

A PROCEDURAL APPROACH TO JUDICIAL REFORM IN ASIA: IMPLICATIONS FROM JAPANESE INVOLVEMENT IN VIETNAM

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This article attempts to bring a civil procedural approach to law and development studies. The focus is on recent judicial reform in Vietnam, where influential international donors have directed the adoption of a set of rigorous reform proposals, including the independence of judicial administration, an adversarial civil procedure, and the judgment disclosure system, as conditions under compelling frameworks such as the U.S.-Vietnam Trade Agreement and negotiations to enter the WTO. The results were, however, something different from the original American model: strengthened institutional independence of the judiciary increased vertical pressure over the adjudicative level; a new civil procedure law that still retained the tradition of social dispute resolution; and the reach of judgment disclosure was limited to the supreme cassation decisions. In this standoff, Japanese assistance has been involved with an incremental approach backed by Japan's own experience of a hundred years' judicial struggle for adjudicative independence. This article explores the nature of donor-recipient interaction in pursuit of a procedural framework that is actually workable in local contexts, so as to balance the twin needs of integrity and flexibility in applying formal law in a changing society. This procedural approach will start with the recognition of constitutional restraints on adjudicative independence, consider the design of civil procedures both protecting and controlling adjudicative independence, and finally, observe the outcomes of these procedural characteristics in the actual adjudicative process, through the study of cassation cases as well as interviews with judges.

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I. INTRODUCTION¹*A. Purpose: Balancing Integrity and Flexibility in Judicial Reforms*

The purpose of this study is to explore an alternative approach to Asian judicial reform that would enable adjudicative independence to be an institutional guarantee for local judges to realize an autonomous process of legal development against the simultaneous pressures of the “conversion” of formal law into global standards and the “dispersion” of informal norms into legal pluralism. The focus will be on judicial reform in Vietnam and the involvement of Japanese legal assistance therein since the mid-1990s.

Numerous assistance projects have aimed to promote judicial reform in Asia since the early 1990s in the context of enhancing “rule of law” in economic transition and recovery from financial crisis.² Although a variety of ways to define the ultimate goal of the “rule of law” have been attempted, there seems to be a convergence at least on their minimum “thin” goals,³ which draws on the need for “judicial independence.”⁴ This judicial independence has been considered in two contexts: (i) the institutional independence of the judiciary from other constitutional organs, and (ii) the independence of individual adjudication. The former naturally requires “integrity” within the judicial system, and hence the need of vertical controls over the adjudication of lower courts. However, the latter need of adjudicative independence requires “flexibility” for autonomy in normative development. Accordingly, there is an inherent tension between both senses of judicial independence, which requires deliberation for the balancing of integrity and flexibility in designing any judicial reform.

However, the actual practice of judicial reform assistance from leading international donors has paid limited attention to this need for balanc-

¹ This paper is the outcome of a group research project at Kobe University under the auspices of grants for scientific research (No. 20402012) of the Ministry of Education, Culture, Sports, Science & Technology of Japan.

² For a brief overview of judicial reform projects in Asia, see ASIAN DEVELOPMENT BANK, LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK (2003), available at http://www.adb.org/documents/reports/Law_Policy_Pov_Red/law_and_policy.pdf.

³ On the terminology of “thin” and “thick” versions of rule of law, see BRIAN TAMANHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004); Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in ASIAN DISCOURSE OF RULE OF LAW 4 (Randall Peerenboom ed., 2004).

⁴ See, e.g., UNITED NATIONS, GUIDANCE NOTE OF THE SECRETARY-GENERAL’S: UN APPROACH TO RULE OF LAW ASSISTANCE (2008), available at <http://www.unrol.org/files/RoL%20Guidance%20Note%20UN%20Approach%20FINAL.pdf>; THE WORLD BANK, INITIATIVES IN LAW AND JUDICIAL REFORM 2003, at 1 (2003).

ing. There should be at least two points of criticism. First, the leading international donors have focused too much on the institutional independence of the judiciary, often disregarding the aspect of independence of individual adjudication.⁵ Second, this focus on the institutional independence of the judiciary has taken for granted the U.S. style of “judicial review” or the constitutional authorization of judicial activism to confront both the legislature and the executive under the regime of “balance of powers.” Furthermore, it lacks a careful consideration of the consistency with the local constitutional regime, and hence often been doomed to failure.⁶

In contrast to other donors, Japan has been focusing on adjudicative independence. Given the enormous focus of leading donor agencies on institutional independence, the role of Japanese assistance has been to balance adjudicative independence against increasing vertical pressure within the judiciary that develops as a result of institutional independence. This article will, in an attempt to identify the determinants of a well-balanced alternative judicial reform, explore the outcomes of Japanese judicial assistance to Vietnam, which since the mid-1990s has involved a variety of attempts at assistance ranging from civil procedural law drafting to judicial training.⁷

⁵ See THE WORLD BANK, INITIATIVES IN LAW AND JUDICIAL REFORM 2001, at 6 (2001); THE WORLD BANK, INITIATIVES IN LAW AND JUDICIAL REFORM 2003, at 4, 26–36 (2003); THE WORLD BANK, LEGAL AND JUDICIAL SECTOR ASSESSMENT MANUAL 2002, at 31, 51 (2002).

⁶ It is a known fact that the leading international donors have been placing first priority on structural reform to shift the authority of judicial administration from the government to the Supreme Court for the purpose of achieving institutional independence, which is a precondition for enabling the U.S. style of “judicial review.” However, it appears that the majority of Asian countries have adopted the continental style of “supremacy of the legislature” model rather than the U.S. style of “balance of powers” that incorporates judicial review. Since the constitutionality of legislative and/or administrative outcomes is expected to be tested in specialized constitutional and/or administrative courts, it is ironic that the focus of leading donors on the independence of judicial administration has had no direct relevance to the promotion of judicial review. For a more detailed discussion, see Yuka Kaneko, *Catalytic Role of Legal Assistance between Formal Law and Social Norms: Hints from Japanese Assistance*, 13(2) J. INT’L DEV. STUD. (Japan) (2007).

⁷ The first phase (1996–1999) of the Japanese official legal assistance project proceeded in a trial-and-error manner until three specific targets for law reform (namely, civil code, civil procedure code, and bankruptcy law) were identified in the second phase (1999–2002), which was succeeded by a bundle of judicial training programs in the third phase (2003–2006), and continued into the fourth phase (2007–2011). For details of the assistance process, see Ministry of Justice of Japan International Cooperation Department, ICD NEWS each issue, available at http://www.moj.go.jp/housouken/housouhoukoku_index.html#icdnews (last visited May 6, 2010).

B. Methodology: Procedural Approach to Adjudicative Independence

The author recognizes the need to go beyond the present methodological standoff in law and development studies where different legal schools are isolated and seldom interact with each other.

In the American context, there is, on the one hand, a stream of academic works led by the school of law and economics that have provided a variety of attractive theories to justify the promotion of the American model as a global standard. Those influential theories such as "governance,"⁸ "convergence,"⁹ "legal origin,"¹⁰ "legal transplants,"¹¹ and "new comparative economic institutions"¹² are all scholarly products meant for promoting a general image of American law as the best practice. Even the mainstream school of comparative law joined this campaign,¹³ despite repeated caution by commentators of "comparative legal culture" against a unilateral way of legal transplants,¹⁴ or often permitted economists in

⁸ Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 11 (1998); Ibrahim Shihata, *The World Bank and 'Governance' Issues in Its Borrowing Members*, in THE WORLD BANK IN A CHANGING WORLD 53 (Franziska Tschofen & Antonio Parra eds., 1991); Daniel Kaufmann & Aart Kraay, *Growth Without Governance* (The World Bank Policy Research Working Paper No. 2928, 2002).

⁹ KATHARINA PISTOR ET AL., THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960–1995, at 264 (1999); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law* (Yale Law School Working Paper No. 235, 2000).

¹⁰ Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins* (National Bureau of Economic Research Working Paper 13608, 2007); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance* (National Bureau of Economic Research Working Paper 5661, 1996).

¹¹ Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003).

¹² Simeon Djankov et al., *The New Comparative Economics* (National Bureau of Economic Research Working Paper 9608, 2003).

¹³ On the call for joining the globalization of the American model as declared by the Association of American Law School (AALS) in January 1998, see Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AM. J. COMP. L. 637 (1998).

¹⁴ Legrand gave an influential argument that law cannot live apart from a given culture and therefore any attempts of legal transplants must fail. See Pierre Legrand, *The Impossibility of "Legal Transplants,"* 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997); Pierre Legrand, *What "Legal Transplants"?*, in ADAPTING LEGAL CULTURES 55–70 (David Nelken & Johannes Feest eds., 2001).

carelessly utilizing academic terms such as “legal origins” and “legal transplants” as instruments for their American law campaign.¹⁵

On the other hand, there is a similarly strong campaign against the practices of leading donors, which is led by critical legal studies, mostly acting within the field of legal sociology. This campaign has acutely criticized the donors’ legal instrumentalism in manipulating the law as a tool of economic growth,¹⁶ while uncovering a basic neo-liberalist bias reflected in donors’ policy agendas and model laws.¹⁷ A weakness of this critical stream of thought, however, is often said to be a tendency to be too theoretical to create actual influence over leading donors’ practice, which has caused pessimism among commentators.¹⁸ Although this critical group has been supplemented by certain international collaborations among legal sociologists and anthropologists from outside of the United States with empirical approaches,¹⁹ the accumulation of anecdotal evidence has not yet amounted to producing proposals that are concrete enough to change donors’ practices.

¹⁵ See UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT’L REV. L. & ECON. 3 (1994).

¹⁶ TAMANAHA, *supra* note 3; Carol Rose, *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 LAW & SOC’Y REV. 93 (1998); Brian Tamanaha & Richard Bilder, *The Lessons of Law and Development Studies*, 89 AM. J. INT’L L. 470 (1995); David Trubek, *The Rule of Law in Development Assistance: Past, Present and Future*, in THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL (David Trubek & Alvaro Santos eds., 2006).

¹⁷ David Kennedy, *Laws and Development*, in LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY (John Hatchard & Amanda Perry-Kessaris eds., 2003); Alvaro Santos, *The World Bank’s Uses of the “Rule of Law” Premise in Economic Development*, in THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL 253 (David Trubek & Alvaro Santos eds., 2006).

¹⁸ See Kevin E. Davis & Michael J. Trebelcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 AM. J. COMP. L. 895, 895–98 (2008); Santos, *supra* note 17.

¹⁹ For example, the Collaborative Research Network No. 24 in the Law & Society Association and the relevant blog site managed by David Trubek and Tom Ginsberg (www.lawdevelopment.blogspot.com) has been a center of international collaboration. While participants from common law countries such as Canada and Australia are basically in favor for the globalization agenda of leading donors (e.g. JOHN GILLESPIE & RANDALL PEERENBOOM, *REGULATION IN ASIA* (2009); *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* (Thomas Lindsey ed., 2007); Davis & Trebelcock, *supra* note 18), those who belong to non-common law regions such as the Netherlands, Sweden, and Japan have been contributing more objective evidence of negative outcomes (e.g. PER BERGLING, *RULE OF LAW ON THE INTERNATIONAL AGENDA* (2006); B. ROOJI, J ARNSHEIDT & JAN MICHIEL OTTO, *LAWMAKING FOR DEVELOPMENT*; Yuka Kaneko, *Implications of Japanese Legal and Judicial Reform Assistance in Asia: Beyond Legal Transplants* (National Report presented to the International Association of Comparative Law, Washington Congress 2010, 2009).

Given this deadlock, the author joins the call for a combined methodological approach, which can bridge the gap between donors' pragmatism and critical scholarship.²⁰ The author attempts to obtain hints from recent interactive works among different legal schools in Japan for articulating an institutional framework to both protect and control judicial lawmaking. Since the celebration in 1998 of the centenary of the Japanese Civil Code, which was originally the symbol of the transplant of Western law in response to the foreign pressures urging fundamental changes in a pre-modern social regime, scholars in the Japanese school of civil law have focused on an overall review of case law development in each socioeconomic stage since the enactment of the Code, especially in areas involving disparity among parties, such as land and housing disputes, labor relations, industrial pollution, etc.²¹ As the Civil Code has never been seriously amended since its initial adoption,²² these socioeconomic issues have been mostly addressed by flexible interpretation of the Code by judges.²³ Accordingly, the methodologies of "interpretation" have been an important consideration for civil law scholars.²⁴ On the other hand, legal

²⁰ See Franz von Benda-Beckmann, *The Multiple Edges of Law: Dealing with Legal Pluralism in Development Practice*, WORLD BANK LEGAL REV., Nov. 2006, at 51.

