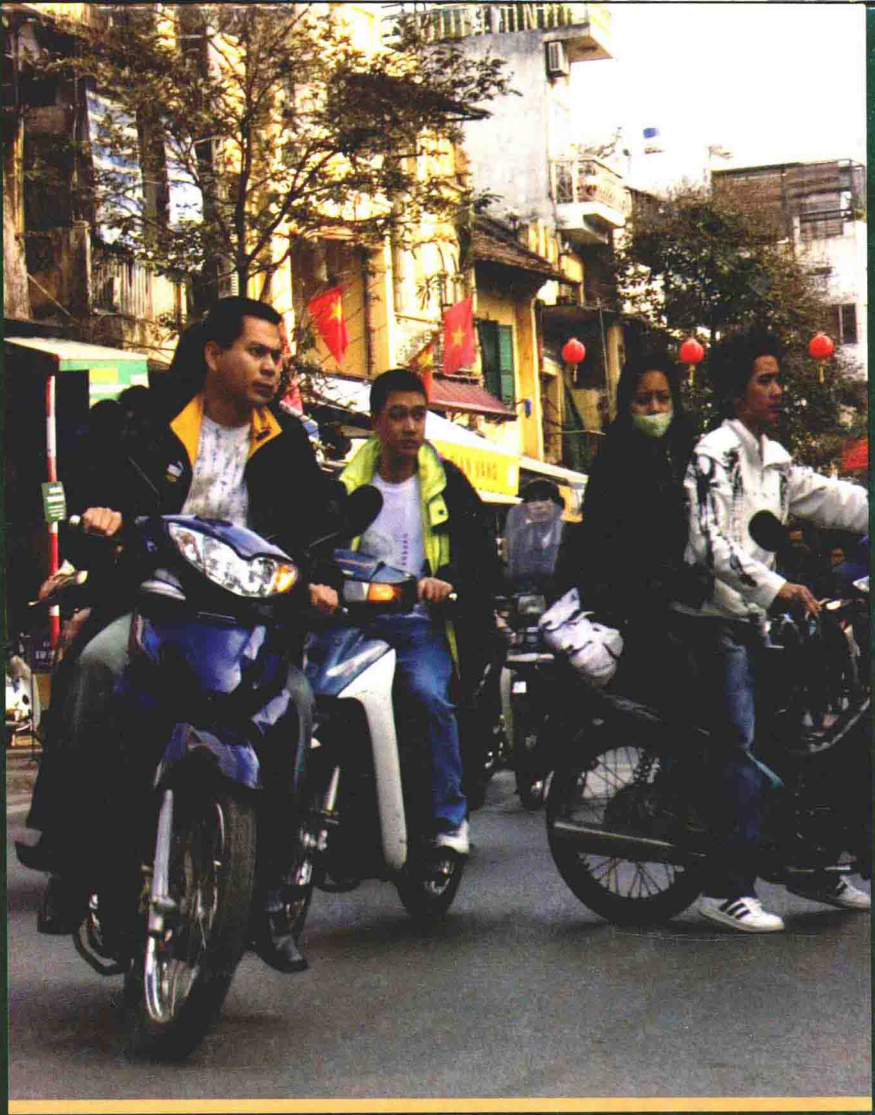

# Law and Society in Vietnam

## The Transition from Socialism in Comparative Perspective

MARK SIDEL

CAMBRIDGE STUDIES IN LAW AND SOCIETY

# LAW AND SOCIETY IN VIETNAM

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# TABLES

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# INTRODUCTION

Vietnam's *doi moi* (renovation) era began twenty years ago, in 1986, and this volume is about Vietnam's struggles to strengthen law and pursue legal reform in that era of reform. Vietnam's efforts are part of a broader transformation of socialist societies, and this volume makes explicit comparisons to developments in China, a country closely watched in Vietnam and whose own reform efforts have sometimes paralleled (or presaged) some of Vietnam's struggles and policies (Cohen 1990).

