In April 2002 the Vietnam Communist Party (VCP) finalised a policy paper, *Resolution of the Political Bureau on Forthcoming Principal Judiciary Tasks* (‘*Resolution 8’*).1 Subsequently the Vietnamese Party-State issued several laws to reform the courts in a response designed specifically to address the reforms identified as necessary in *Resolution 8*.2 The question emerging from this policy paper and the subsequent reforms are whether, or to what extent, this latest round of court reforms reflects contemporary Vietnamese theorising on the role and function of law and courts.

At the heart of this question hovers a larger question. In its transition from a planned economy to a socialist-oriented market economy, the Vietnamese Party-State appears relatively certain about the nature of mixed market economy it envisions and seeks. While not abandoning the role of the State, the Vietnamese Party-State seeks to enable a mixed market-public sector economy. This requires a radical reduction in the role of the State in terms of market planning, production and employment and the take-up of production and employment by the private sector.3

It is not clear that the same vision exists with regard to the shape and form of the Vietnamese legal system: apparently radically changing to accommodate the changing economic conditions. That is, while the economic base changes, it is suggested that the Party-State has not yet articulated an equivalently detailed vision for the form or shape of the transitional legal system. This paper aims to explore whether a role for the courts has been articulated and whether the reforms reflect this.

To answer this question this paper first looks at *Resolution 8* to identify how it characterises the reforms to Vietnamese courts. Part two of the paper considers whether *Resolution 8* offers a conception of or theorised place for courts in Vietnam. In part three, the paper introduces contemporary Vietnamese debates about the role and place of law. Part four considers whether the court reforms reflect or diverge from jurisprudential debates concerning the role of law.

This paper does not wish to take up the question of whether transitional legal systems will inevitably emerge as systems committed to the Anglo-European American liberal legal order. The story of Vietnamese legal reform in the

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1 The author gratefully acknowledges the assistance with translation by Nguyen Thi Ngoc Quynh, Masters Student in Applied Linguistics at the University of Melbourne.
context of global harmonization debates is another tale. Instead, the paper focuses on the question, what, if any, role and place has been ascribed to the courts in the transitional Vietnamese State. In particular, is it that the courts will be theorised as continuing as instruments of the Party-state or will they be increasingly positioned as independent of Party and/or State mechanisms?

Finally, in discussing legal reform and legal theory it is important to note that they are not causally connected. That is, legal theory does not necessarily inform legal reform or vice versa. Instead, it is perhaps better to understand the exchange between legal theory and legal reform as a dialogue. Further, legal reform may anticipate change and document past changes. By analogy, Vietnamese constitutional reform is thought often to reflect underlying changes already given effect and to foreshadow changes not yet implemented.  

1. Resolution No 8

Resolution 8 reflects upon and prescribes changes for ‘cong tac tu phap’ usually translated as ‘judicial work’. At the outset, it is very important to clarify that in the Vietnamese context a reference to ‘judicial work’ is a reference not only to the work of judges and court staff, but a term that includes the work of all organs whose work feeds into the courts. Therefore, for example, the work of the procuracy (kiem sat), the police (cong an) and investigators (canh sat) all fall within the Vietnamese term ‘judicial work’. It could perhaps be better translated as ‘justice work’, but that is not the term ordinarily used. To avoid confusion, where the term ‘cong tac tu phap’ is used it will be translated as ‘court-related work’. This distinction is adopted to identify when a reform targets the courts and when it is pitched more generally to court-related bodies.

Resolution NO 8 – NQ/TW of the Central Executive Committee of the Vietnam Communist Party released on 2 January 2002 commences with a sustained critique of court-related work. It argues that historically the court-related institutions have failed the community by making ‘unfair judgments’ particularly of innocent people, failing to convict criminals and generally reducing the trust of the people in courts and of the Party. Further, it is implicit that the courts have also at least partly failed the Party, where they fail to implement the Party line. Following this frank general condemnation of the courts and court-related institutions the Resolution proceeds to make five particular criticisms of the Vietnamese legal system. Put briefly they are:

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5 This paper is not following the reforms affecting other court-related agencies such as the police or the procuracy.
6 The settlement of CPV policy would have involved circulation of drafts of the policy to relevant organs including the heads of Party cells in law-related institutions. Once the document was settled, it would have been circulated to all relevant agencies and the membership of Party cells within these. This policy can also be purchased from the Party publisher and book stalls.
7 Resolution 8, p. 1
1. There are insufficient judges. Further, the judiciary is morally weak, lacks courage and technically poorly trained.
2. There remains a lack of uniformity in the organisation and perceptions of the function and responsibilities within court-related agencies and institutions (although this has somewhat improved recently).
3. The working conditions (including salaries) within court-related agencies and institutions are very poor. In particular, District Court judges have poor working conditions.8
4. The laws relating to the court-related agencies and institutions are fragmented, inconsistent and incomplete and need to be reworked. Further, dissemination and education concerning relevant laws needs to be improved.
5. The Government and the VCP remain insufficiently involved with the theoretical research and practical performance of the court-related agencies and institutions.9

Following this robust self-criticism by the Party-State of its court-related agencies and institutions including the court system, the policy paper establishes a ‘Directions’ or (quan diem chi dao) section, providing a framework or paradigm within which more detailed reforms are to be made.10

The first comment made in Part A of the ‘Directions’ section of Resolution 8 explains that it is the role of the courts (and other agencies) to follow and implement Party policy.11 In particular, the court-related agencies must give effect to political tasks in the relevant period (cac nhiem vu chinh tri trong tung giai) and ensure the power of the State is united (bao dam quyen luc nha nuoc la thong nhat doan).12 In addition, to being charged to give effect to the Party line, all court-related institutions are required to implement legislative, executive and judicial instructions. This section concludes by reminding the reader that Vietnam is a socialist law-based State of the people, from the people and for the people (nha nuoc phap quyen xa hoi chu nghia cua nhan dan, do nhan dan va vi nhan dan).13 Subsequently, this section specifically calls for society to participate in court-related work. Implicitly this appears as a restatement of a commitment to popular justice: a concept to which the CPV officially committed in the mid 1950s when it embraced Soviet-style reforms to the existing ‘bourgeois’ legal system.14

The balance of the ‘Directions’ section is less preoccupied with the broader role of the court-related institutions and focuses on aspects of courts that need to be developed. For example, courts are to settle cases in a timely fashion, especially where serious criminal matters or offences against the

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8 Ibid, p. 2. This point specifies that not only are the working conditions poor (for example, offices are too small) but the facilities are old.
9 Ibid, p. 1
10 Resolution 8, ‘Directions’ (Quan diem chi dao), p. 2
11 Ibid
12 Ibid
13 Ibid
State are involved, and there is a call for a modernised ‘transparent’ stable and ‘strong’ legal institutions.\textsuperscript{15}

Having set the framework for reform of court-related institutions, \textit{Resolution 8} proceeds to set out the Mission or operational plan for these bodies (\textit{nhiem vu trong tam}).\textsuperscript{16} This is the longest section of the policy comprising 8 parts, each of which proposes a specific reform. The proposed reforms reflect the critique of court-related agencies made at the outset of \textit{Resolution 8} and the general tenor of reforms set out in the ‘Directions’ section.

The 8 reforms to court-related work set out in \textit{Resolution 8}, Part B are:\textsuperscript{17}

1. enhance the quality of and increase the responsibilities of those charged with implementing court-related work;
2. give effect to Party policy on the reform (\textit{cu the hoa}), organization and renovation (\textit{doi moi}) of court-related work;
3. develop a transparent (\textit{trong sach}), strong and stable (\textit{vung manh}) court-related system;
4. invest in the facilities necessary to enable completion of assigned tasks;
5. enhance those participating in and the ability of political organisations to oversee court-related work;
6. increase the explanation of, instruction in, propaganda about, dissemination of, education in and research about law;
7. strengthen international cooperation concerning court-related work; and
8. strengthen the leadership of the Party over court-related work.

Having set out the general parameters of \textit{Resolution 8}, this paper now identifies the extent to which each of the reforms affects the Vietnamese court system.

