

## **NOTE**

# **LEGAL REFORM AND ITS CONTEXT IN VIETNAM**

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## I. INTRODUCTION

Vietnam has been undergoing economic reform since 1986. An important part of that reform has been a re-examination of the role of the courts and the bureaucracy in the resolution of disputes. Vietnam's leadership has expressed the need to create rule by law in accordance with market principles as opposed to the rule of the bureaucracy that marked the centrally planned economies. The movement from the rule of the bureaucracy to rule by law is not necessarily a fast or an easy one. In the case of Vietnam, the ongoing tensions between the system that is hoped for and the system as it currently exists often create perverse or simply unexpected outcomes.

On the one hand, domestic businessmen and parties to disputes seem to have been able to quickly understand the lay of the land in the gray area between rule by law and the rule of the bureaucracy. That understanding implies an ability to navigate the 'system' and an ability to navigate it with a certain degree of accuracy and reasonable expectation of achieving an outcome. This paper attempts to describe the gray area and how parties are able to navigate the system in Vietnam.

This paper begins with a brief overview of the formal legal system in Vietnam, focusing on three of the governmental structures central to the legal system: the Supreme People's Court, the State Prosecutor's Office and the Ministry of Justice.<sup>1</sup> The paper then reviews avenues of dispute resolution available to parties through the courts and the formal legal system, including an overview of the organization of the courts and the procuracy at the central government and provincial levels. The tensions within both vertical and horizontal organizations of these bureaucracies in the management of disputes are central themes that run throughout the discussion of dispute resolution and the functioning of the judicial system.

Next, the paper describes three types of common disputes (commercial disputes, property disputes, and administrative suits) and analyzes how the administrative and bureaucratic contexts exert influence on how and why disputes in these areas are resolved the way they are. In particular, this section will focus on the important role of administrative discretion and the role of the government bureaucracy, as opposed to the judiciary, in the resolution of disputes. Another theme that is pervasive is the status of property rights and disputes over property rights. In

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<sup>1</sup> The roles of the Ministry of Public Security and the Communist Party are quite considerable in the context of Vietnam's legal system. Because of lack of access to real information about their activities, this paper deals with them in only the most minimal fashion. That is, of course, not to discount their true importance.

reviewing the available data and in discussions with court officials, it becomes clear that a substantial number of disputes that are otherwise categorized, in fact, are property (real estate) related disputes.

### A. *The Context of Economic Reform*

By almost any measure, the economic reform program undertaken in 1986 by Vietnam has been successful in ensuring rapid economic growth and a substantial reduction in poverty over the past fifteen years. Average economic growth over the 1990's was 8.5%. Exports to non-CMEA (non-Comecon) countries prior to 1987 were negligible. By the mid-1990's exports to non-CMEA countries grew to more than \$10 billion per year. Throughout the 1980's, Vietnam was a net-importer of food. Following privatization of agricultural production in the early stages of reform, Vietnam became one of the three largest exporters of rice in the world, following Thailand and the United States. Between 1986 and 1999, poverty rates fell from 70% to 30%.<sup>2</sup> While some of the growth may be attributable to the low starting point, the shift to market-based provision of goods and services and the wholesale privatization of agriculture (80% of the population is rural) have created significant opportunities for peasants and enterprises to make independent decisions about sales, investment, saving and consumption, and these new opportunities have been directly responsible for much of the economic growth.

When Vietnam embarked on its program of market-oriented economic reform, the shortcomings of its socialist legal system became painfully obvious to observers at every level. As the legal structures of central planning collided with market realities, the law began to look more and more irrelevant. On the ground, state agencies and individuals routinely ignored laws and legal structures that were at obvious odds with the realities of the market.<sup>3</sup> The glaring and growing discrepancy between the 'law on paper' and law in reality created an urgent need for the government to respond.<sup>4</sup>

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<sup>2</sup> UNDP, *Expanding Choices for the Rural Poor* (Dec. 1998), at <http://www.undp.org.vn/undp/lib/pubs.htm>, (last visited Sept 1, 2001).

<sup>3</sup> Nguyen Tri Dung, *Reform of Government's Structure Essential to Country's Renovation*, VIETNAM INVESTMENT REVIEW, Dec. 30, 1991, at 2.

<sup>4</sup> The earliest demands for changes to the legal system ironically came not from inside, but from the outside. The 1987 Foreign Investment Law was the first of many laws and ordinances put into place. The 1987 Foreign Investment Law, developed in response to international investor interest, was intended to create a regulatory framework to encourage and manage foreign investment in Vietnam.

In an effort to adapt to the rapid changes in the economy and society that accompanied economic reform, the government of Vietnam undertook an aggressive campaign of legislative writing, including amendments to the Constitution in 1992. The rush of legislative activity during the 1990's was marked, more than anything else, by a desire by the government and the legal establishment to catch up with the realities on the ground. These legislative efforts included nearly 120 new laws and ordinances between the years 1992 and 1999 and thousands of implementing regulations and guidelines. The legislation was directed at a number of issues facing the government, such as government organization, criminal law, civil law, an overhaul of the tax system, redefinition of land and property laws, foreign and domestic investment promotion, trade and commerce laws, banking, education, company law, and, finally, laws covering budget and government operations.<sup>5</sup>

In this first phase of legal reform, the focus has been on establishing a legal framework, creating a set of rules that can accommodate the market economy, and adjusting the structures of government to the realities of a market-based system. Initially, the process of legal reform gave scant attention to improving the operation or efficiency of the courts. Indeed, 1992 Constitution did little to change the existing structure of the courts from that which had existed in the 1980 Constitution.<sup>6</sup> Over time, as economic actors and individuals have begun to seek access to the courts for the resolution of disputes, the scope and nature of court activities have also come under scrutiny.<sup>7</sup>

Anyone who has ever visited Vietnam will recognize that 'law on paper' and law in fact can, at times, be far from the same. Where the 'law on paper' is often vague and contradictory, great discretion is left to local officials and petty bureaucrats. Also, where the administrative bodies are sometimes hostile to the ongoing changes, the subsequent implementing regulations can be written in such a way as to ensure defeat of the overall

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<sup>5</sup> In the Vietnamese definition, 'laws' are passed by the National Assembly and hold priority over all other legal documents. Ordinances are issued by the Standing Committee of the National Assembly and have the effect of laws. Implementing guidelines and regulations are issued by the various ministries and hold a legal standing secondary to either laws or ordinances. *CÁC LUẬT CỦA NUOC CONG HOA XA HOI CHU NGHIA VIETNAM [LAWS OF THE SOCIALIST REPUBLIC OF VIETNAM]*, NXB CHINH TRI QUOC GIA (1999); *CÁC PHAP LENH CỦA UY BAN THƯƠNG VỤ QUỐC HOI NUOC CONG HOA XA HOI CHU NGHIA VIETNAM [ORDINANCES OF THE STANDING COMMITTEE OF THE NATIONAL ASSEMBLY OF THE SOCIALIST REPUBLIC OF VIETNAM]*, NXB CHINH TRI QUOC GIA (1999).

<sup>6</sup> Levien Do, *Vietnam's Revised Constitution: Impact on Foreign Investment*, in *VIETNAM AND THE RULE OF LAW 120* (Carlye A. Thayer & David G. Marr, eds., 1993).

<sup>7</sup> The Vietnamese Constitution will be amended in 2002 and restructuring of the courts (Chapter X) is the primary focus of the amendments. Interview with Nguyen Ai Can, Program Officer, UNDP, in Hanoi, Vietnam (July 10, 2001).

objective.<sup>8</sup> Finally, lack of general coordination results in a various arms of the government writing conflicting and overlapping regulations that create more discretion for officials on the ground.<sup>9</sup> Information sharing is also limited and this creates difficulty for officials at all levels to know the current state of regulation. The result is uneven application of current laws and regulations.

A survey of legislative changes could be helpful in understanding the general trend in the development of Vietnam's new legal system, but unfortunately a survey of legislation alone could also be less lucid in explaining what is actually happening. That is to say, legislation and legislative changes are not irrelevant, but then again, not wholly relevant, either. In fact what is happening on the ground is that the existing bureaucratic structures routinely fall behind the market. In an effort to keep pace, the National Assembly and the Government develop very broad legal frameworks that leave, for the most part, local officials to use their own discretion in the implementation of broad policy directions and the resolution of disputes. While there is certainly recognition by policymakers that eliminating levels of bureaucratic interference is important, administrative discretion remains the tool of the day. While this can assure rapid resolution of disputes, it also leaves the door open to corruption and official misconduct.

## II. CONSTITUTIONAL STRUCTURES AND THE FORMAL SYSTEM

The constitutional structures of governance in Vietnam are familiar to an observer of political structures in socialist countries.<sup>10</sup> Though left unspoken in much of the constitutional literature, the Communist Party maintains firm control over government and legal institutions at all levels. There are parallel structures linking the

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<sup>8</sup> This observation is shared by Bergling. See PER BERGLING, *LEGAL REFORM AND PRIVATE ENTERPRISE: THE VIETNAMESE EXPERIENCE* (1999).

<sup>9</sup> The latest examples of which are the proposed regulations from the State Bank of Vietnam that would reverse the existing Land Law's stance on market based pricing of land. In order to reduce fraud and improve lending practices, the State Bank is proposing that for the purposes of collateral, all land be assigned values by the central government rather than using market prices for land. See *SBV to Continue with Flexible Management Policies and Bank Restructuring*, VIETNAM ECONOMIC TIMES, July 25, 2001 (Vietnam News Brief Service, rel. July 26, 2001).

<sup>10</sup> In the Constitutions of many socialist countries, there are two essential components. First is a statement of political philosophy and national aspirations. These typically include a recitation of familiar rights that, in practice, do not exist. These include the right to freedom of speech and association, the right to work, etc. Second, is an exposition of the structure of government and state institutions. This explication in the 1992 Constitution is limited to an explication of the structure of Vietnam's government and state institutions.

government side to the Party. The Party makes its priorities known through a variety of statements and treatises, the most important of which is the Party Congress that meets every five years to map out general policy directions. On a day-to-day basis, the Politburo and the Central Committee exert influence over the institutions of the government and the legal system as they propose legislation and regulations and carry out their normal duties.

It is, of course, now almost cliché to say that traditional socialist systems used the "plan," rather than markets and prices, to allocate resources between competing objectives. The five-year economic plan was as much a political statement as it was a plan about resource allocation. It was through the plan that the Party was able to most clearly spell out its priorities. National ownership of industries, with the exception of the smallest household firms, was a structural device to attempt to assure a more efficient implementation of the plan. As a result of the predominant role of state-owned enterprises in production and commerce, commercial and civil disputes were all in one way or another related to the plan - getting access to resources to meet a plan target or getting access to markets to dispose of production. Prices were simple accounting fictions used by the planning commissions to move resources back and forth among enterprises. Under central planning, commercial disputes were resolved internally by a bureaucratic body, called the Economic Arbitration Center. The Economic Arbitration Center reviewed production plans and made determinations about how best to resolve disputes between enterprises in accordance with the plan.<sup>11</sup>

Under orthodox central planning, governmental structures, like the National Assembly, the People's Court, and the State Prosecutor's Office were all niceties that typically served the plan and the Party. Constitutionally at least, the most important body in the government of Vietnam is the National Assembly. However, there is never much doubt about the internal driving force behind policymaking and the role of the Communist Party in agenda setting. Constitutionally, the National Assembly meets only twice a year for a total of two months.<sup>12</sup> When the National Assembly is not in session, the Standing Committee of the National Assembly is empowered to act on behalf of the Assembly.<sup>13</sup> The National Assembly and the Standing Committee both operate on the basis

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<sup>11</sup> For more on the bureaucracy of central planning see JANOS KORNAI, *THE SOCIALIST SYSTEM* (1992). For more on the functioning of the Economic Arbitration Centers under central planning, see John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 STAN. J. INT'L L. 325 (1994).

<sup>12</sup> *Hien Phap Nuoc Cong Hoa Xa Hoi Chu Nghia Vietnam 1992 [Constitution of the Socialist Republic of Vietnam 1992]*, No. 68 LCT/HDNN8, ch. 6, art. 86 (Apr. 18, 1992).

<sup>13</sup> *Id.*, ch. 6, art. 90.

of the principle of 'democratic centralism' that guarantees that the Party can maintain firm control over the agenda.<sup>14</sup>

The Supreme People's Court, the State Prosecutor and the Government are all on equal constitutional footing just below the National Assembly. The National Assembly is responsible for appointing and monitoring the activities of these institutions, including the naming of the Prime Minister, the Chief Judge and Chief Prosecutor as well as ministers in the Government. In practice, the scope for movement and creativity by the National Assembly is limited by constraints of time and the principle of democratic centralism.

While it is not much of a proactive force, the National Assembly can be reactive. As a result, in recent years, the monitoring function has become more and more interesting as deputies to the assembly take advantage of the question period to ask at times sensitive questions about the performance of the government and the courts. At times, the Assembly has also rejected candidates for minister and declined to pursue particular pieces of legislation.<sup>15</sup>

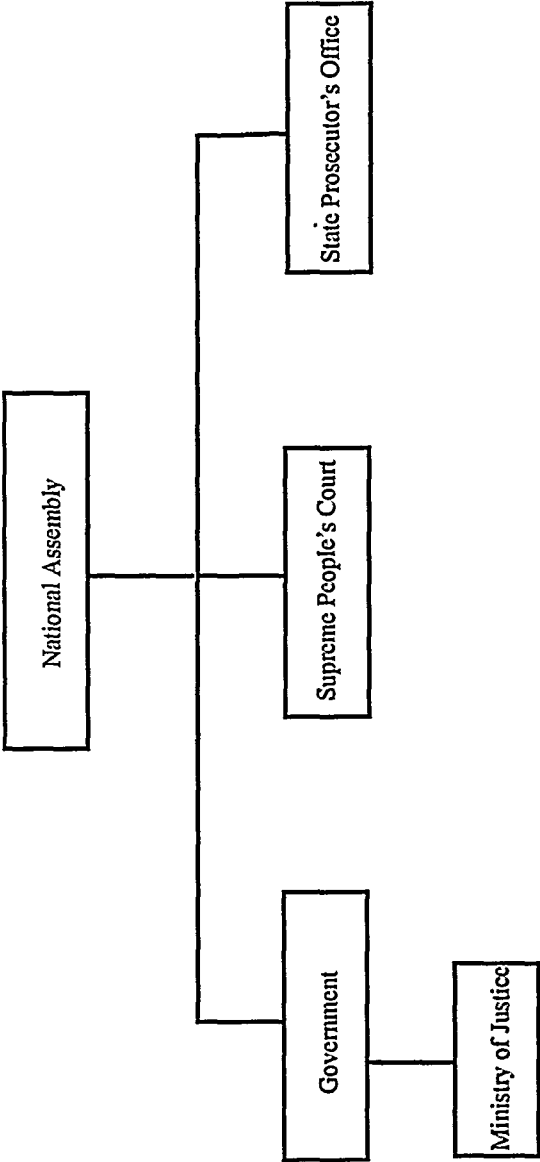
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<sup>14</sup> *Id.*, ch. 1, art. 6. Democratic centralism is a uniquely socialist construct whereby the direction of debate and discussion is determined at the central level, and then debate and decision making within the limits established is permitted. Non-agenda items are not permitted. The result is that all questions before the National Assembly must originate from the Standing Committee and the Standing Committee receives its direction from the Politburo. For more on the principle of democratic centralism, see KORNAL, *supra* note 11.

<sup>15</sup> For example, the National Assembly gave a vote of no confidence to the State Bank's Governor in 1998 and declined to pass legislation to amend the criminal law in 2001.



Figure 1: The Judicial System and Constitutional Bodies



### A. Supreme People's Court

The courts are divided into a number of types including a military court, criminal courts, civil courts, economic courts, labor courts, administrative courts, and a set of appeal courts.<sup>16</sup> Courts of first instance are organized at the county and provincial levels with the seriousness of the offenses determining jurisdiction over cases.<sup>17</sup> There are multiple levels of appeals: first, courts at the provincial level act as the first courts of appeals for cases originating in the county courts; second, there are three regional appellate courts - in Hanoi, Danang and Ho Chi Minh City; finally, there is the Supreme People's Court in Hanoi.<sup>18</sup> The appeals process was first articulated with regard to criminal prosecutions. With the addition of new court responsibilities, the courts have articulated the appeals process for each type of case. In criminal cases, it is important to note that both the accused and the prosecution have the right to appeal findings of the court. This is true even when the accused has been found innocent.<sup>19</sup>

The Supreme People's Court may, at the suggestion of the Ministry of Justice, create additional courts at any given time to meet specific needs.<sup>20</sup> Lower courts have dual reporting requirements: vertically to the Supreme People's Court and horizontally to the People's

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<sup>16</sup> *Luat To Chuc Toa An Nhan Dan [Law on the Organization of the People's Courts]*, No. 02L/CTN, ch. 2, art. 17 (Oct. 10, 1992). Economic cases and economic courts were added in a 1994 amendment to the Law on the Organization of the People's Courts. Economic cases include bankruptcy and liquidation of firms. See *Sua Doi, Bo Sung Mot So Dieu cua Luat To Chuc Toa An Nhan Dan [Amendments to the Law on the Organization of the People's Courts]*, No. 29 L/CTN, art. 1, § 1 and art. 1, § 15 (Jan. 10, 1994). Labor courts and administrative courts were added in a 1995 amendment to the Law on the Organization of the Courts. See *Sua Doi, Bo Sung Mot So Dieu cua Luat To Chuc Toa An Nhan Dan [Amendments to the Law on the Organization of the People's Courts]*, No. 43 L/CTN, art. 1, § 3 (Nov. 9, 1995).

