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John Gillespie

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THE ROLE OF THE BUREAUCRACY IN MANAGING URBAN LAND IN VIETNAM

John Gillespie†

Abstract: In recent years, the Vietnamese government has opened up its economy to both domestic and foreign private investors. In the construction industry, however, developers must contend with a legal environment fraught with contradictions and idiosyncrasies. The industry is one marked by the subordination of law—widespread patronage, party policy, and traditional customs. While property rights superficially resemble those in Western states, ownership and development are in theory strictly controlled by the central government. But paradoxically, the level of compliance with property laws is substantially lower in Vietnam than in the West. Noncompliance with property laws and building regulations is perpetuated by municipal authorities, private investors, and the central bureaucracy itself. Many factors contribute to this widespread noncompliance including the lack of administrative accountability, Vietnam's traditional non-legalistic culture, and the absence of incentives for people to comply. Nevertheless, compliance may be improved by taking a decentralized approach to enforcement which includes, *inter alia*, educating people about the law, integrating the public in developing planning schemes, disciplining corrupt officials, promoting capable officials, and improving the writing and availability of the law.

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† Senior Lecturer, Law School, Deakin University, Melbourne, Australia; Barrister and Solicitor, Victoria; LL.M., B.Sc., Monash. The author gratefully acknowledges the generous assistance provided by numerous Vietnamese officials, academics and lawyers.

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I. INTRODUCTION

After years of central planning, the Vietnamese Government is now actively encouraging its citizens and foreigners to rebuild and renovate urban centers.¹ At the same time, a partial relaxation of strict internal migration rules and a growing class of urban rich² are generating a building boom³ in Vietnam's major cities. Construction is the country's fastest growing industry.⁴

Private development must, however, contend with a legal environment in which "[l]and is the property of the people, and is subject to exclusive administration by the state."⁵ Since 1993, the *Law on Land* has allowed households and individuals⁶ to enjoy rights over residential land that superficially resemble those conveyed by Western fee simple estates. Land used for commercial purposes, by contrast, is not so freely exchanged. The state continues to closely manage land rights, but paradoxically, the level of compliance with positive planning and construction law is manifestly lower in Vietnam than in the West. This Article explores these contradictions, focusing upon the role of the bureaucracy in managing residential and commercial development.

The discussion is divided into four parts. Part II surveys the history of land management in Vietnam. Part III argues that the contemporary legal geography of Vietnam is composed of different types of land control that intersect and lie outside of state land laws. Part IV examines the nature of land management and why formal rules seldom seem to work as intended.

¹ See *Build Your Own Houses, Says Minister*, VIETNAM INVESTMENT REV., Mar. 7, 1994, at 21. City authorities in Ho Chi Minh City and Hanoi predict that these cities will double in size by the year 2010.

² See Tran Phuc Thang, *Tendencies of Change in the Vietnamese Social and Class Structure in the Present Transitional Period*, [1994] 2 VIETNAM SOC. SCI. 3, 5-8; Nguyen Tri Dung, *Urbanisation and Polarisation*, VIETNAM INVESTMENT REV., June 20, 1994, at 16.

³ After two years of boom development, the rate of residential development has recently slowed to sustainable levels. *Real Estate Market Cools*, VIETNAM INVESTMENT REV., Apr. 26, 1993, at 1; Nguyen Van Phu, *New Wave of Land Regulations Threatens to Drown Property Market*, VIETNAM INVESTMENT REV., Sept. 12, 1994, at 18; To Ngoc Doanh, *Race For Real Estate Grinds into a Lower Speed*, VIETNAM INVESTMENT REV., Sept. 26, 1994, at 17.

⁴ Growth rates reached 36% per annum in 1994. See Dao Le Minh, *Vietnam's Prospects of Economic Growth*, VIETNAM ECON. REV., June 1995, at 3.

⁵ *Law on Land*, art. 1 (1993) (Vietnam). It is interesting to compare law reform in former communist countries such as Russia where land may now be privately owned. According to Russia's Presidential Edict of Oct. 27, 1993, which came into force when it was published on October 28, 1993, citizens and juridical persons may buy, sell, bequeath, give, mortgage, lease, and exchange land.

⁶ *Law on Land*, art. 3(2) (1993) (Vietnam). "Any householder or individual shall have the right to exchange, transfer, rent, inherit or mortgage the right to use land allocated by the State." *Id.*

Finally, Part V concludes that, contrary to the current policy that centralizes legal authority, compliance with planning and construction laws may be enhanced by a less instrumental, decentralized approach to enforcement.⁷

II. A BRIEF HISTORY OF LAND MANAGEMENT

A. *The Pre-Colonial Period*

Prior to French colonization, village planning and construction was guided by custom and the wishes of the local Council of Notables as opposed to abstract laws or imperial bureaucratic instrumentalities. Neither customary rules nor imperial patrimony contemplated individual, private legal rights.⁸ Social relations at the village level were guided by customary rules⁹ embedded in an oral and written tradition derived from a syncretistic mix of neo-Confucian, Taoist and animistic beliefs.¹⁰ Customary rights over land could only imperfectly be described in terms of ownership, as the village and family controlled its allocation and use.¹¹ Rural communities rewarded the investment of labor and capital by recognizing family attach-

⁷ Most of the information upon which the author has relied comes from Communist Party of Vietnam ("CPV") policy, legislation, and interviews with law makers and administrators. The author has been researching the laws of Vietnam since 1989, but this article only cites interviews conducted within the previous two years.

⁸ See John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 STAN. J. INT'L L. 325, 326-29 (1994).

⁹ In an idealized customary society, social regulation, punishment, and dispute resolution are based upon the internalized norms and traditions of an organic community, sometimes called *gemeinschaft* (community). See F. TÖNNIES, *COMMUNITY AND SOCIETY* 12-29 (C.P. Loomis trans., 1957). In traditional societies, personal obligations are a function of race, sex, caste, and religion, and are overwhelmingly concerned with the distribution of obligations between persons of different status. In general terms, status systems tend to limit the initiative of individuals, subordinating private rights to the overriding objective of preserving harmony within the community. The differentiation of legal systems according to their degree of rationality was explored by Sir Henry Maine in his celebrated discussion on status and contract systems. See HENRY MAINE, *ANCIENT LAW* 179-215 (1917); MAX WEBER, *ECONOMY AND SOCIETY* 668 (G. Roth & C. Wittich eds., 1978); David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 729-39.

¹⁰ See O. Walters, *Assertions of Cultural Well-being in Vietnam*, 10 J. SOUTHEAST ASIAN STUD. 435, 442-43 (1979); D. MARR, *VIETNAMESE ANTI-COLONIALISM* 20 (1971); L. Cadere, *Religious Beliefs and Practices of the Vietnamese*, 33 BULLETINE DE LA SOCIÉTÉ DES ÉTUDES INDOCHINOISES 1-23 (I. Mabbett trans., 1958) (Working Paper 60, Centre for Southeast Asian Studies, Monash U. (Melbourne)); Do Thai Dong, *Modifications of the Traditional Family in the South of Vietnam*, [1993] 3 VIETNAM SOC. SCI. 77, 80-81.

¹¹ See Minh Quang Dao, *History of Land Tenure in Pre-1954 Vietnam*, 23 J. CONTEMP. ASIA 84, 85-87 (1993); J. Adams & N. Hancock, *Land and Economy in Traditional Vietnam*, 1 J. SOUTHEAST ASIAN STUD. 90, 92-93 (1970); Phan Huy Le, *The Vietnamese Traditional Village Historical Evolution and Socio-Economic Structure*, [1991] 1 VIETNAM SOC. SCI. 38, 38-43.

ment to land. Each village also had its own communal property which was routinely allocated amongst villagers for cultivation. The village headman, appointed by villagers according to criteria determined by the Emperor,¹² collected a proportion of the harvest from communal land to support a public works program and pay taxes to the empire.¹³ Because the central government dealt with the village and not with its constituent members, the village unit behaved as a corporate entity. Where it fulfilled its obligations, the village and its members were left to govern themselves.¹⁴ As a semi-autonomous administrative unit, the cult of the village guardian spirit symbolized "the history, customs, ethics, legal code and common aspirations of the entire village."¹⁵ As a consequence, although rights in land were distributed between family members or clan groups, a strong community interest prevailed over land dealings. External abstract laws¹⁶ and their superintendent officials had little role to play, since land was personalized and had not become a marketable commodity.

Customary rules coexisted with an imperial patrimony.¹⁷ Emperors, assisted by a strong mandarin bureaucratic administration, regulated social order and taxation. Organized authority only interacted vertically, from the state to the family, and it completely disregarded horizontal relationships between families.¹⁸ Families in turn regulated the behavior of their members, and were accordingly held collectively responsible for the wrong

¹² See generally N. WIEGERSMA, VIETNAM: PEASANT LAND, PEASANT REVOLUTION ch. 5 (1988); Phan Huy Le, *supra* note 11, at 39-42.

¹³ Lê Code (1428-1788), arts. 342-387; see John Whitmore, *Social Organisation and Confucian Thought in Vietnam*, 15 J. SOUTHEAST ASIAN STUD. 296, 301 (1984).

¹⁴ NEIL JAMIESON, UNDERSTANDING VIETNAM 29-30 (1993).

¹⁵ JAMIESON, *supra* note 14, at 29 (quoting DAO DUY ANH, VIET NAM HOA SO CUONG [AN OUTLINE OF VIETNAMESE CULTURE] (1951)).

¹⁶ See generally Dana Sachs, *Law—the Centerpiece of an Open Door Policy*, VIETNAM INVESTMENT REV., Nov. 1, 1993, at 14.

¹⁷ The term patrimony is used to describe a society controlled by the personal authority of a political leadership, where the ruling elite and their officials are given considerable latitude to manage the affairs of the public. In such a society, plurality of political views has no place since the ruling elite is the exclusive source of political and ethical standards. All officials draw their authority from this source. This form of leadership may be charismatic, but in Vietnam such domination was accepted merely because it was long established. See generally MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANISATION 358-68, 378-81 (1964); E. Finer, *Problems of the Liberal Democratic State: An Historical Overview*, 25 GOV'T & OPPOSITION 3, 335, 336-42 (1990).

¹⁸ To a limited extent, the Vietnamese imperial codes protected some private rights in land. Land owners were compensated for unauthorized government appropriations, private encroachment (by shifting boundary markers), or fraudulent sale. See TA VAN TAI & NGUYEN NGOC HUY, I THE LÊ CODE: LAW IN TRADITIONAL VIETNAM, A COMPARATIVE SINO-VIETNAMESE LEGAL STUDY WITH HISTORICAL AND JURISDICTIONAL ANALYSIS AND ANNOTATIONS 77-78 (1987); P. HUARD & M. DURAND, VIETNAM CIVILISATION AND CULTURE 147-49 (Vu Thien Kim trans., n.d.).

doing of miscreants.¹⁹ Unless they threatened tax collection or social order, the two pre-occupations of imperial rule, private land transactions escaped official attention.²⁰ As the central administration depended upon personal and land taxes for revenue, village communal land and family land was surveyed and recorded in periodic cadastral surveys. Tax collection required a quite elaborate central administrative system to register plots of land. Village officials, answerable to the Council of Notables,²¹ registered the name of each male member of village families; outsiders were only rarely allowed to assume full membership of a village. In theory, all land was owned by the state; in practice, in return for taxes, villagers were given land use rights that were sufficiently comprehensive to be regarded as "ownership."²² In practice, however, imperial patrimony never directly governed²³ the lower classes, but rather allowed land development at the village level to be guided by internal organic customary rules that had as much to do with mysticism as pragmatic economic considerations such as access to water, labor and communal land.²⁴

B. *French Colonial Law*

When the French colonized Cochinchina (1867) and annexed Annam and Tonkin (1884) they introduced a rights-based, rational²⁵ legal

¹⁹ See TA VAN TAI, *THE VIETNAMESE TRADITION OF HUMAN RIGHTS* 93-94, 217-18 (1988).

²⁰ The primary purpose of the Lê Code (1428-1788) for example, was to assist the orderly collection of taxation. See Ta Van Tai, *Vietnam's Code of the Lê Dynasty (1428-1788)*, 30 AM. J. COMP. L. 523, 523-30 (1982); Lan Quoc Nguyen, *Traditional Vietnamese Law—The Lê Code*, 13 HASTINGS INT'L COMP. L. REV. 141, 142-44 (1989).

²¹ See JAMIESON, *supra* note 14, at 29-33.

²² Ownership is, of course, a relative concept. In traditional Vietnam, no one had the right to let land lie fallow. If land was cultivated, taxes were levied by the village head acting as an intermediary for Imperial officials. See Adams & Hancock, *supra* note 11, at 90, 91; see also H. McAleary, *Diem in China and Vietnam*, 17 J. SOUTHEAST ASIAN STUD. 404, 408 (1985); Minh Quang Dao, *supra* note 11, at 84, 85; Phan Huy Le, *supra* note 11, at 39, 41.

²³ During the 19th century, village rules coexisted in a complex inter-relationship with the Nguyen Code (1813-1945). For example, owners of land could lose legal protection of their right to occupancy if they failed to cultivate and inhabit land beyond a prescription period of 30 years (among relatives) or 20 years (among non-relatives). Lê Code art. 387. See TA VAN TAI, *supra* note 19, at 541-43. While the emperor had little rights of governance over family land, he retained effective control over one form of communal land (*cong dien*). Adams & Hancock, *supra* note 11, at 93-97.

²⁴ See Ngo Ba Thanh, *Vietnam's Integration into a New Humanist International Legal Order*, 1 VIETNAM L. & LEGAL F. 26, 26-28 (1994); Neil Jamieson, *Towards a Paradigm for Paradox: Observations on the Study of Social Organisation in Southeast Asia*, 15 J. SOUTHEAST ASIAN STUD. 320, 326-27 (1984); Adams & Hancock, *supra* note 11, at 92-93, 95-98.

²⁵ Rational legal principles displaced the authority of patrimonial hierarchies, transferring power to autonomous institutions that were founded upon and dispensed impersonal abstract law. It is the role of

system which regulated important social and economic issues through objective law in preference to customs and bureaucratic measures.²⁶ Under French civil law, the allocation and transfer of rights in land was governed by provisions that classified property into movables or immovables,²⁷ public and private. Because the law was the chief written record of governmental policy, implementation required a complex administrative and judicial system.²⁸

Whenever a land transaction concerned Europeans, or Vietnamese with French citizenship,²⁹ Vietnamese imperial and customary rules were excluded. The French Civil Code, applying to land occupied by French citizens and Europeans, was administered by the General Land Management Bureau and enforced by the courts.³⁰ Indigenous Vietnamese and *Asiatiques Assimiles* (Chinese) based their land transactions upon village custom³¹ and, in rare circumstances, the *Nguyen Code*.³² When the legal

law in this system to act as a comprehensive system of logically ordered and conceptually coherent doctrine that circumscribes the exercise of political and bureaucratic discretion. In theory, this is achieved by legally defining the boundaries that curb the exercise of state power, thus enabling institutions to protect private rights. See generally Finer, *supra* note 17, at 334, 335-43, 347-54; Roger Cotterrell, *The Law of Property and Legal Theory*, in LEGAL THEORY AND COMMON LAW 81, 81-98 (William Twining ed., 1986); M. HOOKER, A CONCISE LEGAL HISTORY OF SOUTHEAST ASIA 153-61 (1978) [hereinafter HOOKER, A CONCISE LEGAL HISTORY]; M. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS 232-35 (1975).

²⁶ See generally KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 78-80, 90-95 (Tony Weir ed., 2d ed. 1992).

²⁷ The manner of acquiring and losing property rights *in rem* and *in personam* formed the cornerstone of the French Civil Code. See C. Léwy, *The Code and Property*, in THE CODE NAPOLEON AND THE COMMON LAW WORLD 162, 170-76 (Bernard Schwartz ed., 1956).

²⁸ See HOOKER, A CONCISE LEGAL HISTORY, *supra* note 25.

²⁹ French law was not uniformly applied throughout Vietnam. In the South (Cochin-China), the Vietnamese could voluntarily elect to be bound by French law, but voluntary election was only possible in the center and the north in a narrow range of circumstances. Except in the case of inconsistency, the pre-colonial Vietnamese imperial codes were deemed to apply to the Vietnamese and Chinese, by virtue of Arrête, Chef Du Pouvoir Exécutif de la République Française, Aug. 23, 1871. Another difference between the south and the rest of the country was the widespread introduction of the Torrens law system of title by registration. This system appears not to have proceeded beyond major urban centers in the north by the time of the Geneva Conference of 1954. See HOOKER, A CONCISE LEGAL HISTORY, *supra* note 25, at 167-70; see generally M. MURRAY, THE DEVELOPMENT OF CAPITALISM IN THE HISTORY OF SOUTHEAST ASIA (1870-1940), at 160 (1980).

³⁰ See HOOKER, A CONCISE LEGAL HISTORY, *supra* note 25, at 155-61.

³¹ See Minh Quang Dao, *supra* note 11, at 84, 90-91; M. HOOKER, THE LAWS OF SOUTH-EAST ASIA 228-31 (1986).

³² Although land registers were established as early as 1092 (during the Ly Dynasty), the Nguyen Dynasty (1802-1945) established the strictest rules governing land registration. See Phan Hy Le, *Ancient Land Registers in Vietnam*, [1995] 2 VIETNAM SOC. SCI. 25, 25-28. The Nguyen Code, promulgated by Emperor Gia Long, was in effect from 1813 to 1945. HOOKER, THE LAWS OF SOUTH-EAST ASIA, *supra* note 31, at 441-42.

systems were in conflict, French law prevailed on the theory that rational rules must dominate and cannot coexist with competing legal systems.³³

When French rule came to an end in Vietnam in 1954,³⁴ the system of government and land regulation followed quite different paths in the Democratic Republic of Vietnam ("DRV") and the Republic of Vietnam ("RV"). The RV continued for the most part to apply French civil law, expanding the system of title by registration (Torren's Law)³⁵ and experimentation with land reform.³⁶

C. *The Socialist Legal System*

Despite incipient influence from the radical Maoist model of land reform,³⁷ the Vietnam Workers' Party ("VWP") and the DRV progressively turned to the Soviet Union for ideological and legal inspiration.³⁸ It was the leadership's intention to modernize the country in the shortest time possible. This program called for the methodical substitution of ancient customary rules, feudal land practices and colonial laws with "rational, progressive, socialist legislation."³⁹ In theory, the 1960 Constitution allowed peasants,⁴⁰ "handicraft men"⁴¹ and "national capitalists"⁴² to own land and other means of production. The reality was somewhat different.

³³ In the West, political legitimacy may be compromised where more than one legal system exists. Cf. HOOKER, A CONCISE LEGAL HISTORY, *supra* note 25, at 229-30 (on the diverse nature of Philippine law); WEBER, *supra* note 9, ch. 3; Steinberg, *Law, Development and Korean Society*, 3 J. COMP. ADMIN. 215, 219-22 (1971) (on the introduction of Western law in Korea).

³⁴ Agreements reached between France and the Viet Minh at the Geneva Conference July 1954 ended hostilities in Indochina and partitioned Vietnam along the 17th parallel.

³⁵ By a Decree of July 31, 1925 and an amendment Decree of Nov. 23, 1926, provisions of the Civil Code dealing with the transmission of rights in immovable property were introduced in both France and Cochinchina, Annam and Tonkin. The system of *Les Registres (Dia Bô)*, created indefeasibility of title, rendering inadmissible any action claiming a right not revealed in the proceedings leading up to registration of title. See HOOKER, A CONCISE LEGAL HISTORY, *supra* note 25, at 160.

³⁶ See Le Tai Trien, *Republic of Vietnam*, in NATIONAL REPORTS R19-R22 (Viktor Knapp ed., 1973).

³⁷ See VO NHAN TRI, VIETNAM'S ECONOMIC POLICIES SINCE 1975, at 9-13, 18 (1990).

³⁸ See George Ginsburgs, *The Genesis of the People's Procuracy in the Democratic Republic of Vietnam*, 5 REV. SOCIALIST L. 187 (1979).

³⁹ *Id.* at 195. Interestingly enough, Order No. 97 issued on May 22, 1950 by the President of State declared temporary retention of the old colonial laws, such as the civil land law of Tonkin (North Vietnam). This law only applied to the extent that colonial law was not detrimental to revolutionary reform. See Hoang The Lien, *On the Legal System of Vietnam*, 1 VIETNAM L. & LEGAL F. 33, 33-34 (1994).

⁴⁰ VIETNAM CONST. arts. 14, 19 (1960).

⁴¹ *Id.* art. 15.

⁴² *Id.* art. 16.

After first nationalizing and redistributing land that had belonged to the French, by 1960, the VWP had brought most peasant holdings under the cooperative system.⁴³ The village and countryside were the locus of this legal change. Although little more than a series of hortative principles, land reform legislation attempted, with mixed success, to supplant village customary practices which had survived Chinese and French annexation.⁴⁴ "In such villages, so long as the new socialist collectivities remained coincident with the older and socially meaningful boundaries of neighborhood, hamlet and village, the system worked after a fashion."⁴⁵ The *Land Reform Law* was promulgated in 1953 to reallocate urban land and housing and nationalize commercial property. By the time the post-reunification Constitution was enacted in 1980, no private rights in land or means of production were countenanced⁴⁶—not even in theory.

The system of government during this period differed significantly from those previously described. Although patrimony certainly existed, it alone does not adequately characterize the system of land management in DRV.⁴⁷ For example the law on elections to people's councils⁴⁸ was used to re-establish a system of local government that had been allowed to deteriorate during the French war.⁴⁹ The system of administration was headed at the central level by ministries, urban centers were led by city-level people's committees, and these were further subdivided into district-level people's committees. Rural communes and urban *Phuongs* were the smallest administrative units.⁵⁰

⁴³ See J. HAZARD, *COMMUNISTS AND THEIR LAW* 168 (1969). It was estimated that by 1960, 85.83% of peasant households had been brought into agricultural cooperatives.

⁴⁴ See E. Moise, *Land Reform and Land Reform Errors in North Vietnam*, 49 *Pacific Affairs* 70, 72 (1976). The author has sighted relevant laws, such as the Land Reform Law (Dec. 4, 1953) at the Ministry of Justice Information Center, Hanoi. The VWP was never entirely successful in collectivizing the economy in the North; a "free market," albeit on a limited scale, could never be brought under control. See Carlyle Thayer, *Political Development in Vietnam: From the Sixth to Seventh National Party Congress*, Discussion Paper Series No. 5, 15-16 (1992); Ginsburgs, *supra* note 38, at 195.

