

# Vietnam and the Rule of Law

Carlyle A. Thayer  
and David G. Marr (eds)

Political and Social Change Monograph 19

# **Vietnam and the Rule of Law**

*Proceedings of Vietnam Update Conference November 1992*  
*Department of Political and Social Change*  
*Research School of Pacific Studies*  
*ANU*

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**(editors)**

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Canberra 1993

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First published 1993, Department of Political and Social Change, Research School of Pacific Studies, The Australian National University.  
Printed and manufactured in Australia by Panther Publishing and Printing.

Distributed by  
Department of Political and Social Change  
Research School of Pacific Studies  
Australian National University  
Canberra ACT 0200  
Australia (FAX: 61-6-249-5523)

National Library of Australia  
Cataloguing-in-publication entry

Vietnam and the rule of law

Bibliography  
ISBN 0 7315 1852 7.

1. Law - Vietnam. I. Thayer, Carlyle A. II. Marr, David G.  
III. Australian National University. Dept. of Political and Social Change.  
(Series: Political and social change monograph; no. 19).

349.597

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## **Acknowledgements**

We would like to thank the Australian International Development Assistance Bureau (AIDAB) for financial support in convening the November 1992 Vietnam Update meeting from which this volume has emerged. Australian Ambassador Michael Potts and his staff as well as former Ambassador Graham Alliband, facilitated contact with participants from Vietnam. John Gillespie kindly liaised with the Australian legal community on our behalf. David Laidlaw, William Magennis, Brian Weir and Noel Fabri took part in a panel discussion on legal practice relating to Vietnam, which offered ample food for thought to other participants when revising papers for publication. Staff of the Department of Political and Social Change assisted us every step of the way: Bev Fraser helped to organize the Update, sustained communication with writers in the revision process, word processed and formatted the entire text, and liaised with printers to a tight schedule; Allison Ley researched missing details and ambiguities in the text; and Lulu Turner copy-edited the page proofs for consistency of usage.

The Editors

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# Introduction

Carlyle A. Thayer

In September 1990 the Departments of Human Geography, Political and Social Change, and Pacific and Southeast Asian History, and the National Centre for Development Studies of the ANU's Research School of Pacific Studies hosted a landmark international conference on the theme 'Doi Moi: Vietnam's Renovation — Policy and Performance' (see Forbes *et al.*, 1991). This meeting was so successful that it sparked the idea to emulate the model of the annual Indonesia Update. The Vietnam Update as it was originally conceived, consisted of a review of the major, economic, social and political developments over the previous year and the exploration of a specially chosen theme.

In November 1991 the first Vietnam Update was held on the theme of human resource development. Papers delivered at this conference were not published in an edited collection. This volume contains the revised papers delivered to the second Vietnam Update held in November 1992 on the theme 'the law in Vietnam'. The title of this book, *Vietnam and the Rule of Law*, was adapted from the original title of Mme Ngo Ba Thanh's paper, 'The 1992 Constitution and the Rule of Law'.

The papers delivered at Vietnam Update 1992 fall into three categories. The first consists of the papers delivered by Adam Fforde, Suki Allen and Carlyle Thayer which provide an overview of major economic, public health and political developments in 1992. The second category comprises papers by Ngo Ba Thanh and Levien Do which deal with the 1992 state constitution. The third category includes the papers by John Gillespie, Nguyen Qui Binh and Irene Nørdlund which discuss specialist aspects of the law in Vietnam.

Vietnam's reform process is usually dated to the landmark Sixth National Congress of the Vietnam Communist Party held in December 1986. It is now clear, based on recent research, that the impetus for economic reforms dates back to the late 1970s. Calls for political reform were first expressed in public in 1981 in the lead up to the Fifth National Congress held in March 1982. Comparatively little was accomplished in this area until after 1986.

The speed and scope of changes since 1986 has been quite startling. Within three years Vietnam had all but dismantled its



central planning apparatus and had thrown open its doors to foreign investment. According to Adam Fforde 'if, as one can argue without much difficulty, the Vietnamese economy has been essentially a market economy since 1989, then the leadership is the sole example in the world today of a ruling communist party that has abandoned the central-planning methods derived from Stalinist Russia' (Fforde 1993:293).

What then was the situation in 1992, 'year four' of the Vietnamese market economy? Fforde raises three principal questions in his discussion: What do current economic trends indicate for the state of the country when large-scale foreign assistance recommences? What do current trends indicate for the medium-term rural development outlook? And would the Vietnamese polity be able to cope with the immense strains of market-orientated development without an accompanying political evolution?

Fforde provides his readers with a concise summary of the main economic trends in the first half of 1992. On the positive side Vietnam experienced the rapid growth of private and state capital, the inflow of foreign investment, the strong development of the private sector, especially in the retail trade, soaring oil production, and the growth of marine, agricultural and forestry exports.

On the negative side, the state sector continues to be supported by cheap credits and tax breaks. This serves to stoke inflationary pressures and to distort interest rates. In rural areas Fforde notes that the 'new deal' promised by the party in its Decree No. 10 decollectivizing agriculture has failed to materialize. As a result rural credit and market stabilization remain weak, while the terms of trade facing peasant farmers have deteriorated.

Fforde devotes most of his analysis to the prospects for weaning state enterprises from their dependency on cheap credit. In his view, the political influence of the state business sector is a major constraint on the development of strong institutions that are needed for rapid and stable growth. Fforde also foreshadows other potential problems in the countryside and upland areas. Land use conflicts in the Mekong Delta, for example, have implications for foreign investment in land property.

Fforde ends his discussion on a generally positive note in answering his original three questions. Economic trends, he argues, indicate that the state's capacity to absorb resources in future is 'rather good'. As for medium-term rural development, the outlook is also assessed as 'good' if, and Fforde enters several caveats, the

state can develop rural incomes. Finally, Fforde flags the emergence of a relatively autonomous technocratic group and concludes that market-orientated reforms have already resulted in substantial political evolution.

Suki Allen is a medical doctor with practical first-hand experience in Vietnam, particularly in the provinces of Vinh Phu and Ha Tuyen, where she carried out a survey of women's health in the late 1980s. In addition, Allen also bases her analysis on data provided by Vietnam's Ministry of Health, non-governmental organizations and international agencies such as the World Health Organization and UNICEF.

Allen notes that Vietnam, as a developing country, 'has in fact achieved considerable improvements in the health status of the population over the last three decades, to the extent that many health indicators are comparable to those of higher income countries. However, there are also areas where the effects of the poverty and international isolation of the last two decades are easily seen'. The major portion of her chapter is devoted to a detailed discussion of figures assessing Vietnam's current health status and incidence of disease. Malnutrition remains a major health problem, while malaria and dengue fever are the main causes of morbidity.

Allen also reviews the impact of *doi moi* on the public health sector. She singles out four major reform measures which were introduced in 1989: introduction of user-service fees, legalization of private practice, direct sale of drugs on the open market, and the liberalization of the pharmaceutical industry. Of particular interest is her assessment that Decree No. 10, which eroded the role of the agricultural cooperative, led to a 'low point for health services ... in the 1980s', and that recovery is only now underway as a result of changed training, management and financial policies.

The final overview paper was delivered by Carlyle Thayer, a political scientist. His analysis is divided into two parts. The first discusses the resolution of eight major contentious issues raised during the course of amending the 1980 state constitution. These issues are: the role of the Vietnam Communist Party in society; the doctrine of separation of powers; restructuring of the central state apparatus; human rights; reform of provincial government; the role of National Assembly deputy; the question of property and land ownership; and oversight and control of defence and security matters.

In the second part of this overview paper, which contains the bulk of his analysis, Thayer discusses the electoral process leading up to elections for the National Assembly (ninth legislature) held on 19th July 1992. This section includes a discussion of the new electoral law (which requires that every seat be contested and which made provision for independent candidates to stand for election), candidate selection procedures, and the election results.

Thayer's analysis of the election results is both qualitative and quantitative. He provides a detailed discussion of the results in Hanoi and Ho Chi Minh City, the failure of the two independent candidates, and the special case of Mme Ngo Ba Thanh. Thayer notes that the 1992 elections produced some surprises, especially in Ho Chi Minh City where three incumbents and four of six party-endorsed candidates lost. The shock loss of Mme Ngo Ba Thanh is placed within the context of centre-local tensions.

Thayer attempts to tease out patterns from the voting results. He finds, for example, that the percentage vote received for winning candidates declines as one moves from north to south. This leads him to hypothesize 'that the figures reveal that the party machine tended to influence the results in the northern provinces to a greater extent than in the south'. In looking at the backgrounds of successful candidates (central, provincial and local level), Thayer finds that 'regional military and central-level officials received a higher percentage of the valid vote than provincial, local and religious deputies' and that 'the success of the military and its popularity holds extremely well at all levels — central, regional, provincial and local'. The least successful candidates were those from provincial and local levels with backgrounds in state enterprises, mass organizations, government service and the local public health system.

Whatever the variation in vote received, the party's grip on power in the new National Assembly was not altered. Nearly ninety-two percent of deputies were party members. When the ninth National Assembly met to elect state leaders under the terms of the 1992 constitution, the highest positions of state power, in the government and in the organs of the National Assembly, were filled by members of the Politburo and Central Committee of the Vietnam Communist Party.

Detailed analyses of Vietnam's 1992 state constitution are provided by Mme Ngo Ba Thanh (during 1987–92 head of the National Assembly's Judicial Committee) and Levien Do, a solicitor

with the Sydney firm Mallesons Stephen Jacques. Mme Thanh introduces her paper by noting differences between Western concepts of law and Vietnamese concepts arising from local customs and traditional rules of ethics. This theme is also examined in the paper by John Gillespie. She argues that it was Ho Chi Minh who first introduced into Vietnam the notion of 'a state governed by the rule of law'.

Despite the adoption of a state constitution in 1946, and the subsequent promulgation of a new state constitution in 1980, 'law has not become the state's main instrument for economic and social administration and for the protection of the people's right to mastery'. In Mme Thanh's view, it was not until the policy of renovation was adopted in 1986 that the 'rule of law' was adopted as a party objective.

At the 1986 Sixth National Party Congress, the then Secretary-General Truong Chinh stated in the introduction to the party's Political Report:

The management of the country should be performed by law instead of simply by moral concepts. The law is the institutionalization of party lines and policies and a manifestation of the people's will; and it must be applied uniformly throughout the country. To observe the law is to implement party lines and policies. Management by law requires attention to be paid to lawmaking. It is necessary to step-by-step supplement and perfect the legal system so as to ensure that the state machinery be organised and operated in accordance with the law (Hanoi Domestic Service, 15 December 1986).

The Sixth National Congress ratified Vietnam's program of renovation, the main plank of which was to shift from a centrally-planned to a multi-sector economy. Following the congress, as noted by Mme Thanh, the party's line was institutionalized by the adoption of two domestic investment laws, a Law on Private Enterprise, and a Companies Law (with provisions for a Limited Liability Company and a Shareholders' Company). In brief, 'private enterprises have been relegitimated and given equal rights with other enterprises under the law'. Of equal significance, was the 1987 Law on Foreign Investment which was promulgated in early 1988.

The Political Report to the Sixth Party Congress also called for reform of party-state relations, and reform of people's councils at all levels including the national level. In 1987, under the influence of the renovation process, Vietnam conducted elections to the National Assembly (eighth legislature). Restrictions on candidate selection were eased and this resulted in the highest ratio of candidates to seats in the nation's history (even higher than in 1992). In the past candidates were proposed by the local party secretary with little or no popular input. In 1987, reform-minded members of the party put pressure on middle-level party cadres to end their resistance to change. The pre-selection rules were altered so that candidates could be proposed at public meetings. All candidates were required to post their biographies in public.

Deputies elected to the Eighth National Assembly proved to be vocal and on occasion independent. According to Nguyen Xuan Oanh, a deputy to the Eighth National Assembly, 'every session is ... a grilling for the Council of Ministers. It is doing its job of overseeing the Government'. In one notable incident in mid-1988, deputies challenged the party Central Committee's nomination for the post of Chairman of the Council of Ministers. Government ministers were also accused by name of mishandling a food crisis and of failing to slow the country's raging inflation. Various pieces of legislation were amended or delayed; a law on the press was amended twenty-seven times before adoption.

At the end of its tenure, the Eighth National Assembly had passed more legislation into law than all previous national assemblies. According to Mme Ngo Ba Thanh, the Eighth National Assembly 'passed twenty-five laws and forty-nine ordinances (Council of State), to respond to the need for managing the country through the Rule of Law. The Government passed some seventy by-laws aimed at concretizing the Law on Foreign Investment'.<sup>1</sup>

The mandate for the reformist-minded Sixth National Congress expired in 1991 when, according to party statutes, the Vietnam Communist Party held its Seventh National Party Congress. The Political Report to this congress declared (Communist Party of Vietnam 1991:92):

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<sup>1</sup> There is a discrepancy between the numbers of laws and ordinances cited by Mme Ngo Ba Thanh and the numbers given in the party's Political Report to the Seventh National Congress; see below.

As shown by experience over the past few years, in order to renovate and enhance the political system, and to build up and exercise socialist democracy, *the key lies in a clear-cut delineation of the functions of the Party on the one hand and those of the State and people's organizations on the other and a resolution of the relationship among them; a resolute struggle against bureaucratism and violations of the people's right to mastery, coupled with criticism and overcoming of deviations.*

Following in this direction, there have been decisions and measures to change *the organization and mode of operation of State bodies*. Law-making activities have been stepped up. Over the past four years (up to the end of 1990), twenty-four laws and thirty-three decrees were promulgated by the National Assembly and State Council. The sessions of the National Assembly have given a clearer expression of democracy and the rights and responsibilities of people's deputies. The National Assembly's supervisory functions have been strengthened and made more efficient.

The Council of Ministers and people's committees at various levels have taken initial steps in renewing their mode of operation, performed better the work of governing and managing the State by means of the law, and succeeded in solving many major economic and social problems ...

Later in the Political Report, in the section entitled 'Main Orientations and Tasks, 1991-95 Period', point eight (of ten) stated:

To exercise socialist democracy is the substance of renewing and perfecting the political system. This constitutes both a goal and a driving force in the renewal process.

An important condition for promoting democracy is to build up and perfect the legal system, to strengthen socialist legislation, and to elevate the peoples' intellectual level, their level of awareness of the law and their sense of law-abidance...

A number of tasks should be satisfactorily done:

- To amend the Constitution, to strengthen socialist legislation. To continue to construct and amend the legal

system concerning the economy, culture, society, criminal matters, civic affairs, administration, civic duties and civil rights, etc. To improve the skill of State bodies in making laws, to rapidly issue regulations on construction priorities, to promulgate and organize the implementation of the law with a view to helping the State manage in all respects the life of society through the law. To carry out legal education on a regular basis and foster among the people a sense of living and working in accordance with the law.

- To improve the organization and operation of the National Assembly and People's Councils so that they can perform their functions properly. To renovate deputies' qualifications and the rules and regulations for activities regarding National Assembly and People's Council elections.
- To modify the organizational structure and mode of operation of the government; to attach importance to collective discussion while upholding the individual responsibility and authority of the heads of government and ministries in management and executive work.
- To redefine the functions and tasks of province and district and village levels, so as to restructure the organization of each level; to uphold the autonomy and responsibility of the localities; at the same time ensuring uniform guidance by the central government. To build strong administration at village and urban-ward level.
- To improve the effectiveness of law-enforcement bodies. To renovate the operations and organizations of the Procurator's Office and People's Courts. To ensure the necessary conditions and means for them to safeguard the law and fulfil their tasks .... (pp. 136–137).

Following the Seventh Party Congress, political life in Vietnam focused on substantial amendments to the 1980 state constitution. Three separate drafts were produced before the fourth and final draft was adopted on 15 April 1992. Mme Ngo Ba Thanh, in the second half of her paper, places the process of constitutional amendment within the larger context of Vietnam's program of renovation. She chooses to do so by comparing changes in the wording of various articles of the 1980 constitution with the 1992

constitution. For example, the 1980 constitution defined Vietnam as a 'state of proletarian dictatorship'. This was amended to read that Vietnam was 'a state of the people, by the people, for the people'.

The role of the Vietnam Communist Party and its mass organizations, the Vietnam Fatherland Front and Vietnam Confederation of Trade Unions, was likewise re-defined. The party was no longer 'the sole force' leading state and society but 'the force'. A new clause was inserted which required that the party and all of its organizations 'shall operate within the framework of the constitution and the law'. The role of the Vietnam Fatherland Front was no longer the 'firm prop of the state' but the 'political base of people's power'. The Vietnam Confederation of Trade Unions was no longer defined as a 'school of communism' but 'the socio-political organization of the working class and the toiling people'.

Mme Thanh flags three other amendments. Under Article 12 the State was required to exercise administration of society 'by means of the law and shall constantly strengthen socialist legality'. In Article 50, Vietnam for the first time provided for human rights in the political, civic, economic, cultural and social fields. This had important implications for commercial activity, as Mme Thanh pointed out. Finally, Article 72 included the presumption of innocence to those appearing before a court.

Levien Do's paper is a carefully focused examination of several major issues resulting from the amendment of the 1980 constitution. Do first examines changes in Vietnam's political structure, noting the powers accorded to the National Assembly as 'the highest organ of state authority in Vietnam'. He observed that 'the National Assembly will play a important role in the running of the country now that the VCP has placed itself under the authority of not only the Constitution ... but also the law'.

Do then discusses new organs created by the 1992 Constitution caused by the abolishment of the Council of State and Council of Ministers: National Assembly Standing Committee; Prime Minister and Government, and State President. The Standing Committee will act for the National Assembly on matters entrusted to it or when the assembly is not in session. It replaces the Council of State. Collective leadership has been jettisoned and replaced by a 'single leader government', that is, a prime minister who heads a cabinet-style government. This replaces the Council of Ministers. Finally, a new position, the State President, has been created and endowed with substantive (rather than ceremonial) powers.



Do also discusses the role of the VCP under the new constitution in a manner which parallels the discussion in the papers by Ngo Ba Thanh and Carlyle Thayer. He includes a new issue in his discussion of the constitution and Vietnam's foreign relations. Do notes that references to French colonialism, American imperialism and Chinese hegemonism have been dropped, signifying a change in attitude from international isolation to a more active engagement with the outside world (for example the adoption of a multilateral foreign policy).

Vietnam's amended constitution now recognizes five economic sectors including the private sector. This is discussed by Do in his final substantive section. The 1980 state constitution stated that the 'the state holds a monopoly on foreign trade and all other foreign economic relations with foreign countries'. This is no longer the case, particularly after the adoption of the Law on Foreign Investment. Do further notes that the 1992 Constitution expressly sanctions joint ventures with foreign partners (Article 22) and offers a guarantee that 'foreign investment-funded enterprises shall not be subject to nationalization' (Article 25).

In his conclusion, Do calls the new constitution 'a great step forward' but cautions that it is 'still the first of many needed'. He sets as preconditions the development of a reasonably reliable legal infrastructure, a workable bureaucratic system, and consistency in policymaking, before foreigners will invest 'without any reservation'.

The third category of papers presented to Vietnam Update 1992 are concerned with specialist legal matters. John Gillespie provides an overview of the development of commercial legal rights in Vietnam. He commences his discussion by asking, 'in the pursuit of a "mixed market" economy ... is the interplay between private and state rights in Vietnam sufficiently dynamic to allow the emergence of novel and innovative business practices?' This question arises from differing conceptions of 'private legal rights' between western traditions, where moral and legal rights are seen as separate, and Vietnamese tradition. Gillespie argues, 'in Vietnam the distinction is not as acute (as in the west), as legal rights have traditionally only existed as appendages to an overriding moral obligation owed to the central political authority and family'. These differing conceptions may be overcome by 'a convergence of economic cultures' as Vietnam develops a mixed market economy.

One of the key barriers to the availability of property rights in Vietnam is the development of what Gillespie terms an 'amorphous hybrid' legal system. On the one hand, the state retains ownership over land, while on the other hand it recognizes private ownership of the means of production. This has led to a situation where private legal rights flourish in some settings but not in others where they are subject to state regulation 'almost to the point of extinction'. According to Gillespie, state regulation is most severe when private activity impinges upon state planning objectives.

Gillespie identifies party ideology, as reflected in the legal system, as another barrier to the availability of property rights in Vietnam. In Vietnam a distinction is made between 'commercial land' and 'non-commercial land'. Administrative restrictions limit access to commercial land. For example, applicants for commercial land must obtain 'business registration' status from local authorities. This entails convincing the authorities of the need for the proposed commercial activity. Family traders are not eligible for 'business registration' and thus cannot avail themselves of adjudication and enforcement procedures in the event of a contractual dispute. Other restrictions concern the need to seek approval from local authorities to transfer certificates of ownership of buildings erected on commercial land.

Gillespie concludes his discussion by noting that 'in the last few years, the spectacular enactment of a plethora of commercial legislation, outwardly at least, substantiates the rhetorical adoption of a rights based legal system, and this process will only accelerate as more foreign investors enter the economy and domestic enterprises become internationalized.'

But going against this trend are prevailing popular attitudes which Gillespie presents in the form of two propositions. The first is that in Vietnam the total good is preferable to the good of an individual. The state is perceived as the custodian of the total good, and this has led to the widely-held belief that 'if there is no law that permits a business activity, then that activity cannot lawfully be carried out.' The other proposition is that government, and therefore law based on discretionary power, is better than rule of abstract law.

In Gillespie's view, 'on balance, the differences between the treatment of commercial rights in Vietnam and non-socialist Asia, or more particularly, the West, outweigh the similarities'. Vietnam needs time to modify and adopt western legal norms to the realities

of commercial practice. The reform process is likely to be slow and incremental. Gillespie argues that a balance is needed between state and private interests and that excessive state intervention will inhibit commercial innovation.

Nguyen Qui Binh is the author of two separate papers here, one dealing with real estate laws in Vietnam and the other dealing with the corporate income tax structure. The first paper provides background information on the 1987 Land Law and the 1991 Residential Housing Law and argues that as a result of socio-economic development both laws have become outmoded and in need of amendment. As a result of Party Decree No. 10 (August 1988) farmers were permitted to possess some of the means of production and cooperatives were allowed to allot the right of land use. This led to a variety of disputes over land and a divided party on the eve of the Seventh National Congress.

According to Binh there were three separate views regarding the question of land: 'the first advocated that land is a national resource (and) should belong to the people; the second urged ... the reverse; and the third proposed a share of such ownership between the state and farmers'. The Seventh Congress resolved that all land belonged to the people but land could be allotted for long-term use. This was included in the 1992 state constitution. Other contentious matters, such as inheritance and mortgage of the right of land use, were left for later resolution by the government.

In July 1993, after Nguyen Qui Binh wrote his paper, the National Assembly (eighth legislature, third session) adopted a new Land Law. This law permits foreign organizations and individuals to rent land in Vietnam. Anyone who works the land on a stable basis will be issued a land utilization certificate by the state. Farmers who grow short-term crops will be granted certificates for 20 years, while those who cultivate long-term crops will be given 50 years. The terms of access are renewable, which means that the right of access may be inherited, transferred, sub-leased or used as collateral for a bank loan. The new Land Law took effect on 15 October 1993.

Binh's second paper explores the anomalies and inconsistencies in Vietnam's corporate tax structure. Binh notes that 'Vietnam still does not at all possess a unified tax on corporate-source income. Corporate earnings that are derived from different sources are taxed differently, by different pieces of legislation (or laws), at different rates varying according to business sectors and industries'. This

judgment is based on Binh's review of various pieces of legislation, such as the Law on Business Profit Tax, the Foreign Investment Law, and the Agricultural Tax Law. The lack of a unified system has led to problems of tax equity and various types of discrimination, such as between shareholders and wage earners, between various business sectors, and between foreign and domestic enterprises.

Binh argues that the primary purpose of Vietnam's tax policy is to attract investment and the main means of doing so is a low tax regime on corporate incomes. However, existing regulations are full of loopholes and inconsistencies. For example, no specific tax rate is set out for each natural resource group (for example oil and gas, minerals, precious stones). Tax rates are left to the discretion of governmental authorities. Indeed, Vietnam lacks a tax administration body with complete authority to supervise lower levels. Tax officials at the local level are responsible to provincial authorities. Further, tax liabilities incurred by foreign investors are negotiated directly between the foreigner and the local authority.

Binh asks 'if it is necessary for Vietnam to maintain a differing tax rate structure as a sort of incentive instead of using other methods; or whether a system with a single and moderate tax rate for all domestic and foreign enterprises would be far more efficient'. Binh concludes his paper with a reasoned plea for reform. Quite clearly he favours the second option plus increasing the tax rates applied to foreign enterprises so that they equal rates paid by domestic companies. In Binh's view, 'the policy option which is seen as practical in the Vietnamese case is to adopt a gradual approach and to reconcile both the short- and long-term requirements in a longer-run process of reform'.

Irene Nørlund's paper on the creation of a labour market in Vietnam rounds out the discussion of specialist legal issues. Nørlund contrasts the conditions of workers under Vietnam's centrally-planned economy with conditions produced as a result of Vietnam's market-orientated reforms. By the late 1980s, constitutional guarantees of employment, education, training, rest, social insurance, retirement benefits, and sickness and disability cover had been eroded.

Nørlund's main concern is to evaluate the efficacy of steps taken by the government to safeguard the social welfare of workers in a multi-sectoral market economy. She compares Vietnam's 1980 state constitution with that adopted in 1992 and concludes, 'the state is no longer taking the same responsibility for workers' life' as before.

She also examines the provisions of the 1990 Ordinance on Labour Contracts and the Law on Trade Unions (1990). Under the former, life-time employment has been replaced by labour contracts. Nørlund finds evidence that the latter contains provisions which will permit the establishment of independent unions which can defend the interests of the worker. But she is sceptical that this will come about. In her view, 'unions are a part of the political system and their obligations have not basically changed from what they were before'. Nørlund also reviews the provisions contained in the 1990 Regulations on Labour for Enterprises with Foreign-Owned Capital.

Nørlund concludes that quite fundamental changes have taken place in Vietnam with respect to the labour market. But in 1992 'there was no sign of increased activity on the labour market in order to defend the workers interests, and it seems as if the new legislation was mainly of a superficial character'.

The Vietnam Update 1992 conference ended with a panel session in which some of Australia's leading law specialists doing business in Vietnam were represented. The panel consisted of David Laidlaw (Maddock Lonie and Chisholm), Bill Magennis (Phillips Fox), Brian Weir (Freehill Hollingdale and Page) and Noel Fabri (BHP).

David Laidlaw opened the panel discussion by addressing the question of dispute resolution in Vietnam. In his assessment, Vietnam has a very limited established mechanism for orderly dispute resolution, either at the domestic level or with disputes involving foreign entities. The mechanisms for enforcement of arbitral awards are even more limited. The Foreign Trade Arbitration Committee, the non-government arm of Vietnam's Chamber of Commerce, offers a mechanism for arbitration of disputes involving foreigners. But the Committee will not operate without the consent of the parties concerned. Also, and more importantly, there is no mechanism for enforcement that does not involve the goodwill of the parties. At the domestic level, State Economic Arbitrators have established jurisdiction in domestic disputes but they do not have jurisdiction in disputes involving a foreign entity. So, if a dispute arises between joint venture partners one of whom is a foreigner, the State Economic Arbitrators have no jurisdiction. The avenues for enforcement of awards are by no means clear.

Laidlaw spoke next about some of the methods that have been used to resolve disputes. He mentioned that some major investors

have moved to protect themselves by obtaining agreements with their partners. When disputes arise they will be arbitrated in an international forum. As a result, a number of major investors have felt more secure about going into Vietnam. Many of these investors also felt that the scale and focus of their investments meant they could be confident that the Vietnamese government would protect them should disagreements arise.

According to Laidlaw, the careful 'second-tier' investor with more limited resources, and whose focus is primarily commercial, is understandably concerned at the absence of readily identifiable mechanisms which will protect the investor's economic rights and enforce contract obligations. These concerns act as a significant disincentive for this type of investor. There is a realistic appreciation in Vietnam that the absence of a commercial court system does pose obstacles to second-tier investment. Steps are being taken to reconstitute the Foreign Trade Arbitration Committee into a formal international body. The Vietnam Chamber of Commerce has stated that the reorganization has been approved 'in principle' and will be implemented in future. However, there is still no mechanism for the enforcement of the arbitral awards by that committee.

Plans are also underway to remould the State Economic Arbitrators into an economic court with jurisdiction to hear all commercial disputes arising in Vietnam, including the administration of insolvency and bankruptcy laws. The Ministry of Justice was reported to be preparing a draft ordinance for enforcement of arbitral awards for submission to the National Assembly. According to Laidlaw, until these initiatives are properly implemented, the second-tier investor will be required to make an unreasonable commitment of hope and trust along with capital when investing in Vietnam. In this sense, the absence of an orderly dispute resolution process operates as a serious impediment to widespread second-tier investment in Vietnam.

Laidlaw also raised a new question, the provision of aid for legal training. Vietnam needs to develop a sound legal infrastructure. The great majority of Vietnam's lawyers are untrained in commercial law and few have any first hand experience of developed market economies. Australian firms have taken an initial step by offering internships. Laidlaw offered the opinion that 'Australia, through its bilateral aid program, has an opportunity to offer a carefully coordinated legal training program which will establish a basis for lasting legal links with Vietnam.'

Bill Magennis, the second panelist, began by discussing the question of foreign investment. According to him, about 475 licences have been issued, of which approximately 400 were 'alive'. These investors promised a total of US\$3.7 billion in investment funds; but in reality only US\$900 million had actually been committed, a significant portion of which was in the oil industry. In his opinion, Vietnam had a good foreign investment regime and it was very similar to the one that applied in the People's Republic of China. Vietnam had adopted over one hundred pieces of legislation, far faster than its northern neighbour. In Vietnam, he noted, the *Vietnam Investment Review* actually criticizes the regime and things which happen in Vietnam. This could not happen in China.

Magennis then discussed restraints on investment. The first was 'fear', fear on the Vietnamese side. There were two types of fear in his view. The first was a fear of parting with information. Getting information in Vietnam is difficult. Magennis spoke from personal experience in his dealing with the State Committee for Cooperation and Investment. His firm and the SCCI signed a contract to publish legislation relating to foreign investment. About fifty pieces of legislation were published. Initially Magennis thought he would have been flooded with Vietnamese versions of legislation to translate into English. But this was not the case. Why? Because of the inherent fear of parting with information, the Vietnamese were not forthcoming.

During question time, Magennis was asked about the role of self-regulation in Vietnam. He answered that a state-owned enterprise or a private Vietnamese company which wanted to borrow capital from a bank would have to provide certain data. No bank would lend money until a company provided a set of accounts, a balance sheet, and profit and loss statement. In other words, the bank would seek information and any company wanting a loan will be forced to hand over information. This is at micro-level.

At the macro-level Vietnam is providing more information, he acknowledged. This applied to the current state of investment in Vietnam; Vietnamese legislators were asking investors about their problems. Every problem that has been mentioned at this Update has come to the attention of Vietnamese legislators and administrators, he commented. 'They know all about it. It is on agenda for them to do something. There are ideological battles because there are sixty-seven million people, of whom one hundred

thousand run the country. They are not all of the same mind', Magennis added.

Another aspect of fear is that while Vietnam is very keen to develop a market economy they fear being 'taken down' by foreigners. According to Magennis, the Vietnamese know when they do not know something and they fear being taken advantage of. They are reluctant to accept 'a good deal' when they are not sure what the foreigners motivations are.

According to Magennis, another restraint is ideological conflict within Vietnam. There is no 'Vietnam Inc.' Magennis pointed to north-south conflict, where government organizations in the south act independently of direction from the central government. He gave as one example the question of privatisation. It was publicly announced that five companies would be privatized. This did not occur, in his view, because some people who were scared of proceeding managed to stop the process.

According to Magennis the same applied to the Land Law. He recalled that a workshop was held in Hanoi in May 1992 where drafts of the land law were tabled. Vietnamese participants presented a range of views. Some of the participants were clearly ideologues of the old school, and they argued that 'land belongs to the people and nothing would be done with it'. This attitude was reflected in some of the drafts.

Magennis suggested that perhaps the biggest restraint of all is the mortgage situation and the right to use land. He doubted that any bank would grant a mortgage and lend on the strength of a so-called land-use document. 'That means forget Vietnam unless you are going to pay for it out of your own pocket, or you were going to pay for it based on security you provided to your lender outside Vietnam', he said.

Magennis concluded his presentation by noting that capital investment was needed in state-owned companies. On the basis of his discussions with senior investment officials and the chief legal adviser of the SCCI (Professor Luu Van Dat), Magennis estimated that perhaps US\$4 billion in gold and foreign currency lay 'under the mattress' or 'buried in backyards' in Vietnam. Vietnam would need to develop a banking infrastructure, a stock exchange and develop a psychology of trust by the people in these institutions before such funds would be invested.

The third speaker, Brian Weir, offered a comparative assessment of Vietnam's legal system based on his experience in



Vietnam and elsewhere in Southeast Asia. He began by pointing out that many of Vietnam's problems could be found elsewhere in the region and this had not necessarily inhibited foreign investment and trade. He also acknowledged that there was a wide administrative discretion in relation to the enforcement and administration of most of Vietnam's laws. It was not difficult to get a legal judgment or administrative decision, but it was most difficult to be certain that one's contract would be enforced.

Weir also noted that there were problems with land ownership. But this too must be put into context. In his view, Vietnam had come a long way in a short period of time and was catching up fast with its neighbours. 'It will not be long before its legal system is every bit as good as the legal system that we see in Indonesia and Thailand', he stated. By way of example he noted the 'spectacular enactment of commercial legislation' in Vietnam. He recalled that four years ago, when he first went to Vietnam, he could count on one hand the number of laws that were relevant to commercial activity. By way of contrast, there is now an entire volume published on laws which apply to foreigners. There are probably three or four volumes which relate to specifically domestic commerce in Vietnam, he said.

Weir noted that there are always risks when people make investments and that you cannot be sure that a contract will be enforced. At the moment, he said, enforcement has not been tested in Vietnam. 'In Indonesia, the first advice I would ever give to a foreigner if he got into trouble is do not bother going to court', he added.

Weir then compared the system of land ownership in Vietnam with Indonesia. He offered his opinion that he did not think it was essential for Vietnam to convert the entire country into some sort of land ownership system overnight. Indonesia had not done so. It still retained one of the most archaic land use systems that one could ever read about, he commented. Indonesia still had an almost non-existent mortgage rule in relation to a lot of land use. But what Indonesia had managed to do was to focus on commercial uses of land and find a way to make that land useful commercially. The Indonesian land title systems worked in urban areas, and it worked in relation to factories. Weir concluded that Indonesia was probably a better model for Vietnam to look at than the Torrens land title system, which would carve up the country into title blocks.

During the Update Conference David Marr asked the question: are Australian investors going to be like carp, happy to swim in

muddy water, or will they look for clear water? By way of conclusion Brian Weir answered this question in this way: 'Banks do not lend in muddy water and boards and directors of major Australian corporations do not invest in muddy water. If you want investment from banks and major corporations you will have to have a legal system in Vietnam which allows these investors to make justifiable commercial decisions. Muddy water encourages a lot of carpetbaggers. By and large, most Australian companies either need money from their banks or they need to justify the investment to the board of directors.'

During question time Weir responded to a query about self-regulation. According to him, the fact that there are no laws in Vietnam does not mean you have an unregulated society. Vietnam is a highly-regulated society, and the people have a psychology that unless the law says you can do something, there is a general perception among the bureaucracy that you can not do it. In his view, Indonesia was similar to Vietnam except it was a few years ahead. Vietnam's problem is similar to what Indonesia experienced. Four years ago the government began telling people 'you can do whatever you want to do unless there is a law which says you can not'. That message caused a psychological shift in the minds of the bureaucrats.

According to Weir, 'That's one of the big changes where you talk of Vietnam moving to a rule of law, and it has to occur predominantly at the bureaucratic level. The average free-wheeling Vietnamese businessman, and there are a lot of them, are prepared to do anything they can. But there is a problem of getting things from the State Bank and other bureaucracies, because there is a need to see something in writing that allows them to give permission before they give their consent.'

The last speaker, Noel Fabri, briefly addressed the issue of legal practice in Vietnam's petroleum sector. Investment, he noted, takes place under the Foreign Investment Law through negotiation of what is called a business cooperation contract, or more specifically a production sharing contract.

A production sharing contract is a comprehensive document entered into between a private investor and Petro Vietnam, the national oil company. The production sharing contract establishes the legal regime by which investment takes place. It is the system based on both private and public law between the two parties. A production sharing contract is only a framework document and needs

to be supplemented by government regulation and by adequate domestic and international mechanisms which guarantee the investment by a foreign investor.

