

COMPARING LEGAL DEVELOPMENT IN CHINA AND VIETNAM: AN INTRODUCTION

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Mapping the Comparative Terrain

For many decades, global discourse about legal development has been dominated by Western notions of rule of law and liberal democracy. Although this dialogue is diverse and reflects temporal and geographic variations, until comparatively recently it stared down challenges from religious fundamentalism, Fascism, Marxist-Leninism, and other meta-theories. The gradual shift of economic power from the West to North East Asia over the last 40 years, and to China more recently, presents a new and distinctive challenge to Western domination over global development discourse.¹

To explore this phenomenon, we argue that it is necessary to abandon, or at least suspend, the belief that “global culture,” which developed out of the European Enlightenment and diffused worldwide through imperialism and imitation, is an irresistible socializing force.² We need to

¹ See generally Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?*, Oxford: Oxford University Press, 2007; David Shambaugh, ed., *Powershift: China and Asia's New Dynamics*, Stanford: Stanford University Press, 2006.

² See generally David Trubek and Alvaro Santos, eds., *The New Law and Economic Development: Critical Appraisals*, New York: Cambridge University Press, 2006. Also see John Meyer ‘The Changing Cultural Content of the Nation-State: A World Society Perspective’, in George Steinmetz, ed., *State/Culture: State Formation After the*

consider the possibility that “global culture,” which now includes North East Asian influences, does not invariably produce local variations of Western or North East Asian legal development in socialist Asia.³ These models are important but may not be the *only* reference points for legal development elsewhere in Asia.

This volume explores whether there is a distinctive Chinese legal development model, and if so, whether it is likely to form the nucleus of an alternate global vision for legal development in Asia and beyond. Just what a Chinese development model might look like is difficult to pin down, since China has borrowed from many external sources, is changing rapidly and varies considerably from region to region. Taking this diversity into account, Randall Peerenboom in this volume argues that China is as a non-democratic, export-oriented, open, and yet not neoliberal developmental state. He believes that China has selectively adapted the Western (Washington consensus) and North East Asian development models, but remains open to the

Cultural Turn, Ithaca NY: Cornell University Press, 1999, pp.123–43; Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago: University of Chicago Press, 1996.

³ This optimism is often based on the assessment that legal reforms in North East Asia, especially in Japan, Korea, and Taiwan, replicate Western ideas. See John Ohnesorge, ‘Politics, Ideology and Legal System Reform in Northeast Asia’, in Christoph Antons and Volkmar Gessner, eds., *Globalisation and Resistance: Law Reform in Asia since the Crisis*, Oxford: Hart Publishing, 2007 pp.105–30; Tom Ginsburg and Albert Chen, eds., *Administrative Law and the Judicialization of Governance in Asia*, London: Routledge, 2008.

growing literature that portrays Chinese legal development as distinctive and an alternative to other models.⁴

As China's economic rise becomes clearer, especially following the recent international financial crisis, its development model seems to attract more admirers in Asia and beyond.⁵ The Chinese model may be difficult to resist by leaders in countries like Vietnam that are interested in boosting their economy while curbing social and political pluralism. Adding to its allure, in 2005 China became Vietnam's largest trading partner and in 2008 bilateral trade exceeded US\$15 billion.⁶ Even countries such as Thailand and Indonesia that are pursuing a more liberal development trajectory may increasingly turn to China for inspiration as the disparity in economic power increases. To put this relationship into perspective, when China first proposed trade talks with ASEAN in 1990 its GDP was 1.12 times larger than ASEAN's combined GDP. By 1999 the lead increased to 1.82 and in 2004 its GDP was 2.15 times larger.⁷

⁴ See, for example, Jurgen Haacke, 'The Significance of Beijing's Bilateral Relations: Looking "Below" the Regional Level in China-ASEAN Ties', in H.K. Leong and S.C. Ku, eds., *In China and Southeast Asia: Global Changes and Regional Challenges*, Singapore: Institute of Southeast Asian Studies, 2005, pp.111–45.

⁵ See William Keller and Thomas Rawski, eds., *China's Rise and the Balance of Influence in Asia*, Pittsburgh: University of Pittsburg Press, 2007.

⁶ Ministry of Foreign Affairs of Vietnam, Vietnam-China Relations, <http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns081111085235>, accessed 10 November 2008.

⁷ See United National Statistics Division, *National Accounts Statistics: Analysis of Main Aggregates, 2003–2004*, New York: United Nations, 2006, pp.6–7.

A central aim of this volume is not only understand to what exogenous and endogenous and influences have shaped Chinese legal development, but also to assess the applicability of the Chinese model to other countries in Asia. Vietnam was selected as a test case, because at least on the surface it seems a likely candidate to emulate the Chinese model. China and Vietnam have much in common – a Confucian past, socialist influenced legal systems, and rapidly developing economies and societies. Vietnam’s geography and history has sensitized it to developments in China. For a thousand years China ruled Vietnam and for another thousand years Vietnamese rulers looked to China as a source of ideas about statecraft. After China, Vietnam has the fastest growing economy in Asia.⁸ Its legal and governance structures share some striking similarities with those in China, as does its understanding about the objectives of legal development. It too has experienced rapid economic growth without the trappings of a Western democracy or a fully functioning rights-based legal system. Although the sequencing of reforms differs, each country has enacted comprehensive legislative frameworks, and they are gradually reforming their legal institutions.

These similarities have attracted growing interest by economists⁹ and political scientists,¹⁰ but this volume is the first comprehensive attempt to comparatively assess legal development in

⁸ See Jorn Dosch and Alexander Vuving, ‘The Impact of China on Governance Structures in Vietnam’, Discussion Paper, Bonn: Deutsches Institut für Entwicklungspolitik, 2008, p.24.

⁹ See Martin Rama, ‘Making Difficult Choices: Vietnam in Transition’, Working Paper no. 40, Commission on Growth and Development, Washington: World Bank, 2008.

¹⁰ See Jorn Dosch and Alexander Vuving, *op. cit.*, n.8 above; Regina Abrami, Edmund Malesky, and Yu Zheng, ‘Accountability and Inequality in Single-Party Regimes: A Comparative Analysis of Vietnam and China’, unpublished working paper, Washington, 2008.

these countries. Some commentators assume that Vietnam is a smaller version of China, but Vietnamese scholars in this volume point to the differences residing within the similarities. Most differences are found below the surface level of statutory norms and legal institutions in the conceptual and procedural approaches to legal development and governance. The differences are also to be found in the myriad ways officials, citizens, and business groups interpret and implement the law.

Paying attention to these differences will assist our inquiry into whether there is a distinctive Chinese legal development model, or whether China is better understood as a variation on a broader East Asian developmental theme. The similarities and differences also have much to tell us about the likelihood of other countries replicating the Chinese model. If the model encounters difficulties in a culturally and politically similar country like Vietnam, it may be too dependent on Chinese conditions to reproduce similar results elsewhere. The chapters in this volume combine ‘micro’ or interpretive methods with ‘macro’ or structural traditions to produce a nuanced account of legal reforms in China and Vietnam.

Comparing China and Vietnam

To compare legal development in China and Vietnam, we propose avoiding conventional forms of analysis based on legal traditions and legal culture.¹¹ Analysis of this kind, we argue, registers

¹¹ For a critical analysis of comparative law see Pip Nicholson and Sarah Biddulph, eds., *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia*, Leiden and Boston: Martinus Nijhoof, 2008; Roger

inconsistencies and incompatibilities between essentialized representations of legal culture, and as a consequence cannot account for the observed degree of fragmentation and regionalization in China and Vietnam.¹² More importantly, as David Pollack charges, “homogeneous, holistic notions of culture... cannot provide an explanation for social and cultural change.”¹³ Further complicating legal cultural analysis, in socialist Asia comparison does not progress far without moving beyond legal traditions to consider other sources of social ordering such as political, regulatory, and moral governance. In addition, comparative analysis needs to recognize the limits of the power of law. This is because law does not so much control behaviour as coordinate among a number of other, often non-state, regulatory systems.¹⁴ All this suggests that a comparative analysis needs to range beyond conventional comparative approaches and consider modes of analysis that examine state, non-state, and hybrid regulatory regimes.

To discuss and compare legal development in China and Vietnam we propose five modes of analysis that have been synthesized from the comparative law and social science literature. The

Cotterell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*, Aldershot UK: Ashgate 2006;

David Nelken and Johannes Feest, eds., *Adapting Legal Cultures*, Oxford: Hart Publishing, 2001.

¹² See Rosemary Coombe, ‘Contingent Articulations: A Critical Cultural Study of Law’, in Austin Sarat and Thomas Kearns, eds., *Law in the Domains of Culture*, Ann Arbor: University of Michigan Press, 1998, pp.21–64; Gunther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’, *Modern Law Review*, vol.61, no.1, 1998, pp.12, 21.

¹³ David Pollack ‘Trust in Institutions and the Urge to be Different: On Attitudinal Change in Eastern Germany’, *German Politics*, vol.8, no.3, 1999, p.90.

