

# 1

## The diversity and dynamism of legal change in socialist China and Vietnam

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Asian socialist legal transformation is most often considered from a Chinese perspective.<sup>1</sup> Occasionally analysis of Vietnamese socialist legal change is also undertaken.<sup>2</sup> The unique feature of this book is that the contributors seek to tease out the significance of Asian socialist transformation comparatively, looking to the experience of legal change in both China and Vietnam.<sup>3</sup>

Further, this investigation of socialist legal transformation proceeds from diverse perspectives. Many of those investigating how the laws and legal institutions of both China and Vietnam have been reshaped in the recent past write as 'foreign commentators' on legal change. But their investigations sit beside analyses of legal change by both Chinese and Vietnamese scholars. In the case of Vietnam, 'insider' scholarship written and published in English remains relatively rare (Gillespie 1997). The result is a rigorous comparative analysis of Asian legal transformation from indigenous and foreign perspectives.

The studies presented in this book complement the existing comparative literature on legal transformation in Eastern Europe.<sup>4</sup> They focus on the extent to which 'Asian' legal culture, or more specifically the legal cultures of China and Vietnam, reshape or alter the legal changes introduced to enable a market economy and improve governance structures. The studies engage with two core concerns: how to analyse legal change in Asian transitional socialist states, and the comparative transformative experience of particular institutions and laws in China and Vietnam.

The studies chronicle theoretical and practical responses to legal reform as these countries change from planned economies to socialist-oriented economies. In addition to analysing 'legal change', each author engages either expressly or implicitly with meanings of socialism and their implication for legal reform. The studies address how 'socialism' shapes, constrains, enables or is irrelevant to reform in twenty-first century Asian states.

These issues were initially canvassed at the 'Law and Governance: socialist transforming Vietnam and China' conference in Melbourne on 12–13 June 2003. But as Nguyen Chi Dung of the Vietnamese Office of the National Assembly ironically noted there, Chinese and Vietnamese commentators 'travel to the West to discuss socialism. In Vietnam', he noted, 'these issues are not debated. Instead, we look to practical solutions'.<sup>5</sup>

## SOCIALISM VARIOUSLY CONFIGURED

The diversity of opinions about socialism presented here mirrors the many ways it is debated and understood in the twenty-first century, both by comparative scholars and those living within socialist systems. Some authors adopt working definitions of socialism that reflect Soviet Marxist-Leninist doctrine, which they argue was adopted into China and Vietnam during the early days of their revolutions (Gillespie, Chapter 3; Nghia, Chapter 4; Chao Xi, Chapter 5; St. George, Chapter 6; Bui, Chapter 7; Nicholson, Chapter 8; Nguyen and Steiner, Chapter 9; and Biddulph, Chapter 10). Others leave issues of doctrine to one side and frame their discussion in terms of power (Painter, Chapter 12; and Hansen, Chapter 14). One contributor attributes legal change to 'palace wars' between competing Party and state factions in which socialist norms have little impact on legal outcomes (Dowdle, Chapter 2). Still other authors adopt an essentially non-socialist perspective, framing the analysis in terms of economic policy change—the shift from planned to mixed-market economies (Fforde, Chapter 11; Bryant and Jessup, Chapter 13).

Authors differ not only in the way they conceptualised socialism (theoretically, power relations or economic change), but also in whether they think socialism is adapting to social change. There is a point when the meaning ascribed to socialist values changes so much from the Marxist-Leninist canon that they can no longer be considered socialist. But ascertaining when this point is reached depends much on the observer's judgment about the characteristics and utility of socialism.

Although few authors attempt normatively to define socialism, every author employs implicit understandings about its ongoing social relevance. The mixed views about the dynamism and contemporary relevance of socialism contrast with a general Western perception that capitalism adapts to new conditions. Few would argue, for example, that Western welfare states are no longer capitalist because they have abandoned Adam Smith's *laissez faire* prescriptions. Yet many assert that socialist states are no longer socialist because mixed-market reforms have overtaken planned economies.

The way authors conceptualise socialism, at least in part, influences their conclusions about its ongoing relevance. For example, Dowdle (Chapter 2) uses a static, or epistemologically closed, definition of socialism that leaves little space for change and adaptation. On the other hand, authors examining legal and state institutions (St. George, Chapter 6; Bui, Chapter 7; Nicholson, Chapter 8; Nguyen and Steiner, Chapter 9; Bryant and Jessup, Chapter 13) found that certain core

socialist ideas about Party leadership, democratic centralism and state economic management remained deeply entrenched even though socialist legality is becoming more law-oriented. Biddulph (Chapter 10), Gillespie (Chapter 3) and Nghia (Chapter 4) emphasise the fragmented nature of both Chinese and Vietnamese legal reforms and stress that rights-based economic reforms did not necessarily flow into other social spheres, while Chao Xi (Chapter 5), who focuses on market reforms, argues that socialist theory has pragmatically adapted to new economic conditions without necessarily losing sight of socialist values, such as Party leadership and state economic ownership.

Other authors (Fforde, Chapter 11; Painter, Chapter 12; Hansen, Chapter 14) argue that socialist ideas influenced legal and administrative reforms only marginally (if at all). Overall, however, most authors conclude that core socialist values are contextually adapting to new social conditions.

## LAW AND MARKETS IN TRANSITION

The authors accept that China and Vietnam have largely changed from planned economies to mixed-market economies where private enterprise is allowed, even fostered, but the state retains a strong management and ownership role. But an economic definition of transition does not necessarily explain legal changes evident in Vietnam and China. While most contributors agree that China and Vietnam have provided a clear vision for economic reform, they believe that sociopolitical reform has either been largely left implicit (Vietnam) or recast rhetorically as a transition to a rule of law (China). They suggest that change is more experimental than visionary and that legal transition remains opaque, sometimes unstated, contested, dynamic and unresolved.