\textbf{1.1 Enhancing quality and responsibility for court-related work}

Section B (1) (C) of \textit{Resolution 8} charges the courts to guarantee citizens equal treatment before the law (\textit{deu binh dang truoc phap luat}), real democracy (\textit{thuc su dan chu})\textsuperscript{18} and objective treatment (\textit{khac quan}).\textsuperscript{19} Further, it notes that judges and people’s assessors must be independent and need only obey the law.\textsuperscript{20} Following this statement of the role and function of the courts, court personnel are instructed to determine cases on their merits after testing the evidence and in a timely manner.\textsuperscript{21} To this end the courts are

\textsuperscript{15} Ibid, p. 3
\textsuperscript{16} \textit{Resolution 8}, ‘Some Important Missions for Court-Related Work in the Forthcoming Period’, pp. 3 – 9.
\textsuperscript{17} As set out earlier, this paper only looks at the affect of the policy on court work, and not at its implications for other legal institutions such as the police, the investigators or the procuracy.
\textsuperscript{18} Real democracy is the literal translation of \textit{thuc su dan chu}. In the Vietnamese context it connotes equal rights for individuals.
\textsuperscript{19} \textit{Resolution 8}, ‘Some Important Missions for Court-Related Work in the Forthcoming Period’, B (1) (C), p. 3.
\textsuperscript{20} Ibid, B (1) (C), p. 3.
\textsuperscript{21} Ibid. B (1) (C), p. 4
instructed to enable the full participation of lawyers before trial, during collection of the evidence and during hearings.\textsuperscript{22} Further, courts are instructed to cooperate with other agencies to enhance the enforcement of judgments.\textsuperscript{23}

Section B (1)(dz) of \textit{Resolution 8}, addressing the hearing and determination of cases, is a request to court-related agencies to ‘reconsider’ the death penalty. In particular, the institutions are asked to investigate the possibility of is restricted use.\textsuperscript{24}

\textbf{1.2 Party policy on the reform, organization and renovation of court-related work}

In section B (2) of the reforms, concerned to see the implementation of prior Party resolutions on court-related reform, \textit{Resolution 8} sets out a series of reforms targeting specific courts. In particular, the District Courts (Vietnam’s lowest courts) are to be strengthened, an investigation into whether it is appropriate to expand the jurisdiction of the Administrative Court is proposed and the possibility of establishing a family court is mooted.\textsuperscript{25}

Further, many reforms are directed at the Supreme People’s Court (SPC) - Vietnam’s highest court. In particular, the SPC is to manage the organization of local courts\textsuperscript{26} and to supervise the professional development and the provision of guidelines to lower courts.\textsuperscript{27} Further it is empowered to comment upon the duties of court staff.\textsuperscript{28} The President is to appoint judges at the SPC level.\textsuperscript{29} By implication, the SPC is to be given the power to appoint all judges of lower courts.\textsuperscript{30} This package of reforms suggests the repositioning of the courts to be less influenced by and managed by the Ministry of Justice and President. Before the reforms introduced to give effect to \textit{Resolution 8} were introduced,\textsuperscript{31} the Ministry of Justice was decisive in determining the budget for the courts, the number of judges and at least partly responsible for judicial training.\textsuperscript{32} I have argued elsewhere that the when read together the subsequent reforms implemented to give effect to \textit{Resolution 8} indicate a ‘self-managing’ court system.\textsuperscript{33}

\begin{thebibliography}{9}
\bibitem{22} Ibid. B (1) (Dz), p. 4
\bibitem{23} Ibid. B (1) (E), p. 4.
\bibitem{24} \textit{Resolution 8}, ‘Some Important Missions for Court-Related Work in the Forthcoming Period’, B (1) (Dz), p. 4.
\bibitem{25} \textit{Resolution 8}, ‘Some Important Missions for Court-Related Work in the Forthcoming Period’, B (2) (C), p. 5.
\bibitem{26} Ibid.
\bibitem{27} Ibid.
\bibitem{28} Ibid.
\bibitem{29} Ibid.
\bibitem{30} Ibid.
\bibitem{31} Ibid.
\bibitem{32} See below at pp. 8 – 9.
\bibitem{34} Pip Nicholson (2003) ‘Vietnamese Court Reform: Constancy and Change in the Contemporary Period’, conference paper presented at \textit{Mapping Vietnam’s Legal Culture} at University of Victoria, Canada (forthcoming).
\end{thebibliography}
1.3 Developing a transparent, strong and stable legal system

The third reform objective, set out in B (3), calls for the development of 'transparent strong and stable judicial personnel'. Also, all court-related agencies are called upon to increase the educational qualifications and political, moral and professional standards of their staff. This section particularly seeks the promotion of candidates with appropriate political and moral fibre and seeks more transparent, timely and democratic appointment procedures.

This same section of the paper makes clear that the position of people’s assessors (hoi tham nhan dan) or jurors should be investigated. In particular, Resolution 8 seeks the review of the selection, role in court, training and management of jurors. In effect the function of jurors is not to be taken for granted and is to be reappraised.

As a result of the generic nature of this document, in that it targets all court-related institutions and personnel, it is hard at times to be sure that the reforms apply to courts. In this section (B (3)) there is particular ambiguity because courts are never specifically identified in association with any of the posited reforms. For example, it is not clear whether the proposal for the rotation of staff applies to courts. Nor is it clear that the call for annual review of the work performance of court-related personnel applies to judges.

1.4 Invest in the facilities

Nor is there any particular mention of judges or courts in section B (4) which advocates the improvement of facilities and wages for court-related personnel. It appears implicit that the general call for the completion of building works and the reappraisal of salaries and allowances applies to judges as much as other agencies such as the police, but again they are not specifically mentioned.

1.5 Enhance participation in and oversight of court-related work

Section 5 of Resolution 8 commences with a statement of the need to attract community support for reform. It then urges the National Assembly and local People’s Councils to oversee the work of courts. In particular, the National Assembly and local People’s Councils are to monitor the decision making and enforcement of judgments and to supervise the development of normative legal documents by court-related agencies. It is not made clear to what

34 Resolution 8, ‘Some Important Missions for Court-Related Work in the Forthcoming Period’, B (2) (C), pp. 5 - 6
36 Ibid.
38 Ibid.
extent these bodies would oversee the development of case notes and jurisprudence affecting courts.39

In addition, Section B (5) recommends the development of the existing alternative dispute resolution mechanisms. In particular, it advocates that mediation and arbitration be adopted in the hope that fostering these alternatives would reduce the burden on courts and promote the prompt resolution of disputes.

1.6 Increase the explanation of, instruction in, propaganda about, dissemination of, education in and research about law

In the context of Section B (6), and the recommendation to research, explain and develop propaganda relevant to court-related services, Resolution 8 identifies the need to reform the laws on procedure and enforcement of judgments.40 The Party urges an increase the number of mobile hearings to maximise the flow of information concerning courts.41 There is little else in this section that directly touches on the role of courts. However, it is again implicit that the courts would be caught by a general policy preference for greater legal propaganda and they would be expected to contribute to this.

1.7 Strengthen international cooperation

The penultimate section (B (7)) of the policy paper seeks the strengthening of international cooperation by all court-related bodies, and various issues are identified for additional research.42 Of particular interest to this paper are the Party’s request for comparative research that considers the question of the sovereignty and security of Vietnam and, by implication, its court system. The Resolution also advocates comparative research on training and crime prevention.43

1.8 Strengthen the leadership of the Party

The final section of the operational plan (Section B (8)) restates that the Party ‘shall lead’ (lanh dao) all court-related agencies. In particular, three main areas are identified for Party leadership: politics, organisation and personnel. The posited aim in this regard is to ensure compliance with the Party’s policies and State laws. It is also noted that party membership should be increased and that courts should ‘use the correct employees’. It appears that the Party is here urging the maximum use of Party members in the court-related agencies, including courts.

40 Resolution 8, ‘Some Important Missions for Court-Related Work in the Forthcoming Period’, p. 8
41 Ibid.
42 Ibid.
43 Ibid.
Implementation

Part III of Resolution 8 provides an implementation plan. In broad terms, this seeks to centralise the implementation of this Resolution and to enable various stakeholders to contribute. In particular, the leadership of communist party committees in each of the Supreme People’s Procuracy, Supreme People’s Court, Ministry of Justice, Police, Military and Commission on Internal Affairs of the CPV are called upon to assist.

The Policy Summarised

In summary, Resolution 8 reiterates the leading role of the Party in court-related work. This is stressed both at the beginning of the policy paper and at its conclusion. Yet within this overarching statement, it is also said that citizens should be treated equally by courts and judges and people’s assessors are to be independent and subject only to law. The Resolution also requires the National Assembly and People’s Councils to oversee the work of court-related agencies. In this way, the policy seeks to balance the role of the Party, the State and its laws and the public or society.

Moving from the general to the particular, the policy paper canvasses various specific reforms. It requires that the lowest and highest courts within the Vietnamese court hierarchy, the District and Supreme People’s Court respectively, be strengthened. It urges legal institutions to circulate information about their work more widely and in particular to make greater use of mobile courts. It also calls for the greater use of mediation and arbitration to resolve disputes.

In terms of personnel, Resolution 8 calls for the appointment of better educated staff with good ethical and political credentials. By implication, these appointees are also to be Party members or, at the very least, endorsed by the Party. The policy paper also seeks greater transparency in the appointments process and an increased role for the SPC in court appointments and management. Following the Resolution, the President is only to appoint judges to the SPC, with the Chief Justice of the SPC now appointing all other judges, albeit with local agencies playing a large consultative role. Salaries and working conditions are also to be enhanced.

