11-1-1995

The Role of Bureaucracy in Managing Urban Land in Vietnam

John Gillespie

Follow this and additional works at: https://digitalcommons.law.uw.edu/wilj

Part of the Comparative and Foreign Law Commons, and the Property Law and Real Estate Commons

Recommended Citation

Available at: https://digitalcommons.law.uw.edu/wilj/vol5/iss1/3

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.
Abstract: In recent years, the Vietnamese government has opened up its economy to both domestic and foreign private investors. In the construction industry, however, developers must contend with a legal environment fraught with contradictions and idiosyncrasies. The industry is one marked by the subordination of law—widespread patronage, party policy, and traditional customs. While property rights superficially resemble those in Western states, ownership and development are in theory strictly controlled by the central government. But paradoxically, the level of compliance with property laws is substantially lower in Vietnam than in the West. Noncompliance with property laws and building regulations is perpetuated by municipal authorities, private investors, and the central bureaucracy itself. Many factors contribute to this widespread noncompliance including the lack of administrative accountability, Vietnam’s traditional non-legalistic culture, and the absence of incentives for people to comply. Nevertheless, compliance may be improved by taking a decentralized approach to enforcement which includes, inter alia, educating people about the law, integrating the public in developing planning schemes, disciplining corrupt officials, promoting capable officials, and improving the writing and availability of the law.

CONTENTS

I. INTRODUCTION

II. A BRIEF HISTORY OF LAND MANAGEMENT
   A. The Pre-Colonial Period
   B. French Colonial Law
   C. The Socialist Legal System

III. LAND USE REGIMES
   A. Three Systems of Land Use Control
   B. Traditional Land Use
   C. Urban-Traditional Land Use
   D. Authorized Land Use
      1. The Formal Administrative Structure
      2. The Nature of Land Use Rights
      3. Conceptualizing Authorized Land Use

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

* The editors of the Journal thank Peter Chu for his assistance in preparing this article for publication.
IV. **Bureaucratic Control of Land Use**

A. *The Nature of the Bureaucracy*
   1. Bureaucratic Responsibilities as Defined by Law
   2. Bureaucratic Responsibilities as Perceived by the Ruling Elite

B. *The Institutional Framework of Land Management*
   1. Central Control
   2. Local and Central Control

C. *Bureaucratic Compliance with Land Laws*
   1. Commercial Exploitation of Administrative Authority
   2. The Effect of Patronage on Compliance

D. *Absence of Private Compliance with Land Laws*
   1. Examples and Causes of Private Noncompliance
   2. Futility of Sanctions in Promoting Private Compliance
   3. Cultural Reasons for Private Noncompliance
   4. Additional Disincentive to Comply

V. **Strategies for a Land Management Regime**

A. *Sources of Bureaucracy’s Failure to Obtain Compliance*
   1. Conflict Between Formal Law and Local Land Use Customs
   2. Abuse of Discretionary Authority by Members of the Bureaucracy

B. *Specific Proposals for Encouragement of Compliance*
   1. Predictability Through the Researching, Drafting, and Monitoring of Decision-Making Guidelines
   2. Using Patronage Networks to Disseminate Information
   3. Strengthening Women’s Cultural Rights in Land
   4. Resources for Investigating, Penalizing, and Prosecuting Corrupt Bureaucrats
   5. Rules to Guide Bureaucratic Decision-Making, Encourage Negotiation with Developers, and Sever the Financial Link with State Enterprises

VI. **Conclusion**
I. INTRODUCTION

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

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

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

---

1 See Build Your Own Houses, Says Minister, VIETNAM INVESTMENT REV., Mar. 7, 1994, at 21. City authorities in Ho Chi Minh City and Hanoi predict that these cities will double in size by the year 2010.
3 After two years of boom development, the rate of residential development has recently slowed to sustainable levels. Real Estate Market Cools, VIETNAM INVESTMENT REV., Apr. 26, 1993, at 1; Nguyen Van Phu, New Wave of Land Regulations Threatens to Drown Property Market, VIETNAM INVESTMENT REV., Sept. 12, 1994, at 18; To Ngoc Doanh, Race For Real Estate Grinds into a Lower Speed, VIETNAM INVESTMENT REV., Sept. 26, 1994, at 17.
5 Law on Land, art. 1 (1993) (Vietnam). It is interesting to compare law reform in former communist countries such as Russia where land may now be privately owned. According to Russia's Presidential Edict of Oct. 27, 1993, which came into force when it was published on October 28, 1993, citizens and juridical persons may buy, sell, bequeath, give, mortgage, lease, and exchange land.
6 Law on Land, art. 3(2) (1993) (Vietnam). "Any householder or individual shall have the right to exchange, transfer, rent, inherit or mortgage the right to use land allocated by the State." Id.
Finally, Part V concludes that, contrary to the current policy that centralizes legal authority, compliance with planning and construction laws may be enhanced by a less instrumental, decentralized approach to enforcement.  

II. A BRIEF HISTORY OF LAND MANAGEMENT

A. The Pre-Colonial Period

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

---

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


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


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

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

---

12 See generally N. Wiegersma, Vietnam: Peasant Land, Peasant Revolution ch. 5 (1988); Phan Huy Le, supra note 11, at 39-42.
15 Jamieson, supra note 14, at 29 (quoting Dao Duy Anh, Viet Nam Hoa So Cuong [An Outline of Vietnamese Culture] (1951)).
17 The term patrimony is used to describe a society controlled by the personal authority of a political leadership, where the ruling elite and their officials are given considerable latitude to manage the affairs of the public. In such a society, plurality of political views has no place since the ruling elite is the exclusive source of political and ethical standards. All officials draw their authority from this source. This form of leadership may be charismatic, but in Vietnam such domination was accepted merely because it was long established. See generally Max Weber, The Theory of Social and Economic Organisation 358-68, 378-81 (1964); E. Finer, Problems of the Liberal Democratic State: An Historical Overview, 25 Gov't & Opposition 3, 335, 336-42 (1990).
18 To a limited extent, the Vietnamese imperial codes protected some private rights in land. Land owners were compensated for unauthorized government appropriations, private encroachment (by shifting boundary markers), or fraudulent sale. See Ta Van Tai & Nguyen Ngoc Huy, The Lé Code: Law in Traditional Vietnam, A Comparative Sino-Vietnamese Legal Study With Historical and Jurisdictional Analysis and Annotations 77-78 (1987); P. Huard & M. Durand, Vietnam Civilisation and Culture 147-49 (Vu Thien Kim trans., n.d.).
doing of miscreants. Unless they threatened tax collection or social order, the two pre-occupations of imperial rule, private land transactions escaped official attention. As the central administration depended upon personal and land taxes for revenue, village communal land and family land was surveyed and recorded in periodic cadastral surveys. Tax collection required a quite elaborate central administrative system to register plots of land. Village officials, answerable to the Council of Notables, registered the name of each male member of village families; outsiders were only rarely allowed to assume full membership of a village. In theory, all land was owned by the state; in practice, in return for taxes, villagers were given land use rights that were sufficiently comprehensive to be regarded as "ownership." In practice, however, imperial patrimony never directly governed the lower classes, but rather allowed land development at the village level to be guided by internal organic customary rules that had as much to do with mysticism as pragmatic economic considerations such as access to water, labor and communal land.

