

# TRANSPLANTING COMMON LAW PRECEDENTS: AN APPROPRIATE SOLUTION FOR DEFECTS OF LEGISLATION IN VIETNAM, *(part 1)*

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## Abstract:

*Vietnam is in the midst of legal and judicial reforms as it attempts to construct an appropriate framework for a successful market-based economy. It is increasingly likely that as its legal system has been changed to complement a market economy, an added degree of unpredictability has entered the situation, particularly due to the degree of legal transplantation involved. Vietnam has imported legal rules from the Civil Law and the Common Law, altering its legal system and blurring previously clear structural lines. Further change can be anticipated, and with due consideration, welcomed.*

*Recently, the Vietnamese government has been planning to borrow Common Law precedents as a solution to fill the gaps in its sources of law, which have traditionally been of legislative origin. These sources include Codes, Laws, Ordinances, Decrees, Resolutions, and Circulars. Precedents and customary laws, on the other hand, have not been officially recognized. Partly due to the acceptance of a single source of law i.e. legislation, the application of law in Vietnam is critically evaluated not to be consistent, uniform and effective. Further, a lack of adequate legal interpretation, the uncertainty and the deficiency of the legislation constitute shortcomings of the legal system.*

*Precedents are major sources of law in the Common Law system which is one of the most pre-eminent legal families in the world. As sources of law, precedents are usually considered to possess merits that make the legal system certain, consistent, fair, predictable and stable. Therefore, with those strengths, precedents can supply the certainty and stability which legislation lacks.*

*Several factors favour the integration of precedents. Beside the need for Vietnam to counter the weakness of its legislation and the apparent strengths offered by precedents to fill legislative gaps are the readiness of Vietnam for judicial reform and the strong possibility of success of legal transplants whose success has elsewhere generally been confirmed. These provide strong motives for Vietnam to transplant precedents into its legal system. Therefore, the introduction of the Common Law precedents is completely an appropriate solution for defects of the Vietnamese legislation.*

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## Background:

According to orthodox understanding, the Vietnamese legal system has been always included among the socialist legal systems of the world.<sup>18</sup> However, more recently it appears less likely that one will be able to predict which legal family the Vietnamese legal system will really eventually belong to as Vietnam is

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<sup>18</sup> See John Gillespie, *Transplanting Commercial Law Reform - Developing a 'Rule of Law' in Vietnam* (2006) 60–2; Tri Uc Dao et al, *Nhung Van De Ly Luan Co Ban Ve Nha Nuoc va Phap Luat* (1995) 198 [Trans: Tri Uc Dao et al, *Basic Theoretical Issues on State and Law* (1995) 198].

in the process of legal and judicial reform to accompany the construction of a market-based economy. In this process, Vietnam has selectively borrowed laws from both Civil Law and Common Law countries.

Before 1986, the economy in Vietnam was a centrally planned one which was 'based on the state ownership of the means of production'<sup>19</sup> and which had two main economic sectors, namely the state and cooperative sectors.<sup>20</sup> The legal system of Vietnam followed the model of the Soviet legal system which was imported into Vietnam in the period 1950s – 1970s<sup>21</sup> but was also influenced by the economy and by the legal system of the People's Republic of China, a socialist country during the period 1954–1979.<sup>22</sup> In addition, the Vietnamese legal system was based on Marxist-Leninism,<sup>23</sup> which is acknowledged as 'the basic doctrine of Soviet Law'.<sup>24</sup> Therefore, features of the socialist legal system were reflected in the Vietnamese legal system during the period in terms of sources of law, legislation and the pre-eminence of public law.<sup>25</sup>

As in the legal systems of other socialist countries, the sole source of law recognized in Vietnam was legislation which was classified by rank, that is, the Constitution, codes, laws and secondary law. Customary law and precedents, on the other hand, were not recognized<sup>26</sup>. Additionally, the National Assembly had legislative power in accordance with the process of legislative promulgation, which was regulated by the law.<sup>27</sup> The law was formulated in accordance with the policies and guidelines of the Communist Party of Vietnam (CPV) via

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<sup>19</sup> See Gillespie, 'Transplanting Commercial Law Reform', above n 1, 64.

<sup>20</sup> Vinh Thang Thai and Hong Anh Vu (eds), *Giao Trinh Luat Hien Phap Viet Nam* (2006) 102 [Trans: Vinh Thang Thai and Hong Anh Vu (eds), *Textbook on the Vietnamese Constitutional Law* (2006) 102].

<sup>21</sup> Pip Nicholson, 'Vietnamese Jurisprudence: Informing Court Reform' in *Asian Socialism & Legal Change: The Dynamics of Vietnamese and Chinese Reform* (2005) 171; John Gillespie, 'Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam' (2002) 51(3) *The International and Comparative Law Quarterly* 641, 651; see Poh-Ling Tan (ed), *Asian Legal Systems: Law, Society and Pluralism in East Asia* (1997) 357.

