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Summary

The purpose with this thesis has been to investigate the court system in Vietnam to find out how it relates to the concept of judicial independence. The structure of the Vietnamese court system is described with focus on the role of the courts and analysed from a rule of law perspective. Even though the concept of judicial independence is difficult to define, some general features are drawn up, such as independency and impartiality of the courts.

A short historic review of the Vietnamese legal heritage gives the reader background knowledge about the characteristics of the legal structure in the Vietnamese society. It is stipulated that reasons for some of the structural issues of the current system can be seen as consequences of the Confucian heritage and the adoption of Socialist law made in 1951. Since the first Vietnamese constitution, the judicial, executive and legislative power has been connected and influenced each other. Current structural problems such as widespread corruption and the vulnerable positions of the judges are the result of the Party's different ways of influencing the courts.

The constitutional development in the country is described, with focus on the role of the courts, from the first constitution in 1946 to the latest amendments made in 2002. Finally, the current debate regarding the on going constitutional amendment process is portrayed. Scholars and professionals shares their thoughts on the current legal structure and what results the amendment process might have on the current court structure.

The material used in this thesis partly consists of interviews conducted in Vietnam during a minor field study in the spring of 2012, financed by SIDA.

Sammanfattning

Denna uppsats beskriver det vietnamesiska rättsystemet och utreder hur de vietnamesiska domstolarna förhåller sig till den västerländska idén om vad som kännetecknar en rättsstat. I uppsatsen beskrivs och analyseras det vietnamesiska rättsystemet med särskilt fokus på vilken roll domstolarna har i statsapparaten. Exakt vad som karakteriserar en rättsstat förblir odefinierat men ett antal karaktärsdrag lyfts fram som allmängiltiga, så som krav på opartiska domare och självständiga domstolar.

En historisk tillbaka blick över Vietnams rättshistoriska tradition ger läsaren en bakgrund till det som kännetecknar det vietnamesiska rättsystemet idag. Det Konfucianska arvet och implementeringen av socialistisk lag under mitten av 1900-talet beskrivs som en rättshistorisk förklaring till domstolarnas svaga ställning i landet. Sedan den första konstitutionen antogs har den lagstiftande, exekutiva och judiciella makten varit nära sammanlänkade och partiets kanaler att influera domare och domstolsorganisationen är många. Partiets fortsatt starka position i landet bidrar bland annat till att befästa domstolarnas svaga ställning.

I uppsatsen redogörs även för den konstitutionella utvecklingen, med fokus på domstolarnas ställning, från 1946 till de senaste ändringarna 2002. Slutligen redogörs för den debatt som för närvarande pågår i landet med anledning av den konstitutionella reformprocessen. Forskare och yrkesverksamma delar med sig av sina åsikter om förändringsprocessen och hur den eventuellt kan komma att påverka domstolarnas ställning framöver.

Materialet i denna uppsats bygger delvis på intervjuer som genomförts i Vietnam under en SIDA-finansierad fältstudie våren 2012. Utöver det material som samlats in på plats har även rapporter från internationella organisationer samt böcker och artiklar av både Vietnamesiska och internationella författare använts.

Preface

I would like to thank SIDA for giving me the opportunity to do this Minor Field Study in Vietnam and my good friend Sofia, for being an outstanding travelling companion during our trip. I would also like to thank my supervisor, Bengt Lundell, for guidance and support during the work with this paper.

*'Att göra något utan att riktigt veta vad man gör är att ge sig själv en möjlighet att upptäcka något man inte visste i det man gjort'*¹

Andrea Andersson
Lund, May 2012

¹ Pierre Bourdieu (1930-2002)

Abbreviations

ASEAN	Association of the Southeast Asian Nations
FNL	Front National de Liberation
ICCPR	International convention on civil and political rights
HRC	Human Rights Committee
LAWASIA	The Law association for Asia and the Pacific
N.A	National Assembly
NGO	Non-governmental Organisation
T.T	Towards Transparency
U.N.	United Nations
VCP	Vietnam Communist Party
VFF	Vietnamese Fatherland Front

1 Introduction

This essay will summarize the findings from my field study that took place in Vietnam during spring 2012. It will describe the court system in Vietnam, historically up to today and explain the debate on constitutional changes that may affect the role of the Vietnamese courts in the future. As a conclusion, the difficulties with reaching the demands of a rule of law state will be pointed out referring to other's opinions and finally be analysed by myself.

1.1 Background

Vietnam is currently going through a very interesting period of time. Since the *doi moi*-reform took place, in 1986, the country has experienced rapid economic growth and a significant reduction of poverty. The rural community is changing drastically when people move into the cities and family networks, an important factor in a Confucian society, is being put aside in favour of greater personal freedom. The economic reform has helped the one-party state to go from heavily depending on food imports to the world's third largest rice exporter. Foreign investors now flood into the state and with them an increasing demand for modern dispute resolutions.

The changing community has called for rapid structural changes, both organizationally and legislatively. The governmental focus has been on adjusting the old system to a so-called socialist-oriented market economy and its increasing judicial demands. Even though a lot of important steps have been taken, the Vietnamese Communist Party (VCP) guards their power carefully and seems determined to remain in control over the media, foreign investments as well as of the judicial power.

1.2 Purpose

My purpose is to investigate the court system in Vietnam to find out how well it relates to the aspect of judicial independence. I will describe the structural organization of the courts in Vietnam and their constitutional development. The thesis will focus on the role of the Vietnamese courts and analyse that from a rule of law perspective. Finally the current discussion regarding future constitutional changes that would affect the role of the courts in the future will be described.

1.3 Research method

Part of the information and data in this essay were collected during a research trip to Vietnam in the spring of 2012. Information on the legal

system and the role of the courts in Vietnam were collected via three principle sources: a) In Vietnam, interviews were conducted with law professors, judges, administrative personnel, personnel at the Ministry of Justice and people working with anti-corruption, (b) the four Vietnamese constitutions, adopted from 1946-1992 and the amendments made in 2001 and 2002, (c) a number of publications in English as well as in Swedish were read, such as literature and articles both dealing with the subject in general and more specific questions.

The doctoral thesis of Vietnamese professor Van-Hoa To has been used as a foundation, contributing with facts as well as analytical thoughts on the concept of judicial independence. Literature from international scholars, such as Mark Sidel, John Gillespie and Penelope Nicholson, has been used for an additional perspective of the concept of judicial independence and the situation in Vietnam. A number of regional reports made by NGO's such as Transparency International have also been very useful.

The thesis is dealing with the much-discussed subject of judicial independence; the concept is described, discussed and defined within the first chapter in the essay.

1.3.1 Difficulties and delimitation

This thesis does not claim to cover or describe the whole Vietnamese legal system since the limitations would not allow me to do that fairly. Its mission is rather to open up a discussion on wheatear or not the courts of the Vietnamese judicial system can be considered independent. When referring to a 'court' in this thesis, it means a forum that the state uses to resolve disputes between private or public entities or the state and private and public entities. The essay does not include a total description of the concept of judicial independence but a discussion regarding the term and the different ways of perceiving it. Since the conduction of this essay would not be possible without the Sida MFS-scholarship program it has a development perspective and describes important steps taken to modernize the Vietnamese court system as well as point out which parts that might need to be developed further.

When doing research on a subject like judicial independence, a sensitive issue in Vietnam, you learn much about your own legal tradition and values. Obviously, coming from Sweden, a country often referred to as a rule of law state, certain mechanism or values are taken for granted and it is difficult for any writer not to be bias when investigating a legal structure that is very closely linked to the political structure and force of the country. It is however important to be aware of that fact and try to adjust your mind to the context of the research and understand the differences in legal heritage that separates Swedish legal culture and Vietnamese legal culture. It is also of great value for the researcher to be aware of the 'western' legal culture that very much influences the legal education in Sweden. When it comes to

written sources, both Vietnamese and international, European and American, writers have been used to get different perspectives. I am however aware of the fact that every author is influenced by his/hers way of understanding their own legal tradition and perhaps, when it comes to issues like this, also influenced by his/hers political beliefs. Another difficulty with doing research in a rather closed society is the fact that you many times are left to second-hand sources when it comes to regulation as well as information regarding the legal system. The lack of transparency and translated documents makes it difficult for citizens to reach information and especially for non-Vietnamese speaking.

During my research in Vietnam I had the opportunity to meet a lot of interesting legal professionals, such as judges and scholars active in the debate regarding the constitution. However I sometimes experienced difficulties when conducting interviews regarding the court system and potential constitutional changes. I specially found that questions requiring personal opinions were difficult to receive personal or analytical answers to. This could have been a consequence of miss-interpretation but might also be a result of the carefulness that surrounds questions that is regarded sensitive or at all relates to the Party-policies in Vietnam. Vietnam strives morally from a Confucian heritage, which deters questioning authorities. This generally makes people reluctant to express how things are done in practice but rather explaining how things are supposed to be done, of fear that everyday practices might not be in accordance with state policies or social norms. It is also possible that this reluctance is stronger among the people working within the public sector.²

² S.Scott, F. Miller and K. Lloyd: Research Culture and Research Spaces in Vietnam p 33-38.

2 The concept of judicial independence

2.1 The concept of Rule of Law

In the beginning of his thesis on Judicial Independence, Van-Hoa asks himself why it is of such great importance to have a judiciary that is independent? An important question to think about when taking on the task to investigate wheatear or not a court system is independent. The Rule of law-based system is widespread in western societies and well known as the “right” way to separate the state and the judicial powers. Hoa traces its legal heritage back to the “cradle of western society” and finds its origin, the ancient Greeks. Aristotle, did not use the exact phrasing “rule of law” to describe his thoughts on the legal structure but did refer to law as “reason without passion and (...) therefore preferable to any individual”³. Already in the ancient Greek society the importance of objectivity in legal functioning was being recognized. Many years later, in the 19th century, British scholar A.V. Dicey introduced the term “Rule of Law” to describe the idea that law, preferably constitutional, should function to restrain the political power.⁴

The Rule of Law-concept is today widely accepted and considered desirable in most democratic states. Scholars, jurists and national governments all over the world recognize it. However, it is also clear that the precise meaning of the concept of rule of law is until this day still being interpreted in different ways. A number of developing and explicating literature has tried to define the Rule of Law concept⁵ and would probably agree upon the fact that the concept as such consists of a number of different conditions stipulating foremost legal, -transparency, -objectivity and -foreseeability within the state apparatus. Even though the term is widely debated, one of the aspects that most scholars tend to come to term with is the importance of the independency of the courts and the impartiality and objectivity of the judges working there.

A broad definition of the Rule of Law concept would be that it stipulates, “that the law has a supreme role in the governmental activities, non-governmental organizations and individuals”⁶. To be accepted by legal scholars the term might have be defined a little narrower, namely that the principle stipulates the fact that “the government in all its actions is bound by rules fixed and announced on beforehand”.⁷ A formal definition of the rule of law concept focuses on the way in which laws are adopted. They are

³ Van-Hoa p 29.

⁴ Ibid s 30.

⁵ Ibid p 27-28.

⁶ Ibid p 28.