⁴⁵ JAMIESON, *supra* note 14, at 367.

⁴⁶ VIETNAM CONST. arts. 19-20 (1980).

⁴⁷ For example, the system of patrimony described by Weber applies more accurately to non-communist authoritarian regimes, such as Indonesia. See TODUNG MULYA LUBIS, *IN SEARCH OF HUMAN RIGHTS: LEGAL POLITICAL DILEMMAS OF INDONESIA'S NEW ORDER 1966-1990*, at 86-96 (1993); R. Liddle, *Soeharto's Indonesia: Personal Rule and Political Institutions*, 58 *PAC. AFF.* 68-90 (1985).

⁴⁸ Law No. 004 On Elections to People's Councils and Administrative Committees (July 20, 1957).

⁴⁹ See George Ginsburgs, *Local Government and Administration in the Democratic Republic of Vietnam Since 1954* (pt. 2), 14 *CHINA Q.* 195, 195-97 (1963).

⁵⁰ See VIETNAM CONST. arts. 6, 113, 114, 121 (1960).

The DRV's experimentation with socialist legality⁵¹ was often subverted when VWP cadre ignored formal rules, treating legal instruments as just one means of implementing party policy. The supremacy of policy over law allowed the VWP leadership a virtually unfettered ability to rule through administrative fiat.⁵²

There is reason for believing that the relationship between positive law and party patrimony was highly fluid. Laws, for example, were often not publicized and could be suspended by spontaneous, ad hoc intervention by the VWP⁵³ on the pretext of denouncing political opponents for alleged land reform infringements.⁵⁴ During this period, legal institutions created to support formal laws, such as the procuracy,⁵⁵ had little direct involvement in the legal system; courts⁵⁶ interpreted laws in accordance with party directives; and the Ministry of Justice was completely disbanded. Periodic campaigns to reinforce socialist legality apparently did little to raise the low priority given to the development and enforcement of law. Legal institutions were not strengthened until after reunification;⁵⁷ this process has accelerated since the policy of *Dôi Mới* (renovation)⁵⁸ was introduced by the Sixth Party Congress in 1986.

⁵¹ See VIETNAM CONST. arts. 12, 17 (1980). Socialist legality may be distinguished from the Western concept of rule of law (*Rechtsstaat*) as it is overwhelmingly concerned with social compliance and does not differentiate between the polity and the legal system. See also Resolution, Part VI, in F.B.I.S. DAILY REP. - E. ASIA 94-070, Apr. 12, 1994, at 75 (translating from Vietnamese text in SAIGON GIAI PHONG, Mar. 20, 1994 at 2); Vu Oanh, *Developing Combined Forces in Mass Motivation Work and Renovating the Work Content and Method of the Fatherland Front and Mass Organizations*, NHAN DAN [PEOPLE'S DAILY], Dec. 23, 1993, at 3 (in Vietnamese) [hereinafter NHAN DAN].

⁵² See Hoang The Lien, *supra* note 39, at 34. Cf. Carlyle Thayer, *Political Reform in Vietnam: Dôi Mới and the Emergence of Civil Society*, in CIVIL SOCIETY IN COMMUNIST SYSTEMS 110, 114-15 (Robert F. Miller ed., 1992) (describing the loosening of Party control and increasing support for observance of the law by the Party).

⁵³ Oskan Weggel, *The Vietnamese Communist Party and Its Status Under Law*, in RULING COMMUNIST PARTIES AND THEIR STATUS UNDER LAW 411, 412 (Dietrich Loeber ed., 1986).

⁵⁴ See C. White, *Mass Mobilisation and Ideological Transformation in the Vietnamese Land Reform Campaign*, 13 J. CONTEMP. ASIA 74, 77-81 (1983).

⁵⁵ See Ginsburgs, *The Genesis of The Peoples' Procuracy in the Democratic Republic of Vietnam*, *supra* note 38, at 188-91.

⁵⁶ See Weggel, *supra* note 53, at 413; Ginsburgs, *Local Government and Administration in the Democratic Republic of Vietnam Since 1954* (pt. 2), *supra* note 49, at 196.

⁵⁷ At the Fourth Party Congress, speakers emphasized the need to combat nihilistic views of law. Law enforcement was seen as a scientific method of liberalizing the economy and preventing unrest in the countryside. See Tan Teng Lang, *Economic Debates in Vietnam—Issues and Problems in Reconstruction and Development (1975-1984)*, Research Notes and Discussion Paper No. 55, Institute of Southeast Asian Studies 34-44 (1985).

⁵⁸ Although widely attributed to the watershed 6th Conference, 8th Plenum of the Communist Party of Vietnam, June 10-17, 1986, a progressive freeing of the centrally planned economy has been taking place since 1979. See M. Spoor, *State Finance in the Socialist Republic of Vietnam: The Difficult*

III. LAND USE REGIMES

A. *Three Systems of Land Use Control*

“[L]aw . . . is only one component of a large set of policy instruments and usually cannot [be] and is not used by itself.”⁵⁹ It is thus evident that land use control involves more than the mere formal application of the law. Indeed, at least three types of land control can be identified, but it is important to realize that they are in reality different facets of the same amorphous land regime. The three types are:

- (1) traditional land use (rural land that is regulated by traditional customary rules);
- (2) urban-traditional land use (the unofficial use of urban land according to modified customs to the possible exclusion of state prescribed rules); and
- (3) authorized land use substantially in compliance with state legislation (in theory, statutory rules apply to all land and are administered by state officials).

It should come as no surprise that in a society where status, party patrimony, and rational legal norms commingle, there are likely to be diverse forms of land control. Evidence of competing land use systems emerged when the usually docile National Assembly acrimoniously debated land tenure and personal rights during the enactment of the *Law on Land 1993*.⁶⁰

Transition from State Bureaucratic Finance to Socialist Economic Accounting, in POST-WAR VIETNAM, DILEMMAS IN SOCIALIST DEVELOPMENT 111 (David G. Marr & Christine Pelzer White eds., 1988). As first announced, the policy of *Đôì Môi* reserved for the state a dominant planning role, but deregulated prices and the state-owned industry sector. The subsequent 9th Communist Party of Vietnam Congress went further, restricting the state's role to that of overall economic planner and owner of key industries, and leaving the rest of the economy for mixed state and/or private ownership. See VO NHAN TRI, *supra* note 37, at 181-203; VIETNAM CONST. art. 26 (1992); Adam Fforde, *The Successful Commercialisation of a Neo-Stalinist Economic System—Vietnam 1979-89 with a postscript*, in ĐÔÌ MÔI: VIETNAM'S RENOVATION POLICY AND PERFORMANCE, Political and Social Change Monograph No. 14, 95 (K. Dean et al. eds., 1991).

⁵⁹ Yehezkel Dror, *Law as a Tool of Directed Social Change: A Framework for Policy-Making*, 13 AM. BEHAVIORAL SCIENTIST 553, 554 (1970); see also ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 196-200 (1992).

⁶⁰ See Murray Hiebert, *Land of Hope: Vietnam Gives Its Farmers Greater Security of Tenure*, FAR E. ECON. REV., July 29, 1993, at 5; NHAN DAN, July 2, 1993, at 1; Yen Hung, *Parliamentarians Simmer Over Land Debate*, VIETNAM INVESTMENT REV., July 12, 1993, at 9.

Reflecting the growing polarization, deputies of the National Assembly, for example, recently reopened discussion on whether the state or private sector should be the primary actor in the real estate market.⁶¹ This lack of consensus concerning land use control is demonstrated by other segments of society as well. Even in large urban centers, land development often proceeds as though there were no formal rules.

The current controversy concerning the construction of an eleven story office building overshadowing the historic Ho Chi Minh City People's Committee Town Hall is a case in point.⁶² Non-conforming land use comprises over seventy percent of all urban development in some areas.⁶³ Village resistance to central political and legal control is even more pronounced,⁶⁴ at times erupting into civil disobedience. In one incident, a group of people took control of their village in Nam Ba province, removed state officials, and established their own temporary de facto government.⁶⁵ Unauthorized land use and construction is invariably regarded by officials as lawlessness and a direct threat to state control.⁶⁶ The extent of non-compliance, however, suggests tensions in the legal geography of Vietnam's cities that cannot be easily explained by focusing exclusively upon issues of legality. Thus, it is important, particularly for those trained in common law, to avoid analyzing Vietnamese law as though it is differentiated from society.

⁶¹ The debate surfaced in the session dealing with the introduction of the Ordinance on Land Transfer Tax (1994). Nguyen Tri Dung, *National Assembly Debates Land Transfer Taxation*, VIETNAM INVESTMENT REV., June 6, 1994, at 2.

⁶² The Prime Minister Vo Van Kiet has suggested that if the high-rise disfigures the aesthetics of the Town Hall then the offending stories should be removed. *PM Seeks to Limit HCMC Highrises*, VIETNAM INVESTMENT REV., June 20, 1994, at 5; *contra* Yen Hung, *Prime Minister Yet to Decide on Fate of 11-Storey PDD Building*, VIETNAM INVESTMENT REV., Aug. 22, 1994, at 2.

⁶³ See generally *Chairman Closes Session 14 Jul.*, in F.B.I.S. DAILY REP. - E. ASIA 93-134, July 15, 1993, at 53, 54-55 [hereinafter Nong Duc Manh] (translation of speech by National Assembly Chairman Nong Duc Manh); Andy Solomon, *Now It Is Hanoi's Turn*, VIETNAM ECON. TIMES, June 1994, at 20-21.

⁶⁴ The head of the General Directorate on Land Management, Hanoi, reports that 70-80% of all land infringements have been committed by village and ward authorities. Yen Hung, *Draft Land Law to Be Put to the Test*, VIETNAM INVESTMENT REV., Apr. 12, 1993, at 2. As a Vietnamese saying has it, "royal ordinances are primed by commune customs": in many ways the Vietnamese commune existed, and to a degree still exists, as a state within a state operating according to its own administrative and customary rituals. See Ngo Ba Thanh, *The 1992 Constitution and The Rule of Law in Vietnam*, in VIETNAM AND THE RULE OF LAW, Political and Social Change Monograph 19, Austl. Nat'l U., 81, 83-87 (Carlyle Thayer & David Marr eds., 1993).

⁶⁵ See B. Kerkvliet, *Society and State Interactions in Vietnam's Rural Transformation* 13 (1993) (unpublished manuscript, Vietnam Update Conference, Austl. Nat'l U.).

⁶⁶ See *Vo Van Kiet, Speech at National Assembly Opening* (Hanoi Voice of Vietnam broadcast Dec. 6, 1993), in F.B.I.S. DAILY REP. - E. ASIA 93-235, Dec. 9, 1993, at 66; Nong Duc Manh, *supra* note 63, at 54-55.

B. *Traditional Land Use*

The term "traditional"⁶⁷ is usually reserved for the customs, psychology and religious beliefs of pre-colonial Vietnam. These norms, however, are more than a mere historical curiosity—they survived French colonization and socialist collectivization, changing and adapting in the process.⁶⁸

Traditional norms have not remained static; rather they have responded to and even developed a degree of interdependence with state-sponsored rules. For example, it is reported that in some rural areas the district people's committee may refuse to authorize land use right transfer without evidence of family consent. The *Marriage and Family Law* requires general consent between dual occupants before property held in common can be transferred or encumbered.⁶⁹ When determining whether transferors have made adequate provision for their families, local officials rely on customary norms which treat land as part of the social relations between people.⁷⁰

The state continues to prescribe what is or is not permissible; customary practices only appear to conform where expedient, developing their own parallel procedures in all other circumstances. Traditional land use may be temporarily suppressed, but recent history clearly demonstrates that as soon as incompatible laws are relaxed, customs rebound, albeit in a modified form.⁷¹ Although this phenomenon no doubt exists in all societies,⁷² it is arguably stronger in one like Vietnam where a rational rights-based legal

⁶⁷ The term "traditional" is often used to refer to that period of Vietnamese history prior to French colonization, when a long process of blending indigenous Vietnamese culture with Chinese and Southeast Asian influences had produced, at least in the North, a relatively homogeneous society. See generally JAMIESON, *supra* note 14, at 11-12 (describes, by implication, traditional values in terms of pre-colonial concepts, such as neo-Confucianism and yin-yang).

⁶⁸ See Do Thai Dong, *supra* note 10, at 85-89. See also Tuong Lai, *The Role of Individuality in Vietnam's Emerging Dynamism Amidst Recent Renovation*, [1993] 2 VIETNAM SOC. SCI. 10, 13-15 (examining, e.g., the special position of the family in oriental culture under the influence of Confucianism).

⁶⁹ Marriage and Family Law (1986), art. 15.

⁷⁰ Interview with Mai Xuan Yen, Chief Inspector, General Department of Land Management, in Hanoi, Vietnam (Jan. 28, 1994) [hereinafter Mai Xuan Yen Interview].

⁷¹ See Tuong Lai, *supra* note 68, at 10, 12.

⁷² The phenomenon is most pronounced when one country attempts to adopt cross-cultural laws. See generally ANN SEIDMAN & ROBERT SEIDMAN, *STATE AND LAW IN THE DEVELOPMENT PROCESS* 44-46 (1994).

system is unfamiliar to most people⁷³ and is arguably not particularly successful in guiding human behavior.⁷⁴

With the possible exception of remote pockets of *swiddening* (slash-and-burn farming),⁷⁵ agriculture is influenced to varying degrees by state law. Rural land policy is primarily driven by a desire to improve productivity and preserve social stability.⁷⁶ More recently, however, with the routine allotment of collectivized land for private use,⁷⁷ the influence of district people's committees over farm production has waned, allowing patriarchal village elders and farm organizations⁷⁸ room to fill the power vacuum.

Even at the height of collectivization, the state did not, and could not, control all aspects of peoples lives; this left customary values to fill the gaps. Village leaders now draw upon this syncretistic mix of social norms to develop community standards in diverse areas such as social welfare, criminal behavior, land control and dispute resolution.⁷⁹ However, the state notionally maintains exclusive control over all rights attached to land. The allotment of land and any change in use or occupation requires the consent of district-level people's committees⁸⁰ which administer regulations⁸¹

⁷³ See Gillespie, *supra* note 8, at 326-33.

⁷⁴ See *infra* part III.D.2-3.

⁷⁵ Swiddening has historically been less affected by formal regulations. See Murray Hiebert, *Dynamics of Despair*, FAR E. ECON. REV., Apr. 23, 1992, at 30-31; Nguyen Tan Duc, *The Village As the Highest Level of Social Organisation in the Central Highlands of Vietnam*, [1990] 2 VIETNAM SOC. SCI. 35, 36-40. For a more culturally sensitive policy, see Vo Quy, *Ethnic Minorities in Vietnam: Culture, Environment and Development*, [1995] 2 VIETNAM SOC. SCI. 84, 84-88.

⁷⁶ Interview with Phan Huu Chi, Director of Leadco, in Hanoi, Vietnam (Feb. 4 & 13, 1993 and Feb. 2, 1994) [hereinafter Phan Huu Chi Interview]. See also the debates by the national assembly in NHAN DAN, Mar. 20, 1992, at 2-3.

⁷⁷ Land used for rice production is allocated for a period of seven years, longer term crops for a period of 20. In some provinces, over 90% of rural land has been allotted. See Nguyen Qui Binh, *Real Estate Laws in Vietnam*, in VIETNAM AND THE RULE OF LAW, *supra* note 64, at 156-58; *Land Transferred to Farmers in 47 Provinces* (Hanoi VNA, Jan. 8, 1994), in F.B.I.S. DAILY REP. - E. ASIA 94-006, Jan. 10, 1994, at 55. One and a half million land use certificates have been granted to farmer households, representing 14% of all land designated for allotment.

⁷⁸ Do Thai Dong, *supra* note 10, at 77, 87; A. Ffordo & S. Seneque, *Vietnam—the Economy and the Countryside: Does Rural Development Policy Really Matter?* 27-29 (1993) (unpublished manuscript, Research School of Pacific Studies, Austl. Nat'l U.).

⁷⁹ See Tran Thi Van Anh, *Some Social and Institutional Changes in the Rural Area of Vietnam* 4-6 (1993) (unpublished manuscript, Vietnam Update Conference 1993, Austl. Nat'l U.). The state recognizes that the law does not have answers for all matters and is starting to encourage local resolution of neighborhood disputes. See Vu Oanh, *Great National Unity in the New Situation and Tasks* (NHAN DAN, Feb. 4, 1994, at 3-4), translated in F.B.I.S. DAILY REP. - E. ASIA 94-046, Mar. 9, 1994, at 57.

⁸⁰ Law on Land, arts. 20, 31 (1993).

passed pursuant to the *Law on Land 1993*. In short, land users look inwards at customary values for social guidance, and where possible avoid external, state land controls.⁸²

With a burgeoning rural population causing a huge demand for land,⁸³ the state has recently abandoned its relatively benign governance of traditional land use in favor of direct intervention. Minority assertion of customary rights over land directly conflicts with state laws that foster massive lowland immigration.⁸⁴ The redistribution of land to individual households has also tended to exacerbate long-standing tensions by fragmenting and personalizing competing claims for land.⁸⁵ The state's current policy contrasts with its former recognition that mastery over traditions, customs, and habits must rest with ethnic groups.⁸⁶

State intervention has taken three forms. In the first place, institutions have been created by legislation to manage forest preservation.⁸⁷ Secondly, district level People's Committees have initiated land management programs that offer direct assistance.⁸⁸ These programs resettle farmers outside of sensitive forest areas and retrain them to use intensive agricultural techniques. Authorities acknowledge that minority hill tribes have little experience with instrumentalist rule⁸⁹ and as a result have

⁸¹ See, e.g., Decree No. 64-CP, Regulations on Allocation of Land to Households and Individuals for Stable and Long Term Use for the Purpose of Agricultural Production, Office of Government, arts. 7-11 (Sept. 27, 1993).

⁸² Interview with Nguyen Khai, Deputy Chief of the Inspection Department, General Department of Land Management, in Hanoi, Vietnam (Sept. 9, 1994) [hereinafter Nguyen Khai Interview].

⁸³ For example, out of Gia Lia's (a highland province) current population of 720,000, about 200,000 have migrated from the lowlands since 1945. Murray Hiebert, *Travelling Trash: Vietnam's Environment Under Attack From All Quarters*, FAR E. ECON. REV., Feb. 3, 1994, available in WESTLAW, FEER Library; Nguyen Ngoc Lung, *Forests in Vietnam—Present and Future*, 33 VIETNAM COURIER, July 1992, at 10-11; GERALD HICKEY, FREE IN THE FOREST: ETHNO-HISTORY OF THE VIETNAMESE CENTRAL HIGHLANDS 1954-1976, at 287 (1982).

⁸⁴ Mai Xuan Yen Interview, *supra* note 70.

⁸⁵ See generally Grant Evans, *Internal Colonialism in the Central Highlands of Vietnam*, SOJOURN, Aug. 7, 1992, at 274-304.

⁸⁶ Shortly after Vietnam obtained independence from France, the DRV established autonomous ethnic minority zones; the state forbade local authorities from using administrative fiat and coercion as a means of engineering social change. See George Ginsburgs, *Local Government and Administration in the Democratic Republic of Vietnam Since 1954* (pt. 1), 12 CHINA Q. 211, 217 (1962).

⁸⁷ Law on Forest Protection and Development, arts. 8-12, 28, 29 (1991) (creating a system of dual administration by the Ministry of Forestry and the appropriate provincial, district level People's Committee; it should be noted that criminal penalties may apply for illegal logging or forest clearance). See Violating regulations concerning forest management and protection, PENAL CODE OF THE SOCIALIST REPUBLIC OF VIETNAM, art. 181 (1986) (amended 1992) [hereinafter PENAL CODE]; Law on Protection of the Environment, arts. 12, 29(1) (1994) (forbidding the lighting of forest fires).

⁸⁸ Law on Forest Protection and Development, art. 21 (1991).

⁸⁹ Phan Huu Chi Interview, *supra* note 76.

adopted a policy of direct administrative intervention in preference to guidance through formal rules. In any event, enforcement bodies are chronically understaffed and are consequently unable to enforce prescriptive regulations.⁹⁰ Even if more resources were available to monitor compliance, *swiddening* farmers are among the poorest in a poor country and probably possess insufficient resources to survive the transition to intensive agriculture unaided by the state. Thirdly, in an attempt to inculcate state policy⁹¹ on forest protection, a program of practical and moral education is carried out by mass organizations and party branches.⁹² The Legal Research Institute attached to the Ministry of Justice, for example, translated segments of the *Law on Land 1993* and *Law on Forest Protection and Development 1991* into local dialects, using poetry and song to communicate the law in a culturally appropriate manner.⁹³

C. *Urban-Traditional Land Use*

Traditional land use practices are not confined to the countryside and intermingle with urban values and legal practices, creating what has been termed urban-traditional land use. There is no clear demarcation between urban-traditional land use and noncompliance with authorized land use. These concepts overlap in at least three ways. First, people may have a relationship with land that falls within both categories. For example, land is often lawfully acquired, later to be improved with an illegally constructed house. Second, the mechanical trappings of legality may be satisfied even though the land transaction is infused with rights and duties that are traditional in nature. Third, land records may not always clearly indicate whether land has been allotted for private purposes or remains under state management.⁹⁴ In this legal twilight, multiple notions of land use can

⁹⁰ See Hiebert, *Travelling Trash: Vietnam's Environment Under Attack From All Quarters*, *supra* note 83.

⁹¹ Mai Xuan Yen Interview, *supra* note 70. See VO VAN KIET, VIETNAM IN 1993 AND SOCIO-ECONOMIC PROSPECTS FOR 1994-1995, at 18-19 (1993).

⁹² See *Vo Van Kiet Meets the Giang Officials* (Hanoi Voice of Vietnam broadcast, Mar. 22, 1994), in F.B.I.S. DAILY REP. - E. ASIA 94-057, Mar. 24, 1994, at 42, 43.

⁹³ Interview with Hoan Lien, Vice Director, Legal Research Institute, in Hanoi, Vietnam (June 20, 1994).