<sup>17</sup> Jurisdictions of the courts were set out in the Criminal Law and in the Ordinance on Procedures for Resolving Economic Crimes. Cases where the possible sentences are less than 7 years of confinement are first heard at the county and district level. Cases where the possible sentences are longer than seven years are heard first at the provincial level. See *Sua Doi, Bo Sung Mot So Dieu cua Bo Luat To Tung Hinh Su [Amendments and Changes to the Criminal Law]*, No. 05 L/CTN, Part 3, ch. 15 (Jan. 2, 1993); *Phap Lenh Thu Tuc Giai Quyet Cac Vu An Kinh Te [Ordinance on Procedures for Resolving Economic Disputes]*, No. 31 L/CTN, ch. 2, art. 12-15 (Mar. 29, 1994).

<sup>18</sup> *Luat To Chuc Toa An Nhan Dan [Law on the Organization of the People's Courts]*, No. 02L/CTN, ch. 2, art. 22 and ch.3, art. 28 (Oct. 10, 1992).

<sup>19</sup> There is no protection against double jeopardy. See *Sua Doi, Bo Sung Mot So Dieu cua Bo Luat To Tung Hinh Su [Amendments and Changes to the Criminal Law]*, Part 4, ch. 22, Jan. 2, 1993, No. 05 L/CTN.

<sup>20</sup> *Sua Doi, Bo Sung Mot So Dieu cua Luat To Chuc Toa An Nhan Dan [Amendments to the Law on the Organization of the People's Courts]*, art. 1, § 12, Jan. 10, 1994, No. 29 L/CTN.

Councils at the provincial level.<sup>21</sup> The budget for the Supreme People's Court is administered directly by the National Assembly. Provincial courts, however, are administered jointly by the Supreme People's Court and the Ministry of Justice.<sup>22</sup> The funding of court operations raises important issues regarding the independence of the judiciary that are dealt with later.

The court system has a two-tier appeal process with a third discretionary review. Most cases find their way into the courts at the county level. County courts are courts of general jurisdiction that handle all cases without regard to the specific nature of the offense or dispute. Determinations as to jurisdiction are made on the basis of the type of case and the potential sanction. For civil cases, where there is less than 50 million Dong (\$3,500) at issue, the court of first instance will be the county court.<sup>23</sup> County courts also handle all criminal cases where the potential sentence is less than seven years.<sup>24</sup> These types of minor cases make up the majority of cases entering the system.<sup>25</sup> Any case involving a foreigner will automatically be heard in the Provincial People's Court.<sup>26</sup>

For cases entering the system at the county level, an appeal can be made to the provincial People's Courts. At the appeal level, the cases are distributed to one of five specialized courts - criminal, civil, economic, labor, or administrative - for resolution. Appeals of right are done on the record without argument. Following final appeal, should a party to the disputes want to appeal further, a petition for review can be sent to the Judge's Council of the Province (*Uy ban Tham phan*). The Provincial Judge's Council grants petitions for review on a discretionary basis. Appeals at the level of the Judge's Council are also accomplished with a review of the record without the benefit of oral argument.

Cases of first instances in the provincial level are heard in either courts of general jurisdiction or one of the five specialized courts in the province. Decisions from these courts are subject to a single appeal as of right. These appeals are heard at one of three regional appeal courts of the Supreme People's Court. There are regional appeal courts in Hanoi, Danang and Ho Chi Minh City. From the regional courts, there is a final

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<sup>21</sup> The People's Council is the provincial equivalent of the National Assembly. See *Luat To Chuc Toa An Nhan Dan [Law on the Organization of the People's Courts]*, ch. 3, art. 31, Oct. 10, 1992, No. 02/L/CTN.

<sup>22</sup> *Id.*, ch. 6, art. 42-44.

<sup>23</sup> *Phap Lenh Thu Tuc Giai Quyet Cac Vu An Kinh Te [Ordinance on the Procedures for Resolving Economic Disputes]*, No. 31 L/CTN (March 29, 1994), ch. 2, art. 13.

<sup>24</sup> *Sua Doi, Bo Sung Mot So Dieu cua Bo Luat To Tung Hinh Su [Amendments and Changes to the Criminal Law]*, No. 05 L/CTN (Jan. 2, 1993), ch. 15, art. 145.

<sup>25</sup> See the section titled *Court Statistics*, *infra*.

<sup>26</sup> Interview with Phan Tanh, Deputy Chief Judge, Ho Chi Minh City People's Court, in Ho Chi Minh City, Vietnam (July 31, 2001).

discretionary review that can be made to the Judge's Council of the Supreme People's Court in Hanoi. Like its provincial counterpart, reviews by the Judge's Council of the Supreme People's Court involve no oral arguments or appearances by the parties.<sup>27</sup>

### 1. Court Statistics

The nature and type of court activity is not surprising. According to courts statistics from national and selected provincial areas, court activity is evenly distributed among family matters (divorces, adoptions, etc), civil matters (including economic disputes between individuals and land disputes) and criminal cases. Labor and economic cases (disputes between companies) are differentiated from other civil disputes and make up a very small percentage of the total number of cases brought to court.

Civil cases tend to be of two types: land-related disputes between individuals and debt-related disputes.<sup>28</sup> The civil courts handle cases where at least one of the parties is an individual. Family disputes tend to be divorce cases with associated land and property disputes.<sup>29</sup> Though some civil cases might, fact, turn out to be commercial disputes, commercial disputes are typically found in the economic courts and these cases account for a very small percentage of cases in the courts (less than 1% of all court actions are commercial disputes, see Table 1).

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<sup>27</sup> This description of Vietnam's court system was provided by Judge Tanh. *Id.* The system is also described in detail in *Luat To Chuc Toa An Nhan Dan* [Law on the Organization of the People's Courts], No. 02L/CTN (Oct. 10, 1992).

<sup>28</sup> This description of the content of civil cases relates to Ho Chi Minh City, though it is likely representative. *Id.*

<sup>29</sup> *Bao Cao Cua Chanh An Toa Nhan Dan Toi Cao Tai Ky Hop Thu 8 Quoc Hoi Khoa X Ve Cong Tac Toa An* [Report of the Chief Judge of the Supreme People's Court at the Eighth Meeting of the 10<sup>th</sup> Session of the National Assembly Regarding the Work of the Courts], No. 02 BC/VP, at 14 (Oct. 20, 2000) [hereinafter *Report at the Eighth Meeting*]. See also *id.*



Table 1: National Court Statistics 1994-2000

Cases	1994 <sup>a</sup>		1999 <sup>b</sup>		2000 <sup>c</sup>	
	Accepted	Resolved	Accepted	Resolved	Accepted	Resolved
Criminal	***	***	***	*** <sup>d</sup>	48,114 <sup>e</sup>	45,843
Civil	***	24,324	68,423	48,991	111,127	93,328
Family	***	29,804	49,350	39,409	*** <sup>f</sup>	***
Economic	***	42	1,062	779	980	860
Labor	n.a.	n.a.	476	291	451	413
Administrative	n.a.	n.a.	314	204	453	338
Total			119,625	98,736	161,125	140,782

<sup>a</sup> Only partial data for 1994 are available. Labor and Administrative Courts were not created until 1995. 1994 was the first year of the operation of the Economic Courts. See Nguyen Thanh Thuy, Dispute Resolution and Enforcement of Economic Judgments in Vietnam 16 (1996) (unpublished Research Paper No. 8, on file with Australian International Legal Cooperation Program, Attorney General's Office).

<sup>b</sup> Statistics reported to the National Assembly are for the fiscal year which in 1999 ran from Oct 1, 1998 to Sept. 30, 1999. See *Report at the Sixth Meeting*, *supra* note 32.

<sup>c</sup> Data on courts activities as reported to the National Assembly are not presented in a uniform manner. As a result, they are difficult to compare year to year. See *Report at the Eighth Meeting*, *supra* note 29.

<sup>d</sup> The 1999 report conveys only partial figures on criminal cases, including only numbers on crimes of special interest like smuggling, corruption, prostitution and drugs. These totaled 9,062 during 1999. See *Report at the Sixth Meeting*, *supra* note 32.

<sup>e</sup> Of these, 7,093, or 15%, were drug related. *Report at the Eighth Meeting*, *supra* note 29, at 9.

<sup>f</sup> The year 2000 report of the Supreme People's Court provides no breakdown between civil and family disputes. In the 1999 annual report, the Supreme People's Court provided information about the split between civil and family disputes.

Special categories of criminal cases are identified for particular attention, including corruption cases, smuggling, drug-related cases and prostitution. These special category cases make up approximately 20% of all criminal cases. Of these, drug related cases are growing rapidly, alone accounting for 15% of all criminal cases, but that distribution is not even. The Supreme People's Court reports that in some provinces, nearly 70% of all criminal cases are drug related; in the northern province of Lai Chau near the Chinese border, two-thirds of the prison population are reportedly being jailed for drug-related offenses.<sup>30</sup>

Less than 1% of cases received were related to administrative disputes.<sup>31</sup> The Chief Judge of the Supreme Court noted in his report to the National Assembly that the number of administrative cases presently being heard does not reflect the true demand for the administrative courts. Rather, burdensome filing requirements tend to act a filter to prevent large numbers of cases from being accepted by the administrative courts for hearing.<sup>32</sup>

What is remarkable in the national court statistics and the statistics available from the city of Hue is that so few disputes that make it as far as the courts are settled by the parties out-of-court. Of cases that were filed in the Hue courts, more than 80% ultimately went to court for a decision.<sup>33</sup> Provincial courts report that only 3.2% of all civil cases are settled out of court. Central level courts (appeal courts) report that only 1.9% of cases are settled out of court.<sup>34</sup> Judges interviewed commented that the nature of disputes (personal debt/land/family-related) in the civil courts made them difficult to settle out of court.<sup>35</sup> Cases identified as being related to economic disputes have a much better chance of out of court settlement. In 2000, the Supreme People's Court report that 51.7% of all cases filed with the economic courts were settled prior to trial.<sup>36</sup> Ho

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<sup>30</sup> *Report at the Eighth Meeting, supra* note 29, at 14.

<sup>31</sup> While Administrative cases are supposed to deal with complaints against official acts by government officials, nearly all of the 24 cases displayed in the April 2001 docket of the Ho Chi Minh City Administrative Court were land-related disputes between individuals.

<sup>32</sup> *Bao Cao Cua Chanh An Toa Nhan Dan Toi Cao Tai Ky Hop Thu 6 Quoc Hoi Khoa X Ve Cong Tac Toa An [Report of the Chief Judge of the Supreme People's Court at the Sixth Meeting of the 10<sup>th</sup> Session of the National Assembly Regarding the Work of the Courts]*, No. 167 BC/VP, at 23-24 (Oct. 22, 1999) [hereinafter *Report at the Sixth Meeting*].

<sup>33</sup> Compare this to nearly the reverse result in US courts.

<sup>34</sup> These statistics are at odds with other statements in the report that state "there are courts in the country that report between 60-70% of civil cases settled out of court." *Report at the Eighth Meeting, supra* note 29, at 13-15.

<sup>35</sup> Interview with Phan Tanh, *supra* note 26.

<sup>36</sup> *Report at the Eighth Meeting, supra* note 29, at 13-15.

Chi Minh City, which accounts for more than 50% of all economic cases, reportedly settles between 60-70% of all economic cases out of court.<sup>37</sup>

What seems clear from the limited amount of data publicly available is that since 1994 there has been rapid growth in the number of civil and family cases brought to the formal legal system for resolution. In 1994, there were some 50,000 civil and family cases in the courts. By 2000, this figure had risen to more than 110,000 cases.

The Supreme People's Court complains that it is short of qualified judges. According to a report by the Chief Judge of the Court to the National Assembly in May 2000, the national court system need more than 1,570 judges in order to relieve a growing backlog of cases.<sup>38</sup> The Supreme People's Court in Hanoi reported that it receives 800 new cases from provincial courts every month and that its 97 judges have a backlog of 2,000 cases.<sup>39</sup>

The Chief Judge recently requested that the National Assembly pass a law that would increase the jurisdiction of courts at the county level, thereby moving more work away from the provincial level and down to the county level. It is not clear that this would be effective in reducing the backlog of cases at the highest level. It is also not clear whether these courts are currently being taxed. According to statistics from the Supreme People's Court for 2000, the average number of completed cases per judge at the Supreme Court is 8.7 per month. Unlike in the courts of first instance where one judge is assigned to each case, at the Supreme Court, three judge panels on appeal cases are more common. This means that judges at the highest level are hearing on average 24 cases per month - seven to eight times as many as at the lower levels.

Provincial Courts, on average, seem to have the lowest average number of cases per judge at just over 3. The data assembled below from a number of jurisdictions show a large range in the distribution of work. For example, the six judges in Ho Chi Minh City's Economic Court handled 500 economic cases in 2000, or 58% of all the economic cases in

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<sup>37</sup> Ho Chi Minh City's Chief Judge for the Economic Court reports that more than 3/4 of all cases that reach the courts are 'clear'; for example, one side defaults on a loan payment, or one side has completed its obligations under the contract but is not paid. Interview with Pham Xuan Tho, Chief Judge, Ho Chi Minh City Economic Court, in Ho Chi Minh City, Vietnam (July 31, 2001).

<sup>38</sup> *Vietnamese Legal System Lacks Judges*, PHU NU TP HCM, May 17, 2000 (Vietnam News Brief Service, rel. May 18, 2000).

<sup>39</sup> *Toa Toi Cao Thuong Xuyen Bi Ton Khoang 2,000 An [Supreme Court Has Continuing Backlog of Around 2,000 Cases]*, TUOI TRE, June 19, 2001, at 3; QH: *Tiep Tuc Doi Thoai Thang Than va Dan Chu Ve Nhung Van De Cu Tri Quan Tam [N.A.: Continuing the Frank and Democratic Discussion About the Concerns of Constituents]*, SAIGON GIAI PHONG, June 19, 2001, at 1 [hereinafter *Frank and Democratic Discussion*]; *Chua Thong Qua Bo Luat To Hung Hinh Su Sua Doi, Bo Sung [Amended Criminal Law Not Yet Passed]*, NGUOI LAO DONG, June 12, 2001, at 3.



the country, with an average caseload of nearly seven cases per judge per month.<sup>40</sup> The average caseload varies across jurisdiction and level of the system (See Tables 2 to 6). For example, outside of the main cities of Ho Chi Minh City, Hanoi, Danang and Hai Phong, very few, if any, cases are heard by the provincial economic courts.<sup>41</sup>

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<sup>40</sup> Interview with Pham Xuan Tho, *supra* note 37.

<sup>41</sup> Report at the Eighth Meeting, *supra* note 29.

Table 2: Annual Case Load at Various Levels (Year 2000)<sup>a</sup>

	First Instance	Appeal Level		Judge's Councils	
	Accepted	Resolved	Accepted	Resolved	
County	233,057	119,042	***	***	
Provincial	21,931	20,129	17,282	16,266	
Central	***	***	9,546	7,450	
Military	350	326	130	115	
				9	

<sup>a</sup> There is an inconsistency in the figures reported by the Supreme People's Court. Compare these figures with the reported number of cases in Table 1. *Report at the Eighth Meeting, supra* note 29, at 4 and 13.