⁷ Ibid p 28.

not concerned of the substantive content of the regulations but rather if they were “adopted in accordance with certain formal criteria’s”⁸, the content of the laws as such could never be considered just or unjust if they were adopted in a proper way. The substantive theorists on the other hand, would not only demand that the legislative process follows a certain way but also that the laws recognize human rights, democracy, market economy principles and welfare values.⁹

In the 18th century, Montesquieu introduced the concept of power separation, an idea that has made its way into western legal systems and the concept of Rule of Law. He described a way of dividing the three branches of state power (executive, legislative and judicial) into independent sections where they cooperated with in the state mechanism but were the branches could not influence each other. The sought-after consequences were that in such a society both state and personal security would be guarded and restrained by the different branches operating together within a dynamic state authority. To achieve this goal, an independent court system is crucial.

A well-known scholar, Lon Fuller, diverged from the strict division on formal or substantive conceptions of the term. He created a hybrid-model, which he described in his book “The morality of Law”.¹⁰ In the book he identifies eight criteria’s for adequate law making in a Rule of Law-state: 1) there must be rules to avoid ad-hoc legislation; 2) the rules must be made public and well-known; 3) the rules must be clear and comprehensible; 4) retroactive legislation must be prohibited; 5) the laws can not be contradictory; 6) regulations must be possible to obey 7) laws must have a element of consistency; 8) administration must be conducted in accordance with the laws. No matter if the formal, substantive or hybrid model defines the content of the rule of law concept, the principle of judicial independence is always considered a key element for a state to be regarded as meeting the demands of being a Rule of Law-state.¹¹

2.2 Judicial independence

In his thesis, Van-Hoa, refers to Austrian professor Hans-Georg Henirich, who describes the link between judicial independency and the Rule of Law-state as crucial, since according to him “without the first the latter cannot exist”.¹² Independent courts are fundamental to assure the predictability of the law since the only way for citizens to be able to predict the consequences of their actions is by knowing that they obey the same laws as the courts. The Courts also plays an important role as interpreters, since regulations do not always have obvious effects.¹³ That the judiciary is

⁸ Van-Hoa p 30.

⁹ Ibid p 31.

¹⁰ Lon Fuller, *The Morality of Law*, Yale University Press (1964).

¹¹ Van-Hoa p 43.

¹² Ibid p 45.

¹³ Ibid p 45.

independent becomes crucial for unbiased interpretations and in cases where the court has to solve issues of conflicting norms¹⁴.

Obviously, the judiciary plays an important role in the fulfilment of judicial independency. Therefore, finding out whether a court system is independent or not must begin with figure out how the court system is organized and whom the subjects of this independency are. Van-Hoa, finds out what institutions, individuals and which state agencies that should be considered parts of the judiciary by categorize them by their function. The judiciary consists of institutions and individuals with capability to adjudicate disputes between individuals or individuals and the government. This function differs it from the other two branches, the legislative and the executive power. These branches often interact with each other and it is therefore interesting to see how susceptible the court system is when it comes to undue impact from the executive and legislative branches of power.¹⁵ One part of the examination of whether the judiciary is independent or not would therefore be to understand how easily these branches influence each other. At the same time these two elements are very dependent of each other to fulfil the requirement of judicial independence and if the system is dependent, the ones working there is most likely to also be dependent.¹⁶

An independent judiciary is also of great importance to the protection and implementation of human rights. The theory on human rights would be frail if the rights were to be looked after by a court system depending on i.e. political powers. The concept of judicial independence is therefore very closely linked to the right to protection from for example arbitrary arrests, detentions or exile. Van-Hoa stipulates that 'the independence of the judiciary is an indispensable factor for the protection of human rights in any national context'¹⁷ and he mentions that it is not a coincidence that almost all written international conventions dealing with human rights considers an independent and impartial judiciary crucial for its implementation.¹⁸

¹⁴ Van-Hoa p 46.

¹⁵ Ibid p 67 ff.

¹⁶ Ibid p 81.

¹⁷ Ibid p 61.

¹⁸ Ibid p 65.

3 The Vietnamese Legal system

To fully understand the organization of the judiciary in Vietnam it is important to understand the state apparatus and how it has developed historically. Since the first constitution was adopted in 1946, the judicial, executive and legislative powers of the state has been connected, both by law and in practice. There has never been any claim on applying the Montesquieu rule on separation of powers as there is in many western countries since the state was built on a whole different legal tradition, namely the Socialist one.

3.1 Historically

Since the unification the same Party has led Vietnam and that Party is still the only political party allowed in Vietnam. The group actually leading the country, until recently consisted of more or less the same persons who fought the Americans during the war, at the top.¹⁹ The context, in which the leaders of the FNL-guerrilla came to power in Vietnam, was decades after fighting French colonialism and American occupation. This might have influenced the fact that modern legal thinking in Vietnam is not built on the idea that law is fundamental and crucial for the building of a state but rather the opposite since the revolutionaries wanted to subvert the French and later on American, state structures of power.²⁰ As a cause of these historical events, some think, that the country characterizes by a certain suspiciousness when it comes to interaction with foreign states. However, the same leaders have during the last decade agreed to open up their borders to both French and American enterprises, actions that have helped to raise the standards of living for many Vietnamese citizens. A lot of the state-owned enterprise has though remained state-owned through joint ventures or controlled through Party networks, and the Party has in that way seen to not loosened its control over the state structure or the economy.²¹

When North Vietnam in 1959 adopted a new constitution it was a constitution strongly influenced by the Soviet Union. Shortly after the first 5-year plan was adopted (according to the Marxist way of making detailed plan five years ahead) the plan collectivised the agriculture in the same way that had been done in China before, by making agricultural cooperatives.²² The judiciary during this period consisted of Peoples Tribunals, established in different levels of society. However, the transition towards state-courts

¹⁹ Hägerdahl p 300.

²⁰ Gillespie and H.Y Chen – Legal reforms in China and Vietnam p 78.

²¹ Hayton p 3.

²² Hägerdahl p 289.

was not easy since villages often had their own way of handling disputes.²³ As a solution, the Virtue-rule was introduced, encouraging judges and officials to use personal relationships to connect with the local people. For a long time Confucian thoughts applied parallel with the state mechanism for dispute resolution. On the administrative side, the Ministry of Justice was abolished from 1960 to 1980, as it was considered unnecessary.²⁴ The civil servants and citizens activities were monitored by state agencies with influences from the old Chinese-Vietnamese system with monitoring censors. The knowledge about the legislation was insufficient among these servants, as a consequence of the fact that there was no legal education at all in Hanoi until 1970.²⁵

When the North and South part of the country was united the unified state structure was modelled after the one used in the Soviet Union and the first joint constitution adopted in 1980 was greatly influenced by the Soviet equivalent. That meant that two parallel hierarchies were built up, the Party and the State organs, connected to each other on every level. The National Assembly (N.A) became the highest decision-making organ with power to legislate and making amendments to the constitution. Connected to the N.A. there were a Council of Ministers with the Prime Minister as chairman and one more with the President as chairman. The Party, governed by a central committee consisting of 120 party members, choose a Politburo, which represented the Party against the Government.²⁶

When the two parts of the country were united the practice of law was more or less abolished. The Party closed all law schools and abolished the Bar Association. However, the domestic market had been opened up for foreign investors and the awareness of the need for legal regulation increased.²⁷

3.1.1 Socialist Law in Vietnam

The concept of socialist law is controversial in Vietnam. It was introduced during the years of planned economy and therefore, some doubts its appliance today.²⁸ It was during the First Congress of the Vietnam Workers Party in 1951 that the decision to build the state on Socialist law was taken. Later, during the Third Party Congress the Soviet theory on ‘Social Legality’ was adopted.²⁹ Social Legality defines law as a ‘proletarian dictatorship’ and the lawmakers built the legal system on the belief that the “law is a part of the superstructure, that reflects the will of the ruling class”.³⁰ The Party is the executive power of the people and is considered to be above the law and therefore the ones to decide the content of the law.

²³ Gillespie and H.Y Chen - Legal reforms in China and Vietnam p 79.

²⁴ Hayton p 93.

²⁵ Hägerdahl p 291.

²⁶ Ibid p 300.

²⁷ M. Holscher p 66.

²⁸ Gillespie and Nicholson - Asian socialism and Legal Change p 45.

²⁹ Ibid p 47.

³⁰ Ibid.

There have been theorists arguing for a supervision of the state via the elected organs, as the N.A, but the Lenin-influenced view was that the Communist Party, as the proxy of the proletarian dictatorship, better handled that task.³¹ Lenin argued that ‘capitalist constitutionalism is unrepresentative because it confines popular involvement in law-making to legislative bodies dominated by an elite’. The former director of the Institute of State and Law, Dao Tri Uc, thought that legislation in general reflected the will of the ruling class and therefore legality to him reflects ‘the need to institutionalize the requirement that state administration (...) benefit the working people’.³² Since the VCP is considered to represent the People that legitimizes their position as a legislative force.

Two very fundamental rules concerning the political power originate from the Soviet Legality System and the earlier mentioned “Virtue-rule”. The Virtue-rule appeared as a solution to the old village-value systems that in practice still prevailed in the rural society and the demand for obedience of Soviet legalism. The Party members were considered to have a higher sense of morality and have greater knowledge than ordinary people and should therefore develop personal relationships to micro-manage the people in different issues. That led to discretionary decisions and enhanced the idea that law should not be applied rigidly or technically but with the “reason and sentiment” of the Party members.³³

The Soviet legalism co-developed with the Virtue-rule since Soviet legal advisors were addressed to advise the Vietnamese Party when it wanted to get away from ancient custom and colonial structures. Four core principles stipulated the power within the country;

1. The Party leads the state and society
2. Law is the will of the ruling class, and is not above the state, but rather emanates from the state
3. The Party and the state have prerogative powers to substitute policy for law
4. Individual rights give way to the collective public good³⁴

Party leadership over the state gives Party officials prerogative powers to control state organs. The Lenin idea, which to a large extent influenced the Vietnam judiciary, was to give “the working class” an opportunity to structure and influence the state law making through the Party. That legitimized that the Party had to have powers unchecked by any constitution and the legal system since no one should be above the people’s representatives.³⁵ The last rule, putting the collective before individual rights was so fundamental that individual rights were regarded as an ‘enemy of the state’.

³¹ Gillespie and Nicholson - Asian socialism and legal Change p 48.

³² Gillespie and H.Y Chen - Legal Reforms in China and Vietnam p 82.

³³ Ibid p 79.

³⁴ Ibid p 80.

³⁵ Ibid p 82.

In 1980, the *doi moi* - policy changed the Vietnam economy drastically and the country went from central planning economy to market economy. Many countries, previously supported by the Soviet Union, were forced to reform their economy when the Union collapsed in 1980, and Vietnam was one of them. Positive effects were seen as farmers and workers became more effective when they were allowed to keep a greater share of their profit and the right of ownership was recognized. From now on it was also allowed to export profit to other countries. During the first decennium of the *doi moi* - era the Vietnamese BNP increased around 10 % a year and in 1995 Vietnam agreed to the free-trade agreement that was set up between the ASEAN-members. The embargo put on Vietnam by the US was lifted in 1994. The reformation did introduce some negative aspects to society, as the differences of income increased, especially between the cities and rural society and enlarged the problem with corruption.³⁶

3.2 The State apparatus

In this chapter the most fundamental organs of the state and their functions will be described.