⁹⁴ Even in urban areas cadastral maps may not accurately delineate land boundaries. See Nguyen Qui Binh, Recent Changes in Vietnam's Real Estate Laws 60, 66-67 (Nov. 8, 1993) (unpublished manuscript); Richard Browne, From Paddy Field to Province, in *Environment, State and Society in Asia: The Legacy of the Twentieth Century 19-20* (July 13-16, 1994) (unpublished manuscript, Murdoch University, Australia).

coexist. This does not mean that urban-traditional land use is merely illegal land use by another name, or conversely that all illegal land use is automatically urban-traditional in nature. On the contrary, where illegality is the norm and compliance a fringe phenomenon (such as on the outskirts of Hanoi⁹⁵ and Hue⁹⁶ where over seventy percent of houses are built on farm land that has been illegally sold), it is conceivable that a parallel land control regime coexists with the state system.⁹⁷ Legality is, of course, a relative concept and in a nation like Vietnam which lacks a well-defined rule of law, integrated legislation, and strong instrumental enforcement,⁹⁸ it is especially important to examine legitimacy from the perspective of the occupier as well as the bureaucracy.

The state's response to urban-traditional land use lacks cohesion. The Interior Ministry, for example, spasmodically enforces residency rules against transient squatters, thus denying unregistered rural workers an ability to earn a livelihood in urban centers.⁹⁹ A police campaign in Hanoi, for instance, has recently de-registered cyclo-drivers who have not obtained proper residency cards from the responsible district-level people's committees.¹⁰⁰ Enforcement appears to depend upon competing political considerations. Plentiful labor is required for the urban construction industry, but single male workers squat in building sites, park land, and state residential apartments, creating a perceived threat to civil order.

Long term illegal occupation and/or construction attracts a different response. It is true that Vietnam has so far avoided large squatter settlements that are an urban determinate in some large Southeast Asian cities.

⁹⁵ See Hai Thanh, *Rampant Illegal Construction Turning West Lake Suburb into Chaotic Sprawl*, VIETNAM INVESTMENT REV., Nov. 8, 1993, at 24. A survey shows that since the end of 1992, 150 of 170 new houses erected in an area on the outskirts of Hanoi were built without permits. *Id.*

⁹⁶ See NHAN DAN, Apr. 17, 1993.

⁹⁷ On the other hand, it cannot be said that the authorized legal system does not exist. Legal systems can exist even though the vast majority of the population abhors them and violates the law at every opportunity. See H.L.A. HART, *THE CONCEPT OF LAW* 109-14 (1961).

⁹⁸ See A. Wohlegemoth, *Socialism, Market and the Law in Vietnam*, VIETNAM NEWS, Dec. 25, 1992, at 8 (book review); *Orientalisms for the Building and Perfection of the Vietnam Socialist Republic State*, 1 VIETNAM L. & LEGAL F. 3, 4-5 (Mar. 1995).

⁹⁹ Interview with Duong Dang Hue, Deputy Director, Department of Civil and Economic Legislation, Ministry of Justice, in Hanoi, Vietnam (Jan. 17, 1994 and Feb. 3, 1994) [hereinafter Duong Dang Hue Interview]. See generally Paul Cleary, *Hanoi Tries to Drive Army of Job-Seekers off Streets*, AUSTL. FIN. REV., Mar. 29, 1995, at 10; Nguyen Tri Dung, *supra* note 2.

¹⁰⁰ Police rely on general public disorder or infringement of population registration papers provisions to prosecute offenders. See PENAL CODE, arts. 198, 211 (1986) (amended 1992) (Vietnam).

Strict internal travel rules¹⁰¹ have put a partial brake upon rural migration. Despite tight controls, the search for work and the lure of urban life is irresistible. Makeshift accommodation can be seen along the waterways,¹⁰² city fringe¹⁰³ of Ho Chi Minh City, and the banks of the Red River in Hanoi.¹⁰⁴ State housing also accommodates unauthorized rural migrants, causing one Hanoi planner to lament that without constant bureaucratic supervision, "the high-rise flats of 'socialism' are reversing back to being rural villages."¹⁰⁵ Almost by definition, official land law cannot apply to squatter settlements, since the Penal Code¹⁰⁶ declares this form of occupation unlawful.

Official management of development between the levee embankment and the Red River in eastern Hanoi is representative of the state's response to illegal occupation and construction. This area is flood-prone and has been reserved for park land in the *Master Plan Hanoi 2010*.¹⁰⁷ According to the *Master Plan*, residents will eventually be resettled and there is a ban on further construction and the sale of existing land use rights.¹⁰⁸ Not surprisingly, property values substantially decreased once the plan was made public. In order to minimize their loss, residents are selling their houses illegally to those seeking low-cost accommodation. Average land

¹⁰¹ Vietnam has a long tradition of household and work registration systems. Village heads policed migration and prevented peasant mobility. See Nguyen Ngoc Huy & Ta Van Tai, *The Vietnamese Texts, in 1 THE LAWS OF SOUTHEAST ASIA, THE PRE-MODERN TEXTS 464-69* (M. Hooker ed., 1986). Now, the Interior Ministry, through the police force, controls population movement. A resident of a rural district must have accommodation and a job before an urban people's committee is permitted to issue a residency permit. Interview with Nguyen Nhu Phat, Deputy Director, Center for Comparative Law, Institute of State and Law, in Hanoi, Vietnam (Feb. 1 & 3, 1993 and Sept. 27, 1994) [hereinafter Nguyen Nhu Phat].

¹⁰² Forty thousand shanty houses built along or near canals in Ho Chi Minh City are destined for eventual demolition, according to Ngo Xuan Loc, Minister for Construction. See *Build Your Own Houses, Says Minister, supra* note 1; *Housing Program Needs Much Support*, VIETNAM NEWS, Sept. 11, 1994, at 2.

¹⁰³ Illegal substandard houses are still being built on the former Go Vap Golf Course in Ho Chi Minh City. See Nguyen Ngoc Chinh, *City's Last Major Plot of Land: Golf Course or Park?*, VIETNAM INVESTMENT REV., May 30, 1994, at 9.

¹⁰⁴ Nguyen Tri Dung, *supra* note 2, at 16; Hong Sam, *City Leaders Check Frenzied Construction on Red River*, VIETNAM INVESTMENT REV., Feb. 13, 1995, at 3.

¹⁰⁵ *Residential Architecture and Construction by Individual Resident Investors*, 2 KIEN TRUC [VIETNAMESE ARCHITECTS ASS'N. MAG.] 17-22 (1991).

¹⁰⁶ See PENAL CODE, art. 214. Lawfulness is used here in the narrow sense of non-compliance with legislation, but it should be recognized that in a society with diverse and transitional forms of land use, one law cannot simultaneously address all levels of development with equal efficiency.

¹⁰⁷ The *Master Plan* was approved by the Office of Government as the overall plan for the development of Hanoi until the year 2010. *Hanoi Masterplan Gets Approval*, VIETNAM INVESTMENT REV., Feb. 13, 1995, at 26. See Nguyen Tri Dung, *Will Hanoi Masterplan Quell Construction Chaos?*, VIETNAM INVESTMENT REV., May 30, 1994, at 16.

¹⁰⁸ Interview with Nguyen Ngoc Khoi, Director, National Institute of Urban and Regional Planning, in Hanoi, Vietnam (Feb. 3, 1994 and Sept. 13, 1994) [hereinafter Nguyen Ngoc Khoi Interview].

prices are thought to be higher than government compensation¹⁰⁹ rates, but considerably less than the market value for land in comparable districts. The area is also attracting small substandard housing¹¹⁰ which is illegally constructed on previously unused land.

There is little point in trying to register an unlawful transaction. Official illegality, however, has not deterred residents from creating their own land tenure system, which documents occupation and transfer.¹¹¹ Occupants often use photocopies of official pro forma certificates of land use and house ownership documents for this purpose, even affixing official looking seals.¹¹² As purchasers are reportedly well aware that these documents are not "official,"¹¹³ there appears to be no overt deception; rather, ritual is used to dignify illegal transactions with the trappings of respectability. Public confidence in this unauthorized land use system is evinced by high levels of construction; indeed, in most respects, it is more attractive than the authorized land system. For example, transfer and land tax is avoided, there are no delays or costs associated with building approvals, and as banks rarely lend for domestic housing,¹¹⁴ the lack of access to official credit is not in practice a disadvantage. Moreover, with the exception of electricity, many rural and semi-rural houses have no access to government utilities, rendering the Government's threat to withhold the supply of utilities and sewage to illegal housing an ineffective deterrent.¹¹⁵ Reversing its aim of reducing population density by lowering the value of land, the

¹⁰⁹ The state must pay compensation for the compulsory acquisition of land use rights and lawfully owned improvements, but there is no statutory obligation to compensate at market value. See Law on Land, art. 28 (1993); Decree 90-CP, Compensation for Government Appropriation of Land, Office of Government (July 18, 1994). The actual quantum of compensation is set quite low; it is set forth in tables contained in Decree 87-CP, Stipulating Price List of Categories of Land, Office of Government, art. 4 (Aug. 17, 1994).

¹¹⁰ Nguyen Ngoc Khoi Interview, *supra* note 108; Interview with Ngo Trung Hai, Architect, National Institute for Urban and Regional Planning, in Hanoi, Vietnam (Feb. 3, 1994). Unlawful construction on state land also attracts criminal prosecution. See PENAL CODE, art. 214.

¹¹¹ See Nguyen Qui Binh, *supra* note 94; Yen Hung, *supra* note 62.

¹¹² Interview with Nguyen Lan, Chief Architect, Hanoi People's Committee, in Hanoi, Vietnam (July 1, 1994) [hereinafter Nguyen Lan Interview]. The author has personally sighted these documents.

¹¹³ Nguyen Ngoc Khoi Interview, *supra* note 108.

¹¹⁴ The Governor of the State Bank issued Decision No. 15/QD-NHI Promulgating Regulations on the Deposit of Savings for the Purpose of Housing Construction (Feb. 2, 1994). A borrower's funds must be held at a low rate of interest for twelve months before a loan can be issued; the rate of home lending has not recently increased. Nguyen Ngoc Khoi Interview, *supra* note 108; Ngo Trung Hai Interview, *supra* note 110.

¹¹⁵ Many illegal houses are unlawfully connected to the electricity supply, or legally share a party-meter. Interview with Phan Dinh Dai, Director, Dept. for Construction Management, in Hanoi, Vietnam (Feb. 5, 1994 and Sept. 16, 1994) [hereinafter Phan Dinh Dai Interview].

Master Plan has been directly responsible for increasing the pace of construction along the Red River.

A patchwork of non-conforming development has created an interesting social phenomenon all over Vietnam. Pockets of urban land, usually located on the city fringe where villagers are prepared to illegally sell land to developers, do not strictly adhere to traditional norms and at the same time lie outside of the authorized land regime. Seemingly undeterred by their precarious tenure, squatters and unauthorized developers continue to purchase and sell land. Without positive law to guide their behavior, they look to other norms embodying mutually recognizable, community standards to regulate neighborhood disputes and land transactions. Some form of social control is necessary for any community to function.

Commentators¹¹⁶ argue that these norms are based on village customs, modified for urban living. This view assumes that most law breakers are rural migrants. It is equally possible that urban traditional norms mimic land controls found in current legislation as well as those in the French Colonial and pre-colonial periods of the DRV. If this proposition is correct, laws are likely to have intermingled in such a way that urban-traditional norms vary between localities.¹¹⁷ Such a model is consistent with Vietnam's disparate history of land control¹¹⁸ and its highland-lowland, north-south¹¹⁹ geographical and cultural divide. It is unrealistic to expect the current land regime to harmonize centuries of provincialism, especially since the *Land Law* has only recently been enacted and remains largely undefined by subordinate legislation,¹²⁰ policy pronouncements, and academic commentary. An unknowable law is unlikely to attract support. In the meantime, unauthorized land use flourishes in an environment where mutual rights and obligations embedded in community norms are

¹¹⁶ Nguyen Lan Interview, *supra* note 112; Nguyen Ngoc Khoi Interview, *supra* note 108.

¹¹⁷ The author is unaware of any systematic research in this area and bases this postulation on conversations with many land officials and residents of Hanoi and Ho Chi Minh City.

¹¹⁸ See *supra* part II.

¹¹⁹ Do Thai Dong, *supra* note 10, at 77, 81, 87.

¹²⁰ The Law on Land was enacted in July 1993 and came into force October 15 of that year. To date, only a few supporting decrees have been enacted, for example, Decree No. 64-CP, On the Enactment of Regulations on the Allocation of Land to Households and Individuals for Stable and Long-time Use for the Purpose of Agricultural Production (Sept. 27, 1993); Decree No. 60-CP, Ownership of Residential Housing and Right to Use Land in Urban Areas (July 5, 1994); Decree No. 87-CP, Stipulating Price List of Categories of Land (Aug. 17, 1994); Decree No. 90-CP, Promulgating Regulations on Compensation upon the State Recovery of Land for the Purpose of National Defence, Security, National Interests, Public Interests (Aug. 17, 1994).

unsupported by state agencies. This is the phenomenon of urban-traditional land use.

Although a private system of transfer, construction, boundary demarcation, and dispute resolution has developed without much reference to the instrumental arms of the state, mass movements are active in these communities, and police haphazardly enforce residential registration laws.¹²¹ Otherwise, regulatory authorities,¹²² until recently, have not enforced laws that prohibit illegal construction and land transfer with much rigor.¹²³ Corruption and administrative inefficiency are the favored explanations for past inaction.¹²⁴ Official tolerance was undoubtedly also a factor; in a city suffering an acute housing shortage, the eviction of families and demolition of houses is likely to lead to homelessness.

A campaign coordinated by the Chief Architect's Office, the Hanoi People's Committee, and the Interior Ministry Police has, since the beginning of 1994, resulted in the demolition of over 120 illegal houses built along the banks of the Red River and West Lake in Hanoi.¹²⁵ More recently, in a highly publicized decision, the Prime Minister ordered the removal of illegal houses built on top of the Red River protection dike in Hanoi.¹²⁶ These demolitions represent only a tiny fraction of the tens of thousands of illegal buildings in Hanoi and are unlikely to send a sufficiently clear message to diminish the public's enthusiasm for urban-tradition land use unless they are followed up with consistent enforcement.

¹²¹ Phan Dinh Dai Interview, *supra* note 115.

¹²² District people's committee police do not interfere with illegal construction and property sales unless they are instructed by the responsible authorities, in this case, the city level people's committee of the Chief Architect's Office. Mai Xuan Yen Interview, *supra* note 70.

¹²³ Ordinance on Residential Housing, art. 12(1)(c) (1991) (restricting construction). As a final resort, Interior Ministry police may be requested by the responsible people's committee to take criminal action. PENAL CODE, arts. 180, 214; Law on Land, art. 6 (1993) (restricting land transfer).

¹²⁴ See generally Vo Van Kiet, *supra* note 66; Nguyen Tri Dung, *Construction Procedures: A Blueprint for Chaos*, VIETNAM INVESTMENT REV., May 23, 1994, at 16. See also *infra* part III.D.1-2.

¹²⁵ Interview with Ha Van Que, Assistant to the Chief Architect's Office, in Hanoi, Vietnam (Sept. 14, 1994) [hereinafter Ha Van Que Interview]; see, e.g., *No Permit No Project*, VIETNAM INVESTMENT REV., Sept. 26, 1994, at 1.

¹²⁶ Decision No. 158-TTg, Emergency Measures Against Acts of Violation of the Ordinance on Protection of Dikes in Hanoi (Mar. 16, 1995). See Ha Thang, *Dyke Homes Demolished*, VIETNAM INVESTMENT REV., Apr. 24, 1995, at 6 (seven state officials along with the Deputy Chief Architect were arrested and charged by Interior Ministry Police for allowing structures to be built along the dike; many were charged with violating with articles 220 and 221 of the Criminal Code).

D. Authorized Land Use

1. The Formal Administrative Structure

Most administrators, lawyers, and governments are familiar with land use under formal administrative structures. Such land use differs from other forms of land use because the relationship between individuals and land is defined by legislation, which is administered by state officials. DRV management policy rejected the colonial notion of inalienable private rights in favor of the socialist view¹²⁷ that private rights should be restricted for the public good.¹²⁸ This general premise¹²⁹ continues to underlie post-*Dôì Mói* legislation to the extent that all private occupiers of land borrow their rights from the state, and with the exception of agricultural workers, must pay an annual land tax as "rent."¹³⁰ Intended from the outset to be transitional, the useful life of the *Land Law 1988* was shortened by constitutional changes¹³¹ that recognized limited private rights.

The *Law on Land 1993* crystallized constitutional rights into legislation by codifying limited private rights to land use, transfer, and inheritance. It pays particular attention to rights in rural land¹³² without going so far as to allow outright ownership. These developments are important because security of tenure¹³³ and the right to transfer are fundamental to private sector development; they engender confidence, promote investment, and can assist efficient resource allocation.

¹²⁷ The Agrarian Law of 1952 (DRV) authorized the nationalization of land according to the class category of the owner. See generally E. Moise, *Land Reform and Land Errors in North Vietnam*, 49 PAC. AFF. 70, 70-73 (1976). During the period 1954-1987, a quasi-legal system of land management existed in the North, which was not supported by state authorized legislative instruments. See Nguyen Qui Binh, *supra* note 94, at 2.

¹²⁸ See Nguyen Ngoc Huy & Ta Van Tai, *supra* note 101, at 485.

¹²⁹ See generally Nguyen Van Phu, *Land Law*, VIETNAM INVESTMENT REV., Mar. 16, 1993, at 18.

¹³⁰ Ordinance on Residential Housing-Land Tax, arts. 2, 3 (June 29, 1991).

¹³¹ VIETNAM CONST. arts. 18, 58 (1992). The unexpected rapid increase in urbanization also contributed to the legislation's inappropriateness. See Nguyen Van Phu, *supra* note 129.

¹³² See *Chairman Closes Session* (Hanoi Voice of Vietnam broadcast, July 14, 1993), in F.B.I.S. DAILY REP. - E. ASIA 93-134, July 15, 1993, at 53-54; *Hoi Vu*, NHAN DAN, Apr. 20, 1993, at 3 (in Vietnamese); Dao Pham & Chinh Dinh Tran, *Twenty Seven QH Representatives Produced Interpretation of Land Law at Recent Assembly*, NHAN DAN, July 2, 1993, at 1 (in Vietnamese). It is also possible to own and lease buildings and improvements. See Ordinance on Residential Housing, arts. 15, 20, 21 (1991).

¹³³ Law on Land, art. 1 (1993).

Even though this legislation has created the basis for a normative legal regime, the right to manage land remains with the government.¹³⁴ Control is exercised by central-level ministries, in particular, the General Department of Land Management ("GDLM").¹³⁵ Provincial/city and district-level people's committees have been delegated considerable power to prepare land records, promulgate zoning and land use regulations,¹³⁶ allot and register land use rights,¹³⁷ recover lands, and settle land use disputes in their localities.¹³⁸

2. *The Nature of Land Use Rights*

Although not entitled to full ownership, private companies and individuals wishing to develop urban land¹³⁹ are entitled to various lesser interests in land. The highest of these is known as a land use right. Land use rights are not created equally. Many of their qualities, such as duration or ability to be transferred or bequeathed, depend upon the intended land use. Land allotted for domestic housing, for instance, exists for an unspecified period of time, perhaps in perpetuity,¹⁴⁰ provided that the state does not need to recover it for official purposes.¹⁴¹ A land tenure certificate issued by a people's committee may be freely transferred, bequeathed,¹⁴² or mortgaged,¹⁴³ and in most respects behaves much like a Western fee simple estate. Consequently, land use rights allotted for residential purposes, if not conveying factual ownership, at least entitle occupiers to a quite extensive right of disposition. In contrast, the right to land allotted for commercial

¹³⁴ Article 1 of the Law on Land gives the right of administration to the state. Article 8 stipulates that the government (central executive level of the state) shall administer land on behalf of the state.

¹³⁵ See Decree No. 34-CP On the Functions, Tasks, Power and Organisation of the General Administration of Land, Office of Government (Apr. 23, 1994).

¹³⁶ Law on Land, arts. 13-23 (1993); Decree No. 88-CP, On the Administration and Use of Urban Land, Office of Government (Aug. 17, 1994).

¹³⁷ Law on Land, art. 33(2) (1993).

¹³⁸ *Id.* art. 38.

¹³⁹ *Id.* art. 26.

¹⁴⁰ Land management authorities will not specify the exact duration of an urban land use right. However, unless an occupier infringes a provision of the law, or the land is resumed under compulsory acquisition, there is no legislative impediment to a perpetual duration. See Law on Land, arts. 3, 20, 73, 79 (1993).

¹⁴¹ Law on Land, art. 28 (1993).

¹⁴² *Id.* art. 3(2).

¹⁴³ *Id.* arts. 3(2), 77(2).

use, such as hotels, is of limited duration¹⁴⁴ and cannot be transferred without the approval of the Prime Minister and/or provincial/city level people's committee.¹⁴⁵

Land use rights are also shaped by the legal status of the occupier. Except for urban residential and forestry¹⁴⁶ land (where no legal distinction is made between the state, private corporations, and individuals/households), all land rights reflect the legal status of the occupier. For example, agricultural land is routinely allotted by district level people's committees to individuals and households,¹⁴⁷ whereas allotments made to private companies are strictly governed by criteria inserted into their business licenses.¹⁴⁸ Similarly, restrictive rules govern corporate use of urban land for non-residential purposes. Legal status also governs dispute resolution. All land disputes involving companies or organizations must be resolved by city/provincial rather than district people's committees.¹⁴⁹

3. *Conceptualizing Authorized Land Use*

a. *Towards a theory of state managed land*

Of the three coexisting and interwoven systems of land control in Vietnam, only authorized land use is governed by bureaucrats. This is not to suggest that the state does not attempt to control traditional and

¹⁴⁴ The duration of commercial land usage will be determined by people's committees, at the time of allotment; there are no specific legislative guidelines issued on this point to date. Mai Xuan Yen Interview, *supra* note 70; Nguyen Khai Interview, *supra* note 82.

¹⁴⁵ Lawmakers generally regard the transfer of land used for commercial purposes as a sale of a business. As there is no specific legislation on this point, regulations draw their authority by inference from Law on Private Enterprises, art. 15 (1990) and Law on Companies, art. 21 (1990) that business license transfer is not allowed without people's committee approval. If the land use was to change from a car to a soap factory, for example, a new land use right would need to be issued and the project would have to conform to local planning and environmental guidelines. See Duong Dang Hue Interview, *supra* note 99. See also Decree No. 191-CP Regulations on the Formation, Evaluations and Implementations of Direct Foreign Investment Projects, Prime Minister, arts. 2, 6, 7 (Dec. 28, 1994) (land is allotted to foreign investors strictly in accordance with the licensed business objectives of each individual project, and cannot be acquired for general, unspecified purposes).

