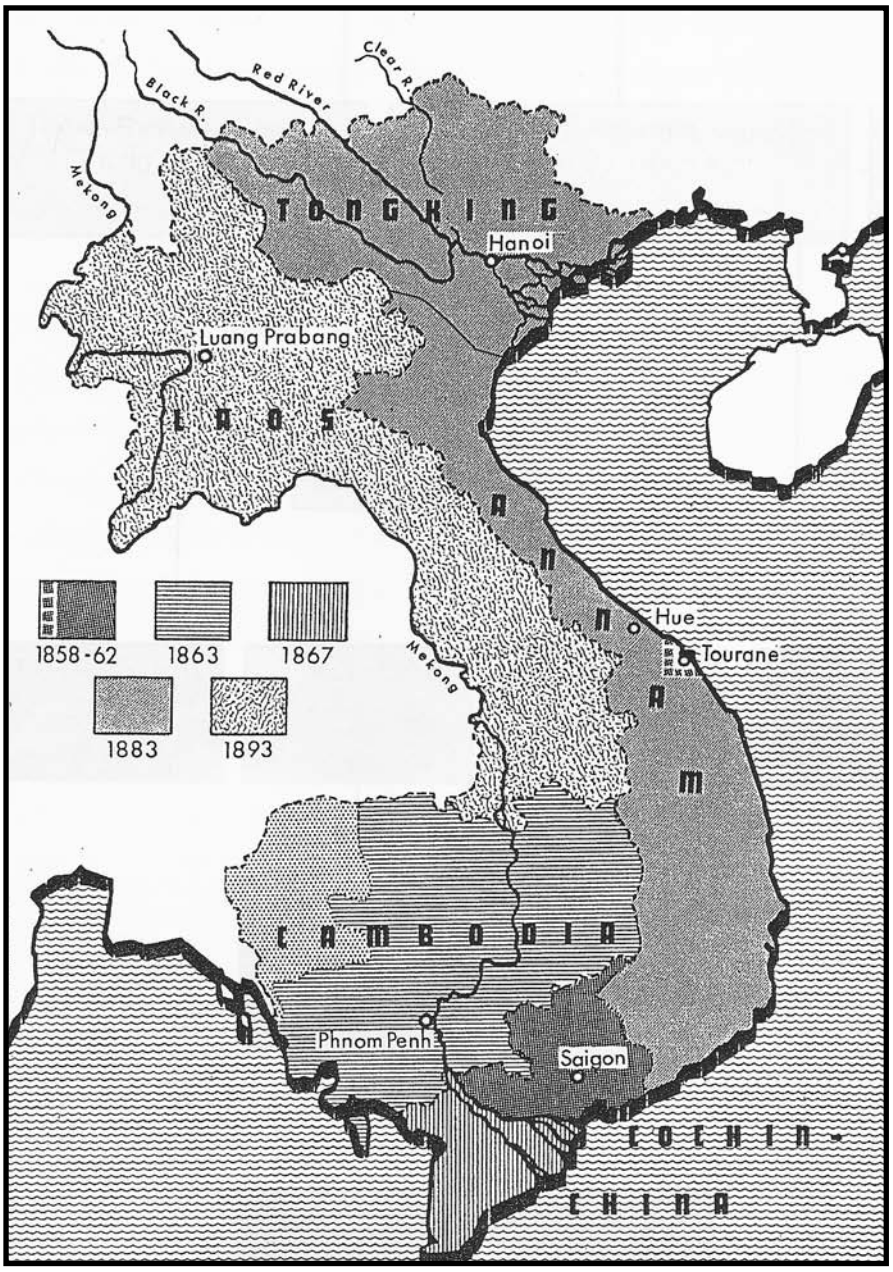
78 Nguyen The Anh, 1985, p. 150.

79 The term 'Indochina' also includes Laos and Cambodia, but their respective legal systems will not be taken up here.

80 A revised civil code, redrafted and including provisions of the *Gia Long Code*, was introduced in Cochinchina in 1883 and in Tonkin in 1931. It came last to Annam between 1936 and 1939. M.B. Hooker, 1978, pp. 157-161. Compare this with the view that the *Gia Long Code* was 'anachronism and an error of legislation; its civil law provisions were never applied by the Vietnamese people': Camille Briffaut, 1922, cited by Nguyen Ngoc Huy and Ta Van Tai, 1986, p. 493.

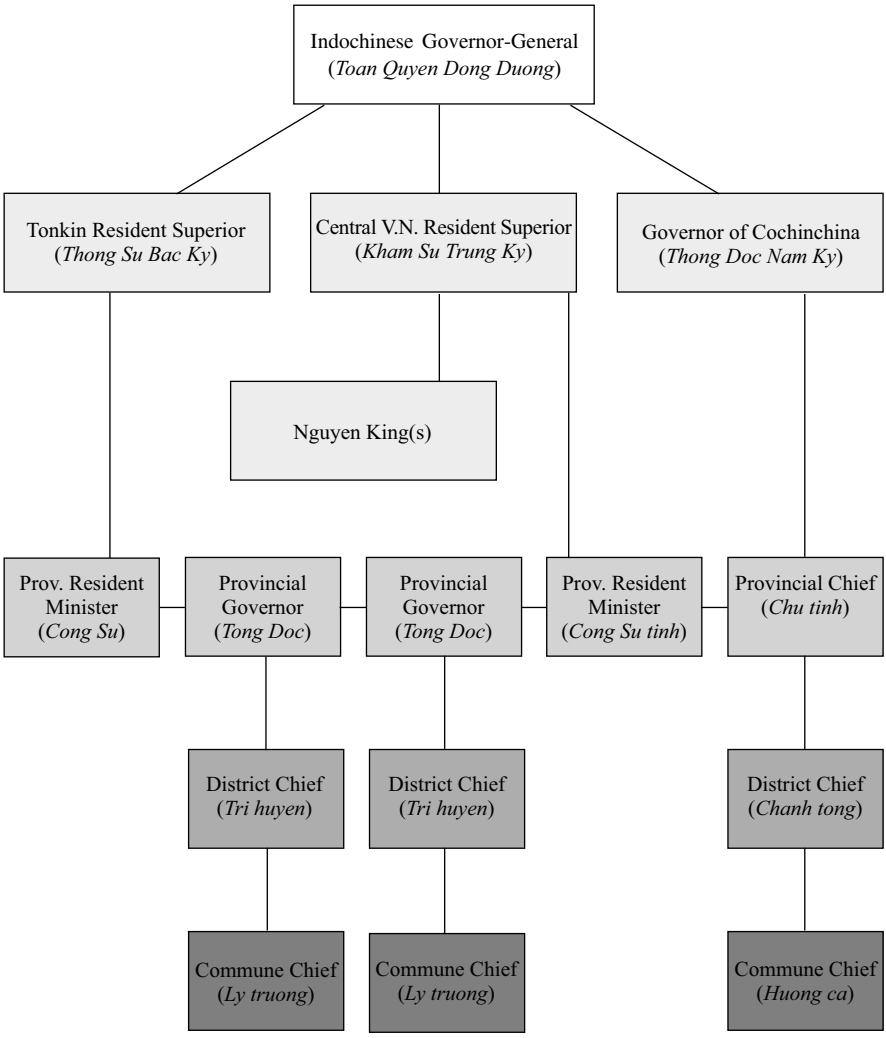
81 The application of the *Gia Long Code* was fraught with difficulties, particularly as French jurists had little or no Vietnamese language and the abridged translations that did exist were done in ignorance of the technical meaning of Vietnamese legal terms. See M.B. Hooker, 1975, pp. 230-231.

82 It is by no means a complete statement of applicable laws in Cochinchina, Tonkin and Annam. For example it does not deal in any detail with the complex land-related laws, tax laws or labour laws.



11. Map of French Colonies in Indochina: Reprinted by permission of Andre Masson, Histoire du Viet-Nam, © PUF, coll. "Que sais-je?" No. 398

12. Structure of French Government in Indochina



The motivations for legal reform varied for different jurisdictions. For example, the French reportedly found the severity of the *Gia Long Code*'s criminal law provisions unpalatable.[83] This prompted a redrafting of the punishments meted out under the *Gia Long* in the first instance and in 1880 in Cochinchina a revision of the criminal code in its entirety (see Appendix six).[84] French commercial law was applied in its entirety as there was no equivalent applicable law. Throughout this period, Hooker characterizes the Vietnamese legal system as subservient to the French system.[85] When a conflict arose about whether French or Vietnamese law applied the issue was usually resolved by reference to the nationalities of the disputants. Where both parties were Vietnamese, the French undertook to apply Vietnamese law.[86] Where one party was Vietnamese and the other French, French law applied. Where the jurists could not locate any Vietnamese precedent, in either customary laws or the codes, French law was applied.[87]

Hooker notes that, despite this variation in the structure of governments and the variation in authority held by the Vietnamese in the various zones of Vietnam, the commune or *xa* existed as a unit throughout the country. This unit usually comprized several families and was characterized by a very strong sense of community.[88] Its existence meant that many disputes would be resolved without the issues ever leaving the confines of the village wall.[89]

Debating the French Legacy

There was a range of responses to the changes initiated by the French to the Vietnamese system of laws. On the one hand, as mentioned previously, there was a body of French scholarship working to 'improve' and 'reform' Vietnamese law with an overall aim of a fused system of laws applying equally to French and Vietnamese citizens.[90] There was also a vehement critique that the French manipulated the legal system for their colonialist purposes. Between these two extreme characterizations are very many different responses to the French legal reform efforts in Vietnam. To take just one example an American lawyer noted:

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83 M.B. Hooker, 1975, p. 230. Hooker quotes Admiral Bonard describing the *Gia Long code* in the following terms: it 'had as its aim to terrify, by fear of the gravest punishment, all those who it appeared could cause the slightest damage to the absolute authority of the king'.

84 The revised criminal code was introduced in Tonkin in 1917 and in Annam in 1933: M.B. Hooker, 1978, pp. 158-159.

85 M.B. Hooker, 1975, pp. 235-237.

86 *Ibid*., pp. 230-231; M.B. Hooker, 1978, p. 155.

87 M.B. Hooker, 1975, p. 232.

88 Alexander Barton Woodside, 1971, p. 154.

89 *Ibid*., Nguyen Ngoc Huy and Ta Van Tai, 1986, p. 493.

90 M.B. Hooker, 1978, p. 161. Hooker points out that jurists were 'looking forward to a fusion of the laws of Cochin-China in both procedure and substance'.

> While all the codes published by the French for Annam and Cochinchina were still in effect in the Republic of Vietnam, they were no more successful in bringing the law to the people than were the Chinese codes that preceded them. The conglomeration of customary, Chinese and French law and the cumbersome dual system of administration did little to enhance the image of law or the central government in the eyes of the average farmer in his hamlet. Significant advances were made under the French, but even to those Vietnamese who were exposed to the law and who understood its workings, it must have seemed that the "rule of law" meant simply the rules of the governing political power, imposed on a population whose only participation in the legal process was passive obedience.[91]

French influence varied regionally, in part reflecting its different level of control in the different parts of Vietnam. In addition, French policy generally toward Vietnam was dynamic. At various times the administration was more or less assimilationist or separatist.[92]

The French were faced by a sophisticated legal system, which they did not necessarily understand due to problems of language and the different tenets on which it was based. They also chose to reform some of the aspects of the pre-existing laws that confronted their Western sensibilities. The extent to which the reforms actually affected daily life is widely and inconclusively debated. There was in effect a split system of laws, one for locals and another for French, resulting in a perception that the French-introduced laws served the elite, and not necessarily Vietnamese nationalistic interests.

The French presence also resulted in the education of a body of Vietnamese jurists in French civil law.[93] But arguably the broader indigenous population did not adopt the French notion of law, instead continuing to subscribe to their own notions of moral conduct. The damning rhetoric used about the system during the war with France tends to support this view. However there are suggestions that the commercial and bureaucratic elite, particularly in the South, collaborated and became very familiar with French law and administration.[94]

The post-colonial writing emanating from the Democratic Republic of Vietnam on the French legacy is in the main a highly charged critique which alleges that the French used law to oppress those they colonized and to advance their own commercial activities. Ho Chi Minh wrote satirically that:

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91 George S. Prugh, 1975, pp. 20-21.
92 Maurice Barruel, 1905.
93 Virginia Thompson, and Richard Adloff, 1947, p. 418.
94 Milton Osborne, 1969, p. 276. Osborne makes the point that two very different elites emerged in the North and the South of the country. In the North, elite groups were in the main members of the bureaucracy and at least partly traditional, while in the South an elite developed, based on material gains made by trading with the French, and increasingly educated by the French. Although Osborne was distinguishing Cochinchina and Cambodia, these comments seem equally applicable to a Cochinchina-Tonkin distinction.

> Justice is represented by a good lady holding scales in one hand and a sword in the other. As the greatness of the distance between Indochina and France was so great, so great that, on arrival there, the scales lost their balance and the pans melted and turned into opium pipes and official bottles of spirits, that the poor lady had only the sword left with which to strike. She even struck innocent people and innocent people especially.[95]

Nationalists used case-studies to argue for war against the French and the introduction of a more enlightened, socialist, government.[96] In his memoir *The Red Earth*, Tran Tu Binh, a teacher turned revolutionary, writes of a bitter trial at which it was alleged that a French rubber plantation manager had kicked a Vietnamese labourer to death in 1930. The verdict was negligent manslaughter accompanied by an order to pay a fine of 5 piaster (or 5 dong). At the end of Binh's account of the court battle he states:

> When one thought about it, though, considering that the whole matter had been brought out in public, before a court of law, and that was the only punishment, the whole thing seemed most cynical and unjust. Experience had now taught us that we would have to take care of our own affairs, and not place any confidence in the courts of the imperialists.[97]

Thus revolutionaries were able to position the French legal system as elitist – working against Vietnamese generally and labouring Vietnamese in particular. Calls for its destruction were therefore connected to the nationalist cause.[98] Civil law as practised and disseminated by the French was characterized as imposed law. As noted, the French attempted a new legal order, premised on individual rights and the paramountcy of law. This contrasted markedly with Vietnamese legal traditions and meant that the northern revolutionaries in particular were able to connect nationalism with notions of right and wrong. In effect this characterization of the French influence on the Vietnamese legal system empowered revolutionaries to reassert the moral qualities required of 'good' citizens in terms of anti-colonial sentiment. Again a world-view is constructed which sees virtue as more significant than any law.

It is not suggested that this was a view held by all Vietnamese. Numerous writers and jurists offered a critique of the construction of socialist law in the early 1950s, casting it as privileging collective interests at the expense of individual civil liberties and rights.[99] However, it is suggested that the officially

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95 Ho Chi Minh, 'Justice' in 1961, 1961, p. 96.

96 For example, more than a hundred memoirs were published after 1960 by veterans of the 1925-1945 struggles against the French. Tran Tu Binh, 1964, p. xi.

97 *Ibid*., p. 42.

98 See Chapter 3, pp. 58-59.

99 The *Nhan Van Giai Pham* incident is an example: see Chapter 2, p. 42; see also the work of those, largely based in the Republic of Vietnam, who fought the advance of the revolutionaries into the South of Vietnam and criticized socialist law. One example of this literature is that of Nguyen Long and Henry Kendall, 1981, pp. 1-3.

propagated socialist understandings of law called for a legal system that would enable the dismantling of a colonial (and therefore repressive) regime and the construction of a socialist political and legal system: a system which was firmly committed to advancing the interests of the collective. Such propagandist rhetoric clearly does not mention the '*mission civilisatrice*' that some French believed they had undertaken in Vietnam.

IV. Historical Conceptions of Dispute Resolution in Vietnam

Huong dang, tieu trieu dinh

The village association is a small court

Alexander Barton Woodside[100]

It is now necessary to look more closely at the history of Vietnamese dispute resolution. Vietnam's pre-colonial courts are variously referred to in the English language literature. They are on the one hand described as legal institutions with the Imperial Court at their head. They are also described as regional bodies, comprized of village elders making pragmatic and locally-influenced decisions. A reading that sits somewhere between these two extremes briefly introduces their salient features.

The Imperial Dynasties and Dispute Resolution

Historians of traditional Vietnam, or Vietnam under the Le and Nguyen dynasties, point out that the *xa* (loosely translated as village or commune) was an integral part of Vietnamese social and political life.[101] These settlements considered themselves largely autonomous both of other *xa* and of the central Imperial Court.[102] Whereas in the first half of the fifteenth century the head of the *xa* was an official appointed by the central government, after the 1460s it was quite common for the head of this community to be a local with some administrative experience.[103] Over time the leadership moved to a council of elders (*hoi dong hao muc*) who had local responsibility in such matters as resolving disputes and also acted on behalf of the central authorities, for example collecting taxes on their behalf.[104]

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100 Alexander Barton Woodside, 1971, p. 154.

101 *Ibid*. Woodside notes that the English translation of 'village' for the Vietnamese word *xa* is inadequate. He describes a *xa* as a 'cluster of multi-family settlements, linked by paths or small waterways, which owned some property in common and which shared a common place of worship and of social consultation, the *dinh*'. *Xa* have been recognized in Vietnam since the tenth century.

102 *Ibid*., pp. 153-164.

103 *Ibid*., p. 154.

104 *Ibid*., p. 155. The Council of Elders was a hierarchical body with membership predicated upon age, scholarly pursuits and previous administrative experience.

The Council of Elders' authority to resolve local disputes was technically held on behalf of the central Imperial Court, yet as a matter of practice it contributed to a sense in which local communities considered themselves independent of the central authority and its laws. Therefore although there is suggestion that the *Le* Code developed sophisticated doctrines of civil law, it is unclear to what extent these permeated village life.[105] Certainly Le Thanh Ton in the mid-fifteenth century crusaded against idiosyncratic and corrupt local dispute resolution by officials.[106] He commented that:

> For some time officials have been settling cases according to their own whims (lit. their own stomachs), taking money illegally and sending up written reports late'.[107]

However, Le Thanh Ton's campaign for more accountable and transparent dispute resolution was not to be effective over the longer term, and by the time the French arrived, regionalism was further entrenched. In addition, legalism promoted by the early Le dynasty was supplanted, at least in part, by the ascending Sung Neo-Confucian doctrines, promulgated for example in the code for village life of 1663.[108] Powerful elites, made up of Confucian scholars, furthered a perception that morals were more important than law, although morals themselves were highly regulated.[109] This context affected the way in which dispute resolution was perceived: essentially it can be characterized as regional with local elites wielding the power to make moral judgments on the actions of others.[110]

The French and the Courts

Into this complex social and political climate stepped the French. As noted, their legal reforms were affected by the nature of the authority they had in the various regions of Vietnam: sovereignty in the South, and protectorates in the middle and North of the country. In Cochinchina a hierarchical court system was introduced in 1864[111] with divisions between administrative and judicial authority.[112] The diagram below sets out the essential structure of the Cochinchinese court system.[113]

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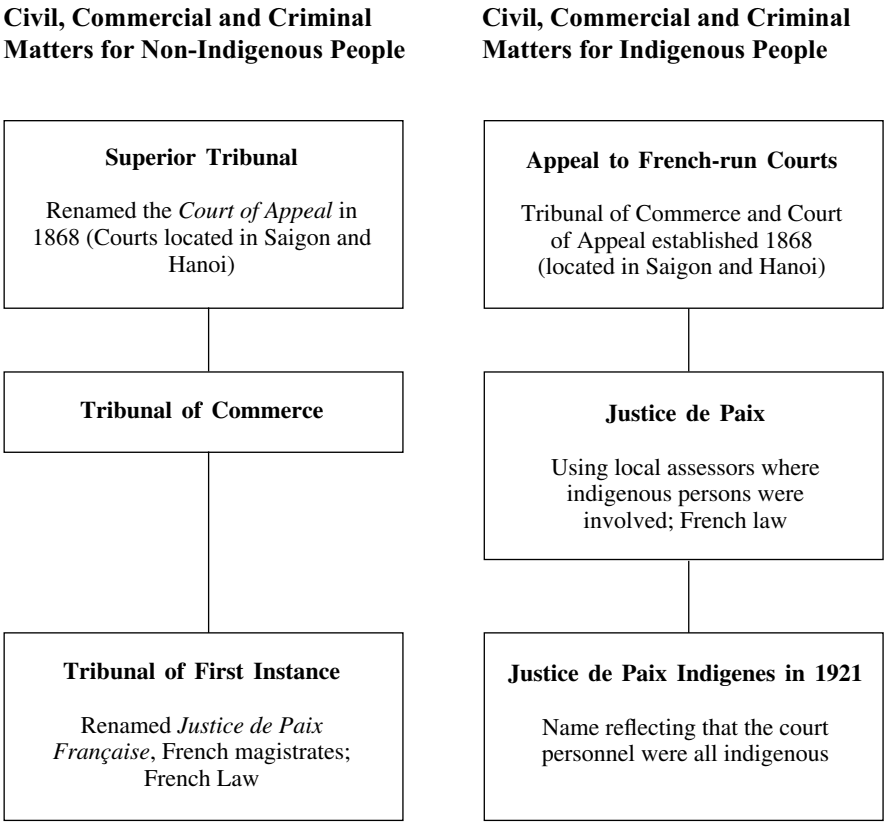
105 Ta Van Tai, 1982, pp. 523-553. This article argues that the *Le Code* was a sophisticated civil law code, but issues about enforcement and litigation are not taken up.
106 Stephen Young, 1976, p. 15.
107 *Ibid*. Young cites Le Kim Ngan, '*To chuc Chinh-Quyen Tring-vong Duoi trieu Le Thanh Ton*', Institute of Historical Research, Saigon, 1963, p. 42.
108 *Ibid*., p. 15.
109 Alexander Barton Woodside, 1976, pp. 14-15.
110 *Ibid*., pp. 14-22.
111 M.B. Hooker, 1978, p. 154. Courts were established by Decree dated 25 July 1864.
112 Antoine-Louis Carlotti, 1903.
113 For a discussion of the French-inspired court system in the Republic of Vietnam during the 1950s and 1960s, see Departement de la Justice, 1963.

13. Structure of Courts in Cochinchina



This neat structure conceals the challenges faced by the French in the running of these court systems. Lack of language skills and the consequent difficulties faced in trying to understand the Vietnamese legal system made the application of local law difficult. French education actively discouraged the indigenous population from taking matters to court, urging them to resolve their differences informally.[114]

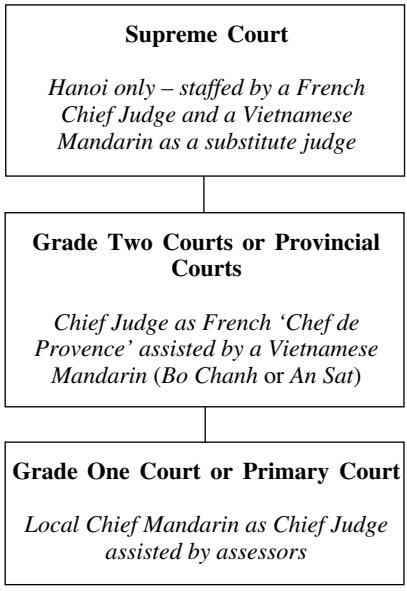
The court systems of Annam and Tonkin were also different. Of particular relevance here is the court system of Tonkin. The courts of Annam remained predominantly under the control of the mandarinate, although the French had increasing overall supervision at the provincial and central levels.[115] In Tonkin,

114 David Marr, 1981, p. 96.
115 M.B. Hooker, 1978, pp. 169-171.

on the other hand, the French announced a legal reform agenda.[116] Essentially this allowed the prior feudal courts to continue although they were ultimately accountable to a French judge who in turn reported to the French *Resident Superieur*.[117] The Tonkin court hierarchy is set out below:

14. Structure of the Tonkin Court System

Courts for Indigenous People



As in Cochinchina, there was no easy transition to this hybrid court system which encouraged French magistrates and Vietnamese mandarins to work together in the higher courts and apply different laws depending on who appeared before them.[118] It also remained a real challenge for the highest court effectively to hear appeals where the relevant law was Vietnamese codes or custom.[119]

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116 *Ibid*., p. 172. Hooker refers to the Royal Ordinances of 3 June 1886 and 17 January 1889 devising 'a mixed French-Tonkinese system of jurisdiction for matters of public security, and crimes and delicts'. Barruel provides a summary written in 1905 of the gradual substitution of French Tribunals for Indigenous tribunals: see Maurice Barruel, 1905.

117 Pham Diem, 1999, p. 29.

118 The *Code of Organization of Indigenous Justice* dated 16 September 1922 provided that indigenous jurisdiction only applied to 'natives'. If a Frenchman or a foreigner were involved their matters were not heard by the indigenous tribunal: *Ibid*., pp. 173-174.

119 M.B. Hooker, 1975, pp. 231-233. In this example Hooker refers to the French interpretation of the Vietnamese concept of *dien* to demonstrate how the colonizer grappled with indigenous legal principles finding it difficult indeed correctly to reflect their meaning.

This brief introduction to the French court systems of Vietnam highlights that there was no universal spread of French civil law, especially in the northern area.[120] French procedural laws were only introduced in Tonkin in the early 1930s and it was only fifteen years later that the country embarked on a bitter war against the French, throwing court administration into disarray.

This analysis suggests that the Vietnamese legal system was, in the main, premised on moral rather than legal tenets. And although the system was dynamic and varied according to region, there is little to suggest a uniform, organized and centrally controlled legal system that particularly manifested the French influence. The fragmentation of French control was particularly felt in the central and northern regions. Even in the South where the French influence was strongest, Vietnamese citizens were taught not to go to courts.[121] Therefore courts and law remained at the periphery of everyday life: used perhaps by educated commercial elites in major centres but not generally relied upon by the broader population.[122] Criminal, family and civil law remained largely within the purview of local mandarins, reinforcing the autochthonous nature of the *xa*.[123]

The Tonkinese court and legal system, despite the French presence, can therefore be seen as a permutation of its Confucian ethics-based predecessor. After all, the French were only effectively in the North between 1884 and 1945, with many significant legal reforms not introduced until the early 1930s. Jurisprudential debate about reforms to the Vietnamese court system occurred only within an elite, many of whom were French or moved to the South as tensions between the northern Vietnamese and the French escalated.

V. Revisiting Difference

The remainder of this chapter will seek to explain differences between the Vietnamese and Soviet court systems that had emerged by 1975 by drawing on the above discussion of Vietnamese culture and the Vietnamese legal system.

A different jurisprudential milieu has been identified as existing between the USSR/RFSR and the DRVN. This general proposition can be further divided into differences over whether or not law was to continue at all as a relevant force in the emerging socialist states, and if so what role it was to play and how that role was theoretically conceived. A further part of any discussion of

120 *Ibid*., pp. 172-183. Hooker provides a summary of the bases of jurisdiction of the indigenous tribunals and sets out how conflict of laws issues were dealt with.

121 David Marr, 1981, p. 96.

122 *Ibid*. Marr makes the comment that there was an apparent increase in litigation with the arrival of the French and this they sought to stem by educating Vietnamese not to litigate.

123 This is not to say that there was not substantial work done by the French on the codification of Vietnamese law and attempts to understand it. Pompeii's work serves as an example of just this type of study: see Paul Pompeii, 1951. See also Pham Duy Nghia, 2001, pp. 21-25.

jurisprudence is how the laws of a country are taught and in particular how the role of law is taught. While these issues were debated within old Russia, it is suggested they were not visited in the same way in Vietnam.

In the DRVN, the debates about law are generally of a different type. For example, the threshold issue of whether law was to remain as part of the socio-political fabric of Vietnamese society was not apparently a subject of debate. Further, law was debated in terms of its use in the implementation of Party-State policy. This is very different from the complex Soviet debates about whether law formed a part of the superstructure or material base.[124] In chapters two and four it was noted that, rather than questioning whether law should continue, the form of law was debated. The protracted war against the French and then American-led forces contributed to the Vietnamese pragmatic approach to law and its development and in part explains less attention to jurisprudence. The DRVN did not have the luxury of peace in which to consider the set-up of its new institutions including its legal ones.

