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Explaining the Transition to the Rule of law in Vietnam
The Role of Informal Institutions and the Delegation of Powers to Independent courts

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Acronyms and Abbreviations

ADB	Asian Development Bank
BERI	Business Environmental Risk Intelligence
CEE	Central and Eastern Europe
CIS	Commonwealth of Independent States
CPV	Communist Party of Vietnam
EBRD	European Bank for Reconstruction and Development
FDI	Foreign direct investment
GSO	General Statistic Office
ICRG	International Risk Guide
IMF	International Monetary Fund
JI	Judicial independence
LOPC	Law on Organization of People's Courts
LOPLD	Law on promulgation of Legal Documents
LSOEs	Law on State-owned Enterprise
NAV	National Assembly of Vietnam
NGOs	Non government organizations
NIE	New Institutional economics
OJPA	Ordinance on Judges and People's Assessors of People's Courts
SOEs	State owned enterprises
SPC	Supreme People' Court
UNDP	United Nations Development Programme
WB	World Bank
WEF	World Economic Forum

Chapter 1

Introduction

“Yes, we defeated the US, but now we are plagued by problems. We do not have enough to eat. We are a poor, underdeveloped nation. Vous savez, waging a war is simple, but running a country is difficult”

(Pham Van Dong, former Vietnamese Prime Minister, 1981)

How do we account for the persistence of poverty in the midst of plenty? If we know the sources of plenty, why don't poor countries simply adopt policies that make for plenty? The answer is straightforward. We just don't know how to get there. We must create incentives for people to invest in more efficient technology, increase their skills and organize efficient market. Such incentives are embodied in institutions. Thus we must understand the nature of institutions and how they evolve.

(Douglass North 2000)

Vietnam - a well-known nation with its war against the US - is in a period of transition to a market economy. There is a broad consensus that institutional reforms, including transformation to the rule of law, are prerequisites for the transition to a market economy because the rule of law plays a major role for economic performance, growth and prosperity in market economies (see Hayek 1960, Ghai 1986, and Barro 1999). Realizing this crucial role of the rule of law, the 1992 Constitution of Vietnam (Article 4) provided that the socialist state of Vietnam governs society by the law. The purpose of my thesis is to explain the transition process to the rule of law in Vietnam using tools of Law and Economics and the New Institutional Economics. More precisely, I will seek to find out the answer to the question of how has the transition to the rule of law in Vietnam been carried out so far? And how will it be carried out in the future?

In order to meet the requirements of a market economy and under the pressures of international integration, the law-makers of Vietnam seem to forcedly copy legal institutions, including the rule of law, originated in western countries regardless of their appropriateness

with a society in which they will come into force. This may lead to the incompatibility of those institutions with the informal institutions that have been rooted in the society of Vietnam for thousands of years. Therefore, the next question that will be dealt with in my research is how do informal institutions constrain and shape the trend of transition process to the rule of law. In this process, the rule of law conceived as a “rhetorical ideal” originated in western countries (Fallon, 1997) must be put into the context of Vietnamese society, which is still heavily influenced by informal institutions.

In the literature, the judiciary system is conceived as the “guardian” of the rule of law (e.g. Aaken et al., 2003). The authors further argue that to fulfil such role, the judiciary must be independent from the other branches of government (Aaken et al, 2003, 2). It is because judicial independence is regarded as a tool to prevent the arbitrary actions of government, which are not in conformity with “pre-existing general principles of law” (Hayek, 1976: 169). However, judicial independence is a prerequisite for the transition to the rule of law and for the economic reform as well. The relationship between judicial independence and the rule of law is precisely described by Jarquin and Carrillo as follows:

“Without judicial independence, there is no rule of law, and without rule of law the conditions are not in place for the efficient operation of an open economy, so as to ensure conditions of legal and political security and foreseeability” (Jarquín & Carrillo 1998: vii)

If the rule of law is guaranteed by an independent judiciary, another important question is whether Vietnam’s policy makers and citizens have incentives to promote judicial independence. Suppose that the answer to this question is yes, the next question will be how to establish judicial independence in the context of building the rule of law in Vietnam? To clarify these issues, a thorough analysis of the development of the judiciary system in Vietnam is needed, especially measuring its independence in terms of both de jure and de facto indicators.

The rest of the chapter will be structured into four sections. Section II will introduce briefly the renovation process known as “Doimoi” in Vietnam, which is a background for the transition to the rule of law currently undertaken in Vietnam. Section III provides a review of literature dealing with institutional reforms in transition countries from a Law and Economics and a New Institutional Economics perspective. The main contents of the thesis are mentioned in section IV. In this section, I also present the main hypotheses of the study.

I. The renovation know as “Doimoi” – a background for the transition to the rule of law in Vietnam

I.1. Economic reform

After the unification of Vietnam (the 1976-1979 period), the country began a “trial-and-error” process to find a suitable path of development. Policy-makers chose a Soviet-inspired *centrally-planned model* that resulted in underdevelopment of Vietnam’s economy. Under this system, the state and collective sectors, which were highly subsidized by the state budget, were the foundation of the economy; there would be no room for small-scale firms; and the market mechanism was eliminated. This system proved to be inefficient and costly, leading to budget deficits and increasing foreign debt., Although it led to greater egalitarianism, it discouraged overall economic growth. As in the talk with a French journalist - Stanley Karnov in 1981, Mr Pham Van Dong, then the Prime Minister, said that “Yes, we defeated the US , but now we are plagued by problems. We do not have enough to eat. We are a poor, underdeveloped nation. Vous savez, waging a war is simple, but running a country is difficult” (Karnov 1997, p. 36).

Accordingly, *economic reform* began to take hold in the period 1980 – 1986 with new economic policies to encourage economic efficiency, loosen central management (reduce direct intervention of the government), etc. However, the economy continued to suffer from many weaknesses by central bureaucratic management or state subsidies and so on. Consequently, by 1986, the economy was at a standstill, the annual rate of inflation was over 700 per cent, exports were less than half of imports and there was no foreign direct investment (FDI) (Arkadie & Mallon, 2004). It is noteworthy that the economic crisis led to a social and political crisis as the public confidence in the Party and State declined. Therefore, the Government was forced to adopt more integrated and consistent reforms since 1986. These reforms were proposed by the Sixth Party Congress of the Communist Party of Vietnam (CPV) in 1986. Through this Congress, the CPV adopted the renovation program known as Doi Moi that will be discussed in detail below.

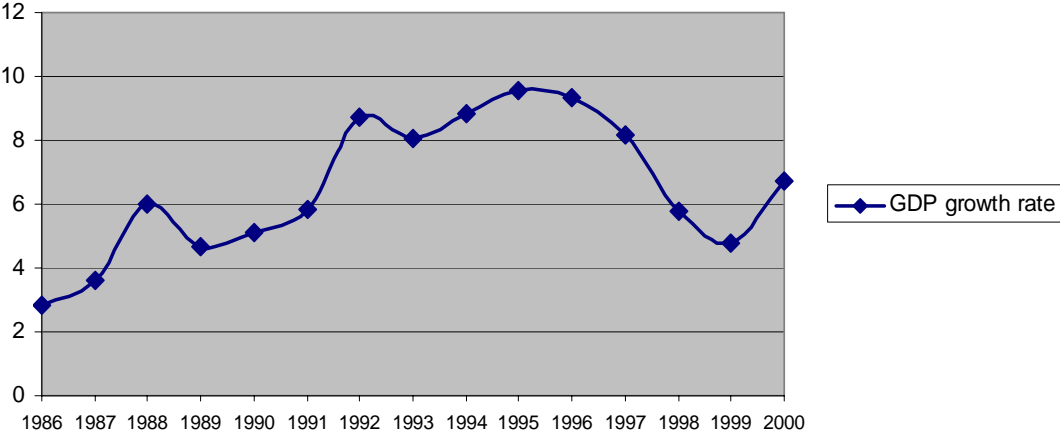
Some foreign observes such as Sachs (1996), Dollar (2001) and Popov (2005) have catalogued the Vietnamese economic reform as a “big bang” or “shock therapy” reform. In contrast, sharing the view that the initial conditions of Vietnam (and China) are essential to its success, Griffin (1998) or Godoy & Stiglitz (2006) insist that Vietnam and its neighbour have

been adopting a gradual approach to the reform. After ten years of Doimoi, Fforde & de Vylder (1996) start to carefully evaluate the reforms from various aspects. One of the most important messages in their study is that the reform is in the nature of a “bottom-up” process, and the renovation is therefore responsive rather than proactive. It was the fact that the reform process was initiated through partial, unofficial relaxation of constraints, which are called “fence-breaking”¹. This change was gradually and officially recognized through the sixth, seventh, eighth and ninth Party Congresses of the CPV in the years of 1986, 1991, 1996 and 2001 respectively. There are three principles which Doimoi is based on and which continue to guide the reform process currently, namely (i) a transition from a centrally-planned to a socialist market-oriented economy, aiming at modifying the economic structure by acknowledging the existence of many economic components, including the private sector and foreign ownership, and giving enterprises an active role and self-responsibility for their business efficiency, (ii) the democratisation of social life, with the aim of developing the rule of law in a socialist state of the people, by the people, and for the people, and (iii) the implementation of the open door policy and the promotion of cooperation and relations for peace, independence and development with all countries.

It is worth noting that the “Doimoi” has had a direct effect on economic development, especially the economic growth in Vietnam (see Figure 1.1). A look at Figure 1 can claim that the Vietnamese economy expanded by high growth rates. Since 1986, Vietnam has maintained high annual GDP growth rate, and the economy continued to gain significant achievements in the development process. More specifically, in 1986, GDP growth rate was 2.84%, but in 1995, the economy had been improved considerably with a rather high GDP growth rate of 9.54%. However, due to the influences of the Asian crisis, from mid of 1997 until 1999, the economy had to face with fierce difficulties that arose from the external negative affects and revealed economic weakness. While most economies within the region were seriously damaged, Vietnam’s economy still grew at a comparatively high rate, however with a decrease annually. In 2000, the economy had achieved a more stable development with GDP growth rate of 6.75%.

¹ The term is used by Youth newspaper online.

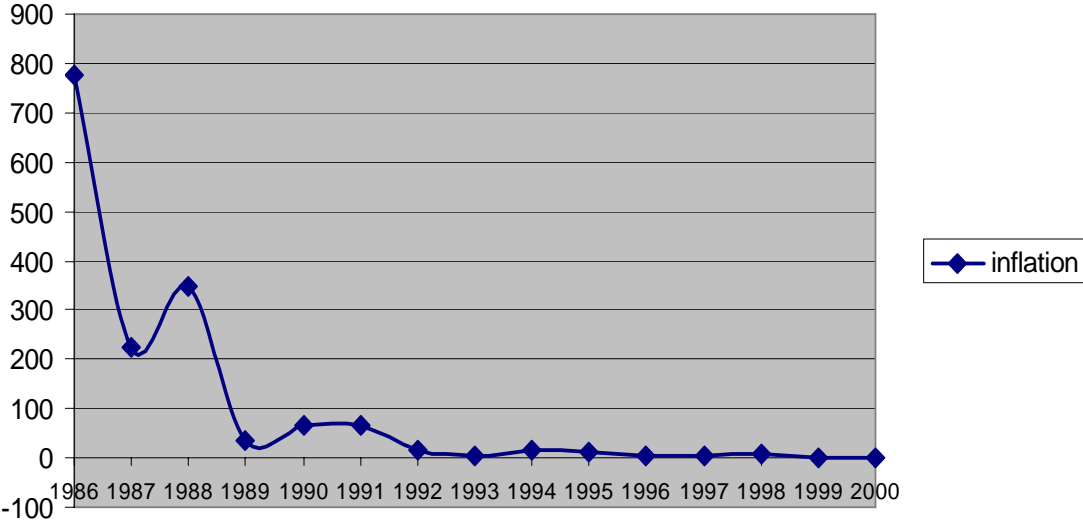
Figure 1.1: Growth in the period 1986-2000 (%)



Source: GSO (2000, 2001)

In terms of macroeconomic stability, inflation has been reduced and fiscal deficits have been contained to acceptable levels (see Figure 1.2). For instance, inflation rate was 774.7% in 1986, 4.5% in 1996 and -0.6% in 2000.