¹⁴⁶ Decree 2-CP on Enactment of Regulations on the Allocation of Forestry Land to Organisations, Households and Individuals for Stable and Long Term Use for Forestry Purposes, Office of Government Regulations (Jan. 15, 1994).

¹⁴⁷ Decree No. 64-CP, art. 1 (1993).

¹⁴⁸ Nguyen Nhu Phat Interview, *supra* note 101; Interview with Nguyen Tien Lap, Chief Legal Officer, Investconsult, in Hanoi, Vietnam (Sept. 30, 1994). The administrative discretion to so govern the companies is provided by Circular No. 472 PLDSKT, Ministry of Justice, May 20, 1993, and Law on Land, arts. 2(1), 3(3), 56 (1993).

¹⁴⁹ Law on Land, art. 38 (1993).

urban-traditional land use. Responsible district level people's committees have made vigorous efforts to resettle *swiddening* farmers. Mass organizations and party branches are also used to exhort urban-traditional land users to conform with the law.¹⁵⁰ However, unless land falls within the authorized system, it escapes the complex administrative structure established by formal legislation.

In order to better understand authorized land use, it is necessary to first characterize the kinds of rights that are available to developers. It has been previously observed that the traditional Vietnamese concept of land can only imperfectly be described in terms of ownership. Kinship and village groupings controlled the distribution of land, in a way that did not give rise to individual property rights along the lines of European land tenure.¹⁵¹

Neo-Confucian subordination of the individual to the community¹⁵² was later appropriated to justify socialist collectivization and continues to underlie much land policy.¹⁵³ It is true that the government now favors an incremental recognition of private land rights.¹⁵⁴ But it is also true that private entitlements are not the focus of the system; they are merely a mechanism used to personalize control over domestic housing. Unlike Western land regimes,¹⁵⁵ Vietnamese land law fails to clearly delineate the boundaries between state and individual rights.

¹⁵⁰ Nguyen Ngoc Khoi Interview, *supra* note 108.

¹⁵¹ In this regard, traditional land use in Vietnam did not differ greatly from other Southeast Asian countries. David Lev described land rights in rural, pre-colonial Indonesia in the following terms: "Men do not generally say they have a right to do something or take something. It is impolite to talk about rights; it connotes selfishness, absoluteness, belligerency and unwillingness to compromise." David Lev, *Institutions and Legal Culture in Indonesia, in CULTURE AND POLITICS IN INDONESIA* 301 (1972). See Minh Quang Dao, *supra* note 11, at 84, 85-87. See also *supra* part II.A.

¹⁵² In rural society, there was no need for a large market as village units were largely self-sufficient. Each person was a member of a family or village and did not differentiate themselves from the community in a legal sense. See Tuong Lai, *supra* note 68, at 10, 13-14. For a detailed account of the effect of Confucian thought on the individual, see Robert Hegel, *An Exploration of the Chinese Literary Self, in EXPRESSION OF SELF IN CHINESE LITERATURE* 8-9 (R.E. Hegel & R.C. Hessney eds., 1985).

¹⁵³ At a widely attended Symposium, *Ownership in the Transitional Period*, held in Hanoi, Vietnam by the Institute of Marxism-Leninism (Oct. 25-26, 1989), it was concluded that ownership of land must continue to be more or less socialist in orientation. See Nguyen Thanh Cu, *Symposium on Ownership in the Transitional Period*, [1991] 1 *VIETNAM SOC. SCI.* 89, 92.

¹⁵⁴ See Gillespie, *supra* note 8, at 325, 338-41.

¹⁵⁵ See generally Cotterrell, *supra* note 25, at 81-98; cf. E. Mensch, *The History of Mainstream Legal Thought, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 18, 23-36 (David Cairns ed., 1982).

Developing this further, the conventional Western¹⁵⁶ construction of land rights as a bundle of entitlements enjoyed over land, dissolves in the face of state management in Vietnam. Vietnamese land entitlements emerge from a balancing process, where the state weighs individual needs against those of society. The broad administrative discretion delegated to people's committees¹⁵⁷ ensures that property rights remain blurred. This is particularly noticeable where land is allotted for commercial, rather than residential purposes. In short, the boundaries between newly emerging private property rights and public power are protean and fragile.

b. Social utility of land

Another dimension to the problem arises from the ongoing struggle between the public interest, as it is interpreted by the state, and individual rights. In Vietnam, factors such as the demand for land, the nature of the terrain, urban character, social utility, and above all else, the efficiency of exploitation, are evaluated by people's committees during the allotment process.¹⁵⁸ Put another way, private land rights exist by virtue of an administrative discretion which looks beyond individual needs to broader community interests. For example, an allotment may be taken back by the state not only where tenure expires or land is abandoned, but also where land is used for a purpose other than that for which it was allotted, the land area exceeds the stipulated area for each household,¹⁵⁹ or where duties contained in a Land Tenure Certificate or business permit are not followed.¹⁶⁰ These latter provisions in particular go well beyond the powers usually vested in Western land management officials.¹⁶¹

¹⁵⁶ This is not to suggest that rights in land in Western jurisdictions are absolute. Like Vietnam, Western nations reserve the power to compulsorily acquire or otherwise diminish private rights in land in the national interest, subject to a guarantee of compensation. The distinction is one of purpose. In the West, rights are created to delineate the boundaries between state and private interests, whereas in Vietnam, land rights are generated as mechanisms to facilitate state management of land.

¹⁵⁷ See Law on Land, art. 18 (1993). See also Gillespie, *supra* note 8, at 338-43, 350-56.

¹⁵⁸ See Decree No. 64-CP, art. 5(3) (1993).

¹⁵⁹ Decree No. 64-CP, art. 13 (1993).

¹⁶⁰ Law on Land, art. 26 (1993). For maximum residential areas, see Law on Land, art. 54 (1993) (generally, the amount of land allocated for residential purposes in rural areas is not to exceed 400 square meters).

¹⁶¹ Western land management officials are typically invested with town planning powers, and may determine land use within designated areas, but are not usually permitted to insert "covenants" setting out rights and duties in respect of individual allotments.

One of the principal aims of the *Law on Land 1993* is to enhance rural productivity, thereby alleviating poverty and increasing tax revenue.¹⁶² The state consequently highly values farming and commercial development¹⁶³ and fosters efficient exploitation of resources by closely supervising this type of land use. Take, for example, the vigorous campaign mounted by people's committees, mass organizations, and the party to reform inefficient *swiddening*. The high social utility attached to efficient farming techniques overrides local ethnic interests; farming land is strictly allotted and monitored by the state. The duration of an allotment coincides with the minimum time required to maximize production¹⁶⁴ and rights are forfeited where land lies idle for longer than twelve consecutive months.¹⁶⁵ Rice land is allocated for seven years for example, plantation and forestry land for forty and sixty years respectively.¹⁶⁶

Commercial land also enjoys a high social utility and it is accordingly allocated on a case-by-case basis reflecting the specific needs of the locality and the particular industry. A textile factory may receive a twenty year allotment, whereas a tourist development may require forty to fifty years to recoup investment and earn an appropriate return on capital.¹⁶⁷ Private

¹⁶² See Nguyen Tri Dung, *New Class of Rural Poor Tests the Limits of Reform*, VIETNAM INVESTMENT REV., June 27, 1994, at 8; Government of Western Australia and The Institute of Land Management Australia, *Feasibility Study On Vietnam Land Management System*, Report 2, 6-9 (July 1993) (unpublished report) [hereinafter *Feasibility Study*].

¹⁶³ See *Do Muoi Delivers Political Report (pt. 1)*, (Hanoi Voice of Vietnam broadcast, Jan. 20, 1994), in F.B.I.S. DAILY REP. - E. ASIA 94-014, Jan. 21, 1994, at 55-58; VO NHAN TRI, *supra* note 37, ch. 4 (describing agriculture, industry and handicrafts in the 1986-90 economic renovation).

¹⁶⁴ See Decree No. 64-CP, art. 3 (1993) (specifying principles according to which land is allocated).

¹⁶⁵ Law on Land, art. 26(3) (1993).

¹⁶⁶ Cf. *Regulations on Allocation of Land to Households and Individuals for Stable and Long Term Use for the Purpose of Agricultural Production* (issued with Decree 64-CP), Sept. 27, 1993, art. 4 (specifying allocation for certain uses and calculations for other allocations). The actual time limits are not published; they remain at the discretion of local officials. Mai Xuan Yen Interview, *supra* note 70. It should be noted that a maximum limit is also placed upon the surface area that can be allotted.

¹⁶⁷ All applications for commercial development of land must be accompanied by a pre-feasibility statement that sets out projected profits and losses for the first five years of production. These figures are then used by the relevant people's committee (in the case of small projects) and the Office of Government (for large projects) to calculate the time required to recoup investment. These authorities will then grant additional years according to a predetermined formula to allow the investor to generate profit. This figure is often determined by negotiation and is influenced by the social utility of the development. See, e.g., Instruction B, Guidance on Instructions for Construction Land Use Licences 601/KTS-TH, Chief Architect's Office, Hanoi People's Comm. (June 11, 1993). Legislation conveys administrative discretion, but within those wide parameters, bureaucrats determine land use duration and allotment criteria. Mai Xuan Yen Interview, *supra* note 70.

rights in land¹⁶⁸ are granted to ensure the following factors:

- the state maintains highest authority over land;
- land is developed in accordance with the market system and managed by the state;
- land is utilized in a rational manner in order to create convenient conditions for economic development and goods production;
- people are given a chance to do what they do best;
- the reorganization of the labor force can commence;
- land speculation may be stopped;
- legitimate rights and interests of land users can be protected; and
- production is stable and farmers can have land for production.¹⁶⁹

Thus, the concept of social utility as a basis for land allocation encompasses a broad range of criteria aimed at achieving specific state goals.

c. Land rights and collective ownership

The relationship between legislation and the status of individuals in Vietnamese society warrants closer examination, as it helps to explain state management of land. As previously discussed, land laws reflect an underlying belief that the good of society in general outweighs individual interests. This lack of an ideological commitment to the individual comes as much from neo-Confucian/Vietnamese village tradition¹⁷⁰ as from Marxism.¹⁷¹ Both doctrines suggest that individuals hold property subject to the performance of duties, not a few of them public. Unlike China, the socialist revolution in Vietnam did not radically reassess prevailing neo-Confucian norms.¹⁷² And the Western notion of individual rights, in legal theory being equal to state rights, has never found many adherents in Vietnam. Laws are seen as statements about duties that must be obeyed, and it is believed that

¹⁶⁸ Law on Land, arts. 73-78 (1993).

¹⁶⁹ Mai Xuan Yen, Land Price Policy (Sept. 15, 1994) (unpublished paper, presented at Conference on the Land System in Vietnam, Vietnam Chamber of Commerce and Industry).

¹⁷⁰ See Tuong Lai, *supra* note 68, at 10, 12; Do Thai Dong, *supra* note 10, at 77, 80-86; Jamieson, *supra* note 14, at 217-18, 283; Hegel, *supra* note 152, at 8-9.

¹⁷¹ *Individual and Collective*, in 4 MARXISM, COMMUNISM IN WESTERN SOCIETY 235-37 (C.D. Kernig ed., 1972).

¹⁷² See Tuong Lai, *supra* note 68, at 10, 12.

if only people were aware of their duties the legal system and society would function harmoniously.¹⁷³

The interaction between rights-based land laws and a society largely governed by conventions, habits, mores, and party ideology is complex and not particularly well understood.¹⁷⁴ Field researchers¹⁷⁵ are concerned about the consequences of introducing Western law, based upon atomistic individuality, into a culture where even in comparatively Westernized urban areas a person's identity tends to be fused with that of the family.

The problem manifests itself where the law requires people's commitments to allocate land use rights to individuals¹⁷⁶ or households.¹⁷⁷ Where land is granted to a household, the Certificate of Land Tenure is signed by the principal income provider—usually the oldest male. Despite research¹⁷⁸ which suggests that in some localities thirty to forty percent of households are supported by women, men are routinely granted legal rights to lease and mortgage land use rights in preference to women.

Allotment criteria tend to favor men. In rural areas, land distribution is based not only on the size of a household, but also on their capacity to farm efficiently.¹⁷⁹ Preference is also given to those without permanent

¹⁷³ Phan Huu Chi Interview, *supra* note 76; Interview with Nguyen Tran Bat, President Investconsult, in Hanoi, Vietnam (Jan. 20, 1994 and June 26, 1994) [hereinafter Nguyen Tran Bat Interview]. This view is similar to the injunction of Mencius that "if each man would love his parents and show due respect to his elders, the whole land would enjoy tranquillity." PHILIP CHEN, *LAW AND JUSTICE: THE LEGAL SYSTEM IN CHINA* 32 (1973).

¹⁷⁴ See Adam Fforde, *Law and Socialist Agricultural Development in Vietnam: The Statute for Agricultural Producer Cooperatives*, 10 REV. SOCIALIST L. 315, 315-19. This is a subject that has not been studied in great detail in Vietnam, but research elsewhere in Southeast Asia suggests that predictions based on cultural assumptions often prove to be wrong. See Stevens Maila, *The Fate of Women's Land Rights: Gender, Matriliney and Capitalism in Remban, Negeri Sembilan, Malaysia*, in *WOMEN, WORK AND IDEOLOGY IN THE THIRD WORLD* 3-9, 28-29 (Helen Atshar ed., 1985).

¹⁷⁵ For example, research conducted by Dr. Esta Ungar of the University of Western Australia, as the official historian to the UNDP Feasibility Study on Vietnam Land Management System, suggests that there is little acceptance of the notion that individuals are the locus of rights. UNDP - Working Paper Series VIE/91/004. A study of Vietnamese literature published between the 1930s and the socialist period suggests that only a small urban Western educated elite asserted their sense of self. See Cong Huyen Ton, *The Role of French Romanticism in the New Poetry Movement*, in *BORROWINGS AND ADAPTATIONS IN VIETNAMESE CULTURE* 52-62 (Truong Buu Lam ed., 1987).

¹⁷⁶ Law on Land, arts. 3, 20 (1993); Decree No. 64-CP, arts. 1, 3, 5(3) (1993).

¹⁷⁷ The term "household" is not defined in the Law on Land (1993), but the population census of 1989 included in this category all people with marriage or blood relationships, or who were being brought up by a family and shared a common fund of expenses and receipts. Households are issued a registration document which lists the number of members, heads of households, and relationship between members. This document has legal consequences as it defines the state's relationship to those listed as members. See Le Thi, *Women, Marriage, Family and Gender Equality*, [1993] 2 VIETNAM SOC. SCI. 21, 22.

¹⁷⁸ See Tran Thi Van Anh, *supra* note 79, at 8-9.

¹⁷⁹ See Decree 64-CP, art. 3 (1993).

resident status, the off-spring of local party cadre, state officials, or cadre and state officials on sick leave or early retirement.¹⁸⁰ In contrast, allocation in urban areas is theoretically determined according to the merit of business and/or building plans in addition to family needs.¹⁸¹ These commercial criteria once again describe aspects of social activity where women do not compete on an equal basis with men.¹⁸²

Community customs reserve a place for women as organizers of the household and workers of land,¹⁸³ providing some measure of security over land. These admittedly imperfect customary rights¹⁸⁴ may erode now that land allotment is increasingly regulated by objective laws that favor household decision makers and property controllers,¹⁸⁵ who are usually male. Customary practices are unlikely to change quickly, but it is plausible that eventually rights-based law will be internalized and integrated into customary norms. The status of women in the interim may be partially protected, or even enhanced, by the enactment of equal opportunity laws or appropriate amendments to the *Marriage and Family Law*.¹⁸⁶ Nevertheless, a danger remains that customary practices will weaken before state mandated safeguards are enacted, internalized, and obeyed.¹⁸⁷

¹⁸⁰ *Id.* arts. 7-8.

¹⁸¹ See Mai Xuan Yen Interview, *supra* note 70; Nguyen Khai Interview, *supra* note 82.

¹⁸² See Bui Thi Kim Quy, *Jobs for Women in Relation to Social Development and Family Happiness*, [1993] 3 VIETNAM SOC. SCI. 94, 96-98; Quan Doi, *Directive of the Central Committee Secretariat on Some Problems Concerning Women Cadre—Related Work in the New Situation*, in NHAN DAN, May 20, 1994, at 1-4 (in Vietnamese).

¹⁸³ Le Thi, *supra* note 177, at 30-33.

¹⁸⁴ See JAMIESON, *supra* note 14, at 18-19.

¹⁸⁵ See JAMIESON, *supra* note 14, at 18-19.

¹⁸⁶ Eliminating discrimination is not as simple as passing legislation. In the debate over the effectiveness of legislation as a tool of social change, the crudely instrumentalist view that legal change translates directly into social change has been discarded. See, e.g., L. Lustgarten, *Racial Inequality and the Limits of Law*, 49 MOD. L. REV. 68 (1986). The effect of law on actual practices is more correctly seen as a complex and unpredictable inter reaction. Nevertheless, there is some evidence that law can change people's values. One explanation for this phenomenon is that when people regard their beliefs and values as a lost cause, forbidden by law, they may abandon them in favor of state-sponsored rules. See William M. Evan, *Law as an Instrument of Social Change*, in THE SOCIOLOGY OF LAW 554-62 (William M. Evan ed., 1980); SEIDMAN & SEIDMAN, *supra* note 72, at 39-51.

¹⁸⁷ As a general principle, formal rules tend to be most persuasive where they act on rational commercial decisions such as property ownership, and least effective in modifying moral or aesthetic values. The literature in this area is extensive. See, e.g., Yehezkel Dror, *Law and Social Change*, 33 TULANE L. REV. 749 (1959); J. Morison, *How to Change Things with Rules*, in LAW, SOCIETY AND CHANGE 8-9 (S. Livingston & J. Morison eds., 1990).

d. *Instrumental problems with land law*

The *Law on Land 1993* is basically a set of broad hortative principles; it fails to provide detailed definitions, guidelines, or procedures. This would not matter if these concepts already existed in commercial practice, but as previously mentioned, Vietnam did not develop an indigenous rights-based land regime.¹⁸⁸ Compounding the problem, lawmakers have been slow to enact subordinate legislation that clearly defines allotment procedures, transfers, financing, and occupation rights. As Vietnam is rapidly changing from state management to a market-oriented economy, lawmakers cautiously identify social trends before committing themselves to legislation that might be unnecessarily restrictive or redundant.¹⁸⁹ In the interim, local authorities exercise a broad administrative discretion that is flexible enough to respond to emerging commercial and social practices, but is at the same time sufficiently authoritative to ensure that land use allotments, transfers, financing, and occupation rights conform to state policy. For example, it has already been noted that people's committees are required to take into account a number of broad criteria when allotting residential land. These factors include the social utility of the proposed land use in addition to personal needs such as the size of the household and whether it includes disabled veterans or the aged.¹⁹⁰ Within these wide parameters, people's committees are free to make decisions on unrelated policy factors governing the market value of real estate in the area, and the commercial need for goods or services, for example.¹⁹¹

Now that the command economy has been virtually dismantled while state institutions remain insufficiently developed to enable economic levers, such as taxation and interest rates, to operate efficiently,¹⁹² the state has

¹⁸⁸ See *supra* part II.A.

¹⁸⁹ Phan Huu Chi Interview, *supra* note 76; Mai Xuan Yen Interview, *supra* note 70; Interview with Phung Van Nghe, Planning Officer, General Department of Land Management, in Hanoi, Vietnam (Jan. 28, 1994).

¹⁹⁰ Law on Land, arts. 19, 20, 33, 54, 57, 59 (1993); Decree 64-CP, arts. 6-9 (1993); Mai Xuan Yen Interview, *supra* note 70; Nguyen Khai Interview, *supra* note 82.

¹⁹¹ Phan Huu Chi Interview, *supra* note 76; Nguyen Tran Bat Interview, *supra* note 173.

¹⁹² The Government has only recently started to raise revenue through the Ordinance on Land and Housing Tax (1992). A transfer tax of 8% (5% paid by transferor and 3% by transferee) is imposed by the Ordinance on Land Transfer Tax (1993). In order to dampen land speculation, a punitive 30% rate, in addition to the maximum rate of tax on personal irregular income, Circular No. 29, Ministry of Finance (1993) applies where capital gain from a sale exceeds 50 million dong or is derived from speculation. Since the tax was first collected on June 1, 1993, recorded land transactions have diminished by over 50% in Ho Chi Minh City. Whether this effect has been caused by property prices or high taxes is unclear. See *Land Market Slows*, VIETNAM INVESTMENT REV., July 19, 1993, at 17. See generally Raymond Mallon,

tended to use administrative discretion as a micro-economic control. Administrative discretion has certain advantages over legislation. For example, discretion is easily guided to take into account nuances of state policy and rapidly changing social norms. In contrast, legislation is comparatively inflexible and frequent amendments and re-enactments may provide an unwanted record of state ineptitude and vacillation. Furthermore, the regional variations between the north-south, highland-lowland divide will militate against the use of general comprehensive national legislation, but administrative discretion decentralizes and localizes national laws. By providing the state with a means of intricately controlling land dealings,¹⁹³ discretion fills the regulatory vacuum that would otherwise be occupied by detailed normative legislation.¹⁹⁴

It is quite possible that an extensive reliance on administrative guidance will remain an enduring feature of Vietnam's legal system. It cannot have escaped the notice of policymakers that most of Vietnam's economically successful neighbors use administrative guidance to tilt their legal systems in favor of state sponsored economic and social goals, usually at the expense of generalized normative law.¹⁹⁵ Notwithstanding rhetoric to the contrary,¹⁹⁶ little is being done to diminish administrative control over urban development and Prime Minister Vo Van Kiet's plea for "a complete change from bureaucratic management to running the nation by law" remains unfulfilled.¹⁹⁷

Many policymakers have now concluded that reform of substantive law cannot on its own bring order to urban development, especially because the *Law on Land 1993* has so far been particularly unsuccessful in achieving this end. It is true that law-based solutions have not prospered because the

Vietnam: Image and Reality, in REVITALIZING SOCIALIST ENTERPRISE: A RACE AGAINST TIME 207-08 (John Heath ed., 1993).

¹⁹³ See Gillespie, *supra* note 8, at 362-63.

¹⁹⁴ For a more detailed discussion of these issues, see *supra* part III.C.1-2.

