

Washington International Law Journal

Volume 7
Number 3 *Symposium: Emerging Land Use Law
in the Pacific Rim*

7-1-1998

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Recommended Citation

John Gillespie, *Land Law Subsystems? Urban Vietnam as a Case Study*, 7 *Pac. Rim L & Pol'y J.* 555 (1998).

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LAND LAW SUBSYSTEMS? URBAN VIETNAM AS A CASE STUDY

John Gillespie[†]

Abstract: Throughout Vietnam's long history, the central elite and peripheral farming communities have been legally and culturally divided. This dichotomy was never as complete as the famous injunction that "the emperor's writ stops at the village gate" infers. Initially, during the period of French colonisation and more recently since the introduction of *doi moi* (renovation) economic reforms, central authorities have attempted to unify land management with universal normative law. This experiment has stimulated widespread non-compliance with land laws in urban centres; in some areas compliance is a fringe phenomenon. In this divided legal geography, pockets of non-compliance give the appearance of autonomy from state legality—suggesting the existence of plural land law sub-systems. But an analysis of case studies concerning land use right applications, squatting, court decisions and compulsory acquisition reveals complex relationships between land occupiers and the state. A myriad of formal and relational connections blurs the interface between state and society, suggesting that the official and unofficial aspects of land management are best understood as two components of the same system. Urban case studies suggest officials and the public share a common culture that sustains relational networks binding state land management and local land practices. In this relational matrix, the legal pluralistic concept of 'non-state legal sub-systems' is difficult to substantiate. Where relational networks are weak, such as between hill tribes and the central state, non-state legal subsystems continue to flourish.

I. INTRODUCTION

After 1954, Vietnamese socialist planners neglected and depopulated northern cities, which were tainted by their colonial heritage.¹ During this period, land managers redistributed housing in the Democratic Republic of Vietnam ("DRV") to party cadre and state employees without addressing the needs of other urban residents.² Uncertain land laws and policies induced a precipitous decline in house construction and maintenance.³ It was not until

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¹ See NIGEL THRIFT & DEAN FORBES, *THE PRICE OF WAR*, 122-34 (1986) (stating Northern cities recorded slow growth, while southern cities lost population).

² Interview with Trinh Duy Luan, Director of the Department of Urban Sociology, Institute of Sociology, in Hanoi (Nov. 8 1997).

³ For example, in 1989, 42% of residents in Ho Chi Minh City lived in housing built between 1961-1971, while in Hanoi the rate was 23% and in Ha Phong 19%. See Trinh Duy Luan and Nguyen Quang Vinh,

reunification of the country in 1975 that a state funded National Housing Program, applying socialist, egalitarian distribution principles, began to improve urban housing conditions. By the 1980s a combination of corrupt allocation practices⁴ and substantial budget shortfalls excited a radical change in housing policy. After the introduction of *doi-moi* (renovation) economic reforms,⁵ those with capital were encouraged to satisfy their own housing needs.⁶ This policy has been spectacularly successful; of all housing built since the reunification in Ho Chi Minh City, eighty-six percent was added between 1986 and 1993.⁷

The reforms have produced a vibrant residential land market, a construction boom and an ascendant middle class. Nonetheless, they have also exacerbated squatting and increased the incidence of non-compliance with land allotment, transfer and compulsory acquisition procedures.⁸ "Hot spots" have also erupted throughout rural Vietnam, which directly, and occasionally violently challenge land management policies.⁹ But more generally, widespread official toleration of technically unlawful land practices infers a convergence between community and low ranking bureaucratic perceptions of land use. Conversely, wide spread non-compliance with land laws suggests a dichotomy between central laws and policies and local perceptions and aspirations.

Center-local bifurcation is not unique to Vietnam. By generalizing and unifying land practices, central laws everywhere have the potential to undermine the integrity of local values. Like maps,¹⁰ laws are cultural texts which conveniently represent the ideological boundaries and aspirations of the ruling elite, both spatial and social, and omit or blur the inconvenient or resistant to control.¹¹ Central to this dichotomy between local diversity and

Tac Dong Kinh Te Xa Hoi Cua Doi Moi Trong Linh Vuc Nha O Do Thi Vietnam [Social and Economic Impact of Reforms on City Residential Areas in Vietnam], 2 XA HOI HOC [SOC. REV.] 15, 17-19 (1996).

⁴ See G. PORTER, THE POLITICS OF BUREAUCRATIC SOCIALISM 131-37 (1993).

⁵ Though reforms were formally introduced at the Sixth Party Congress, a progressive freeing of the centrally planned economy had been taking place since 1979. See M. Spoor, *State Finance in the Socialist Republic of Vietnam: The Difficult Transition From State Bureaucratic Finance to Socialist Economic Accounting*, POST-WAR VIETNAM, DILEMMAS IN SOCIALIST DEVELOPMENT 111 (David G. Marr & Christine Pelzer White eds., 1988); ADAM FFORDE & STEFAN DE VYLDER, FROM PLAN TO MARKET 65-69 (1996).

⁶ See Trinh Duy Luon & Nguyen Quang Vinh, *supra* note 3, at 17-19.

⁷ *Id.*

⁸ See UNDP, FEASIBILITY STUDY ON VIETNAM LAND MANAGEMENT SYSTEM 72-75 (Oct. 1994); The Gia, *Serious Breaches of the Land Law in Ho Chi Minh*, NHAN DAN [THE PEOPLE] Dec. 26, 1995, at 3.

⁹ See *State Media Break Silence on Vietnamese Unrest, Blame Bureaucracy*, AP, Sept. 9, 1997.

¹⁰ See CLIFFORD GEERTZ, LOCAL KNOWLEDGE 234 (1983).

¹¹ See B. D. Santos, *Law: A Map of Misreading. Towards a Postmodern Conception of Law*, 14 J. LAW SOC. 279, 282-86 (1987); John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM UNOFFICIAL L. 1, 2-

central legality are issues of pluralism versus particularism, localism versus centralism, and whether one set of intellectual/cultural traditions will engage or subordinate another. This article considers these themes in the context of urban land management in Vietnam.

The discussion is divided into eight parts. Part II critiques changes in the polycentric division of land management control from the pre-colonial period until the present. Part III examines legal pluralist theory, evaluating means of mapping the boundaries of state and non-state legal subsystems. Parts IV and V respectively consider case studies dealing with the legalization of land use rights and compulsory acquisition. A further case study relating to court decisions dealing with land boundary disputes is located in Part VI. Part VII discusses, in the context of the case studies, whether legal plurality is a function of cultural plurality. Part VIII concludes that although legal pluralism is useful in drawing attention to bifurcated land management practices, by emphasizing difference, it de-emphasizes the political, economic, and cultural pathways that determine social action.

II. A BRIEF HISTORY OF LAND USE SUBSYSTEMS

Land in Vietnam provides more than shelter and support: it forms a mythic and legitimizing basis for communal ties¹² and state legitimacy.¹³ In a myriad of permutations, local precepts are interwoven with foreign influences—Chinese, French Colonial, socialist, contemporary East Asian and Western—forming complex and amorphous land use patterns. Constructed from different systems of knowledge, the new overlaying the old,¹⁴ contemporary land policy is a product of historical processes. These new concepts usually inform the “official law,” which is superimposed over the

5 (1986) (stating that the concept of law based on state power is an ideological myth); *contra* Brian Z. Tamanaha, *The Folly of the 'Social Scientific Concept of Legal Pluralism*, 20 J. L. SOC. 192, 195-99 (1993) (arguing that rules exist within social structures, but is not law without a link to the state).

¹² As an example, the cult of the village guardian spirit symbolized “the history, customs, ethics, legal code and common aspirations of the entire village,” and gave meaning to community land practices. NEIL JAMIESON, *UNDERSTANDING VIETNAM* 29-30 (1993).

¹³ See Thaveeporn Vasavakul, *Vietnam: The Changing Models of Legitimization*, in *POLITICAL LEGITIMACY IN SOUTHEAST ASIA* 265-68, 284-85 (Muthiah Alagappa ed., 1995).

¹⁴ See generally Robert McKinley, *Zaman dan Masa, Eras and Periods: Religious Evolution and the Permanence of Epistemological Ages in Malay Culture*, in *THE IMAGINATION OF REALITY: ESSAYS IN SOUTHEAST ASIAN COHERENCE SYSTEMS* 306 (A. Becker & A. Yengoyan eds., 1979); A. Terry Rambo, *Black Flight Suits and White Ao-Dais: Borrowings and Adaptations of Symbolism of Vietnamese Cultural Identity*, in *BORROWINGS AND ADAPTIONS IN VIETNAMESE CULTURE* 121-22 (Center for Southeast Asian Studies ed., 1987).

pre-existing habits and practices that comprise the "unofficial law."¹⁵ This section traces the interaction of central "official law" and local "unofficial law" in land use management from imperial rule to the contemporary period.

A. *The Origins of Local-Central Bifurcation*

Traditional land use in Vietnam straddled the two social interfaces of imperial-village and village-family.¹⁶ Of these central-local relationships (*tran uong-dia phuong*), the least porous interface divided imperial patrimony, which treated land as a "gift from heaven," from village/clan customs.¹⁷ To varying degrees both central level official law and local level unofficial law are based on postulates drawn from a syncretic mix of neo-Confucian, Taoist, Buddhist and local animistic beliefs known as *tam giao dong nguyen*, which reduce the three religions into one source.¹⁸

Imperial Codes required the Mandarin bureaucracy (*quan vien*) to only deal with village based Councils of Notables (*hoi dong tien chi*) and not with their constituent members.¹⁹ This central system revolved around official law. Village leaders interacted with families and clans, but not individuals. Provided village chiefs (*xa truong*) paid taxes and satisfied labor quotas, the main preoccupations of official law,²⁰ central authorities generally permitted

¹⁵ Official law is the legal system sanctioned by the legitimate authorities, while unofficial law is comprised of underlying community habits and practices that may support or subvert the official law. These concepts were developed to explain the reception of Western transplanted law in Japan. See Masaji Chiba, *Introduction*, in *ASIAN INDIGENOUS LAW: AN INTRODUCTION WITH RECEIVED LAW* 1, 5-6 (Masaji Chiba ed., 1986); cf. F. Von Benda-Beckmann, *Symbiosis of Indigenou, and Western Law in Africa and Asia: An Essay*, in *LEGAL PLURALISM IN EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENEOUS LAW IN 19TH AND 20TH CENTURY AFRICA AND ASIA* 307-25 (W. Mommsen et al. eds., 1992).

¹⁶ The term "traditional" is usually reserved for the customs, psychological, and religious beliefs of pre-colonial Vietnamese. See JAMIESON, *supra* note 12, at 11-12.

¹⁷ Adopting a Sino-Vietnamese conception as first envoy from heaven, the Emperor imposed harmony between nature and temporal elements through delegated authority vested in the Mandarins. See Nguyen Duc Nhuan, *Do the Urban Regional Management Policies of Socialist Vietnam Reflect the Patterns of the Ancient Mandarin Bureaucracy?*, 8 *INT'L J. URB. REGIONAL RES.* 73, 74-75 (1984).

¹⁸ 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. Cadiere, *Religious Beliefs and Practices of the Vietnamese*, 33 *BULLETIN DE LA SOCIÉTÉ DES ÉTUDES INDOCHINOISES* 1-23 (1958); Do Thai Dong, *Modifications of the Traditional Family in the South of Vietnam*, 3 *VIETNAM SOC. SCI.* 77, 80-81 (1993).

¹⁹ See, e.g., *GIA LONG CODE* arts. 64-72 (1812-1945).

²⁰ *LÊ CODE* arts. 342-387 (1428-1788); see John Whitmore, *Social Organisation and Confucian Thought in Vietnam*, 15 *J. SOUTHEAST ASIAN STUD.* 296, 301 (1984); JAMIESON, *supra* note 12, at 29-30.

unofficial law based on village rules, rituals,²¹ and familial status hierarchies²² to determine land allocation.²³ Family land use (*tu dien*) could only imperfectly be described as ownership.²⁴ Although individuals and families asserted rights of use through occupation and cultivation, village authorities guided²⁵ agricultural production, confiscating temporarily abandoned or uncultivated land.²⁶ Land had no market value in a society where occupation rights were determined as much by family rituals and mysticism, as they were by pragmatic concerns regarding access to water, labor and stable rice production.²⁷ Use and control were coterminous, excluding the possibility of commodification.

Early Hanoi echoed the imperial-village cultural divide. A densely built urban precinct, housing villagers, artisans and traders, partially encircled the walled Imperial Citadel in Thang Long (later renamed Hanoi).²⁸ Even the settlements' names implied bifurcation; *Thang Long* designated the royal seat of power, while the Vietnamese term *Ke Cho* (market people) applied to the periphery.

Much of the literature in this area treats the imperial bureaucracy and village structures as ideal types. Little is written about the legal relationship

²¹ The traditional practices were sometimes codified into written Charters (*huong uoc*). See Statute of the Giap of Nam Thuong, Bang Liet Commune, Thruong Tin District (1875), available in 1 VIETNAM STUD. 209-2214 (1980).

²² Hierarchies were governed by gender, age, education and the number of mouths to feed. Families were structured according to neo-Confucian principles where each family operated like a small nation, while the village system was the family system raised to a higher level. See Neil L. Jamieson, *Towards a Paradigm for Paradox: Observations on the Study of Social Organization in Southeast Asia*, 15 J. SOUTHEAST ASIAN STUD. 320, 327 (1984).

²³ The *huong hoa* (family land) passed automatically to the eldest son on the death of the father.

²⁴ Ownership is, of course, a relative concept. In traditional Vietnam, no one had the right to let land lie fallow. If land was cultivated, the village head acting as an intermediary for Imperial officials levied taxes. See J. Adams & N. Hancock, *Land and Economy in Traditional Vietnam*, 1 J. SOUTHEAST ASIAN STUD. 90-91 (1970); see also Minh Quang Dao, *History of Land Tenure in Pre-1954 Vietnam*, 23 J. CONTEMP. ASIA 84, 85 (1993).

²⁵ All male village members belonged to a *giap* (neighborhood associations) which guided family land control. See To Lan, *On Communal Land in the Traditional Viet Village*, 1 VIETNAMESE STUD. 44-51 (1980).

²⁶ If the family left the village, the Council of Notables assigned cultivation rights to others, but within a statutory prescription period rights could be reasserted by the original users. During the 19th century, village rules coexisted in a complex interrelationship with the Nguyen Code (1813-1945). For example, owners of land lost occupancy if they failed to cultivate and inhabit land beyond a prescription of thirty years among relatives or twenty years among non-relatives. LÊ CODE art. 387. While the emperor had few rights of governance over family land, he retained effective control over one form or communal land (*cong dien*). Adams & Hancock, *supra* note 24, at 93-97.

²⁷ Adams & Hancock, *supra* note 24, at 92-93, 95-98

²⁸ See ANDRÉ MASSON, *THE TRANSFORMATION OF HANOI, 1873-1888*, 9-20, 37-49 (Daniel F. Docppers ed., 1983); see generally Charles Fouriau, *Le Phenomene Urbain au Vietnam a L'Epoque Coloniale*, in PENINSULE INDOCHINOISE ETUDES URBAINES, 167, 169-72 (P.B. LaFont ed., 1991).

between the two, or the profound regional variations, particularly between the North and South.²⁹ Most sources focus on the cultural division between the systems. For example, it is often written that attempts by the Nguyen Dynasty to implement their vision for an orderly and morally homogenous Confucian society conflicted with relatively flexible, loosely structured local organizations.³⁰ Local institutions are generally depicted as states within a state, uniting to confront external enemies, while reverting to loosely structured entities when threats subsided.³¹ Not surprisingly, the interaction between official and unofficial law was never static. The legal codes of the Lê Dynasty (1428-1788) and especially the Nguyen Dynasty (1813-1945) were used to penetrate village centered unofficial law, further widening the underlying elite-peasant dichotomy. But official law met resistance at the local level. For example, stern sino-legal principles limiting wives' influence over the sale of family property, enshrined in the *Gia Long* (Nguyen Dynasty Criminal Code), never entered popular village practice.³² At the same time villagers only reluctantly petitioned Mandarins to intervene in especially intractable land disputes.³³

Behind the familiar injunction *Phap vua thua le lang* ("the laws of the emperor give way to the customs of the village"), extremely complex and dynamic clan and patronage networks linked the center and periphery. As a colonial adage infers, "If a man becomes a mandarin, his whole lineage can ask favors of him" (*Mot nguoi lam quan, ca ho duoc nho*), many of the approximately two thousand mandarins serving at any one time breached criminal provisions by bending central rules (*luat mem*) to advance family and local interests.³⁴ Then, as now, particularistic networks linking central and local officials were a closely guarded secret, but suggest the infiltration of unofficial law into the official legal system. The direct allocation of commune

²⁹ See K.W. Taylor, *Regional Conflicts Among the Viet Peoples Between the 13th and 19th Centuries 2, 14-18* (1997) (unpublished manuscript on file with the author).

³⁰ See ALEXANDER B. WOODSIDE, *VIETNAM AND THE CHINESE MODEL: A COMPARATIVE STUDY OF NGUYEN AND CH'ING CIVIL GOVERNMENT IN THE FIRST HALF OF THE NINETEENTH CENTURY 60-66, 94-98* (1971).

³¹ Interview with Hoang Ngoc Hien at the Nguyen Du School of Creative Writing, in Hanoi (Oct. 16 1997) [hereinafter HOANG NGOC HIEN INTERVIEW].

³² See ROBERT LINGAT, *LES REGIMES MATRIMONIAUX DU SUD-EST DE L'ASIE: ESSAI DE DROIT COMPARE INDOCHINOIS 30-36, 93-96* (1952). Many of the LÊ CODE provisions were applied by the population as customary rules during the Nguyen dynastic period. See NGUYEN NGOC HUY & TA VAN TAI, *THE LÊ CODE: LAW IN TRADITIONAL VIETNAM 475-76* (1987).

³³ See WOODSIDE, *supra* note 30, at 155-56.

³⁴ *Id.* at 178-79.

land by the Emperor to reward services rendered further strengthened and centralized state power.³⁵

Despite central aspirations of legal dominance, intra-village hierarchies and networks exerted considerable influence over land use.³⁶ For example, a French colonial district official discovered that some villages kept both official and secret internal records of the *dien-bo* (register of fields), upon which land tax was assessed, and *dinh-bo* (register of obligations), upon which corvee and some personal taxes were based.³⁷ Extensive evidence of selective enforcement of official law (*phap luat*) infers a pattern of outward compliance obscuring covert resistance. Paradoxically, at the same time village and family heads avoided imperial edicts: they were integral players in a central administrative structure based on Confucian moral authority (*Li*).³⁸ The penetration of Village moral structures by the center can be gauged by the rapid acceptance of Confucian beliefs after the Imperial court replaced Buddhism as the state religion in the 14th century.³⁹

The complex, fluid interrelationships between center-local land management systems resist classification as vertical official law. Imperial codes and edicts received superficial compliance, but were frequently subverted by the discretionary authority of the mandarins and village leaders.⁴⁰ On the other hand, although villagers generally managed their land according to unofficial law,⁴¹ they also applied neo-Confucian moral principles that reinforced imperial authority. In fact, village autonomy was more a function of Imperial forbearance than formalized legal principle. Because of their proximity to the central authority, urban settlements were more closely regulated and dependent upon the state than villages; nevertheless a distinct local culture suffused land dealings.⁴²

³⁵ See Tran Thi Tuyet, *Ve Che Do So Huu Ruong Dat Trong Bo 'Quoc Trieu hinh Luat' [Regime of Land Ownership in the 'National Codes']* in *NHA NUOC VA PHAP LUAT [STATE AND LAW]* 6, 25, 25-26 (1996).

