Legal Reform and Private Enterprise
The Vietnamese Experience

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Abstract

Decades after the rise and fall of the Law and Development movement, crude theories about the relationship of law to economic development have reappeared in the wake of "transition". Having observed the process of creating laws governing ownership and contracts in Vietnam, the author of this thesis seeks to determine whether the perceived problems exist in reality and whether the "standard legal prescription" for solving them actually works. The official aspect of the legal reforms, i.a. goals and drafting, has been discussed with legislators, officials and other informed people. The response of those meant to benefit from the laws, the actors in the marketplace, has been explored in interviews with businessmen in and around Hanoi.

Vietnam's reliance on foreign legal models is partly a consequence of the absence of effective means for developing viable organic solutions and partly of a reluctant recognition that overseas trade and intercourse necessitate international compatibility. A favoured technique is to single out individual elements of foreign laws that are considered acceptable and appropriate, while rejecting others. Thus, while much of the new legislation appears to be fairly "modern" and "conventional", certain underlying fundamentals have been rejected for fear that they should be carriers of "dangerous" ideas and practices. Most businessmen nevertheless feel safe in the sense that they are not afraid of expropriation or other immediate threats to their existence. The objective factors of law are intertwined with political "moods" and other subjective factors, and those who believe in their ability to correctly interpret these subtle signals have confidence in the future. That many successful businessmen still rely on kinship ties and moral concepts for day-for-day transactions is another reason to doubt the urgency of the need for "Western-style" laws. However, in this case, changes in the expanding marketplace, e.g. more diverse moral concepts, in the wake of expanding trade, alter the relative costs of formality and informality and promote the new Civil Code and Commercial Law as providers of model terms for impersonal transactions.

That Vietnamese businessmen consider these laws basically good, but at the same time describe the legal system as a whole as "unattractive", indicates a need for judicial reform incorporating traditional concepts of rule of law. The leadership however is ambivalent. It regards the presence of discretion and corruption as a threat to its authority and appreciates that uniformity is important for state-building purposes, but is not willing to compromise with the Party's leading role in society. The resulting policy, a refined version of "socialist legality" or rule by law, meaning that state organs are bound by legislation and that citizens are assured that their economic rights will be upheld as long as they follow the rules, is inherently untenable and incapable of providing the kind of protection associated with conventional rule of law.

Key words: developing countries, judicial reform, law and development, transition, Vietnam.
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Mistakes are inevitable when national and cultural boundaries are transgressed. The law may be a discipline where the risks of misunderstandings and misinterpretations are especially salient. I am solely responsible for all errors and omissions.
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ACRONYMS AND INITIALS

ADB  Asian Development Bank
AFTA ASEAN Free Trade Area
APEC Asia-Pacific Economic Cooperation
ASEAN Association of Southeast Asian Nations
CEPT Agreement on the Common Effective Preferential Tariff Scheme
CIS Commonwealth of Independent States
CPV Communist Party of Vietnam
DRV Democratic Republic of Vietnam
EAO Economic Arbitration Organisation (Vietnam)
GDLM General Department of Land Management (Vietnam)
GNP Gross National Product
GSO General Statistical Office of Vietnam
HCMC Ho Chi Minh City
IMF International Monetary Fund
MoJ Ministry of Justice (Vietnam)
NA National Assembly (Vietnam)
NIC Newly Industrialised Country
OECD Organisation for Economic Co-operation and Development
SCCI State Committee for Co-operation and Investment (Vietnam)
Sida Swedish International Development Co-operation Agency
SOE State Owned Enterprise
SRV Socialist Republic of Vietnam
UN United Nations
UNCITRAL United Nations Commission on International Trade Law
UNDP United Nations Development Programme
USAID United States Agency for International Development
VIAC Vietnam International Arbitration Center
WB The World Bank
1.1 Law and Private Sector Development

Virtually all of the economies that were formerly centrally planned are currently engaged in radical overhauls of their legal systems to meet the requirements of the modern market economy.\(^1\) Not all of them follow the same path. Despite many common features, these countries, far from being a monolithic group, are characterised by different histories and cultures, hence there is a tremendous variety in departure points, strategies and outcomes.\(^2\) Everywhere, however, this “transition” changes the basic rules of the economic game and alters the relationship between people and the political, social and economic institutions.\(^3\)

The shape and content of productive institutional arrangements vary among countries and cultures, but economic scholarship

\(^1\) Many of the concepts from “development language” applied here are inherently value-charged and ideological in nature, e.g. development, developing country and transition, and others can be criticised for being ethnocentric, e.g. good governance, but they are used for want of better terms.

\(^2\) The dividing line between socialist and other countries is somewhat arbitrary, but the group comprises at least 40 members, among them 15 ex-Soviet states, 10 East European countries (considering Yugoslavia as five countries), Cuba, Mongolia, China, Laos, Vietnam, Cambodia, Burma, Algeria, Nicaragua and 8 Sub-Saharan countries. For an overview, see Gelb 1993 and Ljunggren 1993b.

\(^3\) Institutions are here understood as the rules of the game in society, or simply as something established that helps to structure human interaction.
suggests that historically, economies have often grown and consolidated where there have been fair and predictable laws and regulations concerning property, contractual relations, business organisation, etc.\textsuperscript{4} Comparative legal studies have demonstrated that in many countries, especially in Europe, the development of such institutions has often followed generally similar paths, at least for the last hundred years.\textsuperscript{5} Acting on this knowledge, development planners and aid agencies emphasise the creation and maintenance of these same institutions in developing and transition countries. When the pieces are in place, it is argued, people will engage in economic activity and create organisations that take advantage of the new opportunities.\textsuperscript{6}

In some countries, especially in Central and Eastern Europe, the legal reforms are accompanied by changes in the political sphere,

\textsuperscript{4} Both what organisations (for example firms) come into existence and how they evolve are believed to be fundamentally influenced by the opportunities provided by the institutional framework. In turn, the organisations influence how institutions are shaped in that they seek to alter the institutions (for example laws) when these fail to meet their expectations or are seen as undesired limitations on their aspirations. For a general discussion, see e.g. Adelman et. al. 1992; de Soto 1989 and 1993; Eggertsson 1996; Frankel 1993; North 1981 and 1990; North and Thomas 1973; Rosenberg and Birdzell 1986; and \textit{THE STATE IN A CHANGING WORLD} 1997.

\textsuperscript{5} Regarding Europe, see David and Brierley 1985 p. 7; Stein 1984 \textit{in extenso}; and Waelde and Gunderson 1994 p. 373. Regarding Asia, see Pistor and Wellons 1998 pp. 204–215.

\textsuperscript{6} Ibrahim Shihata, Vice President and General Counsel to the World Bank, argues (1991 p. 228) that “[t]here is no way a market system can work efficiently in the absence of clear, enforceable laws regarding property and contractual rights and obligations.” For similar arguments, see i.a. Blair and Hansen 1994; \textit{From Plan to Market} 1996; Gray, C. S. 1991; Gray, C. W. 1993 and 1997; Lateef 1992; Nalin 1994; and van Brabant 1991. Regarding Vietnam specifically, see e.g. Lichtenstien 1993 and 1994; Ngo Ba Thanh 1993 pp. 87 and 91–99; and UNDP Programme Document VIE/92/003 - Legal Reform in Viet Nam, p. 1: “Development means changing institutions. The Government of Viet Nam cannot improve social practices in any area -- for example, economic and public administration and management, the environment and management of its natural resources or even social adjustment necessitated by the reform process itself -- without invoking the legal order.”
while in others, like Vietnam, the regime struggles to preserve the
ehegemony of the Communist Party and other basic tenets of the
political order. Democracy and rule of law in the conventional
Western sense are perceived as threats, rather than goals here.7
These regimes also understand that once a principle of law is
enunciated, it becomes part of the public domain and open to uses
that may be difficult to control.8

Under the banner of doi moi, the Vietnamese leadership aspires
to create a “socialist-oriented market economy” that will thrust the
country into the exclusive group of newly industrialised Asian
countries, but also to control carefully any spin-off in the political
sphere.9 The focal point is the promotion of the emerging private
sector. Although state enterprise still make up a large part of the
Vietnamese economy, and foreign investment is politically and
economically favoured, there is a growing recognition that the real
job of wealth creation must be done by domestic private
entrepreneurs.10 Private business is gradually being brought out of

7 Tolonen (1996 p. 128) points out that many of the goals of “transformation” and
“transition”, e.g. market economy, political democracy and rule of law, are
inherently problematic. They have received their content in a bipolar world where
they expressed the self-identity of the rich Western nations against the opposites,
the socialist countries. Now that this bipolarity is vanishing with the tides of
history, the goals are becoming accepted as slogans, while their real content is
becoming more vague.

8 See Potter 1994b pp. 325–326.

9 Le Minh Thong (1997 pp. 18–29) typically argues that the legal system must
promote “industrialization and modernization”, but also maintain the “[...]”
socialist cause because socialism is actually the objective of industrialization and
modernization” and that criminal law, administrative law etc. “[...]” must be
renovated in a fundamental manner in order to effectively achieve the over all
objective: to prevent and put to failure all schemes and activities of ‘peaceful
evolution’, sedition and subversion of the hostile forces, effectively prevent and
punish all forms of crime, ensure political and social stability of the country, defend
the Party, the regime and firmly maintain security and sovereignty of the
borderline, and contribute to the safeguarding and consolidation of the bloc of
national unity in service of renewal.”

10 See e.g. Luu Van Dat 1994 p. 39.
the grey zone of semi-legality and, at least theoretically, placed on an equal footing with the state sector. Private businesses already outnumber state enterprises by three to one within trade and industry, not including a vast number of small and often unregistered household businesses.¹¹

1.2 “Law and Development”

It is not knew to regard law as an institutional enterprise that may or may not promote development goals. The “Law and Development” movement, active in the fifties and sixties, centred around the idea that while the “primitive” rules of developing countries were barriers to development, consciously and rationally devised “modern laws” or “Western laws” could help these countries develop in the direction of the advanced, industrial nations of the West.¹²

The most radical incarnation of the Law and Development movement suggested that it would be possible to prescribe specific legal reform programmes that would inevitably bring the political, economic and legal systems of developing countries into congruence with those of the developed West. Such programmes would typically include the drafting of “modern” laws, reforming legal education, removing certain “lags” or “barriers” and helping lawyers in general to use the law instrumentally.

One characteristic trait of the Law and Development movement

¹¹ See Edberg 1996 pp. 6 and 10; Pettersson 1996 pp. 19 and 21; and Haggard, McMillan and Woodruff 1996 p. 2. Modest estimates suggest that the household sector alone comprises over 20 per cent of turnover and 80 per cent of total industrial employment, see Lindblom 1996 p. 3.

¹² The definition of the field of “Law and Development” has always been relatively flexible and not rigidly limited by any particular accepted theory. It has often been referred to as the specialised area of academic study concerned with the relationship between the legal systems and various aspects of “development”, i.e. social, economic and political changes taking place in developing countries. For a recent overview of the debate, see Tamanaha 1995.
was its emphasis on action. Rather than trying to learn from the study of some aspect of law in developing countries, the lawyers and policy makers involved were primarily interested in immediate social engineering through law. The preoccupation with action meant that the agencies supporting the law and development programmes often proceeded with the task without seriously trying to evolve or test a theory, or to examine its implications. That the recommendations of the foreign legal specialists involved determined whether or not money would be forthcoming for various projects provided additional leverage.

Many of the initial attempts to link law with economic development seem to have been directly or indirectly inspired by the works by Max Weber, notably "Economy and Society", where he attempts to identify and explain systematically the role of the modern legal system in the emergence of Western capitalism. Weber's analysis goes beyond the observation that legal development occurred simultaneously with the political and economic transformations that led to the industrialised system and the nation-state, and suggests that these changes were mutually causative. Weber stresses that the more "rational" a legal system is, the more conducive it is to the emergence of a capitalist system. A legal system is rational to the extent that it is autonomous vis-à-vis other spheres of society, the norms it formulates and enforces are consciously devised, and those norms are consistently applied to all similar cases. Regimes which apply norms that are seen as immutable and sacred, and charismatic systems that claim that their norms are derived from the great leader, will experience great difficulty in developing legal structures that are sufficiently rational because the very concepts of tradition and charisma are inconsistent with the idea of consciously devised norms.  

13 The discussion of Weber's role for the Law and Development debate is inspired by Trubek 1972 pp. 11-16 and Dalberg-Larsen 1984 pp. 60-65. Trubek (1972 p. 15) stresses that Weber's analysis underlines the fact that modern law does not produce economic development, it merely helps structure the free market, and that modern
There is much evidence to suggest that the tendency for the Law and Development movement to view development as a series of identical stages repeated in all societies was both ethnocentric and evolutionist. It was also a little naive to assume that local or traditional structures always hinder development and that “Western” legal paraphernalia unequivocally speed up development. There are countless of examples of African and Asian countries which have imported Western legal and administrative instruments that have had very little relevance to social reality. David Trubek also emphasises the paradox that while Law and Development theories argue that the rest of the world will repeat the Western experience of simultaneous legal and socio-economic development, they also tend to argue that legal development is not guaranteed and that strenuous efforts must be made to ensure that the right laws are adopted and implemented.

Anthony Carty, David Greenberg, Thomas Franck, and many others, stress that if one is even to begin to understand the relationship between law and development, one must accept the extent to which Western legal instruments and agencies have been used to exploit, incapacitate and even tear apart the political and legal does not bring about political development, it merely supports the centralised bureaucratic state which depends for its legitimacy on a belief that its decisions are rational.

Tuori’s (1997 pp. 432-442) schema for the analysis of national legal orders, consisting of three “levels of law”: (1) the surface level, containing individual statutes, court decisions and similar material; (2) legal culture, which when speaking about the expert culture of legal professionals, is the level of general principles, patterns of legal reasoning, etc.; and (3) the deep structure of law which changes very slowly and forms a kind of a priori for each epoch in history, provides one explanation of how law works and changes and why the introduction of new concepts does not provide the desired results. Phenomena on the surface level of law produce sedimentations on the deeper levels and, on the other hand, the principles and patterns of thought from the deeper levels affect legal decision making at the surface level. Although all levels are simultaneously present in the concrete decision making, they develop at different speeds in continuous interplay with each other.

Trubek 1972 pp. 16–18.
economic structures of Third World societies.\textsuperscript{16}

Remarkably, Law and Development theories have been revived to serve the purpose of explaining and assisting the legal aspects of "transition" after the worldwide collapse of communism and central planning.\textsuperscript{17} Their newfound popularity stems from several factors. Commentators tend to stress the hegemony of "neo-liberal" market concepts of economic relations, the rise of multinational corporations who seek access to markets and natural resources in developing countries and the emergence of an international human rights movement.\textsuperscript{18}

But the attractiveness of Law and Development theories to domestic lawyers and policy makers has also a more mundane explanation: lawmakers constrained by lack of adequate analytical tools, scarce resources and lack of time need some "shortcuts". It is cheap and easy to conform to the standard prescription, but costly and difficult to consider the unique premises at hand. This position is especially marked where the political and economic incentives for feedback between legislative initiatives and the situation in the "real world" are weak or absent.\textsuperscript{19} Policy makers, especially in authoritarian one-party states, are also attracted by the possibility of state-building by means of law that revived models of Law and Development suggest.\textsuperscript{20}

The prospects of obtaining substantial development aid provide


\textsuperscript{17} Rose (1998) explores the reemergence of the Law and Development Movement in the post-Cold War era, with special reference to the impact of foreign legal assistance programmes on legal and political reform in Vietnam.

\textsuperscript{18} See e.g. Jayasuriya 1999 pp. 4–5 and Rose 1998 p. 94.

\textsuperscript{19} While Vietnamese foreign investment laws have been continuously modified to correspond to the expectations of critical investors and foreign commentators, other crucial legal and regulatory instruments, particularly within the area of administrative law, have been afforded much less attention, as will be discussed in Section 6.4 infra.

\textsuperscript{20} See Gillespie 1999 p. 118 and Jayasuriya 1999 pp. 2–3.
additional leverage and eventually risk making Law and Development theories virtually immune to any real scrutiny. International organisations and national aid agencies like to recognise the laws and institutions they help to create. They also appreciate the great utility that revived Law and Development theories have in justifying their participation in the prescription of law reform measures: we have a special expertise to offer as we have seen the future and know how it works. As long as aid is provided on such loose premises, there will be little incentive to find out whether specific reforms were successful because of wisdom, Fingerspitzengefühl, or coincidence, or whether they failed because of political ambivalence or technical difficulties or because certain crucial factors were misinterpreted or overlooked. At the same time, the explosive development of many East and Southeast Asian economies in the absence of such legal concepts suggests that the postulated linkages between law and economic development may not be as strong as is often assumed. The East Asian

21 Ibrahim Shihata argues (1991 pp. 225-226) that a successful implementation of fundamental policy changes in the business environment and in the financial sector have to be accompanied by equally fundamental changes in the overall legal and institutional framework, and that "[...] a sound legal and institutional framework includes a comprehensive, well-defined body of laws and regulations, a cadre of able and honest public administrators, a court system to enforce property and contractual rights and to resolve competing claims, legal and accounting professions to provide a basis for checks and balances and a general willingness on the part of society to be bound by those laws and to respect the institutions which implement and enforce them." Shihata (ibid p. 227) underlines, however, that the wholesale importation of legal systems has created severe problems. This would be especially true when "imported law" is radically different from the norms governing traditional sectors where custom and religious or communal law are more familiar.

22 Trubek pointed out as early as 1972 (p. 18) that one reason why the Law and Development debate clings to both evolutionism and reformism is this very utility.

23 A recent attempt to verify the presence of such linkages is the ADB-commissioned report The Role of Law and Legal Institutions in Asian Economic Development 1960–1995 (Pistor and Wellons 1998). It tests competing theories about law and its relation to economic development against the experience of six Asian economies over thirty-five years, between 1960 and 1995. Vietnam is not among the countries studied and only one country, China, is grappling with the special problems of transition. The report suggests that law has made an important contribution to
experience could, at its starkest, mean that high levels of economic performance bear no relation at all to the presence of “modern” or “Western” law.

1.3 Purpose

It has been emphasised that crude theories of law and development in many cases provide a carte blanche for careless reliance on standard legal formulae and that the resulting attempts to force reality to fit ideal-type models tend to fail. This should not be interpreted as a categorical negation of the advantages in some circumstances of using concepts borrowed from abroad, but rather as a call for a better empirical warrant to help to ensure that the problems discussed really do exist and that the proposed legislative remedies will actually help to solve them.

This thesis makes a modest contribution to providing a such warrant. Geographically, the object of study is the Socialist Republic of Vietnam. Topically, the focus is on the legal institutions that govern ownership and regulate commercial transactions beyond the mere instantaneous exchange of tangible goods in barter exchanges, i.e. property and contract law. The choice of focus stems from the great significance attributed to these institutions in the scholarly discussion of the emergence of industrial capitalism in Europe and North America, in the Law and Development debate, and among policy makers in the developing and transition countries of today. There are also, of course, other important elements in the legal and administrative

Asia’s economic development and that it was most effective when it was congruent with economic policies.

24 The discussion also touches on the institutions of colonial Vietnam and the Democratic Republic of Vietnam (DRV), and, to some extent, the Republic of Vietnam. For bibliographical references to legal materials of the Republic of Vietnam, see Nguyen Phuong Khanh 1977.

25 See Section 1.1 and note 4 supra.
framework that supports private enterprise, e.g. rules for entry, exit and sound competition, but the scope of the present work does not allow their inclusion.

The purpose of this thesis is: (1) to describe and analyse the specific incentives and constraints under which Vietnamese policy makers formulate the official goals of the legal reform effort; (2) to discuss the various means and models available to them, particularly the use of legislative models and transplants; (3) to identify the major problems that occur in the implementation of the resulting laws and policies, with particular regard to the ideologically sensitive issue of rule of law; and (4) to discuss how the favoured policies relate to the needs of the marketplace, as perceived by a group of interviewed Vietnamese businessmen.

This means that the discussion soon transgresses the boundaries of traditional analysis of the current law to present a broad picture of certain characteristic elements of the Vietnamese “legal culture”. The concept of legal culture is inherently controversial and there are a variety of definitions to choose among depending on the levels of abstraction and the setting in which it is being discussed: the internal legal culture of professionals, the external or popular legal culture, Western legal culture, Vietnamese legal culture, etc. The discussion of aspects of legal culture in this thesis accepts the position that legal culture is a subsystem of the general cultural environment.\textsuperscript{26} Lawrence Friedman’s essentially ideational view that it consists of attitudes, values and opinions held in society, with regard to law, the legal system and its various parts, and that this culture, in turn, determines when, why, and where people use legal means and how the system responds, explains with sufficient precision how the concept is used in the following.\textsuperscript{27}


\textsuperscript{27} See Friedman 1977 p. 76. Friedman’s concept of legal culture is sometimes criticised as lacking precision. Cotterrell (1997 pp. 14-15) finds it difficult to see
Unlike the great number of studies by scholars outside Vietnam discussing the laws pertaining to foreign investment in Vietnam, this thesis discusses the legal institutions underpinning domestic business, in the belief that such an approach provides a better indicator of the interplay between legal change and private sector development. The foreign investment legislation is undeniably important to Vietnam, but it is an area largely separated and insulated from domestic concerns where different incentives and constraints prevail. Impediments to the repatriation of revenues may be of great concern to a foreign investor, but hardly to a local entrepreneur, for instance. The degree to which the investors are kept abreast of regulatory changes may also differ significantly between multinational and domestic firms. Multinationals are further likely to receive atypical, often more favourable, treatment from the judiciary and the administration than the large majority of small local firms.28

The purpose is reflected in the organisation of the thesis. Chapter 2, Traditional and Socialist Notions of Law, provides an introductory and essentially descriptive historical overview for the discussion that follows. Chapter 3, Issues of Sequence and Timing, discusses where legal reform fits into the broader context of economic reform and liberalisation, how the Vietnamese leadership identifies the problems to be addressed and formulates the goals, what political incentives and constraints prevail, and the influence of “structural adjustment” and adjustment aid on the reform agenda. Chapter 4, Lawmaking: Methods and Models, examines changes in the organisation and operation of the

what exactly the concept covers and what the relationship is between the various elements. Friedman (1997) defends its utility by pointing out that it allows impressions of general tendencies to be sketched, e.g. changes in social beliefs, opinions, values and outlooks, that cannot easily be discussed using conventional legal tools, and that it is a versatile tool for suggesting approaches, hypotheses, modes of explanation, etc.

28 For a general discussion, see e.g. Brunetti, Kisunko and Weder 1997b p. 6.
legislative institutions in Vietnam, agenda-setting, drafting methods, the use of legislative models and how the leadership seeks to explain and legitimise the measures taken. This chapter also describes and analyses the problems involved in ensuring internal consistency in the legal system.

Chapter 5, Ownership and Contracts, discusses how the new legislation governing property ownership and contracts (including the mechanisms for dispute resolution and enforcement) relate to the officially formulated goal of promoting private sector development. In this case, it means analysing how a group of 40 interviewed Vietnamese businessmen perceive and respond to the constraints and incentives embedded in the legal and administrative environment. It is questioned to what extent the legal and administrative features that ostensibly make transactions difficult and expensive in fact affect the conditions for business; whether the impact of institutional failings is mitigated by their ability to find informal substitutes for inefficient formal institutions and what would constitute an ideal avenue for dispute resolution, etc.

Chapter 6, Trust and Rule of Law relates the findings of the preceding chapters to issues of trust, legitimacy and rule of law. It discusses the subjectively perceived presence of distrust and discrimination against the private sector and how this affects business practices. The chapter also analyses the crucial but sensitive rules vs. discretion contest in which the principles of conventional rule of law collide with a firmly rooted administrative culture of arbitrariness. The question is also raised of what is the status of law among competing political and social norms, and can rule of law principles be implemented in certain sectors of society but not in others, etc. The chapter concludes with a discussion of the effects of the widespread corruption and the risk of the emergence of various forms of organised crime as a further threat to the lawful operation of private businesses.

Chapter 7, Summary with Conclusions concludes the thesis with
a condensated recapitulation of the preceding chapters and a summarising discussion.

It should be noted that this work does not provide a description of Vietnamese law of the kind that an attorney or prospective investor would ask for. There are numerous other publications which provide such information.\(^{29}\)

Another reason for refraining from discussing certain laws in great detail is the futility of looking for the "valid law" in an environment where great confusion prevails even as to which laws are in force and which are not.\(^{30}\) The laws of the last decade are the creatures of rapid economic reforms and continue to be frequently amended. There are several new instruments, including those governing banking, bankruptcy, court organisation, domestic investment, economic contracts, civil and commercial relationships, which lack provisions for identifying and repealing older legislation.

The legislative work in Vietnam continues with uninterrupted rapidity even while this thesis is being written. For practical reasons, enactments and amendments after January 1999 have been only summarily considered. It is also beyond the scope of this work to discuss in detail the effects of the financial crisis in East and Southeast Asia on the institutional reforms in Vietnam.\(^{31}\) It

\(^{29}\) The author has provided one such description, see Bergling 1997c. See also Brahm 1992; Cragg 1993; and Magennis and Nguyen Tan Hai 1992.

\(^{30}\) For instance, there are no rules that authoritatively clarify the fundamental question of whether it is the 1989 Ordinance on Economic Contracts, the 1995 Civil Code, or the 1997 Commercial Law that governs contractual relationships between private enterprises. For a general discussion, see Nguyen Nhu Phat 1996 pp. 11 and 13.

\(^{31}\) There are publications that provide snapshots of the effects of the crisis in different Asian countries. The ninth annual edition of the World Bank publication *Global Economic Prospects and the Developing Countries: Beyond Financial Crisis* (1998) analyses short- and long-term prospects for the developing countries in the region in the wake of the collapse. It also exposes certain weaknesses that seem to have aggravated the situation, notable among them being insufficiencies and frailties in the institutional structure. The main lesson drawn is that Asian countries need to strengthen their regulatory and institutional capacities. Another World Bank publication, *East Asia: The Road to Recovery* (1998), presents an attempt to examine
can be mentioned briefly that as country in transition and relative isolation, Vietnam has not been affected by the crisis to the same extent as its more “open” neighbours Korea, Thailand and Indonesia. APEC figures suggest that Vietnam’s economic growth was around 6 per cent for 1998, which is slightly less than 1997 (8.8 per cent), and that the GNP will increase by 5.1 per cent in 1999 and 5.8 in the year 2000. Inflation is still relatively stable at 10 per cent annually, but the volume of foreign investment is much lower than it used to be.\textsuperscript{32}

1.4 Method

1.4.1 LEGAL REFORM

There are no clear-cut methods determining how something as complex as a legal reform experience should be measured and commented on, but obviously, exegesis of legislation is not sufficient since the whole process is intimately involved with other factors such as politics, economy and culture.\textsuperscript{33} A fair description seems to presuppose an approach in which elements of legal, social and behavioural sciences are combined. The debate on the pros and cons of such integrative approaches is vast, but for the writing of this thesis, the emergence over the last decade of a doctrine of “Legal Reform” has provided inspiration and guidance. With regard to Asia, it is represented notably by William Alford, Jerome Cohen, Donald Clarke, Anthony Dicks, Edward Epstein, James

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\textsuperscript{32} See Neilson 1998b pp. 11–12.

\textsuperscript{33} Regarding the inadequacy of “traditional” legal analysis for understanding Vietnamese law and legal practice, see Nicholson 1999 pp. 300 and 305–311.

Their writings on various aspects of legal reform often merge elements of comparative law, although the comparative element is sometimes implicit, with interdisciplinary methods such as law and economics, sociology of law, law and anthropology, and area studies. They also use various kinds of empirical material, acquired e.g. through interviews, case studies and participatory observations. This integration of tools and techniques from different disciplines allows the analysis to comprise important issues of values and perceptions, enhances the qualitative depth and allows the discussion to rise above the exclusive use of conventional Western legal terms and categories.

The shift towards integrated approaches also relaxes the paralysing attitude to biases that may otherwise preclude important research. "Lay open your values and your methodology" is preferred to unobtainable objectivity, reliability and validity. Another useful result of this development is the freedom for researchers undertaking comparative and cross-cultural work to acknowledge that their work only presents one of many possible perspectives on the object of study and that there is no claim to have produced a definitive understanding of it.

There is no intention in this thesis to embark upon any deeper

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34 Regarding the integration of law and other disciplines in development-oriented research generally, see Dalberg-Larsen 1994; Sandgren 1995-96a and b; Tolonen 1996; and von Benda-Beckmann 1989.


36 Generally, see Mikkelsen 1995 p. 207. Regarding Vietnam specifically, see Nicholson 1999 pp. 309 and 322. Sandgren (1995–96a pp. 738–739 and 1995–96b pp. 1043–1044 and 1055) stresses that lawyers' use of the theories of other disciplines does not necessarily presuppose that the lawyers themselves have mastered the subtleties of the empirical methods that underpin these theories. It is often sufficient that the lawyers are well acquainted with their core meaning.
evaluation of the tentative methodological experiences of using integrated approaches in the Legal Reform literature, except for some remarks on the role of comparative law. 37 “Traditional” comparative law is often helpful in identifying the historical origins of laws and structures and in describing their relative character, but it is also typical of the traditional approach that it has a point of departure in concepts of “Western” law and that difficulties tend to occur when the object of study is a legal culture in which there is limited correspondence with familiar concepts and categories, or when the comparison must comprise factors such as history, mentality, ideology and institutional practice. 38

Some comparatists argue that traditional comparative law, when viewed in its narrowest sense, is meaningful (in terms of the aims and objectives it can pursue) only when used for a comparison of legal systems that share a basic common conception of law. For example, Van Hoecke and Warrington suggest that the differences between Asian and Western legal culture or “paradigms” are so pronounced in regard to the degree of inclination to individualism and rationalism that there is little to be gained from a straightforward comparison. 39 Although Van Hoecke and

37 There is no single, accepted, definition of what comparative law is. It seems best described as a generic term comprising both theories and methods that can be further classified into various sub-groups.


39 Van Hoecke and Warrington define a “legal paradigm” as “[...] a hard core of shared understandings, of basic theories and concepts, a common language, a common methodology.” This paradigm or “common legal culture”, in turn, includes shared understandings on at least (1) a concept of law; (2) a theory of valid legal sources; (3) a methodology of law, both for making and for the adjudication of law; (4) a theory of argumentation; (5) a theory of legitimation of the law; and (6) a common basic ideology (1998 pp. 514–515). There is little to be gained from comparing Western and Asian systems because Asian legal culture is neither individualist nor rationalist: “[t]he individual [in an Asian system] has no rights but
Warringtons' stylised example needs to be refined to be true to reality, it emphasises that the differences in the role of law in society and in the way disputes are handled can be so fundamental that there is little point in merely comparing legal rules and institutions. To merely look at the “law” in a legal order belonging to another family also carries the risk of implying that there are many more similarities than there actually are.

This does not mean that comparative law is useless when the researcher lacks any cultural connection with the object of study. Rather, outsiders conscious of their “otherness” can contribute many valuable insights with the help of certain new approaches in distinguishing and analysing legal cultures at world level, e.g. ethnographic, sociological, anthropological and “cultural studies” approaches. “Law as rules” is no longer at the core, but rather attitudes towards the law and how it interacts with political, economic and cultural variables.

“Law and Economics” methods are also being integrated into modern comparative law and into legal reform literature. ⁴⁰ In this thesis, very elementary Law and Economics tools and terminology are used in the identification and discussion of areas where economic development goals are frustrated by legal rules that cause uncertainty, increase the costs of transaction or otherwise discourage efficient use of available resources, and to draw some general conclusions regarding the effects of the lack of real feedback between lawmaking and market behaviour. ⁴¹ However,

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⁴⁰ Regarding Southeast Asia, see e.g. Knetsch 1993a and 1993b; Knetsch, Hussain and Sumantoro 1993; and Pistor and Wellons 1998.

⁴¹ This discussion is inspired by Cooter and Ulen 1988 and Posner 1992. The attempt by Stone, Levy and Paredes (1996) to answer the question of the extent to which laws that ostensibly increase transaction costs do in fact increase the costs of doing business by combining Law and Development and New Institutional Economics in field surveys in Brazil and Chile, should also be mentioned.
this thesis does not include any attempt to assess the economic efficiency of specific rules.

Some economic-oriented works have provided important background data for the discussion and have been helpful in narrowing a fertile area of investigation. Per Ronnås’ 1992 study of the role of private entrepreneurship for employment generation, which is based on a sample survey covering some 1,000 small enterprises located in Hanoi, Hai Phong and Ho Chi Minh City, has provided an overview of the operational characteristics of smaller Vietnamese businesses.

Haggard, McMillan and Woodruff’s 1996 quantitative survey of 149 private firms and collectives in Hanoi has provided insights into how start-up businesses operate in the face of a poorly developed legal system and inadequate market information. The 1997 World Development Report, “The State in a Changing World”, with background papers, has been inspiring regarding both method and findings. It discusses the views of local entrepreneurs in circa 60 countries (covering almost 3,000 enterprises) respecting the predictability of changes in laws and policies, the reliability of law enforcement, the impact of discretionary and corrupt bureaucracies and the danger of policy surprises due to changes in government. 42

1.4.2 LAW, LITERATURE AND INTERVIEWS

The discussion in this thesis rests on three equally important kinds

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42 This report points out that businesses can consider their environment to be relatively stable despite numerous coups and changes in government, but by the same token, perceive their environment as highly volatile and unpredictable even if the government does not change, see THE STATE IN A CHANGING WORLD 1997 p. 34 and Brunetti, Kisunko and Weder 1997a; 1997b; and 1997c. Country risk indicators based on expert opinions are sometimes used to estimate property rights insecurity and corruption. Such indicators may reflect more closely the concerns of entrepreneurs than e.g. overall measures of political instability, but they are usually based on the perceptions of foreign country experts and tend to be aimed at the problems for foreign investors rather than those of local businessmen, see Brunetti, Kisunko and Weder 1997b pp. 2 and 6.
of material: statutory documents (laws, ordinances, decrees, resolutions, circulars, etc.), literature and empirical material. Each of them brings up specific methodological considerations. Before discussing these in detail, it should be stressed that considerable caution must be exercised in reading and interpreting the limited official material that exists on Vietnam. Official inquiries often serve to sway the opinions of the regime. Statistics are notoriously unreliable, especially concerning the non-state sector, because adequate means for collection and analysis of input data are largely absent and figures juggled to avoid or enforce tax collection, to encourage investment, to demonstrate the success of the system, or because demands are made for figures which simply do not exist.\(^4^3\)

The Vietnamese *Official Gazette* (*Cong Bao*) is published in English by the law journal *Vietnam Law & Legal Forum* and provides official translations of most of the legal instruments enacted by the National Assembly, the government, ministries and other central agencies. Good translations of legislation, even bilingual editions, are also accessible through the efforts of international law firms. For example, Baker and McKenzie provides an English version of the 1997 Commercial Law, with the original Vietnamese text on the opposite side of each page, and gives 111 annotations which carefully explain translation choices, nuances and interpretative difficulties. *Vietnam Law & Legal Forum* provides a similarly organised English translation of the Civil Code.