B. French Colonial Law

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

---

20 The primary purpose of the Lê Code (1428-1788) for example, was to assist the orderly collection of taxation. See Ta Van Tai, Vietnam's Code of the Lê Dynasty (1428-1788), 30 AM. J. COMP. L. 523, 523-30 (1982); Lan Quoc Nguyen, Traditional Vietnamese Law—The Lê Code, 13 HASTINGS INT'L COMP. L. REV. 141, 142-44 (1989).
21 See Jameson, supra note 14, at 29-33.
22 Ownership is, of course, a relative concept. In traditional Vietnam, no one had the right to let land lie fallow. If land was cultivated, taxes were levied by the village head acting as an intermediary for Imperial officials. See Adams & Hancock, supra note 11, at 90, 91; see also H. McAleary, Diem in China and Vietnam, 17 J. SOUTHEAST ASIAN STUD. 404, 408 (1985); Minh Quang Dao, supra note 11, at 84, 85; Phan Huu Le, supra note 11, at 39, 41.
23 During the 19th century, village rules coexisted in a complex inter-relationship with the Nguyen Code (1813-1945). For example, owners of land could lose legal protection of their right to occupancy if they failed to cultivate and inhabit land beyond a prescription period of 30 years (among relatives) or 20 years (among non-relatives). Lê Code art. 387. See Ta Van Tai, supra note 19, at 541-43. While the emperor had little rights of governance over family land, he retained effective control over one form of communal land (cong dien). Adams & Hancock, supra note 11, at 93-97.
25 Rational legal principles displaced the authority of patrimonial hierarchies, transferring power to autonomous institutions that were founded upon and dispensed impersonal abstract law. It is the role of
system which regulated important social and economic issues through objective law in preference to customs and bureaucratic measures.26 Under French civil law, the allocation and transfer of rights in land was governed by provisions that classified property into movables or immovables,27 public and private. Because the law was the chief written record of governmental policy, implementation required a complex administrative and judicial system.28

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

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


28 See Hooker, A CONCISE LEGAL HISTORY, supra note 25.

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

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

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

32 Although land registers were established as early as 1092 (during the Ly Dynasty), the Nguyen Dynasty (1802-1945) established the strictest rules governing land registration. See Phan Hy Le, Ancient Land Registers in Vietnam, [1995] 2 VIETNAM SOC. SCI. 25, 25-28. The Nguyen Code, promulgated by Emperor Gia Long, was in effect from 1813 to 1945. Hooker, THE LAWS OF SOUTH-EAST ASIA, supra note 31, at 441-42.
systems were in conflict, French law prevailed on the theory that rational rules must dominate and cannot coexist with competing legal systems.33

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

C. The Socialist Legal System

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

33 In the West, political legitimacy may be compromised where more than one legal system exists. Cf. HOOKER, A CONCISE LEGAL HISTORY, supra note 25, at 229-30 (on the diverse nature of Philippine law); WEBER, supra note 9, ch. 3; Steinberg, Law, Development and Korean Society, 3 J. COMP. ADMIN. 215, 219-22 (1971) (on the introduction of Western law in Korea).
34 Agreements reached between France and the Viet Minh at the Geneva Conference July 1954 ended hostilities in Indochina and partitioned Vietnam along the 17th parallel.
35 By a Decree of July 31, 1925 and an amendment Decree of Nov. 23, 1926, provisions of the Civil Code dealing with the transmission of rights in immovable property were introduced in both France and Cochinchina, Annam and Tonkin. The system of Les Registres (Dia B6), created indefeasibility of title, rendering inadmissible any action claiming a right not revealed in the proceedings leading up to registration of title. See HOOKER, A CONCISE LEGAL HISTORY, supra note 25, at 160.
39 Id. at 195. Interestingly enough, Order No. 97 issued on May 22, 1950 by the President of State declared temporary retention of the old colonial laws, such as the civil land law of Tonkin (North Vietnam). This law only applied to the extent that colonial law was not detrimental to revolutionary reform. See Hoang The Lien, On the Legal System of Vietnam, 1 VIETNAM L. & LEGAL F. 33, 33-34 (1994).
40 VIETNAM CONST. arts. 14, 19 (1960).
41 Id. art. 15.
42 Id. art. 16.
After first nationalizing and redistributing land that had belonged to the French, by 1960, the VWP had brought most peasant holdings under the cooperative system. The village and countryside were the locus of this legal change. Although little more than a series of hortative principles, land reform legislation attempted, with mixed success, to supplant village customary practices which had survived Chinese and French annexation. 

"In such villages, so long as the new socialist collectivities remained coincident with the older and socially meaningful boundaries of neighborhood, hamlet and village, the system worked after a fashion." The Land Reform Law was promulgated in 1953 to reallocate urban land and housing and nationalize commercial property. By the time the post-reunification Constitution was enacted in 1980, no private rights in land or means of production were countenanced—not even in theory.

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

---

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

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

45 JAMIESON, supra note 14, at 367.

46 VIETNAM CONST. arts. 19-20 (1980).

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

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


50 See VIETNAM CONST. arts. 6, 113, 114, 121 (1960).
The DRV’s experimentation with socialist legality was often subverted when VWP cadre ignored formal rules, treating legal instruments as just one means of implementing party policy. The supremacy of policy over law allowed the VWP leadership a virtually unfettered ability to rule through administrative fiat.

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

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


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

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

A. Three Systems of Land Use Control

"[L]aw . . . is only one component of a large set of policy instruments and usually cannot [be] and is not used by itself."

It is thus evident that land use control involves more than the mere formal application of the law. Indeed, at least three types of land control can be identified, but it is important to realize that they are in reality different facets of the same amorphous land regime. The three types are:

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

It should come as no surprise that in a society where status, party patrimony, and rational legal norms commingle, there are likely to be diverse forms of land control. Evidence of competing land use systems emerged when the usually docile National Assembly acrimoniously debated land tenure and personal rights during the enactment of the Law on Land 1993.\(^5\)

---


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

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

---


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


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


B. Traditional Land Use

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

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

The state continues to prescribe what is or is not permissible; customary practices only appear to conform where expedient, developing their own parallel procedures in all other circumstances. Traditional land use may be temporarily suppressed, but recent history clearly demonstrates that as soon as incompatible laws are relaxed, customs rebound, albeit in a modified form. Although this phenomenon no doubt exists in all societies, it is arguably stronger in one like Vietnam where a rational rights-based legal
system is unfamiliar to most people\textsuperscript{73} and is arguably not particularly successful in guiding human behavior.\textsuperscript{74}

With the possible exception of remote pockets of swiddening (slash-and-burn farming),\textsuperscript{75} agriculture is influenced to varying degrees by state law. Rural land policy is primarily driven by a desire to improve productivity and preserve social stability.\textsuperscript{76} More recently, however, with the routine allotment of collectivized land for private use,\textsuperscript{77} the influence of district people’s committees over farm production has waned, allowing patriarchal village elders and farm organizations\textsuperscript{78} room to fill the power vacuum.

Even at the height of collectivization, the state did not, and could not, control all aspects of peoples’ lives; this left customary values to fill the gaps. Village leaders now draw upon this syncretistic mix of social norms to develop community standards in diverse areas such as social welfare, criminal behavior, land control and dispute resolution.\textsuperscript{79} However, the state notionally maintains exclusive control over all rights attached to land. The allotment of land and any change in use or occupation requires the consent of district-level people’s committees\textsuperscript{80} which administer regulations\textsuperscript{81}

\begin{footnotes}
\textsuperscript{73} See Gillespie, supra note 8, at 326-33.
\textsuperscript{74} See infra part III.D.2-3.
\textsuperscript{76} Interview with Phan Huu Chi, Director of Leadco, in Hanoi, Vietnam (Feb. 4 & 13, 1993 and Feb. 2, 1994) [hereinafter Phan Huu Chi Interview]. See also the debates by the national assembly in \textit{NHAN DAN}, Mar. 20, 1992, at 2-3.
\textsuperscript{77} Land used for rice production is allocated for a period of seven years, longer term crops for a period of 20. In some provinces, over 90% of rural land has been allotted. See Nguyen Qui Binh, \textit{Real Estate Laws in Vietnam, in VIETNAM AND THE RULE OF LAW, supra note 64, at 156-58; Land Transferred to Farmers in 47 Provinces} (Hanoi VNA, Jan. 8, 1994), in F.B.I.S. DAILY REP. - E. ASIA 94-006, Jan. 10, 1994, at 55. One and a half million land use certificates have been granted to farmer households, representing 14% of all land designated for allotment.
\textsuperscript{80} Law on Land, arts. 20, 31 (1993).
\end{footnotes}
passed pursuant to the *Law on Land* 1993. In short, land users look inwards at customary values for social guidance, and where possible avoid external, state land controls.\textsuperscript{82}

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

State intervention has taken three forms. In the first place, institutions have been created by legislation to manage forest preservation.\textsuperscript{87} Secondly, district level People’s Committees have initiated land management programs that offer direct assistance.\textsuperscript{88} These programs resettle farmers outside of sensitive forest areas and retrain them to use intensive agricultural techniques. Authorities acknowledge that minority hill tribes have little experience with instrumentalist rule\textsuperscript{89} and as a result have

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

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


\textsuperscript{84}Mai Xuan Yen Interview, supra note 70.