³⁶ See To Lan, *supra* note 25, at 102-11.

³⁷ See P. ORY, *LA COMMUNE ANNAMITE AU TONKIN* (1894).

³⁸ This system was based on the metaphor of Emperors as fathers and villages as sons. For a discussion about Confucian social control, see D. 'BODDE, *LAW IN IMPERIAL CHINA* 299-315 (1973); see also JAMIESON, *supra* note 12, at 38-40.

³⁹ See WOODSIDE, *supra* note 30, at 25-30.

⁴⁰ For example, urban commerce was regulated to some extent by imperial codes governing matters like fair trade. However, the right to trade depended upon authorization from *phuong* authorities and consent from *mandarins*. See Nhuan, *supra* note 17, at 77-80.

⁴¹ See, e.g., Statute of the Giap of Nam Thuong, Bang Liet Commune, Thuong Tin District (1875), amend. art. 2, available in 1 *VIETNAMESE STUD.* 240 (1980).

⁴² By the 17th Century, Hanoi had a population of between sixty and a hundred thousand people, organized into thirty-six *phungs* (districts), each with its own council of notables, guardian spirit, and charter (*huong uoc*). During the fifteenth century, there were twenty-nine "urban" *phungs* throughout

In summary, far from the strict vertical relationships implied by imperial codes and neo-Confucian literature, a polycentric combination of official and unofficial law governed land use. The balance between these competing power structures was a function of patron-clientism, ethnicity and distance from the seat of power. The preoccupation of nation-states with geo-political territorial claims awaited French colonization.

B. *The Impact of Legal Rationality*

Like the Nyugen Emperors, the French imported foreign legal theories into rural and urban land practices in Cochin China (1867) and Annam and Tonkin (1884).⁴³ Unlike their predecessors, French laws proclaimed territorial and jurisdictional dominance. French laws also addressed individuals instead of corporate villages. By defining the legal boundaries of public-private power, citizens could theoretically enlist private rights to curb state power—a novel concept in a society primarily governed by Confucian moral principles.⁴⁴

French legal authority was derived in principle through treaty with the Vietnamese emperor.⁴⁵ That authority rested on the misconception that like European states, emperors enjoyed eminent domain over all lands.⁴⁶ As previously argued, under imperial rule unofficial law received both formal and informal recognition. Impervious to the existing legal culture, and propelled by an unwavering conviction in the superiority of Western moral standards,⁴⁷ colonial law changed the central organizing principle of political-legal relations—the limited application of direct imperial rule in the *xalphuong* (“commune level administrative unit”)—by insisting that central laws have universal applicability.⁴⁸ Recognizing the undesirability, much less the

Vietnam, compared with some eighty-nine hundred rural villages. See Whitmore, *supra* note 20, at 301; Nhuan, *supra* note 17, at 77-79.

⁴³ See M.B. HOOKER, A CONCISE LEGAL HISTORY OF SOUTHEAST ASIA 153-61 (1978) [hereinafter HOOKER, CONCISE LEGAL HISTORY]; M.B. HOOKER, LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NON-COLONIAL LAWS 232-35 (1975) [hereinafter HOOKER, LEGAL PLURALISM].

⁴⁴ See generally S.E. Finer, *Problems of the Liberal-Democratic State: An Historical Overview*, 25 GOVERNMENT & OPPOSITION 334, 335-43, 347-54 (1990); Roger Cotterrell, *The Law of Property and Legal Theory*, in LEGAL THEORY AND COMMON LAW 81, 81-98 (William Twining ed., 1986).

⁴⁵ See Nguyen, *The Anh, The Vietnamese Monarchy Under French Colonial Rule 1884-1945*, 19 MOD. ASIAN STUD. 147, 147-51 (1985).

⁴⁶ See Dao, *supra* note 24, at 88-89.

⁴⁷ See MILTON OSBORNE, THE FRENCH PRESENCE IN COCHINCHINA AND CAMBODIA: RULE AND RESPONSE (1859-1905), 78-79 (1969).

⁴⁸ In the West, political legitimacy rests upon legal domination, a system compromised where more than one legal system exists. Cf. HOOKER, LEGAL PLURALISM, *supra* note 44, at 229-30 (on the diverse

impossibility of directly applying French law to the Vietnamese population, a system of legal pluralism⁴⁹ partially mitigated the impact of legal absolutism. A complex conflict of laws established points of intersection between transplanted colonial laws, imperial codes, and customary rituals.⁵⁰ Land transactions concerning Europeans and Vietnamese with French citizenship proceeded under French colonial law, while other transactions remained generally within the orbit of pre-existing rules.⁵¹

Legal pluralism was in practice disregarded where local land practices conflicted with colonial policy. For example, Vietnamese urban land use patterns did not form a part of the grand design to transform Hanoi into a capital "worthy of a great colony."⁵² The introduction of title by registration under Torren's Law and *hypothèques* (mortgages)⁵³ enabled the French to safeguard property and security rights for agricultural investors, destabilizing, but certainly not replacing local land use patterns.⁵⁴ To European developers, tradition-bound *xal'phuong* land rules were anything but secure, since they lacked defined boundaries and state rights *in rem* and *in personam*.⁵⁵

nature of Philippine law); Steinberg, *Law, Development and Korean Society*, 3 J. COMP. ADMIN. 215, 219-22 (1971) (on the introduction of Western law in Korea).

⁴⁹ This regime amounted to a narrow form of legal pluralism. Narrow legal pluralism legitimized colonial authority as the law of general application. This principle was refined into a set of conflict of laws rules governing articulation between indigenous customary and transplanted positive legal systems. See HOOKER, LEGAL PLURALISM, *supra* note 44, at 280-81; Griffith, *supra* note 11, at 2-5.

⁵⁰ See HOOKER, LEGAL PLURALISM, *supra* note 44, at 175-80.

⁵¹ 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 Centre 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, LEGAL PLURALISM, *supra* note 44, at 167-70.

⁵² See Erneit Hébrad, *L'urbanisme en Indochine*, in *L'URBANISME AUX COLONIES ET DANS LES PAYS TROPICAUX*, 278, 282-3 (Jean Roger ed., 1932).

⁵³ 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 France, Cochin-China and Tonkin. Unlike the pre-colonial *dien*, the colonial *hypothèque* enabled moneylenders to assume ownership on default. See HOOKER, LEGAL PLURALISM, *supra* note 44, at 160.

⁵⁴ Representing two and one half percent of landholders, French colonials and wealthy Vietnamese landlords by the end of the 1930s held 43% of all agricultural land. See Dao, *supra* note 24, at 84, 90; see generally, JOEL S. MIGDAL, *STRONG SOCIETIES AND WEAK STATES* 57-66 (1988). (Similar policies were perused by the Dutch in the East Indies with the Agrarian Law 1870 and the British in northern India with the Proclamation of 1858).

⁵⁵ The manner of acquiring and losing property rights 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).

Through the mediation of compliant village notables, French officials applied the *Gia Long* Code to local land users.⁵⁶ Although cognizable to French legal theory, the vague and hortative *Gia Long* Penal Code was unsuitable as positive law. For example, *dia bo* tax registers were never invested with the precision needed to function as legally binding land registers.⁵⁷ The transformation of imprecise land boundaries into official law converted loose cultural assertions of land control into abstract rights protected by state authority.⁵⁸

Given the jurisprudential position that colonial law represented acts of state, the continued existence of unofficial law constituted an on-going challenge to French territorial sovereignty.⁵⁹ By the 1930s, French law, aided by vastly improved transport and telecommunications, extended central authority into villages and *phuongs* to an extent unrealized during imperial rule. Compliant village officials shifted the axis of center-local land control from the state-village interface, to a state-family/individual interface. This shift further eroded village claims to organizational and legal autonomy.

By the end of the colonial period, traditional patterns of land use coincided with pockets of strong French influence in urban centers and plantations. Particularly in urban areas a process of cultural symbiosis infused traditional patterns of social organization with Western rationalism and natural rights theory.⁶⁰ However, for all but a tiny francophone elite,⁶¹ external deference to official law cloaked internal adherence to traditional unofficial law. This disjunction between law as written and as practiced flourished in a pluralistic legal system that tolerated official and unofficial law. Located on the periphery of the colonial legal map, the strong corporate village structures that had once moderated the behavior of village officials degenerated. This engendered unprecedented levels of corruption, nepotism

⁵⁶ See SAMUEL L. POPKIN, *THE RATIONAL PEASANT: THE POLITICAL ECONOMY OF RURAL SOCIETY IN VIETNAM 184* (1979).

⁵⁷ These registers were maintained by villages and *phuongs* as records of the tax liabilities of land users, they were frequently vague and out of date. Since taxes were levied on the male adult population and not upon land holdings, tax registers coincided with land ownership. See Nhuan, *supra* note 17, at 76; Nguyen Ngoc Huy, *The Vietnamese Texts, in THE LAWS OF SOUTH EAST ASIA 465-68* (M.B. Hooker ed., 1986).

⁵⁸ Decree of July 31, 1925 and an Amendment Decree of Nov. 23, 1926 introduced a "Torrens Law" system applicable to immovable property in Cochinchina, Annam and Tonkin. See HOOKER, *LEGAL PLURALISM, supra* note 44, at 160.

⁵⁹ See HOOKER, *LEGAL PLURALISM, supra* note 44, at 246-48 (by basing legal jurisdiction on nationality and citizenship, French law cannot easily co-exist with customary law).

⁶⁰ See Hoang Ngoc Hien, *The Strength of Culture and The Development of Culture*, 4 *VIETNAM SOCIAL SCIENCES* 28, 31-33 (1996).

⁶¹ See generally DAVID MARR, *VIETNAMESE TRADITION ON TRIAL 1920-1945*, 136-37 (1981).

and patron-clientism.⁶² As traditional village institutions declined, families increasingly relied on defensive, particularistic means to deal with land.⁶³ Consequently, an already polycentric administrative structure further fragmented under colonial rule. After independence, the relationship between the triadic social system (state, village and family) radically changed in the Democratic Republic of Vietnam ("DRV") and to a lesser extent in the Republic of Vietnam.

C. Socialist Legality—Central Ideology?

Like other modernizing nation-states, on coming to power in 1954, the Democratic Republic of Vietnam and Vietnam Worker's Party (VWP) set about extending central control over the periphery.⁶⁴ Though sharing the colonial goals of political and legal domination, the methods used by the VWP to transform economic, class, gender, and generational attitudes could hardly have differed more from French legalism.

Initially drawing from radical Maoists and later the Soviet experience,⁶⁵ VWP rhetoric extolled the use of "rational, progressive socialist legislation" to methodically supplant and replace ancient imperial rules and colonial laws.⁶⁶ Along with speeches, newspaper articles and other ideological outlets, "rational legislation" was one of many methods used to implement party policy. Tainted by its close association with the despised colonial regime, legalism was rejected in favor of socialist nationalism⁶⁷ and the neo-Confucian principle of *chinh nghia* ("exclusive righteousness or just cause")⁶⁸ to legitimize state action. Contrary to colonial notions of state

⁶² According to one commentator, those who accepted office, "far too often took advantage of their positions to achieve mutual gain." OSBORNE, *supra* note 47, at 71, 87; JAMES SCOTT, *THE MORAL ECONOMY OF THE PEASANTS* 184 (1976).

⁶³ Though administrative structures were fundamentally changed by French rule, village land use remained tradition-bound, with little reference to normative law. See HY. V. LUONG, *REVOLUTION IN THE VILLAGE* 55-79 (1992).

⁶⁴ See CONST. Preamble (1946). The 1946 Constitution selectively quoted from the 1791 French Declaration on the Rights of Man and Citizens and from the American Declaration of Independence 1776. BERNARD FALL, *HO CHI MINH ON REVOLUTION* 139-43 (1967); CONST. Arts. 3, 22, 42 (1960).

⁶⁵ See J. HAZARD, *COMMUNISTS AND THEIR LAW* 180 (1969); cf. William J. Duiker, *Ideology and Nation-Building in the Democratic Republic of Vietnam*, 17 *ASIAN SURVEY* 413, 414-16 (1977) (arguing that the Vietnamese followed a strategy which synthesized Soviet and Chinese experience).

⁶⁶ See George Ginsburgs, *The Genesis of the People's Procuracy in the Democratic Republic of Vietnam*, 5 *REV. SOCIALIST L.* 187, 195 (1979).

⁶⁷ See Vasavakul, *supra* note 13, at 265-68, 281-83.

⁶⁸ See JAMIESON, *supra* note 12, at 316-18. When transformed to serve Communist policy, *chinh nghia* meant not having anything to hide from the party, or allowing personal interests to conflict with

authority resting on the rule of law,⁶⁹ political justifications for state power in Vietnam were based on ideological infallibility and legal subordination.⁷⁰ The postulates underlying the new official law differed from those informing unofficial law.

Although the party enlisted local support for a "new social relationship" by selectively appropriating the symbols of village culture,⁷¹ the moral basis for national development did not emanate from the *xa* or *phuong*, but from nationalistic and neo-Confucian reinterpretations of Marxist-Leninism.⁷² Ideology and social action, rather than traditional, passive local practices appealed to a nationalistic party leadership overwhelmingly recruited from the French educated, urban bourgeois.⁷³ Party cadre attempted to engineer new boundaries between the triadic social subsystems (state, village and family), by applying a grand theory that only partially accorded with Northern and sharply differed from Southern land use practices.⁷⁴ Socialist egalitarianism directly contradicted culture-bound lineage loyalties.

Land reform campaigns between 1953 and 1956 not only confiscated and redistributed land, but also produced a new political and social culture.⁷⁵ Long-standing equitable notions of basic needs were qualified by revolutionary and class relationships. The Land Reform Law of 1953⁷⁶ and a

party policy; see NGUYEN KHAI VIEN, TRADITION AND REVOLUTION IN VIETNAM, BERKELEY 45-52 (1974); S. Young, *Vietnamese Marxism: Transition in Elite Ideology*, 19 ASIAN SURV. 770, 774-75 (1979).

⁶⁹ This concept is based on the social contract between states and civil society which justified the state's monopoly of legal power provided it was strictly exercised within the constants of political power-the social contact. See John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 STAN. J. INT'L L. 325, 326-29 (1994).

⁷⁰ Popular slogans during the land reform period encapsulated the anti-legalist spirit, "Better kill ten innocent people than let one enemy escape," and "party members go first, the nation follows." (*Dang vieu di truoc, lang nouc di sau*). These uncompromising views were not without their critics, but even modest calls to base state action on legal principles were at this time ignored. Interviews with Pham Huu Chi, former Legal Adviser to the Minister of Justice, in Hanoi (Jan.-Feb. 1993, Jan.-Feb. 1994) [hereinafter PHAM HUU CHI INTERVIEWS].

⁷¹ See Nguyen Khai Vien, *supra* note 68, at 24.

⁷² See Duiker, *supra* note 65, at 415-17; Young, *supra* note 68, at 770-74.

⁷³ See WILLIAM DUIKER, THE RISE OF NATIONALISM IN VIETNAM 1900-1941, 217, 259, 274 (1976); MARR *supra* note 61, at 131, 374-76.

⁷⁴ See E. Moise, *Land Reform Errors in North Vietnam*, 49 PAC. AFFAIRS 70, 72 (1976); JOHN MACALISTER & PAUL MUS, THE VIETNAMESE AND THEIR REVOLUTION 88-89, 95-98 (1970).

⁷⁵ See William Kaye, *A Bowl of Rice Divided: The Economy of North Vietnam*, 9 CHINA Q. 82, 84-86 (1962) (describing how land reform was introduced to assert ideological control); *contra* D. Gareth Porter, *The Myth of the Bloodbath: North Vietnam's Land Reform Reconsidered*, 5 BULL. CONCERNED ASIAN SCHOLARS 2, 8-12 (1972) (land reform was introduced to liberate peasants from starvation. Wide scale abuses, however, by corrupt and over zealous cadre went unchecked from 1953 until 1956).

⁷⁶ *Luat Cai Cach Ruong Dat* (Dec. 1953) [Law on Land Reform (Dec. 1953)], CONG BAO [GOVERNMENT GAZETTE NO. 1, 1954].

series of implementing decrees⁷⁷ contained detailed guidelines which divided the rural and urban population along class-lines into landlords, rich peasants, middle peasants, poor peasants, agricultural laborers, and the urban proletariat.⁷⁸ In broad terms, confiscation (*tich tu*)⁷⁹ was reserved for the worst enemies of the party and masses: colonialists, traitors and reactionaries.⁸⁰ Requisitioning (*trung thu*) produced the same result, but implied a lesser degree of miscreance.⁸¹ Government acquisitions (*trung mua*), though providing little compensation, denoted a higher level of probity.⁸² Those considered wealthy, but not exploitative “felt obliged” to donate their property to the state.⁸³ Most communal and religious land was either requisitioned or purchased.⁸⁴

Property confiscated in Hanoi from “colonialists, traitors and reactionaries,” or managed on behalf of Vietnamese who fled to the south in 1954, was in principle allocated according to need or to relatives of the “temporarily absent owners.”⁸⁵ Commentators describe a less orderly process where relational obligations to party cadre and relatives infiltrated informed decision-making.⁸⁶

⁷⁷ *Luat Cai Cach Ruong Dat* (Dec. 1953)[Law on Land Reform (Dec. 1953)], CONG BAO [GOVERNMENT GAZETTE]; Chi Dinh so 471 TTg Phan Dinh Thanh Phan Giai Cap O Nong Thon (Mar. 1955) [Regulations no. 471 TTg on Class Demarcation in the Countryside (Mar. 1955)], CONG BAO [GOVERNMENT GAZETTE]; Thong Tu So 1196-TTg Phan Dinh Thanh Phan Giai Cap O Nong Thon (Dec. 1956) [Decree no. 1196-TTg on Class Demarcation in the Countryside (Dec. 1956)], CONG BAO [GOVERNMENT GAZETTE].

⁷⁸ See generally Moise, *supra* note 74, at 71-73; Christine White, *Mass Mobilization and Ideological Transformation in the Vietnamese Land Reform Campaign*, 13 J. CONTEMP. ASIA 75, 77-79 (1983).

⁷⁹ See Porter, *supra* note 75.

⁸⁰ Articles 25 to 30 of the Decree on Agrarian Policy (Apr. 20, 1953), the preamble to the Law on Land Reform 1953, authorized confiscation and redistribution to landless peasants. See BERNARD B. FALL, *THE VIET-MINH REGIME: GOVERNMENT AND ADMINISTRATION IN THE DEMOCRATIC REPUBLIC OF VIETNAM* 125-26 (1956); EDWIN MOISE, *LAND REFORM IN CHINA AND NORTH VIETNAM* (1983).

⁸¹ Law on Land Reform art. 3 (1953).

⁸² *Id.* at art. 4.

⁸³ See White, *supra* note 78, at 78-80.

⁸⁴ Law on Land Reform arts. 15, 16, 17 (1953).

⁸⁵ In practice, “need” favored rural cadres and veterans of the French War of Resistance. The internal guidelines were never published and are still not publicly available. But in general an area of four square meters was allotted per person, those of high (but unspecified) rank were granted more space. See Decree 600 Ttg on Class Demarcation in Urban Areas (Nov. 1955) (on file at the Ministry of Justice Information Centre).

