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NEW DIRECTIONS IN THE STUDY OF VIETNAMESE LAW

VIETNAM AND THE RULE OF LAW (Carlyle A. Thayer & David G. Marr eds.). Canberra: Australian National University, 1993. 189 pp.

*Reviewed by Mark Sidel**

Interest is burgeoning in Vietnamese law. For forty years that interest has risen and fallen in waves influenced by politics, economics, and war. Today, for the first time in several decades, scholars outside and within Vietnam have the opportunity for textured study of a rapidly changing system and to make the study of Vietnamese law a topic of real scholarly interest.

It was certainly not always so. Hanoi-based foreign study of Vietnamese law — the law of the Democratic Republic of Vietnam (DRV) and now Socialist Republic of Vietnam — has long been weak and fragmented. That is not surprising. The history of law in Vietnam and of its study abroad since the founding of the DRV in 1945 has been marked by Communist Party domination, weak domestic legal scholarship within Vietnam, dependence of Vietnamese legal studies on the understanding of authoritarian politics in North Vietnam, lack of interest in Europe and the United States in Southeast Asian law, and other factors.

It is assumed sometimes that there was virtually no attention paid to Vietnamese law by scholars outside Vietnam between the founding of the DRV and increased interest in trade with and investment in Vietnam which began in the late 1980s. In fact, international attention has been devoted to the study of Vietnamese law since the period of French control in the first half of this century and since the founding of the North Vietnamese state in 1945. However, initial efforts in the field were marked by formalism and fragmentation and were not sustained.¹

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1. Useful bibliographies of foreign writing on Vietnamese law include Barbara G. James, *Vietnamese Law in English: A Selected Annotated Bibliography*, 84 L. LIBR. J. 461 (1992), and the bibliography which appears in the volume under review, VIETNAM AND THE RULE OF LAW

I. STAGES IN A FIELD

A. *The Contributions of the Formalists in the 1950s and 1960s*

The modern era of foreign scholarship on Vietnamese law outside Vietnam began when Ho Chi Minh's Viet Minh forces recaptured Hanoi from the French in 1954. In the years which followed, several writers explored the structures of law under the Viet Minh regime (1945–1954) and in the early years of the DRV (1954–1976). In the 1950s and early 1960s, American writer Bernard Fall wrote some of the strongest works on the newly emerging, weak, Party-dominated Vietnamese legal system.² In a series of book chapters and articles, Fall described and began a preliminary analysis of the legal structures of the DRV.³

182 (Carlyle A. Thayer & David G. Marr eds., 1993) [hereinafter VIETNAM AND THE RULE OF LAW]. The author appreciates additional bibliographic searches performed by Ann Palmer and Lan Vu.

This review essay focuses on the law of the DRV, later renamed the Socialist Republic of Vietnam, and not the study of South Vietnamese law used to govern South Vietnam from 1954 to 1975. That strand of the Vietnamese legal experience must await other occasions for discussion.

It is important to note that Soviet, now Russian, scholars have shown a consistent interest in Vietnamese legal development, and that a number of senior Vietnamese scholars published on their legal system in Soviet, and later, Russian law journals. The works of George Ginsburgs, discussed below, cite many of those contributions. A two-part article Ginsburgs published in 1973 surveys Soviet studies of Vietnamese law through that year. See George Ginsburgs, *Soviet Sources on the Law of North Vietnam (Part 1)*, 13 ASIAN SURV. 659 (1973); George Ginsburgs, *Soviet Sources on the Law of North Vietnam (Part 2)*, 13 ASIAN SURV. 980 (1973). Soviet, later Russian, interest continued into the 1980s and 1990s, as did publication in Moscow by Vietnamese legal scholars. While I wish to note these activities, materials published in Russian are not a primary focus of this review article.

2. Bernard Fall was based in France and the United States for many years and served during the 1960s as Professor of International Relations at Howard University in Washington, D.C. He died in 1967; killed by a landmine while on patrol with the U.S. Marine Corps on the "Street Without Joy" outside Danang. Some of Professor Fall's papers are available at the John F. Kennedy Library at the University of Massachusetts in Boston.

3. These works include BERNARD FALL, VIET-NAM WITNESS 1953–1966 (1966); BERNARD FALL, THE VIET-MINH REGIME: GOVERNMENT AND ADMINISTRATION IN THE DEMOCRATIC REPUBLIC OF VIET-NAM (Greenwood Press and Southeast Asia Programs, Cornell University 1975) (1956); BERNARD FALL, THE TWO VIET-NAMS: A POLITICAL AND MILITARY ANALYSIS (1967); Bernard Fall, *Constitution-Writing in a Communist State: The New Constitution of North Vietnam*, 6 HOW. L.J. 157 (1960); Bernard Fall, *Die Neue Verfassung der Demokratischen Republik Vietnam*, 6 OSTEUROPA RECHT 145 (1960); Bernard Fall, *Die Rechtslage in der Demokratischen Republik Vietnam*, 3 OSTEUROPA RECHT 198 (1958); Bernard Fall, *The Labor Movement in the Communist Zone of Viet-Nam*, 45 MONTHLY LAB. REV. 534 (1956); Bernard Fall, *Local Government and Administration Under the Viet Minh*, 27 PAC. AFF. 50 (1954); Bernard Fall, *North Viet-Nam's Constitution and Government*, 33 PAC. AFF. 282 (1960); Bernard Fall, *North Viet-Nam's New Draft Constitution*, 32 PAC. AFF. 178 (1959).