Vietnam's current debates and activities in strengthening a role for law are, of course, closely related to its history, and understanding that history is crucial to comprehending the debates over legal reform in Vietnam. Nguyen Ngoc Huy, Ta Van Tai, John Gillespie and other scholars have illuminated the important roles that Chinese, French, Russian and (in the south), American law have played in the development of different historical stages of Vietnamese law (Huy and Tai 1987; Tai 1989; Gillespie 2006). In this introduction, we begin the exploration of the modern conflict over the role of law in Vietnam by exploring conflicting strands of legal thought in Vietnam in the 1950s, when the first in a series of debates and conflicts on law under Party rule took place.

Any attempt to unravel these strands cannot challenge the historical fact that law was severely repressed, undervalued and used as an instrument of Party policy during this era. The Vietnam Workers Party, later the Vietnamese Communist Party, directed the legal system, often down to the individual trial level, in much the same way that the Party not only led but directed, or at least sought to lead and direct, often at the micromanagement level, many other elements of Vietnamese economic, political, military and social life. But even as we acknowledge that the Party refused to recognize law as an autonomous force in society or, often, even the narrow roles that law could play within a Party-dominated system, it is important to note that

different conceptions of law did exist (Gillespie 2004, 2006; Sidel 1997c). Vietnamese political and "legal" life from the 1950s well into the 1980s was certainly dominated by the Party (Ginsburgs 1962a, 1962b, 1963). But that clear Party instrumentalization of the government and its ministries, of the legal system, economic life, and social life masks other strands of thought and action that are important to understanding the development of law and the legal system in later decades. The work of David Marr, John Gillespie, Neil Jamieson, Ben Kerkvliet, Adam Fforde, Kim Ninh and others provides a more textured understanding of Vietnamese political, economic and social life in this era (Jamieson 1992; Marr 1995a; Fforde 1986; Luong 1993; Ninh 2002; Kerkvliet 2005; Gillespie 2006). Here we explore some of these complexities for law, strands that may help in understanding the debates and policy development of the period from 1986 to 2006 that form the core of this book's analysis. We do this with reference to similar developments in China and in the analysis of Chinese law, an important comparative base for understanding developments in Vietnam.

Law certainly lags behind history, economics and politics in this analytical understanding. The dominant paradigm in western understanding of Vietnamese law from the mid-1950s through the mid-1980s has been virtually complete Party domination, almost without opposition, and the virtual non-existence of countervailing forces and contending strands of thought (Sidel 1993, 1994, 1997b, 1997c). In the years of the cold war this paradigm was eagerly accepted by some scholars whose political support for American cold war efforts required an acceptance of the Vietnamese (and Chinese) tendency to deny internal conflict, to portray their own views as even more monolithic than they may have actually been.

In recent years, this paradigm for defining north Vietnamese legal development in the 1954–1975 period has been accepted by those working with the emerging Vietnamese legal system, many of whom are interested in the promotion of western models, structures and statutes. The introduction of western models largely without reference to Vietnamese legal traditions and practice is thus not only taken for granted but takes on a kind of nobility: by bringing in the new and modern, the aid-givers can dispense with the old (or, in its slightly more sophisticated version, help Vietnamese reformers discard the old), which is considered of little value by the donors of the new and the modern (Rose 1998).

Two strands of thought that provide contrasting approaches to the hardest of the Party's instrumentalist positions on the role and domination of law arose from intellectuals, journalists and other writers, many originally non-Communist, who joined with the Viet Minh and the Party in the 1940s and early 1950s. The individuals and their thought led in somewhat different directions. One clearly dissenting strand of thought on the role of law led toward a form of political opposition in the mid-1950s, and is already reasonably well-known to specialists. That conflict between the Party and its political/legal apparatus, and those who sought more legal protections for individual freedoms and a more autonomous legal system, is a relatively underexplored aspect of the *Nhan van Giai pham* movement of the late 1950s and its residues in critical and dissident thought beyond that era. The discussion here focuses not on the conflict over artistic and literary freedom that was, admittedly, at the root of the movement, but on the views that Nguyen Huu Dang, Nguyen Manh Tuong and a few others close to the *Nhan van Giai pham* core group published on a different, expanded, and more autonomous role for law and the legal system.