Figure 1.2: Inflation in the period 1986-2000 (%)

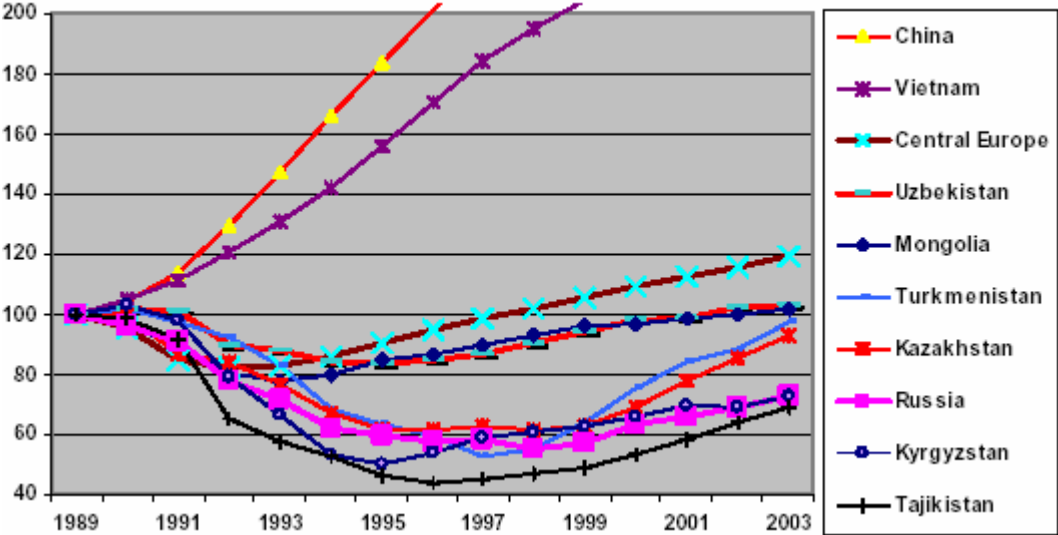


Source: GSO (2000, 2001)

Strikingly, the economic performance of Vietnam is even better than many other transition countries, except China. Figure 1.3 shows that, if counting from 1989 - the year in which

reforms began in most socialist countries - Vietnam and China have the highest GDP growth in comparison with other former socialist countries, especially those in Asia and the former Soviet Republic. In recent research, Godoy and Stiglitz (2006) also suppose that up to now, China and Vietnam are the most successful transition economies (p. 2).

Figure 1.3: GDP change in transition economies (1989 = 100%)



Source: EBRD, WB; cited in Popov 2005

However, the economic and political transformation in Vietnam still faces many difficulties and obstacles. After 1997, when signs of slowdown arose, the Vietnamese economy itself began to reveal many weak characteristics. The reform has to cope with further challenges and foreign observers seemed to be less enthusiastic with the situation of Vietnam and call for further changes (Kokko 1999; Anderson 1999, and Litvack & Rondinelli 1999). The considerable difficulty is the decrease of foreign direct investment and export, which were major factors leading to economic growth in the last decade (see Table 1.1).

Table 1.1: Decrease of foreign investment and export

	1995-1997	1997-2000	2000-2002
Annual Growth of \$ Exports (%)	17.9	12.6	7.0
Foreign Direct Investment per Capita in US Dollars	29	17	17

(Source: IMF cited in David O. Dapice 2003)

Notably, even before the Asian crisis in 1997, Le Dang Doanh (1996) also predicts the slowdown of the Vietnamese economy if the reform fails to deal with the idle state sector. It is because the CPV and the State of Vietnam have developed a so called “socialism-oriented market economy” model where the state sector should dominate the economy. Although it is still unclear how the “domination” role of the state owned enterprises (SOEs) should be implemented, the state-sector had firmly increased until the mid 1990s and been standing for a share of 40% GDP since then, but there is a sign showing that its share continues to fall because its growth has lagged behind that of foreign-invested and local private firms (Ngoc Q. Pham and Thanh D. Nguyen 2005).

In sum, after 15 years of economic renovation, Vietnam has got a great deal of encouraging results, for example high economic growth, ensuring financial stability, etc... However, the country still faces a number of important challenges, not least the problems of SOEs. In the following, I will assess significance of renovation to legal institutions in Vietnam.

I.2. Legal and political reform

The legal reform also took place very early and contributed significantly to the economic development of Vietnam. Before 1992, in order to implement the reform policy of the CPV, the government of Vietnam even issued some regulations contrary to the 1980 Constitution. For instance, while the 1980 Constitution only provided for a centrally planned economy with two types of ownership (state ownership and collective ownership), the Resolution No. 10 issued in 1987 and following regulations concretizing this solution aimed at abolishing the collective farm system and granting individual farmers the land-use rights. As a result, the agriculture of Vietnam developed very quickly and gained legendary achievements. Vietnam was no longer an importer of rice, but became an exporter of rice ranking 2nd in the world. Another contradiction with the Constitution 1980 is the enactment of the first Foreign Investment Law of Vietnam on December 29, 1987. This law opened the way for the FDI flow to Vietnam in the early 1990s that contributed to the dramatic growth of the Vietnamese economy at that time.

The dramatic development of legal and institutional reform in Vietnam began in 1992 with the enactment of the 1992 Constitution. With the aim of economic reform to establish a market economy, the 1992 Constitution grants individuals the private ownership of their income, savings, residential houses, living and production means, funds and other assets in business. However, with the socialist oriented goal, it also provides that the state ownership

and collective ownership are foundations of the economy. Consequently, State-owned enterprises (SOEs) should play the leading role in the economy.

In order to deal with the inefficiency of the state sector as mentioned above, the government launched a reform program in the early 1990s and successfully reduced the number of SOEs from some 12,000 to about 6,000 by April 1995 (Webster and Amin, 1998 cited in Ngoc Q. Pham and Thanh D. Nguyen 2005). However, according to many authors, the Government's SOE restructuring programs did not mean to weaken their economic power but only aims at strengthening the state sector (Ngoc Q. Pham and Thanh D. Nguyen 2005). During the eighth Party Congress (1996), the CPV reemphasized the "leading role" of the state sector as a strategic task in building the market economy with socialist orientation. The state investment then has been accelerated more rapidly than during any other period. This development may, however, lead to overdue debt of banking system in the future.

Notably, with the aim of providing a legal environment for a market economy, a great deal of private laws was also issued after 1992 (e.g.: the Civil code enacted in 1995 and went into force in July, 1996; the Labour Code 1993, the Commercial Code 1997, the Bankruptcy law 1993, etc.). The 1992 Constitution does not only provide for a legal framework for the development of a market economy, but also for a legal foundation for the development of the rule of law which will be analysed in chapter 3.

Parallel with the law reform, the government structure of Vietnam was also somewhat changed in order to make it compatible with a market economy. Although centralization of powers is still the fundamental principle of organization and operation of government, functions and structure of the state organs in Vietnam have been defined more clearly and separately. Together with clear definition of state organs' functions, institutional reforms focus on defining the leading role of the Party and the management role of the State because before "Doimoi", there was a confusion between the role of the state and that of the Party in management. For a long time, social and economic management activities were based on "direct resolutions" issued by Party's Committees from the central to local levels rather than state organs. After "Doimoi", the Communist Party has restrained itself to the role of orientation and policy-making, rather than direct participation in management activities where state organisations should be in charge. Therefore, independent decisions proposed by state organs at all levels (including representative bodies like the National Assembly and the People's Councils) have become much more important. Recently, the CPV and the State of Vietnam have recognized the importance of administrative and judicial reforms. For instance,

the current important Resolution of CPV (Resolution No.8 issued on 2nd January 2001) deals with such reforms.

Although there are a lot of substantive efforts to promote institutional reform, Vietnam still faces many shortcomings and deficiencies of its legal institutions. First, the most serious problem currently in Vietnam is the overwhelming development of arbitrary discretion by officials in the government as well as the CPV. Although the rule of law is mentioned in the 1992 Constitution, it is still not adequately perceived and applied in daily activities of state organs and their officials. Consequently, the individual rights are frequently infringed. Notably, the overwhelming development of arbitrary discretion can lead to numerous contradictory regulations in the legal system, the disaster of corruption among officials at all levels and so on. Arbitrary discretion in the CPV and Vietnamese government, therefore, is the main obstacles of the transition to the rule of law in Vietnam as analysed in chapter 3.

Second, it is a fact that there is a terrible gap between the law “on the book” and the law “in action” in the legal system of Vietnam. After more than 15 years of reform, the state organs of Vietnam have issued a considerable number of laws and under-law regulations. However, instead of using laws, people prefer to rely on a great deal of informal institutions as social norms and family rules to solve their daily transactions. Therefore, there is a phrase said in Vietnam currently that “the state of Vietnam has a forest of laws but its citizens live with forest-law”. As pointed out in the World Bank report on “Judicial systems in Transition countries” in 2005, implementation problems are not only unique in Vietnam but also emerge in many transition countries (p. 13). This problem raises a question about the compatibility of the laws with the informal institutions in society. Chapter 3 and 4 of my research will explicitly deal with this question.

Realizing the importance and difficulty of legal and institutional reforms, the World Bank and other donors have funded the transition countries, including Vietnam, to deal with these reforms. Since the early 1990s, the World Bank has supported a great deal of projects regarding legal reforms in Vietnam². Since 1995, UNDP has got in touch with Vietnamese government to support Vietnam’s efforts in this area. Accordingly, there are also some UNDP’s projects focussing on the legal and institutional reform in Vietnam (e.g.: the project on Strengthening Legislative Capacity in Vietnam or on Strengthening Judicial Capacity in

² See more detail in the website of WB: <http://www1.worldbank.org/publicsector/legal/worldbank.htm>

Vietnam and Strengthening Public Procurator Capacity in Vietnam³). International assistance is very important for the transition of Vietnam currently. However, in order to overcome various shortcomings in economic as well as legal and political reforms and to promote economic development in Vietnam, Vietnamese leadership needs to understand the “nature of institutions and how they evolve” in society as suggested by North (2000). This is also the main purpose of my dissertation.

II. The literature: a brief review

In this thesis, I will use theoretical tools of Law and Economics as well as the New Institutional Economics in order to explain the transition to the rule of law in Vietnam. Therefore, it is necessary to review some basic theories concerning various aspects of this transition process. Accordingly, my research will complement the existing literature on the field of institutional reform and transformation to the rule of law.

II.1. The concept of the rule of law

The first task of my research is to define the conception of the rule of law. I survey the literature dealing with the definition of institutions and the rule of law, and then prove that the rule of law is a set of formal institutions originated in the West.

I will base my discussion on the institutional economics literature to analyse the concept of institution, notably studies of Stefan Voigt and Douglass C. North. In the book published in 1990 and entitled “Institutions, institutional change and economic performance”, North defines institutions as “the rules of the game in a society or, more formally, ... the humanly devised constraints that shape human interaction” and points out that “they consist of formal written rules as well as typically unwritten codes of conduct that underlie and supplement formal rules” (1990, p. 3 - 4). In another work, North clarifies the definition of institution as “a set of rules, compliance procedures, and moral and ethical behavioural norms designed to constrain the behaviour of individuals in the interests of maximizing the wealth or utility of principals” (1981, p. 201 - 202). In addition, another definition can be found in Voigt and Kiwit (1999). In their view, institutions consist of two components, namely a set of rules, and a corresponding enforcement mechanism (p. 6).

³ see more detail in <http://www.undp.org.vn/>

An important point is how to divide institutions into formal and informal institutions? North (1990) divides institutions into “formal constraints” as rules that human beings devise and “informal constraints” as conventions and codes of behaviour. Following this definition, Aoki (2001) argues, “humanly devised constraints may be informal (e.g., social norms, conventions, and moral codes) or formal (e.g., consciously designed or articulated)”. He explains further: “formal rules include political rules (constitutions, regulations), economic rules, and contracts” (Aoki, 2001, 5). Voigt (2002) separates institutions into internal institutions and external institutions basically by defining whether the enforcement mechanism is based on state enforcement or not. Only external institutions are based on state enforcement according to his definition. To sum up, formal institutions are a set of formal rules subject to a state enforcement mechanism. In this study, I apply this notion of formal institution to define the rule of law.

The meaning of the rule of law can be traced back to viewpoints drawn out from the works of some great scholars in the age of enlightenment as John Locke, Jean-Jacques Rousseau and Montesquieu, who provided the most influential contributions to the ideal of the rule of law. However, the conception of the rule of law seems to be more difficult to subsume under a common viewpoint. According to Fallon (1997), the precise meaning of the rule of law is perhaps less clear than ever before (p. 1). Other authors as Hager (1999) show that it is even more difficult to reach a common view about the core components of the rule of law even among scholars and lawyers of the West where the rule of law arose.