**Table 3: Average Monthly Case Load Per Judge (2000)**

	<b>Judges<sup>a</sup></b>	<b>Average Caseload/Month</b>
<b>County</b>	4,217	4.61
<b>Provincial</b>	1,092	3.03
<b>Central</b>	97	8.68
<b>Military</b>	***	***

**Table 4: People's Court of Ho Chi Minh City (2000)**

	<b><u>Cases Received</u></b>	<b><u>Cases Resolved</u></b>
Criminal	10,323 (33.5%)	8,628
Civil	9,914 (32.1%)	8,286
Family	9,669 (31.3%)	8,082
Economic	512 (1.7%)	428
Labor	332 (1.1%)	277
Administrative	112 (0.36%)	94
<b>Total</b>	<b>30,862</b>	<b>25,795</b>
<b>Total Number of Judges</b>	<b>500</b>	<b>500</b>
<b>Average Caseload/Month</b>	<b>5.14</b>	<b>4.30</b>

<sup>a</sup>*Report at the Eighth Meeting, supra note 29, at 23.*

**Table 5: People's Court of Hue**

	<b><u>Statistics, Jan-June 2001<sup>a</sup></u></b>	
	<b><u>Cases Completed</u></b>	<b><u>Cases Received</u></b>
Criminal	67	82
<i>Appeals Requested</i>		6
Civil	56	115
<i>Pre-trial Settlements</i>	11	
Family	140	231
Administrative	2	6
Other		1
<b>Total</b>	<b>235</b>	<b>435</b>
<b>Total Number of Judges</b>	<b>7</b>	<b>7</b>
<b>Average Caseload/Month</b>	<b>5.6</b>	<b>10.35</b>

**Table 6: Ca Mau Province**

	<b><u>Statistics, Jan-June 2001<sup>b</sup></u></b>	
	<b><u>Case Resolved</u></b>	<b><u>Cases Received</u></b>
Provincial Level	235	319
	53.5%	58.2%
County Level	204	229
	46.5%	41.8%
<b>Total</b>	<b>439</b>	<b>548</b>
<b>Total Number of Judges</b>	<b>29</b>	<b>29<sup>c</sup></b>
<b>Average Caseload/Month</b>	<b>2.5</b>	<b>3.1</b>

<sup>a</sup> TAND Thanh Pho Hue: So Ket Hoat Dong Xet Xu 6 Thang Dau Nam [Hue City People's Court: Summary of Activities for First Six Months of the Year], Phap Luat, July 14, 2001, at 1.

<sup>b</sup> Ca Mau: Co Nhieu Tien Bo Trong Viec Xet Xu An Hinh Su, Dan Su [Ca Mau: Many Improvements in Dealing with Criminal and Civil Cases], Phap Luat, July 13, 2001, at 5.

<sup>c</sup> There are also 38 members of the local bar in Ca Mau Province. Telephone Interview with representative of the Cau Mau Province Department of Justice (July 18, 2001).

The Supreme Court has voiced a complaint to the National Assembly on an annual basis that it lacks judges for the system. Given the apparently low rate of cases handled per month per judge, it does not appear, at first glance, that this claim is well founded. Rather, it seems that the allocation of judges is not in balance with the workload, so that there are judges in some parts of the country who are overloaded with cases, while there are judges in other parts of the country with little to do. Of the 5,406 judges in Vietnam only 500, or 9%, are in Ho Chi Minh City while that city accounts for 21% of all court activity. At the same time, there are provinces where, for example, no economic cases were heard at all during 2000.<sup>42</sup>

During the most recent National Assembly session, deputies were asked to vote on a reform of the criminal law that would increase the number of potential cases that might be heard in district and county levels. Under existing rules, cases with potential jail terms of more than 7 years are heard first at the provincial level. District level courts are only allowed to hear cases where the maximum possible penalty is less than 7 years. Under the proposal, district level courts would be the court of first instance for all criminal cases where the maximum possible jail term is 15 years. Deputies expressed vocal disbelief that increasing the caseload of the lower courts would resolve the national backlog that the Supreme Court has complained about. The identified backlog is mostly for appeals and not for cases of first instance at the provincial level. Some deputies expressed a concern that such a reform might well reduce the backlog at the Supreme People's Court, but then create a larger volume of appeals at the provincial level as county judges are not generally well-trained and might not even be capable of correctly handling complex cases. The proposed reform to the Criminal Law was ultimately tabled by the Standing Committee of the National Assembly and not brought to a vote.<sup>43</sup>

## 2. Judicial Independence

The administrative structure and the unspoken role of the Communist Party ensure that to the degree to which there is judicial

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<sup>42</sup> Report at the Eighth Meeting, *supra* note 29, at 23.

<sup>43</sup> In the alternative, the Chief Judge asked for 20 more judges for the Supreme Court to eliminate its backlog. This alternative was also rejected. See: *Chua Thong Qua Luat Sua Doi Bo Sung Mot So Dieu Cua Bo Luat To Tung Hinh Su [Amendments to the Criminal Law Not Yet Passed]*, SAIGON GIAI PHONG, June 12, 2001, at 1; *Frank and Democratic Discussion*, *supra* note 39, at 1.

independence, particularly at the local level, it is more form than function.<sup>44</sup> There are many potential levers of influence over the outcome of proceedings. The administrative structure governing judges ensures that in necessary cases, judges can be influenced. Judges are very sensitive to the precariousness of their positions. Unlike most civil servants who enjoy quasi-lifelong appointments, judges are limited to five-year terms.<sup>45</sup> Particularly at the provincial level, 'uncooperative' judges can find themselves without an appointment at the end of their five-year term. Alternatively, judges that rack up large numbers of citizen complaints can find it difficult to acquire a reappointment at the end of their five-year term.

Through the reappointment process, the local political establishment has leverage to indirectly influence judges. At the end of the five-year appointment, each judge is required to submit a petition for re-employment. A committee, including representatives of various government departments, the People's Council, and the People's Court, reviews the petitions and makes recommendations to the People's Council, which then reappoints judges for an additional five year term.<sup>46</sup> As in most other decision making bodies in Vietnam, the Reappointment Committee runs by consensus. This creates ample opportunity for local government to stop appointments should it feel the need. The incentive for local and provincial judges to be sensitive to the needs of local government opinion with regard to cases of interest is, as a result, high.

Local commentators have noted that the rapid development of new laws and government regulations and the still bureaucratic nature of governance often leave judges in the dark as to the current status of the law and regulations. As a result, when faced with unfamiliar cases and new situations, judges tend to defer to the provincial or national governments, often seeking an informal opinion on the state of the law.<sup>47</sup> Where the government is a mere disinterested observer, asking for the opinion of the government might not be so critical. Where the local government has an obvious stake in the outcome (for example, in a commercial dispute involving a provincially-owned state enterprise),

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<sup>44</sup> During an interview, the Communist Party Chief of Thanh Hoa Province makes it clear that instructions to the judiciary for pursuing a corruption case originate from his office. *Thanh Hoa Co Kien Quyet Xu Ly Vu An Kinh Te Lon Nhat Tu Truoc Toi Nay Cua Tinh?* [Can Thanh Hoa Province Forcefully Prosecute Its Largest Ever Economic Crime?], PHAP LUAT, July 16, 2001, at 1.

<sup>45</sup> *Phap Lenh Ve Tham Phan va Hoi Tham Toa An Nhan Dan* [Ordinance Regarding Judges and the People's Jury], No. 16 L/CTN, ch. 3, art 19 (May 26, 1993).

<sup>46</sup> Information on the reappointment process was provided by Chief Judge Tho. Interview with Pham Xuan Tho, *supra* note 37.

<sup>47</sup> Tran Quoc, *Please All Rise for the Honourable Judge*, VIETNAM INVESTMENT REVIEW, Nov. 9, 1998 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

however, its interpretation of the current state of the law becomes less credible.

While the previous discussion focuses on judges at the provincial and district levels, the same incentives face judges at the central level as well. Even at the national level, there is recognition that judicial independence is non-existent, at least in the way it is defined in the West.<sup>48</sup> At a recent meeting of the National Assembly, deputies questioned the Chief Judge of the Supreme People's Court about the quality of the management and judicial knowledge of the lower courts. The Chief Judge responded by referring the deputies to the Ministry of Justice since the "Supreme People's Court does not manage the Provincial People's Courts."<sup>49</sup>

### B. *People's Office of Supervision and Control*

The People's Office of Supervision and Control, or the People's Prosecutor, is the agency designated with the task of carrying out public prosecutions, including regulating and limiting the power of the government. The People's Prosecutor is administratively distinct from the Ministry of Justice and reports to the National Assembly on a semi-annual basis.<sup>50</sup> In theory, the People's Prosecutor is independent of the Ministry of Justice; in practice, the distinction between the two is much less clear, particularly as one moves to the local level.

The People's Prosecutor has very broad powers of investigation. The People's Prosecutor has a mandate to investigate any matter before the courts, any governmental activity and any private activity where it believes there might be some violation of the law.<sup>51</sup> This has at times resulted in the 'criminalization' of common civil matters and the criminal prosecution of parties to civil disputes and is likely part of the reason why

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<sup>48</sup> Bergling quotes former Vice Chairman for the National Assembly Phung Van Tuu as arguing that "in order to ensure an efficient reform of the judicial agencies, the pivotal thing is to further enhance the Party's leadership over the judicial agencies in all domains: policy making, trial, [and] the assignment of cadres." BERGLING, *supra* note 8, at 140.

<sup>49</sup> *Toa Toi Cao Thuong Xuyen Bi Ton Khoang 2,000 An [Supreme Court Has Continuing Backlog of Around 2,000 Cases]*, TUOI TRE, June 19, 2001, at 3.

<sup>50</sup> *Hien Phap Nuoc Cong Hoa Xa Hoi Chu Nghia Vietnam 1992 [Constitution of the Socialist Republic of Vietnam 1992]*, No. 68 LCT/HDNN8, ch. X, art. 139 (Apr. 18, 1992). The formal English translation for *Vien Kiem Sat Nhan Dan* is the Supreme People's Procuracy. According to BLACK'S LAW DICTIONARY, a Procurator is ... "4) one who represents a religious society in its legal matters." Rather than repeat the use this term, I have used the more common Prosecutor, which is likely closer than Procurator to the actual function of the *Vien Kiem Sat Nhan Dan*.

<sup>51</sup> *Id.*, ch. X, art. 137.

businessmen seek to avoid bringing disputes to the courts.<sup>52</sup> McMillan reports that businessmen state the opinion that bringing cases to courts involves the authorities and “creates problems for [them] rather than support [them].”<sup>53</sup>

The People’s Prosecutor has the prerogative to participate in any part of judicial proceedings with the exception of settlement conferences. Usually, its participation involves a review of the case file and listening to evidence and argument. At the conclusion of the argument by both sides, the Prosecutor will make a recommendation to the trial judge about the resolution of the dispute. Where there are questions of criminal wrongdoing raised by the proceeding, the Prosecutor has the right to refer parts of the case to the criminal court for resolution.<sup>54</sup> Of the ten civil cases observed by the author in July 2001, the Prosecutor was present at all but one case.

The broad ranging powers of the People’s Prosecutor do not stop at the investigation of civil disputes. Because it can participate in all civil and administrative disputes before the courts, the Prosecutor’s Office can wield very strong powers of persuasion against a particular party from pursuing further appeals, often issuing legal opinions to concerned parties that further appeals would be groundless or not successful.<sup>55</sup>

The Prosecutor’s Office is also assigned the power of review of government actions. This power extends to reviewing all government decrees and regulations for their legality, something akin to the process of judicial review in the United States. Where the Office is able to identify potentially illegal actions or practices undertaken by state agencies, the Office can issue instructions and orders to those offices to stop illegal activities and to amend practices that are deemed illegal.<sup>56</sup> This review can take the form of an instruction to rescind or amend policies or actions deemed illegal with an accompanying threat to pursue prosecution should the local authorities not comply. In practice, this has meant that the

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<sup>52</sup> For examples of criminal prosecutions of parties to civil disputes see: *Ngươi Bị Hại Có Được Bồi Thuong?* [Will Those Who Have Been Injured Be Compensated?], NGUOI LAO DONG, June 12, 2001 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>53</sup> John McMillan and Christopher Woodruff, *Dispute Prevention Without Courts in Vietnam*, 15 J L ECON & ORG 637, 641 (1999).

<sup>54</sup> For description of the role of the prosecutor in both criminal and civil trials, see *Luật Tổ Chức Viện Kiểm Sát Nhân Dân* [Law of the Organization of the People’s Prosecutor], No. 03 L/CTH, ch. 4 (Oct. 10, 1992) and Interview with Pham Xuan Tho, *supra* note 37.

<sup>55</sup> This power of persuasion can often be used to protect parochial ends. See *Phải Chưa Còn Có Nhung Đồng Minh Giấu Mặt?* [Are There Still Some Allies Hiding Their Faces?], PHAP LUAT, July 23, 2001, at 9.

<sup>56</sup> *Luật Tổ Chức Viện Kiểm Sát Nhân Dân* [Law of the Organization of the People’s Prosecutor], No. 03 L/CTH, ch. 2, art. 8-10 (Oct. 10, 1992). See also *Quốc hội Phải Làm Chức Nang Chính Là Lập Pháp* [National Assembly Must Write the Laws], TUOI TRE, June 21, 2001, at 1.



Prosecutor's Office reviews government decisions and policies at all levels for their correctness in relation to the law. Rather than actually pursue prosecutions, the Prosecutor's Office will negotiate with local administrative agencies to reach a conclusion that it can justify as complying with the letter of the law or regulation.

For example, in an attempt to more effectively manage the resolution of citizen complaints, the Mayor of Ho Chi Minh City recently delegated the authority to resolve citizen complaints to the office of the Inspector General's Office. The People's Prosecutor Office soon issued an opinion that the mayor could only delegate individual cases for resolution, not delegate authority to resolve all cases.<sup>57</sup> In another example of how this power can be used, the Prosecutor's Office in Gia Lai Province reviewed 270 provincial government decisions and policies and found 86 of them to be in violation of existing law. The Prosecutor's Office ordered the offending policies and decisions rescinded.<sup>58</sup> This order was then followed by a series of negotiations between the city administration and the Prosecutor's Office in an attempt to find a solution.

### 1. Prosecutorial Independence

With such potentially wide-ranging powers, one might expect that the People's Prosecutor would play a more important role in governance. However, like the judiciary, the formal independence of the prosecutor's office can be eroded. The Prosecutor Office is similar to the People's Court in that it has both vertical and horizontal reporting requirements. Horizontally, provincial and local prosecutors must report to local People's Councils. Also, similar to the People's Courts, budgets and personnel decisions at the provincial level are shared between the local Departments of Justice and the People's Prosecutor in Hanoi.<sup>59</sup> This creates almost a double horizontal reporting requirement that can act to constrain zealous prosecutors. Prosecutors, like judges, also face a five-year limit on their term of office.<sup>60</sup> The term limitation and the reappointment process also act to constrain prosecutors who might

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<sup>57</sup> *De Nghi Bai Bo Mot So Noi Dung Trong Vice Uy Quyen Giai Quyet Khieu Nai [Recommendation to Change Some Methods for Delegating the Resolution of Complaints]*, SAIGON GIAI PHONG, June 3, 2001, at p. 5.

<sup>58</sup> *Nhieu Van Ban Sai Pham Da Duoc Huy Bo [Many Incorrect Documents Are Rescinded]*, PHAP LUAT, July 27, 2001, at 1.

<sup>59</sup> *Luat To Chuc Vien Kiem Sat Nhan Dan [Law on the Organization of the People's Office of Supervision]*, No. 031/CTN, ch. 7, art. 35 (Oct. 10, 1992).

<sup>60</sup> *Id.*, ch. I art. 7.

otherwise attempt to undermine the official power structure through their investigatory powers.

Nevertheless, the increasing breadth of activities of the People's Prosecutor have become the subject of a significant amount of public discussion as to whether or not the Prosecutor's broad ranging powers should be curbed in the future. It is possible that in the near future, as part of a pending constitutional amendment, that the People's Prosecutor will find its power to investigate and pass on government action limited or reduced in a significant way.<sup>61</sup>

### C. *Ministry of Justice - Government*

As part of the government, the Ministry of Justice is distinct from either the People's Court or the Prosecutor Office. The Ministry of Justice is in a minor position relative to the two constitutional bodies of the People's Court and the People's Prosecutor. However, in terms of administrative competence, the Ministry of Justice is responsible for managing and budgeting all of the People's Courts.<sup>62</sup> Below the national level, the division between the government and the judiciary quickly begins to disappear as the responsibilities for budgeting and management of the courts and the procuracy fall more clearly into the sphere of the provincial Departments of Justice. At the provincial level the tensions between vertical and horizontal relationships (between the central government's Ministry of Justice and the provincial governments) become apparent.

In the Vietnamese bureaucratic system, the control over provincial operations is mostly delegated by the provincial governments, with local Departments of Justice maintaining only a formal reporting relationship with the Ministry. Personnel and budgetary matters lie largely within the prerogative of the provincial governments.