¹⁹⁵ See Vu Tuan Anh, *Changes and Perspectives of Development*, in VIETNAM'S ECONOMIC REFORM: RESULTS AND PROBLEMS 204-10 (Vu Tuan Anh ed., 1994). See generally D. Douglas, *The Developmental State and the Newly Industrialised Economies of Asia*, 26 ENV'T & PLANNING 543, 545-48 (1994); WORLD BANK RESEARCH REPORT, THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY 353-61 (1993); A. CHOWDHURY & I. ISLAM, THE NEWLY INDUSTRIALISING ECONOMIES OF EAST ASIA, ch. 5 (1993).

¹⁹⁶ See Phan Van Khai, Deputy Prime Minister, Speech at Mid Term Conference of the Ho Chi Minh City Fifth Party Committee, SAIGON GIAI PHONG, Mar. 31, 1994, at 2-3. There is discussion at the party level about perceived inefficiencies in the delegation process. See Le Huu Nghia, *Maintain Political Stability and Renovate the Political System*, SAIGON GIAI PHONG, Mar. 12, 1994, at 2-3.

¹⁹⁷ See *PM Speaks*, VIETNAM INVESTMENT REV., June 20, 1992, at 5.

full complement of subordinate legislation has yet to be enacted.¹⁹⁸ But this is only part of the problem; the land bureaucracy is also a contributing factor.

IV. BUREAUCRATIC CONTROL OF LAND USE

A. *The Nature of the Bureaucracy*

One of the most puzzling questions about land laws in Vietnam is how seriously should they be taken. Although there is an increasingly sophisticated body of formal legislation,¹⁹⁹ often drafted with Western legal assistance, little has been done to retrain an administration imbued with socialist legal principles.²⁰⁰ Many commentators have observed that legislation is often treated by the bureaucracy as an inconvenient adjunct to the central business of state management of land,²⁰¹ and frequent calls²⁰² for the nation to be ruled by law only serve to draw attention to the fact that this broad social goal has manifestly not been achieved. In this legal environment, it is hardly surprising that legal rules seldom seem to work as intended.

1. *Bureaucratic Responsibilities as Defined by Law*

The 1992 Constitution confers administrative responsibilities upon central-level ministries,²⁰³ people's committees,²⁰⁴ legislative administra-

¹⁹⁸ Mai Xuan Yen Interview, *supra* note 70. Of the eighty-nine articles of the Law on Land (1993), less than twenty have been elucidated through subordinate legislation.

¹⁹⁹ Such legislation includes, for example, Law on Land (1993), Ordinance on Residential Housing (1991), Ordinance on Construction (1991), and Regulations on Construction Management and Conservation of the Old Quarter of Hanoi, Hanoi Municipal People's Comm. (Aug. 30, 1993) (city people's committee regulations).

²⁰⁰ See Mark Sidel, *Law Reform in Vietnam: The Complex Transition from Legal Scholarship and Training*, 11 UCLA PAC. BASIN L.J. 221, 255-58 (1993) (there is a concurrence of opinion in Vietnam that more training is necessary).

²⁰¹ See Yen Hung, *Kiet Blasts Bureaucrats, Orders Shake-Up for 1995*, VIETNAM INVESTMENT REV., Jan. 16, 1995, at 5. See generally Government Circular No. 96/BT, Guiding the Implementation of Government Resolution No. 38/CP on Initial Reform of Administrative Procedures in the Solution of Citizen and Organization Affairs (May 31, 1994); Sachs, *supra* note 16, at 14; Assembly Issues Anticorruption Resolution, (Hanoi Voice of Vietnam broadcast) (Ninth National Assembly, Fourth Session, Hanoi, Dec. 30, 1993), in F.B.I.S. DAILY REP. - E. ASIA 94-077, Jan. 11, 1994, at 54.

²⁰² See Ngo Ba Thanh, *supra* note 24; at 108-15; Nguyen Duy Quy, *On the Problem of Building a Juridical State in Our Country*, [1992] 3 VIETNAM SOC. SCI. 10, 13-15.

²⁰³ VIETNAM CONST. arts. 109, 112, 114 (1992).

²⁰⁴ *Id.* arts. 123, 124.

tors,²⁰⁵ judicial administrators,²⁰⁶ but not the CPV²⁰⁷ or mass organizations.²⁰⁸ Administrative functions are not as a rule separated from legislative or even judicial roles. People's committees, for example, not only administer²⁰⁹ but also legislate,²¹⁰ police,²¹¹ and adjudicate²¹² land use.

The state definition of officials provides some clarity by focusing upon the exercise of power rather than designated functions. A person in an official position is "entrusted by appointment, through election, by contract or through other arrangements, with or without payment of a salary, while performing the duties of a particular public office and exercising legitimate powers while performing those duties."²¹³ Accordingly, directors of state owned enterprises are state officials because they exercise state power to carry out policy, but Fatherland Front organizations are excluded, because they are not part of the administrative corpus of the state,²¹⁴ even though their officials discharge state policy and are often paid at public service rates.²¹⁵

2. *Bureaucratic Responsibilities as Perceived by the Ruling Elite*

The Vietnamese bureaucracy is characterized by the existence of an often "chaotic overlap"²¹⁶ between party and government functions;

205 *Id.* arts. 84 (National Assembly), 103 (President), 118 (People's Councils).

206 *Id.* arts. 134, 137.

207 Although the CPV is given a policy making function, it is not part of the state organization. VIETNAM CONST. art. 4 (1992).

208 The Fatherland Front is described as the political base of the administration, so although it has administrative functions, according to the Constitution it is not part of the state. VIETNAM CONST. art. 9 (1992); *Orientations for the Building and Perfection of the Vietnam Socialist Republic State*, *supra* note 98, at 5-6.

209 Law on Land, art. 8 (1993).

210 *Id.* art. 13.

211 *Id.* art. 37.

212 *Id.* art. 38.

213 PENAL CODE, art. 219 (1986) (amended 1992).

214 Interview with Phan Duc Binh, Director, Legal Department, Ministry of Labor, in Hanoi, Vietnam (Sept. 8, 1994). The Office of Government is currently drafting state employee regulations that will contain a legal definition of a bureaucrat.

215 *Id.* For an interesting comparison, see generally, E. Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 19, 25-28 (Pittman B. Potter ed., 1994) (discussing the role of bureaucracy in China in executing the orders of the party, but not necessarily the state).

216 THAI QUANG TRUNG, COLLECTIVE LEADERSHIP AND FACTIONALISM 82 (1985) (citing LA BUREAUCRATIC AU VIETNAM (Boudarel et al. eds., 1993)). See David Marr, *Walking on One or Two Legs in Contemporary Vietnam*, in RESEARCHING THE VIETNAMESE ECONOMIC REFORMS: 1978-1986, at 22, 28-20 (Adam Fforde ed., 1995).

because the CPV monopolizes political power²¹⁷ descriptions of the bureaucracy must be interwoven with the political structure. In commenting upon the bureaucracy, Vo Chi Cong, then President, said:

Nevertheless, we must not confuse the function of party organisations and that of the state apparati. Party organizations are set up in accordance with the principles set out in the party statutes, while state apparati are organised to carry out tasks and duties stipulated by the Constitution and law.²¹⁸

In theory at least, the ruling elite defines the bureaucracy in instrumental terms as an organ that implements the constitution and law. Yet in contrast to the semblance of impartiality and respect for a community's political values required of the Western bureaucracy, CPV doctrine has highly politicized all state organs,²¹⁹ creating an undifferentiated bureaucracy. Political influence is made possible in Vietnam by the extraordinary lengths to which the party goes to ensure that its members occupy influential positions in state organizations under the *nomenclatura* system.²²⁰ The blurred distinction between the judicial, executive, and legislative (National Assembly) branches of government also helps to maintain party control.²²¹ And finally, although state administration is hierarchical and centralist, entrenched localism ensures that cooperation between the central and

²¹⁷ See Carlyle Thayer, *Renovation and Vietnamese Society: The Changing Roles of Government and Administration*, in *DÕI MỚI: VIETNAM'S RENOVATION POLICY AND PERFORMANCE* 21, 21-23 (Dean Forbes et al. eds., 1991); B. Womack, *The Party and the People: Revolutionary and Post-revolutionary Politics in China and Vietnam*, *WORLD POLITICS*, July 1987, at 479-507.

²¹⁸ *Vo Chi Cong Discusses New Constitution* (Hanoi Voice of Vietnam broadcast, Jan. 2, 1992), in *F.B.I.S. DAILY REP. - E. ASIA* 92-007, Jan. 10, 1992, at 66.

²¹⁹ See Peter Nguyen Van Hai, *Recent Public Service Reform in Vietnam*, in *INFRASTRUCTURAL DEVELOPMENT AND LEGAL CHANGE IN VIETNAM* 129, 133-34 (Graham Hassall & Trung Trung eds., 1994).

²²⁰ The "nomenclatura" system establishes a list of appointments by the CPV which ensures that key legislative, executive, and judicial posts are occupied by party members. It forms an informal link between party and state. See Russell Heng Hiang Khng, *The 1992 Revised Constitution of Vietnam*, 14 *CONTEMP. SOUTHEAST ASIA* 221-25 (1992); Thayer, *supra* note 52, at 120-22. Cf. F.J.M. FELDBRUGGE, *RUSSIAN LAW: THE END OF THE SOVIET SYSTEM AND THE ROLE OF LAW* 117-21 (1993).

²²¹ The judiciary and executive are constitutionally answerable to the National Assembly, *VIETNAM CONST. arts. 109, 135* (1992), and "[t]he party directs the National Assembly elections adequately in order to choose highly qualified and competent deputies to represent the people's will and aspirations as well as the common interests of the nation as a whole." Vu Oanh, *supra* note 51, at 3 (in Vietnamese). See Russell Heng Hiang Khng, *supra* note 220; at 221-25.

provincial levels remains problematic,²²² often distorting the bureaucratic chain of command.

Administrative reform has been given a high priority and it is clear that the CPV regards bureaucratic miscreance as a direct threat to party authority.²²³ But calls for a law-based governance will remain a pious hope as long as influential members of the party such as Secretary General Do Muoi believe that "[l]aw cannot have precedence over actual economic and intellectual conditions of a given people."²²⁴ For many in the party the law is not an immutable authority to be obeyed absolutely, but rather an important mechanism for the implementation of CPV policy. In Vietnam, the bureaucracy only derives a mechanical or ceremonial validity from legislation and the constitution. Real authority comes from realizing CPV policy,²²⁵ and this is determined by the bureaucracy's success in implementing national planning goals, such as the development of urban areas, export processing zones, or tourist resorts.

²²² See M. Beresford, *Interpretation of the Vietnamese Economic Reforms 1979-85*, in RESEARCHING THE VIETNAMESE ECONOMIC REFORMS: 1979-86, at 1, 11-13 (Australia-Vietnam Research Project Monograph Series 1, Jan. 1995). It should be noted that the fifth installment of the "basic content" of the Hanoi January 20-25 Mid-Term Party National Conference Resolution called for state authorities to regulate their duties regardless of whether they were central or local. *Further on Hanoi Midterm Congress Resolution*, in F.B.I.S. DAILY REP. - E. ASIA 94-070, Apr. 12, 1994, at 74 (translating from Vietnamese text in SAIGON GIAI PHONG, Mar. 19, 1994, at 2).

²²³ See *Bui Thien Ngo Reports to National Assembly Dec. 8, 1993* (Hanoi Voice of Vietnam broadcast), in F.B.I.S. DAILY REP. - E. ASIA 93-238, Dec. 14, 1993, at 70-71; Vo Van Kiet, *supra* note 66, at 65, 66. "Corruption, ineptitude, a poor sense of organization and discipline, and bureaucratism among not an inconsiderable number of cadres in many state agencies and organizations at various sectors and echelons, both in the administrative and trading sectors, are negating many policies. They are hampering and undermining the renovation, and reducing the people's confidence. They are a challenge to the party leadership and the state management." *Id.* The Prime Minister Vo Van Kiet in a recent directive warned Hanoi People's Committee officials to "ensure that construction in the city be carried out in strict observance of the capital's development *Master Plan* The most important task is to maintain order and the observance of laws and regulations. City authorities should adopt measures to stop at once all construction activities being carried out illegally or without permits." Nguyen Tri Dung, *supra* note 107. *Accord Phan Huu Chi Interview*; *supra* note 76. Powerful people's committee chairmen may, at times, act independent of central power. Hoang Phuoc Hiep et al., *An Introduction to the Vietnamese Legal System* 86-87 (Apr. 1994) (unpublished manuscript on file with author).

²²⁴ *Party Leader Stresses Importance of Reforming Political System*, VIETNAM NEWS, Mar. 25, 1992, at 2. See also John Gillespie, *Australian Legal Assistance to Vietnam: How to Cook the Small Fish*, 20 INT'L L. NEWS, Sept. 1993, at 7, 9.

²²⁵ See *New Orientation in the Industrialisation Policy of Vietnam*, 3 KINH TE CHAU A THAI BINH DUONG [ASIA-PACIFIC ECONOMIC REVIEW], Sept. 1994, at 6 (English translation of the resolution of the Seventh Session of the CPV outlining industrialization policy); Bui Tat Thang, *Industrialisation Under the Economic Renovation in Vietnam*, 2 KINH TE CHAU A THAI BINH DUONG [ASIA-PACIFIC ECONOMIC REVIEW], June 1994, at 17-20.

B. *The Institutional Framework of Land Management*

1. *Central Control*

State officials have a constitutional responsibility to manage land,²²⁶ and a three-tiered administrative structure at each level of government²²⁷ has been created for this purpose. The General Department of Land Management ("GDLM") at the central level is invested with power to formulate policy and enact rules that guide local authorities in the allotment, transfer, encumbrance, and registration of land use rights.²²⁸ Land management departments allocate land, control transfers of land, and resolve disputes concerning organizations.²²⁹ They also guide district and sub-district (*phuong*) people's committees in all other cases.²³⁰

A similar organizational structure governs planning and construction. The Institute of Urban and Regional Planning, attached to the Ministry of Construction at the central level, sets broad planning guidelines (master plans) which are then implemented by chief architect's offices established in the major cities. Provinces have an equivalent planning institute and building department.²³¹ By virtue of their personal appointment by the Prime Minister, chief architects are accorded the status of vice-chairmen but otherwise enjoy a quasi-independent position within the hierarchy of city-level people's committees.²³² As such, their loyalty is divided between the Institute of Urban and Regional Planning of the Ministry of Construction, the Prime Minister, and the local government. Until regulations are passed

²²⁶ VIETNAM CONST. art. 18 (1992).

²²⁷ At the central level, three bodies are responsible for establishing broad legislative principles that guide the detailed administration of development at the city level. The General Department of Land Management oversees the allocation of land use rights, and the Ministry of Construction supervises the Ordinance on Construction (1991) and associated subordinate legislation. Meanwhile, under the auspices of the Ministry of Construction, the Institute for Urban and Regional Planning ("IURP") guides the drafting of the *Master Plans* for Hanoi, Ho Chi Minh City, and other urban centers. The Ministry of Communications and Transport in conjunction with the Ministry of Construction provide professional guidance to Urban Public Works Services attached to city level people's committees. See NGUYEN THANH BINH & PHAN MANH CHINH, PLANNING ORIENTATION AND INVESTMENT PROJECTS FOR DEVELOPMENT OF INFRASTRUCTURE SYSTEMS AND ENVIRONMENTAL ENHANCEMENT OF HANOI CITY 10-11 (1994).

²²⁸ Law on Land, arts. 23, 24, 29, 31 (1993); Decree No. 34-CP, Functions, Tasks, Powers and Organisation of the General Administration of Land, art. 5 (1994).

²²⁹ Law on Land, arts. 23, 24, 29, 31 (1993).

²³⁰ Law on Land, arts. 24, 31, 33 (1993).

²³¹ Nguyen Ngoc Khoi Interview, *supra* note 108.

²³² Ha Van Que Interview, *supra* note 125. The appointment is made on the recommendation of the Minister for Construction. In fact, the current Chief Architect of Hanoi, Nguyen Lan, is a former department director from within the Ministry of Construction ("MOC").

by the central government that authoritatively delineate the role of chief architects, the powers and responsibilities exercised by these bodies will continue to overlap with those of the Institute of Urban and Regional Planning and to a lesser extent, the city-level people's committees.

The recently enacted *Regulation on the Management of Investment and Construction*²³³ divides construction projects into three categories, so-called groups A, B, and C. Central control is maintained over investment projects in group A, while ministers, the heads of ministerial-level agencies, and the chairman of people's committees may approve construction in the other categories. The powers and functions of chief architects await legislative elucidation. It is clear though that these bodies no longer have the power to approve major projects, while their unchecked discretion over smaller projects remains intact.²³⁴

2. *Local and Central Control*

Dual lines of authority create divided loyalties. Vertical lines of authority control central land management working at the provincial/city level; these central land management officials are also controlled horizontally by people's committees.²³⁵ Central government land management officials are recruited, promoted, managed, and accommodated by, as well as directly responsible to, people's committees. Although constitutionally superior,²³⁶ central programs initiated by the GDLM, the Institute of Urban and Regional Planning, and the MOC may be distorted beyond recognition or only partially implemented, particularly where there is conflict with local interests.²³⁷

The success of central control over local land management depends, among other factors, upon the objectives and clarity of ministerial instructions. For example, the provincial/city and district officials are guided by

²³³ Issued together with Decree No. 177-CP of the Government Oct. 20, 1994 (*see* arts. 5, 6 and app. (Classification of Investment Projects)).

²³⁴ Phan Dinh Dai Interview, *supra* note 115. *See, e.g.*, Decision No. 22 BXD-QLXD, Regulations on Construction Activities (Jan. 26, 1993); Circular on Management of Construction Projects with Foreign Capital (Jan. 26, 1993).

²³⁵ Phan Huu Chi Interview, *supra* note 76. *See generally* I. Mayo-Smith et al., Report of the Public Administration Diagnostic Mission; UNDP Hanoi, 8-10, 38-39, 53 (Apr. 1992) (unpublished).

²³⁶ VIETNAM CONST. arts. 109, 112, 116 (1992).

²³⁷ Mai Xuan Yen Interview, *supra* note 70.

detailed provisions issued by the government²³⁸ that prescribe permitted survey tolerances and cadastral mapping methodologies. There is reported to be a high level of adherence to these provisions.²³⁹ All levels of government agree with the need for accurate allotment, and because the legislation is drafted in prescriptive and technical language, it is clear and easy to understand. Less agreeable central-level instructions may be met with bureaucratic procrastination, intransigence, and sabotage²⁴⁰ at the local level. Greater concentration of power in the hands of ministries is often seen as a means of overcoming local autarky.²⁴¹ But this simplistic solution does not adequately address competing family, party, and business loyalties.²⁴²

Prescriptive control from the central level is still unusual. More commonly, local authorities are delegated a broad authority to manage most aspects of land use.²⁴³ Valuable urban and rural allotments are directly controlled by the Prime Minister with less important land under the authority of provincial/city-level people's committees; all other land is governed at the district level, subject to provincial/city direction.²⁴⁴ The Fatherland

²³⁸ See, e.g., Decree No. 119-CP, Promulgating the Regulation on the Management and Use of the Administrative Boundary Dossiers, Maps and Marker Posts of Various Levels (Sept. 17, 1994).

²³⁹ Browne, *supra* note 94, at 14-15.

²⁴⁰ Nguyen Tran Bat Interview, *supra* note 173; Mai Xuan Yen, *supra* note 169.

²⁴¹ See Vu Oanh, *supra* note 51. There is also dissatisfaction with the degree of corruption at the municipal level.

²⁴² See Beresford, *supra* note 222, at 11-13. For a revealing account of the difficulties facing central enforcement over local bureaucracies, compare Kevin O'Brien, *Implementing Political Reform in China's Villages*, 32 AUSTL. J. CHINESE AFF. 33, 41-50 (July 1994).

²⁴³ Law on Land, art. 8 (1993). Article 13 stipulates that state administration of land shall include:

- (1) investigation, survey, measurement, assessment and classification of land, and drawing of maps;
- (2) zoning of land and planning for its use;
- (3) promulgation of rules and regulations for land administration and use, and organisation of the implementation of these rules and regulations;
- (4) allocation, rental and recovery of land;
- (5) land registration, establishing and maintaining land registers, management of land use contracts, recording land statistics and inventories of land, and granting certificates of the right to use land;
- (6) inspection to ensure compliance with rules and regulations on land administration and land use;
- (7) resolution of land disputes and complaints, and denouncement of breaches of provisions on land administration and land use.

Id. art. 13.

²⁴⁴ Mai Xuan Yen, *supra* note 169. It should be noted that projects of national importance are directly controlled by the Prime Minister. See Decree No. 191-CP, Promulgating the Regulations on the Formation, Evaluation and Implementation of Direct Foreign Investment Projects, arts. 6, 7, 10 (Dec. 28,

Front and its member organizations, other social organizations, the people's armed forces, and citizens are encouraged to support state officials in the management of land.²⁴⁵

The inter-relationship between the central and local levels of government is illustrated by the planning process for the Ancient Quarter of Hanoi.²⁴⁶ Under the *Master Plan Hanoi 2010*,²⁴⁷ the NIURP only sets broad planning priorities; more detailed schemes for their respective localities are drafted by district-level people's committees under the guidance of the Chief Architect's Office.²⁴⁸ For example, the Hoan Kiem District People's Committee, with assistance from the NIURP, drafted a comprehensive planning scheme for the thirty-six commercial streets (36 *Pho Phuong*) of the ancient quarter which has been approved by the Chief Architect, Hanoi People's Committee, while more general regulations on construction management have been approved by the Prime Minister.²⁴⁹ Due to domestic and international media attention and to review by the broadly constituted Council for the Restitution of Old Hanoi,²⁵⁰ it is most

1994); Decree No. 177-CP on Regulations on the Management of Investment and Construction, Govt., art. 6, app. (1994).

²⁴⁵ Law on Land, art. 10 (1993).

²⁴⁶ Overall responsibility for coordinating regional planning resides with the NIURP. Nguyen Ngoc Khoi Interview, *supra* note 108. At the instigation of NIURP, the drafting of the *Master Plan* started with the Science and Technology Board. Preliminary plans were then sent to the Hanoi People's Committee Chief Architect's Office for approval. Amendments were made and these were reviewed by the Science and Technology Board. Next, various interested ministries (Ministry of Construction, Ministry of Transport, General Department of Land Management, Ministry of Science, Technology and Environment, Ministry of Water, etc.) were asked to comment. This consultation process was presided over by the Vice-Minister from the Ministry of Construction. Finally, plans were sent to the Prime Minister, who reportedly sought approval from the CPV politburo. The Prime Minister then passed a decree that gave the *Master Plan Hanoi 2010* legislative force.