3.2.1 The Communist party

The Vietnam Communist Party was established in 1951 but was then called the Vietnam Workers' Party. Since 1980 the Party is the "force leading the state and society" according to article 4 in the current constitution from 1992. Since there is no division of powers in the state structure (reasons for that is explained in 3.1.1) the Party-polices shapes both the political and legal system. Every 5th year a national congress is held where the Party adopts their policy resolutions. In Columbia Journal of Asian Law, Brian J.M Quinn explains the governmental structure in Vietnam as typical for a socialist state and sees the Party's great influence on all statelevels as a cause of the parallel state structure; 'Though left unspoken in much constitutional literature, the Communist Party maintains firm control over government and legal institutions at all levels'.³⁷

The most influential bodies of the party is the Central Committee and its core, the Politburo. The Politburo is the organ establishing guidelines to set up the Party politics and shaping governmental policies.³⁸ The National Assembly, the organ described further in the next section are formally the organ that passes the laws and all the laws passed by the N.A starts with a preamble that stipulates which part of the governmental policies it is based upon.³⁹ Historically it has been difficult to distinguish laws from

³⁶ Hägerdahl p 312 f.

³⁷ J.M Quinn – Legal reforms and its Context in Vietnam p 225.

³⁸ M. Holscher p 60.

³⁹ Hayton p 94.

policymaking and what relationship that existed between them. Party policy's was the highest applicable source, and in an event of conflict between law and policy, judges would apply policy.⁴⁰ Around 90 % of the judges working in the courts are Party-members. Party-members are also highly represented in high status positions in other organs of the state.⁴¹

3.2.2 The National Assembly

The National Assembly is the state organ structured similar to a parliament and consists of representatives elected nation-wide. The representatives in the N.A consist to 90 % of Party-members. The elections and the composition of the N.A can be questioned from a democratic point of view.⁴² Some scholars are of the impression that the Party deliberated has developed the National Assembly to fake the parliamentary situation for the citizens and the rest of the world, an issue which will be discussed further in the analysis.⁴³ Anyone could in theory be elected to join the N.A but in practice they have to go through the Vietnamese Fatherland Front-process (VFF) first, which is a fairly difficult process. If they pass the requirement of being approved by two selection meetings at their work and in their neighbourhood they also have to pass the VFF final vetting. Until 1997 all candidates had to be nominated by an organ of the state or the Party but from then on individuals could also nominate themselves.⁴⁴

The N.A. is also responsible to manage the Supreme Court and to organize constitutional amendments.⁴⁵ However, that would not be possible in practice since they only are gathered for a 30-day period twice a year, but between these meetings the body has elected its "Standing Committee" that supervise the Government, Courts and Prosecutors permanently. The Standing committee is by other means the highest executive, legislative and administrative authority in Vietnam, and accordingly there is no division of powers.⁴⁶

The N.A has the power to legislate as well as supervise the Supreme Court, the People's prosecutor and the government. It is their task to monitor their activities as well as appoint the Chief Judge and the Chief Prosecutor. They are also the ones selecting the President and the Prime Minister for a period of five years, i.e. the same period of time as the N.A members themselves are elected. Other Judges of the Supreme Court are appointed and

⁴⁰ Nicholson – Borrowing Court Systems p 89.

⁴¹ Ibid – Borrowing Court Systems p 245.

⁴² Hayton p 95.

⁴³ Ibid p 86.

⁴⁴ Ibid.

⁴⁵ Ibid p 94.

⁴⁶ M. Holscher p 59.

removable by the Chief Judge for a 5 year-term. The Chief Judge of the Supreme Court also appoints and removes judges of the inferior courts.⁴⁷

The National Assembly has by regulation a certain compositions of men, women, ethnic minorities and interests groups as the military, elderly people and government ministers, decided by the VFF. VFF is part of the state apparatus and according to the constitution their assignment is to 'strengthen the political and moral cohesion among the people'⁴⁸. Interesting to know is that the VFF is the 'umbrella' for all activities referred to the "civil society" such as the Woman Union, Youth Union, Farmers Union, the Vietnam Lawyer Association and the Party itself. In reality, the Politburo, with 14-15 members of the Party are the one's controlling the VFF.⁴⁹ According to the present constitution the N.A is responsible for the following tasks, which includes both legislative and judicial, as well as executive powers:

“1. To draw up and amend the Constitution; to make and amend laws; to decide on the program for the building of Vietnamese laws and decrees.

2. To exercise the right to supreme supervision over the observance of the Constitution, laws and resolutions of the National Assembly; to examine reports by the President, the Standing Committee of the National Assembly, the Government, the Supreme People's Court and the People's Inspectorate General on their respective activities.(...)

3.To determine the organization and activities of the National Assembly; the President, the Government, the People's Court, the People's Inspectorate and local authorities;

4.To elect, suspend and revoke the President, the Vice-President, the Chairman and Vice-Chairmen and the members of the Standing Committee of the National Assembly, the Prime Minister of the Government; the Chief Justice of the Supreme People's Court, the Chief Prosecutor of the People's Inspectorate General; to ratify the appointment, suspension and revocation of Deputy-Prime Ministers, Ministers and other members of the Government upon the proposal of the Prime Minister; to ratify the list of members of the Defense and Security Council proposed by the President; and to take a vote of confidence in favor of officials elected or approved by the National Assembly.”⁵⁰

⁴⁷ http://www.nyulawglobal.org/globalex/Vietnam.htm#_edn9 (Accessed 28 February 2012).

⁴⁸ The Constitution of 1992 art. 9.

⁴⁹ Hayton p 98.

⁵⁰ The Constitution of 1992 art. 84.

3.2.3 The Government

Vietnam is geographically divided into 64 provinces. These provinces are in turn divided into smaller districts, which are sub-divided into communes.⁵¹ These administrative levels each have their own government organ with a representing body, called the Peoples Council and an administrative body, the Peoples Committee. The local people elect the people's council every 5th year and the group thereafter appoint the committee members. The tribunal panels at the first instance consist of both a judge and two people's jurors. People's jurors at each level are people elected by the People's Council of the same level.⁵²

The Ministry of Justice was established in 1981 after it had been abolished during twenty years when it was regarded unnecessary. The Ministry of Justice is today responsible for managing and the organization the court system. It handles the assignment of cases to judges, monitoring the "quality" of judgements, decides their salaries, budget and psychical facilities. Until 1992 it held the last ranking in the cabinet but is now moved up in the hierarchy to number four. The Ministry of Justice also selects candidates for judges who are later passed on to the President for approval.⁵³

The President is the one that acts on behalf of the country in foreign affairs and commands the army. The President also promulgates the laws that the N.A. has adopted. The Prime minister is the one conducting the governmental work in the cabinet. The cabinet and its ministry's have the authority to promulgate decrees and resolutions.⁵⁴

3.3 The Judiciary

3.3.1 The Courts

In Vietnam, as in most countries, the court system is organized as a three-levelled structure with a pyramid shape. The court system follows the administrative system with several courts (ap. 600) at the lowest level, a few on the provincial level and one Supreme Court. The Vietnamese courts are also divided into different types, such as labour court, military courts and economic courts.⁵⁵ Every court is linked to a corresponding State agency on the same level. According to the "constitutional principle of the people's sovereign" the Chief judge at the district courts must report regularly to the corresponding district People's Council on the courts activities as well as to the Supreme Court. That principle is closely linked to the principle of "the

⁵¹ The Constitution of 1992 art. 118.

⁵² M Holscher p 62.

⁵³ Ibid p 64.

⁵⁴ Supra note 47.

⁵⁵ J.M Quinn – Legal reform and its context in Vietnam p 228.

National Assembly's supremacy". The Supreme People's Court, the State Prosecutor and the government are hierarchal organized equally below the N.A.⁵⁶

The intermediate courts of the Vietnamese court system are the provincial courts. At the moment 64, corresponding to the 64 provinces in Vietnam. The court is entitled to handle all cases of criminal, civil, administrative, economic and labour disputes. The court also has jurisdiction over administrative decisions or measures issued by ministerial agencies, the Presidential Office, the National Assembly's office, the Supreme Peoples Court, Supreme Peoples Procurators Agency and provincial administrative agencies. The court has the authority to try a case subject to jurisdiction by the corresponding district court if it considers it necessary. This possibility is however rarely used in practice.⁵⁷

The Supreme Court reports to the National Assembly, which controls the judiciary budget and confirms the President's nominees of Supreme Court judges and the Supreme Peoples Prosecutors. Traditionally, the Supreme Court has had the role of leading the work of the lower courts. The communication is handled via 'guidance letters' were the judges of the Supreme Court plays an advisory role for the judges in the lower courts which ability often is doubted. In 2002 the N.A refused to pass a law, giving greater jurisdiction to the lower courts as a consequence of their incapability. The Supreme Court has before also encouraged the lower courts to seek advice in judging matters from their local authorities. That changed in 1999, when they were advised to only seek assistance from the Supreme Court.⁵⁸

3.3.2 The Judges

Judges have a significant impact on the courts and the work that is carried out there. Their independency and impartiality are therefore of great importance for the accuracy of the work being done there.⁵⁹ Traditionally, the profession of an educated judge has not been recognized in Vietnam. As late as 1980 there were no requirements to become a judge and the people elected for the assignment therefore did often not have the appropriate education or experience to conduct their job correctly. In the 1992 legal reform, minimum qualifications regarding legal education were established with the purpose to increase the professionalism in the legal sector. Quinn says that 'until 1992 judges were selected almost exclusively for their loyalties to the Party and had in many cases no legal training'⁶⁰. In 2002 the qualifications for becoming a judge was raised even further and it is now demanded that judges has a bachelor degree in law and has passed trough a

⁵⁶ Van-Hoa p 367.

⁵⁷ Ibid p 389.

⁵⁸ Nicholson - Borrowing Court Systems p 266.

⁵⁹ Van-Hoa p 70.

⁶⁰ J.M Quinn – Gaining Control over the Courts p 455.

legal training course.⁶¹ In 2009, however, a report shows that still only 30 % of the judges in fact had a law degree.⁶²

In 1992, the appointment process of judges was moved away from the local authorities, in another try to professionalize the judges and the judiciary. However, the judges might have regarded it differently since many potential ways to influence the judges remained and the local opinion was still that the court would serve political needs rather than be independent from them.⁶³ One example is the control over reappointments, which made judges dependent on the local good will for being recommended for a new 5-year period. That has however changed and from 1994 the Supreme Court appoints its own judges.⁶⁴ Some scholars mean that politicians have a lot of influence over judges through the re-election process since every judge needs to file for submission every five years, a subject further discussed in chapter 6. A committee, mostly consisting of departments, representatives from the People's Council and the People's Court makes a joint recommendation to the People's Council that reappoints the judges in the lower courts.⁶⁵ In relation to this, it is also interesting to note that in 2009, as much as 90 % of the Vietnamese judges were members of the Party.⁶⁶

Except for having a law degree, judges must in practice work as a court clerk for at least four years before being employed as a judge. According to Dr. Cong, a judge in the Vietnamese Supreme Court, at what instance you will be appointed depends on how much time you have spent working as a clerk. However, since the procedure is not transparent there could be other factors influencing the appointment process, such as under-the-table money and unofficial connections.⁶⁷

In Vietnam the judges are considered to be "civil servants" which means that they enjoy the same status and the same salary as any other person working in the civil society. The salary system for civil servants is the same irrespective of which sector you are working in, which in practice means that you start at the lowest level with earning 100.000.000 (350SEK) Vietnamese Dong a month. During your career your salary can rise up to the highest level, which is ten times the lowest. With these figures in mind, it is difficult to understand how the Vietnamese judges survive or are able to cover the costs for their family since these amounts are exceptionally low, even in Vietnam. Obviously, this is the official salary, there could be a system of bonuses or "under the table" payments that people do not talk about. To be a judge is an influential position in the Vietnamese society, as in many others, and you can often earn money by providing contacts with

⁶¹ J.M Quinn – Gaining Control over the Courts p 456.