<sup>22</sup> See Tan, above n 4, 357; Gillespie, 'Transplanting Commercial Law Reform', above n 1, 62.

<sup>23</sup> The Constitution 1980, Article 38.

<sup>24</sup> Rene David and John E C Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (1985) 169.

<sup>25</sup> These criteria are selected by David and Brierley, above n 7, 26–7.

<sup>26</sup> See the content of the development process of the Vietnamese legal system before 1986, laws were simply written document: Minh Tam Le, *Xay Dung va Hoan Thien He Thong Phap Luat Vietnam - Nhung Van De Ly Luan va Thuc Tien* (2003) 71–109 [Trans: Minh Tam Le, *Building up and Improving the Vietnamese Legal System – Issues on Theory and Practice* (2003) 71–109].

<sup>27</sup> The issue of promulgating laws was regulated in the Constitution, Law on Organization of National Assembly and Standing Committee of the National Assembly, Regulations on Building up Laws and Ordinances and Circular No 02-BT dated 11 January, 1982 of Minister and General Secretary of Ministers' Council on Guiding to draft and pass Legal Documents: Dao et al, above n 1, 406.

institutionalization.<sup>28</sup> For instance, the promulgation of the 1980 Constitution, which addressed the way to build up socialism in Vietnam, was the product of the direction of the CPV in its 4<sup>th</sup> Congress.<sup>29</sup>

Moreover, public law had a central role in the legal system while private law was secondary. Most of the important laws were in constitutional law and administrative law, whereas other fields such as Civil Law, investment law, commercial law and law on tourism were less developed.<sup>30</sup> Of the ten laws issued between 1980 and 1986, only the 1986 Law on Marriage and Family belonged to the field of private law, whereas all of the others belonged to public law i.e. laws on organization and activities of the state machinery, criminal laws and laws on armed forces.<sup>31</sup>

Consequently, the structure of the Vietnamese legal system before 1986 with the hierarchy of laws, legislative power of the National Assembly, sections of laws constituted by the policies and guidelines of the CPV, and the central role of public law presented the legal system of Vietnam as one of the Socialist Legal systems.

During the period 1986–1991, Vietnam's pursuit of an alternative type of economy caused some changes in the socialist features of the Vietnamese legal system. With the launch of the policy of Renovation (Doi Moi) in 1986, Vietnam initiated a reform of the regime of economic management from a bureaucratic subsidized mechanism to a cost accounting mechanism in the centrally planned economy,<sup>32</sup> and then transformed the centrally planned economy into a socialist-oriented<sup>33</sup> multi-sectored<sup>34</sup> market economy.

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<sup>28</sup> This issue will be discussed in the last part of this section.

<sup>29</sup> Dao et al, above n 1, 386–7.

<sup>30</sup> Dao et al, above n 1, 202.

<sup>31</sup> Le, above n 9, 114.

<sup>32</sup> Resolution of the 6th National Representative Congress of the Communist Party (dated 18 December, 1986)

<sup>33</sup> Based on the article of Ha Vi Luu viz. 'Vietnam: Industrialization Viewed from the Interplay between Productive Forces and Relations of Production' to explain the socialist oriented market economy, Gillespie declares that 'the market economy following a socialist orientation is a necessary transition stage on the road to socialism': John Gillespie, 'Changing Concepts of Socialist Law in Vietnam' in John Gillespie and Pip Nicholson (eds), *Asian Socialism & Legal Change: The Dynamics of Vietnamese and Chinese Reform* (2005) 57.

<sup>34</sup> See Resolution of the 7th National Representative Congress of the Communist Party (dated 27 June, 1991) In this Resolution, 'the socialist-oriented multi-sectored market economy includes many economic sectors in which "state-owned enterprises reserve a leading role. Collective economic sector continues to be developed. Individual economic sectors, which still exist in large numbers, gradually do cooperative business voluntarily, democratically, and effectively. Private capitalist economic sectors are allowed to do business in the fields which are beneficial to the people and the country. State capitalist economic sector is developed under many forms. Family economic sector is encouraged to develop

Key elements of this renovation included the reform of state-owned enterprises and the development of the private sector, as well as the pursuit of an 'open door' policy in order to promote economic and commercial relations between Vietnam and other countries and the liberalization of the financial market.<sup>35</sup> These elements necessarily required changes in the existing legal system (1986–1991). Gillespie noted in this regard that 'socialist laws were also considered unsuitable for a mixed-market economy.'<sup>36</sup>

As a result, new laws<sup>37</sup> or changes<sup>38</sup> in existing laws were increasingly needed in the private law field. This led to the promulgation, amendment and supplementation of many laws regarding different important aspects of the society, including land, resources, finance, banking, taxation, foreign investment, companies, private enterprises, technology transfers and quality of goods.<sup>39</sup>