According to Fabri, there is a need for a petroleum law, for a tax regime to control the tax on petroleum products, and for environmental regulation. Finally, Vietnam will need to examine all the international conventions which are in place and decide to which it should become a party. Vietnam has taken the bold step of signing a number of bilateral investment treaties and these are very important to foreign investors.

The papers delivered to the 1992 Vietnam Update conference, as well as the presentations made by invited panelists, clearly indicate that the objective of transforming the Vietnamese state into a state under the 'rule of law' is a long-term one. Vietnam cannot uncritically import foreign models and apply them to its socio-economic setting. Vietnamese policy-makers must first take into account not just current international practice, but a variety of other factors including Vietnamese culture and psychology. Laws imported into Vietnam must be grafted onto administrative and legal traditions formed on the basis of village custom, Confucian practice, French colonial rule and Soviet notions of 'socialist legality'. This will require a gradual, step-by-step approach.

The process of transforming Vietnam into a state under the rule of law is intimately related to the process of socio-economic renovation now underway. Vietnam, despite its undoubted success in developing a multi-sector market economy, remains a poor developing country. It lacks both the human and capital resources to transform dramatically its capacities to make law, to enforce the law and to adjudicate disputes. However, Vietnam's circumstances are not unique, as the experience of other Southeast Asian states indicates. Vietnam, as noted by participants at the Update, has moved faster than some countries when they were at a comparable state, and is rapidly closing the ground on others who have had a head start.

## **PART 1**

### **SOCIO-ECONOMIC SETTING**



## **The Vietnamese Economy in 1992: Development and Prospects**

**Adam Fforde**

### **Introduction**

Nineteen ninety-two is 'year four' of the Vietnamese market economy, if we date that beast from the abolition of central-planning in 1989. About this there should be more debate. After the rather esoteric 'transitional model' of 1981-89, however, Vietnam's post-1989 economic opportunities and constraints are not so different from those of other mixed economies.

Economic performance in 1990 and 1991 was mixed. Inflation returned and the monetary system remained weak. Both of these problems were to do with the use of cheap credits and tax breaks to support the state sector. Whether this was done as part of a deliberate strategy to buy time and ease adjustment costs, we do not yet know. Certainly by the end of 1991 large numbers of lossmaking state units had been closed or shifted to other forms. The two-tier banking system remained hamstrung by the need to respect the needs of the state sector. The expression in market terms of this were the government-imposed distortions of interest rates: lending rates to the state sector were fixed lower than savings deposit rates, and lower than those charged to other sectors. The impact of this priority upon rural development was also bad: the 'new deal' called for by the Vietnam Communist Party's Decree No. 10, which effectively decollectivized the Mekong Delta and savagely cut the powers of cooperatives elsewhere, was not seen. Rural credit, market stabilization etc remained very weak. The domestic rice price has see-sawed, and terms of trade facing farmers have deteriorated (see Figures 1.4 and 1.5 and Appendix B).

Under the surface, however, private capital and autonomous state capital was developing rapidly. Joint ventures were emerging, often as the 'spontaneous privatization' (sometimes overt,

sometimes not) of the state sector. Retail trade became dominated by the private sector. Foreign capital started to come in rather large volumes (perhaps \$500million in 1991), adopting joint venture forms similar to domestic capital. Regional investors, therefore, did far better since they could find ways of reducing risk at acceptable cost.

Vietnam's integration into the world economy accelerated. With the borders basically open — smuggling was extensive — Vietnam's comparative advantages could be easily exploited. Trade with China blossomed, integrating north Vietnam into the powerful development processes occurring in the south. Ho Chi Minh City started to expand textile and other light industrial exports. Marine agricultural and forestry exports grew. And oil production soared (reaching around 40 per cent of Vietnamese exports in early 1992). The expectation was for these trends to strengthen and form the basis for rather rapid, if chaotic, growth. The political influence of the state business interest was seen as a major constraint upon the emergence of the strong institutions that would be needed for rapid and stable growth. This pointed to political tensions.

Three main questions were provoked by these changes:

- what do these trends indicate for the state of the country when large scale assistance recommences?
- what do current trends indicate for the medium term rural development outlook?
- would the Vietnamese polity be able to cope with the immense strains of market oriented development without an accompanying political evolution?

Let us come back to these at the end of the discussion.

### **Economic development in 1992**

Economic development in 1992 has so far followed the broad pattern forecast. Appendix A gives a summary in note form of the most important events. Economic analysts are now much more optimistic than before about the government's capacity to deal with the issue of the efficiency of the state sector and the speed of growth of the private sector in the capital-scarce north. On the other hand, the forecasts for export growth in 1992 appear unlikely to be borne out, partly because of underreporting to avoid controls. Cash crop exports remain in some areas below expectations. Evidence for deepening

rural problems in certain regions — especially the uplands — is mounting; land use conflicts in the deltas are a knotty problem that is difficult for the government to address, and which impact upon the important issue for foreign investors of land property.

A very broad conclusion to be reached about 1992 so far, however, is that in the short- to medium-term, the problems facing the economy are to a great extent now no longer systemic. Instead, it is the weakness of market growth, and the slow development of the rural economy, that are the main issues. These are not things that can be addressed rapidly by government action. 'Normal' macro-economics largely explains the problems of the second half of 1992, and especially the slowdown in output growth. However, the pattern of growth confirms that the state sector has to a very great extent been 'weaned' from its last remaining source of subsidy — cheap credit.

Against this background the evolving pattern of regional development remains of great interest. In a still largely rural country, it is the villages upon which much of the power structure should depend. In the second section we look at a number of long-term features: the retail market and variations in educational participation and attainment. Economic analysts are increasingly bullish about the north's long-term prospects as the economic system continues to improve and the favourable basic fundamentals therefore able to express themselves more forcefully through the operation of market forces. That this should occur when the prime minister and the economic chief (Vo Van Kiet and Pham Van Khai) are both southerners is striking.

### **Weaning the state sector**

Economic growth in the first half of 1992 showed an extremely interesting turn of events, and a rather unexpected success in the reform process.

There are good arguments for noting the importance — generally against the national interest — of the state business interest in the Vietnamese political economy (see Fforde 1993). Supported by subsidized credits and tax breaks, through 1989–91 the sector was receiving around 90 per cent of credits from the state commercial banks. Farmers were crying out for loans, yet received almost nothing, forcing them to borrow at high rates on the informal market. Despite an overall policy thrust that sought to shift the



sector to a 'level playing field' basis, moves in this direction were proving very difficult. Attention was focussed upon systemic reforms, initially of the state banking system, and then of state enterprises. Neither of these ventures had turned out successfully, not least because the high existing level of subsidy meant that the interests of key actors were opposed to such changes.

The run-up to Tet in early 1992 saw US dollar and gold dealers caught in a classic 'bear squeeze' (see Figure 1.2). Rather than falling sharply in the weeks before Tet, the dong started to increase in value, forcing speculators to unwind 'short' positions and tipping expectations against the dollar and gold.

The government continued to sell dollars and gold through the first two quarters. This, added to a reduction in imports and continued export growth, resulted in an average level of the dollar through the first half of 1992 some 40 per cent below that of the second half of 1991 (see Figure 1).

A large number of state enterprises entered 1992 with new equipment and reorganized management structures. This drew upon the successful 'trial by fire' of 1989-91, which saw many close down. Many state enterprises were also benefitting from spontaneous privatization and foreign joint ventures. Their goods were increasingly competitive on both price and quality grounds. They therefore planned to increase output substantially in order to capture market share. However, through the second half of 1991 the rise in the US dollar (some 40 per cent compared with the first half year) had eroded margins. This had, to some extent been offset by subsidized credit.

To 'wean the state sector', the authorities therefore found that through the first and second quarters cash flow and profitability greatly improved. This enabled the state sector to increase its tax and levy payments and also pay off part of its outstanding unpaid debts. The improvement in margins from the fall in the dollar greatly helped this. However, much of this financial flow was effectively diverted from the state sector to the state budget, without (and this is probably the crucial point) encountering much resistance. The baby was thus given hot chocolate to encourage it to let go

At the same time, ginger was applied in a number of ways. The exchange rate used for calculating equipment depreciation charges was devalued, thus increasing the cost of state capital to state enterprises. Furthermore, as the rate of inflation declined real

interest rates charged to the state sector rose sharply. Early in the third quarter interest rates were reduced, but they were still — and this is very significant — kept very positive in real terms. The reason given was the need to increase national savings mobilization.

As the first half year finished, the rapid growth of the first two quarters was running out of momentum. Demand had not grown fast enough, either in export markets, or domestically. Stocks therefore started to rise, and complaints were increasingly made about the high levels of smuggling and competition from imports. The latter discussions were related to the turn-around in relations with China as well as the confusion in Cambodia. However, there has been no significant shift towards a strong trade protection. Indeed, a trend towards a low revenue tariff designed to ensure high collections is more likely. That is certainly the advice the Vietnamese are getting from the World Bank and others.

It is in this light that the sharp slowdown in Ho Chi Minh City in the third quarter should be seen. Just why domestic demand had been growing so slowly is rather complicated, but the point seems to be that the appreciation of the dong created favourable circumstances for the government to 'wean the state sector', which found itself going into the second half year facing weaker markets and positive real interest rates, but with continued output growth. The analysis of the budgetary and financial position of the government in the first six months shows how the situation had stabilised compared with 1990 and 1991.

The conclusion to be reached, therefore, is that the failure of the equitization and corporatization drives to make any significant headway so far hides a remarkable success in attacking the most important remaining source of subsidy to the state sector — cheap credit. This success appears to have been partly deliberate and partly accidental, but certainly assisted by the favourable effects upon state sector cash flow of the appreciation of the dong and the rapid output growth of the first two quarters. It should also be put beside the large scale development of joint ventures 'under the table', in some cases amounting to the effective privatization of state enterprises — according to some guesses, at 50 per cent in the south and 30 per cent in the north.

Looked at over a longer time horizon, it appears that the period 1989–92 has, as in other 'Young Tigers' been years of a rapid learning process prompted by a crisis lit by severe aid cuts (South Korea and Taiwan). In this process, the government and the Party seem to have

drawn upon the experience of the 1980s and especially the costs and dangers of interfering with the free market. Whether this analysis is correct or not will be easily gauged by observing what happens to the real rate of interest charged to state enterprises. It should stay positive. The recent experiences with the electricity price rise suggest that much has already been learnt about how to assess cries for assistance from the state sector.

The success in 'weaning' the state sector from subsidized credit opens the way for the government to address a number of issues that have been 'on the agenda' for some time. Here the apparent recovery in tax revenue growth in the first two quarters is another important sign, for without resources little can be done.

The appreciation of the dong during the first two quarters was unexpected. Figure 1.2 shows how the rate peaked at just under 14,000 and then stabilized around 11,000 by mid-year. This had two main consequences. The fall was not fast enough to give a year-on-year appreciation (see Figure 1.1), but on a quarter-on-quarter basis the shift between the final quarter of 1991 and the first quarter of 1992 was dramatic (see Figure 1.3). Rather than the depreciation of nearly 30 per cent they had experienced in the final quarter, traders found the dong appreciating by some 8 per cent. Since expectations were for a continued decline, this meant that US dollars were around one third cheaper than expected through the first half of 1992. This had normal effects upon the price competitiveness of exports and imports. Secondly, however, it had a sharp impact upon the demand for M1-type monetary assets,<sup>1</sup> which in Vietnam include US dollars and gold as well as domestic currency. As demand for US dollars and gold declined, demand for dong increased, reducing the inflationary impact of the fiscal deficit. In this way general macro-economic stability was enhanced at the same time as the systemic reforms progressed — a similar pattern to 1989 (and of interest if people want to reflect on the events of 1985).

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<sup>1</sup> M1 refers to basic currency (cash) plus trading bank deposits, that is demand (cheques) deposits.

## Employment and wages

It is striking to note that real wages have kept up. The overall supply demand balance for labour in the main urban centres have been such as to prevent any major shift against the interests of labour. Real incomes have been rising, and on the whole employment creation has matched job losses in the declining state sectors. However, as output growth slowed in early 1992, and bearing in mind the slower than expected pace of light industrial export growth, government worries remain. Appendix B shows the current levels of wages in a number of areas — northern rates are already well below those in the south. It was reported that one effect of the power cuts in Ho Chi Minh City in the second quarter was to push Chinese garment industry capital up to the north, where they were apparently surprised by the potential offered, and the lower wages. This led to some renegotiations when they returned south once power supplies improved.

### *Farmers' woes*

Figures 1.4 and 1.5 show how the position of rice farmers has been hit. Appendix C shows the fall in their terms of trade compared with the middle of 1992. However, domestic prices are now around 25 per cent below world market prices, making exports profitable at the 10,000-11,000 exchange rate level.

### *Retail sales*

The Vietnamese retail sales market grew very rapidly in 1990-91. This was partly because there were important asset shifts from gold and dollar hoards into durable goods, but also because much of the rapid expansion of petty production was recorded as retail sales. It is interesting to note the regional distribution, and also the limited size of the market. Figures 1.6 and 1.9 show this. It implies that both foreign investors and Vietnamese businesses will depend greatly upon export markets for any rapid development that occurs.

## Regional educational differences

Figures 1.7 and 1.8 point to the wide differences in educational participation and attainment throughout the country. These show that the north — including the mountain regions which face great difficulties — has higher rates of schooling than the south, even Ho Chi Minh City. In some provinces of the Mekong Delta around one-third of primary school pupils fail their matriculation exams.

## Conclusions

The weaning of the state sector in early 1992, if sustainable, will have profound effects upon the evolution of the Vietnamese political economy. In allowing government attention and resources to concentrate upon more important and deserving areas — especially agriculture and the private sector, and in reducing the attraction of the state form to private capital seeking joint ventures it is highly positive.

In returning to the questions asked at the start, therefore, one can sketch out the following replies:

- what do these trends indicate for the state of the country when large-scale assistance recommences? They suggest that the capacity for absorbing resources, from around 1993 (once the state wage reforms have been pushed through), is rather good.
- what do current trends indicate for the medium term rural development outlook? If the state can now adopt significant efforts to develop rural incomes, mainly through infrastructural and market support, combined with getting local monopolies off the backs of farmers, then the outlook is good. Rural differentiation is an issue that will depend upon two factors amongst many: the speed of non-agricultural job creation, and the measures taken by the Vietnam Communist Party to develop viable local political institutions.
- would the Vietnamese polity be able to cope with the immense strains of market oriented development without an accompanying political evolution? The existing political evolution is substantial, and the emergence of a relatively autonomous technocratic group is starting to become arguable (Wade 1990).

Figure 1.1

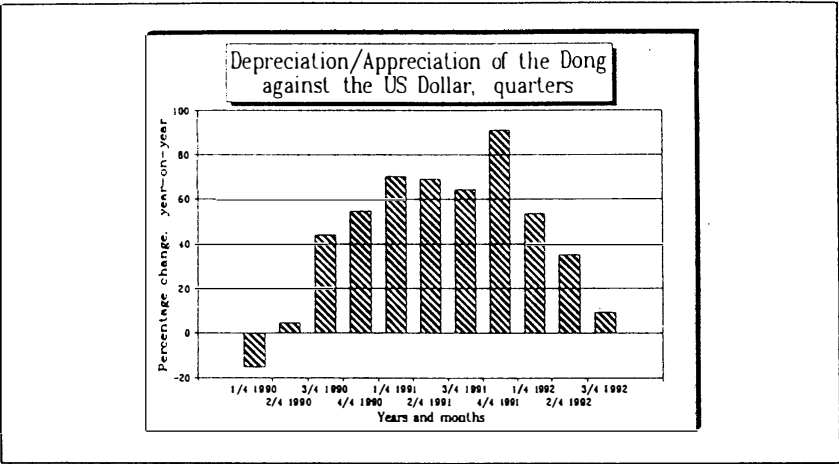


Figure 1.2

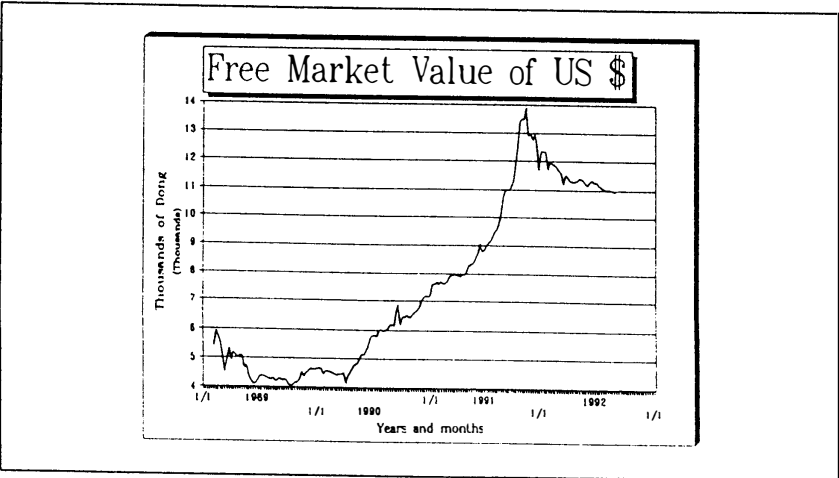


Figure 1.3

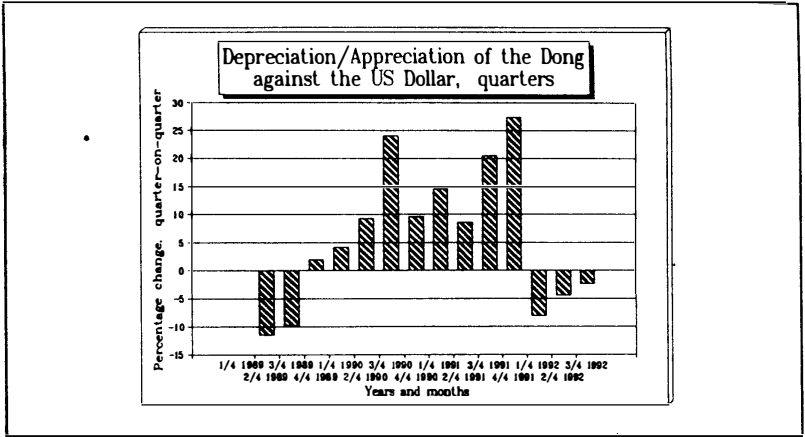


Figure 1.4

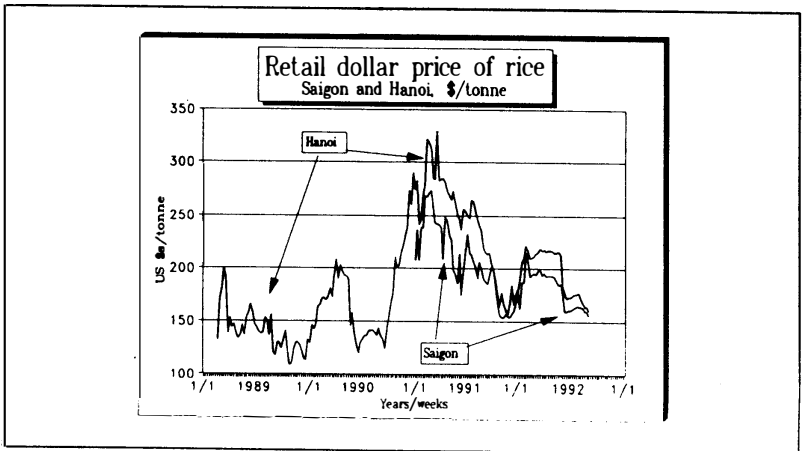


Figure 1.5

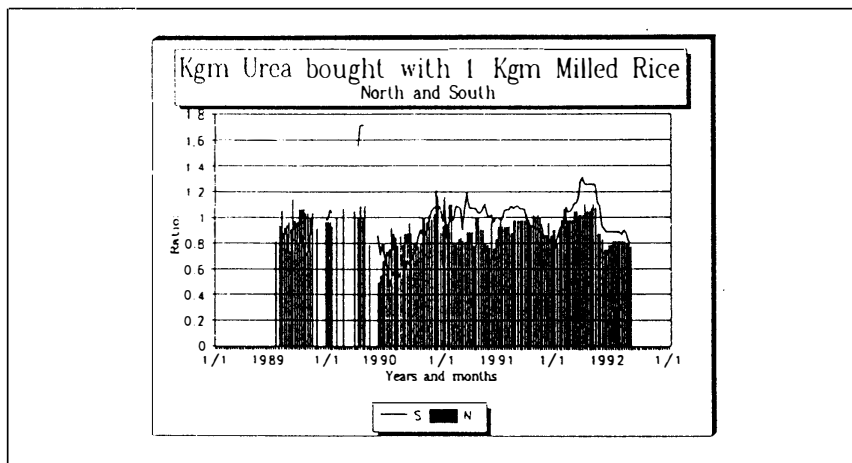


Figure 1.6

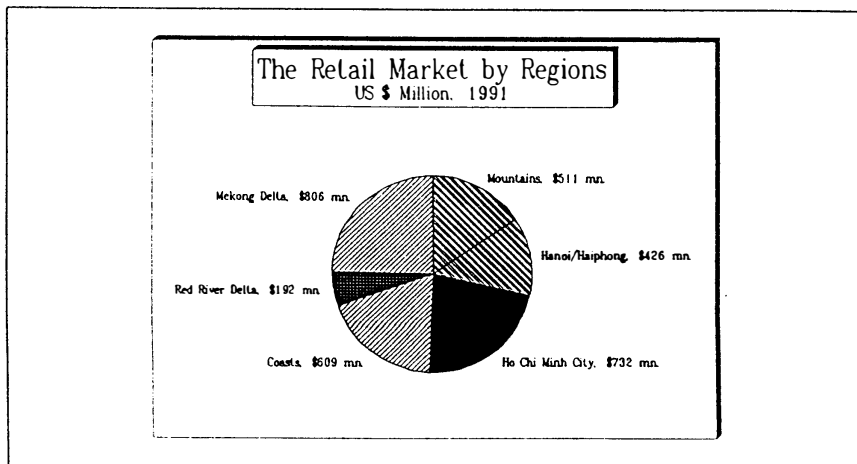




Figure 1.7

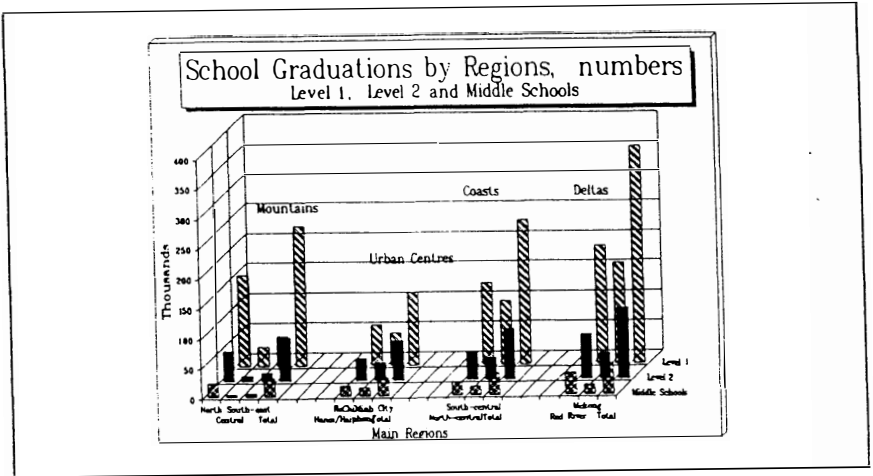


Figure 1.8

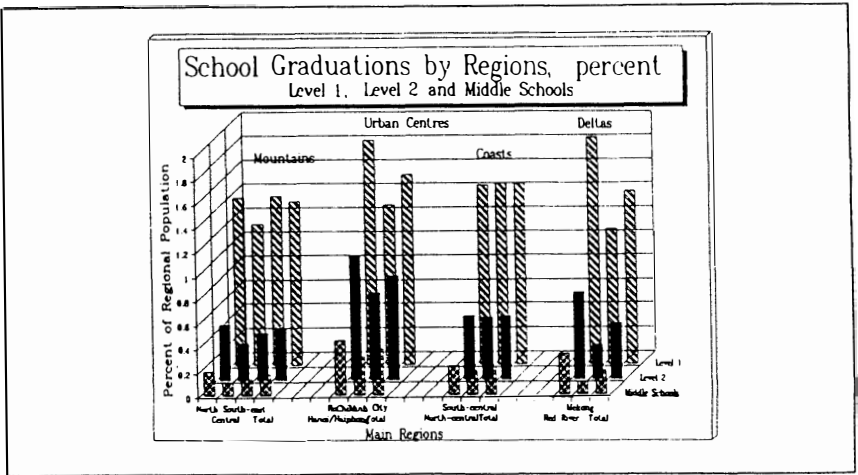


Figure 1.9

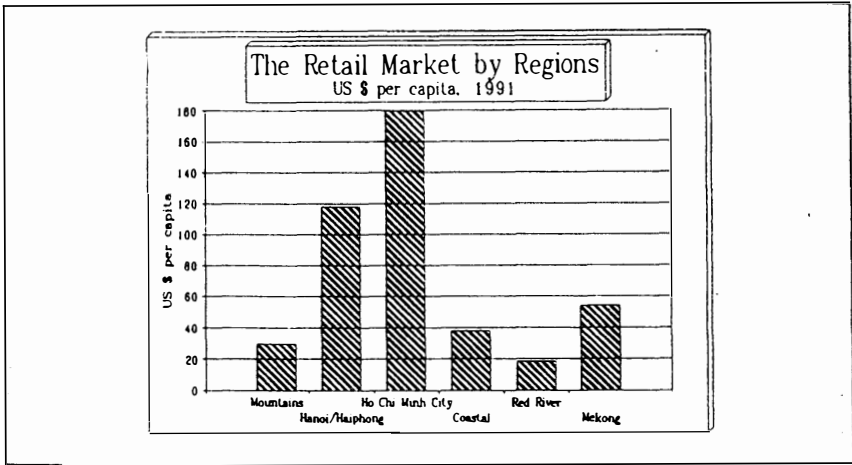
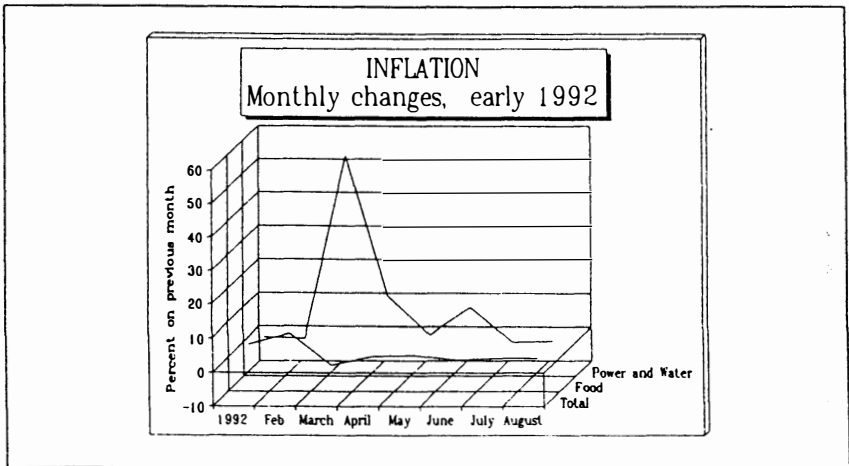


Figure 1.10



## Appendix A

### *The first six months of 1992: the most important events*

**General economic stability; growth still rather slow** - GDP up around 6-7% on the year in the first six months - much of this reflecting recovery in agriculture after early 1991 harvest failure. Political evolution on trend to 'better government' supported by revealed Communist Party support for shift in development priorities away from focus upon state sector. Failure of 'corporatisation' drive rather unimportant as piecemeal measures to raise efficiency of state sector bear fruit.

**Continued high level of foreign inward investment** - around \$ 250-300 mn in total disbursements in the six months - near 2 % of GDP.

**Inflation much slower.** Average monthly price rise: 2.1% - year on year rate down to 36% by June (1991 average: 4.5%); average year-on-year rise for first two quarters: + 48%. Vietnamese Dong appreciated, contrary to expectations, rising from around 12,500 to below 11,000 (previous trough: near 14,000, November 1991) - average appreciation year-on-year in first half: + 40%. Therefore a loss of competitiveness.

**Domestic demand weak** - retail sales up around 5% in volume terms - and not yet replaced by stable export markets. Output growth high in first two quarters but slowing into second half.

**Strong recovery in agricultural output:** up around 16% on the year. Rice harvest for the year now forecast at nearly 21 mn tonnes, up 1.2 mn tonnes - 6% - on 1991. Rice exports in first two quarters around 600,000 tonnes - mainly from stocks. Domestic rice price falling, farmers hit by margin squeeze. Mekong delta rice production flat.

**Industrial growth medium paced and well-balanced:** strong growth in oil and large government projects; total reported industrial growth around 17% year-on-year. Centrally-managed State sector: 30%; locally-managed - 5%. Wide regional differences: Hanoi + 19%; Ho Chi Minh City + 14%; Haiphong + 33%; Quang Nam - Da Nang + 10%. Private sector, especially in north, starting to show rapid growth: Hanoi up around 30% on the year.

**Foreign trade disappointing:** exports only up around 10% on the year despite a 45% volume growth in oil exports and a doubling of rice exports (total trade data probably an underestimate) and imports slowing sharply (down around 20% on the year) - reported trade surplus for first six months of around \$ 150 mn.

**Fiscal position much improved:** state revenues growing far faster than inflation (up around 130% on the year in value terms) and also quicker than state spending (up around 10% on the year in value terms). Fiscal deficit before interest payments therefore declined to an estimated \$ 80 mn - around 1 % of GDP.

**Reforms: major step forward** with ending of subsidised credit to state sector. interest rates cut in third quarter but still positive in real terms

## Appendix B

*Farmers' margin squeeze, 7/91 to 7/92***Paddy**

7/91 - 1,800 d/kg

7/92 - 1,100 d/kg

Price fall: - 39%

**Inputs:****Petrol**

7/91 - 2,800 d/litre

7/92 - 2,550

Price fall: - 11%

**Urea**

7/91 - 2,700-2,800 d/kg

7/92 - 2,200 d/kg

Price fall: - 20%

*Some Wage Levels  
(Vietnamese Factories)*

Ordinary engineering workers: 70-100,000 dong/month; in factories earning high profits, this usually rises to 150-200,000 dong. Similar wages are paid in metallurgy, power and electronics.

Textiles and clothing workers (low skills): 100-150,000 dong in the north and centre; in the south this can go to 150-200,000 dong.

Construction workers: 5-7,000 dong/day for low skilled workers; for skilled workers this rises to 10-12,000 dong and for the most skilled 15-20,000 dong/day.

For food processing workers (especially beer and tobacco), for those in trade and service industries involving foreigners wages rise to 400-700,000 dong/month. The key workers can earn as much as, or more than 1 mn dong/month.

Wages in factories doing putting-out and contract work for foreigners usually earn 300-500,000 dong/month.

The minimum wage for Vietnamese workers in joint ventures is US \$ 30-38 a month.

Source: ADUKI Pty Ltd.

## Appendix C

# Health and the Current Situation and Recent Changes

Suki Allen

## Introduction

The economic crisis of the 1980s and the reform process initiated at the Sixth Party Congress in 1986, known as *doi moi*, has been well documented and discussed. The effects of these changes on the health sector will be the focus of this paper.

## Background

The health sector is organized at four levels — central, province, district and commune. Generally speaking, each level is financed by the people's committee of the same level, which also exerts varying degrees of political influence and control. The nature of the relationship between the different levels of the health service and between the health service and the people's committee continues to change with the ongoing introduction of economic and management reforms. The current situation is a transitional phase which varies from one province to another and with time. Suffice to say, at this stage, that provinces are largely self-funding and are sometimes able to operate with a surprising degree of independence. Only about 10 per cent of total health expenditure derives from central level funds and most of this is spent on central level institutions and hospitals. Additionally, the vertical national programmes, such as the immunization programme, are centrally funded and poor provinces which cannot meet the calculated 'norms' for health expenditure receive some subsidy from the centre. This process goes some way towards smoothing the differences between provinces in resource availability for health, but does not by any means eliminate the differences. For example, Ho Chi Minh City, which raises the largest proportion of central government revenue, has four

times the average per capita expenditure on health while some provinces (not by any means the poorest) spend less than half the average (see Table 2.1).

**Table 2.1: Provincial Health Budget Per Capita (1990)**

Province	Dong per capita	Province	Dong Per capita
Minh Hai	3,900	Kien Giang	2,800
Hau Giang	3,500	Cuu Long	2,400
Ben Tre	3,200	Tien Giang	4,600
An Giang	1,700	Dong Thap	3,800
Long An	3,900	Vung Tau-Con Dau	8,500
Dong Nai	3,300	Tay Ninh	4,000
Song Be	4,400	Ho Chi Minh City	13,800
Lam Dong	3,600	Dac Lac	4,100
Gia Lai - Kon Tum	7,500	Thuan Hai	4,400
Khanh Hoa	3,800	Phu Yen	4,000
Binh Dinh	3,600	Quang Ngai	3,100
Quang Nam Da Nang	6,100	Thua-Thien Hue	2,100
Quang Tri	4,900	Quang Binh	3,200
Nghe Tinh	3,100	Thanh Hoa	2,400
Ha Nam Ninh	2,500	Thai Binh	1,200
Hai Hung	3,000	Ha Son Binh	3,200
Hai Phong	5,100	Ha Noi	4,600
Ha Bac	1,900	Vinh Phu	2,900
Quang Ninh	5,400	Son La	4,500
Bac Thai	3,300	Hoang Lien Son	3,400
Lai Chau	5,500	Lang Son	4,000
Cao Bang	4,200	Ha Tuyen	3,200

About 80 per cent of total health expenditure is spent at province and district level. Management and organizational changes at these levels are currently under way which profoundly effect the control and channelling of funds between district and province. The commune level, which is the main provider of both curative and preventative health services to the community, is supposed to be entirely funded by local (i.e. communal) resources. Since this is considered 'outside' state funds, is not subject to the 'norms' and controls of the other levels and is not reported to the central level, details of health expenditure at this level vary considerably but have been estimated at 10 to 20 per cent of total health expenditure. Before Decree No. 10, which radically changed the role of the agricultural cooperative, the commune supported an extensive social sector ranging from creches, schools and cultural activities to large numbers of healthworkers at both the commune health station and in the work brigades ('brigade nurses'). With the virtual demise of the cooperative structures, the commune was unable to continue to support that level of expenditure, most brigade nurses returned to full time agriculture; health station staff were also compelled to take on other income generating activities as their salaries were consistently postponed for lack of funds. Eventually, in 1989, the central government directed, in Decree No. 123, that the 'state' (i.e. province or district) would pay the salaries of three healthworkers in each commune (with provision for extra healthworkers in large communes). The commune would continue to be responsible for all other expenses including equipment, drugs and buildings.

### **Health status and disease**

It is striking that Vietnam, as one of the poorest countries in the region, has in fact achieved considerable improvements in the health status of the population over the last three decades, to the extent that many health indicators are comparable to those of higher income countries. However, there are also areas where the effects of the poverty and international isolation of the last two decades are easily seen. Health indicators such as infant mortality (45/1,000 births) and life expectancy at birth (65 years) are comparable to those of middle-income countries of the region (National Census, 1989). This is at least in part due to the extensive and comprehensive health network established in the north during the 1950s and 1960s and extended to the south after reunification

(see Table 2.2). This also gives Vietnam health service provision indicators well above the norm for its income level (eg. one doctor/2,694 people compared to one/9,460 in Indonesia, 166 health centres/million population compared to 32/million in Indonesia).

**Table 2.2: The Health Network**

Year	No. of hospitals /million pop.	No. of Health St. /million pop.
1945	5.1	—
1955	4.2	14.6
1965	13.8	299.2
1975	20.1	266.8
1985	12.2	165.0
1989	11.9	66.7

*Source:* Ulrich Vogel, *The Whole of Vietnam Can Be Considered as One Well-Designed Project —Some Reflections on Primary Health Care Experiences in Vietnam, 1945–1985*. University of Swansea, Master thesis, 1987; and Ministry of Health.

**Table 2.3 Literacy by Age and Sex**

Agegroup	Male	Per Cent Literate		Total
		Female		
10-14	94	93		94
15-24	94	93		94
25-34	96	93		94
35-44	96	90		92
45-54	94	79		86
55-64	89	61		74
65+	73	31		48
Total	93	84		88

*Source:* National Census, 1989.



An additional factor contributing favourably to some health status indicators must be the high level of education of the population, especially women (88 per cent of the total population is literate, the figure for women under 45 years is more than 90 per cent) as well as the considerable steps taken to improve the status and position of women over the last 40 years (see Table 2.3).