¹⁴ For a discussion of this notion that law is merely one component of regulatory systems see Hugh Collins, ‘Regulating Contract Law’, in Christine Parker, Colin Scott, Nicola Lacy, and John Braithwaite, eds., *Regulating Law*, Oxford: Oxford University Press, 2004, pp.13–32.

following discussion uses these modes to examine the history and sequencing of legal development, paying particular attention to Chinese influence over Vietnam. The neglect of history invites mechanistic comparison, because history provides an empirical dimension to test the soundness of inferences and suppositions. None of the five comparative modes is intended to function on its own, but in combination they provide ways to understand the interaction between China and Vietnam. The five modes are:

- foreign imposition
- deference
- international integration
- borrowing
- diffusion.

Foreign imposition

Pre-modern Chinese imposition

The foreign imposition of laws and regulations occurs when governance structures are forced on countries by foreign powers.¹⁵ For millennia, legal systems around the world have developed through this process. Some of the best-documented impositions occurred during the military

¹⁵ Forced imposition can also occur within geopolitical borders when one dominant group forces another to accept a unifying legal regime. See Sandra Burman and Barbara Harrell-Bond, eds., *The Imposition of Law: Studies on Law and Social Control*, New York: Academic Press, 1979.

expansion of the Roman Empire and Chinese domination in Vietnam from 112 BC to AD 939.¹⁶ During this period Chinese thinking and practices became the central point of reference for Vietnamese elites. Chinese scholarship, political theories, religious values, family structures, and bureaucratic practices indoctrinated and molded, though never entirely supplanted, indigenous Vietnamese outlooks.¹⁷ Chinese rulers modified their governance system in Vietnam, placing their faith in legalism (*fa*), rather than humanistic moral persuasion (*li*), to control the “resistive and morally unperfected” indigenous population.¹⁸ Isolated from Chinese rule, Vietnamese language and culture survived in the villages. Long after independence, Chinese thinking continued to influence local rulers and actually gained in prestige during the fifteenth century, reaching a zenith in the mid-nineteenth century.¹⁹

French colonial imposition (1864–1954)

¹⁶ See Ellen Goodman, *The Origins of the Western Legal Tradition*, Federation Press, Sydney, 1995, pp.131–36; Keith Taylor, ‘Surface Orientations in Vietnam: Beyond Histories of Nations and Regions’, *Journal of Asian Studies*, vol.57, no.4, 1998, p.949.

¹⁷ See Liam Kelley, “‘Confucianism’ in Vietnam: A State of Field Essay’, *Journal of Vietnamese Studies*, vol.1, no.1–2, 2006, pp.314–70; Keith Taylor, ‘Surface Orientations in Vietnam: Beyond Histories of Nations and Regions’, *57 Journal of Asian Studies*, vol.57, no.4, 1998, p.949.

¹⁸ See David Marr, *Vietnamese Anticolonialism*, Berkeley: University of California Press, 1971, p.10.

¹⁹ Nola Cooke, ‘Nineteenth-Century Vietnamese Confucianization in Historical Perspective: Evidence from the Palace Examinations (1463–1883)’, *Journal of Southeast Asian Studies*, vol. 25, no. 2, 1994, pp.277–82, 303, 305.

In an age of European colonialism in East Asia, French colonial rule officially began when the Vietnamese Emperor, Tu Duc, signed a treaty ceding three provinces to France in 1862.²⁰ But unlike the imposition of Chinese governance almost a two thousand years earlier, colonial legality did not take hold beyond the small colonial enclaves and had surprisingly little lasting impact. French laws rarely touched the lives of most Vietnamese because most people were isolated from the colonial economy.²¹ Even the small population of urban Vietnamese was ambivalent about the colonial model. As Nguyen Tuong Tam noted:

Each side has its good points and its bad points, and it is not yet certain where morality lies. But when the old civilization is brought out and put into practice before our very eyes, we are dissatisfied with the results. We can only continue to hope in Western civilization. Where that civilization will lead us, we do not know. But our destiny is to travel into the unknown, to keep changing and progressing.²²

²⁰ See Nguyen The Anh, 'The Vietnamese Monarchy Under the French Colonial Rule 1884–1945', *Modern Asian Studies*, vol.19, 1985, pp.147–51; Michael Barry Hooker, *A Concise Legal History of South East Asia*, Clarendon Press, Oxford, 1979, pp.175–85.

²¹ See Hy V. Luong, *Revolution in the Village*, Honolulu: University of Hawaii Press, 1992, pp.55–79.

²² Tuong Tam, *Phong Hoa* (18), 20 October 1932, reproduced in Neil Jamieson, 'Relata, Relationships, and Context: A Perspective on Borrowed Elements in Vietnamese Culture', in Truong Buu Lam, ed., *Borrowings and Adaptations in Vietnamese Culture*, Manoa, Hawaii: Southeast Asia Paper No. 25, Center for Southeast Asian Studies, University of Hawaii, 1987, p.130.

Nationalists and Marxist-Leninist revolutionaries in Asia reacted differently to colonial legal systems. For example, nationalists in China during the Republican period (1912–1949)²³ and a few urban intellectuals in Vietnam²⁴ turned to European constitutionalism to galvanize opposition to colonial domination. For revolutionaries, however, contradictions between the harsh implementation of colonial law and its lofty idealism (democracy, liberty, and equality) excited radical opposition to the imposed legal system.²⁵ By questioning the impartiality of liberal legalism, revolutionaries effectively portrayed the colonial legal system as alien and imposed, serving foreign rather than indigenous interests.²⁶

The different responses by nationalists and revolutionaries to colonial legalism are well illustrated in Vietnam. Following independence from the French in 1954, revolutionaries in Northern Vietnam increasingly turned to China and the Soviet Union for legal inspiration. Meanwhile, the nationalist Republic of Vietnam in the South retained much of the French colonial system until reunification in 1975.

The Chinese and Vietnamese leadership today invoke foreign imposition as a tactic to resist calls by foreign and domestic actors for civil rights. They associate Western liberal legalism with caving into foreign domination. This strategy resonates strongly with the public who are instructed from infancy to feel humiliated and angry at the century of Western domination from

²³ See John Fairbank and Merle Goldman, *China: A New History*, Cambridge Mass.: Belnap Press, 1999, pp.244–47.

²⁴ See David Marr, *Vietnamese Anticolonialism*, Berkeley: University of California Press, 1971, pp.330–47.

²⁵ See Nguyen Khac Vien, ‘Confucianism and Marxism’, *Vietnam Studies*, no.1, 1994, pp.54–55.

²⁶ See Ho Chi Minh, ‘On Justice’, in *Selected Works Volume II*, Hanoi: Foreign Languages Publishing House, 1994, pp.96–102.

the mid-nineteenth to the mid-twentieth century.²⁷ Citizens are encouraged to believe that Western liberal legalism is something that is beyond their cognitive horizon, and does not constitute a denationalized, universally valid truth.

Imposition through conditioning

In an age where gunboat diplomacy is actively, if not always successfully, discouraged by international agencies, foreign impositions take the form of economic conditioning. Pressure to follow a particular regulatory path is applied through a combination of economic sanctions and incentives. China used this technique during the 1950s to promote its vision for radical land reform in Vietnam.²⁸ Military and rural assistance was tied to progress in implementing class-based land reforms.

More recently, multi-lateral donor agencies such as the World Bank and Asian Development Bank have, with little apparent success, attempted to link development loans in China and Vietnam to particular legal and administrative reforms.²⁹ Some commentators view the WTO-

²⁷ See Daniel Lynch, *Asian Democratization: Socialization to "Global Culture" in the Political Transformations of Thailand, China, and Taiwan*, Stanford CA: Stanford University Press, 2006, p.4; Matthieu Salomon and Vu Doan Ket, 'Doi Moi Education and Identify Formation in Contemporary Vietnam', in Marie Lall and Edward Vickers, eds., *Education as a Political Tool in Asia*, London and New York: Routledge, 2009, pp.139–56.

²⁸ See Edwin Moise, 'Land Reform and Land Reform Errors in North Vietnam', 49 *Pacific Affairs*, 1976, p.70.

²⁹ See David Trubek and Alvaro Santos, eds., *The New Law and Economic Development: Critical Appraisals*, New York: Cambridge University Press, 2006.

Plus obligations that required China and Vietnam to implement reforms above those imposed on existing members as a type of conditioning.³⁰

Authors in this volume find little evidence that China uses conditioning to promote its law-reform model in Vietnam. In fact, China has consistently rebuffed overtures by some Vietnamese leaders to form a socialist regulatory alliance against Western capitalism.³¹ Rather than promoting legal development, China uses soft loans, investment, and free trade deals to leverage access to raw materials and markets. In a recent example from mid-2008, the Vietnamese government, in return for economic support, controversially agreed to give a Chinese-government-owned company preferential rights to mine bauxite deposits in an environmentally sensitive region in the Central Highlands.³²

Deference

³⁰ See Julia Ya Quin 'Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System', in Donald Clarke, ed., 'China's Legal System: New Development, New Challenges', *The China Quarterly Special Issues*, no.8, 2008, pp.166–87.