The regime's views concerning the content of the legal reform process find expression in official doctrine and are reflected and commented on in *Vietnam Law & Legal Forum*, *Vietnamese Law Journal* (*Revue de droit Vietnamiens*), *Vietnam Investment Review*, and *Vietnam Economic Times*. That these publications are often the most initiated and outspoken in the country is not surprising,

\(^{43}\) For a general discussion on official statistics in Vietnam, see Edberg 1996; Lindblom 1996; and Pettersson 1996.
given that their principal audience is found among resourceful and critical overseas lawyers, businessmen, diplomats and scholars.

The expectation on the part of some commentators that Vietnam will be the next Asian “Tiger” means that Vietnamese law and politics are attracting the attention of a surprisingly large number of overseas expert commentators, especially in the United States, Canada and Australia. Numerous articles and monographs describe the processes of political and legal reform, although often with a focus either on the survival of the Communist Party or on matters affecting the conditions for foreign investors. Notable exceptions in this respect are John Gillespie, William Neilson and Mark Sidel, whose initiated analyses of other important aspects of the legal reform effort, e.g. the nexus between legal and administrative reform, the implications of the membership of ASEAN, and prevailing ideological and educational factors, have contributed greatly to this thesis.

A deeper understanding of the official side of the reform process has been acquired in discussions with Vietnamese political policy makers, legislators and government lawyers on numerous occasions between 1993 and 1998, either specifically for the purpose of researching this thesis, or in conjunction with development cooperation assignments. In total, the author paid over twenty visits to Vietnam. The implementation of laws and regulations, including inter-institutional relationships, individual agency organisation, personnel and reward systems, skills and other factors that determine the operation of the judiciary, was discussed with

44 For example, the author participated in the writing of the joint Swedish-Vietnamese sector review AN INTRODUCTION TO THE VIETNAMESE LEGAL SYSTEM (Bergling et. al. 1998), which is based on more than 50 interviews with Vietnamese policy makers, judges and lawyers in public and private service. Part of the interview material acquired between 1993 and 1995 is commented on and documented in the author’s previous articles on the subject of legal reform in Vietnam (Bergling 1996, 1997a, 1997b and Bergling et. al. 1998). The remaining documentation is kept on file with the author, except for a limited number of cases where the conversational and informal character of the discussions did not allow the taking of notes.
lawyers in public service, attorneys and others with insight into the legal and administrative machinery, largely under the same premises.

Initially, while a broader understanding of the general characteristics of the Vietnamese legal system was sought, these discussions covered a wide array of legal and administrative issues and their relationship to prevailing political and economic conditions. Later, once the topic of this thesis was finally determined, the decision to focus on property and contracts provided a point of departure for more specific topics and questions relevant to the thesis. The decision concerning the thesis topic also meant that the discussion could be linked to some of the most important codifications of recent years, i.a. the 1989 Ordinance on Economic Contracts, the 1990 Law on Companies, the 1990 Law on Private Enterprises, the 1992 Constitution, the 1993 Land Law, the 1995 Civil Code, and the 1997 Commercial Law.

As these interviews sought to probe ideological controversies, the role of the Communist Party, the presence of official corruption and other sensitive topics, most of them had to be conducted with a strict promise of anonymity. No names, dates, or other data that would allow identification of the respondents appear in the following.

In order to contrast the official view of means and ends with the perceptions and reactions of those who are supposed to benefit from the legal reforms, i.e. the owners and managers of smaller businesses, a private sector survey was conducted in the autumn of 1995 and the spring of 1996. The nature of the task and the author’s previous experiences of survey work in Vietnam led to the use of a qualitative approach and the interviewing of a relatively small number of respondents, around 40.45 Some of these

45 Some interviews had to be omitted due to mistakes in the identification of respondents. For example, on three occasions it was revealed that businesses which appeared to be privately owned proved to be owned by state agencies or People's
interviews, 20 in total, were conducted by three instructed graduate students from the Hanoi Law University.

The most significant advantages of qualitative approaches are flexibility, the ability to provide valid in-depth inside information if there is a relationship of trust, and a better understanding of the rationale, motivations, attitudes, etc. that direct people's behaviour.\textsuperscript{46} The disadvantages are errors caused by selection of informants and susceptibility to various forms of interviewer bias.\textsuperscript{47} Although there is no obvious reason to believe that the businessmen in this survey had a systematically different perception of the state of affairs than Vietnamese businessmen in general, it should be stressed that qualitative methods generate hypotheses.

Various forms of self-administered questionnaires were considered as an alternative or complement, but the author's previous experiments with such methods in Vietnam had illustrated the difficulties they pose, \textit{e.g.} with regard to language, dissemination, fear and the situation that once the questionnaire has been sent away, there is no control over who, in fact, fills it out and whether that person takes instructions from others when doing so.\textsuperscript{48} For obvious reasons, people are not willing to describe accurately sensitive matters such as arbitrariness, discrimination and corruption in a widely circulated questionnaire. It should also be mentioned that large-scale surveys aiming at generalisability and representativity are very difficult to carry out in Vietnam where reliable and up-to-date central registries of firms and other basic

\textsuperscript{46} See \textit{e.g.} Mikkelsen 1995 pp. 34 and 224–229; Peil 1983 pp. 82–84; and Ward 1983 pp. 126-130 and 134-136. The decision to use a qualitative approach, and the design of the survey, was also discussed with specialists within legal, social and anthropological fieldwork, and with people with a long experience of Vietnam.

\textsuperscript{47} See \textit{e.g.} Bulmer 1983b p. 98 and Ward 1983 pp. 130–132.

\textsuperscript{48} For a general discussion, see Bourque and Fielder 1995 pp. 19–20.
The businessmen had to conform to certain basic criteria to be eligible for inclusion in the survey, *i.e.* that the business they represented should be wholly domestically owned, active within trade or manufacture, and have less than 50 employees.

It can be mentioned that according to official figures, there are approximately 2 000 state enterprises, 6 000 private enterprises and 600 000 small household businesses in the industrial sector in Vietnam. The 8 000 state and private enterprises represent about 80 per cent of the total industrial turnover and account for 20 per cent of employment. The private enterprises employ 2–5 people on average. In the trade sector there are approximately 2 000 state enterprises, 300 co-operatives, 2 100 enterprises with mixed ownership, more than 6 000 private trade enterprises, and some 1 000 000 household businesses. The trade sector accounts for 30 per cent of the turnover. The 1 000 000 household businesses represent about 70 per cent of the total turnover in the trade sector. In the construction sector (also comprising transport and communication) there are approximately 1 000 private enterprises, 700 limited companies, 10 joint ventures, 800 state-owned enterprises, 15 enterprises owned by social organisations and a

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49 As it is, state-owned, private and joint-venture enterprises are required to provide data on their existence and operations to the General Statistical Office of Vietnam, GSO, but data on the small-scale household businesses, of which there are approximately 2 million, are collected by interviewers from a sample of businesses. Foreign experts assisting the GSO report that in the first category the poor control over the data collection results in substantial non-response (60 per cent for the private enterprises) and consequently large errors. It is even suggested that the report system for private businesses should be replaced by a small random sample with good control and follow-up of non-response, see Pettersson 1996 p. 34. In the second category, response error, particularly under-reporting, is given as the most serious problem. Foreign statisticians argue that turnover, income and some other variables are virtually "unobservable", see Pettersson 1996 pp. 3-4 and 8. The giving of false figures is spurred by fear that statistical data will be used for other purposes, *e.g.* taxation. Private enterprises, especially small private enterprises seem to believe that when one part of the government knows a figure, all parts of the government will know it, see Lindblom 1996 p. 2.
number of small-scale or household businesses.\textsuperscript{50}

In Hanoi (pop. 2 300 000 according to official records), where the majority of the interviews in the private sector survey were conducted, there are 2 800 000 active economic "units" of various character. About 900 of these units are state owned, 2 000 privately owned and 200 joint ventures where the owners can be combinations of private and state. The rest are household businesses, 177 000 within agriculture, 71 000 within trade, 17 000 within manufacture and 5 000 within construction.\textsuperscript{51}

Some respondents were identified in discussions with Vietnamese colleagues, foreign diplomats, businessmen and lawyers working in Vietnam, but the majority were identified with the assistance of the international liaison office of the Hanoi Law University.\textsuperscript{52} The respondents usually proved to be the owners or managers of the businesses, on average middle-aged males (only two were women) with five to ten years of formal education.

Almost half the respondents had experience from production of similar products and services prior to the establishment of their businesses, which suggests that changes of status from employee, presumably in state enterprises, to self-employment are fairly common. Many also mentioned that there was a family tradition of working within a particular trade.

There were certain problems that could arise in the relationship between the interviewer and the respondent because of differences in background characteristics, \textit{e.g.} age, social status and language. It was also known that where a high social value is placed on courtesy and maintaining a pleasant and agreeable atmosphere, as is often the case in Vietnam, people may answer in such a way as

\textsuperscript{50} Vietnamese official statistics referred to in Edberg 1996 pp. 6 and 10-11; Lindblom 1996 pp. 1 and 3-5; and Pettersson 1996 pp. 19-23.


\textsuperscript{52} The graduate students assisting in the interviews were also at liberty to identify suitable respondents within the stipulated selection criteria.
not to disturb this atmosphere or will give information that they feel someone in their position should give.\textsuperscript{53}

It could further be assumed that some of the respondents would be suspicious of the motives for the study or suspect the student interviewers for being police agents or Party officials. Vietnam is still a country where most aspects of political and social life are controlled by the state and people know that surveys often function to sway the views of the leadership. That the interviews involved some delicate questions on the role of the state also aroused concern that respondents who were disappointed with the state would take the opportunity to exaggerate the problems, while those who felt reasonably happy would perhaps decide to present a too rosy a picture.\textsuperscript{54}

Self-conscious awareness that such potential sources of error exist and have to be countered is essential for dealing with them. The literature discussing fieldwork methods in developing countries also suggests an array of tested tools and techniques which can be used to minimise their effects. For the purpose of collecting sensitive information, it was crucial to ensure that the respondents were confident that the data provided were anonymous and could not be related to them. A strong reassurance of anonymity was consequently given.\textsuperscript{55}

Careful wording of the questions and a detailed explanation of the purpose of the interview were also important to clearly establish the image of the interviewer, to reduce erroneous or tacit assumptions and to breach the courtesy barrier. Each interview

\textsuperscript{53} These phenomena are commonly referred to as "courtesy bias" and "ingratiation bias". For their effects in social research in developing countries generally, see Bulmer 1983c pp. 209-213; Jones 1983 \textit{in extenso}; and Mitchell 1983 p. 235.

\textsuperscript{54} Wuelker (1983 pp. 164–165) discusses the effects of authoritarian government and other political factors on empirical social research in Southeast Asia.

\textsuperscript{55} The name, address etc. of each business have been kept with the author in order to make it possible to return for further information. The careful keeping of names and dates, etc. also serves to safeguard against any dishonesty among the locally employed interviewers.
began with a presentation of the research project and an explanation of the nature of the questions. Sometimes as much as 20 minutes of a two-hour interview were spent to allow the respondent to see clearly what the interview was about.

The fairly conversational and situational setting of the interviews (almost all interviews were conducted on the premises of the business in question), a good rapport and a leisurely interview pace (the interviews typically lasted for two to three hours) also helped to make the respondents comfortable about giving critical or impolite answers. Some "leading" questions or phrases could be tolerated if they suggested to the respondent that he or she was not alone in this opinion and that others had already expressed critical views on the subject.\textsuperscript{56} To depersonalise a matter and discuss it hypothetically could also help.

It appears that these relatively simple measures were sufficient to convince the respondents that there was no hidden agenda and that their frank opinions really were sought. The number of obviously rhetorical or "politically correct" answers, otherwise a characteristic trait of interviews in Vietnam, appear to be low.\textsuperscript{57}

To increase the comprehensiveness of the information and make the collection of data systematic, the private business interviews followed a checklist of specific topics to be covered (see Appendix \textit{infra}). Unlike a conventional questionnaire, the topics were open-ended and formulated in a way that allowed probing and the asking of additional questions concerning subjects of

\textsuperscript{56} For example, a phrase designed to establish the acceptability of an impolite or critical response could be used as an introduction to a question: "I have heard that some people around here have problems with ..." or "Vietnam News reported that...". Social scientists working with survey methods in developing countries endorse this practice, see \textit{e.g.} Jones 1983 p. 256 and Mitchell 1983 p. 235.

\textsuperscript{57} A common source of unreliability is questions eliciting opinions, \textit{e.g.} that the respondent voices opinions on issues of which he has no knowledge. The graduate students assisting in the survey had an impression that in some cases the respondents sought to impress the interviewers, who they knew were law students, by putting too much emphasis on legal technicalities.
particular interest. The open-ended topics also allowed the respondents to answer in their own words.\textsuperscript{58} Care was taken to use plain simple talk, to avoid yes or no questions, to mix questions and discussions, etc. After a limited number of pilot interviews to ascertain whether the topics "worked", it was decided to change the sequence slightly and adjust some terms that were still too technical to be properly understood.

The topics were grouped according to subject fields. The first subject field focused on the state-business interface, \textit{i.a.} predictability of rulemaking, the degree to which businesses can influence the formulation of laws and policies and whether the state can actually implement the policies it formulates. The interviews revealed a predominant view among the respondents that the process of rulemaking is secretive and unresponsive to their views and interests.

The next topic in this subject field, how the state implements the laws and policies it formulates, was inspired by the observation that uncertainty might relate less to the rules than to the way they are enforced. The respondents were asked whether they trusted the state to respect their ownership (or "use-rights") of land and movables, to protect these rights against competing claims and infringements from others and to provide a fair judiciary process if grievances occurred. The presence of discretion and arbitrariness in the government-business interface was also discussed. The predominant view of the respondents is that there are difficult problems inherent in the way the judicial and administrative system operates. Lack of clarity in the division of judicial and administrative functions, wide latitude for discretion and extensive involvement of administrative agencies in various aspects of

\textsuperscript{58} Social researchers using interview techniques in developing countries have noted that open-ended questions are often more reliable than closed questions, \textit{see e.g.} Alers 1983 p. 187. This finding is somewhat surprising since theoretically there are two potential sources of error in the open questions, response error and coding error, and only the former applies to the closed questions.
commerce, open the way for arbitrariness and discrimination in the state-business interface.

The final topic in this subject field probed the overall frequency of corruption, *e.g.* whether it is common for the respondents to be required to make irregular payments to acquire licenses, permits, or to otherwise get things done. This topic also sought to discover whether corruption is a predictable transaction cost or a source of uncertainty, *e.g.* by asking whether, after paying a bribe, the respondent was afraid of blackmail, etc. The respondents verified that corruption is commonplace and that virtually all contacts with representatives for the state involve bribes and favours. The amounts required are usually modest, but the practice erodes the little confidence in the agents of the state that still exists.

The second part of the interview checklist focused on the horizontal relationship between businesses. The types of questions asked were: what kind of agreements did the respondents use in the pursuit of business and to what purpose, how did they safeguard against opportunism on the part of the other party, which were the preferred avenues for dispute resolution and enforcement, etc. There was also a topic probing whether the respondents knew of and appreciated the existing legislation governing business transactions and the available means for dispute resolution.

The interviewed businessmen predominantly hold the view that informal mechanisms, *e.g.* family, kinship and reputation, are often impotent when transactions take place over long distances and with unknown partners. At the same time, they argue that the weakness of the means for enforcement prevents them from planning and negotiating in the shadow of the laws that exist. All interviews ended with an open question that invited additional remarks.

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59 Some businessmen were initially reluctant to discuss matters of corruption, but their guardedness could often be managed by letting several questions broach the topic indirectly.
The translation of questions and terms between the English and Vietnamese languages raised problems of its own. Vietnamese and English have very different grammatical structures and each language possesses its own legal and cultural tradition. The most obvious aspect, that of lexical equivalence, i.e. the rendering of questions asked in English in the same words when asked in Vietnamese, can sometimes be dealt with by “back translation” and similar methods. However, such methods may also lull the researcher into believing that equivalence has been achieved when it has not, because words, as language terms, always depend on the context in which they are used.

More important however than lexical equivalence in researching this thesis was to ensure a reasonable degree of conceptual equivalence, i.e. equivalence in meaning or simply talking about the same thing. The concepts used, whether these were a theoretical construction such as “right” or a term with a more direct empirical reference like “payment,” had to transfer without losing their core meaning from English to Vietnamese, and back again.

60 See Marr 1981 pp. 136-189. For non-Vietnamese speaking people to even acquire an elementary knowledge of Vietnamese is a great undertaking.

61 The material, e.g. a questionnaire, is translated from one language to another, and then translated independently, by another translator, back into the original language. The results are then compared to identify and correct semantic errors in the translation. The author tried to organise such a back translation of the interview checklist, but the translators asked to perform it deemed the effort pointless. In their view, the risks of misunderstandings in the translation of the checklist were greatly exaggerated.


63 The concept of “law” was found difficult to define unambiguously, both because the official hierarchy of norms is disputed in Vietnam and because the cultural perception of the phenomena differs. That “law” poses special problems in developing countries is a well-known fact. Some commentators even argue that any research into law and its significance in social life which looks for “the law” or “the effective law” is futile because it sets out from the incorrect assumption that law exists and can be described and analysed independently of context, or, which
A good measure of knowledge of the local culture, enhanced by the participation of Vietnamese lawyers in the articulation of questions and later by the assistance of Vietnamese interviewers in the survey, seems to have helped to ensure a reasonable degree of conceptual equivalence. The use of abstract legal terms, political jargon, and words that lack a Vietnamese equivalent, was also avoided as far as possible. When it was found absolutely necessary to use certain terms, or when the respondents used them, additional questions were asked to ensure that they were correctly understood.

The use of local student interviewers proved to have many advantages. The wording of the questionnaire could be discussed and decided jointly with people with insights into local conditions. As the local interviewers had lived in the community for a long period of time and acquired both knowledge and contacts, they could also check on the information, recognise errors and inconsistencies and ask additional questions to have these quickly clarified.

In spite of the students' qualities in respect to knowledge and motivation, they were observed for any tendencies to be elitist or otherwise have difficulty in abandoning their high status as privileged and envied law students. Difference in age was another factor to consider, particularly in Vietnam where social status is closely linked to age. Contrary to apprehension, most respondents were rather excited by the interests shown in their situation and amounts to the same thing, that it is the same in all contexts, see e.g. von Benda-Beckmann 1989 p. 141.

64 Field researchers specialising in Southeast Asia tend to emphasise the advantages of using middlemen, see e.g. Mitchell 1983 p. 234.

65 The same interpreter who assisted in the interviews conducted by the author translated the interview checklist into Vietnamese. The student interviewers presented the results of their interviews in writing, but were also orally de-briefed in order to detect lacks and lapses in the layout of the survey and to get their own expressionistic picture of the matters covered. The result of the de-briefing essentially reinforced the picture given in the written answers.
explained their problems frankly and amicably to the student interviewers.

There seem to be no strict formulae for the analysis of qualitative data originating from interviews and discussions. Social scientists have noted that the procedures for analysing qualitative data are often a form of “craftsmanship”.66 In the course of gathering data, new ideas also emerged about analysis and interpretation. Although such initial impressions can sometimes distort additional data collection, it seemed that this overlapping of collection and analysis helped to improve the quality of both the data collected and the analysis.

As the main interest was on issues or topics, the analysis began with a description of variations in the description of the interview topics and proceeded to seek patterns and links. In this case the data could not be transformed into numbers, diagrams, etc., but various methods of triangulation, *i.e.* crosschecking with official sources and literature, were used to detect any possible lapses and inconsistencies.

CHAPTER 2

TRADITIONAL AND SOCIALIST NOTIONS OF LAW

This chapter provides an introductory and essentially descriptive overview of the wider historical, political, religious and cultural context in which the process of legal reform takes place.

2.1 Religion, Tradition and Law

For over a thousand years, ending in 939 AD, Vietnam was ruled from China, more or less as a province. Even after that, the Vietnamese emperors, notably the Nguyen dynasty, sought in various ways to replicate Chinese concepts of law and government. The administration of the state was divided into exactly the same six “boards” as the Chinese: civil appointments, rites, war, finance, public works, and punishments (or justice). At the local level there were district magistrates and provincial governors in Chinese model.

Although never static, some traditional concepts have survived both French colonial rule and socialist revolution and still influence various aspects of political and legal life in Vietnam.

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Commentators tend to stress “Confucianism”, a value-based system for social organisation that emerged originally in China in the fourth century BC. This system is founded on a three-level logic that consists of li (ritual), ren (benevolence) and tian (heaven). Li (“Le” in Vietnamese) represents the code of conduct, ren the code of virtue and tian the code of belief.

Li, the code of conduct, was traditionally by far the most important of the three. It suggested that society should not be regulated by laws, but by the internalisation of certain ethical principles of conduct on the part of each individual. The observance of these principles, the central five of which were those of ruler and minister, father and son, husband and wife, elder and younger brother, and friend and friend, was thought to ensure the maintenance of order and harmony. Filial piety was advocated as the cardinal virtue, with the implicit objective of teaching and nourishing subordination and obedience. Filial piety within the family corresponded to the duty of obedience to the emperor.

Confucian norms were never undisputed. Buddhism was one competing force, especially during the Ly and Tran dynasties (11th to 15th centuries). Another competing approach, fa, essentially meaning positive law, held precedence over the

68 See Ngo Ba Thanh 1993 pp. 83-84 and 1994b p. 27. Pye (1985 p. 236) argues that “[m]ore than any of the other non-Chinese cultures, the Vietnamese took to the ideals of power of traditional Confucianism.” It can be mentioned that for nearly ten centuries, from the eleventh until the beginning of the present century, the main subject in the competitive examination syllabus for the recruitment of Mandarins in Vietnam was the study of Chinese Classics.

69 The following famous passage of Louen Yu (Luan Ngu in Vietnamese), quoted in Ngo Ba Thanh 1994b p. 27, summarises the essence of the idea of formally recognising the superiority of education to law: “The Master said: If the people are ruled by laws, and Order and Justice are obtained by means of penalties, the people will seek to escape penalties, but they will never know the feeling of shame. If, on the contrary, they are led and inspired by virtue, and Order is realized by means of the ‘Li’ [...] then the people will have acquired the sense of shame (of right and wrong) and in addition will have improved themselves.”

70 Regarding the influence of Buddhism on Vietnamese law and administration, see Ngo Ba Thanh 1996 pp. 24-28 and Trung Anh 1995 p. 24.
Confucian model for a period. This school of thought made a distinction between law and morality and argued that law should be the primary means to discipline and channel people. It found strong support in the ruling dynasties because of its advocacy of strict obedience to the positive law. *Fa*, and with it the distinction between morality and law, was eventually submerged by Confucianism and *li* reemerged as the primary social norm.71 The remaining role for the imperial codes was essentially to stipulate rules for state security, tax collection and similar matters.72

The state’s lack of interest in the institutions underpinning commerce meant that artisans and traders essentially had to rely on kinship ties, customs, reciprocal obligations and similar mechanisms to carry out their day-to-day operations. The traditional villages, which had their own administrative and religious authorities, could provide some stability when grievances arose.73 It was seldom a matter of objectively balancing the merits of the claims, rather of maintaining a degree of “harmony” and “order” within the village or group. This social ideal did not provide the most fertile ground for entrepreneurship. Traders went to great length to avoid contacts with the authorities and their sons would hope not to carry on the family business, but instead to take the competitive imperial examination and enter the ranks of the bureaucracy in pursuit of higher social prestige.74

The ideas of “Political Confucianism” (Confucianism’s support for a hierarchical system of social relations with an emperor or king at the top and a class of gentlemen-scholars manning a centralised bureaucracy below him) are still relevant for an understanding of

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72 For a general discussion, see Ngo Ba Thanh 1993 pp. 83–84 and 1994b p. 26. A characteristic feature of the imperial codes was their penal character, almost all rules were combined with penal sanctions, see Trung Anh 1995 pp. 25–26.


74 See Fukuyama 1996 pp. 84–85.
the political and legal organisation of Vietnam and many other contemporary Asian societies. For example, the Vietnamese system of Party rule may be described as a “superfamily” where the relationship of the Party and government to the people resembles that of a father toward his children. Thus, the ideal citizen should possess the ability to behave in accordance with explicitly and implicitly articulated rules of conduct. No “rights” for the individual (in the conventional Western sense) or other enforceable guarantees against abuse of official power should be necessary.

2.2 Colonial Law and Administration

From the 1850s Vietnam was under constant military threat, particularly from France. It was occupied entirely by French troops in 1880 and all significant armed resistance had been quelled by 1897. The following colonisation and the making of Hanoi into the centre for the administration of the whole of French Indochina exposed the traditional and relatively conservative Vietnamese society to unprecedented challenges.

The country was dismembered and Cochin-China came under direct French rule and was administrated as a colony. Ton-Kin was allowed a degree of independence, but the powers of the Nguyen Emperors were circumvented by the authority of the French Résident Général and all imperial edicts had to be endorsed by the colonial administration to be effective. Annan had the status of a protectorate and the Nguyen Emperor remained the titular ruler. In practice, official matters of any importance in all regions were subject to a centralised and rather top-heavy administration

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75 The legislation of the Nguyen dynasty included royal orders (sac), which were internal administrative instruments regulating matters such as the appointment of mandarins; ordinances (chi) which were also administrative instruments, e.g. for the recruitment of officials; decrees (du) which could be of both legal and executive character; and royal codes, see Pham Diem 1997a p. 26
operated by the French, supported by an expanded tax and corvée system.76

The economic policy of the French was to support the primary export sector and to ensure near monopoly status for French finance capital and imported products. To meet this end, the colonial authorities organised large land concessions to French companies and Vietnamese collaborators (often disregarding prior ownership or occupancy) which, in combination with the legal and regulatory changes, meant that there was an unprecedented movement towards concentrated wealth, land alienation and the growth of a class of people who were landless or had very little land.

David Marr describes how peasant families who had devoted generations to improving land could find themselves being evicted or converted into tenants, sometimes simply because they had not learned the new rules as quickly as others, and that even those who thought they had protected themselves legally could be outmanoeuvred by means of usurious loans, cadastral manipulations, seizure for back taxes, or simply because the responsible officials could be bought. To seek redress in such situations was usually hopeless, and sometimes dangerous, since colonial retaliatory power was normally at the disposal of any landlord or official who was in the good graces of his superiors.77

The cash economy reached even the most isolated hamlets when central taxes were levied on individuals rather than as before on villages.78 At the same time, the development potential of modern

76 Generally, see Marr 1981 and Pham Diem 1997a and 1997b.

77 The effects of the social changes were not confined to the economic area. Marr (1981 pp. 4 and 127) describes how suicide and opium addiction became commonplace among rootless young men and women. Nelsson’s 1998 compilation of letters from a Swedish national employed by the French military administration in Tonkin contains numerous descriptions of racism, arbitrariness and cruelty towards the indigenous people.

78 The French ordered that the entire land and poll taxes should be paid in solid silver piasters, which peasants often had to acquire solely for this purpose at marked-up
“capitalism” based on private property and impersonal exchange was restricted by the monopolisation of the important rice, rubber and mining sectors and the aggressive attempts on the part of the French companies to control most large-scale endeavours in coffee, tea, tobacco, timber, cement, etc.

With regard to law, the colonial administration, especially after the Napoleonic codification, had the view that the new French codes embodied the final expression of law in terms of having universal value. Thus, the colony had only to follow the model provided by the codes, and it would find the answer to any problem through simple exegesis.\(^79\)

There was little interest in accommodating traditional Vietnamese notions of law and order to this system, for obvious reasons. However, factors such as language, religion and poor means of communication restricted the influence of the colonial courts to the major urban areas. Even there, their services remained a preserve of the elite. Two legal and administrative systems therefore existed side by side, the colonial which applied to the Europeans and the relatively small group of Vietnamese who needed the services that only the colonial system could provide, and the traditional for the rest.\(^80\)

Records suggest that even in the more “Westernised” south, only a very limited number of the Vietnamese population ever submitted disputes to French law.\(^81\)

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\(^79\) Regarding the Napoleonic codes in colonial administration in general, see David and Brierley 1985 p. 3.

\(^80\) The colonial authorities made some attempts to get village notables, landlords and rich peasants to understand and enforce regulations. A variety of handbooks in French were prepared and translated into Vietnamese on topics such as land measurement, property and inheritance law and the petitioning of officials beyond the village level. The manuals could also tell the readers not to be dirty, to obey every law or face the consequences and to be grateful that their taxes were being used for public benefit, see Marr 1981 pp. 338–339.

This does not mean that the attitudes towards ethics, politics and law were static during this period. Rather, the new impulses and continuous confrontations meant that the meaning of traditional terms and concepts gradually changed and that words like loyalty, virtue and justice assumed new meanings different from that which orthodox Confucianism had originally given them. There were also indirect ways in which French concepts of law and administration came to influence the indigenous legal and administrative culture, for example through the training of the elite of Vietnamese lawyers and officials at the French-inspired Faculty of Law in Hanoi, founded in 1917.

2.3 Independence and Socialism

The inner nucleus of people who dominated the Vietnamese struggle for independence from France, and later also led the fight against the “Saigon Regime” south of the 17th parallel, consisted of people whose analysis of the colonial situation found its inspiration in Marxism-Leninism and who had a vision of radical social change based on scientific socialism. The most notable example is Ho Chi Minh, who had become impressed by European socialism and internationalism during his years in Europe. The close links between communism and national identity in the independence movement provided, and still provides, legitimacy for the revolutionary ideology.

In its attempts to consolidate the new-born independent state, the leadership looked to the dominant communist powers of the time, the Soviet Union and China, and adopted a similar system of

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82 Changes in the language have always been important exponents of cultural and political values in Vietnam, see Marr 1981 pp. 32-34 and 136-189.

centralised Party rule. Its policies were implemented by means of decrees, resolutions, programmes, etc, while the few pieces of actual legislation in force were often ignored. The *nomenklatura* system ensured Party hegemony in the judiciary and the administration.  

Inspired by the Marxist view that concepts such as justice and rule of law were fictions veiling the true class character of the law, the leadership sought to depart from the “bourgeois” system introduced by the French. From then on, law and legal services were not to be considered as ends in themselves, but rather as means for realising revolutionary goals, *e.g.* ideological enlightenment, delegitimation of the old order, elimination of “enemies” of the revolution and implementation of the new economic order. A decree from 1955, followed by a similar instruction from 1959, explicitly prohibited the authorities and the courts from practising traditional and colonial law. Most individual entitlements, to the extent they had ever existed, were subordinated to the interests of the state.

The regime experimented with various incarnations of “socialist legality,” a concept that is overwhelmingly concerned with social compliance and discipline in all fields and that does not

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84 The Party directly nominated people for election as judges and people’s assessors and Party approval was required before a person could be appointed to any important position in the administration.


86 It appears that Stalin’s defeat of the utopian Marxist school of jurisprudence, which favoured revolutionary and informal justice, and the following reorientation of Soviet legal thinking towards creating a coherent and powerful system of state judicial administration (see Smith 1996 p. 39 and Costea 1990 p. 237), inspired the official Vietnamese view of the law at the time.

87 Formally, peasants, artisans and “national capitalists” could still own land and other means of production, but the process of nationalisation and forced collectivisation was already well under way and most peasant holdings had been brought into the co-operative system by 1960, see Gillespie 1995b pp. 66–67.
differentiate between polity and the legal system. The epithet "socialist" serves to legitimise the obligation to obey the law, because unlike a law in a capitalist state, a law in a socialist state is seen to exist in the just interest of all people, and as such should be obeyed. The courts and other legal agencies should thus defend the revolutionary order and promote the norms of the revolution. Contracts and contract law, for example, were to be interpreted in such ways as to facilitate the attainment of planned economic targets. The Ministry of Justice and the College of Law became dying institutions and were eventually abolished in 1960. The most essential functions of the Ministry of Justice, i.a. the compilation of legislative programmes, were taken over by an administrative unit of the Government, the Legal Commission.

Despite its political, economic and cultural similarities to China, Vietnam came to rely more and more on the Soviet Union and its allies for political and ideological support. Several political policy makers, lawyers and scholars were given training in the Soviet Union, the German Democratic Republic, and other Eastern European countries. A number of them returned with "candidate of sciences" degrees and constituted Vietnam's academic elite. It was not long before the constitutional principles of the state, the structure and content of the laws and other normative instruments, and the formation of judicial and administrative agencies, displayed characteristic Soviet features. The Supreme People's Court (established in 1958) and the Peoples Procuracy and the State Economic Arbitration (established in 1960), were all modelled on their Soviet equivalents.

The leadership discovered that selective invocation and exploitation of certain "traditional" values, e.g. elements of the

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88 Generally, see David and Brierley 1985 pp. 208-211.
89 See Gillespie 1993 pp. 133-134.
90 See Porter 1993 pp. 172-173.
authoritarian Confucian doctrine, could help to sustain a degree of consensus around its new policies. The origin of the concepts was to be forgotten and their object of allegiance transferred to the Party. Moral training, positive models, forceful persuasion and other forms of indoctrination were among the means used to meet this end. The establishment of links between socialism and traditional concepts also allowed the leadership to invoke traditional sanctions for socialist policies. In meditation, for example, political preferences could be considered under the pretext of group solidarity or some other culturally sanctioned paradigm.92

In the economic sphere, the Vietnamese leadership formulated the “DRV model” (Democratic Republic of Vietnam), which reflected the prevailing idea in many developing countries at the time, namely that colonialism, exploitation and poverty could only be overcome through the planned use of scarce resources. The DRV model was accordingly characterised by a strong commitment to central planning, the idea of the state as the vehicle for development and a culture of secrecy that stemmed from the war experience.93 Even the state budget was a state secret.

The political ambience of the DRV model was reflected in the law.94 Once power over the allocation of the resources had been taken out of private hands and the means of production nationalised, it was up to the political leadership to define the terms of production and distribution. All economic regulations were supposed to serve the building of socialism and the few remaining fragments of private and commercial law were replaced

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92 Corne (1997 pp. 25-28) has observed the presence of similar regime techniques for forging consensus and maintaining social control in China, where the political situation was similar in many respects to that in Vietnam.

93 For a discussion of the political and economic features of the DRV model, see de Vylder 1993; Fforde and de Vylder 1996; and Ljunggren 1992 and 1993a.

94 For a description and analysis of the legislative activities of the period, see Pham Diem 1998b.
by a complex administrative system of planning and control. Employment relations and property disputes within state enterprises, collective farms, and social organisations were to be resolved by internal administrative procedures. Contractual disputes between state enterprises, co-operatives, and other institutions were to be resolved through a system of state arbitration in accordance with the state plan.

The official view of private enterprise could best be described as antagonistic. Since private ownership of the means of production was seen as the origin of social inequality and class struggle, extinction of such ownership was a primary target. Officials should implement the goals of nationalisation and collectivisation by any means available. Vast areas of land, officially claimed to have belonged to "reactionary landlords" and the French, were nationalised and redistributed according to class membership or other vaguely defined merits. The bulk of the industry was also brought under state or collective ownership and many aspects of the traditional craft and trading culture were swept aside.