As pointed out by Melissa Thomas (2001)⁴, the benefits of the rule of law depend on how the Rule of Law is defined. The basic ideal of the rule of law is that even a government as well as its agents should also be subject to the general law just as all other citizens. Obviously, there have been various approaches to defining the rule of law. According to the author, there have been two types of rule of law. The first is "substantive" rule of law, defined to be rule according to some particular set of laws that are valued for their content, such as guarantees of basic human rights. The second is "formal" or "procedural" rule of law, defined to be rule according to any laws generated by some legislative process, even if they are "bad" laws. The “formal” approach, therefore, had been cited by Hayek (1960). In the book *Constitution of Liberty* (1960), he wrote:

“The rule of law, of course, presupposes complete legality, but this is not enough, if a law gave the government unlimited power to act as it pleased, all its actions would be legal, but it

⁴ see more detail in her paper, available at: <http://web.worldbank.org>

would not be under the rule of law. The rule of law, therefore, is also more than constitutionalism: it requires that all laws conform to certain principles” (p. 205).

Those principles, to which all laws should conform, require that law must be abstract and general, known and certain (1960, p. 205-210). It is noteworthy that Hayek supposes the rule of law to mean that government must never coerce an individual except in the enforcement of known rules. He thus attaches the separation of state powers and independent judiciary as integral part of the rule of law (1960, p. 210-211). Accordingly, many researchers - especially those from economics - recently measure the degree of the rule of law by using indicators showing the quality of the court system or judicial independence (e.g.: Gwartney, Lawson and Block 1996; Feld and Voigt 2003; Kaufmann, Kraay and Mastruzzi 2004, 2005).

II.2. Institutional change and the role of informal institutions

There is a great deal of literature dealing with the question of how institutions matter in changing our society (e.g. North, 1990; Voigt and Engerer 2001; Aoki, 2001). North supposes that institutions are “the underlying determinants of the long-run performance of economies” (1990, p. 107). Dealing with the role of institutional reform in transition economies, Voigt and Engerer even claim that “Institutional change was seen as a precondition for economic transition, rather than one the tasks thereof” (2001, p. 150). It can be argued that the transition to the rule of law in one country is a process of institutional change to make its formal institutions to be compatible with an open market economy. It is also assumed that the inherent informal institutions existing in that country impact considerably on this process.

Since influences of informal institutions on the transition are considerable, the aim of this research is also to seek for the role of informal institutions on institutional change. I base my discussion on two recent notions of institutional change. The first approach is led by North (1981, 1990) who focuses on transaction costs, ideology and path dependence as the primary sources of institutional change. North (1990) notices that although the formal rules might change very quickly, informal institutions are much more impervious to deliberate policies. Consequently, he wrote, “these cultural constraints not only connect the past with the present and future, but provide us with a key to explaining the path of history change” (1990, p. 6).

The second approach is led by Knight (1992) who explains institutional development and change by looking at strategic social conflicts and mechanisms solving such conflicts. As regards the role of informal institutions in institutional change, Knight supposes that formal institutions are designed and created in the foundation of informal conventions and norms.

Thus, informal institutions can limit the number of feasible alternatives from which formal institutions are developed (1992, 171-172).

Applying Knight's approach, Voigt (1999b) provides a theory analyzing the change of constitutions in which the constitution is conceived as a set of formal institutions. He observes constitutional change as the outcome of a bargaining process between the rulers and various opposition groups. He thus suggests that the establishment of opposition groups who could overcome the organization dilemma is regarded as a prerequisite for constitutional change. Under the pressure of opposition groups, the rulers have three options to react: i) they can fulfil the demands of the opposition, ii) they can turn them down and iii) they can offer to negotiate (1999, p. 110). If the rulers decide to offer to negotiate and the opposition accepts the ruler's offer, explicit negotiations will take place which bring about constitutional change.

From reviewing the two approaches on institutional change, it can be realized that informal institutions make institutional change more difficult to be achieved. What are the causes for these obstacles? To deal with this question, I rely on Mancur Olson's approach. In "The logic of collective action" (1965), Olson argues that collective action is difficult and problematical. Therefore, when individuals try to overcome inefficient informal institutions, they will face the collective action problem because changing institutions requires group action. Moreover, it is costly to change informal institutions. A kind of such costs which Olson calls "start-up cost" includes the fear of and resistance to the unfamiliar (1982, p. 38).

Furthermore, informal institutions can induce "psychological cost" to institutional change. The elements of informal institutions such as conventions, norms and beliefs that were internalised in the past are properties of individuals, part of their identity, thus changing one's identity or one's conception is psychologically costly. This implies that one would want to prevent such change (Greif 2003, p. 29). In the world today, we can easily witness various calls for preserving identity of one continent, nation, region, ethnic group, and even special group of people from the globalisation and westernisation, including institutional change.

In short, to understand why and how institutions change and how this change can promote economic development, especially in transition economies, it is necessary to scrutinize informal institutions rooted in these economies and their interaction with new formal institutions and policies. Due to the influence of informal institutions, the transition process to the rule of law in different countries is likely to be different. However, there is a consensus

that building and ensuring judicial independence is a prerequisite for the transition to the rule of law.

II. 3. The incentive of making judicial independence

In the traditional literature of Law and Economics, especially on constitutionalism, judicial independence is regarded as a tool to prevent arbitrary action of government. According to Feld and Voigt (2002), judicial independence keeps the government official's acts within the limit laid down in the constitution and the laws. Consequently, while ordinary citizens tend to support judicial independence to constrain arbitrariness, privileged groups in government in contrast, are inclined to hinder this independence.

However, according to the New Institutional Economics, especially the interest group approach, judicial independence also creates a great deal of benefits for the representatives of government. While looking for a solution of the dilemma of the strong state⁵, Weingast (1993) realizes that representatives of government have motives of promising not to infringe into citizens' property rights. Yet their promises will not be perceived as credible if lacking a mechanism constraining their activities. Therefore, rational governments have an interest in establishing an institutional constraint mechanism that could help them to keep their promises credible. This mechanism makes promise breaking costly. In other words, if the expected utility from accomplishing is higher than from breaking their promise, representatives of government can be expected to stick to their promises. Judicial independence, thus, encourages citizens to trust in the relevance of the rule of law (Feld and Voigt 2003). Along similar lines, Landes and Posner (1975) argued that an independent judiciary can prolong the life span of legislative deals beyond the term of the legislator. An independent judiciary enables legislators to do this by reducing the possibilities of post-contractual opportunism either by themselves or by their successors. Legislators, therefore, have a tendency to maintain judicial independence because their own rents will be higher.

Additionally, judicial independence could help government to persuade individuals to comply with their contracts as well as believe in the enforcement of the law (Feld and Voigt, 2002). This aspect is especially important in transition countries where some fundamental institutions of an open market economy such as private property rights, economic freedom, and contract

⁵ The "dilemma of the strong state" emerges when citizens rely upon a strong state to secure their private property rights and contracts, but they are also in fear of expropriation from the strong state (Weingast, 1993). The conception of "the dilemma of the strong state" in the context of transition country will be analysed in detail in chapter 3.

law have just emerged. If the government is incapable of protecting private property rights and enforcing contracts, individuals will opt for informal institutions to protect their property rights. It is the case of underground economy (e.g.: de Soto 1989; Feige 1990; Voigt and Kiwit 1995). However, it will be costly for entrepreneurs to maintain their business under a pillar of informal institutions in the long run. Entrepreneurs will thus invest less or simply shift their activities to the countries where the state has enough competences in protecting their assets. Judicial independence, therefore, is a very important factor in promoting economic growth. It would be difficult to deny that a rational government is always interested in economic growth.

III. The main contents of thesis

Two theoretical issues pertaining to the nature of my research are worth mentioning. First, I will solve issues, to which very little attention has been paid in the existing literature, regarding the question of how to advance the rule of law in a transition society where informal institutions play a dominant role. Over the years, there have been a number of papers and reports showing how informal institutions may hinder the emergence of the rule of law (e.g. Cooter, 1996; Stiglitz and Hoff, 2002; Gelman 2000; Voigt, 2002, 2003c). However, those papers have not yet given a clear solution for this problem. Furthermore, each transition country has its own formal and informal institutions with different characteristics. We should, as pointed out by North (2000), understand the nature of those institutions and how they evolve. In part I of this research (Chapter 2, 3 and 4), I will put more emphasis on those aspects that have received insufficient attention with the focus on the context of transition to a market economy and the rule of law in Vietnam. At the same time, I will seek to provide some complementary solutions. The arguments in my dissertation rely chiefly on a qualitative approach. In the first part, using discourse analysis, my research reviews the literature of Law and Economics and the New Institutional Economics regarding the rule of law, the transition process, institutional change, and so on

Second, as mentioned previously, it seems to be well discussed about whether rational politicians will protect judicial independence or not. However, those findings both in theoretical and empirical perspectives mostly focus on democratic regimes where the opposite groups or opposite parties are allowed to be established. It is still not clear whether policy makers in transition countries where pluralist democracy is not accepted (e.g. Vietnam or

China) have incentives in building and assuring the independence of the judiciary. Supposing that the state leaders have such incentives or they pretend to, the next question is how they can promote Judicial Independence on the one hand, but retain the sole leading role of the Party on the other hand. Further, one can have doubts about the credibility of their promises as they are frequently not properly fulfilled in reality (e.g., see Feld and Voigt 2003). Yet, scholars have paid little attention to these problems, which is indicative of a gap in the literature. Part II of this thesis, consisting of Chapter 5 and 6, will try to fill up this gap. Drawing from the theoretical analysis and empirical findings in part I and II, the last chapter will conclude with some suggestions for policy implication.

III.1. The failure of the rule of law

Based on Hayek's approach on the conception of the rule of law, in Chapter 2 of this thesis, I define the rule of law as a set of formal institutions, consisting of two components:

i) The set of formal rules, namely (i) an equal treatment of all people before the law, (ii) constitutional and actual guarantees of basic human rights and property rights, (iii) a legal system that is fair, transparent, certain and general, and (iv) an effective mechanism to constrain government discretion.

ii) State enforcement mechanism: in which the judiciary is the main enforcer who imposes sanctions to the individuals or state organs that do not comply with the formal rules of the rule of law.

As argued in chapter 2, in the East Asian countries where the Confucian thought plays a dominant role in history, the concept of the rule of law that was applied in the West has played a marginal role at best. In order to meet the requirements of a market economy, some transition countries in East Asia have "imported" the concept of the rule of law as a set of formal institutions originated in the West. In my judgement, this transition process may lead to the failure of the rule of law. Inspired from the theory on the failure of institutions developed by Voigt and Kiwit (1999), my research tries to show why the failure of the rule of law occurs.

Chapter 3 of this study examines the failure of the rule of law in the specific case of Vietnam. After examining the concept of "socialist rule of law" being built in Vietnam, I analyze some main dilemmas and obstacles to this transition process. It is argued that the prevalence or dominance of the informal institutions over formal institutions may create obstacles to the rule

of law in many transition countries including Vietnam. Additionally, it is evident that arbitrary discretion of government appears to be a crucial obstacle to the rule of law and hinders the transitional process to the market economy in Vietnam. Arbitrary discretion has emerged in all branches of government, especially in the executive branch. Moreover, while implementing its sole leading role, the CPV exploits its arbitrary powers, which lead to a weak performance of all government branches. As a result, the legal system is inconsistent and overlapping, and there is no effective mechanism for enforcing the Constitution and the laws. Individuals and enterprises have to bear arbitrary powers as well as corruption of officials whilst the court system protects inefficiently their rights from infringements of executive bodies.

III.2. The gradual transition to the rule of law in Vietnam

Concerning the role of informal institutions in a transition society, this study demonstrates in chapter 3 that when the formal contents of the rule of law are not compatible with the informal institutions, the transition to the rule of law is likely to fail. Therefore, policy makers in transition countries are facing a dilemma. On the one hand, the development of the market economy requires political reform in which the transition to the rule of law is considered as a pre-condition. On the other hand, the emergence of the rule of law meets with the resistance of informal institutions. In this context, how can the country surmount such a dilemma? What are solutions to the conflict between the rule of law and informal institutions?