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

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

\textsuperscript{88}Law on Forest Protection and Development, art. 21 (1991).

\textsuperscript{89}Phan Huu Chi Interview, supra note 76.
adopted a policy of direct administrative intervention in preference to guidance through formal rules. In any event, enforcement bodies are chronically understaffed and are consequently unable to enforce prescriptive regulations. Even if more resources were available to monitor compliance, swiddening farmers are among the poorest in a poor country and probably possess insufficient resources to survive the transition to intensive agriculture unaided by the state. Thirdly, in an attempt to inculcate state policy on forest protection, a program of practical and moral education is carried out by mass organizations and party branches. The Legal Research Institute attached to the Ministry of Justice, for example, translated segments of the Law on Land 1993 and Law on Forest Protection and Development 1991 into local dialects, using poetry and song to communicate the law in a culturally appropriate manner.

C. Urban-Traditional Land Use

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

---

93 Interview with Hoan Lien, Vice Director, Legal Research Institute, in Hanoi, Vietnam (June 20, 1994).
94 Even in urban areas cadastral maps may not accurately delineate land boundaries. See Nguyen Qui Binh, Recent Changes in Vietnam's Real Estate Laws 60, 66-67 (Nov. 8, 1993) (unpublished manuscript); Richard Browne, From Paddy Field to Province, in Environment, State and Society in Asia: The Legacy of the Twentieth Century 19-20 (July 13-16, 1994) (unpublished manuscript, Murdoch University, Australia).
URBAN LAND MANAGEMENT IN VIETNAM

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

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

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

---

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

96 See NHAN DAN, Apr. 17, 1993.

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


100 Police rely on general public disorder or infringement of population registration papers provisions to prosecute offenders. See PENAL CODE, arts. 198, 211 (1986) (amended 1992) (Vietnam).
Strict internal travel rules\textsuperscript{101} have put a partial brake upon rural migration. Despite tight controls, the search for work and the lure of urban life is irresistible. Makeshift accommodation can be seen along the waterways,\textsuperscript{102} city fringe\textsuperscript{103} of Ho Chi Minh City, and the banks of the Red River in Hanoi.\textsuperscript{104} State housing also accommodates unauthorized rural migrants, causing one Hanoi planner to lament that without constant bureaucratic supervision, "the high-rise flats of 'socialism' are reversing back to being rural villages."\textsuperscript{105} Almost by definition, official land law cannot apply to squatter settlements, since the Penal Code\textsuperscript{106} declares this form of occupation unlawful.

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

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

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

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


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


\textsuperscript{108} Interview with Nguyen Ngoc Khoi, Director, National Institute of Urban and Regional Planning, in Hanoi, Vietnam (Feb. 3, 1994 and Sept. 13, 1994) [hereinafter Nguyen Ngoc Khoi Interview].
prices are thought to be higher than government compensation\textsuperscript{109} rates, but considerably less than the market value for land in comparable districts. The area is also attracting small substandard housing\textsuperscript{110} which is illegally constructed on previously unused land.

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

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


\textsuperscript{111} See Nguyen Qui Binh, supra note 94; Yen Hung, supra note 62.

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

\textsuperscript{113} Nguyen Ngoc Khoi Interview, supra note 108.

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

\textsuperscript{115} Many illegal houses are unlawfully connected to the electricity supply, or legally share a party-meter. Interview with Phan Dinh Dai, Director, Dept. for Construction Management, in Hanoi, Vietnam (Feb. 5, 1994 and Sept. 16, 1994) [hereinafter Phan Dinh Dai Interview].
Master Plan has been directly responsible for increasing the pace of construction along the Red River.

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

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

---

116 Nguyen Lan Interview, supra note 112; Nguyen Ngoc Khoi Interview, supra note 108.
117 The author is unaware of any systematic research in this area and bases this postulation on conversations with many land officials and residents of Hanoi and Ho Chi Minh City.
118 See supra part II.
119 Do Thai Dong, supra note 10, at 77, 81, 87.
120 The Law on Land was enacted in July 1993 and came into force October 15 of that year. To date, only a few supporting decrees have been enacted, for example, Decree No 64-CP, On the Enactment of Regulations on the Allocation of Land to Households and Individuals for Stable and Long-time Use for the Purpose of Agricultural Production (Sept. 27, 1993); Decree No. 60-CP, Ownership of Residential Housing and Right to Use Land in Urban Areas (July 5, 1994); Decree No. 87-CP, Stipulating Price List of Categories of Land (Aug. 17, 1994); Decree No. 90-CP, Promulgating Regulations on Compensation upon the State Recovery of Land for the Purpose of National Defence, Security, National Interests, Public Interests (Aug. 17, 1994).
unsupported by state agencies. This is the phenomenon of urban–traditional land use.

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

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

121 Phan Dinh Dai Interview, supra note 115.
122 District people’s committee police do not interfere with illegal construction and property sales unless they are instructed by the responsible authorities, in this case, the city level people’s committee of the Chief Architect’s Office. Mai Xuan Yen Interview, supra note 70.
123 Ordinance on Residential Housing, art. 12(1)(c) (1991) (restricting construction). As a final resort, Interior Ministry police may be requested by the responsible people’s committee to take criminal action. PENAL CODE, arts. 180, 214; Law on Land, art. 6 (1993) (restricting land transfer).
125 Interview with Ha Van Que, Assistant to the Chief Architect’s Office, in Hanoi, Vietnam (Sept. 14, 1994) [hereinafter Ha Van Que Interview]; see, e.g., No Permit No Project, VIETNAM INVESTMENT REV., Sept. 26, 1994, at 1.
126 Decision No. 158-TTg, Emergency Measures Against Acts of Violation of the Ordinance on Protection of Dikes in Hanoi (Mar. 16, 1995). See Ha Thang, Dyke Homes Demolished, VIETNAM INVESTMENT REV., Apr. 24, 1995, at 6 (seven state officials along with the Deputy Chief Architect were arrested and charged by Interior Ministry Police for allowing structures to be built along the dike; many were charged with violating with articles 220 and 221 of the Criminal Code).
D. Authorized Land Use

1. The Formal Administrative Structure

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

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

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

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


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

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


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

2. The Nature of Land Use Rights

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

---

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


138 Id. art. 38.

139 Id. art. 26.

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

141 Law on Land, art. 28 (1993).

142 Id. art. 3(2).

143 Id. arts. 3(2), 77(2).
use, such as hotels, is of limited duration\textsuperscript{144} and cannot be transferred without the approval of the Prime Minister and/or provincial/city level people’s committee.\textsuperscript{145}

Land use rights are also shaped by the legal status of the occupier. Except for urban residential and forestry\textsuperscript{146} land (where no legal distinction is made between the state, private corporations, and individuals/households), all land rights reflect the legal status of the occupier. For example, agricultural land is routinely allotted by district level people’s committees to individuals and households,\textsuperscript{147} whereas allotments made to private companies are strictly governed by criteria inserted into their business licenses.\textsuperscript{148} Similarly, restrictive rules govern corporate use of urban land for non-residential purposes. Legal status also governs dispute resolution. All land disputes involving companies or organizations must be resolved by city/provincial rather than district people’s committees.\textsuperscript{149}

3. Conceptualizing Authorized Land Use

a. Towards a theory of state managed land

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

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

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

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

\textsuperscript{147} Decree No. 64-CP, art. 1 (1993).

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

\textsuperscript{149} Law on Land, art. 38 (1993).
urban—traditional land use. Responsible district level people’s committees have made vigorous efforts to resettle *swiddening* farmers. Mass organizations and party branches are also used to exhort urban—traditional land users to conform with the law.\textsuperscript{150} However, unless land falls within the authorized system, it escapes the complex administrative structure established by formal legislation.

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

Neo-Confucian subordination of the individual to the community\textsuperscript{152} was later appropriated to justify socialist collectivization and continues to underlie much land policy.\textsuperscript{153} It is true that the government now favors an incremental recognition of private land rights.\textsuperscript{154} But it is also true that private entitlements are not the focus of the system; they are merely a mechanism used to personalize control over domestic housing. Unlike Western land regimes,\textsuperscript{155} Vietnamese land law fails to clearly delineate the boundaries between state and individual rights.