Fall's work was largely descriptive of the formal legal structures of the emerging DRV, with an emphasis on the constitutional aspects. From our current perspective, nearly four decades later, several aspects of Fall's pioneering work are striking. One is the hard-headed attitude Fall took toward the developing North Vietnamese legal framework. Fall's writings evince few illusions about any independent power exercised by legal institutions in North Vietnam. Fall recognized that the emerging legal framework was exceptionally weak and had been created for purposes of Party domination and control. These goals were one important reason to study Vietnamese law. Another reason was the system's emphasis on equity and equal treatment, as expressions of the origins of the Viet Minh movement which continued to find their way into policy.

While Fall wisely recognized that law in North Vietnam was a topic worth studying, his analysis was largely limited to formal structures. This formalism was inevitable. Very little was known about the political structures and the emerging legal framework of the DRV, at least in the 1950s. What little was known was, of course, at the relatively shallow level of structure. Conducting research into Vietnamese legal systems itself was very difficult in Vietnam in the 1950s, and Vietnamese legal writing was itself largely formal in nature, beginning in the 1950s and extending, with few exceptions, to the present.⁴

Yet, formalism need not be spare or sterile. Fall's work displays a richness of understanding of Vietnam and a thickness of detail and context about the formal legal system. An understanding of the complexities of Vietnamese society and politics underlies his attention to the legal system and enriches the formal analysis.

Fall's early writing provided sufficient basis in formal description and depth of the relationships between legal, political, and social frameworks to have set the stage for more textured work on Vietnamese law and society, had other scholars taken Fall's work and advanced it. Today, Fall's work can be viewed as a platform for the development of a field of study. But in the 1960s and 1970s there were few other scholars, little interest, and almost no access to research materials on Vietnamese legal institutions with which to build on Fall's pioneering formal work. In retrospect, we are grateful for Fall's formalism, for his willingness, even courage, to engage in formal description to provide baseline information when he knew that other elements of his work went considerably deeper.

4. On the formalism of Vietnamese legal scholarship today, see Mark Sidel, *Law Reform in Vietnam: The Complex Transition from Socialism and Soviet Models in Legal Scholarship and Training*, 11 UCLA PAC. BASIN L.J. 221 (1993); Mark Sidel, *The Re-emergence of Legal Discourse in Vietnam*, 43 INT'L & COMP. L.Q. 163 (1994).

Significant opportunities were missed after Fall's pioneering scholarship on Vietnamese law. In the 1950s and 1960s other scholars might have built on Fall's work to develop a richer picture of the role of law however weak — and it was desperately weak — in an emerging socialist society. Today, when there are the scholars, the interest, and the access necessary to expand scholarship in Vietnamese law, Fall's decades-old work can only be seen as a historical introduction to structures, and not as a more immediate platform for further work.

Professor George Ginsburgs wrote on Vietnamese law beginning in the 1960s and extending into the 1970s. He primarily used formal Vietnamese legal materials translated into Russian and available in Soviet sources.⁵ His work on local government and administration in areas controlled by the Viet Minh (1945–1954) and in the early DRV after 1954 are models of intensely formal analysis; a formalism exaggerated because his targets of analysis were limited not only to formal legal documents, but to formal legal documents largely translated into a third language, namely Russian. Here there was little of Fall's experience with the Vietnamese political and social context.

Like Fall, Ginsburgs neither eschewed nor elevated the value of description of formal legal and political structures. Ginsburgs saw formal descriptions as the building blocks of a field, and they were the sum total of all the information available on a weak legal framework in an authoritarian political state which released little information and allowed virtually no access to scholars or researchers.⁶ One does not dismiss entirely formalism and the work based on it; one uses it as a platform for

5. Among Professor Ginsburgs' works on Vietnam are George Ginsburgs, *The Genesis of the Peoples' Procuracy in the Democratic Republic of Vietnam*, 5 REV. SOCIALIST L. 187 (1979); George Ginsburgs, *Local Government and Administration in the Democratic Republic of Vietnam Since 1954 (Part 1)*, 12 CHINA Q. 211 (1962); George Ginsburgs, *Local Government and Administration in the Democratic Republic of Vietnam Since 1954 (Part 2)*, 14 CHINA Q. 195 (1963); George Ginsburgs, *Local Government and Administration in North Vietnam, 1945–54*, 10 CHINA Q. 174 (1962); George Ginsburgs, *Local Government and Administration Under the Viet Minh, 1945–54*, in NORTH VIETNAM TODAY: PROFILE OF A COMMUNIST SATELLITE (P.J. Honey ed., Frederick A. Praeger, Inc. 1968) (1962); George Ginsburgs, *The Role of Law in the Emancipation of Women in the Democratic Republic of Vietnam*, 23 AM. J. COMP. L. 613 (1975); Ginsburgs, *Soviet Sources on the Law of North Vietnam (Part 1)*, *supra* note 1; Ginsburgs, *Soviet Sources on the Law of North Vietnam (Part 2)*, *supra* note 1.

Professor Ginsburgs is Distinguished Professor of Law at Rutgers University Camden School of Law. During the period in which some of his work on Vietnam was published, Professor Ginsburgs was on the political science faculties of the University of Iowa and the New School of Social Research (New York).

6. Other work on Vietnamese law in the 1950s through the mid-1960s, largely formal in nature, includes J. Price Gittinger, *Communist Land Policy in North Viet Nam*, 28 FAR E. SURV. 113 (1959).

more textured academic work, especially as a society begins to open and direct contact with its legal system becomes possible.