In order to be able to issue new laws which were appropriate to the multi-sectored market economy, which was new and unfamiliar to Vietnam, the legislators had to accept selectively, learn and borrow foreign laws.<sup>40</sup> For example, the 1987 Law on Foreign Investment was the first law which was based on Western law<sup>41</sup> while the 1990 Law on Corporations<sup>42</sup> was borrowed from French law<sup>43</sup> and the 1990 Law on Private Enterprises<sup>44</sup> was adopted from Anglo-American company law principles.<sup>45</sup>

In brief, there are two different points, that is, the role of public law and the change in legal sources which weakened the socialist features of the 1986–1991 legal system compared with those of the pre-1986 legal system. First, public law lost its pre-eminence when the promulgation of private laws was increasingly

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strongly but are not considered as an independent economic sector. Many forms of ownerships mix and interweave to form plentiful economic organizations. They are self-controlled and allied, cooperative and competing in production and business."<sup>35</sup>

<sup>35</sup> Nhu Thang Vu, 'Necessary Reform of Insurance Business Law in Vietnam After Its Accession to the World Trade Organization: Prudential Regulatory Aspects' (2007) 12(6) *Fordham Journal of Corporate & Financial Law* 33.

<sup>36</sup> Gillespie, 'Transplanted Company Law', above n 4, 647.

<sup>37</sup> Le, above n 9, 122.

<sup>38</sup> Natalie G Lichtenstein, *A Survey of Vietnam's Legal Framework in Transition* (1994) 1.

<sup>39</sup> Dao et al, above n 1, 202; Le, above n 9, 119.

<sup>40</sup> Le, above n 9, 123.

<sup>41</sup> This issue was mentioned by Gillespie when he had interviews with some senior legal advisors of Vietnam in 1994, and in 1997. Source: Gillespie, 'Transplanted Company Law', above n 4, 642, footnote no 6.

<sup>42</sup> Amended 1994 and replaced 2000.

<sup>43</sup> Amended 1994 and replaced 2000.

<sup>44</sup> Gillespie, 'Transplanted Company Law', above n 4, 641.

<sup>45</sup> Gillespie, 'Transplanted Company Law', above n 4, 649.

carried out to protect the interest of the existing economic sectors. This was the direct result of the emergence of a multi-sectored market economy which included state-owned enterprises, cooperative economic sectors, individual economic sectors, private capitalist economic sectors and state capitalist economic sectors.<sup>46</sup> Second, instead of copying laws following the model of the Soviet legal system, new laws of this period (or models for them) were mostly obtained from Western legal sources.<sup>47</sup>

From 1992 to the present, the goals of the legal system of Vietnam have been to assist the development of the multi-sectored market economy, one which is designed to be under socialist orientation and state economic management,<sup>48</sup> and to support the policy of international economic integrity.<sup>49</sup> In order to carry out the first goal, the 1992 Constitution affirmed, encouraged and ensured equality amongst many economic sectors.<sup>50</sup> In addition, the National Assembly stated that all economic sectors are considered as important components of the socialist oriented market economy.<sup>51</sup>

As for the second goal, economic cooperation with foreign countries, there is encouragement for foreign organizations and individuals to invest capital and import technologies into Vietnam; and protection of their legal ownership rights of capital, property and other interests, and a guarantee of no nationalization of enterprises with foreign investment capital.<sup>52</sup> In order to facilitate these goals, many laws have had to be issued. For instance, the 2005 Civil Code, the 2005

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<sup>46</sup> Resolution of the 7th National Representative Congress of the Communist Party (dated 27 June, 1991)

<sup>47</sup> AusAid-Vietnam: Legal and Judicial Development, 'Vietnam: Legal and Judicial Development' (2000) 1, <[http://www.ausaid.gov.au/publications/pdf/vietnam\\_wp3.pdf](http://www.ausaid.gov.au/publications/pdf/vietnam_wp3.pdf)> at 22 October 2010; Gillespie, 'Transplanted Company Law', above n 4, 642.

<sup>48</sup> According to Gillespie, "state economic management" is thought necessary to ensure the economy follows the 'socialist' way": Gillespie, 'Changing Concepts of Socialist Law in Vietnam', above n 16, 57.

<sup>49</sup> This issue was affirmed in the documents of 8th, 9th and 10th National Congresses i.e. Dang Cong San Viet Nam, 'Bao Cao cua Ban Chap Hanh Trung Uong Dang Khoa VII' (1996) [Trans: The Communist Party of Vietnam, 'Report of the Communist Party's Central Committee Term VII in the 8th Representative National Congress' (1996)]; Dang Cong San Viet Nam, 'Phuong Huong, Nhiem Vu Ke Hoach Phat Trien Kinh Te - Xa Hoi 5 N m 2001-2005' (2001) [Trans: The Communist Party of Vietnam, 'Direction, Duties and Plan of Socio-Economic Development in 5 Years' Time 2001-2005' (2001)]; Dang Cong San Viet Nam, 'Bao Cao cua Ban Chap Hanh Trung Uong Dang Khoa IX ngay 10/4/2006 ve Phuong Huong, Nhiem Vu Ke Hoach Phat Trien Kinh Te - Xa Hoi 5 N m 2006-2010' (2006) [Trans: The Communist Party of Viet Nam, 'Report of The Communist Party's Central Committee Term IX dated 10 April, 2006 on Direction, Duties and Plan of Socio-Economic Development in 5 years' Time 2006-2010' (2006)].