In spite of the ideological orthodoxy, the implementation of a socialist economy never reached as far in Vietnam as in other, more "developed" centrally planned economies. Small private markets existed even when the ideological commitment was at its strongest. The "traditional" norms governing business relationships were severely suppressed, but never eroded. The ethnic Chinese, an important group of traders, in particular continued to do whatever business they could within the narrowly stipulated parameters of the tolerable. What the socialist policies did succeed in doing was to seriously distort the incentives and

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95 According to Le Hong Hanh (1993 p. 2), of 5,638 normative instruments adopted from 1960 to 1986, there was not one single law relating to economic activity.

96 Hasegawa (1992 p. 80) describes how intensive campaigns to eliminate capitalism in the South, notably the "X2 campaign", led to the brutal suppression of 40,000 "capitalist merchants" and to the mass exodus of Chinese traders in the late seventies and early eighties.
mechanisms that made the economy at large work. The situation within agriculture was especially difficult as collectivisation had damaged the production system to such an extent that the population could not be fed without massive support from the Soviet Union. When this support was reduced and eventually discontinued in the eighties, and simultaneously bad weather ruined the harvests, the situation became critical.
CHAPTER 3
ISSUES OF SEQUENCE AND TIMING

This chapter discusses where legal reform fits into the broader context of economic reform and liberalisation, under what incentives and constraints the process takes place and its relationship to structural adjustment and aid.

3.1 Choice and Circumstance

Issues related to economic, administrative and legal reform in the former centrally planned economies have been discussed with a sense of urgency since the collapse of the Soviet Union and its Eastern European allies. One of the most frequently discussed, but perhaps least understood, aspects of such reforms is the appropriate sequencing for and timing of various measures. While in political and economic scholarship, great efforts are made to enhance the understanding of these questions, surprisingly few lawyers have entered the discussion, although the links and interdependency between political and economic policies on the one hand, and legal reform on the other, are apparent.

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98 To describe legal reform, political reform and economic reform as separate processes is often misleading. The implementation of most political and economic policies
Before discussing some stylised reform approaches, it should be stressed that there is always an interplay between choice and circumstance that affects what policy makers and their strategies can accomplish. The inherited structure of the economy, the administrative capacity of the government, the ways in which the political system mobilises and channels public opinion and other practical constraints, determine the degree to which any strategy can be formulated and implemented.

The academic debate does not provide any formula for success with regard to the speed and sequence of various reform measures. In fact, the stylised approaches are often thought to differ with respect to the total number of disadvantages they generate, both in practical terms and in respect to their perceived credibility. Vastly simplified, a “gradualist” school advocates a policy of gradual or “phased” reform through slow deregulation and regulation, while a “radical” school argues in favour of a very fast all-out reform, “shock therapy” or “big bang.”

It is argued that one advantage with an all-out approach is that it makes it harder for those with vested interests in the status quo to slow down or stop the reform process. The advocates of speed further emphasise that the gaps and inconsistencies that may ensue from a slow or hesitant transition can cause uncertainty regarding the commitment to and motives behind the reforms and threaten the survival of the whole process. An approach where new and old solutions overlap may also create fertile ground for corruption.

The gradualists, on the other hand, point out that most attempts to realise major social transitions in a single leap and create new institutions from scratch have failed. When a system is presupposes certain laws and regulations. For example, a “political” decision to privatise state enterprises or undertake land reform is couched in general terms, while the important decisions such as how the enterprises should be equitised and reorganised, what land to redistribute, to whom, and for what compensation, etc., must be made in the process of lawmaking and implementation of the law. For a general discussion, see Gray C. W. 1997 p. 15 and Seidman and Seidman 1994 pp. 42-43.
radically changed economically, politically and legally, there logically comes a point at which the old system has been dismantled but the new order has yet to be created and consolidated. At this point the nation's institutional capacity is so severely stretched that the entire system risks collapse. The gradualists also tend to stress that many of the adverse side effects of the reforms are not attributable to bad policies *per se*, but rather to uncertainty and conflict caused by haste.

There are many competing interpretations of the Vietnamese approach. A relatively small number of big bang theorists maintain that the application of shock therapy following the Eastern European model has successfully thrust Vietnam into the market economy.99 A larger number of commentators describe the process as gradual. The World Bank, for example, notes that Vietnam (together with China which has followed a substantially similar path), has combined elements of planning and the market and felt for the stepping-stones to cross the river before attaining its own typical form of market economy.100

Most interpretations of the Vietnamese (and Chinese) experience agree in underlining the relative success of the effort. Indeed, China and Vietnam have achieved remarkable rates of economic growth. One factor contributing to the success was that remaining political controls, *i.e.* the continued authority of the Party and its elaborate control apparatus, fulfilled a co-ordinating function and limited disruptions to production and trade during the phased build-up of market institutions. Another was that the spontaneous sequencing of reforms fitted in well with the initial economic and political conditions of the countries. China and Vietnam needed to begin by liberalising agriculture, and because most of the work force was in agriculture better incentives in this

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99 Gillespie (1999 p. 120) notes that this explanation attracts some support from Vietnamese lawmakers because it reinforces government mythology about a strong state, capable of engineering economic development.

sector rapidly generated large increases in productivity and income gains. Allowing smaller state enterprises and family businesses to engage in new and more profitable lines of production, and simultaneously scaling down on labour-intensive heavy industry, also freed up a significant share of the labour force to transfer into new sectors where there was demand for their work.\textsuperscript{101} The policy has not been entirely without costs, including forgone benefits that would have accrued from a faster integration into world trade, accelerating corruption and growing regional disparities.

Although the Vietnamese regime has been at liberty, at least theoretically, to choose critically from a smorgasbord of tools and techniques for the reforms in the legal and administrative spheres, the approach has been rather conventional.\textsuperscript{102} This is not due to any lack of ingenuity, but rather to similarities in economic conditions with other economies in transition. High priority was typically given to facilitating foreign investment and private business through new company laws. The second priority was to set the “rules of the game”, including tax law, commercial law, securities laws, labour law, etc. Another typical element also reflected in the Vietnamese agenda is that “general” legislation, e.g. foreign investment legislation and company laws, should precede “special” legislation, e.g. environmental protection or traffic laws. Vietnamese political policy makers and legislators still follow closely the development in Russia, China and other countries facing similar conditions, as will be further discussed in Section 4.5 infra.

The fact that within the Vietnamese system, in spite of the

\textsuperscript{101} Ibid. p. 25.

\textsuperscript{102} Commentators on the transition in Central and Eastern Europe have noted that where the political transition has been fast and revolutionary, there has been a strong impulse towards a “big bang” economic and legal transition because the new regimes have not been able to rely on the existing bureaucratic structures of control, see From Plan to Market 1996 p. 11 and Gelb 1993 p. 16. The Vietnamese experience is not a case of absolute correspondence, see de Vylde 1993 pp. 6–8 and note 121 infra.
ideological rhetoric, there existed “pockets” of market economy within agriculture, trade and small-scale industry provided natural openings for the initial attempts at reform and liberalisation. The leadership had also experimented with contract systems that allowed farmers to sell surplus production above certain quotas at market prices, and discreetly encouraged state enterprises to undertake “fence-breakings” where planned quotas were disregarded and products were bought and sold on market terms.\(^{103}\) The leadership therefore knew of areas where it could pull back confident that markets would do a better job.

It was not certain that the concessions were irreversible at this stage, some measures were declared temporary and central planning and state ownership still constituted core elements of the official ideology.\(^{104}\) However, the measures taken widened the gap between politics and reality and weakened the rigid dogmas on which the system rested. They also signalled that a more pragmatic way of thinking was represented even at the highest levels. In fact, the tolerance or discrete encouragement of certain previously illegal practices tilted the system to the degree where the previous notion, that everything which is not explicitly permitted is forbidden, changed to a presumption that something formally forbidden could actually be permitted and encouraged.\(^{105}\) David Marr argues that duplicity became commonplace and that “[...] cadres taking notes respectfully on every utterance of their superiors while inwardly mocking what was said and then

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103 For a description of the initial reform measures, see e.g. Fforde and de Vylder 1996; Ljunggren 1992 and 1993a; and Probert 1995.

104 Some concessions may have been conceived as tactical expedients in crisis circumstances or as devices to channel dangerous “spontaneous” behaviour in more acceptable directions. de Vylder (1993 p. 4) mentions that the authorities, when the acute crisis was over, tried to clamp down on the free market in Ho Chi Minh City. See also Fforde and de Vylder 1996 p. 13; Ljunggren 1992 pp. 59–62; and Rozman 1992 p. 39.

105 See de Vylder 1993 p. 4.
implementing selectively or not at all."^106 A flood of more or less spontaneous liberalisations followed throughout the eighties and a dynamic private sector, consisting to a large extent of smaller businesses operating without the necessary licenses and permits, evolved as businessmen seized the opportunity to do whatever business they could. In retrospect, it appears clear that the regime had neither the ambition nor the means to resolutely reverse this development.

Comprehensive reforms were initiated in December 1986 when the 6th Party Congress launched the *doi moi* (renovation) policy, a reform programme aiming at increased economic performance through a gradual conversion to a "socialist-oriented market economy." It is still controversial whether the *doi moi* policy was a result of global trends, above all the beginning of collapse in the Soviet Union, or a genuinely Vietnamese conception. Official Vietnam stresses the latter explanation, while foreign commentators tend to emphasise the international dimension.^107

The orthodox DRV-model was discarded as "voluntaristic" and representatives of the leadership admitted that it had been an expensive mistake to consider reality to be ultimately an expression of will. Truong Chinh, a hard-line Maoist who had argued in 1975 that the Vietnamese people "must go direct to the socialist revolution by-passing the stage of capitalist development", now acknowledged that "had our policies [toward the peasants] – especially [...] pricing, circulation, and distribution policies – been rational, the peasants would certainly not have given up tilling, would not have pulled up tobacco plants, would not have destroyed sugar cane, and would not have given up hog raising; on the contrary they would have enthusiastically produced more."^108

^106 Marr (1994 pp. 3—4) also mentions that the development "[...] fostered double-dealing, fabrication of information, appropriation or stealing of public property, tax avoidance, smuggling and a host of other socially questionable practices."

^107 See e.g. Dao Duy Tung 1994/1995 p. 31.

Discrete but significant changes were also carried out within the Party leadership and the highest state administration around the time of the 1986 Party Congress. Three northern political hardliners who had been closely associated with Ho Chi Minh resigned from the Politburo and a number of more reform-oriented people, among them Nguyen Van Linh, Vo Van Kiet and Vo Chi Cong were promoted. Eight cabinet members who were considered responsible for the poor performance of the previous economic polices were replaced and an election at the Congress in December produced new leaders in the most drastic political change the Party had ever experienced. Thirteen cabinet members were replaced in February 1987 with only the President and Prime Minister surviving. However, they too were replaced the following June. Sixty percent of the members of the National Assembly also retired, some of them allegedly after having been strongly advised to do so, and nineteen ministries and commissions received new leaders.\(^{109}\)

The legal offsprings of the Party Congress, i.a. greater emphasis on the role of law in Vietnamese society generally, foreign investment law, the decision to draft a new constitution and to improve enforcement, were strikingly similar to the directions for legal reform laid out during Gorbachev's ambitious economic "perestroika" in the Soviet Union.\(^{110}\) A symbolically significant measure was that the Party recognised the peasant family as the basic unit in the agrarian structure, and thus also implicitly the existence of individual rights to land, something which just years before would have been an unprecedented challenge to the core of the official ideology.

International events, especially the collapse in Eastern Europe and the Tiananmen massacre in Beijing, caused a temporary...

\(^{109}\) See Vause 1989 pp. 242-244.

\(^{110}\) Regarding the legal content of "perestroika", see Izdebski 1989a pp. 718-719 and 1989b in extenso and Smith 1996 pp. 70-76.
backlash in 1989 and 1990. The leadership appeared to act on the recognition that unrest, disorder and maybe even a new government could come about unless it consolidated its position. Ideological campaigns were launched, political control tightened and some earlier measures were even reversed. The reform path was resumed when it seemed clear that the domestic situation was reasonably under control. A number of legal reforms were implemented through 1989–1991, among them the enactment of the Law on Companies, the Law on Private Enterprises, the Ordinance on Economic Contracts and the Ordinance on Civil Contracts. This period was also characterised by vigorous developments within small-scale trade and private services.

During the first years of the reform policy Vietnam experienced many of the problems that seem typical of the process of transforming centrally planned economies and their supporting legal and regulatory frameworks. One example is the recurrent credit crises of 1989 and 1990 which occurred after the government's decision to raise the interest rates and allow private credit co-operatives and companies to borrow money directly from individuals. The Thanh Huong Perfume Company in Ho Chi Minh City succeeded in attracting enormous amounts by offering absurdly high interest rates, until an investigation by the authorities in early 1990 revealed that the company was a mere pyramid scheme in which money from new investors was used to pay interest to earlier investors. The ensuing closure of Thanh Huong and the resulting loss of millions of dollars initiated a reaction where depositors rushed to withdraw their money from Ho Chi Minh City's other credit institutes. This caused 20 of them to go bankrupt, threatened 30 others and almost caused the

112 According to official figures referred to by Le Dang Doanh (1993 pp. 148-149) private trade and services accounted for 70 per cent of the total retail turnover, 38 per cent of the industrial output and 70 percent of cargo and passenger transport in 1991.
collapse of the fragile banking system.\textsuperscript{113}

Another crisis was caused by an anticipated tourist boom in the 1990 Year of Tourism that never materialised. Prices of land and houses in Ho Chi Minh City plunged at least 30 per cent in six months (after having increased by 300–400 per cent in the previous two years). This collapse bankrupted a number of investors who had financed hotel developments with costly loans and once again threatened the credit institutions.\textsuperscript{114}

While such backlashes and the resulting turmoil could have been used to blacken the market economy and capitalism in general, or otherwise exploited in the continuous political controversy over the wisdom of liberalisation, the regime showed few visible signs yielding to such an inclination. Admittedly, any internal debate at the highest levels in the Party is a well-kept secret. Nor did the policy makers concerned buy the kind of simple explanations used in neighbouring countries, \textit{e.g.} that the cause must be the inherently speculative nature of the real estate business or foreigners with a poor picture of the market. Rather, the crises were soberly interpreted as structural problems that needed to be addressed through institutional reforms.\textsuperscript{115} This meant that legal and administrative issues were more tightly integrated into the broader course of \textit{doi moi}.

\begin{footnotes}
\item For details on the Thanh Houng affair, see Cung 1991 pp. 180-181.\textsuperscript{113}
\item Another effect of the crash was reduced tax revenues and earnings for several government departments. Investors who had pledged to undertake infrastructure projects in return for land lease rights also backed out and several social welfare programmes backed by local real estate companies were suspended, see \textit{Ho Chi Minh City realty market boom goes bust} 1993.\textsuperscript{114}
\item See \textit{ON MORTGAGE INSTITUTIONS IN VIETNAM'S CIVIL CODE} 1996 p. 26.\textsuperscript{115}
\end{footnotes}
3.2 Structural Adjustment, Aid and Conditionality

The new-born interest in the legal and administrative environment was not solely the result of the wisdom of the regime. Although initially blocked by the US embargo on Vietnam the Bretton Woods institutions wielded some influence over the reform agenda.

Stemming from the notion that economic and social development are associated with "structural adjustment", the World Bank, the International Monetary Fund and other major international organisations devise programmes aimed at facilitating modifications of the production structure and of the greater spectrum of incentives and institutions determining people's economic opportunities and behaviour. The underlying assumption is of course that the preconditions for long-term development and growth are better in a flexible economy than in one based on planning, commands or other rigid mechanisms.

Vietnam has undertaken many of the core elements of such programmes, i.a. liberalisation of the capital market, restraining government expenditure and bank credit to curb inflation, state enterprise reform, privatisation, trade policy reforms, which are implemented through, or presuppose changes in, the legal and administrative framework. Vietnam has also committed itself to create what the World Bank calls an "enabling environment" for the private sector. Often these measures have benefited from loans

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116 During the 1970s a notion emerged that ideology and overarching concerns with equitable distribution of wealth cemented severe "imbalances" in the economies of many developing countries. To address these problems the development community urged that programmes of "structural adjustment" should be undertaken and redirected a significant amount of financial assistance to support such programmes. Currently, over 50 developing countries are engaged in structural adjustment programmes undertaken in collaboration with bilateral and multilateral organisations. Generally, see Gelb 1993; Larsson 1994; Ljunggren 1993b; and Shihata 1991. Regarding Vietnam specifically, see Vietnam: Stabilization and Structural Reforms 1990.
and policy advice from international organisations, notably the World Bank.

There are concerns that such assistance can be a means to "purchase" certain reforms that the recipient countries do not believe in or even want. Assistance agreements can also be combined with certain "performance criteria" or other requirements that must be fulfilled before new loans and payments can be released.\(^\text{117}\) It is very difficult really to know whether a specific reform, \(e.g.\) a law, is the result of conditional arrangements or some other form of foreign pressure. The matter is politically sensitive and supporting agencies wisely seek to avoid the use of dramatic terminology like "condition" or "requirement" whenever possible.\(^\text{118}\) The Bretton Woods institutions also energetically refute accusations that the purpose of their activities is to stipulate or purchase reforms. Representatives for the World Bank stress that the policy is simply to finance good policies and to refuse to finance bad policies and that any advice and support in this area is preceded by considerable prior analysis.\(^\text{119}\) The Vietnamese leadership, on the other hand, has a legitimacy interest in making it appear that it sets the agenda itself. There is thus an incentive on both sides to obscure the most apparent links.

The process could be viewed as a bargaining situation in which both parties seek to maximise the assistance, but while the donors wish to maximise the policy implications of the assistance, the recipients may wish to minimise them.\(^\text{120}\) The bargaining power that the recipient country can mobilise is then one factor

\(^{117}\) These have traditionally been quantitative financial criteria, but the prevailing tendency seems to be to combine these with certain qualitative conditions, \(\textit{see Larsson 1994 p. 35.}\)

\(^{118}\) The term "conditionality" refers to the imposition of conditions relating to the recipient country's policies on a loan (besides the actual repayment) or grant given in order to finance development, in general or in a specific sector.

\(^{119}\) \(\textit{See e.g. Shihata 1991.}\)

\(^{120}\) \(\textit{See Larsson 1994 p. 30.}\)
influencing the presence of conditions. It is notable that Laos, as a land-locked country with a very small economy, has agreed to implement what can be regarded as a blueprint of a World Bank/IMF reform agenda within the economic area, including the adoption of what is popularly referred to as “World Bank Laws”, while Vietnam, with expectations of being the next “tiger” and greater bargaining power, has taken the liberty of deviating from WB/IMF prescriptions on some occasions.\textsuperscript{121}

Clearly, the degree to which countries accept conditions, and comply with them, is also greatly influenced by the compliance monitoring on the part of the donors. Although representatives for the World Bank and the Asian Development Bank increasingly criticise Vietnam for backsliding on structural reforms, this monitoring has been perceived as lax enough in a number of cases to allow the government to make loose promises. There is also a growing criticism among Vietnamese policy makers of the IMF and the WB for the naivety of their prescriptions.

To draw general conclusions regarding the success of alternative strategies for supporting the “transition” in the legal sphere is virtually impossible as any reform, ranging from fundamental constitutional changes to merely tinkering with procedures, can be said to include a legal aspect. The USAID boldly suggests constituency or coalition building to ensure political consensus and support for the reform efforts, followed by aid to structural reform, access creation, and finally, assisting efforts to strengthen the judicial capacity (or “administration of justice”).\textsuperscript{122} In practical

\textsuperscript{121} de Vylde (1993 p. 7) points out that instead of following the standard prescription to emphasise macro-economic reforms in the initial phases of the transformation, Vietnam implemented such reforms on a limited scale at the micro level, i.a. by granting farmers a certain amount of tenure on the land they used under the contract system, to provide a better structure of incentives. This meant that the attempts to reduce the large macro imbalances were launched only when the reform process had gained some legitimacy and the links between government policies and market responses worked reasonably well.

\textsuperscript{122} See Blair and Hansen 1994 pp. 10-15. This USAID-account does not consider the special context of transition.
terms, this means that if the Vietnamese leadership is judged to be insufficiently supportive in strengthening the rule of law, then the appropriate donor strategy would be to emphasise constituency and coalition building to ensure support for the rule of law before moving on the structural reform, etc. Obviously, such an approach would provoke immense political sensitivity in Vietnam, as will be discussed in Chapter 4. Another, albeit seriously disputed, lesson is that supporting the introduction of new structures that can begin afresh, unimpaired by past commitments and poor performance, might provide more returns than supporting the reform of existing marginalised institutions.123

It may be suspected that Vietnamese policy makers have sometimes set the legislative agenda with the aim of impressing the donor community, rather than addressing the most urgent needs. For example, laws have been enacted the implementation of which presupposes the existence of sophisticated supporting institutions (see Chapter 5). Such a policy could, in the worst case, create a predictable circle of legislative action and judicial inaction. However, it seems that often the best has not been an enemy of the better. Even less-than-perfect judicial and administrative constructions have helped to sustain credibility and promote private enterprise, thanks to the ideological message they convey. It is also certain that if nothing is done until everything can be done, the entire process would come to a standstill.124

123 For example, various alternative dispute resolution mechanisms could, at least in theory, represent new modalities for litigants who see the traditional court system as unresponsive, time-consuming and unreliable. The development of such mechanisms would, accordingly, bring greater success than trying to revamp the regular court system. This matter is discussed further in Section 5.3.2 infra.

124 For a discussion regarding similar questions in China, see Alford 1995 p. 36. This does not gainsay that enactment of regulations which are too far ahead of reality, or assume and require adequate supporting legal and administrative institutions without being able to provide them, may have some negative effects. Legislation which is believed to be useful but is actually useless can create a predictable cycle of non-action and reaction.
The policy of the Vietnamese leadership to prioritise, politically and legally, the "autonomous" area of foreign investment, while hesitating to undertake the more complicated task of enacting a supportive legal framework for domestic enterprise in the initial stages of the reform process, illustrates the dangers inherent in the opposite approach.\(^{125}\) Thirteen years elapsed between the adoption of the first regulations concerning foreign investment in 1977 and the first enactment of regulations on private companies in 1990. This failure to recognise, by means of law, that the real job of wealth-creation is carried out domestically, and the undermining of the incentives to act on that recognition, forced many businessmen to limit the scale of their operations or to operate informally. Laws concerning companies and private enterprise were eventually enacted in 1990 and the right to own and operate private businesses was endorsed in the 1992 Constitution. Clearly, the private sector has benefited from the feeling of safety that this signal provided. Once this foundation of primary laws was created or was at least in sight, the legislative focus could also be directed to supporting institutions such as land titling, collateralization of movable property, laws governing securities markets, and to the immensely important task of implementation.\(^{126}\)

\(^{125}\) For political reasons, the leadership was more interested in attracting foreign investment than in reforming the economic and bureaucratic structures that support domestic business. Strong domestic interests, e.g. within the state enterprise sector, also resisted changes that would deprive them of their favoured status.

\(^{126}\) It is more serious when Vietnamese lawmakers attempt to regulate social or economic phenomena that have not yet entered the scene. Such an approach can be exaggeratedly instrumentalist, as has been discussed in Section 1.2 supra.
This chapter examines changes in the organisation and operation of the legislative institutions in Vietnam, political incentives for and constraints on legislative action, drafting methods and the use of foreign legislative models.

4.1 Political Control, Popular Opinion and Feedback

Radical and comprehensive reform of the entire legal framework is a formidable challenge for any system. Observers of such processes tend to stress the enormous significance the processes of problem identification, agenda setting and drafting have on both the content and the “life chances” of the laws produced.127

That Vietnam has created an impressive number of legal and administrative instruments in very short time is not only a sign of vitality, it also reveals that lingering ideological constraints and institutional practices prevent lawmakers from discovering factors that deny the appropriateness of the officially formulated policies

127 See e.g. Neilson 1993; Waelde and Gunderson 1994; Seidman and Seidman 1996; and Tanner 1995.
and limit the range of alternatives they conceive and consider. For the actors in the marketplace, inadequate or inconsistent legislation, or the perception of such legislation, can mean uncertainty. In the worst case, such uncertainty risks undermining the entire economic reform policy.\textsuperscript{128}

It is difficult to comprehensively reform the principles for lawmaking in Vietnam as long as the adoption of market principles is not predicated on an official rejection of socialism and Party rule as obsolete or intolerable. The official rhetoric maintains that Marxism-Leninism and Ho Chi Minh’s thoughts are still the supreme guiding principles and that “erroneous” and “rightist” viewpoints must be combated. Arguments in favour of reforms with political implications might still be considered attempts to establish “peaceful evolution”, “sedation” or “subversion” and as such tantamount to treason.\textsuperscript{129} The Party may even see its involvement in agenda setting and drafting as a means of restoring the loss of legitimacy it sustained when people recognised that its previous policies of central planning and state ownership were unable to create wealth, and that the enemy, the pluralist and capitalist system, was more viable and effective.

A common technique for keeping control over the processes of problem identification, policy formulation and drafting is to stress the complexity of the matter and then to assert that a specialised elite only, which happens to be found within the Party or consists of people who have proven loyal to the Party line, possesses the technical skills needed to handle it. Most bills are still conceived in

\textsuperscript{128} A recent nationwide survey commissioned by the World Bank underlines the serious effects of policy surprises and uncertainty on the conditions for business and long-term investment. Notably, while in the CIS countries, almost 80 per cent of the entrepreneurs reported that unpredictable changes in rules and policies seriously affected their business, in the more developed tiger economies of Southeast Asia only about 30 per cent of the respondents identified this as a problem, see Brunetti, Kisunko and Weder 1997a pp. 10-11.

\textsuperscript{129} See e.g. Ngo Ba Thanh 1993 pp. 91-92 and 100–101; Le Minh Thong 1997 p. 19; and Pham Hung 1995 p. 20.
Party bureaus, passed to state executive offices staffed largely by Party members (most ministries host a Party unit, often with a neutral name, which scrutinises all significant plans and operations), and then submitted to the National Assembly, which is also heavily dominated by Party members.\textsuperscript{130} Participating non-Party officials and experts need to prove their loyalty to the official line and are subjected to recurrent personnel investigations. As will be further discussed in Section 5.3.3 \textit{infra}, the People's Courts are prevented from formulating new rules and principles according to precedent. The leadership holds the belief that if the courts strictly adhere to the letter of the law, its policies will be better implemented. The Ministry of Justice even opposes judicial commentaries.\textsuperscript{131} For similar reasons, the leadership encourages, both materially and politically, research that support prevailing Party polices, with the result that it is virtually impossible to identify and present data that are not already known and accepted.\textsuperscript{132}

When the political umbrella organisation the Fatherland Front and its member organisations (the Women's Union, the Union of Peasants, etc.) are consulted, or controlled public opinion polls are conducted, it is essentially for the purpose of supporting the views of the government and the Party.\textsuperscript{133} It should be noted that the committee that drafted the flagship 1995 Civil Code comprised not only the Ministry of Justice, the Office of the National Assembly, the Office of the Government, the Supreme People's Court and the Supreme People's Procuracy, but also representatives for the Vietnam Fatherland Front, the Vietnam Women's Union, the Vietnam General Confederation of Labour, the Ho Chi Minh Communist Youth Union, the Vietnamese

\textsuperscript{130} See Marr 1994 p. 8.
\textsuperscript{131} See Gillespie 1999 p. 129.
\textsuperscript{132} See Sidel 1993 pp. 223–228.
\textsuperscript{133} See Porter 1993 pp. 153–160.
Lawyers' Association and the Vietnam Union of Peasants.134

Formulae such as "the dictatorship of the proletariat" and "collective mastery of the working people" leave very little space for the few constituencies that exist outside the realm of the mass organisations to market their views.135 The leadership also seeks actively to "manage" or "regulate", i.e. suppress, through legislation and by other means, any new interest group that emerges in the wake of the economic reforms.136 This means that bureaucratic outsiders, i.a. intellectuals, businessmen and other groups that lack strong organisational bases, cannot participate in the formulation of policies by highlighting particular problems and proposing solutions.137

The 1996 Law on the Promulgation of Legal Documents requires "evaluation" of draft legislation. However, while the promotion of private sector development by means of law would require evaluations of the financial impact on the private enterprises likely to be affected, e.g. in the form of administration

134 The elaboration and adoption of the Civil Code was preceded by the most ambitious circulation for comment and public debate so far, the process required almost 8 months and resulted in tens of thousands suggestions. The twelfth draft was also published in the press. See Ngo Duc Manh 1995 p. 23 and Vu Mao 1996 p. 18. Rose (1998 p. 101) suggests that this ambitious process appears to have had some validity insofar as many of the comments received focused on formerly sensitive political issues.

135 For a general discussion, see Porter 1993 pp. 160–164.

136 Jeong (1997 p. 167) argues that the Party has institutionalised a state-corporativist system which enables it to effectively control and manage any emerging interest group, and, at the same time, to lead them into believing that their voices are sincerely heard. Nevertheless, some informal organisations concerned with welfare, education, religion, professional advancement and similar matters are slowly emerging, see Jerneck 1995 and Marr 1994.

137 Theoretically, any citizen may of course write to the relevant ministry or approach his elected member of the National Assembly in hopes that he will advocate a view or proposal. In some circumstances, it may also be possible to seek reconsideration via confidential Party channels. However, it is still not possible for an interest group to come together of its own volition, discuss alternative drafts, gain the attention of the mass media, and lobby lawmakers persistently, see Marr 1994 p. 14.
costs, capital expenditure and changed investment strategies, the evaluation outlined in the Law on the Promulgation of Legal Documents focuses on the "necessity" of promulgating the draft document, "the conformity of the draft document with the Party’s lines and policies", its constitutionality and its feasibility.  

Given the scarce physical and material resources available for the task of evaluating draft legislation and the lack of a shared vision as to what the new legislation is to achieve, it is also problematic that responsibility is vested in so many different agencies with their own missions and peculiarities. The responsibility for evaluating the draft laws and ordinances of the National Assembly rests with the National Assembly’s Council of Nationalities and the Law Commission. Draft resolutions and decrees from the government, ministries and other agencies on the central level must be evaluated by the Ministry of Justice. The content of draft resolutions of the Supreme People’s Court and the Supreme People’s Procuracy are to be “discussed” in meetings with the Justice Council of the Supreme People’s Court in which the Chairman of the Supreme People’s Procuracy and the Minister of

138 Law on the Promulgation of Legal Documents, art. 34. The implementation of the Law on the Promulgation of Legal Documents is regulated i.a. in Directive No. 51-TTg on organizing the implementation of the Law on the Promulgation of Legal Documents, January 24, 1997.

139 Alternatively, the responsibility could have been vested in one institution with sufficient resources and integrity to adequately perform the task. The National Assembly would have been the obvious candidate. It has been working hard to transform itself from being a rubber stamp in a show of “socialist democracy” to an institution with real influence over the debate and drafting of new legislation. It seems that members and committees of the Assembly can relatively freely debate, and even reject, new legislation, as long as the fundamental postulates are not questioned. On the other hand, it may be doubted whether the other agencies with legislative competence would submit their documents to the NA, let alone listen to the results of its evaluation. Regarding the National Assembly’s role in filtering new legislation generally, see Do 1993 pp. 116-119; Gillespie 1996a p. 379; Ha Manh Tri 1994 p. 25; and Sidel 1994 p. 171.

140 Law on the Promulgation of Legal Documents, art. 32.

141 Ibid. art. 63.
Justice participate. It is reasonable to assume that in many cases, these agencies lack the means and incentive to continue this task, which is both theoretically and practically arduous. What may seem like careful consideration may well be tactical delay or the result of indecision.

4.2 Setting the Agenda

A major constituent of commentaries on the Vietnamese system is that the top Party and government leaders decide policies, but their substance is a function of the “missions” or “ideologies” of one or more of the ministries or agencies that persistently lobby the leadership. When a specific proposal emerges on the agenda, it should be because a ministry or central agency has managed to convince the leadership that their solution is the best. Such descriptions clearly have some relevance, especially in that they underline traits such as fragmentation of power and authority between various parts of the bureaucracy and that the political leadership prefers bargaining before dictation in the formulation of policies and laws.

Yet, not all agencies are unitary actors with distinctive cultures and missions, and not all legislative changes are slow and incremental. “Political lightning” sometimes strikes and brings controversial or forgotten proposals to the top of the agenda. Murray Scot Tanner’s observations of the process of lawmaking in China helps outsiders to better understand the Vietnamese

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142 Ibid. art. 68.

143 The Law on the Promulgation of Legal Documents (art. 22) stipulates that “The law and ordinance-elaborating program shall be worked out on the basis of the Party’s lines and policies, the strategy on socio-economic development, defence, security and the State managerial requirements in each period while ensuring citizen’s rights and obligations.” A tentative version of this programme is worked out by the government, refined by the Standing Committee of the National Assembly and eventually submitted to the National Assembly for decision.
equivalent. Tanner argues that it is more accurate to describe the politics of agenda-setting, debate and drafting as a less structured interplay of more or less independent “streams” of policy making elements: “[...] governments constantly face a stream of problems, some of which are viewed as urgent or ripe for solution at any given time, and others which go largely ignored for long periods. Meanwhile, other parts of the system, sometimes in response to these problems and sometimes independently, also produce a stream of available policy and/or legislative proposals (that is, potential ‘solutions’). Any of these legislative proposals could be used to address one or more of the currently recognized problems in the system. And the chief advocates of a given policy alternative frequently do not care which problem, so long as their pet proposal is adopted. The system also has continually shifting political power balances or ‘moods,’ or ‘cycles’ which reflect key leaders’ current policy dispositions. [...] Major decisions take place only under relatively rare and auspicious circumstances, such as when a given problem is perceived as urgent and solvable; when one of the available policy solutions is simultaneously viewed as suitable and acceptable; when the leadership’s political mood (or balance of power) is propitious for attacking the problem with that preferred solution; and when an appropriate opportunity or vehicle for ratifying such a choice is at hand.”

How one particular initiative to legislate is distinguished from the huge number of legislative proposals that swirl through the system and is placed on the legislative agenda remains a mystery, very little is known about the internal working of the Vietnamese government and Party, but important forces for breaking deadlocks and speeding up the process can be sudden shifts in leadership politics and strong interventions by top leaders, but so also can foreign pressure or the prospects of obtaining assistance (see Section 4.5.2.4 infra). Such pressure also can increase the

144 Tanner 1995 pp. 43-44.
relative strength of progressive but politically weak actors.

An initiative is definitely on its way to becoming a law when the government or Standing Committee of the National Assembly give the proposal sustained attention and approve a drafting group. That a certain proposal manages to retain its place on the agenda, while others do not, may be the result of the continuous struggle between groups and agencies with different missions and interests. In recent years, several proposals have emerged and re-emerged as a result of such controversies. Successfully delaying a law in the National Assembly, e.g. by insisting that it should be implemented experimentally for a time in a few areas to gain experience, may be tantamount to rejection. Disagreements must often be resolved through attenuating compromises, where comprehensive codifications risk being reduced to mere frameworks in order to pass. Sometimes hand-written amendments are made to the bills immediately before they are voted on in the National Assembly.