⁸⁶ Interviews with the late Phan Huu Chi, former Chief Legal Adviser to the Ministry of Justice, in Hanoi (1992-1994); Interviews with Nguyen Thuc Bao, former Director of the House and Land Department (pre and post 1954), in Hanoi (1996, 1997).

Distinguishing official and unofficial law during the decades following independence is problematic.⁸⁷ The Law on Land Reform of 1953,⁸⁸ and the subsequent Constitution of 1960,⁸⁹ authorized occupants "to transmit land to their heirs, to mortgage, to sell, to give away, etc."⁹⁰ In practice official laws were subordinated by political and legal postulates that classified occupants according to class-based moral imperatives. Attempts to avoid the redistribution of property by exercising statutory rights of transfer lacked socialist probity, despite complying with the letter of the law. This contradiction between state land management and private ownership illustrates the extent to which socialist ideology triumphed over legality.⁹¹ Eventually political practice and legal theory converged when the post-reunification Constitution of 1980 vested all rights in land in the state.⁹²

Determined to avoid the asymmetrical center-local relations of colonial times, the party exhorted cadre implementing land policy not to dictate from above, like "revolutionary mandarins."⁹³ By adopting "model behavior" (*guong mau*) that relied on personal relations to reduce the distance between officials and locals, cadre were partially successful in overcoming resistance to unfamiliar class ideology.⁹⁴ Like the imperial rulers, the party primarily ruled through moral, rather than legal principles. Mass educational campaigns further blurred the distinction between formal law and party policy.⁹⁵

Even at the height of collectivization, the state did not, and could not, entirely supplant local customary land practices. Land management during

⁸⁷ See, e.g., Hoang Quoc Viet, *Development of the Agrarian reform Movement in Vietnam*, Aug. 25, 1954, F.B.I.S.E. ASIA DAILY REP., at CCC 1-10 (Sept. 8, 1954).

⁸⁸ A system of local government was reestablished to replace land administrative structures allowed to deteriorate during the French War. Central line-ministries (*bo chu quan*), ruled at the national level, urban centers were led by city-level people's committees (*Uy ban nhan Dan*), and these were further subdivided into district-level people's committees, and Rural Communes (*Xa*) and urban *phungs* were the smallest administrative units. See George Ginsburgs, *Local Government and Administration in the Democratic Republic of Vietnam Since 1954* (pt. 2), 14 CHINA Q. 195, 195-97 (1963).

⁸⁹ VIETNAM CONST. art. 19 (1960).

⁹⁰ Law on Land Reform art. 31 (1953).

⁹¹ See Trinh Duy Luan and Nguyen Quang Vinh, *supra* note 3, at 17-18.

⁹² VIETNAM CONST. art. 19 (1980).

⁹³ Cadre were warned to avoid laziness (*benh luoi bieng*), boasting (*benh ba hoa*), "narrow-mindedness" (*benh hep hoi*), "commandism" (*loi menh lenh*), "bureaucratism" (*loi quan lieu*), the excessive use of Sino-Vietnamese words (*benh dung chu Han*) and "arrogance" (*benh kieu ngao*). See generally NGUYEN KHAI VIEN, *supra* note 68, at 48-50.

⁹⁴ See *Interzone Five Implements Agrarian Law*, 4 VOICE OF VIETNAM, May 4, 1954, F.B.I.S.E. ASIA DAILY REP., at CCC 13-14 (May 12, 1954); White, *supra* note 78 at 75-79.

⁹⁵ See White, *supra* note 78, at 75-76; Benedict J. Tria Kerkvliet, *Village State Relations in Vietnam: The Effect of Everyday Politics on Decollectivization*, 54 ASIAN STUD. 402-05 (1995).

this period can best be described as polycentric and fragmented. Although unofficial law never received official recognition, Adam Fforde and Ben Kerkvliet have shown that in practice a quiet, sometimes covert process of negotiation and compromise developed between officials and villagers that reconciled central land laws and policies with local practices (unofficial law).⁹⁶ Following the break-down of bureaucratic and penal control mechanisms after reunification, spontaneous local land use patterns expanded, co-existing with, and to a certain extent were tolerated by the state. By the time of the Sixth Party Congress in 1986, the disruption of center-local relations forced profound economic and legal reforms (*doi moi*).⁹⁷

D. *The Post Doi Moi State Managed Land Control System*

Land practices legitimized by, but predating *doi moi* reforms, quickly outmoded the transitional Law on Land of 1988.⁹⁸ The states renewed interest in regularizing and unifying land management, first flagged in the 1988 Law, has been carried over to the Law on Land of 1993. As a concession to the emerging mixed market economy, the new Law now recognizes certain kinds of private interests in land, which can be transferred, leased and encumbered, without disturbing the underlying principle of state ownership of land. Administrative policy has changed and the past ambivalence towards urban development has given way to an understanding that cities play a catalytic role in Vietnam's modernization (*hien dai hoa*).⁹⁹

The Law on Land of 1993 established six principles governing land management: (1) the land belongs to the entire people;¹⁰⁰ (2) the land is uniformly administered by the state;¹⁰¹ (3) which promotes effective and economical use of land.¹⁰² Further, (4) the state protects agricultural land; (5)

⁹⁶ Land was routinely, but illegally, sold during this period. See Adam Fforde, *Law and Socialist Agricultural Development in Vietnam: The Statute for Agricultural Producer Cooperatives*, 10 REV. SOCIALIST L. 315, 317-19 (1984); Kerkvliet, *supra* note 95, at 402-05.

⁹⁷ Only vague intonations of a socialist orientated market economy are forthcoming, but in all its manifestations, a continuing role for central government management over land, production, labor and distribution is ensured. The state owned sector is also promoted as the corner stone of the economy. See Nguyen Phu Trong, *Market Economy and the Leadership of the Party*, TAP CHI CONG SAN [COMMUNIST REVIEW], Jan. 1994, F.B.I.S. E. ASIA DAILY REP. 94-058, at 52-54 (Mar. 25, 1994).

⁹⁸ See FFORDE & VYLDER, *supra* note 5, at 6-10.

⁹⁹ While comprising only 20% of the population, urban centers contribute about 40% of the GDP. See Luu Bich Ho & Tran Thanh Binh, *Process of Urbanization Until The Year 2010*, 5 VIETNAM'S SOCIO-ECONOMIC DEVELOPMENT 33, 34 (1996).

¹⁰⁰ Law on Land art. 1 (1993).

¹⁰¹ *Id.*

¹⁰² *Id.* art.4.

encourages investment in land,¹⁰³ and (6) stipulates the value of land.¹⁰⁴ While retaining ultimate control over legislation and policy, the central state has devolved land management to local government bodies called "people's committees." City level people's committees, for example, possess broad discretion to allot land use rights in urban areas.¹⁰⁵ Local authorities are also responsible for promulgating zoning and land use regulations, registration and settling some kinds of land use disputes.¹⁰⁶ The major innovation introduced by the Law on Land of 1993 is state recognition of household/individual (including legal persons) rights in land. The semi-autonomous village-family/household relationship is no longer a legal possibility.

Echoing pre-colonial usufruct rights, land use rights (*quyen su dung dat*) convey an extensive private right of disposal (*vat quyen*)¹⁰⁷ that has allowed the formation of residential land markets.¹⁰⁸ Though falling short of full ownership, land use rights certificates issued for domestic dwellings¹⁰⁹ are perpetual, freely transferable,¹¹⁰ and inheritable.¹¹¹ There is no policy objection to the outright ownership of buildings.

Attempts to reconcile state ownership of land with security of tenure have engendered some legal particularities. It is still unclear in law, for example, whether ownership of buildings automatically conveys rights to the sub-stratum, and which title, land or building, prevails where there is a mismatch of tenures. Urban residential buildings are unaffected by this problem. Officials now privately concede that land use rights are automatically conveyed with ownership of residential buildings, a policy that effectively creates de facto fee simple estates in residential land.¹¹²

¹⁰³ *Id.* art.5.

¹⁰⁴ *Id.* art.12; Decree Stipulating the Price List For Categories of Land, No. 87 CP, art. 2 (Aug. 17, 1994).

¹⁰⁵ For a detailed discussion of land management discretion see John Gillespie, *The Role of the Bureaucracy in Managing Urban Land in Vietnam* 5 PAC. RIM L. POL'Y J. 59, 82-86 (1995).

¹⁰⁶ Law on Land arts. 8, 13-14 (1993).

¹⁰⁷ See Ha Mai Hien, *Discussion on the Ways of Exercising Ownership in Our Country*, NHA NUOC VA PHAP LUAT [STATE AND LAW] 2, 35, 37-38 (1995). These rights approximate Western rights *in rem*.

¹⁰⁸ See, *Real Estate Markets Finally Appear in HCM City*, VIET NAM NEWS Oct. 30, 1997 at 2.

¹⁰⁹ Law on Land arts. 3, 20, 73,79; Decree on Dwelling House Purchase and Sale, No. 61-CP, arts. 3-4 (July. 5, 1994); Decree Prescribing The Implementation of the Ordinance on the Rights and Obligations of Domestic Organizations with Land Assigned or Leased by the State, No. 85-CP, art. 11 (Dec. 17, 1996).

¹¹⁰ CIVIL CODE art. 693 (1996).

¹¹¹ *Id.* art. 637 (2).

¹¹² Interview with Mai Xuan Yen, Chief Inspector for the Land Administration Department, in Hanoi (Oct. 27, 1997); Interviews with officials on Hanoi People's Committee of the House and Land Department, in Hanoi (Oct. 28, 1997, Nov. 9, 1997).

Tenure disjunction remains a problem for commercial buildings. Although improvements to land can be owned in perpetuity, land use rights allotted for commercial purposes have a limited duration of twenty to fifty years and are not transferable without state approval.¹¹³ Land interests are classified according to their economic purposes, and exist by virtue of an administrative discretion that looks beyond individual needs to broader societal interests. Other than ensuring the implementation of party-state development policy, there is no blueprint guiding the unprecedented legalization of private land holdings. Local experimentation with land allotment and conversion is encouraged, even when this leads to statutory breaches. Since success is invariably measured by central policy makers, local reforms that reinforce central imperatives are considered experimentation, while those that advance local interests risk classification as *vuot roa* (fence breaking). The case studies considered in Part IV should be read against this complex political backdrop.

III. CONCEPTUALIZING CENTER-LOCAL LAND MANAGEMENT

A. *Central-Local Disjunction in Vietnamese Land Management*

The preceding discussion suggests an ongoing cycle of integration and rupture underlying land contests between Vietnam's three social subsystems—state, *xa/phuong* and family. There is little doubt that center-local relations were highly asymmetric during the pre-colonial period. However, despite the appearance of a rigid hierarchical structure, unofficial law (*xa/phuong*) formed an integral element of the imperial administrative structure. Like other neo-Confucian societies, social control was primarily exerted through moral and personal persuasion, rather than legal devices.¹¹⁴ French legal practice unsuccessfully attempted to displace unofficial law with transplanted positive laws, such as Torrens' Law of title by registration and a hypothec security system. French law formalized and accentuated the disjunction between rights-based market laws and the symbols and rituals of unofficial law.¹¹⁵ The colonial government tried to tap into existing village

¹¹³ Interview with Nguyen Khai, Head of the Legislation Inspection Section, General Department of Land Administration, in Hanoi (Sept. 9, 1994, Aug. 30, 1996) [hereinafter NGUYEN KHAI INTERVIEW].

¹¹⁴ See generally XIN REN, TRADITION OF THE LAW AND LAW OF THE TRADITION 19-36 (1997).

¹¹⁵ "If the law is at odds with the values of society, the law falls into disrepute and loses the force it needs to ensure uniformity with its precepts." Gerard Brennan, *Law in Search of Principle*, 9 J. CONTEMP. HEALTH L. & POL'Y 259, 259 (1993); see generally RONALD DWORKIN, LAW'S EMPIRE 206-15 (1986) (conformity with cultural norms confers legitimacy on law.)

organizations, but only succeeded in undermining the organizational and cultural structures that created, justified, and oriented unofficial law. In the end, colonial attempts to make rights-based legislation the law of general application augment revolutionary pressures. Although Socialist policy-makers relied on familiar patterns of moral guidance, land management generally followed transplanted Marxist-Leninist principles, rather than local precepts.

Doi moi reforms attached renewed importance to statutory boundaries between public and private interests in land. Rather than promoting uniformity, experimentation with positive law has produced a legal geography just as divided as the colonial landscape. In some localities compliance with central law is a fringe phenomenon. Though useful in mapping broad changes in land management, classifications based on official and unofficial law are not especially helpful in explaining this disjunction between positive law and non-conforming land use. If state instrumentalities consistently applied positive law, land use could be meaningfully evaluated in terms of legality and illegality. This binary measure breaks down where, as the following case studies reveal, officials actively subvert central law to produce locally acceptable outcomes. In these circumstances the binary nature of official/unofficial classifications de-emphasize and define out of existence the subtle symbiosis and interdependence existing between state officials and land users. A different legal architecture that does not use state authorization as its central point of reference is needed to evaluate Vietnamese polycentric legal terrain.

B. Legal Pluralist Approaches to Land Management

1. Theory Based on Experience

The history of land control in Vietnam intimates that theoretical explanations for contemporary land law violations lies in literature concerning the superimposition of positive law over traditional and relational land use practices. Experience has largely shaped legal commentary in this area. By uncritically accepting Weber's¹¹⁶ putative link between positive law and economic development, those assisting Third World governments to introduce

¹¹⁶ See Sally Ewing, *Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law*, 21 L. SOC. REV. 487, 488-93 (1987) (arguing that Weber's link between law and development is more complex and ambiguous than many of his adherents recognize).

rights-based land tenure systems¹¹⁷ generally assumed that law can be freed from its social and cultural roots. Primarily working through the regional elites, they predicted transplanted land title and registration systems would induce stability and predictability. Positive laws with clear legal boundaries (at least to the central elite) between public and private spheres of land control too often disrupted familial and village customary systems.¹¹⁸

Working at the other end of the social spectrum, those trained in the anthropological methods of Malinowski¹¹⁹ observed firsthand some of the social problems produced by superimposing transplanted legal values upon local norms and practices.¹²⁰ For example, land use rights in Vietnam are issued to the head of households and the most productive farmers. This policy disproportionately benefits males.¹²¹ When explaining local customary resistance to unifying central laws, certain commentators adopted the structural classification of "formal" and "informal" sectors.¹²² It was a small leap from this fragmented legal topography to one comprised of multiple sets of "stacked" legal subsystems. In structural terms, a pluralistic framework stacked the positive legal order on top of the "informal," customary social order.

2. *What Is Legal Pluralism?*

Though used in often confusing and contradictory ways, legal pluralism describes the coexistence of two or more legal systems in the

¹¹⁷ For a critical overview of the movement See David Trubek, *Towards a Social Theory of Law: An Essay on the Study of Law and Development* 82 YALE L. J. 1, 6-15 (1972); cf. Tamanaha, *supra* note 11, at 473-76.

¹¹⁸ See generally D. Webb, *Legal System Reform and Private Sector Development in Developing Countries in ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND LAW* 55-63 (1996).

¹¹⁹ See Tamanaha, *supra* note 11, at 209.

¹²⁰ The literature in this area is extensive. A comprehensive account is found in Griffiths, *supra* note 11, at 29-34. Much of the theoretical justification for legal pluralism is drawn from Moore's concept of semi-autonomous social fields or non-state legal spheres. See R. Sally F. Moore, *Law and Social Change in the Semi-Autonomous, Social Field as an Appropriate Subject of Study*, 7 L. SOC. REV. 719, 720-24 (1973); B. de Sousa Santos, *State, Law and Community in the World System: An Introduction*, 1 SOCIAL L. STUD. 131, 133-37 (1992).

¹²¹ See Ha Thi Phuong Tien, *Some Problems About Land and Rural Women in the Stage of Restructuring*, 2 VIETNAM SOC. SCI. 56, 60-61 (1997).

¹²² See KENNETH KARST ET AL., *THE EVOLUTION OF LAW IN THE BARRIOS OF CARACAS*, (1973). (This investigation placed importance on the judicial role of locally appointed juntas de barrios as arbitrators in cases of legal conflict in squatter settlements in Caracas); *contra* R. Perez Perdomo et al., *The Law and Home Ownership in the Barrios of Caracas*, in *URBANIZATION IN CONTEMPORARY LATIN AMERICA* (A. Gilbert ed., 1982). (A subsequent study of the social conditions examined by Karst suggested that the juntas de barrios' role was minor in comparison to the activities of state officials).

same social field.¹²³ This description is a precise structural classification and should not be confused with the vague use of legal pluralism to denote social and legal diversity.¹²⁴ Legal pluralism in its narrow form justified dualistic legal systems in colonial and post-colonial countries.¹²⁵ Legitimatization for European colonization of non-Christian peoples¹²⁶ rested on religious doctrine that granted all humans a right to salvation—a doctrine that limited colonial power to travel, trade, settlement, and proselytizing the Gospel. Colonial authority did not extend to the abrogation of indigenous cultural practices and laws, unless they contradicted central law. The reality of conquest was somewhat different. The French in Indo-China adopted a similar, though less tolerant formulation that invested central authorities with power to regulate or prohibit local customs. Peering through the lens of colonial legal centralism, it is hardly surprising that “narrow” legal pluralism invariably focused on binary contests between official and unofficial law, de-emphasizing the subtle integration and infiltration between these subsystems.¹²⁷

Narrow legal pluralism takes issue with state law monism, but fails to reject “the ideology of legal centralism, law is and should be the law of the state, uniform for all persons exclusive of all other law, and administered by a single set of state institutions.”¹²⁸ More recently, broader notions of legal pluralism place state law in a legal subsystem that coexists with “non-state” legal subsystems. This characterization echoes Ehrlich’s¹²⁹ concern that societies are organized around group activities, and since each has its own self-regulating system of rules, official law

¹²³ See Griffith, *supra* note 11, at 24.

¹²⁴ See, e.g., Alice E. S. Tay and Poh-Ling Tan, *Conclusion*, in *ASIAN LEGAL SYSTEMS* 398-405 (Poh-Ling Tan ed., 1997).

¹²⁵ In the 1970s legal thinking held that legal pluralism arises in colonial or post-colonial societies. See HOOKER, *LEGAL PLURALISM*, *supra* note 44, at 2-5.

¹²⁶ See *THE LAWS OF SOUTH EAST ASIA* 28-47 (M.B. Hooker ed., 1986) [hereinafter HOOKER, S.E. ASIA LAW].

¹²⁷ In his ground-breaking legal histories of Southeast Asia, Barry Hooker used legal pluralism as a powerful tool to analyze the development of colonial laws. See generally HOOKER, S.E. ASIA LAW *supra* note 127; cf. Daniel Fitzpatrick, *Disputes and Pluralism in Modern Indonesian Land Law*, 22 *YALE J. INT'L L.* 171, 174-76, 194-205, 208-12 (1997). Much of the blame for the failure of Indonesia's Basic Agrarian Law 1960 to integrate central and local land use patterns is attributed to an inherent incompatibility between essentially normative central laws and local *adat* customary practices. Still located within the state legal system, proposals for reform recommend building and broadening the range of land registration choices available to *adat* land holders.