²¹ See, e.g., TOSHIO HIRONAKA & EIICHI HOSHINO, MINPOUTEN NO HYAKUNEN [A HUNDRED YEARS OF THE CIVIL CODE] (1998); Nobuhisa Segawa, *Minpouten no Kaisyaku* [Interpretation of Civil Code], in MINPOU KOUGI: BEKKAN-1 [LECTURES ON CIVIL CODE, ANNEX-1] (Eiichi Hoshino ed., 1990); KATSUMI YOSHIDA, SHIMIN-SHAKAI TO MINPOUGAKU [CIVIL SOCIETY AND THE CIVIL CODE] (1999).

²² This is a result of the basic nature of the Civil Code given as a general law, which was a historical product of a national debate where the Meiji government could not but suspend the country's first ever Civil Code in 1890 drafted by French scholar Gustave E. Boissonade, which never came into force and was later superseded by the 1899 Civil Code drafted by Japanese professors and based on a Prussian model. But this was merely one of the numerous contests against the formal law regime, as described in detail by Professor Masanori Fukushima's series of historical analyses on Japanese capitalist law. See MASANORI FUKUSHIMA, CHISO-KAISEI NO KENKYU [STUDY OF LAND TAXATION REFORM] (1962); MASANORI FUKUSHIMA, NIHON SHIHONSYUGI NO HATTATSU TO SHIHOU [DEVELOPMENT OF CAPITALISM AND PRIVATE LAW IN JAPAN] (1953).

²³ Judicial precedents have often been formed based on general principles such as good faith and the prohibition of abuse of rights, which were later incorporated into the Code in 1947 as fundamental principles of legal interpretation. This judicial activism in Japan has also attracted the attention of foreign scholars. For a discussion of traditional case law culture since pre-modern days, see 1 JOHN H. WIGMORE, LAW AND JUSTICE IN TOKUGAWA JAPAN (1969); 3 JOHN H. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS (1928). For a discussion of the judiciary's role in post-war social changes, see JOHN O. HALEY, THE SPIRIT OF JAPANESE LAW (1998); FRANK UPHAM, LAW AND SOCIAL CHANGES IN POST-WAR JAPAN (1987).

²⁴ See TOSHIO HIRONAKA, MINPO KAISHAKU HOHO NI KANSURU 12 KO [TWELVE LECTURES ON THE METHODS OF CIVIL CODE INTERPRETATION] (1997). "Interpretation" has been explained as a necessary pre-stage for the application of legal provisions within the established legal methodology of managing the code system. Of course, the exact

sociologists, who have been in favor of judicial lawmaking since the inception of the field,²⁵ at this stage of the Civil Code centenary called for a new thrust of intensive work for identifying necessary conditions to control the way of judicial lawmaking.²⁶ This call was in response to a series of interactive works in the fields of legal philosophy,²⁷ legal sociology,²⁸ and civil procedure law²⁹ that had attempted to articulate the procedural conditions to both protect and control the possible roles of judicial lawmaking within the limits of constitutional constraints. The essence of the institutional considerations could be summarized into three aspects: (i) independence of adjudication (constitutional roles of the judiciary; interpretation techniques; established judicial precedents); (ii) interaction of judge and parties (modified adversarial system in terms of judge-parties collaboration for presentation and proof of legal facts), and (iii) social supervision of judicial lawmaking (judgment disclosure system; judgment critiques by expertise).

This article will attempt to borrow these procedural considerations of judicial lawmaking in Japan in understanding the characteristics and the outcomes of judicial reform in Vietnam. This procedural approach will be

terminology should require the classification of (i) interpretation in a narrow sense to clarify the meaning of abstract ideas or general principles within the possible deduction from the statutory provisions, (ii) lawmaking to supplement the deficiency in statutes so as to conform with the existing statute, and (iii) lawmaking beyond individual statutes ("*contra legem*") but within that which has been deduced from the holistic statutory order. However, all these categories, including even the "*contra legem*" type, tend to be accepted as "interpretations" in Japan.

²⁵ Eugen Ehrlich's thoughts on the catalytic role of judicial norms operating between social norms and the formal law greatly influenced Japanese scholars in the Meiji-Taisho modernization period, when scholars were facing enormous difficulties in their attempt to narrow the widening gap between the formal law regime transplanted from German conceptualism and changing socioeconomic conditions. However, recent scholarship tends to express remorse that legal sociologists have only contributed to the judicial practice by identifying customary norms (known as "*lebendes recht*," or, living law), but have not attained much in their primary task of studying the judicial process. See, e.g., YOSHITAKA WADA, *HO TO HUNSO NO SHAKAIGAKU* [SOCIOLOGY OF LAW AND DISPUTES] 10–11 (1994).

²⁶ Seigo Hirowatari, *Shihou Handan to Seisaku Keisei* [Judicial Decision and Policy Making], in 63 *HOU-SHAKAIGAKU* [THE SOCIOLOGY OF LAW] (2005).

²⁷ Shigeaki Tanaka, *Saiban niyoru Ho Keisei* [Judicial Lawmaking], in 1 *SHIN MINJI-SOSHO-HO KOUZA* [NEW PRACTICAL LECTURES ON THE CIVIL PROCEDURE LAW] (1981).

²⁸ Katsuzo Ohta, *Legal Evolution and Social Justice*, in *MINJI-HUNSO-TETSUZUKI-RON* [ANALYZING THE PROCEDURES ON CIVIL DISPUTE RESOLUTION] 109 (1990).

²⁹ Shozaburo Yoshino, *Saiban niyoru Hou-Keisei to Saibankan no Yakuwari* [Lawmaking in Litigation and the Role of Judges], *RITSUMEIKAN HOGAKU* 5–6 (1988); TAKEHIRO HARA, *SAIBAN NIYORU HOSOTO TO JIJITSU-SHINRI* [LAWMAKING IN LITIGATION AND FACT-FINDING] (2000).

able to satisfy both the needs of donors' practices and scholars' critical investigations, by enabling micro-analyses into the detailed institutional mechanisms of judicial function. Accordingly, Section II will reconsider the donor-oriented judicial reform in Vietnam in the context of constitutional constraints over adjudicative independence; Section III will investigate Vietnam's newly enacted civil procedure law in an attempt to identify the nature of the Vietnamese version of the adversarial system; Section IV will explore the outcomes of the new procedural law through the reading of cassation judgments publicized as a result of the judgment disclosure system, supplemented by interviews with local judges. Finally, Section V will induce general implications for donors' alternative approach to judicial reforms in Asia.

II. CONSTITUTIONAL CONSTRAINTS ON JUDICIAL INDEPENDENCE

A. *U.S. Model versus Socialist Constitution*

Since the economic reformation policy of *Doi Moi* was introduced in the late 1980s, Vietnam has been carrying out legal and judicial reform under the auspices of numerous legal assistance programs sponsored by international donors as well as under the pressure of conditions imposed by trade negotiations. Among others, the STAR (Support for Trade Acceleration Project) of the USAID (United States Agency for International Development), backed by the pressure of conditions imposed under the 2001 U.S.-Vietnam Bilateral Trade Agreement (BTA), was the most influential. The USAID imposed stringent targets such as transfer of judicial administration to the Supreme People's Court (SPC), introduction of an adversarial system for civil and commercial dispute resolution, and introduction of the judgment disclosure system.³⁰

The ruling Communist Party of Vietnam quickly responded to these requirements by issuing important directives, such as Central Politburo Resolution No. 8 in 2002 on the forthcoming principal judicial tasks, and Central Politburo Resolution No. 49 in 2005 on the strategies for judicial reform. They were followed by consecutive legal reforms, such as a revision of the Law on the Organization of the People's Court in 2002 for realizing the transfer of authority of judicial administration to the SPC, followed by the enactment of the Civil Procedure Code in 2004 accompa-

³⁰ For details, see U.S. AGENCY FOR INT'L DEV., SUPPORTING VIETNAM'S LEGAL AND GOVERNANCE TRANSFORMATION (Feb. 2008), available at <http://www.starvietnam.org/data/document/USAID-Vietnam-STAR%20Law%20and%20Governance%20Report,%20FINAL-FINAL%20for%20printing,%206-24-08.pdf>.

nied by active campaigning for the adversarial system. In addition, in response to the donors' pressure for the introduction of the judgment disclosure system, in 2005, the SPC started to publish the supreme cassation court's decisions from 2002 onward.³¹

However, these seemingly positive attitudes brought about less than substantial change. First, the transfer of judicial administration has never resulted in the creation of a U.S.-style balance of power system, since the fundamental constitutional principle of democratic concentration remains unchanged.³² Second, the adversarial system introduced by the 2004 Civil Procedure Code has revealed a unique paternalistic nature aiming at social dispute resolution, in opposition to the capitalist principle of private autonomy. Finally, the distribution of supreme cassation decision casebooks has been narrowly limited within the bar, and there was no initiative to disclose lower court judgments.

After all, the lesson was simply that judicial reform could not achieve fundamental changes beyond the limitations set by the local constitution. A successful design of judicial reform must start with an accurate understanding of the position of the judiciary under the local constitutional regime.

B. Partial Role in Judicial Review

The regime of the 1992 Constitution of Socialist Republic of Vietnam is basically closer to the continental "supremacy of the legislature" style rather than the U.S. "balance of powers." The 1992 Constitution continues to hold socialism as the fundamental political foundation;³³ "democratic centralism" has been maintained as the core constitutional principle, and hence it is in the legislature (namely the National Assembly as well as the People's Council at each local level) that the national decision-making power,³⁴ including the authority to supervise the activities of

³¹ TOA AN NHAN DAN TOI CAO, QUYET DINH GIAM DOC THAM CUA HOI DONG THAM PHAN TOA AN NHAN DAN TOI CAO, NAM 2003–2004 [SUPREME PEOPLE'S COURT, CASSATION DECISIONS OF COUNCIL OF JUSTICE AT THE SUPREME PEOPLE'S COURT, YEAR 2003–2004] (2005) [hereinafter CASSATION DECISIONS 2003–2004]; TOA AN NHAN DAN TOI CAO, QUYET DINH GIAM DOC THAM CUA HOI DONG THAM PHAN TOA AN NHAN DAN TOI CAO, NAM 2005 [SUPREME PEOPLE'S COURT, CASSATION DECISIONS OF COUNCIL OF JUSTICE AT THE SUPREME PEOPLE'S COURT, YEAR 2005] (2008a) [hereinafter CASSATION DECISIONS 2005]; TOA AN NHAN DAN TOI CAO, QUYET DINH GIAM DOC THAM CUA HOI DONG THAM PHAN TOA AN NHAN DAN TOI CAO, NAM 2006 [SUPREME PEOPLE'S COURT, CASSATION DECISIONS OF COUNCIL OF JUSTICE AT THE SUPREME PEOPLE'S COURT, YEAR 2006] (2008b) [hereinafter CASSATION DECISIONS 2006].

³² CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM (1992, amended 2001), art. 6.

³³ *See id.*, pmbi.

³⁴ *Id.*, art. 6.

the judiciary,³⁵ is concentrated. Though the 2001 amendments inserted a new clause referring to a coordination among the legislature, executive, and judiciary,³⁶ there has been no change in the core structure of the supremacy of the legislature. Accordingly, the judiciary has never been in a position to exercise the power of constitutional review over the legislature, which is at the present time being conducted by the Standing Committee of the National Assembly,³⁷ provided this might be shifted to the proposed constitutional court that is still under discussion.