\textsuperscript{150} Nguyen Ngoc Khoi Interview, supra note 108.

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

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

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

\textsuperscript{154} See Gillespie, *supra* note 8, at 325, 338-41.

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

b. Social utility of land

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

---

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


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

159 Decree No. 64-CP, art. 13 (1993).

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

160 Western land management officials are typically invested with town planning powers, and may determine land use within designated areas, but are not usually permitted to insert “covenants” setting out rights and duties in respect of individual allotments.
One of the principal aims of the Law on Land 1993 is to enhance rural productivity, thereby alleviating poverty and increasing tax revenue. The state consequently highly values farming and commercial development and fosters efficient exploitation of resources by closely supervising this type of land use. Take, for example, the vigorous campaign mounted by people's committees, mass organizations, and the party to reform inefficient swiddening. The high social utility attached to efficient farming techniques overrides local ethnic interests; farming land is strictly allotted and monitored by the state. The duration of an allotment coincides with the minimum time required to maximize production and rights are forfeited where land lies idle for longer than twelve consecutive months. Rice land is allocated for seven years for example, plantation and forestry land for forty and sixty years respectively.

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

---

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


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


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

167 All applications for commercial development of land must be accompanied by a pre-feasibility statement that sets out projected profits and losses for the first five years of production. These figures are then used by the relevant people's committee (in the case of small projects) and the Office of Government (for large projects) to calculate the time required to recoup investment. These authorities will then grant additional years according to a predetermined formula to allow the investor to generate profit. This figure is often determined by negotiation and is influenced by the social utility of the development. See, e.g., Instruction B, Guidance on Instructions for Construction Land Use Licences 601/KTS-TH, Chief Architect's Office, Hanoi People's Comm. (June 11, 1993). Legislation conveys administrative discretion, but within those wide parameters, bureaucrats determine land use duration and allotment criteria. Mai Xuan Yen Interview, supra note 70.
rights in land\textsuperscript{168} are granted to ensure the following factors:

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

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

c. Land rights and collective ownership

The relationship between legislation and the status of individuals in Vietnamese society warrants closer examination, as it helps to explain state management of land. As previously discussed, land laws reflect an underlying belief that the good of society in general outweighs individual interests. This lack of an ideological commitment to the individual comes as much from neo-Confucian/Vietnamese village tradition\textsuperscript{170} as from Marxism.\textsuperscript{171} Both doctrines suggest that individuals hold property subject to the performance of duties, not a few of them public. Unlike China, the socialist revolution in Vietnam did not radically reassess prevailing neo-Confucian norms.\textsuperscript{172} And the Western notion of individual rights, in legal theory being equal to state rights, has never found many adherents in Vietnam. Laws are seen as statements about duties that must be obeyed, and it is believed that

\textsuperscript{168} Law on Land, arts. 73-78 (1993).
\textsuperscript{170} See Tuong Lai, \textit{supra} note 68, at 10, 12; Do Thai Dong, \textit{supra} note 10, at 77, 80-86; Jamieson, \textit{supra} note 14, at 217-18, 283; Hegel, \textit{supra} note 152, at 8-9.
\textsuperscript{172} See Tuong Lai, \textit{supra} note 68, at 10, 12.
if only people were aware of their duties the legal system and society would function harmoniously.173

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

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

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

---

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

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

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


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

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

179 See Decree 64-CP, art. 3 (1993).
resident status, the off-spring of local party cadre, state officials, or cadre and state officials on sick leave or early retirement. In contrast, allocation in urban areas is theoretically determined according to the merit of business and/or building plans in addition to family needs. These commercial criteria once again describe aspects of social activity where women do not compete on an equal basis with men.

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

---

180 id. arts. 7-8.
181 See Mai Xuan Yen Interview, supra note 70; Nguyen Khai Interview, supra note 82.
183 Le Thi, supra note 177, at 30-33.
184 See JAMIESON, supra note 14, at 18-19.
185 See JAMIESON, supra note 14, at 18-19.
186 Eliminating discrimination is not as simple as passing legislation. In the debate over the effectiveness of legislation as a tool of social change, the crudely instrumentalist view that legal change translates directly into social change has been discarded. See, e.g., L. Lustgarten, Racial Inequality and the Limits of Law, 49 MOD. L. REV. 68 (1986). The effect of law on actual practices is more correctly seen as a complex and unpredictable interaction. Nevertheless, there is some evidence that law can change people's values. One explanation for this phenomenon is that when people regard their beliefs and values as a lost cause, forbidden by law, they may abandon them in favor of state-sponsored rules. See William M. Evan, Law as an Instrument of Social Change, in THE SOCIOLOGY OF LAW 554-62 (William M. Evan ed., 1980); SEIDMAN & SEIDMAN, supra note 72, at 39-51.
187 As a general principle, formal rules tend to be most persuasive where they act on rational commercial decisions such as property ownership, and least effective in modifying moral or aesthetic values. The literature in this area is extensive. See, e.g., Yehezkel Dror, Law and Social Change, 33 TULANE L. REV. 749 (1959); J. Morison, How to Change Things with Rules, in LAW, SOCIETY AND CHANGE 8-9 (S. Livingston & J. Morison eds., 1990).
d. Instrumental problems with land law

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

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

---

188 See supra part II.A.
189 Phan Huu Chi Interview, supra note 76; Mai Xuan Yen Interview, supra note 70; Interview with Phung Van Nghe, Planning Officer, General Department of Land Management, in Hanoi, Vietnam (Jan. 28, 1994).
190 Law on Land, arts. 19, 20, 33, 54, 57, 59 (1993); Decree 64-CP, arts. 6-9 (1993); Mai Xuan Yen Interview, supra note 70, Nguyen Khai Interview, supra note 82.
191 Phan Huu Chi Interview, supra note 76; Nguyen Tran Bat Interview, supra note 173.
192 The Government has only recently started to raise revenue through the Ordinance on Land and Housing Tax (1992). A transfer tax of 8% (5% paid by transferor and 3% by transferee) is imposed by the Ordinance on Land Transfer Tax (1993). In order to dampen land speculation, a punitive 30% rate, in addition to the maximum rate of tax on personal irregular income, Circular No. 29, Ministry of Finance (1993) applies where capital gain from a sale exceeds 50 million dong or is derived from speculation. Since the tax was first collected on June 1, 1993, recorded land transactions have diminished by over 50% in Ho Chi Minh City. Whether this effect has been caused by property prices or high taxes is unclear. See Land Market Slows, VIETNAM INVESTMENT REV., July 19, 1993, at 17. See generally Raymond Mallon,
tended to use administrative discretion as a micro-economic control. Administrative discretion has certain advantages over legislation. For example, discretion is easily guided to take into account nuances of state policy and rapidly changing social norms. In contrast, legislation is comparatively inflexible and frequent amendments and re-enactments may provide an unwanted record of state ineptitude and vacillation. Furthermore, the regional variations between the north-south, highland-lowland divide will militate against the use of general comprehensive national legislation, but administrative discretion decentralizes and localizes national laws. By providing the state with a means of intricately controlling land dealings, discretion fills the regulatory vacuum that would otherwise be occupied by detailed normative legislation.

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

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

---


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


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

197 See PM Speaks, VIETNAM INVESTMENT REV., June 20, 1992, at 5.
full complement of subordinate legislation has yet to be enacted. But this is only part of the problem; the land bureaucracy is also a contributing factor.

IV. BUREAUCRATIC CONTROL OF LAND USE

A. The Nature of the Bureaucracy

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

1. Bureaucratic Responsibilities as Defined by Law

The 1992 Constitution confers administrative responsibilities upon central-level ministries, people's committees, legislative administr-
tors, judicial administrators, but not the CPV or mass organizations. Administrative functions are not as a rule separated from legislative or even judicial roles. People's committees, for example, not only administer but also legislate, police, and adjudicate land use.