⁶² Global Integrity Report (2009) *2009 Assessment – Vietnam*
<http://report.globalintegrity.org/Vietnam/2009/print> (Accessed 28 February 2012).

⁶³ J.M Quinn – Gaining control over the courts p 438.

⁶⁴ M. Holsher p 63.

⁶⁵ J.M Quinn – Vietnam's Continuing Legal Reform p 240.

⁶⁶ Global Integrity Report (2009) *2009 Assessment – Vietnam*
<http://report.globalintegrity.org/Vietnam/2009/print> (Accessed 28 February 2012).

⁶⁷ Interview with a judge, Vietnamese Supreme Court

people you know.⁶⁸ According to Dr. Coung the corruption is a great problem for the independence of the judiciary. However, he does not blame the low salaries for the corruption alone. There are many factors and even very wealthy people do not hesitate to take “dirty” money.⁶⁹ According to several of the persons with insight in the Vietnamese court system, raising the salaries wont alone solve the problem of corruption.

Under international pressure the government has continued a high-profile anticorruption campaign. Recently there has been groundbreaking legislation, establishment of new anticorruption bodies, and ratification of the UN Convention Against Corruption.⁷⁰ Despite this enforcement has been hindered by a combination of factors, such as “inadequate checks and balances, the lack of an independent judiciary and free media, poor incentive structures for civil servants, widespread nepotism and secrecy, and practically nonexistent protection for whistleblowers”. According to the report the “gap between legal standards and practical realities will remain problematic for years to come.”⁷¹ The Party conducted a national survey related to corruption in general in 2005. The survey showed that around 60 % of the respondents had paid a bribe for public services and 30 % said they would accept a bribe if offered. The Party has taken action against the apparently widespread corruption with passing an Anti-corruption law in the end of 2005. The law demands a yearly financial disclosure on the assets of every civil servant, such as houses and other assets valued over 3.300 \$ (25 000 SEK).⁷²

As a consequence of the situation for the judges, professor’s witnesses a lack of interest among newly graduated law students to choose the judge professions as a career. The education after your law degree will consist of working as a court clerk but according to a law professor, “that is when they often get disappointed and apply for the state agency offices instead”, which are generally more preferred than the courts.⁷³ This pattern is also shown in other sectors of the public administration were, among top students at Vietnamese universities, less than 10 % want a career in the public sector at all.⁷⁴

Another factor that has much impact of the judges’ way of work is the huge amount of disciplinary mechanisms applicable. The disciplinary sanctions are often very vague and to break the regulation system could set your whole family’s survival at risk. Since judges are considered both civil servants and legal professionals they are subject of two different kinds of disciplinary regulations since the two legal frameworks are overlapping. The

⁶⁸ Interview with a professor at Hanoi Law University.

⁶⁹ Interview with a professor at Hanoi National University, Faculty of Law.

⁷⁰ United Nations Conventions Against Corruption (UNCAC) adopted by the United Nations General Assembly by resolution 58/4 of 31 October 2003.

⁷¹ US Department of State (11 March 2010) 2009 Country Reports on Human Rights Practices – Vietnam “Anticorruption and Transparency”.

⁷² J.M Quinn– Vietnam’s last call for bribes p 53.

⁷³ Interview with a professor at Hanoi Law University.

⁷⁴ Gillespie and H.Y Chen- Legal reforms in China and Vietnam p 151.

awareness of these disciplinary measures and the vagueness in the regulations very much effects the way the judges act in general with regard to the possibility to be subject of a disciplinary sanction.⁷⁵ It is also prohibited for Vietnamese judges to travel outside the country during their working years. A rule that also applies for persons working for the police force, prosecutor agencies and the military but according to a judge, “this does not mean that no one does it, but it is illegal”.⁷⁶

A growing problem for the judges has been the rapid growth in new legislation during the last decade. Due to the lack in education judges are often insecure in interpreting the laws and therefor seeks for the provincial officials opinion since they are scared of the consequences for a ‘wrong’ interpretation. They also remain under financial dependence from the local authorities.⁷⁷ According to a country report from 2009, there have been many high-profile cases in the last years that clearly have been influenced by the Party often concerning people charged with challenging or harming the Party or the state.⁷⁸

It is finally not only through judges that Party policies can influence the courts. The trial panel consists of one judge and two ‘citizen jurors’. The Fatherland Front (TFF) selects citizen jurors for a 5-year period. Criteria’s for selection is amongst others political loyalty and reliability⁷⁹.

3.3.3 The People’s Prosecutor

The People’s Prosecutor, or the People’s office of Supervision and Control has according to the constitution the mandate of public prosecution and judicial supervision in general. They are structured in a way similar to the structure of the court with three different levels: the Supreme People’s Prosecutor, provincial People’s Prosecutor and district People’s Prosecutor. Their office is independent from the Ministry of Justice and reports directly to the N.A. The office has broad jurisdiction of investigating court matters, governmental activity and private activity. The prosecutors are entitled to participate in any part of the judicial proceedings and make a recommendation to the judge about a resolution to the dispute. In criminal cases the prosecutor has the right to refer the case to the criminal court and carry out the public prosecution role. In non-criminal cases, the People’s Prosecutor supervises the resolution of the cases and has the prerogative to participate in any part of judicial proceedings except the conciliation process. Usually, reviewing the file, listen to evidence and arguments and thereafter makes a recommendation to the tribunal panel. In addition, the

⁷⁵ Interview with a professor at Hanoi Law University.

⁷⁶ Interview with a PhD at Ho Chi Mihn Law University.

⁷⁷ J.M Quinn – Gaing Controle over the Courts p 442.

⁷⁸ US Department of State (11 March 2010) 2009 Country Reports on Human Rights Practices – Vietnam.

⁷⁹ J.M Quinn – Gainging Control over the Courts p 442.

People's Prosecutor supervises the enforcement of the judgments.⁸⁰ The People's Prosecutor also has the power of reviewing governmental actions and controls their accordance with the law. When wrongdoings are detected among State agency decisions, negotiations will follow rather than a prosecution. But the office also has vertical and horizontal report requirements, on the local level they must report to the People's Council.⁸¹

The Ordinance on the People's Office of Supervision and Control shows intent to create a somewhat independent institution. Article 7 stipulates that procurators are responsible only to their Chief Procurator through the management system. In Vietnam this means that management over provincial institutions is not dependent on the local governments. The Chief procurator is the one responsible for appointing all national procurators, and the local governments do not have influence to remove procurators not meeting their demands.⁸² The Chief Procurator sits for a 5-year limited term but none of the other prosecutors faces this kind of limited appointments.⁸³

The constitutional reform in 1992 formally introduced the People's Office of Supervision and Control and defined their tasks, namely to carry out public prosecutions and monitor actions of the government at all levels. The legislation that concerned the office gave it rather broad powers to investigate and prosecute. In practice however, their review has resulted in negotiations with local official to reach a situation where their behaviour can be justified in accordance with the law.⁸⁴ In the 2002 reforms, a reorganization of the office attempted to create the same kind of personal responsibility for the prosecutors as exists for the judges. Currently, the provincial Chief Prosecutor is personally responsible for all his deputies as cases of false imprisonment and illegal detention.⁸⁵ The reform also reduced the powers of the office and made it focus more on public prosecutions and surveillance of the police. During the amendment process, in 2001, the N.A had removed the Offices' authority to supervise and investigate governmental actions since the general feeling was that the Office was 'abusing its supervisory power to the detriment of legitimate government work'.⁸⁶ Their authority over the Police force was on the contrary broadened; in order to stem corruption among the police force the Office could now charge investigating officer on certain cases and control criminal investigations.⁸⁷ However, the centralized structure of the People's Office makes it difficult to have the insight needed for prevent corrupted investigations in the provinces.

⁸⁰ Ibid p 443.

⁸¹ J.M Quinn – Legal Reform and its Context in Vietnam p 241 ff.

⁸² J.M Quinn – Gaining Control over the Courts p 443 ff.

⁸³ Ibid p 444.

⁸⁴ Ibid p 444.

⁸⁵ Ibid p 465.

⁸⁶ Ibid p 460.

⁸⁷ Ibid p 463.

4 The Constitutional development concerning the courts

In this section the constitutional development in Vietnam will be portrayed. In what way the relationship between the Party, the state and other institutions has been stipulated in the different constitutions, will be highlighted. Even if the Vietnamese constitutions historically have been portrayed as more of political statements than legally enforceable texts, it is of great value to follow how the rhetoric on certain rights and institutions has changed over the years.

4.1 Constitutional development before and during the reunification

The constitution is considered the most fundamental part of a legal system and often provides regulation regarding the core of the state structure and the most basic protection for the citizens against their rulers. The Party, formally established in 1952, has been responsible for drafting all four of the Vietnamese constitutions, from 1946 until 1992.⁸⁸ Pip Nicholson has referred to the constitutions as ‘Party- policy documents’⁸⁹ and perhaps the Vietnamese constitutions might have played a bigger role as a manifest of the political power than that of a conventional constitution.⁹⁰

4.1.1 The Constitution of 1946

Many Vietnamese today consider the first constitution, drafted in 1946, as a model for potential constitutional changes in the future. The civil rights section was much more detailed and the constitution also included some democratic features, such as involving a people’s assessors’ in criminal cases “to jointly take decisions with the judges”.⁹¹ The constitutions that came later were much harder characterized by ideology and pushed a well-defined socialist line. The constitution from 1946 had little to tell about the economic system, other than guaranteeing the right to ownership.⁹² It established the N.A with its Standing Committee and the President, alone or with ministers as the Council of Ministers as the

⁸⁸ Sidel - Law and Society in Vietnam p 18.

⁸⁹ Nicholson – Borrowing Court Systems p 49.

⁹⁰ Sidel – Law and Society in Vietnam p18.

⁹¹ Sidel – The Constitution of Vietnam p 37.

⁹² Ibid p 27.

legislative power of the country.⁹³ An interesting control or checking mechanism was established, for supervising and test the question of confidence in the N.A towards the Standing Committee.⁹⁴ The Convention did however not regulate the Prosecutor service or the police force. Neither was there a regulation on judicial review or any interpretation of the constitution.⁹⁵ Other democratic features, such as recall and referendum of the N.A members, disappeared in 1959 but made a come back when amendments was made in 2001.