Chapter 4 of my study will deal with those questions. I will provide a detailed discussion about the role of informal institutions in institutional change generally and in the transition to the rule of law particularly both in theoretical and empirical grounds. The research then employs a qualitative approach to the case study of transition in Vietnam to elucidate underlying theoretical issues. This chapter, therefore, gives empirical evidences showing the impact of Confucian values, as dominant cultural factors in Vietnam's society, on the transition to the rule of law. One of the most important tasks is to make a cautious analysis of the characteristics of Confucian values that dominate the daily life of people in Vietnam currently. After defining such characteristics, I will compare them with the core elements of the rule of law to assess whether they are supportive or unsupportive. Accordingly, I will suggest some possible solutions to the transition to the rule of law in Vietnam.

Due to the influence of Confucian values, it is argued that the transition to the rule of law must be gradual. More specifically, the institutional elements of the rule of law will be

established progressively. In my judgment, because the rule of law is a set of formal institutions with various elements, the transition countries should apply gradually parts of the Western model rather than copy it entirely at once. Furthermore, the informal institutions also need to be adapted, but not to be removed. For those reasons, in Chapter 4, I hypothesise that not all elements of informal institutions of a transition society are contrary to the rule of law. Therefore, an efficient element of informal institutions can merge into a new institutional arrangement. Another hypothesis in this chapter is that if some elements of informal institutions are inefficient, but still influence considerably a people's lifestyle, they should not be changed immediately. The empirical evidences in the World Values Survey (1995-98, 2001) and the Pew Global Attitude Survey (2003) regarding the main features of Confucian values in Vietnam currently seem to reinforce these hypotheses.

III.3. The promotion of JI in the transition of Vietnam

As mentioned already, due to various reasons, rational governments will be interested in promoting judicial independence. However, the question is how they implement judicial independence. In order to find the answer to this question, using the approach provided for by P – A theory, I scrutinize the theoretical foundations for making JI, namely separation of powers and domestic delegation of powers in chapter 5. Accordingly, I analyse various aspects of the independence of the judiciary. Finally, the chapter explains why policy makers in transition countries like Vietnam are in support of using delegation of powers rather than separation of powers to make the court system more independent.

The next content of my thesis is to explain why the leadership in Vietnam currently has incentives in promoting judicial independence. The main argument in chapter 5 is that even in a non-pluralist democratic country like Vietnam, there have been some reasons inducing the leadership to promote judicial independence. It is because the leadership wants: (i) to satisfy criticism on government so as to prevent the rising of opposition in the future, (ii) to enhance their credibility in order to surmount the dilemma of the strong state and (iii) to assure the enforcement of the laws to attract more investment. For those reasons, the CPV and Vietnamese government proposed judicial reform aiming at making JI.

Obviously, one might have doubts that the promise of promoting judicial independence is only an empty promise, which leads to the situation of the so - called “insufficient credibility in domestic delegation of power”. This explains why rational countries will delegate relatively more powers internationally as the creation of domestic independent agencies will often not

be a credible commitment (Voigt 2004, p. 2). Therefore, in chapter 6, I hypothesize that while some political and legal reforms in Vietnam aiming at making the judiciary system more independent seem to be radical, their effects are moderated in practice. In other words, although the CPV and the state leaders have incentive in promoting an independent judiciary, judicial independence is still not properly implemented in Vietnam.

PART I

THE TRANSITION PROCESS TO THE RULE OF LAW IN VIETNAM

Chapter 2

The rule of law – a formal institutional arrangement originated in the West

“Policymakers need to be clear about they mean by the rule of law because answers to many of the questions they are interested in – whether “rule of law” facilitates economic development and whether democracy is a necessary precondition for rule of law, to cite just two examples – depend crucially on what definition of the rule of law is being used. Moreover, the multitude of rule of law concepts is likely to breed confusion and misunderstanding between donors and recipients, or even within different members of the same community”

Matthew Stephenson (2001)

I. Introduction

In recent years, many studies focusing on analysing the benefits and the role of the rule of law on economic development have appeared (Hayek 1960; Ghai 1986; Knack and Keefer 1995; La Porta et al.1997; Barro 1999; Voigt 2003b). Barro (1999) for example, tries to determine aspects of institutional reform which matter for long-run economic performance. He has identified two strands of institutional reform that have effects on the economic transition namely: (i) strengthening democracy; notably the electoral rights and civil liberty on the one hand and (ii) the promotion of the rule of law on the other hand; notably a focus on property rights and the legal system. He concludes that the rule of law plays a more important role in economic performance than democracy. In another study, La Porta et al. (1997) also find strong evidence illustrating that the legal environment and institutional quality (one of the measures used to proxy for the rule of law) have a significant effect on the size of capital markets.

Since the rule of law is recognized as a prerequisite condition for the transition to a market economy, there are various projects aiming at promoting the rule of law in transition countries, carried out by governments as well as international organizations, especially those

of the World Bank. In the introduction of the program “the rule of law and development”, the World Bank provides a clear statement namely: “It is widely believed that well-functioning legal institutions and a government bound by the rule of law are important to economic and political development. As a result, practitioners in the development field have turned increasing attention to reforms intended to improve legal institutions.”⁶

Thomas (2001)⁷ pointed out “the benefits of the Rule of Law depend on how the Rule of Law is defined”. It is therefore necessary to clearly understand the conception of the rule of law as well as its components. However, the concept of the rule of law still has not been understood appropriately in many transition countries. In Vietnam for example, it is simply described as a requirement of compliance with the law by all members of society including the State⁸. There has been a common opinion in Vietnam as well as in other Asian countries that the rule of law is a set of political and legal theories that is only suitable in the Western society in which the individual liberty have a root (Jayasuria, 1999, Tran Duc Luong, 2003). Recently, the concept of the rule of law and its components has been debated not only in Asian countries, but also in Western countries. It seems that a definition of the rule of law that everybody could agree upon is not available. As Fallon (1997, 1) claims, “the precise meaning of the Rule of law is perhaps less clear than ever before”. It is even more difficult to reach a common view about the core components of the rule of law even among scholars and lawyers (Hager, 1999 and 2000). For example, the dissimilarity of the rule of law between Anglo-American concept and Continental European concept has been argued in the works of Dicey (1884); Hayek (1960) or in recent studies of Fallon (1997) or Hager (2000). Some scholars, for example Craig (1997) and Fallon (1997), clarify components of the rule of law by using the conception of “formal” and “substantive” rule of law.

In the book “The rule of law, foundation of constitutional democracy” (1988), Geoffrey de Q. Walker raises question of how we would go about defining the rule of law by means of the institutional approach as we have described it. The main purpose of this chapter is to build a conception of the rule of law and to clarify its components by using the approach of the New

⁶ see more detail at: <http://www1.worldbank.org/publicsector/legal/ruleoflawanddevelopment.htm>

⁷ Her paper available at: <http://www1.worldbank.org/publicsector/legal/western.htm>

⁸ Such a kind of this definition on the rule of law present in some textbooks e.g.: “The rule of law and civil society” Institute of Social Science Information, 1991 or in “The theory of State and Law” Vietnam National University Press, 2001.

Institutional Economics. In the following section (section II), I survey the literature dealing with the historical development of the idea of the rule of law in the West in order to compare it with the notion of the rule by law used in East Asia. Section III deals with the definition of formal institutions and the rule of law. Subsequently, the core components of the rule of law will be analysed in section IV. Section V contains analyses about the failure of the rule of law. The last section concludes.

II. The rule of law – a brief history

II. 1. The ideal of the rule of law originated in the West

In order to find the original ideal of the rule of law, one can trace back to viewpoints drawn out from some great scholars in ancient time such as Plato, Aristotle and so on, or in the age of enlightenment, such as John Locke, Jean-Jacques Rousseau and Montesquieu, who provided the most influential contributions to the conception of the rule of law.

The rule of law as an ideal was developed by some Greek philosophers in ancient times. Karl Popper, in *The Open Society and Its Enemies* (1945), said, "our western civilization comes from the Greeks" (p. 151). Similarly, in *The Constitution of Liberty* (1960), F. A. Hayek also derives the very concept of the rule of law from the Greeks. In his discussion about the origins of the rule of law, he emphasizes the word "Isonomia", meaning "equality of law to all manner of person", as the very original term of the rule of law. This term was developed by the ancient Greeks and exists until it is displaced with the new term of "government of law" and "the rule of law" in the 17th century (p. 164). Who did use the word "Isonomia" to deal with the ideal of the rule of law in ancient time? As suggested by Hayek (1960), they are Herodotus and Plato. According to Herodotus, "isonomy" is the most beautiful of all names of a political order (Herodotus, *Histories*, cited after Hayek 1960, p. 165). Plato, however, assumed that the term "isonomy" contrasts with democracy rather than is identical with it. This is because Plato was convinced that the best form of government is rule by a benevolent dictator. But he also added that as a practical matter, persons with the necessary leadership qualities are rare. Accordingly, he imagined a utopia that is governed not by a benevolent dictator, but by Nomos which means the god of Law. Therefore, Plato's great contribution to the ideal of the rule of law is that he saw the rule of law as a system of rules stemming from natural law rather than from being deliberately formed by man.

Perhaps the most important contribution to the ideal of the rule of law is derived from Aristotle. The modern phrase “government by laws and not by men” stems directly from the following statement of Aristotle in the “Rhetoric”:

“It is of great moment that well drawn laws should themselves define all the points they possibly can, and leave as few as possible to the decision of the judges, for the decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it their duty to decide on the definite cases brought before them” (Aristotle, *Rhetoric*, cited after Hayek 1960, p.165 - 166)

Accordingly, as pointed out by Hayek (1960, p. 165), Aristotle condemns the kind of government in which “the people govern and not the law” and “everything is determined by majority vote and not by law”. In “Politics”, Aristotle also considered whether it is better for a king to rule by discretion or to be subject to law. He found that “it is more proper that the law should govern than any of the citizens, and person holding supreme power should be appointed only guardians and servants of the law”, and that “he who would place supreme power in mind, would place it in God and the laws”, hence, “for, when government is not in the law, then there is no free state, for the law ought to be supreme over all things” (Aristotle, cited in Hayek 1960).

Emphasizing the supremacy of law in society, Aristotle claimed that the law must be natural law. He condemns the laws created by the will of particular individuals because in his view, they create inequality among people and against natural law. He wrote:

“The rule of a master over slaves is contrary to nature, and that the distinction between slave and freeman exists by law only, and not by nature; and being an interference with nature is therefore unjust”⁹.

Strikingly, natural rights and natural laws were also mentioned by the American founding fathers. According to them, natural laws and rights existed before the founding of government and the function of government to secure these rights. The “Declaration of Independence” said that all men are created equal, that they are endowed by their creator with certain unalienable rights that among these are Life, Liberty and the pursuit of Happiness¹⁰. The

⁹ Aristotle, Politics, book 1, translated by Benjamin Jowett, available at http://www.constitution.org/ari/polit_00.htm

¹⁰ Cited in the website: <http://www.usconstitution.net/declar.html#Intro>

founders felt that laws of nature justified their revolution as the British government had violated such natural laws.

Although the ancient Greeks had numerous contributions to the rule of law, the rule of law could not be ensured in the ancient time. In fact, there were some practices of individual liberty in ancient Greece (Hayek 1960, p. 164), but the Roman Empire with the unrestrained executive body destroyed the development process of the rule of law in reality. Sachs and Pistor (1987, p. 25) argue that the Roman Republic did not ensure the rule of law in the modern sense due to the lack of constitutional restraints on the executive. Similarly, the French revolution did not induce the emergence of the rule of law. This is because despite the fact that Napoleon's famous codes of law and procedure (1804-1811) guaranteed equality before the law and protected private property rights, they did not infringe on the privileges of the emperor and his spies, censors, and secret police.