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

2. Bureaucratic Responsibilities as Perceived by the Ruling Elite

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

205 Id. arts. 84 (National Assembly), 103 (President), 118 (People's Councils).
206 Id. arts. 134, 137.
207 Although the CPV is given a policy making function, it is not part of the state organization. VIETNAM CONST. art. 4 (1992).
208 The Fatherland Front is described as the political base of the administration, so although it has administrative functions, according to the Constitution it is not part of the state. VIETNAM CONST. art. 9 (1992); Orientations for the Building and Perfection of the Vietnam Socialist Republic State, supra note 98, at 5-6.
209 Law on Land, art. 8 (1993).
210 Id. art. 13.
211 Id. art. 37.
212 Id. art. 38.
214 Interview with Phan Duc Binh, Director, Legal Department, Ministry of Labor, in Hanoi, Vietnam (Sept. 8, 1994). The Office of Government is currently drafting state employee regulations that will contain a legal definition of a bureaucrat.
215 Id. For an interesting comparison, see generally, E. Epstein, Law and Legitimation in Post-Mao China, in DOMESTIC LAW REFORMS IN POST-MAO CHINA 19, 25-28 (Pittman B. Potter ed., 1994) (discussing the role of bureaucracy in China in executing the orders of the party, but not necessarily the state).
because the CPV monopolizes political power \(^{217}\) descriptions of the bureaucracy must be interwoven with the political structure. In commenting upon the bureaucracy, Vo Chi Cong, then President, said:

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

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


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


\(^{221}\) The judiciary and executive are constitutionally answerable to the National Assembly, *Vietnam Const.* arts. 109, 135 (1992), and “[t]he party directs the National Assembly elections adequately in order to choose highly qualified and competent deputies to represent the people’s will and aspirations as well as the common interests of the nation as a whole.” Vu Oanh, *supra* note 51, at 3 (in Vietnamese). See Russell Heng Hiang Khng, *supra* note 220, at 221-25.
provincial levels remains problematic, often distorting the bureaucratic chain of command.

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

---


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


B. The Institutional Framework of Land Management

1. Central Control

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

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

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

2. Local and Central Control

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

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

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

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


\(^{237}\) Mai Xuan Yen Interview, supra note 70.
detailed provisions issued by the government\textsuperscript{238} that prescribe permitted survey tolerances and cadastral mapping methodologies. There is reported to be a high level of adherence to these provisions.\textsuperscript{239} All levels of government agree with the need for accurate allotment, and because the legislation is drafted in prescriptive and technical language, it is clear and easy to understand. Less agreeable central-level instructions may be met with bureaucratic procrastination, intransigence, and sabotage\textsuperscript{240} at the local level. Greater concentration of power in the hands of ministries is often seen as a means of overcoming local autarky.\textsuperscript{241} But this simplistic solution does not adequately address competing family, party, and business loyalties.\textsuperscript{242}

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

\footnotesize
\begin{itemize}
\item \textsuperscript{238} See, e.g., Decree No. 119-CP, Promulgating the Regulation on the Management and Use of the Administrative Boundary Dossiers, Maps and Marker Posts of Various Levels (Sept. 17, 1994).
\item \textsuperscript{239} Browne, \textit{supra} note 94, at 14-15.
\item \textsuperscript{240} Nguyen Tran Bat Interview, \textit{supra} note 173; Mai Xuan Yen, \textit{supra} note 169.
\item \textsuperscript{241} See Vu Oanh, \textit{supra} note 51. There is also dissatisfaction with the degree of corruption at the municipal level.
\item \textsuperscript{242} See Beresford, \textit{supra} note 222, at 11-13. For a revealing account of the difficulties facing central enforcement over local bureaucracies, compare Kevin O'Brien, \textit{Implementing Political Reform in China's Villages}, 32 \textsc{Austl. J. Chinese Aff.} 33, 41-50 (July 1994).
\item \textsuperscript{243} Law on Land, art. 8 (1993). Article 13 stipulates that state administration of land shall include:
\begin{enumerate}
\item investigation, survey, measurement, assessment and classification of land, and drawing of maps;
\item zoning of land and planning for its use;
\item promulgation of rules and regulations for land administration and use, and organisation of the implementation of these rules and regulations;
\item allocation, rental and recovery of land;
\item land registration, establishing and maintaining land registers, management of land use contracts, recording land statistics and inventories of land, and granting certificates of the right to use land;
\item inspection to ensure compliance with rules and regulations on land administration and land use;
\item resolution of land disputes and complaints, and denouncement of breaches of provisions on land administration and land use.
\end{enumerate}
\item \textsuperscript{244} Mai Xuan Yen, \textit{supra} note 169. It should be noted that projects of national importance are directly controlled by the Prime Minister.\textit{See} Decree No. 191-CP, Promulgating the Regulations on the Formation, Evaluation and Implementation of Direct Foreign Investment Projects, arts. 6, 7, 10 (Dec. 28,
Front and its member organizations, other social organizations, the people’s armed forces, and citizens are encouraged to support state officials in the management of land.  

The inter-relationship between the central and local levels of government is illustrated by the planning process for the Ancient Quarter of Hanoi. Under the Master Plan Hanoi 2010, the NIURP only sets broad planning priorities; more detailed schemes for their respective localities are drafted by district-level people’s committees under the guidance of the Chief Architect’s Office. For example, the Hoan Kiem District People’s Committee, with assistance from the NIURP, drafted a comprehensive planning scheme for the thirty-six commercial streets (36 Pho Phuong) of the ancient quarter which has been approved by the Chief Architect, Hanoi People’s Committee, while more general regulations on construction management have been approved by the Prime Minister. Due to domestic and international media attention and to review by the broadly constituted Council for the Restitution of Old Hanoi, it is most...
unlikely that the Hoan Kiem district planning scheme will significantly deviate from the Master Plan. It does not necessarily follow, however, that planning decisions made by the people’s committee will always comply with the Master Plan, or for that matter with the detailed district plan.²⁵¹

C. Bureaucratic Compliance with Land Laws

1. Commercial Exploitation of Administrative Authority

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

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

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

²⁵¹ Corruption and tax enforcement continue to encourage illegal construction. See M. Mathes, Drawn and Quartered, VIETNAM ECON. TIMES, Sept. 1995, at 24-25.
²⁵² It is difficult to monitor bureau output, accurately assess accounting data, or know whether the bureau’s choice of internal procedure is socially optimal. See generally Jean-Jacques Laffont & Eric Maskin, A Differential Approach to Dominant Strategy Mechanisms, 48 ECONOMETRIA 1507 (1980); Roger Guesnerie & Jean-Jacques Laffont, A Complete Solution to a Class of Principal-Agent Problems with an Application to the Control of a Self-Managed Firm, 25 J. PUBLIC ECON., 329, 329-64 (1984).
²⁵³ Large projects with or without foreign capital must be approved by the Prime Minister. See Decision No. 366 HDBT, Regulations on Evaluation of Projects for Foreign-Owned Capital, art. 4 (Nov. 7, 1991); Decree No. 177-CP, Regulations on the Management of Investment and Construction, art. 6 (1994).
When reviewing allotment and development applications, the CAO exercises a virtually unaccountable discretion. Appeals against unfavorable decisions must, in the first instance, be lodged with the CAO, which of course was the body that made the initial determination. As a judge in its own cause, the CAO has little reason to fear ministerial supervision, and may, within the limits of the Penal Code, exploit its wide administrative authority virtually free of independent review.

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

---


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


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

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

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

262 Ha Van Que Interview, supra note 125.
b. Leases between foreigners and Vietnamese subject to approval by people’s committees

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

---

266 Regulations on the Lease of Premises and Recruitment of Labour by Foreigners and Foreign Nationals of Vietnamese Origin, Council of Ministers, art. B 4(c) (Nov. 10, 1992).
268 For the rules governing disputes between holders of ancien regime title and occupiers, see Decree No 60-CP, supra note 264, art. 10.
2. The Effect of Patronage on Compliance

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

a. Neutral or beneficial effects from patronage

“Super village” organizations and family networks have a strong cultural antecedence in Vietnam. Such organizations and networks

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


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

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

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


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


277 The “super village” is a term applied to extra legal organizations that arrange themselves as corporate identities, an extension of the traditional Vietnamese village organization. See JAMIESON, supra note 14, at 213-20, 256-57.
linked bureaucrats to society through the exchange of information and official favors in return for revenue. Funds received through patronage often benefit an entire organization. Commentators suggest, for example, that "fees" received from architectural service companies are used by the CAO to improve working conditions, retrain, and remunerate underpaid state employees who might otherwise spend less time attending to official functions while earning a second income. Patronage also takes non-monetary forms. Influence can be used to assist family or patrons overcome legal problems, bypass waiting lists for public housing, health, fire, and labor permits as well as secure coveted university entrance.