However, other statistics indicate that for all the achievements there are areas where aspects of health are well below that expected and also where health status and services are deteriorating. The most striking of these is nutrition, where, in spite of the dramatic improvements made in food production and household income since the Sixth Party Congress of 1986, surveys still show high levels of malnutrition amongst children (45 per cent of children malnourished, weight-for-age, 56 per cent height-for-age), which may also be increasing (see Table 2.4). For a proportion of these children, malnutrition starts before birth with 20 per cent of infants born weighing less than 2,500 kg in 1990. It is worth noting that the predominate form of malnutrition is not acute malnutrition (i.e. 'starvation') or wasting manifest in low weight-for-age but the chronic effect of prolonged undernutrition manifest in stunting or low height-for-age. Both types will have detrimental effects on health and intellectual development. Deficiencies of vitamin A (ultimately causing blindness), iron (resulting in anaemia) and iodine (causing goitre and cretinism) are also common in certain sectors of the population. There is no national nutrition programme and both growth-monitoring of children and antenatal care for pregnant women are rare. Most communes lack both the equipment and training to carry out these essential routines.

The main causes of disease are, as expected, infectious diseases; in particular malaria (which is currently increasing sharply), followed by diarrhoea and respiratory infections. The World Health Organization reports a 200 per cent increase in the number of reported deaths from malaria in the last five years and add that the actual number of deaths is probably ten to twenty times greater. Malaria is not yet the main problem in much of the country but is increasing and spreading from pockets in the mountains and highlands, border areas, south coastal areas and where there are large population movements such as demobilising soldiers and migration to and from the new economic zones. Another potentially fatal mosquito-borne disease which is increasing in some areas is dengue fever; efforts to control mosquitoes and reduce the chance of

being bitten would combat both diseases. Water-borne diseases such as gastro-enteritis, dysentery, hepatitis, intestinal parasites, typhoid and cholera take a considerable toll of health status, particularly of children. The problems of malnutrition in children mentioned above are compounded by frequent episodes of diarrhoea and heavy parasite loads causing anaemia.

**Table 2.4: Percentage of Children (Under 5 Years) Malnourished**

Age	1982-1985		1986-1987		1988-1989	
	% malnourished		% malnourished		% malnourished	
Group (months)	Weight for age	Height for age	Weight for age	Height for age	Weight for age	Height for age
0 - 11	21.7	21.5	19.6	28.2	24.5	41.3
12 - 23	59.0	61.3	45.3	50.0	43.8	57.9
24 - 35	62.0	64.7	50.4	55.4	51.4	55.1
36 - 47	56.9	68.3	46.9	56.8	49.8	60.0
48 - 59	55.0	71.8	47.1	55.6	50.3	64.5
0 - 59	52.2	59.7	41.8	49.1	45.0	56.5

*Source:* National Institute of Nutrition, and various surveys.

There is considerable need for further efforts to improve the quality of water and sanitation. Less than half the urban population has access to piped water; less than 10 per cent of the rural population has access to what is considered a safe and adequate water supply. The widespread practice of collecting and using human excreta on vegetable gardens and for fish-raising increases the exposure to fecal pathogens as well as making safer methods of disposal more difficult to introduce, due to the economic effects of the loss of organic fertilizer. Currently about 10 per cent of the rural population has a safe and hygienic latrine and 23 per cent of the urban population is connected to a sewage system.

Control of population growth is a government priority and an economic necessity as population density, particularly in the Red River delta, reaches unsustainable levels with ever-decreasing alternatives available for out-migration. The population growth

rate for the whole country was calculated at 2.1 per cent between 1979 and 1989 (National Census 1989). Although the total fertility rate has fallen considerably (from 5.1 in 1979 to 3.8 in 1989) (see Table 2.5) further falls in population growth rate will be hard-won due to the lag effect of the large numbers of women entering their childbearing age. The government aims to achieve a natural rate of population increase of 1.7 per cent. Whether this is achieved or not, the addition of a further thirty million people to the 64.4 million population over the next twenty-five years is inevitable and presents a daunting challenge.

Profound limitations of the population programme are manifest at district and commune level. In areas outside the major cities, modern methods other than IUDs are rarely available; menstrual regulation and abortion are increasingly used as contraceptive methods, to the detriment of women's health and health resources. Isolated examples of local initiatives at province level show that with effective distribution of and information about alternative contraceptive methods the pattern of use of other methods changes rapidly.

It should be mentioned here that, on the whole, the quality of both health workers and health facilities at all levels is very low; this has probably been falling off since 1975 when the cost of improving health service provision in the south after reunification placed immense pressure on resources for health. This was followed by the withdrawal of foreign aid by most Western countries and China in 1978–79 and the economic crisis of the 1980s which saw resources and the real value of salaries dwindle further. These economic factors are all likely to have reduced the level of investment in human and material resources (training and retraining, equipment, transport etc.), the full effect of which would not become evident until the middle and late 1980's. These factors predate the introduction of *doi moi*, to which many people attribute the deterioration of health services. In fact, many of the current problems in the health sector such as lack of refresher training, deteriorating quality of healthworkers, lack of equipment and drugs and rundown buildings were present in 1988 and have since improved in some regions. There is additional evidence to suggest that in some areas at least, commune-level health services and conditions are now perceived by both healthworkers and community representatives as improving, suggesting that the trough has been reached and improvement is under way, in some provinces at least.

These tend to be the provinces which have addressed the retraining and management issues in good time.

**Table 2.5: Population Figures for Selected Provinces 1989**

Province	Total Population	Population Growth Rate	Population Density/km <sup>2</sup>
<b>Mountain &amp; Midland</b>	10,068,000	2.9	
Lang Son	611,000	2.6	75.06
Bac Thai	1,030,000	2.6	158.58
Vinh Phu	1,807,000	2.9	395.15
<b>Red River Delta</b>	13,576,000	2.3	
Ha Noi	3,056,000	2.3	1426.7
Hai Hung	2,445,000	2.4	958.07
Thai Binh	1,632,000	1.8	1050.87
<b>Central Coast (N)</b>	8,573,000	2.2	
Thanh Hoa	2,993,000	2.6	268.14
Nghe Tinh	3,583,000	2.4	159.07
<b>Central Coast (S)</b>	6,655,000	2.0	
Quang Ngai	1,042,000	1.6	178.06
Phu Yen	642,000	2.3	126.63
<b>Central Highlands</b>	2,491,000	5.8	
Gia Lai-Kon Tum	876,000	4.3	34.13
<b>North-east South</b>	7,797,000	2.8	
Ho Chi Minh City	3,924,000	1.9	1,878.41
Song Be	938,000	3.9	97.89
<b>Mekong Delta</b>	14,171,000	1.9	
Long An	1,120,000	1.8	257.83
An Giang	1,774,000	2.0	518.26
Hau Giang	2,681,000	2.0	434.87
Minh Hai	1,555,000	2.6	203.11
<b>Whole country:</b>	<b>64,412,000</b>	<b>2.1</b>	<b>195.2</b>

Source: National Census, 1989.

## Liberalization of the health sector

The main measures introduced by the Council of Ministers in 1989 were:

1. Introduction of fees for users of health services, with a long list of exemptions including children, war invalids and other handicapped people, families of healthworkers and very poor families if certified as such by the commune people's committee.
2. Legalization of private practice, including 'after-hours' private practice by state healthworkers using public health facilities.
3. Direct sale of drugs on the open market to individuals as well as to healthworkers and facilities.
4. Liberalization of the pharmaceutical industry.
5. Extent of the private sector and direct drug sales.

Private practice does not seem to have become as popular as had been anticipated by many observers. Several surveys in both rural and urban areas have consistently shown that the commune health centre is still the most common place that health care is sought (see Table 2.6). Private practice accounts for two to 15 per cent (the higher figure is for the city of Hai Phong) of consultations; however, what is striking is the consistently high proportion (46-67 per cent) of people who self-treat with drugs bought in the market without consultation.

This can be contrasted with a comparable figure of one per cent for a survey done just before the legalization of market drug sales (small quantities were available but illegal), 1991). It seems that unsupervised direct drug sales have been substituted for consultations, rather than private practice. This is both expensive and detrimental to personal health as inappropriate drugs are often sold in the wrong quantities and doses, side effects can be severe, particularly for children and the elderly, and it is said that there are a large number of fake drugs on the market. The practice also reduces health service utilization when opportunistic health education, screening and preventative activities can be undertaken.

**Table 2.6: Surveys on Health Seeking Behaviour****A. Three Districts in Vinh Phu, Thanh Hoa & Ha Tinh Districts  
1990**

‘What do they do if any member of their family falls ill?’

Action	Income Bracket			Total per cent
	Low per cent	Middle per cent	High per cent	
Nothing	8	6	6	6
Buy medicine	40	56	67	55
Traditional Drugs	61	1	2	2
Call Physician	43	3	3	3
To Health Centre	41	34	22	33
To Hospital	1	0	0	0
To Private Clinic	1	0	0	0

*Source:* Ministry of Health, Baseline Survey for the Bamako Initiative. 1991.

**B: Household Survey of Three Wards in Hai Phong (Urban Area),  
1990**

Action taken by family when someone is sick.

Action	Per Cent
Buy medicine for self-treatment	55
Consult private doctor	15
Go to health clinic	7
Go to polyclinic	7
Go to district hospital	12
Go to province hospital	3
Total	100

*Source:* Ministry of Health, Strategy for the Protection of the Population 1990–2000. 1990.

### C. Phu Luong District, Bac Thai Province, 1992

'With specific illness in the last two weeks, what did Phu Luong people think and do first? '

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All illness	Per Cent
Buy drugs	46
Traditional medicine	24
No treatment	9
To commune health service	8
To district hospital	4
Call doctor	3
Private healthworker	2
Other	3
Mild Illness	
Buy drugs	49
Traditional medicine	27
CHS/Hospital/PC	13
Severe Illness	
Buy drugs/traditional medicine	60
Commune health service	27
Polyclinic/hospital	53

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Source: Hanoi School of Medicine, *Health Population and Socio-Economic Conditions in Phu Luong District, Bac Thai Province*. 1992.

### Conclusion

There is a scarcity of data and information on conditions in the health sector prior to 1988. However, it seems likely from the trend in health indicators and what little evidence there is that the real crisis or low point for health services came in the 1980s, following a period during the 1960s and 1970s of considerable improvement in

health care for most people in the north and after 1975, in the south. The last three decades have seen a dramatic improvement in infant mortality rates and life expectancy at birth as well as the establishment of an impressive health service network. The quality of care and physical resources deteriorated through the 1980s and may now be starting to recover through the implementation of retraining and management strategies for integrated primary health care, as well as the effective use of revenue (eg. user fees and drug fund profits). The introduction of private practice and user fees has not changed health seeking behaviour as much as has the availability of drugs on the market, which is now the most common initial response to episodes of illness. Malnutrition remains a major health problem even though real incomes and food production have both increased in the last three years. Infectious diseases associated with poor standards of water supply and sanitation as well as mosquito-borne diseases (malaria and dengue fever) are the main causes of morbidity, with malaria showing a steep recent increase associated with drug resistance and high death rate.



## Recent Political Developments: Constitutional Change and the 1992 Elections

Carlyle A. Thayer

### Introduction<sup>1</sup>

Since at least 1986, Vietnam has been embarked on the path of political reform. This has led to increased freedom of expression, an attempt to revitalize mass organizations, a continuous campaign against corrupt party officials, and attempts to improve the efficiency of state organs under a new system of law. As the current slogan puts it, paraphrasing Abraham Lincoln, Vietnam aims to create a state 'of the people, for the people and by the people'.

Vietnam's reform efforts slowed noticeably in 1989, with the collapse of communism in Eastern Europe and the Soviet Union. In 1990, Vietnam banned discussion of political pluralism and dismissed its foremost inhouse advocate from the party's Politburo. Nevertheless, Vietnam's leaders appear agreed on the need to continue economic renovation by continued internal reform and by opening Vietnam's door to the outside world, especially the free market economies of the Asia-Pacific region.

In 1992 political reform efforts focussed on two major areas: constitutional reform and National Assembly elections. These will be discussed in this chapter.

### Amending the state constitution

The collapse of communist regimes in Eastern Europe sparked debate within Vietnam about the causes of this unexpected turn of events. It

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<sup>1</sup> Based on Thayer 1992a, Chapter One.

also sparked intense discussion about the role of the Communist Party in Vietnamese society. Official interpretations concerning the collapse of communist regimes range from the 'strategy of peaceful evolution', which blames the machinations of American imperialism, to the corruption of top party leaders. The political debate in Vietnam was circumscribed by party officials who, in 1990, banned public discussion of such issues as pluralism and multiparty democracy.

The Seventh Party Congress (June 1991) conceded some ground to party critics in the matter of political reform. But the congress rejected out of hand any criticism of the leading role of the Vietnam Communist Party (VCP) in society and the ultimate goal of building socialism in Vietnam. The congress acknowledged the need for gradual political reform and moved to manage the process carefully.

Since the Seventh Congress the amendment of the 1980 state constitution has been the central focus of political reform efforts and public discussion in Vietnam. The 1980 constitution has been amended only twice since its adoption. In December 1988, the preamble was modified to drop hostile references to China and the United States. In June 1989, the National Assembly amended and supplemented seven minor articles. At the same time the National Assembly set up the Committee to Amend the Constitution (*Uy Ban Sua Doi Hien Phap*) under the chairmanship of the head of the State Council, Vo Chi Cong, to consider fundamental constitutional reform.

The Committee to Amend the Constitution held eleven plenary sessions in the period up to July 1991. It produced two confidential drafts, the first of which was considered by a special meeting comprising National Assembly deputies, high-ranking and medium-level cadres of all ministries, sectors, committees and mass organisations at the central and provincial levels, special zones and cities directly subordinate to the central government. The second draft was submitted to the ninth session (eighth legislature) of the National Assembly, which recommended that a third draft be prepared and issued to the public for discussion after which the Committee to Amend the Constitution would prepare a final draft for adoption.

The third draft of the constitution was released in late December 1991. After a period of several months' public discussion a fourth draft was prepared and submitted to the eleventh session of the National Assembly which met in March 1992. This draft was

subject to such close scrutiny, heated debate and amendment that the National Assembly had to extend its session by several days before the draft constitution (amended) could be adopted. This was done on 15 April 1992. The same session of the National Assembly also promulgated an electoral law and a law on the reorganization of the National Assembly.

### **Contentious issues**

During the course of public discussion, it was clear that there were at least eight major contentious issues. The first concerned how the role of the Vietnam Communist Party in society should be described. At issue was the wording of Article 4 in the 1980 Constitution, which described the VCP as 'the only force leading the state and society.' The third draft altered this by dropping the word 'only', so Article 4 now reads the VCP 'is a leading force of the state and society'. The amended Article 4 also added as the next sentence, '[a]ll party organizations operate within the framework of the Constitution and law'. At the eleventh National Assembly an attempt was made to alter this last sentence to specify that all party members were subject to the law. This was rejected on the grounds that it was redundant as all party members were Vietnamese citizens and were subject to law anyway. The only other change to Article 4 was to expand the clause which stated that the party follows Marxism-Leninism by including 'The Thoughts of Ho Chi Minh'.

The second contentious issue concerned the doctrine of 'separation of powers' (executive, legislative, judicial) as found in the American Constitution. This was rejected at the outset by the VCP and the Committee to Amend the Constitution. Advocates of the doctrine of the separation of powers were charged with attempting to weaken if not undermine one-party rule. The final version made clear that the National Assembly 'is the people's highest representative agency and the highest organ of state power of the Socialist Republic of Vietnam. It is the sole constitutional and legislative agency... The National Assembly exercises its supreme right of supervision over all operations of the state (Article 83).' In other words, the executive and judicial branches are not independent and are subordinate to the National Assembly.

The third contentious issue involved the restructuring of the central state apparatus and the highest leadership bodies. This issue was disputatious because it involved principles, pragmatism

and personalities. With the inauguration of *doi moi* in 1986, if not before, it was clear that Vietnam's state machinery was cumbersome and inefficient. The system of collective leadership was not working, as no one took individual responsibility for policy failures. In addition, too many senior party officials held dual or overlapping positions in the government. This led to a paralysis in state policy-making due to unclear lines of authority when a party member interfered in the running of the state bureaucracy.

By the time the third draft of the constitution was drawn up, a consensus had emerged that the collective leadership system within the Council of Ministers was not working and should be replaced by a 'one leader system'. A variety of options were considered before the Committee to Amend the Constitution opted for a prime ministerial system. The Council of Ministers was abolished and replaced by a prime minister and cabinet-type government. The prime minister was to be elected by the National Assembly and given the responsibility of appointing ministers, subject to National Assembly approval. The cabinet government was considered 'an executive organ of the National Assembly' and responsible to it.

However, given constitutional changes in the Soviet Union and the various powers adopted by Gorbachev and Yeltsin, Vietnam's constitutional reformers had second thoughts about giving too much power to any one individual. Vietnam opted to balance the powers of the prime minister by creating the position of the prime minister by creating the position of state president with constitutionally designated powers. The president, who is head of state, is to be elected by the National Assembly and responsible to it. The president will act as commander-in-chief of the armed forces and chairman of the National Defence and Security Council. He also will have the power to recommend dismissal of the prime minister, the chief justice of the Supreme Court and the chief procurator of the Supreme People's Organ of Control. Previously, Vietnam's Council of State was the collective presidency of the country, with its chairman serving as a largely ceremonial head of state. The Council of State has been abolished and replaced by a National Assembly Standing Committee, which will take charge of legislative affairs when the National Assembly is not in session. The position of chairman of the Standing Committee offers a potential third check on the powers of the president and prime minister.

The fourth area of contention concerned human rights. Reformers noted that the 1980 constitution made no mention of human rights

*per se*, and that its provisions for civil rights (freedom of speech, press, assembly, association and worship, for example) were formal and not observed in everyday practice. In the compromise which was hammered out, human rights were interpreted broadly, but were counterbalanced with an enumeration of the obligations of citizenship. Attempts to underline the importance of human rights by bringing the article forward in the constitution did not succeed.

The third draft of the constitution stated that 'all human rights are respected and protected.' In the version which was finally adopted (Article 50), this was amended to read, 'all human rights in the political, civil, economic, cultural and social fields are respected and manifested as citizens' rights stipulated in the constitution and law.' Article 58 gave citizens the right to ownership and inheritance, while Article 68 guaranteed that Vietnamese citizens were free to travel both within Vietnam and overseas — 'as stipulated by law'.

The fifth area of contention concerned provincial government, its organization and relationship to the central government. According to one non-communist technocrat, '[i]t's a myth that we have a strong centralized government in Vietnam. Power has been decentralized to forty-eight provincial governments. You have forty-eight little kingdoms...' (Bello 1992). In an effort to overcome this, Vietnam's reformers called for a thorough restructuring of Vietnam's system of local government.

Previously local government was in the hands of people's committees. These committees were the standing bodies of popularly elected people's councils. In practice the local party machine controlled and ran the people's committees with little reference to the people's councils. Reformers called for the breaking up of existing provinces into smaller units, to accord with the province structure existing prior to unification. They also called for people's committees to be renamed administrative committees. These were to be subordinated to the central government by giving the Prime Minister the right to appoint and to dismiss the chairman of the local committee.

The 1992 constitution reduced the size of local government while retaining its previous nomenclature. Although the prime minister was given the right to dismiss local leaders, he could only appoint them on the recommendation of the local people's council. The National Assembly, which had approved a number of changes in provincial boundaries in 1991, decided not to proceed with the

further subdivision of existing units (see Appendix B which lists the new provinces).

The sixth area of contention concerned the question of how to create a professional National Assembly deputy. The issue here was that the role of National Assembly deputy was not a full-time one (Nguyen Dien 1992:6-7). All deputies occupied two or more positions in government, including directorships or board memberships in local state enterprises. There were huge demands on an individual's time, not to mention possible conflict of interest. In the course of constitutional debate, it was decided to reduce the number of deputies from 496 to 395. A certain proportion, to be determined by law, were to be selected as full-time specialists based on specified criteria. These professional full-time deputies were to take charge of managing the affairs of seven National Assembly committees charged with responsibility for some aspect of Vietnamese society and external affairs.

The seventh area of contention concerned the question of private ownership, and private land ownership in particular. Party conservatives successfully fended off calls to legalize private ownership of land. The constitution, while recognizing private ownership of the means of production, only granted the right of access to land and the right for this access to be inherited. At the same time, the constitution stipulated that 'legal property of individuals and organizations shall not be subjected to nationalization' (Article 23).

The eighth area of contention concerned oversight and control of defence and security matters. Reformers successfully argued for the creation of a National Assembly Committee on National Defence and Security, similar to other committees with responsibility for domestic affairs (public health, education, etc.). At the same time, the conservatives retained the previously existing National Defence Council, now renamed National Defence and Security Council. The new president will chair this council and has the power to nominate its members.

### **Elections to the National Assembly (ninth legislature)**

On 19 July 1992, thirty-seven million Vietnamese voters went to the polls to elect 395 deputies to the ninth legislature of the National Assembly. This assembly is now serving a five-year term that commenced September 1992. This assembly has been given the

important task of carrying out the reform of Vietnam's administrative structure under the newly amended state constitution, and to develop the foundations for a political system governed by law. This is no mean task, as the Vietnam Communist Party exercises virtual unchallenged power and its influence pervades all institutions in society.

The July 1992 elections were conducted under an electoral law which specified that each electoral unit had to possess more candidates than places. For the first time independent candidates were permitted to run. Prior to the elections, the Vietnam Communist Party determined the broad composition of the ideal National Assembly. This included representation for party and government institutions, the military, mass organizations, ethnic groups (see Table 3.1) and 'social forces' making up Vietnamese society. The VCP then turned over responsibility for the vetting and selection of candidates to the Vietnam Fatherland Front.

Each of the 601 candidates had to pass through a complex vetting process in order to qualify. Once the broad composition of the ideal National Assembly had been determined, organizations comprising the Fatherland Front, such as those for women, youth, veterans, trade unions, scientists, etc., began to negotiate and lobby to secure representation. This occurred at national level, where just under 100 places were reserved for central level officials, and also at provincial and local levels. Under the terms of the electoral law, all candidates had to support Vietnam's socialist orientation and policies of socio-economic renovation.

During this period each prospective candidate had to present himself/herself to a meeting at their residential area and another meeting at their work place. These meetings scrutinized each candidate's application and *curriculum vitae* before voting on their suitability to stand for election. The Fatherland Front then determined which candidates qualified for the final list; this involved changes to the original list.

According to official figures provided by the Office of National Assembly and State Council, the final candidate list included: 538 party members (89.5 per cent) and 63 non-party members (10.5 per cent). One hundred and nineteen incumbents stood for re-election. There were 133 female candidates (22 per cent) and 103 ethnic minority candidates (17 per cent). The candidates as a group were more highly educated than any previous National Assembly, with 219 holding a higher university degree (48 per cent). Finally, the

list of candidates included four Buddhist monks, four Catholic priests and four persons from the private economic sector.

**Table 3.1**

**National Assembly candidates by ethnic background**

Ethnicity	N =		
Ba Na	3	Kho	2
Ca Tu	1	Kho Mu	3
Cao Lan	2	Khome (Khmer)	11
Cham	2	Kinh (82.7%)	497
Chau Ma	2	Muong	2
Chau Ro	2	Muong	7
Dao	8	Nung	5
E De	5	Rac Lay	1
Gia Rai	1	San Diu	1
Giay	2	Se Dang	1
Gie Trieng	1	Stieng	2
Ha Nhi	2	Tay	15
Huong	8	Thai	9
Hoa (Chinese)	1	Tho	1
Hre	1	Van Kieu	2
Kadong	1		
<b>Total:</b>	<b>601</b>		

The campaign period lasted roughly a month. Voting lists were prepared and made public. Candidates were encouraged to meet with the voters in their local areas. Electoral councils established at each level of administration took charge of propaganda activities designed to educate the voter on procedures to be followed on election day. Candidates' biographies were posted in prominent locations. The day before the elections were held, street parades and motorcades once again publicized the importance of getting out the vote.

Meetings between voters and candidates focussed overwhelmingly on local issues. Candidates were repeatedly asked



what they would do if elected to improve living standards, to lower corruption, and to end smuggling.

On election day, voting began at 7 am and concluded twelve hours later. Voters came to the polls with their entire families and presented their voter registration card to officials manning tables with the voters' lists. Once names and details had been checked, the voter was given a ballot with the names of each candidate. The voter then voted in secret at a booth shielded by curtains. Voters cast their ballots by striking off the name(s) of the candidate(s) they did not wish to elect. They then deposited their ballot in a sealed wooden box. As the voter exited, his/her voting card was stamped by officials. After the close of polls, local citizens were chosen as observers to watch the breaking of the seal on the ballot boxes and the official counting of votes. These were the procedures set out in the electoral law. They appear to have been observed by officials as there were few complaints of irregularities subsequently.

Voters interviewed by the author, who observed the proceedings as an 'official reporter' (*phong vien*), predictably offered a range of opinions on the elections. Some stated they would favour the younger candidates. Others said they would vote for religious figures, because they were deemed to be independent. Vietnamese intellectuals said privately that 'all had been settled in advance', or that the election campaign had been 'boring'. Others confessed to having difficulty in deciding which candidate among the list of highly qualified candidates to strike out. This contrasted with official media reports which proclaimed the elections 'a festival of democracy' and 'the most democratic election ever'.

### The election results

Two days after the election the results for Hanoi were announced,<sup>2</sup> followed by the results for Ho Chi Minh City and Hai Phong the following day.<sup>3</sup> The results for the entire country on a province-by-province basis were published in a series in *Nhan Dan* running from

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2 'Voice of Vietnam Network' in Vietnamese, 21 July 1992.

3 'Voice of Vietnam Network' in Vietnamese, 22 July 1992.

22 to 29 July.<sup>4</sup> After a second round of elections,<sup>5</sup> the final official figures were released (see Table 3.2).

**Table 3.2**  
**Official voting results**

No. of electoral units	158
No. of deputies elected	395
No. of candidates	601
No. of registered voters	37,524,453
No. of actual voters	37,195,592
Voter turnout	99.12%
No. of valid votes	36,837,427
Valid voter turnout	99.03% <sup>6</sup>

The announcement of detailed election results followed the same format. Figures were given on a province-wide basis and included: the number of seats to be filled, the number of candidates, the number of registered voters, the number who actually voted, the percentage turnout, and the number of candidates elected. Immediately after this, the results of each electoral unit within the province was given. This included the names of the successful candidates along with the percentage of valid votes received. No data was given for unsuccessful candidates and no other details of voting results at electoral unit was provided.

<sup>4</sup> National results were also published in the army's newspaper, *Quan Doi Nhan Dan*, and major city dailies such as *Hanoi Moi* and *Saigon Giai Phong*. Provincial newspapers provided local results.

<sup>5</sup> The elections failed to produce a result in Hoa Binh province's second electoral unit and in Thanh Hoa province's sixth electoral unit; runoffs were held on August 9, 1992.

<sup>6</sup> Differing figures have been released. The Electoral Council gave the figure for the national eligible voter turnout at 99.12 per cent, while Vu Mao, of the Office of National Assembly and State Council, gave a figure of 99.08 per cent. See 'Voice of Vietnam Network' in Vietnamese, 5 August 1992.

If official figures are correct, 0.97 per cent or 358,165 of the votes cast were invalid. According to Vietnamese sources consulted by the author, a high percentage of these invalid votes were cast by the intelligentsia in protest at what they perceived to be a limited choice of candidates. This was reportedly true in residential areas surrounding universities and research institutes in Hanoi.

There has been some speculation that the figures for the percentage of voter turnout may not be accurate (eg. according to official figures 99.23 per cent of eligible voters turned out in Hanoi).<sup>7</sup> Nevertheless, an examination of the official figures, even with their limitations, offers some interesting findings. In the words of one veteran Vietnamese journalist, the election produced 'some surprises at who were not elected, and some non-surprises'. An overview of these figures will be discussed separately below, after examining the results in a few selected provinces and municipalities.

## Hanoi results

Hanoi voters interviewed by the author prior to the election said they would vote for younger candidates who held high qualifications. The results seem to confirm this. Thirty-two candidates contested twenty places. Ten of the twenty winners held university degrees, and this was seen as part of a move to bring younger, skilled technocrats into the system.<sup>8</sup> The highest vote getter was Professor Ton That Bach, a surgeon in his forties (and also son of the famous surgeon Ton That Tung, descended from the Nguyen royal family). He received 91.96 per cent of the valid votes cast.<sup>9</sup>

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<sup>7</sup> Jacques Bekaert (1992) noted that voting was not compulsory and that a break down by district was not given.

<sup>8</sup> Biographic details have been taken from, 'Danh Sach Nhung Nguoi Ung Cu Dai Bieu Quoc Hoi Khoa IX Theo Tung Don Vi Bau Cu Trong Ca Nuoc,' *Nhan Dan*, 24 July 1992. This list includes three PhDs in science, two Master of Science degrees, two MA degrees, two engineers and one professor whose qualifications are not listed. Another source states that fourteen of the twenty deputies held a university degree. Reuter dispatch from Hanoi, *The Nation*, 23 July 1992.

<sup>9</sup> 'Ket Qua Bau Cu Dai Bieu Quoc Hoi Khoa IX Tai Thu Do Ha Noi,' *Hanoi Moi*, 22 July 1992.

According to a party official interviewed by a veteran Western journalist, 'This was a very spontaneous vote, as Professor Bach is a very good man, totally dedicated to the well being of the population. He is a man of great moral integrity' (Bekaert 1992). Another official source interviewed by the same journalist stated, 'The vote for Professor Bach is a great lesson. It shows that people respect those who are honorable. It is a lesson for the party's leadership' (*ibid.*). Such appears to be the case as well with Buddhist Superior Monk Kim Cuong Tu, who, despite his 78 years, was successful because voters felt he was a man of integrity and independent-minded. If there were any surprises in the Hanoi results, it was that party Secretary General Do Muoi, 75, failed to top the list of popular candidates. He received only 80.29 per cent, well behind Professor Bach. This meant that nearly one in every five voters crossed Muoi's name off the ballot.<sup>10</sup> Losers in Hanoi included the heads of five city enterprises (including the head of Sel Electronics, a successful private firm),<sup>11</sup> four local government cadres, one local union representative, the deputy principal of a general school, and the head of a city hospital.

### Ho Chi Minh City results

The greatest election surprises occurred in Ho Chi Minh City, where thirty-six persons, including eleven incumbents, ran for twenty-four seats. Three incumbent deputies were defeated,<sup>12</sup> and four of the six candidates endorsed by the Municipal Fatherland Front Committee also lost. These included: the deputy secretary of the city Communist Youth Union, a member of the city War Veterans' Association; the vice chairman of the city Peasants' Association and the chairman of the city Federation of Trade Unions. Other losers in Ho Chi Minh City included three directors of state-owned

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<sup>10</sup> AFP dispatch from Hanoi, *Business Times*, 22 July 1992.

<sup>11</sup> Sel's director was one of only four private businessmen who stood for election. See: Reuter dispatch from Hanoi, in *The Nation*, and *The Straits Times*, 23 July 1992.

<sup>12</sup> Ngo Ba Thanh, Nguyen Hieu Liem (director of the Phuoc Long city agricultural service) and Nguyen Anh Tuyet (deputy secretary general of the city Association of Architects).

companies, a city government cadre, and the director of the city Institute of Social Sciences. The shock loss of Mme. Ngo Ba Thanh, one of only two centrally endorsed incumbents to lose, will be discussed separately below.

Of the twenty-four successful candidates, seven were identified as holding university degrees, including three PhDs, one MD, one Master of Science and two MAs. Unlike Hanoi, the party' senior officials, Politburo members Vo Van Kiet and Phan Van Khai, topped the voting list with 88.02 per cent and 87.01 per cent, respectively.

Other winners included the deputy secretary of the city Party Committee, head of the city People's Council, the director of the city Public Security Office, the commander of the city Military Command, the chairman of the city Fatherland Front Committee, the head of the city Women's Union, the editor of *Saigon Giai Phong* (the city party newspaper), a Buddhist monk, and a Catholic priest.

### The case of Mme Ngo Ba Thanh

Perhaps the greatest election surprise was the defeat of incumbent Mme Ngo Ba Thanh. Mme Thanh is a non-party Western-educated lawyer who is well known in Australia and internationally for her role in the Third Force movement which opposed the Saigon government prior to 1975. In recent years, Mme Thanh has become prominent for her role as head of the Judicial Committee of the National Assembly.

Mme Thanh ran for re-election in Electoral Unit No. 4 of Ho Chi Minh City which included Districts 5 and 10, an area with a high percentage of ethnic Chinese. Four candidates contested three seats. In addition to Mme Thanh, these included premier Vo Van Kiet, a Chinese businesswoman, Ly Kim Mai, and Professor Chu Pham Ngoc Son, head of the city Union of Science and Technology.

Officials on the Ho Chi Minh City Electoral Committee told the author that they recommended Mme Thanh contest a safer constituency but that she insisted on running in Electoral Unit No. 4. During the electoral campaign Mme Thanh confided to colleagues that she faced a tough fight. She publicized the fact that she had

been endorsed not only by the central level but by the Party Central Committee itself.<sup>13</sup> This proved a double-edged sword.

Voters in Ho Chi Minh City complained that Mme Thanh had absented herself too often and had lost touch with the day-to-day realities of her constituency. She was perceived as currying favour with the authorities in Hanoi to the detriment of her relations with local authorities. Disagreements arose on a number of issues, such as how to deal with a housing scandal and legal protection for the accused. Mme. Thanh's threats to clean up corruption by local government officials after the election turned them against her. They feared she would get even tougher after the election. Ngo Ba Thanh charged that rumours were spread in her electoral unit highlighting her deficiencies and that voters were told to cross her name off the ballot.

While Mme Thanh sometimes criticized the party, she supported its economic reforms and defended its opposition to political pluralism. This angered the more reformist and independently-minded voter. After the election, one Hanoi civil servant involved in the electoral proceedings said people voted against Mme Thanh because she failed to fulfil a promise to create a better legal system.<sup>14</sup>

Diplomats stationed in Hanoi were surprised by Thanh's defeat. One Western diplomat said Mme Thanh had been favoured by the party and her defeat was a technical mishap due to the presence of too many popular candidates in one constituency. According to a veteran party member there was another explanation, 'Her defeat is a victory for the [party] mafia' (Bekaert 1992). Mme Ngo Ba Thanh was edged out by Ly Kim Mai. According to one of the successful candidates from this constituency, Mme Thanh successfully carried one of the two electoral units but was overwhelmingly defeated in the other, an area containing a large number of Hoa (ethnic Chinese) people.

Immediately after the results were announced, Mme Thanh went on BBC World Service to air her grievances and to charge that fraud had been committed. Mme Thanh lodged a formal complaint to the

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<sup>13</sup> Interview with a successful non-party candidate from Ho Chi Minh City.

<sup>14</sup> Kathleen Callo, Reuter dispatch from Hanoi, 23 July 1992, reprinted in *The Nation*, 24 July 1992. This view was expressed to the author in interviews conducted in Ho Chi Minh City.

Electoral Council. Her complaint was later dismissed by the Council, which declared tersely that it had found 'no evidence of fraud'.

### **Independent candidates**

Forty-three persons attempted to register as independent candidates.<sup>15</sup> Several independent candidates who initially met the legal requirements to run were pressured to drop out or were disqualified on technical grounds. Other potential independent candidates, such as the prominent non-party intellectual Phan Dinh Dieu and the radical critic (and expelled party member) Duong Thu Huong, were dissuaded from running.

During the vetting process only two independents qualified and were put on the ballot: Tran Van Minh, director of a state import-export company in Ha Tinh; and Dinh Tan Phuoc, deputy head of a primary school in Quang Ngai. One Japanese journalist tried to follow the campaign trail of these two remaining independents. In Quang Ngai he was told it was a 'bad idea' to come because there were 'no candidates campaigning that day'. In Ha Tinh province the journalist was able to see candidates, but only under the watchful eye of plainclothes security men. Later, a long-time senior party member stated, 'Yes, there was a certain degree of harassment against independent candidates' (Bekaert). Not surprisingly, both independent candidates lost.

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<sup>15</sup> Officials in the Office of the National Assembly and State Council refused all requests for complete details on these independent candidates. About half came from Hanoi and Ho Chi Minh City. The others appear to have been scattered throughout the country, particularly in the north-central provinces.

## What the figures show

This discussion of the National Assembly election results may be extended further if we take the official figures at face value and relate them to the composition of candidates who ran and to the deputies actually elected. The author used the official biographies to classify candidates into one of five major categories: central level officials; province level officials; local officials; regional military; and religious representatives. These categories may be defined as follows:

- Central - holding posts at central party, central state, central military or national-level association or institution.
- Provincial - holding posts at province party, province government, province military, or province-level association or enterprise.
- Local - holding posts at district level or below in party, government, military, security or local-level association or enterprise.
- Military - commander of a military region comprising several provinces, excludes central, provincial and local-level military posts.
- Religious - any national, provincial or local figure identified by a post in a Buddhist or Catholic religious body.