³¹ See Alexander Vuving, 'Strategy and Evolution of Vietnam's China Policy: A Changing Mixture of Pathways', *Asian Survey*, vol.46, no.6, 2004, pp.805–24.

³² See 'Vietnam and China: Bauxite Bashers', *The Economist*, 23 April 2009, http://www.economist.com/world/asia/displaystory.cfm?story_id=13527969, accessed 6 August 2009.

Deference occurs when recipients borrow from external sources that are considered prestigious, successful, or morally or spiritually superior.³³ Vietnam's deferential approach to Chinese thinking is anchored in pre-modern attitudes toward China. Given the vast asymmetry in size and capacity in the countries, deference of some kind is hardly surprising. Over the previous two thousand years, China's population has remained about 15 times larger than Vietnam's population. Not only has the disparity in size and power sensitized Vietnam to Chinese concerns, according to some commentators, it has given rise to a pattern of deference in which Vietnam has modified its strategic objectives, and even norms, to avoid conflicting with Chinese sovereignty claims.³⁴ For example, during the many attempts by China to reimpose its authority over Vietnam by force, Vietnamese soldiers treated captured soldiers with the respect due to a great power.³⁵ Similar privileges were not extended to soldiers from the Champa kingdom to the south. In contemporary times, Vietnamese leaders are careful to avoid antagonizing China, even if this sometimes means compromising on issues of sovereignty.³⁶

³³ See Holger Spamann, 'Contemporary Legal Transplants—Legal Families and the Diffusion of (Corporate) Law', Harvard Law School Public Law & Legal Theory Working Paper Series, Paper No. 09-33; Gianmaria Ajani, 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe', *American Journal of Comparative Law*, vol.43, 1995, pp.115–16; Alan Watson, *The Evolution of Law*, Baltimore: Johns Hopkins University Press, 1985, pp.95–96.

³⁴ See Brantley Womack, *China and Vietnam: The Politics of Asymmetry*, Cambridge: Cambridge University Press, 2006.

³⁵ See Jorn Dorch and Alexander Vuving, *The Impact of China on Governance Structures in Vietnam*, Bonn: German Development Institute Discussion Paper 14/2008, p.22.

³⁶ Vietnamese leaders are much more deferential in their handling of territorial disputes with China over the Spratly Islands than they are in dealing with less important sovereignty disputes with the US. See Alexander Vuving,

In addition to asymmetric geopolitical power, deference to China is also attributable to the high esteem in which Confucian teachings, texts, and practices – the Confucian repertoire – are held in Vietnam. Pre-modern Vietnamese intellectuals divided people into two broad categories, efflorescents (*Hoa*) and barbarians (*Di*).³⁷ Efflorescents believed they had attained a sophisticated and integrated system of ritual and governance that was superior to the practices of people outside the Confucian world. For Vietnamese intellectuals, the boundary between *Hoa* and *Di* was not race based, since non-Chinese could, through learning and proper ritual practices, become efflorescent.

The distinction between deference to China as a geopolitical entity and deference to the Confucian repertoire is illustrated by a story from the mid-nineteenth century.³⁸ Ly Van Phuc, a scholarly official working for the Nguyen Dynasty, was sent on a diplomatic mission to Fujian Province in China. When he arrived, the accommodation set aside for his use bore a sign saying “Hostel for the An Nam [Vietnamese] Barbarians.” In a letter of complaint, Phuc explained that Vietnamese literati read and memorised the classic Song and Ming dynasty literature that epitomised (for the Vietnamese) the highpoint of neo-Confucian learning. He then argued that since the full classical repertoire was not taught under the Manchu dynasty, by implication

‘Strategy and Evolution of Vietnam’s China Policy: A Changing Mixture of Pathways’, *Asian Survey*, vol.46, no.6, 2006, pp.819–24.

³⁷ See Benjamin Elman, John Duncan, and Herman Ooms, ‘Introduction’, in Benjamin Elman, John Duncan, and Herman Ooms, eds., *Rethinking Confucianism: Past and Present in China, Japan, Korea, and Vietnam*, Los Angeles: UCLA, Asian Pacific Monograph Series, 2002, pp.1–12.

³⁸ See Liam Kelley “‘Confucianism’ in Vietnam: A State of Field Essay”, *Journal of Vietnamese Studies*, vol.1, no.1–2, 2006, pp.314–70.

Chinese officials were not entitled to claim moral superiority. Phuc made it clear that he deferred to an essentialized version of the neo-Confucian canon and not to particular Chinese emperors or to Chinese culture in general.

Deference to Chinese statecraft declined when the neo-Confucian model offered no viable solution to growing western colonial power during the late nineteenth century. But the shift to socialist thinking among many of Vietnam's anti-colonial leaders (and revolutionary leaders in China) did not precisely coincide with the decline of neo-Confucian rule or disenchantment with Western philosophy and science. Its timing and origin are much more complex.³⁹

During the 1920s, nationalist leaders in Vietnam looked to China's Kuomintang for inspiration, but never managed to widely promote republican constitutionalism as a credible alternative to colonialism. There is no Vietnamese equivalent to China's nationalist leaders such as Sun Yat-sen.

Meanwhile, Vietnamese revolutionary leaders looked initially to China and then later to the Soviet Union for ideas about governance. As the revolutionary movement gained power during the 1940s, Chinese military, economic, and agricultural advisers increasingly influenced the anti-colonial struggle, land reforms, as well as the ideological stance of the Communist Party of

³⁹ See Huynh Kim Khanh, *Vietnamese Communism, 1925–1945*, Ithaca, New York: Cornell University Press, 1986, pp.272–74; Shiping Zheng, *Party vs. State in Post-1949 China: The Institutional Dilemma*, Cambridge: Cambridge University Press, 1997, pp.32–50.

Indochina (the forerunner of the Vietnamese Communist Party).⁴⁰ Maoist thinking peaked by the mid-1950s and was gradually displaced by Soviet thinking.⁴¹ As the most developed socialist state, Soviet laws and legal institutions were the preferred development model.⁴² The relationship with China deteriorated following the Sino–Soviet split in 1968, reaching a low point after the countries fought a brief border war in 1979. At this time, deference toward the Soviet worldview and antipathy to China prevented Chinese ideas from entering Vietnamese public discourse.⁴³ Nevertheless legal development in both countries followed the same general trajectory during this period.

Following *doi moi* (renovation) reforms in Vietnam in the mid-1980s,⁴⁴ some, but certainly not all, Vietnamese leaders tried to bring Vietnamese legal, political, and economic thinking closer to China.⁴⁵ Although deference to the Chinese development model has gradually increased, it is

⁴⁰ See *Thuc Hien Cai Cach Ruong Dat* [Report to First Party Congress], Hanoi: Dang Lao Dong Viet Nam Xuat Ban, 1954, pp.49–66.

⁴¹ See Shawn McHale, ‘Vietnamese Marxism, Dissent, and the Politics of Postcolonial Memory: Tran Duc Thao, 1946–1993’, *The Journal of Asian Studies*, vol.61, no.1, 2002, p.13.

⁴² See Nguyen Duy Trinh, ‘Phat Trien Che Do Dan Chu Nhan Dan va Bao Dam QUYEN Tu Do Dan Chu Cua Nhan Dan’ [Developing the People’s Democratic Regime and Ensuring People’s Liberties and Democratic Rights], *Hoc Tap*, no.3, 1956, pp.23, 26–32.

⁴³ See Dang Phong and Melanie Beresford, *Authority Relations and Economic Decision-Making in Vietnam: An Historical Perspective*, Copenhagen: Nordic Institute of Asian Studies, 1998, pp.40–41.

⁴⁴ For more details see John Gillespie in chapter 3 in this volume.

⁴⁵ See Alexander Vuving, ‘Strategy and Evolution of Vietnam’s China Policy’, *Asian Survey*, vol.46, no.6, 2006, pp.805–24.

now counterbalanced by a desire to learn from and engage with a broad range of countries. Until comparatively recently it was also constrained by limited Chinese language skills in Vietnam.⁴⁶

International integration

International integration occurs where recipients voluntarily harmonize domestic regulatory structures with regional and international treaties. Emulating China's multilateral foreign policy,⁴⁷ the Vietnamese communist party at the Sixth Party Congress in 1986 expanded foreign relations to countries outside the Soviet bloc.⁴⁸ A consensus emerged within the party that holistic borrowing from the Soviet model had led to the near collapse of the economy and Vietnam needed to attract investment from, and find markets in non-socialist countries. Foreign Minister Nguyen Co Thach steered Vietnamese foreign policy from a one-dimensional Soviet orientation to a multifaceted "friend to all" (*da dang hoa, da phuong hoa*) approach. He convinced senior party leaders that the world had experienced profound changes since the cold war period and the military threat posed by Western imperialism had diminished.⁴⁹ His new

⁴⁶ See Mark Sidel, 'The Re-emergence of China Studies in Vietnam', *The China Quarterly*, 1995, pp.521–40.