<sup>50</sup> The 1992 Constitution Articles 15, 21, 22, 23 and 25.

<sup>51</sup> The Constitution 1992 (as amended), Article 16.

<sup>52</sup> The Constitution 1992, Article 25.

Commercial Law and the 2005 Investment Law were promulgated to replace former laws,<sup>53</sup> which were not appropriate to new scenarios.

In general, compared with the 1986–1991 legal system on the one hand, there is an enhancement of private laws by the adoption of foreign laws. For example, the 1995 Civil Code was borrowed from French law and Japanese law. The regulations on ownership, classifications of property types into movable and immovable property, and the method of identifying the land use rights have been modeled on French law.<sup>54</sup> From Japanese law, the institutions on ‘Juridical entities’ have been introduced into the Vietnamese Civil Code.<sup>55</sup>

On the other hand, the current legal system has three new different points compared with the former. The first point is that the ideology of Ho Chi Minh<sup>56</sup> was added into Marxist-Leninism in 1991,<sup>57</sup> which became the basic ideology of the Vietnamese legal system. According to the ideology of Ho Chi Minh, besides applying Marxist-Leninism, Vietnam will maintain its cultural values and inherit the cultural values of other countries regardless of their political regimes.<sup>58</sup> This basic ideology makes the current Vietnamese legal system differ slightly from the previous legal system, which was based on pure Marxist-Leninism.

The second point is that the idea of ‘the law-based state’<sup>59</sup> which is popular in the legal system of developed countries<sup>60</sup> has been introduced in the Vietnamese legal system.<sup>61</sup> The notion of the law-based state in Vietnam contains the following principles: first, people have state power when they directly vote for

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<sup>53</sup> The 1995 Civil Code, the 1997 Commercial Law, the 1987, 1990, 1992 and 1997 Foreign Investment Law.

<sup>54</sup> Ngoc Dien Nguyen, ‘Cau Truc Ky Thuat cua He Thong Phap Luat Bat Dong San Vietnam: Mot Goc Nhin Phap’ (2007) 101 *Nghien Cuu Lap Phap* 18, 19–20 [Trans: Ngoc Dien Nguyen, ‘Technical Structure of Vietnamese Real Estate Law: One aspect from French Law’ (2007) 101 *Journal of Legislature Research* 18, 19–20].

<sup>55</sup> Gillespie, ‘Transplanted Company Law’, above n 4, 648.

<sup>56</sup> Ho Chi Minh (1890–1969) was a former president of Vietnam, applied creatively Marxist-Leninism into the practical situation of Vietnam and gave a birth to the Democratic Republic of Vietnam in 1946. (Source: <[http://www.cpv.org.vn/tiengviet/tulieuvankien/4lanhtu/details.asp?topic=3&subtopic=91&leader\\_topic=7&id=BT1160331632](http://www.cpv.org.vn/tiengviet/tulieuvankien/4lanhtu/details.asp?topic=3&subtopic=91&leader_topic=7&id=BT1160331632)> at 15 May 2008)

<sup>57</sup> Trung Hoai Phan, ‘Buoc Dau Tim Hieu Tu Tuong Ho Chi Minh Ve Dam Bao Quyen Bao Chua Cua Cong Dan’ (2002) 6 *Tap Chi Khoa Hoc Phap Ly* 10, 15 [Trans: Trung Hoai Phan, ‘Initial Study on the Ideology of Ho Chi Minh about Ensuring the Right of Defence of the Citizens’ (2002) 6 *Journal of Legal Science* 10, 15]; Dang Cong San Viet Nam, *Cuong Linh Xay Dung Dat Nuoc trong Thoi Ky Qua Do Len Chu Nghia Xa Hoi* (1991) [Trans: The Communist Party of Vietnam, Communist Party of Vietnam, *Strategies of Building the Country in the Transitional Period Towards Socialism* (1991)].

<sup>58</sup> Dang Cong San Viet Nam, *Van Kien Dai Hoi Dai Bieu Toan Quoc Lan Thu Chin Cua Dang Cong San Vietnam* (2001) 20 [Trans: Communist Party of Vietnam, *Documents on National Representatives of the ninth Congress of the Communist Party* (2001) 20].

<sup>59</sup> The 1992 Constitution (as amended), Article 2, part 1 states that ‘The Socialist Republic of Vietnam is the law-based state which is of people, from people and for people.’

<sup>60</sup> Thai and Vu, above n 3, 114.