Table 3.3 below sets out the electoral success rate for each of these five categories. This table shows that the vast majority of candidates came from the provincial and local categories (83 per cent), and that the provincial category represented nearly 63 per cent of all candidates. Yet the results also indicate that a disproportionate number of military and central candidates were successful. Religious candidates did well, and the loss of one seems problematic.<sup>16</sup> The failure rate for provincial-level candidates was

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<sup>16</sup> The sole unsuccessful religious official was Rev. Luong Quang Duc, parish priest of Hung Nghia parish, Hai Hung village, Hai Hau district, Nam Ha province.



just over a third, while well over a half of local-level candidates were unsuccessful.

**Table 3.3**  
**Success rate for candidates grouped by classification**

	Not elected		Elected		Total Candidates	
	N	%	N	%	N	%
Military	0	0	7	100.0	7	1.16
Central	3	3.5	83	96.5	86	14.31
Religious	1	12.5	7	87.5	8	1.33
Province	133	35.2	245	64.8	378	62.90
Local	69	56.6	53	43.4	122	20.30
<b>Total</b>	<b>206</b>	<b>34.3</b>	<b>395</b>	<b>65.7</b>	<b>601</b>	<b>100</b>

**Table 3.4**  
**Percentage of valid votes received by classification**

Classification	N=	% Vote
Regional Military	7	87.17
Central	83	85.61
<i>Average</i>	-	78.11
Provincial	246	76.65
Local	53	72.65
Religious	7	72.25
<b>Total</b>	<b>395</b>	

Table 3.4 sets out the percentage valid vote received by successful candidates in each of the five categories. The average successful candidate received 78.11 per cent of the valid vote cast.

These figures show that regional military and central-level officials received a higher percentage of the valid vote than provincial, local and religious deputies. Regional military figures appear to be the most popular.

The five basic categories may be further subdivided into party, government, military, mass organization/association, dual (party and government), public security, public health, government cadres, enterprise and 'other' as shown in Table 3.5. See Table 3.6 for an illustration of how this scheme was applied to unsuccessful incumbents.

Table 3.5 (which illustrates success rates for candidates by category) and an analysis of the percentage of valid votes received, reinforce the previous observations about the popularity of the military. The success of the military and its popularity is exhibited at all levels — central, regional, provincial and local. Candidates holding dual party-government posts, performed well at central and provincial levels. At local level, however, the party's success rate drops sharply (100 per cent at central level and 83.7 per cent at provincial level) to 57.1 per cent.

Least successful at both provincial and local levels, are candidates belonging to the categories of state enterprise, mass organizations, government cadres and officials in the public health sector. Least successful are members of local organizations. Of the seventeen candidates representing local organizations who were not elected, eight were members of the Women's Union, seven were members of the Fatherland Front Committee and two were members of the Peasants' Association.

If electoral popularity is measured in terms of the percentage of valid votes received, the results reveal the popularity of all central level categories (government, military, party and mass organization) and the popularity of dual provincial elites, and provincial representatives of the party, military, public security, government and 'other' sectors.<sup>17</sup>

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<sup>17</sup> The 'provincial other' category includes members of art troupes such as renovated traditional opera, folksong and popular opera.

**Table 3.5**  
**Candidates grouped by electoral sub-classification**

	Elected		Not Elected		Total candidates	
	N	%	N	%	N	%
<u>Central</u>						
Party	19	100.0	0	0.0	19	100
Military	6	100.0	0	0.0	6	100
Government	38	97.4	1	2.6	39	100
Organizations	20	90.9	2	9.1	22	100
<u>Province</u>						
Military	12	100.0	0	0.0	12	100
Dual	7	100.0	0	0.0	7	100
Government	43	93.5	3	6.5	46	100
Party	36	83.7	7	16.3	43	100
Public Security	7	77.8	2	22.2	9	100
Other	3	75.0	1	25.0	4	100
Public Health	4	66.7	2	33.3	6	100
Organizations	35	63.6	20	36.4	55	100
Government cadres	68	53.5	59	46.5	127	100
Enterprise	20	39.2	31	60.8	51	100
<u>Local</u>						
Military	1	100.0	0	0.0	1	100
Public security	1	100.0	0	0.0	1	100
Party	8	57.1	6	42.9	14	100
Government	13	52.0	12	48.0	25	100
Enterprises	11	50.0	11	50.0	22	100
Public health	4	50.0	4	50.0	8	100
Government cadres	4	33.3	8	66.7	12	100
Organizations	6	26.1	17	73.9	23	100
<u>Other</u>						
Regional military	7	100.0	0	0.0	7	100
Religious	7	87.5	1	12.5	8	100
Education	15	44.1	19	55.9	34	100
<b>Total</b>	<b>395</b>	<b>65.7</b>	<b>206</b>	<b>34.3</b>	<b>601</b>	<b>100</b>

Table 3.6

**List of Eighth National Assembly incumbents who lost their seats in the  
July 1992 National Assembly elections**

Name	EC	Position	Organization
Ngo Ba Thanh	CG	chairman	National Assembly Judicial Committee
Duong Xuan An	CMO	vice chairman	Vietnam Confederation of Workers
Tran Quang Dung	PE	director	Beer and Soft Drinks Factory
Nguyen Hieu Liem	PE	director	Animal Husbandry Enterprise
Tran Mai Huong	PEN	principal	School for the Gifted
Dao Tan Loc	PGC	head	Province Science and Technology Committee
Truong Nghiep Vu	PGC	chairman	Province Office Fatherland Front
Doan Tan Nang	PGC	deputy director	Province Electricity Service
Ho Van Dieu	PGC	chairman	Province Nationalities Committee
Nguyen Anh Tuyet	PMO	deputy-secretary general	City Architects' Association
Le Thi Thanh Mai	PMO	chairman	Province Women's Union
Duong Huu Giao	PMO	vice chairman	Province Federation of Trade Unions
Sang Van Mao	PMO	deputy	Province Fatherland Front Committee
Chau Kim Seng	LG	chairman	District People's Council
Huynh Thi Huong	LGC	head	City Service Education and Vocational Training
Ho Van Bay	LMO	chairman	District Association Peasants'
Tran Thi Sua	LP	secretary/ chairman	District Party Conunittee

## Notes:

EC - electoral classification: CG - central government; CMO - central mass organization; PE provincial (state) enterprise; PEN - provincial education; PGC - provincial government cadre; PMO - provincial mass organization; LG - local government LGC - local government cadre; LMO - local mass organization; LP - local party.

Provincial party officials are much more popular than their local counterparts, and those occupying dual party-government posts at provincial level are more popular than any category, including the military at regional and central levels. At local level, the military is the most popular of any category.

In terms of least popular it is striking that most local categories fall below the national average of valid votes received. Local enterprise and local party rank the lowest. At provincial level, educators, public health workers, heads of state enterprises, mass organizations and government cadres rank below the average.

What is of interest is that the secretary general of the Vietnam Communist Party, Do Muoi, did so poorly in comparative terms. His 80.29 per cent of valid vote received, while above the national average for successful candidates (78.11 per cent), is nearly one standard deviation below the mean for Central Committee members. Among the sixty Central Committee members, Do Muoi ranked 52nd from the top (see Appendix 4.A). Five of the nine members of the Politburo fell in the bottom half of Central Committee members in terms of percentage of vote received. These are, in descending order, Vo Van Kiet, Phan Van Khai, Le Phuoc Tho, Do Muoi and Bui Thien Ngo. Top vote-getters among the Politburo, in ascending order, were: Vu Oanh, Le Duc Anh, Nong Duc Manh and Doan Khue. Khue is a general and minister for Defence .

Appendix 4.B sets out the average percentage vote received by winning candidates by province. Provinces are identified as being in the north, centre and south. Of interest is that when provinces are listed in rank order on the basis of the average percentage of valid vote received by winning candidates, the list moves geographically from north to south. Most northern provinces rank above the average (exceptions are Hai Hung, Ha Bac, Hai Phong and Hanoi), while southern provinces fall below the national average (exceptions include Kon Tum and Quang Binh in the centre and Minh Hai in the south).

On the basis of earlier work by the author, it has been established that party membership is unevenly distributed. Party membership is higher in the north than in the south. The former Nghe-Tinh province has the most party members. A sociologist interviewed in Hanoi on the eve of the elections stated that with respect to the northern rural provinces, it was his belief that the local voter would follow the wishes of the party machine. Jacques Bekaert, who observed the elections first-hand, concluded that the

election campaign also spelled the need for more work to develop 'the Vietnamese way to democracy' (*ibid.*) Finally, one post-mortem concluded:

Nevertheless not everything has been accomplished as wished. Voters of various social strata did not give an equal heed to the elections. One important reason was the lack of time for adequate preparations and explanations to the electorate. It is also to be frankly recognized that a number of localities had not fully grasped the spirit of renovation in the organization of the elections this time and had proceeded in a routine way, resulting in rather bad effects on the voters ('A Great Festive Day,' *Vietnam Courier* 34 August 1992:4).

On the basis of fragmentary data, it might be hypothesized that the figures in Appendix 4.B reveal the party machine as influencing the results in the northern provinces to a greater extent than in the south. The conservatism of northern provinces and the role of the party machine may explain the very high percentage votes received by candidates from these areas.

Table 3.7 presents data on the the top four Central Committee members who scored one standard deviation above the mean, all located in the north. By the same token, elections in municipalities directly subordinate to the central government (Hanoi, Ho Chi Minh City and Hai Phong) and southern provinces were relatively less influenced by the party machine. Cities tended to have higher education levels. In the provinces the party machine was relatively weak. The percentage winning vote for candidates from these areas is lower and appears to be more dispersed among the candidates. Indeed, the Central Committee candidates who ranked last in popular vote also scored below the average vote received by winning candidates in their home province.

**Table 3.7**  
**Comparison of personal vote received with provincial average vote**

Name	Province	Personal %	Province %	Rank/53*
<i>Central Committee candidates who scored above one standard deviation</i>				
Nguyen Duy Quy	Nghe An	98.72	88.96	5th
Nguyen Manh Cam	Nghe An	98.01	88.96	5th
Do Van An	Son La	97.30	83.30	15th
Le Kha Phieu	Thanh Hoa	96.66	85.15	11th
<i>Central Committee candidates who scored below one standard deviation</i>				
Do Quoc Sam	Hai Phong	76.74	74.99	35th
Nguyen Van Chinh	Tien Giang	75.58	70.35	45th
Phan Minh Tan	Dong Thap	72.20	69.21	48th
Truong My Hoa	Ho Chi Minh	62.70	69.90	47th
Nguyen Van Tu	Dong Nai	62.06	68.39	49th
Le Xuan Trinh	Quang Nam	58.46	72.13	41st

\*Three municipalities and fifty provinces.

## The Ninth National Assembly

According to official figures,<sup>18</sup> the composition of the 395 deputies elected to the Ninth National Assembly consist of:

	<i>Per cent</i>
party members	91.60
non-party	8.40
intellectuals, university graduates /post-graduate degree holders	56.20

<sup>18</sup> Party membership figures were provided by Vu Mao, Voice of Vietnam Network in Vietnamese, August 5, 1992; all other figures are from: 'Cuoc Bau Cu Dai Bieu Quoc Hoi Khoa IX Da Dien Ra Tot Dep Trong Khong Khi Ngay Hoi Lon Cua Nhan Dan Ca Nuoc,' *Nhan Dan*, 21 September 1992.

incumbents re-elected	26.07
women	18.48
ethnic minorities	16.70
members of Fatherland Front/ mass organizations	14.93
religious representatives	1.80
state management sector	31.13
agricultural sector	14.68
industrial sector	4.81
political cadres	10.88
members of the armed forces	9.62
educational sector	6.07
artists or writers	5.06
public health sector	4.06

These categories are not mutually exclusive and may vary from the categories employed by the author in earlier sections.

On 19 September 1992, Vietnam's newly elected National Assembly met in Hanoi to elect state leaders under the terms of the amended state constitution. The leadership of the party over the state apparatus was reinforced with the selections made. Nearly 92 per cent of deputies were party members. The highest positions of state power, in the government and in the organs of the National Assembly, were filled by members of the Politburo and Central Committee of the Vietnam Communist Party.

As early as the fifth national party congress in March 1982, the Central Committee criticized the 'chaotic overlap between party and state institution' caused by the appointment of these 'dual-role' elites. This situation seems to have been perpetuated.

The party's grip on power was revealed in the choices made. Le Duc Anh, Vo Van Kiet and Nong Duc Manh were elected unopposed as president, prime minister and chairman of the National Assembly's Standing Committee, respectively.<sup>19</sup> These men rank second, third and tenth (out of thirteen) on the ruling Politburo. Nguyen Thi Binh was elected Vietnam's first female vice president. She is a member of the Central Committee.

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<sup>19</sup> Anh was elected unanimously, Kiet was unopposed and received a vote of 98.48 per cent, Manh received 384 of 392 votes cast or 97.96 per cent.



Pham Hung, also a Central Committee member, retained his post as chief justice on the People's Supreme Court. Le Thanh Dao (not a Central Committee member) was appointed chief prosecutor of the Supreme People's Organ of Control.

In the new government which was announced after the elections, only two changes were made to the portfolios held by previous ministers.<sup>20</sup> Several state commissions and committees were upgraded to ministerial-level rank.<sup>21</sup> Of the thirty-four ministerial posts filled, all but four were held by members of the party's Central Committee, or 88.2 per cent.

With one exception, the National Defence and Security Council is composed entirely of Politburo members. Party dominance is only slightly less pronounced in appointments made to other organs of the National Assembly. Of the thirteen members of the Standing Committee, eight were also members of the party's Central Committee, or 61.5 per cent. The dominance of the party Central Committee on the seven National Assembly Committees, was least marked, with only three (43 per cent) being headed by Central Committee members.

## Conclusion

This paper has addressed only two major areas of political change: 1992 constitutional reform and elections for the 9th National Assembly. It is clear from field work conducted in Vietnam that the main impetus for reform and change in Vietnam is coming from within the Vietnam Communist Party itself, both as a reaction to events in Eastern Europe and the Soviet Union, but more particularly as part and parcel of the internal processes of *doi moi* begun in 1986.

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20 The ministers of Health (Pham Song) and Energy (Vu Ngoc Hai) were replaced.

21 The heads of the State Committees on Cooperation and Investment, Population and Family Planning, Care and Protection of Children, Ethnic Minorities and Mountainous Regions, and State Planning were upgraded and given ministerial rank. The State Science Committee was upgraded to the Ministry of Science, Technology and Environment. The Ministry of Culture, Information and Sports was renamed the Ministry of Culture and Information, and the Ministry of Trade and Tourism was shortened to Ministry of Trade.

The most recent leadership changes represent a careful balancing of interests. The appointment of a woman as vice president and an ethnic minority (Tay) member to the post of chairman of the National Assembly's Standing Committee are not only symbolically important but significant in their own right. Vietnam needs to draw upon the talent of its women, who represent over half of the population.<sup>22</sup> Ethnic minorities need to be brought into the development process both economically and politically if Vietnam wishes to avoid the ethnic antagonisms which have appeared elsewhere .

More importantly, the three top leaders — Do Muoi, Le Duc Anh and Vo Van Kiet - represent the north, centre and south respectively.<sup>23</sup> They also represent different sections of the party. Do Muoi has his base in the party apparatus, Le Duc Anh holds sway in the military and security sector, while Vo Van Kiet represents those in favour of opening up to the outside world and creation of a market economy. All would appear to agree that economic reforms must continue and that political reforms must be adopted gradually.

What then of the new National Assembly? Clearly it is dominated by the party, yet when compared with previous national assemblies it is a younger and better educated body. On the basis of the performance of deputies at the first session of the ninth National Assembly, it is likely these younger, better educated individuals will play an increasingly constructive if not vocal role in shaping legislation in the future. While all major legislative programs will be vetted by the party in secret, the open debates of the National Assembly will serve as a check, if only a minor one, on policies of the Vietnam Communist Party.

Vietnam's communist regime is not in danger of being overthrown from within by a disgruntled peasantry or outraged working class responding to appeals by emigres from abroad. It is, however, beset by criticism from Vietnam's intelligentsia both within and outside the party (see Thayer 1992b:359-364). The regime has tarnished its image through corruption, mismanagement and occasional policy

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22 The Women's Union was active in the recent elections in lobbying for increased representation.

23 *Bac, trung, nam, cung mot nha* — 'north, centre, south, all under one roof' (all one family).

failures. It can no longer rely on history (past struggles against foreign intervention and past dogmas) to legitimate fully its leading role. Success in managing economic development is vital if the party's critics and the broad masses are to be kept on side. Economic success, which involves opening Vietnam's door to the outside, must also be accompanied by the full implementation of the political reform measures now under consideration.

## Appendix 4.A

Voting results in the 19 July 1992 election to the ninth National Assembly:  
Central Committee members listed by percentage of valid votes received

% Vote	Name	Organization
58.46	Le Xuan Trinh	State Planning Commission
62.06	Nguyen Van Tu	Vietnam Confederation of Workers
62.70	Truong My Hoa	VCP CC/Vietnam Women's Union
72.20	Phan Minh Tanh	VCP CC Dept Mass Motivation
75.58	Nguyen Van Chinh	Vietnam Peasants' Association Central Committee
76.74	Do Ouoc Sam	State Planning Commission
78.21	<i>Average vote received by all 601 candidates</i>	
78.51	Le Xuan Tung	City Party Committee
79.09	Bui Thien Ngo	VCP Politburo/Ministry of Interior
79.52%	<i>One standard deviation below mean</i>	
80.29	Do Muoi	VCP CC Politburo/VCP Secretary General
81.13	Huynh Cuong	National Assembly eighth legislature
82.52	Pham Van Tra	Military Region Three
83.25	Hong Ha	VCP CC Dept International
83.33	Truong Tan Sang	City Party Committee
83.46	Nguyen Thi Than	National Assembly Committee
84.43	Vu Dinh Cu	National Institute of Technology
85.65	Do Phuong	Vietnam News Agency
86.58	Le Phuoc Tho	VCP CC Politburo/CC Dept Organization
86.72	Nguyen Van Sy	Province Party Committee
86.85	Ha Dang	VCP CC Dept Ideology and Culture
87.01	Phan Van Khai	VCP Politburo/Council of Ministers
87.48	Do Quang Thang	Secretary of the VCP CC Politburo
87.72	Pham Van Hy	Province Party Committee
87.78	Nguyen Binh Giang	Province Party Committee
88.02	Vo Van Kiet	Council of Ministers/VCP CC Politburo
88.35	Vu Oanh	VCPCC Politburo
88.45	Phan Thu	General Dept Defence Industry and Economic
90.08	Nguyen Trong Xuyen	Ministry of National Defence
90.10	Le Van Tu	Province Party Committee/People's Committee
90.35	Nguyen Duc Hoan	Province Party Committee
90.60	Huu Tho	Newspaper, <i>Nhan Dan</i>
90.94	Nguyen Ha Phan	Secretary of the VCP CC Politburo
91.33	Nguyen Trong Nhan	Vietnam Red Cross Association
91.36	Tran Thi Thanh	Vietnam Child Care and Protection Committee

91.42	A Ma Pui	Province People's Committee
91.94	Dang Huu	State Science and Technology Commission
92.12	Dang QuanThuy	Military Region Two
92.20	Do Binh Duong	Province Party Committee/People's Council
92.66	Vu Mao	National Assembly Office and State Council
92.74	Nguyen Khanh	Council of Ministers
92.76	Le Duc Anh	VCP CC Politburo
92.94	Dao Dinh Luyen	Ministry of National Defence
93.16	Ha Thi Khiet	Province Party Committee/People's Council
93.46	Trang A Pao	Province Party Committee/People's Council
93.49	Pham Hung	Supreme People's Court
93.51	Nguyen Van Hieu	Vietnam Institute of Sciences
93.58	Nguyen Ba	Province Party Committee
93.86	Le Duc Binh	VCP CC Dept Internal Affairs
94.06	Ha Hoc Trac	Union of Scientific and Technical Associations
94.10	Nong Duc Manh	VCPCC Politburo
94.29	Doan Khue	VCP Politburo/Ministry of National Defence
94.53	Ha Quang Du	HCM Communist Youth Union Central Committee
94.80	Nong Hong Thai	Province Party Secretary
95.16	Nguyen Van Hon	Province Party Committee
95.35	Le Minh Huong	Ministry of Interior
96.16	Nguyen Nhieu Coc	Province Party Committee
96.41	Dam Van Nguy	Military Region One
<b>96.64%</b>	<b><i>One standard deviation above mean</i></b>	
96.66	Le Kha Phieu	VPA Department Political General
97.30	Do Van An	Province Party Committee
98.01	Nguyen Manh Cam	Ministry of Foreign Affairs
98.72	Nguyen Duy Quy	Vietnam Institute of Social Sciences

Count:	60
Average	88.08%
Minimum:	58.46%
Maximum:	98.72%
Standard deviation:	8.56%

## Appendix 4.B

## Average percentage vote received by winning candidates, by province

Province/City	Vote rec'd Per cent	Geographic region	Formerly
Lao Cai	93.97	northern mountainous	Hoang Lien Son
Ha Tinh	92.24	northern central	Nghe Tinh
Lai Chau	91.74	northern mountainous	
Kon Tum	89.05	central highlands	Gia Lai-Cong Tum
Nghe An	88.96	northern central	Nghe Tinh
Tuyen Quang	88.41	northern mountainous	Ha Tuyen
Yen Bai	88.00	northern mountainous	Hoang Lien Son
Ha Giang	87.26	northern	Ha Tuyen
Thai Binh	84.62	northern delta	
Quang Binh	85.61	central	Binh Tri Thien
Thanh Hoa	85.15	northern central	
Cao Bang	84.34	northern mountainous	
Lang Son	84.12	northern mountainous	
Ha Tay	84.04	northern delta	Ha Son Binh
Son La	83.30	northern mountainous	
Hoa Binh	83.21	northern delta	Ha Son Binh
Gia Lai	82.09	central highlands	Gia Lai-Cong Tum
Minh Hai	81.96	southern delta	
Ba Ria-Vung Tau	81.44	southern	inc. Vung Tau-Con Dao
Vinh Phu	81.39	northern delta	
Ninh Binh	80.28	northern	Ha Nam Ninh
Bac Thai	80.15	northern	
Quang Tri	79.93	central	Binh Tri Thien
Nam Ha	79.72	northern	Ha Nam Ninh
Binh Dinh	79.61	central	Nghia Binh
An Giang	79.57	southern delta	
Tra Vinh	79.55	southern delta	
Song Be	79.43	southern	
Quang Ngai	78.89	central	Nghia Binh
Dac Lac	77.71	central highlands	
Hai Hung	77.37	northern delta	
Kien Giang	75.79	southern delta	

[continued next page]

**Average percentage vote received by winning candidates, by province  
[continues]**

Soc Trang	75.75	southern delta	Hau Giang
Ha Bac	75.21	northern delta	
Hai Phong	74.99	northern coastal	
Thua Thien-Hue	74.65	central	Binh Tri Thien
Quang Ninh	74.33	central	
Ben Tre	73.23	southern delta	
Hanoi	73.06	northern capital	
Lam Dong	72.33	central highlands	
Quang Nam	72.31	central	
Long An	71.86	southern delta	
Tay Ninh	70.89	southern	
Can Tho	70.79	southern delta	Hau Giang
Tien Giang	70.35	southern delta	
Phu Yen	70.12	central	Phu Khanh
Ho Chi Minh City	69.90	southern municipality	
Dong Thap	69.21	southern delta	
Dong Nai	68.39	southern	
Ninh Thuan	67.59	southern coastal	Thuan Hai
Vinh Long	66.70	southern delta	
Khanh Hoa	65.94	central coastal	Phu Khanh
Binh Thuan	62.66	southern coastal	Thuan Hai
Average:	78.11 %		
Standard Deviation:	12.01%		

## The 1992 Constitution and the Rule of Law

Ngo Ba Thanh\*

It is a big challenge for a Vietnamese lawyer, even one specialized in comparative law, to address the subject of Vietnam's 1992 constitution and the rule of law. This challenge was made easier because of the experiences gained by a number of Australian scholars and businessmen who visited Vietnam at the time of the adoption of our policy on economic renovation and open door foreign policy. These persons, who were among the very first foreign pioneers from market-economy countries involved in the Vietnam war to visit Vietnam, experienced with us the initial hardships and achievements in shifting from a bureaucratic command economy to a market-oriented economy, with the instrumentality of the rule of law.

Interest in Vietnam has grown beyond this small circle to include other business people and academics, public servants, journalists, NGO representatives and other members of the public. Their presence at this annual Vietnam Update reflects the interest of the Australian and international communities' interest in not only the prospects for Vietnam's future development but cooperation with Vietnam itself. I believe that exchange of views at the annual Vietnam Update conference constitutes small bricks that will build a solid relationship between Vietnam and its neighbours near and far in Asia and the Pacific, to further the cause of peace, stability, independence and development in the region and the world.

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\* The author would like to thank the Department of Political and Social Change, Research School of Pacific Studies, The Australian National University, and all other organizations and individuals whose sponsorship made possible her second visit to Australia and participation in the Vietnam Update 1992.



The Asia-Pacific region has been a region of tension over the past fifty years. The repeated great victories won by Asian nations in their struggle for national independence, and the growth of the forces of peace and development, have led to a change in the Asian-Pacific conjuncture and have promoted a trend for peaceful coexistence and cooperation in the region. The Asian and Pacific region is the cradle of solidarity among nations in the world, who struggle for the famous idea of the Non-Aligned-Movement, as reindorsed by the September 1992 Jakarta Declaration:

Since Bandung thirty-seven years ago, we have consistently struggled for the realization of our fundamental principles and objectives. As we chart our course for this decade and beyond, the Movement is committed to the shaping of a new international order, free from war, poverty, intolerance and injustice, a world based on the principles of peaceful co-existence and genuine interdependence, a world which takes into account the diversity of social systems and cultures. It should reflect global, not separate, interests. And it should be sought through the central and irreplaceable role of the United Nations. We, the members of the Non-Aligned Movement, holding fast to the principles and ideals as originally articulated by our founding fathers do, hereby affirm the fundamental human rights to development, social progress, and the full participation of all in shaping the common destiny of humankind. Through dialogue and cooperation we will project our Movement as a vibrant, constructive and genuinely interdependent component of the mainstream of international relations. Only then, can a new international order take shape on a truly universal basis, ensuring harmony, peace, justice, and prosperity for all ('A Call for Collection Action and the Democratization of International Relations', Jakarta, September 1-6, 1992).

Vietnam is located in a world region with dynamic economic development and at a major international crossroads, with favourable access to the sea. Vietnam is also vested with many favourable conditions for expanding foreign economic relations, attracting foreign investment and developing trade, air, maritime services and tourism.

Vietnam is now in the transitional period to socialism from a semi-feudal society, whose economy was characterized in the main by small-scale production, bypassing the stage of capitalist development, undergoing several decades of war which have left complex consequences: backward technology, low productivity, cumbersome vestiges of a feudal colonial regime with disregard for the rule of law, avoidance of open conflict through non-adversarial dispute resolution by conciliation outside the orbit of the law, favouritism, corruption, arbitrary intervention through family connections with power centres, which are by-products of the so-called 'Asian way of life' which definitely reduce the reliability of the legal framework.

Disregard for the rule of law in Vietnam is due to various causes and deep-rooted historical, philosophical factors, passing the modern boundary between law as a theory of government, to law as a source of positive action, as opposed to the deeply held traditional value of preservation of harmony, by avoidance of state-sponsored legal dispute resolution framework, to yield before local customs.

### **Confucian heritage**

The persistence of Confucian heritage in Vietnam as in other East Asian countries, where peoples have been governed by ethics rather than by law, is quite significant. Confucian teachings were considered for centuries as moral standards of human conduct. Though they have not the binding force of law, as their breaches do not entail a penalty but only expose the offender to public criticism, they are regarded as superior to law because of their high standard in ethics. At most law is considered as a necessary supplement to ethics.

The ancient Legalist School, headed by Han Fei, expounded law as a subject of political philosophy rather than as a juridical science. The gist of such a teaching is that government should be conducted by laws sternly enforced, as opposed to government based on benevolence and conducted by men deemed to be virtuous and wise, as preached by the Confucian School. It is characterized by a supreme belief in the efficacy of law as a panacea of government and seems to ignore that, after all, law is made and administered by men; it is men, not laws, that govern.

It should be understood that the ancient Legalist School does not teach legal rules or the doctrine of supremacy of law, as understood

today, but methods of government. Moreover, according to the traditional conception, civil disputes were most often settled in the village chapel, the temple or the guild. These customary 'courts of equity' were preferred to 'courts of law' by the people because these customary institutions evoke customs and ethical principles in the settlement of private disputes in the spirit of compromise.

If the Vietnamese ancient political order with its Confucian foundations establishes the duties of an individual to the monarch, it also specifies the duty of the monarch to the individual. The monarch must conduct himself as under a mandate from heaven and must manifest an example of wisdom to the people. When a monarch oppresses his people in contradiction to the moral and the natural order, it is held that he loses the mandate and merits being overthrown by the people, who are legitimately justified in obeying another prince invested with a new mandate. Thus, the concept of 'legitimate revolution' has always been current among the mass of the Vietnamese people, based on the principle that 'heaven hears by the ears and sees by the eyes of our people. Heavens honors virtue and punishes vice by means of our people...'

However, the interpretation of the withdrawal and the bestowal of heaven's mandate was left as vague as possible. The Confucian system, placing its faith in the goodwill of those governing, did not deem it necessary to establish more efficacious guarantees against the abuse of power. This failure was rectified by an institution which is uniquely Vietnamese, the commune (or village). The Vietnamese saying most often cited by the jurists concerned with state organization goes: 'Royal ordinances are primed by communal customs'. Briefly, the commune, thanks to the independence taken by it vis-à-vis the empire, is a state within the state, and counterbalances the power of the throne. It has its own administration by notables, its own customary tribunal and its own patrimony which is called communal property. The rice paddies belonging to the commune are inalienable; they are divided among the villagers for cultivation. A part of the harvest from these lands is given to the commune and dispersed by the communal council for public works.

Vietnamese renovation is a comprehensive and synchronous process, but we have to take appropriate steps, to aim at selected targets and define the main links for each period, through deeper insight into Vietnamese society past and present. The above bird's eye view of Confucian method of government, with both positive

and negative influence on social relations, might inspire some aspects of our approach in the building a modern state governed by the rule of law in Vietnam today.

In the modern history of Vietnam, the concept of a state governed by the rule of law was first put forth by Ho Chi Minh in June 1919. In his famous 'Eight-points demand of the Annamese people', sent to the Versailles Peace Conference, the future President of the first Vietnamese democratic republican state demanded that the French colonial administration apply the 'rule of law' in Vietnam.

After the success of the August Revolution in 1945 and the Declaration of Independence, President Ho Chi Minh laid down the urgent tasks for the provisional government, among which were the holding of general elections and drafting of a constitution. He said:

Formerly, we were dominated by the dictatorial imperial regime then by the colonialist regime, no less dictatorial. Therefore, our country had no Constitution, our people had no right to freedom and democracy. We must have a democratic Constitution. I propose that the government holds as soon as possible general elections through universal suffrage. All citizens, male and female, from 18 years upward, have the right to vote and to stand for the elections, regardless of their being rich or poor, their religious belief and generation.

Four months after the Declaration of Independence, the general elections were held, on 6 January, 1946. The first National Assembly, at its first session held on 2 March, 1946, elected the official government, with Ho Chi Minh as first president of the Democratic Republic of Vietnam (DRV). It also appointed him as chairman of the commission to draft the constitution. In November 1946, fourteen months after the Declaration of Independence, the constitution of the Democratic Republic of Vietnam was officially adopted. It laid the legal foundation for the first democratic system in Vietnam in which all power in the country belongs to the people. It put an end to the hereditary imperial regime and the regime composed of mandarins designated by the king and regarded as 'the people's parents', as well as the regime composed of governor-generals, governors and residents designated by the colonialist rulers. From slaves, the Vietnamese people became masters of their own destiny.

Speaking at a national conference of the judiciary, on 22 March 1957, President Ho stressed: 'The judiciary must contribute to the realization of the rule of law, maintain and defend the rights and interests of the people, and defend our democratic system' Unfortunately, the wars of resistance and the implementation of a centralized, bureaucratic administrative mechanism prevented in large measure, the realization of President Ho Chi Minh's intention to establish a democratic state governed by the rule of law.

The legal system implementing the 1980 constitution was established and developed in conformity with the country's revolutionary tasks in the period of transition to socialism on a national scale, with a triangular relationship between the Communist Party as leader, the people as master and the state as administrator in Vietnamese society.

The political system of the Socialist Republic of Vietnam (SRV). the framework of which is the system of elected people's councils both national (National Assembly) and local, firmly consolidated in 40 years' struggle for national and social liberations, may be seen as providing the people with the appropriate political instrument it needs, to exercise its right to mastery.

The corresponding economic system however, is only in the process of formation and has enormous difficulties to face. The country's economy is extremely weak and most heterogeneous, including individual owners, manufacturers, and private capitalists, especially in the southern part. The policy line of the Vietnam Communist Party (VCP) adopted by the fourth congress demanded the mobilization of all productive forces for the advance towards socialism. Hence the 1980 constitution assigned the socialist state the task of guiding, utilizing, and transforming the non-socialist sectors in of the economy, and instituting and consolidating the system of socialist ownership of the means of production. The aim was to build a national economy with two essential components, the state sector under the ownership of the entire people, and the collective ownership of the working people. State-run economic establishments operated according to the orientation and tasks laid down under the state plan. Cooperatives operated in accordance with national and regional economic plans. The state conducted the socialist transformation of the private capitalist economy in both urban and rural areas by suitable forms. The state guided the national economy according to unified plans.

Formally speaking, based on provisions of the 1980 constitution, the legal framework was quite incoherent, especially regarding the economic institutions, which were not in conformity with the socio-economic development. As a result, ten years of misguided central planning, of hasty socialist transformation attempting immediately to abolish the multi-sectoral economy, had by 1986 left the economy in a shambles. Per capita food production was decreasing, labour productivity was abysmal, industry was stagnant, private enterprise was suppressed, and hyperinflation was rampant.

The VCP Sixth Party Congress in December 1986 severely criticized the above failures and shortcomings. It also laid the foundation for the country's economic renovation, shifting from a bureaucratic command economy to a market-oriented economy, which will ensure full utilization of all economic sectors' potentials, expanding economic, scientific and technological cooperation and exchanges with the international market.

All-round renovation makes it imperative for the state promptly to promulgate suitable policies and laws in order to meet the need for social management through the rule of law. Yet, law has not become the state's main instrument for economic social administration or for the protection of the people's right to mastery. While we stand for a vigorous development of a commodity economy and diversification in production and business operations by all sectors, we fail to come out with specific legal provisions to direct and control these activities on a timely basis, or to make the society develop dynamically in accordance with laws and regulations, without confusion and disorder. Our economy is undergoing structural changes, many new economic relations are taking shape or have been formed; meanwhile, lawmaking and organizations have not kept pace with these changes. It is our delay and shortcomings in legal and procedural matters that have created loopholes in business operations and other activities, allowing speculators, smugglers, tax evaders and corrupted cadres to make use of the dereliction in state management, to embezzle properties of the state and the people.

The renovation process gained momentum after 1986, and has been institutionalized more recently in the form of a law on private enterprise and a companies law. Both laws, also known as domestic investment law, are aimed at institutionalizing the general line of development of the multi-sector economy, and encouraging various economic sectors to engage freely in business activities within the

framework of law. Objectives include mobilizing and making effective use of the capital, labour and natural resources of the country; generating new employment; speeding up the pace of economic development; protecting the lawful interests of enterprise owners and investors, while enhancing efficiency of state management of business activities.

The two laws — private enterprise law and the companies law, including the limited liability company and the shareholders' company — have met the expectations of various social strata, especially of people with capital available for business investment. As of 15 August 1992, the various state economic arbitration agencies empowered to examine private enterprises and companies' application for registration, have issued 1,292 permits with a total capital of 700 billion dong, including 758 private enterprises, with a total capital of 141 billion dong; 492 limited liability companies with a total capital of 331 billion dong; and 41 share holders' companies with a total capital of 178 billion dong [10,500 dong= US\$1.00].