⁴⁷ See Christopher Hughes, 'Nationalism and Multilateralism in Chinese Foreign Policy: Implications for Southeast Asia', *Pacific Review*, vol.18, no.1, pp.125–27.

⁴⁸ Brantley Womack, 2006, op. cit., n.34 above.

⁴⁹ See Nguyen Co Thach, 'Tat Ca Vi Hoa Binh Doc Lap Dan Toc va Phat Trien' [All for Peace, National Independent and Development], *Tap Chi Cong San*, August 1989, pp.1–8.

policy echoed Deng Xiaoping's "four modernizations," as it too recognized that Vietnam needed Western technology, capital, and know-how to develop.⁵⁰

Over the last 15 years the Vietnamese government entered into a series of multi- and bilateral trade and investment treaties to secure investment and international markets. Authors in this volume describe differences in the way treaties such as ASEAN, the US–Vietnam and Japan–Vietnam bilateral trade agreements, and the WTO have reshaped governance structures in Vietnam. Vietnam has also entered a few cooperation agreements with China, but they fall well short of strategic alliances or comprehensive bilateral trade agreements like those signed with the US, Japan, and ASEAN.⁵¹ It is worth noting, however, that as a member of ASEAN, Vietnam will benefit from the China–ASEAN free trade agreement.

Borrowing

Borrowing happens when national elites look outside their stock of knowledge for solutions to domestic problems.⁵² This usually takes the form of learning among transnational elites. Vietnam has a long history of holistic borrowing. As we have seen, emperors in pre-modern times, especially since the fifteenth century, believed that effective neo-Confucian virtue-rule (*duc tri*)

⁵⁰ See Phan Doan Nam, 'Ket Hop Suc Manh Dan Toc Voi Suc Manh Thoi Dai Trong Giai Doan Cach Mang Moi' [Combining the Strength of the Nation in the Area of the New Revolutionary Stage] *Tap Chi Cong San*, no. 5, May 1987, pp.53–57. Allen Goodman, 'Vietnam in 1994: With Peace at Hand', *Asian Survey*, vol.35, no.1, 1995, p.98.

⁵¹ See Jorn Dosch and Alexander Vuving, *op. cit.*, n.8 above, pp.12–14.

⁵² For a good summary of legal borrowing see David Nelken, 'Towards a Sociology of Legal Adaption', in David Nelken and Johannes Feest, eds., *Adapting Legal Cultures*, Oxford: Hart Publishing, 2003, pp.7–54.

required the adoption of Chinese ideology, governmental organisations, and political-legal culture, and selective borrowing risked organisational disunity. For example, all but one of the 398 articles in the *Gia Long Code*, enacted during the Nguyen Dynasty in the early nineteenth century, were either identical to, or closely based on, the Qing Code.⁵³ This level of borrowing was unprecedented in other pre-colonial East Asian countries (with the possible exception of Korea) and foreshadowed the wholesale importation of the Soviet political-legal system centuries later.⁵⁴ It is important to add, however, that Vietnamese leaders have demonstrated considerable flexibility and creativity in the implementation of imported ideas.⁵⁵

Like China, recent borrowing in Vietnam has been selective, and importantly, less deferential to the great powers.⁵⁶ Nevertheless, four of the six basic principles in the *doi moi* policy drafted by the party in 1986 reflect reforms previously introduced by Deng Xiaoping in China – a debt that has not been officially acknowledged in Vietnam. Borrowing is most evident in the way Vietnamese leaders have followed China in attempting to instil within the citizenry a socialist morality that is robust enough to deal with challenges posed by the market economic and legal

⁵³ See Tran Thi Tuyet, 'The Nguyen Dynasty and its Legislation in the First Half of the 19th Century', *Vietnam Law and Legal Forum*, vol.3, no.32, 1997, pp.24–25.

⁵⁴ See Dae-Kyu Yoon, 'Korea', in Poh-Ling Tan, ed., *Asian Legal Systems*, Sydney: Butterworths, 1997, pp.162–67.

⁵⁵ See John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam*, Aldershot UK: Ashgate, 2006, pp.39–68.

⁵⁶ See Pitman Potter, 'Legal Reform in China: Institutions, Culture, and Selective Adaptation', *Law and Social Inquiry*, vol.29, no.2, 2004, pp.465–95.

reforms.⁵⁷ They have also followed China in stressing the need for complimentary progress in both the economic, legal, and moral spheres. Leaders in both countries have a similar modernizing vision, one that encourages economic and material progress without embracing social and political pluralism.

Authors in this volume show that even if the general trajectory of Vietnamese reforms follows the Chinese path, the details are often different. They explain that Vietnam imitated China's multilateral trade policy, export orientation, open economy, protection for selected state-owned enterprises, and developmentalism. For example, Vietnamese lawmakers were initially concerned that left unchecked, imported capitalist economic principles would nurture a new capitalist class.⁵⁸ As a corrective, they followed the Chinese model by giving state officials broad licensing powers to limit the scale of private business activities and economic sectors in which they could operate.

In implementing this grand design, Vietnamese leaders looked to other models to avoid repeating China's mistakes. As international economic integration gained momentum during the 1990s, lawmakers increasingly borrowed capitalist laws either directly from multilateral international

⁵⁷ See Nicholas Dynon, "'Four Civilizations' and the Evolution of Post-Mao Chinese Socialist Ideology", *The China Journal*, no.60, July 2008, pp.84–109; Nguyen Phu Trong, *Viet Nam on the Path of Renewal*, Hanoi: The Gioi Publishers, 2004, pp.112–26.

⁵⁸ See generally Duong Dang Hue, 'Phap Luat ve Viec Cap Giay Phep Thanh Lap Doanh Nghiep Dang Ky Kinh Doanh o Viet Nam: Thuc Trạng va Mot Vai Kien Nghi' [Legal Regulations in Relation to Issuance of Permits to Establish Enterprises and Business Registration in Vietnam: The Present Situation and Some Recommendations], *Nha Nuco va Phap Luat*, no.4, 1994, p.20.

institutions such as the World Bank and UNDP, bilateral agencies such as USAID and DANIDA, or via third party Asian countries, especially Japan.⁵⁹ The Law on Business Bankruptcy 1993, Civil Code 1995, Commercial Law 1997, and Enterprise Law 1999, for example, were all inspired by legal models supplied by bi- and multilateral donors.⁶⁰ Further distancing Vietnam from the Chinese model, non-state actors in Vietnam appear to exercise more influence over government policy than their counterparts in China. Both Chinese and Vietnamese leaders have not allowed imported neoliberal commercial principles to disrupt state control over the “commanding heights” of the economy. On balance, however, the authors conclude that lawmakers in Vietnam have followed the Chinese development path, but have learned from a wide range of external and internal sources in formulating the particulars of the development model.

Finally, it is worth noting that borrowing has not been entirely unidirectional. Recent political reforms in Vietnam have attracted interest in China.⁶¹ In the run-up to the Tenth Party Congress in 2006, two candidates applied for the top post of secretary general of the party. Although one candidate eventually withdrew, this event suggested that the central committee has more say about policy formulation than its counterpart in China. Some political scientists dispute the claim that electoral reforms give rise to more political pluralism, because they doubt whether decisions made in the Central Committee represent a broader cross-section of views than

⁵⁹ See John Gillespie, *op. cit.*, n.55 above, p.6.

⁶⁰ See Ministry of Justice, ‘Action Plan for Implementing Vietnam’s Strategy for Development of Its Legal System Until 2010’, unpublished paper, Hanoi, 5 November 2002.

⁶¹ See Zhenting Liu, ‘Yuenan Zhengzhi Gaige Quanmian Chaoyue Zhongguo’ [Vietnam Completely Surpasses China in Political Reform], *Asia Weekly* [Yazhou Zhoukan], <http://news.creators.net/photo/newsViewer.php?id=668161>, accessed 14 July 2008.

decisions made by the Politburo.⁶² To support this view they point to the considerable body of evidence that major decisions are prearranged to reflect shifting alliances between the party factions that control the Central Committee and the Politburo.⁶³ Whatever the substance of the reforms, this episode is significant in showing that both China and Vietnam are looking to each other for solutions to domestic governance problems.

Global diffusion

Global diffusion offers a corrective to the other modes of comparison because it does not presuppose that states dominate legal and regulatory change. Rather, it suggests that the regulatory order in particular “core” countries diffuse through dialogical exchanges and other kinds of communication to peripheral countries.⁶⁴ For example, the exchange of ideas that occurs in law reforms projects, INGO projects, and commercial transactions such as supply chain agreements persuade actors in peripheral countries to adopt global ideas. Global diffusion

⁶² Regina Abrami, Edmund Malesky, and Yu Zheng, ‘Accountability and Inequality in Single-Party Regimes: A Comparative Analysis of Vietnam and China’, unpublished working paper, part 3.1, 2008.

⁶³ See Martin Gainsborough, ‘Beneath the Veneer of Reform: The Politics of Economic Liberalisation in Vietnam’, 35 *Communist and Post-Communist Studies*, vol.35, 2002, pp.356–57.