<sup>61</sup> The Constitution 1980, Article 2.

state bodies;<sup>62</sup> second, the laws, not morality, regulate basic social relationships;<sup>63</sup> third, the state, state bodies, organizations and citizens must comply with the laws;<sup>64</sup> and fourth, the laws hold a leading role in activities and behaviours of every subject in society.<sup>65</sup>

The third point is that the activity of promulgation of legislation is much improved and regulated in the higher-rank legal documents i.e. the 1996 Law on Promulgation of Legislation which was methodically replaced by the Law no 02/2002/QH11 on Amending and Supplementing Some Articles of the 1996 Law on Promulgation of Legislation and then by the 2008 Law on Promulgation of Legislation.

These changes have weakened the socialist features of the Vietnamese legal system. Moreover, the addition of Ho Chi Minh's ideology to the Marxist-Leninist canon, the importation of the idea of law-based state and the recognition of the existence of public law and private law in the legal system are elements that make the legal system of Vietnam differ from those of other socialist countries. Therefore, some scholars assume that the current legal system of Vietnam is quite similar to the Civil Law. For example, Dao, Vo, and Dinh support this idea on the basis that substantive laws, especially Vietnamese Civil Law and procedural law, are similar to that of the Civil Law.<sup>66</sup> In addition, Dennis Zvinakis<sup>67</sup> states that 'Vietnam is a developing country which has the legal system belonging to the Civil Law system.'<sup>68</sup>

However, it is too early to be able to affirm the accuracy of this classification when Vietnam is in the process of the legal and judicial reforms and expanding international cooperation.<sup>69</sup> In this process multi-facetted

<sup>62</sup> Gillespie, 'Transplanting Commercial Law Reform', above n 1, 89; Dao et al, above n 1, 118–9.

<sup>63</sup> Gillespie, 'Transplanting Commercial Law Reform', above n 1, 89; Dao et al, above n 1, 118–9.

<sup>64</sup> Gillespie, 'Transplanting Commercial Law Reform', above n 1, 89; Dao et al, above n 1, 118–9.

<sup>65</sup> Dao et al, above n 1, 119.

<sup>66</sup> Tri Uc Dao, Khanh Vinh Vo and Ngoc Vuong Dinh, *Nhung Van De Ly Luan va Thuc Tien Phap Ly Cua Qua Trinh Hop Tac va Hoi Nhap Quoc Te - Khu Vuc Cua Vietnam* (De Tai Doc Lap Cap Nha Nuoc Thesis, 2001) 26–7 [Trans: Tri Uc Dao, Khanh Vinh Vo, and Ngoc Vuong Dinh, *Legal Theoretical and Practical Issues in the Process of International and Regional Cooperation and Integration in Vietnam* (Independent Project at State Level, 2001) 26–7].

<sup>67</sup> Office Manager of International Development of the US in Vietnam (USAID Vietnam).

<sup>68</sup> Introduction of Volume 1, Special Magazine of the People's Courts on the Cassation Review Decisions on Civil, Business, Commerce, and Labour in the year 2003-2004 (2004).

<sup>69</sup> See the Politburo Resolution No 48 NQ/TW dated 24 May, 2005 on the Strategies for the Development and Improvement of the Vietnam's Legal System to the Year 2010 and Direction for the Period up to 2020, and the Politburo Resolution No 49 NQ/TW dated 2 June, 2005 on the Strategy of Judicial Reform up to 2020.

improvements need to be made in many legal fields. Additionally, the construction of a legal system which is compatible with the development of the market economy is rather unfamiliar and challenging to Vietnam. In order to meet domestic and international requirements, borrowing law from foreign legal systems, in other words legal transplants, are considered to be one of legal solutions of Vietnam. This has officially become one of the leading strategies adopted by Vietnam in the implementation of its legal and judicial reforms.<sup>70</sup> And one which makes simple classification of the emerging legal system difficult.

It is impossible to foresee what legal changes will subsequently occur. It may be that the Vietnamese legal system will move in the direction that Gillespie and Nicholson predict, viz. that '[T]here is a point when the meaning ascribed to socialist values changes so much from the Marxist-Leninist canon that they can no longer be considered socialist.'<sup>71</sup>

### ***Defects of legislation in the Vietnamese legal system***

The sources of law in the Vietnamese legal system have traditionally been of legislative origin. These sources include Codes, Laws, Ordinances, Decrees, Resolutions, and Circulars as typical sources of law.<sup>72</sup> Precedents and customary laws, on the other hand, have not been officially recognized.<sup>73</sup> Partly due to the acceptance of single sources of law i.e. legislation, the application of law in Vietnam is critically evaluated not to be consistent, uniform and effective. A lack of adequate legal interpretation, the uncertainty and the deficiency of the legislation constitute shortcomings of the legal system.