¹²⁸ See Griffith, *supra* note 11, at 3.

¹²⁹ See E. EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 21, 167-68 (1936).

plays a relatively minor role. Before the development of centralized nation-states, all societies consisted of interlocking legal orders.¹³⁰ Only after their development did “a single dominating and comprehensive legal system, coterminous with the territorial reach of the state, come to appear typical.”¹³¹

Griffiths, a leading exponent of legal pluralism, finds non-state legal subsystems coexisting with the state in a social field that encompasses society as a whole.¹³² Internal norms guide members of these subsystems. Rejecting state law monism, Griffiths accepts Moore’s concept of “semi-autonomous social fields” as the central core of legal subsystems. According to Moore,

The semi-autonomous social field is defined and its boundaries identified not by its organization (it may be a corporate group, it may not) but by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them.¹³³

By imagining that social space is comprised of stacked state and non-state subsystems, legal pluralism invests repetitive beliefs and habits underrepresented by official law with law-like characteristics that convey legitimacy. This theoretical position owes much to Durkheim’s notion that law corresponds to its social context. Thus, where rules differ from, or are comprehensively rejected by society, they are not laws.¹³⁴ However, it goes well beyond the notion that state law horizontally coexists and is infused with personal identity and legal postulates such as religion, philosophy and ideology.¹³⁵ From the perspective of central lawmakers, urban squatters in Vietnam, for example, occupy land outside the orbit of state-law and bureaucratic processes. However, when reconfigured as

¹³⁰ See ROGER COTTERRAL, *THE SOCIOLOGY OF LAW*, 30 (1984).

¹³¹ *Id.*

¹³² See Griffiths, *supra* note 11, at 38-39.

¹³³ See Moore, *supra* note 120, at 722-73.

¹³⁴ A moral fact is normal for a determined social type when it is observed in the average of that species. It is pathological in antithetical circumstances. This makes the moral character to the particular rules vary; that is, they depend upon the nature of social types. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 432 (George Simpson trans., 1964).

¹³⁵ See M. CHIBA, *LEGAL PLURALISM: TOWARDS A GENERAL THEORY THROUGH JAPANESE LEGAL CULTURE* 43-46 (1989).

semi-autonomous social fields, urban squatting assumes legitimacy as a non-state legal subsystem.

3. *Problems with the Definition of Law*

This self-defining¹³⁶ path to legitimacy is so appealing that much of the legal literature concerning the Third World's urban poor dissects land practices into legal subsystems.¹³⁷ Nevertheless, the architecture of state and non-state legal subsystems generates its own conceptual contradictions. As Brian Tamanaha¹³⁸ observed, "not only does the term 'law' thereby lose any distinctive meaning—law in effect becomes synonymous with . . . other forms of normative order, like moral or political norms, or customs, habits, rules of etiquette and even table manners." Though its conceivable that in some societies table manners are as valuable as property transactions in the West, this objection does not address Tamanaha's concern that the definitions of non-state legal subsystems used by legal pluralists accept state law monism as a given. The conundrum is that most working concepts of law presuppose differentiated political and legal institutions, ignoring the possibility of law like processes in undifferentiated customary societies and non-state legal subsystems. For example, even definitions that recognize "customary or interactional" law, frequently assume an administration comprised of specialized personnel.¹³⁹ Tamanaha's central difficulty with legal pluralism is that where non-state legal subsystems coexist with the state subsystem, established theory linking law to state sanctions must be discarded in favor of vague anthropological notions of reciprocal and systematic obligations. Put another way, "Where do we stop speaking of law and find ourselves simply describing social life?"¹⁴⁰

¹³⁶ See John Sutton, *Rethinking Social Control*, 21 L. & SOC. INQUIRY 943, 945-46 (1996) (social control theories carry connotations of deviance and even criminality, legal pluralism avoids stigmatizing behavior according to preconceived notions of social conformity and legitimacy).

¹³⁷ See Sally Engle Merry, *Popular Justice and the Ideology of Social Transformation*, 1 SOC. LEG. STUD. 161, 163, 166-68 (1992); Boaventura De Sousa Santos, *The Law of the Oppressed: The Construction & Reproduction of Legality in Pasargada*, 12 L. & SOC'Y REV. 93-105 (1977); Marc Galanter, *Justice in Many Rooms: Courts, Private Orderings and Indigenous Law* 1 J. LEGAL PLURALISM (1981).

¹³⁸ See Tamanaha, *supra* note 11, at 193; see also Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443, 1448-1452 (1992).

¹³⁹ See, e.g., ROBERTO MANGABECRA UNGER, *KNOWLEDGE AND POLITICS* (1976); BRONISLAN MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* 58-59 (1926 reprint 1985).

¹⁴⁰ See generally Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869, 878 (1988); MALINOWSKI, *supra* note 139, at 55, 68.

4. *Forms of Legal Legitimization*

For the architecture of legal pluralism to have analytical power a consistent means of differentiating state from non-state legal sub-systems must be found. It is argued below that there is general agreement between commentators that the boundaries circumscribing all social groups are defined and reinforced by notions of legitimacy. For example, spontaneous peasant land reforms may simultaneously be considered illegal insurrections by central authorities and the reassertion of traditional rights by peasants. Where the validity of non-state sub-groups is determined by state-centered legal precepts, land use is polarized into binary opposites—legal and illegal behavior. If behavior is to avoid being stigmatized according to centrally conceived notions of social conformity, legitimacy must come from values and habits outside the state orbit. But as Tamahana has shown, anthropologists define the boundaries of semi-autonomous sub-groups according to concepts of social control, that do not address the factors that make sub-groups legally distinct from the state and each other. The following discussion briefly considers how established theories of legal legitimization define the boundaries of legal systems.

A starting point in determining whether established concepts of legal legitimization apply to non-state legal systems, is the three possible sources of political legitimacy identified by Max Weber; namely legal, charismatic and traditional domination.¹⁴¹ If law derives its authority from legal postulates underlying political, ideological and cultural institutions,¹⁴² then Weber's use of law as an independent basis of authority in its own right is questionable. For example, Weber's¹⁴³ assertion that law is self justifying and requires no appeal to moral or ideological values, is of doubtful value in Vietnamese society, which is imbued with the Confucian preference for moral (*Duc Tri* or "Rule by Virtue"), rather than legal governance (*Phap Tri* or "Rule by Law"). Charisma and tradition are equally improbable sources of state legitimization in a society ruled by collective party and state

¹⁴¹ See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 875 (G. Roth & C. Wittich eds., 1978).

¹⁴² See generally Muthiah Alagappa, *The Anatomy of Legitimacy*, in *POLITICAL LEGITIMACY IN SOUTH EAST ASIA* 11-14 (M. Alagappa ed., 1995); CHIBA, *supra* note 135, at 43-6.

¹⁴³ See WEBER, *supra* note 141, at ch. 3.

leadership.¹⁴⁴ Nor is there evidence that organized leadership of this kind violates non-conforming urban land use.

Compliance or coercion is the basis of most sociological definitions of law. According to Adamson Hoebel "[a] social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force to an individual or group possessing the socially recognized privilege of so acting."¹⁴⁵ Since this formulation requires some organized system of enforcement it extends to customary societies lacking formal legal institutions. It fails, however, to distinguish between elaborate systems of judicial administration and informal coercion for breaches of internal family rules.

Shared norms and values are regarded by some as essential in determining how behavior ought to be structured within societal sub-groupings. Exponents of this theory reject habitual obedience as an explanation for legal conformity,¹⁴⁶ believing instead that laws exist as external propositions until internalized to inform the experience and perception of individuals.¹⁴⁷ They also assert that legal standards of conduct are evoked when criticizing others, justifying demands and conceding criticism and demands. However, until most consent to a common set of norms, subsystem rules remain too voluntary to qualify as law.

Consent need not be given to the norms embedded in rules, but rather to the processes and forms of legal power. The difficulty here is determining which set(s) of external norms have been internalized. "[T]he property rights regime under which an individual is observed to work is itself an endogenous variable, chosen by the individual who must invest real resources to secure and maintain the legally recognized property rights to the land."¹⁴⁸ The range of choices is immense. "[R]elationships of a broadly patrimonial type pervade a political and administrative system which is formally constructed on rational-legal lines,"¹⁴⁹ while state laws compete with customs, familial

¹⁴⁴ Particularly after his death, President Ho Chi Minh was invested with considerable charismatic authority. See MELANIE BERESFORD, VIETNAM: POLITICS, ECONOMICS AND SOCIETY 86-89, 95 (1988); cf. Vasavakul, *supra* note 13, at 288.

¹⁴⁵ See A. HOEBEL, LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 28 (1954); *contra* Tamanaha, *supra* note 11, at 199-202 (arguing that all definitions of law except those based on customary reciprocity, expressly or impliedly are based on state authority).

¹⁴⁶ See H.A.L. HART, THE CONCEPT OF LAW 132-37 (1961).

¹⁴⁷ *Id.*

¹⁴⁸ Michael Carter & Pedro Olinto, *Decomposition and Identification of the Impact of Land Tilling on Agricultural Productivity in Paraguay*, in RESEARCH ON LAND MARKETS IN SOUTH ASIA (Rashid Faruqee & Kevin Carey eds., 1997).

¹⁴⁹ See CHRISTOPHER CLAPHAM, THIRD WORLD POLITICS 48 (1985).

and patronage obligations in non-state subsystems to form the moral core of rules. Since the internalization of external norms involves choice, it is interesting to speculate to what extent land users, particularly the elderly and poorly educated,¹⁵⁰ guide their behavior by habit, pragmatism, and expediency.¹⁵¹ This raises the question whether patterns of behavior induced by habituation are less legally distinct from those based on rational choice.

Societal consent is also regarded as an essential ingredient of political and communal authority. When discussing legitimization in communist and authoritarian regimes, Muthiah Alagappa¹⁵² suggests that “[w]hile acceptance by the citizens would enhance the moral basis and self-esteem of such regimes, their legitimacy depends on acceptance by state institutions or ‘political forces to be found within the circle of power.’” This emphasis on political and moral legitimacy, rather than structural conformity and popular mandate, accords with Vietnamese notions of state legitimacy. From its inception, the communist party in Vietnam drew upon neo-Confucian principles of *chinh nghĩa* (exclusive righteousness or just cause)¹⁵³ to legitimize state ideology and law. According to this fusion of Confucianism and Marxism, the basis of the states claim to monopolize legislative and administrative power rests on preservation of the interests of the working class and virtue derived from *chinh nghĩa*. In this politicized matrix, the role of law is to unwaveringly implement the party line without constraining administrative processes with legalism, the antithesis of the principle of due process.¹⁵⁴ This doctrine that law is the tool of the ruling party leads to a highly instrumentalist perception of law that rejects the possibility of non-state law.¹⁵⁵

Recently the Public Administrative Reform Program has sponsored a cautious experiment with administrative accountability.¹⁵⁶ For the first time in Vietnamese history, an administrative court has been invested with

¹⁵⁰ See DAVID MARR, VIETNAMESE YOUTH IN THE 1990S 3-4, 52 (1996).

¹⁵¹ See Alagappa, *supra* note 142, at 15.

¹⁵² *Id.* at 28.

¹⁵³ See Young, *supra* note 68, at 774-75; Nguyen Khai Vien, *supra* note 68, at 45-52. (Party *chinh nghĩa* means not having anything to hide from the party, and not allowing personal interests to conflict with the party.)

¹⁵⁴ In Vietnam, social control is still widely perceived as a problem of state control. The notion of due process that values the primacy of the individual and that limits state power over individuals does not enjoy support at either an elite or local level. See PHAM HUU CHI INTERVIEWS, *supra* note 70.

¹⁵⁵ Interview with Nguyen Nhu Phat, Director Center for Comparative Law, Institute of State and Law, National Center for Social Sciences and Humanities, in Hanoi (Dec. 28, 1997).

¹⁵⁶ See THE GOVERNMENT OF VIETNAM, NATIONAL PROGRAMME ON PUBLIC ADMINISTRATION REFORM 1-10 (May 15, 1994).

a limited jurisdiction to review bureaucratic decisions concerning commerce, land, and social security.¹⁵⁷ Although it is too early to make authoritative assessments, court processes by their very nature cloak the naked exercise of political power. Legal legitimacy will, however, remain captive of party policy while the *nomenkultra* system ensures that party members are placed in positions of authority in all state organs and the separation of powers doctrine (*tam queyen yu au lap*) is not a practical or theoretical possibility.¹⁵⁸

Though legal legitimacy remains relatively unimportant, in the interests of maintaining popular support, the party line has changed significantly in response to economic, political, and social forces.¹⁵⁹ The state uses various conduits to co-opt and assimilate contested local ideals and values. The most important of these mechanisms are two way flows of information channeled through Fatherland Front mass-organizations,¹⁶⁰ media commentaries and petitions lodged with local officials.¹⁶¹ This use of ideological apparatus and state corporatism¹⁶² to filter dialogue between the center-local levels of society is a method of elite self-preservation described by Gramsci's concept of "ideological hegemony."¹⁶³

Although Jurgen Habermas' complex theories extend well beyond the parameters of this discussion, they nevertheless provide some useful insights into the legitimacy of legal sub-groups.¹⁶⁴ Unlike Weber, Habermas posits that law is ultimately based on moral principles¹⁶⁵

¹⁵⁷ Interview with Vu Khac Xuong, Chief Judge Administrative Court, in Hanoi (Oct. 28, 1997) [hereinafter VU KHAC XUONG INTERVIEW].

¹⁵⁸ Interview with Nguyen The Quyen, Lecturer, Law University, Hanoi (Oct. 18, 1997).

¹⁵⁹ See Vasavakul, *supra* note 13, at 265-68, 284-85.

¹⁶⁰ I.e., Farmer and Veteran Associations are affiliated with and overseen by the Fatherland Front. The Fatherland Front is an umbrella organization controlled by the communist party.

¹⁶¹ Recent peasant demonstrations in Thai Binh Province suggest that the current mechanisms used to convey local approval or disapproval of laws and administrative practices are not particularly effective. See Thai Binh, *People's Council Accepts Review*, VIET NAM NEWS, Nov. 11, 1997, at 3; *Thai Binh Commune Officials Learn the Hard Way About Collective Responsibility*, VIET NAM NEWS, Sept. 18, 1997, at 5.

¹⁶² Corporatism is a system where interest groups are given monopoly responsibilities in return for compliance or cooperation with the state. See, e.g., Jonathan Unger & Anita Chan, *China, Corporatism and the East Asian Model*, 33 AUSTL. J. CHINESE AFFAIRS 29, 30-35 (1995).

¹⁶³ See M. Cain, *Gramsci, The State and the Place of Law*, in LEGALITY, IDEOLOGY AND THE STATE, 95-118 (D. Sugerman ed., 1983) (stating that ruling elites are strengthened and perpetuated by co-opting and transforming ideals derived from the local level).

¹⁶⁴ See JURGEN HABERMAS, BETWEEN FACT AND NORMS: TOWARDS A DISCOURSE THEORY OF LAW, 426 (1996) [hereinafter HABERMAS, DISCOURSE THEORY OF LAW]; see also J. HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPACE (1989).

¹⁶⁵ See JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE RATIONALITY 261 (Vol. 1, 1984). (Even in Western Europe, "The particular accomplishment of the positivation of the legal order consists

synthesized from exchanges and contests between society and rule makers—a process he terms communicative rationality.¹⁶⁶ These exchanges take the form of rational debates in democratic institutions, the media, symbolic exchanges, and rituals.¹⁶⁷ Legitimization becomes blocked where permitted forms of public debate are based on unqualified traditions, meta-physical beliefs, or ideology.¹⁶⁸ Where discourse is less constrained, the contests and compromises needed to legitimize law collapse the gaps between state and societal values. Legitimization thus depends on the gap between rules and societal, moral, ideological, and cultural norms being neither so great as to lose credibility, or too small to cease being ideals.¹⁶⁹

Habermas developed his theories in the context of the highly bureaucratized societies of Western Europe and the former Eastern Block.¹⁷⁰ Admittedly the concentration of state power found in these societies differs substantially from the polycentric, regionalism in Vietnam.¹⁷¹ Even so, particularly since the Sixth Communist Party Congress in 1986, the party-state believes that “[t]he management of the country should be performed through laws, rather than moral concepts. The law is the institutionalization of Party lines and policies and a manifestation of the people’s will; and it must be applied uniformly

in displacing problems of justification, that is , in relieving the technical administration of the law of such problems even broad expanses—but not in doing away with them.”)

¹⁶⁶ See Jurgen Habermas, *The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies*, in *THE NEW CONSERVATISM: CULTURAL CRITICISM AND THE HISTORIANS’ DEBATE* 100-18 (1989); Bernhard Peters, *On Reconstructive Legal and Political Theory*, in *HABERMAS, MODERNITY AND LAW* 110-16 (Mathieu Deflem ed., 1996). First, communicative rationality is subdivided into two kinds of “action types.” Instrumental action types are discourses and values applied to specific cases as a type of direct action. For example, demonstrations or labor strikes are instrumental action types. In contrast, strategic action types justify norms by their ability to guide or influence decisions through theatrical, symbolic or polemic acts. Naturally, there is some overlap between these categories. Second, although not excluding the possibility of symbolic, religious and mythical communication, Habermas maintains that it is primarily through rational argument that members of society form the mutual understanding necessary to build the compromises needed to legitimize state enforcement of law. See JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 164-97 (Vol. 2, 1987).

¹⁶⁷ See Peters, *supra* note 166, at 104-11.

¹⁶⁸ See HABERMAS, *DISCOURSE THEORY OF LAW*, *supra* note 164, at 426.

¹⁶⁹ See David Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought about Law*, 11 L. SOC. REV. 529, 543 (1977).

¹⁷⁰ Central to Habermas’ theories is the belief that the legal norms of money and market power have “uncoupled” the economic and political systems from the “lifeworld” of customs, society and personality. The instrumental processes of modern industrial states have become so complex that they are no longer integrated by the mechanisms of mutual understanding that binds the lifeworld. Law in Western societies, it follows, performs the task of uncoupling state systems from the lifeworld.

¹⁷¹ See Nguyen Nham, *Why Is the Management of the State by Law Still Weak?* QUAN DOI NHAN DAN, June 13, 1997 at 3.

throughout the country."¹⁷² As the number of legislative instruments proliferates and state authority is extended through administrative licenses into every aspect of the economy, Habermas¹⁷³ concern that legal processes are increasingly the preserve of technicians and the elite appears less remote.

By focusing attention on the process of law formation, Habermas demonstrates that legitimacy is not an all or nothing event. It is a non-generalized phenomenon that waxes and wanes in rhythm to changes in societal relations. Put another way, law is organized in respect of specific events, and has no static immutable meaning, a view that is consistent with the process orientation of Vietnamese law.¹⁷⁴

While emphasizing different aspects of the legitimization process, the above propositions revolve around the relationship between state laws/apparatus and society. They accordingly plot the boundaries of state, but not non-state legal subsystems. Unavoidably, this observation returns the discussion to Tamanaha's problem with closure; there are no methodologically consistent means of separating intertwined non-state legal subsystems.¹⁷⁵ Pospisil,¹⁷⁶ for example, hypothesizes that such groups inhabit "legal levels" that regulate themselves internally. He does not, however, posit a method of determining where one legal level begins and other ends. Moore's "semi-autonomous social fields" are defined in terms of their ability to produce mutual obligations and the means of enforcing or inducing compliance with group rules.¹⁷⁷ Semi-autonomous social fields are self-legitimizing and normatively distinct from other non-state legal subsystems, and Moore is careful to stress their amorphous, overlapping, and competing nature. Though suggestive as metaphors, Moore's representation of the interconnections between state and non-state legal systems lacks precision and the dynamism inferred by Haberman's notion of communicative rationality. However, by delineating non-state subgroups in terms of legal legitimacy, semi-autonomous social fields differentiate between legal and merely social groupings. For this reason,

¹⁷² See VNA, SIXTH NATIONAL PARTY CONGRESS POLITICAL REPORT (Dec. 15, 1986) (on file with author).