However, the ideal of the rule of law was also developed in the Age of Enlightenment by some scholars such as John Locke, Jean-Jacques Rousseau and Montesquieu. John Locke was essentially a pioneer of the Age of Enlightenment. His works have been studied and debated by many scholars and philosophers during the last three centuries. Locke believed that people have the natural ability to govern themselves. He, therefore, rejected the rules derived from other wills, for example those from divine classes that are sovereign in his time. In "Second Treatise of Government" (1690), he wrote:

"A liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be the subject of the arbitrary Will of another, but freely follow his own."¹¹

Particularly, Locke emphasized the importance of democracy because, according to him, democratic government is derived from the consent among people who elect a government to protect their set of natural rights. Locke provided the important point that the only way that men can give up their "Natural Liberty" and put on the bonds of "Civil Society" is by voluntary consent. Therefore, actions of a government that are not supported by that popular consent (leaving aside the complexities of ascertaining that consent) are not valid, or as Locke said, are without authority. In "The Social Contract", Jean-Jacques Rousseau, another scholar in the Age of Enlightenment, argued that the state of nature (where men are not bound by laws) leads to constant competition and conflict, and that society (where men are bound by

¹¹ quoted in the Second Treatise of Civil Government, available at: <http://www.interlog.com/~girbe/locke.html>

laws and norms, “the social contract”) allows men to trade some of their freedom for the protection from others by law. Hence, the legitimacy of government’s action must be based on the general law (social contract) created by all people. According to him, the great problem in politics is how to find a form of government which places the law above men¹². His question was solved by Montesquieu. In his famous work “L’Esprit des Lois” (1784), he gave outstanding solution for this problem, namely the doctrine of separation of powers.

II. 2. The notion of the rule by law in East Asia

In the ancient time, the way of governance used by the East Asian countries was heavily influenced by two philosophical schools in ancient time of China, namely the Confucian school and the Legalist school. Being influenced by these two schools, the legal tradition in China is opposite to the Western individual, rights-based reliance on the rule of law.

Concerning the governance of state and society, Confucianism did not pay much attention to law, but emphasized the importance of rulers and morality. Analyzing Confucian’s view of law, Modde and Morris (1967, cited in Pham Duy Nghia 2002) find out that in Confucianism laws are perceived as not being better than the men who create and execute them. The moral training of the ruler and his officials is more important than the devising of clever legal machinery. This is because Confucianism supposes that as law is applied by men, its effectiveness is entirely dependent on policies and actions of the power holder. Law and regulation cannot be exercised by itself.

In the book “The Dynamic Aspects of the Rule of Law in the Modern Age” (cited in Hager (2000, p. 18), the jurists in South East Asia and the Pacific have pointed out that under the pillar of Confucianism, many states in East Asia were characterized by: (i) Relatively few statutes or similar materials; which tended to be an injunction to comply with certain ethical principles, (ii) non-publication of administrative materials circulated internally within the government among officials, (iii) a bureaucracy, assumed to be drawn from the intellectual elite, which occupied one of the highest if not the highest prestige positions within the society, (iv) unification of the judicial and legislative functions in the hands of the executive, (v) a general dislike for litigation felt by the people and a corresponding lack of “rights consciousness” fostered by active policies of the government. Use of unofficial means of

¹² J.J Rousseau, *Lettre à Mirabeau*, (1826), cited in Hayek (1960)

resolving disputes, such as mediation, was encouraged in place of recourse to courts, and (vi) non-existence of a legal profession.

As pointed out by Carlson and Yeomans (1975), Confucian attitudes had a profound effect on the development of the judicial system in ancient China. The magistrates did not apply universal laws, but sought to induce parties (sometimes under threat of punishment) to accept some mutually satisfactory settlements. Moreover, these attitudes ensured that most disputes were resolved outside the judicial system; maintenance of social order and settlement of disputes depended on informal mediation by local groups such as the clan, the guild, and the village. According to Shiga (1967, p. 48), in the traditional Chinese idea of law, the judge was not a servant of a mechanism aimed at objective truth beyond personal wisdom but was a representative of an omnipotent and compassionate government which held the mandate of heaven to realize harmony in his world. The desire for harmony is a significant feature of Confucian values influencing the legal thought in East Asia. Chapter III and chapter IV of this thesis will analyse more explicitly the influence of Confucian values on the legal thought in the case of Vietnam.

Whereas Confucianism did not lay stress on the laws, the works of the Legalist school, which are contrary to views of the Confucian scholars in China, emphasized the importance of law in society. According to the Tutor Gig Encyclopaedia, Legalism was one of the four main philosophic schools at the end of the Zhou Dynasty. Legalists believed that a ruler should govern his subjects with three means, namely: (i) Fa - the law. The law code must be clearly written and made public. All people under the ruler were equal before the law. Laws should reward those who obey them and punish severely those who dare to break them. In addition, the legal system governs the society but not the ruler. If the law is successfully enforced, even a weak ruler will be strong, (ii) Shu, the method and control. Unlike Confucian thought, morality is not important in Legalism. A strong hand is needed to control the people, or they will become lazy and the law cannot be enforced. Curiously, Legalism considered an official, who performed better than what he was commanded to do, to be as liable for punishment as an official that underachieved, and (iii) Shi, the legitimacy, power and charisma. It is the position of the ruler, not the ruler himself, which holds the power.

Unfortunately, the Qin Dynasty of ancient China only applied the views of the Legalist school for a short time. It was the fact that the Qin Dynasty was brutally totalitarian, thus all of the philosophers and rulers opposed the views of the Legalist school. The failure of this school is because while legalism emphasized the role of laws in regulating society, they did not have

the solution for restraining rulers who do not have to obey these laws. Therefore, the thought of the Legalist school can be regarded as the ideal of rule by law (or rule through law), not the rule of law. The precise ideal of rule by law is that law is considered as means by which the state governs society and that whatever a government does, it should do through laws (Raynolds, 1989).

It is the fact that while publicly promoting the Confucian ideal of governance, rulers and philosophers in East Asian countries seem to base on both schools, Confucianism and Legalism, to govern society. Consequently, in many modern East Asian countries, the ideal of rule by law still has a dominant position in both the literature and the reality of governance. As pointed out by Feinerman (1997, cited in Hager 2000, p. 18), in China, the alleged intent of the State (Party) apparatus and its bureaucrats to achieve rule “by” (or “through”) law rather than rule “of” law has made the rule of law and legal reform debatable both within China and in the West. This is because under the rule of law, the law is pre-eminent and can serve as a check against the abuse of power. By contrast, under the rule by law, the law can serve as a mere tool of a government that suppresses in a legalistic fashion. Similarly, Carothers (1988) observes that some Asian politicians focus on the regular, efficient application of law, but do not stress the necessity of government subordination to it. In their view, the law exists not to limit the state but to serve its power (p. 77).

III. Formal institution and the rule of law

III. 1. The definition of formal institution

There are a great number of definitions of institutions within the New Institutional Economics. As Voigt (2002, p. 33) pointed out, since the NIE is a “young” research program, there has been no commonly accepted definition of institutions. However, there are two main approaches on defining institutions, namely (i) institutions as the results of games (e.g. definition of Schotters 1981 cited in Voigt 2002), and (ii) institutions as the rules of games (e.g. North 1990). In the book published in 1990 and entitled “Institutions, institutional change and economic performance”, North defines institutions as “the rules of the game in a society or, more formally, ... the humanly devised constraints that shape human interaction” and points out that “they consist of formal written rules as well as typically unwritten codes of conduct that underlie and supplement formal rules” (1990, p. 3 - 4). In another work, North

defines institutions as “a set of rules, compliance procedures, and moral and ethical behavioural norms designed to constrain the behaviour of individuals in the interests of maximizing the wealth or utility of principals” (1981, p. 201 - 202). Drawing from the definition of Ostrom (1986 cited in Voigt 2002), Voigt (2002) shows that institutions consists of two components, namely a set of rules and a corresponding enforcement mechanism. Consequently, institutions can be defined as general known rules with a corresponding sanctioning mechanism the use of which is threatened in case of non-compliance with the rule (p. 34).

An important point is how to divide institutions into formal and informal institutions? Voigt (2002, p. 33) separates institutions into internal institutions and external institutions by defining whether the enforcement mechanism is based on state enforcement or not. In his view, only external institutions are based on state enforcement. Accordingly, he lists 5 types of institutions as in table 2.1.

Table 2.1 Types of institutions

Kind of institution	Kind of enforcement	Type of institution
Convention	Self- enforcing	type 1 - internal
Ethical rule	Self- commitment of the actor	type 2- internal
Custom	Informal societal control	type 3- internal
Private rule	Organized private enforcement	type 4-internal
State law	Organized state enforcement	External

Another classification can be found in the study of North (1990). North divides institutions into “formal constraints” as rules that human beings devise and “informal constraints” as conventions and codes of behaviour. Following this definition, Aoki (2001) argues, “humanly devised constraints may be informal (e.g., social norms, conventions, and moral codes) or formal (e.g., consciously designed or articulated)”. He also added that “formal rules include political rules (constitutions, regulations), economic rules, and contracts” (Aoki 2001, p. 5). From such two classifications, it can be defined that formal institutions are a set of formal rules, which are created or recognized by government and subject to a state enforcement mechanism.

III. 2. The conception of the rule of law

The conception of the rule of law, as pointed out above, seems to be more difficult to subsume under a common viewpoint. As a consequence, even in Western democracies, the rule of law belongs in the category of open-ended concepts that are subject to permanent debate. Nevertheless, in common sense, the rule of law means that everybody, the government and its agents included, must be subject to the same rules promulgated publicly, and laid down in advance. The idea behind it is that individuals should be protected against arbitrary use of official power since state authorities are also bound by the law themselves.

There are three basic definitions of the rule of law¹³ classified according to whether they emphasize formal characteristics, substantive outcomes or some performed functions. The “formal definition” of the rule of law emphasizes the measurable characteristics of the rule of law or legal system. According to Craig (1997), formal conceptions of the rule of law deal with: (i) the manner in which the law was promulgated (was it by a properly authorized person...); (ii) the clarity of the ensuing norms (was it sufficiently clear to guide an individual’s conduct so as to enable a person to plan his or her life, etc.); and (iii) the temporal dimension of the enacted norm (was it prospective...). Most formal definitions are based on the view that the rule of law is measured by some explicit standards, namely an impartial judiciary; laws that are public; the absence of laws that apply only to particular individuals or classes; the absence of retroactive laws; and provisions for judicial review and so on.

However, formal definitions of the rule of law have two main shortcomings. First, formal conceptions of the rule of law do not seek to assess the actual content of the law. They are not concerned with whether the law was in that sense a “good” law or a “bad” one. The “formal” approach, therefore, was criticized by Hayek (1960). In the book *Constitution of Liberty* (1960), he wrote:

“The rule of law, of course, presupposes complete legality, but this is not enough, if a law gave the government unlimited power to act as it pleased, all its actions would be legal, but it would not be under the rule of law. The rule of law, therefore, is also more than constitutionalism: it requires that all laws conform to certain principles” (p. 205).

Those principles, to which all laws should conform, require that law must be abstract and general, known and certain (1960, p. 205-210). Similarly, Fuller (1964) also argues that the rule of law requires publicly promulgated rules, laid down in advance, adherence to at least

¹³ Some authors even distinguish four types of the rule of law, see more detail in Fallon (1997).

some natural law values. Strikingly, Hayek supposes that under the rule of law, government must never coerce an individual except in the enforcement of a known rule. He thus seeks to restrain the government coercion by attaching the separation of state powers and independent judiciary as an integral part of the rule of law (1960, 210-211).

According to Stephenson (2001)¹⁴, a formal definition of the rule of law may place too much emphasis on the law “in the books” and not enough attention to the law “in action”. Official rules do not always reflect the actual operation of the legal system. Recently, the economists who believe that since a free market depends on certain institutions and the enforcement of certain rules have also provided some criteria for measuring the rule of law. For example, many economic researchers measured the degree of the rule of law through using indicators of quality of the court system or judicial independence (e.g.: Gwartney, Lawson and Block 1996; Feld and Voigt 2003; Kaufmann, Kraay and Mastruzzi 2004, 2005). Some others even suppose that the rule of law should include the protection of property rights and enforcement of private contracts (Knack and Keefer 1995). In order to test the relevance of institutions for economic performance, Knack and Keefer basically rely on the institutional indicators provided by International Risk Guide (ICRG) and Business Environmental Risk Intelligence (BERI). In their study, ICRG “rule of law” and “state expropriation” indicators are interpreted as proxies for the security of property and contract rights (1995, p. 210).

Despite having drawbacks, as pointed out by Stephenson, the main advantage of a formal definition of the rule of law is that it is clear and fairly objective once the formal criteria are chosen. Choosing which standards to include may be controversial, but after the standards are made explicit, it is usually not difficult to observe the degree to which countries meet or do not meet the standards.