In some cases there are good reasons for avoiding hasty enactments of detailed laws, it has been mentioned that Vietnamese lawmakers seldom have the option of empirically observe business practices before drafting law, but often the resulting lack of substance in the legislation necessitates the adoption of insufficiently verified secondary legislation, e.g. decrees issued by the government in the name of a certain sponsoring ministry or directives or circulars issued directly by ministries or

145 The 1995 Law on State Enterprises and the 1993 Law on Business Bankruptcy were rejected and re-appeared several times because of such disputes, see “Hot Debates on Draft Laws” 1997 and Gillespie 1995a pp. 92-93 and 1996a p. 379. Ha Manh Tri, the Chairman of the Law Commission of the National Assembly, argues (1995 p. 9): “In the process of elaborating the draft laws and ordinances, special attention must be paid to the fundamental viewpoints of the Party and State in order to reach unity in the identification of the scope, objects and main contents of the drafts right from the outset, thus saving the time for repeated submission of the same draft many times.”

equivalent state bodies. These instruments often constitute the very essence of the regulatory reality when they are used daily by front-line officials.

Once adopted, implementation of the law may be the focus of a second campaign where the actors rejoin battle to define how the provisions of the law are to be interpreted, what sub-laws should be drafted, and how the law should be administered. That some new laws are accompanied by a memorandum explaining the policy under administration and enforcement of substantive provisions is of little help, and even the agencies principally responsible for supporting and drafting the law may use this stage to alter its content from what it was when passed by the National Assembly.

It is not only the political elite that fights over implementation. Many middle-level officials in the judicial and administrative system also seek to influence the ways in which power and wealth are distributed. This group is often effective in thwarting reforms that run counter to its interests, for example by introducing internally inconsistent implementation instructions in order to modify the original initiative so radically that it is bound to fail. Even if the obstruction is not organised, the combined effect of many pinpricks is often sufficient to bring the original initiative to nothing.

4.3 Control and Co-ordination

The pronounced sector-by-sector administration of society and the multiplicity of organs given the competence to pass binding norms create great difficulties in effectively co-ordinating lawmaking and controlling the internal consistency of the resulting laws. The gradual retreat of the Party from direct involvement to more subtle ways of influencing the processes has also created an

unprecedented situation where agencies and alliances of agencies with different strategic interests compete to assume the supreme supervisory role that the Party once had.\textsuperscript{148}

The rivalry between the National Assembly, the government, the Ministry of Justice and the Supreme People’s Court is considerable. An early attempt by the Ministry of Justice to bring order to the huge volumes of secondary legislation, where the idea was that neither the government nor the Law Committee of the National Assembly should accept a draft which had not first been properly reviewed by the Ministry, failed because the Ministry lacked the means and authority to influence the other line ministries and other central agencies.\textsuperscript{149} A conspiratorial interpretation of the situation is that the Party has really sought chaos to underline its own significance as a stabilising and consolidating body among other players, but more likely, the power centre has been knocked off balance by forces beyond political control.

The 1992 Constitution and the 1996 Law on the Promulgation of Legal Documents constitute attempts to bring order to the situation. They formally designate the National Assembly (and its Standing Committee) as the principal producers of laws, ordinances and resolutions and stipulate that these instruments are

\textsuperscript{148} It can be mentioned that the first 1977 Decree on Foreign Investment was drafted under the supervision of the Party, not the National Assembly, see Vause 1989 pp. 252-253.

\textsuperscript{149} The controversy over the legal instruments governing the role and organisational membership of the People’s Courts is another case in point. A number of justices, liberal legal scholars and constitutional drafters in the Law Committee of the National Assembly joined forces in 1992 in an attempt to move control over the court system away from the Party, the government and the Ministry of Justice. The Ministry of Justice and a number of conservative officials immediately responded with a joint effort to preserve the status quo. The power struggle was temporarily settled in favour of the Ministry of Justice with the enactment of the new Law on the Organisation of the People’s Courts in 1992, which maintains ministerial control over the provincial and district courts.
formally superior to instruments enacted by other agencies.150

The President of the State is vested with the right to issue orders and decisions to ensure the accomplishment of his duties and powers. The Government is vested with a general competence to issue decrees and resolutions.151 The Supreme People’s Court and the Supreme People’s Procuracy may issue circulars and guidelines to clarify the interpretation and application of laws and sub-laws. The People's Councils may adopt resolutions and the People's Committees may issue decisions and instructions within their area of responsibility.

Another significant stipulation in the Law on the Promulgation of Legal Documents is that important matters pertaining to external and internal relations, socio-economic conditions, defence and security, the organisation and operation of the state apparatus, social relations and the activities of citizens, etc. are to be regulated in law.152 This provision limits the possibility for lower bodies with normative competence to issue conflicting provisions within these areas, although the government is reserved the right to issue decrees in matters “which are extremely necessary but which have not gathered enough conditions for the elaboration of laws and ordinances,” pursuant to approval by the Standing Committee.153

The Law on the Promulgation of Legal Documents goes so far

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150 The hierarchy of normative instruments and the competence of state agencies to promulgate such instruments are spelled out in the 1992 Constitution, arts. 83, 84, 91, 115, 146 and 147, and in the Law on the Promulgation of Legal Documents, arts. 1–2 and 13–19. The National Assembly enacts laws, while the Standing Committee may enact ordinances and resolutions on matters entrusted to it by the Assembly. There is no obvious logic to why some matters end up as laws and some as ordinances, but it may be that ordinances are more expeditious in terms of timeliness and ease of enactment since they are enacted by the permanent body, while laws can only be debated twice a year during the brief sittings of the National Assembly, see Neilson 1995 p. 45.

151 Individual ministers and other members of the government may issue decisions, directives and circulars within their respective fields of responsibility.

152 Law on the Promulgation of Legal Documents, art. 20.

153 Ibid. art. 56. The Standing Committee may give such approval in blanco.
in its ambition to promote a higher degree of legality and uniformity in the legal system as to introduce standard procedures to be followed in the drafting process (including constitutional review), principles for delegated lawmaking and standard requirements as to form and format. However, the agency designated to oversee the implementation of these principles and requirements, the National Assembly,\textsuperscript{154} sits for only 2–3 weeks twice a year and very few deputies have acquired the skills required to do this work.\textsuperscript{155} The real responsibility for supervising and handling “illegal” or inconsistent documents rests with the permanent body, the Standing Committee,\textsuperscript{156} which appears to lack the teeth and integrity needed. The overwhelming task of “examining and handling” illegalities in the rapidly proliferating undergrowth of instruments emanating from ministries, governmental agencies and provincial-level people’s councils and people’s committees rests with the government and the Prime Minister.\textsuperscript{157} The People’s Procuracy is vested with a general mandate to “supervise the observance of laws with regard to legal documents of the Ministers, the Heads of the ministerial-level agencies, the Heads of agencies attached to the Government, the People’s Councils and the People’s Committees in order to ensure that such documents are not contrary to law.”\textsuperscript{158} In spite of the enactment of the Law on the Promulgation of Legal Documents, competition and secrecy remain enduring features of Vietnamese legislative life. There is simply too little incentive for the organs concerned to verify during the drafting stages that their texts comply with, and are issued pursuant to, the Constitution and other primary legislation.

\textsuperscript{154} Ibid. art. 81.

\textsuperscript{155} See Do 1993 pp. 118-119 and Ha Manh Tri 1994 p. 25.

\textsuperscript{156} Law on the Promulgation of Legal Documents, art. 82.

\textsuperscript{157} Ibid. arts. 83–84.

\textsuperscript{158} Ibid. art. 85.
Inconsistencies and conflicts are also commonplace among already enacted legal instruments. The relationship between centrally, provincially and locally enacted instruments appears to be particularly complicated. It is the rule rather than the exception that lower agencies emphasise their “own” legislation at the expense of superior provisions offered by distant central authorities.

Even the most carefully drafted new laws spawn problems. For example, the 1995 Civil Code and the 1997 Commercial Law overlap in a number of areas. To facilitate the integration of the Civil Code into the legal framework, it was necessary to establish a team of 30 experts from different ministries and agencies to review potentially overlapping legal instruments. The team proposed that 43 instruments should be repealed, 49 should be revised or supplemented, 78 should be retained, and 21 new ones should be issued. Similar problems have emerged with regard to the Commercial Law, which also fails to identify older legislation that ought to be repealed. For example, it is still not clear whether the 1989 Ordinance on Economic Contracts survives the enactment of the Commercial Law, at least to the extent it is not directly and obviously inconsistent with it.

Some guidance in resolving issues of conflicting or overlapping

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159 A review undertaken by the Department of Justice in Hai Phong, referred to the author in 1994, of the normative instruments enacted by the local People’s Council and People’s Committee revealed that one third of these instruments contradicted superior laws and regulations.

160 For attempts at clarification, see Cao Mai Phuong 1997 p. 4; Dinh Trung Tung 1996 pp. 27-28; and Le Hong Hanh 1995 p. 24.

161 Similar teams have been set up in all of Vietnam’s 53 provinces and have come up with thousands of secondary instruments to be annulled or revised, see FOR MORE EFFECTIVE ENFORCEMENT OF THE CIVIL CODE 1996.

162 See Burke 1998 p. 3.
rules is provided in the Constitution, in the Law on the Promulgation of Legal Documents, and in other, sometimes secret, instructions to the officials involved. The Constitution and the Law on the Promulgation of Legal Documents contain provisions that require formerly enacted normative instruments that conflict with superior legislation to be annulled or suspended, but the agencies most likely to be confronted with such inconsistencies, the People’s Courts, have no authority to review, let alone annul, normative instruments. This right is essentially reserved to the National Assembly, its Standing Committee, and in cases regarding instruments emanating from governmental agencies, the government or Prime Minister. The Supreme People’s Procuracy has a general mandate to seek out and lodge protests against overlapping and inconsistent legislation. In reality, conflicts among laws are often resolved in informal negotiations and ad hoc arrangements between the agencies concerned.

In order to remedy the most urgent problems, the leadership launches campaigns and establishes task groups and committees ad hoc. The most ambitious effort is the Prime Minister’s order to establish a Government Steering Committee under the chairmanship of the Minister of Justice to review and systematise all existing normative instruments. The actual review is to be

163 See Neilson 1995 p. 47.
164 Constitution 1992, arts. 84, 91 and 114, and Law on the Promulgation of Legal Documents, arts. 1–2 and 81–84.
165 Law on the Promulgation of Legal Documents, art. 85. Nguyen Nien (1996 p. 21) reports that in 1995, the Supreme People’s Procuracy lodged protests against approximately 140 legal instruments issued by ministries, 323 instruments issued by provincial and city authorities and 610 instruments enacted by 2 districts.
166 Regarding the content of these campaigns and their results in general, see Nguyen Dinh Loc 1995 p. 21 and Ngo Ba Thanh 1993 p. 90.
167 The Committee is established pursuant to Decision No. 355-TTg on the establishment of the Government Steering Committee for Overall Revision and Systematization of Legal Documents, May 28, 1997, commented on in Decision No.
carried out by Steering Boards in the respective ministries and agencies. It was optimistically stated that the work would be concluded in the end of 1998 with the publication of comprehensive volumes of effective legal documents, but people in the know say that the work is progressing much more slowly than was expected due to differences in motivation and frequent controversies among the participating agencies.

It should be noted that as of today, no state agency possesses a comprehensive record of all current primary and secondary legislation. In an attempt to remedy this fundamental lack, the Office of the National Assembly is building a computerised legal information system, Winlaw, encompassing most primary legal documents issued at the national level and an increasingly complete selection of ministerial level decrees and resolutions. Work is also in progress to connect all of Vietnam's 61 provinces by a computerised network, not only to each other but also to the central offices of such agencies. In a not too distant future, the Office of the National Assembly, the Supreme People's Court and the Supreme People's Procuracy will also be electronically linked to each other and able to disseminate legal information by electronic means to provincial courts and procuracies. The ambition is also to maintain complete records of current legislation in printed form in centres to which members of the legal profession and the public will have access.

The requirement in the Law on the Promulgation of Legal Documents that instruments enacted by the National Assembly,

355-TTg of May 28, 1997 on the establishment of a Government Steering Committee to organize the review and systemization of all normative legal documents promulgated from 1976. The UNDP, the World Bank and various other agencies have noted that the presence of foreign legal experts within individual government agencies with legislative competence may not appreciably reduce the risk of conflicts and inconsistencies, partly because a foreign legal expert's advice that is directed against a technical agency may not reach the co-ordinating body or may not be given with sufficient awareness of the relationship of potential conflicting decrees and regulations, see UNDP VIE/92/001 - Legal Reform in Viet Nam, p. 9.
the government, the Prime Minister and other central authorities must be published in the Official Gazette (Cong Bao), should make the establishment of such records easier. However, as of today, insufficient resources for the collection of instruments and the publishing and dissemination of the Gazette make it difficult to maintain the accuracy and momentum needed to promote it as an authoritative source of information on the current law. That publication in the Gazette does not carry any legal effect explains why some agencies are slow to submit their enactments for publication.

4.5 Models and Methods

4.5.1 RELATING MEANS TO ENDS

The preceding discussion has emphasised the difficulties Vietnamese lawmakers face in relating means to ends, notably that political and ideological constraints preclude real feedback and responsiveness and that too little time has elapsed to allow a reasonable understanding of the intertwined relationships between the legal order and political-economic institutions to evolve. It has also been mentioned that legal scholarship and training, although politically prioritised, are hindered by both explicit and implicit political taboos and lack of resources.

168 Law on the Promulgation of Legal Documents, art. 10.


170 The Hanoi Law University is organised under the Ministry of Justice and is responsible for most graduate legal training. About 70 per cent of the teaching staff have been trained in Eastern Europe, mainly in the former Soviet Union and East Germany, and about 30 per cent in Vietnam. Only a few speak English. During years one and two, students are taught basic courses, e.g. politics, philosophy,
Given this fundamental position, it is understandable that Vietnamese lawmakers seek for "shortcuts" among foreign concepts. There are numerous examples of hasty and optimistic transplanting. For example, the 1995 Civil Code and the 1997 Commercial Law, enacted with the aim of thrusting Vietnam into the exclusive group of industrialised nations, contain a plethora of concepts borrowed from a variety of systems.\(^{171}\)

This practice gives rise to a number of concerns. Chief among them is that one cannot take for granted that adopting laws or elements of laws that appear to have "worked" elsewhere leads automatically to the desired results. Rather, there is evidence to suggest that transplanted laws only coincidentally induce the same behaviour in their new setting because inevitably people choose how to behave not only in response to the law, but also to a "surround" of other social, economic, political, physical and subjective factors arising from custom, geography, history, technology, etc.\(^{172}\) The "Law of Non-Transferability of Law" even

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171 See Section 4.5.2.3 infra.

172 Greenberg (1980) and Watson (1974) provide numerous examples from Brazil, Chile, Ethiopia, Mexico, New Zealand, Scotland, Turkey and other countries. With regard to Vietnam specifically, Gillespie (1996a p. 401) argues critically that "[b]y enacting laws designed to engineer economic development without regard to existing behavioural patterns, the state fosters social attitudes that reject any
holds that copying country models cannot ensure development unless exactly the same patterns of behaviour that characterised the model country are simultaneously induced.\textsuperscript{173}

The character of imported law as alien and inoperative can also be a result of the circumstance that it communicates badly with the institutional set-up of government and economic organisations. In China, for example, there have been difficulties with the introduction of new legislation because of conflicts between the “official” description of the area subject to regulation and unofficial legal and administrative practices within the organs responsible for the implementation.\textsuperscript{174}

Another factor is that the legal area is sensitively and intimately connected with national sentiments. Conventional Western notions of law and order have received their content in a bipolar world where they have expressed the self-identity of the Western industrialised nations against their opposites, the socialist countries.\textsuperscript{175} An overt advocacy in socialist or formerly socialist countries of the superiority of foreign solutions can easily be perceived as a criticism of the way the country is run and as a hostile attempt to introduce a competing model, and thus incites socialist or nationalist rejection.\textsuperscript{176} At times, the leadership may foment “popular” perceptions of a threat to cherished aspects of traditional society, thereby spurring even more suspicion and resistance.

\textsuperscript{175} For a general discussion, see Tolonen 1996 in extenso and Waelde and Gunderson 1994 pp. 362 and 366–368.
\textsuperscript{176} Le Minh Thong (1997 pp. 19-20) typically argues that “national interests” must be defended and that great caution is motivated in discussing foreign models.
4.5.2 SOURCES OF MODELS

4.5.2.1 Traditional and Colonial Concepts

Historically, commercial norms have often emanated from sources outside the realms of the state. For example, during the industrialisation of Europe, a period during which many key concepts were codified, governments recognised the private sector's customary trade practices, for example internal codes of conduct in fraternal orders of guild merchants, as efficient and well established and gave them the force of law so that breaches could be prosecuted and penalised.\(^{177}\)

This practice was efficient since instead of trying to shape reality to its wishes, the state sanctioned practices which had already proved acceptable and effective. The practice also provided continuity between the traditional and the modern systems of norms and helped to maintain the self-consciousness of the nation or the group. The codification of principles that had proven viable furthermore created room for a continuous interplay between the fiscal needs of the state and its credibility in its relationships with merchants and people in general. To the extent that the state was bound by commitments that it would not confiscate assets or in any way use its power to increase uncertainty, it created a degree of confidence among manufacturers and traders that led to the growth of the economy, etc.

With regard to the more recent attempts at comprehensive codification in Russia and the former Soviet republics, many commentators also emphasise that as much as possible of the "old" system should be retained. For example, Waelde and Gunderson argue that "If the independent republics [of the former Soviet Union] are to complete a legal framework for capitalist market economies, their best chance of achieving legitimacy is to retain as many existing norms as are compatible with such an economic system and develop the legal principles missing or neglected in the

\(^{177}\) See North and Thomas 1973; Stein 1984; and Tigar and Levy 1977.
old system in a manner compatible with what is retained from the old system.”

Vietnamese lawmakers also understand that attempts to regulate business should better coincide with pre-existing business paradigms. It is officially stated that “national characteristics” etc. must be at least implicitly considered in the drafting of new legislation. The dilemma is that Vietnam can seldom create viable economic legislation by retaining elements of an earlier order, simply because there is too little adequate legislation to retain. The traditional Vietnamese state, with its predominantly negative view of commerce (see Section 2.1 supra) spent little effort on enacting rules regarding property and transactions. The informal mechanisms that evolved to make up for the laws and courts were too fragile to allow exchanges of scale.

The traditional business culture, if it ever was homogeneous, also sustained serious attack under the years of socialism when the official policy was to replace “feudal” norms with “correct” values by means of repression and ideological indoctrination. Lately, the system of traditional norms has fragmented along North-South and rural-urban divides and the process seems to be accelerating in the wake of the economic reforms and the opening up to the


179 The “National Characteristics Model” essentially suggests that sources of law can be found in local commercial practice and cultural values, see Gillespie 1996a pp. 397-398 and 405.

180 See Le Hong Hanh 1995 p. 23. Ta Van Tai (1988 pp. 203–212), however, compares the legislation of the Le and Nguyen dynasties on property rights with the Universal Declaration of Human Rights, and holds that the standards prescribed in the royal codes were often higher than is popularly assumed.

181 For example, subsistence farmers could organise among themselves a variety of mutual credit associations which, of necessity, were often limited to a dozen trusted relatives, friends and immediate neighbours. The amount of shared capital was usually small, but all were living on such precarious economic margins that the default of one or two partners could mean danger for all, see Marr 1981 p. 28.
outside world. In the rare cases where attempts have been made to retain allegedly “traditional” concept within the economic legislation, they have often resulted in inconsistencies and confusion, as for example with the stipulation in the 1995 Civil Code that the “family household” is a legal entity *sui generis* with a capacity for civil intercourse parallel with physical and legal persons.\(^\text{182}\)

Nor can the colonial system serve to legitimise contemporary legislative conceptions. The notion that the French-inspired law served the interests of the occupying power was firmly rooted and to litigate or otherwise refer matters to the colonial authorities was considered frustrating, time-consuming and inherently dangerous.\(^\text{183}\) With the summary abrogation of colonial law in the North after the declaration of independence, a number of French-trained lawyers and officials either fled or sought better opportunities in other professions. For similar reasons, the legal system of the “Saigon regime”, *i.e.* the Republic of Vietnam, remains too sensitive a model to be seriously considered.\(^\text{184}\) That French has lost its position as the second language in Vietnam to English, and that the average age of the remaining French-trained lawyers is very high, must also be taken into account when colonial concepts are discussed.

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\(^{182}\) Vietnamese commentators admit that this construction seems strange from a “purely legal and technical perspective”, but argue that the Civil Code should be looked upon as a reflection of a long tradition of promoting the household as an economic and social entity. It is also argued that many other legal instruments, *i.a.* the 1992 Constitution, preserve a special role for the family (art. 21), *see e.g.* Hoang The Lien 1996b pp. 24-25.

\(^{183}\) Marr (1981 pp. 308–315) argues that no experience more defined the nature of Vietnamese revolutionary leadership than prolonged detention in colonial prisons.

\(^{184}\) Some Vietnamese legal scholars acknowledge the effective use of law for state-building purposes in the Republic of Vietnam. Pham Diem (1998a p. 28) argues that “[...] the former Saigon administration attached importance to the legislative work as to legalize and consolidate the regime, regulate and protect social relations in the then colonial and neo-colonial society. Its legal system was fairly complete with various law branches and diversified forms of legal documents.”
Spontaneously developed informal practices, such as fence-breakings and hut transfers,\(^{185}\) have often provided temporary solutions to immediate problems and could, potentially, be recognised within the framework of the law. However, such practices are seldom created with efficiency in mind, but rather to circumvent lacks and lapses in the framework of rules. It is also difficult to recognise “sound” practices within the legal system, e.g. hut transfers as a way of legally selling land, and at the same time enforce the law against other practices that in the eyes of the actors in the marketplace appear equally justified, e.g. to build a restaurant on the sidewalk. Of course, this does not mean that informal practices should be immediately refuted and opposed. Rather, unprejudiced observation of how these inherently dynamic and flexible conceptions evolve and operate can contribute important ideas and impulses.\(^{186}\)

4.5.2.2 International Interdependence

It is increasingly understood that the path of legal reform cannot be determined by domestic factors alone. International conventions, international trade, membership in international bodies for free trade and co-operation and an increasing interdependence in general, create external and internal expectations that the legal system should be harmonised with international law practices in general and with the laws of neighbouring countries and trading partners in particular.\(^{187}\) The 1997 Commercial Law, identified by the Prime Minister as the

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185 Ownership of land for commercial use, and consequently also transfer of ownership of such land, is not yet recognised under Vietnamese law (see 5.1.2 infra). However, installations on the land may be owned and sold, so huts are erected on unused land in order to acquire legal protection for the possession and to facilitate transfer.

186 Regarding the evolvement of formal rules as extensions of informal rules generally, see North 1990 pp. 86–91.

flagship statute that would support Vietnam's application to the WTO, contains a number of provisions modelled on the 1980 Vienna Convention on the International Sale of Goods, CISG. Decree No. 116-CP on the organization and activities of the Economic Arbitration is inspired by UNCITRAL norms, etc.

Most significant in this respect is Vietnam's membership of the Association of Southeast Asian Nations, ASEAN, and the resulting explicit and implicit obligation to adhere to its common goals and principles. At their Singapore Summit of 27–28 January 1992, the ASEAN leaders adopted a legal framework to promote economic co-operation in the region. The system is visualised in three documents. The Singapore Declaration summarises agreements in a variety of fields, i.a. communications and education, and outlines a broad-based programme for economic integration that is adaptable enough to encompass the needs of the ASEAN nations on different development levels. The Framework Agreement on Enhancing ASEAN Economic Cooperation establishes the ASEAN Free Trade Area (AFTA), which is

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188 WTO membership has had important effects on many developing and transition countries. The firm institutional basis for the application and the enforcement of the agreed trade rules mean that there are strong incentives to implement new and more liberal rules and procedures for trade. The requirement to maintain access to its market or pay compensation also provides a constraint on internal pressures for increased state control of trade or other backsliding on reform. Regarding the implications of WTO membership for developing Asian economies specifically, see Ajanant 1996; McGivern 1996; Potter 1996; and Wong 1996.


190 ASEAN came into being in August 1967, primarily as an anticommunist containment pact, with the signing of the Bangkok Declaration by its five original member states, Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei joined in 1984 and Vietnam became the seventh member on July 28, 1995. ASEAN's population, with Vietnam's accession to membership, now exceeds 420 million and it is obvious by any measure that, since its inception, ASEAN, and later AFTA, has made notable economic progress. ASEAN is now the world's fourth largest trading group, ranking behind the United States, the European Union, and Japan. For an overview, see Tan 1994. Regarding the legal aspects of Vietnam's ASEAN membership specifically, see Le Thu Son 1996 and Neilson 1998.
implemented primarily through the provisions of the third document, the Agreement on the Common Effective Preferential Tariff Scheme (CEPT).\textsuperscript{191} Taken together, these three instruments provide a flexible yet workable formal framework for economic cooperation and integration in the region.

The readiness of the member states to entrust greater coordinating and decisional responsibilities to the ASEAN organisation has also led to the development of a regional administrative infrastructure to which Vietnam and all other member states must relate on a regular and continuing basis. It is estimated, for example, that there are over 200 ASEAN officials and ministerial meetings annually, for which the working language is English. The combined effect of these interactions amounts to an extraordinary reversal of Vietnam's previous isolationism. Hundreds of Vietnamese civil servants are currently taking advanced training programs in law, English, ASEAN diplomatic relations, and economic terminology, with the assistance of other ASEAN members and observer states.\textsuperscript{192} The need to continuously follow and react to the interaction between the domestic legal doctrine and the doctrine of other ASEAN member states may even lead to the development of an embryonic common ASEAN legal language.\textsuperscript{193}

4.5.2.3 National Models

With regard to national models, it appears that Vietnamese lawmakers have often sought to identify legal rules that would

\textsuperscript{191} The Framework Agreement allows for future co-operation in a variety of fields, e.g. finance, communications, technology transfer, and human resources.

\textsuperscript{192} See e.g. MINISTER OF JUSTICE ATTENDS ASEAN MEETING 1996.

\textsuperscript{193} For example, Vietnam has agreed to harmonise its laws with other members of the ASEAN in such vast areas as taxation, import and export tariffs and quotas by 2006. Vietnamese lawmakers may find it comforting that such "technical" legislation seems to transplant relatively easily from one society to another, see Waelde and Gunderson 1994 pp. 368-369.
allow business to function as soon and as effectively as practically possible. The overt similarities in political and economic conditions made China the obvious model in the initial phases of reform. The first version of the Vietnamese Foreign Investment Law, the 1988 Decree on Transfer of Foreign Technology, the 1988 Decree for the Establishment and Operation of Resident Representative Offices of Foreign Economic Organisations and the 1989 Ordinance on Economic Contracts were all clearly inspired by Chinese models and borrowed on an ad hoc basis after their relative success had been observed.194

The similarities with China are especially conspicuous in respect to the ideologically sensitive matter of land. As a result of the liberalisation of the collectivist policies, China undertook a constitutional amendment in 1988 to allow the leasing of land for individual long-term use. Vietnam undertook a similar constitutional amendment in 1992. The Chinese amendment was followed by a Land Law in 1986 that provided for legally defined “land use rights” and permitted the transfer of such rights under certain conditions. National regulations for the use of urban land, providing, i.a. for specific maximum terms for different land leases, transfer of land use rights for compensation, bidding and auction, re-transfer of leases and for the pledging of leases, were enacted in 1990. These regulations were supplemented by provisional procedures in 1992 that provided in more detail for land transfer, lease and mortgage.195 Vietnam introduced similar provisions in the Land Law and in its implementing instructions in 1993. More recent examples of Chinese-inspired reforms include the recognition of the “household” as a specific subject of civil intercourse in the 1995 Vietnamese Civil Code, a move apparently inspired by the Chinese General Principles of Civil

195 Regarding land law reform in China, see Lichtenstein 1993 pp. 23–24.
Law,196 and the creation of Economic Courts (chambers) for the resolution of commercial disputes within the structure of general People's Courts.197

The perestroika in the Soviet Union deeply impressed the Vietnamese leadership. It still follows closely the political and legal development in Russia. The continued interest stems both from similarities in economic conditions and from Vietnamese leaders' familiarity with Russian law and language. The reforms within property law (especially the land law) and commercial law are followed with particular interest. It is seldom a matter of transplanting Russian law, rather of identifying solutions that communicate well with established political, legal and administrative practices. The concept of "purposeful use" of land, for example, appears both in the RSFSR Land Code of 1991 (and its supplementary secondary legislation) and in the 1993 Vietnamese Land Law.198

4.5.2.4 Development Cooperation

Advice and assistance from the UNDP, the World Bank, the Asian Development Bank, the IMF, Swedish Sida and other major aid partners, also graft in new perspectives and preferences. The forms of assistance vary, but many programmes consist of combinations of seminars with Western experts in various subject fields, study tours, scholarships for domestic lawyers to study abroad, and in some cases, assisting and commenting in the actual drafting. Some larger programmes have been built around a "Resident (Legal) Advisor" who co-ordinates programme activities

196 Some Vietnamese lawyers and scholars deny such links, see e.g. Hoang The Lien 1996b p. 22.
197 Regarding the creation of economic chambers within the Chinese People's Courts, see Potter 1994b p. 345.
198 Regarding property and land law reform in the RSFSR, see Malfliet 1993 in extenso and Smith 1996 pp. 178-183.
and furnishes relevant advice.\textsuperscript{199}

With a few exceptions, the support has been positioned so as to provide assistance to the priorities made by the Vietnamese government and the Ministry of Justice in their own work programmes.\textsuperscript{200} This caution at the part of the donors has allowed the Vietnamese leadership to confine most of the support to politically "harmless" areas such as economic and commercial law, resolution of economic disputes, and legal information issues. So far, few activities have taken place in areas such as criminal law and human rights.\textsuperscript{201} Donors must also be careful to ensure that the assistance is not used for repressive purposes, as can be the case when supporting \textit{e.g.} criminal law or correctional treatment reform. However, even carefully contained foreign support and

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\textsuperscript{199} Vietnam's propositions for co-operation within the legal area after the initiation of the economic reforms have been well received. Vietnam approached Sweden as early as 1991 with a proposal for assistance in the development of a "legal framework" and an agreement to this end was signed between the Swedish International Development Authority, the Ministry of Justice in Hanoi and the Department of Law at Umeå University in 1992. Since then, the Ministry of Justice and the Department of Law have co-operated around various activities to support the legal aspects of the transition to market economy and to strengthen the rule of law. Regarding the content of the Swedish assistance to Vietnam, see Bergling et. al. 1998; Falk 1997; Nordborg and Dahlberg 1997; Persson 1997; and Sevastik 1997. Other agencies active within the legal area in Vietnam include Australian AIDAB, Canadian CIDA and the UNDP.

\textsuperscript{200} UNDP points to the sensitive nature of legal assistance: "It is not the Programme's [VIE/92/003] nor UNDP's role to advocate (or even recommend) legislation of particular laws in Viet Nam, although it is a fact that Vietnam's legal system has strong civil law traditions, due to its historical links with the French system. Rather, the programme will provide Viet Nam with a fund of knowledge relating to laws in the developed legal systems of world economic powers -- \textit{e.g.}, the United States, the United Kingdom, France, Germany, The European Community, Australia, Japan, ASEAN countries etc." \textit{See UNDP VIE/92/003 – Legal Reform in Viet Nam}, p. 12.

\textsuperscript{201} Human rights are still a sensitive issue. The Vietnamese Ministry of Foreign Affairs has stated that "Vietnam will not allow any country or organisation to investigate the 'human rights situation' here and considers any such action a violation of its sovereignty and interference in its internal affairs." \textit{See Vietnam gives strong response to UN human rights report}, Agence France Presse, February 24, 1995.
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interaction incite internal debate about democracy, rule of law and other politically sensitive issues that otherwise would not had been tolerated. In large measure because of development cooperation and overseas contacts, the National Assembly and the Ministry of Justice have strengthened their position relative to the Party and government. It is also notable that seminars on human rights and rule of law issues jointly organised by the Vietnamese Ministry of Justice and Umeå University have been well received by an interested and well-informed audience of government lawyers.

The prospects of obtaining aid also influences how the Vietnamese leadership seeks to explain and justify its policies. Although the official rhetoric maintains that socialism is still the supreme guiding principle, it is understood that the worldwide collapse of orthodox socialism has made it impossible to convincingly defended laws and policies as part of immutable revolutionary principles or as derived from Ho Chi Minh. Shows of pragmatism and rationality (in the economic sense), on the other hand, are both internationally passable and helpful in restoring legitimacy to the Party's capacity to draft and maintain sensible rules for various aspects of social life.

This does not mean that the leadership always believes in the justifications it presents. Given that it can be perceived more important to justify new legislation to critical foreign investors and aid agencies than to domestic constituencies, the officially presented justifications may not reveal the factors the policy

202 Rose (1998 p. 127) doubts whether the strength and concordance of the political and "nationalistic" interests are as strong as is often assumed: "[...] many Vietnamese elites who might be in a position to question the motives of foreign legal advisers are the ones who stand to benefit the most from foreign assistance projects. As a result, elites often choose projects that seem to go along with Western ideological agendas, at least on the surface, in order to obtain foreign monies for their ministries and, in some cases, personal perquisites, such as the opportunity for international travel."

203 For a similar observation regarding China, see Epstein 1994.
makers themselves considered in arriving at their decisions, but rather those they assume the outsiders consider important and want to hear.\textsuperscript{204}

4.5.2.5 ASSESSMENT AND ADAPTATION

It seems that improved links with "Western" countries in general have helped overcome some of the guardedness that initially prevented a sober evaluation and that potential models are now scrutinised with an eye both to international compatibility and to Vietnam's special conditions.\textsuperscript{205} There is also a greater awareness among Vietnamese lawyers that even a selective and careful use of foreign models means that crucial policy choices must be made.\textsuperscript{206} Foreign observers, on the rare occasions that they have had an insight, have often been surprised by the ease with which drafting groups are able to reevaluate what they have already drafted in the face of criticism or a new thought.\textsuperscript{207}

It is notable that Vietnamese lawmakers and commentators do not consider the common law vs. civil law issue as posing any

\textsuperscript{204} For a general discussion, see Seidman and Seidman 1994 pp. 57-59.

\textsuperscript{205} Nguyen Van Tam (1994) explains how various models for organising the administrative courts were discussed and evaluated. For a general discussion, see Cohen 1990 pp. 44-45; Gillespie 1995a pp. 90-91; Le Minh Thong 1997 p. 19; Ngo Ba Thanh 1994b pp. 28 and 30; and Tran Son 1994 p. 36.

\textsuperscript{206} It is argued that such choices are made through a free and judicious process in the light of comparative law, see e.g. Ngo Ba Thanh 1994b pp. 28-30 and Doan Trong Truyen 1996 p. 7.