On the other hand, although there is no explicit provision in the 1992 Constitution other than a mention of the general role of the judiciary to "safeguard the socialist legality,"³⁸ the court has been responsible for hearing administrative lawsuits under the Ordinance on the Procedures of Administrative Dispute Resolution in 1996, under the influence of perestroika legal reform of the former USSR, which was endorsed by the 2001 Constitutional amendment lifting the authority of administrative review by the People's Prosecutors.³⁹ Accordingly, the holistic structure is such that the judiciary is entrusted with the role of watching over the executive, and this judicial review is supervised under the authority of the People's Procuracy Office. Though it is the current strategy of the Communist Party to strengthen this judicial review over the executive,⁴⁰ its true intention is still unclear, especially when one remembers the fact that a separate administrative procedure (1996 Ordinance on the Procedures of Administrative Dispute Resolution) has been maintained by the government, while it rejected the idea to extend the reach of the 2004 Civil Procedure Code to administrative lawsuits.⁴¹ Accordingly, there is a crucial need for an improved administrative procedural law so as to serve as an

³⁵ *Id.*, art. 84(2), art. 122.

³⁶ *Id.*, art. 2.

³⁷ *Id.*, art. 91(3).

³⁸ *Id.*, art. 126.

³⁹ *Id.*, art. 137. For details, see Khuat Van Gha, *Organization and Operation of the People's Procuracy of Vietnam in the Current Period*, 16 ICD NEWS (Japan) (2004).

⁴⁰ 2005 Communist Party Politburo Decision No. 49 on the Strategies of Judicial Reform Decision (§ 2-1); see also Le Phu The, *Vietnam Shihou-Seido Kaikaku no Genjyou to Mondaiten nitsuite* [Present Status and Problems of Judicial Reform in Vietnam, Japanese translation], 29 ICD NEWS (Japan) (2006).

⁴¹ Japan may likely be the only donor to understand this rationale of separate administrative procedures, since it has actually adopted an independent administrative law in the ordinary court in the context of a compromise after WWII to merge the newly transplanted system of judicial review from the United States with traditionally separate administrative lawsuits under the pre-war Meiji Constitution. As a result, the restrictive nature of current Japanese administrative procedure law has been retained with its constrained standings, limited reach of injunctions, etc., which has discouraged the potentially active role to be played by the judiciary against the administration.

important base for effectuating judicial reviews over the administration, though this need has been less addressed by donors.⁴²

Thus, the constitutional role of the judiciary in Vietnam is quite complicated, being subordinate to the supremacy of the legislature and overseen by the People's Procuracy but having a primary responsibility to review administrative agencies under a restrictive procedure. It is difficult to find any comparable model among Western capitalist constitutions that suitably reflects this complexity. There might be fewer chances of judicial activism under the present state of constitutional limitations.

C. Integrity versus Independence in Ordinary Lawsuits

Apart from the limited constitutional roles of the judicial review, there has been an active campaign to strengthen the inherent role of the judiciary to apply the law in ordinary lawsuits. Under pressure from donors, the Vietnamese government went through an overhaul of issues for reform in the "Comprehensive Needs Assessment for the Development of Vietnam's Legal System to the Year 2010" conducted between 2000-2002, which was later consolidated into two policy documents in 2005, namely, the Communist Party Politburo Decision No. 48 on the strategies of legal reform, and No. 49 on the strategies of judicial reform. These strategies repeatedly emphasized the constitutional concept of *quan ly xa hoi bang phap luat* (administering the society by law),⁴³ which has often been used synonymously with "rule of law," but actually is simple propaganda that the law should be applied equally and uniformly throughout the country.⁴⁴ The judiciary is entrusted with the task of achieving this uniformity in lawsuits, and in this context, the integrity within the judicial system becomes a requirement.⁴⁵

On the other hand, despite this campaign to emphasize judicial integrity and notwithstanding the constitutional principle of democratic concentration and its corollary of legislative supremacy, there have recently been growing calls for a flexible judicial interpretation of the law in order

⁴² For donors who accept a U.S.-style system of judicial review in ordinary lawsuits, the need for a separate administrative procedure to be applied in the same court must be difficult to understand. On the other hand, donors who accept the continental model of a specialized administrative court cannot understand the need for an administrative procedure to be applied in an ordinary court.

⁴³ CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM (1992, amended 2001), art. 12.

⁴⁴ Communist Party Politburo Decision No. 48, § I-1; Communist Party Politburo Decision No. 49, Preamble; see, e.g., MARK SIDEL, THE CONSTITUTION OF VIETNAM: A CONTEXTUAL ANALYSIS (Peter Leyland & Andrew Harding eds., 2009).

⁴⁵ Communist Party Politburo Decision No. 49, § II-1.

to fill lacks or gaps in the formal law system.⁴⁶ This inevitably creates tension between the dual requirements of integrity and flexibility, or in other words, the tension between vertical control and adjudicative independence, in designing any judicial reform projects.

The institutional framework for protecting adjudicative independence seems weak in Vietnam. Though the 1992 Constitution guaranteed the independence of judges,⁴⁷ in reality, the process of nomination of local judges had been subject to political approval by local government at the corresponding level. After the constitutional amendments in 2001, followed by the Law on the Organization of the People's Court in 2002 implementing the vertical control by the SPC of personnel and budgetary administration of lower courts, it is often said that lower court judges are subject to both the SPC's vertical control and the local government's actual influence.

In addition, another serious institutional pressure over judges has been judgment supervision under the French-style "cassation" system. It has been the responsibility of the upper courts and the prosecutors' offices to check all judgments written by lower court judges. Although the 2004 Civil Procedure Code only allows a cassation review in circumstances of conflict with objective facts, material infringement of procedural rules, or material mistakes in the application of law,⁴⁸ it is the actual practice of the SPC to revoke lower courts' judgments based mainly on factual issues even when the real issues center on the interpretation of law. It is also said that the results of cassation are directly relevant to the judges' performance evaluations.⁴⁹ This vertical pressure exerted by the cassation system will be further increased if the currently debated introduction of *stare decisis* for cassation judgments is finalized.

Given these multiple pressures on judges, it has to be the task of judicial reform projects to improve adjudicative independence in order to create a better balance between integrity and flexibility in the application of law.

⁴⁶ Ngo Duc Manh, *Legal Interpretation and the Supremacy of the Constitution*, 165 VIETNAM L. & LEGAL F., May 2008, at 14; John Gillespie, *Perspectives on Legal Interpretation*, 165 VIETNAM L. & LEGAL F., May 2008, at 16.

⁴⁷ CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM (1992, amended 2001), art. 130.

⁴⁸ 2004 Civil Procedure Code, art. 283.

⁴⁹ The author confirmed this in her interviews with several local judges in provincial courts in December 2008.

D. Japanese Approach

Although foreign observations on the situation of adjudicative independence in Vietnam have been mostly pessimistic,⁵⁰ plausible proposals have come from Japanese sources that meet local calls both for integrity and independence. The Japanese prescription has been to improve the quality of judgments through technical training for judges in fact-finding, application of law, and reference to judicial precedents.⁵¹ The logic behind this technical approach is that improved quality of individual judgment is the best means of defense of adjudicative independence against not only external but also internal pressures in the judiciary, especially when backed by a comprehensive judgment disclosure system and qualified academic critiques. This essence of the Japanese assistance has been developed by an expert team involving former Japanese judges who have had actual experience of sitting on the bench for decades amid both internal and external pressures against their adjudicative independence. Techniques of fact-finding, development of a judgment manual, and the introduction of a reference system for judicial precedents have been of central importance in this context.

1. Judicial Training on Interpretation Techniques

As for the improvement of judicial training at the Judicial Academy in Vietnam, experts from the Japanese counterpart to this institution (*Shihou-kensyu-jyo*) were dispatched to introduce their original training methods for the application and interpretation of laws; that is, the method for fact-finding and ultimate facts (*Youken-jijitsu-ron*). The basic dialectical concept of *Youken-jijitsu-ron* seems as simple as the usual technique in civil law countries for applying the raw facts of the individual case in hand to the legal factors deduced from each statutory provision. However,

⁵⁰ Studies cover a broad range of issues, including the Communist Party's intervention (see Pip Nicholson & Nguyen Hien Quang, *The Vietnamese Judiciary: The Politics of Appointment and Promotion*, 14 PAC. RIM L. & POL'Y J. 1, 14–22 (2005); Brian Quinn, *Legal Reform in the Context of Vietnam*, 15 COLUM. J. ASIAN L. 219, 245–6 (2002)), guarantee of the status of judges such as tenures and salaries (see, e.g., Brian Quinn, *Vietnam's Continuing Legal Reform: Gaining Control over the Courts*, 4 ASIAN-PAC. L. & POL'Y J. 431 (2003)), and the judges' capacities to carry out legal interpretation to protect their independence (see, e.g., John Gillespie, *Rethinking the Role of Judicial Independence in Socialist-Transforming East Asia*, 56 INT'L COMP. L. Q. 837 (2007)).

⁵¹ Although similar micro approaches to adjudicative practice are taken by some other bilateral assistance programs such as the CIDA's JUDGE project and the Danida/EU Judicial Access project, in parallel with the UNDP's Access to Justice project, their scope tends to be concentrated to important but limited areas such as ethical training and pro bono activities.

since Japanese judicial training relies strongly on judicial precedents, the training cannot end with paraphrasing statutory provisions but must go further by referring to the array of legal factors added by judicial precedents,⁵² including the modified rules of burden of proof beyond the literal meaning of the relevant provisions.⁵³ Following the exposure to this Japanese-style code application technique, the trainees must be made aware of the dynamism of legal development where judges can take an active role in clarifying or even modifying the meaning of statutory provisions as well as shifting the distribution of the burden of proof. In the author's interviews with several trainers at the Judicial Academy in December 2008, it was emphasized that *Youken-jijitsu-ron* was interpreted and operating in a Vietnamese style.⁵⁴ If this is true, judicial training could be an efficient channel to train future judges for active application of the law within the logical structure of uniformity.

2. Judgment Manual

As for the judgment manual project, although its completion has been postponed for several technical reasons, the original intention of this project can easily be ascertained from the completion report on another judgment manual project prepared by the same Japanese experts for Laos.⁵⁵ It is asserted that the independence of adjudication could be increased by learning from the hybrid nature of the Japanese judgment writing custom, which includes the same lengthy reasoning culture as makes up common law judgments, while inheriting the continental custom of referring not only to legal decisions but also detailed fact-finding in the reasoning.⁵⁶ Such a Japanese-style judgment custom is emphasized as the most straightforward manner for a judge to prove the validity of his/her conclusion before the reviewers both inside and outside of the judiciary, while avoiding suspicion of corruption and undue influence.

⁵² For example, although the Japanese Civil Code contains about 1,000 provisions, it is said that Japanese judges have to know several thousands of precedents in order to apply the Civil Code properly.

⁵³ See HIRONAKA, *supra* note 24; SHIGEKI ITO, *YOUKENJIJITSU NO KISO* [BASICS OF THE ULTIMATE FACTS] (2000); Hirowatari, *supra* note 26.

⁵⁴ These trainers stated that they often hold meetings to reach a common understanding on legal factors in any questionable statutory provision or judgment. The results of such meetings are often reported to the SPC, which will disclose the essence of such reports in official legal journals.

⁵⁵ Masanori Iseki, *Laos Hanketsugaki Mannual Sakusei Shien* [Assistance to the Judgment Manual in Laos], 33 ICD NEWS 9–15 (Japan) (2007).

⁵⁶ *Id.* at 9.

3. Reference System of Precedents

Another pillar of Japanese assistance is the development of a reference system for cassation precedents. This reference system is intended to create a judgment culture based not only on the general rules provided by written laws but also by reference to judicial precedents further clarifying the legal foundations.