The first issue related to written law is the current inadequacy of legal interpretation. In Vietnam, the Standing Committee of the National Assembly is vested with the authority to interpret the Constitution, laws, and ordinances by

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<sup>70</sup> According to this leading view, receiving selectively foreign legal experiences on the basis of the harmonization of the Vietnamese traditional culture and the modernity of the legal system is addressed and supported: Part I, point 2, sub-point 2.3, Politburo Resolution No 48.

<sup>71</sup> John Gillespie and Nicholson Pip, 'The Diversity and Dynamism of Legal Change in Socialist China and Vietnam' in John Gillespie and Nicholson Pip (eds), *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (2005) 2.

<sup>72</sup> Le, above n 9, 355.

<sup>73</sup> Dai Hoc Luat Ha Noi, *Giao Trinh Tu Phap Quoc Te* (2001) 22 [Trans: Ha Noi Law University, *Textbook on Private International Law* (2001) 22]



Article 91 of the 1992 Constitution. However, this body limited the use its power,<sup>74</sup> despite a growing demand for legal interpretation.<sup>75</sup> For instance, this body has used its power only three times in the history of the Constitution while the demand for interpreting laws, the Constitution and ordinances has been growing at three times the rate of similar countries.<sup>76</sup>

Concurrently, the Supreme Court, in its court-related work, plays an important role in legal interpretation. Nonetheless, this work is undermined by the Court's lack of jurisdiction.<sup>77</sup> The Supreme Court carries out this interpretation via its resolutions of the council of judges, annual reports (Bao Cao Tong Ket Hang Nam) and guidance documents (Cong Van). The resolutions are now recognized as secondary law<sup>78</sup> but the annual reports and guidance documents are not.

However, it notes that, in practice, annual reports and guidance documents of the Supreme Court usually are really essential sources to guide the lower courts in judging tasks.<sup>79</sup> These documents serve as a professional guide in shaping judgments. Some scholars thus assume that there is a violation of the Constitution when the Supreme Court interprets laws with these documents<sup>80</sup>. If precedents were recognized as a source of law in Vietnam, the inadequacy of legal interpretation as well as the issue of constitutional violation would also be negated.

Second, the lack of certainty of written laws leads to an ineffectiveness of the laws in practice in Vietnam. Following the Civil Law tradition, the articles, which are contained in the written laws, are usually structured in a generalized

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<sup>74</sup> Van Tu Hoang, 'Ve Quyen Lap Phap cua Quoc Hoi' (2002) 11 *Tap Chi Nghien Cuu Lap Phap* 11, 15 [Trans: Van Tu Hoang 'On a Legislative Power of the National Assembly' (2002) 11 *Journal of Legislative Studies* 11, 15]; Tuan Khai Pham, 'Giai Thich Phap Luat: Cach Nhin cua Hanh Phap' (2008) 120 *Tap Chi Nghien Cuu Lap Phap* 9, 10 [Trans: Tuan Khai Pham, 'Legal Interpretation: A View from Executive Bodies' (2008) 120 *Journal of Legislative Studies* 9, 10].

<sup>75</sup> Anh Tuan Nguyen, 'Van De Giai Thich Dao Luat Hinh Su O Nuoc Ta Hien Nay' (2008) 15 *Tap Chi Nghien Cuu Lap Phap* 28, 31 [Trans: Anh Tuan Nguyen, 'A Current Issue of Interpretation of Criminal Acts in Our Country' (2008) 15 *Journal of Legislative Research* 28, 31]; Duc Manh Ngo, 'Giai Thich Phap Luat La Bao Dam Tinh Toi Cao cua Hien Phap' (2008) 127 *Tap Chi Nghien Cuu Lap Phap* 5, 6 [Trans: Duc Manh Ngo, 'Legal Interpretation is to Guarantee the Supremacy of the Constitution' (2008) 127 *Journal of Legislative Research* 5, 6].

<sup>76</sup> Tri Hao Vo, 'Vai Tro Giai Thich Phap Luat cua Toa An' (2003) 3 *Tap Chi Khoa Hoc Phap Ly* 12, 13–4 [Trans: Tri Hao Vo, 'The Role of Legal Interpretation of the Courts' (2003) 3 *Legal Science Journal* 12, 13–4].

<sup>77</sup> According to the 1992 Constitution, Article 91 legal interpretation belongs to the Standing Committee of the National Assembly.

<sup>78</sup> The 2008 Law on Promulgation of Legislations, Article 2.

<sup>79</sup> Tri Hao Vo, 'Minh Bach Hoa Phap Luat' (2003) 1 *Tap Chi Nghien Cuu Lap Phap* 83, 86.