Authors adopt three approaches to the core question of whether socioeconomic and legal reforms are interrelated, unrelated or even mutually constituted. There is not complete coherence within each approach and most authors argue elements from more than one approach. But the threefold classification is nevertheless useful for illustrative purposes. Fforde and de Vylder (1996) have influentially argued in relation to Vietnam that economic reforms were a gradual, pragmatic response to existing social conditions. In other words, the state has struggled to maintain relevance by legitimising 'bottom-up' economic reforms with *post factum* economic policies and laws. Chao Xi (Chapter 5) makes a similar observation regarding commercial legal development in China, with the proviso that legal reforms aiming to unleash private sector development are not permitted to compromise the Party's leadership and the 'socialist road' to economic development. According to this position, laws respond to social pressure for economic reform, but certain state organisational arrangements are shielded from 'bottom-up' reforms.

Occupying a middle position, Gillespie (Chapter 3), Nghia (Chapter 4) and Biddulph (Chapter 10) agree that much legal development responds to a dialogical exchange between the state and society. But Gillespie and Nghia also stress that

Vietnam is proactively seeking access to international capital and markets and has imported commercial laws and practices to secure these advantages. International trade treaties have flattened regional differences between élite-level lawmakers, creating an international legal dialogue that remains remote from, and frequently incomprehensible to, local political and economic ideas. Because imported legal reforms are not linked to underlying social processes, they are unlikely to engage with, and significantly alter, core socialist precepts like party leadership, democratic centralism and collective mastery.

Gillespie and Nghia share this middle position with many other authors who implicitly see market changes as significant, if not catalysts, for change without specifically engaging in the details of market change and its implications for legal reform discourse (St. George, Chapter 6; Bui, Chapter 7; Nicholson, Chapter 8; Nguyen and Steiner, Chapter 9; and Bryant and Jessup, Chapter 13).

The third position does not specifically attribute any great importance to the influence of economic change on legal change (Hansen, Chapter 14). This chapter examines changes in the Vietnamese treatment of religion without situating these changes in an economic context or without seeing them as affected by economic changes.

## METHODOLOGIES AND THEIR IMPACTS

The utility of the chapters lie not only in their stories of change and their conceptions of socialism, but also in the diversity of analytical tools used. It is a feature of the chapters that the different analytical approaches generate varying conclusions about the role of socialism in contemporary China and Vietnam. As a result, they not only offer a diverse range of understandings about socialism and its transformation in China and Vietnam, but also display a range of possible analytical approaches.

Dowdle (Chapter 2), Gillespie (Chapter 3) and Nghia (Chapter 4) use variations of discourse analysis to explore undercurrents in socialist thinking. As most legal thought is communicated, discourse analysis captures conflict and change in legal ideas. It shows how long-standing socialist ideas have alternatively resisted and accommodated new concepts. Both Gillespie and Nghia draw ideas from outside legal thinking, such as economic, cultural and Confucian notions, to assess changes in socialist thinking.

Discourse analysis also offers insight into the potential for change. Discursive groups or communities use epistemologies to determine which ideas are acceptable. If the epistemologies governing 'discursive groups' (like the central Communist Parties of Vietnam and China) are inclusive, these authors argue that there is potential for legal change.

Others, such as Chao Xi (Chapter 5), St. George (Chapter 6), Bui (Chapter 7), Nicholson (Chapter 8), and Nguyen and Steiner (Chapter 9), examine disparities between socialist ideology and theory as it is announced and practised. This analytical tool opens the discussion to interactions between officially promoted

ideals and governance practices in legal institutions. The 'gap' between law (or policy/ ideology) and practice, as identified by these chapters, raises speculation about reform trends. Nicholson, for example, shows that despite rhetorical movement toward judicial independence, the Party retains a tight control over the ideas circulating within the courts and recruitment of judges. She speculates that the state may face agitation for change from the private legal profession. Nguyen and Steiner (Chapter 9), through their analysis of defence counsel, confirm this. They bring the concept of human agency back into the discussion, demonstrating that individuals opposing orthodox socialist ideals (such as democratic centralism) can alter the administration of justice.

Still others, such as Biddulph (Chapter 10), Fforde (Chapter 11) and Painter (Chapter 12), locate change in particular institutional and social struggles. Biddulph, for example, uses Bourdieu's concept of the 'legal field' to argue that local understandings transformed central 'rule of law' rhetoric into state management. In a similar vein, Fforde suggests that reform of state-owned enterprises has been shaped by local struggles between ministries and directors of state-owned enterprises, more than high-level socialist or capitalist ideals.

Finally, Bryant and Jessup (Chapter 13) and Hansen (Chapter 14) use legal doctrine to search for legal change. Bryant, for example, explores the internationalisation of the Vietnamese legal system by examining doctrinal approaches to the 'incorporation' doctrine in international law. For Hansen, the treatment of the Catholic Church in Vietnam can be explained, in part, through a reading of legal texts and through historical analysis of state-church relations. He finds little evidence that socialist thinking in or outside legal doctrines influences freedom of worship.

## TRANSFORMING SOCIALISM: CONSTITUTIONALISM, LEGALISM AND CONFUCIANISM

Turning to the first of the chapters that draws on discourse theory, Dowdle (Chapter 2) employs an epistemological study of socialism to ask what is socialist about law in China and Vietnam. He makes the semantic point that every country is entitled to describe their policies as socialist, but questions whether this makes their policies socialist 'in fact'. Dowdle uses the example of constitutional transformation in China and Vietnam to demonstrate that the major legal changes taking place are largely untouched by socialist values.