This is in fact another example of the Japanese stance that aims to respond to Vietnamese needs for both judicial integrity and adjudicative independence. It is asserted by the Japanese expert team that, in order to achieve uniform application of law, the current top-down mode of the cassation review system has limited effectiveness, as it merely constitutes an *ex post facto* check made on a case-by-case basis, which can never prevent the repetition of similar mistakes.⁵⁷ Instead, the expert team argued that the new precedent reference system would encourage a bottom-up mode of uniformity of law application on the initiative of lower court judges. This practical proposal was received positively by the SPC, which intended to establish the effect of *stare decisis* on the supreme cassation decisions. The SPC initiated a campaign of *phap trien an le* (development of precedents) in response to Japanese inputs such as the “Japan-Vietnam Joint Research on the Development of the Judicial Precedents”⁵⁸ and the “Seminar on the Precedent System,”⁵⁹ which are expected to influence the revision of the Civil Procedure Code planned for 2010.

However strongly uniformity is stressed, the essence of such a precedent reference system must be in the protection of adjudicative independence from top-down intervention, since it is now the role of lower court judges to take initiative in searching and interpreting cassation judgments from the bottom up.

An interesting tendency observed among the SPC judges is their growing willingness not only to supervise but also to learn from such a bottom-up mode of lower court judgments so as to draft better cassation decisions.⁶⁰ This fact can be taken to imply the possibility that more inter-

⁵⁷ Masanori Iseki, *Nihon-hou to Hikaku shiten no Tokucho* [Characteristics Compared to Japan], 21 ICD NEWS 58–90 (Japan) (2005).

⁵⁸ JAPAN INTERNATIONAL COOPERATION AGENCY, JAPAN-VIETNAM JOINT RESEARCH ON THE DEVELOPMENT OF THE JUDICIAL PRECEDENTS (NGHIEN CUU CHUNG VIET-NHAT VE VIEC PHAT TRIEN AN LE TAI VIET NAM) (2007).

⁵⁹ The “Seminar on the Precedent System” was jointly held by the SPC and the Japan International Cooperation Agency (JICA) Hanoi Office on December 25–26, 2008.

⁶⁰ This information was obtained from the speeches of judges in the aforementioned seminar, *supra* note 59. See Nguyen Van Cuong, *Nhat Thuc Chung Ve An Le, Tam Quan Tong Cua An Le Trong Cong Tac Xet Xu, Kai Quat Cac Trong Phai An Le Tren The Gioi* [The Awakening of the Precedent System and the Importance of Precedents in Rendering

actions as well as tensions will be seen between upper and lower court judges who may together develop a new mode of judge-made law within the logical integrity under the code system.

III. CIVIL PROCEDURAL CODE: VIETNAMESE-STYLE ADVERSARIAL SYSTEM

A. Paternalistic Nature of Dispute Resolution

In order to comprehend the detailed aspects of adjudication in Vietnam, it is necessary to look into the characteristics of the adversarial system newly introduced by the 2004 Civil Procedure Code. The Code was a product of the U.S.-Vietnam Bilateral Trade Agreement (BTA)⁶¹ that required the improvement of contract enforcement, which was paraphrased under the USAID/STAR as the introduction of an adversarial system in the context of the capitalist principle of private autonomy. However, the 2004 Code actually succeeded the basic structure of the 1989 Ordinance on Civil Procedures, which was a result of a compromise between the socialist civil procedures⁶² and Vietnam's own dispute resolution culture.⁶³

Judgments: Outlines of Various Schools Around the World] (presentation paper at the SPC-JICA Joint Seminar, Dec. 25, 2008).

⁶¹ U.S.-Vietnam Bilateral Trade Agreement (2001), ch. II, art. 12.

⁶² The basic framework of socialist civil procedures that influenced Vietnam was established during the Soviet legal reform era of the 1960s. For the substance of the legal reform, see M. A. Gurvich & V. K. Puchinsky, *On the Basic Principles of Soviet Legislation on Civil Procedure*, in *SOVIET CIVIL LEGISLATION AND PROCEDURE: OFFICIAL TEXTS AND COMMENTARIES* 115 (Yuri Sdobnikov trans., 1961); A. K. R. Kiralfy, *The Civil Code and the Code of Civil Procedure of the RSFER 1964*, L. E. EUR., no. 11, 1966.

⁶³ Although French-oriented civil procedural codes were adopted during the colonial period (e.g., 1910 Civil and Commercial Procedure Code in Cochin China; 1921 Civil and Commercial Procedure Code in Tonkin), and succeeded in the south and central parts of Vietnam (1943 Civil and Commercial Procedure Code in Annam and Cochin China; 1972 Civil and Commercial Procedure Code in the Republic of Vietnam), the Democratic Republic of Vietnam (1945–1976) established in the north and its successor, the People's Republic of Vietnam (1976–present), had never applied any civil procedure code, but had continued procedural practices mainly developed in courts, with reference to socialist legal tradition, and partly incorporated into each revision of Law on Organization of the People's Court. See PENELOPE NICHOLSON, *BORROWING COURT SYSTEMS: THE EXPERIENCE OF SOCIALIST VIETNAM* (2007).

1. Broad Reach of "Parties"

First, the 2004 Code defines "parties" broadly. The term "parties" is understood to refer not only to the plaintiff(s) and the defendant(s) but also to all relevant persons, organizations, or institutions, which may be legally relevant to the dispute.⁶⁴ It should also be noted that the court is responsible for making a mandatory order that all relevant parties participate in the case,⁶⁵ following the former Ordinance.⁶⁶ Moreover, it grants the right to bring a claim not only to the "parties" but also to a wider range of people, organizations, and institutions.⁶⁷ These include neighborhoods, relatives, childcare institutions, and women's organizations for cases involving family law, and the competent administrative agencies that are in charge of disputed matters.⁶⁸ This breadth of petitioners is not surprising given the traditional socialist view contained in the former 1989 Ordinance⁶⁹ designed to encourage the community as well as the competent agencies to take part in the resolution of cases, although the former system of filing by the prosecutors on behalf of society at large⁷⁰ has been abandoned in the 2004 Code. Accordingly, the final judgments are binding not only on the parties but also on "all citizens, organizations, and institutions."⁷¹ An appeal is possible not only by either party but also by all relevant organizations and institutions⁷² as well as the People's Procuracy.⁷³

These provisions to encourage wider participation and settlement in a larger society are an inheritance from the socialist civil procedures.⁷⁴ However, a noticeable difference is that, though the Soviet law had respected the principle of free evaluation as the method of fact-finding by judges,⁷⁵ the 2004 Code of Vietnam lacks the corresponding provision, which implies that the wider definition of "parties" is directed to the intensive way of inquisitorial investigation by judges, in contrast to the intensive way of adversarial arguments dedicated to the free evaluation envisaged in the Soviet law.

⁶⁴ 2004 Civil Procedure Code, art. 56(1).

⁶⁵ *Id.*, art. 56(4).

⁶⁶ 1989 Ordinance, art. 19–20.

⁶⁷ 2004 Civil Procedure Code, art. 4.

⁶⁸ *Id.*, 162.

⁶⁹ 1989 Ordinance, art. 8.

⁷⁰ *Id.*, art. 28(1).

⁷¹ 2004 Civil Procedure Code, art. 19.

⁷² *Id.*, art. 243.

⁷³ *Id.*, art. 250.

⁷⁴ *See, e.g.*, Code of Civil Procedure of the Russian Soviet Federal Socialist Republic (RSFSR), art. 29 (1964) [hereinafter RSFSR Civil Procedure Code].

⁷⁵ *See, e.g., id.* art. 56.

2. Inquisitorial Support for Presentation of Facts and Evidence

The adversarial system, or the principle of private autonomy in civil procedure, has been deeply rooted in the civil law tradition, and has been paraphrased into a few indispensable theses to guarantee the trial led by parties' arguments (*Verhandlungsmaxime*), including its central principle that the court is bound to consider the case within the legal facts asserted by the parties. Interestingly, the Soviet civil procedural law has not only succeeded this civil law tradition, but added further improvements to increase the role of judges so as to encourage, instead of restrain, trials by parties' arguments. These improvements have included the obligation of judges to clarify and explain to each party the need to present enough facts and evidence necessary to meet all required legal factors drawn from the statutes,⁷⁶ as well as the strengthened pre-trial procedure for clarification of legal issues.⁷⁷

However, this civil law and Soviet tradition has been uniquely modified by the Vietnamese civil procedures. The 2004 Code retained various aspects of the inquisitorial system inherited from the 1989 Ordinance. For example, though the 2004 Code provides for private autonomy in deciding the scope of issues to be considered by the court,⁷⁸ it also provides that the court can ask the parties to correct the petition during a 30- to 45-day period following the filing, and that the court may reject the petition in the event of non-compliance.⁷⁹ The 2004 Code also revoked the explicit provisions concerning the parties' duty to assert legal facts, though these provisions at one time appeared in the drafting process.⁸⁰ This deletion may provide room for inquisitorial intervention by the court to admit legal facts not asserted by the parties.

As for the parties' responsibility to produce evidence, which was the central issue envisaged in the USAID/STAR, though the 2004 Code appears to explicitly affirm this autonomous principle by allowing the court to intervene only when the parties so request⁸¹ while rejecting the inquisitorial provisions under the 1989 Ordinance,⁸² the 2004 Code actually retains much space for inquisitorial investigation. It should be noted that the

⁷⁶ See, e.g., Basic Principles of Soviet Legislation on Civil Procedure, art. 16.

⁷⁷ See, e.g., RSFSR Civil Procedure Code, art. 141.

⁷⁸ 2004 Civil Procedure Code, art. 5(1).

⁷⁹ *Id.*, art. 169.

⁸⁰ The relevant provisions were included in the 9th Draft Civil Procedure Law as of 2002, art. 7(1); art. 69. For details, see Takenori Yoshimura, *Seiritsu no Haikai to Tokushoku* [Background and Characteristics of the Enacting], 21 ICD NEWS 10-57, 24 (Japan) (2005).

⁸¹ 2004 Civil Procedure Code, art. 6(2), 85-94.

⁸² 1989 Ordinance, art. 3, 38(1).

court is to admit a broad range of indisputable facts, including not only facts that are common knowledge but also documentary evidence such as previous judgments, documents recognized by competent government agencies, and annotated documents.⁸³ This is consistent with the automatic recognition of the admissibility of evidence on annotated documents and documents produced by governmental agencies and institutions,⁸⁴ as well as local customs acknowledged by the local government.⁸⁵ The court can also summon witnesses without parties' request.⁸⁶ The 2004 Code also added strict penalties for noncompliance with court orders of providing evidence and summonses.⁸⁷ These provisions imply a continued paternalistic tradition to supplement the parties' limited access to the evidence.

3. Mandatory Conciliation in the Pre-trial Procedure

A noticeable difference of the 2004 Code from the Soviet legal tradition is the active promotion of conciliation.⁸⁸ A mandatory conciliation process is built into the pre-trial procedures,⁸⁹ which seems to reflect the practice of Vietnamese courts. It is a known tradition in Vietnam that the pre-trial judge continues to sit as the chief justice in the trial of the same case.⁹⁰ It is also reported that Vietnamese judges have been encouraged to investigate into not only legal but also psychological factors during the pre-trial procedures,⁹¹ which implies that the basic conciliation-oriented stance is continually held by the same judge throughout the process from pre-trial to trial.

4. Unclear Nature of Judgment and Its Review

The 2004 Code inherits the Soviet law mechanisms for institutional review of judgments, namely the appeals to be made by the People's Procuracy,⁹² as well as the review of final judgments by the cassation court.⁹³ However, the 2004 Code does not clearly provide for the bases

⁸³ 2004 Civil Procedure Code, art. 80(1).

⁸⁴ *Id.*, art. 83(1).

⁸⁵ *Id.*, art. 83(7).

⁸⁶ *Id.*, art. 87.

⁸⁷ *Id.*, art. 386, 389.

⁸⁸ *Id.*, art. 10.

⁸⁹ *Id.*, art. 180–188.

⁹⁰ See Yoshimura, *supra* note 80.

⁹¹ See Pham Diem, *Civil Procedures in Vietnam*, 172 *VIETNAM L. & LEGAL F.* 30 (2008).

⁹² 2004 Civil Procedure Code, art. 21, 250.