B. *Ambivalent Development in the 1970s and 1980s:
Fragmentation and Rich Contributions in
Western Understanding of Vietnamese Law*

In the 1970s and early to mid-1980s, war, limited access to Vietnam and to written sources, and a decline in interest in the study of Southeast Asia and the law of socialist countries narrowed the scholarship on Vietnamese law, even when compared to the relatively limited activity of the earlier period. With the key exception of the work of Ta Văn Tài and his colleagues,⁷ there was little scholarly cohesion or academic connection between the work done in this period and no sense of a field being built, of foundation stones being laid, of debate beginning to coalesce. Articles ranged from general histories, overviews, and bibliographies,⁸ to explorations of Soviet sources,⁹ legal history,¹⁰ constitutional law,¹¹ the role and status of women,¹² Party-law relations and Party

7. NGUYỄN NGỌC HUY & TA VĂN TÀI, *THE LÊ CODE: LAW IN TRADITIONAL VIETNAM, A COMPARATIVE SINO-VIETNAMESE LEGAL STUDY WITH HISTORICAL — JURIDICAL ANALYSIS AND ANNOTATIONS* (Tran Van Liem trans., 1987) [hereinafter HUY & TÀI, *THE LÊ CODE*]; TA VĂN TÀI, *THE VIETNAMESE TRADITION OF HUMAN RIGHTS* (1988); Nguyễn Ngọc Huy & Ta Văn Tài, *The Vietnamese Texts*, in 1 *LAWS OF SOUTHEAST ASIA: THE PRE-MODERN TEXTS* 435 (M.B. Hooker ed., 1986) [hereinafter Huy & Tài, *The Vietnamese Texts*]; Ta Văn Tài, *The Status of Women in Traditional Vietnam: A Comparison of the Code of the Lê Dynasty*, 15 *J. ASIAN HIST.* 97 (1981) [hereinafter Tài, *The Status of Women in Traditional Vietnam*]; Ta Văn Tài, *Vietnam's Code of the Lê Dynasty (1428–1788)*, 30 *AM. J. COMP. L.* 523 (1982).

8. See, e.g., MICHAEL COTTER, *VIETNAM: A GUIDE TO REFERENCE SOURCES* (1977); Justus M. Van der Kroef, *Southeast Asia*, in *LEGAL TRADITIONS AND SYSTEMS: AN INTERNATIONAL HANDBOOK* (Alan N. Katz ed., 1986).

9. Ginsburgs, *Soviet Sources on the Law of North Vietnam (Part 1)*, *supra* note 1; Ginsburgs, *Soviet Sources on the Law of North Vietnam (Part 2)*, *supra* note 1.

10. See, e.g., HUY & TÀI, *THE LÊ CODE*, *supra* note 7; TA VĂN TÀI, *THE VIETNAMESE TRADITION OF HUMAN RIGHTS*, *supra* note 7; Huy & Tài, *The Vietnamese Texts*, *supra* note 7; Tài, *The Status of Women in Traditional Vietnam*, *supra* note 7; Ta Văn Tài, *Vietnam's Code of the Lê Dynasty (1428–1788)*, *supra* note 7.

Other work on Vietnamese legal history during this period includes DENNIS J. DUNCANSON, *GOVERNMENT AND REVOLUTION IN VIETNAM* 72–139 (1968); Lan Quoc Nguyen, *Traditional Vietnamese Law — The Lê Code — and Modern United States Law: A Comparative Analysis*, 13 *HASTINGS INT'L & COMP. L. REV.* 141 (1989); Stephen B. Young, *The Law of Property and Elite Prerogatives During Vietnam's Lê Dynasty, 1428–1788*, 10 *J. ASIAN HIST.* 1 (1976).

11. See, e.g., Phuong-Khanh Nguyen, *Introduction to the 1980 Constitution of the Socialist Republic of Vietnam*, 7 *REV. SOCIALIST L.* 347 (1981). Fall had contributed earlier work on constitutional law and drafting in Vietnam. See *supra* note 2. James mentions other publications on constitutional law and numerous foreign translations of Vietnamese constitutional texts. James, *supra* note 1.

12. Ginsburgs, *The Role of Law in the Emancipation of Women in the Democratic Republic of Vietnam*, *supra* note 5.

statutes,¹³ the procuracy,¹⁴ agricultural cooperatives and state-society rural relations,¹⁵ human rights,¹⁶ and some early work on trade and investment.¹⁷

The work of Ta Văn Tài and Nguyễn Ngọc Huy, however, was an exception. Their work deserves special mention for its richness, cohesion, and its evident, self-conscious attempt to build a field of intellectual study.¹⁸ Tài and Huy worked to develop a body of scholarship in Vietnamese legal history, with impressive results in substance and focus. Their work moved beyond formalism and fragmentation to a more supple treatment of a specific area of Vietnamese law on which Tài and Huy focused with admirable discipline and on which a platform for scholarly work on other elements of the system developed.¹⁹

Ginsburgs' work on Soviet sources for Vietnamese law during this period²⁰ may seem esoteric and formal even to the specialist, but it must be remembered how little source material was available on Vietnamese law, even in the early 1970s. Spare formalism of a certain sort remains timeless, and it is interesting to note the relevance of Ginsburgs' work — especially on Soviet sources of Vietnamese law — to specialists in Vietnamese law today. But, as with Fall and with Ginsburgs' earlier work, there were opportunities lost here as well. Ginsburgs' noble effort

13. NGUYEN VAN CANH & EARLE COOPER, VIETNAM UNDER COMMUNISM, 1975-1982 (1983); Phuong-Khanh Nguyen, *The Statute of the Communist Party of Vietnam*, in 27 THE PARTY STATUTES OF THE COMMUNIST WORLD 435 (William B. Simons & Stephen White eds., 1984); Oskar Weggel, *The Vietnamese Communist Party and Its Status Under Law*, in 31 RULING COMMUNIST PARTIES AND THEIR STATUS UNDER LAW 411 (Dietrich André Loeber ed., 1986).