The judiciary in the 1946 constitution was defined as a four-level court system. Judges were to be appointed by the government⁹⁶ and their independence stipulated in an article saying that ‘In judgement, judges shall obey only the law (...) other agencies shall not interfere with the judgement’⁹⁷. There were, according to article 51, a possibility to establish a special court when the President, Vice President or a member of the N.A faced prosecution. The president, during these years Ho Chi Mihn, enjoyed a certain position. According to the constitution the N.A had jurisdiction to choose the President for a five-year period, but in practice that decision was taken by Party leaders.⁹⁸

4.1.2 The Constitution of 1959

In 1959 Ho Chi Mihn stated that the constitution from 1946 “had fulfilled its mission”. The new constitution was regarded as a first step in a more communist direction and is referred to as the country’s first socialist constitution.⁹⁹ One important, and big difference from the 1946th constitution was that it was far more detailed in the economic field, another one, that some of the democratic features were removed¹⁰⁰. With this constitution a formal structure for the court system was adopted and the names they have today were set out. According to the preamble of the constitution the task for the Vietnamese people had gone from defending their integrity, winning back their independence and “rebuild the country on a democratic foundation”¹⁰¹ to “consolidate the North and taking it towards socialism”.¹⁰² The ‘clearer commitment to socialism and socialist law’ had consequences for the perception of the rule of law during this constitutional period¹⁰³ and four core principles dominated the legal discourse: (1) The “Party leads” the state and society, (2) Law is the “will of the ruling class

⁹³ Nicholson- Borrowing Court Systems p 45.

⁹⁴ Sidel –The Constitution of Vietnam p 31.

⁹⁵ Ibid p 37-38.

⁹⁶ The Convention of 1946 art. 67.

⁹⁷ Ibid art.69.

⁹⁸ Sidel – The Constitution of Vietnam p 33.

⁹⁹ Ibid p 45- 64.

¹⁰⁰ Ibid p 47-61.

¹⁰¹ Ibid p 28.

¹⁰² Ibid p 47.

¹⁰³ Nicholson– Borrowing Court Systems p 91.

and is not above the state, but rather emanates from the state, (3) The party and state have prerogative powers to substitute policy for law, (4) Individual rights give way to the collective good.

The judiciary was more detailed regulated than before and both a Soviet Regulatory Model and a Socialist Legality Doctrine were adopted.¹⁰⁴ The Standing Committee still had the possibility to pursue some constitutional review, according to article 53. When it comes to the economic system the State would from now on lead ‘all economic activities according to a unified plan’. The constitution guaranteed basic human rights such as equality before the law, freedom of speech and the right to education but at the same time article 38 stipulated that ‘The State forbids any person to use democratic freedoms to the detriment of the interest of the state and of the people’. Which made the protection for the people far less than it had been in the 1946th constitution.¹⁰⁵

The N.A was recognized, as the highest organ of state authority and the only legislative authority in the country. According to article 50, the N.A had the power to supervise the enforcement of the constitution and that is the first sign of recognition of any judicial review in a Vietnamese constitution. This provision would later cause a debate on the establishment of a constitutional court in Vietnam (a subject further discussed in chapter 4.1).¹⁰⁶ At this time the newly established Supreme Court monitored the lower courts that would give regularly report to their highest instance. The Supreme Court was on its part monitored by the N.A and the lower courts were also to report to their local People’s Council.¹⁰⁷ The N.A elected the Chief Judge of the Supreme Court and its Standing Committee the other Supreme Court judges. The local judges were elected by their local People’s Council. Since a ‘revolutionary mind’ was of greater importance in the election process than legal education or experience a consequence became that many councils elected unsuitable candidates for the job and very few of which had a legal education.¹⁰⁸

4.1.3 The Constitution of 1980

In 1980 a revised constitution established the reunification of South and Northern part of the country. An important article was then introduced that also found it’s way to the current constitution, article 4, stipulating that ‘the Party is the only leading force in the country’.¹⁰⁹ Even though the legislative bodies was regulated in a similar way as in the convention from 1959, greater efforts were put on improving the executive agencies and a ‘Council

¹⁰⁴ Sidel – The Constitution of Vietnam p 58.

¹⁰⁵ Ibid p 50-51.

¹⁰⁶ Ibid p 52.

¹⁰⁷ Nicholson – Borrowing Court Systems p 113.

¹⁰⁸ Ibid p 116.

¹⁰⁹ Sidel – The Constitution of Vietnam p 69.

of State' was founded. The Council combined the tasks of the President and the Standing Committee. In article 131 a provision stipulated, "During trials, judge's and people's assessors are independent and subject only to the law". The phrasing was similar to the previous provisions regarding the courts independency and is also repeated in the present constitution from 1992.¹¹⁰

4.2 The Constitution of 1992

With the *doi-moi*-reform in 1986 the constitution from 1980 quickly felt out of date. Due to the economic reform the need for new and foremost more regulation grew. The constitutional reforms in 1992 placed the Party under the constitution and the law by abolish their prerogative powers. It was a step away from the Soviet inspired legal system with local authority controlling the courts. The constitution created a government divided into three branches, the Government, the Supreme Court and the People's Office of Supervision and Control, all equally based under the N.A.¹¹¹ This did however not prescribe any concrete legal constraints over the Party leaders or other organs of the state. A constitutional revision committee, consisting of Party leaders, N.A members, academics and political officials drafted the constitution that was adopted by the N.A in 1992.¹¹² The current constitution is the longest, most detailed and inclusive constitution yet made. It includes provisions on the economic system, culture, education, science, technology, national defence and rights and duties of Vietnamese citizens. According to the constitution the new goal for the Vietnamese people was to "renovate, build and defend their motherland."¹¹³

Article 4, as mentioned earlier caused much debate, since it was slightly changed in the new constitution. The phrasing that stipulated that "the Party is the *only* force leading the State and society" was now replaced by "The Party is the force leading the State and society". Scholars mean that this was a way of slowly open up for other important forces in society, as business and other organisations.¹¹⁴

When it comes to the provisions on judicial independence another, important change in article 4 was the second sentence, that put the Party power under the constitution and the law. In 1980, the wording had only laid down that 'Party organizations operate within the framework of the constitution'.¹¹⁵ Article 4 now also clearly described that the provision was applicable on '*all* party organisations'.¹¹⁶ Some are of the opinion that this way of expressing the constitutional hierarchy is a way of making a more flexible regulation that not clearly stipulates any legal hierarchy. The Party

¹¹⁰ Sidel –The Constitution of Vietnam p 77.

¹¹¹ J.M Quinn – Gaining Control over the Courts p 435.

¹¹² Sidel – The Constitution of Vietnam p 83.

¹¹³ Ibid p 84-85.

¹¹⁴ Ibid p 88.

¹¹⁵ The Constitution of 1980.

¹¹⁶ Sidel – The Constitution of Vietnam p 88.

is though predominant and only ‘operates within’ the constitutional frames.¹¹⁷ It is rather unclear what ‘within the framework’ actually means in practice. Article 12 stipulated that ‘*The State administers society by rule of law and constantly strengthens the socialist legislation*’, a phrasing that can seem somewhat contradictory. In article 2 it is also stipulated that ‘*State power is unity with delegation of power to, and co-ordination among State bodies in exercising legislative, executive and judicial rights*’. Which is a fundamental statement regarding the lack of division of powers in the Vietnamese state.

The section regarding the economic system was the most dramatically changed in the new constitution. Now, joint ventures and private sectors was recognized both domestic and foreign ones. It also guaranteed a fair compensation for forcible purchases of property as well as promised that foreign investments had the right to lawful ownership and ‘shall not be nationalized’.¹¹⁸ The right to private ownership gained constitutional status again since it in the two latest constitutions it had only been possible with “ownership by the people” or collective ownership.

The rights section became more generally formulated and gives few clues on how they are to implemented or claimed by citizens in any other way. It also emphasises the ‘inseparable’ relationship between the citizen’s rights and their duties.¹¹⁹ When it comes to the role of the courts the new constitution requires that ‘at trial, the judges and assessors are independent and shall obey only the law’.¹²⁰ It also defines the Supreme Court as the highest judicial institution and that it ‘supervises and directs the judicial work of local People’s courts and military tribunals’.¹²¹ Even though control over the courts was decentralized and became independent of local authorities, their access to financial resources still relied on the local administration.

4.2.1 Amendments adopted in 2001

In 2001 and 2002 a dialogue concerning the constitution was initiated and an amendments process aimed to update the legal system in line with the new demands from the market economy.¹²² Sidel express some concern about how allowing that kind of debates could strengthen rather than weakening the power of the Party¹²³ and in 2001 the Constitutional Amendment Commission worked hard to narrow the debate concerning the real constitutional questions and process it towards less sensitive issues.¹²⁴

¹¹⁷ Sidel – The Constitution of Vietnam p 89.

¹¹⁸ Ibid p 91.

¹¹⁹ Sidel – The Constitution of Vietnam p 93.

¹²⁰ The Constitution of 1992 art. 130.

¹²¹ Sidel – The Constitution of Vietnam p 104.

¹²² Ibid p 19.

¹²³ Ibid p 19.

¹²⁴ Ibid p 53.

But official and academics continued to raise the issues concerning constitutional review and law enforcement.¹²⁵ Legal scholar Nguyen Van Thao raised the question of having a constitutional court constructed, since they had never once ‘seen the National Assembly or its Standing Committee abrogate, cancel or suspend the implementation of a single document issued by the President, the Government or the Prime Minister’.¹²⁶

Already, at the 7th Party Congress, in 1991, consensus was met regarding replacing the Virtue-rule with the law-based state norm, and in the 2001 amendments process this formally was incorporated into the constitution.¹²⁷ According to Thao, the constitution from 1992 did not delegate responsibility to any institution to review the constitutionality of the laws. According to Pham Duy Nghia, there is no constitutional protection or oversight over administrative agencies, since “the oversight of acts that violate the Constitution or the laws by administrative institutions in Vietnam is fundamentally within the jurisdiction of the National Assembly”.¹²⁸ He also points out that there are numbers of examples of other Asian countries, such as Malaysia, Japan and Thailand that has established constitutional courts without leaving their ‘Asian values’ behind.¹²⁹ In 2005, President Loung addressed the constitutional courts and their role as solvers of conflicts between legislative, executive and judicial power. In contrast to the understanding of the rule of law concept in capitalist democracies he meant, “In our state system, we do not advocate such a division of power (...) Isn’t the task of harmonizing and coordinating among the areas of Party leadership?”¹³⁰

N.A Vice-Chairman and other state officials were continuously defending the quite limited debate regarding which amendments that was to be made to the constitution.¹³¹ A change regarding the judicial system that was made was amongst other a provision stipulating that Vietnam ‘is a state governed by law’. It also says that ‘state powers are unified and decentralized to state bodies, which shall coordinate with one another in the exercise of (...) legislative, executive and judicial powers’.¹³² State officials have though clarified that the phrase in no means stipulates that Vietnam is *ruled* by law in the well-known sense or has the purpose to be so in the future.¹³³

¹²⁵ Sidel – Law and Society in Vietnam p 53.

¹²⁶ Ibid p 54.

¹²⁷ Gillespie and H.Y Chen -Legal reforms in China and Vietnam p 81.

¹²⁸ Sidel – Law and Society in Vietnam p 57.

¹²⁹ Ibid p 58.

¹³⁰ Ibid p 58.

¹³¹ Ibid p 115.

¹³² Ibid p 120.

¹³³ Ibid p 120.