Finally, the Resolution seeks investigation of the following:
1. the role of the people’s assessors;
2. the possibility of a family court;
3. the possibility of expanding the jurisdiction of the Administrative Court;
4. the possibility of limiting the death penalty; and
5. comparative research on the role and place of courts in terms of State sovereignty.

2 Interpreting Resolution 8

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There is an element of ambiguity in the interpretation offered below as only some of the reforms specifically target courts. However, it is possible to see where these reforms have been implemented in the subsequent legislative package introducing court reforms. A brief consideration of the key features of the legislation affecting courts is set out below to give some insight into how the Party-State has interpreted its own policy recommendations.

The core features of legislation affecting people’s courts introduced in the 2002 Law on the Organisation of Peoples Courts are:

1. Judges must have a Bachelor of Laws Degree, have attended adjudication training and have had legal experience (Article 37).
2. With the exception of the Chief Justice and judges of the SPC, all appointments, removals and dismissals of judges to provincial and district courts will be made by the Chief Justice of the SPC on the advice of especially constituted Judicial Selection Councils. Appointment, removal and dismissal of Chief Justices and Deputy-Chief Justices of provincial and district courts will be by the Chief Justice of the SPC, acting on the advice of the relevant People's Council (Articles 25 & 40).
3. There will no longer be a Supreme People’s Court Justice Committee (Article 24).
4. People’s assessors will be elected by Local People’s Councils on the recommendation of the relevant Fatherland Front organization (Article 41).
5. People’s Assessors can be dismissed by the Chief Justice of the court to which they have been elected with the agreement of the relevant Fatherland Front committee (Article 41).
6. The Standing Committee of the National Assembly will determine court budgets acting on the advice of the Chief Justice of the SPC (Article 44).
7. The number of judges and people’s assessors will be determined by the Standing Committee of the National Assembly on the advice of the Chief Justice (Art. 42(1)).
8. The SPC in conjunction with local people’s councils will be responsible for the management of local people’s courts (Article 17).
9. The need to develop information technology to assist the courts to do their work is explicitly recognised (Article 46).

The specific recommendations made in Resolution 8 have been taken up by the 2002 Law on the Organisation of Peoples Courts. However, while the list

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of amendments looks very impressive I have argued elsewhere that in some respects the changes are more apparent than real.\textsuperscript{47} For example, the Chief Justice’s new powers to appoint judges to lower courts does not decrease the Party’s grip on judicial appointments.\textsuperscript{48} In particular, candidates for judgeships still have to produce a letter in support from the Party cell (\textit{y kien cua cap uy}) of the court to which they seek appointment\textsuperscript{49} and a political knowledge certificate from the party’s central training school.\textsuperscript{50}

However, this is not a story of court reform, but a story of the intersections and conflicts between the role and place ascribed to law and the role of the courts in transitional Vietnam. It is therefore not necessary here to examine in detail the features of the recently legislated reforms.\textsuperscript{51} The question remaining for this part of the paper is to characterise the nature of the court’s role as it is set out in \textit{Resolution 8} and then see to what extent this diverges from or is reflective of the role ascribed to law in contemporary Vietnam.

One of the most interesting aspects of Resolution 8 is the tension around the Party-Court relationship. On the one hand, the courts are explicitly under the Party’s leadership including by virtue of the fact that appointments to the courts ought to be Party members with demonstrated political credentials.\textsuperscript{52} On the other hand, courts are to be independent and obey only the law. How can these apparently contradictory statements be reconciled?

If one reads this from a Western perspective imbued with notions of judicial independence, it is not possible to reconcile the policies. The courts as described are intended to enable Party policy with the judiciary and court personnel being members of the Party. Concurrently these political functionaries are to be officers of the Court whose role is to enforce only the law. To those schooled in the requirement that judges have no allegiance other than to the law and the fair determination of disputes before them, free from interference from any other party, body or individual, this dual loyalty required of Vietnamese judges is not tenable.

This raises the question what is ‘law’ in Vietnam. In socialist states law is traditionally seen instrumentally. Thus it is the force that gives effect to Party policy, whether that be through a legal instrument or policy. One of the best

\textsuperscript{47} In particular, implementing legislation has waived the requirement that judges have a Bachelor of Laws Degree. See Pip Nicholson and Nguyen Hung Quang (2003) ‘The Vietnamese Judiciary: The politics of appointment and promotion’ (forthcoming).

\textsuperscript{48} Ibid.

\textsuperscript{49} Inter-circular No. 05/TTLN of Ministry of Justice and Supreme People’s Court dated 15 October 1993 providing guidelines of \textit{Ordinance on People’s Judges and Jurors} 1993, Part III, Item 2.


\textsuperscript{51} Pip Nicholson (2003) ‘Vietnamese Court Reform: Constancy and Change in the Contemporary Period’, conference paper presented at \textit{Mapping Vietnam’s Legal Culture} at University of Victoria, Canada (forthcoming)

\textsuperscript{52} This position is clear in the legislation passed to give effect to this policy. See Pip Nicholson and Nguyen Hung Quang (2003) ‘The Vietnamese Judiciary: The politics of appointment and promotion’ (forthcoming). In particular, judges seeking appointment need a letter of support from the Party Cell of the court to which they seek appointment and a Political Knowledge Certificate from the Central Political Training Institution.
characterizations of Vietnamese law offered by a Western researcher
describes it as:

the underlying notion of law is not so much that of an immutable order to
which all should bow, but rather that of an important element of the way in
which the Party Line is implemented.53

This matter is taken up in greater detail in Part Three of the paper, but for
present purposes law has to be seen as the Party line which may be (and
today more often is) enacted via legal instruments passed by those with State
legislative authority.54

One reconciliation of this apparent conflict is to see courts as independent of
Party interference, but not of Party influence.55 Put another way, courts are to
be guided by Party policy and to see its implementation as one of their
objectives. However, Party members ought not influence particular
proceedings.

Under this approach, courts can be concurrently bound by law and receive
Party guidance particularly if it is accepted that guidance from the Party
assists with the interpretation of laws. Many Vietnamese laws are expressed
in general terms only and their interpretation is wide open. The Party can then
illuminat and explain how laws are to be implemented. For example, Article
37 of the Law on the Organisation of People’s Courts sets out that

Vietnamese citizens who are loyal to the Fatherland and the Constitution of
the Socialist Republic of Vietnam, who have good qualities and virtue, are
incorrupt and honest, determined to protect the socialist legislation, have the
Bachelor of Laws Degree and have been trained in adjudicating operations,
have engaged in practical work for a period of time prescribed by law, have
adjudicating capability and have good health to ensure the fulfilment of
assigned tasks may be selected and appointed to work as judges.56

In this list of attributes required of judges there are various undefined and
loose terms. Just to take two examples, it is not clear how ‘loyalty to the
Fatherland and the Constitution’ is to be interpreted, nor how ‘adjudicating
capabilities’ is to be construed.

Various commentators have suggested how they ought to be read. For
example, in relation to ‘adjudicating capabilities’, the Chief Justice of the
Hanoi People’s Court has written that those who have completed a course at
the Legal Professional Training School have the requisite judicial capacity.57

53 Adam Fforde (1986)’The Unimplementability of Policy and the Notion of Law in Vietnamese
54 See discussion at pp.
conference paper presented at Mapping Vietnam’s Legal Culture at University of Victoria, Canada
(forthcoming), p. 35.
56 Translation from Cong Bao, the Official Gazette, No. 25 of 5 June 2002
mol’, (‘Judicial Criteria - current situation and requirements for new era’), 4 People’s Court Journal,
pp. 2-6.
Further, he has also suggested that judicial capacity should be interpreted to mean a preference for mature or older candidates.\(^{58}\) We see that a senior judicial officer explains how these criteria are to be interpreted; presumably because as a senior judge, he is empowered to speak both on behalf of the court and also on behalf of the Party. Yet this is not the final word on this point. The Party retains the right to clarify this at any time in a variety of ways: for example, by policy statement by endorsing a circular between courts, or more informally through consultation with senior Party figures from the courts, the National Assembly or the Party itself.

A further tension evident in *Resolution 8* surrounds the balancing of individual and collective rights. *Resolution 8* exhorts the courts to treat all persons equally.\(^{59}\) On the face of it this is a call for equal treatment by the courts of all people before it and could form the basis of an argument that individual litigants have rights equal to those of the state or the collective. Concurrently the judiciary is instructed to follow Party leadership and reminded that it is subject to the ‘supervision’ of local democratic institutions such as People’s Committees and, in the case of the Supreme People’s Court, the National Assembly.

