

The Law of China and Vietnam in  
Comparative Law

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## ARTICLE

# THE LAW OF CHINA AND VIETNAM IN COMPARATIVE LAW

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### ABSTRACT

*The law of China and Vietnam has been often ignored or marginalized in mainstream scholarship of comparative law. This is due to three orientalist assumptions, namely: nihilism (lawlessness); instrumentalism (law as a tool for political control without rule of law qualities); and assimilationism (no distinctive legal systems). These assumptions fail to capture the complexity of law in China and Vietnam and fail to place it in a better position in comparative law. This Article argues that the exploration of the law of China and Vietnam can substantively enrich comparative law scholarship, for the following reasons: first, there are multiple layers of law throughout their legal history, namely chthonic law, Confucian law, civil law, socialist law, and global law; second, the two states have accommodated some forms of the rule of law as a strategic response to the need to consolidate the legitimacy of the socialist regimes; and third, there are distinctive legal systems in these countries, namely the Confucian legal system and the socialist legal system, which are separate from other traditional legal systems (Islamic law, Hindu law, and Buddhist law) and other modern legal systems (civil law and common law). This Article concludes that the study of law in China and Vietnam can make important contributions to: traditional comparative law (functionalism and taxonomy of legal systems); post-modern comparative law (law and ideology, law and politics, law and culture, law and society, and legal pluralism); and global comparative law (legal transplants, global legal diffusion, and law and development).*

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### *I. INTRODUCTION*

This Article aims to locate the law of China and Vietnam within the general context of comparative law.<sup>1</sup> A background introduction is necessary. China and Vietnam are two Asian countries whose populations (about 1.4 billion and 95 million respectively) make up

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1. Its primary concern is not to compare law in China and Vietnam, although some comparisons are occasionally made. For substantive comparison, see *LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES* (John Gillespie & Albert H. Y. Chen eds., 2010); *ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM* (John Gillespie and Pip Nicholson, eds. 2005).

approximately twenty percent of the world population.<sup>2</sup> During their millennia history, both countries were influenced by Confucianism, one of the world's major traditions of philosophy.<sup>3</sup> The two countries are among the five socialist/communist countries<sup>4</sup> that survived the collapse of the Soviet Union.<sup>5</sup> After the Cold War, both countries have implemented the so-called “socialist market economy”, leading to China’s being second largest economy and Vietnam’s being the 47th-largest economy in the world measured by nominal gross domestic product.<sup>6</sup> Both China and Vietnam have actively integrated in the global economy, including the joining of the World Trade Organization.<sup>7</sup> Accompanying economic reform is legal reform. The two socialist countries have implemented the so-called “socialist rule of law state,”<sup>8</sup> leading to the development of sophisticated legal systems, despite the international condemnations of violation of human rights and the lacking of the rule of law.<sup>9</sup>

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2. *Countries in the world by population (2017)*, WORLDOMETERS, <http://www.worldometers.info/world-population/population-by-country> [https://perma.cc/DN5R-KWJU] (last visited Oct. 4, 2017).

3. *See generally*, RETHINKING CONFUCIANISM: PAST AND PRESENT IN CHINA, JAPAN, KOREA AND VIETNAM (Benjamin A. Elman, et al. eds., 2002).

4. International observers tend to describe these countries as “communist.” *See eg.*, LEGAL REFORMS IN CHINA AND VIETNAM, *supra* note 1. Meanwhile, these countries tend to identify themselves as “socialist.” *See* for Vietnam Constitution, art. 2(1) (2013) (“The Socialist Republic of Vietnam State is a social rule of law State . . . .”); XIANFA art. 1 (1982) (China) (“The People’s Republic of China is a socialist state.”). In this Article, “communist” or “socialist” regime is understood with same meaning to refer to the regime ruled by a communist party.

5. The three others are Cuba, Laos, and North Korea. For the survival of the communist regimes, see WHY COMMUNISM DID NOT COLLAPSE: UNDERSTANDING AUTHORITARIAN REGIME RESILIENCE IN ASIA AND EUROPE (Martin K. Dimitrov ed. 2013).

6. For economic reform in China and Vietnam, see TRANSFORMING ASIAN SOCIALISM: CHINA AND VIETNAM COMPARED (Anita Chan, Benedict J. Tria Kwekvliet, & Jonathan Unger, eds. 1999); MARKET AND SOCIALISM: IN THE LIGHT OF THE EXPERIENCES OF CHINA AND VIETNAM (Janos Kornai & Yingyi Qian eds., 2008).

7. *Members and Observers*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Oct. 4, 2017).

8. For China, see the roundtable on the future of China’s “rule according to law,” ASIAN POLICY 20 (July 2015). For Vietnam, see John Gillespie, *Changing Concepts of Socialist Law in Vietnam*, in ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM 45 (John Gillespie and Pip Nicholson eds., 2005).

9. *See e.g.*, *China: Events of 2016*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2017/country-chapters/china-and-tibet> [https://perma.cc/5PK2-6A2X] (last visited Oct. 29, 2017); *Vietnam: Events of 2016*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2017/country-chapters/vietnam> [https://perma.cc/W3B8-JV7X] (last visited Oct. 29, 2017).

Unfortunately, law in China and Vietnam has been ignored or marginalized in mainstream scholarship of comparative law,<sup>10</sup> although it has been extensively studied by county-experts and scholars of comparative Asian legal studies.<sup>11</sup> Comparative law literature has focused mainly on modern legal systems of western developed countries in North America and Europe.<sup>12</sup> When it comes to Asia, comparative law scholars are more concerned with the countries which have similar institutional settings and level of development, such as Japan.<sup>13</sup> The neglect or marginalization of Chinese and Vietnamese law in comparative law stems from, among other things, what is called “legal orientalism”<sup>14</sup> or the western conceptualization of law in the Oriental societies like China and Vietnam. Legal orientalism has generated at least three assumptions about law in China and Vietnam, which can be called: nihilism, instrumentalism, and assimilationism.

The nihilist view is that such oriental societies like China (and by extent Vietnam) were dominated by “oriental despotism”<sup>15</sup> in which law did not exist as the consequence of “the rule of man”.<sup>16</sup> Even in modern time, it has been also argued that the domination of the communist regimes in these countries has resulted in the neglect of law,

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10. See e.g., MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS: TEXT, MATERIALS, AND CASES ON WESTERN LAW*, FOURTH EDITION (2014); RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES, TEXTS, MATERIALS* (1998). The law in China is sometime referred to in major comparative law work. See e.g., PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 319-360 (2014); UGO MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, *SCHLESINGER’S COMPARATIVE LAW: CASES, TEXT, MATERIALS* (7th ed. 2009).

11. See e.g. Gillespie & Chen, eds., *supra* note 1.

12. MATHIAS SIEMS, *COMPARATIVE LAW* 35-37 (2014) (criticizing “the focus on western countries” in comparative legal studies”).

13. *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (Mathias Reimann & Reinhard Zimmermann eds., 2006), including one chapter on “development of comparative law in East Asia”, which focuses on Japan). See also, JOHN HENRY MERRYMAN, DAVID S. CLARK & JOHN OWEN HALEY, *COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA, AND EAST ASIA* (2010) (including one chapter on law of East Asian countries, namely China, Korea, Japan, and Thailand).

14. For legal orientalism, see TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES AND MODERN LAW* (2013); Carol G.S. Tan, *On Law and Orientalism*, 7 *J. COMP. L.* 5 (2012).

15. See generally, KARL AUGUST WITTFOGEL, *ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER* (1957).

16. Teemu Ruskola, *Law Without Law, or Is “Chinese Law” an Oxymoron?*, 11 *WM. & MARY BILL RTS. J.* 655, 656 (2003).

such the time of lawlessness during Mao era in China.<sup>17</sup> If the subject matter does not exist, there would be no study. Second, some may agree that there are laws in modern China and Vietnam but hold the instrumentalist view that the socialist states have promulgated law as a tool for political control, exemplified what is called the *rule by law* rather than the *rule of law*.<sup>18</sup> When law in China and Vietnam is considered lacking the rule of law qualities, it will be marginalized or ignored in comparative law literature. Finally, assimilationists cannot see distinctive legal systems in China and Vietnam separate from the two dominant legal systems, namely civil law and common law.<sup>19</sup> Therefore, they have ignored or marginalized their law and focused on the dominant civil law and common law.

The three above assumptions fail to capture the complexity of law in China and Vietnam and fail to place it in a better position in comparative law. This Article argues that the exploration of the law of China and Vietnam can substantively enrich comparative law scholarship, for the following reasons: first, there are multiple layers of law throughout their legal history, namely chthonic law, Confucian law, civil law, socialist law, and global law; second, the two states have accommodated some forms of the rule of law as a strategic response to the need to consolidate the legitimacy of the socialist regimes; and third, there are distinctive legal systems in these countries, namely the Confucian legal system and the socialist legal system, which are separate from other traditional legal systems (Islamic law, Hindu law, and Buddhist law) and other modern legal systems (civil law and common law). This Article concludes that the study of law in China and Vietnam can make important contributions to: traditional comparative law (functionalism and taxonomy of legal systems); post-modern comparative law (law and ideology, law and politics, law and culture, law and society, and legal pluralism); and global comparative

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17. Mo Zhang, *The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience*, 24 TEMP. INT'L & COMP. L. 12 (2010) ("many regarded Mao's era as the era of "lawlessness."").

18. Eric Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L. L. 43, 106 (2001) ("The Chinese government seems to move strongly toward adopting the rule by law in the instrumental, positive sense...").

19. See e.g., the conflation of socialist law and civil law, John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781, 808 (1989) ("Socialist law contains features that distinguish it from the legal systems of other countries of the civil law family. But those points of difference have not removed socialist law from the civil law tradition").

law (legal transplants, global legal diffusion, and law and development).

This argument is pursued in four parts. Part I explores the multiple layers of law in China and Vietnam. Part II will examine the partial achievement of the rule of law in the two countries. Part III considers the two distinctive legal systems. Part IV concludes with further reflections on the possible contributions of exploration of law in China and Vietnam to comparative law.

## *II. NIHILISM? MULTIPLE LAYERS OF LAW.*

Different laws have existed throughout Chinese and Vietnamese legal history, including: chthonic law, Confucian law, civil law, socialist law, and global law. Currently although China and Vietnam are socialist countries, their law does not exclusively include socialist law as elements of other laws have still informed the complex situation of legality. I propose the concept of “multiplayers of law” to understand this complexity. This concept refers to the co-existence of different legal ideas, rules, process, institutions, and cultures in one society. Within this multiple legal framework, one legal system may be dominant, but elements of other legal layers still exist in their complex interactions.

### *A. Chthonic Law*

Patrick Glenn usefully coins the term “chthonic law” to refer to the law of indigenous people.<sup>20</sup> This oldest forms of law exist in both China and Vietnam. In China’s Shang dynasty (c. 1600 BC–c. 1046 BC), chthonic law embodies in the customary laws of the *zu*, “a consanguineous group of people descended from a common ancestor.”<sup>21</sup> In his book *Origins of Chinese Law*, Yongping Liu argues that “there were no unified customary law in Shang times, but there are many sets of customary laws practiced by the different *zu*.”<sup>22</sup> The subsequent dynasty, the Zhou dynasty, codified a series of *li* (rituals) in an attempt to “maintain the unity of the members of the Zhou Zu”, but still “allowed the people of other *zu* to use their customary laws.”<sup>23</sup>

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20. GLENN, *supra* note 10, at 60.

21. YONGPING LIU, *ORIGINS OF CHINESE LAW* 21 (1998).

22. *Id.* at 22.

23. *Id.*

That means the Zhou's law includes both the codified *li* and the indigenous law.

Prior to the coming of the Chinese conquerors in 111 BC, the Vietnamese people lived according to their indigenous law. Ma Yuan, a Chinese official, reported to the Han Emperor that "the law of the Viet people" was different from the law of the Han dynasty in ten points.<sup>24</sup> There is no evidence indicating the existing of written law prior to the Chinese domination. What Ma Yuan called "the law of the Viet people" is indigenous law orally transmitted and memorized throughout different generations of the Vietnamese people. One example from the marriage law is the customary rule that when the older brother dies, the younger brother will marry his sister-in-law, which is stemmed from the matrilineal system of the indigenous people.<sup>25</sup> Chthonic law continues to exist throughout Vietnamese legal evolution with different nuances and contents. During the Chinese dependency period (111 BC- AD 905), the Chinese conquerors continued to allow the local people to live according to their indigenous law at the village level. Successive independent dynasties in Vietnam also allowed the existence of chthonic law at communal level. Notably, during the independent period, chthonic law was written down. The *huong ước* (village law) drafted around the 15<sup>th</sup> century is a written mixture of Confucian moral norms and indigenous customs of the villages.<sup>26</sup> Under French colonialism (1887-1945), *huong ước* continued to exist as the mixture of indigenous customs and colonial policies for villages. The Communist government abolished the *huong ước* but has allowed their revivals since 1998. Contemporary *huong ước* are a mixture of indigenous customs and socialist policies for communal communities.<sup>27</sup> While the *Kinh* people, the Vietnamese majority residing in North Vietnam have their *huong ước*, minority groups in Western Highlands and Northwest of Vietnam have their own

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24. PHAN HUY LÊ, ET AL., LỊCH SỬ VIỆT NAM, TẬP 1 [VIETNAMESE HISTORY, VOLUME 1] 217 (1991).

25. VŨ VĂN MẪU, CỔ LUẬT VIỆT NAM VÀ TƯ PHÁP SỬ DIỄN GIẢNG, QUYỀN THỨ NHẤT, TẬP MỘT [VIETNAMESE TRADITIONAL LAW AND THE EXPLANATION OF PRIVATE LAW, BOOK I, VOLUME 1] 129-132 (1975).

26. *See generally*, VŨ DUY MÈN, HƯƠNG ƯỚC CỔ ĐÔNG BẮNG BẮC BỘ [ANCIENT VILLAGE CONTRACTS IN NORTH VIETNAM] (2010).

27. ĐÀO TRÍ ÚC ED., HƯƠNG ƯỚC TRONG QUÁ TRÌNH THỰC HIỆN DÂN CHỦ Ở NƯỚC TA HIỆN NAY [COMMUNAL CONTRACTS IN THE PROCESS OF IMPLEMENTING DEMOCRACY IN OUR NATION TODAY] (2003).



indigenous law with different names, such as Hịt không (Thái), Phat kđi (Êđê), Phat Ktuôi (M'ông), N'ri (Mạ).<sup>28</sup>

The Civil Code in Vietnam recognizes the applications of customary law defined as “rules of conduct obvious to define rights and obligations of persons in specific civil relations, forming and repeating in a long time, recognized and applying generally in a region, race, or a community or a field of civil.”<sup>29</sup> That means indigenous law is a layer in the Vietnamese multi-player legal system.

### *B. Confucian Law*

I use the term “Confucian law” to refer to a distinctive legal system that is drawn on fundamental ideas, concepts, and principles of Confucianism. Confucianism is a Chinese school of thought created by Confucius (551-479 BC) and developed by Mencius (372 – 289 BC) and Xunzi (312–230 BC) during the late Spring and Autumn Period (770-476 BC) and Warring States Period (475-221 BC) in the history of China.<sup>30</sup> Major Confucian work includes: *The Four Books* (*The Analects* of Confucius, *The Mencius*, *The Great Learning*, and *The Doctrine of the Mean*); *Five Classics* (the *I Ching* or Book of Changes, the *Shu Ching* or Book of History, the *Shih Ching* or *Book of Poetry*), the *Yi Li* or Book of Rites, and the *Chunqiu* or Spring and Autumn Annals); and Xunzi’s writings.<sup>31</sup> Confucianism is a tradition and a philosophy about a good way of life, including a good way of governing. Particularly, in response to the historical context of political chaos, classical Confucians’ central concern is a good political order which in their belief depends on personal cultivation of virtual values. Confucian philosophy therefore develops different moral, political, and legal ideas, concepts, and principles.

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28. *See generally*, NGÔ ĐỨC THỊNH, LUẬT TỤC TRONG ĐỜI SỐNG CÁC TỘC NGƯỜI Ở VIỆT NAM [CUSTOMARY LAW IN THE LIVES OF ETHNIC GROUPS IN VIETNAM] (2010). *See also*, David Lempert, *Ethnic Communities and Legal Pluralism: The Politics of Legal Argument in Market-Oriented Communist Vietnam*, 25 *LEGAL STUD. F.* 539 (2001).

29. Civil Code, No. 91/2015/QH13, art. 5 (Nov. 24, 2015) (Viet.).

30. *See generally*, XINZHONG YAO, AN INTRODUCTION TO CONFUCIANISM (2000).

31. THE FOUR BOOKS: CONFUCIAN ANALECTS, THE GREAT LEARNING, THE DOCTRINE OF THE MEAN, AND THE WORKS OF MENCIUS (James Legge, trans., 1945); MICHAEL NYLAN, THE FIVE “CONFUCIAN” CLASSICS (2001); JOHN KNOBLOCK, TRANS. XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS (1988, 1990, 1994).

In Confucianism, *ren* (variously translated into English as “love”, “perfect virtue”, benevolence”, or “humaneness<sup>32</sup>) is the central concept foundational to the rest moral, political, and legal discourses. The term is not clearly defined in Confucian work, which leads to different scholarly explanations.<sup>33</sup> I define *ren* as the love of others or the concern for others, the distinctive characteristic of the socialized human, distinguishing human being from other beings.<sup>34</sup> On the ground of the central concept of *ren*, Confucianism develops different moral norms regarding the concerns for others in different social relationships, such as *xiao* (filial piety), *ti* (fraternal submission), and *zhong* (loyalty).

*Ren* is also the foundation for the governmental and legal concepts: *zheng ming* (rectification of names) or the consistence between the governmental titles and the expected virtues and functions; *minben* (people as basis) or the government working for the public good; and *li* which comprehensively includes “rituals, institutions, social and moral norms, which regulate all dimensions of the peoples’ lives, ranging from personal behavior, familial relationships, to socio-political functions and structures.”<sup>35</sup> Particularly, *li* is an important concept in Confucian legal theory.<sup>36</sup> *Ren* is the moral foundation of *li*. Therefore, “in order to comply with Li, it was essential to possess morals such as filial submission, brotherliness, righteousness, good faith, and loyalty, basic norms of of virtue.”<sup>37</sup>

From the Han dynasty (221 B.C.) to the fall of the Qing dynasty (1911), the legal system in China was predominantly influenced by Confucianism, and hence it can be called Confucian law, although it was also influenced by Legalism, another Chinese school of thought which underlines the use of law (particularly criminal law) as the instrument of state control.<sup>38</sup> The Confucian influence leads to the characterization of “Confucianization of law” or “the incorporation of

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32. In this study, I refer to use the English term “humaneness”, which better captures the meaning of *ren*.

33. See FUNG YU-LAN, A HISTORY OF CHINESE PHILOSOPHY VOL. 1 70 (Derk Bodde trans. 1952); TU WEI-MING, THE CREATIVE TENSION BETWEEN JEN AND LI, 18 PHILOSOPHY E. W. 34 (1968).