4.2.2 Amendments adopted in 2002

In 2002 the VCP instructed the N.A to approve a reform of administration of the court system and the public prosecutors office, many believe as a consequence of several corruption scandals during the last years. It was Resolution 8, issued by the Politburo, which consisted of two major legal reforms. First, a centralization of authority over the court system personnel to the Supreme People's Court, taking the power to appoint judges away from local authorities. Secondly, the authority of the Prosecutor's Office were narrowed and focused more on monitoring the police. According to Stanford Scholar Brian J.M Quinn, these two things mark an important step towards a more independent judicial system, 'The underlying goal with this centralization reform was to move authority away from local institutions and deal with the bad reputation of the legal sector and develop a more professional, responsible and accountable legal system'.¹³⁴ The Supreme People's Court was given the task to administrate and budgeting the provincial and district courts.¹³⁵ In the new Law on Organization of the People's Courts, issued in 2002, 'interference with the work of judges and citizens jurors is forbidden'. This law also includes structural, administrative changes that according to Quinn might 'create the bureaucratic space required to nurture the beginnings of judicial independence'.¹³⁶

Provincial governments showed a rather reluctant attitude towards the proposed changes. They feared that the close connections between the Supreme Court and the lower courts would jeopardise their independence and judicial autonomy. 'Independence' however, was the independence from the central government and the fear was that the local courts would be too dependent to the highest instance.¹³⁷ The reform did also result in major changes concerning the judges' appointment process. The task is now moved from the President to the Chief of the Supreme Court, instead of the N.A choosing the Chief Judge and the President all the others. This also took influence away from the local governments even though they still have the power to elect the Chief Provincial Judge.¹³⁸

¹³⁴ J.M Quinn – Gaining Control over the Courts p 434.

¹³⁵ Ibid p 450.

¹³⁶ Ibid p 449.

¹³⁷ Ibid p 451.

¹³⁸ Ibid p 453.

5 Future constitutional changes concerning the courts

For the last decades a discussion in Vietnam regarding the constitution in general and what changes that might be needed has evolved. Lately the debate has shifted from, if there is a need for constitutional protection, to which institution that would be suitable to carrying out that task. This chapter will summarize some Vietnamese professionals opinions on the on going debate regarding the changes in general and establishing a constitutional court in particular.

5.1 Constitutional changes

The constitutional amendment process started with the 11th Party Congress 2012 last august, and will be finished in the end of 2013.¹³⁹ The revision process is huge and includes a lot of professionals, academics as well as practicing lawyers. In total the revision mechanism is divided into four main groups. It consist of one revision group from the N.A Standing committee, one group from the Presidents office, one from the Government and one from the Supreme Court, all of which have different sub-groups underneath them. These sub-groups on their part has persons working for them, providing reports on their different subjects. The idea is that every one contributes with knowledge from their perspective and will propose amendments concerning their particular issues from their different experiences. In the group under the Ministry of Justice there are four sub-groups alone, one specialising in the structure of the state (separation of power) one on human rights, one on constitutional review and one, on the improvement of the legal system. The group on improving the legal system is dealing with the problem of implementation that, according to a member to one of the groups, is a widespread problem in a lot of the subject areas.¹⁴⁰

Tuu, who works at the Ministry of Justice and takes part in one of the subgroups, explains that there are many political proposals that are discussed under the umbrella of the amendment process. He explains that the situation could be divided into two major sides, fighting against each other. 'In most countries the constitution provides the most necessary and fundamental principles of the state structure but in Vietnam today the constitution consists of over a 100 articles. Therefore, one side wants to get rid of the 1992 constitution and create a whole new one, a more narrow constitution focusing on the basic regulation on the economic system and the legal system, the parliament and the government'. The other side would

¹³⁹ Interview with a lawyer, Ministry of Justice,

¹⁴⁰ Interview with a lawyer, Ministry of Justice.

prefer to revise some articles in the current constitution and according to Tuu, that sides shares the leader perspective and will be heard since the Party prefer making small amendments to the current constitution rather than create a whole new one. According to him, even though the debate is fairly active and opinions are heard in many fields, he believes that only some articles will be revised and those will be the ones relating to the economic section in the constitution.¹⁴¹ Even though the debate is active and inclusive, the actual changes that will come out of it might not be that forward.

According to Tuu, the question of whether or not the constitution will be a brand new one or just an amended one is not the most important issue. 'It does not matter since the implementation of law in Vietnam is not perfect due to many reasons. The problem is that the people who implement the law and the constitution in Vietnam does not do their job well' he says, and continues by noting that personnel cannot implement nor interpret the constitution or any other laws accurately. When I asked him if this was problem among judges, he explains that it does not only concern the judges, but also is a huge problem among civil servants and officials. He also describes the problem with implementation of international conventions, 'Developing countries say they apply the direct approach but that is in fact very difficult. In Vietnam a judge has problem with reaching the English version of a convention and if so, they don't understand the text and therefore they cannot use them. International law shall prevail but in practice it does not. This is partly because the translation of the conventions, if at all made, are of poor quality but also because the courts and their civil servants prefer to use domestic legislation even if they would conflict the domestic law.'¹⁴² The fear of not interpret or implement both foreign and domestic regulations 'right' makes civil servants reluctant to take things into their own hands. If you feel insecure regarding the regulations, it is easier to turn to the more familiar legislation. A problem, not just in Vietnam but also in many other countries were domestic and foreign norms conflict.

The concept of judicial independence is not one of the things that are discussed openly in the current debate, and if so only on a very low level. Unfortunately, says Van-Hoa, Professor at Hanoi Law University, 'the discussion focuses more about the framework and structure of the state, the basic rights and more specifically defining roles for the different branches of power, the N.A., the Government and the Courts'.¹⁴³ One question that has been actively debated is the N.A's control over appointing the Chief Judge of the Supreme Court and the People's Prosecutor. At this moment the Procuracy is a separate organ but the Government showed interest in taking the Procuracy back to being an organ in the administrative branch, under the Government. However, after voices at the Peoples Procuracy's Office were raised claiming to remain independent and opposed the proposals the

¹⁴¹ Interview with a lawyer, Ministry of Justice.

¹⁴² Interview with a lawyer, Ministry of Justice.

¹⁴³ Interview with a professor at Hanoi Law University.

government no longer insists.¹⁴⁴ Van-Hoa explains that the concept of judicial independence of the Vietnamese courts and judges are not considered important issues from a leader perspective at least and has therefore not been brought up to discussion yet.

However, the structure of the courts and the organization of the court are up for discussion in the amendment process. As described in chapter 3.3.1 the courts are currently divided into three levels, the District, Provincial and Central level. These levels follow the administrative division of the country parallel with the addition of one lower administrative level, the communes. One question that is up for discussion is maybe changing the structure of the court, to change the fact that one court level corresponds to each administrative level. Each level is now structured in a way that as if it was an independent state structure, own council, on peoples committee, on prosecution and own court. Shortcomings are found because it creates an imbalance in the court system, some have small courts other bigger and the 'politicians find it hard to run the courts that way'. With this change the provincial and district courts would be rearranged into regional courts. One court would be responsible for more than one district and replace the district and provincial courts. The fusion of some districts will give the courts more than one district to have jurisdiction over and create so-called inter-district courts, inter-provincial courts.¹⁴⁵ After 2006 discussion started of organize the courts according to the need for adjudication in the different parts of the country, not based on administrative divisions.¹⁴⁶

There is also a discussion going on regarding dividing the Supreme Court into two courts, the Supreme Court and the High Court. The current Supreme Court is becoming to large with its 150 judges and the new one would be more compact and only consist of the top 15 judges.¹⁴⁷ The new court structure would then consist of:

- 1.The Regional first instance
- 2.The Provincial Courts
- 3.The High Court
- 4.The Supreme Court

This change would fill the need to modernize the Supreme Court and create a court with an appropriate size, but also as a fact the judicial and administrative side would not correspond on every level.¹⁴⁸ This change would therefore also influence the independence of the courts even if that is not discussed openly. The current situation leaves the control over the courts in the hands of the Party Units since they control all administrative levels. Van –Hoa explains that 'if it on one level of the state administration, is the Council and the Committee and the Court. The first instances control the

¹⁴⁴ Interview with a lawyer, Ministry of Justice.

¹⁴⁵ Interview with a lawyer, Ministry of Justice.

¹⁴⁶ Interview with a professor at Hanoi Law University.

¹⁴⁷ Interview with a professor at Hanoi Law University.

¹⁴⁸ Interview with a professor at Hanoi Law University.

courts. The leader of the Party Unit mainly controls these committees and therefore, the Courts depend on the local executive.’ Therefore, following the current structure the Court is always dependent on the local executive. But, says Van-Hoa, ‘it is a halfway reform, the provincial courts are still dependent and the court has not totally escaped the power of the state agencies.’¹⁴⁹

Tuu, from the Sub-group in the Ministry of Justice, does not think highly of the proposals to divide the Supreme Court into a High Court and a smaller Supreme Court. Mostly, since the ones working there do not have the ambition to pursue these changes themselves. The Supreme Court is too large, with over 100 judges working there, however it is the small council, consisting of 10-15 of the eldest judges, of the Supreme Court that according to Tuu, ‘is the real Supreme Court’. Therefore, the division is already made in a way. It is, though, more likely that the reorganisation regarding the district courts will happen.¹⁵⁰

Van-Hoa portrays the question of judicial independence as a skeleton in the closet, ‘No one wants to talk about it. No one wants to release something that you can’t control’. When faced with the opportunity, he was surprised of the lack of interest to discuss the question of judicial independence, among the Vietnamese judges. He explains that no one knows exactly why but that there are a lot of speculations regarding the causes of this unwillingness. His opinion is that the judges themselves in fact do not want to be independent. ‘What would they gain on the change? Only more responsibility, more vulnerable of the fault that you make’. Therefore, according to him, they feel safer as not independent since it is easier when you and your boss share the responsibility for your job, an opinion that he refers to as human and very natural. ‘The benefits you get from your job are not enough for cover the cost for your family. The judges has realised that it is not a change worth fighting for since there is no motivation and not anything to win but more personal responsibility. Therefore, there is not the right time for Vietnam to discuss those questions.’¹⁵¹

5.2 Establishment of a constitutional court

Judicial review, in different forms, is a common feature of western legal system but brought attention to it quite recently in Vietnam. In article 12 of the 1992 Constitution it is stipulated that:

“The state exercises the administration of society by means of the law: it shall unceasingly strengthen socialist society. All state organs, economics

¹⁴⁹ Interview with a professor at Hanoi Law University.

¹⁵⁰ Interview with a lawyer at the Ministry of Justice.

¹⁵¹ Interview with a professor at Hanoi Law University.

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".

By this follows, that the legality of an act or decision can be changed judicially only if it does not comply with the requirements of legality mentioned in article 12 but the practice of judicial review in Vietnam is still limited.¹⁵² According to Australian scholar, John Gillespie, some Vietnamese academics debate the issue of constitutional protection openly and proclaim that 'constitutional protection is only possible if Party and state power is governed by unwritten legal conventions, that the party and state are powerless to change'. The establishment of a constitutional court has been debated both before the adoption of the 1992 constitution and when amendments were made in 2001. Today, the N.A (or in practice its Standing Committee¹⁵³) is authorized to interpret the constitution (even though they never exercised this power) and the Party seems reluctant to establish a new institution for carrying out the task. Another fact, making the establishment of an independent institution difficult, is that in a regime built on Socialist law, giving the task to the courts would be against the principle of the people's dictatorship and put the constitution and the courts over the N.A, in some means. Some has expressed concerns that 'foreign investors and domestic capitalist will use a constitutional court to undermine or challenge the socialist values embedded in the legislation'.¹⁵⁴

The Party and the State agencies have monopoly of requesting the N.A to interpret the constitution and few believes that the Supreme Court could handle the interpretation of the constitution since they question the judges willingness to oppose the Party rulers, they rather want an whole new institution that is independent from the rest of the system.¹⁵⁵ Dr. Nguyen Van Quang, professor in administrative law, explains that administrative adjunction is new to the Vietnamese legal system and that you cannot expect a "perfect" legal system from the start.¹⁵⁶ He explains, " The common view amongst legislators, judges, administrators, and the public in general is that the legal framework will improve step-by-step".¹⁵⁷ In his article "Grounds for judicial review" he also discuss possible reasons to why the regulations regarding grounds for judicial review are so few. He refers to the heritage from the Soviet Legal system and that the Vietnamese legal scholars sees the legal system as a set of independent branches, for example there is a clear distinction of administrative law and procedural administrative law. There is also a problem with the lack of mechanisms of judicial interpretation. He experiences that, since the questions is rather new to the debate there is not much interest from Vietnamese scholars to dig

¹⁵² CALE discussion paper p 12.