With the enactment of these two domestic investment laws private enterprises have been re-legitimized and given equal rights with other enterprises under the law. They shall enjoy freedom of enterprise and full initiative in all business activities within the framework of law. The result is the re-emergence of dynamic and creative private sector. Through the use of macro-economic management tools, such as restricting money supply, reducing the budget deficit, eliminating state sector subsidies and floating the local currency, inflation is gradually being brought under control and was running at to 30 to 40 per cent per annum in 1992, half of the 1991 rate. The state sector, although it is to maintain a leading role in key economic areas, is being rationalized. Hundreds of small state enterprises at the local level have been merged or closed, and an equitization of state-owned business is being undertaken on a trial basis, to accumulate experience for a large-scale equitization, before amending statutory provisions, to eventually allow foreign organizations and individuals to buy shares in state-owned businesses.

Five years of economic liberalization under the rule of law have much transformed Vietnam's social landscape. The door to the outside world has been opened wide, gradually integrating Vietnam's internal market with the external market. Foreign and domestic resources, financial and technological, have been brought

to bear on three priority areas: agriculture, consumer goods and exports. The foreign investment law of 1987, amended and supplemented by the National Assembly in 1990, is the leading legislative document of our foreign economic renovation policy, not only because it is considered as one of the most liberal foreign investment laws in Asia, but also because the amended law permits private Vietnamese economic organizations to establish business cooperation relations with foreign investors. This will help raise the share of domestic capital in the investment structure of the national economy, and increase the capacity for drawing foreign investments.

A few years ago, the announcement of the renovation of the economy, the restructuring of the government's system of policies and measures for macro-economic administration on the basis of a five-sector market economy and open-door policy, was only a signal; today, all of these have become surprising realities. The renovation in banking, with joint venture banks and foreign banks operating in competition with Vietnamese banks, is obviously radical when compared to the stagnant state of affairs a few years before.

Also, few people could imagine that from virtually a standstill, matters would advance at such a high speed. Over the past five years, the National Assembly's eighth legislature has examined, debated and passed 27 laws, and the Council of State has enacted 39 ordinances. We have promulgated such legal documents with a view to institutionalizing the policies of the sixth and seventh congresses of the VCP, meeting the requirement of managing the country through the rule of law, and serving the all-round renovation work, first and foremost, economic renovation. This has helped to promote business activities in the economic sectors of the country and foreign investment for national economic development.

Directly related to economic renovation are laws and ordinances such as the land law, the law on foreign investment, law on private enterprises, law on companies, the maritime code, the civil aviation law, the law on forest preservation and development, and taxation laws. Among the ordinances relating to the economy are those dealing with protection of industrial property, transfer of technology, economic contracts, economic arbitration, state bank, credit cooperatives and finance companies, accounting and statistics, mineral resources, preservation and development of water resources, housing, quality of goods, and weights and measures.



On the whole, the legislation programme has been executed with diligence, the newly promulgated laws and ordinances have a higher quality than the earlier ones and some of these laws and ordinances have actually promoted the implementation of the social and economic tasks to suit the great changes.

However, it should be pointed out that, in spite of the above said progress, work still falls behind the situation. The tasks of socio-economic management in economic fields have not yet been regulated and clearly delimited by corresponding documents. There has been no uniformity in the laws and ordinances already passed, and some have had little effect on economic and social life. Some laws which are important and badly needed have yet to be promulgated, such as the labor code. The labour, civil and commercial codes are still in the preparatory draft stage. In addition, some laws and ordinances still leave many questions unanswered; some were modified and supplemented many times, as they contained provisions challenged by social reality, especially regulations to guide the implementation of laws issued too belatedly by the Council of Ministers or by individual ministries. Some laws have a tendency to be ambiguous and vague, with major issues remaining to be resolved by subsequent administrative decisions. Such a tendency reduces the reliability of the laws, by deferring the 'tough issues' for later government discretionary action. Weaknesses were also observed in the publication of laws, in making readily available to the public government regulations, instead of limiting access only to a small group of insiders. Also inadequate has been state management by means of law, leading to a slackening in social order and law observance because some officials, accustomed to the unavailability of government regulations, would adopt new regulations without official repeal of earlier enactments. As a result, the potential for inconsistent or conflicting provisions increased. A legal provision stipulating that no law, decree or other regulation would be effective until publication in an official gazette would be a practical improvement.

### **The 1992 constitution**

At this point, it is necessary to stress that, if Vietnam's social-economic renovation is to be irreversible and successful, a full-fledged legal framework has to keep pace with the challenge of the new mechanism and be guaranteed by reliable constitutional

provisions. All this is posing urgent tasks in the coming period aimed at building a democratic state under the rule of law, if in the process of 'making the people prosperous and the country strong', all citizens are to enjoy freedom of enterprise in accordance with the law, with their rights of ownership with regard to lawful income, savings, housing, chattel, means of production, funds of other possessions in enterprises or other economic organizations, being protected by the law.

The event that had the most significant effect on the law renovation in Vietnam was the revision of the 1980 constitution in a radical and comprehensive manner. The revised 1992 constitution is supposed to institutionalize the overall renovation line laid down by the VCP in its 'Programme on National Construction in the Period of Transition to Socialism', and its 'Strategy for Socioeconomic Stability and Development Until the Year 2000' put forth by the Seventh Party Congress.

The 1992 constitution was adopted by the National Assembly's eighth legislature, on 15 April 1992 and promulgated by the chairman of the Council of State on 19 April 1992. The 1992 constitution inherited from and developed Vietnam's three previous constitutions, those of 1945, 1959 and 1980. The 1992 constitution represents a step forward in Vietnam's constitutional history, it is aimed at strengthening state management of society through the rule of law, building socialist democracy and enhancing socialist legality, so that the superstructure can well enhance its role in paving the way and accelerating socio-economic development.

## **The constitution and economic renovation**

As far as substantive rights set forth by the constitution are concerned, the clearest changes are related to the economic system. In order to understand the impact of the constitution on economic renovation, it is important first to understand the goal that constitutional reform is supposed to serve, namely the introduction of a free-market economy.

Unlike a number of Eastern European countries that are making the transition to the free market, the adoption of free-market principles in Vietnam is not predicated on an outright rejection of socialism. It rather represents formulation by the Vietnamese state of a strategy for developing the country economically. Under 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.

Article 15 asserts that the policy of the Vietnamese state is to develop a multi-sector commodity economy, based on a system of ownership by the entire people, by collectives, and by private individuals, of which the first two are the foundation. The aim of the state's economic policies is to satisfy to an ever greater extent the people's material and spiritual needs by releasing all productive potential, developing latent possibilities of all components of the economy (the state sector, the collective sector, the private individual sector the private capitalist sector and the state capitalist sector) to step up construction of the material and technical bases, to broaden economic, scientific, technical cooperation, and to expand intercourse with world markets.

Another important amendment is related to Article 18 of the constitution, which presages significant changes in the country's land law, which is also to be revised soon to accord with the constitution. While the land is owned by the entire people through and under the exclusive administration of the state, the constitution guarantees 'stable and long term use of land' and the 'right to transfer the use of land'. A more comprehensive leasehold system of land usage is likely to be introduced, which might allow the buying and selling of land leases, the inheritance of land use by immediate descendents and eventually the use of leasehold as a mortgage. It will be sometime before these changes are legally codified and implemented. At present, land leasehold rights for foreigners are restricted to projects under the foreign investment law, leaving unclarified the technical issue of how extensive should land registration be with respect to the registration of mortgages, easements, and liens. There has been some talk of introducing a sophisticated land title system, such as the Torrens system proposed by Australia, and taking up to fifteen years to put in place. This seems to be an issue for discussion by policy-makers rather than an actual project .

To keep pace with the rapid development and fierce competition between investors and between countries receiving investments around the world, is considered an important activity of the Vietnamese government, taking form in the foreign investment law amended in 1990. The 1992 Constitution reaffirms that: 'The state encourages foreign organizations and individuals to invest funds and

technologies in Vietnam, in conformity with Vietnamese law and international law and practices; it guarantees the right to lawful ownership of funds, property and other interests by foreign organizations and individuals (Article 25). Vietnam has been seeking to institute a system of bilateral investment protection agreements and a number of agreements have already been signed with Australia, France, Indonesia, Malaysia, the Philippines, Thailand, Italy, Switzerland, Belgium. Vietnam has also begun negotiating avoidance of double-taxation agreements, the first being signed with Australia in April 1992.

A series of regulations have been proclaimed during 1992, to include decrees on: entry and exit, on residence, on circulation of foreigners in Vietnam; on income tax for foreigners and Vietnamese working in enterprises with foreign invested capital; on minimum wages for Vietnamese workers in the above-mentioned establishments; and on reduction of telecommunication fees to other countries.

A survey conducted by the General Statistics Department in 1990 showed that 4,484 out of 12,084 state-owned enterprises, or 88 per cent of the total, suffered losses. Of these enterprises, 29.6 per cent were centrally run, and 39.9 per cent locally run. These losing enterprises possessed 6,270 billion dong of fixed assets, or 38 per cent of all assets valued, and employed 32.9 per cent of all the work force of the state-owned economic sector.

In recent years, with the new management mechanism beginning to take effect, a number of state-owned businesses, mostly centrally-run, have gradually adapted, being able to stabilize and even increase production. With the reorganization of the state-owned economic sector, a series of local businesses have been dissolved, or have gone bankrupt.

The situation in developing countries has indicated the state-owned economic sector as being generally less efficient than the private sector; for example, in Indonesia, investment for the state economic sector accounted for 54.3 per cent, but this sector produced only 10 per cent of GDP. The respective percentages for South Korea were 16 per cent and 11 per cent, and for India 27 per cent and 12 per cent. In recent years, these countries have taken steps to reorganize the state economic sector by means of privatization and by reducing the overall size of the sector.

Equitization of state-owned enterprises is becoming popular as it has brought about manifest results in many countries. It is also an

inevitable trend in Vietnam. But due to the many constraints, equitization must be carried out step by step, with experimental transformation of state-owned enterprises into joint stock companies. In theory there is nothing to prevent shareholders from being government or non-government, nationals or foreign, managers or employees, or 'sleeping partners', to meet the demands of economic democracy. This would mean free access to production and business for non-producer and non-business people, for the sake of drawing in and making efficient use of investment capital through shareholders, brokers and stock exchange intervention. The foreign investment law, the companies law and other legal documents will have to be adjusted, to provide a comprehensive, efficient legal framework to restructure the corporate system. The Rothschild Group's European Conglomerate will assist the Vietnamese government to corporatize its state-owned enterprises.

According to the Rothschild Group's experts, it is necessary to incorporate assets, liabilities and business activities into new holding companies, whose shares would be issued to the Vietnamese state for sale to the public under the offer for sale.<sup>1</sup> The likely size of the offer will have to be determined early in the divestment programme process. There are many interrelated matters, including the level of shareholding to be retained by the state, the level of debt to be included in the company on divestment, and the capacity of the domestic market and therefore the desirability of overseas tranches in the offering. It may be appropriate to restrict the extent of any overseas offerings, to a level which would not dominate the size of the offer in the domestic market, from a national point of view.

Should Vietnam give to 100 per cent foreign-invested capital enterprises the same preferential treatment granted to joint-ventures? Due to Vietnam's shortage of capital, personnel and management expertise, the law on foreign investment gives preferential treatment to the joint venture form over the 100 per cent foreign-owned enterprise, especially through tax incentives. Article 27 of the foreign investment law provides:

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<sup>1</sup> Tran Phuoc Thien, Managing director, Service Trading Division, N.M. Rothschild and sons (Singapore) Limited.

Depending on the branch or sector of investment, the scale of its capital contribution, the volume of its exports and the nature and duration of its operation, a joint venture may be exempted by the state organ for administration of foreign investment, from payment of corporate income tax for a minimum period of two years counting from the first profit-making year, and be allowed a 50 per cent reduction of corporate income tax for a minimum period of two succeeding years ...

Article 28 adds:

In exceptional cases necessitating encouragement for investment, the corporate income tax may be reduced by the state organ for administration of foreign investment to 10 per cent of the earned profits, and the period of tax exemption or reduction may be longer than that provided for in Art. 27.

It has been suggested that with our open-door policy, with new priorities in socio-economic development and investment opportunities in Vietnam during the 1990s, and in line with the 1992 constitution, perhaps the 100 per cent foreign-owned enterprises should enjoy the same preferential treatment and incentives given to joint-ventures. Experiences has shown that 100 per cent foreign-owned enterprises have many advantages over other forms of investment. As far as investors are concerned, since the capital is provided and the enterprises are operated exclusively by them, some of the contradictions which may arise in joint ventures can be avoided and economic efficiency improved. Foreign investors are willing to introduce advanced technology and management techniques, and in this way produce competitive products. The foreign enterprise can make use of the abundant resources and low labour costs of the host country. Vietnam need not contribute capital nor take risks. The advanced technology introduced by foreign enterprises can be gradually assimilated by local personnel. The use of local raw materials, parts and components by foreign enterprises means that local industry, commerce, transportation and other services can be developed, contributing to more employment, revenue and foreign exchange earnings.

Finally, international investment often involves bilateral relationships. While Vietnam welcomes foreign enterprises to invest in Vietnam, we also begin to establish Vietnamese enterprises

in other countries. In choosing the form of international economic cooperation, it is necessary for the cooperating parties to respect each other's interests. Foreign enterprises must conform to the law and economic requirements of the host country in all their activities, from their establishment until their dissolution. The host country should respect international practices and the legitimate requirements of foreign investors.

## **Nationalization**

This section will review the pros and cons in respect to the highly sensitive issue of nationalization, which involves national sovereignty and North-South polemics. Article 25 of the 1992 constitution guarantees that 'enterprises with foreign investments shall not be nationalized.' The question of whether an immunity from nationalization for enterprises with foreign investment in Vietnam should expressly be provided in the constitution was a subject of hot debate among policy-makers and lawmakers.

The views of those who were against the provisions of Article 25 are as follows. If the economic relations legislation includes the provision that no foreign enterprise will be nationalized, such provision, even though it might temporarily relieve the foreign investors of their misgivings and enhance their enthusiasm for investment in Vietnam, would be tantamount to tying one's own hands and consequently would entail a potential danger. Even though the question of nationalizing foreign investment does not exist at present in Vietnam, it is unwise to exclude such a possibility entirely in the constitution.

As for the opposite viewpoint, proponents argue that the exercise of national sovereignty is by no means absolutely free from constraint. In international relations, as long as different countries continue to cooperate with each other, each country needs to impose some self-restraint on the basis of equality, mutual benefit and its own free will. This principle is enshrined in all international agreements or treaties concluded on the basis of equality and mutual benefit, as rights and obligations are usually reciprocal. Furthermore, with the open door policy and the introduction of the foreign investment law, Vietnam as a socialist country has accepted foreign capital from capitalist countries and has opened part of her domestic market, to allow foreign capitalists to carry out 'capitalist exploitation' (from a Marxist point of view), for a certain period and

to a certain extent, so as to mobilize domestic economic potential and at the same time to attract foreign resources, with a view to creating a new driving force for the growth and development of the economy. Such self-restriction or self-restraint in the exercise of sovereignty is, in the final analysis, designed to achieve greater self-development and to make Vietnam even more independent and prosperous.

In light of the actual world situation and conditions of our country, attracting foreign capital and technology on a controlled scale, on a selective basis and in a methodical manner, would not lead to domination of the national economy by foreign capital or produce adverse effects on the people's livelihood. In view of the fact that foreign capital has not yet been introduced in sufficiently large amounts and fast enough and with the the US trade embargo remaining, it was wise to incorporate the express provision against nationalization of enterprises with foreign investments in the 1992 constitution.

The issue of immunity from nationalization for foreign investment in Vietnam being expressly guaranteed by the constitution of the SRV is highly significant, because for the first time Vietnam has departed from the traditional practice of socialist countries, where no such express provisions have been made. And as we are building a state governed by the rule of law in a way suited to our country's level of social and economic development, in line with the overall renovation policy, comprehensive foreign economic relations legislation must be introduced in order to attract foreign investment in greater amount, at a higher speed and with better results.

It is necessary to stress a very fundamental question on which hinges the success or failure of any new task or policy, i.e. the question of actually establishing law and order in conformity with the new mechanism. Indeed, in the sphere of economic renovation, political-juridical reform requires first of all that businesses in all economic sectors operate according to the rule of law, strictly implementing financial discipline, in order to create a healthy market relationship in which the only things that count are productivity and quality of products. It is also intended to fight against injustices in distribution which have upset all sets of values in society. It is as well a basic condition to fight inflation, to stabilize the macro-economic management and to ensure safety for



all business activities. It is in addition, a prerequisite to fight against speculation, corruption, and smuggling.

Positive results have been gained in the process of implementing economic renovation during the past years: agricultural production has gone up, resulting not only in food self-sufficiency, but also food surplus for exports. Foreign trade has developed relatively rapidly despite a sudden fall in market relations with the former Soviet Union, which compelled us to turn to new markets. Goods consumed in domestic markets have become more abundant and diverse, and consumers have the right to make their own choices. Considerable improvements have been seen in the socio-economic conditions and in the cultural and spiritual life of the people.

Through its policy of opening the door to the outside world and making friends with all countries, Vietnam attaches great importance to foreign direct investment, to attracting capital, receiving modern technologies, creating more jobs and gradually improving the managerial and entrepreneurial skills of business executives. To create a favourable environment for investment in Vietnam, the eighth National Assembly which ended its five-year term of office with the vote of the 1992 constitution, debated and passed some 25 laws and 49 ordinances (Council of State). The government passed some 70 by-laws aimed at concretizing the law on foreign investment in Vietnam and providing guidance for its implementation.

Vietnam's direction of economic development in the next five years is to continue focussing efforts on agricultural production, especially food-grain production, attaching importance to forestry and aquaproducts vigorously developing the food industry and processing of farm, forestry and sea products; step up the production of consumer goods to meet domestic demand while increasing opportunities for export. Special attention must be paid to the application of new techniques and technologies to raise the quality and diversity of products.

Efforts should be made to develop the fuel and energy industry, including expansion of oil and gas prospecting and exploitation on the continental shelf, to increase the capacity of electricity sources and transmission lines, to expand coal mining and raise its quality, and to start construction of an oil and gas refinery. Investments must be made to improve and develop infrastructure, especially that of telecommunications and transport, information and liaison, with the

aim to ensuring steady stages of economic development and creating favourable conditions to attract more and more investment.

Since our renovation course aims at establishing a multi-sectoral commodity economy, the state is to regulate the economy according to long term objectives of the country on the basis of the market law on supply and demand. According to these principles, the spirit of which it reflected in provisions of the economic system chapter of the 1992 Constitution, all economic sectors are equal before the law, economic units are autonomous in terms of finance, planning and distributing business profits, the circulation of goods is free on nation-wide level, and prices are mainly determined by the markets.

To achieve a law-governed state, importance has been attached to the state's function and task of management in a market economy and to the free enterprise of grassroots economic units, in order to strengthen its role as a macro-manager in all spheres and do away with the existence of scattered and overlapping responsibilities, streamlining organization, administration and intermediary roles in each branch, as well as in the management apparatus as a whole. Laws need to be perfected in the following directions: codifying regulations on different types of business enterprise (cooperatives law, state enterprise law); partnership law, strengthening the role of judicial tribunals dealing with business activities, and laying the legal foundation for the settlement of bankrupted enterprises; some legislation needs to be revised: the land law, the foreign investment law, companies law, private enterprise law, and the economic contract ordinance. New legislation will be drafted: civil law, commercial law, environment law, insurance law, competition law, bankruptcy law, and stock market law.

Such is the juridical-economic basis for an economic system open to both domestic and foreign markets and aimed at a common objective: to mobilize all domestic economic potential and at the same time to attract foreign resources, with a view to creating a new driving force for the growth and development of the economy.

### **Political renovation and the state apparatus**

In the face of the needs of all-round renovation of the country, which is hinged on economic renovation, the political system has exhibited many weaknesses and shortcomings. In particular, the apparatus of the party, state and mass organizations has not been

able to represent and implement the right to mastery of the people; responsibilities are not clearly defined, the organization is cumbersome, the working style not scientific, disciplined or effective; bureaucracy and corruption are widespread and serious.

We have already renovated step by step the political system to meet the demands of socio-economic renovation. The present situation requires renovation of the political system in a more basic and systematic manner, thus deepening the process of synchronous and comprehensive change. Revising the 1980 constitution, taking one step in reforming the state apparatus and renovating the party leadership toward the state, are the major policies put forth by the seventh party congress aimed at strengthening the effect of the state management of society through the rule of law, building the socialist democracy and enhancing socialist legality, so that the superstructure can enhance its role in paving the way and accelerating socioeconomic development.

As stated by Vo Chi Cong, chairman of the Committee to Amend the 1980 constitution:

As time passes, we better understood that there will be no ready model for us to copy on our way to socialism, since the transitional period in our country has its specific character. Surely, we need time and transitional steps, measures and methods which should be sought for and tested in reality, in order to change from an old model to which we have become too much accustomed, to a completely new one. Objective law requires that the new can emerge only when there are enough prerequisites for its emergence.

The 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.

Salient constitutional provisions related to the political regime of the Socialist Republic of Vietnam include the following. Article 1 reiterates the principle that Vietnam is an independent, sovereign and united country, which in its territorial integrity comprises the mainland, off-shore islands, airspace and territorial waters.

Unlike Article 2 of the 1980 constitution, which defines the Socialist Republic of Vietnam as 'a state of proletarian dictatorship', the 1992 constitution adds a new concept, defining the SRV as 'a state of the people, by the people, for the people'. All state power belongs to the people, whose foundation is the alliance of the working class with the peasantry and the intelligentsia.

Article 4 reaffirms the overall leading role of the Vietnam Communist Party, described as 'the vanguard of the Vietnamese working class and loyal representative of the interests of the working class, the toiling people and the whole nation, acting upon the Marxist-Leninist doctrine and Ho Chi Minh's Thought, is the force leading the state and society. All organizations of the party shall operate within the framework of the constitution and the law'. There must be no confusion between the party organization and the state apparatus. The principle of democratic centralism must be thoroughly observed in all organizations and activities of the National Assembly, the people's councils and all other state organs.

The Vietnam Fatherland Front is no longer 'a firm prop of the state', but 'constitutes the political base of people's power', and together with the state works for the care and protection of the people's legitimate interests, encourages the people to exercise their right to mastery, ensures the strict observance of the constitution, and supervises the activity of state organs, elected representatives and state officials and employees.

In 1980 the Vietnam Confederation of Trade Unions was described as 'the largest mass organization of the working class, a school of communism, of economic management, and management of the state'. The 1992 constitution states:

The Trade Union, being the socio-political organization of the working class and the toiling people, joins state organs, economic and social bodies in looking after and safeguarding the rights and interests of cadres, workers, employees and other laboring people, joins state organs, economic and social bodies in looking after and safeguarding the rights and interests of cadres, workers, employees and other laboring people, participates in state administration and social management, and in the control and supervision of the activity of state organs and economic bodies; educates cadres and labouring people with respect to construction and defence of Vietnam.

Under Article 5, the state carries out a policy of equality, solidarity and mutual assistance among all nationalities and prohibits all acts of national discrimination and division.

All social activities are brought within the confines of the constitution and the rule of law through the provisions of Article 12, according to which the state exercises the administration of society by means of the law, and constantly strengthen socialist legality. All state organs, economic and social bodies, units of the people's armed forces, and all citizens must seriously observe the constitution and the law, strive to prevent and oppose all criminal behaviour and all violations of the constitution and the law. All infringements of state interests, of the rights and legitimate interests of collectives and individual citizens, shall be dealt with in accordance with the law.

A new disposition provides that foreigners residing in Vietnam are required to comply with the constitution and the laws of Vietnam. Their lives, assets and legitimate rights and interests are protected by the state, in accordance with the provisions of Vietnamese law (Article 81).

The state protects the legitimate interests of overseas Vietnamese, creates favourable conditions for them to keep close contacts with their families and homeland, and contribute to the construction of their native land and country (Article 75).

Regarding fundamental rights and duties of the citizen, the constitution has introduced new provisions guaranteeing not only substantive but also procedural rights of citizens before the courts. Article 50 for the first time provides that '[i]n the Socialist Republic of Vietnam, human rights in the political, civic, economic, cultural and social fields are respected. They are embodied in the citizen's rights and are determined by the constitution and the law'. New rights guaranteed by the constitution include the following:

- Right to do business freely in accordance with the law;
- Right of ownership of lawful income, savings, houses, means of living and production, capital and other assets used by private businesses or by other economic organizations;
- Right to build dwelling houses according to zoning regulations and the law. Rights of lessees and lessors are protected by law;

- Right to freedom of movement and residence within the country, and to travel outside Vietnam and return home from abroad, in accordance with the law;
- Right to copyright and industrial property ownership;
- Equality before the law of all business enterprises. Their legal ownership of capital and assets are protected by the state;
- Enterprises of all economic sectors are permitted to enter into joint ventures or cooperate with foreign individuals and organizations;
- Private sector entities may engage in business and production, and may establish enterprises without restriction as to the size and scope of operation.

### **Presumption of innocence: a constitutional principle**

Article 72 of the constitution provides that: 'No one shall be regarded as guilty and be subjected to punishment, before the sentence of the Court has acquired full legal effect'. The principle according to which no one may be adjudged guilty of a crime and subjected to punishment as a criminal except by a court sentence and in conformity with the law was earlier recorded in the code of criminal procedure.

Yet, during the drafting of the criminal procedure code some people advanced the following argument against the formulation 'a person is presumed to be innocent': why is the defendant presumed to be innocent once he is brought to trial and is inculpated in committing a crime? Who considers him innocent? Evidently not the investigator who has preferred a charge against him and drawn up an indictment, nor the procurator who has approved the indictment and sent the case to court and maintains the accusation in a trial. Moreover, before the court has passed a judgment it does not presume the defendant to be guilty or not guilty. Otherwise, it would not have rendered a decision (a rider) on bringing the defendant to trial, but would have dismissed the case in administrative session. Who then, presumes the defendant to be innocent? Such a line of reasoning is based on the wrong understanding of the meaning of the presumption of innocence, which does not imply a subjective opinion

held by one or the other trial participant, but an objective legal status established by law.

According to the presumption of innocence, the law regards the defendant as innocent until those who consider him guilty can prove that the defendant is guilty, and the court agrees with this conclusion in its judgment. The investigator and the procurator's statement, to the effect that the defendant is guilty, is only their subjective opinion, inference, or conclusion, the correctness of which the court has to prove, and only the court sentence means a positive solution to the accused's guilt.

The right of the defendant to defence and the presumption of innocence are inseparable, i.e the very right to defence would not be protected without the presumption of innocence. Violations of the right to defence arise in one form or another, from the ignoring of the presumption of innocence, from adopting an attitude to the defendant as an exposed criminal. The identification of the defendant as a guilty person before the court handling the case, and the declaration that the defendant is an exposed criminal, with regard to whom the court is alleged to settle only the question of the degree of responsibility and the meting out of punishment, are very serious breaches of the defendant's right to defence and of the presumption of innocence.

The 1992 constitution contains express formulations which remove any possibility of incorrect understanding. It says in straightforward terms :

- The right of the the defendant to be defended is guaranteed. The defendant can either conduct his own defence or ask someone else to do it. An organization of barristers shall be set up to help the defendant and other parties in a law-suit to defend their rights and legitimate interests and contribute to the safeguarding of socialist legality (Article 132).
- No one shall be regarded as guilty and be subjected to punishment before the sentence of the court has acquired full legal effect.

Any person who is arrested, held in custody, prosecuted, or brought to trial in violation of the law shall be entitled to damages for any material harm suffered and his reputation shall be rehabilitated. Anybody who contravenes the law in arresting, holding in custody, prosecuting, or bringing to trial another person

thereby causing him damage, shall be dealt with severely (Article 72).

- The sentences and decisions of the people's court which have acquired legal effect must be respected by state organs, economic bodies, social organizations, people's armed units and all citizens; they must be seriously implemented by the individuals and organs concerned (Article 136).

### **Vietnam's approach to human rights**

Addressing the opening session of the ninth National Assembly, Do Muoi, VCP Secretary General, pointed to the great significance of the adoption of the 1992 constitution, which he described as 'conforming with the real situation, meeting the development needs of the country and matching the progressive trend of our time'. He added:

Our society by its nature is a democratic society. We are for more and more democracy, constant expansion of democracy alongside national development. However, democracy must always lie within the boundary of law: all acts of citizens must comply with the constitution and the law. To challenge and trample upon the law is to challenge and trample upon democracy, and to disregard the freedom and democracy of others, as well as the entire people. That cannot be tolerated.

At present, Do Muoi said, some people regard themselves as supreme judges in the matter of human rights. They condemn others for violating human rights. But, what is the respect of human rights, if not the guarantee of the right of people to live in peace, independence and freedom, to be the master of the country, society and themselves, to lead a plentiful, equal and happy life? Respect for the rights of each person must relate to respect for the right to equality of all nations free from imposition by any country. Equality of citizens before the law, equality among nationalities, between men and women, freedom of belief and non-belief, and other democratic freedoms, must go hand in hand with the obligations and responsibilities of citizens before the country and society. Those who act contrary to the constitution and law, who violate the freedoms



and democratic rights of other people, who harm the interests of the nation and the community, and even misuse freedom and democracy to betray the motherland and oppose the people, must be duly punished according to the constitution and the law.

That is our concept of democracy. Judging from the above, we can assert that our country, our people and our state really respect human rights and respect the Universal Declaration and other conventions on human rights. In our socio-economic environment, democracy and human rights are to be considered as both rights protecting the individual and rights to participate in fashioning society. They are designed to enable people in their own interest to get involved in shaping society, invigorating the party's leadership, improving the efficiency of the law-governed state, promoting and supervising socialist democracy, indirectly through representatives to the National Assembly or people's councils, through collective mastery in mass organizations, through direct participation in public affairs at the grassroots level, or through both indirect and direct forms of people's power.

Human rights as guaranteed by the constitution should not lead anyone to blind trust. Implementation of citizens' rights is to a great extent dependent on people's active involvement and on the action or failure to act of public authorities and other people. Contradictions may occur due to erroneous decisions, illegal behaviour or undue claims. The law of the press, for example, provides that if the press gives false, distorting or denigrating information against a citizen, harming his/her honour and dignity, the press must make public its correction and apology. If it refuses to do so, the citizen concerned has the right to protest to the sponsoring office of the press organ or file an action in court.

To conceive of human rights as participating in the shaping of society means accepting that the contents of these rights undergoes constant development. Laying down and implementing human rights must never be viewed, therefore, as something static and complete once it has been performed, but therefore as something which needs to be improved and renewed constantly.

## **The National Assembly**

The National Assembly is the only organ vested with constitutional and legislative powers. It makes and amends the constitution and the laws, it works out a programme for making laws and decrees; it

exercises the supreme control over conformity to the constitution, the law and the resolutions of the National Assembly.

The Standing Committee of the National Assembly has the power: to interpret the constitution, laws and decrees; to enact decrees on matters entrusted to it by the National Assembly; to exercise supervision and control over implementation of the constitution, laws and resolutions; to suspend execution of formal written orders of the government, the prime minister, the Supreme People's Court, the Supreme People's Office of Supervision and Control, if they contravene the constitution, or laws and resolutions of the National Assembly; to report the matter to the National Assembly for it to decide on abrogation of such orders; to repeal written orders of the government, prime minister, the Supreme People's Court, the Supreme People's Office of Supervision and Control that are contrary to the decrees and resolutions of the Standing Committee of the National Assembly; to exercise supervision and control over and give guidance to the activities of the people's councils; and to annul wrong resolutions by the people's councils of provinces and cities under direct central rule (Article 91).

The country's president, who is the head of state, has the power to promulgate the constitution, laws and decrees and to propose to the Standing Committee of the National Assembly to review its decrees and resolutions in matters stipulated in points 8 and 9 of Article 91, within ten days following their adoption. If those decrees and resolutions are again passed by the Standing Committee of the National Assembly with the country's president dissenting, the latter shall report the matter to the National Assembly for it to decide the issue at its next session.

As for the government, it shall issue resolutions and decrees, the prime minister shall issue decisions and directives and cabinet ministers shall issue decisions, directives and circulars. It is the government's responsibility to ensure implementation of the constitution and the law in state organs, economic bodies, social organizations, units of the armed forces, and among the citizens, besides presenting draft laws and decrees to be passed by the National Assembly and its Standing Committee (Articles 112, 115, 116).

Finally, local governing authorities, such as people's councils, shall pass resolutions on measures to implement the constitution and the law at local level. The people's committee elected by the people's council and being its executive organ and the organ of local

state administration, has the express duty to implement the constitution and national laws, as well as the power to enact more detailed rules, decisions and directives, but only to the extent they are not inconsistent with national laws, the formal written orders of superior state organs and the resolutions of the elected local organ of state power, the people's council (Articles 120, 123, 124).

The enumeration of lawmaking institutions in the constitution provides a means by which a basic legal hierarchy can develop, as all laws must accord with the constitution and all government decrees and administrative regulations must be in accord with the law. Practical evidence for this basic commitment to the constitution's supremacy is found in the fact that the first session of the National Assembly's ninth legislature has to revise previously adopted laws, such as the law on government organization, the law on people's court organization and the law on the people's office of supervision and control, in order to assure their compatibility with the 1992 constitution.

### **The rule of Law**

Through such a process, Vietnam is building a legal framework for the new law-governed state apparatus, aimed at perfecting all state bodies from the central down to the grassroots level by streamlining those bodies and ensuring their unified management and effectiveness, clearly defining their respective duties, mandates and powers. This process also aims to overcome irrational working styles, bureaucracy, arbitrariness, and corruption, while scientifically perfecting the central and grassroots economic management bodies, and separating business and production management duties out of administrative management duties, in fact and in law. Vietnam will give due consideration to comparative law research, as it is well-known that the concept of the rule of law and the building of the state has existed since the Middle Ages in Eastern and Western societies.

According to Dicey<sup>2</sup>, the rule of law means equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts. In this sense, the rule of law conveys that no man is above the law, that officials like private citizens are under a duty to obey the same law, and that there are no administrative courts to which are referred claims by citizens against the state or its officials. Dicey contrasted the rule of law with the French *droit administratif*. But this was not all that Dicey meant by 'equality before the law': 'With us,' he wrote, 'every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen'. This was written at a time when the maxim 'The Queen can do no wrong' prevented the crown from being sued, in the ordinary or any other courts, for breach of its own legal duties. To Dicey, the rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.

It is in the nature of criminal procedure, more than in the content of the substantive law, that the rule of law is at its strongest in England, and it is in this respect that the English rules provide a good example of how fundamental rights of the citizens are safeguarded by the rules of procedure necessary to ensure the rights themselves. Also interesting is the fact that the American system, although being a Common law jurisdiction, has some trends different from its parent country. For example, while England has no written constitution, the United States finds its source of law in the very wording of a written constitution, so that legality means primarily legality according to the constitution. While the procedural matters on which legality depend are on the whole as well protected in the United States as in England, the US Supreme Court has to rely on the executive branch for enforcement of the law, whereas the English courts have inherent authority to compel by sanctions obedience to their judgments.

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2 Albert Vern Dicey (1835-1922) was a British jurist who wrote the influential book, *The Study of the Law of the Constitution*, which was first published in 1885.

In Vietnam today, the building of a modern state governed by the rule of law has become the central task of economic and political renovation. We need not underline the importance of the concept of the rule of law in modern times. Lawyers specializing in comparative law, belonging to different legal systems throughout the world, have joined their efforts in an attempt to ascertain what the rule of law means in terms of modern institutions, and to formulate principles considered essential to the rule of law in any society. Despite different conceptions, basic elements of the rule of law are common to most countries. Common denominators abound when we talk of those doctrines which constitute the essence of the rule of law, such as: separation or diffusion of power; fundamental rights both human and civil; subjection to the law of all persons, including those at the political summit; legality and judicial review of administrative acts; fair trial, i.e. fair and objective procedure, both in the courts and in the administrative process; an independent judiciary brought up in a tradition of impartiality and objectivity; and judicial restraints on arbitrary action by a parliamentary majority.

The search for equivalence of institutions through a comparative method provides a good instrument to weigh more efficiently the functioning and meaning of one's own national institutions through the penetration of foreign legal systems. The law-governed state of Vietnam, as part of the social superstructure, must be built firmly, step by step, in a way suited to our country's level of social and economic development. Such is the creative application of Marxism-Leninism and Ho Chi Minh's Thought to the building of our state apparatus and our political system. This is a long process. For the present purpose, and at the preliminary stage, the building in the SRV of a state governed by the rule of law is to be undertaken along the following basic orientations.