Dowdle's main contention is that socialist precepts in these countries are discussed in closed epistemological frameworks and, as a consequence, have not significantly engaged and shaped the emergence of constitutionalism. Put differently, discussion about how socialism should transform state institutions is conducted within elite circles that are largely closed to external ideas. Institutions, he argues, have their own epistemologies that determine which criteria to take into account when assessing ideas. Constitutionalism emerged in the United States, Dowdle

explains, because the revolutionary drafters favoured the Enlightenment ideal of political knowledge being open to every citizen. They drafted a constitution that made political institutions accountable to public debate.

Though acknowledging their very different political and economic foundations, Dowdle draws parallels between the rise of constitutionalism in the West and in China. Rather than Enlightenment ideals, he argues that political expediency is propelling constitutionalism in China. According to this account, Deng Xiaoping banished his main rivals to political oblivion in the moribund National Congress. But his rivals reclaimed power by bringing the National Congress into the political mainstream. They achieved this objective by convincing the ruling élite that the Communist Party would not have embarked on the disastrous Cultural Revolution and made other grave errors if the National Congress had performed its constitutional function of representing the views of the masses to political decision-makers. The Party made mistakes because, as a closed epistemic community, it lacked access to the wide range of views required to maintain legitimacy and govern a complex society.

Dowdle further posits that socialist ideals are conspicuously absent from the processes shaping constitutionalism in China. He attributes this to the Party's closed epistemological framework and its reluctance to apply socialist ideas meaningfully to contemporary political problems. Dowdle convincingly argues that although constitutional reforms in China were motivated by power politics, rather than the Enlightenment values underpinning Western reforms, once in place, policymaking based on popular representation may create its own momentum. He calls this process 'runaway legitimisation'.

Where he differs from other contributors is in his assertion that socialist ideas have played a minor role in institutional change. Biddulph (Chapter 10) and Chao Xi (Chapter 5), on the contrary, argue that, rather than operating like a closed epistemic community, the Chinese Communist Party has flexibly adapted socialist ideology to accommodate new institutional settings such as private enterprises and to vary institutionalised practices, such as those within the Chinese police. That socialist values are still guiding legal reforms is shown in the way that lawmakers have preserved Party leadership and state ownership.

Consistent with Dowdle's proposition that power politics can induce constitutional reforms, there is compelling evidence that Party politics is exciting representative reforms in the Vietnamese National Assembly. Certain Party leaders believe that some policymaking power should be transferred to the National Assembly, since only a broadly constituted representative body has access to the range of social views needed to resolve complex problems like corruption and land distribution. In tandem with political pressures, Party leaders are using long-standing socialist principles of 'people's mastery' and 'socialist democracy' that advocate popular supervision of state institutions to justify a more representative democracy. As a recent amendment to the Constitution attests, the state believes that people's mastery is necessary to develop 'a prosperous people, strong country, equitable, democratic and civilised society' (Pham Van Hung 2001:66-9).

It is also interesting to speculate whether differences in the public's respect for the Party in China and Vietnam affect the importance attached to socialist values. There are grounds for arguing that the Communist Party of Vietnam enjoys considerably more public support than its Chinese counterpart (Kerkvliet et al. 1999). There was no cultural revolution in Vietnam to discredit Party decision-makers and only a generation has passed since the Party delivered the country from foreign invaders.

Finally, Dowdle's structural explanations for institutional change envisage possible pragmatic legal reform. Quarantined from underlying political and social discourse that may constrain change, Dowdle argues that Party élites freely accept ideas that provide political advantage. Élités reject ideas that compromise the system that gives them privileged access to power, such as Party leadership, but other reforms, such as constitutionalism, are acceptable because they have the potential to extend power over rivals.

In contrast, Gillespie (Chapter 3) argues, using discourse theory, that while Vietnamese socialist legal thinking has always been fragmented it remains important. At the outset he notes that the Democratic Republic of Vietnam administration borrowed uncritically and extensively from the Soviet Union. While the legal borrowing was comprehensive, its implementation, argues Gillespie, was always mediated by practical policymaking.

Challenges for those commenting on socialist legal systems identified by Gillespie include the need to move any analysis beyond an exclusive focus on socialist legality to include the other equally abstract but significant notions of democratic centralism and collective mastery. It is too easy to miscast the role of law in contemporary socialist states if Western lawyers only concern themselves with narrow debates about changes to socialist legality. Gillespie argues persuasively that, historically, the Vietnamese Party–state variously invoked all three tenets to legitimate its leadership and govern. It is not possible to trace the changes to the role of law and its many implications unless all three precepts are analysed.

Looking to the contemporary period, it is Gillespie's thesis that it is not possible to characterise Vietnamese legal change as consistent across jurisdictions. More particularly, Gillespie contends that an analysis of the way law is legitimated, debated and reformed suggests that the legal discourses within the economic, legal and cultural spheres of Vietnamese society produce very different interpretations, both between the discourses and within them. For example, it is suggested that legal transplantation debates within Vietnam reveal both a continuing instrumentalist conception of law and a local commentary drawing on Western socio-legal insight into the ways laws permute and transform.

While cautious of overcasting his interpretation of the three identified discourse areas within Vietnam, Gillespie ultimately concludes that where law and politics are 'interwoven' politics dominates. For example, he suggests that where the debate concerns the extent to which law will regulate or 'constrain party political power' Western rule of law precepts are not admitted into the debates. In contrast, where the

state seeks to regulate emerging market activity Marxist-Leninist conceptions of 'socialist legality' have been adapted to become 'more legalistic and rule-oriented' to enable East Asian developmentalism to flourish. Thus Gillespie concludes that the regulation of the market has shifted from being based upon moral and Party edicts and policies to an increased use of normative laws.