However, this is not the whole story. In 1917 and the ensuing years the Soviet Union was the only country attempting to reconstruct itself on the basis of Marxist-Leninist principles. It had no mentor and no role model to consult. It did not have the benefit of comparative experience to illuminate its own development. In these circumstances, the Soviet Union generally first embraced the notion of law withering over time, only to see this policy supplanted with one retaining law as a tool of the state indefinitely. Courts were expected to deliver class justice and yet had to be rationalized by jurists steeped in the European civil law tradition. The circumstances in which each country faced the issue of what role law would play in their new states inevitably affected how they viewed this issue. In Vietnam there was not the same public avowal that law would wither, rather it was seen as a tool of the revolution without its longer-term role being publicly articulated.

When Vietnam announced its independence in 1945 it had the benefit of nearly 30 years of Soviet experience.[125] Without overstating the connections between Vietnam and the USSR at this time, there is little doubt that Vietnam did not feel the need to abandon law publicly as had been attempted in the USSR. The failure to do so in the USSR was evident and Ho Chi Minh and his cabinet would have been aware of this. Ho cautiously endorsed Stalinism in 1956 saying that 'Comrade Stalin made a great contribution to the revolution, but he also made serious mistakes'.[126]

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124 This is not to say that the Vietnamese did not debate or conceive of law in these terms, but rather to say that such debates were less central. John Gillespie argues that the Vietnamese did indeed cast law as part of the state's superstructure. See John Gillespie, 2004, pp. 148-151.

125 Ho Chi Minh, 'The Great October Revolution Opened the road to liberation To All Peoples' dated October 1967, 1994, pp. 325-336.

126 Ho Chi Minh, 'Speech closing the ninth (enlarged) session of the General Committee of the Vietnam Workers' Party' dated 24 April 1956, in Bernard Fall (ed.), 1960,

Another explanation for the keeping of law in the DRVN in 1945 lies in the fact the DRVN faced a bitter war with France. In such circumstances the DRVN adopted a policy that continued to use law to punish those acting against the state without debating at any length or in any detail the role of law in the wider political context. As one Vietnamese legal historian puts it, 'Thus each member and each community voluntarily participated, implemented and complied with the law of the state (*phap luat cua nha nuoc*) and village customary regulations relating to resisting foreigners'.[127] This period of Vietnamese history might be crudely summarized as predominantly nationalist rather than overly concerned with doctrine and philosophical debates about the role of law.[128] The fact that biographers of Ho Chi Minh frequently debate his politics, nationalist or communist, especially during this earlier period, exemplifies the preoccupation of the DRVN with overthrowing their enemies, the French colonists. As noted previously, Ho Chi Minh's characterization of law as a woman with scales permanently skewed towards the French evokes an image, not of the need to abandon law, but rather to reposition it to make it relevant and attractive to the new regime.

Within the DRVN law had been connected to colonial oppression and so it was not so much that all law had to be abandoned, but that the French legal system had to be dismantled. This connecting of legal change to nationalist sentiment allowed a repositioning of law without the need to challenge it at its base.

As noted, Vietnamese law had been associated with moral uprightness for several centuries and so to argue that socialist law required moral commitment was not new. What was new was the detail of this argument. Confucian ethics and Marxist ethics are obviously not the same, but their point of connection lies in the fact that ethics continued to be a central pillar of social and political life.[129] As Marr explains:

> Whereas the Confucian elite had tended to view the peasants as the passive recipients of moral indoctrination which could improve their attitudes but not their status, Communist cadres sought to create valued new statuses for the impoverished and encouraged them 'to resist their social degradation, both as a situation and as a category of thought, themselves'.[130]

Further, the new ethics introduced the notion of material well-being as a part of the new 'statuses' available under Marxist ideology. In other words, an integral part of the new ethics was to foster a belief that the poorest members of

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p. 299. Bui Tin also notes the cult of Stalinism that dominated in the DRVN for a period: Bui Tin, 1995, p. 37.

127 Tran Thi Tuyet, '*Tac dong cua chien tranh den viec hinh thanh y thuc va loi song theo phap luat*', *Xa hoi va Phap Luat* (*Law and Society*), 1994, p. 253, cited in Mark Sidel, 1997 (2), p. 21.

128 Mark Sidel, 1997 (2), pp. 19-21.

129 Shaun Kingsley Malarney, 1997, pp. 899-920.

130 David Marr, 1981, p. 130. Marr refers to Alexander Barton Woodside, noting that he first used this argument in 'Development of Social Organizations', p. 54.

society were entitled to claim for themselves material well-being.[131] Marr also argues that the new forces sought to (or had to) challenge traditional attitudes of acceptance and quietude to create the energy required to overthrow the colonial powers. Integral to the success of the anti-colonial movements therefore was a move to incite an active struggle among those the French were characterized as oppressing.[132] Finally, Marr points out that the traditional family grouping was widened as Marxists challenged families to join other groups such as workers' and women's unions. All these changes evidence that, while moral life in Vietnam was indeed challenged and changed by the socialists, that does not detract from the very basic proposition that law (at least as it is conceived in the West) remained secondary to systemic moral control.[133]

The strong moral, rather than legalist, framework that regulated Vietnamese social life militated against the development of legalism as it spread in Europe. This means that while Russian law and law schools were developing in the seventeenth and eighteenth centuries, in Vietnam villages, custom and ethics were maintained as great regulating forces. This in turn reflected the non-industrial base of Vietnam's economy. Village life had not been fundamentally challenged by the onset of an industrial revolution and so age-old practices, although not universally acclaimed, had not been threatened fundamentally.[134]

This is not to say that Russian legalism was entirely separate from spirituality. The Russian monarch held power as head of church as well as head of state. With the fall of Constantinople in 1453 it has been argued that Russia became the 'third Rome' dedicated to the 'protection and expansion of Orthodox Christianity'.[135] This connection of church and state 'gave a spiritual character to the Muscovy tsardom'.[136] However, the unity of state and church also reduced the possibility that the Church would curtail the excesses of the state.[137]

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131 *Ibid*., p. 131. For an example of the pre-eminence of teachings on material life, see Truong Chinh, 16 September 1968, p. 6. Here Truong writes that 'The material life of the society and (the society's substance) exist first. The intellectual life of the society comes after. The material life in the society is an objective reality existing independently from man's will. As for the intellectual life in the society, it merely reflects this objective reality. It is precisely the condition of the material life in a society that determines its social theories, political viewpoint, legislation, culture, arts, political (structure) and so forth'.

132 David Marr, 1981, p. 131.

133 Nguyen Khac Vien, 1974, p. 50. Nguyen writes that 'Among the great family of Communist Parties, the Vietnamese and Chinese have exhibited more of a moralistic tone than Communist Parties elsewhere'.

134 Phan Duy Nghia, 2005, pp 76-90.

135 W.E. Butler, 1983, p. 15; E.L. Johnson, 1969, p. 12; G. Vernadsky, 1969, pp. 106-109; Harold J. Berman, 1963, p. 199.

136 Harold J. Berman, 1963, p. 199.

137 For a statement of the breadth of the monarch's authority see for example, Article 1 of the *Imperial Russian Legal Code* which states that:
The All-Russian Emperor is an autocratic and unlimited monarch. Obedience to his supreme power not only from fear but also from conscience is ordained by God Himself.

There are connections between sovereign and religious authority in both Vietnam and Russia during the years 1400-1700. The head of the church was also head of state in many European countries. In each country the notion that the Emperor held a heavenly mandate was fostered and perpetuated with a view to securing the stability of the monarch. The foundations for heavenly authority are distinct – Confucianism and Christianity – yet in neither state before the twentieth century were church and state or ethics and the state separated. In principle, moral life was upheld by the state, although on different bases in each country.

As noted in part one of this chapter, the catalysts for revolution were different in Vietnam and the USSR. This affected the orientation of the new leaders and the perception of their role and plan. The Vietnamese revolution was premised on nationalism: ultimately characterized by the new political leadership as synonymous with calls for fundamental change. This distinguishes the Vietnamese history of revolution from that of the Soviet Union, which was a class-based revolution. It is suggested this distinction also explains different approaches to the conception and use of law and courts.

This chapter has sought to explain some of the distinguishing features of the Vietnamese legal system and in particular its emphasis on moral rather than legal foundations. This contrasts its legal tradition with that of Russia and the USSR. Whereas the latter were close to Europe and the attitudes to law within Europe, Vietnam sat at a distance both geographically and intellectually from those debates. As a result its jurisprudence did not require such detailed analysis of how law was to be managed and used in the evolving socialist state. Further, as noted, Vietnam could refer to Soviet scholarship when it did confront these debates.[138]

However, the likelihood of jurisprudential debates similar to those in the USSR was less in the DRVN precisely because of the continuity of the role played by moral, when compared with strictly legal, systems. In pre-colonial times, and arguably even in colonial times in some areas, law was very much a reflection of local mores. This was not greatly challenged by the newly introduced socialist regime, which in turn was creating a sense in which moral behaviour was required, to the exclusion of legalism as it is conceived in the West.

The Confucian system of government, complete with competitive entrance exams, entrenched the power of the bureaucracy. As noted, where a serious crime was alleged the complaint went first to a bureaucrat, who determined whether or not an investigation would be held. This is just one example of the various matters on which mandarins made judgments that were usually incapable of either challenge or appeal.

With the arrival of the French, attempts were made to streamline this type of decision-making. But again, their influence in the North was for a relatively

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(cited in E.L. Johnson, 1969, p. 12). The Russian title for this code was the *Svod Zakonow* and it was in force until 1917.

138 This is not to say Vietnam did not consult Chinese scholarship, but to note that with the passage of time it relied more heavily on the Soviet experience.

short period, 1884 to 1945. Widespread centrally controlled reforms were not accomplished. The revolutionaries also suggested that the French used power for their own ends in any event. There was therefore a perception that the French administration upheld a bureaucratic elite with wide powers.

These features, when combined with the moral dimension of social life in Vietnam, produced a legal culture where law and jurisprudence were secondary to custom and ideology. It is suggested that the important customs were those of family, community and guidance by elders within that community. This communal focus grew out of the innate regionalism of Vietnam arising from such factors as regional warfare over the centuries, poor communication, different ethnic groupings and locally-based belief systems. The sovereignty of the emperor, although unifying the country, also served to entrench local practices with the emperor variously depicted at their apex, particularly as the Vietnamese emperor was the moral teacher.[139]

This difference in attitudes to the importance and substance of the debates about the role of the law between the USSR and DRVN was also reflected in Vietnam's attitude to legal education. In 1930 the French established the Indochina Faculty of Law in Hanoi. This was closed in 1954 and no formal law university re-emerged until 1976.[140] Some of the reasons for this lack of instituted law teaching, which contrasts with the Soviet Union's continuous commitment to legal education, are similar to those adduced to explain the different jurisprudential contexts. For example, the protracted war left Vietnam with little opportunity to develop new institutions for teaching law, and with the defeat of the French they lost the French institution. In addition, the fact that the Soviet Union provided legal education to Vietnamese reduced the need for such institutions to be established in Vietnam.

But here again a longer view of Vietnamese legal history also suggests other explanations why the Vietnamese would possibly not have prioritized new law teaching facilities even without a war. Promotion to positions of power in Vietnam, including to the positions of senior judges, had been premised on Confucian teachings. Recognized Confucian scholars were the senior policy makers and judges in the pre-colonial period. The separate study of law was therefore associated, at least by the revolutionaries, with colonial oppression. This meant that teaching law would not necessarily have surfaced as a pressing matter for the Vietnamese even had they not been at war. The difference may have been that if not for the war, the Soviet jurists might have poured more energy into establishing teaching facilities in the DRVN than the war permitted.

At the end of chapter nine there was at least a suggestion that the Vietnamese used their court system very much less than citizens of the RSFSR within the Soviet Union. The exploration of the Vietnamese legal system in this chapter suggests that the Vietnamese have a very long tradition indeed of resolving

139 Alexander Barton Woodside, 1976, p. 16.
140 Per Bergling, 1998, pp. 3-4.

disputes at the local level without recourse to a formal court system.[141] The tradition of resolving matters within a community or *xa* dates from at least the fifteenth century. Colonialism had not changed this substantially – especially in the areas of criminal, family and civil law. The French preferred to keep the courts for commercial cases, heard by French judges applying French law.

Arguably not only were courts traditionally relatively irrelevant to the resolution of disputes, but so too was law. It was more important traditionally for families and business associates to resolve their differences amicably without loss of face or compromising existing relationships.[142] Law or state policies may well have existed as a framework within which informal negotiations occurred, but it was relatively infrequently formally consulted.[143] This tradition of using informal dispute resolution mechanisms, which remained largely unchallenged with the arrival of the French, may at least partly explain the low case numbers in the DRVN. The fact that the courts set up by the DRVN administration were new institutions would also have contributed, it is suggested, to their low usage.[144]

Finally, courts were not popular as they were associated with corrupt and arbitrary decision-making.[145] The first Vietnamese experience of revolutionary decision-making was with the War Administration Committees empowered to judge and eradicate enemies of the state. In addition, the work of Military Courts in the early years, coupled with the experience of land reform between 1953 and 1956, resulted in a perception of law and courts as politically controlled and arbitrary. In chapters three and six, these institutions made arbitrary decisions, many of which angered inhabitants of the DRVN. It is suggested that the War Administration Committees, Military Courts and land reform courts left a scar on the Vietnamese public that was not easily eradicated.

Corruption is difficult to define and quantify. However, it too would appear to have a long history within the Vietnamese system of dispute resolution. As noted, Le Thanh Ton called in the fifteenth century for more responsible and less corrupt judicial officers. This is not to suggest that courts were continuously corrupt, but it certainly offers the possibility that corrupt practice within the courts is not a new phenomenon in Vietnam. Arguably when discretionary decision-making is prevalent, corruption is harder to monitor and remove. Interviewees cited corruption as a reason why they would not turn to the courts to resolve their own disputes, and with the continuation of discretionary decision-making, these factors combine to contribute to the low number of cases – especially

141 Alexander Barton Woodside, 1976, p. 24. Woodside notes that at the end of 1824 there were less than 1,000 people in Vietnamese jails and attributes this 'to the success of the dynasty's deliberate localization of justice in the informal sanctions of the lineages and villages'.

142 Nguyen Hien Quan, 2006.

143 *Ibid*.

144 In 1996 a new Administrative Court was established in Hanoi. One of its judges explained its low case numbers as a result of its newness. Interview by the author with Chief Judge Vu Khac Xuong, Hanoi, 1 July 1997.

145 See Chapter 3, p. 82, and Chapter 6, pp. 132-136.

the low number of civil cases where a case is initiated by an individual rather than the state.

Another distinguishing feature of the Vietnamese court system, when compared with that of the USSR, is that it relied on ad hoc trials and tribunals less than its Soviet counterpart.[146] In part this reflects the lesser reliance placed on courts generally in the DRVN. It also reflects the DRVN's bitter experience with the use of ad hoc tribunals during the land reform era.

The fact the DRVN was at war with foreign parties, France and later the American-led forces, also explains why tribunals such as those used by Stalin were not established. The Vietnamese war was not a civil war in the strict sense given that foreigners were actively engaged in the war. This means that until 1959 those against the DRVN regime could be tried as traitors to their country (for collaborating with the enemy) in the Military Court and after 1959 in the People's Courts. The need for special administrative bodies was not so great because of the continuity of courts with jurisdiction to punish those sabotaging the new regime.

There is a further explanation why the purges of the Soviet Union were not repeated in the DRVN. The DRVN socialist revolution resulted from an amalgam of practical politics and anti-colonial sentiment. It was not first and foremost a change that required a purging of anti-Communist sentiment; indeed it was not always clear that it was, particularly in the early days, a communist revolution.[147] Ho Chi Minh played his politics close to his chest and it was not until the late 1950s that the construction of socialism was openly promoted. Prior to that time the war had been a nationalist war.[148] This complication of socialism with nationalism was not present to the same extent in the USSR and therefore its politics were in some ways purer and therefore allowed or demanded less compromise.

This chapter highlights the very great significance of (legal) culture to explain differences in legal systems. In the case of the DRVN and the Soviet Union, the structural components of the two socialist court systems are similar and the former is modelled on the latter. However, there are very real differences in the political context within which each system operated and in the political, economic, social and legal history of each country.

This discussion emphasizes the importance of morality, rather than law, to the Vietnamese legal system, particularly as it developed in the North of the

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146 For a discussion of the political trials and show trials of Stalin, see Robert C. Tucker and Stephen F. Cohen (eds), 1965, pp. ix-xlviii.

147 This distinction between the Soviet and Vietnamese legal systems also arguably applies between the Chinese and Vietnamese legal systems. As Maoist extremism took root in China, the DRVN was engaged in a war where the rhetoric was nationalist as well as socialist.

148 The fact that the Indochina Communist Party was officially disbanded suggests that this aspect of the revolution was carefully managed rather than an openly pursued objective from the outset. See Chapter 2, pp. 39-41.

country. The following also emerged to distinguish North Vietnam's legal culture from that of the USSR:

- War (against the Chinese, French and American-led forces);
- Colonialism (Chinese, French and the American-led presence in the Republic of Vietnam);
- Regionalism;
- The lasting influence of Confucianism on Vietnamese conceptions of law; and
- The significance of kinship and the family in Vietnamese daily life.

These influences combine to explain differences and similarities that existed between the two court systems. The USSR was by 1976 a state in which a highly instrumental conception of law dominated, having replaced an emerging engagement with liberal political and legal jurisprudence; whereas in Vietnam by the mid 1970s, a complex amalgam of politically-charged instrumentalism coalesced with and contested traditional and Marxist ethics-based custom. These legal cultures, reflecting an amalgam of legal history, legal practice and custom, assist to explain the congruence and diversity of the two systems studied.

More specifically it suggests that a matrix of factors needs to be taken into account when attempting to explain how one legal system diverges from another. Factors visited here include; politics including the very foundations of state philosophy; jurisprudence; history; economics, legal culture; sociology, in particular the interaction between national structures or conceptions of authority and communal attitudes; and institutional history, particularly where the study is of court systems. In the next chapter, the broader question of what this study tells us about the transplantation of court systems unfolds.

Chapter 11
Parenting: The Soviet Union and Vietnam

This book has considered several related questions. It has sought to ascertain the defining characteristics of the Vietnamese court system during its formative years and then to contrast these with the court system of its parent the USSR. This comparison illuminated where the court systems of the two socialist countries were similar and where they differed. As explained at the outset, this is a study of roots and routes. The DRVN borrowed heavily from the USSR, importing legislative models, training, and the socialist legal lexicon. And yet despite the transplantation or shifting of Soviet court models into the DRVN, the imported institutions remoulded to reflect local Vietnamese legal culture.

The question remains, what does this experience tells us about the emulation or transplantation of legal institutions, particularly courts, more generally? This penultimate chapter explores the lessons, if any, for development of court systems in socialist countries and how this may illuminate legal borrowing in the contemporary period.

I. Factors Affecting Legal Borrowing

A range of factors exist that might explain why laws operate differently in the countries into which they have been received. Most of these possible explanations were introduced in the preceding chapter. The following factors have emerged as relevant in this study even where the political orientation of the two countries involved in the transplant overlapped considerably.

15. Factors Shaping the Operation of the USSR Court System in the DRVN[1]

Factor	Manifestation
Political Structure & Geography	The USSR was a vast federation while Vietnam was a relatively small unitary state, divided into zones to assist with regional administration for the duration of the war.

1 An earlier version of this table is published in Pip Nicholson, 2006 (1).

Table (*cont.*)

Factor	Manifestation
General history	The USSR was an agricultural society seeking to industrialize and see the benefits of industrialization shared among the citizens, rather than distributed unevenly between elites. The revolution was predicated upon destruction of the elites previously existing. The DRVN was a colony seeking to unite disparate anti-colonial movements to oust the foreign power. Socialism operated as a magnet and catalyst for nationalistic movements. Its revolution was both nationalistic and subsequently concerned with the construction of socialism.
Political history	Socialism was adopted from the diverse histories outlined above. Each of these histories contributed to the legitimacy of the emerging socialist government and its institutions. For example, in the USSR several radical changes of leadership took place indicating the susceptibility of the leadership to revision – both in terms of doctrine and protagonists. The DRVN experienced stable leadership over the entire period of this study and continues to do so today. Until very recently external pressures such as anti-colonialism, the war and resulting poverty acted to unite the country against adversity.
Legal history	Systemic legal differences existed between the two states. The USSR had an established positivist legal system connected to and experimenting with the legal developments in Europe. The DRVN was a society as much predicated upon moral precepts as notions of law, and where law existed it at least in part reflected the moral tenets of (Vietnamese) Confucian principles.
Politics	In both countries there was a commitment to construct socialism – albeit within different contexts and histories.
National government's priorities vis-à-vis law and its role in society	In consequence the place of law and its implementation were different in each society, reflecting historical and cultural differences, although there were similarities in the structures of the legal systems each sought to construct as part of the wider socialist construction. The jurisprudence in each country varied, as did the legal education of professionals. The USSR maintained legal education. The DRVN did not have an existing legal education tradition to continue (that which existed having been set up by the French) and, in combination with the fact of war, this resulted in legal education at university level being discontinued for approximately 20 years. In each country, law was characterized as a political tool and therefore served the domestic political agenda, resulting in particular uses of law.

Table (*cont.*)

Factor	**Manifestation**
Cultural difference	Mention has been made of the moral, largely Confucian, tenets underpinning Vietnamese social order. The content of the moral doctrines morphed from Confucianism to Marxism, but the significance of moral consciousness continued and came to be driven by Marxist ideology. This in turn affected existing culture, but did not simply replace it. A symbiotic relationship evolved between new moral thinking and cultural traditions. In the case of the USSR, socialist moral thinking did not interact with Confucianism but with Christianity and European legalism. Another related cultural factor is the emphasis on obligation to the state rather than individual rights. In the DRVN this can also be linked back to traditional social values. In the USSR there had been a vocal critique of feudal/Tsarist society resulting in a threat to the notion of the supremacy of the state before the revolution of 1917.
Legal culture and customs	The Vietnamese legal heritage was a complex tapestry of Confucian moralism and Confucian legalism with French civil law superimposed with varying degrees of penetration. Contrast this with the articulated civil law legalism of Western Europe that had been embraced and endorsed by Russian legal academics. Vietnam had autochthonous villages, traditionally operating independently of central state policies.
Economic considerations	The relative poverty of the DRVN ensured that it was subservient to the USSR to the extent that aid from that source was central to Vietnam's war effort and development objectives.
Other pressing contextual matters	Between 1945 and 1976 the DRVN was at war with the South, causing major disruptions to daily life. Similar disruptions were not experienced continually over this period in the USSR (officially there was no civil war) although the period of War Communism might be seen as a de facto civil war.

II. Relevance of Legal Culture?

This exercise demonstrates that a comparative study of legal culture as defined in chapter one is not sufficient to understand how law operates in a foreign legal system. More particularly, the key roles played by a long view of history, economics, geography and circumstances particular to Vietnam (such as the protracted war) are evident in shaping and explaining the dynamism of legal systems. In the current comparative law environment when legal culture is regularly invoked as a way to analyze foreign legal systems, this is significant. It suggests that legal culture (as defined in chapter one to include ideological and political context) is a telling part of this analysis, but not of itself sufficient to explain legal reception and rejection of introduced laws or legal institutions.

Legal culture remains highly relevant to explain divergence between the Soviet and DRVN court systems. However, a large part of its utility rests on the broad and inclusive definition of legal culture adopted. For example, had the perception of the courts not been a part of this study and the use of courts not been analyzed, mistaken assumptions about the common role of courts in Russia and the DRVN might have resulted. Because the definition of legal culture adopted here required a consideration of how courts were perceived by the broader (albeit educated and Hanoi-based) public, the distrust of courts emerged.

The implications of the research arguably extend beyond transplantations between socialist states. In particular, the case study demonstrates that legal culture *and* particular contexts extending beyond the legal spheres are significant factors shaping change. When read together, these factors may enable or undermine change.

In Taiwan, for example, particularly since 1986, commentators contend that there has been support for Western-style rule of law reforms.[2] Concurrently, there are economic, cultural and legal cultural factors that constrain legal reform.[3]

More particularly, Tzong Li Hsu depicts Taiwanese legal culture as privileging: morality over law; public interest over individualism; stability over progress; and obligation over rights.[4] Taiwan also has a weak middle class and an education system committed to fostering traditional Chinese values, rather than individualism. When these characteristics are aggregated the resultant legal culture constrains legal reform, even where the political will for change is evident.[5] In effect, the existing role of law and legal culture has a substantial impact on how legal change is received and moderated,[6] but it cannot provide the whole story.

As noted in chapter one, China and Vietnam are today targets of many wide-ranging law reforms aiming to accelerate their transitions to socialist-oriented market economies. Arguably, the challenges inherent in transplantation are exacerbated when the transplant is from a Western, capitalist system, espousing the rule of law, to an Asian socialist state.[7] The current study highlighted the degree of divergence resulting from a socialist-to-socialist transplant where common constructions of law and its instrumentalist role were held. In contexts where the histories, conception and use of law differ, arguably the transplant will

2 Tzong Li Hsu, 12-17 July 1999, pp. 5-7.
3 *Ibid*.
4 *Ibid*.
5 *Ibid*.
6 Ruti Teitel, 1997, pp. 2009-2080.
7 Carol Jones, 1994, pp. 195-221, pp. 197, 215. Jones argues that the significance of family and *guanxi* (relationships) in China operate to ensure the continuing operation of a system of rule of relationships rather than law. Therefore according to Jones it is flawed to assume similar motives in the legal transplant process. Others contradict Jones arguing that ultimately China will have a capitalist economy offering the protection of trading rights that currently only exists in Western capitalist democracies. Cai Dingjian, 1999, and Fan Gang and Xin Chunying, 1998. See also John Gillespie and Pip Nicholson (eds), 2005.

encounter additional challenges. For example, characterizing Vietnamese legal culture in terms of its consistency or otherwise with Western legal positivism produces the following challenges:

- State's conception of the role of/for law. In Vietnam, for example, law continues, despite radical reform, as a tool of the state compared with its characterization as a brake on the state in the West.[8]
- Law as instrument of change (whether by the state or 'other' stakeholders): law is used to mediate between state and individual in the West compared with its function of balancing competing collective interests in transitional Vietnam. By way of illustration, there is no constitutional court in Vietnam, and, as we shall see in the next chapter, very limited judicial review of administrative action,[9] (although, collectives can now argue for legal change with more authority than in pre-*doi moi* Vietnam).
- Social order can be premised upon morality rather than the legality of action or inaction.
- Respect for law and perception of law differ among communities within each system and between them. In Vietnam, we saw very limited trust in and use of courts.

This characterization of divergent legal systems, albeit general, highlights how inter-legal cultural exchanges face particular challenges.[10]

III. Reflective Law Reform: the Soviet-DRVN experience

But what do we learn about legal change more generally from this study? For several decades at least commentators have noted that transplanted legal systems are not closely replicated in new locations.[11] As noted above, we learn that legal culture has a role to play as an investigatory paradigm, particularly if it is defined broadly, but that its utility is greatly enhanced by an analysis of the law's context; particularly its economic and political contexts. But is it possible to distil core strategies and considerations for law reformers looking to use legal transplants

8 There is also a range of matters on which the state still makes discretionary judgments, rather than referring matters to courts of law. For example, most licenses are sought from bureaucrats who exercise an unappealable discretion whether or not to grant them. John Gillespie, 1999, pp. 134-135; John Gillespie, 1997, pp. 367-400.

9 Katharina Pistor and Philip Wellons, 1998, p. 13. Pistor and Wellons point out that where law is used to support a government's implementation of allocative policies, it can play a greater role than when it is working within a competitive market.

10 The extent of the impact of political differences between advisers and recipients of legal transplants will also vary depending on the nature of the transplant. For example, if a proposed transplant were to focus on the development of arbitration in Vietnam, it may be the case that there are more common aims than the current court-focused study demonstrates.

11 Pierre Legrande, 1994, pp. 111-124 is one of the most extreme examples of writing on this point. But see also Kahn-Freund, 1974, Watson, 1996, and Nelken, 2001.

to reform socialist courts or court systems?[12] Can conclusions be drawn about strategies for law reform not restricted to the reform of socialist courts?