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

---

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

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

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


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

284 Nguyen Tran Bat Interview, supra note 173. Although corruption can no doubt be characterized as a sociological problem of deviance, this discussion is concerned with disobedience of law. See R. Seidman, Why do People Obey the Law? The Case of Corruption in Developing Countries, 5 BRITISH J. L. SOC. 45, 50-52 (1978); R. KLITGAARD, CONTROLLING CORRUPTION (1988); W. Wertheim, Sociological Aspects of Corruption in South East Asia, 1 SOCIOLOGIA NEERLANDICA 129, 138-42 (1963).
regulations are not publicly available\textsuperscript{285} or remain ambiguous\textsuperscript{286} professional advice given by those closely connected with regulatory authorities will continue to be valued by developers. This service is quasi-official in the sense that it provides detailed technical information determined by state authorities that mimics the function of prescriptive legislation.

\textit{b. Negative effects from patronage}

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

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

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

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

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

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

\textsuperscript{289} Recent legislation includes Decree No. 87/CP, Stipulating Price List of Categories of Land, art. 2(4) (1994) (setting forth land values to be used by district level people's committee when changing allotment fees for residential land) and Circular No. 2 TC/TCT, Guiding the Implementation of Decree No. 89 of the Government on Collection of Land Use Levy and Land Administration Fee (Jan. 4, 1995).
methods of assessment were not stipulated in legislation. Without prescriptive guidelines, local authorities were reportedly reluctant to test the limits of their discretionary authority, and risk official punishment\(^2\) by either under- or overcharging land valuation fees. In the meantime, few land transfer certificates were issued.\(^2\)

**D. Absence of Private Compliance with Land Laws**

Commentators suggest that the enforcement of planning and construction regulations has been compromised by the uncertainty surrounding the responsibilities of the chief architect’s office.\(^2\) Regulations issued by the Ministry of Construction, for example, require the chief architect to formulate policy and monitor construction, but leave the actual detection of building infringements to inspectors employed by district people’s committees.\(^2\) Imprecise drafting compounds the confusion by failing to clearly delineate the administrative responsibilities of the MOC and CAO. Even though the MOC is the constitutionally superior instrumentality,\(^2\) an overlapping jurisdiction at times hinders the enforcement of building provisions.

**1. Examples and Causes of Private Noncompliance**

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

---

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

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

\(^{292}\) Nguyen Lan Interview, supra note 112; Annalisa Koeman, \textit{Planning into Practice}. \textsc{VIETNAM INVESTMENT REV.}, Feb. 13 1993, at 27 (interview with Hanoi city planner Ha Van Que).


\(^{294}\) \textsc{VIETNAM CONST.} art. 112 (1992).
to build out into the lake or by squatting on public land reclaimed from the Red River.\textsuperscript{295} Although the Hanoi People’s Committee issued a circular demanding suspension of all construction in the villages and wards around the lake,\textsuperscript{296} building activity has reportedly increased.\textsuperscript{297} In the meantime, the area has rapidly become a patchwork of authorized and urban–traditional land use.\textsuperscript{298}

A pilot land survey project\textsuperscript{299} carried out in Gia Lam, a small semi-rural settlement on the outskirts of Hanoi confirms this view. Of the 480 households selected, only 78 conformed to the law and were entitled to land tenure certificates. The remainder were ineligible for a range of reasons, including illegal transfer, occupation, and construction, and non-payment of transfer and land taxes. The survey team concluded that if the General Department of Land Management is to achieve its aim of registering and issuing certificates for all urban land by the year 2005, an efficient evaluation and adjudication process should be established to identify illegality and prescribe remedial action.

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

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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{295} See Hai Thanh, \textit{supra} note 95.
\item \textsuperscript{296} See Hai Thanh, \textit{supra} note 95.
\item \textsuperscript{297} Nguyen Son Lo \textit{Interview}, \textit{supra} note 250; Hong Sam, \textit{supra} note 104, at 3.
\item \textsuperscript{298} See \textit{supra} part III.C. Land development that proceeds without regard to laws or the instrumental arms of the state may be described as urban–traditional.
\item \textsuperscript{299} See Feasibility Study, \textit{supra} note 162, at 116-20.
\item \textsuperscript{300} Mai Xuan Yen \textit{Interview}, \textit{supra} note 70; Nguyen Khai \textit{Interview}, \textit{supra} note 82.
\item \textsuperscript{301} Mai Xuan Yen \textit{Interview}, \textit{supra} note 70.
\item \textsuperscript{302} Decree No. 60-CP, art. 10(3) (July 5, 1994).
\end{enumerate}
\end{footnotesize}
City People’s Committee has recently allocated funds to remove or renovate shanty houses built along the banks of Nhieu Loc and Thi Nghe canals. This strategy will require the People’s Committee to rezone the canal embankment into residential use and transfer the existing urban–traditional land into the authorized system. Funds for projects of this nature are limited and narrowly focused to assist war invalids, widows, state employees, health workers, and members of the armed services. If land registration is to be normalized by the target date, bureaucrats will need to generously exercise their discretion to exculpate illegal occupation and construction. The immediate cost to the state in lost fines and registration fees would soon be recovered through land and transfer taxes.

2. Futility of Sanctions in Promoting Private Compliance

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

---

303 Housing Program Needs Much Support, supra note 102.
304 Housing Program Needs Much Support, supra note 102.
305 Although the specific rates have not been enacted, it is reported that where a land use right is lawfully allotted, but a building erected on the land is illegal, a small fine may be levied. If the building is legal, but illegally located, the fine will be very substantial. Where the land use does not comply with zoning stipulations or encroaches on state land such as railways, there can be no validation and eventually, depending upon the seriousness of the case, the building will be destroyed. Nguyen Khai Interview, supra note 82. See also Decree No. 60-CP, art. 10(3) (1994) (pertaining to cases where the owner does not possess any or some of the required documents).
306 Decree No. 60-CP, art. 10 (1994) (on certificates of ownership and land use rights).
309 Ha Van Que Interview, supra note 125.
310 Decree No. 177-CP, On Regulation on the Management of Investment and Construction, arts. 21, 27 (Oct. 20, 1994); Decision 22-BXD-QLXD, Regulations on Registration of Construction Activities, Arts 9-13 MOC (Jan. 26, 1993); Nguyen Lan Interview, supra note 112.
311 Nguyen Son Lo Interview, supra note 250. Other state agencies also have difficulty in monitoring new construction. The Hanoi Power Service, a state-owned electricity supplier, for example has lost track of many new customers. See Nguyen Chi Thanh, Thieves and Bureaucrats Block Efforts to
given the right motivation, considerably more could be done with the existing resources.\textsuperscript{312} This view is supported by an enforcement experiment whereby district people’s committees in Hanoi monitored purchases of building materials as a means of tracing unauthorized construction. Although the detection rate significantly increased, compliance did not show a corresponding improvement.\textsuperscript{313} This discrepancy was blamed on corrupt officials; it was concluded that low wages unquestionably increase susceptibility to bribery.\textsuperscript{314}

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

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


312 Nguyen Ngoc Khoi Interview, \textit{supra} note 108.
313 Nguyen Lan Interview, \textit{supra} note 112.
314 Nguyen Lan Interview, \textit{supra} note 112; Koeman, \textit{supra} note 292, at 27.
315 See Ordinance on Residential Housing, arts. 12(1)c and (2), 19 (March 26, 1991); Decision No. 103BXD-GD, Regulations on Quality Management of Construction Projects (June 15, 1992) (central-level legislation delegates authority to local government).
316 See, e.g., Hai Thanh, \textit{supra} note 95; Nguyen Tri Dung, \textit{supra} note 124.
318 Id.
319 It is possible to pay a fine to temporarily legitimize the ‘existence’ of an illegally constructed building in Hanoi, but there is no clear legislative basis for this procedure. See Nguyen Tri Dung, \textit{supra} note 107.
long as people's committees continue to believe that vigorous enforcement frightens away foreign investment.  