Again this tension needs to be contextualized. To make sense, this reference to equal treatment is not a statement of the individual rights of claimants or defendants, but a statement that all those before the courts ought to be judged by the same policies and laws. That is, this statement cannot be read as abandoning the value placed on the collective interest in the Vietnamese context, but must be interpreted to say that those in proceedings before a court must be equally subject to the same sets of values, policies and laws. Again what is being set out is not that courts will only be bound by law, but that courts should be consistent in their evaluation of cases which in turn requires consistency in understanding laws and the direction of Party leadership.

*Resolution 8* also calls for greater community knowledge of court work. To this end, one concrete proposal is that courts should increase the number of mobile hearings.\(^{60}\) While this may increase the public scrutiny of hearings it will not enable the public to understand how cases are decided. Although *Resolution 8* calls for the formation of normative legal documents, it does not make any specific recommendation with respect to that process.

Court judgments have not to date been a great source of normative legal principles. As with many civil law systems, why it is that a particular case is determined in a particular way is not evident from the written record. Further, judgments are not publicly available. For example, in criminal cases


\(^{59}\) *Resolution 8*, B (1)(c), p. 3.

\(^{60}\) Since 1959, when the DRVN as it then was established its official court systems, mobile hearings have been a feature of court work. Nicholson 2000 *Borrowing Court Systems: The Experience of the DRVN 1945 – 1976*, Doctoral Thesis, University of Melbourne, pp. 159.
judgments record the names and background of the parties, the charges and whether they have been found guilty. The evidentiary basis for the conviction is not recorded. When explaining sentencing, the judgments include analysis of the moral and political credentials of those being tried, explicitly linking these to the imposition of lenient or harsh penalties. It is not clear from Resolution 8 how the balance between increasing the role of law and maintaining popular justice is to be delivered.

Finally, Resolution 8 appears to promote the role of the lawyers (both advocates and prosecutors). It instructs judges to enable lawyers fully to participate in pre-trial and trial work. How this would affect the outcome in a trial is not clear. It has been common practice in Vietnam for the procuracy to meet with the judges and determine the outcome of cases before trial. Enhancing the role of lawyers raises the possibility of the judge allowing more adversarial-style advocacy in court (ordinarily associated with the common law tradition). Further, it could indicate a shift from having the resolution of cases pre-determined, to testing the evidence before deciding the case.

Promoting the work of lawyers may suggest that the State seeks to foster public trust in the emerging court system by way of empowering the advocate. Just as Mark Sidel has noted that it is too simplistic to talk of Party instrumentalism in the context of Vietnam’s constitutional reforms, it may be the case that the relatively greater role accorded to lawyers in court could produce tensions (even contests) about the proper resolution of cases and enable explicit or implicit criticism of Party policy in court. Thus the court (the Party-State) may eventually negotiate the outcome of cases with lawyers (many of whom are privately employed and not Party-State functionaries).

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61 For example, the judgment resulting from the 1997 trial of Tran Thi Chieu and Bui Van Tham for corruption does not indicate the basis upon which either Chieu or Tham were found to have breached the Criminal Code. Judgment No. 233/HSST 22 February 1997 of the Hanoi People’s Court.
62 Neither do jury trials in common law systems record the evidentiary basis of the conviction.
63 Ibid.
64 The lack of reasons has several consequences. First, it is very hard for courts and lawyers to appeal or review cases when they are not able to understand the reasons behind judgments and particularly if they do not have access to the prosecution documents. Secondly, it is hard for higher courts to instruct lower courts on the basis of judgments alone. This then provokes a need for case summaries to be written and circulated. A need which has traditionally been met through publications in the Court’s Journal and more recently via case summaries prepared for the sole purpose of transmitting how to adjudge cases. See Nicholson (2000) Borrowing Court Systems: The Experience of the DRVN 1945 – 1976, Doctoral Thesis, University of Melbourne, pp. 158 - 163 on the use of the court journal and on the use of case summaries in civil and economic cases see John Gillespie (2003) ‘Extra-Constitutional Law-Making: Vietnam’s Unacknowledged Legislators’, conference paper presented at Mapping Vietnam’s Legal Culture at University of Victoria, Canada (forthcoming), p. 36.
65 Resolution 8, B (1) (c), p. 3.
66 Both lawyer Nguyen Hung Quang (see his comments at this conference) and legal journalist Nguyen Hien Quan (currently a doctoral student at the University of Melbourne) have pointed out to me that lawyers have played an adversarial role in the Nam Cam trial – reflecting an experiment by the State to allow advocates to test the evidence publicly in open court.
68 Changes to the Regulation of lawyers are in fact reinforcing this distinction, by requiring State lawyers not to work in private practice. Discussion with Pham Duy Nghia and Bui Bich Thi Lien in Canada April 2003.
This appears highly experimental in a State where the control of courts has, until recent times, been absolute.

It appears, therefore, that Resolution 8 opens up the possibility of quite radical legal change. Although it appears significant in first appearances, the principle of court independence, mediated by Party leadership, is perhaps the least radical feature of this policy. The potentially more fundamental changes lie in the enhancement of the role of law and of the legal profession including prosecutors. The Party-State may conceive that by retaining Party leadership of the institution and, in particular, reinforcing its tight control over the selection of personnel, changes to the primacy of law and the profession can be incrementally implemented. Alternatively these potentially radical changes might reflect either a new vision giving law a more central and stronger role in regulating social relations (but perhaps not State society relations?) or simply an experimental phase exploring such possibilities.

3 Contemporary Vietnamese debates about the role and place of law

The question is then to what extent the changes introduced in Resolution 8 reflect a theorised understanding of law within Vietnam. This involves some exploration of the role and place of law in Vietnam generally and, more particularly, the role the courts play within any general conception of the role of law.

This part of the paper will outline the key concepts used to describe the political and legal theories underpinning the Democratic Republic of Vietnam (1945 – 1976) and the Socialist Republic of Vietnam (1976 to the present day). The core concepts introduced are ‘democratic centralism’, ‘collective mastery’, ‘socialist legality’ and ‘rule-based State’ (sometimes erroneously translated as rule of law). The role and place of socialist and revolutionary morality and how valuing moral precepts affects or interacts with the role and place of law is also briefly discussed. It will then be possible to revisit Resolution 8 and see how it reflects or diverges from established Vietnamese legal thinking.

The discussion is organised chronologically to reflect the emergence of Vietnamese legal theory and divided into the time periods 1945 – 1959, 1960 – 1976 and 1986 – 2003. The period 1976 – 1986 is not a particular focus as it can largely be viewed as a period of consolidation rather than change, with the North exporting its views and practices to the South of the country in post-unification Vietnam.69

The role and place of Vietnamese law has been dynamic over time. Initially the communist State had a fairly instrumentalist view of law. Theorising was in

69 John Gillespie (2002) ‘Concepts of law in Vietnam: Transforming Statist Socialism’, conference paper presented at Comparative Conceptions of Rule of Law in Asia, Hong Kong, 20 – 21 June, p. 12. Gillespie notes that whether revolutionary thinking should dominate legal thinking was on the agenda in conferences before 1986, but that no decision was made to change the status quo during these earlier debates.
the main political, looking at the role of ‘democratic centralism’ (tap trung dan chu) and the role of law as an administrative mechanism, coexisting with but not binding political leaders and policy makers. In the DRVN over the period 1960 – 1976, socialist legality (nguyen tac phap che xa hoi chu nghia) gained increasing currency. In more recent times, and particularly since the 1991 Seventh Party Congress, the Party-State arguably has endorsed, while not clearly identifying the features of, a law-based state (nha nuoc phap quyen) and a socialist law-based state (nha nuoc phap quyen xa hoi chu nghia). The role of collective mastery (lam chu tap te) in the contemporary period is harder to isolate.

In the Vietnamese context it is not possible to talk of the State without talking of the Vietnam Communist Party. The Party is at the epicentre of Vietnamese politics and it remains responsible for the official enunciation and implementation of all policy changes. The Party dates back to the early 1930s, although it was officially disbanded between 1945–1951 and renamed on several occasions, ultimately carrying the name the Vietnam Communist Party (Dang Cong San Viet Nam) from 1976. Between the 1930s and 1976 the personnel at meetings and congresses essentially remained the same, indicating that whatever the appellation, the core group of leaders identified with the original Indochinese Communist Party continued at the helm until unification. Thayer has commented on the increasing trend to see younger and better educated VCP members in the National Assembly, but while new figures are emerging within state institutions, there remains continuity with the past.