The second type called “substantive definition” of the rule of law stresses substantive values promoted by the law such as certain ideas of freedom, justice, fairness, etc. Those values are regarded as integral components of the rule of law (see more detailed in Stephenson 2001). The scholars, who advocate substantive conceptions of the rule of law, seek to go beyond the limits of the formal approach. Therefore, contrary to the formal approach, the substantive rule of law adheres to the definition of the rule of law with the good legal system, and measures the rule of law in terms of how well the system approximates this idea. The substantive approach, however, faces with some difficulties of definition, specifically (i) determining the

¹⁴ His paper is available at: <http://www1.worldbank.org/publicsector/legal/ruleoflaw2.htm>

"justness" of a particular legal order is very subjective, (ii) defining the rule of law as a "good" legal system risks making the concept so vague that it could include almost anything. In order to overcome those weaknesses of substantive approach, Stephenson (2001), inspired by Hayek (1960) advances the third approach which is called functional definition. This approach is similar to the substantive definition, but focuses on how well the law and legal system performs some functions, specifically the constraint of government discretion and/or the making legal decisions predictable. For example, a society in which government officials have little or no discretion has a high level of rule of law, whereas a society in which they wield a great deal of discretion has minimal rule of law. Based on this approach, the next chapter of this research will scrutinize the rule of law in Vietnam.

Although there are different approaches, there is a common consensus that a political system based on the rule of law embodies some components such as: (i) an equal treatment to all people before the law, (ii) constitutional and actual guarantees of basic human rights and property rights, (iii) a legal system that is fair, transparent, certain and general, and (iv) an effective mechanism constraining government discretion. These components are essential for the protection of citizens against the arbitrary state authority and lawless acts of both organizations and individuals. They are formal institutional arrangement as they are stipulated in the constitution and the laws and rely on government enforcement mechanisms.

IV. Basic components of the rule of law

IV. 1. Equal treatment to all people before the law

Equal treatment to all people before the law is one of the main principles of the rule of law. First, this principle means that in the rule of law state, every person is treated equally before the law, nobody has legal privileges. One of the reasons in favor of such a principle is straightforward: people are more likely to comply with a legal rule if they know that everybody else has to comply too. Obviously, the law itself must respect common interests of every individual in society rather than that of any special interest group. Therefore, Walker (1988, p. 25) claims that the rule of law should restrain a legislature from enacting bills of attainder or other laws which unilaterally benefit or injure particular individuals or groups.

Second, as explained by Dicey (1884), this principle implies that no person is exempted from enforcement of the laws. In his *Lecture on the Law of the Constitution*, Dicey (1884) gave an admirable exposition of the rule of law. He wrote:

“With us, every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen” (p. 278).

In the view of Dicey, equal treatment before the law means not only that no man is above the law, but also that every person, whatever be his rank or condition, is subject to the ordinary law and the jurisdiction of the ordinary tribunals. He said that all officials should be brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority (1884, p. 278).

Third and finally, equal treatment before the law should not be understood that the aim of the rule of law is to make material or substantive equality of different people. Hayek (1944) has pointed out the difference between the equal treatment under the rule of law and the ideal of equality characterized by the social – economic equality in former socialists and Nazis regime. According to him, it cannot be denied that the rule of law produces economic inequality. This is because to produce the same result for different people, it is necessary to treat them differently. He added that in the rule of law state, this economic inequality is not designed to effect particular people in a particular way (1944, p. 59).

The aim of this principle is to restrain arbitrary government. The rule of law, therefore, means that government in all its action is bound by rules fixed and announced in advance. This explains why Hayek (1944) notes that principles of the rule of law can distinguish clearly conditions in a free country from those in a country under arbitrary government (p. 54). The crucial point is that all coercive actions of government must be unambiguously determined by a fair, transparent, certain and general legal system which enables the individual to reduce human uncertainty and economic insecurity as much as possible.

VI.2. Legal system that is general, fair, transparent and certain

The content of the rule of law is always itself related to the criteria of the law. Hayek (1960) raised a strong argument that the rule of law is therefore not a rule of the law, but a rule concerning what the law ought to be (p. 206). However, there is still controversy between the

substantive and formal views about criteria of the law. Fletcher (1996) poses that if the rule of law means rule by laws laid down, whether the legal rules are good or bad, or it means rule by the right rules, by the rules that meet the tests of morality and justice. Inspired by Immanuel Kant, Voigt (2003c, p. 6) also argues that under the rule of law, legal system must be general, abstract, certain, and justifiable.

With respect to the principle that law must be general, in the view of Hayek (1960), this means that the legal system should refer to yet unknown cases and contain no references to particular persons, places or objects. Hayek added that not every enactment of the legislative authority is law since the great majority of the so-called laws are rather instructions issued by the state to its servants (1960, p. 207). Similarly, Dicey (1884) also argued that in the rule of law, the general law must be supreme in order to restrain arbitrary power. In his view, the rule of law in the first place means:

“The absolute supremacy or predominance of the regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government” (Dicey 1884, p. 198).

The requirement that law must be general and abstract does not negate the existence of particular rules. It is undesirable that, in the rule of law, a legal system only consists of general rules as we need both general and “particular laws” (Raz 1979, p. 213). In everyday affairs, an organ of government, especially administrative body has to issue various particular rules, such as regulations, circulars, guidelines and so on. With this argument, Raz implies that the rule of law requires the subjection of particular laws to general, open, and stable ones.

The main concern of the substantive approach to the conception of the rule of law is the principle that law must be “justifiable” or “fair”. As explained earlier, unlike the formal approach, the substantive approach is driven by a moral vision of the good legal system. Dworkin (1985 cited in Stephenson) said that we should measure the rule of law in terms of how well the legal system being assessed approximates the substantive outcomes such as “justice” or “fairness”. Rawls (1971) in “A Theory of Justice” also emphasizes justice as a main character of the rule of law. As he claimed, the rule of law demands that laws be known and expressly promulgated and their meaning should be clearly defined so that it not be used as way of harming particular individuals (1971, p. 236 - 238).

However, some other authors did not agree with substantive views of the rule of law. In their views, the content of the law is not as important as the principle that the law must be general

and certain. For instance, Hayek (1944, p. 59) claimed that it may even be said that for the rule of law to be effective it is more important that there should be a rule applied always without exceptions, than what this rule is. To illustrate his arguments, he gives an example of transportation. He said that it does not matter whether people drive on the left or on the right hand side in the road provided that all people do the same. Therefore, he concluded, the general, abstract and certain rules enable people to predict other people's behaviour correctly, even though in a particular instance people feel it to be unjust (1944, p. 60). According to Voigt (2003c), this requirement is very significant for citizens' everyday affairs because:

“Anyone interested in discovering whether a certain behaviour will be legal can do so with a fairly high chance of being correct and can furthermore expect that today's rules will also be tomorrow's rules” (Voigt 2003c, p. 6).

Rational individuals, thus, likely tend to obey certain rules. Moreover, under the rule of law, not only citizen but the government also should confine itself to fixed rules laid down in advance. According to Hayek (1944), the “non rule of law” government cannot tie itself down in advance to general and formal rules which prevent arbitrariness (p. 55).

IV.3. Constitutional and actual guarantees for basic human rights and property rights

The cornerstone of the theory of the rule of law is the formal recognition of human rights and property rights which a government must respect. The 1948 Universal Declaration of Human Rights states that human rights should be protected by the rule of law. This is because, as pointed out by Aristotle, the end of the rule of law is to preserve and enlarge freedom. In other words, people's actions and possessions are not subject to an arbitrary will of another, but freely follow one's own intentions. The guarantee of human rights and property rights is also seen as a prerequisite for economic development. That is why Wolfensohn, then-President of the World Bank, in his “Proposal for a comprehensive development framework” (1999) affirms that:

“Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contracts, labor, bankruptcy, commercial codes, personal rights law and other elements of a comprehensive legal system that are effectively, impartially, and cleanly administered by a well-functioning, impartial and honest judicial and legal system”¹⁵

¹⁵ Cited in the website http://www4.worldbank.org/legal/ljr_2k/ljrconference.html

Blume and Voigt (2004) also explicitly discuss the impact of human rights and property rights, which are conceived as an important element of constitutions, on economic performance. They show that high degrees of human rights are conducive to economic growth and welfare in a significant manner. Specifically, (i) basic human rights and property rights are conducive to investment while social or emancipatory rights are not, (ii) property rights, civil rights and social rights have a clearly discernible impact on economic productivity while basic human rights do not have. Especially, they find that none of those rights ever has a significant negative impact on economic performance (p. 3).

It is necessary to precisely define the meaning of the term human rights. There are various definitions and conceptions concerning this term. However, there is no general agreement on the nature of human right and its conceptions have varied from time to time and from place to place (Ghai 2000). According to TutorGig encyclopaedia, human rights (or “natural rights”) are rights which some hold to be "inalienable" and belonging to all human beings; according to natural law. These rights are considered as necessity for freedom and the maintenance of a “reasonable” quality of life. Commonly, human rights can be divided into two categories: positive and negative human rights. Every negative human right can be expressed as a positive human right, but not vice versa.

The first category, negative human rights, derives mainly from the Anglo-American legal tradition. These rights create domains which denote actions that a government should not be allowed to trespass. For example, they are codified in the United State bill of rights and the English Bill of rights, including: (i) freedom of speech, (ii) freedom of religion, and (iii) freedom of assembly. According to Blume and Voigt (2004, p. 4), negative rights can further be defined as rights establishing freedom from state or third party interference such as torture, imprisonment without trial and so on. They also argue that negative rights must be understood as a device to protect minorities against current majorities, therefore, limit the possible scope of majority decision-making. In other words, negative rights give their holders the right to behave in a certain way, even if a huge majority would like their holders not to act.

The second category, positive human rights, derives from the Continental legal tradition and consists of things to which every person is entitled and for which every state is obligated. They can include rights: (i) to education, (ii) to a livelihood, (iii) to private property, (iv) to get a job, and (v) to get legal equality. Hayek (1976) claims that positive rights should not be called rights. Yet, he did consider neither the protection of property rights nor the right to legal equality as a positive right. Hayek believes that positive rights are incompatible with a

free society, in which individuals determine their own position according to their own goals and means. However, there are also arguments emphasizing the importance of positive rights. For example, the International Congress of Jurists in 1959 pointed out very clearly that the rule of law protects not only civil and political rights but also social, economic and other positive rights of individuals. The Congress stated that:

“The function of the legislature in a free society under the Rule of law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality”¹⁶

According to Ghai (2000), the different understandings of the conception of human rights have led to a serious conflict on how to implement the Universal Declaration of Human rights. This conflict is only resolved by distinguishing the civil and political rights on the one hand and the economic, cultural and social rights on the other hand. Based on both positive and negative human rights conceptions, Blume and Voigt (2004) suggest that there are four distinguished groups of human rights, namely: (i) basic human rights, which reflect freedom from state interference, and that consist of the absence of torture, the absence of political killings, the absence of people who disappear, (ii) economic rights, which include primarily private property rights broadly defined, (iii) civil and political rights which consist of the unrestricted possibility to participate in political life, to travel, not to be censored by the government etc. and (iv) social or emancipatory rights which endow the individual with positive rights vis-à-vis the state (p. 4).

Property rights, which could be seen as a part of human rights, and the rule of law are inextricably linked. Hoff and Stiglitz (2002) believe that effective property rights are not possible without a strong rule of law. According to them, the rule of law has to ensure well-defined and enforced property rights, broad access to those rights, and predictable rules for resolving property rights disputes. The absence of the rule of law, by contrast, is equivalent to a legal regime that does not protect investors' returns from arbitrary confiscation, does not protect minority shareholders' rights from tunnelling, and does not enforce contract rights (p. 4). The rule of law, thus, can protect the property rights by: (i) limiting official discretion to

¹⁶ Clause I in the report of the first Committee of the International Congress of Jurists at New Dehli, 1959, cited in Raz (1979, p. 210-211).

impair property rights, (ii) establishing institutions and rules that clearly define property rights, and (iii) predictably and consistently enforcing property rights.

Obviously, without clear, impartial rules and predictable enforcement of those rules, individuals will have little certainty that they will derive the benefits that accrue from their efforts to acquire and improve property, in short: to create wealth. They will therefore have little incentive to accumulate wealth and invest in property. Black *et al.* (2000) point out that the absence of a rule of law means that even the ownership rights were a dubious value. For instance, when analyzing the impact of the lacking rule of law in Russia, they show that overnight, a Russian shareholder could see his interests diluted and his assets tunnelled away. Black *et al.* (2000) also said that in many of the post-communist countries, even majority shareholders encountered such problems (2000, p. 5). This is because, according to Hoff and Stiglitz (2002), in the absence of the rule of law, people have a strong incentive to take measures to protect their property from predation by the state and mafias. They also show that under these seemingly favourable conditions, Big Bang reforms may well not create a constituency for the rule of law (p. 37).