Nghia (Chapter 4) emphasises the role of pre-modern values such as Confucianism in contemporary legal discourse more than Dowdle (Chapter 2) and Gillespie (Chapter 3). Nghia examines the interplay between traditional legal thinking, socialist law and rights-based law in Vietnam. His main contention is that Confucian and socialist precepts continue to provide moral values that bind society and determine the social relevance of law. Like other authors (Gillespie, Chapter 2; and Painter, Chapter 12) Nghia argues that imported ideas have formed hybrids with local precepts and practices.

Although he concedes that Confucian, Buddhist and Daoist values coexisted, Nghia believes that Confucianism created the standard norms for Vietnam's society. He bases this view on work by Vietnamese scholars such as Dao Duy Anh and does not engage with Western scholarship (for example, Giebel 2001) that contests the existence of uniform Confucian values throughout the country. Contrasting with the negligible impact of French colonial legalism, Nghia argues that socialism profoundly changed Confucian thinking. He argues that socialism merged with Confucian values that privileged communitarianism, state management of society and instrumental legalism. These norms continue to play a prominent role in economic regulation. For example, the *xin cho* (application grant) approach to economic regulation is attributable to Confucian-socialist notions of state management.

The introduction of the 'law-based state' doctrine in the 1992 Constitution has not fundamentally changed the underlying Confucian-socialist norms. Even though the Soviet term 'socialist legality' is no longer fashionable, its message that public interests should prevail over private interests, that states should 'manage' (*quan ly*) societies, and that law is an instrument of state power, remains intact. Nghia concludes that hasty legal borrowing has left Vietnam with a 'jungle of law' and that there is much to be learnt from legal borrowing from Japan and Singapore where more care is taken to adjust imported norms to suit local social norms. As an interim measure, he speculates that certain Confucian values could augment and even compete with imported laws to build 'social trust, discipline and order'.

## ENDURING SOCIALIST IDEOLOGY AND PRACTICE

Moving from the insight offered by discourse theory, Chao Xi (Chapter 5), St George (Chapter 6), Bui (Chapter 7), Nicholson (Chapter 8) and Nguyen and Steiner (Chapter 9) take up the story of socialist legal transformation in Chinese and Vietnamese institutions. As noted previously, each author invokes the theory-practice gap to investigate how socialism, and more particularly democratic centralism, socialist

legality and people's mastery, enable or constrain legal change. In each of these studies the authors explore what is meant by socialism theoretically and then investigate how socialist ideology has been transformed, marginalised or retained.

In examining the development of the enterprise law, Chao Xi contests the view that legal reforms in China have proceeded largely without the benefit of socialist thinking. He shows that the first enterprise law evolved from a series of compromises between socialist ideology and economic efficiency during the 1970s and 1980s. Each compromise eroded the state sector. Enterprise reforms commenced with the creation of joint-stock companies. But these hybrid state-private entities were only permitted to operate in economic sectors neglected by state-owned enterprises. Later, the government sought greater efficiency gains by separating ownership and management over state-owned enterprises. During that period 'the socialist economic road' and Marxist-Leninist theory influenced lawmakers.

More recently, Jiang Zemin informed the National Congress in 2002 that, in order to remain a socialist country, the state must keep public ownership its core economic policy. Lawmakers drafting a revised Corporations Law were instructed to take what was useful from capitalism while retaining socialist principles of state ownership and economic management. The resulting tensions between 'the socialist road' and managerial efficiency produced incremental reforms. For example, although the new Company Law applies to both state and private entities, a complex shareholding system gives the state a controlling interest in an estimated 84 per cent of privately listed companies.<sup>6</sup> In addition, the law permits the Party to establish committees in every private company.

Chao Xi observed that Russian lawmakers were unconstrained by socialist ideology and adopted Western corporate laws with disastrous results (Black, Kraakman and Tarassova 2000). He concludes that 'Chinese enterprise reforms are but a means to bolster socialism and its economic foundations'. Although Marxist-Leninist orthodoxy has conceded ground to economic efficiency, company law remains an instrument used to secure state ownership and Party leadership.

St. George (Chapter 6) identifies a mismatch between Party-stated objectives for the Vietnamese higher education curriculum and the manner in which education is evolving as a partly privatised activity. She analyses the impact of socialist doctrine (defined as Marxism-Leninism with Ho Chi Minh thought) on the development of the Vietnamese 1998 Education Law. Before turning her attention to the Education Law of 1998, she notes the problematic role for law in a socialist state, noting the ways in which the Party has sought to legitimate law as an instrument of 'all' classes rather than as a bourgeois instrument reflective of the capitalist mode of production. St. George's analysis then turns to higher education, and specifically considers the socioeconomic and political role of education.

St George contends that Vietnamese education is cast as 'intrinsically ideological'. She notes that socialism is explicitly invoked as an aim of education in Articles 2, 3 and 23 of the Law and that Article 36 provides that the 'content of higher education' must include the 'scientific subjects of Marxism-Leninism and Ho Chi Minh thought'.

She characterises these inclusions as ‘committing the national education system to building socialism in the country, as well as to creating people who are socialist in character’. She also correctly notes that invoking socialism is not a feature of all Vietnamese laws.

Having established the rhetorical commitment of the Party-led drafting committee, St George notes that, in certain vital respects, the law departs from its ostensible commitments to socialist ideology. In particular, she cites the practice of allowing private education facilities and schools to establish their own relations with community (particularly donors) as indicating the dominance of practical politics over consistent socialist policymaking. In relation to fees, she notes that the law is internally inconsistent in allowing no ‘commercialisation’ of education, but permitting the use of economic activities to generate funds for schools. Looking at the issue of administration of schools generally, St George identifies that the law should be interpreted as much by what is left out as by what was included. She notes that in the final, twenty-third draft the administration of education is dealt with only cursorily. While a leadership role is retained for central government, the law specifically states that educational institutions are to establish their own regulations affecting relations between schools, families and community.