1. Principle of people's sovereignty: to ensure that all power belongs to people and that the people are the real masters of the country. Our state is a state 'of the people, by the people, and for the people'. Such a principle derives from the nature of our regime: 'In whose hands is the power and whose interests that power serves, that decides the whole content of the constitution', said President Ho Chi Minh when commenting on the draft of the 1959 constitution.

2. To respect and ensure the actual implementation of the citizens' human rights, and democratic rights, since man is placed at the centre of all socio-economic strategies and policies. Such basic individual rights and freedoms are always associated with the nation's fundamental rights and only on the basis of triumph over poverty and backwardness. That is why the exercise by citizens of their rights and freedoms is inseparable from the performance of their duties and obligations. Enjoyment by citizens of their rights and freedoms must not be to the detriment of the interests of society or infringe the legitimate rights of other citizens.
3. To build a society characterized by mutual responsibility between the state and citizens. As lawmakers, state officials have the compulsory and exemplary duty strictly to observe the law. Everybody is equal before the law and no organization or individual may place themselves outside and above the law.
4. All social relations must be regulated basically by law, not by ethics. The supremacy of law must prevail in the whole society, in the activities and behaviour of all entities, of every citizen. Juridical sources must conform to the hierarchy and ensure the unity of the whole legal system in which supremacy is exerted by the constitution .
5. The state apparatus is built on the principle that the highest state power is concentrated in the National Assembly. However, division of jurisdiction between the elected body, the executive branch of government and the judiciary must be clearly defined for the state apparatus to operate scientifically within the bounds of the constitution and the law. There must be unity of understanding and enforcement of laws throughout the territory, under democratic centralism.
6. The principle of equality of citizens is embodied in the principle of the equality before the law applied by the court. Thus, it is of utmost importance to ensure the independence of the judiciary, which only obeys the law when passing judgments in the name of the state, subject to neither legislative nor administrative organs, nor any political or social organizations. In order to strengthen the authority and independence of the judiciary under the new constitution, the election of judges of the people's courts is replaced by a system of appointment of judges by the

head of state, to ensure a selection of competent professional judges having high prestige and credibility to pass judgment ensuring the rule of law.

7. To strengthen auxiliary judicial bodies requires the training or retraining of a full contingent of legal experts with high ethical and professional qualifications to meet the overall renovation process: bar association, notaries public, enforcement officers, law gazette, and judicial records
8. Deference to the judgments and rulings of courts depends upon public confidence in the integrity, independence, and professionalism of judges, which in turn, depends upon their acting without fear or favour, free from personal bias. Together with the method of appointment and tenure of judges by the head of state, new mechanisms to ensure independence of the judiciary, professional education and training for judges, together with a code of judicial ethics are imperative structural requisites for development of a judiciary having sufficient institutional power, whose authority reaches every corner of society, every facet of life.
9. Last but not least in institutionalizing the rule of law system, is to develop a popular legal culture that accepts and trusts the law, being aware of its socio-political value and considering its realization as vital. This serves the cause of renovation, in directing people's behaviour, establishing a sense of 'permitted' and 'non-permitted', encouraging and condemning specific social behaviour.
10. The building of such a state in Vietnam is extremely complicated. A hasty acceleration without necessary premises, or a wrongly oriented political renovation, will result in political instability, which will cause numerous hindrances to the cause of overall renovation and the open-door policy. This is a major lesson drawn from realities in our country as well as the experiences of some other countries. For the Vietnamese people's deep aspiration is to build a socialist society based on the creative application of Marxist-Leninist doctrine and Ho Chi Minh Thought. The leadership of the VCP will have to make a thorough renovation in law-oriented thinking and leadership, as the 1992 constitution states that the Party is the 'vanguard force' charged with representing not only the working class, but

the entire people, the force leading the state and society. However, the party is explicitly brought within the confines of the constitution and the rule of law.

## Conclusion

The 1992 constitution constitutes a fundamental law of the Socialist Republic of Vietnam, the legal foundation for economic, political, social, cultural, national defence and security, and foreign affairs activities of the whole country, under the renovation line and open-door policy initiated by the VCP since the Sixth Party Congress (1986).

Vietnam has already embarked upon ambitious legal reform programmes designed to provide the legal infrastructure that supports, perpetuates and fosters the political economy of our nation. We are fully conscious that, for any such programme to be successful, those who formulate such a comprehensive legal reform programme must make important policy choices. These choices cannot be made without information, and require precision and planning to be successful. Lawmakers must understand the features, terminology and choices that underlie specific substantive policies of law reform. Those charged with the task of implementation must also understand the system.

Some countries that have begun such legal reforms lack familiarity with or access to the necessary information to train people in these important areas, as they move from a centrally planned economy towards a market-oriented one. Such a shift will require hundreds of changes in both written laws and unwritten attitudes, perspectives and behavioural patterns among law-related officials. At least one purpose of developing a market-orientated legal framework is to create space for private economic activity and to foster increased activity by means of the improved certainty, stability and safety usually associated with the rule of law.

The structure of the world community has changed considerably over the last few years. The easing of Cold War tensions as well as political realignments, have presented all nations with new challenges and opened doors long closed, despite the out-of-date trade embargo. These changes provide nations, especially in the Southeast Asia region, with a unique opportunity to reassess and



redefine their national and international priorities. Vietnam, being a developing and non-aligned country, has acceded to the Bali Treaty of Amity and Cooperation in Southeast Asia and become an observer of ASEAN. It carries out an open-door policy, with the guideline of wishing to be 'a friend of all countries in the world community striving together for peace, independence and development'. We are actively expanding our friendly relations of cooperation and mutual benefit with all countries, first of all with countries in Asia and the Pacific.

Asian social scientists, specifically lawyers, are aware that one way of meeting the new challenges, closing the legal information and training gap, is to coordinate legal reform efforts with Asian studies programmes fostered among other disciplines, legal education, training and development. Such Asian studies programmes could assist countries and members of the legal community in informing themselves regarding legal reforms, the history and structure of international legal systems, and the traditions and policy choices upon which these systems are founded. They could also familiarize nations in the region with the 'ad hoc language' of the rule of law, particularly in business, international trade and foreign investment matters, coordinating the efforts of development organizations drawn from across the globe, in the spirit fostered by UNESCO:

That we found ourselves to be of one mind as to the importance of comparative law, as an integral component of any programme designed to further international understanding and peace.

And let me expressly add that such study will assist relations between states, and between private organizations and states, throwing light on the causes of international tensions and misunderstandings arising from differences in national laws. We can begin to remedy this problem in a number of ways, such as :

- providing a broad training programme for policy-makers, government officials, judges and other practitioners, on a variety of subjects;
- providing nations in the region with information and assistance in reforming the system of legal education;

- collecting, collating, distributing, and publishing information regarding legal systems and legal development efforts;
- providing an internationally recognized programme focussing in new and developing areas of international law and global trade and investment law; and
- organizing meetings of policy-makers for the purpose of exchanging information and coordinating policies.

Our exchange of views at the Vietnam Update, in such a people-to-people direct contact, through and beyond academic circles, constitutes, as I noted earlier, small bricks that help to build a solid relationship and expand more vigorously Vietnam-Australia cooperation. It also implements Vietnam's foreign policy: to actively expand, and diversify our relations in all fields — political, economic, cultural, scientific and technical — at the party and state levels, and at the mass organization, non-governmental organization and individual levels.

## Vietnam's Revised Constitution: Impact on Foreign Investment

Levien Do\*

The National Assembly of Vietnam adopted on 15 April 1992 a new constitution which replaced the Soviet-inspired constitution adopted on 18 December 1980, the first charter of the country since reunification. The adoption of the constitution is the most significant realization of the Vietnam Communist Party's (VCP) policy in terms of national development and the involvement of the party in all aspects of the daily life. The constitution is also the result of Vietnam's legislative efforts to install a fundamental legal structure in which *doi moi* operates, in line with the lynchpin of the open door policy, the 1987 law on foreign investment .

Judging by the proportion of unchanged or revised articles compared to the number of newly introduced ones, the constitution appears essentially to be a re-draft of the 1980 Constitution. Of the constitution's 147 articles, 115 are revised versions of articles which existed in the previous constitution. Twelve remain unchanged, and only twenty articles are new. Overall, the structure of the new document is similar to that of the previous one. This is not to say that the constitution does not imply significant changes for Vietnam, but the changes are often subtle ones. For instance, certain words or expressions have disappeared from the official vocabulary, such as 'proletarian dictatorship', or 'in the Socialist Republic of Vietnam, all power belongs to the people'. Even if these changes may appear superficial, they represent very significant changes of view among Vietnam's leaders on issues such as the role of the communist party within the state, the role of the state in the

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\* The author acknowledges the contribution to this paper by Mr Jean Reynaud who was previously associated with Malleons Stephen Jaques and is currently practicing as a lawyer in France.

economy and the role of the government. The question arises as to the impact these amendments may have on foreign investments made in Vietnam.

The role of a constitution in a communist system is not to organize the separation of powers between the legislative, executive and judicial powers but rather to legitimize and dignify the existing regime. The 1992 constitution is no exception to this rule. The constitution reflects the intention of the Vietnamese leaders to carry out economic reforms without affecting the political monopoly of the VCP which has been in power in Hanoi since 1954. The changes to the political structure introduced by the constitution appear to reinforce the power of the executive.

## Changes to the political structure

### *The National Assembly*

As 'the highest organ of state authority in Vietnam', the National Assembly has greater powers than the legislative body of a Western democracy. Its powers are not limited to legislative duties, but extend to government organization, policy making and leadership control. The powers of the National Assembly may be listed as follows:

#### Government organization:

- to define its own organization and the powers of state bodies, including governmental organizations and local administration,
- to decide on the setting up or dissolution of ministries,
- to assess the performance of the government and ministers.

#### Policy making:

- to define the state plan,
- to define the state budget (including new taxes),
- to control foreign policy.

Leadership control:

- to appoint the state president (*chu tich nuoc*) and vice president (*pho chu tich nuoc*), the prime minister, members of the Standing Committee of the National Assembly, government ministers and other senior officials;
- to supervise the activities of people's committees in the provinces and cities which are under the central government's jurisdiction; and
- to abrogate decisions of state organizations (including those of the prime minister and the government) that are inconsistent with the constitution, laws which have been enacted, and resolutions adopted by the National Assembly.

The National Assembly will play an important role in the running of the country, now that the VCP has placed itself under the authority of not only the constitution (which was also the case under the 1980 Constitution), but also the law (provision for which was included in Article 4 of the 1992 Constitution). In Vietnam, to a greater extent than in the West, laws passed by the National Assembly require further implementing regulations, because laws passed by the National Assembly only contain general guiding principles and statements of intent.

The input of the government in the legislative process in issuing decrees, ordinances, and of subordinate authorities in issuing decisions and circulars for the implementation of laws passed by the National Assembly, therefore has become increasingly important. This process results in foreign investors having the often difficult task of keeping up to date with the latest changes. Despite the fact that the National Assembly retains the power to review and to abrogate unwanted 'formal written documents' issued by the above mentioned authorities (Articles 84[2] and [9]), the heavy legislative schedule of the National Assembly in its two sessions per year may not permit it to discharge satisfactorily this function. One should also bear in mind that the Standing Committee of the National Assembly has the power to interpret the constitution, laws, ordinances and decrees (Article 91), and in the absence of a parallel judicial review power, there remains the question of standing to initiate a review of constitutionality and independence in the review process.

It is understood that the Ministry of Justice has been upgraded to fifth place in the hierarchy of ministries (from previously near the bottom), and it is hoped that will permit it to play a more influential role in the establishment of a uniform and more certain legal framework for Vietnam.

### *The Standing Committee of the National Assembly*

The constitution abolished the Council of State that existed under the 1980 Constitution and established instead a Standing Committee which, when the National Assembly is not in session, will act to ensure the continuous function of the National Assembly. It may also convene extraordinary sessions of the National Assembly of its own volition. Under the 1980 constitution (Article 99) the Council of State was 'the collective presidency of the Socialist Republic of Vietnam'; in practice the chairman of the Council of State, who was elected from among deputies in the National Assembly, acted as the 'head of the state'. Under the constitution the National Assembly now directly elects the state president and the chairman of the National Assembly is also the chairman of the Standing Committee.

The legislative powers of the Standing Committee are not as broad under the constitution as the powers previously held by the Council of State. Whereas the Council of State had the right to issue decrees on its own initiative, the Standing Committee may only do so 'on matters entrusted to it by the National Assembly' (Article 91[4]).

### *The prime minister and the government*

The constitution has created the position of prime minister replacing that of the chairman of the Council of Ministers. The prime minister has more effective control over the government than his predecessor. The prime minister may, in particular, appoint all deputy prime ministers and ministers in the government, subject, though, to ratification by the National Assembly. Under the 1980 Constitution, all members of the Council of Ministers were directly appointed by the National Assembly.

More importantly, the prime minister has the power to dismiss the chairmen and deputy chairmen of the people's committees of the provinces and cities under the central government's jurisdiction. The

chairman of the Council of Ministers did not have such a power. The prime minister also has the power to repeal decisions, directives and circulars of government ministers and resolutions (and decisions of the people's committees). There is anecdotal evidence that in recent years certain investment projects supported at the national level did not proceed due to a lack of enthusiasm or cooperation by local governments, although the chairmen and deputy chairmen of the people's committees at all levels are still elected by their own constituencies, the possible removal of them by the prime minister is a sweeping change capable of allowing the integrity of central government initiatives to be maintained nationwide.

### *The state president*

A new position of state president has been created under the constitution, replacing the chairman of the previous Council of State as head of state. Besides having usual honorary and ceremonial duties of the head of state, the president is also able to participate actively in Vietnamese politics by recommending the election and removal of the vice president, the prime minister, the chief justice of the Supreme Court and the head of the Supreme People's Control Commission (Article 103[3]). With this authority, the state president arguably holds the balance of power in the National Assembly.

### *The court system*

The constitution does not address the issue of revamping the court system, which places an over emphasis on social order at the almost absolute expense of commercial relations. It is understood that Vietnam will pass laws for the establishment and operation of a more efficient court system which would be capable of dealing with commercial disputes. Such a move by Vietnam's leaders is crucial in gaining further confidence of foreign investors in Vietnam's investment environment.

### *The role of the Vietnam Communist Party*

Although making certain concessions on the economic front, the VCP remains the dominant force in Vietnamese politics. As a National Assembly press statement of 15 April 1992 stated: 'Between the

National Assembly and the Party, there is still a close relationship'. This is clearly an understatement, considering that almost all of the 395 deputies of the National Assembly are party members who are subject to party directives, and that Vietnam remains a one-party political system. However, there is an evolution in the role of the VCP within the state. This evolution is apparent when one compares the provision dealing with the role of the communist party within the state in successive constitutions:

#### 1980 Constitution

The Communist Party of Vietnam, the vanguard and general staff of the Vietnamese working class, armed with Marxism-Leninism, is the only force leading the state and society, and the main factor determining all successes of the Vietnamese revolution. The party exists and struggles for the interests of the working class and the people of Vietnam as a whole. Its organizations operate within the framework of the constitution.

#### 1992 Constitution

The Communist Party of Vietnam, the vanguard of the Vietnamese working class and loyal representative of the interests of the working class, the labouring people and the entire nation, adhering to Marxism-Leninism and Ho Chi Minh Thoughts, is a leading force of the state and society. All party organizations operate within the framework of the constitution and law (Article 4).

Two changes are worthy of particular mention as demonstrating the profound changes effected by the constitution. The first can be seen in the language referring to the role of party in the state and society. The 1980 Constitution states that the party is 'the only force leading the state and society', whereas the 1992 Constitution states that the party is 'the leading force of the state and society'. The second change relates to the inclusion of 'Ho Chi Minh Thoughts' as a gloss to Marxist-Leninist doctrine.

Another novelty in the new constitution is the relationship between the communist party and the legal system. Traditional Marxist philosophy argues that under a non-communist system the law is made and enforced by the ruling class and is a mere expression of its economic predominance, whereas under a communist system the



law is subject to the overruling power of the communist party. The revision of the last sentence of the provision above indicates a profound shift in attitude, by affirming that the Vietnam Communist Party is now subject to the rule of law.

This is not to say that Vietnam is preparing gradually to shift to a Western-style democratic system. Rather, the principle of democratic centralism which ensures the overriding authority of the party within the state is maintained (Article 6). The Vietnam Fatherland Front, a mass organization under the direction of the VCP, has the right to 'supervise the activities of state agencies, elected deputies state officials and employees' (Article 9). Further, the Law on Election of National Assembly Deputies (15 April 1992) exclusively empowers the Vietnam Fatherland Front to vet and select candidates.

*Foreign relations: from conflict to cooperation*

The constitution also reflects a change in the attitude of Vietnam's foreign policy, aimed at helping the country out of the international isolation that resulted from its former foreign policy and the invasion of Cambodia in 1979. This has resulted over the past few years in closer relations between Vietnam and ASEAN countries, and with Western countries generally, including the United States, with a view to normalizing relations with the United States. This also resulted in the normalization of relations with China in November 1991.

This policy shift is apparent when comparing the aims stated in the respective constitutions. Whereas the 1980 Constitution insisted on the necessity to react to aggression (this was one year after the Chinese offensive on Vietnam's northern border), on the 'fraternal friendship' with socialist countries including 'the Soviet Union, Laos, Kampuchea', on solidarity with the national independence movement, and, finally, on support of the struggle against imperialism, the 1992 Constitution refers to 'international relations and co-operation with all countries in the world irrespective of their political and social systems'. This change of attitude is also apparent in deletion from the constitution of such expressions as 'French colonists', 'American imperialists', and 'Chinese hegemonist aggressors' (refer to the preamble of 1980 Constitution).

## **Economy and foreign investment**

### *An end to state monopoly*

The 1980 Constitution simply stated that, 'The State holds a monopoly on foreign trade and all other foreign economic relations with foreign countries'. This provision was inconsistent with the foreign investment law which promotes investment in Vietnam and authorizes state-controlled entities (and at a later stage also private enterprises) to enter into joint venture agreements or business cooperation contracts with foreign investors. In a fully developed Western-style legal system, this inconsistency would have resulted in the investment law being unconstitutional. However, for nearly five years after the investment law was passed, foreign investments were carried out in conjunction with local enterprises despite this existing constitutionally entrenched prohibition.

The principles underlying the investment law have now been included in the 1992 Constitution, which states that, 'Enterprises in the various economic sectors may enter into joint ventures with domestic or foreign individuals or economic organisations as provided for by the law' (Article 22). The state monopoly over foreign economic relations and foreign investments in Vietnam, which, in practice, ended nearly five years ago, has now officially ended with the 1992 Constitution.

Chapter two of the 1992 Constitution, entitled 'The Economic System' (as in the 1980 Constitution), has been revised most profoundly. Half of the fourteen articles it contains are new. Whereas the 1980 Constitution claimed that Vietnam was advancing directly from a small-scale production economy to socialism, 'bypassing the stage of capitalist development'; the 1992 Constitution encourages individual economic entities and the private capital sector to set up businesses without any limitation as to their scale of activities in areas which are beneficial to the country's economic development (Article 21). This is an extraordinary change of direction since the 1980 Constitution, which only envisaged an economy limited to two sectors, the state sector and the 'collective economic sector' and where remaining private activities, such as small-scale trade, would 'gradually switch to production and other suitable occupation'.

Private enterprise, however, is only allowed a role within an economy of which people's and collective ownership is the foundation. The state sector is to be strengthened and developed in

particular in key areas, thus guaranteeing it a leading role in the national economy (Article 19). This is compatible with Article 5(2) of Decree No. 28/HDBT of 6 February 1991 providing regulations on foreign investment in Vietnam, which requires the permission of the prime minister in respect to foreign investment in the following areas:

- production and distribution of explosives and poisonous substances;
- exploitation of rare and precious minerals;
- large scale generation and supply of electricity and production and supply of water;
- production of transmitters, provision of post and telecommunication services;
- provision of radio and television broadcasting and publishing;
- ocean shipping and air transportation;
- export and import business; and
- international tourism.

The permission of the prime minister is unusual and more stringent than that of the chairman of the State Committee of Co-operation and Investment, who is vested with the power to grant investment (or business) licences in all other areas.

Under the 1992 Constitution, state-owned enterprises are afforded some autonomy to determine their production and transactions and have some responsibility for the results of their operations. Indeed, state subsidies for state enterprises are gradually being removed, paving the way for the public sector and private sector to compete on an arm's length basis. This new direction will result in a mixed economic system, where state planning and the market economy each have a role to play. The opening provision of chapter two clearly states that 'The State develops the multi-sectoral commodity economy in accordance with the market mechanism based on state management and socialist orientation.' In reality, one wonders how the state sector can be expected to maintain a leading role in Vietnam's economy in terms of productivity and dynamism.

## Guarantees to foreign investors

The 1992 Constitution also provides some comfort to foreign investors against the risk of requisition or nationalization of their investment. It was often overlooked by foreign investors in Vietnam that, until 15 April 1992, the Vietnamese constitution gave the state the right to nationalize assets 'with or without compensation' when it considered it 'really necessary'. This provision gave the state a wide discretionary power over foreign investments.

Most legal systems provide that the state may nationalize assets for the purpose of public interest, subject to adequate and prompt compensation. The 1992 Constitution goes even further than this generally accepted requirement, by providing that:

The state encourages international organizations and foreign nationals to invest capital and technology in Vietnam in accordance with Vietnamese law and international law and practices. The state guarantees the right of ownership of the legitimate capital property and other interests of the various international organisations and foreign nationals. Foreign investment-funded enterprises shall not be subject to nationalisation (Article 25).

This new provision aligns the 1992 Constitution with the Foreign Investment Law, which contains a similar guarantee (Article 21).

## Conclusion

The new constitution is a great step forward, if only the first step of many more which are needed. If the 1992 Constitution could be seen as Vietnam's manifesto, its message is clear. That is that national development is to take precedence over ideological pursuits, and therefore nationalization of foreign investment in the current situation of Vietnam should not be a cause of concern. Instead, a reasonably reliable legal infrastructure, a workable bureaucratic system, and a consistency in the policy-making process must all be put in place before Vietnam can expect to see the world wholeheartedly respond to its invitation to invest without any reservation. For Vietnam, adoption of the 1992 Constitution is the beginning of a long march to conquer the minds and the hearts of foreign investors.



**PART 2**

**LAW AND THE ECONOMY**



# **The Evolution of Private Commercial Freedoms in Vietnam**

**John Gillespie**

## **Introduction**

An attractive legal regime is, of course, only one factor that needs to be considered when deciding whether to invest in a foreign country. In the case of Vietnam, frequent policy changes, non-transparent law, and a truculent bureaucracy, make knowledge of laws and legal culture particularly important. The law is currently experiencing rapid change as it is employed to engineer an open, market-orientated economy. During the transition period, a conflict has arisen between what is essentially a rights-based commercial legal system, and a state apparatus and economy that is only now emerging from a rigid command ideology (Thayer 1992d:110-129). The tensions generated are of more than mere academic interest, as they shape the business and regulatory environment within which an investor must operate.

## **Private rights in a mixed market economy**

In the pursuit of a 'mixed market' economy, the question arises of whether the interplay between private and state rights in Vietnam is sufficiently dynamic to allow emergence of novel and innovative business practices. For this to happen, the state must reconcile the fact that devolution of economic and legal autonomy to individuals comes at the cost of possible disruption to state planning objectives. At this point, the emergence of private commercial freedoms assumes importance, as they are the link between an individual and the legal system; they simultaneously declare what an individual may expect from the law, and, perhaps more significantly, what the law may expect from an individual.



At this stage of the discussion the term 'private freedoms' used in the title requires further classification. It has been selected over the more precise designation, private legal rights, to draw attention to the fact that a legal right in Vietnam may not always give rise to the commercial freedom to carry out a business activity. This apparent contradiction is partially explained by the different positions legal rights occupy in Western (Anglo-American jurisdictions) and Vietnamese society.

Most would agree, for instance, that there is a clear difference between saying that someone has a right to conduct a certain business practice, and saying that it is the 'right' thing for a person to do. This is because in the West, in theory at least, a clear distinction may be drawn between what is morally right, and what is legally right. Often the two rights coincide, but it is only legal rights, with the assistance of the state, that can be harnessed by individuals to control the behaviour of others. In Vietnam the distinction is not perhaps as acute, as legal rights have traditionally been subordinated to an overriding moral obligation owed to the central political authority and family. More particularly, commercial freedoms historically have had little to do with state protection of private property by the formal legal system. They were, and to a large extent remain embedded in customary practices exhibited in family relationships, religious beliefs, aphorisms and popular literature.

Commercial freedoms are not of course absolutes, as they exist in a rich diversity in their respective cultural settings. To the conceptual relativist, (Taylor 1987:155-156) cross-cultural analysis will invariably lead to the mistake of ascribing Western precepts to Vietnamese practices. The move towards a market economy has led to a partial convergence of economic cultures, which hopefully now allows commercial freedoms in Vietnam to be meaningfully compared with their counterparts in Western market economies. There is ample evidence to suggest that the relationship between a flourishing market and stable and predictable commercial freedoms is well understood by Vietnamese lawmakers. This essay will explore and speculate upon the less clearly understood paradox: that, on the one hand, it is governments which create and protect private rights, but on the other hand, they may become the greatest threat to private rights and commercial freedoms. Finally, as there is little recent jurisprudential writing on Vietnam, and one can not look to State Economic Arbitrators or People's Courts for guidance,

most information must be gleaned from Vietnam Communist Party (VCP) policy, state legislation, and interviews with law makers and administrators.

## **An overview of the origins of commercial freedoms**

### *Vietnamese Imperial Codes*

Prior to French colonization most law was derived from the Chinese Imperial codes (Ta Van Tai 1982:523-525; Lan Quoc Nguyen 1989:142-144). The Vietnamese Imperial Codes, especially the Lê Code<sup>1</sup> (*Hong Duc* 1428-1788), departed from the Chinese *T'ang* and *Ming* models by extending a limited degree of protection to a range of private commercial rights. Landowners, for example, were compensated against unauthorized government appropriation, private encroachment through the removal of boundary markers, or fraudulent sale. Other aspects of commerce also received protection. Contracts, for instance, were vitiated by fraud or duress; market manipulation and forms of usury were also forbidden (eg. Articles 388-400, 577 Lê Code). It is important not to overstate the importance of the code to commerce; of its 722 articles, less than 10 per cent dealt directly with land, chattels or contracts.

Although superficially similar to Western legal codes, imperial law only interacted vertically from state to the individual. It completely disregarded the support an individual (in a Western jurisdiction) might expect to receive from the state to assist the prosecution of private rights, horizontally, against other individuals. As a consequence, private commercial relationships remained a creature of customary practice (Wolters 1979:442-443), escaping official attention unless they threatened tax collection or social order, the two preoccupations of Imperial rule.

### *Customary practice*

What little is known about traditional commercial practice suggests that trade was conducted through a network of interlocking

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<sup>1</sup> Although much of the legal thought that appears in the LeCode has been attributed to the Le Dynasty, as legal thought does not arise from a vacuum, at least in part it must have existed during the previous Tran Dynasty (1225-1400).

obligations. Each relationship depended upon the observance of a patronage obligation, son to father, family to clan, clan to village, etc. (Hooker 1975:227-229; Ta Van Tai 1988:Chapter Four). Within this system, entitlements depended upon status, and trade tended to be conducted within lineage groups where the hierarchy of authority was well known and likely to be observed. The more distant the relationship and weaker the patronage obligation, the greater the need for the intercession of a respected middleman who could augment the trading link by guaranteeing the performance of each party (Woodside 1984:318-320).

The Vietnamese preoccupation with family and clan relationships arose out of a prudent desire to reduce the risk of transacting with strangers. Patronage links were a means of exerting extra-contractual leverage over a recalcitrant trading partner. As the Imperial laws were penal in nature and largely ignored private commerce, traders avoided the official regulatory system if at all possible, and relied on informal dispute resolution. If a trader misjudged his commercial partners, and personal and family ties were insufficient to secure compliance, the aggrieved party appealed to public opinion to ostracize the offender (Yu Insun 1978:56-79).

When all other means of preserving harmony failed, an intractable dispute could be referred to a clan or village leader. But even in a village forum where conflicting interests were brought sharply into focus, dispute resolution had little to do with adjudication of individual claims. On the contrary, by approaching an umpire of higher social status, the disputants had implicitly abandoned their respective 'rights' and agreed to place their fortunes in 'the hands of a wise and virtuous man' (Young 1976; Landa 1981:355-361). The primary goal of mediation was to restore stability and harmony to family/clan trading relationships, and in the process enhance the social authority of the clan or village elite.<sup>2</sup> Family, and more particularly individual commercial freedoms, were often sacrificed in pursuit of these social goals.

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<sup>2</sup> Although there was often a dichotomy between the Confucian-oriented rulers and their predominantly Taoist, Buddhist and animist subjects, there is little reason to suspect that family or village heads were any more egalitarian or rights-conscious than the monarch or court officials (Marr 1971: 20-25; Whitmore 1984: 300-305).

*French colonial law*

Colonial rule formally began in Vietnam when Emperor Tu Duc signed a treaty in 1862 which ceded the three southern provinces of Cochinchina to the French. The remaining areas of Annam and Tonkin continued to be governed under the titular leadership of the Nguyen emperors (1802-1945), subject to the extensive administrative powers of the French *résident générale* (Nguyen The Anh 1985:148-150; Hooker 1975:229-283).

The French maintained two parallel legal systems. One was essentially the same as the rights-based civil law system of Metropolitan France. It applied to French citizens, Europeans and others whose national laws happened to be substantially similar to those of France. With the exception of a small francophone bureaucratic and merchant elite, most Vietnamese and Chinese continued to be governed by the Vietnamese Nguyen Code (*Gia Long* 1813-1945) and customary practice (Duiker 1976:105-107; Hooker 1975:233-234).

*Socialist commercial practice*

Even before the Declaration of Independence in 1945, the Indochinese Communist Party had advocated a policy of nationalization and redistribution of land that belonged to the French, 'imperialist aggressors' and 'reactionary' landlords (Ginsburgs 1973:674-676; Moise 1976:70-73). Under the Vietnam Workers' Party (VWP) this policy accelerated after partition in 1954, and very quickly almost 90 per cent of agriculture and industry in the North was brought under State or collective ownership (Vo Nhan Tri 1990:9-14). What is highly significant about the change is that traditional trading practices were swept aside along with many colonial commercial practices. The VWP managed to disrupt a trading culture that had survived both Chinese and French annexation. That the VWP succeeded is all the more remarkable when it is realized that at this time the lower courts were still turning to the 'rights-based colonial' law for guidance in commercial matters (RV Decree No 47, 10 October 1945). French colonial laws were not formally abrogated until the 1946 Constitution was replaced by a more orthodox socialist constitution in 1960; this re-enacted an Instruction previously issued by the Ministry of Justice on 30 June 1955 (Nguyen Van Huong 1974:192), cautioning against the use of anti-revolutionary laws.

Initially influenced heavily by the radical Maoist Chinese model, the VWP progressively turned to the Soviet Union as a source of ideology and legal inspiration. Soviet influence was particularly pronounced in its effect upon both the substance of law and formation of legal institutions (Duiker 1977:414-419). Even so, the *modus operandi* of legal administration remained peculiarly Vietnamese.

The French Colonial law which had discriminated between individuals on the basis of their relationship to property, gave way to a VWP policy which was preoccupied with class and nationalism. The few laws that were enacted were often not made public or indeed strictly followed. Except in the south, where even after reunification in 1975 private commerce remained important, much economic activity was conducted by state-owned enterprises or collectives. In this environment commercial law took the form of administrative regulations, which determined production targets, the price of raw materials, finished products, services, transport and most other tradeable property. In short, the commercial law was relegated to the role of administrative directive, whose sole purpose was the implementation of Party rural or industrial management policy. To use a phrase that is as true as it is hackneyed, 'the rule of law was replaced by the rule of men'. It is not really until the neo-Confucian and Marxist antipathy towards legalism is understood, that one can appreciate how formidable is the task of creating a commercial rights based legal system (Nguyen Khac Vien 1974:45-49; Young 1979:776-777).

### **Legal restriction of commercial freedoms**

With the exception of the highly restrictive and demonstrably unsuccessful Ordinance on Foreign Investment, 1977, at the commencement of *Doi Moi* in 1986 Vietnam had virtually no market based laws. In the interim Vietnam has changed from a society where income producing property (public property) could only be owned by the state or collectives, to one where the means of production may now be privately owned and managed (Articles 21, 25, Constitution 1992). Neither socialist or Western, the legal system has become an amorphous hybrid. In some areas, commercial freedoms are regulated almost to the point of extinction, whereas others flourish virtually free of restriction. What appears to trigger intervention is the potential for a business activity to impinge upon state planning objectives. In these circumstances, the interests of the

state are preserved by restricting access to the potentially troublesome business sector.

### *Land use rights*

This process is demonstrated by the administrative barriers erected to control the availability of 'land use' rights. Private ownership of land is not permitted in Vietnam. Article 1 *Land Law 1987*, unequivocally states that land remains '...under the ownership of the entire people', and is placed under the exclusive administration of the state. This latter function has been delegated to people's committees at both the provincial/city and district levels. They are responsible for administering land, promulgating zoning and land use regulations, allotting (leasing) land, registration and settling land use disputes (Article 6, *Land Law 1987*).

Although not entitled to full ownership, various lesser interests in land are available to state/private companies, cooperatives and individuals (Article 18, *Constitution 1992*). The highest of these interests is known as a land use right, which may be allotted on either a stable long term basis, or for a fixed or temporary purpose. Land use rights are not created equally, as many of their characteristics, such as duration, ability to be transferred or bequeathed, depend upon the purpose for which the land is to be used. The largest estate is reserved for residential land. In practice this type of land use right exists in perpetuity, may be freely transferred or bequeathed, and in most other respects differs little from a fee simple estate. These benefits have yet to be formally recognized at law, but are included in the current draft amendments to the *Land Law 1987*.

In contrast, a land use right granted for a commercial usage cannot be transferred without bureaucratic approval and subsists for a limited duration, 5-20 years in the case of cultivation, 20-50 years for industrial or office use.<sup>3</sup> For similar reasons, its transfer and

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<sup>3</sup> According to Article 15, *Law on Foreign Investment 1987-1992*, it is now possible, albeit in exceptional circumstances, for a land use right to be created for a commercial purpose for a period of 50 years. The current draft of the law amending the *Land Law 1987* (July 1993) formalizes an unlimited tenure for domestic land, 20-50 years for industry and 20 years for agriculture. There is some doubt, however, that the draft will pass the National Assembly in its current form.

bequest are also highly regulated, creating an entitlement that resembles the Western concept of a mere licence in land. Also indicative of a licence is the fact that land users, for any type of land, do not possess a tortious right to take action directly against third party infringers. It is true that they may '...enjoy state protection against infringement of their legal land use rights' (Article 49 (6) Land Law 1987). But they cannot initiate their own action and must rely upon the favourable exercise of an unfettered administrative discretion.

### *Allotment of land use rights*

Some of the inherent dangers of allotting land through a process of non-transparent administrative discretion are well illustrated by a supposedly hypothetical example furnished by the Land Inspection Office, Hanoi. In this case, an applicant for a Land Use Certificate resided for a long period of time in a villa confiscated from the French at the end of the colonial period (Articles 2, 3, 26 *Agrarian Reform Law* 1953, DR). Unhappily, the applicant did not possess a French colonial land title (*ancién regime*), as this is generally accepted as compelling, if not conclusive evidence of customary title. And in the absence of a legally enforceable prescription period, he would not automatically have been entitled to an allotment on the basis of adverse possession. The current process is destabilizing, as the regulatory vacuum leaves room for considerable bureaucratic arbitrariness and the social and pecuniary advantages of allotment are manifold. Once an allotment of a land use right is made, the holder becomes entitled to a housing ownership certificate (Articles 11, 15 Ordinance on Residential Housing 1991), and this document conveys the right to sell both the dwelling and the subordinate land use right (Articles 16 Land Law 1987). In spite of official denials, the recognition of some customary rights but not others may be interpreted as a selective gift of assets (*Vietnam Investment Review* 8 June 1992:15; 26 April 1993:5). Many of these problems could have been avoided by the adoption of transparent rules outlining the procedure for the alienation of land from the State.<sup>4</sup> The Central

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<sup>4</sup> For example Chapter 2, 'Measures of Shanghai Municipality Concerning the Transfer of Land Use Rights for Value', 1987, Shanghai Municipal People's Council.

government office is currently reviewing land allotment procedures and is expected to issue a decree regularizing valuation and disposal of state land by late 1993.