Notably, the requirement that the rule of law should respect and protect property rights does not mean that the rule of law should abolish the system of public ownership and interest. As explained by Hager (2000), even Western doctrines of the Rule of Law do not require governments to subordinate all broad national or social interests to specific private property interests. Each legal system has its own variant, but most provide mechanisms whereby a substantial public interest can override a private property claim (p. 42). Hence, it will be a naïve view to think that in order to obtain the rule of law and to speedily transform to market economy; it must transfer the public sectors to private sector as soon as possible. For instance, through analyzing a dynamic equilibrium model of the rule of law demand, Black *et al.* (2000) show that beneficiaries of mass privatization may fail to demand the rule of law even if it is the Pareto efficient “rule of the game”(p. 4). The maintenance of a system of public ownership, however, does constitute a major problem in the transition to the rule of law. For example in Vietnam, the way in which the state deals with its enterprises increased its discretionary power which is inimical to the rule of law. I will explain this problem more detail in the next chapter (chapter 3).

IV.4. Effective mechanism constraining government discretion

The rule of law requires governments to be active to protect human rights and property rights. Yet it is also necessary to restrain excessive interferences of governments in the private sphere. This leads to the dilemma in satisfying both requirements (Weingast 1993). The dilemma may be solved by an effective constraint mechanism restraining government arbitrary powers. The crucial point is how to create such an effective constraint mechanism. As Hayek stated in *“The Political Order of a Free People”* (1979), the effective constraint of arbitrary powers “is the most important problem of social order” (p. 128). To limit arbitrary powers of government, Hayek (1960) suggests that government should itself be subject to review by an independent court for its compliance with general rules. His views can be summarized in four aspects below.

First, as mentioned already, Hayek (1960) remarks that under the rule of law, the coercive powers of the government may not be used unless they are in accordance with general rules. Furthermore, since the monopoly on coercion is in the hands of the government, this great power should not be misused. There may be arguments for giving governments as much discretion as any business management would require in similar circumstance. However, Hayek also realizes the necessity of constraining government organizations by general rules to a greater extent than business concerns. This is because these organizations lack the test of efficiency which profits provide in commercial affairs (p. 213).

Second, according to Hayek (1960, p. 213), under the rule of law, the administrative agencies will often have to exercise discretion, and thus it is necessary to have judicial review to control such discretion powers of administrative bodies. More precisely, the rule of law requires that the executive in its coercive action be bound by rules which prescribe not only when and where it may use coercion but also in what manner it may do so. The only way in which this can be ensured is to make all its actions of this kind subject to judicial review.

It is evident that if there is no judicial review, the courts will never impose constitutional restraints upon the executive, and therefore, the rule of law in the modern sense will not be ensured. As observed by Sachs and Pistor (1987, cited in Hager 2000), Napoleon’s famous codes of law and procedure (1804-1811) guaranteed equality before the law and protected private property rights, but there was no rule of law in France because those codes did not infringe on the prerogatives of the emperor and his spies, censors, and secret police. Based on the French legal system, Dicey (1884) concluded that the traditional conception of the rule of

law contrasts with the situation on the Continent as administrative coercion was still in a great measure exempt from judicial review by the ordinary court. However, according to Hayek, Dicey is mistaken because he did not see the development of the conception of the “Rechtsstaat” with the creation of a system of separate administrative courts in Germany. Hayek points out that in the 18th century, while the literal application of the idea of the separation of powers in France had led to an exemption of administrative action from judicial control, there is an opposite direction, at least in northern Germany (Prussia), entrusting the control of the lawfulness of the acts of administration to the judicial review (1960, p.198 - 204). In similar line, Pham Duy Nghia (2002) also considers the establishment of the administrative courts in 1996 as the first step in building the rule of law in Vietnam.

Third, Hayek (1960) shows that the problem of discretionary powers as it directly affects the rule of law is not a problem of the limitation of the powers of particular administrative agents, but that of the limitation of the powers of the government as a whole. Thus, judicial review should control the arbitrary powers of not only administrative bodies, but also those of the representative assembly. He believes that a nominally unlimited (“sovereign”) representative assembly must be progressively driven into a steady and unlimited extension of the powers of government (1979, p. 104).

Because of the debate between preserving sovereignty of the parliament on the one hand and keeping parliament’s legislation under judicial review on the other hand, judicial review in reality is difficult to be accepted. This debate emerged in many countries, not least in England where it is argued that sovereignty of parliament excludes judicial review. Some arguments insisted strongly that under the sovereignty of Parliament, the courts do not have right to review legislation. As Keir and Lawson (1967) claimed, all that a court of law can do with an Act of Parliament is only to apply it. These views are severely criticized by Hayek. He states that:

“The idea that there is no limit to the powers of the legislator is in part a result of popular sovereignty and democratic government. It has been strengthened by the belief that so long as all actions of the state are duly authorised by legislation, the rule of law will be preserved. But this is completely to misconceive the meaning of the rule of law” (1944, p. 61-62).

To illustrate his argument, Hayek gives an example of Hitler who obtained the unlimited powers in a strictly constitutional manner and whatever he did would therefore be considered as legal in the juridical sense. He argues, hence, that the rule of law implies limits to the scope

of legislation. Specifically, legislation should restrict itself to the kind of general rules known as true law. The rule of law excludes legislation either directly aimed at particular people, or at enabling anybody to use the coercive powers. Having separated true law, which is discovered, from particular orders, which are decided upon arbitrarily by government authorities, is Hayek's prescription for keeping discretionary powers to a minimum.

Fourth and finally, in order to make judicial review effectively and efficiently, Hayek focuses on discussing judicial independence. For example, Hayek (1960, p. 211) supposes that although legislators make laws, but independent judges, who are not concerned with any temporary ends of government, enforce them without any interference from the legislature. In similar line, Aaken, Salzberger and Voigt (2003) also realize that in order to fulfill its role as the guardian of the rule of law, the judiciary has to be independent from the other branches of government.

Since judicial independence and constitutional review mechanism must be regarded as core principles of the rule of law, many countries bring such mechanisms into their constitutions. From the experience of the United States, La Porta et al. (2003, p. 4) show that because the U.S constitution assures judicial independence and extensive constitutional review, courts rather than legislators in reality become final arbiters of what is law. Similarly, Voigt (2000) argues, if an independent judiciary exists, it seems to be plausible to assume that it has most latitude in causing implicit constitutional change because it has the power to judge the constitutional conformity of the actions of the other two government branches (p. 7). Furthermore, as pointed out by La Porta et al. (2003), because judicial review is used to counter the tyranny of the majority, it may be of particular benefit in securing political and human rights, as well as preserving democracy. For example, while the U.S. Supreme Court has long accepted the government's power to tax and regulate various activities, it has been more active in protecting political rights. This explains why Moore (1990) believes that no principle in the American experience has been more important in maintaining the integrity of the major constitutional underpinnings of the rule of law than the principle of independent judicial review. He also points out that a genuinely independent judiciary, of course, requires not only a doctrine of judicial review but also scrupulous protection of the independence of the judiciary in form and in fact (p. 19-23).

V. The failure of the rule of law

As mentioned already, in the East Asia countries where the Confucian thought plays a dominant role in history, there is no rule of law such as that which was applied in the West. In order to meet the requirements of market economies, some East Asian countries have “imported” the concept of the rule of law as a set of formal institutions which originated in the West. In my judgement, this transition process may lead to the failure of the rule of law if it is not compatible with informal institutions overwhelmingly dominating in those countries. This failure is the result of the naïve belief that Western legal systems could be easily transplanted to developing countries. Since the rule of law is regarded as a formal institutional arrangement, I thus apply the approach of Voigt and Kiwit (1999) to the failure of formal institutions to explain the failure of the rule of law.

V.1. The failure of formal institutions

In a common sense, the failure of formal institutions, especially the failure of a legal system and government mechanism which this legal system relies upon, means that those institutions have failed to gain confidence among the people in society. The failure of formal institutions thus frequently implies a situation that instead of using formal institutions provided by governments to secure their relations, relevant actors in society use informal institutions. In the economy, regardless of whether the prevailing system is supposed to be an open market economy or a centrally planned economy, the existence of an “underground economy” or an “informal sector” is the best illustration for the failure of formal institutions (see: de Soto 1989; Feige 1990; Voigt and Kiwit 1995, 1999).

Moreover, to gain their own ends, the participants in social interactions even prefer exploiting illegal activities such as bribery or mafia, than relying on legally tools. This is because relative failure of formal institutions makes informal institutions to be more efficient in solving practical problems. For example, with the case of Russia, Voigt and Kiwit (1999) claim that in Russia, many serious problems with regard to formal institutions (e.g. inconsistent laws or degrees, uncertainty of the legal system and lacking of judicial independence) will increase the likelihood of informal institutions being created or used. The facts in Russia indicate that it is almost impossible to start a business today without having struck some deal with “the mafia” (p. 14 - 15). Obviously, the failure of formal institutions in Russia creates obstacles which force people to get entangled with organized crime to try and enforce contracts or to simply protect themselves.

According to Voigt and Kiwit (1999), because an institution contains two elements - a rule and an enforcement mechanism - the failure of formal institutions might be a result of the failure of one of its elements. There are some reasons for the failure of formal institutions. First, it might be due to: (i) a rule which could be used to secure the interaction striven for, might not exist, (ii) those rules might exist, but contradict each other, (iii) those rules might be uniform but not be known to the participants, and (iv) the contents of those rules might be changed so frequently, and therefore not conducive for building stable expectations. Second, this is due to the failure of enforcement mechanism, which means that such mechanism does not work effectively and efficiently (e.g. inaction or delayed action of the judiciary) so that the non-compliance behaviours are not sanctioned adequately (Voigt and Kiwit 1999, p. 11).

V.2. The failure of the rule of law

From analyzing the failure of formal institutions, the failure of the rule of law might be a result due to the following reasons.

First, the failure of the rule of law can be due to the absence of many core components of the rule of law. For example, the Asian financial crisis of 1997 and 1998 was a result of the lack of transparent and accountable legal and judicial institutions, which indicate the failure of the rule of law reform in East Asian countries (Matsuo, 2003). Therefore, Carothers (1998) said that the Asian countries, in which the so-called miracles occurred are unstable because they lack the rule of law.

Second, the failure of the rule of law is due to contradictions in the legal system. It may be an inconsistency in laws and under law regulations or between the content of laws and that of informal institutions (e.g. social norms, ethical rules, customs, etc) rooting in a country where the rule of law is applied. Remarkably, the compatibility between the content of formal laws and informal institutions influences the way in which the rule of law comes into force. Comparing the “rule of state law” with “rule of law state”, Cooter (1996, p. 191) shows that formal laws in the “rule of law state” are compatible with social norms so that the people obey the laws and even supplement official enforcement of the laws. By contrast, people disobey the laws in the “rule of state law” as they are incompatible with the social norms. Therefore, if the rule of law is only built by the will of some political thinkers or foreign sponsors regardless of the common interest and values in society, it will not lead to the constructive, but the destructive rule of law. Making this point, Walker (1988) warns that:

“The political-intellectual elite will need to stop thinking of the nation’s population as a kind of vegetation that can be pruned, hacked about or uprooted at the will of the reformer...although ordinary people can be just as myopic as any other group, for the legislator to proceed without any regard for their customs, traditions and desires is likely to be both self-defeating and ultimately destructive of the rule of law, even in its basic sense of the state of law and order as opposed to anarchy” (p. 388)

Third, the failure of the rule of law results from the ineffectiveness of legal enforcement mechanisms. The rule of law only brings about benefits if it comes into force efficiently. For instance, Rawls (1971; p. 237) emphasizes that laws and commands are accepted as laws and commands only if it is generally believed that they can be obeyed and executed. In similar line, by comparing laws with a good knife, which has the ability to cut, the laws must be capable of guiding behavior, Raz (1983) points out that conformity to the rule of law is an inherent value of laws, and indeed it is their most important inherent value (p. 225-226). It is evident that, as the millions of dollars spent in Cambodia, Russia and elsewhere show, that the mere enactment of laws is ineffective without changing the conditions for implementation and enforcement. There is also an increasing consensus that the effective and efficient legal system plays a significant role in economic development. For example, the World Bank states that legal and judicial systems that work effectively, efficiently, and fairly are the backbone of national economic and social development. This is because national and international investors need to know that the rules under which they operate will be expeditiously and fairly enforced. Moreover, ordinary citizens need to know that they have the surety and protection that only a competent judicial system can offer¹⁷.