<sup>80</sup> See Cuu Viet Nguyen, 'Khai Niem Van Ban Quy Pham Phap Luat (Tiep Theo) va He Thong Van Ban Phap Luat' (2007) 5 *Tap Chi Nghien Cuu Lap Phap* 27, 33 [Trans: Cuu Viet Nguyen, 'A Concept of Legal Normative Documents (Continued) and a System of Legal Documents' (2007) 97 *Journal of Legislature Research* 27, 33]; Vo, 'Vai Tro Giai Thich', above n 66, 15.

manner to suit the variety of cases which may occur in reality.<sup>81</sup> A defect of a generalized manner of the written laws is that written laws are hardly unanimously understood. As Nicholson commented on this feature of written laws in Vietnam: '[M]any Vietnamese laws are expressed in general terms and their interpretation is open.'<sup>82</sup> For instance, Article 389 of the 2005 Civil Law Code regulates the principles of contracting the civil contracts that

When developing civil contracts, the contracting parties must adhere to the following principles:

1. The parties willingly and freely bind themselves to form an agreement, without violating the laws and the mores of the society.
2. Free will, equality, goodwill, cooperation, honesty, and transparency.<sup>83</sup>

As can be seen, from this quote, Article 389 is written in a generalized manner, which may lead to the possibility of divergent interpretation when judges address questions such as: what behaviors violate social mores?; and to what extent will the behaviors of contracting parties be considered to violate social mores? As a result, and depending on the point of view of particular judges, inconsistency in the application of the law may occur.

In order to overcome this situation, subordinate laws such as decrees and circulars are currently used to detail codes or acts for implementing them. However, drafting and issuing subordinate laws usually takes a long time. This precipitates another problem, namely that a law becomes valid only after subordinate laws are issued. Indeed, the situation frequently arises where Codes

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<sup>81</sup> See Tri Hao Vo, 'Vai Tro Giai Thich', above n 59, 14; Anon., *Vietnam Can Co An Le* (2002) Bao Phap Luat Thanh Pho Ho Chi Minh <<http://vnexpress.net/GL/Phap-luat/2002/04/3B9BB47B>> at 3 June 2008.

<sup>82</sup> Pip Nicholson, 'Vietnamese Jurisprudence: Informing Court Reform' in *Asian Socialism & Legal Change: The Dynamics of Vietnamese and Chinese Reform* (2005) 168.

<sup>83</sup> The 2005 Civil Law Code

and Acts have to wait for Decrees, while Decrees have to wait for the Circulars<sup>84</sup> to be able to be applied in practice.<sup>85</sup>

In addition, general statements which are often expressed in ordinances and laws as a useful means to ensure the cover of the law in every situation<sup>86</sup> also cause drawbacks in applying the law. Those general statements can be 'in the case there are other legal regulations, those regulations will be applied'<sup>87</sup> or 'subjects have other rights (or obligations) in accordance with the law'.<sup>88</sup> The open meaning of terms like 'other regulations' or 'other rights/obligations' hardly makes courts apply them consistently when they make judgements or rulings. Therefore, if there were precedents in which general statements of the law had been concretely interpreted, this weakness could be tackled.

Third, frequent changes of the law lead to instability and gaps in the legal system. In spite of having a large number of pieces of legislation in a variety of forms such as codes, acts, ordinances and subordinate laws which have been promulgated,<sup>89</sup> the legal system of Vietnam is critically considered to be deficient and inconsistent.<sup>90</sup> This is an unavoidable consequence of Vietnam being in transition from a centrally planned economy to a market economy.<sup>91</sup> Some written laws only have short lifespan or even are soon to be canceled because of their inappropriateness to practice.<sup>92</sup> This causes situations where the courts have

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<sup>84</sup> Decrees and Circulars are subordinate laws which are usually issued by the executive bodies such as the Government or Ministries.

<sup>85</sup> Quoc Hung Truong, 'Quoc Hoi Co Phai La Co Quan Lam Luat' (2008) 115 *Tap Chi Nghien Cuu Lap Phap* 23, 23 [Trans: Quoc Hung Truong, 'Is the National Assembly a Legislative Body?' (2008) 115 *Journal of Legislative Research* 23, 23]; Thi Hanh Nguyen, 'Ban Hanh Luat Khung Hay Luat Chi Tiet' (2005) 51 *Tap Chi Nghien Cuu Lap Phap* 30, 34 [Trans: Thi Hanh Nguyen, 'Promulgating Frame-based Laws or Detailed Laws' (2005) 51 *Journal of Legislative Research* 30, 34]; Tri Hao Vo, 'Vai Tro Giai Thich', above n 66, 14.

<sup>86</sup> Van Tu Hoang, 'Danh Gia Chat Luong Du An Luat, Phap Lenh Hien Nay' (2006) 7 *Tap Chi Nghien Cuu Lap Phap* 20, 22 [Trans: Van Tu Hoang, 'Evaluations on the Quality of Current Bills and Ordinances' (2006) 7 *Journal of Legislative Studies* 20, 22]

<sup>87</sup> Ordinance on Amendment and Supplement of Some Articles of the Ordinance on Solving Administrative Violations 2008, article 2.

<sup>88</sup> Law on Cadres and Government Staff 2008, article 8, point 6.