¹⁷³ See S.K. WHITE, *THE RECENT WORK OF HABERMAS: REASONS, JUSTICE & MODERNITY* 116 (1988).

¹⁷⁴ See Adam Fforde, *The Unimplementability of Policy and the Notion of Law in Vietnamese Communist Thought*, 1 *SOUTHEAST ASIAN J. SOC. SCI.* 60, 66-68 (1986).

¹⁷⁵ See Masaji Chiba, *Japan*, in *ASIAN LEGAL SYSTEMS* 87-88 (1997) (stating that there are no fully operational cross-cultural definitions of law); Peter Fitzpatrick, *Law and Societies*, 22 *OSGOODE HALL L. J.* 115, 128 (1984) (stating there are unbridgeable gaps between law and other social forms).

¹⁷⁶ See LEOPOLD POSPISIL, *ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY* 107-25 (1971).

¹⁷⁷ See Moore, *supra* note 122, at 22-23.

Moore' architecture of legal pluralism is applied to the following case studies to ascertain whether local land practices are sufficiently autonomous to constitute non-state legal sub-systems.

IV. CASE STUDIES CONCERNING THE LEGALIZATION OF LAND USE RIGHTS

A. *State Recognition of Land Use Rights*

After decades of revolution and civil war in Vietnam, one of the most urgent and sensitive issues facing state land management is the orderly recognition of *ancien regime* land rights. This problem is particularly acute in Ho Chi Minh City. The overwhelming majority of the population hold titles issued or approved by the former Republic of Vietnam ("RV").¹⁷⁸ These titles must be converted to land use rights issued by the City People's Committee before residents can lawfully transfer, mortgage, and bequeath their land.¹⁷⁹

There are two methods of converting *ancien regime* rights into legally recognized land use rights (*quyen su dung dat*). The first is available to those possessing documents attesting to ownership or rights of occupancy.¹⁸⁰ These include titles issued by the DRV, the Provisional Revolutionary Government of the Republic of South Vietnam, the Socialist Republic of Vietnam,¹⁸¹ and in some circumstances the *ancien regime*. Pre-1975 documentation is only recognized where ownership claims are undisputed and the property in question has not been re-allocated for other uses after reunification. This commonly occurred where occupants were deemed politically hostile ("capitalist landlords"), or occupied large land holdings.¹⁸² Title conversion is also available, but seldom granted to those who lawfully left Vietnam between August 6, 1984, and April 25, 1989.¹⁸³ Adding to the

¹⁷⁸ See Van Hai, *Nha Dat Gia Binh Dam [Cheap Price for Land]*, SAI GON GIAI PHONG, Aug. 31, 1996, at 11.

¹⁷⁹ Decree 61 CP on Dwelling House Purchase, Sale and Business, art. 3 (July 5, 1994) (on file with author).

¹⁸⁰ Decree No. 60-CP On Ownership of Residential Housing and Land Use Rights in Urban Areas art.7 (July 5, 1994) (on file with author).

¹⁸¹ *Id.* art.10; General Department of Land Administration("GDLA"), Official Letter No 647 CV/DV (May 31, 1995).

¹⁸² Decree No. 60 CP on Ownership of Residential Housing and Right to Use Land in Urban Areas art. 10(2) (July 5, 1994) (on file with author); Tuan Minh, *Contractual Dispute at House No. 33/14, District No. 10 Phu Nhuan Precinct*, TROI TRE [YOUTH], June 29, 1996, at 1, 3.

¹⁸³ See Henry Gallagher, *Decision No. 1488: Deed-holders for Overseas Vietnamese*, 4 VIETNAM BUS. J. 30, 30-31 (1994).

complexities besetting document verification, many occupants derive possession through a chain of transfers from the original titleholder. Any break or defect in the chain blocks, without necessarily invalidating, the right to occupation.¹⁸⁴

The second, and most common path to converting *ancien regime* land rights occurs where there is an incurable break in the chain of land documents, or where documents were lost or never existed. In these circumstances *phuong/xá*¹⁸⁵ and Fatherland Front officials¹⁸⁶ must certify uninterrupted occupation since December 18, 1980.¹⁸⁷ Frequent personal changes at this level, combined with poorly maintained residency records makes this an especially difficult process.

Informants claim that both methods of legalization are virtually unworkable.¹⁸⁸ A comparison of the number of land use right certificates issued in Ho Chi Minh City (36.7 percent)¹⁸⁹ and Hanoi (six percent)¹⁹⁰ suggests that the legalization process is comparatively more successful in the South than in the North. Some central officials, however, attribute the discrepancy to higher levels of procedural non-conformity in Ho Chi Minh City.¹⁹¹ In both cities, a twenty percent tax on land transfers,¹⁹² the high cost of verifying cadastral boundaries,¹⁹³ and administrative penalties levied on past unlawful land transfers¹⁹⁴ discourage conversion applications.

¹⁸⁴ Defects in the chain of titles can generally be legalized by payment of an administrative fine. See Instruction No. 1427 CV/DC on the Settlement of Some Problems Regarding Land for the Issuance of Certificates of Land Use Rights art. 3 (Oct. 13, 1995) (on file with author).

¹⁸⁵ The level of state administration below village/district authorities.

¹⁸⁶ The Fatherland Front is the peak umbrella organization for mass organizations. Although it stands apart from the Communist Party of Vietnam, it is still controlled by that party.

¹⁸⁷ This date is important because it marks the enactment of the 1980 Constitution, which extinguished private land ownership. Decree No. 60-CP art. 10 (3) (1994) (on file with author). Official Dispatch Providing Guidelines on the Resolution of Outstanding Matters Regarding the Issuance of Housing Ownership Certificates and Residential Land Ownership Certificates (Dec. 11, 1997 Ho Chi Minh People's Committee) (no ownership certificates issues to those without *ho khan* [household registration]). See generally Interview with Mai Xuan Yen, Chief Inspector for the Land Administration Department, in Hanoi (Oct. 27, 1997) [hereinafter MAI XUAN YEN INTERVIEW].

¹⁸⁸ These observations are based on numerous interviews, conducted with Vietnamese Government Officials, private, lawyers, and representative land occupiers in both Hanoi and Ho Chi Minh City between 1992 and 1996.

¹⁸⁹ In 1995, although 92.4% of land in Ho Chi Minh City was mapped in cadastral surveys, only 36.7% of premises held land use right certificates. See The Gia, *supra* note 8, at 3.

¹⁹⁰ In 1996, although approximately 80 percent of land in Hanoi was mapped in cadastral surveys, only about 6 percent of premises held lands use right certificates. MAI XUAN YEN INTERVIEW, *supra* note 187.

¹⁹¹ *Id.*

¹⁹² Law Governing Taxes on Land Use Right Assignment art. 7 (1994).

¹⁹³ It is estimated that issuance of the 15 million land use certificates needed to cover the country, 100,000 cadastral maps will be required, based on 75,000 aerial photographs. See GLAD AND THE WESTERN AUSTRALIAN GOVERNMENT, FINAL FEASIBILITY STUDY LAND ADMINISTRATIVE REFORM at 9 (March 1995).

Official reports have identified 1,345 annual cases of wrongful or inappropriate land use allotment in Ho Chi Minh City during 1996, but concedes this figure represents "the tip of an iceberg."¹⁹⁵ Others estimate that less than ten percent of tens of thousands of land allotment applications processed annually conform to statutory requirements.¹⁹⁶ Still others place the level of illegal land allotment closer to eighty percent.¹⁹⁷ Whatever the precise figures, where compliance is a fringe phenomena, explanations for non-compliance must look beyond ad hoc or random malfeasance. The question remains whether the interface between local officials and the public constitutes a non-state legal subsystem.

B. *Explanations for Non-Compliance*

1. *Localism (Dia Phuong Chu Nhia)*

Some local officials believe that central authorities are excessively hostile to all things connected with the former Republic of Vietnam. They also say that central policies transplanted from their origins in the North to Ho Chi Minh City, lose much of their ideological relevance and legitimacy.¹⁹⁸ In other words, many officials believe that the state bears primary responsibility for the chaotic land tenure system.¹⁹⁹ As previously discussed, housing allocation before the Land Law of 1988 and especially the Law on Land of 1993 was fragmented and politically based. Residency records were

Even urban areas lack cadastral maps. In Hanoi, for example, only 22 out of 84 sub-districts (*phungs*) are adequately surveyed. See M. Loan, *Further Strengthening Land Management in the Municipality, HANOI MOI* [NEW HANOI], F.B.I.S. E. ASIA DAILY REP. 96-075 at 98, 100 (Feb. 27, 1996).

¹⁹⁴ Instruction No. 1427 CP/DC on the Settlement of Some Problems Regarding Land for the Issuance of Certificates of Land Use Right art. IV (2) (Oct. 13, 1995) (on file with author); Decree No. 4-CP on Sanctions Against Administrative Violations in the Domain of Land Management and Use (Jan. 10, 1997) (on file with author).

¹⁹⁵ Minh Tam, *Legal Documents on Housing and Land are Too Numerous, Backward But They Still Remain*, VIETNAM ECO. DEV. REV., Jan. 1, 1997, at 1-3.

¹⁹⁶ See The Gia, *supra* note 8, at 3; NGUYEN KHAI INTERVIEW, *supra* note 113.

¹⁹⁷ Interview with Do Duc Dinh, Director Institute of World Economy, in Hanoi (Dec. 26, 1996).

¹⁹⁸ A similar mismatch arose when the North attempted to impose its model of rural collectivization on the South shortly after reunification. Facing local resistance and declining crop yields the project was eventually abandoned. See Vo-Tong Xuan, *Rice Production, Agricultural Research, and the Environment*, in VIETNAM'S RURAL TRANSFORMATION 186-88 (1995). Others point to a much more deep seated historical Northern bias. See WOODSIDE, *supra* note 30, at 139.

¹⁹⁹ See Tran Le, *Land Planning Gone Wrong*, VIETNAM COURIER, May 11, 1997 at 5, 10; Truong Lai, *Urban Governance From a Sociological Approach*, 4 VIETNAM SOC. SCI. 22-24 (1996).

poorly maintained and authorities tacitly accepted illegal land and house transfers.²⁰⁰

Since the enactment of the Law on Land of 1993, officials are expected to bring order to urban development. However, faced with dysfunctional central rules and a community that does not clearly differentiate between public and private behavior, they risk losing local trust and cooperation if their decisions are strictly based on rules and procedures. Land management consequentially requires *luat mem* ("flexible law") and *co long tot voi dan* ("showing good heart to the people"). In practice this often means bending central rules to enable family, patrons, and members of the local community to legalize *ancien regime* titles.

Press reports suggest that local officials legitimize otherwise illegal land transfers by accepting certificates verifying continuous occupancy, knowing that they were secured through bribes.²⁰¹ Alternatively, local officials collude in schemes that exploit legal uncertainties. For example, vendors can legalize unregistered land by entering loan agreements with purchasers to finance the construction of a house. In return for extinguishing the loan, vendors transfer the house to the purchaser, and officials grant a land use right to the substratum.²⁰²

2. *Legislative and Procedural Complexities*

Another explanation for non-compliance are complex procedures and under-resourced and overworked staff.²⁰³ Applications for house ownership certificates and land use rights, for example, are supposed to follow four procedural steps taking no longer than sixty days to complete.²⁰⁴ In practice, applicants must negotiate numerous ancillary procedures, often taking six or more months. In one instance, an application lodged in Ho Chi Minh City

²⁰⁰ See MIGRATION, HUMAN RESOURCES, EMPLOYMENT AND URBANIZATION IN HO CHI MINH CITY 28 (1996).

²⁰¹ See Van Hai, *Nha Dat Gia Binh Dan, [Land and House at Low Price]*, SAI GON TIEP CHI, Aug. 31, 1996 at 11.

²⁰² House Ownership Certificates are now issued on Land Use Right Certificates. See Le Uy Linh, *Dat Binh Phu (Q. 6) Dang Tang Gia? [Binh Phu's Land Price on the Rise?]*, SAI GON TIEP CHI, Oct. 26, 1996 at 12.

²⁰³ See Truong Lai, *supra* note 199, at 22-24.

²⁰⁴ Decree on Ownership of Residential Housing and Right to Use Land in Urban Areas, No. 60 CP art.14 (July 5, 1994) (on file with author).

during December 1987 was trapped in a maze of bureaucratic infighting for over ten years.²⁰⁵

Legislation is vague and frequently contradictory. For example, many of the sixteen types of documents²⁰⁶ deemed capable of being legalized into land use rights do not exist.²⁰⁷ Although the Law on the Promulgation of Legal Documents of 1996 was supposed to have authoritatively resolved lingering uncertainty concerning the hierarchical status of legislative instruments,²⁰⁸ officials in Ho Chi Minh City, but apparently not Hanoi, continue to treat circular letters issued by the General Land Department as advisory rather than mandatory.²⁰⁹ More generally, drafting and procedural discrepancies were found in 170 out of 396 land administration documents during a recent survey in Ho Chi Minh City.²¹⁰ Uncertainty leads to conflicting interpretations, even within the same land administration departments.²¹¹ Moreover, notaries are reluctant to certify land documents they cannot understand or verify.²¹²

3. *Corruption*

Corruption is also blamed for non-compliant land title conversions.²¹³ According to party and state accounts, an incomplete regulatory system, poor central supervision, lack of appropriate training, and working conditions are

²⁰⁵ See L.T.O., *Muoi Nam Cho Mot Giay Chu Quyen [Ten Years for a Land Certificate]*, SAI GON GIAI PHONG, Jan. 1, 1997 at 3 (reporting that residents were relocated after fire destroyed two hundred houses in District Five, but after agreeing to issue land use certificates, officials disagreed whether the level of compensation is appropriate); Minh Tam, *Legal Documents on Housing and Land are Too Numerous, Backwards But They Still Remain*, ECO. DEV. REV., Jan. 1, 1997.

²⁰⁶ Accepted documents are listed in Official Letter No. 647, *supra* note 181.

²⁰⁷ Interview with Housing and Land Department Officials on the Hanoi Peoples' Committee, in Hanoi (Oct. and Nov. 1997).

²⁰⁸ Law on the Promulgation of Legal Documents art. 58(3) (1996) (on file with author) (defining the term "guide the implementation" to be considered mandatory by central level officials but advisory by local officials).

²⁰⁹ MAI XUAN YEN INTERVIEW, *supra* note 187.

²¹⁰ See Bao Tram, *Phap Luat Ve Dat Dai: Cuon Chi Can Go Roi [Law on Land; A Coil of Thread to be Rearranged]*, PHAP LUAT, July 1, 1997, at 6-7.

²¹¹ See Nguyen Hoai Nam, *Some Comments on Different Interpretations for Some Articles of the Land Law*, 7 NHA NUOC VA PHAP LUAT [STATE AND LAW] 15-20 (May 1996).

²¹² Minh Tam, *supra* note 195.

²¹³ See, e.g., The Gia, *supra* note 8, at 3; Nhi Thanh, *Kiet Xu So Tham Va An Tham o Tai San Xiton o Phuong Le Loc, Thanh Pho Vinh [First Instance Resolution of the Case of Socialist Property Embezzlement of Le Loi Phuong, Vinh City]*, NHAN DAN [THE PEOPLE], Oct. 15, 1995, at 1.

the underlying causes of malfeasance.²¹⁴ Other officials believe that corruption is tied to declining moral standards more so than imperfect legal structures.²¹⁵ Some point to market reforms and individualism. Whatever the underlying causes, central authorities rarely acknowledge that malfeasance flourishes in the regulatory gap between the unifying aspirations of central land law and local conditions.

The 1986 Penal Code criminalizes bribery, which involves the misuse of public power for private advantage.²¹⁶ However, local prosecutors, sympathetic to the pragmatic motives of land officials, overlook behavior considered criminal by central level cadre.²¹⁷ Despite tens of thousands of technically illegal land conversions in Ho Chi Minh City each year, the author is unaware of a single incidence where a local official has been prosecuted. There are of course numerous prosecutions for embezzlement of state property. It is unclear whether inaction implies tacit approval by city level people's committee officials, or that removal of all offenders is impossible, or that there are simply too many incidents. If senior officials were serious about curbing procedural irregularities, they could follow the usual practice of making an example of prominent offenders. This has not happened.

4. *Administrative Discretion or Spheres of Non-State Law*

The question remains whether wide spread collusion between local land officials and the public constitutes a non-state legal subsystem. Since land legalization processes are prescribed by law, if non-state law exists, it must inform the discretionary authority assumed by local officials. Whether assumed discretion constitutes semi-autonomous social fields depends on the

²¹⁴ See Nguyen Xuan Yem & Doan Kinh, *Offences of Bribery and Some Social Preventive Measures*, 4 NHA NUOC VA PHAP LUAT [STATE AND LAW] 20, 21-22 (1995); Thanh Tam, *Vietnam: Do Muoi Interviewed on Anticorrupton Work*, SIAGON GIAI PHONG, Nov. 5, 1996, at 1, 5.

²¹⁵ See Phong Lan, *Carry on the Anti-corruption Struggle: New Requirements, Strong Measures*, SAIGON GIAI PHONG, Apr. 2, 1994, at 2; Editorial, *Endeavors to Revamp the Party must be Closely Linked with Efforts to Fight Corruption*, NHAN DAN [THE PEOPLE], July 1, 1994, at 1, 3.

²¹⁶ PENAL CODE, art. 226 (bribery) and arts. 211-221 (abuse of official power) (1986). Until recent amendments to the PENAL CODE of 1986 expanded the definition of malfeasance to include acts committed "for other personal motives," abuse of power (including ultra vires acts) without personal gain escaped the criminal justice system. LAW ON AMENDMENTS AND SUPPLEMENTS TO A NUMBER OF ARTICLES OF THE PENAL CODE, arts. 6, 7 (1997).

²¹⁷ Malfeasance is only criminal where it constitutes a "social danger," a nebulous concept that roughly equates to an infringement of the public interest. PENAL CODE art. 8 (1986) (stating that social danger constitutes an infringement of the independence and sovereign integrity of the nation; the socialist state; or fundamental rights of citizens). Interviews with Pham Hong Hai, Director of Criminology, Institute of State and Law, in Hanoi (Jan. 8, 9 1997).

assumptions concerning official decision-making. Archetypal Weberian bureaucracies have no need for assumed discretion, because procedural functions are prescribed by written rules.²¹⁸ In reality, however, organizations do not function like machines.²¹⁹ Written rules cannot cover every contingency.