34. BUI NGOC SON, CONFUCIAN CONSTITUTIONALISM IN EAST ASIA 35 (2016).

35. *Id.* at 52.

36. DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 51 (1973).

37. Zhang, *supra* note 17, at 12.

38. For legalism, see Eirik Lang Harris, *Legalism: Introducing a Concept and Analyzing Aspects of Han Fei’s Political Philosophy*, 9 PHILOSOPHY COMPASS 155 (2014).

the spirit and sometimes of the actual provisions of the Confucian *li* into the legal codes.”<sup>39</sup> One of the most important legal codes in imperial China is the *Tang Code*, which “laid a foundation of the traditional Chinese legal system.”<sup>40</sup> According to Mo Zhang, “many in China regarded the whole Tang Code as an outward legal expression of the Li not only because it was deeply rooted in the Li, but also because it legalized the Li as the basic social norms of conduct.”<sup>41</sup> Particularly, “the ten abominations”, the most serious offenses, stipulated in the Code, “express what we have termed fundamental Confucian morality.”<sup>42</sup> For example, one of them is the lacking of filial piety, which aims to protect the Confucian moral norm of *xiao* (filial piety). Confucianism influenced on not only formal criminal codes but also the practice of criminal law and criminal procedure. Norman P. Ho demonstrates that officials of the Tang dynasty drew on not only the Tang Code but also fundamental moral principles in Confucian classical texts to decide cases.<sup>43</sup> In addition to criminal law and procedure, “constitutional law” and administrative law in imperial China were also influenced by Confucianism.<sup>44</sup> The creation of several imperial institutions (such as the royal examination system, *jingyan* or imperial lectures, and *yushitai* or censorate) was inspired by Confucian principles of good government operated by well-educated and virtual scholars.<sup>45</sup>

The Confucian legal culture has still influenced in contemporary China. Mo Zhang indicates that the Confucian position of a benevolent government working for the people “maintain its influence in the country. For example, it is a commonly held belief in China that a good

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39. BODDE & MORRIS, *supra* note 36, at 29. Some refers to the “legalization of Confucianism.” See Herbert H. P. Ma, *The Legalization of Confucianism and its Impact on Family Relationships*, 65 WASH. U. L. Q. 667 (1987).

40. Zhang, *supra* note 17, at 10.

41. *Id.* at 13.

42. GEOFFREY MACCORMACK, *THE SPIRIT OF TRADITIONAL CHINESE LAW* 57 (1996).

43. Norman P. Ho, *Understanding Traditional Chinese Law in Practice: The Implementation of Criminal Law in the Tang Dynasty (618-907 AD)*, 32 UCLA PACIFIC BASIN L. J., 145, 163 (2015); Norman P. Ho, *Confucian Jurisprudence in Practice: Pre-Tang Dynasty Panwen (Written Legal Judgments)*, 22 PACIFIC RIM L. & POL. J. 49 (2013); Norman P. Ho, *Confucian Jurisprudence, Dworkin, and Hard Cases*, 10 WASH. U. JURIS. REV. (forthcoming 2017).

44. Wm. Theodore de Bary, *The ‘Constitutional Tradition’ in China* 9 (7) J. CHINESE L. 7-8 (1995); Pierre-Étienne Will, *Virtual Constitutionalism in the Late Ming Dynasty* in BUILDING CONSTITUTIONALISM IN CHINA 261-274 (Stéphanie Balme & Michael W. Dowdle eds., 2009).

45. See generally, FRANKLIN W. HOUN, *CHINESE POLITICAL TRADITIONS* (1965).

government is the source of a better life for the people, and the traditional concept of a “parental officer,” whose job is to make decisions for the people, remains intact in the minds of the public and the government.”<sup>46</sup> Another example is that the Confucian virtue of filial piety becomes a legal duty in today’s China: the revised law called “Protection of the Rights and Interests of Elderly People” requires adult children to visit their aging parents regularly.<sup>47</sup> The first case was heard by the People’s Court of Beitang District, Wuxi City in east China’s Jiangsu Province.<sup>48</sup> “The court ruled in favor of the 77-year-old plaintiff, surnamed Chu, who sued her daughter for neglecting her.”<sup>49</sup> Citing the above law, the court ordered that Chu’s daughter and son-in-law must visit Chu every two months and “at least three times during major traditional holidays.”<sup>50</sup>

Confucian law was transplanted from China into Vietnam. During the Chinese dependency period, the colonists introduced Confucianism and Confucian law, but the local people largely lived under their indigenous law, which was tolerated by the invaders. Early independent dynasties, such as the Tran and the Ly dynasties, have some policies to develop Confucianism and Confucian law, but it was not until 15<sup>th</sup> century under the rule of the Le Dynasty that Confucianism became official ideology of the imperial government and Confucian law was well developed with the enactment of the *Quốc triều Hình luật* (the Penal Code of the Royal Court), informally called *Luật Hồng Đức* (*Hồng Đức Code*).<sup>51</sup> Despite its name, the code covers different areas from criminal law to civil law. The Tang Code of China was the model of the *Hồng Đức Code*. Yet, the Le Code is the consequence of both legal transplants and indigenization. The Le Code was more influenced by the Tang Code on criminal matters, but on civil law issues (such as contracts, torts, property, inheritance, and matrimonial property), it was more reflective of Vietnamese

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46. ZHANG, *supra* note 17, at 41.

47. Edward Wong, *A Chinese Virtue Is Now the Law*, N.Y. TIMES (July 2, 2013), <http://www.nytimes.com/2013/07/03/world/asia/filial-piety-once-a-virtue-in-china-is-now-the-law.html>.

48. *First Elderly Care Case Heard After Law Amendment*, PEOPLE’S DAILY ONLINE (July 3, 2013), <http://en.people.cn/90882/8308378.html> [<https://perma.cc/RM98-RZEE>] (archived Oct. 4, 2017).

49. *Id.*

50. *Id.*

51. *See generally*, NGUYEN NGOC HUY & TA VAN TAI, THE LE CODE: LAW IN TRADITIONAL VIETNAM: A COMPARATIVE SINO-VIETNAMESE LEGAL STUDY WITH HISTORICAL-JURIDICAL ANALYSIS AND ANNOTATIONS (1987).

indigenous customs and social reality.<sup>52</sup> Different from the Le dynasty, the Nguyen dynasty (1802-1945), the last dynasty in Vietnam, enacted the *Hoàng Việt Luật Lệ* or the Gia Long Code in 1815, loyally mirroring China's Qing Code. This code was also enforced during the French colonial period.<sup>53</sup> In addition to legal codes, the imperial government in Vietnam also created several institutions inspired by Confucianism, such as royal examination system, *jingyan* or imperial lectures, and *yushitai* or censorate.<sup>54</sup>

The legal system in imperial Vietnam is comprised of not only the above comprehensive legal codes but also many other more specific legal codes and imperial regulations, including:

- *Thiên Nam Đư Hạ Tập* (1483) (Volume of the Leisure of the Southern Heaven), a collection of imperial regulations on different specific issues;
- *Hồng Đức Thiện Chính Thư* (1541-1560?) (Hồng Đức's Book on Good Governance), a collection of imperial regulations on civil law issues, mainly property and family law;
- *Quốc Triều Chiếu Lệnh Thiện Chính* (1705-1729) (The Dynasty's Promulgations and Orders on Good Governance), a collection of imperial proclamations and orders on different specific issues;
- *Quốc Triều Khâm Tụng Điều Lệnh* ((1705-1729) (The Dynasty's Promulgations on Litigation), a collection of imperial promulgations on civil and criminal procedures;
- *Lê Triều Hội Điển* (unknown date) (The Lê Dynasty's United Regulations), a book on the administrations of six ministries (revenue, personnel, defense, justice, public works, and rites);
- *Từ tụng Điều Lệ* (1468) (Regulations on Litigation), a collection of imperial regulations on civil and criminal procedures;

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52. Ta Van Tai, *Vietnam's Code of the Lê Dynasty (1428-1788)*, 30 AM. J. COMP. L. 527 (1982).

53. PHAM DUY NGHIA, VIETNAMESE BUSINESS LAW IN TRANSITION 31 (2002).

54. For more details, see Bui Ngoc Son, *Confucian Constitutionalism in Imperial Vietnam*, 8 NAT'L TAIWAN UNIV. L. REV. 373 (2013).

- *Nhân mạng Tra nghiệm Pháp* (1737) (Methods of Forensic Autopsy), a collection official instructions on forensic autopsy; and
- *Quốc Triều Hồng Đức Niên Gian Chư Cung Thể Thức* (1470-1497) (Hồng Đức Dynasty's Formats For Pleadings), a collection of official formats for drafting legal documents filed with a mandarin's office.<sup>55</sup>

Unlike the comprehensive criminal codes, these legal texts focus on civil law, administrative law, civil and criminal procedure, criminal examination, and legal process, although they may also include criminal penalties. They include not only legally enforceable norms but also prescriptions of moral conducts and other instructions. Like the above criminal codes, these legal texts are also influenced by Confucian moral principles. An extensive examination of these legal texts is beyond the scope of this study. It is, however, useful to give some examples. The *Hong Duc Book on Good Governance*, the unique book on civil law in imperial Vietnam, comprised many provisions about familial issues, which are influenced by Confucianism. For example, Article 36 in an imperial regulation collected in the *Book* stipulates that: "To be a man, to teach and bring up virtuous father and filial children are the foremost tasks. Parents must provide their children with rice and clothes... Children must respect and support their parents..."<sup>56</sup> This Article tries to protect the Confucian norm of filial piety. In the same regulation, Article 38 listed seven reasons for the husband to divorce his wife: failing to have children; disregarding the husband for his poverty; malignant disease; lasciviousness; failing to respect parents; failing to live in harmony with sisters and brothers; and stealing.<sup>57</sup> This provision is closely connected to three among the *sì zì* or four virtues in Confucianism, namely *zhong* (loyalty to the king), *xiao* (filial piety), *jie* (faithfulness), and *yi* (righteousness).<sup>58</sup>

Vestiges of Confucian law still remain even under the contemporary communist rule in Vietnam. To illustrate, the first sentence of the preamble to the Constitution restates the tradition of

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55. These texts are published in modern Vietnamese language. See VIỆN NGHIÊN CỨU HÁN NÔM, *ĐIỂN CHÉ VÀ PHÁP LUẬT VIỆT NAM THỜI TRUNG ĐẠI* [INSTITUTIONS AND LAWS IN VIETNAM IN THE MEDIEVAL ERA] (2011).

56. VIỆN NGHIÊN CỨU HÁN NÔM, 1 *ĐIỂN CHÉ VÀ PHÁP LUẬT VIỆT NAM THỜI TRUNG ĐẠI*, [INSTITUTIONS AND LAWS IN VIETNAM IN THE MIDDLE PERIOD] 456 (2011).

57. *Id.*

58. For more details on these Confucian virtues, see CHUN SHAN, *Major Aspects of Chinese Religion and Philosophy: Dao of Inner Saint and Outer King* 223 (2012).

*nhân nghĩa* (humaneness-righteousness).<sup>59</sup> In addition, as a constitutional culture, the Vietnamese communist leaders have been influenced by both socialist values and Confucian beliefs “that value virtue-rule more highly than strict conformity to legal rules and processes.”<sup>60</sup> The Criminal Code also protects some moral values resonated with the Confucian ethics. For example, the Code includes the offence called “Ill-treating or persecuting grand-parents, parents, spouses, children, grandchildren and/or fosterers.”<sup>61</sup> This provision echoes the Confucian norm of filial piety. Another example in the Code is Article 19 on “non-denunciation of crimes.” This Article stipulates that the grand-father, grand-mother, father, mother, offspring, grandchild, sibling, wife or husband of an offender, who fails to denounce the latter’s crime, shall not bear penal liability unless in cases of failing to denounce crimes against national security or particularly serious crimes.<sup>62</sup> This reminds another controversial aspect called *zhi* (uprightness) in the Confucian norm of filial piety, which requires upright son to “remonstrate his father against his wrongdoing, and the best environment for the successful remonstration can be provided by non-disclosure of his father’s wrongdoing.”<sup>63</sup>

Confucian influence is particularly evident in Vietnam’s family law.<sup>64</sup> Especially, the Confucian norm of filial piety remains a strong influence.<sup>65</sup> To illustrate, the Law on Family and Marriage provides that: “Children have the obligations and rights to care for and support their parents, especially when their parents fall sick, become senile or

59. HIẾN PHÁP [CONSTITUTION], pmbl. (2013) (Viet.).

60. John Gillespie, *Understanding Legality in Vietnam*, in *VIETNAM’S NEW ORDER: INTERNATIONAL PERSPECTIVES ON THE STATE AND REFORM IN VIETNAM* 137, 145 (Stéphanie Balme & Mark Sidel eds., 2007).

61. Criminal Code, No. 100/2015/QH13, art. 185 (Nov. 27, 2015) (Viet.).

62. *Id.* art. 19.

63. Huang Yong, *Why an Upright Son Does Not Disclose His Father Stealing a Sheep: A Neglected Aspect of the Confucian Conception of Filial Piety?*, 5 *ASIAN STUDIES* 15 (2017).

64. Thomas J. Walsh, *The Law of the Family in Vietnam: Assessing the Marriage and Family Law of Vietnam*, 42 *CAL. W. INT’L L. J.* 61 (2011).

65. See generally, Kiều Anh Vũ, *Chữ “Hiếu” Trong Cổ Luật Và Luật Thực Định* [“Filial Piety” in *Ancient and Contemporary Law*], *KIỀU ANH VŨ* (Nov. 2, 2011), <https://kieuanhvu.wordpress.com/2014/11/02/chu-hieu-trong-co-luat-va-luat-thuc-dinh> [<https://perma.cc/Q95Q-QBUX>] (archived Oct. 29, 2017); Ngô Thị Minh Hằng, *Chữ Hiếu Trong Nho Giáo Và Ảnh Hưởng Của Nó Đến Pháp Luật Việt Nam Xưa Và Nay* [Filial Piety in Confucianism and Its influence in Vietnamese Law Then and Now], *TRƯỜNG ĐẠI HỌC LUẬT TP. HỒ CHÍ MINH* (June 25, 2014), [http://www.hcmulaw.edu.vn/hcmulaw/index.php?option=com\\_content&view=article&id=10361:s-kcb-nckh&catid=309:s-kcb-nckh&Itemid=357](http://www.hcmulaw.edu.vn/hcmulaw/index.php?option=com_content&view=article&id=10361:s-kcb-nckh&catid=309:s-kcb-nckh&Itemid=357) [<https://perma.cc/4H4M-3GG5>] (archived Oct. 29, 2017).

disabled.”<sup>66</sup> The Law also requires that: “Adult children who no longer live with their parents are obliged to support their parents who have no working capacity and no property to support themselves.”<sup>67</sup> In addition, the Law stipulates that the following agencies and organizations have the right, as prescribed by the civil procedures legislation, to request the Court to force the people who fail to voluntarily perform their supporting obligation to perform such obligation: relatives, administrative bodies on family and children, women’s unions, and “other individuals, agencies and organizations.”<sup>68</sup> Also, the Law on the Elderly People underlines the children’s duty to offer financial support to their parents and grandparents.<sup>69</sup> Mass media has disseminated many facts about the elderly parents being neglected by their children,<sup>70</sup> but there is no any case in which parents sue their children for being neglected. This context of non-litigation may connect to moral considerations.

Several important factors shape the continuing influence of Confucian legal culture in Vietnam. One factor concerns Ho Chi Minh, the father of modern Vietnam and the founder of the Communist Party of Vietnam, who has played the influential role even in today’s Vietnam. Different from Mao Zedong, Ho Chi Minh is an advocate of Confucian moral values and principles.<sup>71</sup> Second, modern Vietnam does not witness radical movements against Confucianism, like China’s May Four Movement and Cultural Revolution Movement. These factors enable the continuing influence of Confucian legal culture in contemporary Vietnam. However, the recent rising anti-Chinese nationalist movement<sup>72</sup> in Vietnam as the consequence of the conflict between China and Vietnam over the islands may inhibit the direct reference to Confucian values in legal discourse and practice. In this context, the influence of Confucian legal culture may happen at unconscious level: people may not be aware of the Confucian origins

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66. Law on Family and Marriage, No. 52/2014/QH13, art. 71 (Jun. 26, 2015) (Viet.).

67. *Id.* art. 111.

68. *Id.* art. 119.

69. Law on the Elderly, No. 39/2009/QH12, art. 10 (Nov. 23, 2009) (Viet.).

70. See e.g. Nguyễn Huệ, *Cụ bà bị con bỏ rơi giữa đường* [*A Female Elderly Abandoned in the Street*], BÁO ĐIỆN TỬ PHÁP LUẬT THÀNH PHỐ HỒ CHÍ MINH [HO CHI MINH CITY ELEC. L. J.] (Oct. 7, 2013), <http://plo.vn/xa-hoi/cu-ba-bi-con-bo-roi-giua-duong-314679.html> [https://perma.cc/L4T4-865C] (archived Oct. 29, 2017).

71. See Bui Ngoc Son, *The Confucian Foundations of Ho Chi Minh’s Vision of Government*, 46 J. ORIENTAL STUD. 35, 41 (2013).

72. Nhung T. Bui, *Managing Anti-China Nationalism in Vietnam: Evidence from the Media During the 2014 Oil Rig Crisis*, 30 PAC. REV. 169 (2017).



of certain norms and values that inform their legal behavior and practice.

### *C. Civil Law*

Entering the twentieth century, both China and Vietnam transplanted ideas, norms, and institutions of the civil law tradition from the western world as a response to the need to modernize the legal system and the nation more generally so as to cope up with the challenges posted by the western powers.

In his recent book, Michael H.K. Ng provides an extensive account of the “*Legal Transplantation in Early Twentieth-century China*.”<sup>73</sup> Accordingly, in early 1900s, the Qing government initiated a series of legal reforms.<sup>74</sup> After the first Opium War (1839–42), China was forced to sign treaties with Western industrial nations, which led to the extraterritorial application of their western law and institutions in the Chinese territory.<sup>75</sup> Ng notes that “in an attempt to secure the Western powers’ support to abolish extraterritoriality” most of the proposals for legal reform were based on the western civil law model and the Japanese model which had been in turn westernized.<sup>76</sup> In the course of legal reforms based on legal transplants, the Qing government sent their legal experts to study law overseas (mainly in Europe) and hired foreign legal experts (mainly from Japan) as consultants for its legal reforms initiatives.<sup>77</sup> Consequently, the Qing government enacted many legal codes, which “were drafted largely on the base of German, French, and Japanese templates.”<sup>78</sup> Examples include the Provisional Articles for Local Courts and the Court Organization Law, which introduced important changes to the justice system, such as the distinction of civil and criminal cases in trial procedures, or the confirmation of courts as “separate[d] and specialized institution[s] for hearing and adjudicating lawsuits.”<sup>79</sup>

The Qing dynasty also drafted the Civil Code, modelling after German and Japanese law, but this law was not completed under the

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73. MICHAEL H.K. NG, *LEGAL TRANSPLANTATION IN EARLY TWENTIETH-CENTURY CHINA* (2014).