At the outset, it is important to realize that most law reform in fact proceeds within three constraints: cost, competition between donors for projects that are acceptable to their domestic stakeholders (be they mutilateral aid agencies such as the World Bank or bilateral aid agencies such as AusAID, SIDA or CIDA) and strategically focussed recipients, which quite reasonably, have their own aid objectives.

More particularly, aid projects are very expensive and the cost of a proposed reform initiative is a key consideration. Inevitably, in designing law reform a balancing of cost and outcomes takes place. Realistically, therefore, it is important to acknowledge that law reform takes place within a budget, and compromise frequently results.

While this study has not taken the politics of aid as its main focus,[13] the motivations and strategies of aid actors figure in any law reform proposal. So the 'ideal' law reform proposal can again be negotiated to accommodate domestic aid agendas (whether of recipient or donor). To give just one example, there are many donors seeking to work with the Vietnamese court system: the Japanese International Cooperation Agency, the Swedish International Development Agency, the Canadian International Development Agency and the Australian International Development Agency to name just four. Each of these different agencies has to establish a niche or initiative that is acceptable to the recipient and can be 'sold' to their respective governments, which pay for the proposal.

Finally, aid recipients are much more savvy and aid-aware than in the past. Aid offers great funds to emerging institutions and they 'jockey' to attract and manage aid dollars. For example, Vietnamese legal institutions are familiar with negotiating aid budgets and look to maximize the utility of the funds in various ways depending on the project. Law reform is politically and economically charged.

The following is an 'ideal' approach to court reform in transitional socialist states, which may have broader application, but this remains untested. The proposed approach for law reform suggested here appreciates the pragmatic and political considerations that shape how aid is delivered.

This study illustrates that political receptivity to legal reform is a key consideration: the shared political orientation assisted the transplantation of the Soviet court system to the DRVN. In effect, where the political orientation is shared, receptivity to the transplant is less problematic.[14] But as noted in the previous

12 This is not an exercise in developing a model to predict the operation of a transplant.

13 Compare with the work of David Kennedy, 2003, pp. 345-433.

14 But this does not mean that receptivity toward a transplant can be assumed simply because of a shared political orientation. For example, the Vietnamese eschewed the Chinese model of law reform after 1956. See discussion in the introduction to this publication.

section aligned political orientation is not sufficient to ensure the development of similar legal institutions. Therefore political orientation and the legal culture within a state are key considerations in planning a transplant. Where the political orientation as between donor and recipient (or of their agents: the advisers) differs the degree of receptivity to a proposed transplant cannot be assumed. It has to be a matter of investigation.

As a result, it is essential to acknowledge that assuming the relevance and viability of exporting Western-style legal institutions to an Asian socialist state (or elsewhere) is naive at best. It can also be cast as negligent or, as some have periodically suggested, self-referential: privileging assumptions about the suitability and value of Western law and legality.[15] For example, this analysis of Vietnamese law highlighted law's marginality. Law in contemporary Vietnam operates in conjunction with, and sometimes in competition with, Party-State policy.

Further, legal reforms are also introduced to shape institutions, some of which have long-established practices or, as Douglas North explained, 'pathways.'[16] Thus it is very hard to design for the Vietnamese context and to anticipate the traction, if any, of introduced laws. This is all the more problematic where law is seen as of increasing relevance, but not yet of vital importance, as is the case in Vietnam. As we have seen, the marginality of law and the vulnerability of reform to existing legal culture both challenge the take-up of changes.[17] This has implications for law reform strategy. If take-up is to be a measure of success,[18] it may be better to design law reform in light of existing bureaucratic and legal culture, and in full recognition of the role of the past in shaping current practice.[19]

More particularly, a comparatist needs to design legal reform, premised on transplantation, in light of the role of law and legal institutions in both the country for which the reform is proposed and in its own location. This analysis needs to be self-reflective. The reformers and those the target of the proposal need to reflect upon the patterns of law that might touch or affect any one project, noting their own perspective and how this might influence their thinking.

To take just one example, Vietnam had no law universities for much of the period during which socialism was constructed. This meant that the education of

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15 John Gillespie, 1999, p. 102; Carol Jones, 1994, pp. 195-221. Writing on law reform in South America, see Yves Dezalay and Bryant Garth, 2001, p. 245.

16 For a more extensive analysis of the path dependency of Vietnamese dispute resolution (and the irrelevance of courts) generally see Nguyen Hien Quan, 2006.

17 Per Bergling, 1999.

18 On the challenges of defining 'success' see David Nelken, 2001, pp. 35-46.

19 Lawrence Friedman, 1969, pp. 43-44. Here Friedman talks of the need to consider the penetration of law – or the extent to which a government can influence or affect the behaviour and the participation of legal players. This proposal has been adopted in Vietnam by the UNDP which together with other donors has initiated the *Strengthening Legal Capacity Project*, a part of which is concerned to disseminate laws. John Gillespie has taken up the study of Vietnamese bureaucratic culture: see John Gillespie, 2001(1), pp. 1-36.

judges was largely based on political and ethical doctrine, rather than jurisprudence or law. Enter a donor wishing to assist with the training of judges. The donor cannot assume a legal tradition upon which 'legal training' can be built. The donor must think laterally about the ways in which to educate and train judges for court work, which the model supposes will be legal, when resolving cases on the basis of law that has only been very recently introduced. Otherwise the flawed assumption that judges will think legally will fundamentally reshape (perhaps undermine) the proposed project. This need for reflectivity lies not only with the donor, but also with the recipient.

Law reform is not only built on an appreciation of relevant legal history, it must also be based on an understanding of the contemporary role and function of law and legal institutions: in the current example courts. Both external advisers and local reformers need to 'know' the current context. This study has noted the lead role played by the VCP in leading and managing the Vietnamese Party-State. Reformers, whether local or external, need to design and manage legal reform in full knowledge of the role of the Party and the impact the Party has on those outside it. Legal reform can be greatly enhanced by socio-legal research that seeks to establish how institutions operate and how, in Vietnam for example, courts are perceived by those within and outside the Party-State.[20] Such research ought to preclude mistakes about the role and function of legal institutions targeted by proposed reforms.

Further, local reformers, assuming they exist, need to be educated in the ways in which the proposed foreign model operates 'at home'. This equips both those being advised and those advising to enter into a fruitful discussion about the challenges for particular reforms before they have been instigated. Some may use the language of up front 'risk assessment', for in many ways this is what is being suggested. Rather than assuming the transplantability of legal institutions, why not invest in analysis of the risks to a legal export/import? This is a call for investment in research that goes beyond formal considerations to ways in which laws and legal institutions operate.

All too often this call for research is not actually asking a great deal of reformers. Quite often insightful and valuable scholarship already exists and in some cases detailed bibliographies have been undertaken.[21] For example, in the case of dispute resolution in Vietnam there are several studies contending that litigants operate in the shadow of the law.[22] Nguyen argues that social institutions govern dispute resolution and that bargaining between entrepreneurs therefore

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20 John Henry Merryman, David S. Clark and Lawrence M. Friedman, 1979. In 2004, the Canadian International Development Agency sent in a team of international consultants, including an anthropologist, to design and recommend programs for its legal development program. This is indicative of the challenges progressive aid agencies perceive in designing programs with local 'traction' or real prospects of take-up.

21 In the context of Vietnamese law see Barbara James, 1992, Asian Development Bank, 1996, and Pip Nicholson, 2003.

22 John McMillan and Christopher Woodruff, 1999, Per Bergling, 1999.

does not take place 'within the shadow of the law'.[23] There are also studies of courts and the way they operate,[24] and analyzes of arbitration in Vietnam.[25]

The call for research is, however, radically adjusting the normative framework in which aid takes place. It questions the inevitability of global convergence of laws and legal systems, and creates a space for a dialogue about the nature of law and methods of its transformation.

None of this will guarantee 'effective' law reform. The problems inherent in societal engineering are too large. Yet this model changes the dynamic of legal transplantation much discussed in the 1970s and reconstructs its parameters. Instead of assuming the applicability and benefits of Western laws and legal institutions, particularly to socialist states in transition, this approach requires dialogue and debate. It shelves the practices of the past, complete with reformers from Western liberal states declaring best practice, and reinvents legal transplantation as a reflective and critical engagement.[26]

Contemporary law reform, where it involves transplantation of law or legal institutions, is not law and development 1970s-style. It is dialogical law making where the partners to the dialogue are donors and recipients, self critical and aware of the dynamism and uncertainty of legal reform.[27] Chapter one noted that those living in a post-modern world are less troubled by lack of certainty in legal reform. Ironically, a critical, rather than declaratory, approach to legal reform may in fact increase the prospects of acute and practical legal change projects.

To summarize, there are great challenges to the implementation of legal reforms or transplants, either where the donor and recipient share political orientation, or where political orientation diverges but there is a common political will for reform. Whether the transplant is Western-inspired or between socialist states, the following emerge as critical factors from the historical study of the Vietnamese experience:

- Socio-political and economic context of the proposed reforms (including the recipient's dependence or otherwise on aid), often evident in the motivation for the transplant;
- Receptivity to the transplant arising either from aligned political orientation and/or shared view of the legal reform project;

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23 Nguyen Hien Quan, 2006.

24 In addition to this publication see Brian Quinn, 2002 and 2003, Pip Nicholson, 2001 and 2006(2) and Pip Nicholson and Nguyen Hung Quang, 2005.

25 Richard Garnett and Kien Cuong Nguyen, 2006, Quang Chuc Tran, 2006, and Pip Nicholson and Nguyen Thi Minh, 2000, to name just three.

26 There are numerous examples of the failure of highly prescriptive projects. The requirement for the rapid (and therefore inadequate) training of Indonesian bankruptcy judges is just one. See William A.W. Neilson, 1999, pp. 4-15.

27 Compare this use of 'dialogical law making' with that of Benedict J. Kerkvliet, 2001, 263. Kerkvliet here is using the term to refer to dialogue between state and citizen and its potential to produce legal change.

- Role and perception of law affecting the transplant: both from the donor's and the recipient's perspective: the official narrative;
- Existing legal culture in both country of origin and new location of proposed transplant;[28]
- Intellectual and philosophical contexts informing the operation of the model in the donor's environment and in the proposed new location;
- Particularities of the context, stability of leadership, effects of war for example; and
- Ability to communicate reforms to central government, to different levels of government (if applicable), to affected parties (such as lawyers and litigants) and the public.

Given the range and interplay of factors affecting transplants, it is unsurprising that transplanted laws are reshaped and redefined by their new context. As noted, this claim is not new. It is more telling to reflect upon the implications of this finding: in particular, that a strategy for law reform emerges that demands reflective and dialogical law making. Having ascertained a shared commitment to law reform, it is necessary to analyze challenges to the transplant and work to see how they may be accommodated. This is what is meant by moving legal reform work from the declaratory to the inclusive or dialogical.

28 On the problem of determining the 'indigenousness' of law see Timothy Lindsey (forthcoming).

Chapter 12
Contemporary Vietnamese Courts

I. Party-State and Law Revisited

In the 17 years since Vietnam introduced its *doi moi* (renovation) policy, substantial legal reforms have been undertaken.[1] The quantity of legislation introduced over this period and the apparently fundamental nature of the reforms cannot be overstated.[2] Since 1986 Vietnam has introduced a Foreign Investment Law, a Commercial Code and a Civil Code and redrafted its Labour and Penal codes.[3] Institutional reforms include the introduction of economic and administrative courts, reforms to the role of the National Assembly in the development of law and changes affecting how laws will be promulgated.[4] In the main the Party-State has championed these reforms. Certainly they would not have been introduced without its agreement. This chapter asks whether the reforms affecting Vietnamese courts have 'changed' courts. More particularly, has the court system of the then Democratic Republic of Vietnam (1945-1975) altered with the introduction of the most recent round of Vietnamese court reforms in 2002? Questions of divergence from the Soviet model are not revisited here.

The chapter commences with a brief discussion of the relationship between the Vietnam Communist Party (VCP or 'Party') and the state. Part two characterizes the role of law as marginal within Vietnam, drawing upon the earlier analysis of Vietnamese legal culture in chapter ten. Part three provides a brief restatement of the history of the Vietnamese court system explicitly placing court history within the context of Vietnamese political and legal

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1 This chapter is based upon a paper presented at the CERI-International Conference, 'The state of the law and rule of law in post *doi-moi* Vietnam' 6-7 October 2003, Paris, France. An abridged version has been published in Pip Nicholson, 2007 (2).

2 Further, the impressive scale of law-making continues. Over the period 2002-2007 the National Assembly anticipates drafting 137 laws and ordinances. Ngo Duc Manh, 2003.

3 This is merely a sample of the diverse legislation that has been introduced since 1986. Vietnam has also reformed its taxation system, remodelled its complaints procedures, introduced a bankruptcy law and state owned enterprise law. See generally LAWDATA, the law database of the National Assembly and Pip Nicholson, 2003, pp. 139-200.

4 *Ibid.*

change. In part four, recent court reforms are analyzed to enable a discussion of the role and experience of contemporary Vietnamese courts in part five.

This comparison of the pre-unification courts with the contemporary court system enables speculation about cultural shift within the Vietnamese court system. Where the studies are of recent changes alone it is not possible to compare trends and practices within Vietnam over time.

Significantly, the contexts in which Vietnamese 'legal construction' scrutinized in this publication have been undertaken have differed widely. More particularly, the construction of the socialist court system of the Democratic Republic of Vietnam in the late 1950s occurred during a protracted war when the country was divided and further fragmented by being administered in smaller administrative units.[5] Contemporary court reform, adapting the socialist court system to enable a socialist-oriented market economy, is pursued without the major disruption of war. Further, Vietnam during this later period reshapes its legal institutions in a time of increasing globalization, in which Vietnam seeks to be a player.[6]

The question then becomes how Vietnam, which has socialist legality and democratic centralism as foundational tenets, accommodates the tension between the rhetorically alleged 'independence' of the court system and its traditional instrumentalism. This aspect of the Vietnamese court system becomes all the more intriguing as a result of Vietnam's transition to a socialist-oriented market economy. To what form of legal system do the Vietnamese aspire? Vietnamese economic policy change seems relatively settled, at least, in terms of its general trend.[7] In contrast, legal change seems more reactive to economic policy shift than ideologically driven.[8] More particularly, how do the contemporary Vietnamese policy makers and lawyers anticipate the courts balancing VCP power and autonomy? How is the tension between Party 'led' institutions and 'law-based state' (*nha nuoc phap quyen*) to be resolved?

It is necessary to reiterate the lack of public sources on the Vietnamese court system. Official statistics, case reports and court reports are not publicly available, although copies of the reports can be obtained from accommodating court staff.[9] As a result, it is not easy to gain access to court documents. Further, many judges and court staff remain wary of talking officially to researchers generally and foreigners in particular. In recent times, the court and its staff have increased circulation of additional commentary, but as Donald Clarke notes of the Chinese

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5 See generally Bernard Fall, 1956, and Chapters 2-6.

6 For example, Vietnam became a member of the World Trade organization in late 2006.

7 This publication does not discuss the extent to which Vietnam directs economic policy change or reacts to it. But, what is suggested is that whatever the mechanism, the direction of change is more clearly identifiable. See Adam Fforde and Stefan de Vylder, 1996, and Melanie Beresford, 1997, pp. 179-204.

8 Katherine Pistor & Philip Wellons, 1999.

9 The *Supreme People's Court Annual Report to the National Assembly* is a good source (*Bao Cao Cong Tac Nghanh Toa an Nam [year given] va Phuong Huong Nhiem Vu Cong Tac Toa An Nam [succeeding year]*) (in Vietnamese).

experience, the sources of information subsequently published in commentary are not well documented.[10] However, commentary located in the Supreme People's Court's (SPC) journal and the more recent *Cong Ly* (*Justice*) journal also published by the court are revealing. The state-controlled press remains a valuable source depicting the work of courts.[11]

II. Party as Ongoing-Leader?

As noted, in 1946, when Ho Chi Minh declared independence in Ba Dinh Square, it was not clear to Vietnam watchers, nor perhaps to the revolutionaries instigating change, what would be the ultimate shape of the Vietnamese Party-State. To this day there is not widespread agreement within Vietnam (let alone abroad) about the policy direction of Vietnamese officials with respect to political and social change.[12]

In the intervening sixty years, first in the North of the country and then nationally after 1976, the CPV has held power.[13] But the basis of legitimising that hold on power has changed. At first, the revolutionaries cited nationalist credentials to wage a war seeking independence from colonialism.[14] Once the North was consolidated and the country divided in 1956, the leadership of the day increasingly declared its socialist aspirations.[15] As noted in chapter four, a comparison of the constitutions of 1946 and 1959 reveals this transition through the changes in the official rhetoric: from a newly emerging nationalist state positioning itself to befriend the world at large (1946 constitutional preamble) to a state with the twin objectives of unifying the country and constructing socialism (1959 constitutional preamble).[16]

After 1976, with the unification of the country, the central leadership retained its commitment to a centrally planned economy and socialism.[17] But by 1986 the VCP was prepared officially to introduce *doi moi* and countenance an increasing role for law.[18] Similarly centrally determined policy shifts made after the war are

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10 For an excellent commentary on the Chinese courts see Donald Clarke, 2003.

11 In addition, to publication in the official newspaper, *Nhan Dan*, much court work is reported in *Quan Doi Nhan Dan* and *Cong An Nhan Dan, Tuoi Tre* and *The Saigon Daily Times*.

12 Anecdotally, officials report that some key VCP members envision transition to a multi-Party state while others see no change from one Party rule. Carlyle A. Thayer comments regularly on the changing politics of the Party. See most recently, 2004. See also Matthieu Solomon, 2003.

13 As noted in Chapter 2 the Party has been renamed, disbanded and then revived. However, commentators note that the personnel associated with the state's leadership remained constant whether the VCP was 'actually' leading.

14 David Marr, 1995, pp. 169-173. See also Appendix Two.

15 *Ibid.* and Bernard Fall, 1956, Tran Thi Tuyet, 1997, and Marjorie Weiner, 1959.

16 See preamble DRVN Constitution 1946 and preamble DRVN 1959 Constitution. See also Chapter 4.

17 Adam Fforde and Suzanne H. Paine, 1987.

18 At this time, the Party-State recognized the insistent calls for major economic change

echoed in constitutional changes. With the advent of Vietnam's third constitution in 1980, the Party-State committed to unification as a socialist state. In the 1992 Constitution, and with its subsequent amendments, most recently in 2001, the Party-State envisions a socialist-oriented market economy allowing private sector activity.[19] The Party-State up until the present day retains its leadership role while concurrently all, including the Party, are to be bound by law.

At the VCP's 1991-Seventh Party Congress, the Party adopted '*nha nuoc phap quyen*' variously translated as 'state-legal-rights' or 'law-based state' as official Party policy. Gillespie has noted that this is a Vietnamese adoption of the Russian concept '*Pravovue gosudarstvo*', which in turn reflects the German principle of '*rechstaat*'.[20] The Russian and German understandings of this concept have the 'State posited as the highest, if not the only source of law.'[21] In the Vietnamese context, *nha nuoc phap quyen* means that the state will not only be the source of law, but also be bound by it. The ideal of binding the Party-State by law produced the fundamental constitutional changes of 1992, which saw an amended Article 4 introduced:

> The Communist Party of Vietnam, the vanguard of the Vietnamese working class, the faithful representative of the rights and interests of the working class, the toiling people, and the whole nation, acting upon the Marxist-Leninist doctrine and Ho Chi Minh's thought, *is the force* leading the state and society.
>
> All Party organizations operate within the framework of the Constitution and the law.[22]
>
> [Author's italics]

As noted, there was no commitment during the war period that the Party would be bound by law. Rather, the VCP led through its policies. In the event of a clash between law and policy, policy would, and did, prevail.[23] In recent times, the term 'law-based state' has fused with socialist legality, producing 'socialist law-based state' (*nha nuoc phap quyen xa hoi chu nghia*).[24] However, several questions remain. What is meant by the state in this context? Further, to what does the term 'law-based' refer?

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that had been made at Party Congresses at least since 1981. See Carlyle A. Thayer, 1993, pp. 1-3. See also VCP Party Secretary, Truong Chinh's, comments included in the introduction to the 1986 Sixth Party Congress's Political Report: 'The management of the country should be performed by law instead of simply by moral precepts'. As quoted in Carlyle A. Thayer, 1993, 'Introduction' in Carlyle A. Thayer and David Marr (eds) *Vietnam and the Rule of Law*, p. 5.

19 For a discussion of the 2001 amendments see Mark Sidel, 2003.

20 John Gillespie, 2004, p. 151.

21 *Ibid*.

22 *SRVN Constitution*, 1992, Article 4.

23 See Chapters 2 and 4.

24 John Gillespie, 2004, p. 152.

As noted, it was not possible to conceive of the state as separate from the Party. The conflation of Party and state remains, in large part, to this day: hence the use of the term Party-State. For example, the most recent round of constitutional amendments did not change the leadership role ascribed to the Party.[25] Further, as discussed below, *Resolution 8 On Forthcoming Principal Judiciary Tasks* (*Resolution 8*) introduced in 2002 also restates the Party's leadership role.[26] Most recently, the Party has issued *Resolution 48* (*Strategy for the Development and Improvement of Vietnam's Legal System to the Year 2010 and Direction until 2020*) and *Resolution 49* (*Judicial Reform Strategy to 2020*), again essentially restating Party leadership.[27] So it is that in Vietnam today the Party leads the state and determines the political choices and policy orientation of the nation. Further, the Party relies on its members to give effect to its policy choices. This is set out in Article 2(1) of the 2001 *Statute of the Vietnam Communist Party* that provides:

> A Party member shall have the following tasks: to be absolutely loyal to the revolutionary objectives and ideals of the Party; to properly implement the Political program, statutes, resolutions and instructions of the Party and the law of the state; to well accomplish the studies assigned; and fully to subject him/herself to the work assignment and placement of the Party.

The politico-legal arrangements within which the courts operate see this institution under Party-State leadership. As indicated in the Diagram below the classic formulation of the contemporary Vietnamese state is three-pronged. It has the Party that 'leads', a state that 'manages' and mass organizations that 'represent': each separate and yet each connected. This diagram makes clear that the Vietnamese court system is (and has always been) subordinate to the National Assembly.

What the diagram does not show is that Party members, today, as previously, continue to hold the majority of positions within courts, where some 90% of judges are Party members.[28] Party membership is also strong in office bearers in most other organizations and departments within the administrative arm of the state.[29]

The Party-State relationship is highly integrated: each institution inextricably intertwined by virtue of the Party's retained leadership role and the twin duties of all functionaries of the Party-State.

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25 *SRVN Constitution*, 1992, Article 4.

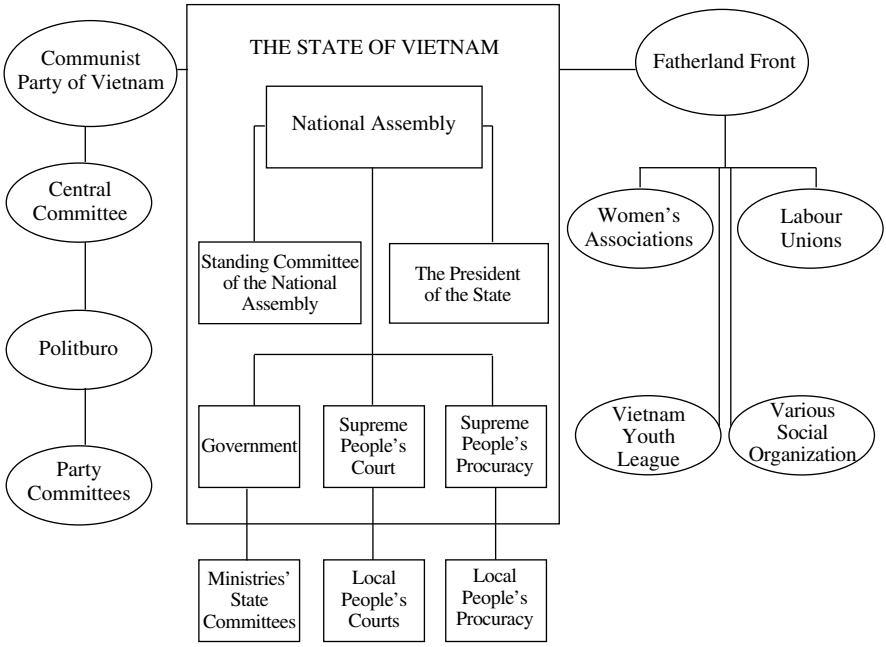
26 See further discussion in Pip Nicholson, 2005.

27 *Resolution 48-NQ/TW* of the Politburo of the VCP dated 24 May 2005 ('*Resolution 48*') and *Resolution 49-NQ/TW* of the Politburo of the VCP dated 2 June 2005 ('*Resolution 49*').

28 Pip Nicholson and Nguyen Hung Quang, 2005.

29 See Carlyle A. Thayer, 2002, p. 8 on National Assembly numbers. John Gillespie has described Party membership as producing a defacto 'nomenklatura' system within the Vietnamese state: John Gillespie, 2002, pp. 180-181.

16.[30] Political and Administrative Structure of Vietnam



However, what is meant by the term 'law-based'? One possible interpretation is that the Vietnamese Party-State has repositioned law as the 'highest' if not ultimately the sole binding regulatory mechanism. This view is supported by the fact that the Party, through the Constitution, is to be bound by law.[31] More particularly, it envisions law ultimately as becoming superior to policy.[32] This characterization contradicts the earlier instrumental role ascribed to Vietnamese law.

Mark Sidel has argued persuasively that it is no longer apposite to describe the Vietnamese National Assembly as an absolute tool or instrument of the Party-State.[33] He rests his argument on an analysis of the National Assembly's role in debating and finalizing the 2001 constitutional reforms.[34] Crude instrumentalism does not capture the role of law in contemporary Vietnam. However,

30 This diagram is based on one produced by Phillips Fox solicitors and used by their Managing Partner in Hanoi to depict the Party-State-mass organizations.
31 *Constitution of the SRVN*, 1992, Article 4.
32 Certainly this is suggested by *Resolution 8*.
33 Mark Sidel, 2002, p. 42.
34 *Ibid*.

in the context of court-reform, the Party-State does not deliver on its adopted rhetoric of an independent court system. It is contended that reforms have shifted the courts from the control of the Ministry of Justice, but that they remain accountable to the Party-State. The courts are increasingly self-managing, but not free of Party-State influence. By retaining the strong leadership role of the Party-State the courts remain intrinsically political, and not (yet) autonomous legal, institutions.

III. Marginal Role of Law

As previously discussed, all commentators on contemporary Vietnamese 'legal' culture argue that traditionally law has been of marginal relevance in Vietnam.[35] This is attributed to Confucianism, the uneven success of French colonialism in 'transforming' the local legal system, and most recently, Soviet-inspired socialist conceptions of law. The latter casts law both instrumentally, as a tool of the state, and subordinate to and less significant than socialist morality.[36] Significantly, Confucianism and Vietnamese village life,[37] and subsequently socialist ideology, produced a system where the dominant source of social mores was morality rather than law.[38] In addition, the highly fragmented and evolving nature of law contributed to its irrelevancy. Opaque laws and low levels of technical legal expertize combined to preclude trust or confidence in the Vietnamese legal system generally, and, it is argued, this also shapes perceptions of the Vietnamese courts.

IV. Court Reform in the Twenty-first Century

As explained in chapters two and three, in 1946 the revolutionary government introduced courts in the north of the country to work alongside the relevant war administration committees. It was not possible to coordinate these courts centrally, hence the reliance on the provincial and local committee structure to instruct in court work. As noted in chapters four, five and six, Vietnamese legal officials talk of a central court system from 1959. However, one of the lasting effects of developing a court system in a time of war, coupled with entrenched community-focused socio-economic units, was a court system beset by regionalism. As noted, the courts did not come within effective central control in 1959.