In conclusion, St George contends that Marxism–Leninism and Ho Chi Minh thought feature as the doctrines that should be taught in curriculum and inculcated in students. Yet the practical realities of an educational system starved of funds and straining to accommodate all those who wish to participate has produced a situation where the Party, at least partly, relinquishes control over the delivery of education.

Bui (Chapter 7) argues, unlike St George, that legal teaching remains infused by Marxist-Leninist doctrine. She examines changing notions of socialist law in Vietnam’s legal education system. The State Education Development Strategy for 2001–10, she notes, envisages a ‘scientific education system with a socialist orientation and nationalist nature. It should be based on the foundation of Marxist-Leninist theories and Ho Chi Minh thought’. The state has the capacity to implement this policy because law courses are well funded and taught by state-managed institutions and staffed by public servants.

She finds that law school curricula reflect Marxist-Leninist theories, but Ho Chi Minh thought is not yet taught. Before studying substantive legal subjects, students are first instructed that law reflects the will of the working class and state economic management (*quan ly nha nuoc ve kinh te*). These doctrines are considered necessary in the mixed-market economy to protect the working class from exploitive capitalism. As Bui observes, even though students are later exposed to subjects about market laws, ‘ideologies of state economic management are often well rooted and continue to develop during the four year course’. Since most legal issues are approached from a state management perspective, students soon learn that law’s main function is to privilege state interests.

Bui believes that legal education lags behind other social sciences in adapting its curriculum to market conditions. She attributes this discrepancy to the prominence

given in legal education to socialist theories that classify 'social relationships' into 'independent law branches'. For example, land law is considered an independent branch because land is a 'special commodity' owned by the state. This classification system constrains teachers from creating new legal taxonomies that reflect the introduction of rights-based laws into the legislative framework.

Bui also shows that structural factors reinforce socialist values. Consensual decision-making used to review curricula discourages teachers from engaging in the controversial debates required to promote reforms. A didactic pedagogy also discourages students from asking questions that may expose gaps between law as taught and actual economic and social conditions. Teaching reforms that encourage problem solving may eventually create more demand for relevant legal instruction. But law teachers have recently been forbidden from working in the legal profession, a decision that distances the most progressive teachers from law-in-action.

She finishes her chapter by considering the impact legal education has on the legal system. University mission statements stress that legal education should improve 'political and moral qualities and the consciousness to serve the people', but neglect to mention the skills required to equip students as members of the legal profession. Only 3–4 per cent of students find work in the legal system, yet legal study is considered prestigious and worthwhile because most students find employment as state officials. Bui gloomily concludes that the purpose of legal education is to train state officials to perpetuate socialist management practices. Her finding that the education system inculcates core socialist values corroborates Nicholson (Chapter 8) and Nguyen and Steiner (Chapter 9), who argue that socialist ideals still profoundly shape decision-making in state institutions.

Nicholson (Chapter 8) examines tensions between long-standing socialist approaches to law and reforms strengthening law-based processes in Vietnamese courts. She finds mixed messages about the trajectory of law reform in the 2002 Politburo Resolution No. 8 on Forthcoming Principal Judicial Tasks. The Resolution reaffirmed decades-old socialist legality doctrine that the Party leads the state. Judges, for example, are enjoined not only to follow laws, but also the Party line. In addition, the Party reserves the right to direct political, organisational and personnel policies within courts.

Counterbalancing socialist legality, Resolution No. 8 also instructs courts to guarantee citizens' equal treatment before the law, real democracy, fair trials based on merit and rights for lawyers to collect evidence and represent clients before and during trials. Broadly reflecting the law-based state doctrine adopted in the 1992 Constitution, these reforms appear to show the Party responding to social demand for more predictable, efficient and transparent courts.

But Nicholson wonders whether lawyers will seize, or be permitted to seize, the opportunity under the new adversarial court procedures to shift judicial decision-making closer to the law; this issue is taken up in the following chapter by Nguyen and Steiner (Chapter 9). Nicholson finds support for both continued Party leadership over courts and a greater emphasis on law-based judicial outcomes in theoretical

discourse. She describes orthodox socialist legality as a 'policy-law dichotomy' in which law and Party policy (and state plans) are interchangeable. Applying this doctrine, courts have historically considered law only one means of implementing Party policies. Although Resolution No. 8 reaffirmed the 'policy-law dichotomy', socialist legality is now modified by the law-based state doctrine that promotes self-managed courts, law-based judicial decision-making and an increased role for the private legal profession.

Nicholson reconciles these contradictory positions by suggesting that although in principle courts are expected to follow law, in practice open-ended legislative drafting gives the Party numerous opportunities to direct judicial outcomes by influencing the interpretation of law. She also presents evidence that other socialist doctrines, such as democratic centralism and collective mastery, influence judicial practices. For example, democratic centralism insists on strict top-down judicial decision-making, and vague echoes of collective mastery are discernable in the Party's decision to allow lay people's assessors to judge cases with professionally trained judges.

Nicholson concludes that reforms promoting law-based decision-making in the courts have not displaced long-standing socialist norms such as Party leadership, democratic centralism and collective mastery. But she acknowledges that procedural changes giving courts self-management powers and modest adversarial proceedings may act as catalysts for more far-reaching reforms. A practical confirmation of Nicholson's theorising is found in Chapter 9 by Nguyen and Steiner.