74. *Id.* at 2.

75. ZHANG, *supra* note 17, at 27.

76. NG, *supra* note 73, at 2.

77. *Id.* at 13.

78. *Id.*

79. *Id.*

imperial regime.<sup>80</sup> The Xinhai Revolution in 1911 overturned the Qing dynasty and created the Republic of China. The republican government resumed the law-making process, but the Code was also not enacted due to “power struggles amongst warlords.”<sup>81</sup> Eventually, the Civil Code was enacted in 1930 under the Nationalist Government, drawn mainly on the civil law tradition.<sup>82</sup> As Mo Zhang explains, “In addition to its civil law style of division between general principles and specific provisions, the Code was replete with civil law concepts. For example, Part III of the Code dealt with property rights, but it used the name of ‘Rights over Things.’ ‘Things’ is a term for property in civil law countries.”<sup>83</sup> Apart from the Civil Code, the Nationalist Government also enacted five other major codes, which also “relied heavily on civil law tradition, and contained many legal principles taken from Germany and Japan.”<sup>84</sup> These codes altogether constitutes the so-called “Code of Six Laws” (*Liu Fa Quan Shu*).<sup>85</sup>

The Code of Six Laws presents “the complete reception of the civil law tradition in China”,<sup>86</sup> but this does not mean a complete break with the past Confucian law. Zhang indicates that: “Despite the strong influence of civil law tradition, mainly in the areas of legal philosophy and jurisprudence, no clear cut distinction was ever made between Chinese legal tradition and the contemporary legal system, especially with respect to the deeply-rooted concept of Li.”<sup>87</sup> In other words, civil law is a modern legal layer superimposed upon the previous Confucian legal layer. At another point, the later socialist regime abolished the Code of Six Laws, but “the civil law feature was not diminished; instead, it was actually carried over and strengthened in the modern legal system of China.”<sup>88</sup> That means civil law remains a legal layer in the contemporary Chinese legal system.

Like China, civil law was also introduced in Vietnam from the West. However, the difference is that the process of transplantation of civil law in Vietnam was the consequence of French colonialism. The French colonists enacted three separate civil codes in three Vietnamese

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80. ZHANG, *supra* note 17, at 29.

81. *Id.* at 29-30.

82. *Id.* at 30.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 31.

87. *Id.*

88. *Id.* at 33.

regions: the *Abbreviated Civil Code 1883* in Cochinchina (south), the *Civil Code Implements in the Vietnamese Courts in Tokin* (north) 1983, and the *Central Vietnam Civil Code 1936* in Annam (centre).<sup>89</sup> In addition, the colonialist also enacted the Vietnamese Commercial Code in 1942 and numerous regulations concerning civil and commercial law issues.<sup>90</sup> Moreover, the colonists “seconded French legal personnel including judges, court officials, and lawyers to administer the system.”<sup>91</sup> French civil law’s influence on Vietnam has been summarized in the following words:

The French heritage remains heavy in the entire legal system, military and civilian. The older, more renowned lawyers and judges are often found to be French educated, French and non-English speaking. Professional works are often published in French. The French trappings as well as institutions are adapted by the Vietnamese, and these are superimposed over the Vietnamese society without much change. The Code Napoleon influence is naturally strong, and the civil code system, as distinguished from the common law, is employed. Trial by jury is not employed, the technique of cross-examination is severely limited, and the authority of an examining magistrate is much enlarged as compared with US or common law practice.<sup>92</sup>

French civil law continues to influence on Vietnam even after the country regained independence from France. John Gillespie observes that: “Vestiges of colonial legality lingered for over a decade after the 1946 Constitution declared Vietnam independent from French rule.”<sup>93</sup> Even under the “Renovation” (*Đổi mới*) period since 1986, the first Civil Code of the socialist regime firstly enacted in 1995 have several provisions deriving from the colonial Civil Code of Annam, such as the provisions on mortgages, pledges, and suretyship.<sup>94</sup>

It has been seen that civil law has been transplanted into China and Vietnam in early twentieth century. However, the mechanisms of

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89. Bui Xuan Hai, *Vietnamese Company Law: The Development and Corporate Governance Issues*, 18 *BOND L. REV.* 22, 23 (2006).

90. PHAM, *supra* note 53, at 32.

91. John Gillespie, *Understanding Legality in Vietnam*, in *VIETNAM’S NEW ORDER: INTERNATIONAL PERSPECTIVES ON THE STATE AND REFORM IN VIETNAM* 140-41 (Stéphanie Balme & Mark Sidel eds., 2007).

92. GEORGE S. PRUGH, *LAW AT WAR VIETNAM 1964-1973*, 21 (1975).

93. Gillespie, *supra* note 91, at 141.

94. John Gillespie, *Transplanting Commercial Law Reform: Developing a ‘Rule of Law’ in Vietnam* 162 (2006).

legal transplants in the two countries are different. Civil law was imposed in Vietnam through colonial power. Differently, although the China was confronted with the western powers, it was not formally colonized and therefore has freedom to choose which models of law to borrow. Why is civil law rather than common law the referred model for legal transplant in China? One may argue that this is because the civil law is consistent with the Chinese legal tradition of codification of legal norms. However, law in traditional China is also consistent with the common law tradition. Confucian legal theory and Confucian law focus on fundamental moral principles as the foundation of the legal system, which is not different from common law. Moreover, Confucian legal theory and Confucian law also underline the necessity of following established traditional norms, which is consistent with the common law's concept and practice of precedents. In fact, the fact that China transplanted civil law rather than common law is mainly because civil law as a kind of positive law is transplantable in a short period of time, while the development of common law relies on the natural evolution over a long period of time.<sup>95</sup> In early twentieth century, the Chinese government needs to reform the legal system in a short time to cope with the immediate challenges from the western powers, and the transplantation of civil law can meet with this demand.

#### *D. Socialist Law*

##### 1. Transplantation

In both China and Vietnam, the current legal system is dominated by the layer of socialist law transplanted from the former Soviet Union. Socialist law is associated with Marxist economic theory and soviet law. Socialist law is defined by these concepts and principles: "socialist legality" which underlines the use of law as an instrument for the state to control the society and citizens' strict and unanimous application of law; "vanguardism" or the leading role of the communist party as the single ruling party; "democratic centralism" or the rejection of the separation of power in favour of the centralization of power into the supreme "soviet" or the national assembly; the "public ownership" of means of productions leading to the state's controlling of the national

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95. In fact, Alan Watson's account of legal transplants also relies on the experience of civil law. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

economy and national economic resources (including lands); and the “citizens’ rights” granted (and withdrawn) by the state.<sup>96</sup>

After defeating the Nationalist Party of China and creating the communist government, the People’s Republic of China, in 1949, the Communist Party of China abolished the Six Codes and other laws of the Nationalist Government.<sup>97</sup> Zhang explains: “This abolition was part of major effort to remove the capitalist influences and to establish a new socialist legal system.”<sup>98</sup> In the course of creating the socialist legal system, the new communist government followed the Soviet legal system. “Consequently, almost all laws and regulations promulgated in the country in early 1950s, including the 1954 Constitution, evidenced a clear Soviet influence.”<sup>99</sup> During this period (1949-1957):

[a] massive project of Soviet assistance was launched, involving ‘roughly ten thousand’ Soviet advisors who came to teach in China. The concept of a universal socialist legal system for new communist states was a major area of collaboration in this ‘golden age’ of Sino-Soviet cooperation. During this period, Chinese legal education ‘was totally under the guidance of Soviet experts.’ A survey of Russian-language Soviet literature on Chinese legal development showed that Soviet and Chinese models were converging at this point.<sup>100</sup>

However, the Cultural Revolution initiated by Mao Zedong induced “legal anarchy”: law schools were shut down and formal laws were absent.<sup>101</sup> After Mao’s death, the development of law in China revived. Particularly, the economic reform program called “reform and opening-up” (*gaige kaifang*) led by Deng Xiaoping has resulted in the enactment of numerous laws.<sup>102</sup> “No matter the rhetoric, legal reformers in Deng’s China had little choice but to lean heavily on the institutions, texts, and ideas of the Soviet socialist model in the early

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96. For features of socialist law, *see generally* *The Common Law of Constitutions of the Communist-Party States*, 3 REV. SOC. L. 155 (1977); JOHN N. HAZARD, *COMMUNISTS AND THEIR LAW: A SEARCH FOR THE COMMON CORE OF THE LEGAL SYSTEMS OF THE MARXIAN SOCIALIST STATES* (1969).

97. ZHANG, *supra* note 17, at 32.

98. *Id.*

99. *Id.* at 33.

100. William Partlett & Eric C Ip, *Is Socialist Law Really Dead?* 48 N.Y.U. J. INT’L L. & POL. 463, 475-6 (2016).

101. ZHANG, *supra* note 17, at 18.

102. For legal reform in China after “reform and opening-up” program, *see* BIN LIANG, *THE CHANGING CHINESE LEGAL SYSTEM: 1978-PRESENT* (2008).

stages of restoring formal legality in the modern Chinese legal system.”<sup>103</sup>

In 1997, the Communist Party of China decided to establish a “socialist legal system with Chinese characteristics.”<sup>104</sup> But the party’s explanation of the “Chinese characteristics” “offers little meaningful substance, but instead is simply a political slogan.”<sup>105</sup> Zhang identifies two “features” of the Chinese socialist legal system, namely the leadership of the communist party and the socialist concept of public ownership.<sup>106</sup> However, these are the common features of the socialist regimes rather than distinctive to China.

Like China, Vietnam also borrowed socialist law from the former Soviet Union. This process began in the 1960s when the communist government dominated North Vietnam.<sup>107</sup> After national unification in 1974, socialist law was borrowed and applied throughout the country. As the embodiment of the instrumentalist nature, socialist law developed in Vietnam before the Renovation period was mainly public law. The Constitution of the Socialist Republic of Vietnam promulgated in December 1980, strictly adhered to the 1977 Constitution of the USSR, evident by the confirmations of the principle of dictatorship of the proletariat, the exclusive leadership of the Communist Party, the centrally planned economy, citizen’s duties and statist rights, and the Leninist constitutional structure consisting of the supreme National Assembly, the collective presidency called Council of State, the subordinate government called Council of Ministers, the procuracies, and the courts.<sup>108</sup>

The Communist Party of Vietnam initiated an important economic reform program known as *Đổi mới* (Renovation) in 1986, which was meant to transform the centrally planned economy into the “socialist-oriented market economy,” comparable to Deng’s *gaige kaifang* program.<sup>109</sup> The Renovation campaign allowed and stipulated certain

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103. Partlett & Ip, *supra* note 100, at 463, 479.

104. ZHANG, *supra* note 17, at 2.

105. *Id.* at 48.

106. *Id.* at 50-53.

107. See generally, PENELOPE NICHOLSON, BORROWING COURT SYSTEMS: THE EXPERIENCE OF SOCIALIST VIETNAM (2007).

108. On the 1980 Constitution, see William J. Duiker, *The Constitutional System of the Socialist Republic of Vietnam*, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA (Lawrence W. Beer ed., 1992).

109. For comparison of economic reform in China and Vietnam, see TRANSFORMING ASIAN SOCIALISM: CHINA AND VIETNAM COMPARED (Anita Chan et al. eds., 1999).

degree of economic liberalization: decollectivization of agriculture, private property, private companies, and foreign investments.<sup>110</sup> To meet the new demands of renovation of the nation, a new Constitution was adopted in April 1992. It confirmed the concept of “socialist-oriented market economy,” allowed the development of private economic sectors, but basically remained the Leninist constitutional structure with some minor changes.<sup>111</sup>

More recently, a new constitution was adopted in Vietnam in 2013, which introduces more human rights and some new concepts (such as controlling the state power), but confirms fundamental socialist features which reflect the soviet legal legacy. To illustrate, it confirms the “socialist rule of law state” and class-based collective mastery:

“The State of the Socialist Republic of Vietnam is a socialist rule of law state of the People, by the People and for the People. The Socialist Republic of Vietnam is the country where the People are the masters; all the state power belongs to the People and is based on the alliance of the working class, the peasantry and the intelligentsia.”<sup>112</sup>

It establishes the aspirations and goals to the socialist paradise: “[t]he state guarantees and promotes the People’s mastery; acknowledges, respects, protects and guarantees human rights and citizens’ rights; implements the objectives of prosperous people, state powers, democracy, justice, civilization, and all that people enjoy that is abundant and free for a happy life with conditions for all-round development.”<sup>113</sup> It confirms the leadership of the Party over the state and the society and “Marxist-Leninist doctrine and Ho Chi Minh Thought” as its ideology.<sup>114</sup> The Constitution confirms the principle of democratic centralism: “The State . . . practices the principle of democratic centralism.”<sup>115</sup> It provides for statist rights: “Citizens’ rights are inseparable from citizens’ duties. Everyone has the duty to respect the rights of others. Citizens are responsible to practice their duties to the State and society. The practice of human rights and

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110. See generally, SOCIOECONOMIC RENOVATION IN VIET NAM: THE ORIGIN, EVOLUTION, AND IMPACT OF DOI MOI (Peter Boothroyd & Pham Xuam Nam eds., 2000).

111. See generally, Russell Heng Hiang Khng, *The 1992 Revised Constitution of Vietnam: Background and Scope of Changes*, 14 CONTEMP. SE. ASIA 221 (1992).

112. HIẾN PHÁP [CONSTITUTION], art. 2 (2013) (Viet.).

113. *Id.* art. 3.

114. *Id.* art. 4.

115. *Id.* art. 8.

citizens' rights cannot infringe national interests and legal and legitimate rights and interests of others."<sup>116</sup> It stipulates the politicized military: "The people's armed forces shall show absolute loyalty to the Fatherland, the People, the Party and the State".<sup>117</sup> It confirms that "The Vietnamese economy is a socialist-oriented market economy with multi-forms of ownership multi-sectors of economic structure; the state economic sector plays the leading role."<sup>118</sup> It establishes the state ownership of all lands.<sup>119</sup> The Constitution also requires the People's Courts and the People's Procuracies to safeguard the socialist regime, among other things.<sup>120</sup> Finally, it also establishes several social policies in the direction towards to socialism:

"The State shall invest in the development of the protection and care of the People's health, provide health insurance for the entire people and exercise a priority policy of health care for ethnic minorities, highlanders, islanders and people living in extremely difficult socio-economic conditions."<sup>121</sup>

Further, "[t]he State shall create equal opportunities for citizens to enjoy social welfare, develop a system of social security, and provide a policy assisting the elderly, the disabled, the poor and people with other difficult circumstances" poor people, and other disadvantaged people" and "[t]he State and society shall provide a favourable environment for the growth of the Vietnamese family which is prosperous, progressive, and happy; create Vietnamese people who are healthy, cultured, profoundly patriotic, unified, independent and responsible."<sup>122</sup>

We have seen that socialist law has been transplanted from the Soviet Union into China and Vietnam and has remained its influence in the two countries nowadays. The process of transplantation of socialist law in China and Vietnam is determined by the fact the two countries were the members of the soviet camp. After the collapse of the Soviet Union, China and Vietnam have remained the socialist regime, which explains the continuity of not only the socialist political structure but also socialist law.

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116. *Id.* art. 15.

117. *Id.* art. 65.

118. *Id.* art. 51.

119. *Id.* art. 54.

120. *Id.* arts. 102, 107.

121. *Id.* art. 58.

122. *Id.* arts. 59, 60.



## 2. Transformation

Since China and Vietnam introduced the economic reform program, socialist law has been remained but experienced a significant transformation, characterized by the enactment of a tone of formal law regulating virtually all aspects of the society. Celebrating its achievements in making formal law, the Chinese government said:

“Since New China was founded, and particularly since the policy of reform and opening up was introduced in 1978, China has made remarkable achievements in its legislation work. By the end of August 2011, the Chinese legislature had enacted 240 effective laws including the current Constitution, 706 administrative regulations, and over 8,600 local regulations. As a result, all legal branches have been set up, covering all aspects of social relations.”<sup>123</sup>

To illustrate, consider the following details:

- Laws for implementing the policy called “one country, two systems”: The Basic Law of the Hong Kong Special Administrative Region, and the Basic Law of the Macao Special Administrative Region.<sup>124</sup>
- Laws for promoting socialist market economy: General Principles of the Civil Law, Law on Industrial Enterprises Owned by the Whole People, Law on Chinese-Foreign Cooperative Joint Ventures, Law on Foreign-funded Enterprises, Patent Law, Trademark Law, Copyright Law, Economic Contract Law, Law on Enterprise Bankruptcy, Company Law, Partnership Enterprise Law, Law on Commercial Banks, Law on Township Enterprises, Anti-Unfair Competition Law, Law on the Protection of Consumers’ Rights and Interests, Product Quality Law, Auction Law, Guaranty Law, Maritime Code, Insurance Law, Negotiable Instruments Law, Law on Urban Real Estate Administration, Advertising Law, Law on Certified Public Accountants, Arbitration Law, Audit Law, Budget Law, Law on the People’s Bank of China, Foreign Trade Law, and Labor Law.<sup>125</sup>

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123. INFORMATION OFFICE OF THE STATE COUNCIL, PEOPLE’S REPUBLIC OF CHINA, *The Socialist System of Laws with Chinese Characteristics* (2011) [hereinafter STATE COUNCIL WHITE PAPER] <http://www.fmprc.gov.cn/ce/cede/det/zl/zgzfbps/t872739.htm> [<https://perma.cc/C9V6-D6MW>] (last visited Oct. 29, 2017).