¹⁵³ Interview with a professor at Hanoi Law Univeristy.

¹⁵⁴ Gillespie and H.Y Chen- Legal reforms in China and Vietnam p 87 ff.

¹⁵⁵ Ibid p 89.

¹⁵⁶ CALE discussion paper p 14.

¹⁵⁷ Ibid p 14-15.

deeper into the issue of constitutional review, and as a consequence there is not very much material or cases to investigate.

According to Dr. Van Quang, it is important to both define grounds for review and a set of administrative law principles regulating the exercise of discretionary powers and which breaches that can constitute grounds for judicial review.¹⁵⁸ Traditionally Vietnamese courts are rather reluctant to exercise their discretionary powers to solve cases. He explains that courts has a weak role, legal professionalism is under-developed and judges have close relationships with bureaucrats, one should not expect the courts to push the issue of stipulating grounds for judicial review forward.¹⁵⁹ As a consequence of the Socialist law system the doctrine of precedents has not been accepted in Vietnam. Only normative legal documents are regarded as a source of law and referable in court decisions. The discussion on the judicial reforms is currently debating this question even though it is not a traditional socialist source of law. Another factor leading to the concerns on the independence of the courts is the unwritten practice of the local court requesting for opinion from the superior court in complex cases. Judgments in Vietnam are not publicly published and it is difficult to get access to past judgments.¹⁶⁰ One step towards increasing the importance of case law has been done by publishing one volume with court judgements from the Supreme Court, with the hope that it will be used as education as well as good source for other judges. However, the cases are very short and not very detailed written, which in practice makes it hard for other courts to follow the legal reasoning that prevailed the judgement.¹⁶¹

Dr. Giao Vuong, Professor at the Faculty of Law at the Hanoi National University, explains that the establishment of a constitutional court was discussed a lot until 2008 but after that fell into silence, but now its facing a revival as a consequence of the on going constitutional debate. Last time, even though the academia called for the establishment of a constitutional review mechanism and scholars wrote a lot about it, politician's was not pursued. Such an institution would change the whole power structure and prevail over all other state branches, even the Party. Naturally party leaders do not like it so much especially when they do not have sufficient knowledge of the issue as such. Dr. Vuong has great doubts of having such a court founded and would rather have a good constitution first and thereafter establish a review mechanism and discuss on what level it should be situated. 'Today, it would either end up having a lot of cases or become an institution that would not function at all'.¹⁶²

Tu, who is a member of the sub-committee on constitutional amendments, confirms that there has been a serious discussion of the establishment of a constitutional court. However, he thinks it is impossible to incorporate that

¹⁵⁸ CALE discussion paper p 28.

¹⁵⁹ Ibid p 47.

¹⁶⁰ http://www.nyulawglobal.org/globalex/Vietnam.htm#_edn9.

¹⁶¹ CALE discussion paper p 53.

¹⁶² Interview with a professor at Hanoi National University, Faculty of Law.

into the constitution as the situation is today and therefore there we will not see the establishment of a constitutional court in the near future. Some scholars have expressed the opinion that they would prefer to have that kind of mechanism but others think that they do not need to have a separate system to review the constitution in the current context of Vietnam.¹⁶³

He would himself had preferred to see a constitutional review mechanism in Vietnam, but due to political and cultural obstacles some scholars does not think that a constitutional review system would be necessary. Instead they would like to use the Standing Committee of the N.A or the Supreme Court for the same task, as it is theory is done today. 'Important people are against this establishment and they think that the Supreme Court or the Standing committee can explain and review the law'.¹⁶⁴

¹⁶³ Interview with a lawyer, Ministry of Justice.

¹⁶⁴ Interview with a lawyer, Ministry of Justice.

6 Judicial independence in Vietnam

This chapter will summarize the debate among scholars and professionals regarding the concept of judicial independence and the Vietnamese legal system.

6.1 Judicial independence of the Courts

The question of judicial independence is a sensitive topic in Vietnam. Since 1946 every constitution adopted, has guaranteed judicial independence but the way that independency has been carried out in practice is much different.¹⁶⁵ Both courts and judges have constantly been linked to the Party and political or administrative interference in their work on both local and national level is common. As late as 1996 a judge of the Supreme Court summarized the task of his fellow colleagues; *'the main task of the police, prosecutors' offices and the courts is to repress counter-revolutionaries - enemies of the people and the socialist regime'*.¹⁶⁶

As Pip Nicholson, an Associate Director of the Asian Law Centre in Melbourne, explains, 'the only time when independency is mentioned in a constitution is referring to the independence from colonial power'. She explains that a consequence of the democratic centralism and the Socialist law principles that the system is built on, the courts responds to guidance from VCP, even if it requires breaking the constitutional regulations.¹⁶⁷ In Vietnam, individual rights are not connected to the democratization of the country but rather a collective freedom from intruders. As such, democracy has in Vietnam been a concept legitimizing the Party to take decisions in interest of the collective.¹⁶⁸

J.M Quinn, coordinator for the Harvard Institute for International Development, is of the opinion that there are many potential influences over the outcome of the proceedings due to the administrative structure that allows close links to judges of the courts, state agencies and the Party. It is also a consequences of the pressure put on judges for being re-elected, since they are afraid of complaints from their local electives as well as from the Party members.¹⁶⁹ Quinn doubts that increased judicial accountability, making judges more accountable for their own actions or decisions, would solve that problem. Since 2002 judges are in a higher extent responsible for their interpretation of the law and damages caused by misinterpretation. This will, according to Quinn, create judges even more eager to seek for the

¹⁶⁵ Sidel – The Constitution of Vietnam p 161.

¹⁶⁶ Nicholson – Borrowing Court Systems p 92.

¹⁶⁷ Ibid p 58.

¹⁶⁸ Ibid p 46.

¹⁶⁹ J.M Quinn – Legal reforms and its Context in Vietnam p 240.

opinion of higher instances.¹⁷⁰ Rapid legislative changes and lack of education among the professional judges makes it hard for judges to follow up the new orders and regulations. He means that this leaves them in a frail position when faced with difficult cases and makes them seek for ‘informal opinions’ from the provincial or national government. The problem with this situation is obvious when the government has own interests in the outcome of the case.¹⁷¹ He also believes that the reason for that the N.A and the Government prefers broad and vaguely formulated legislation is for keeping the peace and leaving it up to local officials to implement and solve disputes. The consequences are that the door is left open for corruption, misconduct and arbitrariness.¹⁷²

Both local and national courts are subject to extensive control, by state bodies and by the Party.¹⁷³ There are also examples of direct interference of these organs in the trial process. In his book ‘The constitution of Vietnam’ Mark Sidel explains that in Vietnam ‘independence is constantly compromised by structural and political factors’. This situation has and still is being criticized both by the N.A, leaders of the Supreme Court and more harshly by foreign dissidents.¹⁷⁴

6.2 Experiences from international actors in Vietnam

There are many international actors working with the issue of judicial independence in Vietnam, as for example the UN and its subgroups. They have been eager to develop an intra-national jurisprudence on the concept and importance of rule of law.¹⁷⁵ The government has taken action and a strategic plan has been outlined, adopted in 2005, called Judicial Reform Strategy toward 2020. Unfortunately, the document is rather weakly formulated.¹⁷⁶ According to a report from UNHCR the implementation of the Judicial Reform Strategy 2020 has been slow. In the report concerns regarding the “ political interference in the judiciary” is expressed and the report stipulates that the judiciary faces a number of challenges, as “lack of trained court officials, shortage of qualified lawyers and that judges being appointed on political grounds.”¹⁷⁷ Quinn stipulates that ‘while attempting to isolate courts from the influence of local government, the recent reforms do nothing to insulate the courts from the influence of the central Communist Party authorities’.¹⁷⁸ It remains to be seen if the on going

¹⁷⁰ J.M Quinn – Gaining Control of the Courts p 458.

¹⁷¹ J.M Quinn – Legal Reform and its Context in Vietnam p241.

¹⁷² J.M Quinn – Legal reform and its context in Vietnam p 224.

¹⁷³ Sidel – The Constitution of Vietnam p 162.

¹⁷⁴ Ibid p 163.

¹⁷⁵ Van-Hoa s 89.

¹⁷⁶ Sidel – The Constitution of Vietnam p 163.

¹⁷⁷ <http://www.unhcr.org/refworld/docid/4d99aa7b50.html>.

¹⁷⁸ J.M Quinn - Gaining Control of the courts p 467.

process will have any results on the Party's possibility to influence the courts, 'it will face difficulties when most academic-discourse avoids sensitive issues, as multi-party democracy and the Party leadership'.¹⁷⁹ When it comes to corruption, the Party often blame the widespread problems on individuals lacking moral values instead of examine wheatear the problem could be a result of the socialist way of organizing the legal system. These conflicts will reappear if a western oriented meritocracy would have to replace the Party's was of placing members in high administrative positions to reflect the reality of the political power.¹⁸⁰ The former director of the Institute of State and Law, Dao Tri Uc, has influenced a lot of the Party theoreticians. In 1999 he expressed his feelings of an independent judiciary: '*Legality in general is the way to organize society, to put social life into the order that fits with the will of the ruling class. If laws are the legalized will of the ruling class, arising from the contemporary need and social condition of the ruling class, legality must be understood as the process to put that will into real life, making it reality. Thus, for us, legality has the same meaning as the need to institutionalize the requirement that state administration and social administration benefit the working people*'.¹⁸¹

Stephanie Chow who works at the international organisation Towards Transparency explains that T.T. puts a lot of work in the implementation of the UN anti-corruption convention, which was signed by Vietnam in 2009. They often work together with the government but, according to Chow, no one wants to "take responsibility" for the work that they do. The government is reluctant to have joint workshops with T.T because of people on the top saying no to cooperation on such issues. Chow knows that a lot of people benefits from corruption and sees it as their biggest challenge to give the civil society a voice and by that increase the demand for transparency. Corruption is according to Stephanie a very integrated part of the Vietnamese society, 'it is very much a part of your daily life as a Vietnamese and maybe hard to recognize as corruption for many people'. She also agrees with the fact that it is a structural problem, lack of transparency and a broad acceptance of the problem in the whole society. Raising salaries could be one solution for the problem, but far from the only one, 'people don't only do it to survive, but also just because they can'.¹⁸² According to a recent report on the situation of corruption in the legal sector 'corruption in the judiciary remains widespread (...) due to the country's large number of ad hoc and inconsistent laws, which create opportunities for judicial corruption in their enforcement. Powerful actors, including high-ranking government officials, are generally above the law'.¹⁸³ According to the report 'there is no clear or effective mechanism for pursuing a civil action to redress or remedy abuses committed by authorities. Civil suits are

¹⁷⁹ Gillespie and H.Y Chen - Legal reform in China and Vietnam p 82.