\textsuperscript{207} In spite of limited experience, international isolation and scarce resources, Vietnamese lawmakers have managed to avoid many of the pitfalls that have occurred in other countries undertaking similar legal reforms, e.g. China. For example, while the Vietnamese regulated all forms of foreign investment in the 1987 Law on Foreign Investment, China regulated different form of investment in different laws, see Brahm 1990 p. 42. Vietnam also placed the State Commission on Co-operation and Investment, at the time the agency responsible for approving foreign investment contracts, apart from other line ministries with interests in the matter, while China incorporated its equivalent into the Ministry of Foreign Economic Relations and Trade, with a problematic relationship to other ministries as the result, see Cohen 1990 p. 46.
major problems. Rather, there is a very pragmatic notion that the real issue is substance rather than form.\footnote{For a similar observation, see Rose 1998 p. 105. For a diverging Vietnamese opinion, see Le Hong Hanh 1995 p. 24.} This view seems typical to many developing and transition societies facing similar conditions.\footnote{See Waelde and Gunderson 1994 pp. 372–373.} It is also notable that Vietnamese lawmakers show few signs of being biased against US concepts and advice. There is a recognition, albeit not always enthusiastic, that Vietnam, like the other countries along the Pacific Rim, cannot resist the continuous process of globalisation in which the United States is often the prime mover.

How, exactly, different model concepts are adapted to specific situations and problems remains a mystery. Foreign experts seldom or never participate in the actual drafting and the Vietnamese lawmakers have an interest in making it appear that the new laws are the genuine result of their own efforts. Judging from the resulting laws, the lawmakers often “cut out” certain elements of model laws that they find appropriate, while rejecting others.\footnote{For a similar observation, see Falk 1997 pp. 115-116 and Rose 1998 p. 105.} A disadvantage with this technique is the difficulty involved in assembling the pieces into a coherent whole, with the risk of developing a system or sectors of a system with fragmented and conflicting provisions. The evaluation of isolated fragments from many different systems also requires considerable time and experience, factors that are in scarce supply. In an attempt to circumvent or at least reduce such problems, Vietnam has begun to draft comprehensive codes that should be easier to put into place.\footnote{See Vu Mao 1996 pp. 17–18.} A recent example is the 1995 Civil Code, comprising seven parts (General Regulations, Property and Ownership Rights, Civil Obligations and Civil Contracts, Inheritance, Provisions on the Transfer of Land Use Rights, Intellectual Property and
Technology Transfer, and Civil Relations Involving Foreign Elements) and 838 articles. Although basically a good idea, the putting into place of the Civil Code posed formidable problems and eventually necessitated the establishment of special review committees and the enactment of additional clarifying legislation, as has been already discussed in Section 4.4 *supra*. 
CHAPTER 5
OWNERSHIP AND CONTRACTS

This chapter discusses how the new property and contracts regimes relate to the officially formulated goal of promoting private sector development. The analysis is based on relevant legislation, i.a. the 1992 Constitution, the 1995 Civil Code, the 1997 Commercial Code, and on interviews with Vietnamese businessmen.

5.1 Ownership in Theory and Practice

5.1.1 POLITICAL AMBIVALENCE AND LEGAL UNCERTAINTY

Conventional wisdom suggests that laws governing property, contracts, companies, etc. are important for the development of successful economies because of their influence over the incentives and transaction costs (e.g. the costs of search, negotiation and enforcement) associated with various business transactions. It is argued that if the opportunities these laws provide are perceived as reasonably fair and favourable, people will have an incentive to invest and work hard to make the most of their assets.212

Inspired by such assumption, a number of international organisations and aid agencies have directed considerable resources to supporting the creation of “legal frameworks” for private

212 See note 4 supra.
enterprise in developing and transition countries. For example, the World Bank emphasises the legal and administrative institutions underpinning the private sector in its structural adjustment, privatisation and financial sector lending operations and Swedish Sida stresses "the legal foundations of market economy" in its support for the legal sector in Vietnam and Laos.

Vietnamese policy makers have taken the message ad notam. Adherence to the suggested formula both helps promote the "socialist-oriented market economy" and opens the way for aid, it is argued. It has been mentioned (see Section 4.5) that for want of viable alternatives, the efforts to create new legislation have often a point of departure in foreign concepts. The 1987 Law on Foreign Investment, the 1992 Constitution, the 1992 Land Law, the 1994 Law on Promotion of Domestic Investment, the 1995 Civil Code, and the 1997 Commercial Law, all contain conventional "Western" principles protecting and governing ownership and transactions.

However, the adoption of this legislation is not combined with any official rejection of state ownership and intervention as obsolete or intolerable. Any concept that challenges important political principles, either directly by opening up way for undesired behaviour or indirectly as a vehicle for dangerous ideas and values, is likely to be refuted. Even the core concept of individual rights

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214 See e.g. Hoang The Lien 1995 and Luu Van Dat 1994.


216 The influential legal scholar and politician Ngo Ba Thanh (1993 p. 91-92) argues that "[u]nder the economic renovation, Vietnam is still to maintain socialism as its long-term goal, but prior to reaching socialism, it must first embrace the market in order to develop certain areas of the economy by using decentralized planning techniques associated with the free market."

217 See e.g. Le Minh Thong 1997 pp. 19 and 22.
has been modified and reinterpreted to have a more weakened meaning.\textsuperscript{218}

This ambiguity is reflected in the laws enacted. The second chapter of the 1992 Vietnamese Constitution, entitled \textit{The Economic System}, balances on a line between market principles and central planning. Private ownership of companies, buildings, machinery and other means of production are permitted.\textsuperscript{219} Nationalisation of private property is prohibited and any necessary expropriation must be adequately compensated for according to law.\textsuperscript{220} Further endorsement of these principles is given in the 1994 Law on Promotion of Domestic Investment, the 1995 Civil Code, the 1997 Commercial Law and in various sub-laws.\textsuperscript{221}

At the same time, the Constitution asserts that the policy of the state is to retain state and collective ownership as "the foundation", to "manage the national economy by means of laws, plans and policies [...]" and to ensure a leading role for the state sector in

\textsuperscript{218} Gillespie (1993 and 1994) argues that rights exists by virtue of an administrative discretion that looks beyond individual needs to broader political goals and community interests.

\textsuperscript{219} Constitution 1992, arts. 21–22, 25 and 58.

\textsuperscript{220} Ibid. art. 23. The provisions on private property and nationalisation, especially article 25 stipulating that "enterprises with foreign investments shall not be nationalised", were fiercely discussed during the constitutional drafting. Some lawmakers argued that such a provision would be tantamount to tying one's own hands and thus potentially dangerous. The proponents of a constitutional guarantee against nationalisation argued that the exercise of national sovereignty is by no means absolutely free from constraints and that Vietnam needs to impose some self-restraint on the basis of equality, mutuality, etc. with other nations. They also argued that the open-door policy and the enactment of foreign investment legislation meant that Vietnam, although still a socialist country, had already accepted capital from capitalist countries and opened part of its market for "capitalist exploitation" as a means of generating economic growth, see Ngo Ba Thanh 1993 pp. 96-97.

\textsuperscript{221} For example, provisions for the implementation of the skeletal Law on Promotion of Domestic Investment are found in Decree No. 7/1998/ND-CP detailing the implementation of the Law on Promotion of Domestic Investment, January 15, 1998.
key branches and areas of the national economy. In the scholarly debate, private ownership is described as an untamed horse that needs to be controlled by a skilful rider. It will bring social injustices, exploitation and eventually slavery unless the state and collective sectors are strong enough to pull it along a socialist oriented path, it is contended.

Although these formulations work to offset some of the stability and predictability that are the overriding goals of the legal and constitutional amendments, a clear majority of the interviewed businessmen felt reasonably safe in the sense that they were not afraid of being deprived of their property through nationalisation, expropriation or competing claims from others. Even businesses that were not properly incorporated did not fear for their existence. For example, a hotel owner who had long operated without any of the required licenses, registrations and permissions argued that the absence of formal safeguards had “in no way” affected him.

Subjective interpretations of the general political climate, in

Constitution 1992, arts. 15, 26 and 19 respectively. The 1995 Civil Code, Part Two, Chapter IV (Forms of Ownership), adds to the confusion by providing for ownership by political organisations (or politico-social organisations), ownership by social organisations (or socio-professional organisations), mixed ownership and common ownership. The construction has historical underpinnings. The property regime under the system of central planning offered different protection to different kinds of property. State or socialist property, which included virtually all urban industrial and commercial property, was considered the “highest” form and enjoyed the greatest level of protection. Yet, actual rights to use this property and exclude others from using it were often unclear. Neither local government nor state-owned enterprises owned the property they used. Instead they had a right of “operational administration” which could include the right to lease the property to others, but not to sell it. The other forms of property, co-operative and personal, were subordinate in principle and practice. Personal property was typically limited to one residence of a particular size, personal belongings, lawfully earned income and savings, and, in some cases, properties of small, individually run shops and businesses, etc.

See Hoang The Lien 1995 pp. 33-34.

It should also be noted that all respondents had bank accounts and that none of them expressed any concerns over the safety of their funds.
which law is just one among many factors, are a key to explaining the general feeling of safety. Arguments such as “a turnaround would be disastrous and therefore not likely”, “everybody knows that the country is on the right road after the Sixth Party Congress” and the political commitment “to create a strong, rich state is very powerful”, were typically expressed among the businessmen interviewed.

5.1.2 LAND RIGHTS

Inquiries into the conditions for allocation and use of land, an area where the ideological ambivalence is particularly conspicuous, endorse the interpretation that when the message the law conveys is too vague or blurred, businessmen look to other sources.

Cultivated land in Vietnam has for long periods of time been administered by collective bodies, mainly because of the ancient land reclamation process which required the whole force of the community to be mobilised to conquer new land. In this system, the village leadership divided the land among the inhabitants to till and pay rent on and carried out the direct management. There was no formal tenure attached to the land and periodical redistributions were carried out, varying from annually to every 10th year.

A feudal class emerged in the 17th century when the Emperor gave land to the local gentry in return for the performance of services of various kinds, e.g. military service. The gentry granted lots to lesser vassals, who granted it to peasants, thus creating a pyramid of land holding. This system essentially remained in place until the French colonial authorities attempted to introduce their own system of land administration. The colonial system, which provided mechanisms for the issuing of certificates of title and for

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225 Gillespie (1994 pp. 358-360 and 1995b p. 78) also stresses that law is always intertwined with politics and ideology in Vietnam and that its true value should lie in demonstrating that the Party will dignify certain economic principles with formal legislation.
registering transactions and mortgages, became fairly developed in the urban areas, but most agricultural land, apart from some larger plantations and estates, usually with French owners, remained untouched.

After the independence from France in 1954, the revolutionary leadership initiated a process of nationalisation and collectivisation aimed at eliminating private ownership of land in general and "landlords" as a "class" in particular. The process essentially consisted of confiscating land from those who had larger estates, and, after briefly allowing small farmers a period of individual use, forcing them in turn to surrender the land to collectives. Apart from managing agricultural production, the collectives also functioned as social, economic and political units and took charge of conscription, public welfare and public order. The collectivisation policy was extended to the South after the reunification of the country in 1975.

The 1980 Constitution formally abolished all forms of private ownership of land. The large-scale imposition of collective methods in agriculture resulted in a dramatic fall in output. Vietnam soon had to import large quantities of food, mainly from the Soviet Union and its allies. A critical point came when bad weather ruined the harvests in the late eighties and the extent of overseas aid from the socialist bloc simultaneously decreased after the collapse of the Soviet Union.

The most acute problems were addressed by liberalising prices to provide incentives to produce more, and more significantly, the introduction of various forms of production contracts and user

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227 Reliable figures are difficult to obtain, but it is said that while the co-operatives usually had two harvests per year and could supply about 0.2–0.3 kg rice per person and working day, the five per cent of the land that was still used by individual tillers could give three harvests or more and provide more than half the national production.
rights to encourage the farmers to make the most of their land. Although these measures were introduced on an experimental basis and the term of tenure was often limited to 5 to 10 years, they were perceived as being stable enough to allow significant land improvement and the reemergence of family-centred forms of land use. A considerable increase in output followed. From being a chronic rice importer, the production rose to a level where not only could the entire domestic demand be met, but export was also already possible in 1989.

After prolonged drafting, over seven years and seventy drafts, a fairly comprehensive Land Law came into force in 1988. It originated in the orthodox 1980 Constitution and maintained that "land is the property of the entire people and is subject to exclusive administration by the State", but also added in the spirit of doi moi that the state shall allot land to individuals, co-operatives, state units and other land users "for use on a stable and long-term basis." The right to use land was not a conventional lease from the state with restrictions and rents, but a system of allocation without charge but with the obligation to observe certain regulations and pay taxes. The duration of the land-use term was decided by the allocating agency on a case-to-case basis, but usually for 5–10 years. The users could transfer, assign or sell the proceeds from the land during the term, but not sell or sublease the land itself, or use the land for other than the planned purposes. In spite of the restrictions on duration and transfer, the policy was considered stable enough to dramatically increase the value of the land, which,

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228 The "production contract system" allowed co-operatives to allocate land to individual farmers, who, in return, would sell a certain quantity of products to the co-operative or the state at a fixed price. The surplus could be sold either to the state or on the free market at market prices. Regarding the production contract system and other initial attempts at reform, see Ngo Ba Thanh 1994a p. 42; Nguyen Qui Binh 1993 p. 157; and Viet Nam - Transition to the Market 1993 p. 26.

229 As early as 1992, Vietnam had emerged as the third largest rice exporter worldwide, see Leipziger 1992 p. 6.
in turn, spurred a number of de facto sales under varying degrees of secrecy. Other restrictions were also routinely ignored, for example by replacing trees with crops and raising buildings on protected rice land.

The effects of the 1988 Land Law were appraised in February 1991. It was rhetorically concluded that the law had brought order to the state administration of land, encouraged production and promoted economic development. However, it was admitted that the law was ambiguous and vague on the most important issue, the delineation between the “ownership of the whole people” and the long-term rights of the users.\(^\text{230}\) It was also recognised that the term of tenure was too short to enable mechanisation and that some households covertly sold their plots because they were too small to be used rationally.\(^\text{231}\) In other forums, Vietnamese policy makers blamed the circumstance that less than one-third of over USD 7 billion in approved foreign investment since 1988 had actually come into the country on remaining inadequacies and uncertainties in the property regime, particularly cumbersome registration and transfer processes.\(^\text{232}\)

In spite of the criticism, Party conservatives prevailed in the drafting of the 1992 Constitution.\(^\text{233}\) All interests, including water, mineral, and air rights, continued to remain “under ownership by the entire people” and be subject to management “in accordance with the plan and the law […]”.\(^\text{234}\) That it is not


\(^{231}\) The covert sales troubled the leadership. There were efficiency arguments for larger production units, but also fear of large concentrations of land in private hands, see Nguyen Qui Binh 1993 p. 157.

\(^{232}\) Hobson, Heung and Chon (1994) stress the problems land ownership issues have posed for foreign investors, and underline that Vietnam’s first foreign hotel investment, the Saigon Floating Hotel, was put on a barge because of such problems.

\(^{233}\) See Thayer 1993 p. 55.

intended for individuals to actually own land can also be understood from the use of words such as "use-right" and "land transfer", instead of terms with a commonly recognised legal meaning such as "own" or "sell." 235

The 1993 Vietnamese Land Law, which was preceded by nation-wide debate and drafted under the auspices of the Ministry of Justice, the Ministry of Agriculture and the General Department of Land Management, reiterates that "land is the property of the people and subject to exclusive administration by the State" and that the state shall allocate land to organisations, households and individuals for "stable and long-term use". 236 This also comprises a right to transfer, inherit and bequeath most such land during the land use term. 237 The Land Law also reiterates the constitutionally endorsed principle that expropriation is possible for national security or strong public interest purposes only and that compensation shall be paid at current market prices. 238


236 Land Law 1993, arts. 1 and 20. The role of the state as owner of all land was vigorously debated, both within and outside the National Assembly. Four alternative policies were suggested: that the "ownership of the whole people" should be maintained and the state should be in charge of the administration of the land; that private ownership should be recognised (widely advocated in the South); that limited rights to transfer, sublease, etc. should be given to the users and that the state should be able to reclaim land only for a narrow range of public purposes; and that the pre-1980 policy with three different kinds of ownership should be retained.

237 Land Law 1993, arts. 3 and 73-77. Detailed rules for the implementation of the provisions on ownership and transfer are found in Decree No. 60-CP on dwelling house ownership and residential land use right in urban areas, July 5, 1994, and in Decree No. 61-CP on dwelling house purchase, sale and business, July 5, 1994. Special restrictions apply for the bequeathing of land on which annual crops are grown (generally paddy fields). The members of the household are guaranteed continued use of such land so the use-right cannot be bequeathed to persons outside the household.

238 The expropriation purpose must be submitted to the People's Committee and the government for approval. The size of the compensation is determined by the Provincial People's Committee (it is not currently possible to give compensation in land). Constitution 1993, art. 23; Land Law 1993, arts. 27 and 28; and Decree No. 22/1998/ND-CP on compensations for damage when the State of recovers land for
However, the protection of the land users under the Constitution and the Land Law is blurred by provisions allowing for use-rights to be recovered under their duration when the legal entity holding the right dissolves (or dies and there are no successor by will or law), becomes bankrupt, relocates or no longer needs the land, uses the land for other purposes than those for which it was allocated, and when the initial allocation did not comply with formal requirements, etc. Land can also be reclaimed if the user does not fulfil certain obligations to the state, for example to protect, enrich and rationally exploit the land, to pay taxes and fees, and to protect the interests of neighbours.239

It should also be noted that the nature of the interests in land that private entities obtain depends on their legal status and on the purpose for which they use the land. While individuals, households and collectives are eligible for the highest interest, an indefinite land use-right that may be transferred, bequeathed and mortgaged with few significant restrictions, commercial entities (i.e. businesses) that use land for income-generating purposes (often referred to as “commercial land”) must rent land for a fixed term. The term of use can be as short as five years for rice production and twenty years for industrial use.240 This form of land use is also surrounded by far more restrictions, for example with regard to the right to mortgage the land for credit.241

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239 Constitution 1992, art. 18 and Land Law 1993, arts. 4 and 26. Such stipulations can also follow from individual provisions in the land use certificates.

240 Land Law 1993, arts. 1, 3, 11, 20, 29, 33 and 36. The rent is determined by the Provincial People’s Committees within limits decided by the Ministry of Finance, see On Decree No. 18/CP on the 13th of February, 1994 of the Government providing detailed guidance for the implementation of the Ordinance on the Rights and Obligations of Domestic Organizations to Which the State Allocates or Rents Land 1995.

241 That all land is under the ownership of “the whole people” (and consequently cannot convey a legally recognised proprietary interest) has been an impediment to the development of a working mechanism for mortgage, see ON NEW
Consequently there are strong incentives for businessmen to disguise the actual use of the land and to devise informal mechanisms for mortgage and transfer. The possibility of owning fixtures located on commercial land opens up a way to buy and sell houses and other structures for profit, thus effectively transferring the underlying land.\textsuperscript{242} The most serious problem with this practice is the risk of mismatches of tenure. While ownership of houses and other structures exists in perpetuity, land lease will, formally, revert back to the state on the expiration of the term.

The rights to land that private entities may obtain are also profoundly affected by prevailing legal and administrative practices. Although national legislation has been enacted and other attempts have been made to streamline the land administration under the General Department of Land Management, considerable power remains with Provincial and District People's Committees, e.g. in preparing land records, promulgating land use regulations and settling land use disputes.\textsuperscript{243} There is ample room for ideology, self-interest and other irrelevant considerations to make their presence felt in these processes.\textsuperscript{244}

This has fuelled a notion among the businessmen interviewed

\begin{quote}
\textit{MORTGAGE AND PLEDGE REGULATIONS} 1996 and Nguyen Quy Binh 1996. The 1993 Land Law, arts. 3 and 77, and the 1995 Civil Code, arts. 727-737, open a way for individuals and households to mortgage land for credit, but the common practice of illegally converting agricultural or residential land for business purposes means that few businessmen can benefit from this opportunity. Vietnamese law also requires notarisation of mortgages, where documents evidencing ownership must be attached to the mortgage documents.

\textsuperscript{242} "Hut transfers", \textit{i.e.} the practice of erecting a hut or simple house and selling it in order to transfer the underlying land, has been described in Section 4.5.2.1 \textit{supra}. Gillespie (1994 pp. 352-353 and 1995a pp. 97-98) suggests that the authorities may regard such transactions as a sale of a business. As there is no specific legislation on this point, regulatory authorities should base their interpretation upon an analogy drawn from the 1990 Law on Private Enterprise, arts. 23-24.


\textsuperscript{244} See Gillespie 1994 pp. 338-343 and 350-355 and 1995b in extenso.
\end{quote}
that contacts with the land administration are costly and uphill and that it is better to pursue the easier, albeit technically illegal, practice of secretly subletting land from others. Businessmen also seek to avoid the fees that must be paid upon application for and registration of land leases. The widespread practice of secretly subletting land is made possible by the large-scale allocation of attractive land to state-related institutions, formally for operational purposes, which, in turn, covertly rent it on commercial terms to well-connected private entities. It is also common for land along the future right-of-way of roads, which now form a large part of the retail and small-scale manufacturing space, to be rented on dubious legal grounds on “short-term” base with money presumably changing hands unofficially.

The safety of informal land-use arrangements can be enhanced in various innovative ways. For example, land users without proper registration may use homemade certificates with various official looking seals to prove their right to the land and facilitate transfer. Purchasers and representatives of the authorities are generally aware that these documents are not official. John Gillespie suggests that it is a matter of using ritual to dignify illegal transactions with the trappings of respectability.\(^245\) Another way to ensure that one is allowed to stay on a location is to pay some sort of fine or tax to the authorities, which although formally levied on the assumption that it does not confer any right to the property, implicitly constitutes a proof that whatever has to be done in order to stay on the location has been done properly. For example, a hotel developer with a vacant site in Hanoi’s ancient Hoan Kiem district knew that the special rules for real-estate development that apply in the district made it unlikely that his application to build a hotel would be approved. He was also aware that Hanoi Tourism had become much more restrictive about giving the necessary permission to operate a hotel in this part of the city. The developer

\(^{245}\) See Gillespie 1995b pp. 77 and 108.
therefore took the easier way of registering a trade company to operate on the same location, and immediately this was completed filed a petition to change it into a hotel business. Meanwhile, he had started to construct a five-storey building that could easily be converted into a hotel. This calculated “crime” resulted in a police investigation and eventually a modest fine. The receipt for the fine could be presented as a “license” to Hanoi Tourism and other concerned agencies to prove that all formal requirements had been met.\textsuperscript{246} The desired permission to operate the hotel was then granted.

The high level of construction and other forms of improvement of informally held land indicates that people are reasonably confident about being able to stay on the location.\textsuperscript{247} It is noted that the authorities, at least so far, have not expended much effort in enforcing laws that prohibit illegal construction and land transfer. Many respondents suspect that the state lacks both the resources and the political will to undertake any major redistributions or expropriations.\textsuperscript{248} Notably, the city authorities in Hanoi have hesitated to remove illegally built houses even when they have sealed off entire streets.

The state’s inaction stems partly from a notion that efforts to actually enforce planning and building regulations would not be appreciated by anyone. It also seems that the practicability of some informal arrangements have led the state to silently accept them. For example, although a land user may lack the proper documentation to prove his right to a specific plot, there may be a

\textsuperscript{246} de Soto (1989 pp. 66 and 68-69) describes the presence of similar mechanisms in Peru, where vendors develop “special rights of ownership” that establish a special relation to informally held land.

\textsuperscript{247} Obviously, there are no statistics available for informally held land, but it can easily be seen in Hanoi that households and businesses occupy parts of the pavement or the street and build permanent installations on it. The demolition of illegally built houses on the embankments of the Red River appears not to have significantly diminished the enthusiasm for such practices.

\textsuperscript{248} For a similar observation, see Gillespie 1994 p. 339 and 1995b p. 79.
general recognition of his right to it that allows applicable taxes and fees to be levied.249

The preceding account underlines that the objective factors of law are still intimately intertwined with ideology and politics in Vietnam. It also shows that those who can correctly interpret the political ambience feel reasonably safe, in spite of lingering socialist rhetoric in the economic legislation. The problem with the remaining elements of socialist and collectivist policies is first and foremost that they give rise to inconsistencies in the legal and administrative framework and make systematic revisions and unprejudiced feedback difficult.250

5.2 Contracts in Theory and Practice

5.2.1 TRIAL AND ERROR

As economic scholarship has elaborated for more than two hundred years, there is much evidence to suggest that the creation of wealth is enhanced in various ways by exchange.251

It is also argued that the institutions that structure exchange and determine the resulting transaction costs fall into general types.252 In its earliest form, typically a small village, exchange takes place without formal written rules and third party enforcement. This is made up for by repeat dealings, cultural homogeneity and a dense social network of informal rules. The costs of transaction in this


250 Kornai (1992 pp. 570-574) emphasises the long-term eroding and destabilising effects on socialist and post-socialist systems of such contradictions and inconsistencies.

251 See e.g. Eggertsson 1996; Libecap 1996; North 1981 and 1990; North and Thomas 1973; Rosenberg and Birdzell 1986; and Stone, Levy and Paredes 1996.

252 The following description is essentially based on North 1990 pp. 34-35 and 120-130.
context are low, but because specialisation and division of labour are rudimentary, transformation costs are high. As the size of the market grows the transaction costs increase sharply because the dense social network is replaced by new and alien partners and more resources must be devoted to measurement and enforcement. There may still be no formal rules or institutions for third party enforcement, but moral precepts etc. can impose standards of conduct that help to reduce the costs of transacting. This stage is also typically when the state begins to take a role in the protection of businessmen and trade, e.g. through the promotion of merchant codes, since the links between higher volumes of trade and greater revenue potential become apparent. The third level of exchange includes the creation of capital markets and the development of firms with large amounts of fixed capital. In this world of impersonal and complex transactions, personal ties and other voluntary constraints are no longer effective.

With a point of departure, explicit or implicit, in similar arguments, development agencies and policy makers argue that those countries that want to take the leap into developed market economies should spend their energies ensuring that there are laws facilitating "freedom of contract" and providing adequate means for dispute resolution and coercive enforcement. The Vietnamese leadership is also committed to introducing "modern" and "rational" principles for contracting, but the starting point for the Vietnamese effort is not the tribal village, but rather the radically different context of socialism and central planning.

The planned economy in Vietnam had also required an elaborate regime for the formation and implementation of various

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253 See i.a. Blair and Hansen 1994; From Plan to Market 1996; Gray, C. S. 1991; Gray, C. W. 1993 and 1997; Lateef 1992; and Nalin 1994. de Soto (1993 p. 10) argues that the difference between developed and underdeveloped countries is not that the former have markets and that the latter do not, markets are an old and universal tradition, but that in developed economies the legal system has created property rights which can be exchanged in an expended market, whereas in less developed countries, it has not.
agreements necessary for the attainment of the plan targets. Special "economic" legislation governed the contracts that were formed for the sale of goods and other transactions between state enterprises. Disputes resulting from these contracts were resolved through a system of state arbitration where the arbitrators looked more closely at the plan than the merits of the claims (the task of each enterprise was determined by an administrative planning decision that constituted a reason or causa for the contract that would come about). Contracts that were inconsistent with "socialist morality", etc. could be nullified. Psychologically and economically, the main point with these contracts was to ensure that the obligations spelled out had been understood by the managers of the state enterprises. By signing the contract they declared that they considered their enterprises capable of fulfilling the obligations of the plan and that they were willing to engage their personal prestige to that end.

The regime's silent acceptance of "fence-breakings" in the late seventies, i.e. allowing state enterprises to engage in activities outside the state plan and to buy and sell products on a commercial basis, was the beginning of the end of the most orthodox notions of economic contracting, but it took until after the Sixth Party Congress in December 1986 for the Party to acknowledge that more comprehensive reforms were needed.

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254 Regarding the functions of contracts in the context central planning generally, see Bogdan 1993 pp. 204-208 and David and Brierley 1985 pp. 296-303. Regarding Vietnam specifically, see Gillespie 1991 and 1994.

255 Contracts formed between individuals for non-profit purposes, on the other hand, were governed by separate "civil" legislation, and on the rare occasion they were brought to adjudication, were settled by the general People's Courts.

256 The regime had also experimented with a "Three Plan System": In addition to using inputs supplied by the state for the state (Plan A), enterprises were legally permitted to acquire resources through their own efforts and dispose of the outputs as they wished to acquire additional inputs (Plan B), as well as to diversify their production by turning out minor products for state trading organs and the open market (Plan C), see Ljunggren 1992 p. 85.
A Chinese-inspired Ordinance on Economic Contracts regulating contracts related to "production, exchange of goods, provision of services, research and application of scientific and technical know-how or other business agreements [...]" was adopted in 1989. The right to enter into economic contracts was restricted to juridical persons and individuals with proper business licenses and registration, and attempting to form an economic contract without fulfilling this requirement could mean liability to administrative action or criminal prosecution. However, the exaggeratedly bureaucratic procedures for incorporation of private enterprises, and the subsequent need to bribe the officials involved, meant that most small-scale businesses still faced uncertainty regarding basic issues of dispute resolution and enforcement.

Various attempts were made to broaden the Ordinance on Economic Contracts to encompass a greater share of the transactions and otherwise make it more viable in a market context. For example, the Economic Arbitration Organisation (EAO), the government body responsible for the adjudication of disputes over economic contracts, simply decided that the wording of the Ordinance was broad enough to allow the inclusion of contracts between individuals. Many other provisions were also

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257 Ordinance on Economic Contracts, art. 1. Detailed provisions for the implementation of the Ordinance on Economic Contracts are provided in Decree No. 17-HDBT on Economic Contracts, January 16, 1990.

258 Ordinance on Economic Contracts, arts. 2, 8-9, 39; Decree No. 17-HDBT on Economic Contracts, art. 1; and Penal Code 1985, art. 168. The model law, China's 1982 Economic Contract Law, also restricted the right to form economic contracts to registered enterprises, see Lichtenstein 1993 p. 26 and Potter 1994b p. 343.

259 The authorities considered disparate factors such as the character of the proposed company, the reputation of the organisers, the availability of raw materials, the demand for the products, and compliance with national planning policies.

260 See Lichtenstein 1994 p. 34. The EAO may have been inspired by the little used special provisions in the Ordinance on Economic Contracts (art. 42) that allow scientists, technicians, artists, private farmers and "owners of household businesses"
subject to re-interpretation towards a meaning more akin to market principles. There is a similarity here with those of the former socialist countries of Eastern and Central Europe that initially achieved access to enforceable contracts by broadening the scope of the provisions in the existing socialist legislation.\footnote{See Gray, C. W. 1993 p. 10.}

It is also notable that the rather arbitrary application of the Ordinance on Economic Contracts, for which the EAO was famous, was shifted into something resembling legalist orthodoxy. It seems that the EAO suddenly realised that an unequivocal and resolute policy was essential to convince potential litigants of its determination to wipe out the suspicion of its being corrupt or inclined to treat state enterprises with special favour. The role of the Ordinance was confined to that of an instrument for determining whether or not the formal requirements for the formulation of binding agreements had been met. When it was found that these had been complied with, and the wording was considered unambiguous, the obligations were held to be enforceable according to the letter, even if the parties insisted that they had originally intended something else. It was stressed that adjudicators should not look beyond the strict terms of the contract unless there was evidence of fraud, duress, etc., and that every available means, including fines and penal damages, should be used to secure compliance.\footnote{Gillespie (1994 pp. 365-366) mentions that Vietnamese lawmakers, reluctant to look beyond the four corners of a contract, spoke of an “ordinary market” of disembodied, abstract entities, and that this policy seemed to survive even if it transformed a contract into a one-sided privilege.}

In spite of these efforts, the Ordinance on Economic Contracts lagged hopelessly behind reality. It was increasingly difficult to distinguish between economic and non-economic pursuits. If a company bought a television set for the canteen, the activity could be considered either economic since it furthered the commercial to form such contracts with registered legal entities.

\footnote{See Gray, C. W. 1993 p. 10.}

\footnote{Gillespie (1994 pp. 365-366) mentions that Vietnamese lawmakers, reluctant to look beyond the four corners of a contract, spoke of an “ordinary market” of disembodied, abstract entities, and that this policy seemed to survive even if it transformed a contract into a one-sided privilege.}
interests of the company, or non-economic since it did not directly generate income. Another problem was that economic contracts were automatically rescinded when they exceeded the authorised objective spelled out in the business license. As business licences were not public documents, third parties who wanted to ensure that a transaction fell within the authorised objective had to insist on the voluntary presentation of a copy of the license before entering into every single contract. The remedies provided were also inadequate. Severe penalties for any breaches and the strong encouragement of specific performance had made sense in the centrally planned economy where no amount of money could make available scarce inputs for production, but were impractical in the new context of private ownership and decentralised decision making. The number of contracts between private entities that were concluded and implemented with reference to the Ordinance of Economic Contracts was consequently low.

A group of Vietnamese policy makers, inspired and supported by foreign donors and their consultants, were soon able to advance the position that the use of contracts could not wait for the promulgation of comprehensive laws. A hugely ambitious Civil Code was adopted in 1995 that provides i.a. for rules on legal capacity and various forms of “civil” contracts (“sale and purchase contracts”, “exchange contracts”, “donation contracts”, “loan contracts”, “leasing contracts” and “transportation contracts”). An equally ambitions Commercial Law comprising 264 articles presumed to govern all “commercial” contracts and trading relationships (purchase and sale of goods, provision of commercial services, trade promotion activities, etc.) was adopted in 1997 and

263 Ordinance of Economic Contracts 1989, art. 8.
264 Ibid. arts. 29–38.
265 Civil Code 1995, Part 3, Chapter II. A decision to draft a Civil Code had been taken already in the early eighties, but the work had low priority and proceeded very slowly. For an overview, see Dinh Van Thanh 1996.
identified by the Prime Minister as the flagship statute that would thrust Vietnam into the companionship of advanced market economies and support its application to enter the World Trade Organisation.\textsuperscript{266}

5.2.2 CONTRACTING IN REALITY

Inquiries into the conditions in the marketplace show that these laws have limited, but not insignificant, influence over the way business transactions are conducted.\textsuperscript{267}

According to the private sector survey, Vietnam is still a cash economy \textit{par excellence} where various non-legal approaches, \textit{e.g.} kinship ties, moral concepts and reputational mechanisms, remain the most frequently used means of safeguarding business arrangements. The number of businessmen who refer to laws and regulations when discussing agreements in the pursuit of business, or consider referring disputes to courts or tribunals over which the state exerts real or perceived influence, is still low.\textsuperscript{268}

However, characteristic features of the expanding Vietnamese marketplace such as weak physical infrastructure, poor means for market information and increasingly diverse moral and cultural notions under the impact of long-distance trade and intercourse, are rendering these means increasingly impotent. The interviewed businessmen underline the difficulties and hazards involved in transacting over long distances where information is difficult to obtain and community sanctions are difficult to enforce.\textsuperscript{269} 

\footnotesize{The Commercial Law also defines the legal status of traders and other actors in the marketplace, spells out the conditions and procedures for the registration of businesses and recognises the use of arbitration clauses and choice of law provisions.}

\footnotesize{The first series of interviews were conducted prior to the enactment in 1997 of the Commercial Law, but follow-ups indicate that it does not seem to have significantly changed the picture.}

\footnotesize{Hendley (1992) describes a similar situation in the Soviet Union, where the introduction of market-oriented legal mechanisms in the wake of \textit{perestroika} initially had very limited impact on the behaviour of business managers.}

\footnotesize{In the absence of formal intermediaries such as brokers, dealers, wholesalers, trade}
limit their risks, they often prefer to buy and sell in their locality and to pass over potentially gainful trades with unknown parties. At the same time, economically oriented surveys of Vietnam’s private sector show that those businesses that do manage to sell a bigger proportion of their products to distant customers have significantly better prospects for fast growth. Experiences from other developing and transition countries also show that a shortage of new business liaisons means a dearth of new ideas and inhibits the adoption and development of new technologies.