Through its extensive ‘nomenklatura’ system the contemporary VCP continues to ensure that all significant office holders of the State are Party members. For example, 90% of judges are said to be Party members. Similarly Thayer estimates that the current National Assembly comprises

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around 90% Party members.\textsuperscript{76} It is not possible to separate the Party from the State. State functionaries are Party members with the obligations that membership of the Party involves.\textsuperscript{77} It is for this reason that the term Party-State is used.

Although the Party-State is the dominant political force in Vietnam, it is an organisation where various political views are expressed and debated. For example, it is widely known that Party members have preferences ranging from transition to a multi-party state to the correctness of strong one-Party leadership being retained.\textsuperscript{78}

While Vietnamese jurisprudence is closely linked to that of the Soviet Union and arguably not isolated from that of the People’s Republic of China, it is not a replica of either.\textsuperscript{79} Over the period 1945 to the early 1970s Vietnam was most influenced by Soviet jurisprudence.\textsuperscript{80} In more recent times, while the extent to which the Chinese and Vietnamese converse about legal theory remains unclear, it is known that exchanges occur.\textsuperscript{81}

**Morality and Law**

Much has been written about the marginal role of law in Vietnam.\textsuperscript{82} Broadly speaking the argument is that custom and morality (Confucian and socialist)\textsuperscript{83} played a major role in shaping Vietnamese social mores and that law existed largely as a punitive instrument of the State, rather than as the basis for social interaction. This paper does not address the question whether law is more relevant in contemporary Vietnam. This is a subject for another study. Yet the fundamental significance of morality is raised to protect against any misconception that the role of law has changed to such an extent that morality is no longer relevant. Without significant studies of legal consciousness this


\textsuperscript{77} Statute of the VCP, 2001.

\textsuperscript{78} Conversation with lawyers in Hanoi over the period 1992 – 2002.


\textsuperscript{80} Ibid.


\textsuperscript{83} Shaun Malarney traces the continuities between Confucian and socialist ethics in Shaun Kinglsey Malarney (1997), ‘Culture, Virtue and Political Transformation In Contemporary Northern Viet Nam’, *The Journal of Asian Studies*, Vol. 54 No. 4, pp. 899 -920
mature cannot be resolved, but studies among local Vietnamese businesses indicate that the relevance of law remains marginal.84

**Early Days: War and Legal Instrumentalism**

Between 1945 and the late 1950s, during which period the DRVN defeated the French and the country was partitioned, the role and place of law was contested.85 Arguably Ho Chi Minh never anticipated governing without the assistance of law.86 He wrote of the excesses of colonial court systems,87 but did not foreshadow a society without law or legal institutions.88 Ho Chi Minh argued convincingly that the French were able to maintain one law for the Vietnamese and another for their own subjects.89 Ho’s trenchant criticisms of the French administration of justice, described as the scales of justice being permanently skewed against the local population of Vietnam, was not a general critique of law.90

Lawyers debated the uses to which the new DVN government put law and legal institutions,91 these discussions being at their most divided and outspoken during the publication and then banning of the *Nhan Van (Humanity)* and *Giai Pham (Beautiful Literary Work/Masterpiece)* periodicals. These two publications circulated in 1956 and contained some extremely direct critiques of the uses to which law had been put by the Viet Minh leadership. For example, three categories of critique were undertaken by *Nhan Van*: freedom and democracy; legality, human rights and the strengthening of institutions; and opening up all legal thought and research.92 Those that spoke out on these issues did so without circumlocution or delicacy, as demonstrated by the following passage:

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86 This contrasts with the position in the USSR where during the early days of the revolution legal philosophers conceived of law withering away. See Chapter VII, pp. 181-182.


It is the absence of legislation that favours abuse of power and authoritarianism.\textsuperscript{93}

This extract is taken from an article dealing with the errors of the land reform campaign\textsuperscript{94} and the ‘contempt for legality’ prevailing, so it was argued, in Vietnam at this time.\textsuperscript{95}

The government was exhorted to put a stop to these expressions of dissent; the request that the publications be closed down was printed in the official newspaper:

\begin{quote}
We demand that the authorities take definite measures against Nhan Van. The souls of the young students are still as pure as a white page inscribed with beautifully bright pictures of our regime, our future and our happiness. We want to be given healthy thoughts and are determined to oppose anything which stands in the way of our advancing steps.\textsuperscript{96}
\end{quote}

By 1960 the Party closed down the publications and a series of trials ensured that the major players were incarcerated.\textsuperscript{97}

The organizational basis of the DRVN shortly after the revolution is perhaps best described by the term ‘democratic centralism’.\textsuperscript{98} When describing the features of the newly introduced Vietnam Workers’ Party in 1951 Ho Chi Minh

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\textsuperscript{93} ibid., pp. 165–166. Here Boudarel is quoting from an editorial written by Nguyen Huu Dang in the fourth issue of \textit{Nhan Van} published in November of 1956.


\textsuperscript{97} Georges Boudarel (1990) ‘Intellectual Dissidence in the 1950s: The \textit{Nhan Van Giai Pham} Affair’ 13 \textit{The Vietnam Forum}, pp. 154, 172–173. Boudarel notes that five main players (Nguyen Huu Dang, Luu Thi Yen, Tran Thien Bao, Phan Tai and Le Nguyen Chi) were tried and that all received periods of imprisonment followed by a period of national indignity, where they cannot leave their homes.

wrote ‘As regards its organization, it adopts the system of democratic centralism’.99 In short, democratic centralism in Vietnam meant that all office holders and Party representatives were elected and each organization was accountable to the higher equivalent body.100 For example, a District People’s Committee was responsible to a Provincial People’s Committee and a local court was accountable to the next highest court. Ultimately most organizations were accountable to the Party either via the National Assembly, Ministries or the Party committees at local and regional levels.101 It was only through such accountability and central control (also referred to as ‘iron discipline’)102 that the Party could hope effectively to enforce its policies. This approach was justified on the basis that it enabled grass-roots involvement (via election) in the democratic process,103 but also that once the ‘correct’ policy had been determined (one that benefited the ‘masses’),104 implementation would be centrally coordinated. Failure to implement according to instruction carried with it censure.105 In relation to the courts this basic principle was an ideal to which the courts aspired, but implementation was problematic. As we shall see, democratic centralism has been retained as an organizing principle to the present day.

The regime’s supporters during the period 1945 to 1959 propounded an instrumentalist view of law without explicitly theorising about socialist legality

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100 Statute of the Vietnam Workers’ Party, 1960, Article 10. This legislation is referred to here, although it was not introduced until 1960, because it reflects the practices that emerged in the preceding years of the administration. In many cases, as we shall see, formal laws were introduced after a period in which that which was introduced had already been operative. See also Martin Gainsborough (2003) Changing Political Economy of Vietnam: The Case of Ho Chi Minh City, London, New York: Routledge Curzon, pp. 40 – 44.

101 The Party ceased to exist between 1945 and 1951, but once reformed its membership comprised major office holders such as the President and Prime Minister (Ho Chi Minh) and Ministers. For example, the Ministers of Defence and Foreign Affairs and the Commander in Chief of the Armed Forces were all Party members. See Bernard Fall (1956) The Viet Minh Regime Government Administration in the Democratic Republic of Vietnam, Connecticut: Greenwood Press Publishers, p. 44.


103 Gillespie notes that this is the foundation of socialist democracy: where, borrowing from Lenin, the working class have to ‘centralise power in their hands’. See John Gillespie (2003) ‘Continuity and Change in “Socialist” Legal Thinking’, conference paper for Law and Governance: Socialist Transforming Vietnam at University of Melbourne.

104 Statute of the Vietnam Workers’ Party, 1960, Preamble. Here the word ‘masses’ is used because of its use in the Statute. However, it will also be used throughout this paper when a reference is made to Vietnamese people who were members of the agricultural or labouring classes. It is an overtly political word used throughout Vietnamese writing to refer to the previously oppressed, but soon to be liberated, classes of Vietnamese society. Use of the word assists the reader to understand the militant political milieu in which this story was unfolding.

No separate narrative emerges, from the available sources for the period, explicitly relying on socialist legality to connect law, socialism and the new nation.107

The perception that law was more commonly viewed instrumentally rather than theoretically (except by its detractors) rests on several commentaries on Vietnamese legal development and the nature of the debates between intellectuals and Party figures over this period. For example, Nguyen Nhu Phat, a theorist with the Institute of State and Law, writes:

The Communist Party of Vietnam is a political party which gained society's almost absolute confidence and is able to call on the support of all people. Moreover, in the first years of the people's democratic system, the distinction between the leadership of the Party and the administration of the state was out of the question because the state could not be present everywhere in the country and secret Party cells had to play the role of the state.108

Nguyen Nhu Phat portrays Vietnamese law in the early period of the revolution as reflecting the domination of political expediency and practical considerations; legal jurisprudence was relegated to a critique of practice.109 The Nhan Van Giai Pham experience reinforces this perception. Not surprisingly, the socialist legal debates did not immediately take hold in war-torn Vietnam.