124. *Id.*

125. *Id.*

- Laws for joining the World Trade Organization (WTO): Securities Law, Contract Law, Law on Bid Invitation and Bidding, Trust Law, Law on Individual Proprietorship Enterprises, Law on the Contracting of Rural Land, Government Procurement Law; revisions of the Foreign Trade Law, Law on Chinese-Foreign Equity Joint Ventures, Law on Chinese-Foreign Cooperative Joint Ventures, Law on Foreign-funded Enterprises, Patent Law, Trademark Law, and Copyright Law.<sup>126</sup>
- Laws for dealing with social, cultural, and environmental issues: Higher Education Law, Law on Prevention and Control of Occupational Diseases, Law on the Protection of Cultural Relics, Environmental Protection Law, Law on the Prevention and Control of Water Pollution, Law on the Prevention and Control of Atmospheric Pollution, Marine Environmental Protection Law, and Pharmaceuticals Administration Law, Social Insurance Law, Labor Contract Law, Employment Promotion Law, Food Safety Law, Law on Renewable Energy, Circular Economy Promotion Law, and Law on Environmental Impact Assessment.<sup>127</sup>
- Laws for building state institutions: Law on Administrative Penalty, Law on Legislation, Law on State Compensation, Judges Law, Public Procurators Law, Law on the Supervision of Standing Committees of People's Congresses at All Levels, Administrative Licensing Law, and Administrative Coercion Law.<sup>128</sup>
- Laws concerning justice, crimes, and procedures: Criminal Law, Criminal Procedure Law, Civil Procedure Law, Administrative Procedure Law, People's Mediation Law, Law on Labor Dispute Mediation and Arbitration, and Law on Lawyers.<sup>129</sup>

Like China, Vietnam has developed a sophisticated system of formal legal rules which cover almost every aspect of the society. While formal law in China has been documented by other scholars,<sup>130</sup> formal law in Vietnam has not yet been received sufficient academic attention, and hence is examined in greater details in this section. Since Vietnam launched the Renovation campaign in 1986, the party-state

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126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. See LIANG, *supra* note 102; YUHUA WANG, TYING THE AUTOCRAT'S HANDS: THE RISE OF THE RULE OF LAW IN CHINA 18 (2015).

has had a serious concern of governance by formal law. To illustrate, the post-Renovation Constitution enacted in 1992 stipulated in Article 12 that “The state shall govern the society through law.” In 2005, the Politburo introduced the *Resolution 48-NQ/TW on the Strategy to Construct and Perfect the Vietnamese Legal System from Now to 2010 with a Vision to 2020* (hereinafter, 2005 Legal Reform Strategy).<sup>131</sup> The party believed that law has been developed during nearly two decades of Renovation, but it is imperative to develop the legal system comprehensively with a long-term plan. After ten years implementing this strategy, on 04 April 2016, the Politburo issued the Conclusion No.01-KL/TW on the continuous implementation of the strategy with the detailed plan of legal reform from 2016 to 2020.<sup>132</sup>

Another indicator of the party-state’s serious concern of formal law is the enactment of the law on making formal law. Formally called as “Law on Enactment of Normative Legal Documents”, this law was first enacted 1996 and replaced by subsequent versions in 2004, 2008, and recently 2015. According to the current version, formal legal rules are promulgated with different types of legal instruments and by different legal institutions. The legal validity of these legal rules is hierarchical. For example, “by-law” documents must conform to legislations which are in turn under the Constitution- the supreme law of the land. The law also provides for complex processes of law-making (not constitution-making which is provided in the Constitution itself) and supervising the consistence among the legal instruments. The Law on Enactment of Normative Legal Documents indicates the party-state’s real grave concern on making formal legal rules and structuring the sophisticated formal rule-making process.

Quantitatively, during the post-Renovation period, Vietnam has enacted a tone of regulations. I relied on the online database of Vietnamese law called *Thư viện Pháp luật* (Law Library)

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131. Bộ Chính trị [Politburo], 48-NQ/TW, Nghị Quyết Về Chiến Lược Xây Dựng Và Hoàn Thiện Hệ Thống Pháp Luật Việt Nam Từ Nay Đến Năm 2010, Định Hướng Đến Năm 2020 [Resolution On The Strategy To Construct And Perfect The Vietnamese Legal System From Now To 2010 With A Vision To 2020].

132. Bộ Chính trị [Politburo], Kết luận số 01-KL/TW, ngày 04/4/2016 của Bộ Chính trị về việc tiếp tục thực hiện Nghị quyết số 48-NQ/TW của Bộ Chính trị khóa IX về Chiến lược xây dựng và hoàn thiện hệ thống pháp luật Việt Nam đến năm 2010, định hướng đến năm 2020. [Conclusion No. 01-KL/TW, dated 4 April 2016 on the Implementation of Resolution on the Strategy to Construct and Perfect the Vietnamese Legal System from Now to 2010 With a Vision to 2020].

(<http://thuvienphapluat.vn>) to create figures in the Appendix.<sup>133</sup> The quantitative data was coded till 6 November 2016. The number of regulations (154,507) enacted during around post-Renovation thirty years (1987-2016) exceeds around 19 times those (8,029) enacted in the previous fifty years (1936-1986).

Figure 1 demonstrates that the number of regulations have remarkably increased over post-Renovation years. While there were only 309 regulations in 1987, the number dramatically increased to 15,4507 by 6 November 2016. Particularly, in the 21<sup>st</sup> century when the socialist market economy has been basically established and Vietnam has gradually integrated into the world market, the country has promulgated thousands of regulations.

Figure 3 indicates that formal laws have covered different areas of society. The number of formal laws on the governing structure is highest. Important laws for legal institution-building include the Constitution and organic laws on major state branches. The Constitution and these constitutional laws are revised and replaced several times during the last three decades. The current Constitution was enacted in late 2013, following the enactment of revision of organic laws, including: Law on Organization of the National Assembly (2014), Law on Organization of the Government (2015), Law on Organization of the People's Courts (2014), and Law on Organization of the People's Procuracies (2014). The implementation of the Renovation policy requires formal legal framework for the operation of the emerging market, which explains the huge amount of formal laws for the market. Important legislative laws for the market are enacted, revised, and replaced several times in the last three decades. The current important laws for the market include: Civil Code (2015), Enterprise Law (2014), Investment Law (2014), Real Estate Business Law (2014), Securities Law (2006, amended 2011), Intellectual Property Law (2005, amended 2009), Law on the State Bank of Vietnam (2010), Law on Finance (2005), Competition Law (2005), Bankruptcy Law (2014), Law on Commercial Arbitration (2010), and Corporative Law (2012), Labor Code (2012), and Land Law (2016). Economic transformation also creates a number of social, cultural, and environmental problems, which explains the high numbers of formal laws enacted to deal with these. Important current

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133. See the Appendix of this Article. For comparative figures regarding formal law in China, see WANG, *supra* note 130, at 51, 59.

legislative laws in this area include: Law on Social Security (2014), Housing Law (2014), Law on Residence (2013), Law on Environmental Protection (2014), Law on Anti-Corruption (2012), Ordinance on Population (2008), and Ordinance on Anti-Prostitution (2003). In the areas of laws dealing with offences, important documents are Law on Administrative Offences (2012) and Criminal Code (2015). Mayor procedure laws include: Civil Procedure Code (2015), Criminal Procedure Code (2015), and Administrative Procedure Law (2015).

Legislative laws are just small number of legal documents in the Vietnamese legal system. Figure 4 indicates that to implement 366 documents of legislative laws, legal institutions in different levels from the central Government to communal governors have enacted a mountain of by-law documents. Vietnamese law is therefore popularly described as a “jungle of law.”<sup>134</sup> Particularly, the number of decisions is highest, including 99,823 documents. This is due to the fact that this type of document is the most popular form of regulation which can be issued by many authorities, namely President of State, Prime Minister, heads of ministerial bodies, and hundreds of local governors from the provincial to communal levels.

A huge amount of regulation is enacted by ministry-level bodies. Figure 5 demonstrates that ministry-level institutions have promulgated a gigantic amount of by-law documents to exercise their administrative power and to implement legislative laws. Most notable are the institutions concerning state finance, such as the Ministry of Finance and the State Bank. Given that Vietnam is an agricultural country, a number of regulations are issued from the Ministry of Agriculture and Rural Development.

The context of formal law in Vietnam has been significantly complicated by thousands of regulations issued by local governments to implement central laws and to govern local affairs. Figure 6 in the Appendix indicates that big and prosperous provinces, such as Hanoi and Hồ Chí Minh City, have considerably higher number of regulations.

The party-state’s concern is not only rule-making but also ensuring that the rules meet with normative requirements of formal law. The foremost aim of the 2005 Legal Reform Strategy is “to construct

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134. Đan Thanh, *Lạc giữa... “rừng luật”* [“Missing the Way in ... “The Jungle of Law”], *BÁO AN NINH THỦ ĐÔ* (May 27, 2008), <http://anninhthudo.vn/chinh-tri-xa-hoi/lac-giua-rung-luat/325550.antd> [<https://perma.cc/RSU6-EETD>] (archived Oct. 29, 2017).

and perfect a legal system that is synthetic, consistent, enforceable, public, and transparent.”<sup>135</sup>

The party-state has achieved these goals to some extent. The formal legal rules are publicly promulgated. After enactment, legal instruments are published in national gazette. The party-state has had efforts to make formal law accessible. Several state institutions, like the National assembly, the Government, and the Ministry of Justice, also create various online databases of Vietnamese law, which makes law accessible to the people. The Law on Legal Propaganda and Education (2012) is enacted to ensure citizens’ right to access to the law and their duty to study the law (Article 1). Governmental programs of legal aids are implemented to help law accessible to vulnerable groups, whose legal framework is the Law on Legal Aid (2006). In reality, the 2015 Justice Index report demonstrates that: “Overall, more citizens are accessing legal information from a more diverse range of information sources compared to previously. This explains the positive change in access to legal information and the improved legal knowledge of citizens.”<sup>136</sup>

On the other hand, there is a significant gap between Vietnamese formal law and the anticipated goals. To illustrate, an empirical survey of the Central Institute for Economic Management in 2012 identified “Nine Nos” in the Vietnamese legal system: no sufficiency; no clarity; no certainty; no consistency; no transparency; no predictability; no reasonableness; no effectiveness; and no validity.<sup>137</sup> In the review of ten years of implementation of the 2005 Legal Reform Strategy, the Party also explicitly acknowledges weakness in the nation’s legal system as follows:

The legal system has not yet really perfect and synthetic; the effectiveness and the enforceability have not met with the actual

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135. [Politburo], *supra* note 131.

136. VLA & UN DEV. PROGRAM, JUSTICE INDEX REPORT (2015) [http://www.vn.undp.org/content/vietnam/vi/home/library/democratic\\_governance/2015-justice-index/](http://www.vn.undp.org/content/vietnam/vi/home/library/democratic_governance/2015-justice-index/) [https://perma.cc/7KS9-7B2M] (last visited Oct. 29, 2017). This report is the result of the collaboration since 2010 between the Viet Nam Lawyers Association, the Centre for Community Support and Development Studies (CECODES) under the Viet Nam Union of Science and Technology Associations and the United Nations Development Programme (UNDP). The report is based on interviews with the 13,841 participants across Viet Nam.

137. Nam Nguyễn, *Tiêu chí xác định chất lượng của hệ thống pháp luật* [Criteria of the Quality of the Legal System], MINISTRY OF JUSTICE, <http://moj.gov.vn/qt/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=1538> [https://perma.cc/AAG2-8N5M] (last visited Oct. 29, 2017).

demands. In some areas, laws have lacked the stability; the predictability has not been high; the quality has not been guaranteed; the amendments and supplementations have been too frequent. The procedure of making the law has included too many stages, which made the process of enactment and enforcement slow. Legal enforcement is the weakest point in implementing the Resolution 48-NQ/TW. The delay to enact regulations to detail and instruct [legal implementation] has been relatively popular. The review, systematization, and codification of law have not yet forcefully practiced; legal popularization, propaganda and education has lacked critical solutions and have not yet been highly effective; staffs in charge with law-making have not yet been consolidated to meet with the demands of the duties; the supervision and checking of legal documents have not been often; the dealing with errors and violations has not yet been thorough; and legal enforcement in some places and sometimes has been undisciplined and lacked the high effectiveness of deterrence and education.<sup>138</sup>

This problematic context is determined by, among other things, the authoritarian arrangement. To begin with, Vietnamese formal law is more instrumental than limiting. The nature of the Vietnamese authoritarianism characterized by the single leadership of the Communist Party is one of important factors determining the instrumentalist nature of Vietnamese formal law. When ruling by fiats and personal commands has been proven as damaging to political legitimacy, the party needs to turn to formal law in exercising its power. Through controlling the state from the capital to remote villages, the party is able make sure that party's policies are formalized and institutionalized by formal law enacted by the different state agencies. Consequently, law is instrumental to the party-state. The fact that the majority of formal rules focus the state machinery, as described above, indicates that law is an instrument for the party-state to formalize and consolidate its power. Formal law regarding the state machinery is less concerned with limiting the officials. Formal constitutional rules containing in the Constitution and organic laws are mainly designed to structure and enhance the political power. Most important is the constitutional rule regarding the leadership of the Communist Party over the state and the society.<sup>139</sup> To be sure, there are a few rules for

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138. [Politburo], *supra* note 130.

139. HIẾN PHÁP [CONSTITUTION], art. 4 (2013) (Viet.).

constitutional constraints, such as the rules on vote of confidence. Moreover, the huge regulations regarding the administrative system are primarily concerned with enhancing, using, rather than restraining the administrative power. Administrative law is basically the instrument for the state to control people. To be sure, some rules regarding administrative litigations allow the citizens to constrain administrative power in concrete cases.

Another problem in Vietnamese formal law concerns the administrative regulations. As mentioned above, a fewer number of statutory laws can only be implemented through the huge amount of administrative regulations. Yet, legislations include very general rules which allow a wide space for administrative regulations. And, the administrative regulations do not simply interpret legislations. Administrative agents seize the space of legislations to extend their discretionary power. Although the legislative institutions have the constitutional power to supervise the consistence between administrative regulations and legislations, it is difficult for them to do so, given the mountain of administrative regulations and the part-time nature of the majority of the legislature's members. Consequently, they have never practiced this power. Within the administrative system, the Ministry of Justice is in charge with checking the consistency of administrative regulations. This body is rather active in this work, but its work is only advisory. Instead, the issuing institutions retain the power to revise the challenged laws. In practice, the challenges by the Ministry of Justice have resulted in the issuing institutions' revising or withdrawing the regulations in question.<sup>140</sup>

The consequence of the extending of administrative discretions through administrative regulations is significant. Legislative laws may grant more freedom to citizens, but administrative regulations narrow it down. For example, the Enterprise Law 2005 guaranteed the freedom of business, but administrative regulations restricted this freedom by numerous rules regarding requirements, conditions, and licenses of conducting business, which gave more discretion to administrative agencies.<sup>141</sup> As a matter of authoritarian arrangement, judicial review

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140. For more details, see Bui Ngoc Son, *Constitutional Developments in Vietnam in the First Decade of the Twenty First Century*, in *CONSTITUTIONALISM IN ASIA IN THE TWENTY FIRST CENTURY* 207 (Albert Chen ed., 2014).

141. Nguyễn Tấn, *Tinh thần Luật Doanh nghiệp còn không?* [*The Spirit of the Enterprise Law Disappears*], *THỜI BÁO KINH TẾ SÀI GÒN ONLINE* (Aug. 25, 2011),



is absent, and citizens are not allowed to challenge an administrative regulation with general effect in the courts for the reason that it violates their rights protected in the Constitution or/and legislations. The administrative courts are only allowed to hear appeals to administrative decisions affecting individual cases.

But, as admitted by the party itself, the weakest point in the Vietnamese formal legal system concerns legal enforcement. Vice-President and then President of the National Assembly Nguyễn Thị Kim Ngân lamented that: “In Vietnam, there is a very fine and strange law that the world does have, namely the Law on Legal Propaganda and Education. That means when there are laws, people do not follow. Therefore, the Law on Legal Propaganda and Education must be enacted, but the people still do not follow.”<sup>142</sup> This situation is significantly divorced from the formalist rule of law ideal’s requirement that law must be obeyed. Empirical survey by the authors of the 2015 Justice Index confirms the popular culture of turning against legal institutions because of the problems associated with these institutions:

Local authorities play an important role in receiving and dealing with citizens’ legal matters. Unclear procedures for dispute settlement, lengthy processing time and inefficiency in dispute resolution are the main reasons why disputants choose to solve problems by themselves or opt to use informal measures, instead of turning to local judicial institutions.

The assistance offered by local state agencies in settling disputes and complaints has not been as effective as the assistance of lawyers and legal aid providers.

Access to the court is still limited due to disputants’ concerns about costs, procedures and confidence in the integrity of judges and court staff.<sup>143</sup>

So, one of the reasons for the people’s turn against formal law concerns the poor quality of the authoritarian legal institutions in delivering justice. Yet, this is not the whole of the story. Another reason concerns legal history and legal culture, which may need more

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<http://www.thesaigontimes.vn/59939/Tinh-than-Luat-Doanh-nghiep-con-khong.html>  
[<https://perma.cc/94LV-PV52>] (archived Oct. 29, 2017).

142. *Việt Nam Có Một Luật Rất Lạ Mà Thế Giới Chưa Có*[*Vietnam Has A Strange Law That The World Does Have*], *BÁO LAO ĐỘNG* (Sept. 21, 2013), <https://news.zing.vn/viet-nam-co-mot-luat-rat-la-ma-the-gioi-chua-co-post354226.html>.

143. VLA & UN DEV. PROGRAM, *supra* note 136, at 12-13.

empirical verification. Formal law has a complex relationship with legal legacy. Formal law just locates at the top of the Vietnamese legal pyramid which includes multiple legal layers. Preexisting legal layers and informal social norms may render formal law ill-enforced. Vietnamese people are more familiar with living with their traditional legal culture, customs, and habits than with newly enacted formal legal rules. Vietnam is an agricultural country, and the majority of the population (around seventy percent) lives in rural areas. For them, village law, customary law, and traditional social-moral norms are more relevant than the Constitution and legislations. Regarding formal law, they may be concerned with administrative regulations enacted by communal governments directly relevant to their daily life. The urbanization has brought thousands of peasants to more modern cities together with their village mindset, which makes the legal culture of the emerging middle class in urban areas resonant with their hometown's culture. Consequently, even in modern cities, informal rules prevail over formal rules in many cases. For example, in economic transactions, personal relationship and social network are in many cases more relevant than formal legal rules. In the administrative system, there is a popular saying on the hierarchy of influential factors in the appointment and promotion: “*Nhất hậu duệ, nhì tiền tệ, ba quan hệ, bốn trí tuệ*” [“*Descendants first; money second; relationship third; intelligence fourth*”].

#### *E. Global Law.*

The final and newest layer of law in China and Vietnam is global law. Global law is “a multicultural, multinational, and multidisciplinary legal phenomenon finding its roots in international and comparative law and emerging through the international legal practice that was prompted by the globalization of the world economy.”<sup>144</sup> Global law is promoted by “global players”, including “international organizations, international law practitioners, and universities.”<sup>145</sup> The legal system in China and Vietnam is now added with global legal rules, norms, and doctrines, which has their roots in the law of western countries (not necessarily the countries dominated by the civil legal system) and international law.

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144. Pierrick Le Goff, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, 14 IND. J. GLOB. LEGAL STUD. 119, 128 (2007).

145. *Id.* at 130.

Jianfu Chen points out the movement towards “assimilation”, “harmonization with international practice”, and “internationalization” of Chinese law, which began in 1992 when the Communist Party decided to establish a “socialist market economy.”<sup>146</sup> He documents that:

The leaders of the law-making authorities also explicitly endorsed bold adoption and the direct transplant of foreign laws. With such a legislative policy in place, the Maritime Code which had been in the making for over ten years and was primarily composed of borrowings from international conventions and practice, was not only adopted in 1992, but its adoption was heralded as an excellent example for harmonising Chinese law with international practice. Many long awaited codes, e.g. the Company Law (1993), the Foreign Trade Law (1994), the Arbitration Law (1994), the Audit Law (1994), the Securities Law (1995), the People’s Bank Law (1995), the Law on Commercial Banks (1995), the Law on Accounting (1995), and the Insurance Law (1995) were all adopted. Speedy revisions or additions were made to existing laws which were deemed inconsistent with international practice. Taxation laws, joint venture laws, intellectual property protection laws, the Criminal Procedure Law and the Criminal Law, and most recently, the Company Law, the Securities Law, all underwent major revisions. Further, China has now ratified a large number of international conventions dealing with international economic relations, especially intellectual property protection.<sup>147</sup>

Another example is the case of the 1999 Contract Law, in which “the UNIDROIT Principles of International Commercial Contracts (1994) and the UN Convention on Contracts for the International Sale of Goods (1980) were the actual models, and in some places were copied article by article.”<sup>148</sup> Global law affects not only private law but also public law. As Chen illustrates, “the 1996–1997 (and again, the 2011-12) revisions to the Criminal Procedural Law and Criminal Law were aimed at absorbing commonly accepted international standards on justice and the rule of law, rather than following any particularly legal tradition.”<sup>149</sup> Chen finally concludes that: “With these

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146. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 81 (2016).