Nguyen and Steiner use the changing role of lawyers in Vietnam to assess the contemporary relevance of socialist legal concepts. They argue that socialist legality and democratic centralist principles imported by revolutionary leaders, extirpated colonial legality from Vietnamese legal institutions. Rather than balancing conflicting rights, courts in the new society followed democratic centralism by vertically implementing Party rules and policies. Independent bar associations established under French rule were closed and most French trained lawyers fled or were purged. The few who proved their loyalty to the new regime became state officials entrusted to implement state policy.

Starting with the 1980 Constitution, which provided for the establishment of organisations for lawyers, the authors argue the state has incrementally given lawyers more autonomy. The Ordinance on Lawyers' Organisations, passed in 1987, paved the way for the reintroduction of bar associations and the possibility of a private (non-state) legal profession. The Ordinance on Lawyers 2001 codified Party policy that acknowledged the role the legal profession play in protecting the democratic and legal rights of citizens.

The authors then assess whether high-level policy has influenced the way state officials administer the interaction between lawyers and clients. They show that lawyers require 'good relationships' and the payment of bribes to secure access to state officials and cooperation to mediate on behalf of their clients.

In the court system, new criminal and civil procedures codes have introduced modest adversarial procedures that now place lawyers on a similar, if not equal, footing with procurators in criminal trials. But the authors note that the judicial practices developed over many decades when judges and procurators dominated trials are unlikely to change without considerable encouragement. For example, they convincingly show that in the notorious Nam Cam criminal trial the state was not prepared to allow lawyers to depart from the prosecution's script and fully represent their clients' interests. The authors assert that lawyers acting for a high-ranking Party member broke the democratic centralism principle of prearranging outcomes in important trials. More particularly, defence counsel contested the accusations rather than delivering a plea in mitigation in this instance. In contrast to the Minh Phung criminal trial conducted five years earlier, in this instance the Chairman of the Bar Association and some media outlets were prepared to support the rights of lawyers to represent their clients fully and vigorously.

Chapter 9 primarily focuses on state-directed reforms, but it also postulates how lawyers will change the legal system. Implicit in the authors' narrative is Weber's assumption that lawyers work towards the formally rational elements of law, because these instruments provide the self-contained doctrinal rules that inform predictable and consistent legal opinions. For example, Nam Cam's lawyer used legal arguments to expose shortcomings in the prosecution's case and commercial lawyers argued with state officials to protect statutory legal rights from bureaucratic interference.

In Vietnam's state-directed legal landscape it is also possible that, rather than promoting private legal rights, lawyers will prefer to mediate and negotiate their clients' interests with state authorities. Evidence presented in Chapter 9 shows lawyers forming 'good relationships' with bureaucrats and judges and altering outcomes with bribes. This behaviour undermines 'formal rationality' and is entirely consistent with the situational and discretionary outcomes promoted by socialist legality. That lawyers pursue both strategies, sometimes simultaneously, implies a transitional and fragmented legal space. Whether lawyers decide that formal legal rationality is the most persuasive strategy depends not only on changes with the state, but also on the kinds of interests clients want protected.

## SOCIALIST TRANSITIONS: THE CENTRE AND THE LOCAL

In part three, Biddulph (Chapter 10), Fforde (Chapter 11) and Painter (Chapter 12) each explore the intersections and conflicts between centre-led and locally-instituted change. Both Fforde and Painter explore the extent to which state-owned enterprise and administrative reforms respectively reflect endogenous change, rather than the implementation of Party-led legal reform. Biddulph, on the other hand, uses Bourdieu's (1987) device of the 'legal field' to find evidence of central legal influence in the local administration of detention powers in China. She argues this at once enables the Party-state to reconstitute its powers legally, while not diminishing them.

More particularly, Biddulph explores the changing role of law in China in the context of administrative detention powers. In particular, she asks whether Chinese administrative detention powers are debated and defined in legal or political terms. Through a study of the Chinese police detention power, 'Detention for Investigation' (*shourong shencha*), Biddulph examines how the Chinese state manages legal reform and change to maintain social order.

Biddulph argues that it is possible to discern local contests concerning whether administrative powers should be maintained and how they might be legitimised. Further, she argues that without the use of the 'field' as an analytical tool it is all too easy to cast Chinese law reform as inevitably producing a thin version of the 'rule of law' (Peerenboom 2004). Biddulph's preference is not to see Chinese legal reform reflecting a transitional paradigm, inevitably replicating Western-style legal institutions and processes. Rather, she argues that the emerging contests of the role and place of administrative law bring to the fore the ways in which the state, and particularly the Party, produce and manage legal change. She argues that, while it appears that the Chinese Party-state, and its various agencies, appropriates the rhetoric of the rule of law and reform, it in fact continues to pursue various policies for control and social order.

Biddulph characterises socialism in terms of state power. She does not trace developments in Chinese socialist ideology, preferring instead to cast Party-state instrumentalism as local, pragmatic and increasingly harnessing the language and rhetoric of law to produce new patterns of social order. She demonstrates that the administrative power to detain Chinese has not been lost, but instead has been recast and legitimised by its reintroduction in the Chinese Criminal Procedure Law. This transformation is cast as a largely indigenous exercise played out among the new 'law' professionals, including police, academics and lawyers.

Unlike Biddulph, Fforde (Chapter 11) does not define socialism in ideological terms. Rather he contends that Vietnamese 'socialism' is a local political force: more pragmatic than ideological. He characterises its 'political' objectives as enabling stable transition to an enhanced role for the 'law of value' while concurrently retaining the Party-state as the mediator of public-private interests. This characterisation of the role of the state as more affected by 'rule than by law' leaves socialist doctrine and law *per se* of little relevance in the context of Vietnamese state-owned enterprise reform.