⁹³ *Id.*, art. 18, 283, 299.

for these appeals and reviews that have been explicitly provided in the Soviet law tradition. Namely, it lacks the general principle on the legal basis of judgments, which was clearly declared in the Soviet law.⁹⁴ Also, the provision in the 2004 Code on the necessary contents of a judgment omits an explicit mention to the identification and the reasoning of fact-finding and the application of law.⁹⁵ The 2004 Code also lacks the provision on the legal basis at the appeal court.⁹⁶ Though the reason for these omissions is unknown, one possibility is that Vietnamese lawmakers intended to tighten institutional control over lower court judgments by implicitly expanding chances for review.

B. Resemblance to Contemporary Policy-making Suits

In light of the aforementioned key procedural features, even though political campaigns have emphasized a successful introduction of an “adversarial system” according to the conditions set by the U.S.-Vietnam BTA, the 2004 Code retains the overall inquisitorial nature that makes much of judges’ role to investigate holistic facts behind a case so as to bring about a conciliation-oriented settlement.

The question arises as to why this Vietnamese procedure with its tint of inquisitorial paternalism has so easily satisfied the evaluation of the donors. One hypothesis would be that the basic framework of the 2004 Code borrowed from the socialist civil procedures has created an impression of an advanced mode of the adversarial system. Indeed, some advanced aspects of the Soviet law chime with progressive views on contemporary policymaking lawsuits in capitalist countries. There is a trend in and around the school of civil procedure law to articulate the necessary conditions to both protect and control judicial roles, where the modification of the primary capitalist principle of private autonomy has been a stake.

For example, in the civil law countries, in the context of the modification of capitalist civil procedures based on laissez-faire, or the movement toward social civil procedures (*Der soziale Zivilprozeß*), reforms such as strengthened pre-trial procedures and active duties of clarification by judges to achieve substantial equality between parties in the trial have been pursued in the revisions of civil procedure codes. Even in common

⁹⁴ But see, e.g., RSFSR Civil Procedure Code, art. 10.

⁹⁵ But see, e.g., *id.*, art. 197.

⁹⁶ But see, e.g., *id.*, art. 307.

law countries, increasingly active judges have been characterized as “managerial judges.”⁹⁷

Recent academic discussions have also been directed to situations where the law itself is an issue to be found in an interaction between the judge and parties, and the dualistic separation of burdens of the law to judges and of the facts to parties is actually a fiction.⁹⁸ These discussions often introduce a classification of facts into two categories as developed in the tradition of American constitutional lawsuits, namely, specific or judicial facts directly relating to the individual case, and general or legislative facts constituting the base of judicial recognition in the legal policy. Since “legislative facts” are facts, the responsibility to present and to prove them can in principle go to the parties, which might enlarge the likelihood of social initiatives to raise new policy issues before the court, but at the same time, judges are expected to assist the parties’ assertion of these facts as far as there are legal issues. Accordingly, it is asserted that the traditional principle of an adversarial system on the private autonomy in fact-findings must be altered so as to invite more inquisitorial procedures as well as third parties’ involvement such as *amicus curiae* involving the litigating *amici*, which might increase the possibility of overcoming the difficulties inherent in establishing legislative facts.

The socialist civil procedures have developed many advanced aspects that resemble the contemporary aspects of modified capitalist private autonomy. For instance, wider scope of “parties” may facilitate certain progressive outcomes, such as the statement of facts from multilateral perspectives, production of evidence in an expedient manner, and the extended application of a judgment to settle all relevant disputes simultaneously. They are reminiscent of the most advanced procedural phenomena being developed in contemporary policy-making suits, such as expanded standing, judicial notice, the role of discovery, the development of *amicus curiae* involving the litigating *amici*, and so on. It is highly probable that the facial resemblance of Vietnamese law to these advanced reforms has hidden the true inquisitorial nature of the 2004 Code.

C. Implication of Japanese Involvement

The school of Japanese civil procedure law has been aware of the contemporary context of modification to the adversarial system (or *Ver-*

⁹⁷ See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982); Judith Resnik, *Procedure's Projects*, 23 CIV. JUST. Q. 273 (2004).

⁹⁸ See, e.g., Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L. J. 301, 310–12 (1989).

handlungsmaxime) in Japan's own context, while borrowing theoretical arguments in Germany⁹⁹ and the United States.¹⁰⁰

Indeed, Japanese judges quite often flexibly intervene into the assertion of claims and facts by parties based on the judge's authority of clarification, especially in cases of self-representation which is quite common in rural areas. As for the burden of proof, although the traditional mainstream in the German and Japanese schools is based on the idea that the burden should be automatically determined according to literal provisions in the substantive law, it is commonly known in Japanese lawsuits that judges shift the burden flexibly in order to balance the disparity between parties, such as in pollution damage claims, with respect to the parties' distance from the evidence and the difficulty of proof, in addition to the legal policies implied in the substantive law. This has often been asserted to be a form of judicial lawmaking that supplements the substantive law with procedural influence.¹⁰¹

This relatively active role of judges, however, has only recently been expressly re-admitted in the provisions of formal code. The historical recollection of Japanese civil procedure law reveals a long, winding way of legal development.¹⁰² The country's originally enacted 1890 Civil Procedure Code was based on the extreme capitalist value of private autonomy prevailing in the late 19th century, which could not avoid modification in the 1926 amendments based on the social welfare-oriented values of the early 20th century, while providing for the *ex officio* control of procedures, *ex officio* production of evidence to supplement the parties' autonomy, and strengthened duties of judges of clarification. Given the higher degree of assertion and proof required in the code countries according to the legal facts drawn from the statutory provisions of the code system, these modifications to the principle of private autonomy seemed necessary especially for assisting weaker parties in self-represented suits. However, when the post-WWII amendments in 1948 under the influence of the American "adversary system" omitted these *ex officio* provisions, Japanese court practice at once suspended all historical roles developed for the modification to extreme private autonomy. Since then, Japanese judges have been able to act only within the formalistic framework of the "ad-

⁹⁹ German legal reforms, especially *Das Gesetz zur Vereinfachung und Beschleunigung gerichtlicher Verfahren* in 1977, have influenced Japanese reformists' thoughts for the new Civil Procedure Code introduced in 1996.

¹⁰⁰ For example, the system of small claims courts was newly introduced in the 1996 Civil Procedure Code in Japan based on studies of the American practice.

¹⁰¹ See e.g., ITO, *supra* note 53 (explaining the methodological ways in which Japanese judges have applied "judicial norms" developed from the substantive law).

¹⁰² See Yasuhei Taniguchi, *The Development of Adversary System in Japanese Civil Procedure*, in *LAW IN JAPAN: A TURNING POINT* (Daniel H. Foote ed., 2007).

versarial system,” which has created the notorious practice of a repeated series of short hearings (*samidare-shiki* proceedings) in order to reach the required level of fact-finding within the limited ability of parties to assert. The frustration among judges seems to have caused informal court practices, such as the utilization of conciliation procedures for the purpose of allowing more active judicial roles in effective fact-finding (*venron-ken-wakai*).¹⁰³ Though reformists have been in favor of these active judicial roles, it was not until the introduction of the new Civil Procedure Code in 1996 that some parts of these court practices have been expressly endorsed in the formal law.

This historical experience of Japan should be understood as an outcome of legal reform under the pressure of a forced foreign model, especially when such a model carries a different policy value from that of local law and practice. This hard-learned experience of Japanese law seemed to chime the recognition of Vietnamese lawmakers who had been struggling for self-oriented code-drafting. According to the recollections of Vietnamese high officials involved in the drafting of the 2004 Code,¹⁰⁴ the first, second and third drafts prepared in the mid-1990s were quite inquisitorial and affected mainly by China and Russia, and according to these officials, this stance remained even when the USAID and other donors started to intervene in the fourth to seventh drafts after 1997. According to this official’s account, however, a drastic change occurred following the full-scale involvement of the Japanese team in 2000, which was manifested in the sophisticated outlook of the ninth to twelfth drafts. This change is explained as resulting from the catalytic role of the Japanese experience with struggling for maintaining an adversarial system in a social welfare-oriented direction even under the capitalist-oriented formal law.

IV. REVIEW OF CASSATION CASES

A. General Trends

In this section, in order to observe recent changes in the actual practice of adjudication resulting from judicial reform, the author will look

¹⁰³ It is remarkable that formalistic faceless Japanese judges turn into enthusiastic settlers in the conciliation procedures. For a detailed description of these two different faces of Japanese judges, see YOSHIROU KUSNO, *WAKAI-GIJYUTSU-ON [TECHNIQUES OF CONCILIATIONS]* (1995).

¹⁰⁴ See, e.g., the minutes of the lecture by the Vice President of the Supreme People’s Court, Mr. Dan Quan Phong, in 21 ICD NEWS 115, at 119–23 (Japan) (2005).

first at supreme cassation decisions disclosed under the recent judgment disclosure project as a primary information source.¹⁰⁵

Cassation cases given by the Vietnamese Judges Council at the SPC between 2002 and 2006 are now available for study as a result of the U.S. assistance made for their publication.¹⁰⁶ Though the coverage of disclosure as well as the reach of distribution was something far from the U.S. assistance team's initial intention of achieving a comprehensive social disclosure of judgments,¹⁰⁷ its indirect impact on the development of Vietnamese adjudication culture could be enormous, especially when the aforementioned Japanese assistance on the precedent reference system is taken into consideration. Cassation casebooks are now one of the primary sources of judicial precedents referred to by lower court judges. Although these casebooks are still too short to make useful reference material, given the unsophisticated mode of disclosure without any index or commentaries indicating the essence of precedents, it is certain that they at least exert influence over local judges to write better judgments given the fear of possible criticism by judges from other courts who will, under this precedent reference system, possibly refer to cassation decisions that revoke their original judgments.

Although the 2004 Civil Procedure Code integrated both the procedures for civil and commercial disputes,¹⁰⁸ which have been separately treated according to the socialist tradition, statistical trends as partly reflected in Table 1 show that the majority of disputes brought before the SPC are still civil. While economic disputes have tended to be settled between the parties rather than be brought before the courts,¹⁰⁹ this relative popularity of courts in civil disputes is interesting. The Vietnamese government has been re-strengthening traditional community-based concilia-

¹⁰⁵ The author expresses special thanks to Nguyen Van Trong, Nguyen Bang Trung, Phan Hoang Tu, and Duong Thu Huong for their enormous assistance and useful comments in understanding these cassation judgments.

¹⁰⁶ CASSATION DECISIONS 2003–2004, *supra* note 31; CASSATION DECISIONS 2005, *supra* note 31; CASSATION DECISIONS 2006, *supra* note 31.

¹⁰⁷ See Virginia Wise, *Several Proposals to Vietnam on the Judgment Disclosure Practices in the World's Leading Systems*, in preface, CASSATION DECISIONS 2003–2004, *supra* note 31. Initially, the cassation casebooks were only distributed among courts. In December 2008, the SPC created a connection with the USAID/STAR project's website where everyone can search cassation decisions, available at <http://www.toaan.gov.vn/portal/page/portal/tandtc/545500/cbba/dtba> [last visited Mar. 23, 2010].

¹⁰⁸ 2004 Civil Procedure Code, art. 1.

¹⁰⁹ See NICHOLSON, *supra* note 63, at 261; John Gillespie, *Concepts of Law in Vietnam: Transforming Statist Socialism*, in Peerenboom, *supra* note 3, at 146–82; John McMillan & Christopher Woodruff, *Dispute Resolution Without Courts in Vietnam*, 15 J. L.ECON. & ORG. 3 (1999).

tions for the purpose of managing a burst of civil disputes,¹¹⁰ but these statistics imply that the nature of civil disputes are mostly beyond the control of such traditional means. This is probably a result of drastic changes to formal law in the process of market economy reform, which has been expedited not only in the commercial field but also in basic civil fields such as the Land Code¹¹¹ and Civil Code.¹¹²

An overwhelming majority of such civil disputes are land disputes. Many of these are extremely complex due to the historical changes in the land regime,¹¹³ and also due to the impact of hasty legal reforms under market economy reform. This complexity seems all the more serious because of the basic stance of Vietnamese lawmakers to favor compulsory provisions in their formal lawmaking.¹¹⁴ Accordingly, there is an obvious conflict between the compulsory formal law and the flexibility derived from traditional customs, where the very paternalistic nature of the above-mentioned Vietnamese civil procedure law is expected to intervene to achieve better social settlements.