While the budgeting of the Supreme People's Court and the State Prosecutor's Office is undertaken directly by the National Assembly, budgeting for the Provincial People's Courts and Provincial State Prosecutor's office is undertaken by the local Departments of Justice through the provincial governments. While both of these organizations are theoretically independent of the government, lack of administrative capacity requires both of these organizations to rely on local government for access to the financial resources required to undertake their day-to-day

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<sup>61</sup> *Quoc hoi Phai Lam Chuc Nang Chinh La Lap Phap [National Assembly Must Write the Laws]*, TUOI TRE, June 21, 2001, at 1.

<sup>62</sup> *Luat To Chuc Toa An Nhan Dan [Law on the Organization of the People's Courts]*, No. 02L/CTN, ch. 1, art. 16 (Oct. 10, 1992).

activities. As a result, these organizations are sensitive to the concerns of local governments.

The local governments and Departments of Justice maintain significant control over the judiciary and judicial appointments. While lists of potential appointees to the Supreme People's Court are drawn up by the Standing Committee of the National Assembly, they must be approved by a committee, including representatives of the Ministry of Justice, the Ministry of Defense,<sup>63</sup> the Fatherland Front,<sup>64</sup> and the Bar Association.<sup>65</sup> At the provincial level, the Minister of Justice, on the advice of the local director of the Department of Justice, is responsible for nominating judges to a similar committee. At the district and county levels, the head of provincial local Department of Justice is responsible for nominating judges.<sup>66</sup> The same committee must approve reappointments of judges after five years.

Control over the courts is not limited to the budgetary processes and selection of judges. Local Party Committees and provincial governments can have significant influence over the outcomes of particular cases. Judges serve together with 'citizen jurors' on a panel, typically consisting of one professional judge and two jurors for criminal trials in the first instance. Juries, the professional judges together with the 'citizen jurors,' must decide cases based upon a majority vote. The Fatherland Front, a Communist Party front organization, selects the 'citizen jurors' to participate on the panels. The selection criteria for the Fatherland Front are political loyalty and reliability.<sup>67</sup> The majority of 'citizen jurors' are nominated by a Communist Party front organization, effectively giving the Party the ability to control outcomes in cases in which it has a strong interest.

As a result, the potential for real judicial independence is effectively minimized and power is moved from the courts to the Ministry of Justice, the provincial governments, and the Communist Party. Where provincial governments have substantial commercial interests before the courts, the alignment of interests behind the provincial governments calls

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<sup>63</sup> The Ministry of Defense is consulted directly with regard to the selection of Military judges for the Military tribunals, which fall under the supervision of the Supreme People's Court.

<sup>64</sup> The Fatherland Front is a Communist Party front organization. In addition to organizing various grassroots groups, the Fatherland Front is responsible for vetting candidates to the National Assembly.

<sup>65</sup> The Bar Association is organized on a provincial level with a national coordinating body. Membership to the bar is highly restricted. *Phap Lenh Ve Tham Phan va Hoi Tham Toa An Nhan Dan* [Ordinance Regarding Judges and the People's Jury], No. 16 L/CTN, ch. 3, art 21 (May 26, 1993).

<sup>66</sup> *Id.*, ch. 3, art. 22-23.

<sup>67</sup> *Id.*, ch. 4, art. 29-30.

into question whether and how parties can seek adequate resolution of their disputes in the provincial courts.

### 1. Enforcement of Judgments

The enforcement of civil judgments is an issue of concern in the context of legal reform in Vietnam, more so when it exposes the tensions between provincial governments and the central government. The procedures set in place to ensure the enforcement of judgments, on their face, seem not that different from those used in a number of countries, including the United States. However, it is interaction of the procedures with the local administrative structures where the stresses between the vertical and horizontal reporting structures common in socialist countries are most obvious. In answering a question before the National Assembly about the enforcement of judgments, Ha Minh Tri, Vietnam's Chief Prosecutor said:

The enforcement of civil judgments in the past has always been closely monitored and undertaken in a timely fashion. Of course, there are some cases related to provincial People's Committees [provincial government executive bodies] where judgments have not been enforced because the Province has a particular opinion about the judgment. With regard to the cases where Provincial governments have particular opinions, the State Prosecutor's Office has researched the files and quickly given clear instructions to the local People's Committees. It's a shame that some Provincial People's Committees, after having received our instructions, and also instructions from the Supreme People's Court, that the People's Committees must enforce these judgments according to the law, that they do not enforce them. The State Prosecutor's Office sees clearly that Provincial People's Committees must be more serious, must better coordinate and support the enforcement of judgments.<sup>68</sup>

The tensions between local government players and central government players cause enforcement of judgments to run into difficulty. As a result, the ratio of judgments that are enforced is low. According to statistics from the Ministry of Justice's Department of Enforcement, some 37% of judgments in civil cases are, for one reason or another, unenforceable.<sup>69</sup> The experience of Hai Duong Province in northern Vietnam seems to be typical. Over the first six months of 2001,

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<sup>68</sup> Ha Manh Tri VKSNDTC Tra Loi Chat Van Dai Bieu [Ha Minh Tri, State Prosecutor's Office Answers the Questions of Deputies], PHAP LUAT, July 20, 2001, at 5.

<sup>69</sup> Ha Anh, Co Cach Nao De Dam Bao Thi Hanh An? [Is There Any Way to Guarantee Enforcement of Orders?], PHAP LUAT, July 4, 2001, at 5.

it enforced only 18% of the outstanding orders in the jurisdictions. The rest were described as “complicated” and were not enforced.<sup>70</sup>

The Ministry of Justice, through the provincial departments of justice, is responsible for enforcing judicial decisions. The provincial Departments of Justice have dual reporting functions. The first loyalty of the provincial department of justice, particularly at its higher levels is to the local Provincial People’s Committees. The local governments are responsible for budgetary support, personnel, and facilities for the Department of Justice. The positions of director and vice director of the department must be approved by the local Personnel and Organization Department as well as the Provincial Communist Party cell. The Ministry of Justice provides only guidelines and general instructions down to the provincial level. Departments of Justice are required to provide reporting data on a monthly basis to both the local government and the Ministry of Justice. Each Provincial Department of Justice has an Enforcement Office that reports, through its director, both horizontally to the Provincial People’s Committee and vertically to the Ministry of Justice’s Department of Enforcement.

Some commentators have observed that the national court system might potentially create a strong framework for the enforcement of judicial decisions. For example, Bergling notes that, in theory, a court in Hue could issue a judgment against a company in Ho Chi Minh City, thereby creating a potentially strong national judiciary.<sup>71</sup>

While the jurisdiction of the People’s Court judgments are national, the fact that enforcement of decisions falls under the rubric of local governments weakens the People’s Court’s ability to develop a strong national court system.<sup>72</sup> In practice, the decision to actually enforce a judgment is left to the local government in the jurisdiction where the company finds itself. The stress placed on enforcement officers to seek ‘voluntary enforcement’ can mean slow going for enforcement efforts when faced with a provincial government that is determined not to make payment.<sup>73</sup>

In the Vietnamese bureaucratic system, Provincial Governors and Ministers hold equivalent rank. Provincial governments and ministries also rank equally. This bureaucratic equality gives local governments

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<sup>70</sup> Hai Duong Province reported enforcement of 1008 of 5474 outstanding judicial orders. See *Hai Duong: So Ket Cong Tac Thi Hanh An Dan Su 6 Thang Dau Nam [Hai Duong: Review of Civil Enforcement in the First Six Months of the Year]* PHAP LUAT, July 27, 2001, at 5.

<sup>71</sup> BERGLING, *supra* note 8, at 132-133.

<sup>72</sup> *Phap Lenh Thi Hanh An Dan Su [Ordinance on Enforcement of Civil Judgments]*, No. 13 L/CTN, ch. 2, art. 12-17 (Apr. 26, 1994).

<sup>73</sup> Thuy notes that voluntary enforcement is the preferred method of enforcement. See Nguyen, *supra* Table 1 note a, at 23.

ample opportunity to thwart enforcement against favored firms. The Ministry of Justice in its capacity as the Ministry of record (*Bo chu quan*) is able to exert only limited authority over a provincial government that is determined not to be bound by a decision. The authority of the Ministry of Justice seems to be particularly limited where the local party is a favored state enterprise. In many cases, if the Ministry of Justice can only request that the local government give enforcement of judicial orders due 'consideration' (*quan tam*).

In a commercial dispute between a private company and the Phu Tho Trading Company, a provincial state company, a \$15,000 outstanding enforcement order was left open for more than two years. In 1999, the Department of Judicial Enforcement at the Ministry of Justice sent official correspondence to the governor of the province asking for his assistance in enforcing this order against the Phu Tho Trading Company. Through a variety of delaying tactics, the provincial government has succeeded in preventing enforcement of the order.<sup>74</sup> A common delaying tactic is to take advantage of the non-voluntary enforcement process. Before undertaking non-voluntary enforcement, an Appraisal Committee, including representatives from the local government's Department of Finance and the department of record for the economic sector in question, must meet in order to determine a valuation for the assets of the party against whom there is a judgment. A local government can thwart enforcement simply by not sending representatives to participate in the committee. Should the local government participate in an Appraisal Committee it can reach the same result by undervaluing the assets of the local party in which it has an interest.<sup>75</sup>

The enforcement situation is made more difficult by the process. Rather than being automatically enforcing, the process requires that the party with the order attempt voluntary enforcement without outside intervention. Should that fail, a party with a judicial order may then petition the local Enforcement Office of the local Department of Justice for assistance in enforcing the judgment.<sup>76</sup>

Even at the enforcement stage, there are still avenues for appeal that can slow the process down further. For example, after a judgment has been ordered by the courts and the plaintiff has filed the petition for enforcement with the local Department of Justice, the defendant has the

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<sup>74</sup> *Phai Chang Con Co Nhung Dong Minh Giau Mat? [Are There Still Some Allies Hiding Their Faces?]*, PHAP LUAT, July 23, 2001, at 9.

<sup>75</sup> For a description of the Appraisal Committee, see *Phap Lenh Thi Hanh An Dan Su [Ordinance on Enforcement of Civil Judgments]*, No. 13 L/CTN, ch. 4, art. 31 (Apr. 26, 1994).

<sup>76</sup> *Id.*, ch. 3, art. 18-19.

right to appeal the enforcement order to the local Department of Justice and then to the local People's Committee.<sup>77</sup>

While, in theory, the petition should be accepted and the judgment enforced, there remains significant local discretion with regard to enforcement. This discretion is, however, extralegal and typically does not result in a resolution or written document from the enforcement agency. Rather, the request to enforce may 'disappear,' or there may be an order from the local government not to enforce.

A typical example of a 'complicated' case is that of the Thanh Hoa Border Trading Company. The Thanh Hoa Border Trading Company became involved in a contractual dispute with the Thanh Ha Hanoi Trading Company in 1995. The Thanh Hoa Border Trading Company is a state-owned enterprise from Thanh Hoa Province and the Thanh Ha Hanoi Trading Company is a private trading company based 400 km away in Hanoi. The case went to the People's Court of Thanh Hoa Province where a judgment for nearly \$100,000 was issued in favor of Thanh Ha Hanoi. Thanh Hoa Border Trading refused to pay the judgment and the local Department of Justice never pursued enforcement. Thanh Ha Hanoi appealed directly to the Ministry of Justice for assistance. The Ministry of Justice ultimately sent a delegation headed by a Vice Minister to call on the People's Committee of Thanh Hoa Province to enforce the order. As of 2001, six years after the judgment, it has yet to be enforced.<sup>78</sup>

In another similar case, also in 1995, a foreign businessman successfully sued a state-owned enterprise in Khanh Hoa Province on the south-central coast. Although there were interventions from the Supreme Court in Hanoi, the State Prosecutor's Office, and even from the Enforcement Office of Ho Chi Minh City's Department of Justice on behalf of the investor, the People's Committee of Khanh Hoa Province refused to enforce the \$50,000 judgment against its own company.<sup>79</sup>

These cases represent what is recognized by many within the government as a common response at the local level to judgments made against favored local firms. They also highlight a serious deficiency in the bureaucratic and legal systems in Vietnam that inhibits the development of a stronger judiciary. So long as judicial orders are treated as advisory, parties to disputes will be required to seek alternate non-judicial avenues for resolution.

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<sup>77</sup> *Id.*, ch. 5, art. 44.2.

<sup>78</sup> *Nhung Ban An "Troi" Tren Cap Treo [The Cases Stuck in the "Sky"]*, PHAP LUAT, July 20, 2001, at 1.

<sup>79</sup> *Id.*

#### D. Arbitration Centers

In addition to the formal court system there are a number of official arbitration bodies sanctioned by the government. The five arbitration centers presently licensed in Vietnam are the Vietnam International Arbitration Center (VIAC), the Saigon Economic Arbitration Center (SACENT), two centers in Hanoi, and one in rural Bac Giang province in the north.<sup>80</sup> Arbitration centers, distinctly different from the Economic Arbitration Centers operated during central planning, were established in response to demand from foreign investors seeking an alternative to the domestic courts. The VIAC, an arm of the Vietnam Chamber of Commerce and Industry, was established in 1993 to handle commercial disputes between Vietnamese and foreign parties. As such the VIAC is recognized by the government as an "International Arbitration Body."<sup>81</sup> The Saigon Economic Arbitration Center was established in 1997 in the country's commercial capital to handle disputes primarily between Vietnamese parties.<sup>82</sup>

Arbitration is an example of the contradictions in the Vietnamese legal system that has been the focus of complaints by observers both in and out for years. On the one hand, the government decree that established the Economic Arbitration Centers in 1992 makes it clear that "decisions of resolution of disputes of the Economic Arbitration Centers are effectively binding and may not be appealed."<sup>83</sup> On the other hand, the same decree allows, "where an arbitral award is not respected by one party, the other party may petition the court of competent jurisdiction to resolve [the dispute] in accordance with the procedures for resolution of economic cases."<sup>84</sup> That is to say, if a party to the dispute disagrees with the outcome of arbitration, he has a right to take the dispute to the courts for further hearing.

Enforcement powers of the arbitration body are left ambiguous in the government decree establishing the centers. Effective enforcement of arbitral awards is hampered further by a refusal by local enforcement

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<sup>80</sup> Nguyen Hong, *And the Winner Here Is ... Everyone Here*, VIETNAM INVESTMENT REVIEW, Aug. 30, 1999 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>81</sup> Vietnam is a signatory to the New York Convention. VIAC was afforded the special position of International Arbitration Center when it was established by Government Decision No 204/TTg dated April 28, 1993. The VIAC replaced all other arbitration bodies existing at the time. For a summary of this decision, see *Arbitration Forum to Resolve Civil Disputes*, VIETNAM INVESTMENT REVIEW, Aug. 31, 1998 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>82</sup> Interview with SACENT staff, in Ho Chi Minh City, Vietnam (July 27, 2001).

<sup>83</sup> *Nghi Dinh cua Chinh Phu So 116/CP Ve To Chuc va Hoat Dong cua Trong Tai Kinh Te [Government Decision No. 116/CP Regarding the Organization and Operation of Economic Arbitrators]*, No. 116/CP, ch. 1, art. 5 (Sept. 30, 1992).

<sup>84</sup> *Id.*, ch. 3, art. 31.



officials to recognize arbitral awards as anything other than advisory.<sup>85</sup> The *Ordinance on Enforcement of Civil Judgments* clearly spells out the responsibilities of enforcement personnel: They are required to carry out enforcement of civil judgments of the courts. The ordinance makes no mention of arbitral bodies.<sup>86</sup> One judge noted that while there was a government directive establishing arbitration centers, the government neglected to establish a process by which arbitration awards can be accepted by the courts.<sup>87</sup>

These loopholes, or lack of regulatory guidance, effectively emasculate the Arbitration Centers as effective dispute resolution bodies. Voluntary enforcement of decisions has resulted in arbitrators viewing their role as primarily that of a mediator rather than a judge.<sup>88</sup> In practice, nearly all disputes in arbitration where one side does not accept the decision of the arbitrator end up going to court for resolution.<sup>89</sup>

Because of its special status as an "international arbitration center," the effectiveness of VIAC decisions is more limited than that of other arbitration centers. Vietnamese courts routinely refuse to hear appeals from VIAC decisions, stating that as an "international arbitration center" its decisions are final and cannot be reviewed by a Vietnamese court.<sup>90</sup> Decisions of the VIAC are trapped in an odd *Catch-22*: no appeal allowed in the courts and no effective means of enforcing its own order. This situation takes away any threat of enforcement and means that the disputes that end up in Vietnam's largest arbitral body entirely can be resolved only on a voluntary basis. Decisions of 'domestic' arbitration bodies, on the other hand, can be appealed in the courts. Review by the courts, at least, leaves open an avenue for resolution of the case through the courts when arbitration proves ineffective.

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<sup>85</sup> Interview with Ho Quang Nghia, Arbitration Judge, in Ho Chi Minh City, Vietnam (July 27, 2001); Interview with Pham Xuan Tho, *supra* note 37.