14. Ginsburgs, *The Genesis of the Peoples' Procuracy in the Democratic Republic of Vietnam*, *supra* note 5; Hiroshi Oda, *The Procuracy and the Regular Courts as Enforcers of the Constitutional Rule of Law: The Experience of East-Asian States*, 61 TUL. L. REV. 1339 (1987).

15. Adam Fforde, *Law and Socialist Agricultural Development in Vietnam: The Statute for Agricultural Producer Cooperatives*, 10 REV. SOCIALIST L. 315 (1984).

16. See, e.g., Stephen B. Young, *The Legality of Vietnamese Re-education Camps*, 20 HARV. INT'L L.J. 519 (1979).

17. See, e.g., Sandra Hickok, *Foreign Investment — Regulations of Foreign Investments — Decree No. 115/CP, April 18, 1977, Socialist Republic of Vietnam*, 19 HARV. INT'L L.J. 681 (1978); Tang Thi Thanh Trai Le, *The Foreign Investment Code of the Socialist Republic of Vietnam*, 13 INT'L LAW. 329 (1979); John Quigley, *Vietnam's Legal Regulation of Foreign Trade and Investment*, 6 INT'L TRADE L.J. 24 (1980-81).

18. See *supra* notes 7, 10.

19. Other useful work on Vietnamese legal history completed during this period included Young, *The Law of Property and Elite Prerogatives During Vietnam's Lê Dynasty (1428-1785)*, *supra* note 10; Insun Yu, *Law and Family in Seventeenth and Eighteenth Century Vietnam* (1978) (unpublished Ph.D. dissertation, University of Michigan).

20. Ginsburgs, *Soviet Sources on the Law of North Vietnam (Part 1)*, *supra* note 1; Ginsburgs, *Soviet Sources on the Law of North Vietnam (Part 2)*, *supra* note 1.

to make Soviet sources for Vietnamese law known outside the Soviet Union was not followed by further analysis of the influence of Soviet law in the mix comprising the "variety of influences — indigenou, Chinese, French, and American — [which] have combined to produce a unique legal amalgam, now to become even more complex by the . . . addition of socialist law to the mix."²¹

C. *Focus on Capital in the Late 1980s and Early 1990s:
The Uncertain Value of the Writings on Trade with
and Investment in Vietnam*

The late 1980s and early 1990s have seen a rapid increase in writing on Vietnamese law, but that work has been almost entirely restricted to the area of trade and investment with a reforming Vietnamese state.²² Given the paucity of work in Vietnamese law in the thirty years preceding 1986, the sheer volume of published work on trade and investment and related domestic and foreign economic law in the post-1986 period of *doi moi* (renovation) is itself noteworthy.²³ Specialized topics in the

21. Carleton W. Kenyon, *Foreword*, in NGUYEN PHUONG-KHANH, *VIETNAMESE LEGAL MATERIALS 1954-1975: A SELECTED ANNOTATED BIBLIOGRAPHY* at v (1977) (quoted in James, *supra* note 1, at 464).

22. An exception, in the early part of this period, is John Quigley's useful article which provides a foundation for Western understanding of Vietnamese criminal law. See John Quigley, *Viet Nam's First Modern Penal Code*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 143 (1988); see also John Quigley, *Vietnam at the Legal Crossroads Adopts a Penal Code*, 36 AM. J. COMP. L. 351 (1988); Phuong-Khanh T. Nguyen, *The Criminal Code of the Socialist Republic of Vietnam*, 13 REV. SOCIALIST L. 103 (1987). Despite these three publications on criminal law, the overwhelming focus in this period was on trade and investment issues. A few other articles appeared on the Lê Code, Vietnamese Amerasians, and other topics.

23. Some of the early publications which might be cited on this topic include JEROME A. COHEN ET AL., *INVESTMENT LAW AND PRACTICE IN VIETNAM* (1990); Canice Chew-ming Chan & Sheila M. O'Donnell, *Vietnam's Foreign Investment Law*, 7 INT'L FIN. L. REV., Oct. 1988, at 38; John Gillespie, *Foreign Investment in SR Vietnam Revisited*, 18 INT'L BUS. LAW. 416 (1990); Neill T. MacPherson, *Foreign Investment in the Philippines, Thailand and Vietnam*, 17 INT'L BUS. LAW. 233 (1989); W. Gary Vause, *Foreign Investment Climate: Facts and Impressions*, 11 E. ASIAN EXEC. REP., June 15, 1989, at 10; W. Gary Vause, *Investment in Vietnam — Prospects and Concerns for the 1990s*, 4 FLA. INT'L L.J. 231 (1989); Sesto E. Vecchi, *Highlights of Vietnam's New Foreign Investment Regulations*, 11 E. ASIAN EXEC. REP., May 15, 1989, at 8; Sesto E. Vecchi, *Operating in Unstructured Legal Environments: The Vietnam Model*, 13 E. ASIAN EXEC. REP., July 1991, at 21.