⁶⁴ See David Strang and John Meyer, ‘Institutional Conditions for Diffusion’, *Theory and Society*, vol.22, 1993, pp.487, 490–91; David Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism’, *The ANNALS of the American Academy of Political and Social Science*, no.598, 2005, pp.22–27.

emphasizes the importance of shared conceptual languages, close economic ties, and educational linkages in spreading reform.⁶⁵

Authors in this volume provide ample evidence that global legal ideas diffuse into China and Vietnam. They find evidence that along with transnational social and economic linkages, state ideology plays a role in determining what global ideas appear attractive and what social groups import them. Both Shi and Nguyen argue in this volume that business associations in China and Vietnam became progressively more active in adopting global legal ideas as ideological and regulatory controls over the private sector were relaxed. Nguyen shows the some global legal ideas bypass state and quasi-state institutions (such as business associations) and are disseminated through supply chains and investment agreements to state and non-state actors. He gives the example of the Business Ethics and Code of Conduct that Intel Corporation signed with a state-owned industrial park in Ho Chi Minh. It compels the local corporation to collaborate with Intel in monitoring and preventing corruption. This evidence of bottom-up lawmaking is important as it questions state mythologizing that legal development flows exclusively from farsighted action by the political leaders.

To summarize, the five modes of comparison provide multiple perspectives from which to view the complex interaction between China and Vietnam. Vietnam has a long history of deference toward Chinese, and more recently to Soviet modes of governance. Since *doi moi* reforms began

⁶⁵ See Holger Spamann, *op. cit.*, n.33 above. Also see Michael Dowdle, 'Pushing Against Globalization: Toward an Analytic Template', in John Gillespie and Randall Peerenboom, eds., *Regulation in Asia: Pushing Back on Globalization*, London and New York: Routledge, 2009, pp.51–63.

over two decades ago, the Vietnamese state has pursued a multilateral international policy that balances deference to the Chinese illiberal legal model with a desire to learn from and attract investment from other developed regions. As China's economic power grows, it is possible that the Vietnamese state will be manoeuvred into a more dependent relationship that constrains its capacity to selectively borrow from other systems.

However, there are several factors working against convergence. Although Vietnam experienced social instability caused by decades of war, it did not follow China in staging its own cultural revolution. As Fu Hualing and Pip Nicholson point out in this volume, one important consequence is that party leaders in Vietnam, in contrast to their counterparts in China, did not look to legality or court reform as a means of restoring social stability.

The diffusion of global ideas constitutes another check on Chinese influence. As Shi and Nguyen show, Chinese firms have not so far used trade and investment linkages to convey state-sponsored development ideas into Vietnam. At the same time telecommunications, foreign investment and trade, and international travel have made global ideas much less dependent on state sponsorship than in the past. Global diffusion has given hybrid and non-state actors in China and Vietnam new ideas to reinterpret, transmogrify, and even resist state sponsored legal reforms.

Finally, it is useful to observe that the Chinese development model does not challenge the entire Western development schemata. Both models share a modernist faith in progress and the state's capacity to instrumentally engineer outcomes, as well as the need to abolish pre-industrial

notions about human dependency on nature. Their major point of departure regards the role of pluralism (especially political pluralism) and individual rights in society. The Chinese model also implicitly rejects the universality and denationalized claims made by Western global narratives.

An Overview of Some of the Issues and Findings in this Volume

The chapters in this volume seek to describe and understand the legal reforms that have taken place in China and Vietnam in the last three decades in their political, economic, social and cultural contexts. Some of the issues raised by the authors, and the major findings made by them, may be summarised under the following inquiries:

- What progress, if any, has been made in China and Vietnam in the last three decades in the domain of legal reform and the development of the Rule of Law?
- What, if any, is the relationship between legal development and economic reform in China and Vietnam?
- What, if any, is the relationship between legal development and the political system in China and Vietnam?
- To what extent has the legal reform changed the traditional or pre-existing legal culture in the two countries?
- How should we evaluate the legal reform that has taken place in the two countries, and what is the likely trajectory of legal development in future?

Progress in legal reform

This volume provides ample evidence that the governments in both China and Vietnam, led by their respective Communist Party, have actively pursued the agenda of legal development in the last three decades. These reforms have: emphasized the importance of law by making official pronouncements, enacted numerous laws and regulations, promoted a socialist law-based state and public administration in accordance with law, developed the court system, the legal profession, legal aid and legal education, and increased participation in the international legal framework as well as the assumption of treaty obligations under international law.

The chapters by Chen and Gillespie provide an account of the development of official thinking and ideology regarding law and legality in China and Vietnam in the last thirty years. Readers may discern strikingly similar development trajectories, such as the increased emphasis on the importance of law and on the value of a state operated on the basis of “socialist” rule of law. China’s economic and legal reforms began in 1978 when the Third Plenum of the Eleventh Central Committee of the Chinese Communist Party (CCP) decided to abandon ultra-leftist policies and embark on the path of *gaige kaifang* (reform and open door). In Vietnam, the corresponding landmark was the Sixth Congress of the Vietnamese Communist Party in 1986 which officially proclaimed the *doi moi* (renovation) reform. In China, the new Constitution of 1982 affirms the supremacy of the Constitution and the law by providing that all state organs and political parties must abide by the Constitution and the law, and the new CCP constitution of 1982 expressly declares that the CCP shall operate within the framework of the Constitution and the law. In Vietnam, the same principle that state organs and the Communist Party shall operate

within the Constitution and the law was affirmed in the new Constitution of 1992. Earlier, in 1991, the Vietnamese Communist Party at its Seventh Congress adopted the concept of *nha nuoc phap quyen* (the law-based state, derived from the Soviet term *pravovoe gosudarstvo* as pointed out in Gillespie's chapter), and this notion was incorporated into the Vietnamese Constitution when it was amended in 2001. In China, the equivalent concept of *fazhi guojia* (translated in Chen's chapter as "the Rule of Law state") was endorsed by the Fifteenth Congress of the CCP in 1997 and written into the Constitution by the constitutional amendment of 1999. As regards human rights, this concept received constitutional recognition in the Vietnamese Constitution of 1992, and in the 2004 amendment to the Chinese Constitution.

With regard to Vietnam, Gillespie points out in his chapter that "governance is undergoing juridification", and that although "for most of Vietnam's history, law-based regulation played a relatively minor role", "during the last two decades, juridical thinking has moved from the fringes to center stage in Vietnamese discourse." Precisely the same may be said for China. As Fu puts it in his chapter on access to justice in China: "Law did not only represent the new normative order, but a new way of thinking, a new religion. Through legalization, the Party-State aimed at achieving a framework in which every social problem required, and was provided with, a new legal solution. ... Law was replacing the failed political ideology to legitimize the Party-State." Indeed, the idea that increasing reliance on legality may be understood at least partly as a device to bolster the communist regime's legitimacy in China and Vietnam appears in several chapters in this volume.

One of the main elements of building a law-based state is to reform the operation of state executive organs so as to (in the words of Salomon and Vu in this volume) “[shift] from administrative fiat to a more rights-based public law; from administrative/political orders to laws and rights; from secrecy and omnipotence to transparency and accountability”, and to establish (in Zheng’s words in this volume) a “type of government [that] satisfies Max Weber’s criteria for a legal-rational type of authority”. The chapters by Zheng and by Salomon and Vu (and to some extent also the chapters by Chen and Gillespie) document the efforts that the governments in China and Vietnam have made in this regard in the last two to three decades.

For example, Zheng cites three important policy documents on law-based public administration promulgated by the Chinese government in 1999, 2004 and 2008 respectively. It is possible to also consider the enactment in China in 2007 of the Regulations on Disclosure of Government Information a breakthrough. In Vietnam, public administration reform (PAR) was initiated at a Party Plenum in 1995, and is now governed by the PAR Programme for 2001-2010 promulgated in 2001. In China, administrative litigation – by which citizens may challenge the legality of governmental actions in court – was institutionalized by the Law of Administrative Litigation 1989. In Vietnam, courts began to handle administrative litigation in 1996. Salomon and Vu show that one of the goals of administrative reform in Vietnam is to establish “a public service accountable to citizens”. Zheng and Leng in their chapters on China also refer to the similar concept of the “service-oriented government” endorsed by the Seventeenth Congress of the CCP in 2007. Interesting, both the chapters by Zheng and by Salomon and Vu highlight the introduction in China and Vietnam respectively of the “one-stop service” or “one-stop shop” to improve public dealings with government departments, which Zheng considers to be an example

of “middle-level institutional designs” that can contribute to the improvement of public administration in China.