<sup>86</sup> *Phap Lenh Thi Hanh An Dan Su [Ordinance on Enforcement of Civil Judgments]*, No. 13 L/CTN, ch. 2, art. 14 (Apr. 26, 1994).

<sup>87</sup> Interview with Phan Tanh, *supra* note 26. See also Nguyen, *supra* Table 1 note a, at 12-13.

<sup>88</sup> Judges freely accept that enforcement of arbitration awards in Vietnam is strictly voluntary. This forces judges to come up with decisions, not necessarily based in the law, that will be acceptable to both sides. Interview with Ho Quang Nghia, *supra* note 85.

<sup>89</sup> SACENT staff offered an example of a 2000 case. The case was brought by two parties to a construction contract. The plaintiff owner of the home made nearly 100% payment to the builder, but the defendant builder had failed to make any progress on construction of the home. At arbitration, both sides agreed to a voluntary settlement in which the plaintiff would make certain further payments and the builder would complete construction of the home. After the resolution, the builder failed to make any progress on building the home and the plaintiff owner failed to make any further payments. This case has moved into the court system where it will be tried again. Interview with SACENT staff, *supra* note 82.

<sup>90</sup> Interview with Ho Quang Nghia, *supra* note 85.

Given its lack of effectiveness, to no one's surprise, relatively few cases end up at Arbitration Centers for resolution. In the words of an arbitration judge, they are often seen as an "unnecessary extra step" in the process of resolving commercial disputes.<sup>91</sup> The Saigon Arbitration Center (SACENT), one of two arbitration centers in Ho Chi Minh City, handles only 5 cases annually. During the period, 1993-1999, the VIAC, with centers in Hanoi and Ho Chi Minh City handled only 99 cases – or 8 cases per center per year. Ultimately, one third of these cases brought to the VIAC during the period 1993-1999 ended up being challenged further in the courts<sup>92</sup> with the courts routinely refusing to hear any of them.

These structural defects make the arbitration process in Vietnam unattractive to businesses looking for non-judicial ways to settle disputes. As a result, arbitrators have developed a different understanding of their own job. Rather than make rulings on the facts and the law, arbitration judges make no effort to mask that they are undertaking mediation exercises. The inability of the arbitration to result in effective decisions means that for the center to become a relevant part of the resolution of commercial disputes, they must be able to fashion effective, voluntary settlements between parties.

Curiously, the defects associated with the Arbitration Centers are common knowledge throughout the system, as the possible remedies that might be taken to improve the workings of the centers. Nevertheless, the defects persist with little sign that the National Assembly or Government will take the steps necessary to address them.

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<sup>91</sup> *Id.*

<sup>92</sup> Vu Thuy Huong, *Legislative Prejudice Hampers Arbitration Process*, VIETNAM INVESTMENT REVIEW, Feb. 14, 2000 (Vietnam Investment Database CD-ROM, rel. Aug. 2001), *Arbitration Forum to Resolve Civil Disputes*, VIETNAM INVESTMENT REVIEW, Aug. 31, 1998 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

Table 7: Saigon Arbitration Center Disputes Handled 1998-2001<sup>a</sup>

Cases	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>
	4	6	5 <sup>b</sup>	5*

\*SACENT Estimate

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<sup>a</sup> Interview with SACENT staff, *supra* note 94.  
<sup>b</sup> In 2000, two cases were related to construction contracts and three related to commercial contracts. The value of the disputes ranged from VND300 million to VND13 billion (\$20,000 to \$850,000). *Id.*

### E. *Local Mediation and Conciliation Bodies*

Throughout Vietnamese legal literature there is an emphasis on mediation and conciliation of disputes.<sup>93</sup> In recognition of the role that local bodies play in resolving disputes, Vietnam has a quasi-formal system of local mediation of disputes.<sup>94</sup> The mediation system is 'formal' in that its role is recognized as important in the day-to-day maintenance of order and the resolution of disputes. It is 'quasi' in that its form and function are extremely flexible, depending on location and circumstances of the dispute. There is no particular form required for the mediation of disputes.

Mediation and conciliation is generally limited to minor family matters, personal disagreements, minor commercial disputes, and minor administrative matters that can be resolved through issuance of a fine. 'Serious' criminal offenses, serious violations of national law, matters involving land disputes, are specifically not to be resolved through a mediation or conciliation process.<sup>95</sup> In practice, however, at the local level mediators resolve issues well beyond their portfolio, including minor land disputes<sup>96</sup> and labor disputes.<sup>97</sup>

Mediation boards are typically made up of members of the neighborhood councils (*to dan pho*), police, district or village People's Committees and the local representatives of the Fatherland Front. As representatives of the state, and also as known local leaders, local mediation boards are often best suited to resolve disputes between parties.

Depending on the circumstances, a dispute can be mediated and a resolution reached verbally, or there can be a more formal hearing of both sides with a written resolution accepted by both sides.<sup>98</sup> It is, in one form,

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<sup>93</sup> See *Luat To Chuc Toa An Nhan Dan* [Law on the Organization of the People's Courts], No. 02/L/CTN, ch. 1, art. 2.2 (Oct. 10, 1992); *Phap Lenh Ve To Chuc va Hoat Dong Hoa Gai o Co So* [Ordinance on the Establishment and Operation of Mediation at the Unit Level], No. 01 L/CTN (Jan. 1, 1999).

<sup>94</sup> *Phap Lenh Ve To Chuc va Hoat Dong Hoa Gai o Co So* [Ordinance on the Organization and Operation of Mediation], No. 01 L/CTN (Jan. 1, 1999).

<sup>95</sup> *Id.*, ch. 1, art. 3.

<sup>96</sup> *To Chuc Tot Viec Hoa Gai* [Good Organization of Mediation] (Ho Chi Minh Television, July 22, 2001).

<sup>97</sup> In the case of labor disputes, the Vietnam Confederation of Labor takes upon itself the role of labor mediator in labor disputes between management and labor unions. See Tran Thi Sanh, *Trade Unions: A New Role in Vietnam*, VIETNAM INVESTMENT REVIEW, Aug. 16, 1993 (Vietnam Investment Database CD-ROM, rel. Aug. 2001); Nguyen Tan Hai, *Settlement of Labor Disputes*, VIETNAM INVESTMENT REVIEW, Sept. 19, 1994 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>98</sup> *Phap Lenh Ve To Chuc va Hoat Dong Hoa Gai o Co So* [Ordinance on the Organization and Operation of Mediation], No. 01 L/CTN, ch. 3, art. 13 (Jan. 1, 1999).

the ultimate codification of the Vietnamese expression, "the king's law stops at the village gate" (*phep vua thua le lang*).

More often than not the process is as simple as two parties in the market disputing the price or quality of a particular product. The mediator, usually known to both sides listens to the argument and then suggests an outcome that might be equitable. A very common alternate scenario involves the police. At the scene of a motor accident, the police will often observe both parties and then suggest a distribution of costs rather than write up traffic tickets and officially document the accident. At the extreme, the police have been known to use their mediating role in criminal offenses.

In the case of deaths the result of seemingly negligent behavior, often related to traffic accidents, the police are known to broker compensation payments between relatives of the deceased and the party charged. In exchange, the criminal charges against the negligent party are not sought.<sup>99</sup>

### III. DISPUTE RESOLUTION

Vietnam, like other formerly-centrally planned economies, has a bureaucratic system that encompasses a series of vertical and horizontal reporting relationships. These overlapping reporting relationships, in theory, allow for the establishment of a single civil service staffed locally, but responsible to the center. The series of vertical reporting relationships were intended to help instill uniformity and more effectively implement the central plan. In fact, rather than a national civil service with the central government reaching vertically down to the lowest levels, what has developed instead are a series of strong provincial governments that compete with the central government for political power.

Civil servants are almost exclusively hired locally. Transfers of personnel from one province to another are almost non-existent and transfers vertically from provincial governments to the central government occur only at the policy level.<sup>100</sup> The result is that in the Vietnamese bureaucratic structure, provincial governments have

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<sup>99</sup> The Year 2000 report to the National Assembly by the Chief Judge of the Supreme People's Court lauds the role of the police in mediating and finding some resolution to criminal activity without going to court through education, restitution, and confessions. For example, in 2000 the police reported uncovering 5,110 smuggling cases. Through mediation and other means, they were able to reduce the number of cases going to court to only 103. See *Report at the Eighth Meeting*, *supra* note 29, at 8-11.

<sup>100</sup> There is a conscious effort to select candidates for the positions of Vice Minister and above, from all three of Vietnam's major regions. The central government civil service tends to be dominated by people from the Hanoi area.

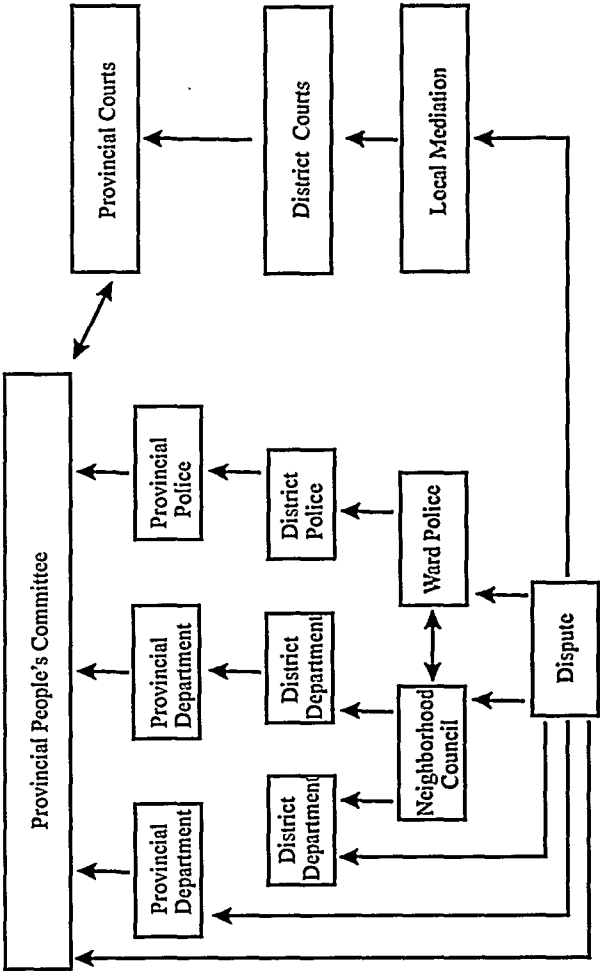
considerable influence over the implementation of legal and economic reforms and considerable latitude in the interpretation of government policy.

The important role of the local government authorities in personnel and budgetary matters as they relate to the Provincial People's Courts and the Provincial State Prosecutors effectively eliminates any notion of independence by these bodies. This will be particularly true when there is a dispute that might involve a local state-owned enterprise.

Prior to the economic reform, the bureaucracy itself was the primary means for the resolution of most disputes. Particular types of cases, for example criminal cases, were settled through the courts. But for the vast majority of civil and commercial disputes local bureaucratic structures like the mediation councils or direct appeal to line departments in the government was the only recognized avenue to resolve disputes. These bureaucratic avenues also had a nearly unending series of possible appeals – to higher levels in the bureaucracy or to other parts of the bureaucracy at the same level.

Local policemen and neighborhood councils (*to dan pho*) held, and in many cases still hold, the authority to resolve disputes between neighbors and over minor land matters. In the alternative, parties to a dispute can petition relevant government departments at the local or provincial levels for assistance in mediating a resolution to a dispute. Parties to the dispute can, and often do, simultaneously petition a variety of potentially friendly departments in order to seek a favorable resolution to a dispute. These petitions can cascade until a relatively minor dispute is pushed to the highest levels of the bureaucracy. While this is occurring, of course, parties are still free to pursue their dispute through the courts. Figure 3 offers a stylized description of the potential avenues for dispute resolution. This figure is quite simple; in reality the number of potential combinations for working oneself through the bureaucracy can be quite large.

Figure 3: Potential Avenues for Dispute Resolution



Before economic reform, commercial disputes involving a state enterprise and the five-year plan would be resolved by the Economic Arbitration Centers. According to Gillespie, the Arbitration Centers handled 3,000 cases in its last year.<sup>101</sup> Following the beginning of economic reform, the Economic Arbitration Centers were no longer adequate to serve the function of resolution of commercial disputes. It was an institution designed to mediate between enterprises in order to assure the fulfillment of the central plan. Without the central plan left to act as a guide, the Economic Arbitration Centers seemed to be unable to play an equivalent role in multi-sectored market economy. As a result, they were abandoned in 1992 when, following amendments to the Constitution, the courts were reorganized.<sup>102</sup>

While there has been significant growth in the usage of the courts since the early 1990's, the number of commercial disputes seems not to have risen to levels that reflect the last years of the Economic Arbitration Centers with only over 1,000 cases heard in the economic courts in 2000. Rather than move into the courts, it seems clear that some portion of commercial disputes have moved into the informal sector.

With the growth of the market economy, reinforced by institutional frameworks that pull power away from the courts, the natural tendency to seek negotiated or mediated settlements has strengthened. Though there has been a doubling in the demand for civil actions in the courts, it seems that a relatively large number of potential commercial disputes have 'disappeared' in the transition to the market. The 'disappearance' of the vast majority of commercial disputes raises questions about how and under what circumstances these potential disputes are ultimately resolved.

The balance of this paper will examine the interaction between the formal system, the bureaucracy and the informal sector in an attempt to illustrate the way civil and commercial disputes are resolved. It appears that in particular types of disputes (though involving state enterprises and property, that parties will turn to the bureaucratic structures to resolve disputes as much as they will the courts. For the most part, the bureaucracies are willing to attempt to resolve disputes brought to them rather than refer them to the courts. What follows is a description of three important types of disputes common in Vietnam today. While they do not represent the entire universe of disputes they are indicative of how the

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<sup>101</sup> John Gillespie, *Insolvency Law in Vietnam*, in *INSOLVENCY LAW IN ASIA* 12 (Roman Tomasic, ed., 2000).

<sup>102</sup> Nguyen, *supra* Table 1 note a, at 8-9.



formal and informal systems tend to deal with some of the more important areas of disputes. These areas of concern are: administrative suits and complaints against government officials, resolution of property disputes and finally the resolution of commercial disputes.

### A. *Administrative Suits*

Though administrative suits still make up a tiny fraction of the court activity, administrative suits and their complement - complaints and denunciations against officials - are rapidly growing in importance. When taken together, the creation of the Administrative Courts in 1995, along with the 1998 *Law on Complaints and Denunciations* and the 1998 *Amended Ordinance on Procedures for Resolving Administrative Cases*, are potentially very important milestones in the transition process. In theory, these laws and institutions create a set of tools that can be used by individuals to restrain the arbitrary power of the state. Though the reality of this goal is still long off, the area deserves attention.

The Vietnamese Constitution established the right, indeed the obligation, of citizens to report improper conduct by officials.<sup>103</sup> Peasants in Vietnam have long made a habit of walking in from the countryside to vent their grievances directly with the highest leadership of the country, by the mid-1990's it was not uncommon to see peasants knocking on the doors of the residences of the Prime Minister or General Secretary in an attempt to get them to personally intervene in their dispute with local officials.<sup>104</sup> Larger demonstrations of peasants in the main cities are not unknown. Illustrative was the live-in demonstration by peasant farmers in front of the Prime Minister's Ho Chi Minh City office in 2000.<sup>105</sup> Of greater concern to the government and the Party are the types of more violent demonstrations against government abuse that sporadically occur throughout the countryside. The peasant uprising in Thai Binh is

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<sup>103</sup> *Hien Phap Nuoc Cong Hoa Xa Hoi Chu Nghia Vietnam 1992 [Constitution of the Socialist Republic of Vietnam 1992]*, No. 68 LCT/HDNN8, ch. 5, art. 74 (Apr. 18, 1992).

<sup>104</sup> Unlike in China, high-level cadres are not assigned special quarters and their addresses and home telephone numbers are routinely published in the white pages of the telephone book. The Prime Minister claimed to be receiving 1.5 kg of complaint mail at his home everyday. See Ha Thang, *Deputies Demand New Voice Under New Complaints Bill*, VIETNAM INVESTMENT REVIEW, May 4, 1998 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>105</sup> Nearly 300 peasant farmers with land complaints camped in the street in downtown Ho Chi Minh City from May 2000 until November 2000. Protestors set up a semi-permanent camp and were well ensconced. Police initially made no active effort to eject the protesters. It is likely that this demonstration would have persisted much longer had US President Clinton not visited Ho Chi Minh City in late November 2000. Just hours prior to his arrival in the city, police and security forces peacefully removed the protesters.

probably the best known of these.<sup>106</sup> But there have been others in Dong Anh (Hanoi)<sup>107</sup>, Dong Nai<sup>108</sup> and more recently in the central highland provinces of Dak Lak and Gia Lai.<sup>109</sup> The common theme throughout all of these demonstrations was the consistent complaint against the arbitrary and improper use of state power at the local level to dispossess peasants of their land. Land and land ownership is a critically important issue. According to official sources, some 50% of the complaints and denunciations received from citizens from 1994 to 1999 were related to land matters.<sup>110</sup> Government and Communist Party responses to these types of disputes tend to walk a fine line. On the one hand, they recognize the serious nature of the complaints. On the other, they are limited by the power of provincial administrations with regard to local affairs. While the central government can persuade and cajole, it often finds it difficult to do more than that when a provincial government is unwilling to cooperate.