### *Ownership of improvements to land*

Even though a legal fiction is maintained that land cannot be privately owned, there is no policy objection to the outright ownership of improvements such as buildings or plantations. Ownership of an improvement automatically conveys a land use right to the substratum. It is unclear whether the process operates in reverse (Articles 5, 15, Ordinance on Residential Housing, 1991). In order to stimulate private investment in housing construction, law makers had to find a way of conveying security of tenure over improvements without offending the VCP unwavering commitment to state ownership of land. Unfortunately the two objectives cannot easily be reconciled without creating a mismatch of tenures. Residential buildings are not effected by this problem, as land use rights for domestic land, like ownership rights in dwellings, exist in perpetuity, hence there is a concurrence of tenures. It is an entirely different matter for commercial buildings, for although the structure may be owned in perpetuity, the subsisting land use right is only granted for a period of 20 to 50 years.

The land tenure system leaves many other questions unanswered, chief among these is whether on expiration of a commercial land use right ownership of improvements automatically reverts back to the state? An affirmative answer appears to be incompatible with the very specific guarantees of private ownership of property contained in the Constitution 1992. If, on the other hand, ownership of the improvement continues in perpetuity, it is a nonsense to suggest that it has a realizable value unless it can be sold with the subsisting land use right. If this supposition is correct, once commercial land has been improved the underlying land use right becomes alienated from the state in perpetuity, thereby eliminating the mismatch of tenures, but perhaps offending the Party's injunction against private ownership of land.

### *Commercial contracts*

Barriers have also been erected to control access to legally enforceable contractual rights. Only those who have been vetted and granted 'business registration' either as a company, private



enterprise or sole trader, can form commercial agreements that will be recognized and enforced by state institutions, in this case Economic Arbitrators (Article 7 Ordinance on Economic Contracts 1989; Article 12 Ordinance on Economic Arbitration 1990). Excluded from this privilege are unregistered family traders, by far the largest and most active of the private economic sectors. In contrast, all may enter contracts for non-income producing activities (Articles 3, 4 Ordinance on Civil Contracts 1991). Of course the distinction between commercial and non-commercial pursuits may not always be clear. According to one school of thought, for example, a contract entered into by an excavation company to purchase a truck is governed by the Ordinance on Civil Contracts 1991, as the truck is not used as a tradeable commodity. Had the truck been purchased to be leased or sold, the Ordinance on Economic Contracts 1989 (Article 1) may have applied. Other commentators might insist that as both transactions have a commercial flavour they are economic contracts.

Although in most civil law jurisdictions contracts are classified by the rules of civil procedure according to their dominate purpose, there are convincing reasons for believing that in Vietnam the distinction is ideological. This supposition is supported by the fact that the penalty for making a mistake and entering an economic contract without business registration is not only an unenforceable contract, but also possible criminal prosecution (Articles 8, 39 (3), Ordinance on Economic Contracts 1989). Surely this is an unnecessarily draconian outcome if the economic/non-economic classification is merely a procedural issue.

One possible explanation for a legal system that restricts access to commercial, but not non-commercial property, may be found in Party policy. The VCP has set itself two contradictory if not irreconcilable objectives. The tension should be familiar to Western observers, as it concerns the balance between state control and private commercial autonomy.<sup>5</sup> In the past the socialist distinction

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<sup>5</sup> The Constitution 1992 (Articles 12, 15, 16) now allows individuals to exercise private rights over both income producing assets and personal property. Paradoxically, although Article 22 of the Constitution 1992 states that all sectors of the economy including citizens are equal before the law, state and collectively owned segments are otherwise described as enjoying a 'corner stone' (article 15) or 'leading role' (article 19) in the economy. It should be noted that some of the drafts of the Constitution

between public and personal property ensured that income producing property (public property), was controlled by state entities or collectives. Other property which satisfied personal material and cultural requirements, but did not actually contribute to the economy (personal property) could be safely entrusted to individuals (Quigley 1988b: 154-157).

Economic circumstances have now changed. Faced with the emergence of a burgeoning privately owned economy and foreign investors, planners have been forced to abandon direct enterprise management as a form of economic control. But the market is still said to be insufficiently developed to enable traditional economic levers such as taxation and interest rates to operate efficiently. Commercial freedoms, on the other hand, have matured to the point where they may now interfere with state planning goals. This potential for conflict has for the time being been minimized by restricting private access to commercial rights. Applicants for commercial land, or 'business registration', must convince bureaucrats of the need for a proposed commercial activity. Factors such as the availability of raw materials, trained labour, utilities, demand for products or services, and compliance with national planning policy, are all used to assess the suitability of an application. But in the end private commercial freedoms must be enjoyed by an individual in a way that harmonizes with state policy.

### **Bureaucratic control of commercial freedoms**

Commercial freedoms are not just subordinated to the public interest by restricting access to commercial private rights. Once alienated from the state, commercial land use rights can only be transferred with the approval of the appropriate people's committee. Further restrictions apply to the transfer of a certificate of ownership for buildings erected on commercial land. As transactions of this nature are regarded as a sale or merger of a business, transfer is conditional upon the incoming parties complying with all the previously described requirements for business registration (Articles 24 Law on Private Enterprise 1990; articles 15, 21 *Law on Companies* 1990), or

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1992 clearly display the competing agendas of the so-called 'socialist hard line' and progressive factions within the VCP.

the rules of the State Committee for Cooperation and Investment (SCCI) where transferees happen to be foreign entities (Articles 15, 33 Decree Providing Regulations on Foreign Investment in Vietnam 1993). In keeping with the policy of leaving non-commercial property relatively free of restriction, ownership certificates for residential land may be transferred upon the completion of mechanical registration formalities (Chapter 5, Ordinance on Residential Housing 1991).

### *Intervention by economic arbitrators*

The Ordinance on Economic Contracts 198, in most respects leaves contracting parties free to strike a commercial bargain. When the ordinance was introduced, an administration still unfamiliar with and distrustful of private commerce insisted that contracts must be registered with [E]conomic [A]rbitrators. Although this practice has all but discontinued, economic arbitrators still retain the power proactively to monitor the performance of registered economic contracts, and intervene even when parties to a contract have not formally attempted to assert their legal rights (Articles 1, 2, 7, 14 Ordinance on Economic Arbitration 1990). Although legal commentators dismiss intervention of this kind as a paternalistic relic of an arbitration system originally established to supervise production plans between state enterprises, the practice still continues.

In 1992, Saigon Jewellery, a company partially owned by the Ho Chi Minh City People's Committee, imported gold on behalf of a private company. As a condition for issuing a letter of credit, Vietcom Bank required Saigon Jewellery to guarantee payment on behalf of the private company. As an economic contract, the guarantee subsisting between the bank and Saigon Jewellery was registered, and became subject to the supervision of the Ho Chi Minh City Economic Arbitrators (Articles 6, Ordinance on Economic Contracts, 1989). When the private company found itself unable to pay, Vietcom Bank looked to the guarantor for the funds. To the surprise of all parties, even before the bank had formally sought to enforce its rights enshrined in the instrument of guarantee, the economic arbitrators unilaterally ordered Saigon Jewellery to honour its obligations. It is true that no great hardship was experienced in this case. Nonetheless, the economic arbitrators proactivity usurped the autonomy of individuals, and imposed an

outcome that may have been inconsistent with the rights and wishes of both parties.

### *Intervention by people's committees*

Admittedly, direct intervention by Economic Arbitrators is now a rarity. But the supervisory powers that have been relinquished by Economic Arbitrators have been more than offset by the controls now exercised by local government. As previously mentioned, by administering a system of business registration (Articles 24 Law on Private Enterprise 1990; arts. 15, 21, Law on Companies 1990; Articles 1 *Decree on Signing and Carrying out Economic Contracts* 1992), people's committees at both the provincial/city and district levels regulate entry into the formal commercial sector.

Bureaucratic control does not stop at registration, but continues to varying degrees over the life of a business venture. Take, for example, the activities of sub-departments controlled by city level people's committees: the Sub-Department of Construction and Housing issues building permits and may supervise construction; the Sub-Department of Trade in conjunction with market control boards regulates trade practices; the sub-Department of Health establishes and enforces hygiene standards; and the Sub-Department of Land determines tariffs for the rent of land and water. Even the sale of manufactured products is controlled at the local level. All goods destined for the domestic market must be registered and pass quality assurance tests set by the Sub-Department of Standards, Measurement and Quality (*The Saigon Times* 18 February 1993:5). Anecdotal evidence suggests that if a people's committee lacks direct administrative authority over a particular offensive business practice, pressure can be applied through the exercise of a power that effects the business in an other area.

But there is more to administrative supervision of business activity than simply the desire to implement government policy. Together with their regulatory responsibilities, people's committees own and operate companies that engage in commerce. The People's Committee of Ho Chi Minh City, for example, has gone one step further and assembled a Japanese-style trading conglomerate. This is made up of a series of companies interlinked by substantial cross-ownership shareholdings. At its core are finance and insurance companies, and these service interests in tourism, textiles and transportation.

By allowing local authorities the right to participate in the market place, the impartiality of their regulatory and administrative functions may be compromised. The regulatory system furnishes many opportunities for a people's committee to use its regulatory powers in a self-serving manner to exclude or disadvantage competitors. Chief among these is the power to prevent state or private businesses from lawfully entering into binding economic contracts without a licence issued by an economic arbitrator. This institution is appointed by, and experience suggests that it rarely acts without the consent of the corresponding provincial/city people's committee.

Once a competitor has become established, the people's committee has the power to fine or close establishments that offend health, building and market regulations. It is true that most provincial/city people's committees are actively competing with each other to attract investment, and far from discouraging applicants they may offer attractive inducements. Nevertheless, if an investment happens to compete with an enterprise owned by a people's committee, short of complaining to the prime minister, who may now transfer or dismiss recalcitrant chairmen and vice chairmen of provincial/city people's committee, there is no judicial body with the authority to review the abuse of administrative power.

### **Indirect control of property rights**

Rights may also be controlled indirectly. One consequence of making access to, and transfer of, commercial rights dependent upon the favourable exercise of administrative discretion, is that the boundaries delineating private commercial rights often become blurred. This imprecision may affect the quality of rights both subjectively and objectively. Once received and decoded, private rights guide individuals in deciding what commercial activities they think they are permitted to carry out. The conventional test for a good law in the West is one that may be easily understood by members of the community, with the assistance of a legal adviser. On this basis much of Western law fails the grade. Rights are also used by adjudicators to lay down minimum acceptable standards of commercial behaviour. In both cases, conventional legal theory maintains that commercial freedoms are enhanced by stable,

predictable rules, and frustrated by vagueness and vacillation (Ogus 1983:29-41; Landa 1981; 349-355).

Some of the indirect consequences of state interference in Vietnam are illustrated by the uncertainties surrounding the 'authorized' business of companies and private enterprises. Both of these forms of commercial organization must comply strictly with the business objectives set out in their respective certificates of registration (article 13(1) Law on Companies 1990; article 22(7) Law on Private Enterprise 1990). Unfortunately it is not always possible to know what activities are authorized by a licensed business objective. For example, can a business licensed to operate a tourist hotel also lease cars? The incentive to avoid an *ultra vires* transaction is powerful, for once stripped of the protection of the corporate veil, the person who entered into the unauthorized contract on behalf of the company or private enterprise will be held personally liable and the business licence may be revoked.

If the permitted boundaries of legal autonomy are not clearly delineated, and commercial customary practices are inaccessible or no longer efficacious, the danger is that private investors will be reluctant to take risks and invest capital. Without precise rules that make it easy for people to understand their rights and responsibilities, individuals may tend to look for guidance outside of the formal legal systems; in these circumstances state ideology will assume a quasi legal status (*Vietnam News* 25 March 1992). Social control through ideology exists in all jurisdictions, but is arguably particularly effective in countries like Vietnam where the state controls the media and publications, and where courts have yet to develop a high level of commercial expertise or a robust form of independence.

Reliance upon abstract legal concepts and the ability of independent and impartial judicial institutions to delineate and adjudicate private rights arose out of the unique cultural, economic and political history of Western Europe. There is no reason to believe that the formal legal system in Vietnam will follow a similar path (Heng Hiang Khng 1992:225-228; Vecchi *et al* 1991:47-51). For the present, at least, the legal process has little to do with the strict formal rights set out in commercial legislation. Written laws and regulations can only be regarded as general guidelines, establishing the rough ambit of bureaucratic discretion.

Returning to the example of the tourist hotel, the business licence does not create immutable rights. The operators of the hotel

may be regarded as obstructionist, trouble-makers, or anti-social if they insist on leasing cars after the people's committee has decided that this is an inappropriate activity. The point in all this is that state policy is just as important as formal laws. Indeed, the validity of a law is often measured in terms of its ability to effectively implement policy. Put another way, as soon as a right imbedded in a licence or law conflicts with policy, it tends to lose its validity and by definition ceases to be a right.

## Conclusions

An assessment of the success of an experiment that borrows cross-cultural legal rules is a dubious proposition, unless one has the luxury of a long period of retrospection. As the process in Vietnam is still young and is yet to evolve into a mature form, it is too early to postulate grand theories. Perhaps all that can be said is that, particularly in the last few years, the spectacular enactment of a wide range of commercial legislation, outwardly at least, substantiates the rhetorical adoption of a rights-based legal system, and this process will only accelerate as more foreign investors enter the economy and domestic enterprises become internationalized. In fact, if the laws currently under consideration are passed (in particular amendments to the *Ordinance on Economic Contracts 1989*, *Land Law 1987*, and enactment of *Tortious Liability*, *Fair Trade Practice* and *Bankruptcy* laws) many of the concerns outlined in this article will have been overcome.

On a more abstruse level, the success of the experiment will depend upon the bulk of the population being converted, so that they share the values behind the legal reforms. This, of course, leads to the question: what are these values? Superficially they might resemble those found in Western rights-based law. But delve a bit deeper and prevailing legal thought appears to rest upon two very different propositions. Both of them are at variance with the Anglo-American creed of natural rights and atomistic individualism, which has exalted private rights in property above the good of society as a whole (Philbrick 1938:723-726; Weber 1947).

The first proposition is that the total good is preferable to the good of the individual. It is hardly surprising that a legal system which evolved in this philosophical context affords the individual little real opportunity to curb the exercise of state power, or that bureaucrats and managers of state-owned enterprises widely believe

if there is no law that permits a business activity then that activity cannot lawfully be carried out. This attitude can easily translate into an obstructionism that stifles innovation.

The other proposition is that government, and therefore regulation through the exercise of discretionary power, is preferable to the rule of abstract law. Commercial law is littered with examples of administrative discretion that control both the availability and transfer of commercial rights. As previously discussed, this is most clearly seen in the power vested in people's committees to permit only those who meet the requirements of business registration to enter economic contracts.

Although both propositions bear a strong resemblance to the underlying principles of socialist law, they are also found in non-socialist, corporatist economies, for example those of Indonesia (Lev 1978) or South Korea (Tae Hee Lee *et al.* 1991:172-175). These countries share with Vietnam a developing nations' status and an attendant belief that the sanctity of private rights and scope of commercial freedoms must at times give way to more important social imperatives such as national development. Indeed, even in the West, governments have a vital role to play in curbing commercial freedoms, particularly where they lead to unfair trade practices or unconscionable behaviour. It is worth emphasizing that the debate in Vietnam is one of survival of rights, transcending mechanistic economic arguments about the respective merits of a free market as opposed to a national industry policy.

On balance, the differences between the treatment of commercial rights in Vietnam and non-socialist Asia, or more particularly the West, outweigh the similarities. The disparity arises not so much because of the level of state intervention, although this is more pronounced in Vietnam than in most other countries, but because individuals cannot rely upon the state to prosecute or defend their private rights and preserve commercial freedoms. It will be recalled that, except for a tiny Francophone elite, the jurisprudential notion of inalienable rights, which underpins the social obligation of the state to protect private interests, never gained wide acceptance in Vietnam. The difference is also one of expectation, for practice suggests that a Vietnamese right holder tends to view a right as a passport to do something that otherwise would be unlawful. If a business dispute arises, the inclination is to rely on customary practices and not abstract legal rights to resolve the disagreement. Likewise, given the lack of 'teeth' in the debt recovery procedure,



there is very little point insisting upon the strict performance of one's rights.

Just because Vietnamese commercial freedoms differ from their counterparts in the West does not justify the conclusion that they do not exist. In fact, the rapidly expanding private economy indicates that private commercial freedoms do exist, if not flourish, in spite of the often precarious status of private legal rights. Perhaps all that can be meaningfully said is that the link between commercial freedoms and private rights does not operate in Vietnam in the way that Western models would predict. For in the West it is inconceivable that commercial freedoms could exist in an environment where private rights cannot be effectively protected against the state, or consistently enforced against individuals.

It makes sense that reform of the Vietnamese legal system should be slow and incremental, allowing time for what are essentially Western legal norms to be modified and adapted to suit domestic commercial practice. Otherwise there is a risk that a facade of superficially Western legislation may hide a culturally mismatched and unpredictable legal system. However, it is equally important that the balance between state and private interests should not be overwhelmingly tilted in favour of the state. If the only benefit of a business license is the privilege of paying taxes or supervision by People's Committees and/or Economic Arbitrators, firms are unlikely to seek membership.<sup>6</sup> They will tend to conduct their business 'underground', creating a covert economy which avoids detection. It should be remembered that Vietnamese traders have a long history of forming and enforcing commercial transactions independent of bureaucratic rule and judicial supervision.

The other major problem with bureaucratic guidance of private rights is that it tends to inhibit commercial innovation, a factor already in short supply. A not inappropriate analogy is that of a parent instructing a child to be 'independent the way I tell you'. The challenge facing law makers is to devise a legal system that fosters and protects private rights without jeopardising state planning objectives. Whatever the outcome, Vietnam will quite rightly

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<sup>6</sup> After an unenthusiastic reception, the Companies Law 1990 has attracted as many registrations in the first half of 1992 as it did in the previous eighteen months: 215 limited liability companies, 21 shareholding companies. *Vietnam News*, 23 August 1992:3

develop its own unique solutions. But for this to happen, the state must place more trust in the commercial maturity of individuals and devolve legal as well as economic autonomy. There is some reason for believing that, in spite of periodic setbacks, this is a trend already well in progress.

## Real Estate Laws in Vietnam

Nguyen Qui Binh

Under Western common and civil law, real estate is usually understood as land and anything permanently affixed to the land, such as buildings, fences and fixtures attached to the buildings. In Vietnam, property is divided into two parts: land is owned by the state, but buildings upon the land can be privately owned. Owing to this fact, individual title over the land upon which a building has been erected is legalized by law as 'the right of land use'. In a way, this is rather close to the western 'leasehold' concept.

Real estate in Vietnam is governed by two different sets of legislation: the *Land Law* (existing since 29 December 1987 and recently under intense review) and the *Law on Residential Housing* (enacted on 6 April 1991). Both laws are the results of a long process of real estate reform, during which a host of problems were encountered. Certain corrective actions have been taken, either to ensure production output, to settle disputes or to cope with new developments.

Only five years after enactment, the Land Law already proves itself to be outdated. Five different drafts of amendments on the law have been circulated among various governmental and non-governmental offices for opinions. Yet, the National Assembly in session in late 1991 still decided to postpone its consideration of the amended text for further study. In the amended law it is intended among other things that land will be given to individual (farmers) on a long-term basis, and that the 'right of land use' be saleable, mortgaged or rented as a 'special' commodity in the market economy.

### The 1987 Land Law

#### *Basic principles*

Long before enactment of the 1987 Land Law land in general was under state ownership. It had been the practice that citizens

possessed and had the right to use land but did not own it. Based on this premise, the Land Law does not focus on the ownership of the land, the landowners' rights, or land ownership registration and transfer. Rather, it concentrates on the land itself and on the rights and duties of an individual who occupies or obtains the right to use the land. The Land Law classifies land by its usage purposes, directs the states as to its administration, and stipulates the terms for land users.

### *Categories of land*

Depending on the purpose for which the land is to be used, land is classified into four categories: (1) farmland, (2) forestry land, (3) land for residential areas, and (4) specialized land. Provisions is made for idle land as well.

### *Land administration*

Functions of the state as outlined by the Land Law consist of 7 areas:

- Investing, surveying, measuring, mapping and classifying the land;
- Zoning and land use planning;
- Regulating land administration and land use;
- Allotting and recovering land;
- Registering land and issuing certificates;
- Inspecting the observance of the rules and regulations;
- Settling disputes.

### *The right of land use*

- (a) The right of land use is granted by the state at certain levels as set by the law. Land users rights are protected by the state. Land users may use the land on a stable and long-term basis. They may enjoy the fruits of their labour and the returns on their investment. They may assign or sell their dwelling house, other structures and perennial trees on allotted land. If their land is recovered by the state for other uses, they are indemnified for actual losses and added value. Land users are entitled to enjoy the benefits derived from public projects and receive information for land protection and improvement. They

also enjoy State protection against infringement of their legal land use rights. If the land they are currently using is expropriated, they will be given compensation.

- (b) Duration of the right to use land: the duration may be life-long, limited or temporary. There is no maximum for long-term land use set in the law. For foreigners, it can be 50-year rent (the maximum period for foreign embassies rent is 99 years). Limited term land use is five years and temporary land use is less than five years.
- (c) Land certificates will be issued by provincial/city or district committees, depending on the type of user: individual, social organizations, state farms and enterprises, governmental offices in towns or cities, joint venture companies, foreign individuals and organizations. District committees shall issue certificates to cooperatives, production groups and cooperative members for their agricultural and forestry lands. The form of the certificate is determined by the Land Administration General Department.
- (d) Payment of fees and taxes are some of the obligations of land users. In addition, users shall pay a fee when obtaining a certificate.
- (e) Users must register their land when it is given to them, when transferring their rights, or when changing the use of their land. To register, users apply to the people's committee which has jurisdiction over the land. Land users are required to pay a fee for registration and, as mentioned above, an additional fee for the issuance of the certificate.
- (f) Land users are obligated to use the land allocated to them in accordance with zoning regulations and the laws regarding the exploitation and conservation of resources. They are obligated to protect, improve and fertilize their land, and to refrain from all acts harmful to the environment or infringing the legal interests of adjacent land users. If the land allotted to them is land recovered from others, they are to indemnify preceding users for any loss actually incurred and pay compensation for the effects of labour as well as investments which have brought added value to the land. As long as they possess the land, users are to pay taxes and to pay regular fees when proceeding with cadastral formalities.

## Land for foreign investors

### *General*

The allotment of land for use by a foreign investor is set out in a separate chapter of the Land Law and is further elaborated in the implementing decree of 23 March 1989 of the Council of Ministers. Unless treaties between Vietnam and the country of which the investors are nationals provide otherwise, foreign investors are subject to the same obligations as Vietnamese nationals when using land, but the procedure by which they obtain land use rights is different from the procedure followed by Vietnamese nationals in two respects: in obtaining rights to use land, and in paying rent.

### *Process for obtaining the right to use land*

Land for foreign investors is categorized two ways: (a) land for plants or warehouse for manufacturing purposes, referred to as land for enterprise; and (b) land for building hotels, apartments and the like, referred to as land for property development. The former is discussed here, the latter will be dealt with in another section.

Land for enterprise can be obtained in two ways, depending on the form of investment selected: (a) business cooperation contract (BCC) and joint venture; or (b) wholly (100 per cent) foreign owned.

### *Business cooperation contract and joint ventures*

If either one of these forms is selected, foreign investors need not worry about obtaining land, as it will likely be contributed by the Vietnamese partner as equity. However, the problem for foreign investors will be in setting a value on the land contributed by the Vietnamese partner, and the equity ratio to be negotiated.

With respect to valuation, the cost of the land is difficult to determine because there is no reliable property market, and the price is administratively set according to rates published by the Ministry of Finance. However, this rate is for rental, not the selling price. The method of valuing is first to determine the land category, then to multiply the rental price by the area of land contributed and the duration of the project. The figure is then discussed with partner, the supervisory office, and unofficially with specialized departments concerned with foreign investments before it is offered to the foreign investor.

The Vietnamese partner feels obliged to obtain no less than 20 per cent of the equity. Official instructions urge the Vietnamese partner to negotiate for 50 per cent of the equity, either by requesting the foreign partner to lower her equity, or by obtaining a loan to make up the difference. For these reasons, the land price offered is likely to be distorted. Additionally, when the application dossier is submitted for preliminary approval at the provincial/city level, an assessment committee comprised of different agencies will determine the value of the capital contribution, including the land price offered. The committee's remarks on the price may contribute to the pressure the Vietnamese partner feels to seek an inflated value for her contribution. At the State Commission for Cooperation and Investment (SCCI), where final approval of the investment is made, the land is assessed again, and rejection of the initial valuation may well occur.

The price range set by the Ministry of Finance can be varied by provinces and cities. This creates competition between localities trying to attract investors by lowering the price. Less competitive provinces have complained about the lack of a uniform price. The relevant decision allowed that 'valuation of capital contribution shall be agreed upon by both parties', which means that foreign investors may still propose land prices based on similar land in neighbouring countries.

The law allows land users to pay rent not exceeding 50 per cent of the total during the survey and construction phases. Full payment will be required after production has begun. Payment is to be made in two instalments during a year, and is paid on a yearly basis beginning from the time the licence is issued. If the rental duration exceeds seven months, the rent must be paid for the entire year. Payment may be reduced in cases such as natural calamities, as an incentive to encourage projects operating under hardship, in promoted fields, or as a rebate for those who prepay three to five years rent. The reduction rate may be as much as 50 per cent and will be set by the SCCI. Payment is made in US dollars, after a declaration and verification of the amount of area to be used to the Finance authority. This payment, declaration and verification must be done within one month from the date the land is first used. There are sanctions for failure to pay and for overdue payment, namely a US\$10 per day fine on overdue declarations, triple the amount on false declarations, and 0.5 per cent interest per day for overdue payments.

In joint venture projects, where the land is contributed by the Vietnamese partners, the rent payment will be taken care of by the contributors. In BCC projects, the rent may be included within the share given to Vietnamese partners. In such cases, the enterprise is no longer required to pay rent, but such rent will be extracted from the shares given to the Vietnamese partners and paid to the government.

### **Residential housing law**

The Law on Residential Housing was enacted on 6 April 1991 to consolidate the legislation existing since the sixties. Land for residential areas is divided into urban and rural areas. Each is treated separately because the former might already have structures existing on it, and the latter may be affected by local cultivation. The provincial/city committee is authorized to allot land for residence at the maximum rate of 100 m<sup>2</sup> for families living in a town, and 200-400m<sup>2</sup> for families living in rural, delta and mountainous areas. These rates are modified by the committees depending on the availability of land. Those that are given farmland for residence are to pay an indemnification based on the acreage and land category. This payment is put in the national budget for new land development. All recipients of land must pay fees for mapping, registration and other paperwork required in making the allotment.

The Residential Housing Decree contains 42 articles, separated into seven chapters. Its significant provisions can be classified as follows:

#### *Ownership of a residential house*

The ownership of a house is not restricted by quantity, purpose of use, locations of construction, or way of procurement, provided such ownership is registered at the appropriate people's committee, taxes are paid and the house is maintained and repaired. To renovate a house one must obtain a permit, and demolition is permitted for houses on the verge of collapse or for zoning purposes. Owners may use, rent, pledge, or mortgage their houses. The state still maintains ownership over houses which have been under its management since the revolution; further regulations in this area are to be established by the Council of Ministers.



### *Real estate transactions*

Organizations and individuals are allowed to conduct real estate transactions, including construction or renovation for habitation, sale, rent, or other business purposes in accordance with the law. This stipulation abolishes the view that houses are for habitation and not a commodity that is saleable for profit. Houses and other structures on the land are saleable, but the land itself is not. However, the right of land use is also transferred to the new owners through the sale — from the point when the sale is approved by the proper authority. The contract must be notarized, registered, and a tax must be paid every time the house is sold. Only the owner may sell his house. If a house is co-owned, the consent of all owners must be obtained.

### *Administration of residential houses*

The state represented by different administrative levels supervises residential houses as follows:

- Issuing permits for construction and renovation of houses. Permits for such activities in districts and towns are to be issued by provincial/city people's committees.
- Registration of houses and issuing title deeds. This will be performed by the people's committee that has given the permit for construction or renovation.
- Approving destruction of houses in three cases: a badly-damaged house on the verge of collapse; a house located within an area where there is a construction zoning plan; or a house that has been constructed or renovated unlawfully.

### *Residential houses for foreigners*

Foreigners have the right of ownership of residential houses during the time of their investments, or during their settlement, or for long term stay in Vietnam. The ownership of houses is not restricted by quantity, usage, location of construction or way of procurement. Owners may use, rent, pledge or mortgage their houses. Foreigners and overseas Vietnamese are allowed to conduct housing business. They are subject to the same regulations as local Vietnamese regarding ownership, administration, rent and sale of houses. The Residential Housing decree has set only general guidelines. For each

subject, further decrees will need to be implemented. There is no separate law yet dealing specifically with commercial real estate.

Under the Law on Residential Housing, enacted on 26 March 1991, private ownership of houses and buildings is protected under due process. Such ownership may be acquired by purchase, construction, renovation, gift or inheritance. The owner of a residential house may also lease, sell or put the house up as collateral.

## Dispute settlements

### *Land disputes*

Disputes about the land itself are solved by the people's committee which has jurisdiction over the land in question. Proper jurisdiction of each level of people's committee depends on the legal capacity of litigants involved. Land maps, documents, labour power, living conditions of the litigants, and land available in the area are all possible types of evidence to be considered by committees in settling disputes. Petitioners may seek recourse through an appeal to the immediate supervisory committee of the committee that decided their case. The decision of the appellate committee is final and enforceable. When the disputes involve administrative land boundaries, they will be discussed between district/provincial committees. Failing an agreement, disputes may be taken to the Council of Ministers for resolution if the litigants are from villages and districts, or to the National Assembly if they are provinces.

### *Housing property disputes*

Disputes about dwelling houses, structures, or perennial trees erected on particular plots are handled by courts. They are considered disputes on ownership, and disposition of the structures will simultaneously determine the right to use the land beneath them.

The distinction between the two kinds of disputes has been clarified by the Supreme People's Court thus:

the court only handles cases on the right of land use when disputes exist on the right of use or the ownership of dwelling houses, including garden, pond, yard, well adjacent to the houses, or land over which is grown perennial trees. As for land that is apart from dwelling houses or without

perennial trees and possesses only seasonal vegetables, disputes concerning its right of use and inheritance are not under the jurisdiction of the Court' (1988 Annual Report of the Judiciary).

Within this guideline the court has expanded its jurisdiction to include:

- Petitions for compensation for labour results, inherited labour results, investment returns or added value made to the land, crops, and properties presently being used for agriculture which are recovered for public needs;
- Petitions for compensation as a result of an infringement of land use rights;
- Petitions for inheritance of gardens, aquaculture products, constructions on land where said land has been diverted from its original purpose for production and commercial purposes.

### **Future prospects for real estate legislation**

About three months after enactment of the Residential Housing Decree, a decree on Real estate tax was issued and become effective from 15 July 1991. This legislation set a tax rate of 0.3 per cent on the value of a house and 0.5 per cent on the value of land per year. The value of houses will be set based on the market price of each type of house or land and its profitability. This tax is a supplement to the residential housing law, it recognizes disputes in the ownership of houses, and provides that in such cases the tenant will pay tax. How fast the 'ownership gap' is filled will depend on the execution of the Land Law, especially interpretations regarding the right of land use.

As for the Residential Housing decree itself, problems will arise in the provisions dealing with foreigners, who are now, in principle, allowed to own and to transact in real estate, but how will they obtain land for construction, are they allowed to sell houses, what are the formalities? Answers again are dependent on implementation and development of the Land Law. Three years after its enactment, the implementation of the Land Law was appraised in a meeting held in February 1991, where it was

concluded that the Land Law had put in order the administration of land performed by the state and, along with other policies, had encouraged production and gradually settled the use of land for economic development. However, there were three issues discussed in that meeting, and the hottest one was the relationship between the regime of people's ownership and the right of land use. Resolution No 10 of August 1988 of the party allows farmers to possess some means of production, such as machinery, buffalo and cows. It also permits cooperatives to allot the right of land use to farmers. In fact, in some provinces over 90 per cent of total agricultural land has been allotted. The allotment was conducted in three steps: (1) land to farmers on an average basis based on manpower with the right to use this land for 5-10 years; (2) additional land for those who produce efficiently or are able to develop their farming thanks to experience, manpower and capital available; and (3) farmers may bid for new land. Under this process farmers have been given a certificate of land use right, which makes them more comfortable about production in the long run, and is in reality a return to them of their land. All of these measures have resulted in an increase of agricultural output.

This allotment, however, does pose several problems. The average distribution in step one does not enable mechanization, which will be necessary in the long term for higher production. In some cooperatives in the northern delta and in central Vietnam, a family with four labouring members has only half a hectare. On the other hand, this average allotment has forced those who lack experience or capital to accept something that they are not able to handle, which has created unlawful sales of land among farmers, between those who can and can't till the land effectively. Finally, the 5-10 years term is still too short.

In addition to these problems occurring in the north and centre, the south is still faced with land disputes resulting from the previous reform and redistribution, which will take some time to settle. Such disputes do not only exist in the countryside, but also in urban areas like Ho Chi Minh City. In a periodic meeting of the Ho Chi Minh City People's Council it was said that over 60 per cent of petitions sent to that council involved housing disputes.

In open discussion, it has been said that some provisions of the Land Law now contravene reality. For instance, with the change in agricultural cooperative structure, farmsteads now become the core of agricultural production and must take care of themselves, yet if

they may only have the right to use land under the restrictions of the land law this is impractical. It has been argued too that in certain localities in the South the land use right and ownership are considered as one, as people proceed to transfer and pass on to their offspring the right of use. More generally, in an economy possessing multiple sectors, ownership will often assume different forms.

The prevailing trend at the Sixth Party Congress in 1986 was to state that land belongs to the people as a collective, but the Council of Ministers should be in a position to enact further legislation to elaborate the transfer of the right of land use, the sale of labour results and investment returns, the inheritance of land, and the status of mortgages. Subsequently, during discussions among party members prior to the Seventh Party Congress in 1991, the issue was raised again and there were three proposals: the first advocated that land is a national resource which should belong to the people as a whole; the second urged a reversal of this principle; and the third proposed sharing of ownership between the state and farmers.

Those who argued the first proposal pointed out that the land had gone through different reforms, not only in this regime but also in defunct ones too, not to mention those who received their title deeds in French colonial times. Determination of proper title would require examination of the origin of the land, and its legal status. Such a task would be extremely complicated. What would one do when a person submitted a title deed yet that land of his distant ancestor on a certain piece of land, had then changed hands through several holders? Supporters of the opposite point of view contend that since the quantity of certificates of land use right issued so far is still small, farmers are not so desirous of participating in new arrangements, especially those who cultivate land left by their ancestors. Statutes and party resolutions allow mortgages, yet banks do not honour land use right certificates. The fact that farmers holding land may transfer it and pass it on to their offspring, that city dwellers have ownership to houses, and that companies own their equipment, begs the question of why farmers should be banned from having ownership of their cultivated land.

At the Seventh Party Congress, 97 per cent of participants agreed finally to put into the platform of the party that land is under general people ownership, but is allotted to particular people for long term use. Other matters, such as the transfer, inheritance and mortgage of the right of land use, shall be set by the state. That is the position of the party. The duration of long term use was again

debated in the National Assembly in August 1991, with some representatives proposing 50 years with renewal, and one representative, the chief judge of the People's Supreme Court, even suggesting a term of 100 years. Such differences reflect the dilemma of ownership versus use, and must be solved in order that land institutions become the foundation for a financial market leading to a market economy, as resolved by the Party Congress and the National Assembly.

While lawmakers are still puzzling over the duration of the land use right, and the Land Administration has only issued about 10,000 certificates of such right to farmsteads, there have been attempts to pledge the land use right certificate as security for loans from banks. This trial has been undertaken in one district in An Giang Province, in the southern delta, and it has proven successful. The same procedure is being expanded to other districts in the province. In a subsequent harvest, An Giang had the highest rice output nationwide. Prompted by this success, the State Agriculture Bank, on 12 July 1991, set procedures to given loans directly to farmers with the certificate of land use right being accepted for pledge if local people's committees so allowed. This is a departure from the old system, where loans were made through cooperatives with no collateral.

This reality puts forward a question of whether the scope of land use right should cover other rights beyond the present ones to transfer and pass on to offspring? Shall the provision of 'all forms of sale, purchase, seizure and lease of land.. are strictly prohibited' (Article 5 of the Land Law) be revised? These questions could not be answered immediately, but reality will not wait, and if no revision is made then there will be a separation between the Land Law and its practice. Moreover, the pledge of the certificate of land use right will also provoke many potential risks and confusion, due to the present lack of a judicial process to foreclose, and to put on auction the land pledged, if the bank is allowed to sell it. And what will be the political impact when land slips from farmers to non-farmers?