²⁴⁷ A similar planning regime exists in Ho Chi Minh City, where a Master Plan was recently approved under a Decree issued by the Prime Minister on January 16, 1993. The Plan was drafted by the Chief Architect of Ho Chi Minh City, Le Van Nam. See *Prime Minister Approves of Ho Chi Minh City Growth Plan*, VIETNAM INVESTMENT REV., Feb. 8, 1993, at 15.

²⁴⁸ Nguyen Lan Interview, *supra* note 112; Phan Dinh Dai Interview, *supra* note 115. It should be noted that research on the *Plan for Protection, Rehabilitation and Development of the Ancient Street Area of Hanoi* was carried out by the NIURP. The plan was approved by the Prime Minister on April 19, 1995.

²⁴⁹ The regulations are based on the *Official Report on Plan for Protection, Rehabilitation and Development of the Ancient Street Area of Hanoi* prepared by the NIURP. The regulations were approved by the Ministry of Construction ("MOC") on March 30, 1995 and the Prime Minister on April 19, 1995. The planning scheme has already been approved by the Hanoi People's Committee and Chief Architect's Office, and the Hanoi master-plan was approved by the Government early in 1995. See *Hanoi Masterplan Gets Approval*, *supra* note 107; Interview with Nguyen Van Quy, Vice President SENA Corporation, in Hanoi, Vietnam (Jan. 21, 1994).

²⁵⁰ The Council is led by the Chairman of the Hoan Kiem People's Committee and is comprised of central-level ministries. Interview with Dr. Nguyen Son Lo, Director, Institute for Urban Technology and Development ("IUTD") in Hanoi, Vietnam (Jan. 21, 1994) [hereinafter Nguyen Son Lo Interview].

unlikely that the Hoan Kiem district planning scheme will significantly deviate from the *Master Plan*. It does not necessarily follow, however, that planning decisions made by the people's committee will always comply with the *Master Plan*, or for that matter with the detailed district plan.²⁵¹

C. *Bureaucratic Compliance with Land Laws*

1. *Commercial Exploitation of Administrative Authority*

Measuring bureaucratic efficiency is notoriously difficult,²⁵² particularly where organizational rules are recent and incomplete (such as the *Law on Land 1993*) and statistics are unreliable. Efficiency may best be assessed from observable action. Observation of the discrepancy between statutory expectations and the actual behavior of officials furnishes a useful case study. What distinguishes land management in Vietnam are the tensions between central-level planning and construction legislation and decision making at the local level. The dynamics of this relationship may be explored by comparing building approval procedures set out in municipal construction regulations with the modus operandi of the Hanoi building industry.

a. *Land use licenses and construction permits are subject to approval by chief architect's office*

Except for large projects of national interest,²⁵³ applications for land use licenses²⁵⁴ and construction permits²⁵⁵ must be approved by the chief

²⁵¹ Corruption and tax enforcement continue to encourage illegal construction. See M. Mathes, *Drawn and Quartered*, VIETNAM ECON. TIMES, Sept. 1995, at 24-25.

²⁵² It is difficult to monitor bureau output, accurately assess accounting data, or know whether the bureau's choice of internal procedure is socially optimal. See generally Jean-Jacques Laffont & Eric Maskin, *A Differential Approach to Dominant Strategy Mechanisms*, 48 *ECONOMETRIA* 1507 (1980); Roger Guesnerie & Jean-Jacques Laffont, *A Complete Solution to a Class of Principal-Agent Problems with an Application to the Control of a Self-Managed Firm*, 25 *J. PUBLIC ECON.*, 329, 329-64 (1984).

²⁵³ Large projects with or without foreign capital must be approved by the Prime Minister. See Decision No. 366 HDBT, Regulations on Evaluation of Projects for Foreign-Owned Capital, art. 4 (Nov. 7, 1991); Decree No. 177-CP, Regulations on the Management of Investment and Construction, art. 6 (1994).

²⁵⁴ See, e.g., Instruction B, Applying for Construction Land Use Licence, Guidance on Instructions for Applications for Construction Land Use Licences 601/KTS-TH, Chief Architect's Office, Hanoi People's Comm. (June 11, 1993).

²⁵⁵ See, e.g., Instructions on Applying for New Construction, Rehabilitation and Separation of Architectural Works 602/KTS-TH, Chief Architect's Office, Hanoi People's Comm. (June 11, 1993). See also Nguyen Tien Lap, *Licensing for Construction*, 1 *VIETNAM L. & LEGAL F.*, July 1995, at 14-15.

architect's office ("CAO") attached to city-level people's committees.²⁵⁶ When reviewing allotment and development applications, the CAO exercises a virtually unaccountable discretion. Appeals against unfavorable decisions must, in the first instance, be lodged with the CAO, which of course was the body that made the initial determination. As a judge in its own cause,²⁵⁷ the CAO has little reason to fear ministerial supervision,²⁵⁸ and may, within the limits of the Penal Code,²⁵⁹ exploit its wide administrative authority virtually free of independent review.²⁶⁰

The absence of accountability comes at a cost. As a precondition to approval, applicants are reportedly encouraged to use architectural service companies²⁶¹ controlled by the CAO and/or people's committee.²⁶² These organizations prepare building plans and process and lodge development applications. Officials justify this practice on the grounds that service companies work closely with the CAO and understand the unpublished nuances of municipal policy.²⁶³ Use of authorized service companies is not compulsory, though independent consultants complain of delays in modifying plans to meet the CAO's rather vague and protean interpretation of building and planning legislation.

²⁵⁶ See Instruction B. Apply for Construction Land Use Licence, Guidance on Instructions for Applications for Construction Land Use Licences 601/KTS-TH, Chief Architect's Office, Hanoi People's Comm. (Jan. 11, 1993).

²⁵⁷ A system of self-referential administrative review offends most notions of natural justice. See S.A. DE SMITH., JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 226-28 (1973).

²⁵⁸ There has been no reported instance where the Chief Architect has been overruled by the Ministry of Construction or Prime Minister. Ha Van Que Interview, *supra* note 125.

²⁵⁹ PENAL CODE, arts. 220-221, 226 (1986) (official negligence, abusing official position and powers, and accepting bribes). See Phong Lan, *Carry on the Anti-corruption Struggle: New Requirements, Strong Measures*, SAIGON GIAI PHONG, Apr. 2, 1994, at 2.

²⁶⁰ Since the Chief Architect is equal in rank to a Vice Chairman of a People's Committee, his decisions can only be reviewed by the Prime Minister. VIETNAM CONST. art. 114(3) (1992); Ha Van Que Interview, *supra* note 125.

²⁶¹ For example, the SENA Corporation, an entity owned by the Institute for Urban Technology and Development (a body established by the Hanoi People's Committee), carries out much of the large-scale architectural design, civil engineering, and planning work for private developers 'referred' by the Chief Architect's Office. Nguyen Son Lo Interview, *supra* note 250. A similar network of service companies reportedly serves the Ho Chi Minh City, Chief Architect's Office.

²⁶² It is unlawful for an official to directly own a private business, Law on Companies, art. 6 (1990); Decree 221 HDBT, Regulations of the Council of Ministers Making Detailed Provisions for a Number of Articles in the Law on Enterprises, arts. 2, 3 (July 23, 1991). As a consequence, service companies are owned by people's committees, local mass organizations, and/or by private individuals associated with officials. Research in this area is complicated by two factors. Officials are understandably reluctant to speak about these issues, and will not formally acknowledge their comments. There is no public record of corporate information, making it difficult to identify ownership, office bearers, and members of service companies.

²⁶³ Ha Van Que Interview, *supra* note 125.

b. *Leases between foreigners and Vietnamese subject to approval by people's committees*

Commercial exploitation of state administrative authority occurs in other areas of land management. Despite clear legislative provisions²⁶⁴ stating that foreigners may own residential houses, in practice, ownership is not permitted. Foreigners are permitted to lease from state businesses, other state organizations or entities, and private Vietnamese citizens.²⁶⁵ All leases with foreigners must be approved by provincial/city-level people's committees²⁶⁶ before they become enforceable. Registration is withheld unless leases have been concluded with the assistance of an authorized land service company. These enterprises are frequently owned or controlled by the people's committee (or associated mass organizations) authorized to grant approval. Foreigners complain that service companies do not perform substantive functions. For instance, leases are negotiated in advance so that they are ready to sign even before a service company is engaged; service companies are nevertheless entitled to charge fees ranging from four to six percent of the rent payable over the term of the lease.²⁶⁷ One possible advantage of this system is that the local people's committee may feel contractually or morally bound to use its coercive power to recover compensation where land is leased to a foreigner without good title. In the south, where overseas Vietnamese continue to reclaim abandoned property,²⁶⁸ a guarantee of good title is especially important.

²⁶⁴ Ordinance on Residential Housing, arts. 16, 17 (1991); Decree No. 60-CP, On Ownership of Residential Housing and Right to Use Land in Urban Areas, arts. 21, 22 (1994). See Dao Quang Binh & Jeremy Grant, *Coming Up Roses* (Interview with Nguyen Manh Kiem, Vice Minister for Construction), 3 VIETNAM ECON. TIMES 24, 25 (1994).

²⁶⁵ Decree No. 56/CP, Regulation on Leasing Houses in Vietnam to Foreigners and Vietnamese Settled Abroad, arts. 1, 2 (Sept. 18, 1995); Ordinance on the Rights and Obligations of Foreign Organizations and Individuals Who Lease Land in Vietnam, (Oct. 14, 1994) (*in* VIETNAM LAW & LEGAL FORUM, Nov. 1994, at 28).

²⁶⁶ Regulations on the Lease of Premises and Recruitment of Labour by Foreigners and Foreign Nationals of Vietnamese Origin, Council of Ministers, art. B 4(c) (Nov. 10, 1992).

²⁶⁷ Circular on Leases and Employment by Foreigners No. 03-TT-LB, pt. A-III(1), (2) (Apr. 8, 1991).

²⁶⁸ For the rules governing disputes between holders of *ancien regime* title and occupiers, see Decree No 60-CP, *supra* note 264, art. 10.

2. *The Effect of Patronage on Compliance*

As a Neo-Confucian, relationship-driven society,²⁶⁹ family/group²⁷⁰ patronage undoubtedly dominates in Vietnam; however, there are other kinds of linkages that bind²⁷¹ land management bureaucracies. Party influence over the bureaucracy is maintained by ensuring that party members hold key positions.²⁷² In this regard, the party exhibits many of the characteristics of a neo-Confucian "superfamily"²⁷³ and secret society,²⁷⁴ even though it is governed by an internal statute.²⁷⁵ Party censure often signals the end to further promotion, forced retirement, reduction in retirement benefits, or direct removal from office.²⁷⁶

a. *Neutral or beneficial effects from patronage*

"Super village" organizations²⁷⁷ and family networks have a strong cultural antecedence in Vietnam.²⁷⁸ Such organizations and networks

²⁶⁹ Confucian social obligations to the family are often regarded as the driving force behind East Asian nepotism. See MAX WEBER, *ESSAYS IN SOCIOLOGY* 78-81 (1958). These obligations have been co-opted and integrated by the Marxist elite in Vietnam. See NGUYEN KHAI VIEN, *TRADITION AND REVOLUTION IN VIETNAM* 47-52 (1974); Weggel, *supra* note 53, at 418.

²⁷⁰ Recent sociological writings in Vietnam suggest that the 'closed' traditional family is transforming into a more open grouping which for commercial reasons may coopt influential or skilled people without common lineage. See generally Le Ngoc Lan, *The Question of Family and the Realisation of the Functions of the Family in the Present Society*, [1994] 2 VIETNAM SOC. SCI. 70, 71, 74; M. Beresford, *Interpretation of the Vietnamese Economic Reforms 1979-85*, in *RESEARCHING THE VIETNAMESE ECONOMIC REFORMS: 1979-86*, at 11-13 (Australian-Vietnam Research Project, Monograph Series #1) (Jan. 1995).

²⁷¹ See Murray Hiebert, *No Dong No Deal: Corruption is Spreading Rapidly in the North*, FAR E. ECON. REV., June 25, 1992, at 13; Thayer, *supra* note 52.

²⁷² See *Vo Chi Cong Discusses New Constitution*, *supra* note 218. "Party members and those entrusted by the party must directly hold essential positions in the state apparatus. Without this practice the party is not a ruling one and is considered an outside of the administration or the party will participate in the administration with a weak role." *Id.*

²⁷³ JAMIESON, *supra* note 14, at 217-18, 256-57.

²⁷⁴ See Weggel, *supra* note 53, at 418. Secret societies have a long history in Vietnam. See ter Haar Borend, *Messianism and the Heaven and Earth Society: Approaches to Heaven and Earth Society Texts*, in *SECRET SOCIETIES RECONSIDERED: PERSPECTIVES ON THE SOCIAL HISTORY OF MODERN SOCIALIST CHINA AND SOUTHEAST ASIA* 153, 153, 162-63 (David Ownby & Mary Somers Heidhues eds., 1993).

²⁷⁵ For example, see Thayer, *supra* note 52, at 20. The current party statute was adopted at the Fourth Party Congress (Dec. 1976), and it has been amended on several subsequent occasions.

²⁷⁶ See *Ho Chi Minh City Reviews Anti-Corruption Work* (Hanoi Voice of Vietnam broadcast, May 29, 1994), in F.B.I.S. DAILY REP. - E. ASIA 94-104, May 31, 1994, at 71; Phong Lan, *supra* note 259, at 2.

²⁷⁷ The "super village" is a term applied to extra legal organizations that arrange themselves as corporate identities, an extension of the traditional Vietnamese village organization. See JAMIESON, *supra* note 14, at 213-20, 256-57.

linked bureaucrats to society through the exchange of information and official favors in return for revenue.²⁷⁹ Funds received through patronage often benefit an entire organization. Commentators suggest, for example, that "fees" received from architectural service companies are used by the CAO to improve working conditions, retrain, and remunerate underpaid state employees who might otherwise spend less time attending to official functions while earning a second income.²⁸⁰ Patronage also takes non-monetary forms. Influence can be used to assist family or patrons overcome legal problems, bypass waiting lists for public housing, health, fire, and labor permits as well as secure coveted university entrance.²⁸¹

In a society where state salaries are generally insufficient to sustain even a modest standard of living, state bodies commonly augment their budgets with funds generated by service companies or research institutes.²⁸² Naturally, bureaucracies favor associated state business interests and use their discretion to prevent or limit competition from services provided by private capital. Society distinguishes between state patronage and the acceptance of bribes.²⁸³ For example, service companies trade with the public and provide value to their clients and society in a way that direct monetary bribes do not.²⁸⁴ While allotment, planning, and construction

²⁷⁸ See Whitmore, *supra* note 13, at 296, 301-305; Truong Buu Lam, *Patterns of Vietnamese Response to Foreign Intervention: 1858-1900*, 12 J. SOUTHEAST ASIAN STUD., 49-54 (1967) (translating Tran Hung-Pao, *Call to the Officers and Soldiers of the Army (1285)*); Hiebert, *supra* note 271.

²⁷⁹ Accounts of Vietnam under the Lê and Nguyen dynasties suggest that officials and their subordinates often took advantage of their public office in spite of meticulously prescribed criminal penalties for corruption. See TA VAN TAI, *supra* note 19, at 204-10.

²⁸⁰ These impressions were gleaned from informal discussions held with employees of Hanoi and Ho Chi Minh People's Committees and building contractors. Bribes received by corrupt village officials for illegally issuing land use rights were paid into the village budget. See *Four Sentenced Over Land Deals*, VIETNAM INVESTMENT REV., Sept. 4, 1995, at 4 (village Chairman and others given suspended prison sentence for granting land use rights in return for deposits made to the village budget).

²⁸¹ See Le Phuoc Tho, *Effect on Important Change in Cadre-Related Work in the New Situation* (NHAN DAN, Sept. 16, 1993, at 3), translated in F.B.I.S. DAILY REP. - E. ASIA 93-197, Oct. 14, 1993, at 71-72; Hoang Phuoc Hiep et al., *supra* note 223.

²⁸² See generally Natalie Lichtenstein, *A Survey of Vietnam's Legal Framework in Transition*, Policy Research Working Paper 1291, The World Bank Legal Department, East Asia and Pacific Division, 14-18 (Apr. 1994).

²⁸³ However, article 226 of the Penal Code 1986 prohibits officials from taking "bribes of money or other forms, directly or through an intermediary, to perform or refrain from performing certain jobs as requested by the person offering bribes."

²⁸⁴ Nguyen Tran Bat Interview, *supra* note 173. Although corruption can no doubt be characterized as a sociological problem of deviance, this discussion is concerned with disobedience of law. See R. Seidman, *Why do People Obey the Law? The Case of Corruption in Developing Countries*, 5 BRITISH J. L. SOC. 45, 50-52 (1978); R. KLITGAARD, *CONTROLLING CORRUPTION* (1988); W. Wertheim, *Sociological Aspects of Corruption in South East Asia*, 1 SOCIOLOGIA NEERLANDICA 129, 138-42 (1963).

regulations are not publicly available²⁸⁵ or remain ambiguous,²⁸⁶ professional advice given by those closely connected with regulatory authorities will continue to be valued by developers. This service is quasi-official in the sense that it provides detailed technical information determined by state authorities that mimics the function of prescriptive legislation.

b. *Negative effects from patronage*

Not all aspects of patronage have neutral, much less beneficial consequences. The inevitability of corruption in Vietnam has yet to be determined. The broad discretion given to local authorities generates little incentive to comply with NIURP-sponsored Master Plans or enact detailed local plans. The bureaucracy's monopoly over land development information undoubtedly places at an advantage those who enjoy a patron-client relationship, thereby adding to the cost of development for others. Patronage also diminishes the importance of merit in determining the economic and social value of development. Bribes permit private investors to gain control over decision-making, shaking public confidence in abstract laws and distorting the pattern of investment and urban development. Discretionary controls breed corruption, giving dishonest officials a vested interest in retaining and increasing this form of governance.²⁸⁷ Given this broad discretion, it is surprising to find a strong rhetorical commitment within the Hanoi Chief Architect's Office to the *Master Plan* in general and preservation of the historic Hoan Kiem district in particular.²⁸⁸

Placing constraints on bureaucratic discretion, however, can cause paralysis in decision making at the district level. Consider, for example, the collection of land transfer taxes. Until recently,²⁸⁹ the rate of taxation and

²⁸⁵ There has been a recent improvement in the publishing and display of planning schemes, although they are presented as an established fact without a formal system of community comment. See *Citizens Respond to Masterplan*, VIETNAM INVESTMENT REV., Sept. 26, 1994, at 16.

²⁸⁶ See *Build Your Own Houses*, *supra* note 1; Nguyen Mai, *Infrastructure and Real Estate: Incentives and Priorities*, VIETNAM INVESTMENT REV., Nov. 8, 1993, at 22.

²⁸⁷ See generally SEIDMAN & SEIDMAN, *supra* note 72, at 151-60; GUNNAR MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS* 1126, 1131 (1968).

²⁸⁸ See Ngoc Anh, *Hanoi Development Master Plan Unveiled*, VIETNAM INVESTMENT REV., Sept. 19, 1994, at 9. The Chief Architect's Office was formed in 1993 under Decree No. 322 BXD TDT from the Ministry of Construction on December 28, 1993. It inherited many problems from the pre-existing construction departments. Ha Van Que Interview, *supra* note 125; Nguyen Lan Interview, *supra* note 112.

²⁸⁹ Recent legislation includes Decree No. 87/CP, *Stipulating Price List of Categories of Land*, art. 2(4) (1994) (setting forth land values to be used by district level people's committee when changing allotment fees for residential land) and Circular No. 2 TC/TCT, *Guiding the Implementation of Decree No. 89 of the Government on Collection of Land Use Levy and Land Administration Fee* (Jan. 4, 1995). It

methods of assessment were not stipulated in legislation. Without prescriptive guidelines, local authorities were reportedly reluctant to test the limits of their discretionary authority, and risk official punishment²⁹⁰ by either under- or overcharging land valuation fees. In the meantime, few land transfer certificates were issued.²⁹¹

D. *Absence of Private Compliance with Land Laws*

Commentators suggest that the enforcement of planning and construction regulations has been compromised by the uncertainty surrounding the responsibilities of the chief architect's office.²⁹² Regulations issued by the Ministry of Construction, for example, require the chief architect to formulate policy and monitor construction, but leave the actual detection of building infringements to inspectors employed by district people's committees.²⁹³ Imprecise drafting compounds the confusion by failing to clearly delineate the administrative responsibilities of the MOC and CAO. Even though the MOC is the constitutionally superior instrumentality,²⁹⁴ an overlapping jurisdiction at times hinders the enforcement of building provisions.

1. *Examples and Causes of Private Noncompliance*

The bureaucracy has not been successful at enforcing the land laws. A survey conducted by the Hanoi People's Committee showed that of 170 new houses constructed during the December quarter 1992, 150 were built without building permits. To make matters worse, of the few who had obtained official approval, most had disregarded the maximum two-story height restriction. Public land had also been appropriated by using landfill

remains to be seen whether the authorities will be reassured by these rules and accelerate the allotment process.

²⁹⁰ Negligent official action is a crime against the state and may be investigated by the procuracy. PENAL CODE, arts. 220-221 (1986 as amended).

²⁹¹ Cf. Browne, *supra* note 94, at 16 (since guidelines have been prepared, the process of issuing land tenure certificates is outstripping the capacity of mapping agencies to keep pace).

²⁹² Nguyen Lan Interview, *supra* note 112; Annalisa Koeman, *Planning into Practice*, VIETNAM INVESTMENT REV., Feb. 13 1995, at 27 (interview with Hanoi city planner Ha Van Que).

²⁹³ Decision 102-BXD-GD, Regulations on Quality Management of Construction Projects, arts. 3, 26, 32, 34, 35 (Jan. 15, 1992).