If this strand of dissenting thought on the role of law was buried under repression in the late 1950s, another strand of thought on the role of law was submerged for a long period in academic work and political powerlessness. In the early 1960s, a groups of intellectuals, including some from non-Party political backgrounds, came together in the newly-formed "law group" (*to luat hoc*) within the social sciences section of the State Sciences Committee in Hanoi. The writings of some members of that group evinced a respect for a comparative approach, for the role of strong legal systems in western societies, and for the role of law (in addition to Party policy) in promoting economic development. At one level the isolation of this strand in the academic world removed these views from day-to-day policy influence just as surely as repression would have done. But removal and isolation were not in fact repression, and the views and methods these scholars represented were left to hibernate and ripen until finding some vindication several decades later, once reform had begun.

A third set of contending approaches is the most difficult to analyze and perhaps the most controversial to discuss. That is the varying strands of thought on the role of law within the Party and its leadership. There are some who would deny that it is possible to identify anything

but complete and monolithic convergence within the Party on the question of the role of law. But we know that monolithic convergence of view was not the case in economics, in artistic policy, even on the conduct of the war with the United States, and monolithic convergence of policy was not the case in law as well. In recent years other scholars (such as Gillespie 2004) have begun unraveling these strands on the role of law within the Party itself.

## CONFLICT WITH "ENEMIES" OVER CONTENDING APPROACHES TO LAW: *NHAN VAN GIAI PHAM* AND BEYOND

The story of *Nhan van Giai pham*, the 1956–1959 conflict between the Party and a group of dissenting intellectuals that is often analogized to China's Hundred Flowers Movement and its repression, has been told since the late 1950s (Chi 1958; Mai 1958; Boudarel 1991; Tuong 1992; Ninh 2002). But I focus here on the group's visions for a different relationship between law and the Party.

Nguyen Huu Dang and Nguyen Manh Tuong were two of the intellectuals who had (in Dang's case) joined with Ho and the Viet Minh forces, and (in Tuong's case), initially adapted to Viet Minh and Party control. Nguyen Huu Dang joined Ho Chi Minh's first cabinet in 1945, and helped to plan the September 2, 1945 ceremony in Ba Dinh Square where Vietnam's independence was declared. Tuong was, in the 1950s, one of Vietnam's most prominent intellectuals, the famous "dual doctorate" from France, who had returned to teach in Hanoi. When the *Nhan van* and *Giai pham* periodicals began publication in 1956 they were important participants, especially Nguyen Huu Dang.

These figures expressed their approach to the role of law in the mid-1950s in two strands of thought. First, they emphasized the need for sharply strengthened, considerably more independent legal processes under considerably less day-to-day Party control, with more vigorous protection of individual liberties and system autonomy. As Nguyen Huu Dang noted,

> [W]e are used to looking down upon bourgeois legal principles, so that among a large number of people this state of affairs has turned into contempt for the law in general. It is also because, during our long and hard resistance, we were used to solving all questions within our groups, at our convenience. We were accustomed to resorting to a "rule of

> thumb" to move things along every time our work ran into a regulation. We have been used to replacing law with "viewpoint".
>
> (Dang 1956a)

The solution was not a firmer political "viewpoint," but the failure to embrace legal norms as a standard for conduct.