Transforming a concept suitable to one system into another will always dictate a transitional period. Both the Land Law and the Residential Housing decree are right in this phase. They will be subject to modification, willingly or unwillingly. When and how? Only time can tell.

## **Problems in the Corporate Income Tax Structure of Vietnam**

**Nguyen Qui Binh**

### **The corporate tax system at present**

Under the reformed system, Vietnam still does not possess a unified tax on corporate-source income. Corporate earnings that are derived from different sources are taxed differently, by different pieces of legislation (or laws), at different rates according to business sectors and industries. Except for the case of using natural resources, a company is subject to one kind of income tax, depending on the source from which the income is derived. The division can primarily be drawn, for the sake of simplicity, between:

- Income from domestic types of enterprises, comprising both industry and commerce in public and private businesses, commonly defined as the non-agricultural sector;
- Income from foreign investment, ranging from 100 per cent foreign-source of capital investment; and
- Income from agricultural sources, or the agriculture sector.

There are some rational implications behind such division. First, it is believed by the government that taxing the agricultural sector is more complicated, and that traditionally the agricultural tax is such an important tax that it needs to be administered separately. Secondly, from the point of development strategy at present, there is a need to attract substantial investment capital from abroad. And as a matter of incentive, enterprises with foreign investment now enjoy much lower tax rates. Thirdly, due to the problem of the deficit and the need to raise further revenue, the

government may think that it cannot afford to provide tax incentives to locally owned corporations.

Before discussing the problems and shortcomings of the aforementioned policy approach, it should be noted that a worthy effort has been undertaken in the recent reform to rationalize the multi-tax system to avoid double taxation. The method applied is to array the various taxes levied on a corporation under the umbrella of net profit, by allowing deductions of all other prepaid taxes (such as turnover, patent, royalty) when computing taxable income. This has made the corporate tax system more acceptable and simpler. The tax system is now framed by three pieces off tax laws described below.

The law on *Business Profit Tax* (promulgated on 30 June 1990) is applied to all local corporations, including state-owned enterprises. This law replaces the previous tax decrees on profit transfer from state enterprises and on private businesses. Tax rates have been reduced considerably compared with the past, to one level for each schedule. However, multiple tax rates are still applied :

<u>Tax rates</u>	<u>Economic sectors</u>
30 per cent	heavy industries (electricity, mineral mineral development, steel, manufacturing, chemical, construction aquaculture, forestry, communication
40 per cent	light industries, including food processing
50 per cent	commerce, services

Tax reductions or exemptions are allowed for 'encouraged' investments (up to 50 per cent of the tax due in a year), when the enterprise is located in a mountainous region (with a maximum of three years exemption), or in the case of natural disaster. If loss is still incurred in the above cases after reduction, it can be carried forward to the following years, but in no case beyond three years. For the purpose of computing taxable income, other additional taxes paid by companies will be considered as deductible expenses — except for the royalty tax on the use of natural resources. Reinvested earnings are tax free in the event of 'encouraged' investment, but such a tax exemption shall not exceed 50 per cent of the total tax on retained and distributed earnings. The law also provides that small businesses with monthly turnovers under certain limits are not taxed



by the above rates, but on the presumptive method of assessment (as applied to the turnover tax).

The foreign investment code (adopted in December 1987, and amended on 30 June 1990) sets out tax provisions applied to enterprises with foreign capital or foreign parties in business. Taxable income is computed as total receipts minus expenditures. The code provides for very flexible tax rates of between 10 and 25 per cent, in three categories, depending on the sector in which the investment takes place. The government's implementing regulations further divides tax rates as follows:

<u>Tax rates</u>	<u>Sectors/criteria</u>
21-25 per cent	standard categories
15-20 per cent	priority categories (investment projects that meet two out of seven prescribed criteria)
10-14 per cent	'exceptionally encouraged' (in the priority category and operating in remote areas of under difficult conditions)

The code also provides that for oil and gas, and some other valuable and rare resources, 'the profit tax shall be levied at higher rates in accordance with international practice.' Reinvested earnings are tax exempt (which in a sense implies that the tax only applies to dividends). Upon repatriation or remittance of profits abroad, foreign partners (companies or individual) are liable to a withholding tax at 5 to 10 per cent of the remitted profits — yet exemption or reduction may be granted in 'exceptional cases where encouragement for investment is needed'. A maximum two-year full tax holiday, counting from the year a joint-venture starts making profit, can be provided in certain cases; and a further two years of 50 per cent tax reduction is negotiable. Loss in any tax year may be carried over to the next five years to apply against profits. Enterprises may be exempt from import duties if imports are paid for them from own-source foreign exchange.

There is still a sizeable effort being put into taxing agriculture. The focal point of the tax reform is to move to a cash-based system instead of in-kind collection. However, this has posed many practical difficulties — as in the case of taxing income that comes from different crops or different activities — unless the multi-schedule system is eliminated.

It should be noted that the newly reformed system also contains some other forms of taxation, such as the turnover tax (which now acts as a consumption tax on goods and services), or the natural resources tax (levied on corporations exploiting natural resources to generate private profits). This will be discussed below.

## Structural problems

### *Quasi-integration*

As a general matter, the corporate tax structure in Vietnam was modelled on the system of taxing different types of income at different proportional rates. The tax system recognizes the corporation as a juridical person, separate from its shareholders. However, one should notice a peculiarity of the Vietnamese tax treatment of corporations, in that all business incomes will be taxed only once at the corporate level, and the shareholders' distributed earnings are not subject to personal income tax. This can be explained partly by the absence of a personal income tax, which was abolished after the French left. The newly introduced personal income tax that went into force in April 1991 (which in fact is more like a wage tax) continues to follow the same principle, treating the corporation as a separate taxable entity, and considering dividends as a tax-free return of capital rather than a taxable event. Employees are subject to personal income tax, where shareholders are tax exempt as the consequence of paying tax at the corporate level. Self-employed businesses or professionals are taxed like private corporations, at corporate rates, and enjoy personal tax exemption as shareholders do.

This looks all right at first glance, since integration could be accomplished at the corporate level. However in the Vietnamese case, this is not so, because of the problem of alignment between personal and corporate tax rates. In fact, serious discrimination and distortions have arisen along the following lines. When shareholders are not subject to tax at the individual level reinvestments are generally tax free, the corporate tax actually seems to fall only on distributed earnings, albeit the dividend tax is not on the same schedule as personal income tax. Since there has been no effective alignment between the present corporate and personal tax rates, the equity in the tax system seems to be lost. Tax equity problems do not pertain in Vietnam's case to double taxation of dividends, but relate to other sorts of discrimination, caused by

exemption of shareholders from personal income tax , as we can see below.

### **Problems of tax equity**

Unfair treatment of corporate and wage earnings becomes the focus point of problems in the corporate taxation system in Vietnam. Despite wishful thinking or genuine efforts at rationalization of the tax treatment, the current tax system remains unfair, due to the fact that entrepreneurs, wage-earners and other individuals who are equally well off have not been treated equally for tax purposes. And those who possess differing ability to pay are not being treated the same. Problems of equity arise mainly from the following discriminations.

First, there is discrimination between shareholders and wage-earners. Serious problems of tax equity can arise from the current exclusion of dividends from personal income tax in Vietnam. If one compares tax rates on individual wage-earners and on corporations (which are at the same time effective rates for shareholders, professionals and traders), it can be seen that the tax on the latter category of people does not at all conform to the personal income rate schedule, which is supposed to be progressive. High income shareholders investing in light industries, for example, pay only 30 per cent tax, while a wage earner in the same bracket might pay 50 per cent. Generally, capital could be taxed higher than wages and salaries, if not at the same rates. The above illustration is just one of many instances where the shareholders' tax liabilities turn out to be much less than the marginal personal income tax rates. Interestingly, the socialist tax system is now in the position of discriminating against the labour workforce. To get an overview, we first look at the tax rate schedules.

When the shareholders' tax is paid at the corporate level, the alignment of corporate and personal tax rates becomes impractical, even if the nominal rates between these two types of taxes are relatively set in the same line, as in the Vietnamese case. It is impossible to achieve true alignment because the shareholders' tax liability is not determined at the individual level, as a personal income tax. The essential mistake in Vietnam's approach is to limit the personal income tax basically to a tax on wages and salaries, while leaving corporate dividends untouched. This shortcoming is quite understandable since Vietnam, in trying for the first time to

introduce a personal income tax, has only very brief experience in integrating the tax system. The situation becomes even worse for the wage-earners when we analyse the real effects of tax exemptions on re-invested earnings. If the enterprises or the shareholders decide to retain 50 per cent of their earnings for investment, the tax rates applied will be then reduced by a half — which means only 15 per cent, 20 per cent and 25 per cent effective tax rates respectively on incomes from locally-owned corporations; or 5 per cent to 12.5 per cent on incomes invested in foreign-owned companies.

Second, there is discrimination between business sectors. Vietnam's tax equity problems also stem from the application of multiple tax rates and tax schedules. How can tax neutrality be achieved between different sectors, industries or forms of business when tax rates and schedules are based in essence on a discriminatory premise? For instance, agricultural tax schedules differentiated by region can lead to a situation where a farmer in the delta who has a bad crop pays more tax than a farmer from the mountains who harvests a relatively good year. The same thing happens with different industries or business sectors. Arbitrariness inherent in the fixing of tax rates and in the possibility of renegotiating one's tax can give rise to serious discrimination among various individuals, enterprises and business sectors, and also encourage massive corruption. Questions may be raised about whether the government should intervene in the first hand into the market process, or rather wait until the market does not function properly to set a return to unprofitable businesses and correct extraneous factors.

Third, there is discrimination between domestic and foreign enterprises. In Vietnam the tax system greatly favours companies with foreign investment. Currently, Vietnam taxes this sort of earnings under a separate schedule by only half of the standard rates applied to domestically owned corporations, and then a 5 to 10 per cent additional tax on profits remitted abroad. The whole scheme is designed to attract foreign investment. However, this creates a lot of problems of both tax equity and economic distortion. A person who enters into a joint venture with his foreign counterpart will pay a standard rate of between 20-25 per cent, but if he runs the business on his own or with a local partner he pays 30 to 50 per cent tax out of his earnings. This sacrifice, besides being unfair, often leads to inefficiency in production and misallocation of resources.

## Problems of tax efficiency

The complexity of Vietnam's corporate tax schedules and the proliferation of the rates stem in large measure from a genuine effort to treat different sectors of society with 'fairness'. However, multiple tax rates have proved to be counter-productive to tax equity as well as tax efficiency. Comparative experience confirms that a single corporate tax rate is far preferable, in terms of both fairness and efficiency. In fact, major problems can be proven as regards complex tax rates.

First, those sectors enjoying tax exemption or lower rates are less likely to be efficient producers. On the other hand, those that are taxed at higher rates may be driven out of business in sectors which otherwise would have been profitable. In the past, due to large exemptions, 100 per cent of the trade burden was born by about 20 per cent of imports.

Second, discrimination in tax rates leads also to misallocation of productive resources and a serious limitation of tax capacity. When the tax burden of supporting government operations is not evenly spread over all sectors and individuals, the actual tax base becomes narrowed, the government cannot afford to have low tax rates.

Third, tax evasion and corruption are obvious problems. When there is a complex proliferation of assessments, the chance for tax evasion becomes greater. It is more difficult for the government to restrict corruption occurring during tax collection. Also, the more complex the system the higher the collection costs of taxes, becoming excessive in relation to effective yield.

Fourth, another sort of distortion relates to the unpredictability of taxation. Producers and investors need to know exactly what their tax liabilities will be, before their planned production or consumption, so as better to predict better predict the overall costs of their investment decisions and to avoid unintended bankruptcies as a result of tax surprises. By the same token, flexible multiple rates make it hard for the government to undertake sound budget revenue estimates. Without reasonably accurate estimates of available resources the government runs the risk of having to resort to inflationary bank financing or external borrowings. In the recent past, the problem of revenue instability has beset Vietnam's public finance. Finally, if companies feel sure that they will be bailed out when running into serious financial difficulties, their attitude to risky businesses becomes careless; the possibility of negotiating on

tax rates often encourages enterprises to be financially irresponsible, with eventual heavy costs for the government budget.

### **Tax incentive problems**

Looking at Vietnam's tax system one recognizes the major policy motive of attracting investment. Low tax rates on corporate incomes, especially those with foreign-owned capital and a range of preferential tax treatments, are clearly intended to offer attractive long-range prospects for investors. Reluctance to incorporate shareholders dividends into the personal income tax might be deemed an additional attempt to give advantage to investors.

Let us now examine Vietnamese tax incentives from the standpoints of their effects on resource allocation. Low tax rates are of course very important to investment decisions, as they ensure higher prospective returns on capital, shorter recovery periods, and lower risk when undertaking an investment. The problem of Vietnam's preferential tax rates is that they undermine the clarity and firmness of the tax rules. A tax system with firm rules and adequate safeguards against abuse is far preferable to a system of tax elasticity, of individual contracts with investors, requiring negotiation in each case. If a spectrum of possible rates is offered, it is likely that the majority of investors will bargain and succeed in obtaining the minimum rate, and the higher rates will become redundant.

The negative effect of varying tax rates on resource allocation is also seen in connection with their inefficiencies in investment production. Transnational economic activities have shown that very low tax rates are not necessarily an incentive for foreign firms which enjoy no tax-sparing from their home country; and tax rates may be the last thing considered compared to a whole series of investment incentives, such as depreciation allowances, reasonable tax holidays, investment credits, profit repatriation, low custom duties, labour regulation, appropriate skills and adequate infrastructure.

Efficiency problems also arise in connection with the form of incentive specified as tax exemption for reinvested earnings. Other than the discrimination effect against wage-earners, illustrated above, such exemptions distort decisions on resource allocation and open the tax system to wide abuse. Shareholders or companies will take advantage of this kind of exemption to minimize their actual tax liabilities, at the government's expense. Retention of earnings by

no means assures their optimum investment. Yet, investors may legally retain earnings at higher levels for the purpose of tax deferral, then switch ownership of stocks in case of high income, or wait for a low-income years to distribute such earnings. They may abuse the exemption by false reinvestment, and it is very hard for the tax administration to keep track. For example, a new machine may be put in place for the tax authority's verification, then disappear when the tax officials have gone.

### **Problems of definition**

Current tax legislation does not define, for the purpose of tax computation, items of either gross or taxable income. Nor does it specify clearly business expenses or exemptions and deductions. Legislators feel anxious about including technical provisions in the laws, instead of putting them in the implementing regulations. This reflects legal tradition and the early stage of legislative development in Vietnam.

Tax laws on corporate profits generally define taxable income as the difference between total revenues (to be brought in from marketing of products, provision of services or any other business activities) and total expenditures (which include costs, expenses, standardized depreciation of assets used in production or business, most taxes or tax-equivalents already paid, money paid to the social insurance fund, loss from previous years). While taxable income is defined to include bank interest profits, the definition of expenditures excludes interest on loans and fringe benefits. To every businessman, such exclusion seems very arbitrary. So long as loans to an enterprise do not exceed a reasonable debt-equity ratio and are made on an arm's length basis, it is difficult to justify the refusal to allow the enterprise to deduct interest on its loans as a legitimate expense. Similarly, one may feel that bonuses or fringe benefits for staff and workers are not treated as deductible expenses; yet 'fringe benefits having wage-or-salary character' are subject to personal income tax. Such inconsistencies are due to the lack of familiarity with world-wide practices in the tax treatment of corporations.

Except for a concise definition of corporate income, cited above, the present tax law basically omits rules on identification of income and expenditures. Thus, there is a lot of uncertainty about tax treatment regarding incomes imputed or derived, capital gains and losses, fringe benefits, gifts, insurance benefits, business expenses,

cost allowances, interest on loans, depreciation or investment credits. Taxpayers and tax administrators need clear guidance with respect to all the constituents to be included or excluded from adjusted gross income. This seems to be a major contributing factor to tax inefficiency, weakness and confusion.

Problems of coherence can also be seen in the application of the statutory tax rates. For example, royalty tax rates on the exploitation of natural resources are stipulated to extend from 2 to 10 per cent for metallic minerals, 2-12 per cent for coal, 10-12 per cent for non-metallic resources, 6-20 per cent for oil and gas, 3-15 per cent for precious stones, and the specific tax rate for each resource group is left to the discretion of the executive branch, namely the Council of Ministers. One can imagine the unpredictability and hardship faced by companies and the tax authority alike, going from these statutory rates to final determination of the actual tax rate for each investment project. The same situation is envisaged in regard to corporate tax rates applied to foreign investment. Much, if not all, will depend not on the virtue of the law provisions but on the 'goodness' of the State Commission on Cooperation and Investment, which has the authority to decide on the actual tax rate applied. In plenty of cases, this can undermine the credibility of a tax regime; and the discouraging impact of an unstable tax policy on businesses and investments may be much greater than the incentive effect of obtaining a lower tax rate by bargaining.

### **Tax base erosion**

It has become a practice of the government for many years now to rely on inflation 'tax' for its deficit financing. However, the impact of inflation on explicit tax revenue can be devastating at times, especially when inflation rates are very high and there is a lag in tax collection. During the last few years, with inflation rates jumping to two digits per month, the corporate income tax base has eroded considerably. Tax laws at present contain no mechanism for an inflation index, except for a general provision allowing the government to make adjustments when the inflation rate is above 20 per cent. Since these are newly introduced laws, it is not clear how the adjustment system will work in regard to different taxes and to different sorts of indexation (threshold allowances, deductions, interest and debt payments, depreciation), so as not to further exacerbate distortions. Although business firms are required to pay



estimated tax each month, one cannot avoid drastic erosion in the tax base. The impact on progressivity and fairness of taxes will depend on the way indexation is applied.

### **Administrative problems**

One of the current issues limiting the efficiency of tax administration in Vietnam is a lack of vertical integration in management of taxes, due to limited authority given to the tax administration and a multi-layered organizational structure. The tax administration is not an independent body with full competence, as in other countries. At the central level, the head office is placed under the Ministry of Finance, which reports to the Council of Ministers through the State Planning Committee. Functioning primarily as an advisor in the definition of tax policy, the head office seems to have very little supervisory power over offices at lower governmental levels. Provincial and district tax offices are under the control of the local authorities, through the local finance bureaus. Tax collection is done through local officials on behalf of the government. Such an organizational structure prevents any effective harmonization in implementation of tax laws or regulations, with each level of local authority pursuing objectives that may best serve its particular interests. Corruption and tax embezzlement spread further down the grades. No hierarchical control is effective. Moreover, when local tax officials have the prerogative of assessment, opportunities for harassment of taxpayers and for collusion between the parties proliferate.

Another problem affecting tax administration is the absence of an integrated viewpoint or a system of master-files and taxpayer identification numbers. Corporate taxes are independently stipulated, separately collected and administered. A tax may well advance one specific objective at the expense of another. Tax arbitrage and loss in revenue are beyond administrative capacity to control, due to the present 'separation' approach. Until very recently, tax collection relied basically on withholdings applied to incomes from state enterprises — where administrative measures are monolithic, and accounting methods easier to verify. In new market economy conditions, however, with private businesses expanding and diversifying, taxpayer identification and record-keeping require new administrative techniques to effectively combat non-compliance, such as underreporting income, overstating costs and

credits, failing to declare or to make timely payment. So far, tax assessment and verification in the country has been very weak and outdated. Most obvious is the administration's inability to assess even the magnitude of the revenue-raising capacity of the taxes. One can hardly confirm any tax data, except for a rough total of collected tax from a past year.

Voluntary compliance is still new to tax administration in Vietnam. Recent tax efforts concentrate on providing incentives not to taxpayers but to the tax collectors (government offices, enterprises, and local authorities engaged in the service of collecting tax), by allowing them to retain 0.5 to 1 per cent of the tax collected. The entire tax system is based on official assessments which require a lot of administrative effort to determine tax liabilities and a good deal of contact between tax administrators and taxpayers. This again raises the relative cost of enforcement and allows greater opportunity for collusion or for arbitrary determination of tax liabilities.

Vietnam is also short of a tax litigation system. The tax laws, while recognizing the taxpayers' right to petition and litigate with regard to any tax matter, make no particular mention of the resolution of tax disputes in court. This reflects not only traditional legal practices but also the weakness of present enforcement mechanisms.

Finally, serious problems still exist with respect to administrative facilities and technical staff. There is insufficient training of key personnel, absence of motivation, poor morale or corruption in some cases, low productivity by a grossly underpaid and overstuffed workforce, and lack of infrastructure and expertise - particularly those required for efficient control, auditing and data processing.

In the last few years there have been growing amounts of tax evasion and smuggling, both among small traders and state enterprises engaged in underground economic activities (reportedly about 50 per cent of their turnover was not declared). Tax evasion is an endemic problem that stems from lack of control, sanction and inefficiency in management of the tax system; it thus signifies an increased resistance as well as a warning vis-à-vis the tax authorities. Only significant rationalization of the tax treatment, as well as systematic introduction of modern measures, will foster eventual diminishment in the incentives for tax evasion, and enable a dramatic improvement in tax collection.

## **Toward a desirable tax structure**

### *Objectives in tax reform*

In the near future, major reforms in corporate taxation are required in Vietnam because of the pressing need for: (a) further changes and improvements in the tax structure and the tax rates to reduce economic distortions; and (b) increased revenue mobilization to correct macro-economic imbalances in a non-distorting and equitable manner. These are very broad themes, comprising both short-term interests and long-term requirements. Tax reform measures need to balance various objectives: between revenue raising and efficiency, equity, and administrative effectiveness. Attention should be paid not only to the tax structure itself, but also to institutional features or other conditions of the country to ensure the optimal sequence and success of the reforms.

The policy option seen as most practical in the Vietnamese case is to adopt a gradual approach and to reconcile both short- and long-term requirements. Even though revenue mobilization through various tax measures will have to be an essential strategy for the government, reform in taxation is bound to be a longer-term endeavour, rather than an overnight antidote, somehow tailoring the tax system to the new economic environment.

### **Conclusion**

We have examined the current Vietnamese approach to taxation of corporations, looking in particular at existing problems from the standpoint of achieving a sound tax policy. Vietnam now stands at an important juncture as it attempts to introduce basic reforms in the economy. During the last few years it has made a formidable start in efforts to create a legal environment congenial to investors, through the promulgation of a huge body of necessary laws and regulations. Its chances for success will be enhanced by removal from the present tax system of those provisions or regimes that cause economic distortions and inefficiencies. As time passes and experience is gained, Vietnam will hopefully be able to obtain a desirable tax structure comparable to its development objectives.

## **The Creation of a Labour Market in Vietnam: Legal Framework and Practices**

**Irene Nørlund**

Work is the primary right, obligation and privilege of citizens. Citizens have the right to work. People fit for work must work as provided by the law. The state creates jobs on the basis of economic development plans, employs people according to both their personal aptitudes and desires, and social requirements. It fosters professional skills, preserves the health of the workforce, and constantly improves working conditions for both mental and physical labour. The state institutes and enforces regulations aimed at preventing industrial accidents and occupational diseases (Article 5).

Working people are entitled to rest. The state regulates the conditions relating to work, rest and recreation for workers and office employees. Working people are entitled to social insurance benefit in retirement, old age, sickness, or disability. The state guarantees the working peoples' right to social insurance and gradually extends the system as the national economy expands. The state guides cooperatives in gradually making social insurance benefits available to their members (Article 59).

The above articles are from chapter five ('Basic Rights and Obligations of Citizens') of Vietnam's Constitution of December 1980. They express the official view of the relationship between workers, peasants and the state before the reform process in Vietnam began. The state was the main actor in safeguarding the life and security of workers and other working people. The system was consolidated in the north and has in the main lines expanded to the south.

The wage system was fairly unified, mainly depending on the length of time employed in the enterprise. Unemployment did not exist as a concept. The state took care of free education and health

care, as well as social benefits like retirement benefits, old age pensions and sickness benefits. Working hours were limited by law. Employees were able to buy cheap goods like rice and other basic goods at very low fixed prices. In most cases housing was also provided, including almost no cost for electricity and water. No direct income tax system existed.

Employment in the state sector was basically employment for life. State employment was attractive because of job security and a certain number of privileges. Outside the state sector there was no social security. However, the overall problem was a very low level of incomes and a system that had little possibility of expanding, because of its inability to compete with the fast-developing economies of East- and Southeast Asia. Economic crisis became the challenge of the 1980s.

Already in the early 1980s reforms had started in the state sector. Incentives were introduced and the wage system changed, because a much more complicated system mixed between fixed basic wages and an increasing dominance of piece-rate incomes and extra work of all kinds. For a couple of years the economy managed to survive by 'pulling itself up by its bootstraps' through more work and extra work in the factories.

Quite a large number of new regulations were introduced, but most of them of limited scope. When *doi moi* was introduced in 1987 the process went further, but it was not until 1989 that fundamental reform took place and Vietnam moved to build a market-based economy based on cost-accounting as the leading factor.

In the former system, ideologically speaking, the state was built on the working people. Therefore no contradictions existed between employers and employees. In the early reform system three interests existed, all of which were supposed to be taken into consideration: the state, the enterprises and the individual. However, the individual had little chance of manifesting his or her interests, and the existing trade unions were not of any help in this respect. The role of the unions was essentially to educate the workers that there were no contradictions between their interests and the state.

The system also existed without a formal labour market, which had to be established along with the other reforms. By 1988 reform had gone further in the south than in the north when it came to state subventions of rice and other basic goods. The subsidy system still predominated in the north, whereas it was almost eliminated in the south.

However, if the enterprises worked on a cost-accounting basis, it would be necessary to close down a substantial number of factories and to sack a considerable number of workers in other factories. This meant that the lifetime labour system could not function any longer, and a free labour force could be created. The concern was that if new jobs could not be created at the same time, a new crisis of political dimensions might result, with a large number of dissatisfied workers turning against the state.

Obviously it was necessary to create a labour market working on rules existing in societies based on the market economy as part of broader transformation of the economy. This included both a new type of trade union, which would defend the interests of workers independently of the state, and the establishment of some kind of social security system to support workers who were unemployed, sick or had to retire. But the main interest was to create a free labour market, where wages were also related to a cost-accounting system.

In 1989 and 1990, discussions took place about how to make regulations for the new system of labour relations. In April 1990, representatives from the General Confederation of Trade Unions were still not sure how the labour law would finally be formulated. The 2.7 million workers had been working under the old system and they were not happy to sign contracts. By this time the government had decided that changes into a contract labour system should take place step-by-step. At first new workers should be employed in a contract system, then workers employed outside the state system included, and finally it should be extended to the whole labour force.

In relation to the question of sacking labour, a number of criteria were specified. First of all the workers should be above forty-five years of age. Priority was to fire first the weak, the lazy and the workers with low productivity or quality of labour. The regulation said that an unemployed worker should receive a bonus for leaving in proportion to the number of years employed, but at least three months income. But interviews in Hanoi did not confirm this was a general practice. The number of workers losing their jobs was estimated in 1989 by the General Confederation of Trade Unions to be seven to 10 per cent of the industrial labour force. More have followed in subsequent years, which is one reason for the strong interest in foreign investments and job creation.

In mid and late 1990 a number of laws, decrees and regulations on labour questions were adopted and the legal basis for a labour market established. During 1991 and 1992, further detailed policies on labour

were adopted. The system changed substantially in relation to what had existed in 1980. In April 1992, a new constitution was adopted. Chapter Five, on 'The Fundamental Rights and Duties of Citizens' :

Labour is the right and duty of citizens. The state and society have plans to create even more jobs for workers. (Article 55)

The state promulgates policies and systems for labour safety. It prescribes the time of work and system of wages, rest and social security insurance for state employees and other wage-earners and encourages the development of various forms of social security insurance for workers. (Article 56.)

It seems clear enough that the state is no longer taking the same responsibility for workers' lives as in the 1980 constitution. In relation to health and education, the 1992 constitution does not claim to provide free general education and medical care as in the 1980 constitution. Now it says that 'elementary education is mandatory and free', and that 'the state shall devise a system for hospital charges, and for exemption and reduction of hospital charges.'

An essential point in relation to the female labour force is regulation of maternity leave and facilities in relation to childcare (this is considered to be the female sphere and is also established practice).

The 1980 constitution, Article 63, stated:

Women are entitled to pre- and post-natal paid leave if they are workers or office employees, or to maternity allowances if they are co-operative members. The state and society ensure the development of maternity homes, creches, kindergartens, community dining halls and other social amenities to create favourable conditions for women to produce, work, study and rest.

In the 1992 constitution this was amended to read:

Women state employees and wage earners are entitled to fully paid pre- and post-natal leave as stipulated by law. The state and society will create conditions for women to raise the level of their knowledge and develop their role in society. It will take care of developing maternity homes, pediatrics, creches, and other social welfare facilities to alleviate family burdens and create

conditions for women to produce, work, study, receive medical treatment, rest, and fulfill their duty as mothers.

The 1992 constitution has not reduced the promises in this field, except for the community dining halls. It is a question, however, whether this system has been available at any time to more than the most privileged workers, mainly in large state-owned enterprises. This question is not easy to answer, because some families prefer to let relatives take care of the children. In none of the cases is it clearly specified who is to pay the expenses. Earlier on creches and kindergartens were very cheap, but now this is probably one of the heaviest burdens in the family economy, just like school classes above fourth grade have to be paid for, and even earlier grades demand some payment to support the low incomes of teachers.

### Laws and regulations

During 1990, several regulations and rules were passed by the Council of State, the National Assembly and the Ministry of Labour, War Invalids and Social Affairs to follow up the on the 1987 *Law on Foreign Investment* (29 December). Two of the most important documents concerned workers in enterprises in general: the Ordinance on Labour Contracts (10 September 1990), which relates to the Articles 58 and 100 of the 1980 constitution., and the *Law on Trade Unions*, passed by the National Assembly on 7 July 1990.

The decision to establish labour relations based on labour contracts is probably one of the most important steps, because it eliminates the former practice of life-time employment. The labour contract is an agreement between employee and employer. It can be either written or oral. In the latter case there is of course the chance that the employee is not fully aware of his or her rights and obligations, whereas the written labour contract shall be in the standard form published by the ministry.

Three types of labour contracts are outlined: the definite, the indefinite, and the contract for a specific or seasonal job. Specific rules relate to each type, as in termination of the job and other measures; but it mainly concerns the length of time of employment. Other clauses in the ordinance relate to: the legal age of being employed (fifteen years, or eighteen years for dangerous jobs); trial period; questions related to untimely suspension or termination of contract;



when contracts cannot be untimely terminated; and finally regulations of resolution of labour disputes.

The Law on Trade Unions is certainly a step in the direction of establishing independent unions which can defend the interests of workers vis-à-vis employers and the state. However, it is still questionable how independent they are, if the intentions in the text are taken at face value :

*Article 1.1:*

A trade union is a large political and social organization of the working class voluntarily established under the leadership of the Vietnam Communist Party. It represents Vietnamese workers, is part of the political system of Vietnam and brings the benefits of socialism to workers.

The law also contains chapters on rights and obligations of trade unions and guarantees concerning trade union activities. It is obvious from the articles that unions are considered part of the political system and obligations have not changed basically from what they were before:

*Article 4.2:*

Each union shall promote the constitution and laws, educate workers to follow and uphold the law, participate in the building of socialism, protect the fatherland, protect socialist property, and work with discipline, productivity, quality, and efficiency.

*Article 7:*

Each union shall liaise with the bodies, units and organisations concerned in order to create employment, organise training, and improve professional standards, culture, and science and technology skills of workers.

*Article 9:*

Each trade union shall, within its function, monitor the observance of the laws on labour contracts, employment, retrenchment, wages, bonuses, labour protection, social insurance and policies in relation to the rights, obligations and interests of workers.

The purpose of the unions earlier on was mainly related to training and social and cultural affairs. Article 9 opens up for a more influential role for the unions, and they are moreover the representatives of workers in negotiations and the resolution of

disputes. In the 1980s, many workers in state enterprises were not always aware of their membership. It has yet to be seen if workers themselves are becoming more interested in unions now that their daily income is much more threatened than before.

The General Confederation of Trade Unions has been quite enthusiastic about the new trade union law, including the necessity of establishing a new regime of social security. There were certainly disagreements about the contents of the law, but the General Confederation of Trade Unions probably would prefer to see a more active role played by the unions.

### **Labour in enterprises with foreign-owned capital.**

As a reflection of the importance of obtaining foreign investments for Vietnam, regulations on labour for enterprises with foreign-owned capital were issued by the Council of Minister on 22 June 1990. This was followed by provisions for implementation from the Ministry of Labour, War Invalids and Social Affairs, (31 December 1990, No. 19-LDTBXH-TT).

The two documents are structured similarly in relation to their eleven chapters. Although neither documents spells out the exact details, which might change over time, both offer basic lines for agreements between a foreign employer and employees — either Vietnamese or foreigners. The chapters on labour for enterprises with foreign-owned capital deal with the following issues:

1. General provisions
2. Labour recruitment and training
3. Labour contracts
4. Collective labour agreements
5. Trade Unions
6. Working hours and holidays
7. Wages and salaries
8. Social insurance
9. Occupational health and safety
10. Labour inspection and control
11. Resolution of labour disputes.

One difference compared to the general regulations is that the employee has to be aged eighteen years. Only for the purpose of training may someone be employed from the age of sixteen. The

method of recruitment is specified, and the circular on labour specifies who is to pay the cost.

Collective labour agreements have to be signed no later than six months after the start of operation of the enterprise. The local labour office shall approve the agreement within fifteen days, so the regulations clearly try to speed up the process of a sometimes very slow working bureaucracy. Trade unions shall be established according to the Trade Union Law.

The regulation of working hours is specific. Weekly working hours shall not exceed 48 hours per week, with one hour less than that per day for workers under eighteen years and for heavy or dangerous work. All employees are entitled to eighteen days fully paid leave per year.

Women employees have the right of a minimum of twelve weeks' maternity leave and may be entitled to twelve more weeks maximum in special circumstances. The first twelve weeks should be paid at 100 per cent of the principal salary. These provisions seem to disadvantage women compared to established practices in the factories. During the 1980s, maternity leave was extended from two to up to six months. The problem with maternity leave and sick leave, however, was that the employees were paid only basic wages, which represented only a small portion of the real wage. Virtually nothing is stipulated about child care facilities.

Social insurance is organized so that the enterprise contributes 10 per cent of total wages and salaries. Of this amount, 2 per cent has to be contributed to the local labour office, to go into a fund for unemployment benefits. The other 8 per cent shall be contributed to a social fund established at the factory to cover sickness, labour accidents, pregnancy, maternity and child-care, and burial and funeral expenses. The employee has to contribute 10 per cent of the monthly salary specified in the labour contract (and not the actual amount eventually received) to a local insurance fund to cover old age benefits, benefits for permanently disabled, and burial expenses.

In relation to occupational health and safety, the enterprise is obliged to protect labour and health according to laws in Vietnam — including environmental protection — and according to international standards and practices. This is not established practice in Vietnam, and may help to improve the level of security and protection.

The chapter on labour inspection and control is much more detailed than can be found in the general regulations; the Ministry of Labour, War Invalids and Social Affairs is responsible. The labour

inspector has quite wide discretion, to request information, but it is not clear what he can actually do to change the state of affairs.

When it comes to complaints, the local office responsible for labour matters should first try to manage the problem. If it is not resolved, the case goes to the Ministry on Labour, War Invalids and Social Affairs. Regarding disputes, the director of the enterprise should first try to settle the problem with the trade union or employees' representative and a solution achieved within seven days. If negotiations are unsuccessful, it goes to the local labour office, or, if still unresolved, the ministry can appoint a person to act as arbitrator. The last possibility is to go to the people's court.

Wages and salaries are to be calculated in accordance with the terms of the collective labour agreement, and shall not be less than the minimum wage announced each year by the Ministry of Labour. Night shift work is to be paid 50 per cent higher than day rate, overtime shall be paid at the same rate and work on festival days shall be paid at least 100 per cent above the daily wage. The salary shall be denominated in foreign currency, but may be paid in both Vietnamese and foreign currency.

## Conclusion

It seems evident that labour legislation in Vietnam is undergoing reformation, and that basic laws concerning an independent labour movement — with some modifications — are now established. From the point of view of labour, quite fundamental changes have taken place in Vietnam, which of course is a reflection of wider economic change. In 1992, however, there was no sign of increased activity on the labour market in order to defend workers' interests. It seems the new legislation is not totally without importance, although the most important fact probably is the harsher labour conditions applied in foreign-owned enterprises compared to the traditionally more lax labour discipline. Moreover, there exist unions in state-owned factories that often function as intermediaries in case of dissatisfaction among the workers, whereas in foreign-owned enterprises most often unions are not established. Therefore, legal provisions are not implemented in many cases.

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ISBN 0 7315 1852 7.  
ISSN 0727-5994