Since 1992 publication on trade and investment has accelerated. Examples include WILLIAM G. MAGENNIS & NGUYEN TAN HAI, *LAW IN VIETNAM: THE FRAMEWORK FOR FOREIGN INVESTMENT* (1992); STATE COMMITTEE FOR CO-OPERATION AND INVESTMENT, *FOREIGN INVESTMENT LAWS OF VIETNAM* (1992); VIETNAM: A LEGAL BRIEF (Frederick R. Burke & David Howell eds., 1992); F. Gayle Connor, *Vietnam: Trading with the Enemy or Investing in the Future*, 25 L. & POL'Y INT'L BUS. 481 (1994); Peter G. Furniss, *The United States-Vietnam Trade Relationship: Politics and Law in the Process of Normalization*, 35 HARV. INT'L L.J. 238 (1994); Michael J. Scown, *Taxation in Vietnam*, 15 E. ASIAN EXEC. REP., June 1993, at 8; James Taylor, Jr., *Vietnam: The Current Legal Environment for U.S.*

trade and investment genre were also explored, such as dispute resolution,²⁴ intellectual property,²⁵ taxation and tax policy,²⁶ banking law,²⁷ the bilateral negotiations on claims and frozen assets,²⁸ technology transfer,²⁹ and the status of foreign lawyers and law firms.³⁰

Investors, 25 L. & POL'Y INT'L BUS. 469 (1994); Sesto E. Vecchi & Lisa L. Borter, *U.S. MFN Status for Vietnam*, 17 E. ASIAN EXEC. REP., May 15, 1995, at 6; *Vietnam's Transition to a Market Economy: Reform Priorities — Foreign Direct Investment (Part 1)*, 15 E. ASIAN EXEC. REP., Dec. 15, 1993, at 9; *Vietnam's Transition to a Market Economy: Growth Prospects, Financing Requirements and a Reform Agenda (Part 2)*, 16 E. ASIAN EXEC. REP., Jan. 15, 1994, at 8; Robert L. Wunker, *The Laws of Vietnam Affecting Foreign Investment*, 28 INT'L LAW. 363 (1994); Note, *Protection of Foreign Direct Investment in a New World Order: Vietnam — A Case Study*, 107 HARV. L. REV. 995 (1994). See also the useful short articles by Foster, Hayward and Law, Lecat, Ruderman, Hagan and Weller, Arstall and Platt in *An Investors Guide to Vietnam*, 14 INT'L FIN. L. REV. SUPP. (Feb. 1995).

Many of the papers presented at the University of Melbourne conference on Infrastructural Development and Legal Change in Vietnam: Recent Developments and Future Prospects reflect the trade and investment theme as well (Nov. 1993).

Several attorneys specializing in a Vietnam-oriented practice — Sesto Vecchi, Fred Burke, James Finch, Frank Meier, Michael Scown and others — have published numerous articles in EAST ASIAN EXECUTIVE REPORTS on various aspects of the trade and investment agenda.

24. See, e.g., John Gillespie, *Commercial Arbitration in Vietnam*, 8 J. INT'L ARB., Sept. 1991, at 25; James S. Finch & Harold P. Fisk, *Vietnam's Evolving Arbitration System*, 17 E. ASIAN EXEC. REP., Apr. 15, 1995, at 9; Mark Lockwood & Nguyen Tan Hai, *Arbitration in Vietnam*, 13 INT'L FIN. L. REV., March 1994, at 28.

25. Frederick Burke, *Trademark Protection in Vietnam*, E. ASIAN EXEC. REP., Oct. 1991, at 8; Stephen Hayward, *Vietnamese Copyright Law*, 49 COPYRIGHT WORLD 40 (April 1995); Michael A. Polkinghorne & David L. Weller, *Trademark Registration and Protection in Vietnam*, 76 TRADEMARK WORLD 26 (April 1995); Rory J. Radding & H.T. Than, *Patent Protection in Vietnam: A Business Decision*, 8 TRANSNAT'L LAW. 87 (1995).

26. Thao Cung & Frank Meier, *Overview of Recent Tax Reforms in Vietnam*, 11 TAX NOTES INT'L 1207 (1995); Glen P. Jenkins & Seth E. Terkper, *Administration Reform for Fiscal Systems in Transition Economies: The Case of Vietnam*, 6 TAX NOTES INT'L 795 (1993); Glen P. Jenkins & Seth E. Terkper, *Vietnam's Tax Reforms: Policies in Transitional Economies*, 6 TAX NOTES INT'L 469 (1993); Tibor Nagy, *Vietnam: Changes in the Tax System*, 41 BULL. INT'L FISCAL DOCUMENTATION 554 (1984). A useful series of articles on specific aspects of taxation in Vietnam was published by Michael Scown in the JOURNAL OF INTERNATIONAL TAXATION in 1993, 1994, and 1995.

27. See, e.g., David C. Doyle, *Banking Law in Vietnam*, 8 BUTTERWORTH'S J. INT'L BANKING & FIN. L. 430 (1993); Arno Wohlegemuth, *The Law on Foreign Banking in Vietnam*, 7 J. INT'L BANKING L. 284 (1992).

28. Stephen Hayward, *Technology Transfer and Licensing of Technology in Vietnam*, 71 PATENT WORLD 37 (April 1995); Thomas J. Lang, *Satisfaction of Claims Against Vietnam for the Expropriation of U.S. Citizens' Property in South Vietnam in 1975*, 28 CORNELL INT'L L.J. 265 (1995).

29. Sesto E. Vecchi, *Technology Transfer: Problems and Potential*, E. ASIAN EXEC. REP., Jan. 15, 1991, at 8.

30. See, e.g., K. Minh Dang & Jack H. Su, *Vietnam Opens Its Door to Foreign Law Firms*, 12 INT'L FIN. L. REV., June 1993, at 6; *Eastern Promise*, 90 L. SOC'Y GAZETTE (U.K.), May 12, 1993 at 12; Jacques Wantz, *Draft Regulations on the Practice of Foreign Law Firms*, 21 INT'L BUS. LAW. 476 (1993).