In response to such problems, business practices in Vietnam are developing towards greater formalisation. Written contracts are becoming common as a means of impressing on business partners the binding nature of the commitments, while preserving the ability to reach individual agreements and respond quickly to new market phenomena. The Civil Code and the Commercial Law, albeit often fragmented and inconsistent, help businessmen dare to take a greater commercial risks by spelling out implicit terms and providing models for the settlement of disputes. All the businessmen interviewed claimed that the contracts they formed were binding.

associations, etc., information about a potential trading partner’s capacity and trustworthiness must be provided essentially by the family or the kin, or in informal “gossip” meetings between businessmen within the same branch and area.

See Haggard, McMillan and Woodruff 1996 pp. 3, 10 and 32. However, Haggard, McMillan and Woodruff also boldly suggest that a poorly developed legal system and inadequate market information may sometimes offset each other in Vietnam: Poor market information and the subsequent difficulty in locating trading partners helps make self-enforcing contracts workable since firms that have nowhere else to go might refrain from breaking their agreements (ibid. pp. 3–4 and 8–12).


For a similar observation, see Haggard, McMillan and Woodruff 1996 p. 8.

A respondent typically explained that “the most important thing is credibility. Whether you are credible or not depends on how the contracts are implemented. If the contracts are not considered to be binding it is difficult to share duties, rights, and responsibilities. When the contracts are considered to be binding each side has to carry out its duties and help the other to successfully implement his duties.”
breaks the contract must pay for it" were common.\textsuperscript{274} In other ways too, the interviewed businessmen are fairly oriented concerning the legal effects of the contracts they form.\textsuperscript{275} The businessmen also have the idea that carefully formulated contracts serve the cause of clarity and reduce the risk of them facing protracted and costly disputes over interpretation, possibly with the arbitrary interference of various authorities.\textsuperscript{276} A representative for an import-export company told an illustrative, albeit not necessarily true, story about a business colleague who had agreed to supply Vietnamese fishermen to work on Taiwanese fishingboats, but had forgotten to stipulate in the contract what kind of fish they should catch. The fishermen ended up fishing for sharks, an activity that is believed to be very dangerous. The Vietnamese fishermen refused to do the job and the colleague was sued and eventually ordered to pay heavy damages.

The interviews further suggest that there are PR reasons behind the increasing use of contracts. Businessmen hold the view that written commitments express seriousness, which, in turn, attracts new customers. There is a strong notion among the respondents that they have invested prestige and goodwill in the loyal implementation of the provisions. Most of them also felt safe in the conviction that their counterparts felt the same way.

\textsuperscript{274} The rigid function of contracts in the centrally planned economy may be another factor causing the actors in the marketplace to appreciate so easily the significance of binding force, \textit{see} Section 2.3 and 5.1 \textit{supra}.

\textsuperscript{275} It should be noted that specific rules are difficult to discuss when confusion prevails even as to which law applies. Many new laws, among them the Civil Code and the Commercial Law, fail to specify whether older legislation within the same subject field has been repealed or not. Some respondents liked to discuss the cumbersome form requirements in the obsolete Ordinance on Economic Contracts as if the Civil Code and the Commercial Law had never been enacted. Notably, even the relationship between the Commercial Law and the Civil Code in regard to contracts formed in the pursuit of "business" and "commerce" is subject to great controversy, \textit{see} Burke 1998 pp. 3–4 and Dinh Van Thanh 1996 pp. 15–17.

\textsuperscript{276} Standardised contracts, however, are rarely used. Many respondents had never heard of the concept.
Thus it is change in the relative costs of formality and informality that drive the increasing formalisation of business arrangements in Vietnam. Those who operate without the support of contracts and other available legal instruments may save some of the costs the system imposes \textit{ex ante}, e.g. costs for drafting and registration, but they must bear higher costs and penalties \textit{ex post}, not least in the form of greater uncertainty about dispute resolution and enforcement. Notably, it was even suggested that detailed contracts could enhance the power of informal community sanctions by making it easier to substantiate facts and claims.

Further, the use of important trade instruments such as letters of credit and warrants often presupposes the existence of contracts that spell out the nature of the relationship. Lenders and other financiers may also be reluctant to deal with businesses that cannot or will not use the means the law provides because it is difficult to limit the scope of relationships to a sufficiently defined sphere.

A first step in assessing new or little known counterparts is often to collect as much information as possible about his or her reputation and business record from “friends” and other business acquaintances. It is also common for Vietnamese businessmen without previous experience of each other to “meet and speak” in order to form an opinion about their respective personal qualities and to build “trust” and “understanding”. Counterparts who are believed to be trustworthy and to have a strong incentive to honour their obligations may be trusted to transact essentially on

\begin{itemize}
  \item \textsuperscript{277} For a discussion regarding the effects on business behaviour of changes in the costs of formality and informality in general, see de Soto 1989 pp. 131–172 and North 1990 pp. 61–69.
  \item \textsuperscript{278} A paper manufacturer who lacked sufficient funds to incorporate his own firm had agreed to conclude a “secret” agreement to operate covertly under the name of another company and to pay an annual sum for this right. Although this contract could not be enforced by formal means, he felt quite confident about the safety of the arrangement and had invested considerable sums in plants and machinery. For similar observations, see Haggard, McMillan and Woodruff 1996 pp. 8.
\end{itemize}
the same terms as the "family" or kin, i.e. on the basis of an oral agreement and with the benefit of credit. Those who do not pass the litmus test must agree on the terms in writing or pay on delivery until they have proven their credibility, unless the sums involved are very small.

In large and complex transactions, such initial discussions may develop into the drafting of a generally held "principle contract" (similar to a letter of intent) spelling out the nature of the relationship, e.g. that the seller is willing to provide the furniture for a mini hotel that is under construction by the buyer, that the buyer intends to pay in ten monthly instalments in gold and cash and that the seller and buyer will meet on a later occasion to agree on the specific terms.

The next step may be the drafting of the actual contract, comprising all the normal terms of a transaction, e.g. technical specifications, prices, terms of delivery and remedies for breach. While it could be assumed that the drafting of the contract would be a brief process because of the extensive pre-contractual discussions, the interviewed businessmen explained that many provision are discussed in great detail and that preliminary agreements are often re-negotiated.

In spite of official encouragement, dispute resolution clauses are seldom included in the contracts. That only a few businessmen have experienced any "real" disputes over interpretation and implementation means that there is little perceived need for such clauses. Terms like "dispute" and "conflict" are also believed to create the wrong ambience in documents manifesting friendship and long-term commitment.

279 The extent to which credit is used in Vietnamese business life is disputed. Ronnås 1992 pp. 106-107 suggests that it is a very rare arrangement, while Haggard, McMillan and Woodruff (1996 pp. 17, 20-25) argue that is relatively common: 51 per cent of the customers of the firms interviewed in their survey receive credit and 64 per cent of the interviewed firms receive credit from their suppliers. Among the businessmen interviewed by the author, only one always refused credit.

280 Regarding construction contracts specifically, see Shadbolt 1995 p. 269.
The preceding account demonstrates that although family and kinship ties are still important, contracts are achieving increasing popularity as a means of fostering trust, reducing risk and facilitating advance planning. Written contracts also seem to enhance the power of informal community sanctions by making it easier to substantiate facts and claims. The function of contract law in this context is not so much that it provides a framework for enforcement, but rather that it suggests model solutions and spells out implicit terms.

5.2.3 Implementation

It has been stressed that contract law in Vietnam works less through judicially imposed sanctions than as a point of reference and a bargaining lever. The following discussion will show that the notion of being strictly bound by contract is also more a useful fiction than a matter of fact. The real world of implementation is characterised by considerable pragmatism and flexibility.

The businessmen interviewed expect negotiations when difficulties occur and are aware that the settlement may have a rather peripheral connection to the original contract.281 There is a notion that it would be stupid to insist on the letter of the contract when the other party is known or the reward is small, especially since such short-sighted behaviour would probably result in the termination of the relationship. A typical argument is that a good businessman should be flexible when someone experiences difficulties because such generosity creates trust and promotes greater business goals. Contracts may facilitate transactions with strangers, but whether the relationship will be profitable over time is believed to depend on the careful maintenance of the underpinning bedrock of social and cultural obligations.

281 Nordborg and Dahlberg (1997 p. 183) suggest that women and men in Vietnam differ from each other in their ideas about solutions to conflicts or abuse, i.e. Vietnamese men would be more inclined to invoke legal sanctions, while women would prefer reconciliation and community-oriented solutions.
A first step in devising a mutually acceptable solution may be informal discussions between the owners or managers of the companies concerned. It is common to discuss in terms of goodwill, friendship, etc., and sensitiveness to the situation of the other party is considered as crucial. Customs within the branch may be referred to as model solutions.\textsuperscript{282}

In the common event of default in payment, where the reason for not paying is most often lack of money, the usual response among the interviewed businessmen is simply to wait. Penalty interest is rarely asked for, but if the waiting becomes too prolonged, it may be suggested that compensation should be given in other ways, \textit{e.g.} that the defaulting party promises to compensate the seller in future deals.\textsuperscript{283}

In the event of an amicable settlement appearing beyond reach, the claimant may seek to formulate a strategy that allows him to “intensify” the discussion, \textit{i.e.} to increase the pressure without making the other party “lose face” or otherwise precluding a friendly settlement. It is often sufficient to mention discretely that the support of certain influential people has been ensured and to underline the damage to his reputation the other party risks sustaining. Preparations for an intensified discussion should be made without delay if there is a risk that the other party will seek to rely on the same means. However, there is a risk that too obvious or aggressive preparations will affect relationships with other trading partners.\textsuperscript{284} The interviewed businessmen therefore considered it important to combine such steps with declarations to

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\begin{itemize}
\item \textsuperscript{282} For example, it is common in the Vietnamese construction business that the divergence between the design and the finished construction is higher than the “acceptable error” stipulated in the contract. A builder may therefore underline to a dissatisfied customer that there is a practice in the business of accepting a higher error in return for a modest compensation.
\item \textsuperscript{283} Allegedly, a small sum of money under the table is often sufficient to convince the director or accountant of the defaulting company to pay your invoice before the others.
\item \textsuperscript{284} For a similar observation, \textit{see} Haggard, McMillan and Woodruff 1996 pp. 15–16.
\end{itemize}
\end{footnotesize}
others that the ambition is not to crush a counterpart who has encountered temporary problems, but merely to bring it home to the defaulting party that one is serious about getting paid.

In some rare circumstances, one may threaten to sue or to otherwise involve the authorities. However, the vast majority of the respondents hold the view that the body of applicable law is too vague and the administrative and judicial processes too cumbersome and unpredictable to make such threats credible. There is also the risk that they may backfire. It was argued that “you must really try to believe that the court is your friend before you ask it for help” and that “you have to be absolutely certain that you are right and certain to win before contacting the authorities”, etc. Corrupt officials are reported to lend their services to the party who pays best. “It [a court proceeding] would be the end of the company because if you ask the authorities to help you your company will be investigated and they [the agents of the state] might find many errors”.

Other avenues of forceful persuasion are therefore sought. It has been mentioned that various private intermediaries, often influential friends and relatives within the administration or the business community, are asked to help convince stubborn counterparts to comply. The interviewed businessmen argued that while it is usually sufficient for these people just to ask, they may also indicate, or on some rare occasions in fact create, “problems” with taxes, gas, electricity, etc. Another peculiar method is to ask the local police to “persuade” or “frighten” reluctant counterparts. The perceived problems with these kinds of arrangements are not so much that they may be illegal, rather that they are costly. The keeping of strategic networks requires frequent gifts at family and religious feasts, invitations to parties, recurrent favours, etc. The inclination among unrelated “influential people” to assist in these

matters is known to be higher, and the remuneration required lower, when there is something that reduces the risks they face, for example some kind of moral or political support for the claim.

The last available means is recourse to the law of the jungle, e.g. to “take” a house, a machine, jewels, etc., as compensation or collateral. It is well known that there are people who offer such services for remuneration, in want of a better word they are sometimes described as mafia, but they are not organised family constellations in the conventional Italian or American sense, rather small gang-like groups of criminal elements with a more senior and well-linked person as their patron. According to the businessmen interviewed, these people may threat on violence, but seldom dare to carry it out. It is also understood that relying on such people, or even maintaining contacts with them, is inherently dangerous and likely to cause problems in relationships with other businessmen and the authorities. There is also the risk of being blackmailed after having had recourse to illegal activities.

This account suggests that it is not a moral, religious or some other notion of ethics that determines whether businessmen use formal channels or not. In fact, none of the interviewed businessmen had a religious or culture-related motive for not using the services of the courts or other formal forums. Rather, the negative attitude stems from a perception that the courts and the administration are incompetent, unreliable and hostile. It is also notable that the vast majority of the businessmen interviewed claimed that they would not hesitate to refer disputes to formal forums with compulsory authority, e.g. courts, if they were sure that the matter would be handled fairly and expeditiously.

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286 This notion has some substance, as will be discussed in Chapter 6 infra.
5.3 Court Reform

5.3.1 CONVENTIONAL WISDOM

The problems with judicial unpredictability and of having contracts effectively enforced are not unique to Vietnam, albeit the combination of a "weak" state and centralist policies might have brought the dichotomy between law and its application to an extreme. A recent World Bank-commissioned survey comprising 69 countries and 3,600 entrepreneurs points out that a well-functioning judiciary seems to be the exception rather than the rule in developing countries. Over 70 per cent of the surveyed entrepreneurs said that they did not trust the judiciary to provide fair and efficient adjudication and enforcement. 287

Nor is it unique to Vietnam that increasing volumes of trade and greater complexity of the transactions are reflected in a greater perceived need among businessmen for conventional laws and courts. Rather, this seems to be a characteristic trait of the development of many Southeast Asian economies. Katharina Pistor and Philip Wellons' comparative study of the relationship between law and economic development in six Asian countries suggests that there is a relationship between economic growth and a higher rate of commercial and administrative litigation. 288 Edward Epstein also notes that greater economic freedom in

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287 See Brunetti, Kisunko and Weder 1997a p. 19 and THE STATE IN A CHANGING WORLD 1997 p. 36. Regarding the relationship between enforcement and economic development in general, see Clarke 1995 pp. 65–66; Gray, C. S. 1991 pp. 2–5 and 20–23; Gray, C. W. 1991 pp. 763–764; North 1990 pp. 54–60; and Waelde and Gunderson 1994 pp. 360–361. It is an oversimplification to say that insufficient means for enforcement is always bad. It can be the case that business transactions are made difficult by an obsolete or otherwise inappropriate substantive law, but that lax enforcement allows effective institutional substitutes to evolve that mitigate the costs that otherwise would have been imposed by the inefficient laws, see e.g. Stone, Levy and Paredes 1996.

China has made Chinese people more willing to view their world in terms of individual rights and to litigate to protect those rights. From 1982 to 1991, the initial phase of the Chinese economic reform effort, the number of civil cases taken to Chinese courts annually more than doubled and economic cases more than quadrupled.

Acting on this recognition, the Vietnamese leadership stresses that the efficiency of the implementing agencies must be enhanced if the new legislation is to be moved from theory to practice.

More progressive policy makers have also noted that a new important aspect of enforcement has surfaced in the context of transition from state ownership and central planning to diversified ownership and decentralised decision making. If state and private enterprises are to operate in a competitive environment, it must be ensured that they operate under the same set of constraints regardless of who the owners are, or the system risks reverting to the kind of specific directives and *ad hoc* bargaining, the inadequacies of which necessitated reform in the first place.

Only the courts of general jurisdiction, the People’s Courts, have the authority to issue binding orders cutting across bureaucratic and territorial boundaries. A judge sitting in Hue

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289 Epstein 1994 pp. 38-39. At the same time, the number of settlements successfully mediated by the Chinese courts fell from its usual high of about 90 per cent of cases to between 70 and 80 per cent. Throughout the eighties this was accompanied by a decrease in cases taken to the Chinese People’s Mediation Committees, that is, extrajudicial neighbourhood organisations with no legally compulsory powers.

290 Dinh Ngoc Vuong (1997 p. 22) argues that “[u]nder the current conditions of Vietnam where the economy has undergone a complete reform, shifting from a centrally-planned bureaucratic subsidy-based mechanism to the market mechanism with the State control along the socialist orientation, the reform and creation of economic jurisdictional bodies in charge of dispute settlement have become an objective necessity.”

291 For a general discussion, see Clarke 1995 p. 66. Regarding Vietnam specifically, see Nguyen Thanh Thuy 1996 p. 6 and Trung Duc 1994 p. 20. Previously, managers with grievances could often turn to senior administrative or Party officials and ask them to order the delivery of key inputs, etc.

292 The People’s Courts are organised in District People’s Courts, Provincial People’s
Ownership and Contracts 133

can, at least in theory, legitimately order a state-owned bicycle factory in Hanoi to pay a sum of money to a privately owned tire manufacturer in Ho Chi Minh City. It is thus not necessary to have recourse to the traditional practice of finding a common superior with administrative jurisdiction over both parties.

Another strong reason to emphasise the People’s Courts is that if the system works as it should, norms enforced by them are not as diluted as norms enforced by administrative agencies because of the lower number of layers between policy making and policy implementation. A court can resolve a dispute by making a direct reference to the original and most authoritative text, the law, issued by the relevant policy maker, the National Assembly. In a not too distant future, they may even find guidance in precedent cases rendered by a Supreme Court that actually carries out its function of “supervising and directing” the work of the lower courts.293

Furthermore it is clear that international trade, membership of ASEAN and the Pacific Economic Co-operation Council, possible integration with the WTO and an increasingly global environment in general, create external and internal expectations that the institutions for dispute resolution and enforcement should conform reasonably well to their equivalents in neighbouring countries.294 Developing agencies such as Swedish Sida and UNDP are simultaneously shifting the focus of their support from legislative assistance to the implementation and the administration

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293 Constitution 1992, art. 134.

of justice. Inevitably, however, the reforming and reinforcing of the judicial organisations is a much slower and more cumbersome undertaking than the drafting of new laws.

5.3.2 MEDIATION AND ARBITRATION

It may be argued that formalism and mechanical implementation, as associated with an "ideal" court system, could be a constraint on a business community that seeks to avoid open dispute and puts great value on flexibility. The "costs" associated with using the laws and services provided by the state, e.g. in the form of compliance with bureaucratic requirements and corruption, can also be a discouragement from using formal forums. It could further be argued that laymen have advantages over professionals in certain aspects of decision making, for example in the application of common sense oriented values such as reasonableness, fairness or good faith. Perhaps, therefore, mediation boards, arbitration schemes or some other quasi-judicial body, either organised under judicial or administrative structures such as the Ministry of Justice or the People's Committees, or existing without directly visible links to the state, would be more appropriate for Vietnam.

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295 Gillespie (1999 p. 128) refers to Vietnamese commentators who suggest that the primary reason for the limited success of the recently established Economic Courts in terms of the number of cases settled could be the change from state management (through the EAO) to adversarial contest. Gillespie (pp. 128 and 130) argues that this is one important factor calling into question "neo-liberal assumptions regarding the centrality of courts to market transactions." "[...] it is far from certain that that neo-liberal legal institutions are needed to resolve domestic commercial disputes. It is equally possible that informal and non-state institutions, more in tune with particularised trading networks will expand to perform this function."

296 In many advanced industrialised societies informal rules and mechanisms are gaining increased attention as their advantages over courts in terms of time, costs, and probity become obvious, see e.g. Deakin, Lane and Wilkinson 1994 and Stein 1984 pp. 15–16. Regarding developing and transition countries specifically, see Blair and Hansen 1994 p. 34 and Gray, C. S. 1991 pp. 21–22.
There is an official interest in such arrangements, stemming both from a belief that they would be able to begin unimpaired by past shortcomings, and from an idea that they would allow political and executive organs to retain a degree of influence over civil and economic decision making. Two state-sponsored bodies for out-of-court dispute resolution have been established so far, the Vietnam International Arbitration Center (VIAC) for disputes involving "foreign elements" and the Economic Arbitration (Centers) for disputes between domestic parties. The delineation between "foreign" and "domestic" arbitration is somewhat blurred, with resulting problems of jurisdiction. VIAC has been established within the formally non-governmental Vietnam Chamber of Commerce and Industry and staffed by lawyers and businesspeople who are expected to become specialists within their respective subject fields by sitting regularly in the tribunal. It relies on a legislation that, at least theoretically, allows coercive enforcement of some awards.

The Economic Arbitration Centers are "socio-professional.

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297 See e.g. Minister of Justice Nguyen Dinh Loc 1996 p. 20.
298 These bodies should not be confused with the "popular organisations at grass-roots level" for the resolution of "disputes among the people" provided for in the 1992 Constitution, art. 127. Usually these bodies consist of representatives for the People's Committee, the Fatherland Front, the Women's Union and the youth organisations.
299 See Decision No. 114-TTg on expanding the competence of Vietnam International Arbitration Center in settling disputes, February 16, 1996, and Dinh Ngoc Vuong 1997 p. 23.
300 VIAC was established pursuant to Decision No. 204-TTg on the Establishment of the Vietnam International Arbitration Center, April 28, 1993. The Vietnam Chamber of Commerce and Industry supports VIAC with equipment, technical staff, etc., and may amend the procedural rules. For a general description, see Ha Hung Cuong 1995 p. 39; and Nguyen Hoang Van 1997 pp. 23-24.
301 Vietnam has recently ratified the 1958 New York Convention on Recognition and Enforcement of International Arbitration Awards and enacted instruments for its implementation, i.e. the 1995 Ordinance on the Recognition and Enforcement of Foreign Arbitration Awards.
organisations”, formed by private initiative in cities and provinces with the consent of the Provincial People’s Committee and the Ministry of Justice. They have jurisdiction to settle disputes over commercial matters such as contracts, stocks, bonds, etc. between properly incorporated business entities. Each Center has its own charter, procedural rules and charges.

However, the legitimacy of quasi-judicial organisations in general appears to have been seriously damaged by the previous amalgamation of legal and socio-political functions in such organisations. In the eyes of the businessmen interviewed, these new forums are little different from discredited village authorities and community boards. That the arbitrators in the Economic Arbitration Centers are certified and supervised by the Ministry of Justice is not seen as a quality guarantee, but rather as a challenge to their independence.

Businessmen also find it strange and suspicious that to be enforceable, awards which cannot be implemented voluntarily should be tried all over again in the Economic Courts.

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303 Whether arbitration awards are final and enforceable or not is subject to controversy. According to Decree No. 116—CP on the organization and operation of the Economic Arbitration, art. 5, awards rendered by the Economic Arbitration Centers are binding and may not be appealed. At the same time, art. 31 provides that in cases where either party disagrees with the award, the other party is entitled to claim further settlement by a competent people’s court according to the procedures for settling economic cases. For an attempt at clarification, see Ha Hung Cuong 1996 pp. 13–14.
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of Justice Nguyen Dinh Loc's explanation for this procedural construction is worth noting: "Some people predicted that by this provision, Vietnam limits the usefulness of economic arbitration in Vietnam, since if awards made by these arbitration bodies are not enforced by the State, their attractiveness shall be considerably diminished. We are fully aware of this weakness. But this is only an experiment, and therefore, this provision will be positively corrected when conditions permit."\(^{304}\)

It should be mentioned that the Economic Arbitration Organisation (EAO), which was originally established to monitor the performance of registered economic contracts between state-owned enterprises, made a failed attempt to transform itself into a more conventional arbitration body after the launching of the new economic policy.\(^{305}\) People within the organisation understood that few businessmen would voluntarily use their services if it was rumoured that inexperienced and presumably partial adjudicators rewrote contracts according to their own notions of fairness and appropriateness.\(^{306}\) Thus, they formulated a policy of strictly adhering to the principle of sanctity of promise, of interpreting laws and contracts word for word and of not looking beyond the


\(^{305}\) The Economic Arbitration Organisation owed its existence to the fact that various state and collectively owned bodies needed an organisation with coercive authority to ensure that contracts formed for the implementation of the state plan were actually implemented. It was also charged with a number of administrative and regulatory functions making it resemble an administrative agency, as much as, if not more than, a judicial body. For example, it could \textit{ex officio} set the terms and conditions of a contract which the parties had to conclude, or take up questions touching on the proper operation of enterprises and suggest disciplinary sanctions if deficiencies were found. The EAO was represented on district, provincial and central level. Decisions awarded on district level could be appealed to the EAO on provincial level. The final body of appeal was the State Economic Arbitration. For a detailed discussion, see Gillespie 1991. Regarding its Soviet model organisation, the \textit{arbitrazh}, see Smith 1996 p. 40.

\(^{306}\) It was no secret that arbitrators were appointed on political merits and that a number of decorated soldiers and revolutionary heroes held high positions in the organisation.
strict terms of a contract unless there were indications of fraud, duress or illegality of purpose. All available means, including fines and penal damages, should be used to secure compliance.\footnote{307} This show of legalism was not sufficient, however. The popular perception remained that the EAO was an inefficient, secretive, corrupt and generally irrelevant remnant of state ownership and central planning.\footnote{308} A trial attempt to revive the organisation was made with the enactment of the 1990 Ordinance on Economic Arbitration and the introduction of a reformed framework of procedural rules for the resolution of commercial disputes, but the organisation was finally abolished in 1994.\footnote{309}

5.3.3 **REINFORCING THE PEOPLE’S COURTS**

Efforts to strengthen and promote the courts relative to other state institutions in the wake of \textit{doi moi} are determined by historical and political factors, as well as prevailing institutional practice.\footnote{310} As has been already discussed in Section 2.1 \textit{supra}, pre-colonial Vietnam had a rather elaborate administrative and judicial system for matters such as defence, taxation, irrigation, criminal law, etc., but the law was almost silent on commercial dispute resolution and enforcement. Village elders and other trusted middlemen could sometimes help disputing businessmen to reach an amicable


\footnote{308} Especially the available means to ensure enforcement, essentially comprising seizure of assets, freezing of bank accounts, and transferring of funds from the losing party to the winning party, were considered impractical in a market context. In discussions in 1993 representatives of the Ministry of Justice and the EAO admitted that less than 50 per cent of the total number of decisions could be implemented. For a general discussion, see also Dinh Ngoc Vuong 1997 p. 22.

\footnote{309} Paradoxically, at almost the same time as the EAO was abolished, Vietnam’s “little brother” Laos took the first steps towards introducing a similar organisation, see Radetzki 1994 p. 804.

\footnote{310} For an historical overview of the development of the People’s Courts, see Nicholson 1999 and Pham Hung 1995.
settlement. The French colonial authorities established administrative and judicial systems that catered to the expatriates and a handful of indigenous traders involved in business with continental merchants, but the vast majority of domestic tradesmen preferred other avenues. Penelope Nicholson holds that "[t]here is little doubt that French courts were seen by the Vietnamese as arbitrary and violent."  

The struggle for independence and the introduction of Marxist-Leninism as the official ideology brought about a radical reorientation of the administrative and judicial systems, first following Chinese and later Soviet models, although always with distinctively Vietnamese features. The limited space for private economic activity within the framework of the centrally planned economy gave the state little reason to expend efforts on adjudicating commercial disputes and other functions underpinning market transactions. For the limited number of small-scale manufacturers and traders that remained, third-party dispute resolution could sometimes be provided by community boards, Party members or other authorities, but social pressure was often exerted to make the parties give up lawful rights for other goals such as "solidarity" and "fairness." The skills and resources needed to adjudicate complex matters were generally missing. In fact, the entire legal system, with the notable exception of criminal law, was relegated to a minor and underfunded appendage to the executive branch of the state. Its credibility was also seriously damaged by patronage in judicial appointments and outside interference in the proceedings, as will be discussed in Chapter 6.

The new court organisation outlined in the 1992 Constitution

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311 Local folklore stresses the significance of notions of "harmony" and "peace" in these processes, but the relative power and wealth of the parties were probably at least as decisive.


313 For an overview, see Phung Van Tuu 1996 pp. 3-4.
diverges little from its predecessor in the orthodox 1980 Constitution.\textsuperscript{314} Judges are to be appointed instead of elected, but the term is still five years and the requirements remain to protect “socialist legality” and “the socialist regime” (by nodding in the direction of prevailing Party policies) and to answer to political bodies.\textsuperscript{315} The President of the Vietnam Lawyers’ Association and Vice-Chairman of the National Assembly, Phung Van Tuu, typically argues that “[i]n order to ensure an efficient reform of the judicial agencies, the pivotal thing is to further enhance the Party’s leadership over the judicial agencies in all domains: policy making, trial, the assignment of cadres. Though with the leadership of the Party, the judicial agencies’ independence in trial shall not be lost. To this end, the judicial cadres must have a high sense of responsibility for their assigned tasks in accordance with provisions in the law. The ‘independence’ here does not mean the separation from the Party’s leadership. The independence in trial requires that the judges, more than anyone else, must, with their own wisdom, conscience and responsibility, consider cases carefully so as to

\textsuperscript{314} Nicholson (1999 p. 317) makes the interpretation that the government has actually responded to some of the criticism of the courts: when they are particularly destructive \textit{vis-à-vis} the government’s relationship with its revolutionary supporters, they are shaken up or reformed.

\textsuperscript{315} Constitution 1992, arts. 126 and 135. Politically appointed lay judges are still represented at all levels of the court system. Notably, representatives of the Supreme Court, a number of liberal legal scholars and some constitutional drafters in the Law Commission of the National Assembly joined forces in 1992 to increase the independence of the courts, primarily by re-asserting the Supreme Court as the primary institution in control of the lower courts and by moving the administrative control over the court system away from the Party and the executive organs of the government, including the Ministry of Justice, see Sidel 1994 pp. 170-171. The Ministry of Justice and a number of more conservative officials joined forces to oppose this proposal and argued that the Supreme Court’s control would in fact offer less independence to the lower courts which would be forced to obey the Supreme Court’s directives and guidelines. The Ministry argued that maintained ministerial influence would better protect them from undue interference from above. The dispute appears to be at least temporarily settled with a compromise. The district and provincial courts remain under ministerial control, while the Supreme Court is responsible to the National Assembly.
make correct decisions.”

Not until 1994 was a comprehensive system of Economic Courts established within the system of general People’s Courts for handling disputes relating to contracts, intellectual property, securities, unfair competition, bankruptcies and other business-related matters. The District People’s Courts have special judges trained in commercial matters. Their judgements may be appealed to the Economic Courts (chambers) of the Provincial People’s Courts, whose decisions, in turn, can be appealed to the Economic Department of the Supreme Court. Procedural rules for the Economic Courts are provided in the 1994 Ordinance on Procedures for the Resolution of Economic Cases.

For the Economic Court judges, many of whom are accustomed to act within an extremely ideological environment, the new role as adjudicators of complex commercial matters in a market economy poses a formidable technical and ideological challenge. Judges with little or no experience of commercial matters naturally find it difficult to comprehend the subtle legal implications of seemingly straightforward and uncomplicated concepts like to “own” something or “be indebted.” They must also suddenly disregard the social status and revolutionary merits

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317 For a detailed description of the organisation of the Economic Courts, see Ha Hung Cuong 1996 pp. 6–10.
318 Pham Hung, the President of the Supreme People’s Court, explains (1995 p. 20): “[T]he People’s Courts have always based themselves on the political tasks, and closely collaborated with the law enforcement agencies, under the leadership of the Party and through their original court sittings, have made a major contribution to the timely and effective repression of the counter-revolutionaries, spies, commandoes and reactionaries of all colors engaged in sabotaging the revolution”.
319 Judges are now required to have “knowledge of law” equivalent to an LL.B. degree, but the scarcity of legal professionals makes it difficult to meet this requirement. Pham Hung (1995 p. 21) refers to official figures stating that in 1995, 82 per cent of the judges in the Supreme People’s Court had a university degree, 71 per cent of judges in the Provincial People’s Courts and 35 per cent in the District People’s Courts.
of the parties and define the issue between them more narrowly in general.\footnote{Gillespie (1999 p. 129) has observed that trial judges in provincial courts pointedly extol the war record, Party and community contributions of certain litigants, thus implying that the other party should settle.} The balancing of the legal merits of the claims further means that the resulting decisions must often take the form of an uncomfortable either/or affair. Understandably, many businessmen hesitate to refer their grievances to the courts as long as they are not certain that the judges can fairly and accurately comprehend and adjudicate the matter.\footnote{For a similar observation, see Phung Van Tuu 1996 p. 5.}

Another factor which makes the work of the Economic Courts difficult is the inconsistency and fragmentation of the substantive laws, which, in turn, often stem from conflicts and lack of communication between the various parts of the legal and administrative machinery in which lawmaking and lawfinding authority are vested (see Section 4.3\textit{ supra}). The problem is not unique to the Economic Courts, all Vietnamese courts and agencies face great difficulty in finding out what is valid law in a specific matter. At the end of the day, detailed secondary legislation such as instructions and guidelines, in some cases even mere political statements, may often prevail over actual laws.

The confusion is not reduced by the circumstance that not even the Supreme Court is recognised as an interpreter of laws and cases, a position that may be ascribed largely to the rejection of the theory of constitutional separation of powers by Marxist-Leninist legal theorists, who instead insist that the power to supervise and "explain" the application of the law should be vested in the legislature as the supreme legal expression of the will of the ruling class.\footnote{For a general discussion, see David and Brierley 1985 pp. 237-239 and Dicks 1995 p. 86.} Another factor may be the influence of traditional Chinese legal culture to which any theory of separation of powers is unknown. The Standing Committee of the National Assembly,
the organ designated to provide such explanations, seems to perform this function with great restraint, if at all.323

Some guidance concerning the correct application of “unclear” laws and cases can be found in the “guidelines” issued annually and monthly by the Supreme Court and the Supreme Procuracy to lower courts and agencies. Obviously, these cannot be issued for all matters that come under the jurisdiction of the general courts. Although the practices of looking to the “purpose of the law” and applying law by analogy have been abandoned in theory,324 it seems that courts that cannot find sufficiently detailed rules to rely on often have recourse to analogies. In some cases, they may also present a constructed procedural hindrance.

The administrative integration of the Economic Courts into the general People’s Courts means that the Economic Courts suffer from the same lack of fundamental support functions to attain a sufficient standard of decision making as the People’s Courts. The problem is compounded by the circumstance that some judges and senior administrators have little power, or even interest in, enforcing discipline and probity among their staff. There are reports of tacit, unholy alliances among judges and staff that allow the soliciting of bribes from lawyers, plaintiffs and defendants to misplace files, slow down investigations and otherwise affect or obstruct the procedures. What seems like a perverse management system from the outside can be a very productive one for those who work within it.325

323 The 1992 Constitution, art. 91, stipulates that the Standing Committee has a duty to “interpret the Constitution, the law, and decree-laws [...]”. These interpretations are not supposed to be aimed at specific cases, but rather to provide guidance for the implementation of new legislation.