¹¹⁰ MICHATSU KAINOU, TUNEO MATSUMOTO & YOSHIKI KURUMIZAWA, *AJIA HOUSEIBISHIEN: TAISEI-IKOUKOKU NI-TAISURU HOUSEIBISHIEN NO PARADIGM KOUCHIKU: GAKUSAI-TEKI APPROACH* [LEGAL ASSISTANCE IN ASIA: BUILDING NEW PARADIGM FOR LEGAL ASSISTANCE TO TRANSITION COUNTRIES: AN INTERDISCIPLINARY APPROACH] 111–13, 191–92 (2006).

¹¹¹ Land Code, first adopted 1993, revised 2003.

¹¹² Civil code, first adopted 1995, revised 2005.

¹¹³ Land re-distribution to the lower classes was a feature of the early socialist policy in 1950s, which was succeeded by a drastic land concentration policy, but finally turned into a land return project under the *Doi Moi* market economy reform. Accordingly, typical land disputes involve conflicts of claims between the original landowner and the land users during the socialist period, as well as disputes among heirs recently regaining lands of an original landowner in the pre-socialization period. For details, see Chihiro Miyazawa, *Shakaisyugi-Shijyoukeizai-Ka niyoru Nousei no Kouzou-henryou* [Structural Changes of Rural Districts Under the Socialist Market Reform], in HOUSEIBISHIEN TO SHIYOUKEIZAIIKA (TOCHI TO RIYOU) [LEGAL ASSISTANCE AND SOCIALIST MARKET REFORM (LAND AND ITS USAGE)] (Michiatsu Kainou, Tuneo Matsumoto & Yoshinori Kurumizawa eds., 2007).

¹¹⁴ According to the Civil Code, civil agreements prior to the Code are invalid if they conflict with compulsory provisions of the Code, *see* National Assembly Decision on the Implementation of Civil Code dated October 28, 1995 and its replicate by the National Assembly Decision No. 45, 2005. All the formalities applying to land rights and land transactions laid down in the Land Law are considered to be compulsory (art. 88), and should be enforced over rights and transactions that occurred prior to enactment of the Law at the earliest convenience, *see, e.g.*, 1993 Land Law, art. 38(2) replicated by 2003 Land Law art. 50 with respect to the denial of the opportunity for parties lacking the relevant formalities to bring land disputes before the courts.

Table 1: Number of Cassation Decisions Rendered by the Judicial Council at the SPC

	Civil	Commercial	Labor	Administrative	Criminal
2002–2003	38	14	2	3	26
2004	6	4	0	3	10
2005	32	9	0	2	23
2006	44	7	13	3	31
Total	174	34	15	11	90

(Source: CASSATION DECISIONS 2003–2004, *supra* note 31; CASSATION DECISIONS 2005, *supra* note 31; CASSATION DECISIONS 2006, *supra* note 31)

B. Trends in Judgments Before the 2004 Civil Procedure Code

Although there is no disclosure system for lower court judgments in Vietnam, it is possible to follow, to a certain extent, the trends in lower court practice per the summaries of lower court judgments stated in the cassation casebooks. There seems to be some differences between the judgments handed down before¹¹⁵ and after¹¹⁶ the introduction of the 2004 Civil Procedure Code.

Pre-2004 lower court judgments on land disputes tend to be “conciliatory” judgments, in the sense that their primary purpose seems to be directed to amicable compromise rather than to legal resolution. They usually articulate a lengthy reference to raw facts, without streamlining legal factors according to statutory provisions, before abruptly providing a conclusion without mention to the detailed reasoning of fact-finding and legal application. Although most cases are brought before the courts following the failure of an earlier attempt for conciliation at local administrative offices, the judges’ approach appears also to be conciliatory. Ultimately, these judgments amount to compromises that seek an emotional balance between the parties rather than implementing the law.

Cassation decision No. 05/2003HDTP-DS¹¹⁷ is one such typical example among many others. In this case, the plaintiff purchased the land in question long before the adoption of the Land Law. Lacking the formality imposed by the Law, the plaintiff demanded the cessation of encroachment on his land by the original seller’s heir, who responded that the original land transfer was made null and void after he obtained his own formal registration under the Land Law. The court of first instance in the

¹¹⁵ See CASSATION DECISIONS 2003–2004, *supra* note 31.

¹¹⁶ CASSATION DECISIONS 2005, *supra* note 31; CASSATION DECISIONS 2006, *supra* note 31.

¹¹⁷ See CASSATION DECISIONS 2003–2004, *supra* note 31, at 57.

retrial procedure, Tai Ninh District Court, dismissed the plaintiff's claim, but at the same time recognized the winning party's increased responsibility to pay back the land administration cost as well as court fees. This decision was upheld by the appellate court in Ho Chi Minh City.

Cassation decision No. 11/2003HDTP-DS¹¹⁸ is a case where an original land owner claimed back the then-collateralized land confiscated by the socialist collective that later transferred the land to one of its officials. The court of first instance, Khanh Hoa District Court, as well as the appellate court in Da Nang, affirmed the plaintiff's claim for restoration while simultaneously granting increased compensation to the defendant at a present value to be flexibly borne by related parties based on the "spirit of volunteerism."

Cassation decision No. 38/2003HDTP-DS¹¹⁹ is a case where the heirs claimed a restoration of land against an old lessee who claimed land ownership rights dating back to the 1960s. The court of first instance, Ba Dinh District Court, ordered division of the land, granting three-fifths to the plaintiff and two-fifths to the defendant. This judgment was partially modified by the appellate court in Hanoi province at a ratio of four to the plaintiff and one to the defendant.

These conciliatory judgments are supposed to represent a judicial custom throughout the country in the pre-2004 Civil Procedure Law period. This should have been expected in the paternalistic culture of dispute resolution. It should be noted, however, that the disputants did have opportunities to continue disputes even after such conciliating judgments had been made by lower and/or appellate courts so as to seek better legal resolutions through repeated retrials and petitions for cassation.

What was the reaction of the SPC's cassation decisions to these conciliating judgments? In the earlier era of the pre-2004 Civil Procedure Code, there was a tendency for the SPC to endorse the lower court conciliating judgments, while even supplementing their legal reasoning. For example, in the aforementioned cassation case No. 05/2003HDTP-DS, the cassation decision introduced the logic of "prescription," which appears never to have been asserted by the lower courts, so as to affirm the lower courts' recognition of old land rights that lacked appropriate formality.

However, in later cases, an increasing tendency emerges for the SPC cassation decisions to revoke lower court judgments based on the shortage of investigation of the facts. For example, in the aforementioned cassation decision No. 11/2003HDTP-DS, the SPC revoked the lower court judgment simply because of the dearth of investigation into facts and the

¹¹⁸ *Id.* at 7.

¹¹⁹ *Id.* at 213.

failure of the related parties to participate. Moreover, in the aforementioned cassation case No. 38/2003HDTP-DS, the cassation decision was a revocation on the basis of the shortage of fact-finding going back as far as the 1940s, although the cassation judgment given in 2003 on the same case used to admit the old land transfer in its entirety, regardless of the lack of formality.

These recent tendencies in the SPC cassation cases could be characterized as increasing requirements of evidentiary specificity and procedural validity as if trying to turn away from the traditional conciliatory culture of lower court judgments.

C. Trends in Judgments After the 2004 Civil Procedure Code

The evidence-centered and procedure-oriented stance of the SPC has appeared even more clearly since the adoption of the 2004 Civil Procedure Law. Although the same conciliatory judgment culture remains in most of the lower court judgments, the SPC is more inclined to revoke them on the basis of the failure to observe procedural rules, without going into the substantive legal questions.

For example, cassation decision No. 10/2005HDTP-DS¹²⁰ is a debt collection case concerning joint venture partners. Although the court of first instance, Thanh Hoa District Court, admitted a flexible resolution to allow a setoff against the investment preemptive rights of the defendant, the cassation judgment denied this conciliatory solution on the basis of failures in the investigation of the details of the joint venture. In cassation decision No. 11/2006HDTP-DS,¹²¹ which concerned a dispute among several parties insisting individual transfer of land from different heirs of an inheritance going back to the 1970s when communal ownership was dissolved into individual rights, the court of first instance, Tan Hong District Court, worn down by repeated appeals and retrials, handed down a judgment that was basically a compromise in which the land was to be divided among the related parties according to the status quo. However, this judgment was revoked by the SPC, which criticized the shortage in investigation of facts and the lack of participation of related parties, without referring to substantive questions of land law. The cassation decision No. 28/2006HDTP-DS¹²² is another such example of the revocation of a compromising judgment in a dispute between heirs inheriting land and the buyers from the local administration that had once confiscated the same land.

¹²⁰ See CASSATION DECISIONS 2005, *supra* note 31, at 149.

¹²¹ See CASSATION DECISIONS 2006, *supra* note 31, at 232.

¹²² *Id.* at 342.

Thus, especially in complicated situations of norm conflicts, lower courts have shown a tendency to seek compromising solutions, but the SPC cassation decisions only dismiss these endeavors of lower courts while calling for more precise fact-finding, but without identifying substantive legal issues for the sake of better fact-finding.

On the other hand, an interesting new trend may be observed in some lower court judgments of introducing detailed legal foundations as if trying to persuade the upper courts. For example, cassation decision No. 04/2006HDTP-DS¹²³ concerns a dispute over the scope of a land sale where the buyer physically occupied a portion of land that used to be owned by the other party (i.e., the seller's sister). The court of first instance, Tu Liem District Court, decided the case by means of retroactive application of the Civil Code provisions on the formality of land transactions and the restoration of invalid contracts. This decision was at first revoked by the appellate court in Hanoi, but later upheld by the SPC cassation decision without much legal reasoning. Also, cassation decision No. 26/2005HDTP-DS¹²⁴ is a case where a claim of land restoration by the original seller was challenged by a bona fide third party who obtained the land from the original buyer. The court of first instance, O Mong District Court, seemed to admit this third party's assertion against the basic principle of Vietnamese law of disregarding the knowledge of third parties to a transaction on immovable.¹²⁵ The SPC cassation decision revoked this case without mentioning this very legal question.

Also, cassation No. 06/2006HDTP-DS¹²⁶ is a case where a "husband" in an informal marriage sought the division of properties jointly owned by the couple. The court of first instance, Kien Dang District Court, first issued a conciliatory judgment in which it ordered equal division of the properties. Following revocation of this decision by the appellate court in Ho Chi Minh City, the Kien Dang District Court, in the first instance retrial, addressed the issues using detailed legal foundations to justify the same conclusion as the first trial. The foundations applied ranged from the application of custom and analogy,¹²⁷ division of joint property,¹²⁸ compensation with respect to delayed performance,¹²⁹ jurisdiction over persons having foreign nationality,¹³⁰ and certain other relevant provisions. We can find a cassation precedent (No. 22/2005HDTP-DS) on a

¹²³ *Id.* at 180.

¹²⁴ See CASSATION DECISIONS 2005, *supra* note 31, at 245.

¹²⁵ See Civil Code, art. 138(2).

¹²⁶ See CASSATION DECISIONS 2006, *supra* note 31, at 197.

¹²⁷ Civil Code, art. 14.

¹²⁸ *Id.*, art. 238.

¹²⁹ *Id.*, art. 313.

¹³⁰ *Id.*, art. 822, 830, 833.

similar case involving an “informal marriage,” issued in the period between the first trial and the retrial of the No. 06/2006 case. The case seems to have been studied by the diligent Kien Dang District Court, although not specifically referred to, in order to justify the court’s belief that the civil custom of informal marriage should be acknowledged, by way of analogy, under the formal law. The appellate court basically upheld this reasoning. However, motivated by the sudden thought that informal marriages offend the social order and good morals, the SPC cassation decision on this retrial rejected these painstaking endeavors in legal reasoning by the lower courts, and revoked their judgments on the grounds of a shortage in investigation of facts.