**A Unified DRVN: The Policy-Law Dichotomy**

There was not one view of law between the defeat of the French in 1954 and up until the unification of the country in 1976. However, the outspokenness of the Nhan Van Giai Pham period did not resurface.110 The Supreme People’s Court’s publications explicitly condemned it.111 Instead, this period witnessed the development of a legal studies group (to luat hoc) debating law.112 The legal studies group originally convened under the auspices of the Social Sciences Division of the State Sciences Committee, later forming the genesis

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106 Mark Sidel (1997) ‘Some Preliminary Thoughts in Contending Approaches to Law in Vietnam, 1954-1975’, March, *Association for Asian Studies*. The understanding that law had a role to play in the revolution seems to have been spoken about by lawyers and politicians, but it is hard to ascertain how it was more generally debated.


109 ibid., pp. 397–412.

110 See discussion in Chapter II, pp. 53–54.


of the Institute of State and Law. According to Mark Sidel, this group, comprising scholars and non-communist intellectuals, included ‘leading voices for legal reform’.

One of the key tensions for the emerging system of administration was the relationship between law and policy. All too often, policy was not enacted as law and yet Party-State officials were expected to implement both. Policy was at least as significant as luat (law). For example, law could be used interchangeably with policy. As a result, the importance of policy (or the state Plan as it was also referred to) cannot be underestimated. As we saw above, Fforde aptly characterises law as ‘an important element’ of the Party line, but not of itself authoritative at this time.

Policy was the leading doctrine which Party members were expected to follow. Where policy and law collided, judges were expected to apply policy. As one Vietnamese jurist puts it:

At present the people’s courts only apply the new laws of the people’s power. In the event of there being no legislative text they follow the principle of analogy or simply the general political line of the revolution.

Nguyen Nhu Phat expresses a similar view of law in this period when he writes:

In the old regime, planning was the main instrument used by the state to administer the national economy. That is to say that planning but not law was the main and most important factor. Planning would always prevail over law. Any conflict between the law and the planning would be resolved in ‘favour’ of the planning. Generally speaking the law was only a subsidiary instrument while the policy and resolutions passed by the party, administrative commands and planning documents were the main instruments in governing economic activities.

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113 ibid.
114 ibid., p.16. In particular, Sidel cites Vu Dinh Hoe (previously Minister for Justice, a non-communist lawyer) and Tran Cong Truong as leading figures campaigning for legal reform.
115 ibid.
There was also debate about the application of policy that was intended to be law, but was not yet enacted. A Vietnamese lawyer writing in 1968 talked of the need to enforce laws, distinguishing them from policies:

The policies of the Party must go through a process of explanation and elucidation so that the people will understand them clearly, support them and by their self-awareness carry them out. These policies must also pass the National Assembly, the government Council and other government organs before being enacted into law and before being backed by the authority of the government.120

This more legal approach, requiring that policy be enacted as law in order to be enforceable, is rarely so clearly stated in major public speeches.121 More commonly the terms ‘policy’ and ‘law’ are used interchangeably or ambiguously.122 For example, in this period the role of the Party was developed and entrenched via active promotion of its work and by training its members - a strengthening of the Party as Truong Chinh described it.123 He wrote that, ‘In Party building we stress both ideological and organizational aspects’.124 In short, the Party aimed to raise the calibre of members via training. In 1968 all cadres were to be schooled in the ‘four-good’ principles. The second of the four tenets was:

Good at helping the people in obeying the law and in the implementation of Party and state policies.125

This statement suggests that policy, after it became law, was what the people must obey. Yet both law and policy must be 'implemented'. Truong Chinh did not address the issue of whether policy and law were interchangeable or what happened if they differed.

Le Duan writes that:

Formerly the Party line and policies penetrated the masses and were implemented through propaganda and agitation work with regard to each person or each group. Today besides these methods which we must apply even more effectively, broadly and adequately, we must also use large-scale

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121 The tone of the article is legalistic rather than critical. This distinguishes it from the articles published in *Nhan Van (Humanity)* discussed previously.
124 ibid., p. 605.
125 ibid., p. 606. The other three tenets were: good at guiding production work and fighting; good at caring for the masses and integration with them; and good at strengthening the work of the Party.
organized measures [...]. This can be done only through state laws which reflect the interests and the will of the working people.¹²⁶

This statement, made in 1973, advocates the passage of policy into law. This approach is echoed in contemporary Vietnam. One typical call for a law-based state refers to earlier times when ‘it seems that for a while we emphasized building a society by means of the “rule of morality” and thus somehow neglected the law’.¹²⁷

Despite a clearer articulation of how the emerging socialist state would be administered (democratic centralism with the Party at the epicentre of politics), the state’s policy priorities were variously implemented via laws or policies or both. In effect, the debate about the role of law and policy continued, but law was not necessary to state-sanctioned decision making.¹²⁸

It is relevant here to consider how the Vietnamese courts themselves conceived of their role.¹²⁹ The Chief Judge, in an article summarising the SPC’s Five-Year Plan 1961–1965, commenced by referring to the Third Communist Party Congress, held in September 1960. He noted the comments made at that Congress on the relationship between Party and state ‘in the transitional stage towards socialism in the North’.¹³⁰ He argued that the Party’s role in the leadership of the State was paramount:

To unite the entire people, bring into full play our people’s ardent country-loving spirit, traditions of brave fighting and hard work, at the same time to reinforce the solidarity among the socialist countries headed by the Soviet Union, to create favourable conditions for the North to march speedily, strongly and firmly towards socialism, build a comfortable and happy life in the North and consolidate the North as a steady base for the struggle for the country’s unification, thus making a contribution to strengthening the socialist camp and the defence of peace in Southeast Asia and the world.¹³¹

The Chief Judge reiterated the Third Party Congress’ view that the People’s Democratic Administration, of which the court was a part, must ‘fulfil the historic task of the proletariat’s dictatorship’¹³² and to that end implement socialist reformation in the areas of agriculture, industry, economic policy and cultural change. Chief Judge Pham Van Bach pointed out that ‘position, role and political responsibilities of the People’s Court are not separable from

¹³¹ ibid.
¹³² ibid., p. 1.
position, role and political and economic responsibilities of the People’s Democratic State’.\textsuperscript{133} In turn the state’s responsibilities were ‘pointed out clearly in the political report of the Party Central Committee’.\textsuperscript{134} Here the connection between Party and court is at its most clear. The Chief Judge has drawn the connections so that no reader could be in any doubt that the role of the courts was ultimately to implement state policy.

Articles such as this, the Chief Judge explained, are written to assist the court worker to interpret Party policies relevant to the courts. When the author started to talk about ‘us’ in the article he referred to the reader and the author as one – sharing duties and responsibilities. The Court’s journal was circulated to professionals, and so the Chief Judge was able to communicate an expectation of absolute loyalty to the new regime. This was manifest when he instructed staff to share a united view of the role of the courts as political tools of the political authority – the Vietnam Workers’ Party.\textsuperscript{135}

Having outlined the court’s political role the Chief Judge proceeded to connect the court’s work with the five-year plan.\textsuperscript{136} He urged the work of the court to assist the revolution; to defend the social order (which included economic policies); to educate the masses to fight against acts violating the law, policy and disciplines of the state; and to promote the people’s democratic legality. This call to arms also stipulated that the role for the courts was to implement state policies as well as state laws.\textsuperscript{137}

To implement the party’s policies effectively, court officials were told:

\begin{quote}
We must be fully aware of the role and effectiveness of the People’s Court in contributing to the furtherance of the entire revolutionary work, ... apply properly the line and policy of the Party and state, always heighten the People’s Court characteristic of true democracy, apply strict basic principles guiding the work of adjudication, organise trials according to the \textit{Law on the Organization of People’s Courts} and ensure careful, correct and lawful adjudication which always enjoy sympathy and support of the people.\textsuperscript{138}
\end{quote}

Judges and assessors were thus instructed not only to apply state and Party policies, but also the \textit{Law on the Organization of People’s Courts} when organizing trials. This law set out the basic elements of a fair trial, the role of assessors and judges, and the meaning of an open court. The statement suggested that careful and correct adjudication required the judge and people’s assessors to apply policies to produce lawful adjudication acceptable to the masses.

\textsuperscript{133} ibid., p. 2.
\textsuperscript{134} ibid.
\textsuperscript{135} ibid.
\textsuperscript{136} ibid., p. 3.
\textsuperscript{137} ibid., p. 5.
\textsuperscript{138} ibid., p. 6.
Finally, Chief Judge Pham Van Bach pointed out that neither the civil (which includes family) nor criminal laws were sufficiently detailed: ‘law-making work becomes imperative for many branches especially for our [Supreme People’s Court] branch.’ He made the point that a new Constitution had been proclaimed and that the courts were active, but that they must work without procedural laws and, in many cases, substantive laws. Thus it was up to the courts to study policies and propose laws and for the senior court to overview the work of the lower courts.