324 Regarding the use of analogies in Vietnam generally, see Quigley 1988 p. 354.

325 For similar observations from other developing and transition societies, see Blair and Hansen 1994 p. 48 and Gray, C. S. 1991 p. 21. Policy makers within the Ministry of Justice initially greeted Sida initiatives to support efforts to improve the structures for judicial administration, e.g. budgetary and personnel and record-keeping systems, with little enthusiasm, seemingly because such matters were not
The most serious difficulty facing the Economic Courts is the very low enforcement rate and the resulting popular notion that they are impotent.\footnote{See Section 6.1 infra.} According to the 1994 Ordinance on Procedures for the Resolution of Economic Cases, judgements and decisions in economic matters shall be enforced in accordance with the not yet fully operational 1993 Ordinance on the Enforcement of Civil Judgements.\footnote{Ordinance on Procedures for the Resolution of Economic Cases, art. 88. For a discussion of the principles for enforcement generally, see Nguyen Thanh Thuy 1996 pp. 13–30.} This Ordinance stipulates that the person or organisation in favour of whom the judgement is enforced may petition the (Civil) Judgement Enforcement Agency, an administrative organ under the People's Committee, to have the judgement enforced.\footnote{Ordinance on the Enforcement of Civil Judgements, arts. 19 and 20. The system of Civil Judgement Enforcement Agencies consists of the Department of Management of Civil Judgement Enforcement under the Ministry of Justice at the central level; the Judgement Enforcement Office under the Department of Justice at provincial level; and the Civil Enforcement Group under the Office of Justice at the district level.} The Judgement Enforcement Agency shall then issue a decision on enforcement within ten days.

Upon receiving this decision, the responsible Enforcement Officer shall fix a time limit of no more than 30 days for the voluntary implementation of the judgement. During this time, the Enforcement Officer, with the assistance of mass organisations such as the Fatherland Front and the Women's' Union, is to actively encourage voluntary implementation. If this fails, the Enforcement Officer can choose from a range of forcible measures depending on "the content and importance of the case". These include \textit{i.a.} seizure of bank assets and movables held by the judgement debtor or other people and forced surrender of
houses. Most common in respect to the enforcement of economic judgements are deduction from bank assets and seizure of movables. Seized assets are to be auctioned, but where an object cannot be sold, the judgement creditor must accept the object as compensation.

The problems involved in finding and seizing property, especially bank deposits, are considerable. There are no reliable records of who owns what. The records of the Notary Public, the organ principally responsible for registering use-rights and leases of real property, are known to be notoriously unreliable. Parties who anticipate litigation take precautions such as hiding their assets if they believe there is a real risk of losing them. The banks operate under a more competitive regime and are anxious to show that their loyalty rests primarily with the customers, which makes them reluctant to co-operate with the authorities. Some financial institutions may see the courts as just another bureaucracy with no more authority than e.g. the Telecommunications Administration or the Post Office. It may also be the case that banks with outstanding loans to the debtor seek to ensure repayment of their own loans before they freeze funds in favour of others.

The possibility of enforcement is also affected by various case-specific factors, e.g. that the courts are implicitly expected to be particularly solicitous towards state-owned enterprises. It is further understood that enforcement alone should not be stressed to the neglect of other factors. The Minister of Justice Nguyen Dinh Loc argues that enforcement measures are to be undertaken "[...] with the care and direction of the local Party Committees and administration, and with the support of the Vietnam Fatherland

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329 The available measures of force are spelled out in Chapter IV of the Ordinance on the Enforcement of Civil Judgements.

330 See Nguyen Thanh Thuy 1996 p. 28.

331 For a similar observation regarding China, see Clarke 1995 p. 79.
Front and its member organizations”. This can mean refraining from enforcement when it means closing down the defendant enterprise and throwing the workers out on to the street, etc.

A form of local protectionism further prevents effective enforcement. An official or agency in one district may not help to enforce a judgement in favour of a plaintiff in another district, especially if a court outside the first district has delivered the judgement. The problem is less pronounced with provincial court judgements where the connection with local politics and finance is less intimate. It may also happen that a district court reaches a judgement and finds that it is not supported by other local organs and therefore subtly indicates that little effort should be spent on having it enforced. A Judgement Enforcement Agency that is neither hostile nor afraid of the local government may simply deem it too much trouble to spend resources on enforcing the judgements of other courts when it finds it difficult to enforce those from its “own” court.

Both a notion of respect and sheer self-interest help to explain why courts and enforcement agencies are reluctant to confront other authorities and leaders. Local Party or government organs control almost all aspects of their operations, from budget matters to staff housing. There are lawyers and officials who realise that radical measures are needed to address the prevailing conditions of weakness, incompetence and maladministration, but they seem to be resigned to the overwhelming difficulties of penetrating a rooted and protected culture of perverse incentives, local protectionism, and corruption, as will be discussed in the following chapter.

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Chapter 6
TRUST AND RULE OF LAW

This chapter discusses the subjectively perceived presence of distrust and discrimination at the state-business interface and how this affects business practices. It also analyses the sensitive rules vs. discretion contest, in which rule of law concepts interact or collide with a rooted administrative culture of arbitrariness and whim.

6.1 Distrust and Discrimination

While recent nationwide research suggests that the presence of “trust” at the state-business interface is a most important factor for positive social and economic development, such trust is often lacking in Vietnam. The legacy of mismanagement and discrimination regarding the private sector has stamped the popular concept of the legal and administrative systems, often to the extent that they are judged outright antagonistic. Businessmen may consider the new codifications concerning property, companies and contracts as basically good, and at the same time describe the administration of the laws as “unattractive” or “hostile”. When they say “there is no law,” which they often do, they mean that the judicial and administrative bureaucracies are not restrained by their own rules, but that they should better be.

333 See i.e. de Soto 1989; Fogelklou 1992; Fukuyama 1996; and Potter 1994b.
There is also a feeling that contacts with agents of the state should be avoided. None of the businessmen interviewed had appeared before a court. Only a few knew anyone who had. Very few thought they could gain anything from administrative appeal and litigation. Businessmen may even feel compelled to undertake costly preventive measures to stay clear of official involvement and to ensure “friendship” with the police, the People’s Committees and other potential adversaries. Other commentators, both foreign and Vietnamese, have also noted the cynicism about the ability of courts and administrative agencies to perform their functions adequately and the tendency among businesspeople to focus on the inclination of the state agencies to disrupt business operations.  

There is further an idea that state enterprises are favoured at the expense of private businesses. A frequently used metaphor is that state enterprises are treated as biological children, while private companies are treated as adopted children. A transport agent explained: “Legally, all sectors are equal, but in practice the private sector is badly protected. If we buy a car, we have to use white license plates, but the state uses green or red plates. The police know this, and the drivers of cars with white plates will be stopped and asked for money.” Some respondents worried over the recent establishment of large so-called General Corporations (GC) comprising state enterprises in key trade and production sectors. The GCs allegedly engage in a wide range of anticompetitive practices, including market rigging, price fixing and discriminatory pricing, and it is claimed they benefit from favourable regulatory treatment and preferential access to state credit. Other

335 Fforde and de Vylder (1996 pp. 68-69) have also noted a remaining hostility towards the private sector.
336 The creation of the GCs marks the third phase of state enterprise reform in Vietnam. In the first phase (1991-1994), more than 12 000 SOEs were reorganised into 6 200 companies, of which two thirds operated at the provincial level and one
businessmen have noted the favourable terms enjoyed by enterprises with foreign capital under the Law on Foreign Investment and suspect a lingering predisposition towards foreign investors.  

There is a view among the businessmen interviewed that much of the discrimination and harassment can be traced back to the notion among officials that private business is politically suspect. That successful businesses are especially exposed provides some support for this view. It was explained that advertising, expanding, or otherwise revealing that the business is prospering are likely to result in overzealous tax and safety inspections. A paper manufacturer explained that during such inspections "[...] officials abuse that you can never comply with all regulations" and "[...] ask for fines because the company has infringed a minor rule or overlooked some procedure."  

"Secret" campaigns by the People's Committees and the police often focus on businesses that typically lack links to the political leadership and strong "moral" justification for their existence, e.g. mini hotels, restaurants and karaoke bars. Party organisations, third was managed by the central government. In the second phase (1994-1995), further restructuring pushed ahead and the first GCs were established to create state-owned industrial units that could compete in the market economy. For a general discussion, see Jerneck 1995.

337 The 1995 Law on Promotion of Domestic Investment was drafted in response to such complaints. It extends to Vietnamese citizens, overseas Vietnamese, long-term foreign residents and Vietnamese organisations, including private companies, the provisions in the 1992 Constitution that investments and profits are protected and guaranteed by the state and that there can be no compulsory acquisition without compensation. Foreign investors are still eligible for a lower profit tax, but must pay much higher utility charges for land rent, electricity, telephone, etc. In reality domestic investors only rarely pay the full rate of taxation.

338 Levine (1998 p. 26) refers to Vietnamese businessmen stating that they believe these problems increase exponentially when businesses reveal growth in production or increases in declared income.

339 A proprietor of a karaoke bar explained that the presence of prostitutes in some other bars is used as a pretext for exaggeratedly frequent inspections of his premises during which all documents are checked, the staff is questioned and the business
the police, judicial institutions, and even defence counsels, are explicitly and implicitly expected to contribute to their successful implementation by revealing and punishing a reasonable number of “violations”.

Some businessmen seek to demonstrate their loyalty to the currently favoured policies so as to be able to hide behind the resulting shield of goodwill, but the most common response it to limit expansion to remain below the limit where the attention of the authorities is attracted. The use of multiple business cards is widespread, rather than growing big businessmen expand into multiple small businesses and fish through their pockets to produce the correct card for the business being discussed.

Vietnamese commentators have also begun to describe the lack of judicial and administrative accountability as a problem. Professor Nguyen Nien argues: “Many State employees remain stuck to the old State mechanisms, know little about the law and are often unqualified for administrative work. Besides they do not have much sense of responsibility, of impartiality or of discipline. [...] Corruption and bribery are common at all levels, and undermine citizens’ trust and confidence in the government.”

Even the judiciary itself admits that there are problems. The President of the Supreme People’s Court, Pham Hung, explains that “[a]s things stand now, the contingent of Court officials remain both deficient and weak, and cannot meet the requirements of the renewal. Some of them have committed corruption, a number have been brought to trial. They are, as a saying goes, ‘worms that spoil a pot of porridge’ [...]”.

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340 A hotel developer who caught an impostor specialising in overseas tourists claimed to have stayed clear of involvement with the police and other authorities ever since the incident.


342 Pham Hung 1995 p. 20.
6.2 Rules vs. Discretion

Legal and administrative reform cannot be reduced to a rules vs. discretion contest. John Gillespie accurately points out that in some circumstances, discretionary regulation can allow “subtle combinations of formality and informality, avoiding the all or nothing absolutism of positive law and in the process it [discretionary regulation] allows the legal boundaries of state authority to become more porous and perhaps more accommodating to existing business patterns.”\(^\text{343}\) It should also be remembered that the inflow of foreign investment and the growth of the national economy have been substantial in Vietnam in spite of the remnants of a high degree of administrative discretion, and that other successful Asian economies, *e.g.* Korea and Japan, are characterised by a high degree of administrative regulation.\(^\text{344}\)

However, while in many other systems, the influence of preferences, attitudes and personal gain over decision making is limited by a framework of prescriptive rules and implicit obligations to act loyally to certain fundamental principles, this is seldom the case in Vietnam. Officials have ample room to exercise discretion according to their own notions of fairness and appropriateness and only limited means are available to hold them accountable for their decisions and actions.\(^\text{345}\)

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\(^\text{343}\) Gillespie 1996a pp. 399-401. Gillespie also suggests that bureaucrats who are required to publish guidelines which identify the criteria in these functions will contribute to creating a body of codified commercial standards which transforms observed commercial practice into knowable legal norms. Lawmakers could then, according to Gillespie, draft legislation informed by the repetitive patterns of behaviour that shape commercial transactions (*ibid*).

\(^\text{344}\) The implicit argument is that East Asian businessmen tolerate a high degree of intervention in their operations and are able to prosper even when legal transparency is minimal, *see e.g.* *The East Asian Miracle* 1993.

\(^\text{345}\) Nguyen Nien (1995 p. 14) argues that “[f]or years, administrative procedures at all levels of the government have been multiplying so quickly that the entire system has become burdensome and at times quite arbitrary. Administrative procedures often involve at least 12 different kinds of fees and negotiations with State
registration and licensing, although constantly under reform towards what is supposed to be greater simplicity, elucidate how the virtually unfettered discretion allows officials to police entry on ideological and commercial grounds and to favour certain people and disadvantage others on grounds of kinship or self-interest.  

At the moment, an application for a business license must first be lodged with the Planning and Investment Service on the provincial level. The application will then be submitted to the chairman of the People's Committee for consideration. It should be accompanied by a curriculum vitae certified by the police verifying that the applicant is entitled to reside in that locality and is not subject to current criminal charges or an undischarged sentence. The application together with supporting documentation must then be forwarded to the Assessment Department of the district or provincial-level People's Committee. The information required includes typical data such as names, ages and permanent addresses of the founding members, address of the proposed head office, business objective and chartered capital, but also peculiarities such as a feasibility plan, an environmental employees who may abuse their power, behave in an authoritarian manner, and even request bribes. Many of these procedures are established and applied informally and are hidden from public scrutiny.

The procedure of licensing and registration is outlined in the Law on Companies, arts. 14–21, and the Law on Private Enterprises, arts. 8–15. The following account is based on Dang Duc Dam 1996 pp. 13–14; Gillespie 1995a pp. 99–109; Nguyen Nhu Phat 1996 pp. 16–18; and Nguyen Nien 1995 p. 15. Gillespie (1995a pp. 99) mentions that the formation and incorporation of Song Thu Ltd., a company established in Ho Chi Minh City to operate a mini hotel, took eight months and required the promoters to submit 40 documents with 83 official seals and 107 signatures to 26 different official bodies. The Ministry of Planning and Investment has been instructed to draft rules for a “one-door” registration process in which enterprises will no longer need to be licensed, see Instruction 16-1998/CT-TTg of the Prime Minister, commented on in Vietnam News, Friday, April 3, 1998 and in Vietnam Law and Legal Forum Vol. 4, No. 47, 1998 p. 15. Very small traders are already exempted from the requirement to apply for business licences, but are expected to seek “approval” from the head of district and commune level People's Committees.
impact statement, and medical certificates and statements of educational qualifications for each applicant. Many of the required documents need to be certified, a service that can be both costly and time-consuming.

Although there are some prescriptive administrative regulations to guide the work of the Assessment Departments, they have a variety of subtle means available for discouraging investment in activities that fall outside the broad policy directives issued by the Party and the government. John Gillespie notes that the preferred *modus operandi* is not to reject applications, but rather to apply indirect pressure to modify or withdraw proposals that are not favoured. For example, if an applicant is unresponsive, the responsible People’s Committee may delay the application, charge excessively for infrastructure improvement or impose restrictive environmental controls.347

When a business licence has been acquired, registration with the Planning Department must follow. This re-examination focuses not only on certified documentation, but also on the merits of the application. Although a business that is registered in one province may trade in every province, a new registration application, including a certified copy of the company registration, documents that prove leasehold of land and details of the proposed business such as raw material, labour, etc., must be lodged every time it wishes to open a branch or representative office in another province. Consequently it is possible for provincial authorities to pursue different strategies and to reach different decisions regarding the same business. There is also a requirement, although perhaps obsolete, that a business that attempts to manufacture something must register all products with the General Department of Standards, Weights, Measurement and Quality before the products may be distributed and sold.348


348 The Science, Technology and Environment Departments attached to the Provincial People’s Committees are supposed to supervise compliance with national standards.
completed these steps does not mean that it can export its production. The granting of an export license to a private business requires approval by the Prime Minister.\footnote{Instruction 16-1998/CT-TTg of the Prime Minister, referred to in Vietnam News, April 3, 1998, contains provisions aimed at abolishing export licensing except for items that need to be under government control.}

Notably, the influential People’s Committees are themselves major actors in the marketplace, both as owners of trade and production companies and as owners and operators of “service bureaus” and similar bodies that undertake to process applications for permits and licenses.\footnote{Instruction 16-1998/CT-TTg of the Prime Minister also forbids Government agencies to establish new service bureaus in fields such as land, construction and investment.} It is also commonly known that Vietnamese officials are often engaged in such businesses on their own account.

Administrative discretion does not cease to be a problem once a business is properly incorporated. Often the problems become worse. While it is at least theoretically possible to identify and address the rules and agencies invoked in the process of registration and licensing, the actual operation of a business involves contacts with a much larger part of the administrative universe, from customs regulations to refuse collection. John Gillespie refers to a survey conducted by the central Economic Management Research Institute in which sixty percent of the private businesses surveyed in Ho Chi Minh City said they had received “close management” by state agencies.\footnote{See Gillespie 1994 p. 356.} The policy makers may not always see, or have not yet had time to assess, how this plethora of means and actors affects business operations.\footnote{Kim Chi (1998 pp. 18–19) and Nguyen Quy Binh (1996 pp. 20–21) describe administrative procedures that make it virtually impossible for private business to mortgage land as collateral for loans, for example.}

As few national standards have been promulgated, applicants can be required to submit their own.
Land administration is a case in point. There is a body of new legislation governing land use in the 1992 Constitution, in the 1993 Land Law and in a number of secondary instruments, but little has been done in real terms to address the entrenched socialist principles according to which the land administration operates. The Land Management Departments under the People's Committees continue to legislate, administrate and adjudicate land use according to ingrained principles and resist central initiatives towards reform. Businessmen are aware that the Departments serve the incompatible duties of balancing competitive private interests and the inculcation of state planning policies and consequently see little point in applying for leases or seeking assistance when problems arise.

The countermeasures to overcome or circumvent the obstacles that administrative discretion sets up are often of a such nature that they themselves enhance the uncertainty. The significance of political, sentimental and moral arguments in conflicts with the authorities has already been mentioned. It has also been stressed that as a relation-driven society, strategically placed friends and relatives are important to safeguard against problems, and that essentially for this reason, the traditional business family is transforming into a more open grouping that includes influential people without common lineage. The interests of this family are

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353 For a description of the attempts to simplify the procedures for allocation of land, see Nguyen Nien 1996 pp. 14–16.

354 The 1993 Land Law, art. 38, allows adjudication in court for disputes over land, but reserves this right for disputes between citizens with documentation proving their relationship to the land, i.e. land use certificates. Disputes over land where none or only one of the parties have a certificate, or between individuals and organisations (including companies), or between organisations, remain to be resolved administratively. The increase in the value of the land in the wake of the economic reform policy has given rise to a number of disputes over land, both vertically between land users and the state and horizontally between land users. In 1993, there were already over 200 000 disputes over boundaries, intrusions, nationalisation, etc. that had been adjudicated, see Viet Nam - Transition to the Market 1993 p. 30.
 accorded preference over other values when there is a clash, which reduces the already weak sense of civic duty. The situation is further aggravated by the widespread corruption that reduces the fragile justice the system can deliver to a purchasable commodity and forces businessmen to expend much effort on influencing and manipulating officials (see Section 6.5 infra). Allowing officials to continue to supervise and interfere in business operations would mean surrendering to localism, favouritism, corruption and other phenomena that represent the very antithesis of a stable and favourable policy environment. It would also mean accepting a very unequal relationship between rulers and subjects and that people would have to be afraid and suspicious before the authorities.

### 6.3 Rule of Law: Incentives and Constraints

The preceding account has emphasised that the process of *doi moi* is impeded not so much by inappropriate laws and policies as by the manner in which those policies are implemented. The government’s own inquiries identify a wide range of problems, *i.e.* inflexible and authoritarian attitudes, selective application and enforcement, non-transparent decision making, poor differentiation and co-ordination between powers at the central and local levels, inefficient office procedures and corruption. Vietnamese scholars add “old viewpoints”, “backward ways and habits” and “people who do not wish to see things renovated”.

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355 Corne (1997 pp. 35-38) has noted a similar development in China, where family-based “clientist” structures have regrouped and taken on a greater role in recent years.


357 See *e.g.* Doan Trong Truyen 1994 pp. 30–31 and 1996 p. 3; Nguyen Duy Gia 1997 pp. 18-19; and Nguyen Duy Quy 1994 pp. 32–33.
The leadership is also aware that there is an important relationship between the degree of popular confidence vested in it and its ability to implement its own policies.\textsuperscript{358}

Societies worldwide have devised an array of formal and informal mechanisms to curtail discretion and ensure uniform implementation, but most successful attempts, at least in modern times, have included some form of authoritatively defined and balanced division of power between the legislative, executive, and judicial branches, including giving the courts the formal authority to hold the executive branch effectively accountable for its decisions.

It is also notable that most of the new constitutions in the former socialist republics of Central and East Europe prescribe that the state should be “law-governed,” “law-based,” “legal” or “constitutional,” reflecting attempts to translate the rule of law concept or \textit{Rechtsstaat} into the indigenous language and legal culture.\textsuperscript{359} The actual transformations towards rule of law regimes in these countries have typically included (i) the abolition of the most repressive forms of legal rules (\textit{e.g.} in criminal law and constitutional law) and removal of the monopoly of the Party in political life, (ii) the adoption of new normative instruments to promote the market, \textit{e.g.} commercial law, and (iii) the restructuring and reinforcement of the judicial system.\textsuperscript{360}

\textsuperscript{358} Doan Trong Tryen (1996 p. 3) argues “The Vietnamese people support and have great confidence in the Communist Party, the State and the Government of Vietnam. Therefore, it is the wish of the people that there should be a State power implementing machinery that is honest, strong, stable, truly competent and qualified, and capable to govern effectively and efficiently.”

\textsuperscript{359} The meaning of the concept of rule of law varies. For example, while the continental \textit{Rechtsstaat} emphasises legalism and public administration and presupposes a state, the Anglo-American concept of rule of law is more concerned with the content of the rules and does not refer to the existence of the state. Although these concepts have different historical and philosophical underpinnings, they belong to the same group of ideas of law and state which stress that the exercise of state power must be regulated by law, \textit{see} Fogelklou 1997(b) pp. 35-36.

\textsuperscript{360} Fogelklou 1997(b) pp. 53-54 and Zila 1997 pp. 59-60. While the legislation
That an approach to rule of law seems to presuppose changes in the political sphere towards conventional liberal democracy is a very sensitive issue in Vietnam. Principles such as separation of powers and political rights challenge the CPV’s self-assumed constitutional role as the “force leading the State and society” and the “vanguard of the Vietnamese working class”.\textsuperscript{361} Vietnamese scholars and policy makers repeatedly stress that the basic tenets of the political system cannot be compromised.\textsuperscript{362} They also note with satisfaction that many successful neighbouring market economies are characterised by the presence of authoritarian, or at least “strong”, regimes that provide and enforce the “rules of the game”, and that the incentives and feedback arising from economic success have promoted the effectiveness and legitimacy of the regimes. In Singapore and Hong Kong, for example, the governments boast of the existence of the rule of law, and indeed, find in it a crucial legitimising factor.\textsuperscript{363}

When the Vietnamese leadership calls for rule of law, what it actually means is a refined version of socialist legality and rule by law as a means to enhance the capacity of the administration to produce outcomes that substantially reflect Party objectives.\textsuperscript{364} The essence of the policy is all public bodies must be bound by the legislation and that all citizens and businessmen must be assured that their economic rights are regulated in law and will be upheld

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\item adopted in the first and second stages has often been of a temporary nature, the third stage has consisted of adopting comprehensive and carefully drafted bodies of legislation, including civil and criminal codes (\textit{ibid}).
\item 361 Constitution 1992, art. 4.
\item 362 See \textit{e.g.} Doan Trong Truyen 1994 pp. 30-31 and 1996 p. 4; Nguyen Duy Gia 1997 p. 20; and Nguyen Duy Quy 1994 p. 33.
\item 363 For a detailed discussion, see Jayasuriya 1999 p. 16 and Wade 1993 pp. 165-169.
\item 364 The former Vietnamese Prime Minister Vo Van Kiet is often quoted as urging that “there must be a complete change from bureaucratic management to running the nation by law.”
\end{itemize}
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as long as they follow the rules.\textsuperscript{365}

This construction may help people to base their claims on detailed provisions. Its emphasis on strict application of the rules also promotes, at least in theory, a higher degree of uniformity and predictability. It is even conceivable that reformed legal and administrative procedures, the essence of the Vietnamese rule by law, will have some normative implications. It should also be considered that the success of the reorientation towards a higher degree of norm-based governance is dependent on the attitudes of the implementing organs. Vietnamese officials accustomed to Party rule and convenient concepts such as the "interest of the state" or "socio-cultural interests" may find the political dimension of rule of law threatening and react accordingly, while an approach that does not radically alter the fundamental premises on which the system rests might be easier both to understand and accept.\textsuperscript{366}

On the other hand, Vietnamese rule by law, with its lack of real judicial independence etc., cannot provide the protection of the individual traditionally associated with the rule of law. It is also inherently dangerous in the context of transition. The Vietnamese economic system, although increasingly market-oriented, still contains elements of central planning and \textit{dirigisme} and vests far-reaching discretionary power in the hands of administrative authorities. At the same time, the institutions meant to serve and

\textsuperscript{365} The 1992 Constitution, art. 4, stipulates that all organisations of the Party "operate within the framework of the Constitution and the law". Art. 12 stipulates that the state administers society "by means of law", that all state agencies "must seriously observe the Constitution and the law" and that all infringements of the lawful rights and interest of collectives and individuals "shall be dealt with in accordance with the law".

\textsuperscript{366} Ngo Ba Thanh (1993 p. 100) typically argues that "[t]he process of renovation in general and reform of the state apparatus in particular must be carried out actively. But it is necessary to carefully weigh each step in order firmly to ensure and increase political stability. This process must be based on creative application of Marxism-Leninism and Ho Chi Minh's Thought, on realities in the country and on experience in building the Vietnamese state in several past decades, taking into account advanced experiences of the world."
protect market participants have not yet assumed the integrity and knowledge to accurately weigh conflicting norms and practices against each other. As already has been discussed in Section 4.3 supra, neither the National Assembly nor the judiciary has the expertise, authority, or access to the day-to-day information needed to set firm standards and supervise their proper implementation.367

It may also be doubted whether the rule by law policy is strong enough to penetrate the rooted and protected conditions of patronage, nepotism and corruption. Amalgamated Party and business interests exhibit many of the characteristics of a neo-Confucian “superfamily” that maintains control over all sectors by ensuring that its members hold strategic positions within the administration, the judiciary and state enterprise. The judicial system itself often seems to favour compromise, ad hoc bargaining and reliance on superior authorities before formalised decision making under law.

Finally, there are conspicuous difficulties involved in emphasising rule by law principles for the economic area, while having a more ambivalent policy with regard to the civil, criminal and administrative areas. The legal and administrative “paradigm”, i.e. the core of shared understandings, theories and methodologies, must be essentially the same in all areas to make such principles viable.368 The overlaps between political and administrative functions, the blurred distinction between legislative, executive and judicial roles, and the lengths to which the Party goes to ensure that its members occupy influential and profitable positions

367 For example, no legal agency protested when former Prime Minister Vo Van Kiet ordered unspecified “administrative measures” to punish two Hong Kong firms and their Vietnamese partners who set up factories producing fake Marlboro cigarettes, after the US manufacturer Philip Morris had complained, see Vietnamese PM intervenes to halt illegal “Marlboro” production 1994.


under the *nomenklatura* system, are characteristic features of all sectors of the Vietnamese society. It seems overly optimistic to assume that judges in the Economic Courts could operate with a fundamentally different definition of law and its relationship to other norms, or use radically different methods of interpretation and adjudication, than their colleagues in the courts of general jurisdiction.

6.4 Administrative Law Reform

It has been mentioned that the execution of legal functions is often undifferentiated from the implementation of administrative policies in Vietnam. It has also been underlined that legal rules governing administrative regulation and decision making are often lacking or simply ignored.

In an attempt to respond to the sharp increase in complaints against administrative decisions and to enhance the regularity of administrative decision making generally, a system of Administrative Courts (or chambers) has recently been established within the general People’s Courts. A framework of procedural rules for their operations has been provided in the 1996 Ordinance on the Procedures for the Settlement of Administrative Cases. The Administrative Courts have jurisdiction to review decisions *i.a.* on expropriation and other forms of forcible acquisition, taxation, investment licenses and permits, administrative fees, land

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369 The number of complaints increased from 95,731 cases in 1992 to 241,720 cases in 1994 according to official figures referred to by Pham Tuan Khai 1995 p. 9. The first drafts of the organisation of the administrative courts placed them under the control of the Office of the Government and the Prime Minister, but delegates of the National Assembly successfully argued that a close relationship between adjudicators and administrators would compromise procedural neutrality and convinced the draftsmen that the Administrative Courts should be established within the system of general People’s Courts, see Gillespie 1996a p. 394; Nguyen Van Tam 1994 pp. 34-35; and Tran Son 1994 p. 36.
allocations and transfers, and fines for administrative violations.\textsuperscript{370} Before discussing the difficulties involved in implementing this reform, it should be stressed that its greatest significance lies in the circumstance that it was even initiated. The establishment of administrative courts represents a formal expression of support for the basic principle of judicial review of administrative conduct, which is an extraordinary change in direction from the historic path of Party rule. That the courts are granted a degree of supervisory authority over the state administration also reflects and encourages changing popular attitudes that deny the infallibility of the leadership.\textsuperscript{371} There is now, at least in theory, a basis for asserting that administrative decisions affecting business decisions must be in accordance with fundamental laws and regulations.

The making of this legislation an effective means to control the administrative system is challenged on many fronts. Until recently, Vietnam’s system of administrative law essentially consisted of rules allocating authority among the organs of the state. As these organs were presumed to be legitimate repositories of the will of the people, they enjoyed primary authority to interpret and apply their own regulations free from outside interference and to supervise themselves. Any attempt at reform consequently collides with a rooted and protected political and organisational culture in which ideas that official power should be based on consistent principles and rules appear as impractical constraints on the realisation of political policies.\textsuperscript{372}

The implementation of the reform is also resisted by influential

\textsuperscript{370} Ordinance on the Procedures for the Settlement of Administrative Cases, art. 11. Before bringing a matter before the courts, the individual or organisation concerned must have exhausted all means of administrative appeal, \textit{ibid.} art. 2.

\textsuperscript{371} Potter’s (1994a) detailed description of the Chinese experience of administrative law reform is helpful in explaining the incentives and constraints behind the Vietnamese ditto.

people with a personal stake in the *status quo*. Many officials are engaged in projects that are only rather flimsily connected to their principal assignment, from charging for services and permits to large-scale business ventures, some of them illegal. These people do not hesitate to obstruct initiatives that run counter to their interests. That the cumbersome nature of the administrative system not only translates into higher transaction costs for those who use its services, but also produces substantial income in the form of fees and bribes for those who operate it, also helps to explain why delegation of decision making power to lower levels is so difficult.

Legal-technical factors, *e.g.* limits on the range of matters subject to review, procedural ambiguities and restrictions on suspension of administrative decisions, further dilute the effectiveness of the Administrative Courts. The principle that the courts are authorised to review only the legality and not the propriety of administrative decisions particularly undercuts their powers. Vietnamese laws and regulations are often intentionally vaguely drafted to give officials maximum discretionary authority, so it is difficult if not impossible to establish that any but the most egregious conduct is actually in violation of existing regulations. The focus on legality rather than propriety supports the assumption that the major motive for promoting uniformity is to make the administrative bureaucracy more effective at implementing centrally formulated policies, rather than to establish real procedural safeguards for persons subject to administrative decision making.

The enforcement of administrative judgements is known to be problematic. The agencies concerned are reported to be unwilling

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373 *See* Doan Trong Truyen 1994 p. 31.

374 Ljunggren (1992 p. 159) refers to documents from the Seventh Party Congress showing that influential interests within the Party would like the state and the provinces to maintain a significant role in manufacturing as well as in wholesale trade combined with retail trade of essential goods.
to co-operate, for example by commenting on the matter or appearing in court. It also happens that the Administrative Courts refuse to try a case out of fear of causing friction with the defendant, usually the local People’s Committee. *Viet Nam News* reported in February 1997 that of one thousand complaints received by the administrative courts, only 100 had been heard. The Supreme Administrative Court received about 80 petitions, but heard only one case.375

Apart from the establishment of the administrative courts, little is done in real terms to discipline and diminish political and administrative control over business activity. The reforms essentially consist of attempts at “perfecting” the system, often by centralising decision making and concentrating even greater power in the hands of ministries, rather than serious attempts to address the underlying structural problems.376 Prime Ministerial Instruction No. 16-1998/CT-TTg, which aims at reducing red tape for foreign and domestic investors, provides a case in point. In an attempt to provide faster processing of proposals and complaints, it stipulates that all government agencies must deal with such matters within 15 days, and once the 15 days have expired they must report the results to the Office of the Government (matters beyond their expertise and jurisdiction must be referred directly to the Prime Minister for advice). However, the Instruction makes no attempt to address the conditions of inefficiency, discretion and corruption that are the root source of the prolonged processing.

The measures taken can also be so vaguely formulated that they cannot be implemented. For example, the Prime Minister has been quoted ordering ministries and departments to revise current judicial documents on policies, organisational structures and


administrative procedures under their management and "eliminate any irrationality, inconsistency and overlapping that may hinder the normal operation of enterprises."\textsuperscript{377}

Experiences from other former centrally planned economies emphasise that attempts at “fine-tuning” and “perfecting” have not worked. International trade and intercourse have grafted greater expectations of a reliable policy environment onto the business culture, necessitating in turn comprehensive reforms of the administrative system.\textsuperscript{378} The Vietnamese leadership lacks both the courage and incentive to seize and act on this recognition.

\section*{6.5 Corruption}

\subsection*{6.5.1 A CHRONIC DISEASE}

Judicial and administrative corruption are now so pervasive in Vietnam that it is considered a "national disaster."\textsuperscript{379} The


\textsuperscript{378} Nuti (1991 pp. 53–56) points out that tentative experiences from Eastern Europe and elsewhere show that whenever a market-oriented concept is even minimally present in a centrally planned economy, the process tends to proceed towards its further extension.

\textsuperscript{379} Few generalisations can be made about corruption other than that it exists in all societies and lacks a commonly accepted definition, but a broad definition suggests that it encompasses conscious behaviour by public officials who deviate from formal duties and accepted norms for private advantage. According to the 1997 index of corruption perception, released by the Berlin-based organisation Transparency International, Vietnam ranks number 43 among 52 countries from which sufficient information is available. The score for Vietnam is 2.79, while Denmark, the least corrupt nation, scores 9.94, and Nigeria, the most corrupt nation, scores 1.76. Vietnam is considered worse than China, but better than Russia, with scores of 2.88 and 2.27 respectively. The Vietnamese government, despite few resources and sometimes lack of incentive, was reported as uncovering more than 17 000 economic crimes in 1995. One reported case involved the customs office in the southern port of Vung Tau, where the customs officers had agreed to pool all bribes over USD 45. When the scheme came into light in 1995, the inspectors’ fund was bringing in USD 20 000 a month, see Schwarz 1996 p. 18.
phenomenon encompasses a wide array of actors and activities, but private businessmen are among the most exposed. The leadership is concerned, not only because donors and investors take notice,\textsuperscript{380} but also because corruption is one of the few political issues that the average Vietnamese really cares about. There is a fear that popular disgust with corruption will turn into dissatisfaction with the regime.\textsuperscript{381}

That there are few rules and other visible standards to guide administrative decision making allows officials to extract bribes and other pay-offs on a more or less systematic basis for services that should be performed as part of their duty. Another common form of corruption is that officials in supervisory functions "forget" real or imaginary breaches of various requirements in exchange for money.\textsuperscript{382} Payoffs are also known to be frequent up to the highest levels of government, e.g. in the awarding of major contracts, privatisation and the allocation of quotas, etc. The State Inspectorate and the Procuracy, the agencies supposed to oversee the lawful operation of the state apparatus, do not effectively perform their function.