In a modern legal system, apart from the laws themselves and their implementation, the levels of development of the courts, the legal profession, legal aid and legal education are all important indicators of the level of development of the legal system itself. In this volume, Fu and Nicholson write about the courts and access to justice in China and Vietnam; Conner and Bui write about legal education and the legal profession in the two countries. These four chapters collectively provide a fairly comprehensive picture of the evolution and present circumstances of the relevant legal institutions in the two countries. Empirical and legislative data is presented which demonstrates the rapid expansion of the court system and the legal profession that has taken place in China and Vietnam over the last two to three decades, the trend towards professionalization in the judiciary and among lawyers, the increasing demand for legal services, the movement towards privatization and marketization of lawyers’ practice, the rising number of court cases, the development of legal aid, and the growth of legal education and training in the two countries. It is noteworthy that some significant developments only occurred relatively recently. For example, Conner points out that the number of Chinese law schools doubled between 1999 and 2005; 376 new law schools were opened between 2000 and 2005. There was a twelve-fold increase in the number of law students between 1992 and 2003. China now has over 600 law schools with a student population of 450,000. In the case of Vietnam, Bui mentions in her chapter that the Hanoi Law University – “the first post-colonial tertiary-level law school” – was only established in 1979, and the number of law schools has grown since then to 20 in the year 2008. She also notes that whereas there were only about 800 lawyers in the whole of

Vietnam in 1997, by 2007 the number increased to 4,000, while China had about 150,000 lawyers at this time (as compared with only a few thousand lawyers in the early 1980s) as noted by Conner.⁶⁶ In his commentary on the chapters by Conner and Bui, Cohen suggests that the different levels of development of the legal profession and legal education in China and Vietnam can be partially explained by the “relevant pre-Communist experience of the two countries”, and partly by “the fact that Vietnam’s revolutionary war concluded a generation after China’s did”.

Similar trends may be observed in the development of the legal profession and legal aid in China and Vietnam as recounted by Conner, Bui, Fu and Nicholson. Booth notes in his commentary in this volume, there exist “fundamental similarities which transcend the differences between the two legal systems and their stage and pace of development.” In China, the restoration of the legal profession (after the turmoil of the Cultural Revolution era) began with the enactment of the Provisional Regulations on Lawyers in 1980, under which lawyers were “state legal workers” and could not engage in private practice. In Vietnam, the first set of regulations on lawyers enacted in the *doi moi* era was the 1987 Ordinance on Lawyers Organization which, like the Chinese regulations of 1980, did not allow private practice by lawyers. In China, quasi-private practice by lawyers in “cooperative law firms” were allowed in 1988, and full private practice in partnership law firms was permitted in 1993. The Lawyers Law was enacted in 1996; it abandoned the idea in the Provisional Regulations that lawyers were state legal workers, and recognized that lawyers were professionals providing services to members of the public. In

⁶⁶ The population figures of China and Vietnam in 2007 were 1,320 million and 85 million respectively (see Leng’s chapter in this volume). Booth in his commentary in this volume notes that as of 2009, there were 5,300 lawyers in Vietnam.

Vietnam, the Ordinance on Lawyers, enacted in 2001, introduced a similar policy that permitted lawyers to set up their own law firms. The Law on Lawyers, passed in 2006, further entrenched this reform.

Whereas the All-China Lawyers' Association was established in China in 1986, its Vietnamese counterpart – the Vietnamese Bar Federation – only came into existence in 2009. Although in both countries provincial bar associations had existed for many years. The Chinese and Vietnamese governments have sought to regulate lawyers by combining state control and supervision with self-regulation by professional associations of lawyers.

Compared with the legal profession, the development of legal aid is a more recent phenomenon in both China and Vietnam. Fu points out in his chapter that legal aid in China started to develop in 1994, but the legal aid system should be seen in the context of the larger system of legal services which includes as its branches not only lawyers but also “barefoot lawyers”, “judicial assistants” and “township legal workers”. The system of legal aid was only formalized in 2003 with the enactment of the Legal Aid Regulations.⁶⁷ In the case of Vietnam, Nicholson traces the origins of legal aid to a government directive in 1996 to establish a “Legal Aid network”. The Law on Legal Aid was enacted in 2006 in Vietnam.

Legal development and economic reform

⁶⁷ See Albert H.Y. Chen, *An Introduction to the Legal System of the People's Republic of China*, Hong Kong: LexisNexis, 3rd ed. 2004, pp. 182-185.

The extraordinary growth in legality and juridification in China and Vietnam mentioned in the preceding section corresponds closely with the equally extraordinary economic development in the two countries. According to conventional law and development theory, some practice of legality or some form of the rule of law – particularly rules that protect private property rights and the enforcement of contracts – is a prerequisite for a successful market economy. However the case of China and Vietnam in the last few decades may cast doubt on, or at least demand modifications to this thesis.⁶⁸ Peerenboom in this volume argues that “China and Vietnam are not exceptions to the general rule that sustained growth requires rule of law. A functional legal system has played an important part in growth in China and to some extent in Vietnam as well.” He identifies “both a push and a pull aspect” in the relationship between legal and economic development: “a stronger legal system facilitates economic development and economic growth increases demands for legal reforms.”

The economic reforms in both China and Vietnam included as one of their most crucial components opening up the country to foreign trade and investment and pursuing integration with the global market economy. The law – including the making of domestic law and the

⁶⁸ See, e.g., Albert H.Y. Chen, ‘Rational Law, Economic Development and the Case of China’, *Social and Legal Studies*, vol. 8, 1999, p. 97; Donald C. Clarke, ‘Economic Development and the Rights Hypothesis: The China Problem’, *American Journal of Comparative Law*, vol. 51, 2003, p. 89; Franklin Allen, Jun Qian and Meijun Qian, ‘Law, Finance, and Economic Growth in China’, *Journal of Financial Economics*, vol. 77, 2005, p. 57; Katharina Pistor and Chenggang Xu, ‘Governing Stock Markets in Transition Economies: Lessons from China’, *American Law and Economics Review*, vol. 7, no. 1, 2005, p. 184; Guanghua Yu and Hao Zhang, ‘Adaptive Efficiency and Financial Development in China: The Role of Contracts and Contractual Enforcement’, *Journal of International Economics Law*, vol. 11, no. 2, 2008, p. 459.

assumption of treaty obligations under international law -- has played an important role at least in signaling the major developments in this regard. As Leng mentions in her chapter on commercial regulatory reform in China, one of the first laws made in China to inaugurate the era of “reform and opening” was the Sino-Foreign Equity Joint Venture Law of 1979. The parallel development in Vietnam was the enactment of the Foreign Investment Law in 1987. Major legal reforms in China and Vietnam were prompted by their accession to the WTO in 2001 and 2007 respectively, and in the case of Vietnam also by the bilateral trade agreement it entered into with the U.S.A. in 2001.

At the same time as encouraging the influx of foreign capital, the two countries also fostered the growth of domestic business and the private sector of the economy. In China, the first law on domestic private business firms – the Provisional Regulations on Private Enterprises – was introduced in 1988.⁶⁹ In Vietnam, domestic private commerce, hitherto prohibited under socialism, was decriminalized in the same year. In China, the constitutional amendments of 1988, 1993, 1999 and 2004 all affirmed and elevated step by step the importance of the non-state or private sector of the economy; the 1993 amendment declared that China would practice a “socialist market economy”, and the 2004 amendment gave increased formal recognition to private property rights. In Vietnam, the 1992 Constitution provides for a “multi-component commodity economy functioning in accordance with market mechanisms”, and the 2001 amendment further expands the permissible scope of private business activities. In China, the

⁶⁹ See generally Alison E.W. Conner, ‘The PRC Constitution and Private Enterprise Regulation’, *Hong Kong Law Journal*, vol. 18, 1988, p. 486; Alison E.W. Conner, ‘To Get Rich is Precarious: Regulation of Private Enterprise in the People’s Republic of China’, *Journal of Chinese Law*, vol. 5, no. 1, 1991, p. 1.

constitutional amendment of 1988 provided the legal basis for the privatization and marketization of property rights in land. In Vietnam, the Land Law of 1993 began to permit “horizontal land transfers” and paved the way for the emergence of a real estate market a decade later.

In both China and Vietnam, special legal regimes were initially created to cater for the interests of foreign investors. Different sets of laws and regulations governed the business activities of different types of firms depending on their sources of capital – which might come from the sectors of “state ownership” or “collective ownership”, domestic entrepreneurs, foreign investors or a combination of some of these sources. Thus Leng describes in her chapter a “dual-track, differentiating regulation of domestic and foreign-invested enterprises” in China, and the gradual movement in the legal reform towards “a level playing field” for all market participants in the Chinese economy as evidenced by the enactment of laws such as the Uniform Contract Law, the Corporate Income Tax Law and the Anti-Monopoly Law. In Vietnam, the government also established a “dual-track” regulatory regime initially, and then sequentially implemented reforms designed to create “a level playing field” for the public and private sectors. As Beresford notes in her chapter on Vietnamese commercial regulation, the new Enterprise Law of 2005 “puts SEs [state enterprises] and private firms on the same footing.”