After Vietnam's unification in 1976, the Party-State sought to export the Northern court system to the South.[39] Following the introduction of *doi moi* in

35 See Chapter 10 and Mark Sidel, 1997, pp. 356-406.
36 *Ibid*. See also John Gillespie, 2002, pp. 167-200.
37 See Chapter 10. See also Pham Duy Nghia, 2000.
38 See Chapter 10, pp. 222-227.
39 Decree of the Council of Ministers *On the Organization of the People's Courts and the People's Procuracies*, dated 15 March 1976.

1986 the Party-State passed additional laws with national application in the early 1990s to clarify and modernize the role of the courts.[40] Perhaps the best way of describing the changes of the early nineties is to see them as introducing new courts, particularly those needed by a socialist-oriented market economy. Thus the Economic Court and the Administrative Court were introduced in 1994 and 1996 respectively, but no constitutional court was introduced.

Since 2000, a series of policies and laws have been introduced to reform the Vietnamese courts. As noted earlier, in 2002 the Politburo of the VCP issued *Resolution 8*, which is not a blueprint for legal reform, but is a significant critique of the shortcomings of the existing legal system and the need for reform of key legal institutions including the courts, the procuracy and the investigation of offences by the police.[41] Since 2002, the President has issued the new *Law on the Organization of People's Courts* and the National Assembly passed the *Ordinance on Judges and People's Assessors*.[42] Resolutions have also been passed to provide implementational details.[43] As mentioned previously, in 2005, the Politburo of the VCP issued *Resolutions 48* and *49*.[44] When these sources are read together the Party has restated its leading role, while concurrently calling for courts to judge cases independently.[45]

Turning to consider the three recent Party resolutions relevant to courts, the threshold issue is 'what prompted them?' Quinn notes that *Resolution 8* operated as an instruction to the National Assembly to initiate reforms to the court system and legal sector generally.[46] Yet while this tells us that the Party wanted to see reform, it still does not explain why change was announced at this time. Quinn also suggests that in the aftermath of the notorious Nam Cam corrup-

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40 Pip Nicholson, 2001, p. 37 and Brian J.M. Quinn, 2002, p. 221.

41 Comments made by Nguyen Chi Dung while in conference session at the conference on 'Law and Governance: Socialist Transforming Vietnam' 12-13 June, 2003, Melbourne, Australia. Nguyen noted that the Party-State's blueprint for judicial reform may emerge as early as 2004. In fact they were released in mid 2005. For more details see also Decision No. 584/2002/QD-BTP *Promulgating the Action Program of the Judicial Service for the 2002-2007 Period*, dated 25 December 2002.

42 *Law on the Organization of People's Courts*, 06/20002/L/CTN dated 2 April 2002 and *Ordinance on Judges and Jurors of People's Courts*, 11 October 2002.

43 In particular see: Inter-Circular No. 01/2003 TTLT/TANDTC-BOP-BMV/UBTWMTTQVN, dated 1 April 2003 *Guiding the Implementation of a Number of Provisions of the Ordinance on Judges and Jurors of the Supreme People's Court*, The Ministry of Defence, The Ministry of Justice, The Ministry of the Interior and The Vietnam Fatherland Front Central Committee and Resolution 131/2002/NQ-UBTVQH11 On Judges, People's Assessors and Prosecutors, 3 November 2002. See also Decision No. 584/2002/QD-BTP of 25 December 2002 *Promulgating the Action Program of the Judicial Service for the 2002-2007 Period*.

44 Resolution 48-NQ/TW of the Politburo of the VCP dated 24 May 2005 and Resolution 49-NQ/TW of the Politburo of the VCP dated 2 June 2005.

45 On constitutional reforms see Mark Sidel, 2002, p. 74. In relation to legal institutions generally see *Resolution 8*, and in relation to courts in particular, see *Resolution 8* Part II B (1) (c). For a more detailed critique of *Resolution 8* see Pip Nicholson, 2005.

46 Brian J.M. Quinn, 2003, p. 433.

tion affair, the Politburo felt compelled to strengthen the legal sector.[47] It has also been suggested that there had been so much criticism of courts through the media, generating and/or perhaps reflecting a negative public perception of courts, that the political leadership felt compelled to announce a legal reform agenda.[48] The statement, through *Resolution 8*, of a commitment to legal reform bought the Party-State time to debate and draft the details later announced in *Resolutions 48* and *49*. These later resolutions offer an official statement of the Party's commitment to develop the Vietnamese legal system in line with World Trade Organization requirements.

Resolution 8 exemplifies the tension between independent (where only law is binding) and Party-led courts.[49] *Resolution 8* explains that it is the role of the courts (and other legal agencies such as police and procuracy) to follow and implement Party policy.[50] In particular, the court-related agencies are charged with giving effect to political tasks in the relevant period (*cac nhiem vu chinh tri trong tung giai doan*) and with ensuring that the power of the state is united (*bao dam quyen luc nha nuoc la thong nhat*).[51] In addition, Party leadership is restated by exhorting all court-related institutions to implement legislative, executive and judicial instructions. *Resolution 8* also reminds readers that the Party 'shall lead' (*lanh dao*) all court-related agencies. Party leadership is explicitly proclaimed over politics, and organization and personnel of legal institutions, including courts. The tensions between Party control and the supposed emerging independence resonate throughout this document.

Resolution 48 is the more general of the two recent Party policy statements. Yet it contains some radical recommendations. In particular, it espouses developing judicial review of administrative decisions.[52] Further, in a section on court reforms the policy paper calls for: independent court systems; the centralization of the execution of judgments; more transparency in court proceedings; and greater 'adversarial' court proceedings.[53]

Resolution 49 carefully and comprehensively restates the leadership role of the Party, in many ways echoing the language and tenor of *Resolution 8*. In particular, there is no suggestion that the courts lose their accountability to the National Assembly. Rather, the National Assembly is called on to strengthen its

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47 *Ibid*., p. 448.

48 Interview by the author with court functionary 'Z' in December 2004. It has also been suggested that *Resolution 8* was in part issued to signal changes as a result of the Bilateral Trade Agreement negotiated with the USA.

49 *Resolution 8* is not only concerned with courts. In the Vietnamese context a reference to 'judicial work' is a reference not only to the work of judges and court staff, but a term that includes the work of all organs whose work feeds into the courts. Therefore, for example, the work of the procuracy (*kiem sat*), the police (*cong an*) and investigators (*canh sat*) all fall within the Vietnamese term 'judicial work'.

50 *Ibid*.

51 *Ibid.*

52 *Resolution 48*, Section II, Paragraph 1.4.

53 *Ibid*., Paragraph 1.5.

capacity to oversee judicial organizations, including courts.[54] However, *Resolution 49* also outlines a vision of substantial reform. In addition to calling for an overhaul of criminal and civil laws (including procedure laws), it proposes radical institutional reorganization with far-reaching implications.[55] In particular, it suggests that the courts be organized along jurisdictional lines, rather than reflecting geo-political units as has been predominantly the case since their introduction in early 1946. It proposes regional courts, responsible not to any one province but to several administrative units.[56]

The latest resolutions foreshadow legislative initiatives as yet unimplemented. Therefore Vietnam may witness radical overhaul of its current court system. But to date, the radical reform agenda has usually been moderated when implemented: either as a result of the stranglehold of existing practices[57] or because the Party deliberately overstates its vision for reform, producing a 'gap' between the vision and actuality of reforms.

Despite the calls for potential radical reforms, *Resolutions 8* and *49* describe courts in terms that require them to be both subservient to Party leadership and independent. In this respect very little has changed from earlier statements of their role. John Gillespie reconciles these principles by explaining that courts remain under the Party's leadership, but must be free from Party interference.[58] But as Gillespie notes, how interference and leadership are to be distinguished remains unclear.[59]

The legislative reforms, which succeeded *Resolution 8* but preceded *Resolutions 48* and *49*, set out existing court reform in much more detail. The following are the core features of the court reform package affecting people's (but not military) courts introduced in the *Law on the Organization of People's Courts* in April 2002:

1. Judges must have a bachelor of laws degree, have attended adjudication training and have legal experience (Article 37).
2. With the exception of the Chief Justice and judges of the Supreme People's Court (SPC), all judicial appointments, removals and dismissals to provincial and district courts will be made by the Chief Justice of the SPC on the advice of especially constituted Judicial Selection Councils. Appointment, removal and dismissal of Chief Justices and Deputy-Chief Justices of provincial and district courts will be by the Chief Justice of the SPC, acting on the advice of the relevant People's Council (Articles 25 & 40).
3. There will no longer be a Supreme People's Court Justice Committee (Article 24).

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54 *Resolution 49*, Section 2.4.
55 *Ibid*., Section 2.1.
56 *Ibid*. In addition the policy paper suggests that this initiative ought to be implemented by 2010. See Section III on 'Implementation'.
57 See the discussion of the role of long-standing practices in moderating the efficacy of aid in Chapter 11.
58 John Gillespie, 2004, p. 167.
59 *Ibid*.

4. People's assessors will be elected by Local People's Councils on the recommendation of the relevant Fatherland Front organization (Article 41).
5. People's Assessors can be dismissed by the Chief Justice of the court to which they have been elected with the agreement of the relevant Fatherland Front committee (Article 41).
6. The Standing Committee of the National Assembly will determine court budgets acting on the advice of the Chief Justice of the Supreme People's Court (Article 44).
7. The number of judges and people's assessors will be determined by the Standing Committee of the National Assembly on the advice of the Chief Justice (Article 42(1)).
8. The SPC in conjunction with Local People's Councils will be responsible for the management of Local People's Courts (Article 17).
9. The need to develop information technology to assist the courts to do their work is explicitly recognized (Article 46).

The reforms suggest two fundamental changes.[60] The first relates to personnel (recruitment, dismissal and qualifications). The second refers to how the funds will be made available and by whom. More particularly, the Party-State delivers on the policy commitment to foster higher qualifications among staff; at least in theory (see more below). Further, it empowers the Supreme People's Court (SPC) to appoint and remove judges and to remove people's assessors for incompetency. The budgetary reforms position the courts to seek their budgets directly from the National Assembly. They are no longer dependent on the Ministry of Justice for funds, as has been the case since the re-establishment of the Ministry of Justice after its abolition in 1960. Similarly, management of local courts no longer rests with the Ministry of Justice, but is a matter for the SPC acting with local bodies. Finally, the numbers of judges and jurors is also a matter for the SPC working with the National Assembly, rather than a matter for the Justice Ministry.

The most recent legislative reforms therefore produce a decoupling of the courts from the Ministry of Justice.[61] In addition, they reaffirm the Supreme People's Court role of leading and managing lower courts, working with local bodies as appropriate. This could produce radical change: moving the courts from direct political control via the ministries to self-management or quasi autonomy. However, these reforms have to be interpreted in light of the continuing interconnection between the Party-State and courts.

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60 This chapter does not take up the story of changes to the Procuracy. See Brian J.M. Quinn, 2003, pp. 432-468.

61 In particular the courts are to assume an increased management role. *Law on the Organization of People's Courts*, 06/20002/L/CTN dated 2 April 2002, Articles 44-46.

V. Courts Profiled

As previously mentioned, the VCP relies on its members to give effect to its policies. 90% of judges are members of the VCP.[62] In effect, court personnel owe a duty to the VCP and to the court as a legal institution.[63] There is, therefore, the potential for judges and court personnel to face conflicting duties where the law and Party policy are inconsistent. The recent court reforms explicitly require judges to be bound by law, and still policy remains binding on Party members.[64] Thus while the recent reforms suggest a movement of the courts away from the political arm of the Party-State through giving them more independence from the Ministry of Justice, the reality is that these changes are mediated by Party influence. This chapter contends that the courts remain subordinate to Party influence generally and the National Assembly in particular.

It is too simplistic to determine whether the Vietnamese courts have 'changed' simply by reference to their officially ascribed place in the state's structure. The balance of this part considers the official function of courts, how judges are appointed and paid and how the court goes about its business to see if there is a discernible difference in the 'shape' of contemporary court work.

Official Court Function

Article one of the most recent *Law on the Organization of People's Courts* sets out the courts' functions as follows:

> The Supreme People's Court, the local People's Courts, the military courts and other law-making bodies are the adjudicating bodies of the Socialist Republic of Vietnam.
>
> The courts adjudicate criminal, civil, marriage and family, labour, economic and administrative cases and settle other matters as prescribed by law.
>
> Within the scope of their functions, the courts have the task to protect the socialist legislation; to protect the socialist regime and the people's mastery; to protect the property of the state and collectives; to protect the lives, property, freedom, honour and dignity of citizens.
>
> Through their activities, the courts shall contribute to educating citizens in the loyalty to the Fatherland, the strict observance of law, the respect for social conducts and the sense of struggle to prevent and combat crimes and other law offences.[65]

Comparing Article 1 of the 1960 *Law on the Organization of People's Courts* with its ultimate successor introduced forty-two years later makes clear that the

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62 Pip Nicholson and Nguyen Hung Quang, 2005.
63 *Statute of the Vietnam Communist Party*, 2001 Article 2(1).
64 See Chapters 1 and 6.
65 *Law on the Organization of People's Courts*, 06/20002/L/CTN dated 2 April 2002, Article 1.

courts have various jurisdictions, have the mandate to solve cases, must educate the people about law and finally ought to protect the state. Essentially there is little change, except the introduction of two new jurisdictions.

> People's Courts are judicial organs of the Democratic Republic of Vietnam.
>
> People's courts adjudicate criminal and civil cases to punish criminals and resolve civil disputes arising between people.
>
> The purpose of the trial is to protect the people's democratic regime, social order, public property and legitimate interests of the people, and to contribute to the course of socialist construction in the North and the work of fighting to unify the country.
>
> In all their activities the People's Courts shall educate citizens to be loyal to the Fatherland, the people's democratic regime, to respect private property, and voluntarily to observe the law, labour discipline and principles of social life.[66]

However, two differences emerge. First, the courts of the twenty first century are no longer charged with assisting national unification and socialist construction. Secondly, courts in 2002 are entrusted with promoting strict compliance with law (*chap hanh nghiem chinh phap luat*).[67] This is a shift from the less formal encouragement made in 1960 for citizens to be consciously law-abiding (*tu giac tuan theo phap luat*).[68]

It is necessary not only to look at the recent reforms, but also to consider what remains from the past. For this reason the recent articles dealing with the official tasks and functions of the courts should be compared with those of the equivalent 1960 law. The most striking difference between the two laws is that the 2002 law is more detailed and deals with the responsibilities of the SPC before it turns to the duties of the lower courts.[69] In contrast, the 1960 law first deals with local level courts before briefly turning to outline the role of the SPC.[70]

The 2002 law, while generally dealing with the issues raised by the law of 1960, does so in a more detailed manner. For example, the 1960 law notes that both civil and criminal judgments must be enforced (Article 24). The 2002 law not only provides that judgments must be enforced, but lists those agencies that must respect and give effect to judgments of any court (Article 12). Further, there are changes in the details of who manages courts at any one level and how the SPC will coordinate and oversee the work of lower courts. In particular, the SPC is charged with responsibility to oversee all lower courts, including the

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66 *Law on the Organization of People's Courts*, 19 – LCT dated 26 July 1960.
67 *Law on the Organization of People's Courts*, 06/20002/L/CTN dated 2 April 2002, Article 1.
68 *Law on the Organization of People's Courts*, 19 – LCT dated 26 July 1960.
69 *Law on the Organization of People's Courts*, 06/20002/L/CTN dated 2 April 2002, Articles 18-26.
70 *Law on the Organization of People's Courts*, 19 – LCT dated 26 July 1960, Articles 20-23.

17. Comparing the *Law on the Operation of People's Courts 1960 and 2002*

Duty/Task	***Law on the Organization of People's Courts*, 19 – LCT dated 26 July 1960**	***Law on the Organization of People's Courts*, 06/20002/L/CTN dated 12 April 2002**
Public trials	Article 6	Article 7
Citizens equal before the law	Article 3	Article 8
Right to defence	Article 7	Article 9
Right to use own language	Article 8	Article 10
Two-level trial	Article 9	Article 11
Judgments must be respected and strictly enforced	No equivalent – only states must be enforced Article 24	Article 12
Law reform function	Article 21	Article 13
Educational role for courts	Only in Article 1, not separately articulated	Article 14
Courts to work collaboratively with other law enforcement agencies and community groups to combat crime	Article 21	Article 15
Chief Judge of the SPC to report to National Assembly	Article 15	Article 16
SPC to manage lower courts	Implicit Article 15	Article 17

appointment and dismissal of staff.[71] The later legislation is much more specific about which agencies will be responsible for what aspects of court work.

In addition, the more recent legislation is much more explicit about constraints on judges' behaviour.[72] Judges are exhorted not to: contravene existing laws affecting officials and public employees; provide consultancy to parties to cases; illegally intervene in the settlement of cases or attempt to influence others settling cases; take dossiers out of their offices except for appropriate purposes; or meet with defendants or parties to cases except in 'prescribed places'.[73]

71 *Law on the Organization of People's Courts*, 06/20002/L/CTN dated 2 April 2002, Articles 18-26, 29 (1).
72 *Ordinance on Judges and Jurors of People's Courts*, 11 October 2002, Article 15.
73 *Ibid*.

This legislation sets out with much greater clarity that judges are not to deal with parties, nor are they to influence the determination of other cases.[74]

Judges Characterized

Historically Vietnamese judges have been both appointed (and by different bodies) and elected.[75] The criteria by which judges have been appointed have also changed.[76] As noted, in the early days after the revolution, judges were theoretically appointed by the Ministry of Justice in the case of primary courts (now district courts). The President appointed secondary court (now provincial court) judges.[77] The appointments were based on the twin criteria of 'political dignity and professional skill'.[78] Although the legislation stipulated that judges were to have law degrees and have completed judge-specific training,[79] these requirements were not enforced, with the state introducing temporary provisions requiring only that judges have finished school or worked as a clerk or middle bureaucrat.[80]

People's assessors were drawn from a list made up in the first instance by the Administrative Committee of the relevant level of government. Over time this duty was transferred to the War Administration Committees. The revolutionary government's introduction of people's assessors to courts was stressed as a reform evidencing the government's commitment to popular and not elite justice.[81] In other words, people's assessors were seen as important to the popularising of courts and a sign of the essential differences between colonial and post-colonial justice systems.

The court reforms of 1959 and 1960 heralded the election of most judges to office.[82] The National Assembly was to elect the Chief Judge of the Supreme People's Court and its Standing Committee appointed the remainder of the Supreme People's Court judges. Within local courts, the People's Councils elected judges to the relevant court. For example, Provincial People's Councils elected judges to the Provincial People's Courts within their area. It was reported by those working in courts at this time that the quality of judges varied widely.[83]

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74 Compare with *Ordinance on the Organization of the People's Supreme Court and Local Courts*, 23 March 1961.
75 See Chapters 3 and 6.
76 For an analysis of the appointment process in the 1990s see Brian J.M. Quinn, 2003, pp. 432-468.
77 Prosecutors were appointed from within the pool of people appointed as judges. Thus there was no substantive difference in the skills sought of those prosecuting and those determining cases. See Chapter 3.
78 Interview with by author with 'Ly Anh', 1999.
79 Order 13, *On the Organization of Courts and the Status of Judges in the DRVN*, dated 1 January 1946, Articles 54 & 55.
80 *Ibid*., Articles 58-64.
81 See Chapter 3, pp. 74-77.
82 See Chapter 6, pp. 115-117.
83 Le Kim Que, 1961.

Like judges, people's assessors were generally also elected to office after the 1959 amendments, with the exception of the Supreme People's Court's people's assessors who were appointed by the Standing Committee of the National Assembly.[84] Given the same power as judges to determine disputes, the role of people's assessors was widely circulated with the official paper *Nhan Dan* reporting that 'people's jurymen would now have the same power as people's justices'.[85]

As explained above, the recent court reforms suggest that the criteria for appointment now place a greater focus on professional skills.[86] Further, that whereas the President has most recently had the power to appoint all judges, with the exception of the Chief Justice of the SPC who had to be nominated by the President and then elected by the National Assembly, the recent reforms have moved the power to appoint all local (provincial and district) level judges to the SPC. The President now only appoints the SPC judges. As suggested earlier, when read together it appears that judges will be both better trained and potentially more independent of political influence. However, two implementing documents undermine, or at the very least reduce, the impact of the reforms: Party approvals needed for appointment (*Circular 01* of 2003) and the re-introduction of a waiver of the educational requirement (*Resolution 131* of 2002).[87]

First, it remains the case that the VCP vets all judicial appointments. This is consistent with *Resolutions 8, 48* and *49* which explicitly provide that the Party will select/approve personnel. This vetting of judicial candidates is done in several ways. The Party requires that all applicants for judicial position produce political theory diplomas.[88] The Circular provides no definition of 'political theory diplomas' but in the prior circular candidates had to furnish a 'political knowledge certificate' (*chung chi trinh do ly luan chinh tri*).[89] This is a certificate obtained from the National Political Academy, in turn managed by the VCP. A person must be either a member of the VCP or a candidate to be a member to obtain such a certificate.[90] Further, the certificate demonstrates that candidates have been

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84 *Ordinance on the Organization of the People's Supreme Court and Local Courts*, dated 23 March 1961, Articles 16 & 17.

85 Anonymous, 'Election of Justices and People's Jurymen', *Nhan Dan*, 18 May 1961, FBIS.

86 This issue is taken up in more detail in Pip Nicholson and Nguyen Hung Quang, 2005.

87 Circular No. 01/2003/TTLT/TANDTC-BOP-BMV/*UBTWMTTQVN Guiding the Implementation of a Number of Provisions of the Ordinance on Judges and Jurors* the Supreme People's Court, The Ministry of Defence, The Ministry of Justice, The Ministry of the Interior and The Vietnam Fatherland Front Central Committee dated 1 April 2003 ('Circular 01') and *Resolution 131/2002/NQ-UBTVQH11 On Judges, People's Assessors and Prosecutors*, 3 November 2002.

88 Circular 01, Chapter 3, Article 2, Step 4.

89 *Inter-circular No. 05/TTLN* of Ministry of Justice and SPC, 15 October 1993 *Providing Guidelines on Ordinance on People's Judges and Jurors* 1993, Part III, Item 1.

90 Pip Nicholson and Nguyen Hung Quang, 2005.

> trained in politics effectively and strongly to implement judicial responsibility and to protect against the phenomenon of 'mechanical and simple legalism, non politics' (*may moc, don thuan, vo chinh tri*).[91]

Commentators suggest that *Circular 01* will be interpreted consistently with its predecessor.[92] More particularly, the provision of political theory diplomas will require candidates to supply a 'political knowledge certificate'.[93] Maintaining this requirement therefore enables the central VCP institutions to check on the appropriateness of candidates for judicial office.

An applicant's dossier must also include support from the 'collective leadership of the provincial-level People's Court' and the Head of the Organization and Personnel Section of the Provincial-level People's Court of the institution to which an applicant seeks appointment.[94] Thus local VCP functionaries within the court where an applicant seeks office also feed their views of a particular judicial candidate directly into the recruitment process.[95] Therefore if applying to be a judge at the Provincial People's Court in Hanoi, support must be obtained from the Head of Personnel and the Chief Judge of that court.

This practice ensures that the VCP, at both the local and central level, retains decisive input into the recruitment of judges. Hence the recent reforms can be characterized as diminishing the influence of the Ministry of Justice, and to a certain extent the National Assembly, but not the Party itself. Further, as noted above, these recruits remain doubly obligated. As the Constitution and other documents note, they are to be bound by law, but also owe absolute loyalty to the Party.

The Party's leadership role is also evident in two aspects of the court's work. First, the Party usually decides whether or not to prosecute.[96] Therefore at the local level the local People's Committee is usually instrumental in determining whether a case will be pursued.[97] Secondly, interviews reveal that the Party is often intimately involved with the determination of cases.

The corruption case of Judge Bui Van Tham serves as an example of how a judge's twin loyalty to law and Party operate. Judge Bui Van Tham of the Hanoi Supreme People's Court (civil division) was charged with exerting undue influence on a person holding an official position in 1997.[98] It is common for senior Party functionaries of the court and procuracy to meet with judges responsible

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91 Nguyen Van Hien, 2001, p. 4.
92 Comments made to author by 'Hien', 6 October 2003.
93 *Ibid*.
94 Circular No. 01, Chapter 3, Article 2, Step 3.
95 Under the previous circular judicial candidates had to include an 'opinion letter from the Communist Party cell' (*y kien cua cap uy*) of the court to which they applied. *Inter-circular No. 05/TTLN* of Ministry of Justice and SPC, 15 October 1993 *Providing Guidelines on Ordinance on People's Judges and Jurors* 1993, Part III, Item 2.
96 Brian J.M. Quinn, 2002, p. 240.
97 *Ibid*.
98 Judgment No. 233/HSST 22 February 1997 of the Hanoi People's Court.

for trials, and 'together' they resolve how cases are to be determined.[99] More particularly, when a judge faces trial for corruption the Judges' Council meets together with the trial judge to determine an appropriate course of action.[100] To characterize this as interference is to misunderstand the Vietnamese court system. What the case illustrates is how Party leadership is given effect within courts.

The second way in which the recent reforms are undermined has been with the introduction of *Resolution 131*, which has the primary purpose of waiving the requirement that judges have law degrees.[101] *Resolution 131* replicates an earlier Resolution that introduced the concept of a 'legal knowledge debt' (*no kien thuc phap ly*).[102] In effect, a candidate can seek appointment on an undertaking that s/he will subsequently obtain a law degree. Since, 1993 when the idea of a legal knowledge debt was first introduced, the trend has been that judges undertake law training after their appointment, but not necessarily bachelor of laws degrees. Reports suggest that as many of 85% of the judges and 70% of the court officers admitted on an undertaking to obtain legal qualifications do so by receiving training at one of the many law-training institutions, but they do not take out bachelor of laws degrees.[103] Examples of the law-training institutions include those run by the courts, the procuracy and the police. It is unclear whether the earlier practice of substituting the lesser qualifications for law degrees will continue.

The wide-ranging reforms have not changed judge's terms, which remain at five years.[104] Currently, at the conclusion of a five-year term a judge seeking reappointment must submit a fresh application. This practice is much criticized by commentators.[105] It means that judges who have been viewed favourably by the central and local branches of the VCP will receive the needed supporting documentation. Those who have displeased the Party cell at which they are based will, in all likelihood, not be supported.

The reforms have also not altered judges' classification as civil servants. This means that promotion, or at least salary increase, flows from time spent in the job. If a judge moves to a higher court there may also be financial benefits, but this depends how long the judge has served at the lower level. As noted, there is no mechanism for transferring judges between courts other than application to a particular court for a particular position.

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99 Interview by author with 'Dung', 2001.
100 Interview by the author with 'Hung', February 2001.
101 *Resolution 131/2002/NQ-UBTVQH11 On Judges, People's Assessors and Prosecutors*, 3 November 2002.
102 See *Resolution No. 37/NQ-TVQH9* dated 14 May 1993.
103 Tran Van Tu, 2003, pp. 34-39.
104 *Law on the Organization of People's Courts*, 06/20002/L/CTN dated 2 April 2002, Art. 40 and *Ordinance on Judges and Jurors of People's Courts*, 11 October 2002, Art. 24.
105 *Ibid.* and Mai Bo, 2000, p. 3.

18. Judicial Salaries[106]

JUDICIAL SCALE	**SALARY LEVEL**[107]								
	1	2	3	4	5	6	7	8	9
Supreme People's Court	6.20	6.56	6.92	7.28	7.64	8.00			
Provincial People's Court	4.40	4.74	5.08	5.42	5.76	6.10	6.44	6.78	
District People's Court	2.34	2.67	3.00	3.33	3.66	3.99	4.32	4.65	4.98

(The current basic salary is 290,000VND.)[108]

Judges' status as civil servants also ensures that they are not well paid. For example, a Supreme People's Court judge with three years experience will be paid 6.56 × VND 290,000 or approximately US $119.00 a month. A newly appointed District Court judge with no experience will receive 2.34 × VND 290,000 or approximately US $42.00 a month. Generally, judicial salaries are on a par with other civil servants. As a result, there are much more lucrative careers either in other bureaucratic positions or in private practice. While it is the case that judges may acquire additional funds by 'extra-judicial' payments, their salaries do not compare well with others.[109] Official reports note that there has been trouble recruiting judges, with many rural District Courts having only one judge.[110]

It appears that senior court judges are ordinarily recruited from the pool of lower court judges, court clerks and personnel.[111] Further, new recruits are to have law degrees or be prepared to undertake the legal knowledge debt, whereas in the past, political credentials were the primary determinant of suitability for judicial office.[112] There is an evident trend away from morality being the basis of appointment to a combination of Party approval and technical competency. There is insufficient public information to know quite how this plays out across

106 Resolution 730/2004/NQ-UBTVQH11 of the Standing Committee of National Assembly dated 30 September 2004 on *Approving Position Salary Schedule, Position Allowance Schedule for Senior Executives of the State and Professional Salary Schedule for the Judiciary and the Procuracy*, Art. 1.