147. *Id.* at 82-83 (citations omitted).

148. *Id.* at 85.

149. *Id.* at 86.

developments, the process is thus better described as the internationalisation, rather than the westernisation, of Chinese law.”<sup>150</sup>

Like China, borrowing from global law is an important mechanism of legal development in Vietnam after the Renovation program was introduced in 1986. Private law (especially, the civil law and corporate law) have been developed in this line.<sup>151</sup> For example, “the Enterprise Law (EL) enacted on 12 June, 1999 introduced comprehensive Western corporate governance rules. Principally borrowing Anglo-American company law principles, in one hundred and thirty-four articles the EL regulates directors’ duties, disclosure, members’ rights (especially those of minority shareholders), boards of management and inspection board rights and duties, dividend payments, conversion among corporate entities, dissolution, dissolution merger and liquidation.”<sup>152</sup> Another example: “the key provisions of the Vietnamese Competition Law [2004], which prohibit anti-competitive behaviour, abuse of market dominance and other monopolistic activities, were loosely modelled on the European Union Competition Law.”<sup>153</sup> Public law, like constitutional law, is also reformed with new global ideas. For example, the 1992 Constitution adopted the concept of “human rights”. The new Constitution in 2013 further incorporated more human rights familiar in international human rights treaties, including: the right to life, right not to be expelled from home territory, right to private family life, presumption of innocence, right to appeal to higher court, right to favorable working conditions, prohibition of child labor, and the right to healthy environment.<sup>154</sup>

The diffusion of global law in China and Vietnam has been driven by internal and external factors. Internally, domestic economic reform leads to the need of legal framework for the market, and the global law can offer solutions for this legal reform; the adoption of global law is

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150. *Id.*

151. Phạm Duy Nghĩa, *Tiếp Nhận Pháp Luật Nước Ngoài - Thời Cơ Và Thách Thức Mới Cho Nghiên Cứu Lập Pháp [Transplants of Foreign Law: Chances and Challenges for Legislative Legal Studies]*, 5 NGHIÊN CỨU LẬP PHÁP 50 (2002): 50; Bùi Xuân Hải, *Tiếp Nhận Pháp Luật Nước Ngoài: Lý Thuyết Và Thực Tiễn Trong Pháp Luật Công Ty Việt Nam [Transplants of Foreign Law: Theory and Practice of Vietnamese Corporate Law]* 7 NGHIÊN CỨU LẬP PHÁP 23 (2006).

152. John Gillespie, *Transplanted Company Law: An Ideological and Cultural Analysis of Market-Entry in Vietnam*, 51 INT’L AND COMP. L. Q. 641, 649 (2002).

153. John Gillespie, *Localizing Global Competition Law In Vietnam: A Bottom-Up Perspective*, 64 INT’L AND COMP. L. Q. 935, 938 (2015).

154. Bui Ngoc Son, *The Global Origins of Vietnam’s Constitutions: Text in Context* 2017 U. ILL. L. REV. 525, 542-543 (2017).

the mechanism to attract foreign investment; socialist leaders adopt global legal norms to integrate the countries into the global economic and political order; they also adopt global law to gain more international legitimacy, by which to enhance domestic legitimacy. Externally, international agencies (such as World Trade Organization, World Bank, and United Nations of Development Programme), foreign governments have sought to diffuse global law into China and Vietnam through different mechanisms, such as treaty negotiation and agreements, legal aid programs, and academic exchange programs.<sup>155</sup>

One feature of the diffusion of global law in China and Vietnam is that this process is more prominent in private law (especially business law) than in public law. One of the most important reasons is that the adoption of global private law does not challenge the socialist regime while facilitate economic reform, which confer more legitimacy to the existing regimes. Global norms of public law can be adopted only to the extent that they can confer more legitimacy to the existing socialist regime rather than challenge it. This explains why Vietnam adopts more social, economic, and cultural human rights, but does not adopt institutions to implement constitutional rights, such as a constitutional review system or a human right committee.<sup>156</sup> Similarly, Chinese government may adopt global private law but would regard institutions associated with liberal constitutionalism (such as judicial review, judicial independence, and the separation of powers) as dangerous for Chinese socialist regime.<sup>157</sup> While global harmonization of business law is useful for economic development and global integration, constitutional law is the area for the Chinese government to maintain the “Chinese characteristics” because constitutional law is more expressive of national identity than business law. Unlike China, Vietnam does not have the exceptionalist thinking in developing public law, but also would not adopt the global public legal norms and institutions that are potentially destructive to the socialist regime.

Finally, it should be underlined that there is less interaction between China and Vietnam during their process of adopting global

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155. See CHEN, *supra* note 146, at 85; Gillespie, *supra* note 152, at 937; Carol V. Rose, *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC’Y REV. 93 (1998).

156. Bui, *supra* note 151, at 559.

157. See Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the “Urgency” of Political Reform*, 11 E. ASIA L. REV. 337, 389 (2017).

law. John Gillespie notes that during the early time of Renovation, “Vietnamese law-makers turned initially to China for legal inspiration”.<sup>158</sup> For example, the provisions on special economic zones in the Foreign Investment Law of 1987 “drew heavily from the Sinic templates.”<sup>159</sup> However, Gillespie provides three reasons explaining the limits of Chinese influence on Vietnamese legal development: the border war between China and Vietnam in 1979; Vietnamese law-makers knew more about Soviet and East German law than Chinese legal and economic development and Chinese language; and in the late 1980s, “the Chinese legal model had not yet proved its capacity to generate sustained economic growth.”<sup>160</sup> Now, the last reason may not be relevant, but the first two are enhanced by more developments, which explain the less legal exchange between China and Vietnam: the conflict between China and Vietnam over the Amphitrite and Spratly Islands, and increasing number of Vietnamese people studying law in the western countries and democratic East Asian countries, such as Japan.

#### *F. Conclusion*

It has been seen that Chinese and Vietnamese societies are not lawless, as there are many laws existing throughout their history. Different legal systems existed and played different role during different periods. During pre-modern time, for example, Confucian law played the dominant role, while indigenous law co-existed. Currently, socialist law has been the hegemonic layer of law in China and Vietnam, while elements of other legal layers have co-existed. The co-existence of non-socialist legal layers means not only the concurrent application of other legal rules, processes and institutions but also the continuing influences of other legal ideas and legal cultures on the legal practices.

### *II. INSTRUMENTALISM? STRATEGIC ACCOMMODATION OF THE RULE OF LAW*

Having documented the existence of law in China and Vietnam, the next question is whether their law has certain qualities of the rule

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158. John Gillespie, *The Juridification of State Regulation in Vietnam*, in LEGAL REFORMS IN CHINA AND VIETNAM, *supra* note 1, at 92.

159. *Id.*

160. *Id.*

of law. Within this single article, I will focus on the current situation of law in the two countries.<sup>161</sup> The rule of law is normally conceived as an antithesis to communism. For example, Martin Krygier argues that Marxism did not support legal restraints on power but offered “considerable support to the repressive, ideological and purely instrumental uses of law and the rejection and destruction of the rule of law, which were characteristic of communism.”<sup>162</sup> However, there is a vast literature on the rule of law in China.<sup>163</sup> Like China, during the post-soviet era, Vietnam has been committed to a certain degree of the rule of law, and this has also been examined by some scholars.<sup>164</sup> To understand the rule of law in China and Vietnam, I propose a conceptual model of “strategic accommodation” of the rule of law. On that base, while the instrumental nature of the law has remained dominant in China and Vietnam, the socialist states have accommodated some forms of the rule of law as a strategic response to the need to consolidate the legitimacy of the socialist regimes. The conceptual model of “strategic accommodation” includes two components: accommodation and strategy. The idea of accommodation explains how the rule of law exists under socialism, while the idea of “strategy” explains why it is so.

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161. For the account of the possible existence of the rule of law in pre-modern China and Vietnam, see TA VÂN TÀI, *THE VIETNAMESE TRADITION OF HUMAN RIGHTS* 233 (1988); Qiang Fang & Roger Des Forges, *Were Chinese Rulers Above the Law? Toward a Theory of the Rule of Law in China from Early Times to 1949 CE*, 44 *STAN. J. INT'L L.* 101 (2008); Tạ Văn Tài, *Confucian Influences in the Traditional Legal System of Vietnam, with Some Comparisons with China: Rule by Law and Rule of Law*, 1 *VIETNAMESE SOC. SCIENCE REV.* 11 (2009).

162. See e.g. Martin Krygier, *Marxism and the Rule of Law: Reflections after the Collapse of Communism* 15 *L. & SOC. INQUIRY* 633, 633 (1990).

163. For some recent publications, see KATRIN BLASEK, *RULE OF LAW IN CHINA: A COMPARATIVE APPROACH* (2016); QUANXI GAO, WEI ZHANG & FEILONG TIAN, *THE ROAD TO THE RULE OF LAW IN MODERN CHINA* (2016); CHINA'S SOCIALIST RULE OF LAW REFORMS UNDER XI JINPING (John Garrick & Yan Chang Bennett eds., 2016); LIN LI, *BUILDING THE RULE OF LAW IN CHINA* (2017); SAMLUI SEPPÄNEN, *THE IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA* (2016).

164. John Gillespie, *Concept of Law in Vietnam: Transforming Statist Socialism*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.* 146 (Randall Peerenboom ed., 2004); Pip Nicholson, *Judicial Independence and the Rule of Law: The Vietnam Court Experience*, 3 *AUSTL. J. OF ASIAN L.* 37 (2001); MARK SIDEL, *LAW AND SOCIETY IN VIETNAM* (2008); *VIETNAM AND THE RULE OF LAW* (Carlyle A. Thayer & David G. Marr eds., 1993).

*A. Accommodation: How Is The Rule of Law Possible Under Socialism?*

Law under socialist regimes cannot be evaluated from the perspective of liberal legalism. If law under socialist regimes is assessed against substantive requirements of the rule of law specifically associated with civil liberty, it is hard to find the rule of law here. But, an exclusive employment of legal formalism is another misleading. While some scholars have correctly identified the practice of formal rule of law in socialist regimes like China,<sup>165</sup> they tend to ignore or underestimate other non-formalist dimensions of the rule of law. In addition, existing formalist accounts of the rule of law fail to appreciate the complex interwoven and competition of different strands of the rule of law. Formal legal rules cannot operate neutrally. Rather, they complexly interact with other aspects of the rule of law. For example, the legal tradition of non-litigation in part explains why in resolving civil disputes the Chinese people tend to prefer mediation and informal institutions than formal legal institutions like courts.<sup>166</sup> The substantive concepts of law also determine positively and negatively the context of formal law. Positively, the promotion of formal rule of law is underpinned by the consequentialist conceptualization that the rule of law can promote economic development. This legal consequentialism leads to the concerns of not only formal rules but also their substantive contents: property rights, contract rights, and freedom of conducting business. Negatively, the statist concept of law reduces formal law to an instrument to control civil liberty.

To understand how the rule of law is possible under socialist regime, an accommodationist conceptualization of the rule of law is necessary. The idea of “accommodation” is useful to capture the practice of the rule of law under socialism. It refers to a special arrangement in which a certain mode is dominant while other modes are tolerated. In this regard, the socialist regime will retain the hegemony of socialist legality while tolerate some forms of the rule of law that may conflict with but would not substantively damage the socialist legality and the socialist regime in general.

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165. See RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 6 (2002) (“both the Party constitution and the 1982 constitution confirm the basic principles of a government of laws, the supremacy of the law, and equality of all before the law.”)

166. See generally Albert H. Y. Chen, *Mediation, Litigation, and Justice: Confucian Reflections in a Modern Liberal Society*, in CONFUCIANISM FOR THE MODERN WORLD 257 (Daniel A. Bell & Hahm Chaibong eds., 2003).



Accommodationism would reject a clear dichotomy between the rule of law and authoritarianism. The rule of law is normally conceived a component of the transition from authoritarian regime to democracy.<sup>167</sup> The implication is that the rule of law and authoritarianism are something that cannot co-exist in a single polity. This is a misleading. Even under well-established rule of law systems, legal authoritarianism can also be partially executed. In this case, the rule of law is still the hegemonic spirit of the polity, but authoritarian laws can be implemented in some aspects of the society under certain circumstances.<sup>168</sup> To illustrate, Robert Diab investigates in the United States “law and policy defining four basic features of authoritarian legality, including the repudiation of absolute or “non-derogable” human rights in torture, indefinite detention, and targeted killing; the expansion of state secrecy and surveillance; judicial deference to executive discretion; and a reluctance to remedy serious rights violations, or be held accountable for them.”<sup>169</sup> Conversely, even under well-established authoritarian systems like socialist regimes, the rule of law can also be partially accommodated. In this case, authoritarianism remains the hegemonic spirit of the polity, but the rule of law can also be implemented in some aspects of the society under certain circumstances.

Accommodationism would adopt an idealist approach to the rule of law. As Richard H. Fallon argues, “The Rule of Law is an ideal that can be used to evaluate laws, judicial decisions, or legal systems.”<sup>170</sup> The rule of law is an ideal that humankind has tried to achieve in its broader course of pursuing just, decent, and organized society. The realization of the rule of law is “a matter of degree.”<sup>171</sup> No legal system can realize the ideal of rule of law perfectly. “A legal system that on the whole comports with the Rule of Law may nevertheless include

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167. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L. J.* 2009, 2016 (1997).

168. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 *INDIANA LAW JOURNAL* 379, 382 (1991) (Discussing the extreme level of authoritarianism “during the McCarthy era in the United States, when, as a result of fear, hatred and extreme nationalism, the government, with private and judicial support, used law to persecute and punish citizens for being ‘un-Ameri-can’”).

169. ROBERT DIAB, *THE HARBINGER THEORY: HOW THE POST-9/11 EMERGENCY BECAME PERMANENT AND THE CASE FOR REFORM* 23 (2015).

170. Richard H. Fallon, ‘*The Rule of Law*’ as a Concept in *Constitutional Discourse*, 97 *COLUM. L. REV.* 9 (1997).

171. *Id.*

regulations or decisions that do not.”<sup>172</sup> In another extreme, a legal system that on the whole departs from the rule of law may nevertheless accommodate regulations or decisions that partially meet with the rule of law desiderata. That means the legal system of authoritarian regimes can achieve the rule of law ideal to a certain degree. With this conceptual ground, it can be expected that some expects of the socialist legal system may substantively depart from the rule of law ideals, while accommodate them in the other expects. Albert Chen recently discusses “differential degrees of compliance with the rule of law in different domains and contexts of the Chinese state and society.”<sup>173</sup> To illustrate, he points out that: “There are certain types of court cases in which judicial professionalism, autonomy, and independence has developed considerably, while there are also ‘political sensitive’ cases in which the courts would defer to relevant party authorities.”<sup>174</sup> Drawing from empirical survey, Wang Yuhua also argues about “a *partial form* of the rule of law”<sup>175</sup> in China.

Accommodationism would also adopt the rule of law as a multi-dimensional concept. Fallon’s typology of the rule of law ideal is useful in this regard. Accordingly, although the rule of law is a contested ideal, virtually all contested arguments about the rule of law ideal can be modelled by a historic, formalist, legal process, or substantive ideal type.<sup>176</sup> Firstly, “A historicist ideal type of the Rule of Law, in order to be coherent, must be conceived as internal to a legal culture, form of life, hermeneutic circle, or interpretive community; meaning cannot be conceived as independent of culture, context, or shared understandings.”<sup>177</sup> So, in historic rule of law ideal, legal actors are bound by pre-established legal legacy, legal culture, and shared underlining principles of an interpretive community. Secondly, under the formalist ideal type, to borrow Justice Antonin Scalia’s utterance, *the rule of law* means *a law of rules*.<sup>178</sup> Rules are conceived as “a clear prescription that exist prior to its application and that determine appropriate conduct or legal outcomes.”<sup>179</sup> The formalist rule of law is

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172. *Id.*

173. Albert Chen, *China’s Long March toward Rule of Law’ or ‘China’s Turn Against Law?* 4 CHINESE J. OF COMP. L. 30 (2016).

174. *Id.*

175. WANG, *supra* note 130, at 18 (emphasis in original).

176. Fallon, *supra* note 170, at 10.

177. *Id.* at 14.

178. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

179. Fallon, *supra* note 170, at 14.

underpinned by the assumption on “human being as rational planners and maximizers, who reasonably demand to know in advance the legal consequences of alternative courses of action.”<sup>180</sup> Proponents of legal formalism include A.V. Dicey, Friedrich Hayek, John Rawls, Joseph Raz, and Lon L. Fuller.<sup>181</sup> In particular, Fuller identifies eight requirements of formal rule of law or “legality”, including: generality, clarity, public promulgation, stability, prospective, free of contradiction, possible to obey, and the consistence between promulgated laws and their actual administration.<sup>182</sup> Thirdly, the legal process type focuses procedural requirements in the development and application of legal norms.<sup>183</sup> These include, for example, fairness, due process, and judicial review of legislative, executive, and administrative actions.<sup>184</sup> Finally, the substantive ideal type of rule of law insists that “the forms of law- which may encompass rules, conventions of legal reasoning, and process of legal deliberation- are unintelligible as legal norms in the absence of rationally cognizable purposes that possess reasonable claims to moral allegiances.”<sup>185</sup> Ronald Dworkin, for example, insists on the individual rights as the substantive requirement of the rule of law.<sup>186</sup> Frank Michelman’s “Law’s Republic” treats freedom under law as the substance of the rule of law.<sup>187</sup>

The rule of law strands do not exist independently in a legal system. Rather, they are complexly interwoven and compete with each other.<sup>188</sup> There may be relative priority of different rule of law strands in different legal systems. And within a legal system, there may be relative priority of a certain strand of the rule of law in different periods. Therefore, an account of the rule of law in different contexts must take into account the complex manifestation, interaction, and competition of different rule of law ideal types. Fallon suggests that: “To the extent that the ideal types reflecting conflicting values or approaches, a sound theory needs assign relative priorities, assess the

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180. *Id.* at 15.

181. *Id.* at 16.

182. LON L. FULLER, *THE MORALITY OF LAW*, REVISED EDITION 33-94 (1964).

183. Fallon, *supra* note 170, at 18.

184. *Id.*

185. *Id.* at 21.