Both Leng and Beresford stress the path-dependent nature of the evolution of commercial regulation in China and Vietnam, and the fact that the starting point was a centrally planned economy in which the state was the owner of all economic resources. From this starting point, China and Vietnam have embarked upon the journey towards what Leng calls the “regulatory

state” in which the state uses law and other means to regulate business activities in an evolving market economy. In both countries, foreign-invested enterprises and domestic private enterprises were allowed to flourish; many state enterprises have undergone partial or wholesale privatization, including the “corporatization and shareholding reform” described by Leng and the “equitization” described by Beresford. But in both countries, the state has retained control of enterprises and business operations in the “commanding heights” of the economy. This has resulted in a situation in which, as Leng observes, the state plays a dual role as “both a regulator and a participant in the market”, and a separation of the two roles is essential if effective regulation is to be achieved. It seems that progress in this regard has been made in both China and Vietnam. In China, the State-owned Assets Supervision and Administration Commission was created in 2003 to perform the functions of state owner. In Vietnam, a State Capital Investment Corporation began operations in 2006, which, as Beresford points out in her chapter, can “hopefully [remove] the clear conflict of interest that previously existed when the line ministries were both owners and regulators of SEs.”

Another aspect of the path-dependent nature of economic development and regulation in China and Vietnam stems from a fact identified by Clarke in his commentary in this volume: in both countries, “the commercial sector itself first emerges in a significant way out of the business activities of the state, and the first private entrepreneurs (at least on a scale large enough to become rich and influential) are well-connected former officials or their relatives.” In Beresford’s words, “The networks of economic power that emerged during the transition from central planning remained influential, linking various sectors of the Party and bureaucracy with SEs and privately owned SMEs in ways that continue to be politically negotiated and

renegotiated over time.” The “dividing line between public and private sectors is blurred”, and market relations are embedded in “social networks of power and influence”. In these circumstances, “legal regulation is widely regarded as irrelevant”. Although Beresford makes these observations with regard to Vietnam, they are also largely applicable to China, where the distinction between state capital and private capital is often blurred and social networks involving officials and entrepreneurs play a crucial role in economic activities.⁷⁰ Beresford borrows the term “alliance capitalism”, originally invented to describe the close state-business relationship in Japan, South Korea and Taiwan, in her analysis of commercial regulation in Vietnam, and concludes that alliance capitalism “has served the Vietnamese nation-building project very well”. Similarly, Leng opines that China has borrowed much from the “North East Asian model” of the developmental state. However, Dowdle in his commentary points out that although both China and Vietnam have adopted “state-led developmental strategies”, they have different industrial structures reflecting their different comparative advantages in the global economy, which might impel them in the future to pursue divergent paths in economic regulation.

In her chapter on “bottom-up” regulation in China, Shi uses the concept of “state corporatism” to describe the relationship between the state and what she calls “business associations” -- associations formed by business and industrial firms to represent their interests. She notes that the state created most of these associations in contemporary China. They receive funding from the state and are often staffed by retired officials or persons with government background. Their autonomy is therefore limited, nevertheless they play a role in lobbying and liaising with the

⁷⁰ See, e.g., Jean C. Oi and Andrew G. Walder, eds., *Property Rights and Economic Reform in China*, Stanford: Stanford University Press, 1999.

government and otherwise participating in policy and law-making processes. In contrast to domestic associations, she concludes that foreign business associations in China are particularly active in representing their members' interests and bargaining with the government.

In his chapter on non-state actors and the regulatory environment in Vietnam, Nguyen observes that “social associations” (a term that corresponds to Shi’s “business associations”) such as the Vietnam Chamber of Commerce and Industry – a “quasi-state organization” – participate in policy-making and law-making processes. Foreign investors have been active in pressuring the Vietnamese government to join relevant international conventions, conclude bilateral trade agreements and to improve the rule of law. He notes that “International donor agencies, especially the UNDP, Asia Development Bank, and bilateral agencies play a central role in advocating law reform in Vietnam.”

Legal development and the political system

Although the Chinese and Vietnamese states have promoted law and legal institutions to stimulate economic development, they have been cautious in ensuring that legal reform would not sow the seeds for challenges to the Communist Party’s monopoly of political power. The rejection of political liberalization and democratization thus constitutes an outer limit to the extent to which legal reform may go – the extent to which constitutional rights may become truly enforceable, the extent to which the courts may become truly independent, the extent to which the legal profession may become free of political control and truly self-regulating, and the extent to which legal discourse may be used to pressurize the Party-State to become truly accountable

to the people for how it exercises power. Various chapters in this volume describe this tension between legal development and political power.

Chen and Gillespie demonstrate that the principle of “the leadership of the Communist Party” is still supreme and sacrosanct in China and Vietnam. The introduction of a “functional” separation between Party and State organs in the two countries, discussed by Gillespie, Zheng, and Salomon and Vu, has not weakened or diminished the Communist Parties’ authority and influence. Both China and Vietnam inherited from the Soviet Union the idea that the constitution coordinates rather than checks or constrains the power of the Party-State. They also inherited “the unity of powers” doctrine that justifies the (nominal) concentration of power in the National People’s Congress (in the case of China) and the National Assembly (in the case of Vietnam). This doctrine limits the power of state institutions other than the legislature to interpret the constitution, thus constraining the establishment of an independent institution (such as a constitutional court) with powers to interpret the constitution and safeguard its implementation. In addition to the Soviet heritage in Vietnam, Gillespie suggests that after Vietnam joined ASEAN in 1994, its “leaders were especially attracted to the Malaysian and Singaporean models where neoliberal deregulation and privatization did not signal a retreat from state control” and “the illiberal constitutionalism practiced in these countries seemed to offer a way to develop a sophisticated commercial regulatory system without exciting social demand for political and civil rights.” This, apparently, has also been the agenda pursued by the Chinese Party-State.

Salomon and Vu in their chapter on Vietnam refer to “a dualist thinking, mixing ‘rule of law’ and ‘rule of the Party’”. This is reminiscent of the current Chinese theory of “the three

supremes” mentioned in Chen’s chapter – the supremacy of the Party’s cause, the supremacy of the interests of the people, and the supremacy of the Constitution and the law. Salomon and Vu point out that “in practice the Party’s regulations still trump laws” in Vietnam, and “people cannot legally complain about the Party’s decisions and regulations.” This is also the case in China where the system of administrative litigation may only be used to challenge state administrative actions but not Party decisions or norms. This policy leads Dowdle to conclude that “much political regulation lies outside the reach of the public law system” in China and Vietnam.

Fu, Nicholson, Conner and Bui provide further illustrations showing how the Party’s monopoly over political power limits the development of the rule of law. Fu observes that although rights talk and practice have been permitted or even encouraged by the Chinese state in “less political spheres” such as equality and anti-discrimination, courts are weak and legal norms are fragile when confronted by the authoritarian Party-State. In particular, he explains that Chinese courts have neither the power nor capacity to handle politically sensitive cases (such as cases involving “national security”) and what Peerenboom calls “growing pains” cases – cases generated by the difficult choices (such as a tradeoff between social justice and economic growth) and sacrifices that have to be made as a poor nation embarks on the road to economic development. They include disputes about land taking, reform of state-owned enterprises and related labor disputes, and environmental problems. In Fu’s words, “Courts cannot save us from a Hobbesian world” or one in which “legislative and regulatory chaos” abound.

In a similar vein, Nicholson points out that the Vietnamese Party-State's approach to legal reform has been a "cautious and controlling" one. "Multiple narratives" co-exist; "only incremental and uneven increases in access to legal infrastructure and discourse" have been allowed. "The uncertainty about the ultimate reform narrative gives rise to conflicts, tensions, and disagreements about the role of law, lawyers, and legal institutions". These observations are also pertinent to the case of China. Several stories are told by Nicholson, Cohen, Conner and Bui showing how some "vocal minorities" of lawyers in China and Vietnam have struggled for a greater degree of professional self-regulation or have devoted themselves to using the law to serve, protect and defend weak and underprivileged members of society (e.g. the *weiquan* or "rights protection" lawyers in China).⁷¹ But as Cohen suggests in his commentary, in both China and Vietnam "the Soviet-style Party-State structure ... tightly controls the legal profession, monitoring and often squelching independent efforts to promote law reform. The leadership in both countries is determined to prevent the growth of an autonomous legal profession".

Legal reform and the traditional or pre-existing legal culture

Apart from the political considerations of the Party-State that set an external limit to the possible reach of legal development, there exists also what may be called an internal limit to legal development or the effectiveness of legal reform that is constituted by the traditional or pre-existing legal culture of the society concerned. Here "legal culture" refers to the attitudes, values, mentality as well as the modes of behavior of people or actors in government, society and the

⁷¹ See Hualing Fu and Richard Cullen, 'Weiquan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public-interest Lawyering', *China Journal*, vol. 59, 2008, p. 111.

economy that may be relevant to the operation of law and the legal system. Various chapters in this volume demonstrate the nature and operation of such internal limits and legal culture in China and Vietnam. We offer four specific examples.