²⁹⁴ VIETNAM CONST. art. 112 (1992).

to build out into the lake or by squatting on public land reclaimed from the Red River.²⁹⁵ Although the Hanoi People's Committee issued a circular demanding suspension of all construction in the villages and wards around the lake,²⁹⁶ building activity has reportedly increased.²⁹⁷ In the meantime, the area has rapidly become a patchwork of authorized and urban-traditional land use.²⁹⁸

A pilot land survey project²⁹⁹ carried out in Gia Lam, a small semi-rural settlement on the outskirts of Hanoi confirms this view. Of the 480 households selected, only 78 conformed to the law and were entitled to land tenure certificates. The remainder were ineligible for a range of reasons, including illegal transfer, occupation, and construction, and non-payment of transfer and land taxes. The survey team concluded that if the General Department of Land Management is to achieve its aim of registering and issuing certificates for all urban land by the year 2005, an efficient evaluation and adjudication process should be established to identify illegality and prescribe remedial action.

Wars and collectivization have created great social dislocation. Land is frequently occupied by those who received title from an *ancien regime* or an official body that is no longer recognized as having had the authority to allot land (*i.e.*, the Revolutionary Committees).³⁰⁰ Still more residents are noted on registers compiled by district people's committees, but have not been issued a certificate of land use and housing ownership.³⁰¹ In view of the extent of non-conformity, the regularization of titles is only likely to be successful where criminal penalties are combined with an administrative discretion which exculpates all but the most flagrant violations. The *Decree on Ownership of Residential Housing and Right to Use Land in Urban Areas*³⁰² represents a policy shift in this direction. Provided housing is constructed within a residential zone, the decree allows long term, but undocumented occupiers to regularize their land holdings.

Where resources are available, city people's committees may take extra-legal action to solve the problem of illegal housing. The Ho Chi Minh

295 See Hai Thanh, *supra* note 95.

296 See Hai Thanh, *supra* note 95.

297 Nguyen Son Lo Interview, *supra* note 250; Hong Sam, *supra* note 104, at 3.

298 See *supra* part III.C. Land development that proceeds without regard to laws or the instrumental arms of the state may be described as urban-traditional.

299 See Feasibility Study, *supra* note 162, at 116-20.

300 Mai Xuan Yen Interview, *supra* note 70; Nguyen Khai Interview, *supra* note 82.

301 Mai Xuan Yen Interview, *supra* note 70.

302 Decree No. 60-CP, art. 10(3) (July 5, 1994).

City People's Committee has recently allocated funds to remove or renovate shanty houses built along the banks of Nhieu Loc and Thi Nghe canals.³⁰³ This strategy will require the People's Committee to rezone the canal embankment into residential use and transfer the existing urban-traditional land into the authorized system. Funds for projects of this nature are limited and narrowly focused to assist war invalids, widows, state employees, health workers, and members of the armed services.³⁰⁴ If land registration is to be normalized by the target date, bureaucrats will need to generously exercise their discretion³⁰⁵ to exculpate illegal occupation and construction.³⁰⁶ The immediate cost to the state in lost fines and registration fees would soon be recovered through land³⁰⁷ and transfer taxes.³⁰⁸

2. *Futility of Sanctions in Promoting Private Compliance*

Even with the best intentions, it is beyond the resources of the Hanoi Chief Architect's Office to monitor and control all building activities.³⁰⁹ The problem is in part structural since official detection depends upon compliance with registration procedures. Once developers have applied for construction and planning permission,³¹⁰ they must register their projects with construction departments attached to people's committees. Unless developers notify authorities by filing development applications, district people's committee staff reportedly find it difficult to monitor illegal construction and occupation.³¹¹ Commentators suggest, however, that

³⁰³ *Housing Program Needs Much Support*, *supra* note 102.

³⁰⁴ *Housing Program Needs Much Support*, *supra* note 102.

³⁰⁵ Although the specific rates have not been enacted, it is reported that where a land use right is lawfully allotted, but a building erected on the land is illegal, a small fine may be levied. If the building is legal, but illegally located, the fine will be very substantial. Where the land use does not comply with zoning stipulations or encroaches on state land such as railways, there can be no validation and eventually, depending upon the seriousness of the case, the building will be destroyed. Nguyen Khai Interview, *supra* note 82. See also Decree No. 60-CP, art. 10(3) (1994) (pertaining to cases where the owner does not possess any or some of the required documents).

³⁰⁶ Decree No. 60-CP, art. 10 (1994) (on certificates of ownership and land use rights).

³⁰⁷ Ordinance on Residential Housing, arts. 2, 3, 18 (1991).

³⁰⁸ Law on Land Transfer Tax (1994).

³⁰⁹ Ha Van Que Interview, *supra* note 125.

³¹⁰ Decree No. 177-CP, On Regulation on the Management of Investment and Construction, arts. 21, 27 (Oct. 20, 1994); Decision 22-BXD-QLXD, Regulations on Registration of Construction Activities, Arts 9-13 MOC (Jan. 26, 1993); Nguyen Lan Interview, *supra* note 112.

³¹¹ Nguyen Son Lo Interview, *supra* note 250. Other state agencies also have difficulty in monitoring new construction. The Hanoi Power Service, a state-owned electricity supplier, for example has lost track of many new customers. See Nguyen Chi Thanh, *Thieves and Bureaucrats Block Efforts to*

given the right motivation, considerably more could be done with the existing resources.³¹² This view is supported by an enforcement experiment whereby district people's committees in Hanoi monitored purchases of building materials as a means of tracing unauthorized construction. Although the detection rate significantly increased, compliance did not show a corresponding improvement.³¹³ This discrepancy was blamed on corrupt officials; it was concluded that low wages unquestionably increase susceptibility to bribery.³¹⁴

Reliance on sanctions to enforce compliance has demonstrably failed. Unwieldy provisions allow people's committees to demolish illegally constructed houses,³¹⁵ a draconian penalty that is rarely used. Small fines may also be levied, but as a fraction of the value of the illegal structure, they are treated as affordable penalties or negative licenses.³¹⁶

The Ho Chi Minh City People's Committee recently issued new regulations to control illegal construction. The regulations provide for a range of fines from 200,000 up to 1,000,000 dong for serious violations.³¹⁷ This flexibility enables the People's Committee to fashion deterrence strategies inducing non-conformers to comply.³¹⁸ If the land bureaucracy is to regain control of urban fringe development, legal mechanisms must encourage articulation from the urban-traditional to the authorized system. Such mechanisms may take the form of once only fines,³¹⁹ or incremental penalties combined with rewards such as access to low cost construction loans and architectural advice. But these measures will be disregarded as

Modernise Power Grid, VIETNAM INVESTMENT REV., Oct. 25, 1993, at 7; Nguyen Tri Dung, *supra* note 124.

312 Nguyen Ngoc Khoi Interview, *supra* note 108.

313 Nguyen Lan Interview, *supra* note 112.

314 Nguyen Lan Interview, *supra* note 112; Koeman, *supra* note 292, at 27.

315 See Ordinance on Residential Housing, arts. 12(1)c and (2), 19 (March 26, 1991); Decision No. 103BXD-GD, Regulations on Quality Management of Construction Projects (June 15, 1992) (central-level legislation delegates authority to local government).

316 See, e.g., Hai Thanh, *supra* note 95; Nguyen Tri Dung, *supra* note 124.

317 Decision No. 1076/QD-UB-ND, On Promulgation of the Regulations on Penalties for Administrative Violations in the Field of Construction in Ho Chi Minh City, People's Comm. (Apr. 13, 1994) (fines range from US\$20 to \$100).

318 *Id.*

319 It is possible to pay a fine to temporarily legitimize the 'existence' of an illegally constructed building in Hanoi, but there is no clear legislative basis for this procedure. See Nguyen Tri Dung, *supra* note 107.

long as people's committees continue to believe that vigorous enforcement frightens away foreign investment.³²⁰

3. *Cultural Reasons for Private Noncompliance*

In addition to the absence of fear that serious sanctions will be enforced, private individuals hold a cultural antipathy towards bureaucrats. This antipathy is only reinforced in those circumstances where the authorities are seen to prosper from the legal system. To make matters worse, even when individuals wish to obey the law, compliance is made difficult by vague and sometimes unpublished planning and building regulations.

Noncompliance also stems from the lack of information about existing laws. Madam Ngo Ba Thanh, Vice President of the Vietnam Lawyers' Association, argues:

[t]he conversion process in Vietnam requires two very important transformations within Vietnamese society. First, the laws are meaningless until bureaucrats learn to enforce them Secondly, the people themselves require education so that they can understand the concepts of the new system. "Our way of publishing the laws is very bad" Vietnam has no tradition of making legal information available to the general public.³²¹

Ideological change through education is a long term solution. Authorities report that even after extensive press coverage of the *Land Law 1993*, non-conformers routinely plead ignorance.³²² On a more fundamental level, unless rules are practical and coincide with community moral, ideological, and cultural norms, they are unlikely, at least initially, to be internalized and obeyed.³²³

4. *Additional Disincentive to Comply*

Costs create barriers to entry into the authorized land use system. Administrative fees and survey charges are incurred whenever an occupier

³²⁰ Nguyen Lan Interview, *supra* note 112 (speaking about preservation of the Hoan Kien district, Hanoi); Koeman, *supra* note 292, at 27.

³²¹ Sachs, *supra* note 16 (*quoting in part* Ngo Ba Thanh).

³²² Hai Thanh, *supra* note 95.

³²³ The literature in this area is vast. See, e.g., SEIDMAN & SEIDMAN, *supra* note 72, at 119-26.

applies to a people's committee for a Land Tenure Certificate and Housing Ownership Certificate.³²⁴ Before a certificate can be issued, buildings are appraised according to a statutory valuation scale,³²⁵ often pricing the transaction beyond the means of a land user. Once a certificate is issued, land is subject to an annual tax.³²⁶

By halving the number of officially registered land transfers since its enactment in June 1994, the recently introduced legislation on land rights transfer taxes has had a particularly dramatic effect upon the authorized land use system.³²⁷ A forty percent levy is imposed when farm land is converted to another use. The impost is only paid where the transferee fails to cultivate the land, and is designed to limit the spread of cities into rural areas. In practice, city fringe farmers still sub-divide their land and avoid taxes by selling outside the authorized land system.³²⁸ Using the language of law and economic theorists, land holders decide whether to obey laws by reference to their economic self-interest.³²⁹

Compliance with planning and construction regulations also adds to the cost of development. Planning approval commonly requires fourteen separate official approvals taking from eighteen months to two years.³³⁰ It is hardly surprising where the benefits of compliance include taxes, building, health and fire safety regulations, and time delays, occupiers choose to remain outside the authorized system.

³²⁴ Ordinance on Residential Housing, arts. 11, 18 (1991). It is reported that many residents of Hanoi who are entitled to claim housing ownership certificates have not done so because of the attendant costs. Their occupation would in any event be noted in Residential registration books held at the local district people's committee. Mai Xuan Yen Interview, *supra* note 70. In rural areas, the cost of issuing a Land Tenure Certificate varies from 20,000-70,000 dong per hectare. In some circumstances, fees may be paid by the rural commune. See Browne, *supra* note 94, at 15, 16.

³²⁵ Decree No. 87-CP Stipulating Price List of Categories of Land, (Aug. 17, 1994).

³²⁶ Ordinance on Residential Housing Land Tax, arts. 2, 3 (1991).

³²⁷ See Nguyen Van Phu, *supra* note 3, at 18-19; *Tax on Farmland Transfer Under Scrutiny in Ho Chi Minh City*, VIETNAM INVESTMENT REV., May 23, 1994, at 17. A 20% tax applies to the transfer of urban land.

³²⁸ Mai Xuan Yen Interview, *supra* note 70; Ha Van Que Interview, *supra* note 125. See Instruction No. 1044-KTN, Prime Minister (Mar. 3, 1995) (temporary halt on the conversion of wet-rice land for housing and other purposes) (sighted by the author at the Ministry of Justice Legal Information Center).

³²⁹ See generally R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (1986); G. Calabresi & D. Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (the self-interest theory).

³³⁰ Ha Van Que Interview, *supra* note 125. See also Nguyen Tri Dung, *supra* note 107, at 16; *Build Your Own Houses*, Says Minister, *supra* note 1.

V. STRATEGIES FOR A LAND MANAGEMENT REGIME

A. *Sources of the Bureaucracy's Failure to Obtain Compliance*

1. *Conflict Between Formal Law and Local Land Use Customs*

The complex interplay between the instrumental use of law and custom, ideology, and bureaucratic culture should not be ignored. Professors Ann and Robert Seidman have identified four prerequisites for the instrumental use of law.³³¹ First, good law must specify achievable implementation. Second, law-makers and implementors must understand the closely intertwined relationship between the legal order and political-economic institutions. Third, they must conduct ongoing research to identify the behavioral consequences of law; and fourth, they must ensure that the form of law, including its wording, adequately communicates its prescriptions for changing behavior.

The process of legal development in economically successful East Asian states provides empirical evidence that formal legal rationality is not always necessary and may actually inhibit modernization.³³² In such countries the normative legal system is incomplete; existing laws are often poorly drafted and poorly understood by the public. But problems are not limited to drafting and publication defects. As applied to Vietnam, formal legal rationality also tends to categorize authorized land use as legal and urban-traditional land use as illegal. This simplification ignores the patronage networks, property demarcations, and dispute resolution practices that have developed without much regard for state instrumentalities and have largely shaped land use behavior in Vietnam.

The coexistence of Neo-Confucian values and Western rights-based law creates a divided legal geography³³³ in which formal law does not address the needs of entire communities.³³⁴ In this divided legal geography, formal law's lack of relevance fosters a social attitude that rejects any

³³¹ SEIDMAN & SEIDMAN, *supra* note 72, at 43-44.

³³² See Douglas, *supra* note 195; THE JAPANESE LEGAL SYSTEM 353-88 (Hideo Tanaka & Malcolm Smith eds., 1976); WORLD BANK RESEARCH REPORT, *supra* note 195, ch. 7; CHOWDHURY & ISLAM, *supra* note 195, ch. 5.

³³³ Neo-Confucian values embedded in Vietnamese culture seek to personalize relationships so that social control is carried out within the context of social relationships. Western law, based upon atomistic individuality, may not easily integrate into a culture where, even in comparatively Westernized urban areas, a person's legal identity tends to be fused with that of his or her family or business group.

³³⁴ This is especially true for those on the urban fringe.

comprehensive obligation to comply with an external rule unless it coincides with community sentiment. In a society where over three quarters of urban development breaches the law,³³⁵ it is time to rethink the concept of legal domination and consider the possibility that several legal systems co-exist in Vietnam.³³⁶

Alternatives to the "all or nothing approach" in which formal laws either convey legitimacy or they do not should be considered. Theoretically, administrative discretion is sufficiently flexible to act as a bridge, allowing urban-traditional land users to integrate step-by-step into the authorized system. Discretionary regulation would allow subtle combinations of formality and informality, enabling administrators to deal on a case-by-case basis with the extremely complex inter-relationships between authorized and urban-traditional land use.³³⁷

To the extent that laws tend to be internalized and obeyed³³⁸ where they are compatible with and preserve established cultural and legal principles, a legal system in which urban-traditional norms have been assimilated may elicit social compliance. For example, the rules governing rural land use are generally obeyed;³³⁹ perhaps this due to their similarity with traditionally rural practices.³⁴⁰ In contrast, urban land policy is not derived from principles embedded in Vietnamese culture, perhaps contributing to widespread noncompliance with the formal rules.³⁴¹

³³⁵ See *supra* part III.C.

³³⁶ Coexisting land control systems has an historical basis arising from the social dichotomy between the Confucian rulers and predominantly rural Taoist, Buddhist populace. See Fforde & Seneque, *supra* note 78, at 318-19; Yu Insun, *Law and Family in 17th and 18th Century Vietnam* 56-79 (1978) (unpublished Ph.D. thesis, University of Michigan); A. WOODSIDE, *COMMUNITY AND REVOLUTION IN MODERN VIETNAM* 21, 118-20 (1976); S. Young, *The Law of Property and Elite Prerogatives During Vietnam's Lê Dynasty (1428-1788)*, 10 *J. ASIAN HIST.* 1 (1976). French and Soviet, and (in the South) American influence has amplified the rural-urban divide. But the mosaic of land control systems is not simply the product of cultural difference; the administration of formal rules is also a determinant.

³³⁷ See generally D. GALLIGAN, *DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION* ch. 4 (1986). The "Veblen-Ayres dichotomy" suggests that institutions may not be an appropriate locus for social change. See Thomas De Gregori et al., *An Institutional Theory of Bureaucracy*, in *BUREAUCRACY: THREE PARADIGMS* 84-86 (Neil Garston ed., 1993).

³³⁸ Yet, compliance will presumably be enhanced should these rules embody community values. See generally J. Raz, *On the Functions of Law*, in *OXFORD ESSAYS IN JURISPRUDENCE* 280-87 (A.W. Simpson ed., 1973); J.R. PENNOCK & J. CHAPMAN, *THE LIMITS OF LAW* 2-5 (1974).

³³⁹ Phan Huu Chi Interview, *supra* note 76; Mai Xuan Yen Interview, *supra* note 70.

³⁴⁰ Phan Huu Chi Interview, *supra* note 76.

³⁴¹ See *supra* part IV.D.

2. *Abuse of Discretionary Authority by Members of the Bureaucracy*

a. *Inadequacy of existing system for review of administrative acts*

Without a system of independent judicial review, no amount of skillful legal drafting will, on its own, ensure uniform bureaucratic outcomes. Transparent legislation and a separation of administrative and commercial functions are insufficient to remove all opportunities for the bureaucracy to benefit from discretionary authority. Except for highly prescriptive technical rules, such as those governing the acceptable range of dimensions for window frames, legislation must be interpreted before it can be administered. If laws are to constrain the bureaucracy, the system of justice must be autonomous³⁴² and make officials accountable not only to their superiors, but also to those affected by their decisions. For this to happen, the review institution must be structured in such a way that provides access to the poor and socially disenfranchised, those most likely to breach land laws.

An extra-judicial machinery for reviewing complaints already exists. Complaints may be lodged with the land management body that issued the contentious decision in the first instance.³⁴³ It is likely that grievances will be addressed under this system. In theory, an appeal may be formally referred to the Prime Minister,³⁴⁴ who can abrogate decisions of people's committees or chief architects. The authoritative people's procurators may also act on complaints, but only when a decision involves actual illegality.³⁴⁵ The Ministry of Construction has the power to issue warnings, or in more serious cases, promulgate resolutions or decisions³⁴⁶ directed at recalcitrant people's committees. As a final resort, the Prime Minister may be persuaded to dismiss the Chairman and/or Vice Chairman of the offending people's committee.³⁴⁷ This is only likely to occur with the consent of

³⁴² See Trubek, *supra* note 9, at 9.

³⁴³ Law on Land, art. 38(2) (1993) (Appeals against unfavorable land allotments); Instruction B, Applying for Construction Land Use Licence, Guidance on Instructions for Applications for Construction Land Use Licences, Chief Architect's Office, Hanoi People's Comm., 602/KTS-TH (June 1993) (appeals against the rejection of construction or planning permits must be made to the Chief Architect's Office).

³⁴⁴ VIETNAM CONST. art. 114(4)-(5) (1992).

³⁴⁵ Law on State Procurators (1982) (sighted by author at Ministry of Justice Information Center). Complaints may also be lodged according to the People's Inspectorate Ordinance on the Punishment of Administrative Violations (Nov. 30, 1984).

³⁴⁶ VIETNAM CONST. art. 115 (1992).

³⁴⁷ *Id.* art. 114(3).

the CPV. These administrative avenues of appeal undoubtedly reduce arbitrariness, but they also act like a pressure valve, releasing dissatisfaction without establishing a body of review that is "independent of state, its workings and its ideology."³⁴⁸

Gaps in the existing regulatory system are evinced by hotel construction bordering Hoan Kiem Lake in Hanoi.³⁴⁹ In 1994 the Hanoi People's Committee recently authorized construction of an eight-story hotel³⁵⁰ in this historic precinct. Planning approval took over two years and was only granted when a Hong Kong-based investor agreed to enter into a joint venture with Haneco, an import-export service company owned by the Hanoi People's Committee's External Economic Relations Department. Acting on complaints from various professional bodies such as the Vietnam Architects Associations, the NIURP attempted to prohibit the Hanoi People's Committee from issuing a construction license to the hotel developers. As the NIURP lacks legislative power, its objections took the form of representations to the Hanoi People's Committee. These overtures were ignored, which should have allowed the NIURP to formally complain to the Ministry of Construction. Yet no further action was taken as the project had attracted high level government support.

Vietnam has never accepted the Anglo-American notion³⁵¹ of judicial review as a genuine method of bringing administration under the rule of law. On the contrary, most political actors regard any check on discretionary authority a potential threat to political authority. Vietnam's long history of bureaucratism tends to indicate that patronage has become an intrinsic part of the economic legal system and is not just a transitory immoral aberration.³⁵² Naturally, groups which are excluded from bureaucratic

³⁴⁸ A. Tay & E. Kamenka, *The Future of Administrative Justice in the USSR and China*, in SOVIET ADMINISTRATIVE LAW: THEORY AND POLICY 47-61 (George Ginsburgs ed., 1989). See generally, *id.*

³⁴⁹ The height of buildings surrounding the lake is not supposed to exceed a notional 45 degree line rising inland from the lake's edge. See Dao Quong Binh & Jeremy Grant, *supra* note 264.

³⁵⁰ See Quoc Vinh, *Hotel Construction Finally Under Way*, VIETNAM INVESTMENT REV., Feb. 7, 1994, at 5; Ngoc Dung, *Long Wait from Licence to Lift-Off*, VIETNAM INVESTMENT REV., Feb. 13, 1995, at 24.

³⁵¹ Compare MARK ARONSON & NICOLA FRANKLIN, REVIEW OF ADMINISTRATIVE ACTION 1-11 (1987) (evolution of judicial review in Anglo-American legal environments) with Charles Szladits, *The Civil Law System*, in 15 THE INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 49-69 (Rene David et al. eds., 1982) (discussing the judicial review of administrative law under civil law traditions).

³⁵² Nguyen Tran Bat Interview, *supra* note 173. There appears to be a social differentiation between patronage and direct payment of bribes. The distinction does not seem to turn on degrees of moral approbation but rather on the openness with which an official deviates from an authorized norm. See generally Wertheim, *supra* note 284, at 136-40.

patronage networks find urban-traditional land use more attractive than the authorized system.

b. Inadequacy of efforts to control bureaucratic discretion

Nevertheless, some influential reformers continue to vigorously champion bureaucratic accountability.³⁵³ Fearing that patronage and ad hoc decisions may compromise state policy, reformers have attempted to launch a party and government campaign³⁵⁴ to control bureaucratic discretion.