This output is almost entirely descriptive and oriented in a wholly instrumental fashion to the requirements of trade and investment with Vietnam. The few notable exceptions to the descriptive and instrumental character of this literature are either particularly sophisticated in their comparative nature,³¹ or particularly sophisticated in their policy implications.³² Others focus more on issues and debates in the reform of the domestic economic law system and property system than on trade and investment.³³ It is telling that some of the most informative and sustained work on legal reform in Vietnam, beyond the narrow trade and investment agenda, has been provided by journalists.³⁴ But in recent years, with these and several other exceptions,³⁵ the study of law in Vietnam has been subsumed in the description of the formal regulatory requirements of trade and investment with Vietnam.

Research and writing on trade and investment are indications and expressions of the greater openness of the Vietnamese system and of more supple opportunities for access to information, at least in this area. And some, though truly very little, of the trade and investment literature goes beyond summary descriptions of how to trade with and invest in Vietnam to deeper explorations or interesting analyses of the system — which are sometimes comparative in nature.³⁶ This is not surprising, at least in one sense, since most of the trade and investment literature is not

31. Jerome A. Cohen, *China's Influence on Vietnam's Foreign Business Laws*, 17 CHINA BUS. REV., May-June 1990, at 43.

32. See the particularly useful NATALIE G. LICHTENSTEIN, *A SURVEY OF VIET NAM'S LEGAL FRAMEWORK IN TRANSITION* (1994).

33. See, e.g., *id.*; ROY L. PROSTERMAN & TIMOTHY M. HANSTAD, *AGRARIAN REFORM AND THE 1993 LAND LAW* (1994); John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 STANFORD J. INT'L L. 325 (1994); John Gillespie, *The Role of Bureaucracy in Managing Urban Land in Vietnam*, 5 PAC. RIM & POL'Y J. 59 (1995); Hong-Anh Tran, *An Assessment of the Vietnamese Land Law and Regulation*, 13 WIS. INT'L L.J. 585 (1995).

34. See, e.g., Murray Hiebert, *Miles to Go*, FAR E. ECON. REV., July 29, 1993, at 24; Murray Hiebert, *On Your Marks*, FAR E. ECON. REV., April 15, 1993, at 65; Murray Hiebert, *Trial and Error: Legal System Fails to Keep Pace with Political Change*, FAR E. ECON. REV., July 5, 1990, at 16; *Vietnam: A Law Unto Themselves*, ECONOMIST, Oct. 22, 1994, at 41.

35. Several other exceptions include Mark Sidel, *Law Reform in Vietnam: The Complex Transition from Soviet Models in Legal Scholarship and Training*, 11 UCLA PAC. BASIN L.J. 221 (1993); Mark Sidel, *The Re-emergence of Legal Discourse in Vietnam*, 43 INT'L & COMP. L.Q. 163 (1994); Mark Sidel, *Vietnam: The Emergence of a Nonprofit Sector and Philanthropy in the Socialist Republic of Vietnam*, in EMERGING CIVIL SOCIETY IN THE ASIA PACIFIC COMMUNITY 293 (Tadashi Yamamoto ed., 1995); Mark Sidel, *Philanthropy, Development of New Forms of Social Organization, and the New Context for Corporate Philanthropy in Vietnam* (Sept. 1995) (unpublished paper presented to the Symposium on Corporate Citizenship in Asia Pacific, on file with the author).

36. See, e.g., Cohen, *supra* note 31.

written by scholars. We should not impose an entirely scholarly lens on materials written, primarily, for practical, utilitarian reasons.

In this manner work on trade and investment law is a route into a more textured understanding of Vietnamese law. The overwhelming focus on trade and investment writing, however, also skews attention to the rapid changes in Vietnamese law over the past decade since the *doi moi* process began. The extraordinary emphasis on trade and investment implies, with a particularly strong effect on students, that only economic and largely foreign economic life is changing in Vietnam — in reality, social transitions have also been occurring with a pace and depth which would surprise many foreign observers.

II. BEYOND TRADE AND INVESTMENT: DEEPENING THE STUDY OF VIETNAMESE LAW AND SOCIETY

Knowledge of Vietnamese law must expand beyond trade and investment if the field is to progress and, perhaps ironically, to return to Fall's original, deeply experienced understanding of the relationship between the Vietnamese legal structure, however weak, and Vietnamese political and social change. *Vietnam and the Rule of Law*, edited from a conference at the Australian National University which was explicitly intended to move beyond the trade and investment agenda, is an important step in that direction.³⁷ The work represents a departure from the trade and investment focus in the direction of a broader and deeper understanding of the role of Vietnamese law in Vietnamese society, including economic life.

As the field struggles to move beyond a single-minded focus on trade and investment, initial products of that struggle are likely to be mixed in quality and will combine newer methods of analysis with older formalism. That is certainly the case in this volume, an important initial attempt to put Vietnamese law in its societal context and to move beyond the focus on trade and investment law. Given the goals, it is not surprising that *Vietnam and the Rule of Law* is edited by a historian and a political scientist, both of whom are long-time specialists in Vietnam studies.

One of the strongest law-related essays in this compilation points to a new direction ahead for legal scholarship on Vietnam. Professor Carl Thayer, a specialist in Vietnamese politics at the Australian National University and the Australian Defense Force Academy, has taken advantage of the new access to Vietnam, a more permissive attitude toward providing information to foreign researchers, and the somewhat more

37. VIETNAM AND THE RULE OF LAW, *supra* note 1, at 1.

open Vietnamese press to produce the most detailed study of Vietnamese constitutional development yet available.³⁸ Thayer describes and analyzes the process of amendment and adoption of the 1992 Vietnamese Constitution and the contentious 1992 elections when independent candidates were formally allowed to run for the National Assembly but, informally, were strongly discouraged from pursuing candidacy. It is the specific level of detail, and the close analysis possible from such detail, which points to the possibilities for Vietnamese legal research in the years ahead.