Decision-making at the local level is not well researched. Claims by some Ho Chi Minh City Peoples Committee officials that their decisions are primarily based on rules, policy, and procedures, are not supported by informants, nor are they plausible. It is known, however, that in Vietnam's communitarian society discretion is a collective undertaking. Informants describe land allotment process where approval for title conversion is rarely given without interdepartmental consultation.²²⁰ For example, applications to convert *ancien regime* titles are routinely resolved by consensual determinations of housing and land, and cadastral departments. Where no title exists, occupancy claims are verified by committees comprised of personnel drawn from *phuong* (and sometimes *ton*) level people's committees, Fatherland Front organisations, police and party branches. Decisions are presented as unanimous outcomes. Since consensus relies on strong personal interaction, local cultural factors like status, experience, education, familial and patron-client relationships compete with external policy and rules. In short, local norms and practices inform all official decisions, blurring boundaries between public and private responsibilities.

Distinctions based on state and non-state legal subsystems are difficult to substantiate where it is unclear whether the role of the state is to manage society according to immutable ideals, or whether that role is to support the public by adjusting policies to reinforce observed practice on the ground.²²¹ When reconfigured in this organizational context, procedural non-compliance

²¹⁸ See Max Weber, *Bureaucracy*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196-244 (H.H. Gerth & C. Wright Mills eds., 1946).

²¹⁹ This is a highly controversial area of legal discourse. See K. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1976); cf. D. GALLIGAN DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 167 (1988).

²²⁰ The following comments are based on interviews with officials from the Chief Architects Offices in Hanoi and Ho Chi Minh City during November 1995 and November/December 1997; and Hanoi and Ho Chi Minh City Housing and Land Departments December and October/ November 1997. See Anh Khue, *Thay Gi Qua Cia Cach Hanh Chanh O Nganh Dia Chinh* [Comments on Administrative Reform by the Land Administration Office], SAI GON GIA PHONG, May 1, 1997, at 2.

²²¹ Central laws enforced according to the policy of *Nha Nuoc Phap Queyen* [literally, rule by law or, state legal rights], are construed at the local level as ultimately unattainable ideals, rather than absolutes that must be obeyed. See Nguyen Nham, *Why is the Management of the State by Law Still Weak?*, QUAN DOI NHAN DAN, June 13, 1997, at 3.

in Ho Chi Minh City is consistent with officials diligently reconciling dysfunctional central rules with an urgent local demand for secure land titles. Even the terminology used by officials to describe discretionary processes is infused with subjectivity. One commonly used term for discretion (*niem tin noi tam*) literally means "believe in one self" or "was the decision made with the heart" (*tam*).

The distribution and arrogation of power between central policy-makers, and city and district/*phuong* officials, not only suggests polycentric land management, but also de facto federalism. Though sometimes pursuing local agendas that conflict with central postulates, there is little in the preceding case study to infer the high level of social cohesion needed for the interaction between local authorities and land use right applicants to constitute a semi-autonomous social field—non-legal subsystem. The official and unofficial aspects of the registration process are better understood as two components of the same system. It suits all levels of government to sanction a degree of unofficial activity, since this invests authorities with a broad administrative control over areas that are technically outside the legal framework.²²²

C. Squatter Settlements

1. Non-state Land Transactions

The sense of community associated with squatting implies mutual obligations and norms, a precondition of non-state legal subsystems. Overcoming strict residency restrictions, the search for work and lure of urban life proves irresistible to rural migrants.²²³ Together with the urban poor, they have built makeshift accommodations along the waterways and city fringe of Ho Chi Minh City and the banks of the Red River in Hanoi.²²⁴ Once regarded as a state responsibility,²²⁵ the allocation of residential housing

²²² Extensive power is given to local authorities to control the lives of citizens through complex administrative regulations that cover most aspects of human activity. See Decree No. 4-CP on Sanctions Against Administrative Violations in the Domain of Land Management and Use, No. 4-CP (Jan. 10, 1997) (on file with author).

²²³ See IPS, *Vietnam: No Place For Unskilled Rural Migrants*, INTERNET VNB NEWS, Jan. 30, 1997.

²²⁴ Newspaper reports place unlawful housing construction in Ho Chi Minh City at 50% in general and rising to 90% in District No. 4. See Le Uy Linh, *Vi Phan, Xay Dung-Can Benh Man Tinh?* [*Illegal Construction - Chronic Disease?*], SAIGON TIEP THI [SAIGON CONSUMER], June 7, 1997, at 8; Trinh Duy Luon & Nguyen Quong Vinh, *supra* note 8, at 21-25.

²²⁵ The Ho Chi Minh City Master Plan promulgated by the Prime Minister in January 1993 establishes the location of different land uses. See Nguyen Quang Vinh, *Socio-Economic and Spatial*

is now almost entirely reliant on market forces. Sharply reduced state housing subsidies, the commodification of residential land, and an acute housing shortage, have all increased residential costs beyond the means of low-income groups.²²⁶ Rapidly increasing urban squatting is the predictable consequence.²²⁷ Approximately seven percent of the population of Ho Chi Minh City lives in squatter settlements primarily constructed on public land.²²⁸

Of all the different manifestations of urban land use, squatting has the most ambiguous social and legal status. In each of its guises squatting exists outside the orbit of state law.²²⁹ The regularization of long term occupation is hindered by statutory provisions²³⁰ that restrict title conversion to areas zoned residential in Urban Master Plans.²³¹ Since most squatting takes place on public land, watercourses, road verges, parks and state owned enterprise land, legalization is generally not a possibility. Even where it is, a tax amounting to twenty percent of land valuation is levied on land occupied since 1980. This rate rises to one hundred percent after 1993.²³²

The state's reluctance to regularize squatting contrasts with broad community support for those who, over a long period of use, have come to rely on the shelter provided by land. Both the *Le* and *Nguyen* legal codes protected adverse possession after a period of twenty to thirty years, a principle that subsequently entered popular customary practice.²³³ Though

Aspects of the Urbanization Process in Ho Chi Minh City, in PLANNING AND GOVERNANCE OF THE ASIAN METROPOLIS 226-27 (Basil van Horen & Aprodicio A. Laquian eds., 1995); Trinh Duy Luon and Nguyen Quong Vinh *supra* note 8, at 27-29.

²²⁶ See Vietnam: No Place For Unskilled Rural Migrants in the Cities, *supra*, note 223; D. Forbes. *The Urban Network and Economic Reform in Vietnam*, 27 ENVIRONMENT & PLANNING 793, 805 (1995).

²²⁷ See Trinh Duy Luan, *Nhung Chieu Canh Kinh Te-Xa Hoi Trong Su Tien Hoa Cua Mo Hinh Nha O Do Thi Ha Noi [Social and Economic Features of Residential Models in Hanoi]*, 1 XA HOI HOC [I Soc. REV.] 1996).

²²⁸ See Nguyen Quang Vinh & Michael Leaf, *City Life in the Village of Ghosts: a Case Study of Popular Housing in Ho Chi Minh City, Vietnam*, 20 HABITAT INT'L 2, 175-76 (1996).

²²⁹ Much of the commentary on squatting based on a series of interviews with city and district level officials in the Housing and Land Departments of Hanoi and Ho Chi Minh City Peoples' Committees during January, October, and November 1997.

²³⁰ Decree No. 60 CP art. 10 (July 5 1994) (on file with author).

²³¹ See QUY HOACH CAC DO THI VIET NAM VA NHUNG DU AN PHAT TRIEN DEN SAU NAM 2000 [MASTER PLAN OF URBAN AREAS IN VIETNAM AND DEVELOPMENT PROJECTS TO THE YEARS AFTER 2000] 9, 15-16 (Nguyen Tien Duy ed., 1997).

²³² See Decree No. 45-CP Supplementing Article 10 of Decree No. 60 (July 1994) of the Government on Dwelling House Ownership and Residential Land Use Right in Urban Areas art. 1 (Aug. 3, 1996) (on file with author).

²³³ MAI XUAN YEN INTERVIEW, *supra* note 187.

adverse possession of state land appears to encourage appropriation, it also promotes the effective use and development of valuable resources.

Squatters have created their own elaborate self-legitimizing processes to formalize otherwise illegal land transactions. For over a generation, squatters in Ho Chi Minh City have used hand written documents to evidence land transfers and bequests, duplicating the legitimizing mantle of land use rights.²³⁴ More formalized de facto land tenure systems have evolved in settlements adjoining the Red River in Hanoi.²³⁵ Here, occupants certify photocopies of official pro-forma certificates of land use and house ownership documents with official looking seals.²³⁶ In other cases, respected third parties both witness and certify transactions. Since purchasers are evidently well aware documents are not "official," rather than deception, their function is apparently to dignify illegal transactions with the trappings of respectability. Squatters treat occasional fines and bribes as affordable penalties or negative licenses,²³⁷ while threats to demolish unlawfully constructed houses are disregarded in the face of official inaction.²³⁸

When required by local officials to move, squatters frequently evoke the 1980 Constitution which guarantees "citizens a right to housing."²³⁹ Both the public and local officials have been slow to internalize the new housing policy based on self-help enshrined in the 1992 Constitution.²⁴⁰ Socialized by the belief that with responsibility comes an obligation to support and protect, officials are acutely aware that strict legal enforcement of land law inevitably leads to homelessness. They are particularly reluctant to act where, by transgressing community mores, their families experience social ostracism. Relocation of squatters is, moreover, a financial drain on local resources except where the central state provides specific budgetary outlays for this purpose.

²³⁴ See Nguyen & Lief, *supra* note 228, at 183-84: Van Hai, *Nha Dat Gia Binh Dam [Cheap Prices for Land and Housing]*, SAI GON GIAI PHONG, Aug. 31, 1996, at 11.

²³⁵ Interviews with Nguyen Ngoc Khoi, Director, National Institute of Urban and Regional Planning in Hanoi (Feb. 3, 1994 and Sept. 13, 1994); Interviews with Nguyen Lan, Chief Architect, Hanoi People's Committee in Hanoi (July 1, 1994 and Dec. 20, 1996).

²³⁶ The author has personally sighted these documents.

²³⁷ See Hai Thanh, *Rampant Illegal Construction Turning West Lake Suburbs in to Chaotic Sprawl*, VIETNAM INVESTMENT REV., Nov. 8, 1993 at 24; Nguyen Tri Dung, *Construction Procedures: A Blue Print for Chaos*, VIETNAM INVESTMENT REV., May 23, 1994, at 16; L.U.L., *Lien Mung Cat Nha va Chia Phat [Illegal Construction and Fines]*, SAIGON TIEP CHI, Dec. 21, 1996, at 6.

²³⁸ See L.U.L., *Quy Cu Quy, Mua Van Cu Mua [Land Transactions Continued Despite the Zoning Plan]*, SAIGON TIEP THI [SAIGON CONSUMER], Dec. 7, 1996, at 6.

²³⁹ CONST. art. 62 (1980). (The state assumed responsibility for providing housing).

²⁴⁰ CONST. art. 62 (1992). (Citizens have a right to build their own housing).

Though genuine need remains the primary cause of squatting, a romantic attachment to the dispossessed, should not obscure underlying motives of commercial opportunism. For example, many of those purchasing houses illegally constructed along watercourses or on flood planes are attracted by low market prices.²⁴¹ Further, state compensation motivates opportunistic construction on land reserved for new roads and foreign investment projects.²⁴²

2. State Involvement in Squatter Settlements

Contrary to the popular prejudice that blames squatters for disease and crime, squatter communities are in most respects law abiding. Even the most flagrant violators of zoning²⁴³ and property²⁴⁴ laws must contend with an authoritarian government. When peeled away, the external appearance of legal autonomy reveals complex legal and extralegal relationships between squatters and the state. For example, a recent study of Xom Ma squatter settlement in Ho Chi Minh City discovered informal officially sanctioned street committees (*To Dan Pho*) cooperating with the local district peoples' committee to plant trees, supply electricity and water, and advance low interest loans.²⁴⁵ As unauthorized rural migrants or displaced urban poor, most squatter households are only entitled to register with the police as temporary residents, a status that in theory denies access to state services such as housing credit, health care and education.²⁴⁶ In practice, sympathetic local officials demonstrate their "good heart with the people" (*co long tot voi dan*) by granting access to social services.²⁴⁷

Conditions vary among localities, but most squatters enjoy regular or irregular employment, participation rates are comparable to those of Ho Chi

²⁴¹ See Van Hai, *supra* note 234, at 11.

²⁴² Interview with Ha Van Que, Assistant to the Chief Architect, in Hanoi (Nov. 10, 1997) [hereinafter HA VAN QUE INTERVIEW].

²⁴³ Law on Land arts. 18, 19 (1993).

²⁴⁴ *Id.* arts. 20, 23(3)(d).

²⁴⁵ See Nguyen & Lief, *supra* note 228, at 185; M. Hosaka, *Sharing Local Development Experiences Transnationally: Networking in Support of Community and Local Initiatives*, 5 ENV'T URBANIZATION 132 (1993) (discusses government assistance in Hiep Thanh squatter settlement HCMC).

²⁴⁶ Decree on Household Registration and Management, No. 51-CP, arts. 11, 12 (May 10, 1997) (on file with author). Permanent registration is only open to those possessing a certificate of "Lawful Dwelling-House." These are only issued to lawful house owners/tenants and their guests.

²⁴⁷ See Le Van Nam, *Urban Housing in the Implementation of Ho Chi Minh City Master Plan 3 XA HOI HOC* [3 Soc. REV.] 32, 32-35 (1993); Nguyen & Lief, *supra* note 228, at 184-86.

Minh City as a whole.²⁴⁸ High housing costs have made squatting an attractive alternative to the legal housing market for young families and even some professionals. The report also indicated that members of the squatter settlement belonged to political organizations, including the party and other Fatherland Front organizations.

3. *Legal Pluralism or Tolerated Illegality?*

The self-enforcing land rights and obligations found in some squatter settlements resemble the semi-autonomous social fields of non-state legal subsystems. However, even these apparently self-contained communities resist the template of legal pluralism.

Far from perceiving themselves as a semi-autonomous sub-group, squatters generally regard unofficial occupation as a temporary transition to legality. Indeed, in most respects squatters are indistinguishable from their land owning neighbors. Apart from norms of trust and moral reciprocity common to society as a whole, interviews with squatters reveal no group-based legal postulates or enforcement practices capable of justifying a legally distinct, non-state subsystem.²⁴⁹ The formalization of land transactions was primarily motivated by thoughts of eventual conversion to legal titles rather than furnishing evidence for community based enforcement. Coercion generally relied on highly contextualized family and/or patron-client networks, which lacked the cohesion of semi-autonomous social fields.

One of the most perplexing aspects of the legal pluralist model is knowing when interaction between subsystems breaks down the notional boundaries surrounding semi-autonomous social fields. This issue is particularly relevant to squatting, since this phenomena cannot exist without the support, or at least the forbearance of local officials. As previously noted, community services and social cohesion is maintained through organizations like street committees, which negotiate and cooperate with local officials. The boundaries surrounding squatter subsystems would need to be extremely porous to account for integration with the state system.²⁵⁰ Even the most spontaneous forms of squatting are shaped and reliant upon the very rules they flout.

²⁴⁸ Fifty seven percent of squatters are regularly employed. Twenty-five percent are irregularly employed. See Nguyen & Lief, *supra* note 228, at 181.

²⁴⁹ See HOANG NGOC HIEN INTERVIEW, *supra* note 31.

²⁵⁰ Though it is possible that the squatter subsystem includes local, but not central level officials, this argument does not account for the polycentric power structures in Vietnam. Although, sometimes pursuing conflicting agendas, both central and local authorities claim membership in the state legal subsystem.

Lacking cohesive policies and laws concerning the treatment of squatters, local officials use their discretionary power to subtly combine official and unofficial law to further local imperatives. This blending of norms is evident in the innovative use of customary, adverse possession rights to convert over time temporary unofficial occupancy into permanent official occupancy. If, as this suggests, legal legitimacy is an ongoing process, rather than a binary legal/illegal event, then non-compliance with central land laws neither signifies illegality or membership of a non-state legal subsystem. After all, fine distinctions between state and non-state legal subsystems are difficult to sustain where the bulk of the population, including the urban elite, indulge in some form of unofficial land use.

Competing visions for urban space revolve around those who argue on moral grounds that rules should be flexibly applied (*luat mem*) to squatters and those who champion aspirations for an orderly, rule based (*luat cung*) modern city.²⁵¹ This debate is sometimes located in the struggle between the "supervillage" (*sieu lang*) customs binding local officials and squatters, and modern rational laws representing the development objectives of the elite.²⁵² As the French discovered over a century ago, impersonal laws have few points of intersection with a society composed of individuals linked by highly fluid and contextualized familial and political/business networks. Although neo-Confucian moral values have been unraveling for at least a century, family centered moral influence continues to reinforce and stabilize most human interaction.²⁵³ Unaccustomed to legal mechanisms controlling land use, instrumental laws and institutions appear uncontrollable to some, possessing the ability to disrupt daily lives. Others, who are frequently elites, invest laws with the ability to excite urban modernization (*hien dai hoa*). This interaction between legal control (*phap tri*) and personal control (*duc tri*) is poorly researched, but in it are glimpses of a more textured understanding of the relationship between willful civil disobedience and identification with non-state subsystems.

²⁵¹ For example, at the same time that City government lacks resources to deal with squatters, and when it cannot control residential construction, the government plans a "21st century cybercity." See *Housing Program Needs Much Support*, VIETNAM NEWS, Sept. 11, 1994, at 2; Lee Yan Kuen, *Illegal Building Means Dangerous Houses*, VIETNAM NEWS, Nov. 4, 1997, at 2; Tuan Ho, *HCM City Wants to be 21st Century Cybercity*, VIETNAM NEWS, Nov. 5, 1997, at 3.

²⁵² The term "supervillage" refers to the infiltration of *hu tuc* [degenerated customs] from villages into all streams of Vietnamese society. Approximately half of the population of Ho Chi Minh City came from rural areas. See INSTITUTE FOR ECONOMIC RESEARCH FOR HO CHI MINH CITY, *MIGRATION, HUMAN RESOURCES, AND URBANIZATION IN HO CHI MINH CITY* § 2.3, at 37 (1996). On the question of the supervillage, see Hoang Ngoc Hien, *The Strength of Culture and the Development of Civilization*, 4 VIETNAM SOCIAL SCIENCES 54, 64-67 (1996).

²⁵³ See Ngo Ba Thanh, *Vietnam's Integration into a New Humanist International Legal Order*, 2 VIETNAM L. & LEGAL FORUM 26 (1995).

V. COMPULSORY ACQUISITION OF LAND

A. *Appropriation for Public Purposes*

The Law on Land of 1993²⁵⁴ gives the state power to compulsorily acquire land, subject to payment of compensation.²⁵⁵ Like taking of private property laws in Western countries,²⁵⁶ compensation in Vietnam is only available to those possessing, or legally entitled to land use rights.²⁵⁷ This reliance on legalism generates problems where only a third of all occupants (excluding tenants) in Ho Chi Minh City, and fewer in other urban centers, hold valid land use certificates. The problem is compounded on the city fringe of Hanoi, where local authorities have deliberately refrained from issuing land use certificates over rural land in the hope of attracting major investment to unoccupied land.²⁵⁸

Villagers living in Tho Da village, on the outskirts of Hanoi, for example, opposed the compulsory acquisition of ninety-three hectares of land by the Daewoo corporation for the construction of a golf course. Lacking land use rights, some villages resorted to violence to press claims for compensation denied under Decree 90 CP 1994.²⁵⁹ A few have been jailed for opposing police evictions.²⁶⁰

1. *The Adequacy of Compensation*

Even where occupiers hold land use right certificates, compensation for compulsory acquisition is frequently below market values. Legislation provides for either the replacement of compulsorily acquired land with allotments of similar area and standard, or an equivalent level of monetary reparation.²⁶¹ Payments are calculated on the basis of a standard formula based on factors like location and building quality. Though periodically

²⁵⁴ Law on Land art. 27 (1993).