In 1991, the government created a complaint procedure to complement the Constitutional right to complain. The 1991 *Law on Complaints and Denunciations* was intended to provide citizens with an avenue for seeking administrative appeals internally. It was formalistic and created a number of loopholes for local officials to suppress and dismiss complaints from the public. In practice, the 1991 *Complaints Law* was routinely ignored. Protests in Thai Binh, Dong Anh and Dong Nai gave impetus to a rewriting of the 1991 law. The 1998 *Law on Complaints and Denunciations* replaced the previous version of the law.<sup>111</sup>

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<sup>106</sup> This dispute is well documented internationally. Land clearance, land compensation and the corruption of local officials were amongst a number of issues that local people raised against county and provincial level governments. See Tran Manh Hung, *Bitter Harvest for Farmers*, VIETNAM INVESTMENT REVIEW, Dec. 29, 1997 (Vietnam Investment Database CD-ROM, rel. Aug. 2001); *Politburo Acts to Safeguard Right of Rural Communities*, VIETNAM INVESTMENT REVIEW, Mar. 9, 1998 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>107</sup> In this case, villagers refused to accept a local government decision to eject the entire population of the village from their land in favor of a foreign-invested company building a golf course. A riot ensued and at least one person was killed by security forces. See *Turf Battle Rages Over Golf*, VIETNAM INVESTMENT REVIEW, Dec. 9, 1996 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>108</sup> In this case, protests erupted along Highway 1 after local government officials decided to convert a number of closed-churches to markets. The churches had been occupied by squatters who demanded compensation. In the end, the churches were returned to religious authorities after negotiation between protestors and representatives from the central government.

<sup>109</sup> Here, competition between upland minority people and lowland migrants over land led to unrest. The minority people claimed that the local governments had been complicit in allowing low-land migrants to occupy minority land. See *Government Consolidates Control in Central Highlands*, NHAN DAN, July 24, 2001, at 1.

<sup>110</sup> Nguyen Hanh, *Land Certification 'Badly Bugged Down'*, VIETNAM INVESTMENT REVIEW, Apr. 19, 1999 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>111</sup> *Luât Khieu Nai, To Cao [Law on Complaints and Denunciations]*, No. 09/1998/QH10 (Dec. 2, 1998).

At approximately the same time as there was movement to create a legal basis for complaints against government officials, the National Assembly made a number of reforms in the court system that might accommodate complaints against government officials acting in violation of the law. In 1995, the *Law on the Organization of the Courts* was amended to add an administrative court to the court system.<sup>112</sup> This new court would hear for the first time suits filed by individuals and enterprises against official government agencies. Prior to that time, any enterprise or individual who felt that administrative bodies had abused their positions of authority causing damage could only be dealt with through the administrative complaint procedures established by the 1991 *Law on Complaints and Denunciations*.

The courts, similar to Administrative Litigation in China<sup>113</sup>, are intended to allow citizens to sue government offices when they feel that government officials have overstepped their authority in a number of areas, including housing and construction disputes, illegal arrest and detention, illegal layoffs, issuance of licenses, illegal confiscation of real estate, illegal assessment of taxes and fees, regarding housing, land use and the assessment of taxes.<sup>114</sup>

While on its face it seems to create ample opportunity for citizens to use the courts to restrain arbitrary government activity, there remain significant filing obstacles that have effectively kept this avenue for redress closed. Most significant are the inconsistencies between the *Ordinance on the Procedures for Resolving Administrative Disputes*<sup>115</sup> and the *Law on Complaints and Denunciations*. Judges not inclined to hear administrative cases can, using the inconsistencies between the laws refuse to hear cases. For example, the *Law on Complaints* requires that a citizen pursue all complaints about government action internally within the administrative bureaucracy and not within the courts. The *Amended Ordinance on Procedures for Resolving Administrative Disputes*, on the other hand, allows cases to enter the courts without having exhausted all internal appeals. So long as there is still a possible avenue of internal

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<sup>112</sup> *Sua Doi, Bo Sung Mot So Dieu cua Luat To Chuc Toa An Nhan Dan [Amendments to the Law on the Organization of the People's Courts]*, No. 43 L/CTN, art. 1, § 3 (Nov. 9, 1995).

<sup>113</sup> The Chinese Administrative Litigation Law was the model adopted for the Vietnamese Administrative Courts. See Uong Chu Luu, *Procedures for Reviewing Administrative Decisions - Administrative Jurisdiction in Vietnam* 11 (1996) (unpublished Research Paper No. 6, on file with Australian International Legal Cooperation Program, Attorney General's Office). For more on the Administrative Litigation Law in China, see generally Susan Finder, *Like Throwing An Egg Against A Stone? Administrative Litigation In The People's Republic Of China*, 3 COLUMBIA J CHINESE L 1, 1989.

<sup>114</sup> *Phap Lenh Thu Tuc Giai Quyet Cac Vu An Hanh Chinh [Ordinance on the Procedures for Resolving Administrative Disputes]*, No. 49 L/CTN, ch. 2, art. 11 (June 3, 1996).

<sup>115</sup> *Id.*

appeal, and there are many, there exists sufficient cause for reluctant judges to dismiss complaints.<sup>116</sup> These internal inconsistencies within the law make it difficult for parties to pursue an administrative case against government officials.

The relatively small number of cases accepted for trial relative to the number of complaints the courts report as having received shows that barriers to entry in the administrative courts remain a major problem. First and foremost, the court defines its jurisdiction very narrowly refusing to accept cases that lie outside its scope.<sup>117</sup>

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<sup>116</sup> *Phap Lenh Sua Doi, Bo Sung Mot So Dieu Cua Phap Lenh Thu Tuc Giai Quyet Cac Vu An Hanh Chinh* [Amended Ordinance on the Procedures for Resolving Administrative Disputes], No. 01/L-CTN, ch. 1, art. 1 (Jan. 5, 1999); *Luat Khieu Nai, To Cao* [Law on Complaints and Denunciations], Dec. 2, 1998, ch. 2, No. 09/1998/QH10. Chapter Two of the Law on Complaints outlines the variety of bodies that are empowered to hear and resolve complaints. Notably, Chapter Two does not include the courts.

<sup>117</sup> Interview with Phan Thanh, *supra* note 26.

Table 8: Complaints and Administrative Suits Supreme People's Court

	1999 <sup>a</sup>	2000 <sup>b</sup>
Complaints <sup>c</sup>		
Received	3,171	3,619
Resolved	1,316	2,668
Administrative Suits		
Received	314	453
Resolved	204	338

<sup>a</sup>

*Report at the Eighth Meeting, supra note 29, at 24 and 26.*

<sup>b</sup>

*Id. at 19 and 21.*

<sup>c</sup>

These are complaints and denunciations received by the courts that arrived outside of the Administrative Law Suit channels.

Under the ordinance, citizens have the right to sue public officials for illegal acts committed under the color of law.<sup>118</sup> Citizens cannot sue if a public official acts within his discretion. This has limited the effectiveness of the courts as, for example, the issuance of business licenses was at that point discretionary.<sup>119</sup> Additionally, in order for a suit to be filed, the state agency must have issued a written order. Official inaction or verbal instructions by government officials are not a sufficient basis for the administrative court to establish jurisdiction. Needless to say, narrow drawing of jurisdiction creates a number of large loopholes by which local administrations can avoid the administrative courts altogether.<sup>120</sup> This is not just theory, in the first three days of the administrative court's operation in Ho Chi Minh City, there were twenty-five suits filed with the court. The court refused to hear any of the cases stating that the cases did not meet the criteria established for a hearing.<sup>121</sup>

One of the important criteria initially required that individuals exhaust all direct appeals to the administrative body responsible for the initial decision.<sup>122</sup> The process could be easily thwarted by an uncooperative state agency. For example, state agencies are required to respond in writing to complaints. A suit cannot be brought against a state agency that has not responded in writing to a complaint. The court's own procedures prevented it from hearing complaints where the state agency has essentially ignored the complaint being brought. This inconsistency was resolved in 1998 when the *Amended Ordinance on Procedures for Resolving Administrative Suits* went into effect, allowing for certain kinds of cases to be resolved directly by the courts. Under the present procedures, a suit may be filed if the relevant agency does not respond in writing within thirty days of a complaint having been filed.<sup>123</sup> However, it is still not clear which of the *Amended Ordinance on Procedures for*

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<sup>118</sup> *Phap Lenh Thu Tuc Giai Quyét Cac Vu An Hanh Chinh [Ordinance on the Procedures for Resolving Administrative Disputes]*, No. 49 L/CTN, ch. 1, art. 2 (June 3, 1996).

<sup>119</sup> This was later changed by the 1998 Enterprise Law which made the issuance of a business license automatic upon completion of registration documents.

<sup>120</sup> *Court Gives Forum for Public Complaint*, VIETNAM INVESTMENT REVIEW, July 16, 1996 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>121</sup> *Id.*

<sup>122</sup> *Phap Lenh Thu Tuc Giai Quyét Cac Vu An Hanh Chinh [Ordinance on the Procedures for Resolving Administrative Disputes]*, No. 49 L/CTN, ch. 1, art. 2 (June 3, 1996).

<sup>123</sup> *Phap Lenh Sua Doi, Bo Sung Most So Dieu Phap Lenh Thu Tuc Giai Quyét Vu An Hanh Chinh [Amended Ordinance on Procedures for Resolving Administrative Suits]*, No. 01-L/CTN, ch. 1, art. 2 (Jan. 5, 1999).

*Resolving Administrative Suits* or the *Law on Complaints and Denunciations* take precedence.<sup>124</sup>

Less high profile cases, like those registered by the Hue People's Court show that the backlog for administrative cases is much higher than for any other types of cases (only one third of the administrative cases received were categorized as completed, versus more than 50% of all other cases). The overall number of administrative cases remains very small, however (less than 1.5 percent of cases accepted by the Hue court). Nationally, the figures are similar. Eighty-four percent (1999) and 86% (2000) of all cases accepted into the system were resolved within the year. However, administrative cases were dealt with more slowly, with only 64% (1999) and 74% (2000) of administrative cases resolved within a year of being filed. At the same time, administrative cases make up a very small percentage of the cases in the system, less than 1% of all cases.

Given the large number of complaints sent to high officials, the low number of suits accepted for a hearing raises questions.<sup>125</sup> The Supreme People's Court in Hanoi recognized a possible weakness in the system when it noted the reluctance of enterprises to bring suits against state bodies, rather seeking to preserve relationships and negotiate resolutions.<sup>126</sup> There is also recognition that, at least at the lower levels, the relationship between the administrative courts and the local governments makes it difficult to always expect an unbiased outcome in administrative suits.<sup>127</sup>

The structure of the complaint process leads to a series of potential conflicts of interest and slow-downs in the resolution of complaints. Having the local authority responsible for making the decision also act as arbitrator of the complaint process can sometimes lead to the suppression of positive outcomes for complainants. A high profile case is now being brought by a private businessman in Hanoi who is seeking compensation from local authorities because they expropriated his business in the mid-eighties. In this case, the businessman complained to the authorities for 17 years before receiving high-level intervention in the form of a resolution from the Prime Minister's Office that he be compensated for the losses associated with the expropriation.

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<sup>124</sup> Tran Vu Hai, *Cai Cach He Thong Toa An Hanh Chinh [Reform the Administrative Court System]*, TBKT SAIGON, July 26, 2001, at 44.

<sup>125</sup> According to official sources, the Prime Minister receives 1.5 kg of complaint mail at his home everyday. See Ha Thang, *Deputies Demand New Voice Under New Complaints Bill*, VIETNAM INVESTMENT REVIEW, May 4, 1998 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>126</sup> *Courts Seek Greater Powers*, VIETNAM INVESTMENT REVIEW, May 28, 2001 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>127</sup> Tran, *supra* note 124, at 44.

The local government officials in Hanoi refused to comply with the Prime Minister's resolution. In July 2001, the administrative court in Hanoi agreed to accept the suit.<sup>128</sup>

In the 1998 *Law on Complaints*, a path for appeals of local administrative decisions is laid out,<sup>129</sup> at the same time it is contradictory in that there is also a requirement in the law that complainants accept the findings of the relevant body without appeal.<sup>130</sup>

The *Administrative Suits Ordinance* carves out an odd exception. Upon resolution of any case, should the Prime Minister feel that the court has acted 'incorrectly,' he may request that the Prosecutor's Office and the Court to review the decision again and effectively overturn the decision.<sup>131</sup> Nowhere else in Vietnamese law can the Prime Minister officially intervene to overturn a court decision. Given the structure of the Party's control over the courts, it seems odd that law makers would even bother to create such an obvious exception that has the potential of causing conflict between the various arms of government. As of this date, this public policy exception has not been used.

Clearly, the rise of corruption lowers public confidence in confidence in public institutions. Increasing transparency of public decision making and reducing bureaucratic discretion may help reduce the level of corruption. The work of the administrative courts and the impact, if any, of the *Law on Denunciations and Complaints*<sup>132</sup> will be important in ultimately resolving issues of corruption and public administration reform. However, there is still a hesitancy on the part of the courts and the bureaucracy to accept many cases. As a result, the bureaucracy itself handles the vast majority of cases of official misconduct internally.

### B. *Property Disputes*

Property disputes are probably, after family matters, the single most common form of dispute in Vietnam. The Court reports that the majority of the approximately 45,000 civil disputes brought to the court in 2000 were property related. Indeed, many of the family matters at the

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<sup>128</sup> *Hanoi People's Committee Sued*, PHU NU TP HCM, July 14, 2001, at 1.

<sup>129</sup> *Luat Khieu Nai, To Cao [Law on Complaints and Denunciations]*, No. 09/1998/QH10, ch. 1, art. 39 (Dec. 2, 1998).

<sup>130</sup> *Id.*, ch. 1, art. 8.

<sup>131</sup> *Phap Lenh Thu Tuc Giai Quyet Cac Vu An Hanh Chinh [Ordinance on the Procedures for Resolving Administrative Disputes]*, No. 49 L/CTN, ch. 1, art. 8 (June 3, 1996).

<sup>132</sup> *Luat Khieu Nai, To Cao [Law on Complaints and Denunciations]*, No. 09/1998/QH10, ch. 1, art. 8 (Dec. 2, 1998).



court tend to revolve around property disputes.<sup>133</sup> In 1998, the General Department of Land in Vietnam reported that 11,097 complaints about land disputes were reported to its office for resolution.<sup>134</sup> According to the government, more than half of all citizen complaints have been related to land disputes.<sup>135</sup> In the period of transition, property rights are still sufficiently ambiguous as to engender significant confusion amongst parties that it is often not clear who owns what and which rights are actually part of the ownership. More often disputes are between possessors of property and local governments and revolve around takings and issues of compensation.

During the height of Vietnam's central planning, all land belonged to the State and individual ownership of property was prohibited. During the period of central planning following the end of the war in 1975, it was illegal to buy or sell land and put all property under the management of the State. In practice, urban families bought and sought homes informally using handwritten agreements (*sang tay*) notarized or witnessed by local officials.<sup>136</sup> In the rural areas, there was significant regional variation in the interpretation of the stricture against land sales. In northern provinces, where collectivization was strongest, local officials were able to allocate and reallocate land to members of the collective on an annual basis. In the southern provinces where collectivization failed to take root, farmers tended to have a higher expectation of ownership of the land that they worked.<sup>137</sup>

The 1993 *Land Law* and its subsequent amendments in 1998 established that land would be "owned by the people and managed by the State" with the State granting long-term use rights to enterprises, socio-political organizations, families, and individuals.<sup>138</sup> Under the law, farmers were granted long-term use rights of between 20 and 50 years, depending on the particular crop, with the right to extend at the end of that term.<sup>139</sup> Land used for residential housing is granted to owners of the

<sup>133</sup> *Report at the Eighth Meeting*, *supra* note 29, at 14.

<sup>134</sup> *Complaints and Denunciations Overload Cadastral Department*, TUOI TRE, Dec. 3, 1998, at 1.