In summary, this publication explained to court officials that they had to implement State policies and rely on senior courts and training as the basis of understanding those policies. Pham Van Bach reiterated that officials must understand that their work was political and that both the Party and the community must endorse it. He sought to inspire pride in the work of the courts as institutions linked to the fortunes of the war-dominated country. The Supreme People’s Court’s role was to show leadership, and in so doing, reflect the Party’s policies.

Throughout the sixties, a judicial conference was held annually to reinforce the duties and responsibilities of judges. The Supreme People’s Court issued a report on the conference’s conclusions. The issues raised in the Chief Judge’s first Five-Year Plan for the courts, outlined above, were echoed over the years. The central political role of the courts was reiterated. It was the duty of the Supreme People’s Court to foster the upholding of socialist legality by lower courts. However, it was pointed out that there was not always agreement among senior judges about what the law ought to say or, where it existed, how it ought to be interpreted.

This exploration of the policy-law dichotomy in Vietnam is one way of unpacking what is meant by socialist legality. It demonstrates that law is not binding or immutable, but rather a support to and manifestation of the Party line. In particular, law does not override policy, but exists to give it effect. As an element of the Party line, law is therefore not binding on Party members who would have a better appreciation of the Party’s intentions and how they should be implemented in particular settings. For example, a judge writing about how law and policy interacted explained:

At present the people’s courts only apply the new laws of the people’s power. In the event of there being no legislative text they follow the principle of analogy or simply the general political line of the revolution.

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139 ibid., p. 7.
140 Chief Judge of the Supreme People’s Court (1967) Editors, Conference Summary, p. 3 (in Vietnamese).
141 ibid., p. 3.
142 Chief Judge of the Supreme People’s Court (1968), Conference Summary, p. 25 (in Vietnamese).
In a similar vein Gillespie explains that socialist legality characterises policy as the 'soul and spirit (linh hon) of the law.' Further, Gillespie argues that socialist legality conflated legalism and 'state discipline (ky luat nha nuoc)' with the result that 'violations of the law were considered revolutionary betrayals.'

Over the years 1959 to 1976 a subtle change emerged. In effect, socialist conceptions of law were introduced and promoted. In particular, the Supreme People's Court articulated a clear commitment to socialism and socialist legality, which saw law as a vehicle for Party-State policies and where they conflicted as inferior to the Party line. The press and the leadership criticised capitalist legal systems for working only to the advantage of the bourgeois classes. In Vietnam a socialist legal system was endorsed: where law was not independent, nor binding, on the Party-State.

**Legal Theory in the Contemporary Period**

Thus far we have seen the Party-State construct theories concerning the interaction of the Party and its laws and legal institutions (socialist legality) and the mechanism by which all organisations are to be held accountable to and led by central Party institutions (democratic centralism). What remains unexplored is theory indicating the Party's relationship with the people.

Through the revolutionary period the Party-state positions itself as giving effect to the 'mass' line. Its leadership is of the people, from the people and for the people (nha nuoc phap quyen xa hoi chu nghia cua nhan dan, do nhan dan va vi nhan dan). This principle of Party leadership giving effect to the will of the people is captured in the two DRVN constitutions of 1945 and 1959 and their two SRVN successors of 1980 and 1992. However, the principle of 'collective mastery' (lam chu tap the), is not articulated as a

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145 Ibid.


147 Before proceeding I wish to acknowledge the work of John Gillespie in mapping contemporary Vietnamese socialist legal thinking. Much of the Vietnamese legal theory relied upon in this section is directly drawn from his more recent, and as yet unpublished, work.

148 See footnote 96 on p. 18 above.

concept until the ‘euphoria surrounding reunification in 1975’. Gillespie argues that at this time the State explicitly acknowledges the ‘mastery’ of the working peoples, and posits the interests of the State and individual as one: the political leadership existing to reflect and enable the worker-peasant alliance. As Gillespie notes, the classless society envisioned by Vietnamese collective mastery is predicated upon social harmony and group effort. In so doing, the doctrine removes private ‘space’ for talk and debate outside the State-sanctioned domains of collectives and State bureaucracies. Further, Gillespie notes that the doctrine was ‘hostile to private legal rights.’ How the doctrine accommodates the transition from socialist legality to law-based state (set out below) remains unclear.

In 1991 the Seventh Party Congress of the Vietnam Communist Party (VCP) adopted ‘nha nuoc phap quyen’ variously translated as ‘State-legal-rights’ or ‘law-based state’. As Gillespie points out this is a Vietnamese adoption of the Russian concept ‘Pravovoe gosudarstvo’ in turn reflecting the German principle of ‘rechstaat’. In each case the principle has the ‘State posited as the highest, if not the only source of law.’ In the Vietnamese context, nha nuoc phap quyen means that the State will not only be the source of law, but also be bound by law. This was the basis of the very fundamental constitutional changes made in 1992, which saw the introduction of an amended Article 4 to include a statement requiring Party members to be bound by the law. The introduction of ‘law-based state’ as a conceptual basis for the place and role of law in contemporary Vietnam has not replaced socialist legality as the current orthodoxy. Instead, the two concepts of law coexist and fuse to produce ‘socialist law-based state’ (nha nuoc phap quyen xa hoi chu nghia). Two issues emerge. What is meant by the State in this context? Further, to what does the term ‘law-based’ refer?

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151 Ibid.
153 Ibid.
155 Ibid. p. 13.
156 SRVN Constitution 1992, Article 4
158 Ibid.
As we have seen, it was not possible to conceive of the Vietnamese State without admitting the leadership of the Party.\textsuperscript{159} This remains the situation today. For example, the most recent round of constitutional amendments did not change the leadership role ascribed to the Party in 1992.\textsuperscript{160} \textit{Resolution 8} also restates the Party’s leadership role.

The extent and limits of the term ‘law-based’ are less clear. On one view the Vietnamese Party-State has repositioned law as the ‘highest’ if not ultimately the sole source of binding instrument. This view is supported by the fact that the Party, through the Constitution, is said to be bound by law.\textsuperscript{161} More particularly, it envisions law ultimately as becoming superior to policy.\textsuperscript{162} Yet as a matter of practice law remains subordinate to Party policy, particularly given the reliance on policy to interpret law.

\textbf{Socialist legality and law-based state compared}

The table below summarises, albeit briefly, the similarities and differences of socialist legality and law-based state. In an attempt not to confine the comparison to Western liberal notions of law a range of indicators have been listed to tease out what each of the concepts reflects.

<table>
<thead>
<tr>
<th>Feature</th>
<th>Socialist legality</th>
<th>Law-based State or socialist law-based State</th>
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<tbody>
<tr>
<td>Policy- Law dichotomy</td>
<td>Law supports and where possible gives effect to Party policy. Law does not override policy,\textsuperscript{163} but is a means by which the Party line can be instituted.\textsuperscript{164}</td>
<td>All State organs and the Party are to be bound by law.\textsuperscript{165} Policy remains central as a guide to the interpretation of law. What is left unclear is whether, in cases of conflict, law would override policy.\textsuperscript{166}</td>
</tr>
<tr>
<td>Role of Morality</td>
<td>Socialist legality is a valid mechanism to give Vietnamese commentators note that</td>
<td></td>
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</tbody>
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\textsuperscript{159} See above pp. 14 – 15.
\textsuperscript{161} Ibid.
\textsuperscript{162} Certain this is suggested by \textit{Resolution 8}.
\textsuperscript{163} DRVN Constitutions of 1959 and 1980.
\textsuperscript{164} Adam Fforde (1986) ‘The Unimplementability of Policy and the Notion of Law in Vietnamese Communist Thought’ \textit{1 Southeast Asia Journal of Social Science}, p. 63.
\textsuperscript{165} SRVN Constitution 1992, Article 4
\textsuperscript{166} For example, in 2003 a Ho Chi Minh City prosecutor refused to be bound by principles enunciated in \textit{Resolution 8} as it had no legal force until it was implemented by way of the relevant procedure law. Unknown Author (2003) ‘2 cong to vien tranh luan voi hon 70 luat su’ (‘2 Prosecutors Argue with More than 70 Lawyers’) \textit{Nguoi Lao Dong (Labour Men)}, 16 February 2003. Located on \textit{www.vnexpress.net} on 5 June 2003
effect to Party policy because it reflects appropriate sentiment, specifically revolutionary or socialist morality. Law can be conceived as a playing the role ascribed to it by Western ‘natural law’ theorists, namely law is only valid if it reflects the ‘higher’ or ‘natural order’. Characterised in this way Vietnamese law is seen as a moral force, and its interpretation is subject always to current moral doctrine.