186. *See generally* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

187. Frank Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493 (1988).

188. Fallon, *supra* note 170, at 42.

significance of greater or lesser departures from relevant desiderata, and identify the pertinence of various contextual factors.”<sup>189</sup>

The socialist regimes in China and Vietnam have partially accommodated different strands of the rule of law. Consider first the partial existence of the historic type the rule of law. This is evidenced by the recent practice of “guiding cases,” a kind of case-law, in China and Vietnam. Recently, the supreme courts in both countries have drawn on their decisions to issue de facto biding decisions guiding the adjudication of the lower courts in similar cases.<sup>190</sup> In this context, lower courts are constrained by the pre-established legal rules. But, the account of historic strand of the rule of law should go beyond the mere consideration of the binding of precedents or particular historic legal rules. The historic strand of the rule of law is also achieved when the arbitrariness of legal actors (e.g., politicians, law-makers, and judges) are constrained by the historic legal legacy, legal culture, and legal principles. The communist authorities in China and Vietnam cannot completely ignore other layers of law that have existed throughout their legal history. The communists’ development and application of law is also constrained by historicist legal norms, institutions, and shared principles of the respective interpretive communities. To illustrate, communist legal actors have to respect the rights of the indigenous peoples to live according to their own chthonic law. To some extent, they are also constrained by Confucian legal culture, as evidenced by its continued influence in different aspects of the legal system as documented above.

That said, the historicist rule of law is partially practiced. In other words, communist legal actors are only partially constrained by historicist legal sources. Historicist legal sources can constrain but at the same time are manipulated by communist legal actors. Most importantly, without judicial review system, the communist authorities have the monopolist power to apply and interpret the historicist legal sources in the line with their interests. The revival of *huong ước* in Vietnam is an example. *Huong ước* is both expressive of the

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189. *Id.* at 43-4.

190. See Mo Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China* 26. WASH. INT’L. L. J. 269 (2017); Mark Jia, *China Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213 (2016). For the case of Vietnam, see Tòa án Nhân dân Tối cao [The People’s Supreme Court], Đề án Phát triển triển án lệ ban hành theo Quyết định 74/QĐ-TANDTC ngày 31/10/2012 [The Proposal to Develop Precedents Issued together With Decision 74/QĐ-TANDTC, dated Oct. 31 2012].

indigenous identity of the communal community and instrumental to the implementation of the state's policies at the village level.

The second, formalist type of the rule of law is more remarkable in China and Vietnam, evidenced by the enactment of numerous formal laws. The promulgation of numerous formal legal rules indicates the regime's commitment to formal legality in exercising the public power. Governing through formal law is at least better than lawless or ruling by personal fiat. Moreover, the socialist legal system meets with the some requirements of formalist rule of law ideal to some extent, such as publicity and enforceability. Without judicial review, the two countries have developed specific mechanism called "filing and review" to make sure that formal laws are free of contradiction.<sup>191</sup>

The focus on formal law is due to epistemological and practical reasons. First, the promotion of formal law is consistent with the positivist view of the law endorsed by the socialist states as the consequence of the influence of Marxist legal philosophy. From this positivist perspective, law must come from the state rather than from the interpretative community, although the guiding cases can be tolerated to some extent when formal law is not available. Second, formal law meets with the socialist states' imperative of regulating new areas emerged from the development of the market, the increasing complex society, and the need of more effective state institutions, which are the consequence of the implementation of the economic reform initiatives. Finally, formal law has empty contents<sup>192</sup> and hence is not detrimental to the existing socialist regime.

Third, legal process in China and Vietnam is basically authoritarian but also includes some rule of law elements. The judicial process is politically controlled but also has some elements of legal process rule of law ideal. Wang Yuhua argues that courts in China are independent and enforce the law equally in commercial realm but not

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191. See Keith Hand, *Understanding China's System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony*, 26 COLUM. J. ASIAN L. 139 (2013) (discussing the way China addressed legislative conflict through the system of filing and review of legislation at different levels of government); LÊ HỒNG SƠN, ED., MỘT SỐ NỘI DUNG QUY ĐỊNH VỀ RÀ SOÁT, HỆ THỐNG HÓA VĂN BẢN QUY PHẠM PHÁP LUẬT [SOME ISSUES ON THE REGULATIONS ON REVIEW AND STANDARDIZATION OF LEGAL NORMATIVE DOCUMENTS] (2013) (a collection of legal rules defining the system of filing and review of legislation at different levels of government in Vietnam).

192. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 93 (2004).

in political realm.<sup>193</sup> The logic is that local governments in the regions where economic development relies more on foreign investment will foster the formal rule of law to attract foreign investment, but the rule of law will not be extended to the realm where the citizens seek to challenge the government action in courts.<sup>194</sup> In the case of Vietnam, Nicholson argues that: “The contemporary Vietnamese court is concurrently a legal and political institution. Legal in that ideally it is bound by law, political in that ultimately it works for the party-state and must resolve matters in accordance with a complex hierarchy of influences, only once of which is law.”<sup>195</sup> The political side is dominant and illustrates the authoritarian feature of the judicial process. The legislative and executive actions are not subjected to judicial review: conversely, the judicial process is controlled by the political powers. However, the legal side illustrates some partial achievement of the legal process rule of law ideal. At least in formal terms, some fair trial rights are constitutionally guaranteed, including the right to counsel, the right to public trial, and the prohibition of double jeopardy. Notably, the new 2013 Constitution introduces more rights which aim to ensure the fairness in judicial process, namely, presumption of innocence, the right to a timely trial, the right to “fair” trial,<sup>196</sup> and right to appeal to higher court.<sup>197</sup> The new Criminal Procedural Code in 2015 introduces the principle of adversarial trial and extends the types and the rights of the defenders.<sup>198</sup> These procedural developments are meant to limit the arbitrary powers of the judicial institutions. In practical terms, trials have been publicly held, which allows the public to supervise the judicial process. Some important cases have been even live televised. Professional lawyers are more active in the judicial process. The trials are predominantly inquisitorial but increasingly adversarial in recent years.<sup>199</sup>

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193. WANG, *supra* note 130, at 18.

194. *Id.* at 18, 22.

195. Pip Nicholson, *Renovating Courts: The Role of Courts in Contemporary Vietnam*, in *ASIAN COURTS IN CONTEXT* 562 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2015).

196. HIẾN PHÁP [CONSTITUTION], art. 31 (2013) (Viet.).

197. *Id.* art. 103

198. Hoàng Nhưõng, *Những điểm mới nổi bật của Bộ luật Tố tụng hình sự 2015* [*New Remarkable Points in the Criminal Procedural Code 2015*], *BÁO ĐIỆN TỬ QUÂN ĐỘI NHÂN DÂN* (June 22, 2016), <http://www.qdnd.vn/xa-hoi/nhung-diem-moi-noi-bat-cua-bo-luat-to-tung-hinh-su-2015-481439> [<https://perma.cc/HZ6M-KQHN>] (archived Oct. 29, 2017).

199. Trần Duy Bình, *Thực trạng và một số kiến nghị nhằm nâng cao chất lượng tranh tụng tại phiên tòa hành sự theo tinh thần cải cách tư pháp* [*The Reality and some Suggestions to Enhance the Quality of Adversarial Process in Trials According to the Spirit of Judicial*

Let's now turn to consider the substantive type of the rule of law in China and Vietnam. The so-called "socialist rule of law state" (Chinese: *shuhui zhuyi fazhiguo*; Vietnamese: *nha nuoc phap quyen xa hoi chu nghia*) was adopted by the communist leaders of the respective countries in the middle of the 1990s, and was then enshrined in the national constitutions in China in 1999 and in Vietnam in 2001.<sup>200</sup> However, the substantive meanings of the "socialist rule of law state" are ambiguous.

On 23 October, 2014, in the 4th Plenum of the 18th Congress of Chinese Communist Party (CCP), the party's Central Committee passed a decision focusing on promoting the "socialist rule of law state", called "Decision on Some Major Issues Concerning Comprehensively Promoting Governing the Country According to Law."<sup>201</sup> The Decision "persist[s] in marching the path of Socialist rule of law with Chinese characteristics, build a Socialist rule of law system with Chinese characteristics."<sup>202</sup> The Decision persists in these "principles": the leadership of the Chinese communist party "within the scope of the Constitution and the law"; "the dominant position of the people", including the protection of people's basic rights and ensuring of their duties; equality of all "in the fact of the law";<sup>203</sup> "integrating ruling the country according to the law and ruling the country according to virtue"; and "starting from China's reality."<sup>204</sup> This Decision is subject to controversial academic debates.<sup>205</sup> In the case of Vietnam,

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*Reform*], TRƯỜNG ĐẠI HỌC KIỂM SÁT HÀ NỘI, <http://tks.edu.vn/thong-tin-khoa-hoc-chi-tiet/79/189>.

200. For China, see PEERENBOOM, *supra* note 165, at 6. For Vietnam, see John Gillespie, *Changing Concepts of Socialist Law in Vietnam*, in *ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM* 45 (John Gillespie & Pip Nicholson eds., 2005).

201. CCP Central Committee, *Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law*, CHINA COPYRIGHT AND MEDIA [Oct 28, 2014], <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward> [<https://perma.cc/5SRW-9ZS4>] (archived Oct. 29, 2017).

202. *Id.*

203. *Id.*

204. *Id.*

205. See Randall Peerenboom, *Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?* HAGUE J. RULE L. (2015) 7: 49, 58 (arguing that the decision "established socialist rule of law with Chinese characteristics as the foundation for all legal reforms"); Eva Pils, *China, the Rule of Law, and the Question of Obedience: A Comment on Professor Peerenboom*, HAGUE J. RULE L. (2015) 7: 83 (criticizing Peerenboom's view as "inaccurate account of (positivistic and

the “socialist rule of law state” is said to have the following distinctive characters: the leadership of the Vietnamese communist party, the supremacy of the constitution, all state powers belonging to the people, the unity of state powers, the promotion of the law together with enhancing education of social morality, human rights going hands in hands with the citizens’ duties and obligations to the state and the nation.<sup>206</sup> So, there are several common features in the construction of the meanings of the “socialist rule of law state” in China and Vietnam.

I contend that among the three western versions of the rule of law, the Anglo-American “rule of law”, the French *État de droit*, and the German *Rechtsstaat*, the version of “socialist rule of law state” is closer to the German version. The Anglo-American concept of the rule of law focuses on legal limitations of the state power to protect natural rights,<sup>207</sup> and this is clearly contradictory to the socialist state’s strong concern on strengthening the control of the state over individuals through regulations. The French *État de droit*, characterized by the concept of constitutional state as legal protector of fundamental rights from legislative infringements,<sup>208</sup> is also unsuitable to the socialist states which make the national legislatures the supreme body as the embodiment of unitary power. Instead, the German *Rechtsstaat* is more attractive to the socialist states.<sup>209</sup> The evolution of this concept has a long history, associated with Kant’s philosophy and legal positivism.<sup>210</sup> Michel Rosenfeld summarizes the features of the German *Rechtsstaat* as follows:

Like its Kantian counterpart, today’s *Rechtsstaat* enshrines fundamental rights above the realm of ordinary laws, although these rights are substantive rather than formal and differ significantly in content from their Kantian predecessors. On the other hand, like its positivistic predecessor, today’s *Rechtsstaat* institutionalizes legality, but it is a legality that is not merely dependent on consistency and predictability, but also contingent

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naturalist) liberal conceptions of law prevents him from understanding the implications of this decision’s deeply illiberal commitment to power concentration and Party supremacy over law.”).

206. Nguyễn Trọng Phúc, *Sáng tỏ Nội dung Xây dựng Nhà nước pháp quyền* [“The Contents of Building the Rule of Law State are Clear”], BÁO ĐIỆN TỬ CHÍNH PHỦ [Dec. 01, 2014], <http://baodientu.chinhphu.vn/Tin-noi-bat/Sang-to-noi-dung-xay-dung-Nha-nuoc-phap-quyen/190835.vgp> [https://perma.cc/ATC2-BZUU] (archived Oct. 29, 2017).

207. Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1334 (2001).

208. *Id.* at 1330.

209. *See id.* at 1318.

210. *See id.* at 1319.



on constitutional conformity and on the realization of constitutionally recognized substantive goals. This, in turn, tends to constitutionalize all politics and to convert the *Rechtsstaat* into a *Verfassungsstaat* (i.e., a state rule through the constitution) as some German scholars have argued. Finally, even beyond constitutionalization as such, today's *Rechtsstaat* judicializes realms, such as the promotion of welfare, which were clearly relegated to politics by its nineteenth century predecessors.<sup>211</sup>

Like the German *Rechtsstaat*, the “socialist rule of law state” underlines governing through the law, constitutionalization of the state organization and operation, constitutional supremacy, and the protection of fundamental rights. The socialist states in China and Vietnam might have adapted the *Rechtsstaat* to generate the “socialist rule of law state”, the mélange of *Rechtsstaat*, socialist, and local elements. There are good reasons for this. The *Rechtsstaat*'s positivist view that the state is the exclusive channel of law is consistent with the socialist legality which equally underlines the statist nature of law. Moreover, the idea of governing through promulgated law is also attractive to the socialist states because this provides the justification for governing the transitional society through formal regulations. But, the German *Rechtsstaat* has both formal and substantive contents. It also stresses the constitutionally protected fundamental rights above ordinary law and politics.<sup>212</sup> The socialist states might have adopted and adapted this idea with a commitment to constitutional supremacy and protection of constitutional rights, which can be regarded as the rule of law elements in the “socialist rule of law state.” This rule of law elements exist in tension with the socialist elements, such as the leadership of the communist party, the concentration of state power, and the statist rights of citizens. In addition, “socialist rule of law state” also includes elements reflecting the local values. This is evident in the emphasis on the role of moral values, which resonates with the Confucian tradition of the rule of virtue. In short, the version of “socialist rule of law state” is an ambiguous and dissonant ideology of substantive law in which *socialist legal statism* remains dominant, but some substantive ideas of the rule of law are partially adopted.

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211. *Id.* at 1328-29.

212. Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, *supra* note 207, at 1327.

*B. Strategy: Why Do Socialist Regimes Accommodate The Rule of Law?*

The strategic approach, which has been applied in economics, political science, and more recently legal studies, focuses on rational actors' calculus of costs and benefits of "potential courses of action."<sup>213</sup> As David Collier and Deborah L. Norden write, "a strategy is a calculus of behavior adopted to enhance the likelihood of achieving some goal, such as reform or democracy."<sup>214</sup> Applying the "strategic-realist approach" in comparative constitutional inquiry, Ran Hirschl argues that "The quest to increase benefits and lower risks and costs - most notably by enhancing regime legitimacy and stature, promoting centralization and fostering nation-building or locking in a certain set of contested worldviews and policy preferences- is a major determinant of constitutionalization."<sup>215</sup>

The strategic accounts are particularly relevant to socialist regimes in China and Vietnam where law and politics are indistinguishable. The socialist regimes that survive the fall of the Berlin Wall are dynamic enough to adjust themselves to the changing world, which explains their resilience.<sup>216</sup> Nowadays, they have been operating under the domestic and international milieus substantively different from the Soviet era. Domestically, they have to consolidate the sociological base of legitimacy by their actual performance, and economic development is a key concern. The accommodation of some forms of the rule of law can benefit economic development and hence socialist elite's legitimacy. Moreover, the socialist states also need to build state institutions, which is instrumental to its consolidated power and its legitimacy, because powers that are institutionalized can become stronger and more legitimate than personalized powers. Some forms of the rule of law can also be used for these institutional purposes. Internationally, the socialist countries like China and Vietnam have actively integrated politically and economically into the global order. To acclimate to the changing world, the communist nations have been compelled to adapt its ideology, institutions,

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213. Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV 1673, 1718 (2015).

214. David Collier and Deborah L. Norden, *Strategic Choice Models of Political Change in Latin America*, 24 COMPARATIVE POLITICS, 229, 230 (1992).

215. RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 175 (2014).

216. For ideological, institutional, and economic adaption in communist regimes, see generally, DIMITROV, *supra* note 5.

economy, and law by, among other things, accommodating some forms of the rule of law familiar with the global community to gain more international legitimacy, which in turn can also consolidate domestic legitimacy.

But, the socialist regimes have been confronted with the dilemma. On the one hand, the rule of law has the potential to ruin the socialist regimes. On the other hand, these regimes have to be dynamic enough to be resilient by, among other things, accommodating some forms of the rule of law. The solution for this is to adopt some realistic strategies to legal reform. These strategies must guarantee the hegemony of communist rule and the accommodation of the rule of law at the same time. The rule of law is accommodated to the extent that it will not substantively challenge the existing socialist regimes. To achieve this, the socialist regimes adopt the differential and partial strategies to legal reform: the rule of law can only be achieved differentially and partially. By this, legality under socialist regimes is transformative, not revolutionary. The whole practice of the rule of law (with the substantive adoption and practice of precedents, judicial review, judicial independence, the separation of power, multi-party system, free elections, and civil-political rights) will damage the socialist regime, for which this is impossible. But, the “partial form of the rule of law,” as Wang Yuhua argues,<sup>217</sup> is a legal reform, not legal revolution, for which this is possible.

The “differential” strategy means that the socialist regimes have different approaches to different types of the rule of law and the application of the rule of law in different areas of the society. This is resonated with Albert Chen’s argument.<sup>218</sup> First, the socialist regimes practice different types of the rule of law but would have priority to the types that are more instrumental to their legitimacy and less damaging to the existence regimes. This explains their prioritization of the formalist type of the rule of law. Second, within a single type, the rule of law is applied differently in different realms. As Wang’s study suggests, the Chinese government can accommodate the (legal process) rule of law in commercial realm, but not in political realm.<sup>219</sup> But, this differential approach is not limited to the procedural rule of law. On the substantive rule of law, the socialist governments may have different

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217. WANG, *supra* note 130, at 18.

218. Chen, *supra* note 173, at 30.

219. WANG, *supra* note 130, at 3.

strategy to different substances of law. For example, they can accommodate more social economic rights than civil-political rights, as the former can consolidate the sociological foundation of the political legitimacy, while the latter would open the door for the citizens to challenge the existing regime. To illustrate, the freedom to do business is more accommodated than the freedom of speech and expression.

### III. ASSIMILATIONISM? TWO DISTINCTIVE LEGAL SYSTEMS

Having demonstrated that law in China and Vietnam has a rich history, and that the law embodies some rule of law qualities, the next question is whether there are distinctive legal systems in these countries. I argue that there are two legal systems practiced in China and Vietnam, namely the Confucian legal system and the socialist legal system, which are separate from other traditional, and modern legal systems of the world. However, before considering these legal systems, it is necessary to define what constitutes a legal system.

#### A. Legal System

For the purpose of this study, I deploy the concept of “legal system” rather “legal families” or “legal tradition” although the two later may have virtues in their own ways. Unlike the concept of legal families, the concept of legal system does not focus on legal methods, legal sources, and style of trials.<sup>220</sup> Unlike the concept of legal tradition, the concept of legal system is not primarily concerned with the transmission of legal information across generations.<sup>221</sup> To be sure, all of these elements are reflected in the concept of legal system.