First, law on the books will only be translated into law in action in a legal culture that supports the implementation of the law. In China and with the limited exception of colonial Vietnam, law did not play a significant role in the political, economic and social system before current legal reforms began two to three decades ago. Prior to reforms, Party policy documents and administrative directives rather than laws were the primary instrument of governance. Legal reforms have now brought into existence an elaborate hierarchy of legal norms with some situated at higher levels and some at lower levels. Several chapters in this volume show that in practice, there is in both China and Vietnam considerable inconsistency and conflict between legal norms, particularly between superior legislation and subordinate rules. This suggests that lower level organs and officials involved in local rule-making have not yet developed a culture of respect for and compliance with higher level legal norms. It also implies that the legal system has not been sufficiently internalized by power-holders in the state apparatus. In both countries, the problem of inconsistent legal rules has been further aggravated by what Salomon and Vu call the “institutional fragmentation” of the state apparatus and the lack of an effective system for review the legality of norms.

Secondly, as several authors in this volume argue, provincial and local authorities in both China and Vietnam may not faithfully implement laws enacted by the national legislature. This practice can be understood as an aspect of legal culture – local officials have not yet developed the habit

of or cultivated the mentality of strict observance and enforcement of laws enacted by the supreme legislature. Laws may have been enacted but the supporting legal culture has not yet come into existence. Gillespie observes that after Vietnam introduced the Enterprise Law in 1999 “to deregulate market access by abolishing licensing gateways used by local authorities . . . , [m]any local officials responded by creating new licenses and permits to replace those abrogated by the Law.” Similarly, Leng notes “the unsatisfactory result of downsizing administrative licenses to do business” in China: the Law on Administrative Licensing enacted in 2003 “has seen poor-to-mixed implementation at local government levels”. She cites this as an example of “the possibility of divergent interests and policy considerations between central and local governments”. Salomon and Vu link the traditional saying in Vietnam that “The King’s Law gives in to the village’s one”, with contemporary governance. They note that local leaders are influenced by a “‘political contract’ that follows these general lines: we do not care how you manage your province/district/village, as long as you produce economic growth without political instability.” This analysis is largely applicable to China as well.

Thirdly, several chapters in this volume suggest that citizens in China and Vietnam have not yet developed sufficient trust in the legal and judicial systems or a habit of turning to the law and legal institutions to solve problems (as distinguished from relying on personal relationships, social networks or resorting to political and administrative channels). Zheng mentions this point in his chapter on Chinese administrative law. Although there is more administrative litigation in China relative to Vietnam (even after taking into account the difference in population), less than 2 per cent of the cases accepted by the Chinese courts for trial in 1996-2004 concerned administrative action. Zheng also cites survey results showing that most people in China choose

not to take any further action when they have disputes with administrative organs, and the minority who take action prefer mediation or taking their grievances to the government itself to going to court.

Making a similar argument, Nguyen observes that after taking into account the population difference, litigation has been used less in Vietnam than in China as a means of dispute resolution, not only for disputes involving the government but generally in civil disputes. “People do not expect to settle their disputes in court, or as a proverb puts it: ‘try not to go to court’.” The chapters by Salomon and Vu and by Nicholson further suggest that people in Vietnam have a very low level of trust in the legal system, laws, courts, and lawyers. Nicholson also notes that “Vietnamese people ‘lack the habit’ of using lawyers” and do not have a “public instinct to turn to the law and to legality to resolve disputes”.

Fourthly, several authors in this volume draw our attention to the age-old tradition in China and Vietnam of (a) reliance on personal connections and social networks to do business; (b) dispute resolution through mediation, and (c) attaching more importance to “sentiment and reason” than to law as a means of regulating human behavior. Naturally, this tradition or culture is inconsistent with and resistant to “juridification”. The chapters by Zheng and by Salomon and Vu stress that in China and Vietnam, personal relationships and social networks play an important role in citizens’ dealings with the administration (sometimes involving corruption). Salomon and Vu write: “The first reference of both civil servants and citizens is not the law or rights, but ‘who.’ ‘Who’ is asking you for the service (favor)? ‘Who’ do you know in the administration that will be able to help you?” Precisely the same point is made by Zheng, who in

his chapter cites an example from his personal experience. Zheng goes on to mention that China is a “sentiment-reason based society”, and “[r]eason and sentiment in carrying out the law as vividly described in Salomon and Vu’s chapter also applies to China.” This means that – as Booth puts it in his commentary – even “courts draw heavily on local norms and moral narratives in deciding cases rather than legal precepts”.

Nguyen provides a detailed discussion of self-regulation and informal dispute resolution in Vietnamese villages. He shows that that “village authorities are able to dispense contextually relevant forms of justice. Village elders live among the people and have a rich, nuanced knowledge about community norms and tacit understandings and can apply ‘reason and sentiment’ to resolve disputes.” A similar point is made by Fu in his account of the revival of emphasis on mediation by courts in China and on the increasing attention paid to indigenous customary norms: “courts are rediscovering the virtues of customs and using them to supplement, if not to replace, legal provisions.” Finally, it should also be noted that mediation has a long history in both China and Vietnam and is considered an important characteristic of their traditional legal culture.⁷² As we saw in the chapters by Fu, Nicholson and Nguyen, the modern socialist states in China and Vietnam have invested much in building a system of local grassroots mediation as a major means of dispute resolution and maintenance of social order.

⁷² See, e.g., Albert H.Y. Chen, ‘Mediation, Litigation, and Justice: Confucian Reflections in a Modern Liberal Society’, in Daniel A. Bell and Hahm Chaibong, eds., *Confucianism for the Modern World*, Cambridge: Cambridge University Press, 2003, chap. 11 (pp. 257-287).

Evaluation and forecast

It appears from the preceding review that the similarities in legal development in China and Vietnam in the last three decades are substantial and significant. Although the relatively few differences do not imply different development trajectories, there is strong evidence to suggest that reforms are influenced by different path dependencies and stages of development. What has emerged in the two countries resembles what Peerenboom in this volume calls a “two-track legal system” in which the rule of law is promoted in the economic domain, but civil and political rights are not respected and protected by law, and the judiciary lack the independence to effectively review party and state power. This mode of legal development has attracted much criticism. The chief objection is that law reform aims only to strengthen and legitimize the Party and State and fails to promote and realize human rights and human development, which this critique presumes is the ultimate purpose of the rule of law.

However, Peerenboom in his chapter puts forward a powerful defense of legal development in China and Vietnam that he associates with an “East Asian Model” of development.⁷³ The defense is based on the notion of “sequencing”: it may be appropriate, legitimate, prudent or at least pragmatically a sound strategy for a poor nation to pursue economic development first before proceeding to democratization; the development of the market, the rule of law and the building of relevant institutions of a modern society may properly come before the full-scale practice of electoral democracy. Peerenboom argues on the basis of both empirical evidence and sociopolitical analysis that countries pursuing democratization while they are at low levels of

⁷³ See also Peerenboom, *China Modernizes*, op. cite. note 1 above.

economic development often experience major problems such as social instability, human rights violations and political violence; “transitional or illiberal democracies” may also be repressive: “as political space opens, the ruling regime is subject to greater threats to its power and so resorts to violence.” On the other hand, “[a]rguably, authoritarian regimes are better suited to lower levels of development because they can force through tough economic decisions and maintain social stability, albeit by restricting civil and political rights”. Peerenboom thus concludes that there are “preconditions” for successful democratization, such as a certain level of wealth, the existence of certain effective institutions (including the market and the Rule of Law), and the development of a civil society. His views return us to the proposition outlined at the beginning of this chapter that we should avoid the assumption that legal development in China and Vietnam has been or will be based on a western liberal template.

If Peerenboom is right, then China and Vietnam have indeed followed the correct legal development path over the last three decades, given their initial social, political and economic conditions. The mode of legal development that they have adopted may have contributed to their spectacular economic growth. On this view the repression associated with maintaining the Communist Partys’ monopoly of power may be the price that the people of China and Vietnam have paid and are still paying in return for economic development. This thesis is of course controversial, as critics will no doubt question whether the same increase in material wealth could have been achieved without such heavy handed repression of civil liberties, or whether the price is worth paying for material wealth.

In predicting the future, Peerenboom recognizes that the “two-track legal system” is not going to stay or should not stay indefinitely. “[T]here is an emerging consensus that while the EAM [East

Asian Model] is useful during the catch-up phase, it is not so effective later.” “[T]he legal system is likely to play a more important role as China and Vietnam attempt to move from middle-income to high-income status.” Peerenboom goes on to note that “sequencing *did* work in Japan, South Korea, and Taiwan”⁷⁴ and that democracy – subject to local interpretations and in a form adapted to local culture and circumstances -- thrives in these countries today. Thus for him “sequencing” only means postponing democratization until a certain level of economic development has been achieved. Far from rejecting democratization, his argument seems to imply that democratization is necessary and inevitable at a later stage. Peerenboom observes that “after democratization, the courts in South Korea and Taiwan were able to quickly step into the role of more aggressively protecting civil and political rights”. Will these legal pictures of South Korea and Taiwan today be those of China and Vietnam tomorrow? On questions like this, readers of this volume are invited to form their own judgment as they read the interesting and exciting stories of legal reform in China and Vietnam told in the following chapters.

⁷⁴ Emphasis in the original.