<sup>135</sup> Deputy Prime Minister Nguyen Cong Tan referring to more than 250,000 complaints over an unspecified period related to land clearance and land compensation. See *Gov't to Adjust Land Compensation Policy*, THANH NIEN, Dec. 15, 2000, at 1.

<sup>136</sup> While these types of transactions are expressly forbidden in the 1993 *Land Law*, they continue nevertheless. See *Luat Dat Dai [Land Law]*, No. 24 L/CTN, ch. 2, art. 30 (July 24, 1993).

<sup>137</sup> For a general discussion on collectivization, see Vo Nhan Tri, VIETNAM'S ECONOMIC POLICY SINCE 1975 (1992).

<sup>138</sup> *Luat Sua Doi, Bo Sung Mot So Dieu Cua Luat Dat Dai [Amendments and Additions to the Land Law]*, No. 10/1998/QH10, art. 1, § 1 (Dec. 2, 1998).

<sup>139</sup> Land used for perennial crops and fisheries is limited to 20 years in duration, while land used for long growing tree crops is limited to 50 years. The extension of the use right is conditional upon the leaseholder having used the land "in accordance with the law." See *id.*, art. 1, § 4.

structure on a 'long-term' basis, and is effectively permanent.<sup>140</sup> Land used for commercial purposes can be rented from the government for a period of up to 20 years.<sup>141</sup> Leaseholders are also granted the right to transfer, sell, rent, or mortgage the property under their control.

State enterprises have an odd exception to this provision. In the case of bankruptcy or closure of the enterprise, its land must be returned to the state's management.<sup>142</sup> Effectively, state-owned land cannot be the subject of foreclosure by a bank. They are allowed to mortgage state owned assets under their control only with the approval of the People's Committee or relevant government ministry.<sup>143</sup> In case of foreclosure, a bank can only take possession of the assets of a state-owned enterprise following a process called *phat mai* by which the local People's Committee or relevant agency agrees to grant the land to the financial institution for the purposes of resolving the debt of a state-owned enterprise. This process is a discretionary process on the part of the local government; they are not required to give up state owned land to financial institutions. In practice, state enterprises rarely seek permission to mortgage land; banks accept mortgaged state property on the assumption that, should the enterprise default, the local government will allow the bank to take the land.<sup>144</sup>

Ambiguities relating to property title can make it difficult for entrepreneurs to mortgage assets and get credit to build up businesses. There are, however, a number of issues that can stand as obstacles. Under central planning, title to property was not important; land was assigned and reassigned by local authorities on a regular basis. Throughout the South where landowners had already established rights to land, these rights were, in theory, abolished. Following the shift to the market economy, establishing clearer rights to land and property became more important.

According to the 1993 law and its regulations, land use rights over particular piece of property can be established through documentation that essentially shows that the leaseholder has been in uncontested

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<sup>140</sup> *Id.*, art. 1, § 4.

<sup>141</sup> John Gillespie, *Land Law Subsystems? Urban Vietnam as a Case Study*, 7 PAC. RIM L. & POL'Y J 555, 571 (1998).

<sup>142</sup> *Luat Dat Dai [Land Law]*, No. 24 L/CTN, ch. 2, art. 26 (July 24, 1993).

<sup>143</sup> *Luat Doanh Nghiep Nha Nuoc [Law on State Enterprises]*, No. 39 L/CTN, ch. 2, art. 6 (Apr. 20, 1995).

<sup>144</sup> This puts banks in a tenuous position with regard to the value of collateral. Following the collapse of a state-owned enterprise in 1997 (Minh Phung/EPCO), local governments refused to allow banks holding property under mortgage to foreclose on the properties; instead the banks must return the property to state management.

possession for a specified period of years. This can be done through the use of at least one of the following documents.

- 1) Title documents (previous regime);
- 2) Sales document approved by local government;
- 3) Land rental agreement (previous or current regime);
- 4) Copy of land registration book (previous regime)
- 5) Letter from local government establishing long-term residency.<sup>145</sup>

The power of local officials to accept these documents, though, is written in such a way as to provide maximum discretion to local officials. On the one hand, it might be extremely difficult to provide any of the documents required to establish property rights - a document from the previous regime in the South or the colonial regime in the North, for example. On the other hand, should local officials be cooperative, the entire process can be quite simple - a letter from the local People's Committee and local Fatherland Front establishing that one has been resident and the land not claimed by others.<sup>146</sup>

Clear title, alone, is not sufficient condition. When clear title is accompanied by burdensome or opaque land-use regulation, the value of the title may be severely degraded. Vague use regulations are common in Vietnam - particularly in the rural areas where farmers with title must seek permission from local authorities before converting land used to grow rice to an alternative use.<sup>147</sup> The discretionary, and often arbitrary, application of these regulations leaves title-holders subject to seemingly random land-use regulation by a host of overlapping administrative bodies. This confusion over land-use planning results in potentially higher transaction costs associated with converting use of land from agricultural to industrial uses.

For most transactions, an informal sale and purchase using the 'sang tay' process was sufficient. Small-scale private firms, partly a result of government policy and partly a result of inadequate title on land, rarely rely on banks for financing. As the economy and private firms develop, informal 'sang tay' sales may limit the growth potential of private firms. As firms grow from family-owned and operated businesses

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<sup>145</sup> General Land Department, *Cong Van 647/CV-DC Ve Virc huong Dan Mot So Diem Thuc Hien Nghe Dinh So 60/CP* [Document 647/CV-DC Regarding Guidelines on the Implementation of Government Direction 60/CP], Part 1, § 2 (May 31, 1995).

<sup>146</sup> *Id.*, Part 1, §§ 1-3.

<sup>147</sup> *Chi Thi So 247/TTg Cua Thu Tuong Chinh Phu Ve Khac Phuc Tinh Trang Giam Sut Dien Tich Dat Trong Lua Nuoc* [Prime Minister's Directive 247/TTg Regarding Turning Around the Problem of Lower Areas of Rice Cultivation], No. 247/TTg (Apr. 28, 1995).

to larger more formal corporate structures, their need for capital and space rises.

Recent government policy has been to accede to reality. Where local governments can establish that particular parties have been in actual, uncontested possession of a particular piece of property for a prescribed amount of time, the governments are encouraged to accept possession as a proxy for ownership and a presumptive land-use right.<sup>148</sup> This has been an important step, but it does not resolve all of the issues that stand as obstacles.

For many small businesses, the process of converting land from personal ownership to firm ownership can be onerous from a financial point of view. The legalization of land title requires land owners to pay a registration fee equal to 20% of the market value of the land, payable at the time of registration.<sup>149</sup> If the land is used for residential purposes, then it is granted by the government at no cost. Land cannot be granted to a commercial enterprise, rather it must be rented from the state.<sup>150</sup> Gillespie has noted that the difference in tenure associated with residential land and commercial also plays a role in the decision by businessmen to convert their property to commercial.<sup>151</sup> More importantly there seems to be a disincentive for family-owned firms to convert their assets from family held to corporate ownership, as the result would be to trade in effective long-term ownership for a renewable five-year leasehold. While rented land can be used as collateral, collateral rules require that the lease be prepaid for at least five years in order for the land to be available as collateral.<sup>152</sup> Had the property not been converted, it might still be used for the same purpose, but lease payments to government would not have to be made. The result is that undercapitalized private firms are unable, or unwilling, to secure lending from banks because they do convert property from residential to commercial classifications in order to avoid having to pay land rentals. Also, conflicting public policy aims also create incentives for bankers to be averse to making private sector loans.<sup>153</sup>

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<sup>148</sup> Though there are exceptions to this general rule that involve land belonging to State agencies or state enterprises lent to individuals and land belonging to Overseas Vietnamese. See *Nghi Quyết Số 58/1998/NQ-UBTVQH10 Về Giao Dịch Dân Sự Về Nhà Ở Được Xác Lập Trước Ngày 1-7-1991 [Resolution No 58/NQ-UBTVQH10 Regarding Civil Transactions for Houses Completed Before July 1, 1991]*, No. 58/NQ-UBTVQH10, ch. 2, art. 5 (Aug. 20, 1998).

<sup>149</sup> *Luat Dat Dai [Land Law]*, No. 24 L/CTN, ch. 2, art. 22a (July 24, 1993).

<sup>150</sup> *Id.*, ch. 2, art. 22b.

<sup>151</sup> Gillespie, *supra* note 141.

<sup>152</sup> Dong Phuong, *Main Theme Still Implementation*, VIETNAM INVESTMENT REVIEW, June 18, 2001 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>153</sup> For example, left over from the 1980 Constitution which guaranteed every citizen with a right to housing is the accepted practice in Vietnam that one cannot take an action that results in

Getting access to new land by private firms can also be an obstacle. Rather than buy land from existing owners, a firm looking for a greenfield site will typically have to submit request to the local government for allocation of a piece of land. Allocation of the land is at the discretion of the local government. Where the local government has a competing state enterprise, it is not uncommon to hear of successful private businesses denied access to new land.

### Box 1: Squatters

Squatters present a similar, but yet more complicated challenge to the management of property disputes. Squatter families also adopted the strategy of buying and selling land through handwritten agreements (*sang tay*) notarized or witnessed by local officials, with fines and bribes issued by local officials treated as licenses to use the land.

It is not uncommon to find squatter communities supported by local government services and develop familiar governmental structures.<sup>154</sup> For local officials who have developed relationships among the them it becomes extremely difficult to attempt to evict squatters. Implementing regulations for land registration are full of exceptions for people who 'have a true need' for land, establishing great latitude for discretion by local officials in making that determination.<sup>155</sup>

In many cases, urban squatters are also drawn from the corps of cadres and 'policy families', making their eviction more difficult in the face of less onerous alternatives. In a recent case, a squatter community in Hanoi has been threatened with eviction without much success. Of the

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another becoming homeless. This has caused difficulties as bankers find it difficult to foreclose and evict, if the eviction results in a person becoming homeless. While not explicitly stated, the *Ordinance on the Enforcement of Civil Judgments* can be read to include a prohibition against taking one's home in the enforcement of a judgement. See *Phap Lenh Thi Hanh An Dan Su [Ordinance on Enforcement of Civil Judgments]*, No. 13 L/CTN, ch. 4, art 30.1-2 (Apr. 26, 1994). As a result, there is a serious disincentive for bankers to foreclose on problem loans. Also, a series of lending scandals involving private companies that resulted in long prison sentences being handed down to bankers, created an incentive not to undertake any unsecured lending activity (TAMEXCO case, EPCO case). The Law on State Enterprises makes it a criminal offense for a state-owned enterprise manager to take action that leads to "losses in assets of the enterprise." This creates a disincentive for bankers to make 'risky' loans. See *Luat Doanh Nghiep Nha Nuoc [Law on State-Owned Enterprises]*, ch. 8, art. 56.3 (Apr. 20, 1995).

<sup>154</sup> For a detailed description of the process used by squatters, see Gillespie, *supra* note 141, at 591-592.

<sup>155</sup> For an example of the wide discretion afforded to local officials, see Vietnamese General Land Department, *Cong Van So 1427/CV-DC Ve Vicc Huong Dan Xu Ly Mot So Van De Ve Dat Dai de Cap Giay Chung Nhan Quyen Su Dung Dat [Document 1427/CV-DC Regarding Guidelines to Resolve Some Problems in the Registration of Land Use Certificates]*, § 3 (Oct. 13, 1995).

125 families in this particular community, 49 families were government cadres and 6 families were 'policy families.'<sup>156</sup>

The problem is made more complicated by the treatment in the Land Law of occupiers of land who do not have sufficient claim to the underlying land, but do have clear ownership of the home that sits on the land. Ownership of improvements on disputed land give the improvement owners access to the courts on the same basis as if they held the actual land-use right.<sup>157</sup> This creates a common situation where the land-use right belongs to one party, and the improvements belong to another. Courts and administrative agencies have, to date, not developed a consistent method of dealing with this problem.

Property disputes are generally to be resolved by the local People's Committee.<sup>158</sup> According to the law, disputes regarding 'land use rights' are to be resolved first by conciliation between the parties.<sup>159</sup> When conciliation fails, disputes can take two alternate paths: disputes involving parties without proper land use documentation are to be handled by the local People's Committee.<sup>160</sup> Disputes involving state administrative agencies and state enterprises are also to be handled by the local People's Committee and the administrative units concerned.<sup>161</sup>

Private parties in dispute can only gain access to the courts if both sides have proper paperwork in order.<sup>162</sup> In a country that has gone through war, revolution and land reform, the requirement for perfect title can be a substantial obstacle for possessors of land. Limiting access to the courts to only those with proper title would effectively eliminate most claims from the courts. In recognition of that reality, there is an 'improvement' exception.<sup>163</sup> Where parties do not have proper paperwork on the land, but they have made significant improvements (house), then the law will grant them the option of accessing the courts as if they had

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<sup>156</sup> Policy families are equivalent to Gold Star Mothers in the US. Families who have lost immediate members as a result of their service in the military are considered policy families singled out for special assistance by the state. See *Giai Toa Cac Cong Trinh Lan Chiem Dat Cong Tai Ho Thuoc Tay* [Clearing the Buildings Occupying Public Land Along the Thuoc Tay Lake], PHAP LUAT, July 25, 2001, at 9.

<sup>157</sup> *Luat Dat Dai* [Land Law], ch. 2, art. 38.3, July 24, 1993, No. 24 L/CTN.

<sup>158</sup> People's Committee is the Vietnamese version of an American city/town council.

<sup>159</sup> *Luat Dat Dai* [Land Law], ch. 2, art. 38.1, July 24, 1993, No. 24 L/CTN.

<sup>160</sup> *Id.*, art 38.2.

<sup>161</sup> *Id.*, art 39.

<sup>162</sup> *Id.*, art 38.3.

<sup>163</sup> *Id.*

proper title. The 'improvement' exception has been the subject of quite a bit of controversy as it essentially legalizes squatting.<sup>164</sup>

Narrowing the access to the court system establishes that most disputes involving land are handled outside of the courts - either through informal mediation or through the bureaucracy. In the alternate, parties seek access to the courts, but on related matters, not land matters directly.

The case of Mr. Phan Ngoc Khanh presents a familiar scenario.<sup>165</sup> Mr. Khanh occupied 100,000 square meters of state-owned forest land in 1993 to convert to fisheries. After occupying the land, Mr. Khanh petitioned and received from the local government permission to use the land he occupied for the purpose of raising shrimp and fish. Three years later, the local government reversed its opinion and fined Mr. Khanh for illegally occupying the land. It did not seek to eject him. In 1997, the provincial government announced its intention to use a large parcel of land, including the parcel still occupied by Mr. Khanh, to build a large port facility. In order to get access to the land, the provincial government offered Mr. Khanh compensation for his home, but not the land he occupied to raise fish. Mr. Khanh refused to accept the compensation and appealed the decision internally and then to the administrative courts.<sup>166</sup> Mr. Khanh's case was ultimately rejected by the administrative courts and he was ordered to give up the property. The provincial government did not seek to eject Mr. Khanh, but has continued to negotiate with him. The case remains unresolved.

As the legal basis for access to the courts for the resolution of property claims is still unclear, many of these cases are resolved through the bureaucracy. Where they are admitted to the courts, they often enter as related claims.

### C. *Economic Disputes*

Prior to economic reform, the formal legal system was primarily concerned with issues of criminal law and national security. Economic

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<sup>164</sup> The typical squatting scenario goes as follows: A newspaper announces that XYZ firm will develop a project in a particular area. Overnight people begin to move in and build homes. Months later when the firm shows up to begin construction of its investment project it discovers hundreds of people living on the site. These people must be compensated for their land or the dispute resolved in a court. Generally, developers will pay compensation. For examples, see Nguyen Ngoc Chinh, *Compensation Furor Delays Roadway*, VIETNAM INVESTMENT REVIEW, Nov. 4, 1996 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>165</sup> Chinh Quyen Cau Tha, *Nguoi Dan Vo Loi [Government Forgives, The People Have No Sin]*, DAU TU, July 24, 2001, at 6.