> To have a firm point of view is very valuable, but this is not sufficient in itself . . . A complete legal code would be a guarantee for the democratic nature of our regime. It will be the main track for the train smoothly speeding our people toward socialism. It is due to the lack of a legal code that our agrarian reform has bitterly failed. . . It is due to the lack of a legal code that a police agent can ask for a marriage certificate from a couple sitting on the bank of the "little lake" waiting for the moonrise, that a census cadre can watch at the door of a house, making its tenants so uneasy that they cannot eat or sleep . . . It is due to the lack of a complete legal code that shameless political slanders and threats can be made.
>
> (Dang 1956a)

And the measures proposed for reaching that solution were spirited and daring. They included a new Constitution that would replace the 1946 Constitution and further enshrine the rights embodied in that document; more authority for and more frequent meetings of the National Assembly, "because in peacetime there is no reason why the National Assembly should entrust all its work to its standing committee, which, so far, has been practically inactive"; and "reorganization of the judiciary, and giving it real power" (Dang 1956a).

Nguyen Huu Dang discussed the core problem of constitutionalism in the next, and as it turned out, last issue of *Nhan van*. Dang continues to argue that law and its enforcement are necessary for consolidation of socialism in the north, not an inconvenience or a luxury that can be deferred until reunification is completed. And consolidation of law requires promulgation of a new or amended Constitution adequate to current needs. At another level, however, Dang seems aware that he is fighting different forces: not only those who regard law as an inconvenience, but some who seek to roll back even the very limited protections provided in the 1946 Constitution and the laws and regulations promulgated under it. By late November 1956 that view is also of deep concern.

> I only want to assert one thing, that no matter what the content of a future Constitution may be, the parts of the 1946 Constitution relating to guarantees of democratic freedoms cannot be changed, because this is the basis of a democratic regime.
>
> Today ... some say about the 1946 Constitution, "the 1946 Constitution is a blanket, strategic concession to the gang of the Vietnamese Nationalist Party aided by the Chinese Nationalists, and to those who did not follow the revolution at the time ... It is all the more inadequate in the present situation, when the people's government has made great progress. Since the forces of the workers and the peasants are now greatly developed, of course one should be stricter, instead of falling back to the level of bourgeois democracy of 1946.
>
> Actually, there is no opinion that is more anti-democratic than the one stated above.
>
> (Dang 1956b)

Thus even in late 1956 the democratic dissidents were drawing distinctions between some in the Party leadership who favored the perhaps somewhat gentler instrumentalism of the early years of the Democratic Republic of Vietnam (DRV), and those who favored even less autonomy than already existed for an already highly controlled, instrumentalized legal system, and more repression.

Nguyen Manh Tuong made similar criticisms in his far-reaching and famous attack on the repressive land reform campaign, delivered before a meeting of the Fatherland Front:

> Administrative measures, and particularly legal measures, when correctly used, can ensure the success of the Revolution. What did we want then? We wanted to discover the enemies of the peasants, of the revolution, in order to suppress them. But if we were prudent, if we wanted to safeguard the prestige and the success of the revolution, we should not forget that revolutionary justice must not miss its target: the enemy. A slogan has been put out: Better kill ten innocent people than let one enemy escape. This slogan is not only leftist to a ridiculous degree but it is also harmful to the Revolution ...
>
> We have the means of discovering our enemies ... we must avoid mass repression and ... we must not kill innocent people.
>
> (Tuong 1956)

Professor Tuong then outlined the safeguards that he believed would better serve the revolution. At the time these procedural steps were proposed (and proposed carefully, as is clear in Tuong's careful reticence from calling directly for judicial independence), they constituted

perhaps the single most clear-cut call for legal reform in the Democratic Republic of Vietnam of the 1950s:

> The first principle is: Those who committed crimes many years ago should not be punished for those crimes now ...
>
> The second principle is: The responsibility falls on the guilty person only, not on wives, children or relatives ... None of the Western countries has proceeded in such a manner for four hundred years. Responsibility before the law is always individual ...
>
> The third principle is: We cannot condemn a man without valid evidence ...
>
> The fourth principle is: The interest of the defendant must be taken into consideration in the process of investigation and accusation. The prisoner at the bar has the right to be represented by counsel ...
>
> How can these principles be applied to our Land Reform? The reform could certainly continue, but the punishment of reactionaries should not be settled by the Special People's Court[s], obviously so full of shortcomings ... On the contrary, having mobilized the spirit of the people and listened to their denunciation, we should charge the ordinary People's Court to investigate, to examine, to interrogate, to judge, while the defendants should have the right to defend themselves and to be represented by counsel. We only hate the crime they might have committed; their human dignity we respect. We ought to have confidence in the court and to provide all necessary guarantees for the judge to enable him to perform his duty free from any administrative pressure and quite separate from the executive. I say separate but not independent.
>
> (Tuong 1958)

Tuong, however, went further. He sought to "analyze the causes of our errors," and among those causes one was stated in the strongest possible terms.

> We despise legality. A Polish professor, Mr. Mannell, when lecturing at the Ministry of Justice, reported that in Poland, immediately after the revolution, the politicians completely despised legality. They thought that they were talented enough to take upon themselves the direction of justice; to compel justice to serve political interests without paying any attention to fundamental principles of law ... All this does not surprise us. At the beginning the politicians were crazy with their successes, naturally, for those successes were imposing ... Our politicians are biased by their prejudice against legality, thinking that justice is only a spoke to be put into the wheel. They do not understand that, on the contrary, legality serves to prevent the car from being overturned ...

> A great danger lies in the fact that the politicians think that they are above the law . . .
>
> Politics still considers justice a poor relative . . . Although there exists in our country a Ministry of Justice as well as many tribunals, laws and regulations; a politics of legality seems to be totally non-existent . . . Politics is leading justice – that is perfectly right – but politics is impinging on justice, replacing justice.
>
> (Tuong 1958)

For these views Nguyen Huu Dang, Nguyen Manh Tuong and others were severely criticized, and their professional and personal lives crushed (Tuong 1992; Ninh 2002). The criticism of *Nhan van Giai pham* took into account the views of Dang, Tuong and others on problems in the role of law, and directly criticized those views (Huu 1958; Bon Nhan Van 1959).

There are few other episodes of direct expression of conflicting views on the development of the role of law and the legal system before 1975. The more closed political atmosphere after *Nhan van Giai pham*, and the unifying mobilization that came with the onset of the US war, are among the reasons for that. Among the very few other episodes in this period available to us that may be interpretable as involving contending approaches to the role of law is the 1967 trial of the philosopher Hoang Minh Chinh and a number of others charged with "revisionist" and "counter-revolutionary" activities. But that episode – the last major flare-up of political dissent in northern Vietnam before the late 1970s – still remains somewhat murky and insufficiently documented.

## THE "ACADEMIC" STRAND IN VIETNAMESE LEGAL THOUGHT

While some intellectuals went into opposition in 1956 through *Nhan van Giai pham* and related developments, others chose more quietly to advocate contrasting approaches to the role of law. Some, such as Phan Anh, head of the Vietnamese Lawyers Association and a pre-1945 non-Communist intellectual, seem to have operated largely within the policy sphere. But a methodological alternative to the hardest of the Party instrumental visions of law came from a group of senior legal scholars, some of them non-Communist intellectuals before and after 1945, who gathered in the legal studies group (*to luat hoc*, later the Institute of State and Law, *Vien nghien cuu nha nuoc va phap luat*) in

what was first known as the social sciences division of the State Sciences Committee (*Uy ban khoa hoc nha nuoc*) in the early 1960s.