D. Findings from Case Review

One of the findings from these cassation cases is the continued stance of the lower courts to bring about conciliatory judgments. We could also note some new approaches among the lower courts to base their decisions on explicit legal foundations, but they seem to be a manifestation of what historically has been unstated but implicit judicial reasoning. Their reasoning seems mostly directed at the legal justification of conciliatory conclusions, and rarely seems to be of a type that automatically applies the logic prescribed by formal law. It could be concluded that lower court judges in Vietnam have used an implicit method of legal interpretation in order to achieve social dispute resolution, and, while continuing to hold to their basically paternalistic approach to conciliation, are now trying to master the new arms of explicit legal reasoning in order to place their traditional implicit methods of legal interpretation before the public.

In contrast to such challenging trends among the lower courts, the SPC cassation level seems more hesitant about clarification of legal issues, while adhering to procedural requirements such as participation of related parties and only generally referring to failures in fact-finding. This procedure-oriented stance of the SPC seems to have been given a stronger basis in the 2004 Civil Procedure Code. How should we understand the SPC’s hesitant attitude? Perhaps the SPC is too concerned with leading the lower courts towards a new adjudicative culture based on the new procedures before looking into the merits of the cases. Or is it that this highest level of the Vietnamese judicial system has not yet been able to decide the fate of the judiciary’s role in society, lost in the choice of norms between the local conciliatory tradition and the integrity to be sought strictly under the formal law? Or is it the SPC’s intentional strategy to control the lower courts on the sole basis of factual issues, while hiding the questions of legal policies?

While the highest level has thus been hesitant about legal questions, lower courts are being compelled to respond to social needs amid rapid socioeconomic change. It seems that two different directions are being sought in lower court practice. One is the stronger recommendation for conciliation in the course of litigation to avoid increasing pressures for the evidence-based procedural requirements of the upper courts.¹³¹ The other is a positive stance for more flexible interpretation of legal provisions. Even a quick review of the lower court judgments that appear in the cassation casebooks shows signs of dynamic evolution of new legal interpretations; that is, the admission of retroactive completion of land transactions that lack the formalities prescribed by formal law; respect for peaceful long-term land usage; consideration for bona fide third parties despite the adverse principle of the formal law; admission of a compensation contract beyond the formal law provision as a private special agreement; supplementary interpretation of contracts to deem an invalid grant as a valid rental agreement; orders to return the balance between debts and collateral in a foreclosure-type security contract; and analogical application of the formal law to informal marriages.

All these interpretations arising out of the conciliatory tradition used at the lower court level seem to provide vivid evidence of bottom-up challenges of judge-made law. However, this activism among lower courts could be dangerous, if it goes too far without any endeavor of inducing additional legal factors to be commonly applied consistently with legal factors explicitly provided in the statutory provisions. The SPC cassation decisions should take the task of this systematization of inductive development of the holistic legal system, but their recent formalistic stance does not imply an active leadership.

V. JUDGE INTERVIEWS

A. *Observation of Civil Trials*

In December 2008, the author attempted to interview local judges at the provincial-level courts in the capital city Hanoi, Bach Ninh province (100 km northeast of Hanoi), and Hung Yen province (80 km southeast of

¹³¹ See, for example, cassation decision No. 24/2006DS-GDT on a dispute involving a collateral agreement taking the form of ownership transfer, which was heard seven times at various levels in the court system prior to cassation due to difficulties with regard to fact-finding. See CASSATION DECISIONS 2006, *supra* note 31, at 314. Settlements were tried frequently in this case. As for economic cases see, for example, cassation decision No. 02/2006KDTM-GDT. CASSATION DECISIONS 2006, *supra* note 31, at 577.

Hanoi). Before the individual interviews, the author was allowed to observe civil trials in each court.

One trial in Hanoi was a case of first instance concerning a complicated land dispute filed by four heirs who had disputed the outcome of an inheritance dating back to the 1940s, as well as more than 70 related parties who had bought and lived for decades in a part of the disputed land which was once under the control of the defendant (the eldest brother among the heirs). The trial parties were unrepresented by attorneys, and the People's Procuracy did not participate. The chief judge, together with two people's assessors, aggressively led the whole hearing process, while quite frequently asking questions. The role of the parties in court seemed limited to answering these questions as quickly and briefly as possible. The judge repeatedly recommended a settlement while compelling the parties to think about what would be wiser: to conciliate or to have the case decided by the strict application of the law. On learning that there was no prospect of the parties conciliating the case, the chief judge turned to persuade the plaintiffs to modify their claim from the original demand of the division of the whole estate to a narrowed demand for a partial tract of land to be left unoccupied by the third parties. The plaintiffs did not easily assume this modification of the claim, but were finally persuaded by the people's assessor who made a long, impressive speech about the beautiful tradition of paternal line inheritance in Vietnam. Upon this successful modification of the claim, the chief justice quickly finished the other part of the hearing, and after a twenty-minute break, gave a conciliating judgment that allowed the heirs to equally divide the unoccupied small part of the disputed land, which seemed to have been the line of conclusion prepared since the pre-trial conciliation stage by the pre-trial judge (i.e., the chief judge in the trial). There was no explicit discussion, either in the hearing process or in the judgment, of legal issues such as the reason for respecting the status quo position of third parties regardless of the basic principle of restoration under the Civil Code.¹³² It seemed that these legal issues had already been resolved in the judge's mind through flexible interpretation of the formal provisions, but the judge made no mention of such fundamental issues in the judgment.

Another example was the appeal of a debt collection dispute between an informally married couple in Hung Yen province. Similarly, the trial parties were also unrepresented by attorneys, and there was no participation from the People's Procuracy. All three of the judges were extremely eager for the parties to reach a settlement, while continuously proposing a line of settlement to them throughout the whole process of the hearing, even making repeated threats to the defendant (the husband) that the re-

¹³² Civil Code, art. 137(2).

sult would be painful for him if the dispute was decided under formal law. The judges' positive leadership of the whole trial process and their quick and relentless style of questioning were the same as what the author had observed in Hanoi. A particularly notable aspect of the case was the judges' automatic rejection of the defendant's oral assertion of new issues (the fact of partial setoff and the untruthful recognition of debts forced by the police) on the ground that he should have asserted them in a written petition when he filed for the appeal. This implies that the newly introduced adversarial system was understood by lower court judges as a new type of formalism tightening procedural requirements on the parties. In answering questions posed in the author's interview following the trial, the judges revealed that they had obtained more detailed facts from the local administration, including the husband's relationship with another woman, which seemed to largely help their pre-trial consideration for the line of settlement.

Judging from this limited number of observations, civil procedure in Vietnam seems to take some paths that are different from what was envisioned in the campaigns for an adversarial system. For one thing, the judges' traditional inquisitorial role is still vividly present. Another clear tendency is the enthusiastic promotion of conciliations. The author learned from judges that the high rate of successful conciliations is not only respected by society in general but is also the basis of affirmative grading in the personnel evaluation of judges, which is often directly relevant to the promotion of judges and their re-election following expiration of their five-year tenure. It also seems that conciliations are favored by judges as a means of avoiding appeals and rejections by the upper cassation courts, especially in situations involving difficulties in fact-finding or touchy legal issues.

One implication is the difficulty of straightforward application of the adversarial system in a local context. The judges all appeared highly motivated and capable of tackling the task of judicial reform, but at the same time, seemed much too occupied with the enormous difficulties of fact-finding in complicated but rather trivial domestic disputes. It seems that the newly introduced adversarial system of the 2004 Civil Procedure Law has only raised the bar further for judges with respect to the task of fact-finding, given the gap that exists between the ideal of private autonomy in trials and the parties' inability to exercise it properly. This gap could work against adjudicative independence by increasing the danger of vertical intervention by the cassation courts on the basis of factual issues, without identifying touchy questions of law.

B. Institutional Basis for Judges in Practice

An analysis is provided in the following sections based on the author's interviews with local judges conducted between December 23-30, 2008 at provincial level courts in Hanoi, Bac Ninh province and Hung Yen province. One reservation is that, due to the intention of the chief judge in each provincial court visited, the author could only obtain two answers to the structured questionnaire, which was supplemented by seven answers obtained from unstructured interviews. Reference will also be made to some earlier studies in which similar types of interview have been attempted.¹³³

1. Independence in Adjudication

To start with political independence, the author's review of cassation casebooks did find some cases in which it was questionable whether the judges reached a judgment free from political influence, though there were few explicit instances¹³⁴. However, in the author's interviews with local judges, all answered in the negative to the question of whether they had ever experienced political pressures related to their adjudication. Nevertheless, some of them answered that they often received particular communications from the local Party's politburo in important or complicated cases.¹³⁵

As for intervention into the personnel control of judges, a few judges admitted that the local people's committee still holds a strong veto power with respect to the nomination and promotion of judges, even after the concentration of judicial administration to the SPC in the revised Law on Organization of Courts in 2002. This was the case mainly because a

¹³³ UNDP HANOI OFFICE, REPORT ON THE SURVEY NEEDS OF DISTRICT PEOPLE'S COURTS NATION WIDE (2007); John Gillespie, *Rethinking the Role of Judicial Independence in Socialist-Transforming East Asia*, 56 INT'L & COMP. L.Q. 837 (2007).

¹³⁴ There are quite a few cases where repeated retrials and cassations are admitted by the strong initiative of the People's Procuracy, even where persuasive legal grounds are lacking. Such an explicit mention of intervention by a member of the National Assembly over Procuracy is found in cassation case No. 10/2006HDTP-DS in which a SPC cassation decision revoked the decision made on appeal based on a procedural error, with no reference at all to the merits of the case. See CASSATION DECISIONS 2006, *supra* note 31, at 232. Another typical situation relates to disputes involving economic policy issues such as investments made by expatriates where the SPC often revokes lower court judgments that lawfully found the illegal nominal transactions by foreign investors void. See cassation decision No. 3/2006HDTP-DS, in CASSATION DECISIONS 2006, *supra* note 31, at 106; cassation decision No. 16/2006HDTP-DS, in CASSATION DECISIONS 2006, *supra* note 31, at 182.

¹³⁵ This is a point also noted in the report by Gillespie, *supra* note 133, at 849-51.

judge's career normally develops within the same province. This reality may constitute the background to the recent discussion in Vietnam on the restructuring of the whole system of court jurisdiction to shift it away from the administrative jurisdiction of each province.¹³⁶

As for the existence of vertical pressure within the judicial system, all judges answered in the negative, stating that they hold regular discussions with their supervisors in the same court and frequently seek the opinions of higher courts. This information corresponds to the findings of preceding research studies.¹³⁷ In this connection, answers were divided on the question of whether the recent disclosure of cassation precedents has improved their legal application.

2. Norms Applied

The judges were also interestingly divided on the question of what norms they apply in cases. Some insisted that they strictly and literally apply the formal law, with the reservation that they often consult colleagues in the same court on the accurate interpretation of statutory provisions. Others confessed that flexible interpretation or analogical application of provisions is unavoidable because of the ambiguity of wording and lack of precision in the statutory provisions.

As for the order of priority of normative sources, which judges often resort to when finding ambiguities or deficiencies, one judge clarified her order of priority as follows: (1) opinions of cassation courts; (2) trends of precedents in other courts disclosed in the occasional study meetings between provincial court level judges and the annual SPC meeting for judgment review; and (3) customs and analogies.

Asked about the expectation for future improvements, a few judges emphasized the need for more detailed precedents to clarify the interpretation of legal factors within currently ambiguous statutory provisions, further legislative reform to reflect such detailed precedents, and more positive admission of flexible interpretation of provisions.

These answers eloquently reveal the predicament of Vietnamese judges: the more they try to achieve stricter application of the formal law than before, the more they realize the need for flexible interpretation of the formal law. In this sense, the views contained in previous studies on this subject—such as the view that the Vietnamese judges only apply the formal law as a situationally relevant guideline,¹³⁸ and that, when it comes

¹³⁶ See Communist Party Central Politburo Resolution No. 48, § II.1-5 (2005).

¹³⁷ UNDP HANOI OFFICE, *supra* note 133, at 50; Gillespie, *supra* note 133, at 853.

¹³⁸ See Gillespie, *supra* note 133, at 856.

to the application of the formal law, judges are only allowed to apply it literally and mechanically¹³⁹—are quickly becoming outdated.