More particularly, Fforde takes up three questions: whether and how socialism shapes law and law-related institutions, whether external or internal factors explain legal change, and, finally, whether socialist doctrine inhibits legal change. To answer these, he undertakes surveys of laws relating to state-owned enterprises and media commentary in two time periods. First, Fforde looks at the interaction between law and state-owned enterprise practice in the early 1990s and then compares this with their interaction between 2000–02. Second, he considers the role played by law in media reporting of state-owned enterprise activities, again over these two time periods.

Fforde demonstrates the Party–state’s pragmatic understanding of its socioeconomic reality to explain how it is that the state can officially enable state-owned enterprise reform and concurrently constrain it. This constraint is legitimised because too many shocks could harm the Vietnamese economy and its citizenry. In this sense, a pragmatic political sense produced *ad hoc* Party interventions in the early 1990s rather than systemic policy or law-based reforms.

Moving to the early twenty-first century, Fforde contends that while state-owned enterprises are now ostensibly managed more systematically, they in fact continue unshaped by law. While law generally has become more detailed, Fforde cites the ongoing ambiguities of particular laws and the leadership’s continued *ad hoc* style in support of this thesis. This analysis forms a part of Fforde’s wider thesis that law and even economic policy ought not be seen as shaping Vietnamese socialist transformation (or indeed perhaps any transition?). Instead, he characterises regulation of state-owned enterprises as a fluid context-driven phenomenon where the state selectively and sporadically invokes policy to give effect to their pragmatic preferences.

Fforde’s findings contrast with those of some other commentators. For example, Gainsborough (2003) argues that economic decisions in Vietnam are pragmatic in the sense that they do not consistently follow particular ideals, but in forming decisions, Party leaders draw on predetermined sets of ideas, many of which are socialist. In studying the ‘hollowing-out’ of the state sector in Ho Chi Minh City during the 1990s, he concluded that neoliberal economic ideas have not penetrated the thinking of senior state officials deeply. Instead, privatisation followed compromises between socialist thinking and personal gain.

Returning to the questions Fforde asks upfront, he concludes that practical politics, and not ideologies, shape law. This view contrasts with Chao Xi’s and Gainsborough’s summation that law reforms aim to reconcile state ownership ideology with economic efficiency and personal interests. Further, Fforde’s argument implicitly suggests that internal factors (a local understanding of what is needed) dominate policy and lawmaking affecting state-owned enterprises. Finally, he argues that it remains hard to answer the question of whether socialism impedes legal change, as the relationship between the two is at best dynamic and fluid. He rejects the notion that law drives transition and remains sceptical about its relevance to transition.

Painter (Chapter 12), writing about transforming socialist ideals in the context of public administrative reform in Vietnam, is also sceptical of the local impact of centrally determined reform policy. He identifies three factors that influence the interaction between local and imported ideas about administrative reform. First, how important is political rhetoric to change? Second, what institutional factors make competing ideas about reform appear attractive to policymakers? Third, are reform ideas assessed according to their compatibility with Party doctrine?

For Painter, Party policies and theories dominate public administrative reform. He notes that public administrative reform stresses linkages joining state reform and Party reform, grassroots democracy and mass-organisation reforms. These objectives reflect long-standing Marxist-Leninist notions of Party leadership over

the state, democratic centralism and collective mastery. Less importance is given, he believes, to imported Western reforms that stress administrative efficiency and rational bureaucratic processes.

Drawing from administrative and legal transplantation literature, Painter maintains that imported public administrative reform initiatives rarely follow prescribed patterns. Rather than applying set solutions for identified problems, reforms are fragmented into multiple agendas that 'have a life of their own, solutions look for problems as much as vice versa'. He borrows the metaphor of 'cropping up' to describe the phenomena where global 'talk' or discourse about administrative reforms produce similar solutions to problems in different localities.

The case for 'cropping up' reform is tested in a study concerning Vietnamese salary reform. Painter contends that the state sought to increase public sector salaries by implementing a series of local adaptations that clearly reflected 'themes and models that are very familiar in the global context'. In other words, the ideas used to reform public administration were largely borrowed, but the selection and adaptation of these ideas followed local political imperatives. He concluded that multilateral donors did not impose the public administrative reforms that were eventually adopted by local authorities. Borrowed ideas were merged with local precepts and practices to produce homegrown hybrid solutions. His observations about public administrative reforms are based on salary reform and do not contest the broader view that other initiatives, such as administrative streamlining and judicial accountability reflect a global agenda (Vichit-Vadakan 1996).

Painter leaves his readers with the important insight that borrowed ideas frequently take on new roles in host countries. As Luhmann (1987) puts it, transplants act as 'irritations' or 'perturbations' that give rise to new and unpredictable political and legal meanings. What is left unsaid is how core socialist notions, such as Party leadership, democratic centralism and collective mastery, are reconciled with imported administrative reforms promoting a Weberian meritocracy. Finally, what is the transformative potential for imported ideas to create what Dowdle calls 'runaway legitimation' and generate their own momentum for change?

## RECONCILING IDEOLOGIES: INTERNATIONALISM AND CATHOLICISM

The final two chapters take up the issue of reconciling ideologies, each arguing that socialism is reconcilable with other ideologies. In particular, Bryant and Jessup (Chapter 13) (on international law) and Hansen (Chapter 14) (on Catholicism) argue that socialism impacts on Vietnam's capacity to integrate other ideological commitments. Hansen argues forcefully that Vietnamese socialism *per se* has not precluded Catholicism, rather historical antagonisms between church and state have caused tensions. Bryant and Jessup argue that Vietnamese socialism is preventing the systematic incorporation of international law, but international law is introduced in an *ad hoc* manner.