Lawrence M. Friedman defines a legal system as including three elements, namely: structure, substance, and culture.<sup>222</sup> The structure of the legal system refers to “the skeleton or framework, the durable part, the part that gives a kind of shape and definition to the whole.”<sup>223</sup> This legal structure is consisted of the organizations, sizes, jurisdictions of the basic branches of state: the judiciary, the legislature, and the executive.<sup>224</sup> The second element of the legal system is its substance

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220. For legal families, see SIEMS, *supra* note 12, at 75.

221. GLENN, *supra* note 10, at 13.

222. LAWRENCE M. FRIEDMAN, AMERICAN LAW: AN INTRODUCTION 19-22 (1998).

223. *Id.* at 19.

224. *Id.* 19-20.

defined as “the actual rules, norms, and behavior patterns of people inside the system.”<sup>225</sup> The third element is legal culture, or “the people’s attitude toward law and the legal system- their beliefs, values, ideas, which concerns the legal system.”<sup>226</sup> Friedman underlines that: “the legal culture, in other words, is the climate of social thought and social force that determine how law is used, avoided, or abused.”<sup>227</sup>

Friedman provides a useful framework to conceptualize a legal system. However, in addition to the three elements, there may be a fourth element namely the *jurisprudential* foundation of a legal system. Drawing on the work of post-modern legal comparativists,<sup>228</sup> this refers to the fundamental principles, concepts, ideas, that underline the whole legal system. The *jurisprudential* foundation shapes the creation and operation of legal institutions, the substantive contents of the law, and the way people use or avoid the law. Jurisprudential element is different from the cultural element in Friedman’s construction as the latter only refers to the way of legal practice.

All in all, a legal system can be conceptualized as including four elements: jurisprudence, structure, substance, and culture. With this in mind, we will consider the Confucian legal system and the socialist legal system in the next sections.

### *B. The Confucian Legal System*

The Confucian legal system can be considered a distinctive legal system as it has distinctive jurisprudence, structure, substance, and culture. The jurisprudential foundation of the Confucian legal system is the Confucian philosophy. The Confucian legal system is underlined by distinctive Confucian concepts, principles, and doctrines, such as, *ren* (humaneness), *li* (rituals), *yi* (righteousness), *zhong* (loyalty), *xiao* (filial piety), five relationships (ruler - ruled, father-son, husband-wife, elder brother -younger brother, friend-friend), *junzi* (gentlemen), *zhengming* (rectification of names), and *minben* (people-as-basis). The conceptual foundation of the Confucian legal system is drawn on classical Confucianism, but the evolution of this legal system in different periods of time in China was accompanied by the evolution of Confucianism. Consequently, the jurisprudential foundation of

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225. *Id.* at 20.

226. *Id.*

227. *Id.* at 21.

228. SIEMS, *supra* note 12, at 98-99.

Confucian legal system evolved over time, with the reconstruction of the classical Confucian ideas and concepts and the generation of new ideas and concepts of neo-Confucians. For example, the Confucian legal system in the Sung dynasty (1127–1279) in China was underpinned by Sung Neo-Confucians, particularly, Zhu Xi (1130-1200), who integrates “law closely with both morality and his metaphysical views on *li* (principle).<sup>229</sup>

The second element of the Confucian legal system is structure. The monarch, as an institution, is the most important element in the Confucian legal structure. A legitimate monarch is required to work for the happiness of the people, as stipulated by the concept of *minben* (people-as basis.) A physical king must also act in accordance with the expected virtues and functions of an ideal king, as suggested by the doctrine of *zheng-ming* (rectification of names).<sup>230</sup> In addition to the monarchial institution, there are several distinctive institutions designed to implement the Confucian philosophical concepts and principles regarding the virtues of the rulers and officers, including: the royal examination system, the imperial lectures, the censorate, and the historic offices.<sup>231</sup>

The third element of the Confucian legal system is its substance. The substance of the Confucian legal system includes the rules and norms. The sources of these rules and norms include Confucian classics, imperial codes, imperial regulations, case-law, and customary law.<sup>232</sup> The contents of the rules and norms cover different aspects, not merely crimes and punishments, although the Confucian legal rules and norms are normally backed by criminal sanctions. The substance of the Confucian legal system extended from criminal law to criminal and civil procedures, litigation, family law, land law, property law, administrative law, and even constitutional law (fundamental rules and norms regulating the imperial power). To be sure, the Confucian legal system does not have a clear distinction of these areas of law as modern legal systems.

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229. Norman P. Ho, *The Legal Philosophy of Zhu Xi (1130-1200) and Neo-Confucianism's Possible Contributions to Modern Chinese Legal Reform*, 3 TSINGHUA CHINA L. REV. 168 (2011) (not be confused between *li* (理) [“principle”] with *li* (礼) [“rituals”], *id.*, 186).

230. For more details, BUI, *supra* note 34, at 43-45.

231. *Id.*, at 83.

232. Albert Chen, *Confucian Legal Culture and Its Modern Fate*, in THE NEW LEGAL ORDER IN HONG KONG 519-20 (Raymond Wacks ed., 1999).

Finally, the Confucian legal system has distinctive legal culture. One example is the culture of non-litigation (*wusong*) stemming from the related doctrine of social harmony and the disregard of the pursuit of material interests in the name of moral self-cultivation.<sup>233</sup> This culture is significantly different from the litigious tendency in liberalist and individualist legal culture.<sup>234</sup> Another culture is called “legalization of morality,”<sup>235</sup> or the protection and enforcement of moral values by law, as opposed to the liberalist trend to separation of law from morality, underpinned by the concept of neutral government.<sup>236</sup> In other words, in the Confucian legal culture, there is no a clear distinction between law and morality. Last but not least, the Confucian legal system has generated what can be called “Confucian constitutional ethics” which emphasizes the necessity of political leaders’ acquiring moral virtues and their propriety in practicing political power. This is different from liberal constitutionalism which focuses mainly on the political leaders’ observation of constitutional rules.<sup>237</sup>

Nowadays, in China and Vietnam, Confucianism has been no long the official ideology, and the Confucian legal system has been no longer implemented. The jurisprudential, structural, and substantial, and cultural elements of the current legal systems in the two countries are significantly informed by socialist and global elements. Yet, as mentioned above, some Confucian values and ideas, such as filial piety, are still reflected in the modern law in China and Vietnam. There is another area of the legal system in which the Confucian influence is prominent, namely legal culture. The triumph of communism, the borrowing of socialist law, and the diffusion of global law have virtually removed the Confucian, structural, and substantial elements from the legal system. However, the Confucian legal culture ingrains in the mindset of the people for thousand years and operates at the sub-conscious level, and therefore, is difficult to be eradicated within a few

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233. Chen, *supra* note 166, at 260-61.

234. FRIEDMAN, *supra* note 222, at 20.

235. Caleb Wan, *Confucianism and Higher Law Thinking in Ancient China*, 10 REGENT J. INT’L L. 77, 97 (2013).

236. For a comparison of Chinese and western legal culture, see Zhiping Liang, *Explicating “Law”: A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 50 (1989).

237. For criticism of this liberal tendency and the call for constitutional ethics, see Keith E. Whittington, *On the Need for A Theory of Constitutional Ethics*, 9 THE GOOD SOCIETY 60 (2000). See also, JAMES M. BUCHANAN, JAMES M. BUCHANAN, *THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL LIBERTY* 371 (1999) (proposing the concept of “ethics of constitutional citizenship”).

decades. Consequently, the Confucian legal culture remains its influences. The tendency to avoid going to the court, to legalize moral values (as the cases of filial piety law), and to aspect political leaders to have moral values is still evident in China and Vietnam. Even global legal scripts are also viewed, understood, and re-interpreted by the local people with the infusion of Confucian meanings.<sup>238</sup> The Confucian influence on legal culture in China and Vietnam may be un-conscious: the people may not aware of the Confucian roots in their legal behavior and attitudes. Finally, the contemporary influence of the Confucian legal culture is fragmentary rather comprehensive as it was during the imperial time.

### C. The Socialist Legal System

During the soviet era, comparative law scholars added the third legal system, namely socialist law, to the two familiar legal systems (common law and civil law).<sup>239</sup> After the collapse of the Soviet Union, socialist law has virtually disappeared in comparative law literature.<sup>240</sup> John Quigley in his influential article published during the Soviet era concluded that socialist law “contains features,” but “those points of difference have not removed socialist law from the civil law tradition,” because of “the historical connection of socialist law to civil law and the continuing relevance in socialist law of civil law rules, methods, institutions, and procedures.”<sup>241</sup> Wring after the soviet era, Inga Markovits argued that socialist law was not dead simply because it did not exist: the alleged features of socialist law are not confined to the law of the former socialist countries.<sup>242</sup> Recently, William Partlett and Eric C Ip revitalized the debate, arguing that socialist law has distinctive features, and that socialist law has not been dead as it has still influenced the current Chinese public law.<sup>243</sup> I argue that socialist law is a distinctive legal system which is still implemented in China and Vietnam.

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238. Gillespie, *supra* note 152, at 953 (discussing how several Confucian norms (such as filial piety, loyalty, and gentlemen) influence the way the Vietnamese people understand competition law.).

239. RENE DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (1968).

240. Partlett & Ip, *supra* note 102, at 473.

241. Quigley, *supra* note 19, at 808.

242. Inga Markovits, *The Death of Socialist Law?* 3 ANNUAL REV. LAW. SOC. SCI. 233 (2007).

243. Partlett & Ip, *supra* note 102, at 465.



To begin with, socialist law is underpinned by distinctive *jurisprudential* foundation. A legal system is characterized not only by rules, methods, institutions, and procedures, but more essentially by jurisprudential foundation or fundamental ideas and principles that underpin the legal system. In this regard, socialist law is undergirded by distinctive fundamental legal ideas and principles, which differentiates it from other legal systems, and hence makes it a distinctive legal system. The ideational foundation of socialist law is rooted in Marxism-Leninism, defined by these distinctive legal concepts: “socialist legality”; “vanguardism”; “democratic centralism”; “public ownership of means of productions”, and statist rights. These concepts are hegemonic in the socialist legal system, dominating the law-making and legal discourse and practices of politicians, legislators, lawyers, officers, and ordinary citizens. Other legal systems do not have such concepts or vocabularies. These concepts are embodied in the socialist legal system and guild the direction of legal evolution and of the society as a whole towards what the communists believe as the paradise of socialism and then communism. Therefore, the Law on Legislation in China requires that: “Lawmaking shall adhere to the basic principles of the Constitution, and shall be centered around economic development, and shall adhere to the socialist road, adhere to the democratic dictatorship by the people, adhere to the leadership by the Chinese Communist Party, and adhere to the theory of Marxism, Leninism and Mao Zedong thoughts and Dengxiaoping theory, and adhere to the reform and opening to the outside world.”<sup>244</sup>

Socialist law may contain some rules and procedures similar to those of civil law, but they are fundamentally sustained by different legal principles, which make the operation, manifestation, and nuance of the similar rules and procedures different. For example, the concept of public ownership may be adopted in other legal systems, but in the socialist legal system, this concept dominates the whole economy and the whole property regime with the regime’s aspiration to achieve the socialist paradise in which every property belong to the public. Moreover, the domination of the communist party also means that its ideology (Marxism-Leninism) dominates the whole intellectual life of

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244. LEGISLATION LAW OF THE PEOPLE’S REPUBLIC OF CHINA (2000), art. 3.

the society despite the emergence of pluralist ideas due to social complexity and globalization.

Partlett and Ip correctly point out that socialist law is evident in Chinese public law. This is evident in Vietnam as well. However, the influence of socialist law in China and Vietnam is not confined to public law. Even private law is also influenced by the socialist legal concepts and principles. Law for the market, such as corporate law, competition law, investment law, and property law, cannot escape the “socialist orientation” of the market economy. The so-called “economic law” in China which has its root in Soviet law is an instrument for the state to direct the economy towards the state’s socialist goal. The Chinese government defines the function of economic law as follows: “Economic laws are a collection of laws and regulations which adjust social and economic relations arising from the state’s intervening in, managing and regulating economic activities for the society’s overall interests. They provide legal devices and an institutional framework for the state to conduct appropriate intervention in, and macro control of the market economy, thereby preventing malpractices resulting from spontaneous and blind operation of the market economy.”<sup>245</sup> Vietnam also has the “economic law,” which has the same instrumental function, although it has gradually changed to be more like business law.<sup>246</sup> In fact, the whole legal system in China and Vietnam are underlined by the fundamental socialist legal concepts and principles. Some aspects of the legal system in China and Vietnam may contain some non-socialist elements, but fundamental socialist legal concepts and principles, such as “socialist legality”, the leadership of the communist party; “democratic centralism”, remains dominant in the legal system. Finally, socialist law and socialist legal theory have still provided distinctive legal vocabularies and concepts for legal discourse in China and Vietnam.<sup>247</sup>

Let us now turn to consider the second element in the socialist legal system: the *structure*. The most important element in the socialist legal structure is the communist party, which differentiates the socialist

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245. STATE COUNCIL WHITE PAPER, *supra* note 123.

246. *See e.g.*, PHAM, *supra* note 53, at 50.

247. SEPPÄNEN, *supra* note 163. For early discussion, *see* Albert Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 PACIFIC BASIN L. J. 125, 164 (1999) (“The dogmas of the Marxist orthodoxy as codified by the Soviet and Maoist states are still alive and well in China.”) For the case of Vietnam, *see* Thiem H. Bui, *Deconstructing the “Socialist” Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam’s Constitutional Reform Process*, 36 CONTEMP. SE. ASIA 77 (2014).

legal system from other modern legal systems. To be sure, absolute power or single-party system is not distinctive to socialist law. But, in the socialist legal system, the communist party is not a private organization separate from the state created to compete for power through free and equal elections: it is essential component of the legal structure and dominates all aspects of the state and the society with party departments created from the central to the communal levels.<sup>248</sup> Socialist law in China and Vietnam cannot be conceptualized without the consideration of the essential role of the communist party in the legal system.

The state institutions in China and Vietnam also have distinctive features. To be sure, like many other countries, these countries also have three fundamental state powers, legislature, executive, and judiciary, practiced by different state branches. However, the arrangement of these institutions is different due to the fact that they are underlined by different constitutional jurisprudences. This arrangement is characterized by the supreme position of the legislature and the subordinate positions of other institutions. This formal arrangement is underpinned by the principle of “democratic centralism.” Within that arrangement, the legislature is not merely an ordinary legislature as in western civil or common law countries. It is both the constitution-making and law-making bodies. It has both constituent power and constituted powers. In terms of constituted powers, it has not only the legislative power, but also other powers that may be practiced by other institutions in civil law and common law countries, such as the power to review the constitutionality of the law (including its law and regulations issued by other state institutions). Other state institutions are constitutionally required to report to the legislature and have no institutional means to challenge it, such as veto, dissolution, or judicial review. This arrangement must be distinguished with the commonwealth model of parliamentary supremacy underpinned by a different concept of sovereignty in which the

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248. Backer Larry Catá, *Party, People, Government, And State: On Constitutional Values And The Legitimacy of The Chinese State-Party Rule of Law System*, 30 B.U. INT'L L.J. 331, 342 (2012) (“the party as the polity”). For the case of Vietnam, see Tuong Vu, *The Revolutionary Path to State Formation in Vietnam: Opportunities, Conundrums, and Legacies*, 11 J. VIET. STUD. 267 (2016) (arguing that “the [communist] party’s radical ideology and practices shaped the path of state formation by creating particular opportunities and conundrums in five key aspects of state formation: legitimization, establishing sovereignty, territorialization, creating a centralized bureaucracy, and monopolizing violence.”).

executive can dissolve the parliament and the courts can have the weak judicial review power.<sup>249</sup>

In addition, the courts system in the socialist legal structure in China and Vietnam has the distinctive feature: centralization. In socialist law, “following the Leninist principles of vanguardism and democratic centralism, courts were seen as extensions of Party control. Thus, all courts were institutionally subordinated to a powerful Supreme Court with vast power to control the work of lower courts and ‘articulate judicial policy.’”<sup>250</sup> Partlett and Ip indicate that this feature “has not faded away” in China.<sup>251</sup> More specifically, “like Soviet courts, Chinese courts were centralized supervisory institutions entrusted with the responsibility to promote the Party’s ideology and agenda.”<sup>252</sup> Courts in Vietnam have similar feature. The Law on Organization of People’s Courts of 2014 is enacted, among other things, “to institutionalize the Party’s guidelines and viewpoints on judicial reform.”<sup>253</sup> The Law establishes one of the chief functions of the courts as to protect “the socialist regime.”<sup>254</sup> The Law also creates a centralized judicial system. Accordingly, the supreme people’s court is vested with the powers: (1) to supervise the adjudicating work of other courts, except cases prescribed by a law; (2) To make overall assessment of adjudicating practices of courts, ensuring the uniform application of law in trial; (3) to train and retrain judges, assessors and other staffs of people’s courts; (4) to manage people’s courts and military courts organizationally in accordance with this Law and relevant laws, ensuring independence of courts from one another; and (5) to submit to the National Assembly draft laws and resolutions; to submit to the National Assembly Standing Committee draft ordinances and resolutions in accordance with law.<sup>255</sup>

The structure of the socialist legal system in China and Vietnam is also characterized by the Leninist-style institution called procuracy.

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249. *See generally*, STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2012).

250. Partlett & Ip, *supra* note 102, at 502.

251. *Id.* at 503.

252. *Id.* For more details on the relationship between the communist party and courts in China, *see* Ling Li, *The Chinese Communist Party and The People’s Courts: Judicial Independence in China*, 64 *AM. J. COMP. L.* 37 (2016).

253. VNL\_KH1, *Salient Points of The New Law on Courts*, *VIETNAM LAW AND LEGAL FORUM MAGAZINE* (Feb. 6, 2015), <http://vietnamlawmagazine.vn/salient-points-of-the-new-law-on-courts-4009.html> [<https://perma.cc/B59M-CF4C>] (archived Oct. 29, 2017).

254. *LAW ON ORGANIZATION OF PEOPLE’S COURTS* (2014) (Viet.), art. 2.

255. *Id.*, art. 20.

Lenin designed this institution to implement the principle of “socialist legality”: strict and unanimous application of the law of the central government by the lower level state institutions and citizens.<sup>256</sup> In the legal structure in China and Vietnam, the procuracy remains the fourth branch of the state, not a component of the executive or the judiciary, organized from the central to the local levels.<sup>257</sup> However, their functions are narrower than in the original version: they practice public prosecution, and only supervise judicial procedures and activities.<sup>258</sup> While the former function is similar to the prosecutions in other legal systems, the later function is distinctive to the socialist legal system, reflecting the Leninist legacy.