Other articles, though not directly analyzing legal reform and development, indicate analogous advances in the study and understanding of present-day Vietnam. Suki Allen's chapter on health policy and the effects of marketizing economic reform,³⁹ and Adam Fforde's chapter on economic reform policy⁴⁰ are each cogent analyses by long-time and close observers of Vietnam both at the central Hanoi level and from the field. The close analysis by Allen, Fforde, and Thayer evidence the rich possibilities ahead for scholarship on Vietnam and Vietnamese law.

The other six essays in this volume all focus on law. Three are by Vietnamese senior practitioners and officials, and three are by analysts of Vietnamese law based outside Vietnam. Together they illustrate both the limitations and opportunities at this new stage of Vietnamese legal studies. A chapter on constitutional law by Ngo Ba Thanh,⁴¹ a Vietnamese attorney and, until her defeat in the 1992 National Assembly elections, Chair of the Assembly's Legislative Commission, contains both extensive formal description and rhetorical flourish. Yet notably, in several key sections, Thanh takes a somewhat coldly critical attitude toward elements of the Vietnamese political structure in her analysis of the internal discussion over key drafting issues in the new constitution. These issues include the relatively open discussions of nationalization of foreign investment (including divergent views in the constitutional revision process) and the issue of the presumption of innocence.⁴²

38. Carlyle A. Thayer, *Recent Political Development: Constitutional Change and the 1992 Elections*, in *VIETNAM AND THE RULE OF LAW*, *supra* note 1, at 50.

39. Suki Allen, *Health and the Current Situation and Recent Changes*, in *VIETNAM AND THE RULE OF LAW*, *supra* note 1, at 38.

40. Adam Fforde, *The Vietnamese Economy in 1992: Development and Prospects*, in *VIETNAM AND THE RULE OF LAW*, *supra* note 1, at 23.

41. Ngo Ba Thanh, *The 1992 Constitution and the Rule of Law*, in *VIETNAM AND THE RULE OF LAW*, *supra* note 1, at 81.

42. Other elements of Thanh's discussion — on human rights and other topics — are noticeably less frank.

What makes this notable is that the author is a Vietnamese attorney and official writing from Vietnam, and in that context, the somewhat greater flexibility toward analysis and outlining debate may be more important than the traditional, formal description and rhetoric produced by most Vietnamese authors today.⁴³ Thus, both the traditional elements and newer and more textured analysis are present. That the traditional lack of frankness and clarity is present in Thanh's work partially reflects her then key governmental role as Chair of the Law Committee in the Vietnamese National Assembly. The openness and progressive views expressed on such topics as the debate over the presumption of innocence reflect her flag-bearing role as representative for a vision of law in Vietnam which is both somewhat more participatory and rights-focused than the Stalinist traditions of North Vietnamese legal scholarship and practice ever allowed.⁴⁴

Four articles on the framework and environment for foreign trade and investment comprise the second half of the volume. In one sense, these articles show that greater access to Vietnamese legal texts and policy and a relatively more open atmosphere for discussion in Vietnam can bring scholarship beyond mere formalism, even in the inherently limited genre of trade and investment writing. The sophisticated contribution by John Gillespie, an Australian scholar and frequent writer on Vietnamese law,⁴⁵ illustrates the possibilities that research and writing on commercial topics can have for the understanding of Vietnamese law and society.

Gillespie moves beyond the formal, descriptive outline of trade and investment provisions toward the difficult problem of economic and political transition from a sharply centralized system: "During the transi-

43. A third and shorter contribution on the constitution, by the Australian practitioner Levien Do, is a more formal outline of the constitutional changes with descriptions of their relationship to foreign investment. Levien Do, *Vietnam's Revised Constitution: Impact on Foreign Investment*, in VIETNAM AND THE RULE OF LAW, *supra* note 1, at 116.

44. John Gillespie has begun the process of analysis of Thanh's views, and made a start at delineating the different strands of legal thought in Vietnam today, a process which requires considerably more work. See John Gillespie, *Australian Legal Assistance to Vietnam: How to Cook the Small Fish*, 20 INT'L L. NEWS 7 (1993). See also MARK SIDEL, *CONFLICTING APPROACHES TO LAW IN VIETNAM, 1954-1995* (forthcoming, 1996). Other works in English by Ngo Ba Thanh include NGO BA THANH, *LEGAL AND POLITICAL REFORMS IN VIETNAM TODAY: AN INSIDER'S PERSPECTIVE* (1991); NGO BA THANH, *VIETNAM'S ECONOMIC RENOVATION AND THE DEVELOPMENT OF LAW* (1991).

45. See, e.g., Gillespie, *Australian Legal Assistance to Vietnam: How to Cook the Small Fish*, *supra* note 44; Gillespie, *Commercial Arbitration in Vietnam*, *supra* note 24; Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, *supra* note 33; Gillespie, *The Role of Bureaucracy in Managing Urban Land in Vietnam*, *supra* note 33; John Gillespie & William S. Logan, *Heritage Planning in Hanoi* (Nov. 1993, rev. 1994) (paper presented to the conference on Infrastructural Development and Legal Change in Vietnam: Recent Developments and Future Prospects, University of Melbourne).

tion period, a conflict has arisen between what is essentially a rights-based commercial legal system, and a state apparatus and economy that is only now emerging from a rigid command economy."⁴⁶ Placing a discussion of commercial law in this societal context is new in the study of Vietnamese trade, investment, and commerce, and Gillespie follows with a brief and cogent historical and current analysis of the tension facing commercial development in Vietnam. This approach gives broader meaning both to a more expansive study of Vietnamese law and to the sometimes sterile trade and investment discussions. It is much to be welcomed.