107 Salary level is increased by one unit after every three years of service, which entitles judges to an increased salary grade within the relevant salary schedule. Decree 204/2004/ND-CP of the Government dated 14 December 2004 on *Salary Regime for Cadres, Public Servants, Officials, and Armed Force Personnel*, Art. 7(1)(b1).

108 Decree 203/2004/ND-CP of the Government dated 14 December 2004 on Prescribing Minimum Salary Level, Art. 1.

109 Pip Nicholson, 2002, pp. 201-218.

110 Supreme People's Court Report, 2002, pp. 46-47 (in Vietnamese).

111 Interview by the author with 'Dung', 2001, and with 'Hung', 2001.

112 See Chapters 3 and 6.

the diverse courts that make up the Vietnamese court system, but there is no doubt that judges of lower courts are less technically able than those employed by senior courts in major centres such as Ho Chi Minh City and Hanoi.

Vietnamese judges are therefore officers and employees of the Party-State. Their qualifications are usually fairly limited. They live and work in a politically charged culture where the local Party cell of their employment controls their reemployment prospects. As noted earlier, the official documents relevant to courts, particularly *Resolution 8* of the Politburo, supports the organic relationship between Party and state institutions, including legal ones.

Shape of Court Work

As described, courts are charged with deciding cases, introducing implementing legislation, educating citizens and fostering and protecting the socialist state. The following provides an analysis of the volume of the courts' work, both in terms of the number of cases decided and their distribution between different jurisdictions. This enables speculation, based on emerging trends, of the growth in numbers of cases and nature of the courts' work. Further, an attempt is made to compare today's court work in these areas with court work in the North pre-unification to see how contemporary work patterns compare with judicial work practices of an earlier period. These issues are the focus of this section because the court's educational role has remained largely constant over the period.

It is noted that the jurisdiction of the court has greatly expanded since the pre-unification period. In 1994 an Economic Court was introduced and in 1996 an Administrative Court commenced. While neither of these new courts is particularly busy, they represent entirely new areas of work requiring judges to develop new areas of expertise. Thus the number of jurisdictions in which the court can potentially be active has increased.

Any attempt to access and meaningfully interpret the available data, however, is challenging. Court reports are not publicly available so access is limited and time consuming. More problematically, reported data is not presented in a uniform manner, which renders it difficult confidently to compare it from one year to another.[113] For example, from 2003, there is no breakdown between the numbers of civil and family cases. Instead they are aggregated and reported as a single category.[114] The accuracy of data is at times questionable; not only because of the usual reservations about the credibility of the reporting system, but also because it appears that the total number of cases reported does not always correspond to the sum of numbers reported periodically.[115]

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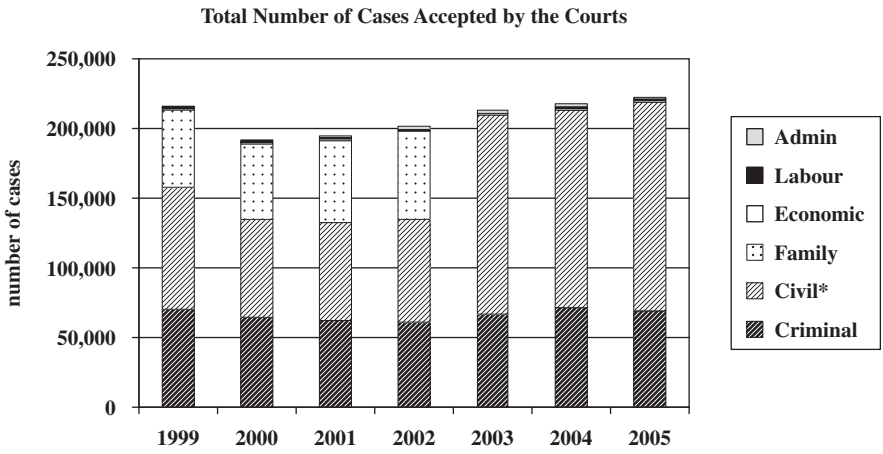
113 See also comment in Brian J.M. Quinn, 2002, p. 232.

114 See e.g. Supreme People's Court Report, 2005, p. 4 (in Vietnamese).

115 For example, in 2002, the number of cases in the criminal, civil, family, economic, labour and administrative jurisdictions totalled 201,570 cases rather than 201,473. The difference was even larger in 2001 when a discrepancy of 2,780 cases was identified.

19. Case Statistics in the Contemporary Period



* Because court statistics for 2003-2005 do not separate family and civil cases, family cases are included in civil cases for this period.

Above is a graph indicating the total caseload of the courts for the period 1999-2005.[116] Regrettably figures for 2003 are based on an approximation as a result of differing reports of the data for that year. This graph demonstrates that, except for a sudden drop of about 10.9% in the total number of cases from 1999 to 2000, overall case numbers have increased slowly but steadily since 2000, with an average 3.3% annual growth rate.

The decline in cases in 2000 is hard to explain. Examination of the data reveals a decrease of 23,410 cases, which is primarily attributable to a decrease in the number of criminal trials (by 4,964) and a striking fall in the number of civil cases (by 16,081 or 21.03%). No explanation for the reduction of criminal cases was provided in the Supreme Peoples' Court's annual reports, but it is suggested that the enactment of the Criminal Code in December 1999 impacted upon case numbers.[117]

The court reports suggest, albeit tacitly, that the sudden jump in civil cases reported in 1999 was exceptional. In particular, it is suggested that it could be due to the introduction of the Civil Code in 1997 and the subsequent issuing of various guiding resolutions and circulars in 1998 and 1999.[118] The Court report of 2000 suggests that these laws affected complicated land disputes, originating before 1991.[119]

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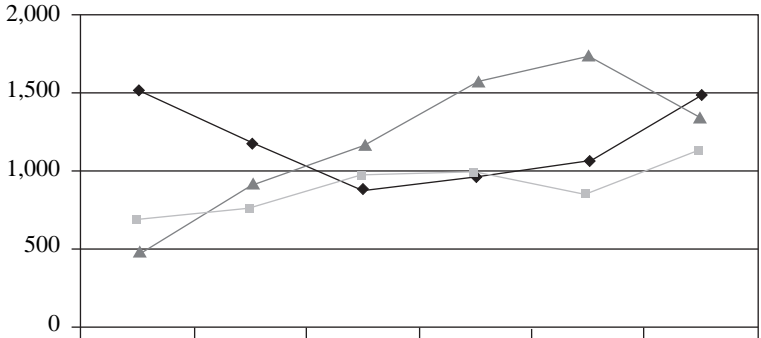
116 These numbers are drawn from the Supreme People's Court Reports to the National Assembly for the years 1999-2005. At the time of writing, statistics were not available for other years. Although Quinn, 2001, includes statistics for 1994, it is not possible to use them here as they run only to October of that year.

117 Supreme People's Court Report, 2001, p. 3 (in Vietnamese).

118 Supreme People's Court Report, 2000, pp. 32-33 (in Vietnamese).

119 *Ibid*.

20. Economic, Labour and Administrative Case Statistics in the Contemporary Period



	1999	2000	2001	2002	2004	2005
Economic	1514	1174	884	958	1051	1495
Labour	665	762	967	976	844	1129
Admin	471	913	1172	1595	1746	1361

* The detailed breakdown between economic, labour and administrative cases are not available from the 2003 Final Report and so figures for this period are not included. This data refers to the total of economic, labour and administrative cases accepted, appealed and revised by the courts.

In general, the composition of court work over the period 1999-2005 has not radically changed. Criminal cases consistently make up 30-34% of total caseload, while civil and family cases vary between 64-67%. The number of economic, labour and administrative cases remains insignificant, accounting for less than 2% of total court work. While economic and administrative case numbers have grown, the rate of growth has been very small since 2000. This undoubtedly indicates a failure of the new jurisdictions to attract any great volume of users.

The graph above makes clear that the number of labour and administrative cases litigated has greatly and consistently increased. For example, the number of these cases newly accepted in 2005 more than doubled those initiated in 1999. However, because the numbers of cases remain low, the rapid growth within these jurisdictions is not captured when analyzing the overall growth rate of court work.

The 'U-shaped' distribution of economic cases needs explanation. In 1999, there were a total of 1,514 economic cases (accepted, appealed and revised), and this number plunged to 884 cases in 2001, a decrease of 630 cases or 41.6%. The case numbers subsequently climbed back to 1,495 in 2005 (see also Table #21 below). The striking decrease in economic cases has been attributed to forum testing. The Economic Court was introduced in 1994 and while its work

21. Economic Case Numbers*

Economic cases	1999	2000	2001	2002	2004	2005
Trial	1280	960	690	732	885	1260
Appeal	207	193	174	193	155	219
Revised	27	21	20	33	11	16
Total	**1514**	**1174**	**884**	**958**	**1051**	**1495**

* The total figure for economic cases for the year 2003 is not available from the 2003 Final Report.

increased in its early years,[120] the overall picture indicates no great take-up of its jurisdiction. Vietnamese lawyers advise that ongoing problems defining that jurisdiction make it a hard forum to use.

Further, the Economic Court's unpopularity, more than ten years after its introduction, supports the argument that there are strong informal institutional networks substituting for the law in Vietnam.[121] One scholar argues that the informal networks do not bargain in the shadow of the law, rather bargaining occurs without the law shaping it.[122]

In summary, the volume of court work over the last six years has generally increased. In particular, the new labour and administrative courts have seen noticeable growth in case numbers. However, the number of economic cases has returned to original levels. The source of growth is primarily fluctuations in criminal, civil and family cases. Although based on a very small sample, this suggests that the volume of the courts' work has not radically increased over the last six years and it is unlikely that it will do so in the near future. It also suggests a lack of growth in litigation generally. Ironically, while economic court reform is a policy area attracting great interest domestically and internationally it has not exhibited much growth.

However, this tale does not explore the extent to which case numbers have increased since the war years or even since the early days of the unification of the country. Sadly it is very hard to obtain accurate data for this period. As noted in chapter nine, only unofficial statistics are available for the DRVN civil and criminal cases for the period 1963 to 1976. A meaningful comparison is very difficult given the jurisdictional changes over time; particularly after *doi moi*. In addition to fluctuating jurisdictions, the country's population has also increased and become much younger since the unification of the country in 1976.

120 Pip Nicholson and Nguyen Thi Minh, 2000, p. 13.
121 Nguyen Hien Quan, 2006.
122 *Ibid*.

22. Comparing the Old and the New: Statistics

Year	Total Number of Civil Cases Per 10,000 of the Population (Excluding Divorce Cases and Unclear whether Appeals are Included or Not)[123]	Total Number of Civil Cases (Excluding Divorce Cases and Unclear whether Appeals are Included or Not)
1965	6.3	11,660
1966	4.1	7,800
1967	2.7	5,231
1968	2.5	5,035
1969	2.7	5,578
1970	3	6,531
1971	3.3	7,304
	Total Number of Civil Cases Per 10,000 of the Population (Including Appeals)	**Total Number of Civil Cases excluding appeals, and excluding divorce cases and total number of civil cases including appeals but excluding divorce cases**[124]
1999	10 or 11.5 [using an official population of 76.3 million][125]	76,441 + (10,388 + 812) = 87,641
2000	7.7 or 8.9 [using an estimated population of 78.5 million][126]	60,360 + (9,095 + 548) = 70,003
2001	7.5 or 8.8 [using an estimated population of 78.68 million]	58,979 + (9,695 + 637) = 69,311
2002	7.9 or 9.1 [using an estimated population of 79.71 million][127]	64,315 + (8,457 + 651) = 73, 423

123 It is not clear whether appeals are included in the total number of civil cases for the pre-unification period. It is likely that they are as these figures were supplied as a total by an anonymous court clerk. However, it is not possible to be certain on this point. See earlier discussion about the Vietnamese statistics in Chapter 9.

124 The Annual Reports of the Supreme People's Courts for the period 1999 to 2002 provide figures for the number of civil appeals and civil revisions; these have been added to the number of civil trials to see what difference they make to the total.

125 Figure released by the General Statistics Office of Vietnam according to the 1999 census at http://www.gso.gov.vn/default_en.aspx?tabid=476&idmid=4 as of 7 August 2006.

126 Population statistic for 2000 was drawn from the World bank website at http://devdata.worldbank.org/external/CPProfile.asp?CCODE=VNM&PTYPE=CP as of 7 August 2006.

127 Population statistics for 2001 and 2002 were drawn from the official announcement of the General Statistics Office of Vietnam as reported in the website of the

To attempt a comparison of case numbers over this period, jurisdictional changes have been ignored and case numbers calculated per 10,000 of the population. Regrettably, it was not possible to obtain population statistics from one source over the period of 1999-2002 so population data is drawn from several credible sources.

This exercise, tainted as it is with grave uncertainties, indicates that the work of the courts on civil cases has roughly doubled since the unification of the country.[128] This is a large increase and suggests a greater role for the courts in the contemporary period. This is not to say that Vietnam's courts are busy compared with courts in other countries,[129] but to note the increase in the recourse to the courts within Vietnam in the contemporary period. In part, this may be explained by the end of the war. But it is unlikely that this is the whole story. Instead, it suggests that more people are prepared to go to courts voluntarily, in turn suggesting, at the very least, a preparedness to test the newly fashioned civil courts.

In addition to resolving cases, the Supreme People's Court is required to reform laws and implement laws necessary to the implementation of more general legal instruments. A study of LAWDATA (the National Assembly database of Vietnamese law) indicates that, while this function of the courts has remained constant over time, the Supreme People's Court has become much more legislatively active in recent times (see Appendix Seven). In particular, a search of LAWDATA over the period 1945 to 2003 suggests that the Supreme People's Court has produced many more decisions (*quyet dinh*), circulars (*thong tu*), official letters (*cong van*) and resolutions (*nghi quyet*) in the 1990s than in the thirty years between 1960 and 1990.[130]

The substantial increase in the Supreme People's Court's legislative activity has been in evidence throughout the 1990s, particularly after the constitutional changes introduced in 1992. This suggests several things. First, the role and relevance of the courts, and law more generally, have been emerging over the last decade.[131] Secondly, although the legislation relating to courts might not indicate a great shift in court roles and responsibilities, there is evidence of

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Embassy of Vietnam in the United States at http://viet.vietnamembassy.us/tintuc/story.php?d=20021016101956 as of 7 August 2006.

128 In particular, the unofficial nature of the pre-unification statistics, the changing jurisdiction and the lack of clarity about how many of the civil cases are in fact appeals of earlier decisions.

129 See Chapter 9, pp. 184-189. As noted previously, my earlier statistical analysis could also be criticized for a cavalier attitude to jurisdictional differences as between the DRVN and USSR. However, the crude exercise suggested that Vietnamese during the war period were generally much less litigious than their Soviet counterparts.

130 Not all 'official letters' issued by the SPC appear on LAWDATA. It would appear that letters relating to specific cases have not been included on the database.

131 This has to be balanced against findings by both Per Bergling and John McMillan and Christopher Woodruff that suggest that use of the courts is rarely contemplated by those in commercial disputes. John McMillan and Christopher Woodruff, 1999, pp. 637-658 and Per Bergling, 1999.

new patterns of behaviour. More particularly, the courts are now more active in contributing to the formation of implementing laws, perhaps in turn reflecting the greater emphasis on law as the basis of judging.

The Supreme People's Court's Leadership Role

Since 1959, the Supreme People's Court has been responsible for guiding the work of lower courts.[132] This has always been considered a significant function and it is perhaps even more the case today. In recent times, grave concerns have been expressed about the abilities of lower court judges. In 2002, the National Assembly refused to endorse a proposed reform to increase the criminal jurisdiction of district courts on the basis that judges at this level were incapable of handling more complex cases.[133] The vision for instigating regional courts set out in *Resolution 59* is aimed at reducing the impact of poor district courts on local communities.

However, how the Supreme People's Court handles its leadership role has not remained constant. In particular, litigants' use of appeals today suggests that this is one method by which the senior courts influence decision making. For example, in 2005, approximately 24.57% of resolved criminal cases went on appeal.[134] In the same period, 17.38% of economic cases, 11.29% of civil cases and 18.32% of labour cases went on appeal. The most appeals were lodged within the administrative courts with 60.5% of administrative cases going on appeal.[135]

Further, the Supreme People's Court plays a far greater advisory role today in the work of lower courts. As noted, the contemporary Supreme People's Court is much more proactive in the drafting of subordinate legislation (Appendix Seven). Much of this is enacted to guide lower courts. The Supreme People's Court has also increased the number of official letters which respond to local court inquiries on how to determine specific cases. In 2002, 38 guidance letters on technical matters and 'hundreds' of other official letters to lower courts and other organizations were produced.[136]

As noted in chapter six, the Supreme People's Court's 'guiding' work of lower courts in the 1960s and 1970s had been carried out through an annual conference and articles published in the Supreme People's Court's Journal, (*Tap San Tu Phap* (*Justice Journal*) renamed *Tap San Toa An Nhan Dan Toi Cao* (*Supreme People's Court Journal*) in 1972). The use of conferences and journals continues today, augmented by the use of similar fact summaries (*tong*

132 See Chapter 6.
133 See AFP 14 June 2001, circulated on vnnews-1 on 14 June 2001.
134 Supreme People's Court Report, 2005, p. 2 (in Vietnamese).
135 *Ibid*., pp. 4-6.
136 Supreme People's Court Report, 2003, p. 10 (in Vietnamese).

ket chuyen de).[137] The limited available evidence suggests these are used mostly in civil and economic cases.[138]

In chapter six it was also noted that the early socialist courts were actively encouraged to seek advice from relevant local authorities to determine cases.[139] More specifically, courts were advised to seek advice from the local VCP committee. Today's Supreme People's Court reports do not refer local courts to VCP committees. Instead the reports of 1999, 2000 and 2001 state that local courts are encouraged to seek the assistance of the Supreme People's Court staff.

Finally, increasing the role of the Supreme People's Court in the selection of provincial and district court judges may also enable the Court more scope to appoint judges sympathetic and responsive to centrally-based leadership.

These new trends, coupled with the most recent reforms that re-emphasize the leadership role of the Supreme People's Court, suggest that the contemporary court system has endorsed the Supreme People's Court as the most significant guide in determining cases, subject to the guidance it receives itself from the National Assembly. In addition, the Supreme Peoples' Court has been entrusted with developing implementing documents (in effect subordinate legislation and practice notes). However, it is important not to overstate the leadership role of the Court. The take-up of the reforms needs to be understood in the context of entrenched regionalism and the dearth of technical legal skills within courts.

This chapter does not argue that the decisions of the Court are becoming increasingly legalistic or that they will become so in the short term.[140] Rather, it suggests that the bases of judgments may ultimately reflect more consistency as lower courts come to echo the strategies and inclinations of higher courts, even if that strategy is to determine cases on the basis of 'reason and sentiment in carrying out the law' (*ly va tinh trong viec chap hanh phap luat*).

Propaganda and the Courts

As noted earlier, courts still have the responsibility to inculcate Party-State loyalty, to encourage people to live according to law and to contribute to the struggle to prevent and combat crimes and offences.[141] In addition, a part of the courts' propagandist function has traditionally been to foster loyalty to Vietnam

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137 John Gillespie, 2003, p. 36.

138 *Ibid*. In 2004, both the Japanese International Development Agency (JICA) and the Australian International Aid Agency (AusAID) decided to work with the Supreme People's Court to introduce Economic Court case summaries (JICA) and a Bench Book (AusAID).

139 See Supreme People's Court Report, 1977, pp. 50-51 (in Vietnamese).

140 John Gillespie, 2003, pp. 29-36. Gillespie argues that judges are still motivated to resolve cases by 'reason and sentiment in carrying out the law' (*ly va tinh trong viec chap hanh phap luat*).

141 *Law on the Organization of People's Courts*, 06/20002/L/CTN dated 2 April 2002, Article 1.

and to help eradicate social evils. Traditionally this was done by press coverage and the use of mobile courts.[142]

Traditionally the practice of mobile courts was used especially for criminal cases where court hearings were held in factories and housing estates before workers and neighbours. For example, in 1964 the Court Journal reported the use of over 600 mobile court hearings before more than 20,000 people.[143] This practice continues into the contemporary period. There were approximately 1,877 mobile hearings in 2003,[144] and more than 2,000 and 2,500 mobile court hearings in each of 2004[145] and 2005[146] respectively. The Supreme People's Court openly acknowledges the educational and deterrent use of mobile courts, using them to increase legal awareness among the broader population and involve the public in the prevention of criminal activities.[147]

The courts have radically increased their use of the press to promote greater awareness of the types of cases that come before them and how they are determined.[148] It is therefore suggested that much of the courts' propagandist work is today carried out by using the media (radio, television and print media) to report on cases.

The press has itself taken a keen interest in reporting court news. There is today regular reporting of court cases not only in the police daily, *Cong An Nhan Dan*, but also in the business and labour press. For example, the *Saigon Daily Times* created its first page dedicated to reporting law and business in 1996.[149]

Vietnamese media remains state-controlled.[150] Yet commentators have noted that only the uninformed characterize the media as rigidly and consistently controlled by the Party-State.[151] While there is little doubt that the court uses/manipulates the press,[152] individuals also use the courts to press legal claims and run defences, as do emerging associations and 'lobbyists.'[153] Without taking up

142 See Chapter 6, pp. 129-132.
143 Supreme People's Court Report, 1964, p. 8 (in Vietnamese).
144 Supreme People's Court Report, 2003, p. 4 reported 1500 hearings for the first 9 months of 2003. Also Supreme People's Court Report, 4 May 2004, p. 3 reported 754 mobile court hearings for Quarter IV 2003 and Quarter I 2004 (in Vietnamese).
145 Supreme People's Court Report, 2004, p. 3 (in Vietnamese).
146 Supreme People's Court Report, 2005, p. 3 (in Vietnamese).
147 *Ibid*.
148 Examples of newspapers where court work is regularly reported include: *Nhan Dan, Saigon Daily Times, Lao Dong, Cong An Nhan Dan, Quan Doi Nhan Dan, Saigon Giai Phong*.
149 The paper appointed a legally qualified reporter to work part-time on law and business news, Nguyen Hien Quan. Nguyen Hien Quan wrote regularly for a page devoted to reporting news of economic cases.
150 For a discussion on the limits of press freedom see Human Rights Watch, 2000, pp. 14-18.
151 Russell Hiang-Khng Heng, 2001, pp. 213-237 and Mark Sidel, 1998 (1), pp. 97-119.
152 See the discussion of the propagandist function of the courts historically in Chapter 6.
153 Mark Sidel, 1998 (1), pp. 97-119. More recently, Vietnamese lawyers have advised the author that media campaigns about the moral strength of dedendants are essential to pleas in mitigation for drug cases.

the issue of the delicate court-media relationship mediated by the Party-State, it should be noted that this set of relationships is complex and the balance of power between media, courts and the Party-State is dynamic according to the issues and parties involved.

In addition to the courts' promotion of laws and their role in their application, the Ministry of Justice and local government today have an increased role in both disseminating legal documents and explaining the role and function of laws and legal institutions. Targets have been set requiring 100% of schools, agencies and state enterprises and 100% of communes, wards and district townships to have a 'law bookcase' by 2007 and 2005 respectively.[154] This initiative reflects a state commitment to see the laws more widely disseminated and made available to the public. This policy signifies a shift in two important respects. First, more agencies today are expected to contribute to the dissemination of legal knowledge. Secondly, the laws themselves and not just the theatres in which they are given effect (such as mobile courts) are expected to be accessible to Vietnamese citizens.

Interpreting Change

When taking a snapshot of the work of the courts between 1959 and 1974, analysis was based on media reports and interviews with an anecdotal sample of high-school educated Vietnamese based in Hanoi. In recent times there have been more detailed studies of perceptions of courts. In 2003, a nationwide survey was commissioned by the United Nations Development Program (UNDP) to investigate Vietnamese citizens' access to justice. A part of the survey explored citizens' awareness of, access to and confidence in courts in the contemporary period.[155] In addition, three academic projects have characterized business perceptions of the legal system, and courts within it, since the introduction of *doi moi* in 1986.[156] Finally, human rights groups regularly publish perceptions of the legal system generally which implicitly criticize courts.[157]

The UNDP's *Access to Justice in Vietnam: Survey from a people's perspective*, reported in May 2004 on the results of a survey of 1000 Vietnamese citizens spread over six provinces (urban, rural and mountainous) and seeking to capture diversity in employment, education, gender, age, ethnicity and religion and socio-economic groups.[158] In its opening comments, the UNDP report notes that the survey work was contracted out to an unnamed private consultancy and therefore the UNDP 'cannot guarantee the accuracy of the data'.[159] Despite the

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154 Decision No. 584/2002/QD-BTP *Promulgating the Action Program of the Judicial Service for the 2002-2007 Period*, dated 25 December 2002, Chap. IV, Art 6.
155 UNDP, 2004.
156 Per Bergling, 1999, and John McMillan & Christopher Woodruff, 1999 and Nguyen Hien Quan, 2006.
157 See for example, Human Rights Watch, 2000, pp. 14-18.
158 UNDP, 2004, Annex A, p. 20.
159 *Ibid*., p. 1.

disclaimer accompanying the report, there is no other survey offering the breadth or the depth of this work, comprising as it did 98 questions and proceeding by personal interview.[160]

The report notes that citizens' awareness of the Vietnamese court system varied greatly. In particular, it was noted that the higher the income the higher the probability that citizens were aware of the Vietnamese courts. 42% of those with an income between 8-12 million dong a year (low salary or roughly equivalent to US $533-US $800) were unaware of the existence of the courts. Of those interviewed with an income above 60 million dong/year (high salary or roughly equivalent to US $4,000), only 9% were unaware of the courts. A correlation between geographical location of the interviewees and knowledge of courts was also discerned, with 51% in mountainous areas, 36% in rural areas and 10% in urban areas claiming to be unaware of courts.[161] In effect, those in rural or mountainous areas or with low incomes were least likely to be aware of courts.

This survey confirms the case-related data cited earlier indicating the very low usage of the courts within Vietnam. Only 6% indicated that they had ever had recourse to Vietnamese courts.[162] Court usage also varied greatly according to location. 9% of urban dwellers and 8% of rural dwellers claimed that they had used courts, while only 1% of those living in mountainous areas indicated they had been to court.[163] In short, Vietnamese rarely use the court system to settle their disputes. This finding is strikingly consistent with a study of 259 privately owned manufacturing firms in Hanoi and Ho Chi Minh City between 1995 and 1997 ('the McMillan and Woodruff study'),[164] which found that only 9% were of the view that 'a court or other government agency could help to resolve a dispute.'[165] Further, where the dispute involved quality of goods, only 2% of those interviewed said they would go to court.[166]

A recent study of contractual arrangements in Vietnam by Nguyen Hien Quan also illustrates this pattern.[167] Although Nguyen's survey is smaller in scale than the McMillan and Woodruff study, it highlights the general aversion of businesses to formal dispute resolution. Nguyen's interviewees consider that litigation has a damaging effect on business relationships and creates an undesirable reputation for litigious businesses in the market.[168] Only one of the thirty one merchants interviewed, the head of a legal department of a large state owned enterprise, reported using legal processes and courts to resolve contractual disputes. In part this can be explained by state entities strategically using courts to shift blame

160 *Ibid*., Annex A, p. 20.
161 *Ibid*., p. 7.
162 *Ibid*., p. 11.
163 *Ibid*., p. 11.
164 John McMillan and Christopher Woodruff 1999, p. 639.
165 *Ibid*., p. 641.
166 *Ibid*.
167 Nguyen Hien Quan, 2006, Chapter 4.
168 *Ibid*., p. 70. See also McMillan and Woodruff, 1999, p. 646.

from their executives.[169] In addition, others have suggested that state entities can more readily expect favourable decisions from courts and thus there is greater strategic advantage in their use of them.