²⁵⁵ Decree Promulgating Regulations on Compensation Upon State Recovery of Land for the Purpose of National Defense, Security, National Interests, Public Interest, No. 90-CP, arts. 6-10 (Aug. 17, 1994) (on file with author).

²⁵⁶ See for example the Fifth and Fourteenth Amendments to the United States Constitution. See Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation"* Law, 80 HARV. L. REV. 1165 (1967).

²⁵⁷ Decree Promulgating Regulations on Compensation Upon State Recovery of Land for the Purpose of National Defense, Security, National Interests, Public Interest, No. 90-CP, art. 2 (Aug. 17, 1994).

²⁵⁸ See Cong Thanh, *Land Certificates Misused, Delayed*, VIETNAM INVESTMENT REV., May 1, 1995, at 3.

²⁵⁹ See Peter Mares, *Viet Golf* (Radio Australia Broadcasting radio broadcast, Dec. 31, 1996).

²⁶⁰ See, *Vietnam Jails Golf Course Protesters*, Reuters, Nov. 8, 1996.

²⁶¹ Decree Promulgating Regulations on Compensation, No. 90 CP, art 6-10 (Aug. 17, 1994) (on file with author).

revised, intense competition for housing has stimulated rapid price rises that have outstripped compensation levels. Commentators report that it is almost impossible to purchase properties of similar quality in equivalent locations with prescribed payments.²⁶²

The problem is illustrated by protests demanding adequate compensation for land appropriated for the constructing of a foreign funded trunk road from Ho Chi Minh City to its southern satellite town.²⁶³ Negotiated payments amounted to less than a quarter of market value, representing a loss of approximately one hundred million Vietnamese *dong* (about USD \$9,000) per person. Adding to the general sense of injustice, "surplus land" was resold by the road construction company at a substantial profit. As one commentator put it, "the foremost purpose of the implementation of the Law of Foreign Investment was to serve the common goals of the state and people. The bitter thing here is that the honest peasant with muddy feet and hands were the first to suffer."²⁶⁴ Authorities believe that open-ended compensation scales encourage occupants to delay projects to increase payments.²⁶⁵

2. *Compensating Possessory Interests*

World Bank funded projects have avoided protests effecting road widening projects elsewhere in Vietnam, by requiring provincial authorities to compensate all occupants displaced by road works at market rates.²⁶⁶ The Bank's Operational Manual states that compensation shall be paid to those "who may have customary rights to the land or other resources taken for the project. The absence of legal title to land by such groups should not be a bar to compensation."²⁶⁷ Bank projects recognize two sources of legal occupation: land use rights and temporary written permission from

²⁶² See Duong Thanh, *What's It Worth? Land Compensation Disputes Can Stir Up Local Passions*, VIETNAM ECON. TIMES, June 1997, at 24; T.B.L., *Administrative Reform, Shortcomings, Resolutions*, SAIGON GIAI PHONG [SAIGON LIBERATION], Jan. 13, 1996, at 1, 5; Hoang Phuong, *Tai Sao Nguoi Nong Chiu Thiet, [Why Do Farmers Suffer Losses?]*, TUOI THI [YOUTH], July 18, 1996, at 3.

²⁶³ See *Le Cong Son Tram Dan Do Dan [Road Widening Dispute]*, THANH NIEN [YOUNG], Mar. 1, 1997, at 9, 15.

²⁶⁴ See Huang Phuong, *Tai Sao Ba Con Nong Dan Phai Chieu Thiet?*, THANH NIEN [YOUNG], July 18, 1996, at 8.

²⁶⁵ See Duong Thanh, *supra* note 262, at 24-25.

²⁶⁶ See WORLD BANK, SECOND HIGHWAY REHABILITATION PROJECT HIGHWAY NO 1 BETWEEN VINH AND DONG HA, RESETTLEMENT ACTION PLAN 1 (Dec. 1996); Nguyen Thi Quy, *Involuntary Resettlement in Development Projects*, 4 ASIA PAC. FORUM 2, 14 (1996).

²⁶⁷ See WORLD BANK, WORLD BANK OPERATIONAL MANUAL at OD-4.30, 14, 17 (June 1990).

responsible authorities. Contrary to Vietnamese law, the Bank recognizes and compensates the possessory interests of squatters,²⁶⁸ provided they occupied land prior to the announcement of the road-widening project.²⁶⁹ This policy corrects an inconsistency between Decree 90 CP 1994, which limits compensation to those holding temporary or permanent land use rights, and Decree 60 CP 1994, which allows all those occupying land in conformity with relevant Master Plans to legalize their entitlements.

B. Compensation and the Development Norm

1. State Legitimization and the Development Norm

In densely settled urban precincts, compulsory acquisition of land is an inevitable corollary of modernization (*hien dai hoa*) and industrialization.²⁷⁰ This is particularly true in Vietnam, where the public is expected to make short term personal sacrifices for long term public development objectives.²⁷¹ The subordination of private land interests for shared economic prosperity is a formula for legal legitimacy successfully adopted by non-communist, developing states elsewhere in East Asia.²⁷² Increasingly, the party-state projects nationalist images of a modern industrial state, a kind of development norm, to justify its monopoly over instrumental lines of authority. Take for example nonconforming rural land use. Provided it does not adversely effect production, local officials can afford to show leniency, especially where coercion may alienate the party's large rural constituency. Conversely, dissatisfaction with the levels of compensation paid to those dispossessed by industrial development projects directly challenges the states' modernization program and ultimately its claims to legitimacy. The importance attached to development can be gauged from its ability to displace or at least

²⁶⁸ See WORLD BANK, *supra* note 266, at 7-12.

²⁶⁹ Compensation equivalent of 60% of valuation were paid to this class of occupants. See MINISTRY OF FINANCE, CIRCULAR NO. 91/TC/QLCS: PROVIDING GUIDELINES ON THE CLEARANCE COMPENSATION AND RELOCATION ASSISTANCE FOR SITE CLEARANCE FOR THE REHABILITATION OF NATIONAL ROAD NO. 1 (Dec. 6, 1996) (on file with Ministry of Justice Information Center, Hanoi).

²⁷⁰ See DO MUOI, VIETNAM: NEW CHALLENGES AND NEW OPPORTUNITIES 109-16 (1995) (discussing Vietnam's path to modernization through industrialization).

²⁷¹ See Part III. B.4.(d). See generally Cao Duy Ha, *Two Basic Issues to Industrialize and Modernize the Country*, TAP CHI CONG SAN [COMMUNIST REV.], July 1994, at 7-10.

²⁷² See J. CAMPOS & H. ROOT, THE KEY TO THE ASIAN MIRACLE 28-30 (1996). Although it is still evoked rhetorically, Marxist-Leninist ideology is losing, but has by no means lost, its ability to legitimize state power in Vietnam's emerging market economy. See Vasavakul, *supra* note 13, at 276-83.

moderate local imperatives. For example, official sympathy for occupiers often evaporates where state mandated investment is challenged.²⁷³ The capacity of the development norm to unify the polycentric central and local land management practices, strongly links the state to local land use systems. This in turn suggests that non-state legal subsystems exist, if at all, through the forbearance of the state.

2. *The Dyke Wall Case*

If national development was the only or dominate political consideration, a strong official reaction would have been expected in the following case. Reacting to public concern that structural cracks in Yen Phu Nhat Tan dyke may allow the Red River to flood, the Prime Minister ordered the demolition of housing unlawfully constructed on the dyke wall.²⁷⁴ Despite extensive media coverage, of the more than eleven hundred illegally constructed villas in this affluent West Lake region of Hanoi, only two hundred were removed and a further one hundred and fifty partially demolished.²⁷⁵ Allegations of favoritism were ingeniously dismissed by a government official, "Fortunately no high ranking officials have houses in the area and there were not many of their relatives there either."²⁷⁶ Others were less circumspect, suggesting an unusual degree of leniency where official and private misbehavior so clearly endangered the public.²⁷⁷ In contrast to the treatment of lawful occupants facing compulsory acquisition elsewhere, West Lake violators have not been fined, most unlawful buildings remain on the dyke wall, and the Hanoi People's Committee officials targeted for opprobrium were quickly reinstated.²⁷⁸ The highly contextualized personalism evinced in this case, suggests another site of integration between polycentric state authority and influential members of the public.

²⁷³ It is conceded that local enthusiasm for central development initiatives is by no means universal. However, regional variations are expected in a country prone to localism, and may also reflect the degree of importance attached to projects at the central level.

²⁷⁴ Decision No.158-TTg. Judgement of the Prime Minister on Handling Violations of the Ordinance on Dykes in Hanoi, in *Công Báo*, 10 VIETNAM L. LEGAL FORM 15 (May 31, 1995).

²⁷⁵ See Hanoi VNA Dike Protection Law reportedly Violated, Radio Vietnam, Nov 10, 1995, F.B.I.S. E. ASIA DAILY REP. 95-222, at 76 (Nov 17, 1995).

²⁷⁶ AFP, See Minister Denies Vietnam Leaders Involved in Dyke Scandal, AFP, Mar. 23, 1995.

²⁷⁷ See, *Mercy Shown to Squatters*, VIETNAM NEWS, Nov. 2, 1995, at 3.

²⁷⁸ See *Sacked Officials Returning to Posts*, VIETNAM INVESTMENT REV., Dec 4, 1995, at 3.

VI. COURT DECISIONS CONCERNING LAND MANAGEMENT

A. *Judicial Jurisdiction*

Disputes concerning buildings and land titles are appearing before peoples' courts in increasing numbers, dispelling archetypal depictions of Vietnamese as litigation adverse.²⁷⁹ Where land use right certificates have not been issued, disputes are resolved by peoples' committees. Courts consider disputes involving buildings and titles issued by "authorized state bodies."²⁸⁰ Reflecting party-state sensitivity, the courts' jurisdiction to resolve disputes concerning housing rights created before the enactment of the Ordinance on Residential Housing of 1991 (which was repealed by the Civil Code) has been temporally suspended. It seems that property appropriated by state authorities and the party before housing procedures were regularized by the Ordinance is now being reclaimed by those holding lawfully issued titles.²⁸¹

B. *Land Boundary Disputes*

Judges in land boundary cases²⁸² observed by the author,²⁸³ described contests in figurative terms, making little attempt to differentiate fact and law. Legislation²⁸⁴ that based land use legality on compliance

²⁷⁹ Interview with Nguyen Khac Cong, Supreme People's Court Judge, in Hanoi (Oct. 21, 1997) [hereinafter NGUYEN KHAC CONG INTERVIEW].

²⁸⁰ Law on Land art. 38 (1993). See Thant Tu, *Jurisdiction Over Land Use Right Dispute*, 8 NHA NUOC VA PHAP LUAT [8 STATE L.] 62, 62-63 (1997); Nguyen Hoai Nam, *Mot So Y Kien Ve Nhung Cach Hieu Khac Nhau Doi Voi Mot Quy Dinh Cu The Trong Luat Dat Dai* [Different Opinions on Interpreting Regulations of the Law on Land] 5 NHA NUOC VA PHAP LUAT [5 STATE L.] 15-18 (1996).

²⁸¹ See generally Dinh Van Que, *Temporary Suspension of Dealing with Disputes Over Residential House Transactions Established Before 1 July 1991*, 10 NHA NUOC VA PHAP LUAT [10 STATE L.] 62 (1997).

²⁸² In a country dependant on intensive wet rice agriculture, it is not surprising that land boundary disputes have a long history. During the collectivization of Northern farm land, ancient boundaries marking village and family land were removed or relocated to facilitate large scale agrarian production. The reassertion of former boundaries following de-collectivization has engendered numerous land disputes. People have not forgotten the old boundaries. The move to de-collectivization was ushered in by Political Bureau Decision No. 10 Apr. 5, 1988, which introduced household production contracts, a legitimization of what many villagers were already doing with "sneaky contracts." See generally ADAM FFORDE, *THE AGRARIAN QUESTION IN NORTH VIETNAM 1974-1979: A STUDY OF COOPERATOR RESISTANCE TO STATE POLICY* 205 (1989).

²⁸³ Three cases were observed in the Vinh Phu provincial court and are in the Ha Bing District Court during February 1994. The author was accompanied by a lecturer from the Faculty of Law, Hanoi National University and all observations are based on a mediated understanding of trial proceedings.

²⁸⁴ Law of Land, art. 19; Decree on the Enactment of Regulations on the Allocation of Land to Households and Individuals for Stable and Long Term Use For the Purpose of Agricultural Production,

with zoning provisions and social need²⁸⁵ was largely ignored. Even sources of evidence, such as peoples' committee reports were of peripheral interest. Instead, judges focused on the litigants' war records, party and community affiliations, and family wealth, and as a consequence, decisions turned almost entirely on status and connections.²⁸⁶ Outcomes naturally favored the best-connected litigant, except where there was a considerable disparity in wealth. In one case, where litigants both were members of the same *xa* (commune) party committee, the court adopted a more professional demeanor, applying an instrumental legality that sharply differentiated law and fact. In contrast with earlier cases, the decision-making process here appeared paralyzed and the court adjourned proceedings pending further *in camera* discussions.

Personalities and power relationships dominated the decision-making processes. Central ideology expressed in written laws struggled to control decisions infused with local customs, hierarchies and patron-clientism. Replicating the center-local bureaucratic disjunction, this case study suggests that inferior level judges are actors in a highly fluid, polycentric state system. Central law has the appearance of generality, but in practice is frequently treated as a convenient way of getting things done. Rules and processes are ignored where expediency points in other directions. At the same time the supervisory powers exercised by the Supreme Court and party integrate inferior level judges into the central orbit of the polycentric state system.²⁸⁷

No. 64-CP, arts. 6-10,13 (Sept. 27, 1993) (on file with author); Decree on the Regulations on the Management and the Use of the Administrative Boundary Dossiers Maps and Marker Posts of Various Levels, No 119-CP, art. 8 (Sept. 16, 1994) (on file with author).

²⁸⁵ Preferential access to land is given to the unemployed children of local cadre, state officials and retrenched or incapacitated cadre, state officials and military personnel. Decree No. 64 arts. 7, 12 (1994)(on file with author).

²⁸⁶ The vernacular press is full of accounts where courts have made serious errors of legal interpretation or have been influenced by external forces. See, e.g., *Tuan Minh, Can Luu Y Giai Quyét Cac Vu An Tranh Chap Nha Dat- Bien Dong Gia Ca Thuong La Nguyen Nhan Dan Den Tranh Chap* [Notes on House and Land Dispute Resolution: Price Fluctuation Being the Cause for Dispute], TUOI TRE [YOUTH], May 18, 1996, at 3 (wherein the court annulled a land transfer contract in the mistaken belief that the vendor had not lawfully gained a right to occupation from that state); Ha Van Thuy, *Ca He Thong Toa An Bi Te Liet Boi Mot To Giay Viet Tay* [The Whole Legal System is Paralyzed by a Hand Written Paper], TUOI TRE [YOUTH], Aug. 29, 1996, at 2.

²⁸⁷ Decisions made by lower level courts can be appealed. Moreover, the Supreme Court issues circular letters guiding decision making on important issues. Where courts breach the law, the peoples procuracy have the jurisdiction to mount criminal prosecutions. This has rarely happened at the local level. See NGUYEN KHAC CONG INTERVIEW, *supra* note 279; VU KHAC XUONG INTERVIEW, *supra* note 157.

VII. LEGAL PLURALITY OR CULTURAL PLURALITY?

A. *Urban Cultural Bifurcation*

A central theme of much structural analysis of land management patterns in Southeast Asia is the dichotomy between elites occupying the center of political and legal authority, and local, self-consciously defined communities on the periphery.²⁸⁸ Usually associated with cities, the ruling center distinguished itself in order to rise above the local level by borrowing foreign symbols.²⁸⁹ For example, centuries after independence from China, the Confucian bureaucratic elite of eighteenth century Hanoi and nineteenth century Hue represented the highest level of assimilation of Chinese practices.²⁹⁰ During the colonial period a symbiosis of French and Vietnamese culture, particularly in the administrative centers, culturally distinguished the bureaucracy from the mass of the people.²⁹¹ To a lesser extent, the DRV's promotion of the essentially European values embedded in communism generated new forms of cultural disjunction after independence. The gulf between the normative orientated elite and pragmatic superstitious masses was further entrenched when large numbers of party and government cadre received socialist training in Eastern Block universities.²⁹²

Throughout Vietnam's history, central legal texts have spoken of normative values which changed according to the relationship between policy, ideals and the perceived reality of the time.²⁹³ By enforcing universal policies and laws, central lawmakers decided which strand or representation of a culturally and ethnically diverse society received legitimacy. The

²⁸⁸ The social construction "center-periphery" was largely developed by Edward Shils. See EDWARD SHILS, *CENTER AND PERIPHERY: ESSAYS IN MACROSOCIOLOGY* (1975); see also R.B. SMITH & W. WATSON, *INTRODUCTION TO EARLY SOUTH EAST ASIA* 3-14 (R. B. Smith & W. Watson eds., 1979). Others posit a less bifurcated social structure which "depicts society as a melange of social organizations" or an ongoing dialectic of resistance, comprised of negotiation and compromise integrating the center and periphery. See respectively MIGDAL, *supra* note 54, at 28; BENEDICT J. TRIA KERKVIET, *LAND STRUCTURES AND LAND REGIMES IN THE PHILIPPINES AND VIETNAM DURING THE TWENTIETH CENTURY* 18-23 (1997).

²⁸⁹ Functioning as a supra-local order, the ruling centers assumed Indic, Sinitic, Arabic, or Western cultural forms. See Richard A. O'Connor, *Indigenous Urbanism: Class, City and Society in Southeast Asia*, 26 *J. SOUTHEAST ASIAN STUD.* 30, 34-36 (1995).

²⁹⁰ See generally WOODSIDE, *supra* note 30.

²⁹¹ See generally MARR, *supra* note 61, at 327-65.

²⁹² See generally Mark Sidel, *Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training*, 11 *UCLA PAC. BASIN L.J.* 221 (1993). This training came to an abrupt halt in 1990 when the Soviet Union cut most aid to Vietnam. *Id.*

²⁹³ For example, the Quoc Trieu Hinh Luat (Penal Code of the Le Dynasty) treated infractions of the state mandated Confucian moral order as criminal violations. See TA VAN TAI, *THE VIETNAMESE TRADITION OF HUMAN RIGHTS* 39-41 (1988).

following discussion speculates that the boundaries between state and non-state legal subsystems are a function of culture.

B. *Cultural Subsystems and Legal Plurality: A Hypothesis*

Non-state legal subsystems are likely to coalesce around self contained communities. This proposition follows from both the mutual obligations binding Moore's semi-autonomous social fields and the legal theory that grounds official and unofficial law in formative and sustaining legal cultures²⁹⁴ and postulates.²⁹⁵ Chiba,²⁹⁶ for example, classifies the socio-legal entities underlying plural systems of law according to their cultural origin. He identified two possible sources of law: "indigenous law" and "transplanted law." Indigenous law is intricately interwoven with local cultures, while transplanted law is derived from foreign cultures. The close relationship between law and culture leads to the hypothesis that viable law must correspond to its culture of origin.²⁹⁷ Or, conversely, legal subsystems are likely to correspond to cultural subsystems.