Two contributions by the prominent Vietnamese attorney and official Nguyen Qui Binh, now Director of the International Law and Treaties Department of the Vietnamese Foreign Ministry, are largely formal descriptions of statutory and regulatory developments in real estate law⁴⁷ and corporate income tax.⁴⁸ But formal descriptions of a statutory system by a Vietnamese authority to a foreign audience using the English language is itself a step forward. Binh goes a bit deeper, pointing out issues in the property regulatory regime (including implementation, the division of land into such small plots as to make cultivation and mechanization more problematic, and other difficult and controversial issues) and sharp contradictions in tax equity, integration, efficiency, incentives, and evasion in the income tax structure. The largely formal nature and content of the presentations along with new detail and texture of description and analysis illustrate the transitional nature of this volume and of the field it represents.

A final essay on labor law and practice written by Irene Norlund, a senior research fellow in the Nordic Institute of Asian Studies,⁴⁹ further exemplifies the transitional pattern of this volume. Relatively little has been written by foreign scholars on labor regulation in Vietnam, and virtually nothing since the *doi moi* began in 1986. Thus, Norlund's article serves as a foundation, a baseline study, and a forum to raise contradictions between labor protection and an export-oriented manufacturing economy. It is a topic in which a formal, if brief, description necessarily precedes an analysis more fully based on Vietnamese realities. The

46. John Gillespie, *The Evolution of Private Commercial Freedoms in Vietnam*, in VIETNAM AND THE RULE OF LAW, *supra* note 1, at 129, 129.

47. Nguyen Qui Binh, *Real Estate Laws in Vietnam*, in VIETNAM AND THE RULE OF LAW, *supra* note 1, at 148.

48. Nguyen Qui Binh, *Problems in the Corporate Income Tax Structure of Vietnam*, in VIETNAM AND THE RULE OF LAW, *supra* note 1, at 160.

49. Irene Norlund, *The Creation of a Labour Market in Vietnam: Legal Framework and Practices*, in VIETNAM AND THE RULE OF LAW, *supra* note 1, at 173.

importance and also the brevity of the initial role of formal description is illustrated by Australian scholar Gerard Greenfield's superb article on labor relations in Vietnam which appeared within two years of the publication of the Thayer and Marr volume. Greenfield defiantly eschews formal analysis in favor of a sophisticated political economy approach to labor relations and to the role of labor law in Vietnam.⁵⁰ His approach significantly advances our understanding of this area.

III. NEW DIRECTIONS IN THE STUDY OF VIETNAMESE LAW

Vietnam and the Rule of Law is an important transitional volume in the progression of Vietnamese legal studies from a formal and fragmented description and from a sometimes useful, occasionally unhealthy focus on trade and investment, into a more complete understanding and analysis of the role of Vietnamese law in Vietnamese society.

But much more is needed. More sophisticated bibliographic surveys of the Vietnamese primary and secondary materials available on law must be prepared and must catalogue and analyze materials available throughout Vietnam and abroad.⁵¹ Key gazettes, journals, and volumes must be microfilmed or otherwise protected and distributed for use by Vietnamese and foreign scholars. More substantial exchanges including exchanges in constitutional law, legal theory, and law and society issues beyond the trade and investment field would improve the quality of legal scholarship by providing wider perspectives on legal reform within Vietnam and by giving foreign scholars greater access to recent Vietnamese legal history and thought. Further, writing beyond the formal trade and investment genre must be encouraged — specifically, writing which explores the role of law in a rapidly changing Vietnamese society and which can help to explicate those extraordinary changes.⁵² *Vietnam and the Rule of Law*

50. Gerard Greenfield, *The Development of Capitalism in Vietnam*, in SOCIALIST REGISTER 1994: BETWEEN GLOBALISM AND NATIONALISM 60 (Ralph Miliband & Leo Panitch eds., 1994).

51. The present author has prepared a research guide to law in the DRV (1945–1976) and pre-*doi moi* (renovation) Socialist Republic of Vietnam (1976–1986) (forthcoming, 1995) and is preparing a research guide to law in Vietnam under renovation (1986–1995) (forthcoming, 1996) and to Vietnamese legal research journals (1962–1995) (forthcoming, 1996). For sources of law under the South Vietnamese regime, see the thorough and careful NGUYEN PHUONG-KHANH, VIETNAMESE LEGAL MATERIALS, 1954–1975: A SELECTED, ANNOTATED BIBLIOGRAPHY (1977).

52. That process has begun, but has involved largely the incorporation of legal issues into other studies. Ben Kerkvliet's work on everyday politics and state-society relations at the village level in Vietnam, Peter Zinoman's Cornell University history dissertation on Vietnamese prisons under French colonial rule, Melinda Tria Kerkvliet's forthcoming institutional study of a factory in Hanoi since the 1950s and other writings indicate the texture with which it may now be possible to analyze legal themes, directly or indirectly, in Vietnam. Different papers presented to the recent University of Melbourne conference on Infrastructural Development and

transgresses the formal and fragmented past in Vietnamese legal studies, and in its more analytical chapters, points the way to the future of a field.

Legal Change in Vietnam: Recent Developments and Future Prospects, *supra* note 23, evince both the formalism and modest ambitions of much recent writing on Vietnamese law and, in the more textured efforts, some real attempt to come to a more textured understanding of Vietnamese law and legal development in its political and social context today. Gillespie and Logan's paper on heritage planning in Hanoi, *supra* note 45, and Thayer's paper on Vietnamese political reform illustrate the latter, more textured efforts.