Perhaps low court usage may be at least partly explained by the low confidence in the courts also identified in the UNDP Report. This UNDP survey asked three questions to investigate confidence in the court system and 38% of interviewees chose not to answer them.[170] Nevertheless, and based on the available responses, it is suggested that rural Vietnamese had least confidence in obtaining just and fair results from courts (29%) while their urban (44%) and mountainous (37%) counterparts remained more optimistic that court decisions would be just and fair.[171] There was no noteworthy correlation with income level and perception of the fairness of Vietnamese courts.[172]

Bergling's study of 40 local Vietnamese businesses indicates that in the main they distrusted courts because they are state controlled and technically incompetent and the laws themselves are fragmented and hard to interpret.[173] In addition, Nguyen suggests that the limited role of the courts in resolving disputes is attributable to the failure of the formal contract law system.[174]

A recent article by Nguyen Hung Quang and Steiner argues – from the lawyers' perspective – that the bureaucratic nature and incompetence of the courts has constrained the development of lawyers as a profession.[175] Nguyen and Steiner also contend that the continuing military and political influence on the court system have contributed to the public's general resentment of lawyers.[176] They cite the courts' practice of denying lawyers' participation in the investigative stages of judicial proceedings (despite laws that provide otherwise) and the writing of pre-determined judgments before trials as further undermining the role of the nascent profession in Vietnam. These factors, they argue, have often reduced the lawyers' role to that of a 'broker' (*nguoi moi gioi*) working to maintain good relationships between the litigants and the court.[177]

As noted previously, there is a variety of factors that can be adduced to explain the low court usage in Vietnam such as corruption (see below), lack of familiarity, expense, the marginal role of law generally and a lack of confidence in the technical capacity of judicial officers. However, the UNDP report coupled with the commercial sector surveys and Nguyen and Steiner's research suggests that, to this day, Vietnamese prefer to resolve disputes informally and not invoke

169 Nguyen Hien Quan, 2006, p. 71.
170 UNDP, 2004, p. 15. It was interviewees from mountainous regions and low income groups who were most loath to answer these questions.
171 *Ibid*.
172 *Ibid*.
173 Per Bergling, 1999, pp. 136-146.
174 Nguyen Hien Quan, 2006. Chapter 5.
175 Nguyen Hung Quang and Kerstin Steiner, 2005, pp. 197-201.
176 *Ibid*., 198.
177 *Ibid*., pp. 199-200.

the assistance of state-run courts.[178] In this respect, although the numbers using courts may be increasing, trust and confidence in courts remain low.

Corruption in Contemporary Vietnam

This book does not offer a study of Vietnamese corruption, nor of court corruption in Vietnam.[179] However, no one disputes that corruption exists within the Vietnamese courts, although there are varying views on what constitutes corruption.[180] At the very least, it is not uncommon for judges to meet with plaintiffs before and during trials. Vietnamese advocates proclaim that their relationship with the judiciary is vitally important to how a case will be resolved and that they must be able to appeal to judges beyond the court room.[181] In addition, advocates note that it is not uncommon to invoke relationships and, on occasions, offer monetary or other material incentives to judges and other court officials to obtain a favourable decision.

In addition, the courts will often be advised by Party-State institutions, particularly high Party functionaries, who are not directly involved in the litigation. Whether this is corruption is a moot point. But it certainly confirms that judicial decision-making is less than transparent. For example, in the notorious Nam Cam corruption trial in Ho Chi Minh City in 2003 the court was allegedly in regular contact with a central Party committee, taking its advice on how the case should proceed.[182]

As noted earlier, the state has, in recent times, frowned upon corrupt judicial practice. It has legislated to clarify what judges must not do. It has also introduced legislation requiring the court to compensate parties where 'judges or jurors (previously translated as people's assessors) while performing their tasks and exercising their powers, cause damage'.[183] In turn, judges and jurors are personally liable to compensate the court if a compensatory payment is ordered.[184] How this change to the law will take effect is not yet clear, but it remains as a clear signal that the Party-State wishes to see judges and people's assessors taking responsibility for their decision-making.

The question remains whether corruption has increased since 1945, or more particularly, whether it has increased since the introduction of the *doi moi* policies.

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178 *Ibid*., UNDP Report, 2004, p. 19 and McMillan and Woodruff, 1999, pp. 640-641.

179 See Penelope (Pip) Nicholson, 2001.

180 It is also beyond the purview of this book to embark on a discussion of what constitutes corruption.

181 Interview by the author with 'Hien', 6 October 2003. See also facts of the Bui Van Tham corruption case set out in Pip Nicholson, 2002.

182 Comments made on the basis of anonymity by Vietnamese official in 2003.

183 *Law on the Organization of People's Courts*, 06/20002/L/CTN dated 2 April 2002 Art. 37 (4) and *Ordinance on Judges and Jurors of People's Courts*, 11 October 2002, Art. 8.

184 *Ibid*.

Interviews with state functionaries suggest the official position is that corruption has increased since the introduction of the socialist-oriented market economy in 1986. However, as noted in chapter four, judicial practices in the early years of the DRVN (1945-1959) suggest that influence was brought to bear on court decisions, particularly from those hoping to invoke personal favours. The lack of transparency around corruption precludes the effective analysis of judicial corruption, all the more so when the definition of corruption is itself dynamic. At this stage it is too early to assume that a marketization of the economy has increased corruption. What has become clearer is that the state is prepared to prosecute at least some judges and clerks for corruption.

VI. The Future of the Vietnamese Courts?

Sixty years on, the Vietnamese court system remains a Party-led institution. The Party approves court staffing appointments, and through its extensive network of bureaucrats retains control over the direction of court decisions and court leadership generally. Salaries remain low and terms of office short. However, the courts today are not the same as the courts of the North in pre-unified Vietnam.

This chapter has shown that the Party-State envisages a more technically competent judiciary that is largely appointed by the Supreme People's Court. Further, that the package of recently introduced reforms promotes, at least in theory, the Supreme People's Court as the body responsible for managing courts. The Supreme People's Court will negotiate the number of judges needed and select personnel. In addition, the Supreme People's Court has been charged with taking a lead role in introducing implementing legislation. Appendix Seven indicates that the Supreme People's Court actively gives effect to that role.

Yet these many reforms are introduced into a firmly entrenched court system, which has operated for over fifty years. The Party continues to lead on policy issues affecting courts (including how to determine high-profile cases) and selection of court personnel. Therefore the current reforms ought not be interpreted as creating an 'independent' (Western-style rule of law) court system. The Vietnamese court construction projects indicate a strengthening of court self-management with the Supreme People's Court taking a lead role. Further, the role of the Ministry of Justice is diminishing. But streamlining accountability between legal institutions, increasing judicial competency, court management of budgets and introducing new courts continues to enable the Vietnamese courts to be led and accountable to the Party-State of the day: officially to the National Assembly and concurrently to the Party leadership. The extent to which the reforms foreshadowed in *Resolution 49* actually alter this model remain to be seen, but at this stage the current patterns and practices seem relatively secure.

APPENDICES

Appendix 1
Sources and this Study

This appendix considers sources available to a study of Vietnamese courts and also notes the unavailability of some sources. Part One discusses the issue of language generally, and translation in particular. Part two considers written sources available to inform a study of the Vietnamese court system (Vietnamese, English and French), while part three surveys the sources informing the Soviet comparison. Part four discusses the interviews conducted and the questions used for the oral history component of this study.

I. Language and the Study

The author possesses basic Vietnamese language skills, but the bulk of the Vietnamese-language research was conducted with the assistance of an interpreter/translator.[1] Native Vietnamese speakers fluent in English checked all the translations undertaken by the author. The author worked directly with English and French materials, being able to read both. Appendix three is a glossary of Vietnamese-English legal terms. Given the lack of Vietnamese-English legal dictionaries,[2] this appendix ensures readers understand the translations adopted

1 Throughout this study one of three interpreters were used. All interpreters are law graduates and worked for the same private organization. This meant there was excellent continuity and a great deal of discussion about which terms to use and why between the interpreters and the author.

2 At the time of writing there was no Vietnamese-English legal dictionary existing that had been written as a result of a collaboration between English speakers and Vietnamese speakers from the north of Vietnam. There are dictionaries that were generated in the Republic of Vietnam. For example, Nguyen Danh Thanh, 1965. There is also a dictionary of trade terms, *Legal Dictionary English-Vietnamese: Finance, Trade, Customs, Insurance, Law, Administration*, undated. One of the most freely available dictionaries of International Law is *English-Vietnamese Dictionary of Modern International Trade and Finance*, 1996. Perhaps one of the better contemporary law dictionaries for sale in Vietnam since 1997 is *A Dictionary of Economics and Commerce – English-Vietnamese*, 1997. None of these greatly assists a researcher of Vietnamese legal history.

here. Over time certain terms have been differently translated and it is essential to ensure that the terms used here are clearly recognized.[3]

II. Written Sources (Vietnamese, English and French)

This section briefly considers the sources (in Vietnamese, English and French), which inform this study.[4] Vietnamese sources are considered first, followed by an explanation of the use of English language translations of Vietnamese material, particularly those provided by the Foreign Broadcast Information Service (FBIS) and the Joint Publications Research Service (JPRS).[5] Subsequently the English and French language sources are introduced.

Vietnamese Language Sources

The four constitutions of Vietnam are a starting point in any analysis of Vietnamese law and legal culture. Supplementing these is *Cong Bao*, the Official Gazette of the Vietnamese National Assembly, a compilation of Vietnamese laws since 1945. However, not all legislation promulgated was published in *Cong Bao*. Estimates vary about how many of the Vietnamese laws were excluded, but one expert puts it as high as thirty per cent of the passed decrees, ordinances, circulars and regulations between 1945 and 1975.[6] Put another way, all laws of the National Assembly are in *Cong Bao*, nearly all laws of the Standing Committee of the National Assembly are also published, but perhaps just under two thirds of government decrees enacted over the period of this study were published in the official record.[7]

Appendix four is a list of relevant legislation, some of which was in *Cong Bao*. But most of the pre 1986 legislation came from the Ministry of Justice Library, its database and the publications *Tong thuat chung ket qua chinh nghien cuu de tai* (*Final Abstract of the Principal Research*) – a retrospective Vietnamese

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3 Bernard Fall provided a useful glossary in his study of the government of the Viet Minh Regime. See Bernard Fall, 1956, pp. 185-187.

4 Russian language sources also exist concerned with the Vietnamese court system. Here they are only used when cited by English speaking commentators or when translated. For an example of the former category of Russian-source based scholarship see George Ginsbergs, 1973, p. 980.

5 FBIS and JPRS are available at the Menzies Library at the Australian National University and at the Australian National Library, Canberra, Australia. Neither of these organizations has a complete set of either publication so it is necessary to work with both and piece together as much information as possible. The Library of Congress has the most complete hard copy of the translations.

6 Interview by the author with 'Thai', Ministry of Justice, Hanoi, 21 November 1998.

7 Obviously it is very hard to estimate what was not published as this cannot be clearly ascertained. It is suggested that increasingly more of the decrees and circulars are contained in *Cong Bao*. Interview by the author with 'Thai', Ministry of Justice, Hanoi, 21 November 1998.

court history)[8] and *Tap luat le ve tu-phap* (*Collection of Laws about Justice*).[9] Contemporary legislation was available on LAWDATA, the National Assembly's subscription-service searchable database of Vietnamese legislation.

In addition, there are documents generated by the courts, the Ministry of Justice and the National Assembly indicating how courts operated and what their priorities were over the period. This publication relies heavily on the journal of the Supreme People's Court. By reading this journal the researcher gains an insight into the policy choices faced by the highest court and perceives how it viewed its role. This journal was published under the title *Tap San Tu Phap* (*Justice Journal*) from 1961 to 1971.[10] In 1972 the name changed to *Tap San Toa An Nhan dan* (*Journal of the People's Court*). In 1990 the journal was again renamed becoming *Tap Chi Toa An Nhan dan* or *People's Court Journal.*[11] Finally the Supreme People's Court issued an annual report and this was also used to gather an impression of the priorities and challenges faced by the courts after 1959.

Nhan dan (*People's Daily*) is Vietnam's official newspaper. As with the court publications, the researcher has to recognize that *Nhan dan* is a state-sanctioned publication and highly censored. Articles from *Nhan dan* were variously sourced from searches made of the paper in the National Library, Hanoi, and translations by American agencies.

English Language Sources

FBIS, originally known as the Foreign Broadcast Monitoring Service, was established by the United States in 1941.[12] Five years later its functions were transferred to the Central Intelligence Agency (CIA). The translated reports derive from overseas print and radio sources. Vietnamese sources used by FBIS include the *Vietnam News Agency* daily broadcasts. Initially researchers using FBIS were unable to cite it as a source, however since 1970 citation has been allowed.[13] The criteria for selecting articles are not publicized, although it seems that the aim of the service was to keep American officials up to date with world news and the local responses and reporting of that news.

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8 A judge of the Institute of Juridical Science at the Supreme People's Court provided a copy of this draft retrospective history of the courts in 1997. It comprizes court-related legislation – although by no means all court-related statutes – and several chapters looking at the history of Vietnamese courts.

9 This publication was Located in the School of Oriental and African Studies Library, London School of Economics, London.

10 The Court previously published the *Legal Journal of Indochina* (in French), but after 1954 this publication was only issued for the southern court system in Saigon.

11 Other legal journals consulted here include *Nha Nuoc va Phap Luat* (*State and Law*, first edition in 1959) and *Luat Hoc* (*Law Journal*).

12 Robert L. Solso, 1986, pp. 203-208. This article gives a brief history of the development of FBIS.

13 Morehead, and Mary Feltzer, 1992, pp. 374-375.

JPRS, the Joint Publications Research Service, commenced operations in 1957 as a central translation agency responding to any American federal government agency request for translated material. In the late 1960s, JPRS became a part of FBIS and therefore a part of the Central Intelligence Agency. Why JPRS lost its independence is not clear.[14] JPRS coordinates the translation of material by arranging for native speakers to translate articles as required.[15] Since the material translated is chosen because it meets an agency's request, it is possibly more eclectically selected than the FBIS material. Unlike FBIS it does not appear to have a general brief that requires it to cover world news.

A series of filters therefore operates before either the Vietnamese publication or the translated text arrives on the desk of the researcher. In both cases the source is first published in Vietnam, clearly going through several censors before it reaches the Vietnamese. It is then either sought by an American agency or deemed newsworthy by FBIS before it is included in either the FBIS or JPRS translations series. There still seems to be an abundance of material that, at the very least, can assist the researcher to identify the chronology of events and the players in those events.[16] In this case it is possible to sketch court development and to see how the state officially portrayed courts or dispute resolution by relying on FBIS and JPRS material-especially after 1957 when JPRS started translating. Further, the working of the Vietnamese media is illuminated. For example, the reporting on Vietnamese criminal convictions does not focus on legal argument, nor on the court process, but rather on the guilt of the accused and the 'antisocialist' nature of the crime. These points have been more fully discussed when considering the propagandist role of the courts in chapter six.

The Vietnam News Agency published *Vietnam News* in Bangkok between 1948 and 1954.[17] This series, published in English, reflected an effort by the DRVN to keep the rest of the world informed of its initiatives,[18] although its reporting of legal matters was sparse.

Unlike the Western press, a lot of the material reported in the Vietnamese press is ministerial speeches and Party cadres' announcements. Therefore media reports give the researcher access to primary material as the actual reports are taken from the speakers' own texts rather than reworked by a journalist. Ironically, the highly censored press is an excellent conduit of the government's and Party's official propaganda.

Vietnam Law and Legal Forum and *La Revue De Droit Vietnamien* were introduced in September 1994 and 1995 respectively. *Vietnam Law and Legal*

14 David Allen, 1982, p. 91.

15 *Ibid.* Allen points out it is unclear how much other translation work is carried out, but not publicized, by federal agencies.

16 Solso argues that the quality of translation of FBIS USSR Daily Reports is quite high and alleges this on the basis of comparisons he has made between the translated text and the original. Robert L. Solso, 1986, p. 205.

17 These papers were located at the Kroch Library, University of Cornell, New York State, United States of America.

18 It has been published almost continually, breaking at peak moments in the war, since 1948.

Forum, published by the Vietnam News Agency, contains a careful mix of both commercial law developments and commentary on constitutional changes and institutional development in Vietnam. The *Vietnamese Law Journal,* (*La Revue De Droit Vietnamien* – a bilingual publication in French and English) published by the Vietnamese Lawyers Association, has a greater emphasis on research topics. Both journals are very informative, with articles written by members of the government and the universities. In each case they publish material reflecting on Vietnam's legal history.

The Foreign Languages Publishing House (FLPH), based in Hanoi, is another English language source of Vietnam-related publications. The FLPH has an eclectic publications list, largely published to inform visitors to Vietnam of the advances made by the Party over the years.[19] Interesting examples include an endorsed Vietnamese history by Nguyen Khac Vien entitled *Vietnam a Long History.* In addition to scholarly works the FLPH regularly issues reports after each Communist Party National Congress in a volume of collected papers.

French Sources

There are numerous texts about law in Indochina, by French authors. These are of some use when exploring subsequent court development.[20] For example, two French theses were identified that assisted the research.[21]

Gaps in Sources

In addition to the available sources, written and oral sources have referred to material that has not been released to the author. For example, why is the legislation establishing the courts available, but not all the directives issued by the Supreme People's Court to all lower courts?[22] The only answer appears to be that the Vietnamese are still wary of Western researchers (and possibly even Vietnamese researchers). Certainly, colleagues and friends made material available to me that was not in the public domain, such as samples of the Court's directives, but systematic exploration of these sources was not possible.

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19 *Foreign Languages Publishing House* 1997. This is a list of everything published by the Foreign Languages Publishing House until 1997.

20 Arthur Girault, 1927-1930, See Vols. 1-3; Pierre Lafont, 1963; Leopold Sabatier, 1877; P.L.F. Philastre, 1967 (reprint of 1909 edition); P. Giran, 1908.

21 Maurice Barruel, 1905 and Andre Ordonneau, 1909.

22 The internal memorandum from the senior courts to the lower courts were sought from the Institute of Juridical Science, Supreme People's Court, from retired judges and also from the Ministry of Justice in December 1995 and August 1996. At all points the researcher was told that the lower courts were independent of higher courts and then no documentation was produced. References to this material exist in Russian commentary on the development of the court system. V. Kolesnikov, 1961, p. 36, translated by JPRS. Interviewees also made references to it.

III. Sources for the Soviet Comparison

In the main, this study of the Soviet system of dispute resolution relies on English-language scholarship and translations. This is possible because of the vast literature describing the Soviet legal system: a literature that includes translations of trial transcript, legislation, commentary and Soviet jurisprudence. Russian language materials were not consulted except in translation, with the exception of the 1936 RSFSR Constitution, which could not be obtained in English.[23] Appendix five sets out a list of Soviet court-related legislation.

The preponderance of relevant research, but certainly not all, by Westerners on the Soviet legal system consulted here was undertaken in the United States of America.[24] While at first blush American scholarship might appear an odd source, for throughout the period of this study the United States and the Soviet Union were estranged, closer reading of the scholarship indicated reservations about its use could be put to one side. In the main the material falls in to the immersion category of cross-cultural scholarship that Curran so passionately defends.[25] Russian-speaking jurists, who spent long periods in the USSR, compiled most of the scholarship.

IV. Interviews and the research

Early in the Vietnamese research it became clear that that Supreme Peoples' Court did not wish to grant a foreign researcher access to case notes and files.[26] It was also clear that very little court reporting takes place via the press.[27] Therefore interviews were undertaken with some of those involved in courts during the period of the study. Later additional interviews were sought from those who

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23 A later version of this Constitution published in 1968 was located, but it was necessary to check this against the earlier Russian version and this was done with the assistance of the Robert Lagerburg of the Russian Language Department, of the University of Melbourne in 2000.

24 W.E. Butler, 1988, pp. 99-100. Here Butler talks of leadership provided to Soviet legal studies by Harold J. Berman in the 1950s and 1960s. The editors of this publication outline the work of American researchers on the Soviet legal system. What emerges is a picture of a very tightly integrated nucleus of researchers working in North America (at Harvard and at Columbia University's Parker School of Foreign and Comparative Law) on the Soviet legal system. Prominent figures in this group include: Harold Berman, John Hazard, William Butler, John Quigley, George Ginsbergs and Peter Maggs.

25 Vivian Grosswald Curran, 1998.

26 One should not assume that a Vietnamese researcher would necessarily gain official access to this information although, if well connected, they might be able to source it unofficially.

27 The author undertook a search of *Nhan dan* over the period 1945 to 1976 and its publication of court reporting was extremely scant. In recent times, there has been a sharp increase in court reporting. See for example, *Nhan Dan, Saigon Daily Times, Lao Dong, Cong An Nhan Dan, Quan Doi Nhan Dan, Saigon Giai Phong*. The issue of increased reporting is taken up in Chapter 12.

study the courts today, and those who have current court-related expertise. The questionnaire used for initial interviews is included at the end of this Appendix. Follow-up interviews were granted without the need for formal questions. In addition, ten Hanoians were interviewed for their perceptions of court over the period of the study. Ultimately for cultural reasons an interpreter had to conduct these interviews on my behalf. There are problems with interviews conducted by agents, but the choice was either to proceed down this path or to abandon the inquiry.

The decision to interview also reflected the age of the main players in Vietnamese court development, most of whom are now in their seventies, eighties and nineties. Meetings were sought and obtained with several retired judges and jurists in 1996 and 1997.

The interviews with legal officers, conducted in 1996 and 1997, were largely with work colleagues and friends of the lawyer Phan Huu Chi, who worked as a public prosecutor at the Hanoi First Instance Court from 1945 to 1960 and then at the Supreme People's Court until 1979.[28] At that time he moved to establish the Hanoi School of Advanced Legal Studies, before becoming a senior adviser to the government. In 1992, the author worked with a private law firm, LEADCO, established by Phan Huu Chi. While working with LEADCO I also collaborated with his son, Phan Nguyen Toan, on an exchange of information about legal systems. From 1992 until 1995 the researcher and Toan kept in touch, and it is largely through this friendship that informal meetings with people connected with the early court system in Vietnam were arranged. Of the nine interviewed in 1996, five were friends of Phan Huu Chi, who agreed to assist as a result of that connection.[29] They were in the main, retired legal officers who met in friendship, and not professionally. No money was paid for the interviews. Instead, legal materials were sent back to Vietnam with a letter of thanks for the interview. The remaining interviews were gained with the assistance of colleagues at the Hanoi Law School and the Institute of State and Law.[30]

Pseudonyms are used throughout this publication. Below I supply a list of pseudonyms used and a deliberately general description of the occupation of the interviewee. Several of those interviewed were happy to have their names disclosed, and these are also listed below. Relatively full accounts were offered by a group of retired judges, two describing their experience working in courts and tribunals in the forties and fifties. An interviewee, an academic from a Vietnamese University, assisted with a detailed account of the development

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28 Phan Huu Chi died in 1995.

29 I had met some of those interviewed in 1996 and 1997 in 1992. Where I have notes from those earlier meetings and where the interviewee authorized use of their material, the earlier material is referred to as relevant.

30 The Institute of State and Law's Institute of Comparative Law hosted my 1995 visit to Hanoi. The Institute of State and Law studies the role of law and legal institutions in Vietnam. The Hanoi Law School was the first formally established school of law in a united Vietnam. For a discussion of these institutions see Mark Sidel, 1993, pp. 221-259.

of the structure of the court system and the courts' role and function in the emerging state. These interviews provide invaluable insights into the operation of the courts and their structure.

Some of those approached for interviews were cautious in their responses.[31] The author identified a greater openness in discussions about the court system in 1997 than in 1996. This may reflect changes to the court system occurring at this time, such as the introduction of the administrative and labour courts in 1996.[32] Alternatively it may reflect a growing confidence in the relationship evolving between the author and the interviewees.

Some of the interviewees of 1996 set out to find answers to the questions they could not answer themselves,[33] while others spoke only about what they knew. For example, 'Van', a senior judge, referred briefly to legislative developments during this period affecting the court system.[34] He did not refer to committees or informal courts with decision-making authority. There are many possible explanations for his caution and strictly legalistic responses to the questions. It may reflect a different level of trust as the author was not introduced to him by mutual friends. It may reflect his current formal position within the existing court hierarchy. It may be a matter of personal style.

As 'Tuan' of the Institute of State and Law stated 'There are various opinions about the courts and it is important to meet with those in the courts and out of them to hear it all'.[35] At no stage was the author able officially to interview people who had used the court system. Therefore to interview for perceptions of the court and its work ten educated people who had lived in Hanoi during the period of the study were approached. The author attended the first of these interviews with the interpreter. It became clear that the interviewee was uncomfortable. The author left the room and the interview continued with the interpreter alone. After this experience the interpreter suggested that he conduct interviews on behalf of the author.

This discussion of perceptions of the Vietnamese court system confines itself to in-country Vietnamese perceptions, noting the particular pressures that attached to those consenting to comment. Those Vietnamese residing outside Vietnam frequently allege that it is impossible to obtain a critical account when interviewing residents of Vietnam. As this study demonstrates, that is not the case, although

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31 Interviews by the author with: 'Tung', Hanoi, December 1995; 'Duc', National Assembly, Hanoi, December 1995; and Phan Nguyen Toan, private lawyer, 1995.

32 In 1995, Phan Nguyen Toan, a lawyer in private practice in Hanoi, advised the author against interviewing about the period 1945-1960. In 1996, Toan indicated that it might be easier to interview about the period 1945 to 1960. The author had attempted to interview about this period in both 1995 and 1996, and found that Toan's assessment of access to information about this period had been correct. It was easier to talk of this period in 1996.

33 'Minh', Hanoi Law University, interviewed on two occasions in 1996 in Hanoi, is the best example of this approach to the questions.

34 Interview by the author with 'Van', Supreme People's Court, Hanoi, 4 September 1996.

35 Interview by the author with 'Tuan', Hanoi, 3 September 1996.

it is perhaps realistic to assume that Vietnamese citizens who are resident in Vietnam cannot be as critical or as open as some other groups.[36] This situation arises when there is one Party rule and that Party also has substantial control over the court system and debates about the need for reform.[37]

Of course, oral history poses its own problems. How does one interview across a spectrum of values and ideas? How does the researcher know what to ask? Is it not inevitable that the researcher's questions will reflect his/her perception of the issues? It is argued that self-consciousness in the research assisted to maximize the benefit of this method of reconstructing events, while also identifying the limitations.

V. Interviewee Details

Where permission to cite a source was given, the full name of the person interviewed is provided. The list below uses a single fictitious name for those interviewed who did not wish to be identified.

Judges and Researchers

'Tung', Judge and researcher, Supreme People's Court
19 December 1995 and 1996.
'Van', Judge and researcher, Supreme People's Court
4 September 1996
'Quang', Retired judge and researcher, Supreme People's Court
5 September 1996 and 30 June 1997
'Tri', Retired judge of the district, provincial and central court systems and legal researcher
20 September 1996 and 30 June 1997

Legal Officials

'Duc', Legal officer at the National Assembly
19 December 1995
'Vinh', Ministry of Justice
5 September 1996
'Thai', Ministry of Justice
21 November 1998

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36 There are various groups of Vietnamese living abroad who agitate for the reform of the Vietnamese government. Some maintain that working with the existing government will bring about democracy as it is conceived in their adoptive countries. Others advocate the complete isolation of the regime.