3. Cultural Reasons for Private Noncompliance

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

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

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

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

4. Additional Disincentive to Comply

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

---

320 Nguyen Lan Interview, supra note 112 (speaking about preservation of the Hoan Kien district, Hanoi); Koeman, supra note 292, at 27.
321 Sachs, supra note 16 (quoting in part Ngo Ba Thanh).
322 Hai Thanh, supra note 95.
323 The literature in this area is vast. See, e.g., SEIDMAN & SEIDMAN, supra note 72, at 119-26.
applies to a people’s committee for a Land Tenure Certificate and Housing Ownership Certificate. Before a certificate can be issued, buildings are appraised according to a statutory valuation scale, often pricing the transaction beyond the means of a land user. Once a certificate is issued, land is subject to an annual tax.

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

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

---

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


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

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


330 Ha Van Que Interview, supra note 125. See also Nguyen Tri Dung, supra note 107, at 16; Build Your Own Houses. Says Minister, supra note 1.
V. STRATEGIES FOR A LAND MANAGEMENT REGIME

A. Sources of the Bureaucracy’s Failure to Obtain Compliance

1. Conflict Between Formal Law and Local Land Use Customs

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

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

The coexistence of Neo-Confucian values and Western rights-based law creates a divided legal geography\(^{333}\) in which formal law does not address the needs of entire communities.\(^{334}\) In this divided legal geography, formal law’s lack of relevance fosters a social attitude that rejects any

\(^{331}\) SEIDMAN & SEIDMAN, supra note 72, at 43-44.

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

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

\(^{334}\) This is especially true for those on the urban fringe.
comprehensive obligation to comply with an external rule unless it coincides with community sentiment. In a society where over three quarters of urban development breaches the law, it is time to rethink the concept of legal domination and consider the possibility that several legal systems co-exist in Vietnam.

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

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

---

335 See supra part III.C.
336 Coexisting land control systems has an historical basis arising from the social dichotomy between the Confucian rulers and predominantly rural Taoist, Buddhist populace. See Fforde & Seneque, supra note 78, at 318-19; Yu Insun, Law and Family in 17th and 18th Century Vietnam 56-79 (1978) (unpublished Ph.D. thesis, University of Michigan); A. Woodside, Community and Revolution in Modern Vietnam 21, 118-20 (1976); S. Young, The Law of Property and Elite Prerogatives During Vietnam’s Lê Dynasty (1428-1788), 10 J. ASIAN HIST. 1 (1976). French and Soviet, and (in the South) American influence has amplified the rural–urban divide. But the mosaic of land control systems is not simply the product of cultural difference; the administration of formal rules is also a determinant.
339 Phan Huu Chi Interview, supra note 76; Mai Xuan Yen Interview, supra note 70.
340 Phan Huu Chi Interview, supra note 76.
341 See supra part IV.D.
2. Abuse of Discretionary Authority by Members of the Bureaucracy

a. Inadequacy of existing system for review of administrative acts

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

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

---

342 See Trubek, supra note 9, at 9.
345 Law on State Procurators (1982) (sighted by author at Ministry of Justice Information Center). Complaints may also be lodged according to the People's Inspectorate Ordinance on the Punishment of Administrative Violations (Nov. 30, 1984).
347 Id. art. 114(3).
the CPV. These administrative avenues of appeal undoubtedly reduce arbitrariness, but they also act like a pressure valve, releasing dissatisfaction without establishing a body of review that is "independent of state, its workings and its ideology."348

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

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

---

349 The height of buildings surrounding the lake is not supposed to exceed a notional 45 degree line rising inland from the lake’s edge. See Dao Quong Binh & Jeremy Grant, supra note 264.
352 Nguyen Tran Bat Interview, supra note 173. There appears to be a social differentiation between patronage and direct payment of bribes. The distinction does not seem to turn on degrees of moral approbation but rather on the openness with which an official deviates from an authorized norm. See generally Wertheim, supra note 284, at 136-40.
patronage networks find urban–traditional land use more attractive than the authorized system.

b. Inadequacy of efforts to control bureaucratic discretion

Nevertheless, some influential reformers continue to vigorously champion bureaucratic accountability.\(^{353}\) Fearing that patronage and ad hoc decisions may compromise state policy, reformers have attempted to launch a party and government campaign\(^{354}\) to control bureaucratic discretion.

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

---

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

\(^{354}\) See Resolution No. 38-CP. On Administrative Reform. Office of Government (May 4, 1994);

Phong Lan, supra note 259.

\(^{355}\) See Hoang et al., supra note 223, at 87-88.

\(^{356}\) Id.

\(^{357}\) See Sidel, supra note 200, at 221, 224-28.

\(^{358}\) The separation of powers has traditionally been linked with the rule of law as the cornerstone of Western legal systems. Of course true separation of powers does not exist in any country, indeed to concentrate absolute power in three separate organs in the absence of proper safeguards is perhaps more dangerous than a blurring of the distinction between these organs. It is quite likely that if a separation of powers develops in Vietnam, it will not resemble the balance struck under Western parliamentary systems. In the meantime, the Vietnamese administration will continue to exercise an unfettered discretion until some degree of judicial independence is guaranteed. The literature in this area is vast. See, e.g., S.A. DE SMITH & R. BRAZIER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 18-22 (1989). For the Vietnamese official line, see Nguyen Duy Quy. supra note 202.
in the highly unlikely event that the party abandons the *nomenclatura* system and democratic centralism.\(^3\)

Despite its shortcomings, the creation of a judicial forum capable of reviewing the legality of administrative decisions, acts, omissions, and delays\(^3\) may eventually improve bureaucratic compliance. Review of bureaucratic discretion can only achieve this goal if land allotment, transfer, planning, and construction legislation contain judicially discoverable and manageable standards. Without clear limitations and guidelines, the exercise of discretion is tantamount to the formulation of government policy, and is therefore beyond judicial review.\(^3\) Ultimately, unless administrative judgments are backed by enforceable sanctions, they are likely to be ignored.

Administrative reform has been given a high priority by the state, though its focus is almost entirely structural. Faults in the system, so it is argued, may be rectified by streamlining allotment and transfer approvals, improving the technical competence of cadre, reorganizing ministerial responsibilities and increasing the vigilance of law enforcement.\(^3\) Little progress has been made to extend the underlying principle of legal reform to administrative regulation, *i.e.*, that a law-based society should bring greater regularity to Vietnamese political, economic, and social life.

**B. Specific Proposals for Encouragement of Compliance**

Vietnam's lawmakers\(^3\) are increasingly looking towards local social, economic, and cultural values as a source of law before turning to Western rights-based law. This so-called "National Characteristics Model"

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

\[^{360}\text{See Draft Ordinance on Procedure of Settlement of Administrative Cases, art. 2. (sighted by the author at the Ministry of Justice Information Center).}\]


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

\[^{363}\text{Interview with Tran The Vuong, Director, Legal Department, National Assembly, in Hanoi, Vietnam (Sept. 13, 1994) [hereinafter Tran The Vuong Interview]; Do Muoi, *Building and Perfecting the State*, 1 VIETNAM L. & LEGAL F. 3, 7-8 (Feb. 1995); Ngo Bai Thanh, *Vietnam's Integration into a New Humanist International Order*, 1 VIETNAM L. & LEGAL F. 26, 28-30 (Sept. 1995); Hoang The Lien, supra note 39, at 34-35.}\]
is expected to graft the system of administrative guidance onto a conventional legal model. How this will be achieved in practice is a matter for speculation. Recent land legislation has increased the administrative discretion of local government without introducing general normative standards and objective rules of law.

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

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

---

364 Nguyen Tran Bat Interview, supra note 173; see generally HART, supra note 97, at 124.
365 Ngoc Anh, supra note 288: Interview with Hu Van Que, Assistant to Chief Architect, in Hanoi, Vietnam (Sept. 14, 1994). The use of custom as a source of law is also gaining importance. See Hoang The Lien, supra note 39, at 33.
366 Compliance will presumably be enhanced where decision making is based on community values. See Hoang The Lien, supra note 39, at 35. See generally Raz, supra note 338, at 280-87; HART, supra note 97, at 24.
Bureaucrats should research, draft, and monitor guidelines describing the scope and subject matter of decision-making criteria to provide assurance of predictability. A major difficulty constraining legislative drafters is the paucity of research concerning land use practices. Central-level lawmakers need time to observe rapidly evolving social and economic land use patterns before codifying general principles of law or prescriptive land use regulations. Research is hindered by a secretive drafting process that tends to distance central level lawmakers from community practices, values, and expectations. Administrators at the local level are closer to these trends.367 Local administrators have experience resolving social problems where normative laws provide inadequate guidance, and are more used to drawing from a protean mixture of party resolutions and moral principles embedded in Vietnamese culture to resolve such problems.368 On the other hand, the potential for administrators to use their discretion to cynically plunder cultural principles to support short-term political goals, constitutes a fundamental risk of the so called National Characteristics Model.