<sup>89</sup> According to the data base of the Ministry of Justice, from 1 January, 1987 to 30 November, 2008, legislation issued by the Central bodies comprises 19126 legal documents which includes 208 Acts and Codes, 192 Ordinances, 2097 Decrees, 267 Resolutions, 36 Circulars, 1213 Joint-Circulars: (2009) <[http://vbqpl.moj.gov.vn/law/vi/portal\\_form/chart\\_edit\\_form](http://vbqpl.moj.gov.vn/law/vi/portal_form/chart_edit_form)> at 6<sup>th</sup> March 2009.

<sup>90</sup> See Hung Cuong Ha, 'Hoan Thien He Thong Phap Luat Dap Ung Yeu Cau Xay Dung Nha Nuoc Phap Quyen XHCN' (2009) 139+140 *Tap Chi Nghien Cuu Lap Phap* 17, [Trans: Hung Cuong Ha, 'Improving the Legal System to Meet Requirements of the Construction of the Law-based Socialist State' (2009) 139+140 *Journal of Legislative Studies* 17, 20–21].

<sup>91</sup> From the launch of the policy of the Renovation (Doi Moi) in 1986 in Vietnam, the centrally planned economy was transformed to a market economy: Dang Cong San Viet Nam, 'Nghi Quyet Dai Hoi Dai Bieu Toan Quoc Lan thu Sau cua Dang Cong San Viet Nam' (1986) [Trans: The Communist Party of Vietnam, 'Resolution of the 6th National Representative Congress of the Communist Party of Vietnam' (1986)].

<sup>92</sup> Hung Cuong Ha, above n 73, 21.

great difficulty in giving decisions for existing disputes because there is sometimes no law available to be applied.<sup>93</sup> In addition, the legislature cannot anticipate what new social, civil, criminal or commercial relations may occur in the market economy so that there are many situations on which the law remains silent.<sup>94</sup>

Vietnam has started to multiply its sources of law by applying the Common Law precedents to supplement and overcome the ineffectiveness of its legal system up to the year 2020. Precedents are ‘major’<sup>95</sup> sources of law in the Common Law system which is one of the most pre-eminent legal families in the world.<sup>96</sup> As sources of law, precedents are usually considered to possess merits that make the legal system certain,<sup>97</sup> consistent,<sup>98</sup> fair,<sup>99</sup> predictable<sup>100</sup> and stable.<sup>101</sup> Therefore, with those strengths, precedents can supply the certainty and stability which legislation lacks.

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<sup>93</sup> Duy Luong Tuong, ‘Vai Suy Nghi Ve Viec Tong Ket Thuc Tien Xet Xu, Huong Dan Ap Dung Thong Nhat Phap Luat cua Toa An Nhan Dan Toi cao’ (2007) 9 *Tap Chi Nha Nuoc va Phap Luat* 11, 11 [Trans: Duy Luong Tuong, ‘Several Thoughts on Synthesizing Judging Experiences, Guidance for the Consistent Application of Laws by the People’s Supreme Court’ (2007) 9 *Journal of State and Law* 11, 11]; Hoang Anh Nguyen, ‘Ap Dung Nguyen Tac Phap Luat Trong Hoat Dong Xet Xu’ (2004) 11 *Tap Chi Nghien Cuu Lap Phap* 53[Trans: Hoang Anh Nguyen, ‘Applying a Rule of Legal Application in Judging Tasks’ (2004) 11 *Journal of Legislative Studies* 53, 56].

<sup>94</sup> See Tuong, above n 76, 11.

<sup>95</sup> A K R Kiralfy, *Potter's Historical Introduction to English Law and Its Institutions* (4 ed, 1958) 263.

<sup>96</sup> J H Baker, *An Introduction to English Legal History* (3rd ed, 1990) 34; Peter de Cruz, *Comparative Law in a Changing World* (3rd ed, 2007) 100.

<sup>97</sup> Susan W Brenner, *Precedent Inflation* (1992) 6; Ronald Walker and Richard Ward, *Walker and Walker's English Legal System* (7<sup>th</sup> ed, 1994) 58.

<sup>98</sup> Patricio A Fernandez and Giacomo A M Ponzetto, *Stare Decisis: Rhetoric and Substance* (2008) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1116784](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1116784)> at 16 October 2008.

<sup>99</sup> Lee J. Strang, ‘An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and The Common Good’ (2006) 36 *New Mexico Law Review* 419, 423; Justice Michael Kirby, ‘Precedent Law, Practice & Trends in Australia’ (Paper presented at the Conference of the International Academy of Comparative Law, Netherlands, 2006) 2.

<sup>100</sup> Strang, above n 82, 423; Fernandez and Ponzetto, above n 81; Kirby, above n 82.

<sup>101</sup> Todd J Zywicki, ‘The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis’ (2003) 97(4) *NorthWestern University Law Review* 1551, 1558; Strang, above n 89, 462.

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