A small side payment for a government service may seem a

\textsuperscript{380} The IMF, for example, warns that financial assistance may be withheld or suspended if government corruption prevents the country’s economy from developing, see Transition 1997 p. 20.

\textsuperscript{381} Schwarz (1996 p. 18) refers to prominent Party leaders who describe internal corruption as a bigger threat than the many perceived foreign and domestic enemies who would like to drive the Party from power.

\textsuperscript{382} The proprietor of a karaoke bar explained that the presence of prostitutes in other bars is used as a pretext for exaggeratedly frequent inspections of his premises in which officials check all documentation, question the staff, disturb the guests, etc., and eventually find a real or fictitious error. It is then made clear that money should change hands secretly. A representative of a construction company similarly described how “tax officials and inspectors regularly intrude and ask for various documents, letters, etc., and abuse their power to extort money.” The problem is not unique to Vietnam. Mutén (1993 p. 522) has observed a widespread practice among tax inspectors in developing countries to look until something that may be reported is found, and that this practice is often countered with the "planting" of a harmless irregularity to satisfy the inspecting authorities.
minor offence. It may also be tempting to accept certain forms of corruption as part of the "culture", e.g. the giving of gifts to officials to show appreciation for services rendered. However, worldwide studies show a clear negative correlation between the level of corruption (as perceived by businesspeople) and both investment and economic growth.\textsuperscript{383} Bribes create incentives to keep regulations costly and complex. Corruption also undercuts the ability of the state to enforce legitimate regulations and collect public revenues, as activities shift in the shadow economy to avoid the state altogether.\textsuperscript{384} In Vietnam there are signs that the creeping accumulation of seemingly minor infractions has eroded public trust and political legitimacy so profoundly that even noncorrupt officials see little point in playing by the rules and where virtually all public initiatives are regarded with scepticism.

Another seductive argument suggests that there should be significant differences between "greasing" corruption, which may be predictable and function like a transaction cost, and blocking corruption, which is unpredictable and causes uncertainty. For example, if the bureaucracy that acquires a bribe seeks to maximise bribe income and shares it among all the members, the person paying the bribe is subject to low uncertainty, although possibly to high bribes. If the corruption within the bureaucracy is not organised, on the other hand, the payer is subject to more uncertainty and perhaps also to multiple blackmail from different officials. There are some indications that for a given level of corruption, countries with more predictable corruption tend to have higher investment rates, but even here, the corruption has a serious adverse impact on economic performance. World Bank

\textsuperscript{383} See i.a. \textit{THE STATE IN A CHANGING WORLD} 1997 pp. 102-103 and Brunetti, Kisunko and Weder 1997a, 1997b and 1997c.

\textsuperscript{384} de Soto (1989 p. 13) points out that the development of informal practices outside the boundaries of state control means that the state is forced to enter on a path of steady retreat which undermines its social relevance, sometimes to such a degree that it is unable to execute even modest objectives.
studies show that no matter how high the degree of predictability of corruption in a country, the rate of investment would be significantly higher were there less corruption.\footnote{See \textit{THE STATE IN A CHANGING WORLD} 1997 p. 103.} There is also the risk that countries which have achieved high rates of economic growth despite serious corruption find themselves paying a higher price in the future as corruption feeds on itself and creates a widening spiral of illegal payoffs until ultimately development is undermined and years of progress are reversed. There are already many signs of a shift from productive activities to an unproductive struggle for spoils in Vietnam.

The corruption is not a product of \textit{doi moi}, but rather a reflection of historically rooted political and economic peculiarities and distortions.\footnote{See Neilson 1995 p. 57.} During the 1960s and 1970s, the need to access scarce resources through the centrally planned economy urged the development of numerous patron-client networks, commonly known as “umbrella” systems. In return for sharing the profits with their high-ranking government and Party patrons, managers and subordinate officials were allowed to sell various subsidised commodities produced in the state enterprise sector on commercial terms.\footnote{See Gillespie 1996b p. 14 and Porter 1993 pp 137–138.}

Similar practices continued throughout the 1980s. The lack of public accountability, the culture of secrecy and the freedom from legal restraints served to protect those officials who took advantage of the system. Gareth Porter explains that “[t]he sponsorship of a higher-level Party official brought lower-level cadres quick promotions, salary increases, and special privileges and allowed them to escape punishment for blatant corruption and thievery by obtaining transfers to other, often higher positions.”\footnote{Porter 1993 pp. 137-138.} 

\textit{Doi moi} has merely enhanced the possibility, and perhaps also
inclination, of many parts of the administration and judiciary to engage in corrupt practices. Politicians, administrators and judges can now control access to benefits of much greater value and impose costs of an entirely new dimension on people in general and private businesses in particular. The weakening of the system of control through Party channels before introducing new control mechanisms has also made those who weigh the expected benefits of breaking the law against the expected costs of being caught and punished more inclined to pay or accept bribes. These people may rightly believe that if caught, the justice system itself can be bought. The moral confusion that has followed in the wake of economic reform is another contributory factor.\footnote{389 Gillespie (1996b p. 4) argues: “The wider the gap between legal norms and every day conditions, the greater the presumption that factors outside positive law legitimise social and political standards of official behaviour. It is a small leap to suggest that legal constructions of public office corruption lack meaning, unless illuminated by broad societal concepts of public interest and opinion.”}

Organised crime is often intertwined with corruption in transition economies. The market economy opens new avenues for criminality and current and former public officials may feel tempted to participate in extortion, illegal collection and racketeering. Private security groups, including groups that are exclusively criminal, also tend to emerge to fill the void left by the inefficient or corrupt police and judiciary. Vietnam displays many features that would provide fertile ground for organised crime, \textit{e.g.} poorly protected property rights, monopolies, large-scale drug-trade and an ineffective legal system, but apart from the presence of small gang-like constellations of criminal elements that offer debt-collection and similar services for remuneration (discussed in Section 5.3.2), there are few signs of a \textit{mafia} developing. The businessmen interviewed liked to stress that Vietnam is not like Russia.
6.5.2 CURES AND SIDE EFFECTS

While the political leadership and most other people agree about the seriousness of the problem, there is less consensus on how it should be tackled.\(^{390}\) The currently favoured means, criminal sanctions (including show trials and the occasional use of capital punishment for those who lack patrons influential enough to protect themselves), campaigns with appeals to “purity” and “socialist morality” and various task-forces and commissions,\(^{391}\) have proved largely ineffective.\(^{392}\) Even high-ranking Party members admit that the campaigns to encourage morality smack of rhetoric or even hypocrisy.\(^{393}\)

Much of the corruption, as is revealed today, stems from problems in the changeover from state ownership and central

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390 The businessmen interviewed argued that the matter is delicate because “it is difficult for the state to deal with the situation when it affects the interests of many people. Everyone must rely on one another to exist”, and that “in some cases, the responsible people seem to sympathise with these negative phenomena.”

391 The 1985 Penal Code (arts. 156, 129–137, 211, 221 and 226–227) forbids officials to accept bribes, extort private property, steal and embezzle socialist property and abuse official power. The material element of crime in these provisions requires an infringement of the independence and sovereign integrity of the nation, the socialist state-economy, the fundamental rights of citizens or other aspects of the socialist legal order, in other words some form of social danger. Offences that cause low levels of social danger should be handled by administrative sanctions and internal Party discipline. A special anti-corruption commission has been established pursuant to Decision No. 35-TTg on establishing the Commission against Corruption and Smuggling, January 19, 1996.

392 The number of cases, both minor and high profile, brought to court seems to be rising, but prosecution remains slow, haphazard, and ultimately guided and limited by political considerations.

393 See Schwarz 1996 p. 18. The 1995 national anti-corruption campaign, which also targeted smuggling and extravagant government spending on celebrations, etc., surprised some people when the former Director of the Ho Chi Minh City Customs Bureau was sentenced to life imprisonment for “corruption and smuggling” and the director of the Anti-Drug Unit of the Hanoi Economic Police (who also happened to be the son of Vietnam’s Deputy Minister of Interior, who is also a member of the Party Central Committee), was arrested, see Neilson 1995 pp. 54–56.
planning to private ownership and decentralised decision making, and would better be addressed as such. Reforms that speed the pace of the changeover and increase the competitiveness of the economy generally, e.g. the removal of entry barriers for private businesses and the abolition of controls on foreign trade, reduce the opportunities for corrupt behaviour regardless of sanctions.\(^{394}\) Put simply, if the state has no authority to restrict exports or to license businesses, there will be no bribes in those areas.

A small step forward has been taken with the requirement that each level of the administration is to simplify, or in the case of illegality, abolish procedures and fees.\(^{395}\) A recently drafted anti-corruption ordinance also requires officials to declare their property and incomes and bans them from depositing gold and cash in foreign and domestic banks. Nor can they start or manage private companies or appoint their relatives to positions such as chief accountants or cashiers in publicly owned enterprises.\(^{396}\) A specific instruction even advises the Customs Department, a branch of the state suspected of being especially inclined to fraud and corruption, to dismiss any officers guilty of “annoying” businesses.\(^{397}\)

A viable anti-corruption policy must also include steps to ensure that the judicial and administrative system is staffed with capable and motivated people. Like many other Asian countries, Vietnam relies on a “mandarin-style” national civil service entrance examination that separates out the more skilled from the less

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\(^{394}\) Obviously, this does not mean eliminating those mechanisms that have strong justification, but reforming them. Abolishing taxes is not a sensible way to root out corruption among tax collectors, for example.


\(^{396}\) Ordinance against Corruption, March 9, 1998, and Decree No. 64/1998/ND-CP detailing and guiding the implementation of the Ordinance against Corruption, August 17, 1998.

\(^{397}\) Instruction 16-1998/CT-TTg of the Prime Minister, reported in Vietnam News, Friday, April 3, 1998.
However, there are ample opportunities to enter the ranks on other merits. Vietnam also lacks effective means to sustain performance after recruitment, such as clear criteria for upward mobility and rewards for meritorious service. This leads officials to worry as much about pleasing their superiors and other influential people as performing their duties. It is estimated that as many as 40 per cent of Vietnamese civil servants do not meet the basic professional requirements for their positions. Another problem is that civil service salaries lag too far behind what the private sector can offer. While a lawyer working for a private company may earn USD 200 or more, a judge may earn as little as USD 40 per month. Skilled Vietnamese lawyers working for foreign companies in Vietnam may earn several thousand USD per month. There is also widespread confusion among officials about what their responsibilities and goals are after the radical economic and social changes of recent years. It seems that some of them have problems identifying themselves with their organisations.

Vietnam should therefore spend more effort on promoting a healthy *esprit de corps* that conveys a common understanding about what is desirable and undesirable behaviour, imposes self-discipline and helps to uphold the honour of the civil service. The Vietnamese leadership has begun to think along similar lines. It

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398 The Government Committee on Organization and Personnel introduced reformed principles for the competitive entrance examinations for personnel to the ministries and local governments in 1995.

399 A first step has been taken with the enactment of the Ordinance on Public Employees, March 9, 1998. This instrument seeks to clarify the principles for recruitment and promotion, defines the tasks and responsibilities of civil servants and provides rules for supervision and disciplinary action.

400 See To Tu Ha 1997 p. 4.

401 It should be mentioned that a recent IMF-commissioned worldwide study (Van Rijckeghem and Weder 1997) of the relationship between wages and corruption in the civil service suggests that the relationship linkage may not be as strong as is often assumed. Where the wages are low in general, as is the case in Vietnam, the level of wages may be of secondary importance, as potential bribes dwarf wage income.
has found an appealing model in the Singaporean bureaucracy, which, within a relatively short space of time (since the early 1960s), has developed into a group well known for its competence and conscientiousness. It seems that the ideological dimension of the Singaporean effort, i.e. the ruling People's Action Party's successful attempt to imbue the administration with certain desirable political and professional values, is particularly attractive to the Vietnamese leadership. The building of prestige for the Vietnamese civil service will not be easy, however. People are simply very cynical about the personal qualities of the officials, which is reflected in the motivation and confidence of the officials themselves.

Another important measure is to break the rooted culture of secrecy. As a result of the war experience and international isolation, officialdom tends towards secrecy in the discharge of legal and administrative functions. Strong institutions that promote transparency and accountability are therefore needed. Independent anticorruption commissions or ombudsmen can help to monitor arbitrary or corrupt use of public power, but even more important are mass media with the means and incentive to expose corruption and other violations of rule of law principles. Within the narrow limits sanctioned by the Party, and with reservations for the possibility that it has been used or manipulated, the press, especially perhaps the business papers, has already assumed an important role here. There are signs that officials are more cautious about misusing official power in the face of press exposure. In this sense, there is reason to believe that mass media in general are much more closely linked to the causes of administrative and judicial reform than has usually been assumed.

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402 See e.g. DEPUTY JUDGE CONVICTED ON CORRUPTION CHARGES 1997.
CHAPTER 7
SUMMARY WITH CONCLUSIONS

This chapter draws out the key messages from the preceding chapters, i.e. what can be learned from the Vietnamese experience and what does it suggest for other countries grappling with similar issues of legal reform?

7.1 Conventional Wisdom and Standard Prescriptions

Decades after the rise and fall of the Law and Development movement, crude theories about law and its relationship to economic development are reappearing. Perceptions that efficient institutional arrangements should resemble conventional Western norms of law and enforcement hold sway in the wake of “transition.” However, legal reform is never as simple as prescribing in normative terms conditions opposite to those that comprise the problems.

This thesis seeks to provide a better empirical support for the claim that the perceived problems really exist and that the proposed measures will actually help to solve them. The object of study is the creation of a legal framework governing ownership and contracts in Vietnam. The formal side of the legal reform process, i.a. goals, motives and drafting techniques, has been discussed with
policy makers, legislators and government lawyers. The implementation of laws and regulations, including inter-institutional relationships, personnel and reward systems, and other factors that determine the operation of the judiciary and the administration, has been discussed with officials working within key judicial and administrative agencies, attorneys and others with insights into the machinery. How those meant to benefit from the institutional changes, the actors in the marketplace, perceive and respond to the reforms has been explored in interviews with 40 managers and owners of private businesses in and around Hanoi.

7.2 Sequence and Timing

The new and greater role for law in economic life is both a conscious choice of the Vietnamese leadership and an inevitable consequence of the socio-economic changes that were introduced to dismantle state ownership and central planning in the wake of the 6th Party Congress in December 1986. Even prior to that, Vietnam had made reactive concessions to the market in the face of acute economic crises, e.g. in the form of production contracts within agriculture and “fence-breakings” within state enterprises, which meant that the leadership already knew of areas where markets could do a better job. There was seldom a uniform view about the desired outcome of these measures, but they were symbolically significant in so far that they weakened the rigid dogmas on which the system rested and signalled that a more pragmatic line of thinking was also represented at the highest levels.

The launching of the doi moi (renovation) programme in 1986 meant that Vietnam set off along a path of comprehensive reform towards the “socialist-oriented market economy”. Discrete but significant changes were also carried out within the Party leadership and the highest state administration. The legal spin-offs, i.e. foreign investment law, the drafting of a new constitution,
company laws and statements that all activities of the state must take place within the framework of the law, were strikingly similar to the initial directions for legal reform laid out during Gorbachev's economic perestroika in the Soviet Union.

The first years of the doi moi were characterised by vigorous developments within small-scale trade and private services, but Vietnam also experienced many problems that seem typical of the process of transforming centrally planned economies and their supporting legal and regulatory frameworks, i.e. recurrent credit and banking crises. While such backlashes could have been used to denigrate markets and capitalism generally, or otherwise exploited in the continuous political controversy over the wisdom of liberalisation, the leadership showed few signs of such inclinations. Rather, the crises were soberly interpreted as structural problems that should be addressed by means of better legal and administrative instruments for supervision and control, and such issues became even more tightly integrated into the broader course of economic reform.

The greater emphasis on the legal and administrative environment was not attributable solely to the wisdom of the regime. Development aid, particularly support and encouragement of "structural adjustment" (although the Bretton Woods institutions were initially held back by the US embargo), also influenced the course of events. Vietnam undertook to liberalise capital markets, restrain government expenditure, reform the state enterprise sector and implement trade policy reforms, all of which are typical elements of structural adjustment programmes and implemented through, or presuppose changes in, the legal and administrative framework. Whether these reforms were "bought" or otherwise the result of conditional arrangements is controversial. The Vietnamese leadership is conscious of its prestige and integrity and wants all significant policies to appear as genuinely domestic conceptions. The World Bank, the International Monetary Fund, the Asian Development Bank and
other major actors are also aware of the sensitivity terms such as "condition" and "criteria" provoke and seek to blur the most apparent linkages. However, in some cases the leadership's eagerness to keep pace with other reform economies, fulfil performance criteria and otherwise impress donors seems to have resulted in the enactment of laws and other instruments the effective implementation of which presupposed the existence of sophisticated supporting institutions. Such a course of action carries the risk of creating a detrimental cycle of legislative action and judicial inaction, but it seems that the best has not been an enemy of the better. Although these laws are largely non-enforceable, businesspeople have been encouraged by the ideological message these spearhead laws convey, and the resulting investments have helped to sustain legitimacy and credibility around the economic reform effort.

7.3 Lawmaking: Strategies and Processes

The processes of lawmaking have great significance for both the content and the "life chances" of the laws produced. Vietnam has created an impressive number of legal instruments in a very short time, but the effort has proceeded without a comprehensive strategy and effective means of ensuring legality and consistency, with fragmented and inconsistent legislation as the result. The problem is especially pronounced in regard to the impenetrable undergrowth of secondary legislation and administrative instruments. For the actors in the marketplace this means uncertainty.

The Party is often to blame. It is still involved in most aspects of policy making and legislative drafting and it is not particularly interested in transparency, critical feedback and participation of outsiders. Most legislative initiatives are still conceived in Party bureaus, passed to state executive offices where Party members hold controlling positions and then submitted to the National
Assembly, which is also overwhelmingly dominated by Party members. With regard to initiatives emanating from other sources, the Party may argue that only a specialised elite, which happens to be found within the Party or among its members, possesses the skills needed to handle the issue. These strategies for legalising politics, or politicising legislation, prevent political outsiders from being the unprejudiced critics of new legislation that they should be. The political ambience also renders the role of the courts in formulating and commenting new rules and principles limited.

The 1992 Constitution and the 1996 Law on the Promulgation of Normative Legal Documents constitute attempts to reform the principles of lawmaking (including introducing embryonic mechanisms to check the impact, efficiency and practicability of new legislation), but it is difficult to really change the entrenched principles according to which the legislative system operates as long as the reforms are not predicted on an official rejection of socialism and one-party rule as obsolete or intolerable. The Party may even see its involvement in “legislative engineering” as an opportunity to restore the loss of legitimacy it has recently sustained.

Political control does not prevent competitive ministries and agencies from pursuing “their own” missions within the realms of the tolerable. That one proposal retains its place on the agenda, while others do not, is often the result of the continuous struggle between economically assertive organisations or groups who seek to promote or block initiatives depending on how their interests are affected. Successfully delaying a law, e.g. by insisting that it should be implemented experimentally in a few areas for a long time to gain experience, can be tantamount to rejection. Disagreements must often be resolved through weakening compromises and comprehensive laws have been reduced to mere frameworks in order get them passed. Once adopted, there may be a second campaign over how the provisions of the law are to be interpreted and carried out, if at all. The lack in many cases of
appropriate repeal and transitional provisions creates even more confusion. It is also common for lower agencies to emphasise their "own" legislation at the expense of superior provisions offered by distant central authorities.

Some guidance in resolving issues of conflicting or overlapping rules is provided in the Constitution and the Law on the Promulgation of Normative Instruments, but also in separate, sometimes secret, instructions to the agencies and officials concerned. It is notable that the People's Courts do not have the authority to settle conflicts of law or review the constitutional validity of normative instruments. This right remains with the Standing Committee of the National Assembly and, regarding instruments enacted by governmental agencies, the government and the Prime Minister. In reality, conflicts of laws are commonly resolved through informal negotiations and ad hoc arrangements between the agencies concerned.

7.4 Models and Transplants

Vietnam's reliance on foreign legal models is to a large extent a consequence of the absence of effective means for identifying and developing viable organic solutions. Vietnamese lawmakers are urgently pressed to find "shortcuts" to achieve the officially formulated goal of promoting economic development with law.

The interest in foreign concepts also stems from a recognition, albeit reluctant, that Vietnam's legal system cannot be determined by internal factors alone. International conventions, overseas trade, membership of regional and international bodies for free trade and co-operation, create external and internal expectations that the legal system should be harmonised with international law practices in general and with the laws of neighbouring countries and of the most important trading partners in particular. Most significant in this respect is the membership of the Association of Southeast Asian Nations, ASEAN, and the resulting explicit and implicit
obligations to adhere to its goals and principles.

While legislative models have an important function as vehicles for ideas and know-how, historical experience suggests that the "transplanting" of foreign concepts often has a limited impact, or an impact very different from that envisaged, because people choose how to behave not only in response to the law, but also to other social, economic and political factors. It is also important to keep in mind that the legal area is ideologically sensitive, intimately connected with national identity and highly dependent on attitudes. Foreign concepts are easily perceived as intrusive.

A favoured technique among Vietnamese lawmakers is to single out those elements of foreign laws that are considered acceptable and appropriate, while rejecting others. With regard to specific country models, it is notable that the question of common law versus civil law seems not to pose any major concerns. It is argued that the issue is not so much form as substance. There is also a notion that Vietnam, like other Pacific rim countries, is subject to an uncontrollable process of regional integration and globalisation, driven by the ASEAN and APEC co-operation, development aid, foreign study, popular culture, etc., where concepts from a variety of nations and systems are continuously blended. Apart from this, it seems that the apparent similarities in economic conditions with China and, to some extent, Russia, have prompted a particular interest in the development in these countries. The policy makers' relative affinity with Chinese and Russian law and language, often acquired in foreign study, may also have an influence.

7.5 Markets and Law

While the new market-oriented legislation contains many fairly conventional "Western" principles governing ownership and transactions, certain fundamentals underlying these principles are not accepted because of the challenge they present to the political system, either directly by opening up the way for undesirable social
and political practices, or indirectly as vehicles for potentially "dangerous" ideas and values.

Even the landmark 1992 Constitution treads a tightrope between endorsement of private business and maintained state and Party control of the economy. It permits private ownership and transfer of companies, buildings, machinery and other means of production, but does not allow private entities to own land and maintains the peculiar division of economic interests between "by the whole people," collective and personal, with the two first as the "foundation".

A vast majority of the businessmen interviewed nevertheless consider their businesses sufficiently safe in the sense that they are not afraid expropriation or other immediate threats to their existence. It appears that the objective factors of law are intertwined with subjective factors such as ideology and prevailing political "moods", and that those who have confidence that they can correctly interpret these subtle signals have confidence in the future. Inquiries into the conditions for allocation and use of land, where the ideological and legal ambiguity is perhaps the most pronounced, show that businessmen may also devise extra-legal protective mechanisms, e.g. homemade certificates with various official looking seals, to be able to remain on the land. Another method is to pay some sort of fine or tax to the authorities, which although formally levied on the assumption that it does not confer any right to the land, implicitly constitutes a proof that that which is required to be done in order to stay on the location has been done properly. A network of strategically located friends and patrons in the administration and the judiciary provides residual security should all else fail. The major problem with the remaining rhetorical elements of socialist and collectivist policies in the legislation is not so much that they impede business operations, rather that they give rise to inconsistencies in the legal and regulatory framework and make systematic revisions and unprejudiced feedback difficult.
The relative success of many smaller Vietnamese businessmen who seldom or never refer to the Civil Code, the Commercial Law and other supposedly important laws, let alone consider invoking them in court, is another reason to doubt that the survival of the private sector depends on large-scale codification. A variety of informal mechanisms, e.g. kinship ties, moral concepts and reputational mechanisms, are still the most common means of predicting how others will act, or refrain from acting, in various situations.

However, it seems that changes in the expanding Vietnamese marketplace, e.g. more diverse moral and cultural notions as a result of international trade and intercourse, are gradually eroding the relevance of these mechanisms. Businessmen are urged to buy and sell in their locality and to pass over potentially gainful trade with distant parties. At the same time, surveys of Vietnam's emerging private sector show that those businesses that manage to sell a bigger proportion of their products to distant customers have the greatest prospects for fast growth. The inability to enter into relationships with distant partners also inhibits the adoption and development of new technologies. Although difficult to enforce, the Civil Code and the Commercial Law fulfil an important function here by spelling out model terms for impersonal transactions. It is also notable that in spite of the close relationship between buyer and seller and the fact that Vietnam is still a cash economy par excellence, the use of written contracts is already unmistakably increasing as a means to reducing uncertainty and to fostering trust.

Changes in the relative costs of formality and informality are another factor behind the increasing preference businessmen exhibit to formalise their arrangements. Those who operate without the support of contracts and other available legal

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403 The 1995 Civil Code and the 1997 Commercial Law in 1997 were enacted with the explicit aim of facilitating "rational" contracting and thrusting Vietnam into the company of advanced market economies.
instruments may gain in flexibility and save some of the costs the bureaucracy imposes, but cannot benefit from increasingly important trade instruments such as warrants and guarantees and face difficulty in obtaining and extending credit.

7.6 Judicial Reform

The private sector survey underlines that the lack of fair and effective dispute resolution and enforcement mechanisms weaken the effects of the reforms of the substantive law. What the businessmen interviewed feel they really need are precise and predictable decisions by authorities with compulsory authority, typically courts. The absence of effective enforcement also challenges the broader course of “transition”. If state and private enterprises are expected to produce in a competitive market, they must operate under the same set of constraints, regardless of who the owner is, or the system risks reverting to the kind of specific directives and ad hoc bargaining the inadequacies of which necessitated reform in the first place.

The political establishment has also recognised that the court system must be reformed and reinforced. Special Economic Courts with jurisdiction to handle such matters as contracts, intellectual property and bankruptcies have been established within the structure of general People’s Courts. The procedural rules are essentially based on conventional “Western” concepts and display for Vietnam an unprecedented degree of formalisation.

Obviously, a procedural reform is not sufficient in itself to make the Economic Courts operative. Complex commercial adjudication poses formidable challenges for the judges, many of

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404 Notably, the businessmen interviewed have little confidence in the Vietnam International Arbitration Center and the Economic Arbitration, apparently because of the previous amalgamation of legal and socio-political functions in conciliation offices, community boards and similar quasi-judicial bodies.
whom lack adequate training. They are also required to suddenly disregard ingrained notions of Party loyalty and community status. The Economic Courts are further constrained by the same lack of fundamental support functions as holds back the general People's Courts, e.g. efficient budgeting, personnel and record-keeping systems, with poor administrative performance, lost or misplaced records and corruption as the result.

An attempt to address the most serious problem, the notoriously low enforcement rate, has been made with the transfer of the enforcement function from the People's Courts to special Judgement Enforcement Agencies, but to find and seize property, especially bank deposits, is still difficult. The banks operate under a more competitive regime themselves and are anxious to show that their loyalty rests primarily with their customers. Characteristic defects in the political and administrative systems, notably a detrimental form of local protectionism, also prevent effective enforcement. It is not at all certain that officials in one district will help to enforce a judgement in favour of a plaintiff in another district, especially if a court outside of the first district has delivered the judgement. It may also happen that an Economic Judge in a District People's Court reaches a judgement and finds that it is not supported by other local organs and therefore does not expends much effort to have it enforced. Meanwhile, businessmen doubt whether the Economic Courts can really assume the role of efficient and impartial adjudicators of any disputes they should have.

7.7 Legitimacy and Rule of Law

That Vietnamese businessmen consider the new codifications concerning property, companies, contracts, etc. as basically good, but at the same time describe the legal system as a whole as "unattractive" or "irrelevant" underlines a critical difference between the law in the books and the law in action. It also shows
that the legacy of mismanagement of legal affairs has influenced
the popular notion of the system, sometimes to the extent that it is
considered outright antagonistic.

This notion has some substance. The insufficient separation of
administrative, legislative and judicial functions in Vietnam allows
a plethora of central, regional and local bodies to regulate and
administrate critical aspects of business life, e.g. licensing and land
use, and to treat centrally enacted laws and policies as mere
inconvenient adjuncts to their own grand visions and interests.
The counter-measures are often of such a nature that they breed
bargaining, secretive alliances and further uncertainty. As a
relation-driven society, strategically located “friends” within key
agencies are most important in forestalling various bureaucratic
problems. Essentially for this reason, the traditional Vietnamese
family is being opened up to include influential people with no
common lineage.

In other countries, successful attempts to curtail whim and
discretion have usually included some form of authoritatively
defined and balanced division of power between the legislative,
executive and judicial branches, including giving the courts the
formal authority to hold the executive branch effectively
accountable for its decisions. This circumstance is very politically
sensitive in Vietnam. On the one hand, the leadership regards
judicial and administrative discretion and corruption as a threat to
its authority and appreciates that an approach to rule-bound use of
official power is important for state-building purposes. On the
other hand, the regime is not willing to accept any concessions in
the political sphere. The resulting policy, as visualised in the 1992
Constitution, is a refined version of “socialist legality” or rule by
law, meaning that all public bodies shall be bound by the
legislation and that all citizens and businessmen are to be ensured
that their economic rights will be upheld as long as they follow the
rules.

The emphasis on strict application of the rules does ensure, at
least in theory, a higher degree of predictability. The attitude of the implementing organs should also be considered. While the inherently ideological concept of rule of law may be perceived as threatening and be greeted with an uncooperative attitude on the part of officials accustomed to Party rule and convenient principles such as the “interest of the state”, an approach that does not radically alter the fundamental premises on which the system rests may be easier to both understand and implement. It should also be remembered that the new role of defender and promoter of private ownership and market economy is potentially destabilising for a political cadre that has for decades sought legitimacy through disrupting and destroying such “bourgeois” concepts.

However, Vietnamese rule by law can never provide the kind of protection associated with traditional rule of law. It also seems optimistic to assume that judges in the Economic Courts could speed up and begin to operate under a new definition of law and its relationship to other norms, and use different methods of interpretation and adjudication, than their colleagues e.g. in the Civil Courts and Administrative Courts. The core of shared understandings, theories and methodologies about the law must be essentially the same regardless of which sector the lawyers operate in. The historical amalgamation of judicial, executive and legislative functions in Vietnam should also be considered. There is no tradition of maintaining special policies for the different branches of the state and the judicial system has a long tradition of preferring ad hoc bargaining and reliance on superior authorities before autonomous decision making under law.

The official view of the role of law is seen clearly in the attempts at administrative law reform. Administrative Courts that may review decisions on taxation, administrative fees, land allocations and similar matters have been established within the general People’s Courts. However, limits on the scope of review and the range of matters subject to review, procedural ambiguities, restrictions on suspension of administrative decisions, etc., suggest
that the major purpose of the reform is to make the administration better implement centrally formulated policies by promoting uniform use of official power, rather than to establish real safeguards for persons and businesses subject to administrative decision making.

Outright corruption is also inextricably bound up with the judicial and administrative systems. The accumulation of minor infractions has eroded public trust and political legitimacy to the point where even noncorrupt officials see little meaning in playing by the rules. A small side payment for a government service may seem a minor offence, but worldwide studies have demonstrated the presence of a clear negative correlation between the level of corruption (as perceived by business people) and both investment and economic growth. Vietnam is struggling to fight it by various traditional measures, principally stiff punishments and campaigns for purity and “socialist morality”, but the results so far have been disappointing. The corruption is to a large extent a symptom of problems in the changeover from central planning to market economy and ought to be addressed as such. Any measure to speed up this changeover, e.g. abolishing controls on foreign trade or removing entry barriers to private industry, would also reduce the opportunities and incentives to pay bribes. It is also crucial to break the culture of secrecy in official matters, a lingering vestige of the war and international isolation. The role of mass media is crucial. The bold business papers have already assumed an important function in exposing various forms of corruption at the state–business interface, and officials do take notice.
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Appendix

Checklist: Private Businesses

(Present yourself, the purpose of the survey and the nature of the questions. Underline the confidentiality.)

Name and address of the researcher:
Date and time:

Name, address and telephone (fax) number of the business:

Branch:

Name, position and sex of the respondent:

Ownership
When did you start or buy your business?

What made you decide to start or buy the business?

Which problems (risks) did you face when you bought or started your business (political, legal, administrative, taxes, uncooperative attitudes, corruption, etc.)?

How did you address them (legal and informal means)?
Has the situation changed (with the enactment of the law/ordinance/decreed on..., the reform of...)?

Do you feel that someone or something (the state, the People's Committee, individual officials, taxes, others) could force you quit or sell?

Does this affect the way you work? How?

Do you think the authorities (the state) are aware of these problems?

Are they addressed?

What are the prospects for using legal means against the state, the People's Committee and individual officials?

Are there other means?

Which are the advantages and disadvantages with these?

How do you find information about the law?

Do you think this information is accurate?

What is the general role of the state (helpful, neutral, intrusive)?

Specific laws and provisions (the 1992 Constitution, the Law on Companies, the Law on Private Enterprises, the Law on Promotion of Domestic Investment, the rules governing Economic Arbitration, the draft Civil Code and Commercial Law, etc.). Known? Relevant? What is missing?
Business Transactions

Who do you typically deal with when you buy and sell goods and services (relatives, friends, certain groups of businessmen, people in general...)?

How you sell (buy) goods (services) to people you know?

How you sell (buy) goods (services) to people you do not know?

What kinds of agreements (written, detailed, binding, etc.) do you make?

How do you know that our counterpart knows and respects the terms of agreements and contracts?

How are agreement and contracts implemented?

Would you use formal channels for enforcement? Why?

Are there other means available?

The specific laws and provisions on contracts and enforcement of contracts (the Ordinance on Economic Contracts, the rules on Economic Arbitration, the Law on the Organisation of the People’s Courts, the draft Civil Code and Commercial Law). Known? Relevant? What is missing?
Decades after the rise and fall of the Law and Development movement, crude theories about the relationship between law and economic development have reappeared in the wake of "transition". This thesis seeks to determine whether the perceived problems really exist and whether adhering to the "standard legal prescription" is actually helpful in solving them. The conclusions are based on observations of the Vietnamese effort to create new, and supposedly more viable, laws governing ownership and contracts. The official aspect of the process, the goals, motives and drafting techniques, has been discussed with policy makers, officials and other knowledgeable informants. How those who are supposed to benefit from the new legislation, the actors in the marketplace, perceive and respond to the laws has been explored in interviews with private businessmen in and around Hanoi.