Vietnamese culture has a long tradition of valuing moral precepts over legal ones. Where does this leave law? In theory, law regulates and morality is relevant to the extent that is used as a lens through which to interpret and apply laws. In reality, the legitimacy of law rests on its connection to the wider moral framework. It is perhaps for this reason that we witness the neo-traditionalism of a classic good governance paradigm being reappropriated in Vietnam today so as to enable the conflation of nationalism, moralism and legalism.

Democratic centralism A concept that accompanies socialist political thought and socialist legality requiring that all

In theory, retained as a political doctrine to deliver accountability and consistency to Vietnamese laws and

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168 This analogy cannot be taken too far as what the Western liberal natural law theorists holds as universally ‘good’ differs from the qualities and features valued by socialist morality and legality. For a discussion of Western liberal natural law theorists see Margaret Davies (1994) Asking the Law Question, Sydney: The Law Book Company, Chapter 3.


| Role of State institutions: courts | The Party leads, the state administers or manages and the people represent. In this formulation the courts exist to give effect to Party leadership whether the relevant doctrine is in policy or law. There is no separation of powers. The courts are instruments of the Party-state. | The Party leads, the state administers and the people represent is retained as an operational plan. However, the administrative function is linked explicitly to the legal function and ideally policy is not implemented until it is law, except to the extent that it is drawn upon to explain and interpret law. While there is no separation of powers, there is to be greater separation of functions among the management organs of the State. The courts are an increasingly self-managed institution while continuing under the leadership of the Party-state and implementing the law. Due process is characterised as a significant feature of the newly emerging law-based state. |

| Role of the Party – implicit in many of the categories above | The Party is the sole force leading the country and legal institutions exist to give effect to its political leadership of the people, for the people and by the people. The Party exists effectively | The Party retains its leading role in political affairs, but the administrative arm of the State is to have more autonomy to implement Party leadership. |

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Collective rights | Best captured in the doctrine of collective mastery. Collective mastery does not strain socialist legality. It preserves the dominance of the Party-state over the individual, by doctrinally positioning the Party-State as working on behalf of the worker-peasant alliance. | It is unclear how collective mastery and socialist law-based state can be reconciled. However, collective rights retain their prominent place in socialist-law based state by virtue of the continued leadership of the Party to give effect to the collective will.  

| Individual rights | Individual rights will always be subservient to the collective interest. 174 | Individual rights remain secondary to the collective interest. 175 However, it is officially recognised that individuals have rights to trade and profit not previously held and that the collective interest must be exercised in a more transparent manner. |

This analysis demonstrates that whereas socialist legality sees law and legal institutions existing to give effect to a socialist conception of a Party-led State, the law-based state (or at least its socialist variant) envisages a shift from an instrumental role for law (and courts) to a situation where law exists to regulate social relations and where legal institutions are increasingly self-managed, although within the auspices of Party leadership. Law-based state does not posit state institutions as autonomous of Party influence, rather it reconfigures Party influence. The Party remains as the dominant influence, mediated by an ancillary set of duties to the law. Yet as we shall see this remains more fluent in the abstract than it does in practice.
4 Resolution 8 and Legal Theory

Returning to Resolution 8 we see that the reforms affecting courts can be summarised as follows:

1. increase the role of the SPC in the management of lower courts;
2. give the SPC power to appoint judges;
3. increase the technical competency of judges;
4. increase the public’s knowledge of the work of courts;
5. increase the role of lawyers/prosecution in court advocacy; and
6. investigate the role and function of: administrative court, family court, people’s assessors, death penalty, state sovereignty legal practice and international cooperation.

The central tenet of Vietnamese jurisprudence (or political-legal theory) has moved from socialist legality to the emerging conception of law-based state. The core feature of the law-based state is its attempt to characterise the law as a phenomenon that binds the State. However, the law is always subject to interpretation and thus what is drawn upon to determine its meaning might be law or policy that has not yet been nor may never be enacted.

In Vietnam, the notion of law-based state does not sit alone, but is accompanied by other legal doctrines, in particular, collective mastery and democratic centralism, each of which, while dynamic, also affords continuity with Vietnam’s legal history. Yet neither of these doctrines have been fundamentally revisited or rejected since the reconceptualising of the state as ‘law-based’.

Resolution 8 appears largely to give practical effect to recent Vietnamese theorising. Its most significant changes potentially enable the courts to manage their own staff, professional development and guidelines. In other words, as a legal institution, the courts are uncoupled from the executive arm of the State and given autonomy to implement Party direction. This is evident in the SPC’s greater control over budgets and staff selection and the project of developing a trained, technically competent judiciary.

Yet as noted in both Resolution 8 and the shift to law-based state the Vietnamese leadership does not countenance a diminishing role for the Party. The Party retains a very tight grip on who will be appointed by the SPC to lower courts. In particular, no judicial appointee can take office without a letter in support from the Party cell of the court to which application was made, nor without producing a political knowledge certificate from the Party’s central training school. These requirements ensure that local and central

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178 Ibid.
branches of the Party vet all judicial candidates. Further, every appointment is revisited every five years. Without security of tenure it is very unlikely that judges will ignore Party direction generally or in particular cases.

The areas that Resolution 8 nominates for further investigation indicate that the Party-State either does not have a comprehensive blue-print for legal change or wishes to see legal changes introduced incrementally. In particular, it is currently too difficult to reformulate the role of people’s assessors and the Administrative Court in a State where the mass line and Party leadership have not been abandoned. Put another way the Party leadership is not prepared to remove lay representatives from trials (although they have gone from the SPC) and the greater review of administrative decisions. Each of these reforms could potentially see the Party’s leadership diminished.

By avoiding reforms to the system of people’s assessors and administrative review, the leadership of the Party and its claims to representing the ‘masses’ via democratic centralism and collective mastery are left largely intact. Arguably this reflects their connection with the socialist/collective and popular notions of justice. For example, it may be difficult for a socialist State which introduced people’s assessors to democratise and popularise the law and the courts to remove them. Therefore potential people’s assessors reforms (such as better training or even abolition) are not yet implemented despite criticism of their lack of technical competence by lawyers. Instead, their role is to be ‘investigated’. In a similar vein, widening the scope of administrative review could threaten the leadership of the Party as it could enable challenges to the Party-bureaucracy’s discretionary decision-making. Again, rather than challenge the leadership of the Party by expanding review of administrative action, this debate is left for another day.

While the notion of law-based state is not entirely consistent with either democratic centralism or collective mastery, precisely because it envisages the Party-State being bound by law and not able to respond as directly as now to pressures and policies from the Party and State, this conflict has not been taken up on Resolution 8. Yet again Resolution 8 appears consistent with Vietnamese theoretical understandings of law where this tension is not widely debated.

Finally, Resolution 8 specifically promotes the role of the lawyer in the emerging law-based state. The socialist law-based state implicitly requires a repositioning of lawyers as it is consistent with a move from political discretion to law-based decision making. Yet it appears on the face of it that an active private legal profession could challenge the Party-State’s hold on the synergies between Vietnamese legal theory and policy review. Potentially an activist group of lawyers could push to see legalisation of institutions and practices in Vietnam which could fracture the delicate balance between socialist conceptions of law and justice and institutional renovation currently in

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179 This comment is not intended to detract from the very great pace of legal change in Vietnam since the adoption of the renovation (doi moi) policy.
place. Only time will tell whether the nascent Vietnamese legal profession will act as a catalyst for more dramatic legal change or whether they will work closely with the Party-State further to reshape Vietnam’s legal system.

This paper commenced by asking whether the latest VCP policy statement on ‘judicial reform’ reflected contemporary Vietnamese legal theory. As we have seen, in the main it does. The orientation of Resolution 8 accords with the emerging doctrine of law-based state. More particularly, we have seen that the policy direction for courts, that they be self-managed, bound by law and also implementing law echoes the notion of a Vietnamese state based on law. At the same time, both the policy paper and the doctrine of ‘law-based state’ assume the continuing supremacy and leadership of the Communist Party of Vietnam. In conclusion, Resolution 8 appears largely consistent with Vietnamese jurisprudence. It reflects Vietnam’s adoption of the socialist law-based state while containing the same ambiguities evident in legal theory about the role and place of the masses and Party-State leadership.

This paper also raised a larger question at the outset: namely the extent to which Vietnam has conceived of the role and place of law in post doi moi Vietnam. While it is harder to answer this question solely on the basis of an analysis of one, albeit major, recent policy, it appears that the Party-State has adopted cautious incrementalism and experimentalism in its reshaping of law and legal institutions. Vietnamese pragmatism is once again evident.
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