3. Judicial Training

Although previous studies by the UNDP emphasized the contribution of the judicial training school for post-nomination career judges established under the SPC,¹⁴⁰ the author's interview did not detect a positive influence. There were scarce mentions of the experience of training in fact-finding techniques and the application of law. This tallies with the judges' disclosure that they often need to ask cassation courts for direct advice on individual applications of law. Some also mentioned the benefits of occasional study meetings among provincial court level judges and the annual SPC meeting for judgment review as opportunities for training.

Interestingly, most of the interviewees knew of and held expectations for the Japanese assistance for promoting the precedent reference system as well as the judgment manual project. These expectations for more opportunities to learn the techniques of fact-finding and application of the law, or the core methods for better judgments, have to be recognized by the donors who provide training for minimally pragmatic purposes such as recurrent learning on global models in commercial laws, English usage, and computer processing.¹⁴¹

C. Adversarial System and Fact-finding in Practice

1. Adversarial System

Although, as discussed earlier, the 2004 Civil Procedure Code introduced the adversarial system under foreign pressure, neither the author's review of cassation cases nor observation of civil trials could detect any hint of the parties' initiatives in raising and proving facts. All judges in the trials that the author observed exercised aggressive authority to control the claim and inquire into facts, which the parties had little choice but to obey. We have even noted in the above chapter that the SPC's cassation decisions have repeatedly emphasized the judges' inquisitorial responsibility to investigate into facts.¹⁴²

¹³⁹ *Id.* at 849.

¹⁴⁰ See UNDP HANOI OFFICE, *supra* note 133, at 101.

¹⁴¹ *Id.* at 102–04.

¹⁴² This is not only in civil cases but also in commercial cases. See, e.g., cassation decision No. 01/2006KDTM-GDT, in CASSATION DECISIONS 2006, *supra* note 31, at 441); cassation decision No. 03/2006KDTM-GDT, in CASSATION DECISIONS 2006, *supra* note 31, at 454.

Interestingly, however, all the judges interviewed by the author insisted that they were always strictly applying the values of the adversarial system as laid down in the 2004 Code, and that they never intervened on an inquisitorial basis unless explicitly requested to do so by the parties in accordance with the 2004 Code. This is, in a sense, a very truthful response when one considers the author's observation that during the trials, the judges aggressively took the lead, provided that this was done in order to induce parties to settle along the lines already prepared by judges for successful conciliation, but the judges never exercised their authority for the purpose of intervention to assist parties' procedural rights. An implication is that the adversarial system tends to be understood by local judges as a new set of formalisms added by the 2004 Code.

Judges' lack of concern about the fact that eighty percent of cases are conducted without representation by advocates was also interesting. Instead, one judge proudly mentioned the broad definition of "parties," which allows social organizations to act positively to assist the direct parties to the disputes. This opinion of judges contrasts with the position of advocates illustrated in previous studies.¹⁴³

In this regard, however, a strong minority opinion emerged from the interviews that both the adversarial system and inquisitorial procedures should be used in a harmonious manner to achieve effective fact-finding.

2. Burden of Proof

As noted above in the case review, the author detected a tendency of judges to strongly recommend conciliation, especially in cases where judges saw difficulties in fact-finding, which was also observed to some extent in the observation of trials. However, many of the judges interviewed denied this, while emphasizing the importance of a strictly evidence-based trial. Nevertheless, many of them referred to the benefits of promotion of conciliation with remarkable enthusiasm, as if justifying their dependence on conciliation, mentioning issues such as the spirit of procedural law to make it compulsory for judges to recommend conciliation before each trial, the fact that roughly thirty percent of filed cases have been resolved by conciliation, the enhanced prospects of enforceability due to the parties' genuine satisfaction, and the ratio of successful conciliations, which is considered in personnel evaluations at courts. Asked about the norms to be applied in conciliations, interviewee answers were divided between the same norms as in litigation and a combination of both formal and customary laws, though there remained a possibility that both answers meant the same thing.

¹⁴³ See, e.g., UNDP HANOI OFFICE, *supra* note 133, at 59.

D. Quality Control of Judgments in Practice

As mentioned above, though Western donors insisted on the use of the judgment disclosure system for achieving social supervision of judgments, the Vietnamese strategy for judgment supervision has so far been directed at the promotion of a precedent reference system in the context of integrity in application of the law by strengthening the effect of *stare decisis* of cassation decisions. However, as noted in the above case review, the SPC has been strangely silent on the production of precedents as clear bases of reference for lower courts. Cassation decisions do not appear to have been intended to set standards for the application of law. In particular, in land disputes, which represent a large majority of total civil disputes, it is extremely difficult to find a single precedent clarifying legal factors to guide the uniform understanding of relevant provisions of the Civil Code and/or Land Law.

When the author asked the judges during interviews about the frequency and mode of their reference to cassation precedents, responses were divided between a seemingly model answer emphasizing that the interviewees had studied the casebooks in every case, and more honest answers confessing that the interviewees had looked at them but had never used them in preparing for judgments. The latter answers even revealed strong dissatisfaction with the contents of current cassation casebooks, especially regarding the scarcity of concrete suggestions on how to conduct fact-finding and how to apply the relevant legal provisions. Some of the judges mentioned that they could obtain better concrete suggestions in the annual case review meeting at the SPC and the occasional meetings between provincial courts.

V. CONCLUSION: LOCALIZATION OF CIVIL PROCEDURE

This paper has attempted to observe the outcomes of judicial reform in Vietnam in the context of balancing the conflict between institutional integrity and adjudicative independence. In the static design of procedural laws as well as in the actual court practices, we have often observed institutional biases toward integrity, such as the strengthened vertical personnel controls over judges, cassation reviews over both factual and legal matters of each individual judgment, frequent rejections by cassation decisions on the increased formalism in the name of the adversarial system, and the promotion of a judgment disclosure system meant to strengthen *stare decisis* for supreme cassation decisions.

Nevertheless, we have observed proactive attitudes among local judges to tackle several, sometimes mutually conflicting judicial tasks, to bring about more effective and satisfactory resolution of disputes. One clearly recognizable feature is the basic conciliatory nature of lower court judgments. As exposed in the SPC's recent campaign for integrity and greater procedural transparency, one of the remarkable reactions among lower court judges is the strong inclination to promote conciliations. The author has also detected signs of a more active stance among lower court judges toward using detailed legal reasoning in their judgments, for the very purpose of providing justification for their own conciliatory conclusions for the sake of satisfactory dispute resolution.

In principle, the SPC is expected to control all these bottom-up movements in lower court practices in order to achieve integrity.¹⁴⁴ However, the SPC has been observed to be quite hesitant to intervene on the merits of cases beyond minimum reviews on procedural and factual grounds, and to develop precedents on legal issues on its own initiative. Instead, it seems that the SPC has been allowing lower courts to take responsibility for continuing each experiment in seeking better outcomes of legal interpretation. It must also be the case that the current constitutional limitation restricting the interpretive role of the judiciary has something to do with this hesitancy of the SPC. In any case, as long as the SPC continues this restrictive stance, the meaning of the current campaign for a precedent reference system is likely to be different from something designed to strengthen a top-down mode of integrity within the judicial system.

The author instead foresees potential for the "precedent reference system" in some bottom-up contexts, where normative decisions made at various grassroots levels compete with each other in providing better legal reasoning until ultimately being selected as a new precedent in the SPC casebooks. In a sense, this system can initiate a potential "secondary rule" in the Hartian philosophical sense. Grassroots initiatives can bridge the gap between the formal lawmaking controlled by global models and the local social norms, enabling a new direction for the formal law modification out of dynamic inductions, which might remind us of the Japanese experience in the Meiji modernization.¹⁴⁵

Donors should assist such an incremental process of normative integration in the local grassroots initiative. Japan, as a donor, has a comparative advantage because of its own experience of having developed an autonomous legal system by way of judicial interpretations, led mainly by

¹⁴⁴ See Gillespie, *supra* note 133, at 868.

¹⁴⁵ See, e.g., Carl Steenstrup, *New Knowledge Concerning Japan's Legal System Before 1868, Acquired from Japanese Sources by Western Writers Since 1963*, in *LAW IN JAPAN: A TURNING POINT* 7-33 (Daniel H. Foote ed., 2007).

the lower courts amid various pressures against their independence as rigorous as observed in recipient countries. One of the essential institutional conditions, which has made the independence of Japanese adjudication possible, is, as repeatedly emphasized by former judges involved in the Japanese assistance team in Vietnam,¹⁴⁶ the qualified fact-finding and legal reasoning pursued in each judgment by judges so as to prove the validity of their own judgments before the reviewers. In assisting Vietnamese judges with better fact-finding and legal reasoning, perhaps donors should pay more attention to the comparative difference between the models and the local holistic system of civil proceedings.

Along the same lines, one important implication drawn from the author's observation in this article is that the American adversarial system does not always provide a perfect way to overcome the trade-offs among different judicial tasks,¹⁴⁷ including increasing pressure for evidence-based fact-finding, calls for the quick and efficient resolution of the disputes, and the independence of the adjudicator.¹⁴⁸ The adversarial system in the civil law countries has required higher levels of fact-finding under the test of "high probability" in establishing each material legal factor deduced from statutory provisions,¹⁴⁹ which is also essential for strengthening self-justification of judgments to achieve adjudicative independence. However, this precision in fact-finding can result in a prolonged and inefficient resolution, unless modifications are made on the principle of private autonomy, such as improved pre-trial procedures and active clarifications by judges to help weaker parties make precise assertions of facts, particularly given the local reality of unrepresented litigations. It should be noted that socialist civil procedures had made advanced attempts for such modifications of the adversarial system even beyond the similar endeavors that had been made in capitalist civil law countries, where active involvement of judges has been encouraged to help parties to make better argumentation of material facts.¹⁵⁰ This socialist avant-garde tradition has met with the Asian paternalistic culture of dispute resolution, and seems to have formed something unique to Vietnamese law.

¹⁴⁶ See Iseki, *supra* note 55.

¹⁴⁷ See *infra* Table 2.

¹⁴⁸ Cautious arguments against a uniform promotion of the American model have been discussed among comparativists. See, e.g., John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545 (1995).

¹⁴⁹ The standard of proof required for civil law judges is considered higher than the "propensity of evidence" applied in American law courts by the jury. See Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243 (2002).

¹⁵⁰ See e.g., Inga Markovits, *Playing the Opposites Game: On Mirjan Damaška's The Face of Justice and State Authority*, 41 STAN. L. REV. 1313 (1989).

An automatic transplant of the American adversarial system could harm such a unique aspect of Vietnamese civil procedure. At present, reasonable Vietnamese judges seem to resort more to conciliations because conciliations can provide a viable means of obtaining efficient resolution, while avoiding the difficult task of clearing the test of "high probability" in fact-finding within the newly tightened formalities of the adversarial system. This dependence on conciliations, however, could harm the development of qualified judgments for the enhancement of adjudicative independence.

Table 2: Summary of Foreign Models Surrounding Vietnam

	Strict Standard of Assertion and Proof (Application of Code; High Probability Test; Legal Review by Appellant Court)	Eased Standard of Assertion and Proof (Case Law Culture; Preponderance of Evidence Test; Jury Trial; No Legal Review)
Private Autonomy	• Post-1948 Japan (prolonged resolution; mismatch with self-represented suits) • Vietnam's commitment in trade treaties	• American model
Modification to Party Autonomy	• Soviet civil procedure • Various attempts in civil law countries • Post-1996 Japan	• Contemporary policy-making suits

Commentators on law and development studies have repeatedly emphasized that donors should consider local contexts, but they often do not identify what specific contexts are to be considered. One implication of this study on Japan's involvement in Vietnam is the need for a more in-depth, precise consideration of the comparative legal knowledge of not only the present legal system, but also of the historical influence behind the present system, which, in the case of Vietnam, particularly incorporates Soviet law as well as a traditional culture of dispute resolution. When a donor clearly recognizes basic similarities between historical or cultural conditions surrounding the adjudication systems of its own past and of the present recipient country, a better chance of successful judicial assistance can be expected.