<sup>166</sup> It appears that the majority of the cases that the administrative courts hear are land-related. The most recent docket available at the Ho Chi Minh City Administrative Court (Apr., 2001) shows that nearly all of the 24 cases being heard that month were related to land matters.

disputes during the period of central planning, when they arose, typically involved at least one state enterprise, and often, were disputes over the implementation of the economic plan. As a result, these disputes were naturally resolved within the bureaucratic planning structures and not in the courts. Under central planning economic arbitration bodies existed to serve state administration of contracts and resolving disputes between parties. At the time (prior to 1990), Economic Arbitration Centers had the right to conduct investigations of business records and contract implementation.<sup>167</sup>

When the Economic Arbitration Centers were finally phased out in 1993, they were replaced by the establishment of the Economic Courts within the court system as a specialized court at the provincial and central level. Economic Courts claim jurisdiction over the following types of disputes: 1) contract disputes between legal persons; 2) disputes within enterprises and disputes in regard to the establishment, operation and dissolution of enterprises (including bankruptcy); and disputes related to the sale of stocks and bonds.<sup>168</sup>

Disputes involving an individual not associated with the company are not heard in the Economic Courts, but in civil courts. With regard to jurisdiction, procedure requires that economic disputes are heard in the jurisdiction of the defendant, except in cases relating to real estate in which case the dispute is heard in the locale of real estate in question.<sup>169</sup> Alternatively, if it is a contractual dispute, the case may be heard in the jurisdiction where the contract was to be carried out.<sup>170</sup>

A recent review of the docket of cases at Vietnam's largest Economic Court (Ho Chi Minh City) revealed that of the 28 cases scheduled for July, 2001, all but three involved exclusively private parties (including foreign invested enterprises). Two involved exclusively state enterprises and one involved a dispute between a state-owned firm and a private firm. Twenty of the cases scheduled for the month of July listed a real estate related contractual dispute as the primary issue for the court's consideration, including sale, rental, and construction of real estate. The balances were listed disputes related to service or trading contracts.

The 1,000 or so cases that make it to the economic courts do not likely represent the entirety of business disputes. Survey data from

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<sup>167</sup> Economic Arbitration Boards under central planning are to be understood differently from arbitration as presently understood. They were quasi-legal bodies, replaced in 1994 by the Economic Courts. See Nguyen, *supra* Table 1 note a, at 10.

<sup>168</sup> Most cases heard in the Economic Courts are, in fact, contractual disputes between businesses. *Phap Lenh Thu Tuc Giai Quyét Cac Vu An Kinh Te [Ordinance on the Procedures for Resolving Economic Disputes]*, No. 31/LCTN, ch. 2, art. 12 (Mar. 29, 1994).

<sup>169</sup> *Id.*, ch. 2, art. 14.

<sup>170</sup> *Id.*, ch. 2, art. 15.



McMillan and others indicate that most of the resolution of commercial disputes takes place outside the system. Indeed, Gillespie reports that in 1993, the last full year of operation, the Economic Arbitration Centers handled more than 3,000 disputes between state-owned firms.<sup>171</sup>

There are still relatively few commercial disputes brought to the country's economic courts and fewer still cases brought to arbitration centers. On average about one thousand commercial disputes are brought to the courts every year and less than two dozen cases are brought to any one of Vietnam's four arbitration centers. Rather, the formal dispute resolution system puts an emphasis on settling disputes out of court.<sup>172</sup> Over and over again, a constant theme throughout Vietnamese legislation is the focus on mediation (*hoa giai*) of disputes. Approximately half of the 1,000 commercial disputes brought to the economic courts every year end in settlements before trial and the nature of the Economic Arbitration Centers (present) tends to ensure that parties work towards a mediated outcome.

Rather than seeking the settlement of commercial disputes through the formal legal system, commercial disputes, particularly those involving state enterprises, are resolved in very different forums. More often than not, parties to commercial disputes may seek to access the bureaucracy in order to seek resolution in disputes. The case of the Luong Co Mining Company, a state-owned enterprise in southern Baria-Vung Tau province is illustrative of the bureaucratic dispute resolution processes, as they exist.<sup>173</sup> In that case, the state-owned mining company entered into a series of long term contracts with private companies whereby the private companies would undertake mining and transportation activities on behalf of Luong Co.

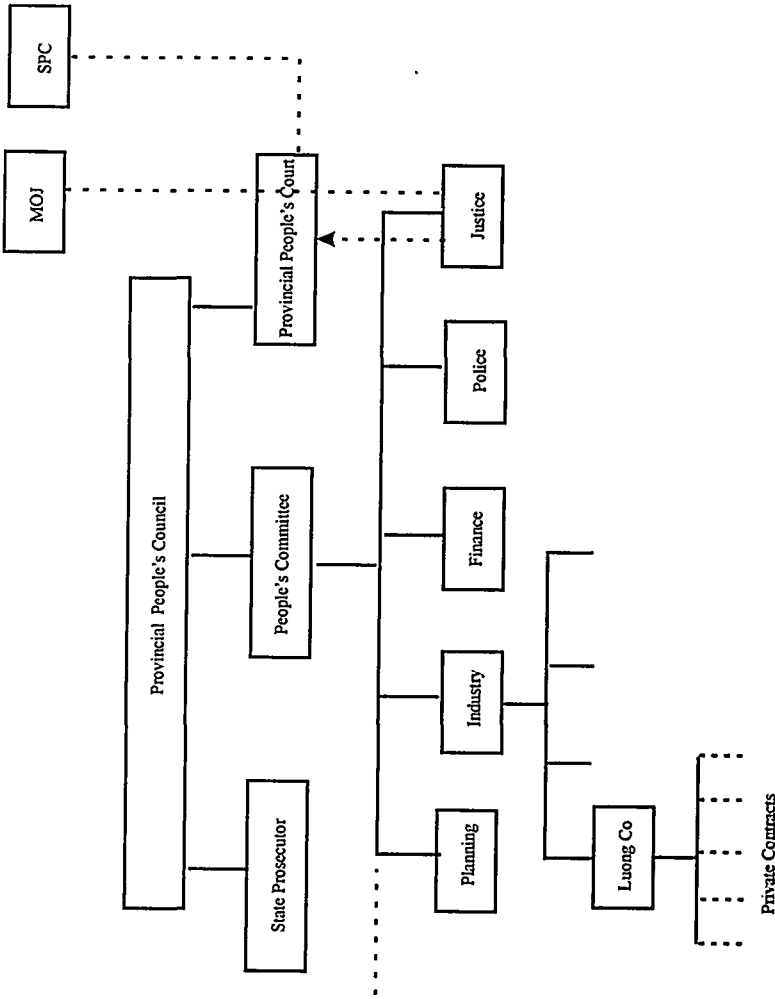
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<sup>171</sup> Gillespie, *supra* note 101, at 12.

<sup>172</sup> *Phap Lenh Thu Tuc Giai Quyét Cac Vu An Kinh Te [Ordinance on the Procedures for Resolving Economic Disputes]*, ch. 1, No. 31 L/CTN, art. 5 and ch.7, art. 36 (Mar. 29, 1994).

<sup>173</sup> This dispute was featured on the program: *Cong Ty Khoang San Luong Co Nen Co Phan Hoa [Luong Co Mining Company Should Equitize]* (VTV1, July 31, 2001).

Figure 4: Luong Co Mining Company Corporate Reporting Structure



After some years of operation, nearly all essential mining activities were undertaken by private companies working under the contract. A series of disputes arose between Luong Co and its private contractors, leading to a unilateral cancellation of all work at the Luong Co mine. Rather than seeking redress from the courts for the breach of contract, the private contractors took their complaints, first to the local Department of Industry, and then to the People's Committee of Baria-Vung Tau province. After some six months of negotiation with the People's Committee and the Department of Industry acting as mediator, the People's Committee issued a directive instructing Luong Co to undertake certain acts to resolve the dispute.

Had the disputes gone to the courts, the local courts would have been unable to reach a decision contrary to the interests of the province without at least the acquiescence of the local government. Enforcement of any judgment against the company would have also required that the private parties seek the assistance of the local Department of Justice. Rather than expending time and energy moving through the courts, the private parties to the dispute negotiated directly with the Provincial People's Committee for a resolution.

In business relationships with state-owned firms, the responsible government authority (*co quan chu quan*) in resolving disputes occupies a very important position. This is particularly true at the provincial level where the provincial governments have authority not only over the operations of the state-owned firms, but also over the judicial apparatus and the police. As a result, at the first sign of a dispute, parties will often turn to responsible government authority in order to seek resolution through negotiation in a political, rather than judicial, setting.

## **Box 2: Criminalization of Civil Disputes**

The phenomenon of 'criminalization' of civil and economic disputes is one that attracted the attention of local commentators in recent years. This phenomenon may find its origins in the history of central planning and an anti-private sector ideology that was especially prevalent in the early days of reform and still lingers in many respects today. From an ideological perspective, the private sector was considered a class of 'exploiters.' The private sector was also looked upon with suspicion as fraudsters and cheats. With the shift to the market economy, the courts at times take upon themselves the mission of protecting parties in disputes

from the potentially nefarious conduct of private businessmen through criminal action.

Judges in the civil and economic court reserve the right to call an inspector into any case. The inspector is usually drawn from the Prosecutor's Office and has the right to carry out an inspection and investigation into the economic dispute. Additionally, the Prosecutor's Office also reserves the right to participate in any economic dispute before the court - with or without the permission of the presiding judge.<sup>174</sup> The threat of an independent inspector from the prosecutor's office poring through the books of a private company is probably sufficient to dissuade most parties from taking their disputes to a court unless absolutely necessary.<sup>175</sup>

This has likely had an affect on bankruptcy proceedings where since the bankruptcy was passed in 1994, nationally only 64 companies had completed the bankruptcy procedures by May, 2000. At the same time, there were as many as 1,000 firms in Ho Chi Minh City, alone, that might qualify as technically bankrupt.<sup>176</sup> The Supreme Court identifies the biggest obstacle to more aggressive use of bankruptcy proceedings as the inability of bankrupt firms to complete the paperwork required to file.<sup>177</sup>

Recent cases that illustrate the problems when the Prosecutor's Office becomes involved in civil disputes. There is, for example, the case of Ms. Ngo Thi Be Ba. Ms. Be Ba signed a contract with Mr. Nguyen Ton Van to sell her house. Mr. Van paid a deposit on the house. After the paperwork on the sale had been processed, Mr. Van announced that he would no longer purchase the property. Ms. Be Ba sued in the county court for specific performance of the contract and the buyer of the house counter-sued. The State Prosecutor's Office involved itself in the matter and then accused Ms. Be Ba of fraud and jailed her pending trial. In the meantime, Mr. Van moved into Ms. Be Ba house. After nine months in

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<sup>174</sup> *Phap Lenh Thu Tuc Giai Quyét Cac Vu An Kinh Te [Ordinance on the Procedures for Resolving Economic Disputes]*, No. 31 L/CTN, ch. 4, art. 24 and 28 (Mar. 29, 1994).

<sup>175</sup> Bergling quotes an interview subject on the question of bringing commercial disputes to the courts, "It could be the end of the company because if you ask the authorities to help you, your company will be investigated and they [the agents of the state] might find many errors." See BERGLING, *supra* note 8, at 129. McMillan quotes a respondent when asked whether or not they would bring the authorities into a dispute as saying that the local authorities "just create problems for us rather than supporting us." See McMillan and Woodruff, *supra* note 53, at 641.

<sup>176</sup> According to the Supreme People's Court in Hanoi, the bankrupt firms were broken down as follows: SOE's, 10; Private, 25; Limited Liability Companies, 15 and Other types of firms, 14. See Duong Phong, *Bust Firms Prefer to Just Disappear ...*, VIETNAM INVESTMENT REVIEW, May 8, 2000 (Vietnam Investment Database CD-ROM, rel. Aug. 2001).

<sup>177</sup> *Report at the Eighth Meeting*, *supra* note 29, at 16.

jail and two appeals, Ms. Be Ba was finally released and regained possession of her home.<sup>178</sup>

In another similar case, Mr. Nguyen Sy An was sentenced to 18 years for 'fraud' in a land dispute between a previous owner of the land in question and the local People's Committee. In that case, following the end of the American war, Mr. An was granted a home by the local People's Committee. This home had previously belonged to a Mr. Le Cu who had moved away and left the house unoccupied for years. Mr. An applied for and was granted a land-use right to the property. After residing in the house for 14 years, Mr. An sold the house. At that point Mr. Cu reappeared and sued Mr. An for fraudulently selling property that didn't belong to him. At the insistence of the State Prosecutor's Office, Mr. An was charged with fraud and then sentenced to 18 years in jail, his wife to 8 years. After two years of imprisonment, Mr. An was finally released.<sup>179</sup>

The state prosecutor's role in civil and commercial disputes is at times described as a perfunctory review of the files. Nevertheless, the state prosecutor is routinely present at court hearings on civil matters, taking notes and presenting opinions on the case to judges.<sup>180</sup> The active presence of the prosecutor during proceedings can create a significant level of anxiety amongst parties to a dispute regardless of the content of the dispute.

The structure of the dispute resolution system creates obvious incentives for parties to settle their disputes without the intervention of the courts. Also, the lack of effective external enforcement mechanism of contracts and business agreements leads parties to undertake different types of contracting that are based upon trust, relationships, and self-enforcement of business agreements rather than third party enforcement. This structuring of business and dealing patterns has an impact on the kind and types of businesses that are possible in the present climate. Vietnam's business community has organized itself in ways that are familiar of the patterns identified by Landa and Bernstein.<sup>181</sup>

<sup>178</sup> *Nguoi Bi Hai Co Duoc Boi Thuong? [Will Those Who Have Been Injured Be Compensated?]*, NGUOI LAO DONG, June 12, 2001, at 1

<sup>179</sup> *Id.*

<sup>180</sup> While the author was visiting the courthouse, the Prosecutor was present in all but one civil case.

<sup>181</sup> See Janet Tai Landa, *A Theory of Ethnically Homogenous Trading Groups*, 10 J. LEG. ST. 349 (1981); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. ST. 115, 121 (1992).

Both studies by McMillan & Woodruff<sup>182</sup> and Bergling<sup>183</sup> as well as informal discussions with businessmen confirmed that there is a very low level of confidence in the ability of the formal legal system to adequately resolve economic disputes between business partners. The results of a survey of private businessmen undertaken by McMillan make it clear that few businessmen in Vietnam feel the courts do an adequate job. In response to the question, which third parties can help them resolve business disputes, 89% of surveyed businessmen responded "there is no one." Only 2% of respondents answered that they would take a commercial dispute to the courts or other local bodies.<sup>184</sup>

A typical response to the lack of third party enforcement is that businessmen rely on networks and relationships in order to develop trust and a binding commitment to contracts.<sup>185</sup> In Vietnam, parties tend to do business with parties that are known to them or with parties with which there is a trusted intermediary. As a result, much of the economic activity undertaken by private businessmen in Vietnam is local, 60% of reported sales are made locally and manufacturers often sell half or more of their output to a small number of identified buyers.<sup>186</sup> McMillan's survey showed a hesitance on the part of Vietnamese businessmen to undertake new deals with strangers, even though the stranger offered a 10% lower price.<sup>187</sup>

Without the ability to deal at long-distance, there seem to be significant obstacles to long-term development prospects. These constraints have yet to be tested, but it is still an open question whether a commercial environment based entirely on non-judicial remedies to disputes can truly thrive as it seeks to move into international markets where it has few, if any, contacts.

#### IV. CONCLUSION

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<sup>182</sup> McMillan and Woodruff undertook a survey that formed the basis of a series of quantitative studies. See McMillan and Woodruff, *supra* note 53; John McMillan and Christopher Woodruff, *Private Order Under Dysfunctional Public Order*, 98 MICH L. REV. 2421 (2000); John McMillan and Christopher Woodruff, *Interfirm Relationships and Informal Credit in Vietnam*, 114 Q. J. ECON. 1285 (1999).

<sup>183</sup> Bergling carried out a series of interviews that made the basis of a qualitative study on the status of the legal system in Vietnam. See BERGLING, *supra* note 8.

<sup>184</sup> McMillan and Woodruff, *supra* note 53, at 641.

<sup>185</sup> See BERGLING, *supra* note 8, at 125-126; McMillan and Woodruff, *Private Order Under Dysfunctional Public Order*, *supra* note 182, at 2454-55.

<sup>186</sup> McMillan and Woodruff, *supra* note 53, at 645.

<sup>187</sup> Only 29% percent of respondents said they would switch from a known supplier to an unknown supplier if the new supplier offered a discount of 10% on current prices. See McMillan and Woodruff, *Private Order Under Dysfunctional Public Order*, *supra* note 182, at 2455.

The rapid changes occurring in Vietnam's economy put significant strains on Vietnam's socialist legal system. Since the beginning of economic reform, the legal system has been in constant flux. The direction of legislative efforts and changes in the system appears constant: increasing transparency, reduction of arbitrariness and increased predictability in the legal system.

While legislative changes are necessary, they are not sufficient. Improvements in the implementation of the law, in the courts and the administrative system remain critical challenges particularly as Vietnam seeks to pursue a policy of openness to the rest of the world. The vertical and horizontal management structure that served central planning will likely continue to feel the tensions associated with market opening. The discretion that served central planning may, in the end, be a drag on the potential long-term development of the economy as businesses take their form and operate in the shadow of the rules of the market. Where the market rules are unclear and guided by local discretion, the culture of local business will adopt those attributes. This adopted business culture, in the end, may create a drag on the development of local business as they grow and seek to expand not only throughout Vietnam but also into the region.

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