37 Robert Templer, 1998, pp. 153-176. In this chapter Templer chronicles the difficulties faced by the local press.

'Vu', Assessor with the Hanoi People's Court
23 September 1996
'Tuan', Institute of State and Law.
28 August 1996 and 3 September 1996
'Minh', Hanoi Law University
12 September 1996 and 17 September 1996
'Huong', Arbitration official
17 June 1997
'Nhuong', Arbitration official
17 June 1997
'Hung', State-employed Lawyer
February, 2001
'Hoa', Court official
December 2004

Private Lawyers

'Chi', Barrister at the Supreme People's Court and Director
5 September 1996 and 17 June 1997
'Bob', Foreign lawyer
24 June 1997
'Ly Anh', Vietnamese barrister
1999
'Phong', Vietnamese lawyer
21 November 1998, 10 and 12 December 2000
'Dung', Vietnamese Lawyer
2001
'Hien', Vietnamese Barrister
6 October 2003

Those who Agreed to be Named

Le Hong Hang, Vice Rector, Hanoi Law School
September 1996 and November 1998
Nguyen Hung Quang, Director, NH Quang and Associates
Regular consultation over the period 1995-1998
Nguyen Mai Phuong, Solicitor, LEADCO
September 1996, June 1997 and November 1998
Nguyen Quoc Hoan, Lecturer, Hanoi Law University
21 November 1998
Pham Quang Hieu, Solicitor, LEADCO
September 1996
Phan Huu Thu, Vice Director of the Judicial Training Centre
14 November 1998

Phan Nguyen Toan, Managing Partner, LEADCO Solicitors
Regular consultation over the period 1995-1998
Vu Khac Xuong, Chief Judge, Administrative Court, Hanoi
1 July 1997

Interview Questions

There are two sets of questions used here. Jurists/lawyers were asked for their perceptions of the court system (see below). Follow-up interviews were then held with this same group. The interviewees did not ask for questions in advance of these second interviews. The second group of questions set out below were relied upon when interviewing ten educated lay people residing in Hanoi for their impression of the courts.

Questions for Jurists on their Perception of the Vietnamese Court System[38]

A. Structure

1. What, if any, relevance to the courts have the chapters of the Constitutions dealing with the courts? Constitutional debates that consider the courts?
2. Could you outline for me the major developments to the structure and organization of the courts in Democratic Republic of Vietnam and the Socialist Republic of Vietnam over the period 1945-1995? The introduction of the *Law on the Organization of Courts* in 1960 had what consequence for the court system? What did the subsequent changes initiate? 1976? 1981? 1992? Amendments of 1993?
3. Are there are other bodies that had responsibilities for decision-making that affected the masses? Role of Tribunals?
4. Are the tribunals, such as the Land and Military Tribunals, seen as independent from the court system or as a part of it? (Is the use of the term court system appropriate?)

B. Jurisdiction

5. When do the various courts have jurisdiction to hear cases? Is there a test or can anyone present a case before the people's assessors and judges?
   Civil Division?
   Criminal Division?
   Economic Division
   Appeal Division?
   Other divisions? (family? administrative?)
   Central Military Court?

38 The term 'jurist' is used as not all those interviewed were in fact qualified lawyers.

6. How widely known are the different divisions of the Supreme People's Court? Local courts?
7. On what basis can an appeal be lodged from any of these divisions?

C. Personnel – Appointment and Removal of Judges

8. How are judges appointed to the Supreme People's Court, for how long are they appointed and how are they removed?
9. What are the appointment and removal procedures for judges in the local and provincial courts?

D. Role and Function of the Courts

10. How would you characterize the role and function of the Supreme People's Court? Other courts? (Propaganda?)

Follow Up Questions for jurists

Follow up questions were not formally documented. In each case those that agreed to second interviews expanded upon answers received in the first interview. The role of War Administration Committee was a particular focus.

Questions to Educated Hanoians on their Perception of the Vietnamese Court System

A. Interviewee Background

1. How old were you between 1954 and 1975?
2. Where did you live during this period?
3. What languages do you speak?
4. What was your occupation?

B. Perceptions of the Courts

5. Were you aware that there was a court system in the DRVN in 1945? In 1959? In 1965? In 1975? When do you think you first realized this?
6. Did you ever go to court for a family, civil or economic matter? If you went to court, when was that? Please describe your court case.
7. Did anyone you know ever go to court?
8. If no one went to court, how were disputes resolved?
9. Was the court system responsible for trying criminals?
10. How did you learn what you know about the court system? Papers? Journals? Radio? Talking to people?

C. Perceptions of the Supreme People's Court

11. Did you know there was a Supreme People's Court? If you were aware of it during this period, when did you become aware of its existence? In 1945? In 1959? In 1965? In 1975?

12. What did you understand the SPC's role to be?
13. How did you learn about the SPC?

D. General

14. Would you or your family go to court today if you had to settle a dispute or would you use other methods to resolve your case?
15. Have you or any one you know ever used *To hoa giai* in the period 1945 to 1976?

Appendix 2
Dispute Resolution in Context: A Short History of the Democratic Republic of Vietnam 1945-1976

In August 1945, following a period of severe famine, the Ho Chi Minh-led *Viet Minh* seized power from the Japanese who had occupied Vietnam, with the unwilling cooperation of the French, since 9 March 1945.[1] The Declaration of Independence occurred in Puginier Square, now called Ba Dinh square, an area adjacent to the Governor General's Palace, on 2 September 1945.[2] On 6 January 1946 elections were held for the first Vietnamese National Assembly.[3] The Assembly met on 2 March 1946 and after congratulating the Provisional Revolutionary Government on its success, appointed a cabinet led by Ho Chi Minh. A few days later, on 6 March, Ho Chi Minh and Jean Sainteny[4] signed a preliminary agreement acknowledging North Vietnam as a 'free state' within the French Union.[5] A limited legislative program was initiated[6] and on 9 November 1946 the first Constitution of the Democratic Republic of Vietnam was approved. In 1947 the new provisional government decamped from its location just out of Hanoi to Tan Trao in Viet Bac to wage its war of resistance.[7]

From the end of 1946 attempts to reconcile French and nationalist interests in northern Vietnam were interrupted by armed conflict. Gradually resistance grew

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1 *Viet Minh* is an abbreviation of *Viet Nam Doc Lap Dong Minh Hoi* frequently translated as Viet Nam League for Independence. See Bernard Fall, 1956, p. 187.

2 David Marr, 1995(2), pp. 221-231. This paper describes the pageantry and politics of Vietnam's first Independence Day. For a more general history see also David G. Marr, 1995(1), pp. 529-537. See also William Duiker, 2000, pp. 322-324.

3 As Ngo Duc Manh observes the members of the National Assembly were not all elected as those elected decided to add seventy seats without going through another peoples' vote. Ngo Duc Manh, 1994, p. 27.

4 Jean Sainteny was a French intelligence officer involved in the resolution of the French role in Indochina. David G. Marr, 1995(1), p. xix.

5 David Marr, 1992.

6 Only 13 pieces of legislation were passed by the National Assembly in the period 1946-1960 according to Ngo Duc Manh, 1994, p. 27. However, this figure is misleading as numerous Administrative Committees and Ministries were active legislators during these war years with many of their laws included in *Cong Bao* (*The Official Gazette*) for this period.

7 William Duiker, 2000, pp. 399-400.

to the French presence, with military strategies changing quite substantially over the period 1945 to 1948.[8] In 1950 both the People's Republic of China and the Soviet Union officially recognized the Democratic Republic of Vietnam.[9] In 1954, at Dien Bien Phu, the Vietnamese had a decisive victory over the French. This culminated in the Geneva Agreement of 21 July 1954 and with that the division of Vietnam at the seventeenth parallel. The Ho Chi Minh-led administration moved back to the capital, Hanoi. The agreement indicated that free elections were to be held throughout Vietnam in 1956 to determine the future of the whole country. The election did not eventuate.

In addition to foreign policy matters, the DRVN faced opposition within its own borders. Not only did Ho Chi Minh's cabinet have to cope with the exigencies of distance, poor communication and little experience of governing, they had to develop policies that were attractive to the people and easy to communicate.[10] The debate about the extent to which Ho Chi Minh was a committed communist or Marxist is on-going.[11] As will be shown the decrees establishing state-sanctioned decision making bodies were introduced as early as 1945 and regularly amended indicating the priority with which the issue of state-sanctioned decision-making was addressed.

The Democratic Republic of Vietnam initiated a series of rectification campaigns against those who did not wish to support the *Viet Minh*. As Truong Chinh notes, 'fighting the enemy and crushing the national traitors are two tasks which must be undertaken simultaneously.'[12] In particular the land campaign was waged between 1953 and 1956. The land policies aimed to effect a redistribution of land from landowners to land tillers and to educate the people on political matters.[13] In 1956 the Vietnam Workers' Party publicly condemned the harsh-

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8 Greg Lockhart, 1989, pp. 183-221.

9 It was only after the revolution of 1949 that the Chinese ceased to pose a threat to Vietnam's northern borders.

10 Bernard Fall, 1956, pp. 3-8.

11 This study does not enter into the debate about Ho Chi Minh's politics. Huynh Kim Khanh, 1982, pp. 57-63 discusses the early politics of Nguyen Ai Quoc, known later as Ho Chi Minh. Jean Lacouture's biography, 1968, is another account of the debates about whether Uncle Ho was a committed communist, a political pragmatist, a nationalist or a combination of these. Bernard Fall, 1967, also notes the difficulty of ascribing a single political agenda to Ho Chi Minh. Fall argues that Ho Chi Minh 'never quite reconciled within himself the at times conflicting demands of over-all communist strategy and his own love for his country' at page ix. Ho Chi Minh himself explains his adoption of Marxist ideals in an article he wrote for a Soviet publication in 1960, 'The Path that led me to Leninism', 1994, pp. 250-252. See also William Duiker, 2000.

12 Truong Chinh, 'The Resistance Will Win' in 1947, 1994, p. 108.

13 Ho Chi Minh, 1962, p. 404; *Ordinance No. 150-SL Issued on 12 April 1953 On the Establishment of Special People's Courts in Places where the People are Encouraged and Promoted to work out the Land Policies*; Truong Chinh, 'Implementing the Land Reform' report Delivered at the First National Conference of the Viet Nam Workers' Party 14-23 November 1953, 1994, pp. 442-528; An excellent discussion of the land reform period is located in Christine White's doctoral thesis, *Agrarian Reform*

ness of the land reform campaign and Truong Chinh resigned as Secretary of the Vietnam Workers' Party marking the introduction of new policies.[14]

In 1955 the Party announced the establishment of the Vietnam Fatherland Front (*Mat tran to quoc Viet Nam*), arguably to attract the support of nationalists in the South to ensure that a united group could support the Vietnam Workers' Party to isolate and defeat the American 'imperialists'.[15] This organization claimed to 'represent all segments of the population, all shades of political opinions, and sectional interests of both North and South Vietnam'. Its role officially was to act as a conduit of ideas and aspirations of the people to the Party. However, with very tight control over the senior leadership of the Vietnam Fatherland Front, the Vietnam Workers' Party was well placed to control the association.[16]

Between 1957 and 1960 the DRVN waged the rectification campaign against bourgeois ideology.[17] Other policy initiatives of this period include the reduction of land rents, the collectivization of agriculture, the introduction of literacy campaigns and the shift to state or central planning.[18]

In the South Ngo Dinh Diem assumed power in 1955.[19] He refused to hold the national elections outlined in the Geneva Agreement, and declared the Republic of Vietnam with himself as President. The French left Vietnam in 1956 and Diem signed a joint communiqué with President Eisenhower condemning communism.

In January 1959 the Vietnam Workers' Party decided to pursue a policy of revolutionary struggle in the South of Vietnam.[20] After 1959 the war moved from guerrilla attacks in the South by the DRVN Army to a coordinated movement to liberate the South lead by the National Liberation Front established in December 1960. On 8 March 1965 the first American combat troops arrived, taking American involvement beyond endorsement of the strategic hamlet policies of 1962 and an advisory role.[21] In 1966 the first bombing of the north of

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and National Liberation in the Vietnamese Revolution: 1920-1957, 1981. See also: J. Price Gittinger, 1957, pp. 113-126, p. 114; Hoang Van Chi, 1964; D. Gareth Porter, 1972; Edwin Moise, 1976, pp. 70-92.

14 Vietnam Delegation in France Information Service, 1949, p. 18.

15 Wells C. Klein. and Marjorie Weiner, 1959, pp. 395-396; Robert F. Turner, 1975, p. 140. Here Turner cites Hoang Quoc Viet's characterization of the role of the Vietnam Fatherland Front.

16 Robert F. Turner, 1975, pp. 127-139.

17 Oskar Weggel, 1986, p. 415.

18 For a general discussion of economic change throughout this period see Melanie Beresford, 1997, pp. 179-204. For a more detailed analysis see Adam Fforde and Suzanne H. Paine, 1987; and Adam Fforde and Stefan de Vylder, 1996.

19 For an excellent discussion of the government and policies of the Republic of Vietnam until 1959 see Wells C. Klein and Marjorie Weiner, 1959, pp. 315-387.

20 David Marr, 1992. See also David G. Marr, 1995(1); this elegant and masterful history considers the role of the French, the Japanese and the various Vietnamese factions in the period leading up to the Declaration of Independence on 2 September 1945.

21 For a description of the strategic hamlet policy see Stanley Karnow, 1985, pp. 255-258.

Vietnam occurred. In 1968 the North successfully launched the Tet offensive, capturing Hue and many other villages, before ultimately having to withdraw. Despite peace talks in Paris in May 1968, the war continued. On 27 January 1973 the 'Agreement on Ending the War and Restoring Peace in Vietnam' was signed in Paris and all American troops left Vietnam by the end of March 1973. On 30 April 1975 The People's Liberation Armed Forces took control of Saigon and declared the independence of the South.

While the war raged throughout this period, the government of the North consolidated its position and attempted to organize its administrative apparatus. National elections were held in May 1960, only the second national elections held since 1945.[22] At the Third National Congress, held in Hanoi in September 1960, the administration restated its twin objectives of unifying the country and constructing socialism in the north.

Ho Chi Minh died in September 1969. In 1971 the Fourth national elections were held.[23] The Fourth National Congress of the Vietnam Workers' Party, at which a change of name was adopted resulting in the creation of the Vietnamese Communist Party, opened on 14 December 1976. Elections for a new National Assembly were held on 25 April 1976, signifying the unification of the country.

Over the period of this study Vietnamese relations with both the USSR and China were to have major implications for the establishment of its system of dispute resolution.[24] Vietnamese leaders were originally schooled in Moscow (in the 1920s and 1930s) and later in China (1940s and 1950s).[25] Both recognized the DRVN in 1950. Before proceeding it is important to note that Vietnam was not a mere satellite reflecting the communist doctrine of its larger and more powerful comrades. There is little question that Vietnam's communism reflected the particularities of its history and context.[26] Perhaps the most notable of these were the mixing of nationalism and communism in the DRVN,[27] and Vietnam's recurring need for foreign aid to fund its protracted war.[28] Throughout the period the Vietnam Workers' Party vigorously debated its relations with these

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He describes the policy as a 'plan to corral peasants into armed stockades, thereby depriving the Vietcong of their support': at p. 255.

22 For a description of the background of the successful candidates see *The Democratic Republic of Viet Nam*, 1960, pp. 46-47.

23 United States Mission in Vietnam, 1971.

24 Turner points out that DRVN-USSR relations and DRVN-China relations should not be seen as a see saw. That is, it should not be assumed that the DRVN moved from one to the other. At some times Vietnam was not on good terms with either as in 1971 and 1972 for example. Robert F. Turner, 1975, p. 292.

25 *Ibid.*, pp. 290-291.

26 *Ibid.*, pp. 279-280. See also Georges Boudarel, 1980, pp. 137-138.

27 See Bernard Fall, 1956, pp. 3-8.

28 Georges Boudarel, 1980, pp. 152-154. Boudarel argues that it was the need for aid more than any other single cause that affected how the DRVN managed its Sino-Soviet relations.

two communist superpowers and at times the feuds over the relative merits of Maoist and Leninist communism were divisive.[29]

China was particularly supportive of the DRVN between 1950 and 1956, contributing substantial assistance to the land reform campaign.[30] In many ways the land reform campaign was modelled on the earlier Chinese experience.[31] However during the mid to late 1950s the DRVN developed closer ties with the USSR. This was at least partly attributable to the unacceptability of the land reform campaign in Vietnam and the need to reduce Chinese influence. China's relative preoccupation with domestic affairs[32] also reduced Chinese influence, as did the increase in aid available to the DRVN from the USSR.[33] With the advent of the Sino-Soviet split in the early 1960s, Vietnam was forced to side with either the USSR or China, whereas previously Vietnam had been able to foster relationships with both countries.

In 1962 the DRVN openly supported China,[34] as a result of being unable to sign a total test ban treaty. This one-sided support was relatively short lived.[35] By 1965, with the entry of the USA into the war, the DRVN government needed greater assistance than was forthcoming from the Chinese and looked to the Soviet Union for it.[36] Commentators argue that during the most intense period of the Vietnam War, between 1965 and 1973, the DRVN attempted to foster good relations with both the USSR and China.[37] It is suggested this policy worked for the Vietnamese until the USA visited both China and the USSR in the early 1970s at which point Vietnam was relatively isolated. Yet the fact that the DRVN sought to maintain good relations with both over this period does not detract from the fact that from mid 1965 Vietnam was dependent upon substantial aid from the USSR.

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29 *Ibid.*, p. 146.
30 Robert F. Turner, 1975, pp. 131-146.
31 *Ibid.*, pp. 132-134.
32 China was at this time, in the midst of the Great Leap Forward, experiencing its own difficulties.
33 Georges Boudarel, 1980, p. 145. Boudarel reports that in 1955-1957 the USSR provided $119.5 million in aid, but by 1958-1960 it had provided $159 million. Over this same period Chinese aid had halved.
34 Bui Tin, 1995, pp. 43-46. This is an insider's account of the Party's split on this issue. See also Robert F. Turner, 1975, pp. 290-304.
35 *Ibid.*, pp. 296-297.
36 Georges Boudarel, 1980, pp. 148-149. Boudarel notes in particular that the Chinese call for 'self-sufficiency' in revolutionary wars acted as a catalyst to the DRVN to resume relations with the USSR.
37 Robert F. Turner, 1975, pp. 300-301.

Appendix 3
Vietnamese-English Glossary of Court-Related Terms

ban thanh tra đặc biệt	special inspection department or commission
ban tư pháp xã	communal justice board *ban* is section, board or committee according to the dictionary and *tư pháp* is justice of private law. In this context justice is more appropriate. *xã* means commune. Hence the translation communal justice board or Justice Board/Section of the commune
ban thường vụ	standing committee
báo cáo	report
biên bản hòa giải	conciliation minute of the conciliation council of district court
cấp kỳ	administration division
cấp tỉnh	provincial level
cấp liên khu	inter-zone level
chánh án	tribunal president or chief judge
chính phủ	government
chỉ thị	directive issued by various levels of the system of government, for example by a minister
chưởng lý	old word meaning public prosecutor also referred to as the procuracy. Word used today is *kiểm sát*
chưởng lý tòa thượng thẩm	public prosecutor of the appeals court
công an	police force
công báo	official gazette
công an có nhiệm vụ	police officer with responsibilities / duties of a police officer, also written a*s nhiệm vụ của công an*

Table (*cont.*)

công tố viên	prosecutor
công văn	official letter/notice of decision
giám đốc	to inspect or review director or executive
giám đốc thẩm	judicial review where a case reviewed as a result of a perception of a procedural error. The error can be alleged by either the court or either party – literally means director of judges
giám sát	to check or supervise
hiến pháp	constitution
hội đồng hòa giải	conciliation council at district court level
hội đồng nhân dân	people's council
hội đồng trọng tài hàng hải Việt Nam	foreign maritime arbitration council
hội đồng trọng tài ngoại thương	foreign trade arbitration council
hội đồng thẩm phán	judges board/board of judges [some call this the judicial council]
hội đồng (toàn thể) thẩm phán nhân dân tối cao	the board/council (of all) of judges at the supreme people's court
hội thẩm nhân dân	people's assessors – sometimes translated as jurors
hướng dẫn	instruction/guidelines from any authorized agency
huyện	district in the country-side
kiểm sát	procuracy/procurate
kiểm sát viên	procurator
kiểm tra	to inspect or control
luật	law generally or also law issued by the national assembly
luật dân sự	civil law
luật hình sự	criminal law
nghị định	decree
nghị quyết	resolution issued by any type of congress, for example party or people's council
nguyên tắc pháp chế xã hội chủ nghĩa	principle of socialist legality
nguyên tắc tập trung dân chủ	principle of democratic centralism

Table (*cont.*)

nhân viên chấp hành	executor of documents – *nhân viên* is employee and *chấp hành* means to execute. May also be executive officer. More recently likely to be written as *nhân viên thi hành* or *chấp hành viên*
phán quyết	judgment
pháp lệnh	ordinance
phó chánh án	vice tribunal president or vice chief judge
phúc thẩm	appeal to the next level or second instance of a case by either party or by a state organ
phúc thẩm kháng cáo	appeal raised by the parties
phúc thẩm kháng nghị	appeal raised by a state organ such as the court itself or the procuracy
quận	district in a city
quy chế or quy định	regulations
quốc hội	national assembly
quyết định	decisions issued by either a minister or any other authorized body
sắc lệnh	old word literally translated as order. Now usually translated as decree
sơ thẩm	first instance of a case/original hearing
sơ thẩm đồng thời chung thẩm	rehearing of a case at first instance following a decision of the appeal court ordering a retrial
tái thẩm	retrial because of new evidence discovered by party or the state organ only held at the supreme people's court
thẩm phán	judge
thẩm quyền	jurisdiction
thông tư	circular
thường vụ quốc hội	standing committee of the national assembly
tỉnh	province
tòa án	court or tribunal – the words are used synonymously by the Vietnamese. But interpreters from different cultures (such as France and Australia) approach the words reflecting their own understanding of bodies holding the power to determine disputes
tòa án binh	army court. This is a literal translation where *toa an* means court and *binh* means army

Table (*cont.*)

tòa án binh khu	zonal army court
tòa án binh tại mặt trận	army court at the front
tòa án binh tạm thời	temporary/provisional army court
tòa án binh tối cao	supreme army court
tòa án binh đặc biệt	special people's courts
tòa án lưu động tại mặt trận	mobile court at the front
tòa án miền núi	courts in mountainous areas
tòa án nhân dân cấp huyện	district people's court
tòa án nhân dân cấp tỉnh	provincial people's court
tòa án nhân dân đặc biệt	special people's court
tòa án nhân dân địa phương	local people's court
tòa án dân huyện	district people's court
tòa án nhân dân ở các khu vực tự trị	people's courts in the autonomous zones
tòa án nhân dân tỉnh + tên	name of (for example Ha Noi) provincial people''s court
tòa án nhân dân tối cao	supreme people's court
toà án quân pháp	military law court – literal translation is court (*toà án*), military (*quân*), and law (*pháp*). Note Bernard Fall translates this as military courts martial
toà án quân sự/ tòa quân sự	military court
toà án quân sự liên khu	inter-zone military court
tòa chuyên trách	specialized courts
tòa dân sự	civil court
tòa hình sự	criminal court
tòa phúc thẩm tòa án nhân dân tối cao	appeal court of the supreme people's court
toàn thể thẩm phán	judging staff or all judges
tòa thượng thẩm	appeal court – old word
tổ hòa giải	mediation
tư pháp xã	commune justice commission
tuyên truyền	propaganda
ủy ban hành chính	administrative committee
ủy ban kháng chiến cách mạng	revolutionary resistance committee

Table (*cont.*)

ủy ban kháng chiến hành chính	resistance administration committee
ủy ban nhân dân	people's committee
ủy ban thẩm phán	committee of judges at the provincial or supreme court levels. There is no committee of judges at the district people's court. Also called by some the commission of judges
uỷ ban thẩm phán tòa án nhân dân tối cao	committee (sometimes commission) of judges at the supreme people's court
việc tuyên truyền	propaganda work
xã	commune
xét xử	trial

Appendix 4
List of Democractic Republic of Vietnam (1945-1975) and Socialist Republic of Vietnam (1976-2006) Legislation Relevant to Dispute Resolution

Type	Authority	Date of Promulgation	Title
Order 33C	Chairman of the Revolutionary Government	13.09.1945	On the Establishment of the Military Courts
Order 37	Chairman of the Revolutionary Government	26.09.1945	On the Determination of Jurisdiction of Local Military Courts
Order 40	Chairman of the Revolutionary Government	29.09.1945	On the Establishment of Nha Trang's Military Court
Order 65	Chairman of the Revolutionary Government	22.11.1945	On the Organization of People's Councils and Administrative Committees at Villages, Districts, Provinces and Regions
Decree 63		22.11.1945	On the Organization of People's Councils and Administrative Committees
Decree 64		23.11.1945	On the Establishment of a Special Inspection Agency
Decree 37		01.12.1945	On the Organization of the Ministry of Justice
Order 77	Chairman of the Revolutionary Government	21.12.1945	On the Organization of People's Councils and Administrative Committees at Provincial and Regional Cities

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Decree 77B		24.12.1945	Entrusting the Cochinchina People's Committee to Decide the Mitigation of Punishment in Article 3 of the Decree dated 13 September 1945 on the Establishment of the Military Courts
Order 77C	Chairman of the Revolutionary Government	28.12.1945	On the Establishment of the Military Court in Phan Thiet
Order 7	Chairman of the Government	15.01.1946	To Supplement Order 33C on the Establishment of Military Courts dated 13.09.1945
Order 13	Chairman of the Government	24.01.1946	On the Organization of Courts and Status of Judges
Order 21	Chairman of the Government	14.02.1946	On the Reorganization of Military Courts
Order 22B	Chairman of the Government	18.02.1946	Giving the Power of Justice to the Administrative Committee where an Independent Court is not established
Circular 82	Ministry of Justice	25.02.1946	To Determine the Application of the Order dated 14.02.1946
Circular 1000 NV/DL		20.03.1946	Minister of Interior to the Chairman of the Administrative Committees of the Middle Area (central zone)
Decree 104	Ministry of Justice	21.03.1946	On the Organization of Courts in the Middle Area
Order 43	Chairman of the Government	03.04.1946	On Three Regional Councils to Determine Jurisdiction between Military Courts, Special Courts and Normal Courts in Vietnam
Circular 135		05.04.1946	To Amend Articles 1 & 3 of Circular 82
Order 51	Chairman of the Government	17.04.1946	On Stipulating the Jurisdiction of Courts and Work Classification of Staff in the Courts
Decree 137		20.04.1946	On the Organization of Bac Ky Court
Circular 1264 NV/PC		25.04.1946	From the Minister of the Interior to the Chairman of Administrative Committees in the Northern Middle Area (central zone)

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Circular 146		04.05.1946	To Amend Articles 9 & 24 of Circular 82
Circular 1642-P/4		28.05.1946	About Jurisdiction of all Vietnamese Courts to deal with Commerce, Forestry, Trains and Counterfeit Money
Circular 166		08.06.1946	About Setting up Three First Instance Courts at Hoi An, Quang Ngai and Chau Ba Thuoc and Cancelling the First Instance Court at Ly Son (Quang Ngai)
Order 111	Chairman of the Government	28.06.1946	To Supplement Article 62 of Order 13 dated 24.01.1946 on Court Organization and Judges Status
Order 112	Chairman of the Government	28.06.1946	To Supplement Articles 23 & 44 of Order 51 dated 17.04.1946 on Stipulating the Jurisdiction of Courts and Work Classification of Staff in the Courts
Order 113	Chairman of the Government	28.06.1946	To Stipulate Court Fees
Circular 187		13.07.1946	Establishing the District Court at Dong Hy and Thai Nguyen
Circular 74/P4		29.07.1946	About Jurisdiction of the Commune Justice Committees, and Courts of First Instance and to Distinguish Invalid and Valid Petitions about Loss through War Damage
Order 163		23.08.1946	On Establishment of the Provisional Army Court in Hanoi
Decree 217	Government	13.09.1946	Establishing the Hai Duong Town First Instance Court
Order 190	Chairman of the Government	01.10.1946	About the Prosecution Jurisdiction of Courts
Constitution	National Assembly	09.11.1946	
Order 217	Chairman of the Government	22.11.1946	To Appoint Judges to Become Lawyers