We are now in a position to consider the *substance* of socialist law. To be sure, the sources of legal rules and norms in China and Vietnam include codes and legislations like in many civil law countries. The two countries have also begun to develop case-law like common law countries. But, one of most important features of the legal rules in the socialist legal systems in China and Vietnam is their sources contained in a huge amount of administrative regulations issued by different institutions and with different titles. In China, in addition to the constitution, the sources of Chinese law, as stipulated in the Legislation Law, include: “the law (*Falu*) enacted by the NPC; administrative regulations (*Tiaoli*, *Guiding* or *Banfa*) enacted by the State Council (central government); administrative rules (*Guizhang*) enacted by the State Council organs; local regulation enacted by the local People’s Congress (*Di Fang Tiaoli*); and local rules (*Guizhang*) enacted by local governments.”<sup>259</sup>

In a similar vein, the Law on Enactment of Normative Legal Documents lists the following sources of Vietnamese law:

1. The Constitution.

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256. See generally, Stephen Holmes, *The Procuracy and Its Problems: Introduction*, 8 E. EUR. CONST. REV. 76 (1999).

257. For the case of China, see Partlett & Ip, *supra* note 102, at 498-501. For the case of Vietnam, see Pham Lan Phuong, *The Procuracy as a Subject of Constitutional Debate: Controversial and Unresolved Issues*, 11 ASIAN J. COMP. L. 309 (2016).

258. For more details, see Organic Law of the People’s Procuratorates of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cont., Sept. 2, 1983), art. 4; Law on Organization of the People’s Procuracies, art. 2 (Nov. 24, 2014) (Viet.).

259. Qianlan Wu, *How has China Formed Its Conception of The Rule of Law? A Contextual Analysis of Legal Instrumentalism in ROC And PRC Law-Making*, INT’L J. L. IN CONTEXT 5 (2017).

2. Codes and Laws (hereinafter referred to as Laws), Resolutions of the National Assembly
3. Ordinances, Resolutions of Standing Committee of the National Assembly; Joint Resolutions between Standing Committee of the National Assembly and Management Board of Central Committee of Vietnamese Fatherland Front
4. Orders, Decisions of the President.
5. Decrees of the Government; Joint Resolutions between the Government and Management Board of Central Committee of Vietnamese Fatherland Front
6. Decision of the Prime Minister.
7. Resolutions of Judge Council of the People's Supreme Court.
8. Circulars of executive judge of the People's Supreme Court; Circulars of the Chief Procurator of the Supreme People's Procuracy; Circulars of Ministers, Heads of ministerial agencies; Joint Circulars between executive judge of the People's Supreme Court and the Chief Procurator of the Supreme People's Procuracy; Joint Circulars between Ministers, Heads of ministerial agencies and executive judge of the People's Supreme Court, the Chief Procurator of the
9. Supreme People's Procuracy; Decisions of State Auditor General.
10. Resolutions of the People's Councils of central affiliated cities and provinces (hereinafter referred to as provinces).
11. Decisions of the People's Committees of provinces.
12. Legislative documents of local governments in administrative economic units.
13. Resolutions of the People's Councils of districts, towns and cities within provinces (hereinafter referred to as districts).
14. Decisions of the People's Committees of districts.
15. Resolutions of the People's Councils of communes, wards and towns within districts (hereinafter referred to as communes)
16. Decisions of the People's Committees of communes.<sup>260</sup>

This feature of legal source is due both to the practical need to govern the emerging market and changing society and to the

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260. Law on Enactment of Normative Legal Documents, No. 80/2015/QH13 art. 4 (Nov. 25, 2015) (Viet.).

jurisprudential reason concerning Marxist legal positivism. These legal instruments play an important role in the socialist legal system in Vietnam: these regulations are essential to the implementation of the constitutions, codes, and legislations. The latter do not have the direct effect to the society like the former. So, different from civil and common law systems, in the socialist legal system, the constitution and legislations are enforced mainly not by court's judicial decisions but by administrative regulations.

Another feature of socialist legal rules and norms is that they can be found even in the documents of the communist party. As the communist party is the essential component of the legal structure, its documents are not purely political but also include norms or even rules that have the weight of legal effects. The communist party in China and Vietnam, through national congresses, the central committee, and the Politburo, often issue documents which decide on consequential national issues, and provide the guidance for socioeconomic, legal and political developments. The party conclusions and guidance are not optional but authoritative to the state actions. The state bodies cannot in general reverse what has been decided by the party. For example, the opening policy for economic reform in both China and Vietnam was decided by the communist party and then was translated into constitutions and law.<sup>261</sup> With this definitive effect, the party's documents can be considered having legal weight in certain circumstances. In this regard, the Communist Party of China's Central Committee's *Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law* is the authoritative legal source. The Communist Party of Vietnam's Politburo's *Conclusion No.01-KI/Tw on The Continued Implementation of The Strategy for Legal Reform from 2016 to 2020* has similar legal significance.

The contents of legal rules in socialist law include issues similar to the law of common law and civil law countries. But, socialist law does not adopt the distinction between "public law" and "private law" as in other legal systems. Instead, legal rules and norms in socialist law are grouped under the rubric called "branch of law." In the Soviet legal jurisprudence, "a 'branch of law' is understood as the aggregate of legal

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261. For China, see, Chen, *supra* note 146, at 60. For Vietnam, see Tran Thanh Huong & Duong Anh Son, *Economic Development and Constitutional Reform in Vietnam*" in 3 CONSTITUTIONALISM IN SE. ASIA 311(Clauspeter Hill & Jörg Menzel eds., 2008).

norms regulating relations in a particular sphere (branch) of social life”.<sup>262</sup> The concept of “branch of law” has still informed the socialist legal system in China and Vietnam. For example, in China’s Whitepaper on its legal system refers to “branches of the socialist system of laws with Chinese characteristics”.<sup>263</sup> Accordingly, “the socialist system of laws with Chinese characteristics is an organic integration of the related laws of the Constitution, civil and commercial laws, administrative laws, economic laws, social laws, criminal laws, litigation and non-litigation procedural laws, and other legal branches, with the Constitution in the supreme place, the laws as the main body, and administrative and local regulations as the major components.”<sup>264</sup> Similarly, the concept of “branch of law” remains dominant in Vietnam. In law-making, a legislation is normally started by identifying the particular sphere of social life that the legislation will regulate.<sup>265</sup> The division of the “branch of law” also affects legal education. Vietnamese textbooks on “general theory on law and state” clearly define the concept of “branch of law,” its components (including “scope of regulation” and “method of regulation”), and introduce fundamental branches of law in the Vietnamese legal system, including: state law or constitutional law, administrative law, financial law, land law, civil law, labor law, marriage and family law, criminal law, criminal procedure law, civil procedure law, economic law, and international law).<sup>266</sup> Even the structure of law schools in Vietnam is also organized according to the concept of “branch of law” following the soviet-style. Therefore, the law schools are divided into certain “departments” consistent with the branches of law.<sup>267</sup>

Finally, let us consider *legal culture*. Unlike rules and structures, legal culture need time to establish. There may not be a well-

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262. Harold J. Berman, *Legal System*, in *ENCYCLOPEDIA OF SOVIET LAW* 477 (F.J.M. Feldbrugge et al. eds. 1985).

263. STATE COUNCIL WHITE PAPER, *supra* note 123.

264. *Id.*

265. *See, e.g.*, Criminal Code, No. 100/2015/QH13 art. 1 (Nov. 27, 2015) (“This Code regulates crimes and punishments.”) (Viet.).

266. *See, e.g.*, *GIÁO TRÌNH LÝ LUẬN NHÀ NƯỚC VÀ PHÁP LUẬT [TEXTBOOK ON GENERAL THEORY ON LAW AND STATE]* (Lê Minh Tâm ed. 2009).

267. For example, the School of Law at Vietnam National University-Hanoi is comprised of these six departments: Department of Theory and History of State and Law; Department of Constitution and Administration; Department of Criminal Law; Department of Civil Law; Department of Business Law; and Department of International Law. *See School of Law, VIETNAM NATIONAL UNIVERSITY, HANOI*, <http://www.vnu.edu.vn/eng/?C2247/N12718/page1> [<https://perma.cc/Z7C4-9D6P>] (last visited Oct. 10, 2017).



established socialist legal culture in China and Vietnam. However, some features of legal culture of socialist law have germinated in China and Vietnam. At least, two emerging cultures can be observed, which can be called: the *regulatory* culture and the *bureaucratic* culture. First, the regulatory culture indicates a strong tendency among the state agencies to regulate the society as a top-down, interventional process. To be sure, regulation is not distinctive to the socialist legal system.<sup>268</sup> However, socialist law, as evident in China and Vietnam, has a heavy concern on the state's regulatory intervention on nearly all corners of the society, ranging from the way to organize the public power to the way to wear clothes.<sup>269</sup> Among other purposes (eg., economic development), this socialist regulation is meant to direct people's behaviors towards the culture and goals that the state favor. The second culture is bureaucratic. In this regard, legal and administrative process in socialist law heavily requires multi-steps of procedures. This is not merely a technical issue. The heavy concern of multi-staged procedures is to make sure that the party and the state can meticulously control the society and people's behavior to achieve their goals.

#### *IV. CONCLUSION: TOWARD A BETTER PLACE IN COMPARATIVE LAW*

I conclude with further reflections on possible contributions of the study of law in China and Vietnam to traditional comparative law, post-modern comparative law, and global comparative law.<sup>270</sup>

To begin with, the study of the law of China and Vietnam can enrich traditional comparative law. As Siems writes, "the disregard of non-western countries by traditional comparative law is more difficult to excuse."<sup>271</sup> The study of law in China and Vietnam can avoid such excuse. Moreover, the diversity of law in the legal history of China and Vietnam cast doubt on the functionalist approach in traditional comparative law which tends to overemphasize the common legal

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268. *See generally*, BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION (2007).

269. *See e.g.* Decree on Penalties for Administrative Violations Pertaining to Culture, Sports, Tourism and Advertising, No. 158/2013/NĐ-CP, art. 13 (Nov. 12, 2013) (imposing administrative punishment on models who wear clothes inconsistent with Vietnamese culture in their performance) (Viet.).

270. I adopt these three dimensions of comparative law from SIEMS, *supra* note 12, at 9.

271. *Id.* at 36.

features.<sup>272</sup> In addition, the study of law in China and Vietnam can rectify some mistakes in classification of legal systems in traditional comparative law. It is simplistic to group law in China under a single rubric, like “Chinese Law”<sup>273</sup> or “Chinese legal tradition.”<sup>274</sup> There are different legal systems in China and Vietnam, and these legal systems play the dominant role in different period of time. The traditional taxonomy of legal systems can be enriched by the addition of two distinctive legal systems, namely the Confucian legal system and the socialist legal system. Moreover, the study of these legal systems is important for understanding legal history and contemporary law not only in China and Vietnam but also in other countries and jurisdictions whose traditional law and modern law are influenced by these legal systems. To illustrate, Confucian law also influenced legal history and even modern law in Japan and Korea.<sup>275</sup> Vestiges of Confucian legal culture can also be found in Singapore<sup>276</sup> and Hong Kong.<sup>277</sup> Socialist law is also adopted and has recently experienced different levels of change in three other contemporary socialist countries, namely Laos,<sup>278</sup> North Korea,<sup>279</sup> and Cuba.<sup>280</sup> Finally, the addition of the Confucian legal system and the socialist legal system can enrich comparative legal systems. Confucian law can be compared with other traditional legal systems (e.g., Islamic law, Hindu law, and Buddhist law),<sup>281</sup> while

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272. For functionalism, see KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 34 (1998).

273. *Id.* at 286.

274. JOHN W. HEAD, GREAT LEGAL TRADITIONS: CIVIL LAW, COMMON LAW, AND CHINESE LAW IN HISTORICAL AND OPERATIONAL PERSPECTIVE 458 (2011).

275. CONFUCIANISM, LAW, AND DEMOCRACY IN CONTEMPORARY KOREA (Sungmoon Kim ed. 2015); Chaihark Halm, *Law, Culture and the Politics of Confucianism*, 16 COLUM. J. ASIAN L. 253 (2003); Woo-jung Joon, *The Influence of Confucianism on the Criminal Laws of Korea and Japan*, 9 KOR. U. L. REV. 21 (2013).

276. M Chen-Wishart, *Legal Transplant of Undue Influence: Lost in Translation or a Working Misunderstanding?* 62 INT’L COMP. L. Q. 1 (2013).

277. Charles K. N. Lam and S. H. Goo, *The Intrinsic Value of Confucianism and Its Relevance to the Legal System in Hong Kong and China*, 3 CHINESE J. COMP. L. 175 (2015).

278. U.N. DEVELOPMENT PROGRAM, THE LAW-MAKING PROCESS IN LAOS PDR: A BASELINE STUDY (2015).

279. Eric Yong-Joong Lee, *Development of North Korea’s Legal Regime Governing Foreign Business Cooperation: A Revisit under the New Socialist Constitution of 1998*, 21 NW. J. INT’L L. & BUS. 199 (2000-2001).

280. Larry Catá Backer, *The Cuban Communist Party at The Center of Political and Economic Reform: Current Status and Future Reform*, 7 NW. INTERDISC. L. REV. 94 (2015).

281. For other traditional legal systems, see WERNER MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA (2006); WERNER MENSKI,

socialist law can be compared with other modern legal systems (e.g., civil law and common law).

The study of law in China and Vietnam can also contribute to post-modern comparative law, which focuses on the way similar legal words and concepts having different meaning in different legal systems.<sup>282</sup> Throughout its history, law in China and Vietnam is apparently not autonomous. Their law is not merely controlled by professional lawyers but is understood and practiced in its complex relationship with contextual factors. Therefore, China and Vietnam provide rich data for post-modernist comparative studies of: law and ideology, law and politics, law and culture, law and society, and legal pluralism.

Finally, global comparative law can greatly benefit from exploring law in China and Vietnam. These countries provide rich data for the study of legal transplants and global legal diffusion. Confucian law was transplanted cross East Asian traditional societies, and this deserves a comparative study. The transplants of civil law and socialist law in China and Vietnam further provide a laboratory for comparative examination of legal transplants. Moreover, the fact that China and Vietnam are now global actors and vehemently borrowed global law provide significant data for study of legal global diffusion. Last but not least, the global revival of the “law and development” movement<sup>283</sup> is resonated in the two countries.<sup>284</sup> While some are optimistic about the role of law in fostering economic development, others are frustrated about reality.<sup>285</sup> Economic development in China and Vietnam in the last three decades has occurred in tandem with legal reform. Whether there is connection between the legal reform and the economic reform deserves further comparative legal studies.

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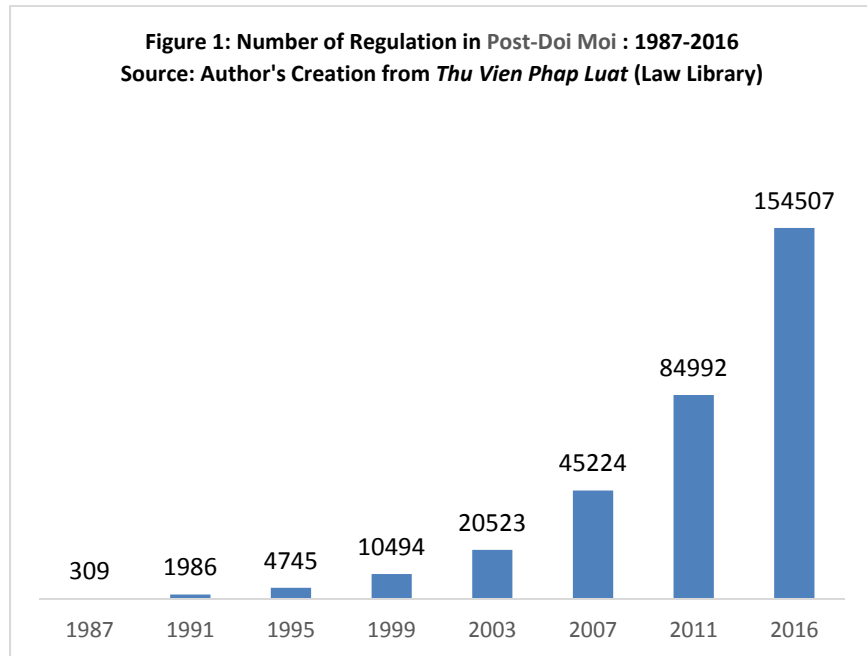
282. SIEMS, *supra* note 12, at 5.

283. For the evolution of law and development movement, see Michael Trebilcock, *Law and Development: Forty Years after ‘Scholars in Self-Estrangement’* 66 UNIV. OF TORONTO L. J. 301 (2016); Michael Trebilcock, *Between Universalism and Relativism: Reflections on the Evolution of Law and Development Studies*, 66 UNIV. OF TORONTO L. J. 330 (2016).

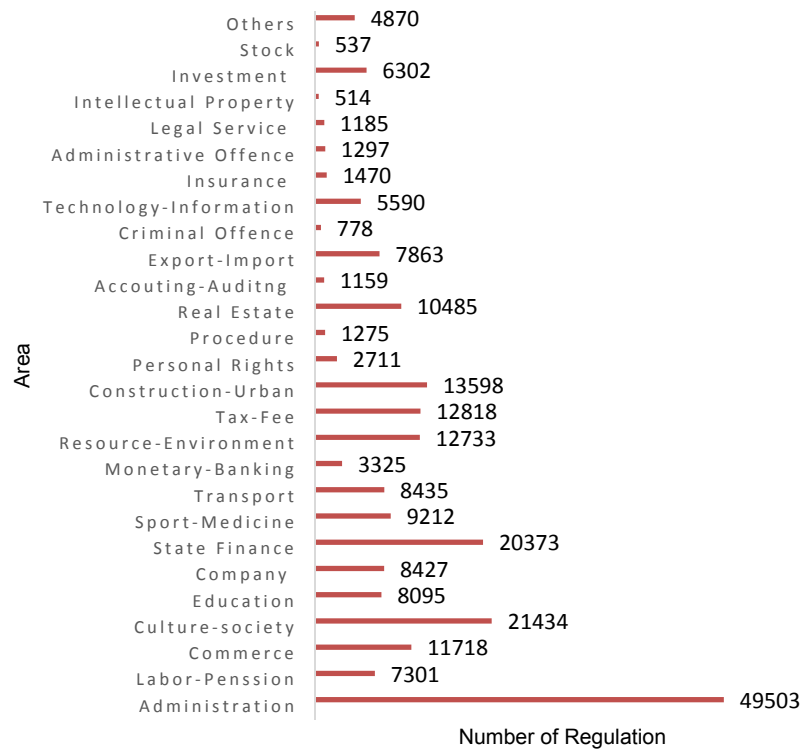
284. GUANGHUA YU, *RETHINKING LAW AND DEVELOPMENT: THE CHINESE EXPERIENCE* (2013); *LAW AND DEVELOPMENT AND THE GLOBAL DISCOURSE OF LEGAL TRANSFERS* (John Gillespie & Pip Nicholson eds., 2012).

285. Benjamin van Rooji & Pip Nicholson, *Inflationary Trends in Law and Development*, 24 DUKE J. COMP & INT’L L. 297-348 (2013).

APPENDIX



**Figure 2: Number of Regulation by Area: 1987-2016**  
**Source: Author's Creation from *thu vien phap luat* (law library)**



**Figure 3: Type of Regulation: 1987-2016**Source: Author's Creation from *Thu Vien Phap Luat* (Law Library)