The inadequacies of this campaign, however, are evident. Pressure for greater bureaucratic accountability appears to be limited to vertical lines of authority within ministries and between central and local governments. Current drafts of a law on the organization of the administrative courts envisage a highly qualified private right to appeal against administrative discretion. The court must, for example, consider the nebulous "will of the state" before individual rights.³⁵⁵ Judicial independence is further undermined by an obligation, shared with the Fatherland Front and authorized mass movements, to "struggle, prevent and fight against unlawful violations in state administrative activities."³⁵⁶ Unnecessarily complex procedures are also cause for concern. Furthermore, the establishment of an entirely new court organization will undoubtedly strain the resources of a judicial system already critically short of adequately trained judges.³⁵⁷ Without a political commitment to the doctrine of separation of powers,³⁵⁸ genuinely independent review thus remain a pious hope. Such a reform can only be meaningful

³⁵³ It should also be noted that the Prime Minister has endorsed a limited form of judicial review of administrative action in Instruction 6, Resolution No. 38-CP. On Administrative Reform (May 4, 1994).

³⁵⁴ See Resolution No. 38-CP. On Administrative Reform. Office of Government (May 4, 1994); Phong Lan, *supra* note 259.

³⁵⁵ See Hoang et al., *supra* note 223, at 87-88.

³⁵⁶ *Id.*

³⁵⁷ See Sidel, *supra* note 200, at 221, 224-28.

³⁵⁸ The separation of powers has traditionally been linked with the rule of law as the cornerstone of Western legal systems. Of course true separation of powers does not exist in any country, indeed to concentrate absolute power in three separate organs in the absence of proper safeguards is perhaps more dangerous than a blurring of the distinction between these organs. It is quite likely that if a separation of powers develops in Vietnam, it will not resemble the balance struck under Western parliamentary systems. In the meantime, the Vietnamese administration will continue to exercise an unfettered discretion until some degree of judicial independence is guaranteed. The literature in this area is vast. See, e.g., S.A. DE SMITH & R. BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 18-22 (1989). For the Vietnamese official line, see Nguyen Duy Quy, *supra* note 202.

in the highly unlikely event that the party abandons the *nomenclatura* system and democratic centralism.³⁵⁹

Despite its shortcomings, the creation of a judicial forum capable of reviewing the legality of administrative decisions, acts, omissions, and delays³⁶⁰ may eventually improve bureaucratic compliance. Review of bureaucratic discretion can only achieve this goal if land allotment, transfer, planning, and construction legislation contain judicially discoverable and manageable standards. Without clear limitations and guidelines, the exercise of discretion is tantamount to the formulation of government policy, and is therefore beyond judicial review.³⁶¹ Ultimately, unless administrative judgments are backed by enforceable sanctions, they are likely to be ignored.

Administrative reform has been given a high priority by the state, though its focus is almost entirely structural. Faults in the system, so it is argued, may be rectified by streamlining allotment and transfer approvals, improving the technical competence of cadre, reorganizing ministerial responsibilities and increasing the vigilance of law enforcement.³⁶² Little progress has been made to extend the underlying principle of legal reform to administrative regulation, *i.e.*, that a law-based society should bring greater regularity to Vietnamese political, economic, and social life.

B. *Specific Proposals for Encouragement of Compliance*

Vietnam's lawmakers³⁶³ are increasingly looking towards local social, economic, and cultural values as a source of law before turning to Western rights-based law. This so-called "National Characteristics Model"

³⁵⁹ See *supra* part IV.A: Seventh Installment of the Basic Contents of the Hanoi 20-25 January Mid-Term Party National Conference Resolution, SAIGON GIAI PHONG, Mar. 1994, at 3; *Communique of the 8th Plenum of the CPV Central Committee (7th Congress)*, 1 VIETNAM L. & LEGAL F. 10, 11 (Feb. 1995).

³⁶⁰ See Draft Ordinance on Procedure of Settlement of Administrative Cases, art. 2. (sighted by the author at the Ministry of Justice Information Center).

³⁶¹ See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

³⁶² Doan Trong Truyen, *Administrative Reform, Key Issue for the Reform of the State Apparatus*, 1 VIETNAM L. & LEGAL F. 30, 30-31 (Oct. 1994); Le Hun Nghia, *supra* note 196, at 2; *Orientations for the Building and Perfection of the Vietnam Socialist Republic State*, *supra* note 98, at 3-6.

³⁶³ Interview with Tran The Vuong, Director, Legal Department, National Assembly, in Hanoi, Vietnam (Sept. 13, 1994) [hereinafter Tran The Vuong Interview]; Do Muoi, *Building and Perfecting the State*, 1 VIETNAM L. & LEGAL F. 3, 7-8 (Feb. 1995); Ngo Bai Thanh, *Vietnam's Integration into a New Humanist International Order*, 1 VIETNAM L. & LEGAL F. 26, 28-30 (Sept. 1995); Hoang The Lien, *supra* note 39, at 34-35.

is expected to graft the system of administrative guidance onto a conventional legal model. How this will be achieved in practice is a matter for speculation. Recent land legislation has increased the administrative discretion of local government without introducing general normative standards and objective rules of law.

As a top-down system, the conventional legal model tends to discourage resort to law by individuals, particularly where there is a conflict between legal and community norms.³⁶⁴ Admittedly, the public is surveyed during the law-making process and their responses are interpreted according to "scientific principles." However, non-party community groups, and especially individuals, are usually excluded from the drafting process, the more so as draft legislation is rarely made public. Ministry of Construction and General Office of Land Management policy also shows reluctance to recognize the worth of non-conforming land use. Urban-traditional land use, for example, continues to be criminalized even in localities where authorized usage is a fringe phenomenon. Lawmakers, however, are beginning to show some tentative signs of allowing the public to play a role in developing planning schemes.³⁶⁵ As a corollary, more attention is devoted to publicizing subordinate legislation, although certain ministries still tend to treat law as state secrets.

However, even the most precisely drafted laws remain ineffective without an able bureaucracy. This is particularly true in Vietnam, where a socialist-trained bureaucracy is responsible for administering rights-based land laws. Exceedingly complicated planning and building procedures, poor institutional organization and training, and a lack of resources have already been identified as key impediments to bureaucratic efficiency. The largely unfettered discretion³⁶⁶ exercised by land administrators has also been linked to corruption and rent-seeking behavior. However, as the following tentative propositions suggest, it is equally possible that discretion may be used to enhance compliance.

³⁶⁴ Nguyen Tran Bat Interview, *supra* note 173; see generally HART, *supra* note 97, at 124.

³⁶⁵ Ngoc Anh, *supra* note 288; Interview with Hu Van Que, Assistant to Chief Architect, in Hanoi, Vietnam (Sept. 14, 1994). The use of custom as a source of law is also gaining importance. See Hoang The Lien, *supra* note 39, at 33.

³⁶⁶ Compliance will presumably be enhanced where decision making is based on community values. See Hoang The Lien, *supra* note 39, at 35. See generally Raz, *supra* note 338, at 280-87; HART, *supra* note 97, at 24.

1. *Predictability through the Researching, Drafting, and Monitoring of Decision-Making Guidelines.*

Bureaucrats should research, draft, and monitor guidelines describing the scope and subject matter of decision-making criteria to provide assurance of predictability. A major difficulty constraining legislative drafters is the paucity of research concerning land use practices. Central-level lawmakers need time to observe rapidly evolving social and economic land use patterns before codifying general principles of law or prescriptive land use regulations. Research is hindered by a secretive drafting process that tends to distance central level lawmakers from community practices, values, and expectations. Administrators at the local level are closer to these trends.³⁶⁷ Local administrators have experience resolving social problems where normative laws provide inadequate guidance, and are more used to drawing from a protean mixture of party resolutions and moral principles embedded in Vietnamese culture to resolve such problems.³⁶⁸ On the other hand, the potential for administrators to use their discretion to cynically plunder cultural principles to support short-term political goals, constitutes a fundamental risk of the so called National Characteristics Model.

As long as administrative decision making remains vague and unchallengeable, developers need assurance that administrative decisions are predictable. If bureaucrats are required to research, draft, and monitor guidelines describing the scope and subject matter of decision-making criteria, the most efficacious rules could eventually be codified, forming authoritative community standards that transform observed commercial practice into knowable legal norms. These standards could be used by the Ministry of Construction and the General Office of Land Management as the basis for legislation.³⁶⁹ Thus codified, through a process of acknowl-

³⁶⁷ Note the example of district people's committees applying local custom to determine whether a land transferor has adequately provided for co-occupiers. See *supra* part III.B.

³⁶⁸ Nguyen Tran Bat Interview, *supra* note 173.

³⁶⁹ See Ordinance on Residential Housing, art. 14 (1991). It is possible that courts may also create a parallel system of law as judgments in the civil division of the people's court concerning housing disputes contribute to the development of land use standards. Although Vietnam has a civil law system, in following the Soviet legal model, the Supreme People's Court issues a summary and commentary about key cases in its annual report. These set out principles of law extracted from a series of analogous cases. There is some dispute whether they are binding upon inferior courts or can only be treated as guidance. See Hoang The Lien, *supra* note 39, at 33; Nguyen Nhu Phat Interview, *supra* note 101; Wohlegemoth, *supra* note 98.

edgment and internalization, the norms may actively unify and reinforce acceptable standards of community behavior.

2. *Using Patronage Networks to Disseminate Information*

Bureaucracy should use patronage networks to disseminate information about regional land use practices and win local-level acceptance for state policy. Land use practices vary considerably in Vietnam, especially along the urban-rural, north-south, and lowland-highland divides.³⁷⁰ It may be premature to enact comprehensive, uniform national land use³⁷¹ and construction legislation³⁷² in the midst of the current rapid transformation of land use practices. In the meantime, land and building administrators may use patronage networks to localize statements of principle enshrined in national laws. Patron-client relationships can be used to disseminate information to local bureaucrats about regional land use practices as well as state policy. The National Characteristics Model's reliance on local bureaucratic authority carries with it the risk of regionalization, already a significant problem in Vietnam.

3. *Strengthening Women's Cultural Rights in Land*

State policy should encourage the strengthening of women's cultural rights in land. It has been suggested that positive rights-based laws may tend to exacerbate a gender imbalance³⁷³ by preferentially allotting land to individuals and the heads of households. If equal opportunity laws were introduced, values based on equality of outcomes are unlikely to be rapidly received into Vietnam's neo-Confucian society.³⁷⁴ The process might be strengthened, however, if local authorities were required by state policy to exercise their discretion to strengthen women's cultural rights in land.

³⁷⁰ See part III.B.

³⁷¹ See Steven McFadzean, Recent Developments in Vietnamese Land Law, Asian Studies Association of Australia Biennial Conference in Perth (July 16, 1994) (unpublished paper).

³⁷² Phan Dinh Dai Interview, *supra* note 115.

³⁷³ See *supra* part III.D.3.c.

³⁷⁴ The difficulty of attempting to modify people's moral and social values through law is discussed by Ngo Ba Thanh, *supra* note 24, at 28-31; COTTERRELL, *supra* note 59, at 53-58.

4. *Resources for Investigating, Penalizing, and Prosecuting Corrupt Bureaucrats*

State policymakers should allocate resources to sufficiently investigate, penalize and prosecute corrupt bureaucrats. Experience from other Asian countries³⁷⁵ suggests that Vietnam's administrative reform program, which publicly demonizes corrupt officials, promotes according to merit, trains and re-trains, strengthens central control, streamlines procedures, and improves auditing,³⁷⁶ is useful; to achieve success, however, three further steps are needed. First, a reliable and efficient system of information gathering will expose abuses of administrative authority. The press in Vietnam, for example, have played a significant role in exposing corrupt land officials. Second, penalties need to be adjusted to match the gravity of the offense. Finally, an investigating authority should be given the powers and resources to prosecute officials of all ranks. At present, crime fighters can also be found amongst the ranks of perpetrators.³⁷⁷ Through the implementation of these three steps policymakers can begin to show that bureaucratic corruption will not be tolerated.

5. *Rules to Guide Bureaucratic Decision-Making, Encourage Negotiation with Developers, and Sever the Financial Link with State Commercial Enterprises*

The state should establish rules to guide bureaucratic decision-making, encourage negotiation between bureaucracy and developers, and sever the financial link between bureaucrats and state commercial enterprises. Although decision-making can only become accountable to the public with the support of powerful institutions capable of enforcing rules against the bureaucracy,³⁷⁸ prescriptive rules do establish authorized behavioral parameters and reduce the risk of punishment attached to decision

³⁷⁵ See KLITGAARD, *supra* note 284, at 74-97, 115-31.

³⁷⁶ See Doan Trong Truyen, *supra* note 362, at 30-31.

³⁷⁷ See Bui Thien Ngo, NHAN DAN, Dec. 23, 1993, at 1; Benedict J. Tri Kerkvliet, *Politics of Society in the Mid 1990s*, in DILEMMAS OF DEVELOPMENT: VIETNAM UPDATE 1994, at 1, 20-28 (Kerkvliet ed., 1995).

³⁷⁸ There is considerable evidence that laws change behavior. But the reasons for compliance are more complex than the convergent values and attitudes of self interest. There is extensive literature in this area. See generally ROBERTO M. UNGAR, LAW IN MODERN SOCIETY: TOWARDS A CRITICISM OF SOCIAL THEORY, ch. 2 (1976); Dror, *supra* note 187, at 787-93 (on values and attitudes); POSNER, *supra* note 329; Calabresi & Melamed, *supra* note 329.

making. Given the existing uncertainty and absence of such parameters, however, it is highly likely that inferior level bureaucrats will remain reluctant to make land management decisions, only cautiously exercising their administrative discretion.

a. *Negotiation*

Just as important as rules, a dialogue between administrators and developers allows practical problems to be resolved through negotiation. The private legal profession is emerging as one of the most influential bridges between the state and developers. Although sometimes dismissed as illegitimate intruders interfering with bureaucratic power, attempts by lawyers to define the boundaries of official authority are being reluctantly acknowledged.³⁷⁹ Administrative efficiency may also be enhanced by simplified land development procedures. The existing complicated approval processes undoubtedly cause costly delays and create opportunities for corruption.³⁸⁰

b. *Law on State Enterprises*

Another way rules can change behavior is to reduce the potential for conflicts of interest by severing the financial link between state officials and state commercial operations. Probably with some justification, local autarky is thought³⁸¹ to be sustained by revenue derived from profit-making companies owned or associated with state instrumentalities. The forthcoming law on state enterprises is intended to transform state-owned enterprises into independent business entities by diverting income away from state

³⁷⁹ Interview with Nguyen Tien Lap, Chief Legal Division Investconsult, in Hanoi, Vietnam (Sept. 30, 1994 and Feb. 10, 1995).

³⁸⁰ See Nguyen Tri Dung, *supra* note 124; Vo Van Kiet, *Report to the 9th Session of the National Assembly (Dec. 7, 1993)*, VIETNAM INVESTMENT REV., Nov. 1, 1993, at 3.

³⁸¹ Interview with Minister Le Xuan Trinh on Administrative Reforms, in Ho Chi Minh City, Vietnam (Jan. 8 1994), in F.B.I.S. DAILY REP. - E. ASIA 94-062, Mar. 31, 1994, at 65-66 ("Administrative reform is an urgent task The responsibilities of the central and local organizations must be clearly determined; and there must be a clear distinction between the responsibilities of the state management organizations and those of the commercial production organizations."); VO VAN KIET, *supra* note 91, at 20-23.

supervising agencies³⁸² to an independent body attached to the Ministry of Finance.³⁸³

Reforms will free state enterprise managers from direct state control, possibly through the formation of a board of directors selected from candidates outside of the controlling bureaucracy. If decision making no longer generates a direct financial return, law-makers rather optimistically believe that officials may be more inclined to impartially discharge state policy.³⁸⁴ For example, the law will sever the above-mentioned nexus between the chief architect's office and architectural service companies, in theory leveling the playing field between state and private architectural service companies. These changes are intended to allow the private sector to compete more equally with the state enterprises. This vital aspect of the economic reform program was constantly delayed by state agencies benefitting from revenue generated by state enterprises.³⁸⁵

Success is not assured; reforms do not address a pronounced bureaucratic antipathy towards private development³⁸⁶ nor do they extend to enterprises indirectly controlled by officials and their families. Unacceptable commercial influence on decision making could be further quarantined by requiring land management officials to disclose personal and family assets and benefits received from state and privately owned enterprises. The draft law on state enterprises also fails to create a general duty to avoid conflicts of interest arising from close personal and professional relationships that subsist between state officials and associated state enterprises. These links are likely to remain after income generated by enterprises is redirected into consolidated revenue.

It is also interesting to speculate whether party influence over state enterprises,³⁸⁷ reportedly in decline³⁸⁸ since the enactment of *Decree*

³⁸² See Decision No. 83/TTg, Establishing a Central Steering Committee on Enterprise Reform, Govt., (March 1993); Nguyen Dinh Loc, *Striving for an Integrated System of Economic Laws*, 34 VIETNAM COURIER, Aug. 1992, at 5.

³⁸³ Decree No. 34 CP, Tasks, Power and Organizational Mechanism of the General Department for Managing State Capital and Assets in Enterprises (May 27, 1995).

³⁸⁴ Tran The Vuong Interview, *supra* note 363.

³⁸⁵ Raymond Mallon, Overview of Recent Developments in State Enterprise Reform in Vietnam, State Enterprise Reform Program (VIE/91/011) 18-19 (Apr. 1994) (unpublished paper, Government of Vietnam, UNDP, and World Bank).

³⁸⁶ Vo Dai, *Renovation of the Ownership Structure in Vietnam in the Shift to Market Economy*, 17 ECON. PROBLEMS, July-Sept. 1992, at 3, 4-6; Vo Nhan Tri & Anne Booth, *Recent Economic Developments in Vietnam*, 6 ASIAN-PACIFIC ECON. LITERATURE 16, 23-24 (1992).

³⁸⁷ See Mallon, *supra* note 192, at 211-12.

³⁸⁸ See Thayer, *supra* note 44, at 24-25.

217,³⁸⁹ will expand to fill the power vacuum left by the removal of direct bureaucratic supervision. Given the party's unchallenged leadership of the state apparatus, unless it voluntarily relinquishes direct and indirect influence over state enterprises, legislation is unlikely to be an effective restraint. This is because party members are disciplined according to internal party rules and immunity is rarely waived to allow civil suit or criminal prosecution.³⁹⁰ As one National Assembly member has been quoted as saying, "[a]s long as violators of the law are treated with tolerance by their old comrades we will have gaps in our legal system."³⁹¹

VI. CONCLUSION

In view of the low levels of compliance with land laws, it is not surprising that the state is reassessing the importance of extra-legal means of implementing policy.³⁹² The National Assembly has called upon the Fatherland Front and other mass organizations to motivate the public to comply with planning and construction laws. The party has a long history of using ideological apparatus such as mass organizations to augment bureaucratic implementation of law.³⁹³ Mass movements have in the past been highly effective at maintaining control. They influence behavior through education and discipline of members.³⁹⁴

Although there is a clear commitment by the party to instrumental governance, it is acknowledged that:

the law alone cannot resolve all issues in daily life, which is full of complicated social problems. As a result, while formu-

³⁸⁹ Decree No. 217 HDBT, Stipulations on Renovation Policies of Planning and Socialist Business Accounting for State Enterprises, Council of Ministers (Nov. 14, 1987) (sighted by the author at the Ministry of Justice Information Center). Pursuant to this Decree, state enterprises were granted autonomy to formulate and implement short, medium, and long term plans for production, free from party or ministerial intervention.

³⁹⁰ See VO VAN KIET, *supra* note 91, at 39-42; Nguyen Thanh Giang, Address to the Central Committee, Vietnamese Communist Party, VIETNAM INSIGHT (internet SEASIA-L, pts. 1-4 (Sept. and Oct. 1994)).

³⁹¹ Murray Hiebert, *Miles to Go: Despite Reform, Legal System Leaves Much to Be Desired*, FAR E. ECON. REV., July 29, 1993, at 24-25.

³⁹² Nguyen Ngoc Khoi Interview, *supra* note 108; Mai Xuan Yen Interview, *supra* note 70.

³⁹³ The current experiment with rule through state instrumentalities only started to gain wide support after the introduction of *Dôi Mới* (renovation) in 1986.

³⁹⁴ Mechanisms such as the power to demote or promote, as well as to grant or deny access to state services such as health and education, are used to influence those employed in the state sector. See Beresford, *supra* note 222, at 119-24; Thayer, *supra* note 217, at 21-26.

lating various laws we must develop our social mechanism and promote the people's rights to autonomy in managing the family, ward, village, and community activities to improve their daily life and to settle social issues through social contracts.³⁹⁵

So far, the state has shown little willingness to legitimize those community values embedded in urban-traditional land use. Instead, administrative reform in this area has so far been designed to strengthen central authority so that laws prohibiting illegal occupation and construction are more rigorously enforced.³⁹⁶ This kind of reform, however, is unlikely to encourage compliance.

Compliance is more likely to increase when bureaucratic discretion allows rights-based laws to become more porous and responsive to urban-traditional values. Towards that end, bureaucratic discretion should be checked by an independent and widely accessible system of review; otherwise top-down reform may simply replace one patronage network with another.

Recognizing that bureaucratic rule has failed to control urban development and that foreign laws are rarely politically or economically appropriate, lawmakers are looking inwards at local customary practice and cultural values as sources of land law. This so-called National Characteristics Model, however is a long-term strategy. In the meantime, the National Assembly has called upon the Fatherland Front and other mass organizations to motivate the public to comply with planning and construction laws. It is possible that these organizations can achieve what the bureaucracy cannot, though in a "mixed market" economy it is unclear whether mass organizations still command sufficient respect to change social attitudes.

³⁹⁵ *Land Transferred to Farmers in 47 Provinces*, *supra* note 77, at 57.

³⁹⁶ *Land Transferred to Farmers in 47 Provinces*, *supra* note 77, at 57; Vu Oanh, *supra* note 51, at 3; *Let Us Continue to Renovate the Party-Initiated Mass Mobilisation Work in the New Situation* (NHAN DAN, Sept. 21, 1993), translated in F.B.I.S. DAILY REP. - E. ASIA 93-201, at 3; *Assembly Issues Anti-Corruption Resolution* (Hanoi Voice of Vietnam, Dec. 30, 1993), in F.B.I.S. DAILY REP. - E. ASIA 94-007, Jan. 11, 1994, at 53-54.