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Direction 12B-NV-CT	Chairman of the Government	29.12.1946	About the Organization of Jurisdiction in Special Situations
Decree 5-DB	Government	01.01.1947	Temporarily Suspending the Case-Work of Appeal Courts
Order 19/SL	Chairman of the Government	16.02.1947	On the Establishment of the Army Court
Order 45/SL	Chairman of the Government	25.04.1947	On the Establishment of a Supreme Army Court
Decree 26-DB	Government	19.02.1947	About the Equal Division of Second Rank Court's Work in Two or Three Equal Divisions in Provinces with a War Situation and Obstructed Transportation
Inter – Circular 41-NV-TP-NgD		21.03.47	Construction of two Military Courts in Zone Two
Order 59/SL	Chairman of the Government	15.07.1947	On the Establishment of an Inter-Zone Army Court
Order 60/SL	Chairman of the Government	05.07.1947	On the Amendment of Article 11 of Order 19/SL dated 16 February 1947 On the Organization of Army Courts at the Front
Circular 64/TT		06.08.1947	On the Distinction between Army Courts and Military Courts
Circular 1528-P/4	Ministry of Justice		To Maintain Chief Justice of Supreme Court in Hanoi, Thuan Hoa and Saigon
Circular 693		25.09.1947	To Determine the New Interrelationship between War Resistance Administration Committees, Administrative Committees and Justice Departments
Circular 28-KC		08.02.1948	To Determine the Jurisdiction of Military Courts
Order 170-SL	Chairman of the Government	14.04.1948	On the Restructuring of Military Courts
Order 185-SL	Chairman of the Government	26.05.1948	To Determine Jurisdiction of all First Rank and Second Rank Courts

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Order 231-SL	Chairman of the Government	20.08.1948	On the Amendment of Order No 19/SL dated 16 February 1947 on the Establishment of Zonal Army Court
Order 254-SL	Chairman of the Government	19.11.1948	On the Re-organization of People's Committees during the Period of Resistance
Order 264-SL	Chairman of the Government	01.12.1948	To Supplement Order 163 dated 23.08.1946 about the Organization of Army Courts
Decree 83/KS		01.06.1949	On the Establishment of Two Military Courts in the Fourth Frontal Zone
Order 85/SL	Chairman of the Government	22.05.1950	On Reformation of Justice Mechanism and the Procedure Law
		22.05.1950	On Changing the Name of Preliminary Courts, Secondary Courts, Appeal Sentence Council and People's Assessors
Order 103 SL	Chairman of the Government	05.06.1950	On the Relationship between War Administration Committees and Other Specialized Bodies
Circular 289/P4	Ministry of Justice	4.10.1950	On the Working Manner of Provincial and District Courts
Order 151/SL	Chairman of the Government	17.11.1950	On the Assignment of People's Assessors and Members of Appeal Court in Special Cases
Order 155/SL	Chairman of the Government	17.11.1950	On Military Courts in the Inter-Zones
Order 156/SL	Chairman of the Government	17.11.1950	On the Organization of Inter-Zone People's Courts
Order 157/SL	Chairman of the Government	17.11.1950	On People's Courts in Temporary Enemy Occupied Zone
Order 158/SL	Chairman of the Government	17.11.1950	On the Assignment of Judges from Honoured Officials
Decree 133-TTg	Prime Minister	26.11.1951	On the Establishment of People's Courts in the Fifth Inter-Zone
Decree 134 TTg	Prime Minister	26.11.1951	On the Establishment of People's Courts in the Third Inter-Zone

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Order 150/SL	President	12.04.1953	On Establishment of Special People's Courts in an Area to Mobilize the Masses to Implement the Land Policy
Order 151/SL	President	12.04.1953	On Punishment of Landlords Who Fight against the Laws in an Area Where the Masses are Mobilized to Implement the Land Policy
Decree 264 TTg	Prime Minister	11.05.1953	Regulates in Detail the Laws of 12 April 1953 on Land Policies
Ordinance	Standing Committee of N/A	23.11.1953	To Establish a Special Court to Hear Cases against Corrupt Cadres
Circular 442	Prime Minister	19.01.1955	On the Way to Judge Death Penalty Cases
Order 233/SL	President	14.06.1955	To Amend Articles 3 & 4 of Order 150 – SL dated 12.04.1953
Circular 1458-HCTP	Ministry of Justice	19.08.1955	Providing for Two Levels of Judgment
Decree 634 TTg	Prime Minister	22.12.1955	On the Establishment of a Zonal Court in Ta Ngan
Order 012/SL	President	30.3.1957	On Changing the Name of Zonal People's and City People's Courts and Amending Adjudication Jurisdiction for Political Cases of People's Courts
Circular 2037-HCTP	Ministry of Justice	29.5.1957	Providing Details on How to Implement the Order Which Applies Two Levels of Judgment with regard to Political Cases
Circular 67-Vhh-HS	Ministry of Justice	12.6.1957	On Guiding the Judgment of Disorganizational Cases, Cases Violating Discipline, and Cases Violating Security Orders
Order 004	President	20.7.1957	On Elections to People's Councils and Administrative Committees
		29.04.1958	On the Organization of Local Organs of Authority
Decree 300-TTg	Prime Minister	14.8.1959	On People's Court Appeal Level
Decree 381-TTg	Prime Minister	20.10.1959	Stipulating Obligations of Powers of the Supreme People's Court

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Circular 92-TC	Supreme Court	11.11.1959	Providing Detailed Explanation of the Obligations and Powers of Appeal Courts in Hanoi, Hai Phong and Vinh
Constitution	National Assembly	01.01.1960	
Law	National Assembly	26.07.1960	On the Organization of People's Courts
Ordinance	Standing Committee of N/A	30.3.1961	Stipulating the Organization of Supreme People's Courts and Organization of Local People's Courts
Ordinance	Standing Committee of N/A	23.01.1961	On the Election of Members of People's Councils
Law	National Assembly	10.11.1962	On the Organization of People's Councils and Administrative Committees
Resolution 157 NQ-TVQH	Standing Committee of N/A	02.3.1963	Charter Stipulating Particulars of the Organization of People's Courts at all Levels in Viet Bac Autonomous Zone (Stipulated by the People's Council and adopted by the National Assembly)
Decision 185/ VQ-TVQH – of the SCNA	Standing Committee	09.07.1963	To Satisfy the Chapter of the People's Committee of Tay Bac Autonomous Zone Comprising Detailed Regulations for the People's Courts at All Levels within Tay Bac Autonomous Zone
Ordinance	Standing Committee of N/A	27.01.1970	To Amend Article 15 of the Ordinance of 30.3.1961 on the Election of Judges of Local People's Courts
Decree 75-CP	Government Council	14.04.1975	On the Charter of State Economic Arbitration Council
Order 01/SL/76 of C of M.		15.3.1976	On the Organization of People's Courts and the People's Procuracy
Constitution	National Assembly	19.12.1980	
Ordinance	Standing Committee of N/A	22.01.1981	To Amend Ordinance 1961 on the Election of Members of People's Councils

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Law	National Assembly	13.07.1981	On the Organization of People's Courts
Decree 24-HDBT	Council of Ministers	10.08.1981	To Amend Some Issues in the Organization of the State Arbitration Council
Circular 3831	Ministry of Justice	25/1/1983	Outlining the Work To Be Done by the Judicial Sector
Law	National Assembly	09.07.1983	On the Organization of People's Councils and People's Committees
Law	National Assembly	02.01.1984	On the Election of Members of People's Councils
Decree 62-HDBT	Council of Ministers	17.04.1984	Jurisdiction of Local State Arbitration Agencies
Decision 10/ HDBT	Council of Ministers	14/1/1985	Entrusting the People's Courts to Handle Labour Disputes
Circular 49-TT/PC	State Arbitration	03.12.1986	Guidance on Jurisdiction to Hear Disputes from Economic Contracts and Appeals
Resolution 814 NQ/HDNN7	State's Council	28.04.1987	Guidance on Organization and Operation of Sub-committees of People's Councils in Suburban Districts and Villages
Decision 190-QD/TT	Chair of State Arbitration	20.08.1988	Authorization for Provincial State Arbitration Agencies to Adjudicate Disputes from Economic Contracts
Law	National Assembly	04.01.1989	To Amend the Law on the Organization of People's Courts 1981
Law	National Assembly	11.07.1989	On the Election of Members of People's Councils
Law	National Assembly	11.07.1989	On the Organization of People's Councils and People's Committees
Ordinance	Standing Committee of N/A	10.01.1990	On Economic Arbitration
Decree 436-HDBT	Council of Ministers	22.12.1990	On the Organization of Economic Arbitration Agencies and Allowances for Arbitrators

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Decree 70-HDBT	Council of Ministers	25.03.1991	On Procedure for Resolution of Disputes from Economic Contracts
Decree 169-HDBT	Council of Ministers	25.05.1991	On Civil Servants
Constitution	National Assembly	18.04.1992	
Law	National Assembly	6.10.1992	On the Organization of People's Courts
Ordinance	Standing Committee of N/A	26.04.1993	On the Organization of Military Courts
Decision 204 TTg	Prime Minister	28/4/1993	On the Establishment of the Vietnam International Arbitration Centre
Resolution 37 NQ/UBTVQH9	Standing Committee of N/A	14.05.1993	To Explain Some Issues on the Implementation of Ordinance on Judges and People's Assessors
Ordinance	Standing Committee of N/A	26.05.1993	On Judges and People's Assessors
Joint Circular 4 TTLN	Ministry of Justice, Supreme Court, Supreme Prosecution Bureau	24.07.1993	On the Implementation of some Provisions of the Ordinance on Recognition and Enforcement of Foreign Courts' Judgment and Civil Decisions in Vietnam
Inter-circular 05/TTLN	Ministry of Justice and Supreme Court	15.10.1993	Guidelines on the Ordinance on Judges and People's Assessors
Law	National Assembly	10.01.1994	To Amend the Law on the Organization of People's Courts 1992 [First Amendments]
Resolution 155/ NQ/UBTVQH	Standing Committee of N/A	02.02.1994	On the Implementation of the Law to Amend and Supplement Articles on the Law on the Organization of People's Courts

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Ordinance	Standing Committee of N/A	16.03.1994	On Procedure for the Settlement of Economic Disputes
Directive 136-TTg	Prime Minister	01.04.1994	On the Implementation of the Law to Amend and Supplement the Law on the Organization of People's Courts
Law	National Assembly	05.07.1994	On the Election of Members of People's Councils
Law	National Assembly	05.07.1994	On the Organization of People's Councils
Order 35-L/CTN	President	05.07.1994	To Promulgate the Law on the Organization of People's Councils and People's Committees (Amended)
Decision 355-TTG	Prime Minister	11.07.1994	To Transfer Staff and Accommodation of State Economic Arbitration to the People's Courts and the State Committee for Planning
Decision 94-TCCB	Chief Justice of the Supreme Court	11.08.1994	On the Organization and Operation of the Economic Court of the Supreme Court
Decree 116/CP	Government	05.09.1994	On the Organization and Activities of Economic Arbitration
Circular 02/PLDSKT	Ministry of Justice	03.01.1995	Guiding the Implementation of Some Articles of Decree 116/CP Dated 5/9/1994 on the Organization and Operation of Economic Arbitration
Directive 410-TTg	Prime Minister	15.07.1995	On the Training and Refresher Training of Judges for Administrative Courts at All Levels
Decision 453/QD-CTN	President	28.07.1995	On the Ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)
Ordinance	Standing Committee of N/A	27.09.1995	On the Recognition and Enforcement of Foreign Arbitral Awards in Vietnam
Law	National Assembly	09.11.1995	To Amend the Law on the Organization of People's Courts 1992 [Second Amendments]

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Decision 114 TTg	Prime Minister	16.02.1996	On Expanding the Competence of the Vietnam International Arbitration Centre in Settling Disputes
Circular 45/ TCCP-BCTL	Minister for Governmental Personnel	11.03.1996	Guidelines of Annual Salary Increments for Civil Servants in Administration, Party Organizations and Other Socio-Political Organizations
Decision 154-TTg	Prime Minister	12.03.1996	On Implementing the Regime of Allowances to Legal Workers, Including Judges, People's Procurators, Court Secretaries etc. Participating in a Trial Session
Decision 160-TTg	Prime Minister	15.03.1996	On Implementing the Regime of Allowances for the Juridical Expert Witness
Ordinance	Standing Committee of N/A	03.06.1996	On the Procedures for the Settlement of Administrative Cases
Ordinance	Standing Committee of N/A	03.07.1996	On the Concrete Tasks and Powers of the People's Councils and People's Committees at Each Level
Decision 744/TTg	Prime Minister	08.10.1996	On the Establishment of Provincial Labor Arbitration Councils
Circular 02/ LDTBXH-TT	Ministry of Labor-Invalid-Welfare	08.01.1997	Guidance on the Implementation of Decision 744/TTg on the Establishment of Provincial Arbitration Councils
Decree 70-CP	Government	12.06.1997	On Court Charges and Fees
Ordinance	Standing Committee of N/A	1998	Ordinance on Civil Servants
Decision 57/1998 QD – TTg of 5/3/1998	Prime Minister	05.03.1998	On the Regime of Allowances for Juridical Expert Witnesses
Joint Circular 4/1998/TTLT-TCCP-TC-TP	Minister for Governmental Personnel	23.07.1998	Guiding the Implementation of the Decision 57/1998 QD – TTg of 5.3.1998 of the Prime Minister on the Regime of Allowances for Juridical Expert Witnesses

Table (*cont.*)

Type	Authority	Date of Promulgation	Title
Joint Circular 187/1998 TTLT-TCCP-TC -TP	Minister for Governmental Personnel	30.03.1998	Guiding the Regime of Allowances for Collaborators Engaged in Legal Assistance Activities
Decree 95/ND-CP	Government	02.12.1998	On Recruitment, Use and Management of Civil Servants
Decision 11/1998QD-TCCP-CCVC	Minister for Governmental Personnel	05.12.1998	On the Annual Assessment of Civil Servants
Decision 150/1999/QD-TCCP	Minister for Governmental personnel	12.02.1999	Regulation on Civil Servants Upgrading Examination
Ordinance	Standing Committee of N/A	01.08.2000	To Amend Article 18 of the Ordinance on the Military Court on 14.09.1993
Decree 77/2000/ ND-CP	Government	15.12.2000	On the Adjustment of the Basic Salary, Subsidies and Living Expenses for the Persons Who Receive Salary, Subsidies and Living Expenses
		22.04.2001	Statute of the Vietnam Communist Party
Resolution 51/2001 QH10	National Assembly	25.12.2001	On Adding to and Amending Some Articles of the Constitution of 1992
Resolution 08/ NQ-TW of the CPV	Politburo of CPV	02.01.2002	On Justice Reform
Resolution 19-QD/TW of the Politburo	Politburo of CPV	03.01.2002	On Banned Works for Party Members
Resolution 287-2002-NQ-UBTVQH10	Standing Committee of N/A	29.01.2002	Guidelines for the Implementation of a Number of Recent Constitutional Amendments
Instruction 10/2002/CT-TTg	Prime Minister	19.03.2002	To Implement Resolution 8 of the CPV Dated 2.1.2002
Law	National Assembly	02.04.2002	On the Organization of People's Courts
Ordinance 02/2002/PL-UBTVQH11	Standing Committee of N/A	04.10.2002	On Judges and People's Assessors of the People's Courts

Table (*cont.*)

Type	**Authority**	**Date of Promulgation**	**Title**
Resolution 132/2002/NQ-UBTVQH11	Standing Committee of N/A	04.10.2002	On the Protocol of Co-operation between the Supreme Court and Local People's Councils in Administration of the Organization of Local People's Courts
Ordinance 03/2002/PL-UBTVQH11	Standing Committee of N/A	04.10.2002	On Prosecutors
Resolution 131/2002/NQ-UBTVQH11	Standing Committee of N/A	04.11.2002	On Judges, People's Assessors and Prosecutors
Ordinance	Standing Committee of N/A	15.11.2002	On the Organization of Military Courts
Decision 584/2002/QD-BTP	Ministry of Justice	25.12.2002	Promulgating the Action Program of the Judicial Service for the 2002-2007
Ordinance 08/2003/PL-UBTVQH11	Standing Committee of N/A	25.02.2003	On Commercial Arbitrators
Resolution 388/NQ-UBTVQH11	Standing Committee of N/A	17.03.2003	On Compensation for Damages Wrongfully Caused by Criminal Procedures
Inter-Ministerial Circulation 01/2003/TTLT-TANDTC-BQP-BNV-UBTWMTTQVN	Supreme Court-Ministry of Finance-Ministry of Justice-Central Committee of Vietnam's Father Front	01.04.2003	Guidelines on the Ordinance on Judges and People's Assessors of the People's Courts
Resolution 05/2003/NQ-HDTP	Council of Justices	31.07.2003	Guidelines on the Implementation of Ordinance on Commercial Arbitration
Decree 65/2003/ND-CP	Government	11.06.2003	On Organization and Function of Legal Consultancy Services
Circulation 04/2003/TT-BTP	Ministry of Justice	28.10.2003	Guidelines on Decree 65/2003/ND-CP on Organization and Function of Legal Consultancy Services

Table (*cont.*)

Type	Authority	Date of Promulgation	Title
Directive 27/2003/CT-TTg	Prime Minister	11.12.2003	Furthering the Implementation of the Enterprise Law and Promoting the Development of SMEs
Ordinance 13/2004/PL-UBTVQH11	Standing Committee of N/A	28.01.2004	On the Enforcement of Civil Judgments
Inter-Ministerial Circulation 01/2004/TTLT-VKSNDTC-BCA-TANDTC-BTP-BQP-BTC	Prosecution Office-Ministry of Police-Supreme Court-Ministry of Justice-Ministry of Defence-Ministry of Finance	25.03.2004	Guidelines on Resolution 388/NQ-UBTVQH11 on Compensation for Damages Wrongfully Caused by Criminal Procedures
Official Letter 116/2004/KHXX	Council of Justice	22.07.2004	On the Jurisdiction of Courts According to the Land Law 2003
Resolution 730/2004/NQ-UBTVQH11	Standing Committee of N/A	30.09.2004	On Approving Position Salary Schedule, Position Allowance Schedule for Senior Executives of the State and Professional Salary Schedule for the Judiciary and the Procuracy
Decree 203/2004/ND-CP	Government	14.12.2004	On Prescribing Minimum Salary Level
Decree 204/2004/ND-CP	Government	14.12.2004	On Salary Regime for Cadres, Public Servants, Officials, and Armed Force Personnel
Resolution 48/NQ-TW of the CPV	Politburo of the CPV	24.05.2005	Strategy for the Development and Improvement of Vietnam's Legal System to the Year 2010 and Direction for the Period until 2020
Resolution 49/NQ-TW of the CPV	Politburo of the CPV	02.06.2005	Judicial Reform Strategy to 2020

Notes

The following sources provide the legislation listed above:

The National Assembly Database, LAWDATA

Tong Thuat Chung Ket Qua Chinh Nghien Cuu de Tai, (General Abstract of the Principal Research), unpublished, Hanoi, 1996

Cong Bao, (Official Gazette)

Tap Luat ve Tu Phap (Laws about Justice), Hanoi, 1957

In addition officers of the Ministry of Justice provided copies of laws considered relevant.

Although publications and the Ministry of Justice database were consulted, this appendix may be incomplete. Not all legislation passed in Vietnam is printed in *Cong Bao.*

Notes on numbering and annotation styles of legislations

Most legislation promulgated after 1 January 1997, when the *Law on Promulgation of Legal Documents* came into effect, follows a uniform system of numbering and annotation set out in that law.

However, legislation issued before that law are not numbered and annotated in a uniform manner as there was no pre-existing statutory system. Numbering and annotation was treated differently by the various issuing bodies.

Appendix 5
List of Soviet Court-Related Legislation

USSR Legislation

6 July 1923	Constitution
14 July 1924	Instruction to the Supreme Court of the USSR
29 October 1924	Basic Principles of the Judicial System of the USSR and of the Union Republics
31 October 1924	Order approving drafts of (1) the fundamental principles of criminal legislation of the USSR and of the Union Republics; (2) Fundamental principles of Criminal procedure of the USSR and of the Union Republics and; (3) Statute on Military Crimes
24 July 1929	Statute on the Supreme Court of the USSR and the Prosecutor of the Supreme Court of the USSR
4 March 1931	Abolition of the Arbitration Commission
3 May 1931	Statute on State Arbitration
5 November 1934	Establishment of Special Boards in the People's Commissariat of Internal Affairs of the USSR
5 December 1936	Constitution
16 August 1938	Law on Court Organization
1953 (undated)	Abolition of Special Boards of the Ministry of Interior
24 May 1955	Statute on Procuracy Supervision in the USSR
12 February 1957	Statute on the Supreme Court of the USSR
25 December 1958	Fundamentals of Legislation on the Judicial System of the USSR, and the Union and Autonomous Republics
25 December 1958	Statute on Military Tribunals confirmed by law of the USSR

27 February 1959	Amended Statute on Procuracy Supervision in the USSR
3 March 1960	Amended Statute on Procuracy Supervision in the USSR
17 August 1960, amended on 29 October 1962	Statute on State Arbitration of the USSR Council of Ministers
31 August 1960, amended on 17 May 1963	Temporary Rules for Consideration of Economic Disputes By a Court of Conciliation
31 October 1961	Rules of the Communist Party of the Soviet Union adopted by the 22 ND congress of the Communist Party of the Soviet Union
8 April 1966	Amended Rules of the Communist Party of the Soviet Union
14 December 1966	Amended Statute on Procuracy Supervision in the USSR
30 September 1967	Amended Statute on the Supreme Court of the USSR
21 February 1968	Amended Statute on Military Tribunals confirmed by law of the USSR
6 July 1970	Amended Statute on Military Tribunals confirmed by law of the USSR
12 August 1971	Amended Statute on Military Tribunals confirmed by law of the USSR
26 November 1973	Amended Statute on Military Tribunals confirmed by law of the USSR
1974	Re issued Fundamentals of Legislation of the USSR and the Union Republics
7 October 1977	Constitution

RSFSR Legislation

24 November 1917	First Decree on the Courts
15 February 1918	Second Decree on the Courts
10 July 1918	Constitution
20 July 1918	Third Decree on the Courts

30 November1918	People's Court Act
16 February 1918	A Three-man Arbitration Court
4 January 1919	Statute on Revolutionary Tribunals
12 April 1919	Revision of the Statute on Civilian Revolutionary Tribunals
16 September1920	Special Sessions of the People's Court and Standing Sessions
21 October 1920	People's Court Act
10 March 1921	Charter for Superior Judicial Control
23 June 1921	Uniting all Revolutionary Tribunals of the Republic
31 October 1922	Judiciary Act
1 January 1923	Judiciary Act
7 July 1923	Changes in and Additions to the Judiciary Act
28 September 1923	Procedure for Requiring People's Lay Judges to Perform Judicial Duties in Court Sessions of the Supreme Court
16 October 1924	Additions to and Changes in the Judiciary
11 May 1925	Constitution
19 November 1926	Statute on Court Organization
21 January 1937	Constitution
27 October 1960, amended by edicts dated 29 June 1961, 13 October 1961, 11 October 1962, 20 February 1964 and 9 September 1968	Law on Court Organization of the Russian Soviet Federated Republic
25 December 1958 as amended on 21 February 1968	Statute on Military Tribunals
27 October 1960	Law on Court Organization
	Decree on Jurisdiction of the Comrades' Courts
30 March 1962, amended on 22 September 1965	Statute on Administrative Commission of Executive Committee of District and City Soviets or Working People's Deputies of the RSFSR and on the procedure for cases of Administrative Violations

23 October 1963	Jurisdiction of the Comrades' Courts
13 April 1978	Constitution

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Appendix 6
Legislation in Vietnam Under the French[1]

Region	Title	Subject Matter	Jurisdiction	Applied elsewhere	Effect
Cochinchina (CCC)	Statut Francais	All codes of France were promulgated in CCC on 21/12/1864	French citizens, Europeans & others who came from countries where laws resembled those of France	Applicable in Tonkin and Annam from 1884 when both were declared protectorates	A body of French law was exported to CCC, including French commercial law
	Citizenship laws	Laws passed on 25/5/1881, 7/2/1877, and in 1913 & 1915 enabling Vietnamese to be elevated to status of French citizen	Vietnamese who spoke and wrote French	as above	French law applied to this group
	Statut Annamite (also known as the Gia Long Code incorporating subsequent revisions)	Perpetuation of the existing Gia Long Code relying also on customary law and the Le code to augment it	Vietnamese, Asiatiques and assimiles	as above	Body of law applicable to locals and those grouped with them
	Civil Code	Codification of Vietnamese Civil laws located in Gia Long code promulgated on 3/10/1883	Vietnamese, Asiatiques and assimiles	Tonkin – effective by 1931 Annam – introduced over the period 1936-1939	Official restatement by French of Vietnamese civil law

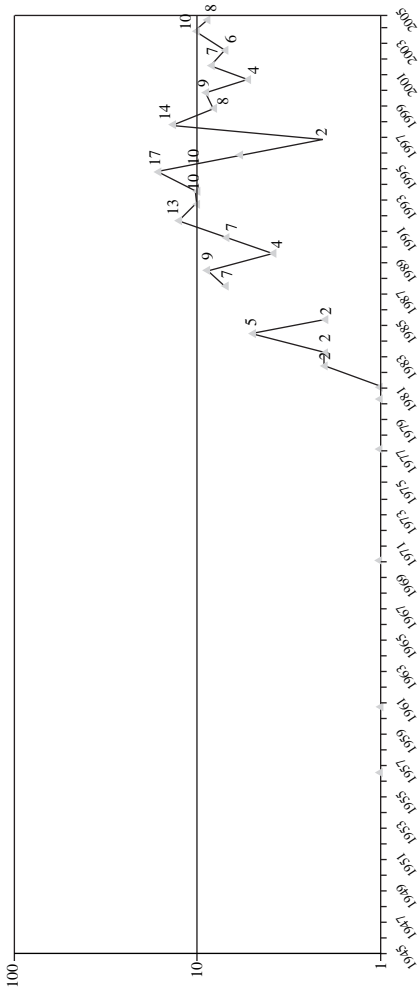
1 Information for this table was drawn from two publications by M.B. Hooker: *Legal Pluralism: An Introduction to Colonial and Neo Colonial Laws*, 1975 and *A Concise Legal History of South-East Asia*, 1978.

Table (*cont.*)

Region	Title	Subject Matter	Jurisdiction	Applied elsewhere	Effect
	Civil Procedure Code	Simplified French civil procedure code introduced 1877 and 1910	Vietnamese, Asiatiques and assimiles	Revised version applied 1910	
	Penal Code	Revised version of the Gia Long applied until 1877. 1880 revised version of the French criminal code introduced. Revised on 31/12/1912 and 1921	Vietnamese, Asiatiques and assimiles	Tonkin – Revised version effective from 1917 Annam – modified criminal code in place by 1933	Revisions were aimed at removing particularly 'barbaric provisions' inimical to the French
	Criminal procedure code		Vietnamese, Asiatiques and assimiles	Tonkin – effective by 1917 Annam – effective 1935	Unsure when introduced to CCC

Note: The French-introduced Civil Code repealed the *Gia Long Code*.[1] Other laws passed after 1864 applied only to the French and their associates.

Appendix 7
Legislation by the Judicial Branch of the State[1]



1 This table was prepared with the assistance of Nguyen Hien Quan. For an earlier version see Pip Nicholson, 2006(2).

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Part One Books, Articles, Journals, Theses and Papers
Part Two Vietnamese Court and Justice Ministry Publications
Part Three Vietnamese Political Speeches, Papers, Media and Journal Commentary
Part Four Bibliographies, Vietnamese Reference Works and Internet Sites

For Vietnamese and Russian Legislation see Appendices Four and Five respectively.
For a list of interviewees see Appendix One

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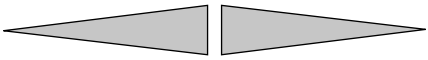

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