Central to this hypothesis is the debate surrounding cultural relativism.²⁹⁸ Much has been written about traditional Vietnamese land use practices which presupposes an authentic, central, national culture (*van hoa dan toc*) surrounded by layers of received external influences.²⁹⁹ This theme is especially evident in nationalistic tracts designed by the central elite to

²⁹⁴ See Chiba, *supra* note 135, at 203. Chiba suggests legal culture is a "cultural configuration in law." By this he means the patterns of thought and action of a well-defined sociological unit. For his definition of "cultural configuration," he relies on the work of Ruth Benedict. See R. BENEDICT, *PATTERNS OF CULTURE* 42-43, 225-27 (1934).

²⁹⁵ See Chiba, *supra* note 15, at 6-7; see also O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MD. L. REV. 1, 27 (1974); see *contra* Alan Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV. 79, 80-84 (1976) (law is distinct and not dependent on culture).

²⁹⁶ See Chiba, *supra* note 175, at 87-88.

²⁹⁷ It is beyond the scope of this article to address the extremely complex question of what is culture. For the purpose of this discussion culture is taken to mean "the activities and non-physiological products of human personalities that are not automatically reflex or instinctive." A.L. KROEBER, *ANTHROPOLOGY: RACE, LANGUAGE, CULTURE, PSYCHOLOGY, PREHISTORY* 253 (rev. ed. 1948). Others believe that culture creates common sets of codes and "[w]ith the aid of such a common systems of codes it is possible to communicate group affiliation to the environment, to the group and to oneself." Jorgan Selmar, *"Cultural Groups" and the Study of Life-Styles and Cultural Identity*, in *TRADITION AND CULTURAL IDENTITY* 47, 57 (Lauri Honko ed., 1988).

²⁹⁸ See generally C. Geertz, *Distinguished Lecture: Anti Anti-Relativism*, AM. ANTHROPOLOGIST 86, 263-78 (1984).

²⁹⁹ See, e.g., Minh Quang Dao, *supra* note 24, at 84-90; Nguyen Tu Chi, *The Traditional Viet Village in Bac Bo: Its Organizational Structure and Problems*, 61 VIETNAMESE STUD. 7 (1980) (this study by a Vietnamese historian emphasizes the class structure within villages); Marr, *supra* note 150, at 46-47.

highlight a culture in opposition to foreign influences.³⁰⁰ Like articles of faith, certain “Vietnamese” institutions like Red River Delta villages are placed within the traditional core, while other land use patterns, particularly in urban centers, were relegated to the social margins. For example, socialist planners “tried to eradicate the inferiority complex in former colonial cities and towns by introducing into urban life the factors of community life inherent in the traditional rural community.”³⁰¹ Pre-colonial notions of land control were selectively plundered to endow ideologically orthodox land use patterns with historical legitimacy.³⁰² Using similar techniques for entirely different purposes, various overseas Vietnamese writers have invested pre-colonial laws with Western natural rights in order to demonstrate that public law orientated socialist law is an historical aberration.³⁰³ Both views insist that it is not until unauthentic cultural layers are stripped away that the true nature of Vietnamese land use practices is revealed. Others argue that cultural centers are ideological constructions and that regional and foreign values and precepts are integral components of contemporary Vietnamese culture.³⁰⁴

Despite deep regional differences, a common language, education system, literary canon, habits, myths, artistic forms and politically constructed history of national salvation³⁰⁵ bind the *kinh* ethnic majority to a shared national identity and culture. It is true that the communist party forged a nation-state out of a regionally diverse people. Nevertheless, their promotion of political and cultural national unity (*doan ket*) and national harmony (*hoa hop dan toc*) has been particularly successful. So successful, that even socially marginalized squatters appear to share the same basic legal culture and postulates as other urban ethnic *kinh*. This does not mean that Vietnamese society is homogenous; on the contrary, the nation is a symbiosis of cultures—not a few being foreign. But it does suggest that in urban centers

³⁰⁰ Dinh-Hoa Nguyen, *Vietnamese Creativity in Borrowing Foreign Elements*, in *BORROWINGS AND ADAPTIONS IN VIETNAMESE CULTURE* 22 (Truong Buu Lan ed., 1987). (The remainder of the chapter argues against its opening assertion by listing the large number of borrowed words for Vietnamese national dishes, like *pho* (beef noodle soup). *Id.* at 24.)

³⁰¹ Nguyen Duc Truyen, *From Housing Policies to Urban Development Strategy*, 3 *SOC. REV.* 82 (1993), available in Tuong Lai, *Urban Governance: A Sociological Approach*, 4 *VIETNAM SOC. SCI.* 12, 20-21 (1996).

³⁰² The Vietnam Law And Legal Forum Journal has run a series of articles since mid-1995 tracing legal development since Chinese occupation 111 BC-932 AD. Interviews with Nguyen Nhu Phat, Director Center of Comparative Law, Institute of State and Law, in Hanoi (June 1995; October 1995; August 1996; December 1996; January 1997).

³⁰³ See, e.g., TA VAN TAI, *THE VIETNAMESE TRADITION OF HUMAN RIGHTS* 196-201 (1988).

³⁰⁴ See Hoang Ngoc Hien, *supra* note 60, at 31-33; Taylor, *supra* note 29, at 22-25.

³⁰⁵ Interview HOANG NGOC HIEN INTERVIEW, *supra* note 31.

there is insufficient social and cultural separation from the state legal system to justify the existence of non-state legal subsystems. As the previously discussed hypothesis implies, legal pluralism is only likely to exist where self-contained and culturally distinct communities reside within the geo-political borders of another culture.

C. *Cultural Difference: The Case of Ethnic Minorities*

To test this hypothesis, this discussion evaluates the legal autonomy of hill tribe communities. Ethnically, linguistically and culturally different, *swidden* (slash and burn agriculture) communities are far removed from *kinh* social structures, beliefs, habits, and more importantly their laws.³⁰⁶ A combination of remoteness and economic backwardness have partially quarantined some hill tribes from low land *kinh* influence³⁰⁷ Though it is difficult to generalize about the diverse highland minorities, they have never been completely isolated from themselves or the low land ethnic *kinh*.³⁰⁸ Currently only three percent of villages are monocultural, while the majority have three or more ethnic groups. It is only in rural *xom* (hamlets) that ethnic and cultural homogeneity is common.³⁰⁹ Recent legal-anthropological work suggests that social structures in the more remote *xom* contain most of the elements of non-state legal subsystems,³¹⁰ including self-referential land rules, conformity with habits and rituals, dispute resolution mechanisms, sanctions for non-compliance, and societal processes that have the capacity to accommodate new events and change power structures. Since these communities are culturally, economically and socially self-contained, the extensive legal, administrative and relational interconnections that bind *kinh* sub-groups with the state legal subsystem are comparatively unimportant. Despite permeable boundaries, a case can be made that remote hill tribes

³⁰⁶ *Swiddening* has historically been relatively unaffected by outside rules. See Vo Quy, *Ethnic Minorities in Vietnam: Culture, Environment and Development*, 2 Soc. Sci. 84, 84-88 (1995).

³⁰⁷ There are approximately 60 ethnic groups, each with their own path-dependent histories. For example, Vietnamese Imperial rulers influenced the Muong from early times. See To Dong Hai, *Conventions and Practices of "Muong" Ethnic Minority*, 3 VIETNAM L. & LEG. FORUM, 26, 28 (Sept. 1996); while the Dao group are tightly self-regulated with strong internal sanctions for non-compliance with community norms. See To Dong Hai, *The "Dao" Ethnic Minority: Its Customs and Practices*, 3 VIETNAM L. & LEGAL FORUM, 28, 28-29 (Nov. 1996).

³⁰⁸ See DEVELOPMENT TRENDS IN VIETNAM'S NORTHERN MOUNTAIN REGION 10 (Deanna Donovan et al. eds., 1997).

³⁰⁹ *Id.* at 9.

³¹⁰ See, e.g., To Dong Hai, *The Gia Rai and Its Customary Laws*, 4 VIETNAM L. & LEGAL FORUM 27, 27-28 (1997); To Dong Hai, *The K'ho Ethnic Minority and Its Customary Law*, 3 VIETNAM L. & LEGAL FORUM 26, 28-29 (1997).

function in non-state legal subsystems. This conclusion supports the hypothesis that legal pluralism is a function of cultural segregation. It is no coincidence that much of the literature concerning legal pluralism maps the boundaries of non-state legal subsystems along cultural and/or ethnic lines.³¹¹

Minority assertion of customary rights conflict with efforts to transplant the market-orientated national land laws needed to support lowland immigration and agricultural investment in the highlands.³¹² State laws³¹³ designed to promote sedentary agriculture (*van dong dinh canh dinh cu*) strike at the heart of minority cultural practices and communal relationships grounded in a *swidden* agricultural economy.³¹⁴ The imposition of land title systems on customary, communal forms of tenure has elsewhere reduced legal certainty, exciting disputation and ultimately the erosion of customary values and authority.³¹⁵ This sharp clash of cultural, economic, and political values evinces clear boundaries between the state and non-state legal subsystems.

Faced with declining productivity in traditional *swidden* agriculture, there is now an urgent need for new agricultural methods requiring cultural, technological, and legal change.³¹⁶ Since ethnic minorities have little experience with instrumental rule, the government is using moral education to convey the principles of state land policy and in the process inculcating *kinh* culture.³¹⁷ As the poorest in a poor nation, it is unlikely that *swidden* farmers

³¹¹ See, e.g., S.E. Merry, *Anthropology, Law, and Transitional Processes*, 21 ANN. REV. ANTHROPOLOGY 357 (1992); Anan Ganjanapan, *The Northern Thai Tenure System: Local Customs versus National Laws*, 28 L. SOC. REV. 609 (1994); June Prill-Brett, *Indigenous Land Rights and Legal Pluralism among Philippine Highlanders*, 28 L. SOC. REV. 687; Sally Engle Merry, *Popular Justice and the Ideology of Social Transformation*, 1 SOC. LEGAL STUD. 161 (1992).

³¹² See Tran Quang Nhiep, *Effecting New Change in the Areas Inhabited by Ethnic Minorities*, TAP CHI CONG SAN [COMMUNIST REV.], June 1994, reprinted in F.B.I.S. E. ASIA DAILY REP. 94-187 at 86, 87 (Sept. 27, 1994).

³¹³ See, e.g., Decision No. 73 TTg Approving the Master Plan for Protection of Forests in the Upstream Area of the Lower Ayun Irrigation Project (GIA LAI PROVINCE) art. 1 (Feb. 4, 1995) (on file with author); Decree on Sanctions Against Administrative Violations in the Domain of Land Management and Use, No. 4-CP, arts. 1(3), 3(1), 3(2) (Jan. 10, 1997) (on file with author).

³¹⁴ See DEVELOPMENT TRENDS IN VIETNAM'S NORTHERN MOUNTAIN REGION, *supra* note 308, at 16, 18.

³¹⁵ See, e.g., R.A. Cramb & I.R. Willis, *The Role of Traditional Institutions in Rural Development: Community-Based Land Tenure and Government Land Policy in Sarawak, Malaysia*, 18 WORLD DEV. 347 (1990).

³¹⁶ See DEVELOPMENT TRENDS IN VIETNAM'S NORTHERN MOUNTAIN REGION, *supra* note 308, at 133-34.

³¹⁷ See Vo Oanh, *Step Up the Mass Movement to Implement the Party Resolution on Industrialization and Modernization of Agriculture and Rural Economy at the District Level*, QUAN DOI NHAN DAN, Aug. 24, 1994, translated in F.B.I.S. E. ASIA DAILY REP. 94-182 at 91,92. The Legal Research Institute attached to the Ministry of Ministry of Justice translated segments of the Law on Land 1993 and Law on Forest Protection and Development into local dialects, using poetry and song. Interview with Hoan Lien, Vice Director Legal Research Institute, in Hanoi (June 20, 1994).

possess sufficient resources to survive the transition to intensive agriculture unaided by the state. Their dilemma calls into question the practical usefulness of legal pluralism as a system of analysis in circumstances where the social structures that convey access to central power and resources lie outside the legal orbit.

VIII. CONCLUSION

It is easy to portray Vietnam's bifurcated urban landscape as a series of interlocking, quasi-autonomous legal subsystems. This approach is particularly appealing where land contests concern those in need of protection from the central state, like squatters and ethnic minorities groups. Reality is, however, more complex than structural theory. Bifurcated land controls benefit the government, which cannot provide alternative housing for the urban poor, just as much as they benefit the large number of urban residents who enjoy access to inexpensive unregistered land. The overriding primacy given by all levels of government to modernization and industrialization ensures that the elite can upgrade their cities and that foreign investors have access to compulsorily acquired land. The treatment of authorized and unauthorized land control as two components of the state legal system, is increasingly unraveling as urban investment excites numerous contests between competing social interests. As official law loses social validity where the state openly tolerates contradicting unofficial law. The dilemma facing most occupiers is that by staying outside the official system they remain vulnerable to development,³¹⁸ but registration is time consuming, costly, and exposes owners to a range of building controls and taxes.

Legal pluralism's explanation for urban land control is riddled with disjunctions. Its narrow form juxtaposes central uniformity and the pluralist vision of coexisting systems of law.³¹⁹ Paradoxically, this is achieved by applying norms embedded in the central culture to measure social difference in other groups and systems of law. Not surprisingly, wherever it has been tried,³²⁰ central state legality has subordinated non-

³¹⁸ Even if occupiers legalize their land holding, until the compulsory acquisition laws are changed to guarantee compensation based on market value, a legal title does not ensure financially secure property rights.

³¹⁹ It should be noted that in a limited fashion courts are permitted to take into account local custom, where state law is silent on an issues. CIVIL CODE art. 14 (1995).

³²⁰ See, e. g., Timothy Lindsay, *Square Pegs & Round Holes: Fitting Modern Title into Traditional Societies in Indonesia*, 7 PAC. RIM L. POL'Y J. (1998).

state legal subsystems. By challenging the hegemony of central legal authority, broad legal pluralism appears to avoid this problem. For a society like Vietnam that inherited colonial boundaries, it offers a means of symbolically recognizing ethnic minorities as formally equal, and at the same time embedded in their own historical, geographic, cultural and historic context.

The architecture of stacked layers of law proposed by broad legal pluralism poorly represents the polycentric distribution of urban land control in Vietnam. Adapted from principles developed by the Western civil rights movement,³²¹ legal pluralism transfigures political, economic, and cultural rights into legal rights. This strategy is reasonably effective in protecting the dispossessed and ethnic minorities in societies regulated by the rule of law, but is of doubtful value in countries like Vietnam where law is little more than an instrumental means of implementing state policy. As the case studies establish, Vietnamese bureaucrats are not afraid to bend laws to serve or disadvantage those on the legal periphery.

When transplanted to East Asia, legal pluralism has the potential to hijack indigenous political, economic and cultural values by reinventing them as civil rights.³²² In a society like Vietnam, where law is clearly filtered through powerful social and political relationships, a problem exists in identifying legal rules as the most important structural characteristic. By forcing diverse and interwoven familial and patron-client networks into "stacked" subsystems, legal pluralism de-emphasizes the personal linkages that blur distinctions between state and society. Legal classifications based on subsystems also fail to adequately account for the integrative, structuring forces generated when administrative discretion blends official and unofficial law. The problem cannot simply be resolved by re-emphasizing the porosity of subsystem boundaries. If subsystem boundaries are sufficiently porous to account for these integrative forces, then the entire notion of bounded non-state legal subsystems begins to unravel.

³²¹ See D. Trubek & M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1080-83. Teubner distinguishes "old" and "new" legal pluralism in terms of the shift in emphasis from colonial domination to subordinated minorities in Western plural democracies. Teubner, *supra* note 138 at 1456-62.

³²² Daniel Lev's description of rights consciousness in Indonesia is equally applicable to Vietnam. "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." Daniel Lev, *Institutions and Legal Culture in Indonesia*, in *CULTURE AND POLITICS IN INDONESIA* 301 (1972).

Provided political objections to the recognition of *ancien regime* and possessory interests can be overcome, a rational, facilitative model of land registration could expedite the legalization of land tenure. Indeed, some commentators believe that the history of land tenure is so complex and politically sensitive that authorities should disregard past land policy and extend legal recognition to all those occupying land at a certain date.³²³ Land regularization programs elsewhere suggest that facilitative registration systems that reward compliance with access to finance and reduced taxation and penalize non-compliance, reduce spontaneous housing and unregistered land transactions.³²⁴ For example, the regularization of adverse possession in areas zoned residential is a policy currently used by the state as an incentive to build houses on suitable state land, rather than along waterways and road verges. Experimentation in Ho Chi Minh City with "one stop" land registration procedures has also demonstrated that overcoming legal and institutional shortcomings is another necessary step in the regularization of urban land.³²⁵ However, without state financial assistance or access to bank finance, unregistered occupiers are unlikely to raise their building standards and complete the expensive and time-consuming procedures necessary for articulation into the official legal system. Above all else, to the extent that unofficial occupancy is created by the state, it must also be resolved by the state. For example, legal rights granted by state authorities are meaningless until the state provides access to inexpensive urban land.

For ethnic minorities, integration into the central legal system will undoubtedly subordinate culturally based legal practices. Paradoxically, state recognition of traditional communal mechanisms would increase land security at a fraction of the cost of establishing individual legal titles. For the majority *kinh*, the problem is gaining access to the political processes that control land planning and building regulations. Though modest in scale, state experiments with resident appointed management committees have evidently produced dramatic improvements in the maintenance of

³²³ This view is supported by the Hanoi Chief Architects Office. HA VAN QUE INTERVIEW, *supra* note 242.

³²⁴ See Rodolfo Mercado & Richardo Uzin, *Regularization of Spontaneous Settlements*, 8:2 BUILDING ISSUES 15 (1996). Various rational land regularization procedures have been developed with some success in squatter settlements in South America. *Id.*

³²⁵ See Mai Quoc Binh, Overview of the Implementation of Public Administration Reform in Ho Chi Minh City, Paper Presented at the UNDP International Colloquium on Public Administration Reform (Sept. 24-26, 1996).

state owned housing.³²⁶ On a broader level, community participation in local planning decisions is seen by some policy makers as a means of familiarizing the public with land laws, and at the same time instilling a sense of ownership of local land management. However, after decades of central planning laws are generally perceived as mechanisms used by remote governments to impose top down controls without consulting the wishes of the people.³²⁷ As a consequence, the public does not identify with or accept responsibility for laws. The Vietnamese do not usually think in terms of "asserting civic power against the state . . . they prefer to infiltrate the state."³²⁸ The particularistic routes and means used to achieve personal objectives are a function of political, economic and social factors and as such are only indirectly addressed by systems of legal analysis. By emphasizing legal difference, legal pluralism distracts attention away from these non-legal channels that effectively broker genuine changes to urban land management.

³²⁶ See Bang Thanh, *United Units Point Way Ahead for Urban Living*, VIETNAM INVESTMENT REV., Oct. 27, 1997, at 21.

³²⁷ Experimentation is already underway in Hanoi with devolution of city level planning powers to the district and phuong level peoples' committees. HA VAN QUE INTERVIEW, *supra* note 242.

³²⁸ David Marr, *The Vietnam Communist Party and Civil Society*, Paper Presented at the Vietnam Update Conference (Nov. 10-11 1994).