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

367 Note the example of district people’s committees applying local custom to determine whether a land transferor has adequately provided for co-occupiers. See supra part III.B.
368 Nguyen Tran Bat Interview, supra note 173.
369 See Ordinance on Residential Housing, art. 14 (1991). It is possible that courts may also create a parallel system of law as judgments in the civil division of the people’s court concerning housing disputes contribute to the development of land use standards. Although Vietnam has a civil law system, in following the Soviet legal model, the Supreme People’s Court issues a summary and commentary about key cases in its annual report. These set out principles of law extracted from a series of analogous cases. There is some dispute whether they are binding upon inferior courts or can only be treated as guidance. See Hoang The Lien, supra note 39, at 33; Nguyen Nhu Phat Interview, supra note 101; Wohlegemoth, supra note 98.
edgment and internalization, the norms may actively unify and reinforce acceptable standards of community behavior.

2. **Using Patronage Networks to Disseminate Information**

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

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

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

---

370 See part III.B.
372 Phan Dinh Dai Interview, supra note 115.
373 See supra part III.D.3.c.
374 The difficulty of attempting to modify people's moral and social values through law is discussed by Ngo Ba Thanh, supra note 24, at 28-31; Cotterrell, supra note 59, at 53-58.
4. **Resources for Investigating, Penalizing, and Prosecuting Corrupt Bureaucrats**

State policymakers should allocate resources to sufficiently investigate, penalize and prosecute corrupt bureaucrats. Experience from other Asian countries\(^\text{375}\) suggests that Vietnam's administrative reform program, which publicly demonizes corrupt officials, promotes according to merit, trains and retrains, strengthens central control, streamlines procedures, and improves auditing,\(^\text{376}\) is useful; to achieve success, however, three further steps are needed. First, a reliable and efficient system of information gathering will expose abuses of administrative authority. The press in Vietnam, for example, have played a significant role in exposing corrupt land officials. Second, penalties need to be adjusted to match the gravity of the offense. Finally, an investigating authority should be given the powers and resources to prosecute officials of all ranks. At present, crime fighters can also be found amongst the ranks of perpetrators.\(^\text{377}\) Through the implementation of these three steps policymakers can begin to show that bureaucratic corruption will not be tolerated.


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

\(^{375}\) See KLITGAARD, supra note 284, at 74-97, 115-31.

\(^{376}\) See Doan Trong Truyen, supra note 362, at 30-31.


\(^{378}\) There is considerable evidence that laws change behavior. But the reasons for compliance are more complex than the convergent values and attitudes of self interest. There is extensive literature in this area. See generally ROBERTO M. UNGAR, LAW IN MODERN SOCIETY: TOWARDS A CRITICISM OF SOCIAL THEORY, ch. 2 (1976); Dror, supra note 187, at 787-93 (on values and attitudes); POSNER, supra note 329; Calabresi & Melamed, supra note 329.
making. Given the existing uncertainty and absence of such parameters, however, it is highly likely that inferior level bureaucrats will remain reluctant to make land management decisions, only cautiously exercising their administrative discretion.

a. Negotiation

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

b. Law on State Enterprises

Another way rules can change behavior is to reduce the potential for conflicts of interest by severing the financial link between state officials and state commercial operations. Probably with some justification, local autarky is thought\textsuperscript{381} to be sustained by revenue derived from profit-making companies owned or associated with state instrumentalities. The forthcoming law on state enterprises is intended to transform state-owned enterprises into independent business entities by diverting income away from state

\begin{itemize}
    \item \textsuperscript{379} Interview with Nguyen Tien Lap, Chief Legal Division Investconsult, in Hanoi, Vietnam (Sept. 30, 1994 and Feb. 10, 1995).
    \item \textsuperscript{380} See Nguyen Tri Dung, \textit{supra} note 124; Vo Van Kiet, \textit{Report to the 9th Session of the National Assembly (Dec. 7, 1993)}, \textit{VIETNAM INVESTMENT REV.}, Nov. 1, 1993, at 3.
    \item \textsuperscript{381} Interview with Minister Le Xuan Trinh on Administrative Reforms, in Ho Chi Minh City, Vietnam (Jan. 8 1994), \textit{in F.B.I.S. DAILY REP. - E. ASIA} 94-062, Mar. 31, 1994, at 65-66 ("Administrative reform is an urgent task . . . . The responsibilities of the central and local organizations must be clearly determined; and there must be a clear distinction between the responsibilities of the state management organizations and those of the commercial production organizations."); \textit{VO VAN KIET, supra} note 91, at 20-23.
\end{itemize}
supervising agencies to an independent body attached to the Ministry of Finance.\textsuperscript{382}

Reforms will free state enterprise managers from direct state control, possibly through the formation of a board of directors selected from candidates outside of the controlling bureaucracy. If decision making no longer generates a direct financial return, law-makers rather optimistically believe that officials may be more inclined to impartially discharge state policy.\textsuperscript{384}

For example, the law will sever the above-mentioned nexus between the chief architect’s office and architectural service companies, in theory leveling the playing field between state and private architectural service companies. These changes are intended to allow the private sector to compete more equally with the state enterprises. This vital aspect of the economic reform program was constantly delayed by state agencies benefiting from revenue generated by state enterprises.\textsuperscript{385}

Success is not assured; reforms do not address a pronounced bureaucratic antipathy towards private development\textsuperscript{386} nor do they extend to enterprises indirectly controlled by officials and their families. Unacceptable commercial influence on decision making could be further quarantined by requiring land management officials to disclose personal and family assets and benefits received from state and privately owned enterprises. The draft law on state enterprises also fails to create a general duty to avoid conflicts of interest arising from close personal and professional relationships that subsist between state officials and associated state enterprises. These links are likely to remain after income generated by enterprises is redirected into consolidated revenue.

It is also interesting to speculate whether party influence over state enterprises,\textsuperscript{387} reportedly in decline\textsuperscript{388} since the enactment of Decree

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

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

\textsuperscript{384} Tran The Vuong Interview, supra note 363.


\textsuperscript{387} See Mallon, supra note 192, at 211-12.

\textsuperscript{388} See Thayer, supra note 44, at 24-25.
217,\textsuperscript{389} will expand to fill the power vacuum left by the removal of direct bureaucratic supervision. Given the party's unchallenged leadership of the state apparatus, unless it voluntarily relinquishes direct and indirect influence over state enterprises, legislation is unlikely to be an effective restraint. This is because party members are disciplined according to internal party rules and immunity is rarely waived to allow civil suit or criminal prosecution.\textsuperscript{390} As one National Assembly member has been quoted as saying, "[a]s long as violators of the law are treated with tolerance by their old comrades we will have gaps in our legal system."\textsuperscript{391}

VI. CONCLUSION

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

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

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

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


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

\textsuperscript{392} Nguyen Ngoc Khoi Interview, supra note 108; Mai Xuan Yen Interview, supra note 70.

\textsuperscript{393} The current experiment with rule through state instrumentalities only started to gain wide support after the introduction of Đổi Mới (renovation) in 1986.

\textsuperscript{394} Mechanisms such as the power to demote or promote, as well as to grant or deny access to state services such as health and education, are used to influence those employed in the state sector. See Beresford, supra note 222, at 119-24; Thayer, supra note 217, at 21-26.
lating various laws we must develop our social mechanism and promote the people's rights to autonomy in managing the family, ward, village, and community activities to improve their daily life and to settle social issues through social contracts.\textsuperscript{395}

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

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

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

\textsuperscript{395} Land Transferred to Farmers in 47 Provinces, supra note 77, at 57.