More particularly, Bryant and Jessup argue that the legacy of Vietnamese socialist ideology undermines Vietnam's apparent preparedness to allow those international treaties it has ratified automatically to become a part of Vietnamese domestic law. They note that the incorporation approach to international law (one that provides if you have signed a treaty it automatically becomes a part of a state's law without need for a separate legal instrument) is not explicitly adopted in Vietnam. Rather, the 1998 Ordinance on the Conclusion and Implementation of International Agreements only countenances incorporation in Vietnam where the treaties are either consistent with Vietnamese law or address areas currently not covered by Vietnamese law. But, Bryant and Jessup argue, accepting this qualification, the Vietnamese fail consistently to give legal effect to ratified treaties.

The authors note that Vietnamese scholars and commentators on international law consistently argue that international laws ought not be binding on Vietnam, unless they are specifically transformed. They note that this is consistent with Marxist-Leninist jurisprudence, which conceives of law as reflecting the economic base. Within such a framework it is not possible uncritically to adopt international laws as these laws would, by definition, reflect the capitalist bases of the nations that produce them. Further, they note that a preoccupation with sovereignty, which they ascribe to ideological tenets, has stymied the incorporation of ratified treaties.

The result, as this chapter documents, is a law-practice gap in Vietnam. The provisions enabling the direct incorporation of treaties consistent with Vietnamese law or filling in gaps in domestic law are rarely cited. Rather, treaties are given effect through regulations and policies introduced by the responsible ministry or agency and not through a high-ranking legal instrument, such as an ordinance or law passed by the National Assembly. The result is that international law is implemented through policy or low-ranking laws in an *ad hoc* fashion. In effect, practical politics subverts the ideological argument against the incorporation of treaties, but it does so covertly rather than through National Assembly lawmaking. In conclusion, the authors call upon the Vietnamese state explicitly to adopt an incorporation approach to the international treaties to which it is a signatory.

In contrast, Hansen contends that church-state relations in Vietnam ought not be seen as constrained by Marxist ideology. Rather, he argues, that the mutual distrust between church and state in contemporary Vietnam, where evident, is a function of history. He bases his contention on two arguments. First, through an analysis of the constitutional and criminal law provisions affecting the ability of citizens to maintain their Catholic faith, Hansen argues that the Communist Party of Vietnam never intended to wrest spiritual leadership of Vietnamese Catholics from Rome. In particular he argues that, unlike China, Vietnam never required the ordination of bishops not in communion with Rome. Put another way, while the Vietnamese state has at various times been unsympathetic toward Catholics, Hansen suggests it has never systematically sought to sever structural links between the local church and its leadership in Rome.

Second, Hansen investigates the incarceration of Father Ly in Vietnam and concludes that his agitation went beyond issues of faith to engage directly with

political issues of the day. For that reason the Vietnamese state's prosecution of Father Ly can be defended. Hansen contends again that it is not ideology that results in Father Ly's prosecution, rather his overt political actions in a one-party state.

Hansen notes the increasing freedom to practise religion and also describes unenforceable constitutional guarantees of freedom of religion, he does not attribute either manifestation of church–state relations in Vietnam to ideology. He reiterates his characterisation of an antagonism that evolved as a result of the long history of mutual distrust of the political agendas of church and state to explain each phenomenon.

Hansen writes as a cleric and lawyer arguing persuasively that the Vietnamese Party–state has, in recent times, softened its restraint of religious freedom *vis-à-vis* Catholics. Not all will be persuaded by a thesis that does not address why it is that contemporary Catholics are still, in the main, distrusted by the political élite and remain prevented from maintaining their faith and holding political posts. But Hansen argues forcefully that ideology has been overcast as an explanation of church–state relations in Vietnam. This is a bold analysis downplaying the importance of Marxism to state–church relations and casting the contest as about power rather than beliefs.

In summary, several themes emerge from the diverse and insightful accounts of legal and institutional change in China and Vietnam. Most authors agree that, despite the changes instituted by market reforms, certain core socialist ideas continue to order state–society relationships. But the authors also think that understandings of socialism are both ideologically and contextually constructed. These chapters demonstrate how certain socialist ideals change their meaning and significance according to context. Those studying socialist precepts in tightly controlled institutions such as courts and universities found relatively low levels of adaptation and hybridisation in official thinking, whereas those studying the interaction of socialist concepts with market and non-state institutions reported high levels of adaptation. These studies also show that Party and state leaders selectively plunder the socialist canon for situationally appropriate ideas, producing fragmented meanings that retain their authority in some social arenas, but not in others. Finally the chapters point to a set of questions and methodologies to guide further studies in the dynamism of law and legal institutions within socialist Asia.

## NOTES

- <sup>1</sup> See, for example, Lubman (1999); Peerenboom (2002); Chen (1999); Potter (2001); Vermeer and d'Hooghe (2002); Chi (2000); Turner et al. (2000); Otto et al. (2002); Otto et al. (2000).
- <sup>2</sup> See, for example, Bergling (1999); Gillespie (2004); Nicholson (2002); Pham Duy Nghia (2002); Quinn (2002); Sidel (2002).
- <sup>3</sup> For an excellent treatment of the comparative transformative experience of Asian socialism, but not confined to a discussion of legal change see *The China Journal*, Special Issue on Transforming Asian Socialism, Vol. 40, July 1998. See also Chan et al. (1999); Abuza (2001).
- <sup>4</sup> See, for example, Barry (1992); Frankowski and Stephan (1995); Varga (1995); Kornai (1990).

- <sup>5</sup> Nguyen Chi Dung, Comment at the Law and Governance: Socialist transforming Vietnam and China conference, Asian Law Centre at the University of Melbourne and Law School, Deakin University, Melbourne, Australia 12–13 June 2003.
- <sup>6</sup> Vietnamese Ministry of Finance figures show that the state retains a major (51 per cent or more) stake in 47 per cent of privatised state owned enterprises and a controlling stake in many more (*Dua Tu Chung Khoan*, 12 April 2004:16).

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