¹⁸⁰ Ibid p 84 ff.

¹⁸¹ Gillespie and H.Y Chen – Legal Reforms in China and Vietnam p 83.

¹⁸² Interview with a person working at TT.

¹⁸³ US Department of State (11 March 2010) 2009 Country Reports on Human Rights Practices – Vietnam "Rule of Law".

heard by administrative courts, civil courts, and criminal courts, all of which follow the same procedures as in criminal cases and are adjudicated by members of the same body of judges and lay assessors. All three levels were subject to the same problems of corruption, lack of independence, and inexperience'.¹⁸⁴

¹⁸⁴ US Department of State (11 March 2010) 2009 Country Reports on Human Rights Practices – “Civil Judicial Procedures and Remedies”.

7 Conclusion

The Vietnamese society is not just changing economically and socially, it is also, perhaps as a consequence of the other two, undergoing a juridification process. My purpose with this thesis is to describe the legal development in Vietnam, focusing on the issue of judicial independence. When Vietnam was introduced to market economy the consequences of lacking a decent judicial system became evident and therefore major changes have been done to the court system during the last decades. Even though this shows a will from the Party to change the arbitrary systems, not one of these changes has in any way transferred power from the Party elite to the courts. This chapter will summarize some of my own thoughts regarding judicial independency and the Vietnamese legal system and present four reasons that could explain the lack of independency in Vietnam.

7.1 Why is judicial independence important?

As far back as in the time of Aristotle, law without reason and sentiment was regarded the right way to see to that justice was done, at least from a western perspective¹⁸⁵. The fact that an idea is old is however, not alone a criterion for its rightfulness. That judges and the courts should practice law objectively and impartial, an idea that most western legal systems are built upon, strives from the social context that Aristotle lived in. It therefore goes hand in hand with the idea of a democratic state structure, a structure that later on has been connected to the belief in individual rights and freedoms for every human being. It is therefore interesting to ask oneself, who are we, in the western democracies, to decide the state structure in countries with different legal heritage and historical experiences? Well, that is an equally important as difficult question to answer and perhaps more suitable for philosophical essay. I believe that Montesquieu described it well when he pointed out the importance of dividing the three branches of power (executive, legislative and judicial) into independent sections where no one could influence the work of the others. The sought-after consequences were that in a society created by independent branches of power, both state and personal security would constantly be guarded and restrained. To achieve this ideal society, where independent branches operate dynamically, an independent control mechanism, as the court, is crucial.

¹⁸⁵ See chapter 2.1.

7.2 Are the Vietnamese courts independent?

In the section below I will shortly present four potential reasons for the lack of independence in the Vietnamese courts society and explain why the Vietnamese courts are not to be considered independent.

Firstly, the legal tradition in Vietnam has not been constructive for the building a rule of law state. Historically, written law has not been as important to Vietnamese people, as for example moral values strived from the Confucian heritage have. In modern time, the rule of law has been neglected in favour for the Soviet law, and its idea of the absolute authority of the People's Party. In history, the written law and regulations, has not given the people protection from the government and that might be one reason for why there has not been a people's movement pushing for such legal development. It is a fact that the Party has, with different methods been able to rule the country with very few interruptions from dissidents. That could be a consequence of lack of democracy or lack of legal tradition that makes Vietnamese people today reluctant to seek help from their own legal system and therefore does not put great value in it. Confucian thoughts, that many Asian societies are built upon, includes a tradition not to seek legal help for conflict-solving and only seek assistance of state-run courts as a last resort for solving issues. In Vietnam, as in any other socialist society, collective rights politically prevail over individual freedom. This has made human rights, at least individual rights, as the right to a fair trial, the right to movement and the right to freedom of speech, suppressed by the government, with reference to the 'well-being' of the country. Instead collective rights, such as social and economical rights, in practice have improved drastically during the last years. The Communist ideology, or at least socialist law, does not only conflict with the idea of human rights but also with the idea of division of powers and as a consequence of that, also with an independent court system. A legal system, built on Socialist law and the Rule of Law are in fact contradictional.

Secondly, the foundation on which every law-based state lean, the constitution is by all means not a consistent document protecting the people but rather a document presenting the current Party policies. It does not have the purpose of protecting the people and does therefore neither function as a protection for the people. Constitutionally, the situation, and the lack of separation between the state organs are in no way a secret. In article 4 of the current constitution, it is stipulated that the Party is the leading force of the state and that is just what it is.¹⁸⁶ It is therefore hard to see what effect a constitutional court, with the purpose of protecting that constitution, would have on the judicial independency of the courts? Such a institution would also be highly dependent on the Communist Party. Even though the

¹⁸⁶ See chapter 3.2.1.

phrasing of the constitution stipulates basic independence for the judicial system that says nothing of how that independency is carried out in practice.

The third reason for the lack of independence is the state structure. The needs are excessive for independent control mechanisms, transparency and life-long appointments for judges to end corruption and increase independency. If there is no structure that divides the branches of power, the courts can never be considered independent and as long as the judges are dependent on re-elections they will never be independent. The legislative power (the N.A.¹⁸⁷) and the executive (The Standing Committee and the Government) are closely linked to the judicial power (The Courts and the Procuracy). On all levels, organs with judicial, executive and legislative have overlapping tasks. Quinn is of the opinion that the parallel state structure plays an important part in the absence of judicial independence. The idea of dividing the court system into four levels while the state agencies will remain at three, could possibly restrain the influence that the state agencies have over the district and provincial courts. The other problem however, could be, the increased influence that the Supreme Court gets. A small council, consisting of 10-15 judges, controls the Supreme Court. It is unclear on which conditions these people are elected but it is safe to say that the Party has a great deal to do with it. The Party, though has close connections to and very much influences the courts and the people working there. The Politburo, the core of the VCP, consists of a small group of people, but their influence is great. They can in practice more or less control the elections process to the N.A and through that also the appointment processes to almost all high positions in the departments as well as in the Supreme Court and the Supreme Procuracy. Does the Party influence stop there? No, with disciplinary sanctions, low salaries and five-year limited employments the will of the Party is of as great importance to the judges working under leadership of these chiefs. The regulation concerning the judges enhances the dependency of the court system. Even though judges, constitutionally, are bound to 'obey only the law'¹⁸⁸, that will not lead to an independent practicing of if he has to ask for other opinions to find out what the 'law' says and especially not so, if he does that out of fear of losing his job or at least not become reappointed.

The last years the authority of written law and the will of letting it rule has increased. However, it is important to ask oneself if the written law in Vietnam is too much of a Party policy to be regarded as 'law' in the right sense. The 'one-Party rule' does not allow the Vietnamese people to chose their own government and therefore it does not allows the Vietnamese people to influence the law-making process. Even though the Party often wants to portrait the National Assembly as a functioning democratic institution, it cannot be considered to meet those demands in practice. The elections to the N.A are influenced by Party policy, not only the

¹⁸⁷ The N.A infact alone holds both legislative, judical and executive powers as noted in chapter 3.2.2.

¹⁸⁸ See chapter 4.2.

composition of the N.A but also the majority of the candidates are customized by the Politburo.¹⁸⁹

Last, but definitely not least, the widespread corruption is one reason why the court system will meet great difficulties if ever trying to adjust to a rule of law structure. Even if the state structure changes it will be difficult to prevent the tradition where personal relations and dirty-money matters in the courts decision-making. You do not have to be in Vietnam for a long time to recognize that there is something that does not add up in the financial system. The salaries of the Vietnamese people do not match up with the cars some of them drive or the restaurants they visit. Accordingly, compared with the situation for some Vietnamese that more or less live their lives on the street, that does not match up with the communist idea about everyone's right to equal living standards. It is obvious that the lack of transparency opens up for the possibility to take advantage of their own and others economical situation.

7.3 Will future constitutional changes affect the role of the courts?

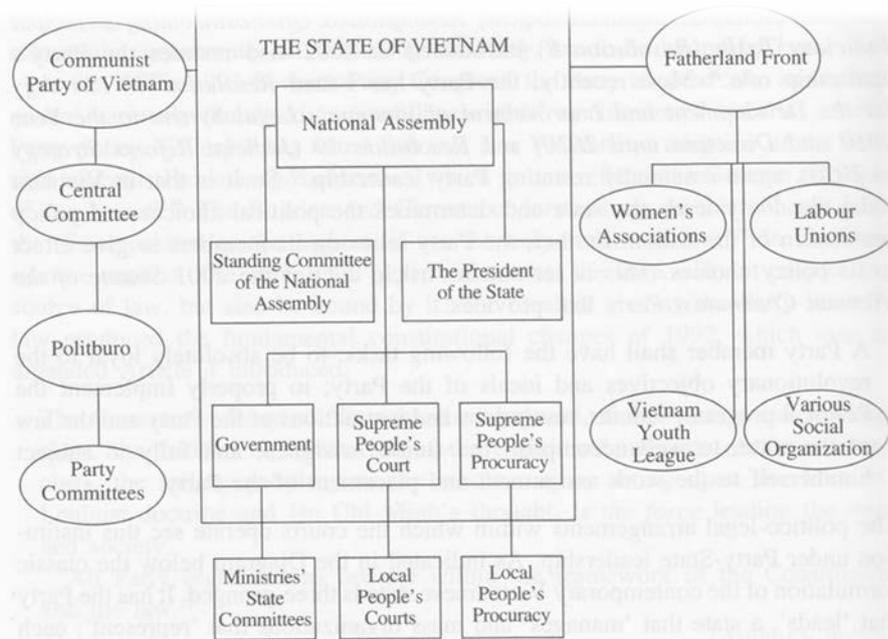
The country went from the 1946th constitution proclaiming civil rights and some control mechanisms to the much more political one in the 1950's. Since 1992 amendments to the constitution has been made both 2001 and 2002. Ten years later, the discussion about constitutional amendments has revitalized and the question is how far the Party is prepared to go this time. When it comes to how the constitution has developed over the years and how it potentially could develop in the future it is interesting to look at a number of things. First of all, it is known that the ruling-class is reluctant to make changes to the system that they are privileged in and in Vietnam today the 'ruling-class' would be regarded as the VCP. Therefore changes will come slowly and new ideas handled harshly. The Party enjoys a privileged 'elite' position in the country's organization and judicial system.

But the force of Vietnam leadership does not only stand still or strive backwards, in fact, the Vietnamese society is undergoing a juridification process and much indicates that law plays and will play a greater part of Vietnamese life in the future. Additionally, no one should be sure of the fact that western thoughts on rule of law and separation of power all times prevails over the Confucian idea of conflict solving or the Socialist ideas putting the collective before the individual. However, it is evident that society in Vietnam is changing in many ways, and with an open economy and greater international influence on other areas there will be hard to compete on equal terms with western states if the legal system does not develop in accordance with the economic reforms. History shows, that in an

¹⁸⁹ See chapter 3.2.2.

open society the needs of the industry as well as of the people will increase and greater freedom and transparency will be demanded. The only solution to that is democracy and transparency.

8 Appendix - Political and Administrative structure of Vietnam



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PhD, Ho Chi Mihn Law University

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Professor, Hanoi Law University