In the Chinese case, the role of such senior scholars, trained abroad often in non-Soviet systems, has been the subject of foreign scholarly analysis for some time. And it is becoming clearer that these scholars were, in the Chinese case, a key nucleus for the hibernation and then development of new strand of legal thought, and new notions of the relative autonomy of law and the relationship between law and the Party (Sidel 1995b; 1996). The group of Vietnamese legal scholars that gathered in and around the "legal studies group" in the early and mid 1960s and its successor, the Institute of State and Law in the early 1970s was a fairly diverse collection of scholars and officials, some perhaps more closely tied to the Party and Party views than others. The original group included key Party intellectuals such as Professor Pham Van Bach, then a member of the State Sciences Committee responsible for the work of the legal studies group and later President of the Supreme People's Court and Vice Chairman of the Vietnam Lawyers Association, and others. That group also included such senior figures as Tran Cong Tuong, who has been identified by former Party official Bui Tin as a leading early voice for legal reform and served as Director of the Theory and History of State and Law Division of the Legal Studies Group from 1963 through 1966 and perhaps beyond. Bui Tin sets the scene:

> There were many scholars and intellectuals outside the Party who had a far better understanding of the country than the Communists ... Even within the Party, there were intellectuals who were sincere, upright and knowledgeable, but they were demeaned because they maintained high standards and refused to act as toadies ... Gradually the role of the intellectuals and technocrats within the Party and the government was eliminated by reducing them to impotence or to being symbolic and decorative ... [T]here were the ideas of Tran Cong Tuong in the 1950s and 1960s about building up a legal system and setting up a Ministry of Justice and a Law University. These too were ignored ... Since 1945, legal experts like Phan Anh, Tran Cong Tuong and later Nguyen Huu Tho have stressed that the development of a legal system is very urgent. But these ideas have been ignored.
>
> (Tin 1995)

These legal scholars also included originally non-Viet Minh, non-Communist scholars, lawyers and officials such as Vu Dinh Hoe, who had served as Minister of Justice in Ho Chi Minh's first, broad-based

cabinet and then as a senior scholar specializing in economic and civil law at the Institute of State and Law for much of the 1960s. Vu Dinh Hoe had an extraordinary career, and as the Vietnamese political scene relaxed in the late 1980s and early 1990s he was able to complete and publish a volume of memoirs of his life as a journalist, editor, legal scholar and official since the 1930s (Hoe 1995). The group also included other accomplished legal researchers whose political affiliations were not necessarily clear.

Among this group the comparative orientation of Vu Dinh Hoe and several others stands out in contrast to the more militant approach of some in the Party and military apparatus toward the role of law. We have in Hoe and his colleagues a respect for a comparative approach, for the role of strong legal systems in western societies, and for the role of law in addition to policy in promoting economic development that goes beyond the Soviet models strongly promoted in Vietnam in the 1960s and which cannot be found in the work of a number of Party leaders and documents.

Vu Dinh Hoe's career is well-known to many Vietnamese intellectuals and officials. Born in Ha Dong, his father a teacher, Hoe studied in his home province and then in Hanoi, first in the French-run Yen Phu primary school, then in the famous French-run Buoi School beside the West Lake, and still later at the French Albert Sarraut School in Hanoi, in the buildings where the Party Central Committee now works. After graduation from Sarraut he entered the French-run Hanoi Law University, graduating after three years with a bachelor's degree in law. Hoe went to teach at the Thang Long and Gia Long private schools and was "active in the General Association of Students, participating in the ... students' movement." Later he took leadership roles in several non-Communist newspapers and associations, and participated in the movement to spread romanized Vietnamese as Vice Chairman of the Association for the Propagation of Romanized Vietnamese (*Hoi truyen ba hoc Quoc ngu*), where he worked with Nguyen Huu Dang, who would much later come to grief in the *Nhan van Giai pham* movement and its repressive aftermath. Hoe became an editor of the non-Communist *Thanh Nghi* newspaper that was published between 1941 and 1945, and a leader in the SFIO, the branch of the Workers International Party, and later in the Democratic Party (*Dang Dan chu*).

After the 1945 revolution Hoe served for six months in Vietnam's provisional joint government, and "then Mr. Ho [Chi Minh] transferred me to [the position of] Minister of Justice in the joint government of