The effectiveness of the legal enforcement mechanism thus depends heavily on the performance of the judiciary system. As Salzberger and Voigt (2003) pointed out, this is because the judiciary is the main enforcer who imposes sanctions on actors who do not comply with the laws. There are two main functions of the judiciary: (i) to decide whether actions carried out by members of the other two branches are within the legal frame or the rule of law, and (ii) to adjudicate disputes between individuals and to decide whether individuals ought to be sanctioned because they violated the law. From analysing the supply constraints for the rule of law, many other authors such as Johnson, Kaufmann, and Shleifer (1997), Roland and Verdier (1999), and Glaeser, Johnson, and Shleifer (2001) also recognize that ineffective judicial enforcement of legal rules may create an obstacle in the reform

¹⁷ The World Bank statement, cited in Upham (2002)

process to the rule of law. Yet, the judicial enforcement is part of the reform process and cannot be assumed to be given at the beginning. Thus, in my judgment, making judicial system independent and effective is a significant step in the transition to the rule of law.

In summary, the failure of the rule of law occurs when the institutional arrangements which are necessary to the rule of law are often corrupt, ineffective, unavailable, or do not correspond to the social reality and/or contemporary needs. Consequently, constitutionally established rights are not implemented in reality, inequitable treatment before the laws is normal, and actions and decisions of government are not based on general rules, but on arbitrary discretion. In such a situation, instead of believing in the formal legal system based on the rule of law, people tend to rely on social norms and informal practice to secure their rights. There is a fact that human factor still plays a major role on the success or failure of the rule of law. The rule of law will be widespread only if it can overcome the situation that leaders refuse to abide by the law. For example, Hoff and Stiglitz (2002, p. 36) recognize the huge cost associated with the transition to the rule of law in many countries, where there are some individuals who may "invest" a great deal in the maintenance of no rule of law, including killing those who work to establish the rule of law. Some other studies of Dewatripont and Roland (1992, 1995) or Hellman (1998) focus on the problem of sustaining the demand for reform over time in order to explain the obstacle to the rule of law reform. They found that voters who suffer short-term losses may turn against reform, or the early winners from partial reform may block continuation of reforms in order to earn rents. Consequently, as Voigt (2003c, p. 8) pointed out, a "perfect" or "complete" rule of law has probably never been realized empirically. It is evident that men and women still have been treated differently just as members of different races have been. Successful rent seeking that leads to tax exemptions or the payment of subsidies is not in conformity with a perfect rule of law either because it is equivalent to treating people differently. He added that the rule of law, therefore, should be understood as an ideal type in the sense of Max Weber (1922/1947), a type that abstracts from many characteristics found in reality.

In addition, respect for the rule of law will not occur in countries rife with corruption because corrupt government officials and leadership have no reason to give up their huge interests under no rule of law. This explains why Carothers (1998) claims that corruption is likely to lead to the failure of the reform to the rule of law. In his judgment, the rule of law reform will never succeed except it can get rid of the fundamental problem of leaders who refuse to be

ruled by the law. However, it is the fact that even the new generation of politicians arising out of the political transitions of recent years is reluctant to support those reforms.

VI. Conclusion

In this chapter, based on the institutional approach, I define the rule of law as a formal institutional arrangement that originated in the West. In the western countries, the ideas underlying the concept of the rule of law are not new. Tracing its roots back to ancient Greece, this chapter shows that the Greek philosophers saw the rule of law as a system of rules stemming from natural law rather than from being deliberately formed by man. The ideal of the rule of law was also developed in the Age of Enlightenment by some scholars such as John Locke, Jean-Jacques Rousseau and Montesquieu. In the East Asian countries where the Confucian thought plays a dominant role in institutional development, there is no rule of law as such that was applied in the West. Although the Legalist school emphasized the importance of law in governing society, it failed to constrain the arbitrary powers of the rulers. Therefore, the Legalist's model can be regarded as the ideal of rule by law (or rule through law), not the rule of law.

This chapter also distinguishes between two types of rule of law, specifically the formal and substantive rule of law. The formal definition of the rule of law emphasizes the measurable characteristics of the rule of law or legal system. The second type, the substantive rule of law, stresses the adherence to a set of laws valued for their content, such as certain ideas of freedom, justice, fairness, etc. Based on these different approaches to the rule of law, I regard the rule of law as a formal institutional arrangement consisting of four components: (i) an equal treatment to all people before the law, (ii) constitutional and actual guarantees of basic human rights and property rights, (iii) a legal system that is fair, transparent, certain and general, and (iv) an effective mechanism constraining government discretion. These components are essential for the protection of citizens against the arbitrary state authority and lawless acts of both organizations and individuals.

The rule of law, according to Fallon (1997), is a historic idea, and appeals to the rule of law remain rhetorically powerful. One crucial question is how this rhetoric idea has been implemented in reality. Since the rule of law is nowadays regarded as a fundamental factor in fostering development, millions of dollars have been spent to promote the rule of law in many

transition states, yet the results have been limited. Therefore, in this chapter, I propose some explanations for the failure of the rule of law. First, the failure of the rule of law can be due to the absence of many core components of the rule of law. Second, it may be due to an inconsistency in laws and under law regulations or between the content of laws and that of informal institutions (e.g. social norms, ethical rules, customs, etc). Third, the failure of the rule of law results from ineffectiveness of legal enforcement mechanism.

In the following chapter, I will analyze the context in which the rule of law is accepted and implemented in the transition of Vietnam. Especially, the concept of socialist rule of law developed by the communist party and state leaders of Vietnam will be scrutinized. Based on the analyses in this chapter, I will seek to explain the current dilemmas and obstacles to the rule of law reform in Vietnam.

Chapter 3

The dilemmas and obstacles to the rule of law in transition economies – the case of Vietnam

“Vietnam has built a socialist society towards the goals of rich people and strong country; justice, democracy and civilization; having the well developed economy ... having the socialist state of people, for people and by people governed by the rule of law under the Communist Party leadership”

(Draft of Policy Report to the forthcoming 10th Congress of the CPV)

I. Introduction

As mentioned already in chapter I, Vietnam has carried out economic transformation known as Doimoi since 1986, and dramatic change began in 1989. In the field of legal and political reform, the major trend is the transplantation of the western legal systems¹⁸ and political institutions into Vietnam in order to meet the requirements of a market economy. The purpose of institutional and political reform is to: (i) improve the effectiveness of state management, (ii) involve the people more closely with decision-making, (iii) revitalize democracy, but without pluralism or multi-party democracy, and especially (iv) promote governance by the rule of law. Transition to the rule of law thus is one of the main objects of political and institutional reform.

In the search for a possible explanation about the transition to the rule of law in Vietnam, it is necessary to elucidate two aspects. First, as I demonstrate in chapter II, under the influences of the Confucian school as well as the Legalist school of ancient China, the rule by law (but not the rule of law) currently plays a dominant role in the reality of governance in many East

¹⁸ The western legal systems here consist of common law and civil law traditions which differ from socialist law. In a series of papers made by La Porta, Lopez-de-Silanes, Shleifer, and Vishny (1997, 1998, and 2000) regarding the effects of legal institutions on the protection of economic freedom, the authors also distinguish legal systems with common law, civil law and socialist law. A similar approach can be found in Djankov et al. (2002) or Berkowitz et al. (2003).

Asian countries, including Vietnam. Furthermore, many social-economic conditions in East Asia and in Vietnam lead both the legal reform in general and the rule of law reform in particular to be different from those in the West. Berkowitz et al. (2003) argue that a “close fit” between the “supply” and the “domestic demand” is a crucial condition for the overall effectiveness of legal and institutional reform. Similarly, Voigt (1999a) argues that to be effective, the constitutional rules (as well as legal system as a whole) chosen by a society need to be compatible with its internal institutions. Therefore, in this chapter, I hypothesize that it will be inappropriate to transplant or “copy” mechanically the rule of law as well as legal system from Western countries to the case of Vietnam. This chapter also emphasize that the meaning of the “socialist rule of law” concept is only understood through analyzing the local conditions and circumstances of reform in Vietnam.

Second, in the current transformation process, the leadership of Vietnam always affirms that it is a transition to a socialist state governed by the rule of law under the Communist party leadership (e.g. see the Policy Report to the forthcoming 10th National Congress of the CPV). Certainly, the legacy of socialist law plays a significant role in defining the characteristics of the rule of law in Vietnam. In this chapter, I hypothesize that arbitrary discretion of government which is considered to be a consequence of the legacy of socialist legal system seems to be a crucial obstacle to the transitional process to the rule of law in Vietnam. Arbitrary discretion emerges in all branches of government, especially in the executive branch. It is incontestable that arbitrary discretion of government undermines the development of the rule of law as well as the solidification of liberty and freedom. Therefore, contrary to the “rule of man”, building the “rule of law”, as indicated by Dicey (1884) and Hayek (1960), is aimed at restraining discretionary powers. In the similar line, Zywicki (2002) shows that building the rule of law is to provide the legal and institutional solution in order to avoid tyranny and limit size and scope of government.

Accordingly, this chapter aims at explaining the concept of “socialist rule of law” built in the cultural context of Vietnam. Especially, I focus on examining the failure of the rule of law in the case of Vietnam. Although this chapter concentrates on the rule of law reform in Vietnam, I also indicate some characteristics of the transformation process to the rule of law both theoretically and empirically in some other countries (notably China) where characteristics of politics, geography and society are similar to those of Vietnam.

The remains of this chapter will be structured as follows: the next section (section II) examines the concept of “socialist rule of law” which has been built in Vietnam currently. In

section III, I explain some dilemmas to the rule of law reform in Vietnam. Section IV analyses arbitrary discretion of government which undermines the rule of law and hinders the economic reform in Vietnam. Section V concludes.

II. The concept of “socialist rule of law” in Vietnam

II. 1. The adoption of the rule of law concept

As mentioned above, building a state governed by the rule of law is one of the main goals of political and institutional reform in order to meet the requirements of market economy in Vietnam. Realizing the importance of the rule of law to economic reform, Vietnamese leaders have been gradually recognising and introducing the concept “rule of law” into their legal system. Since 1991, the official political documents of the Communist party of Vietnam have provided that the State of Vietnam governs society by laws. The 7th Party Congress of the CPV in 1991 introduced a notion “*nha nuoc phap quyen*” translated as “rule of law” state or “law-based” state. This concept, in the view of Gillespie (2004), is a Vietnamese adoption of the Russian concept “*pravovoe gosudarstv*” and the German principle of “*Rechtsstaat*”. It can be said that the 7th Party Congress of CPV indeed has set the milestone for rule of law reform in Vietnam.

The introduction of the rule of law concept in the CPV’s policies recently has opened up a legal debate among many researchers and politicians regarding the compatibility between the rule of law and socialist law in Vietnam (Gillespie 2005). Some Vietnamese scholars even regarded the notion of “socialist rule of law” as a kind of state according to Marxist theory on the state and law (Ngo Duc Manh 1996, Tran Duc Luong 2002). Another author claims that the Western concept of the rule of law has nothing to be similar to Marxist theory. In fact, the CPV has not accepted the separation of powers and the western “rule of law” as well (e.g., see Nguyen Van Tai 1996, cited in Pham Duy Nghia 2002, p. 66). With the promulgation of the 1992 Constitution, it seems to be that the concept of the rule of law has been indirectly used in Vietnamese legal system. Article 12 of this constitution also shows the necessity of governance by means of the law (“*quan ly bang phap luat*”) as follows:

- (1) The State governs the society by means of the law; it shall unceasingly strengthen socialist legality.

(2) All State organs, economic and social organizations, units of the people's armed forces, and all citizens must seriously abide by the Constitution and the law, strive to prevent and oppose all criminal behaviour and all violations of the Constitution and the law.

(3) All infringements of State interests, of the rights and legitimate interests of collectives and individual citizens shall be dealt with in accordance with the law.

Obviously, when promulgating the 1992 Constitution, which is the amendment of the 1980 Constitution, Vietnamese lawmakers were still hesitating over whether to use the rule of law concept instead of the concept of proletarian dictatorship (“*chuyen chinh vo san*”). Article 12 in the 1992 constitution was seen as a compromise, neither the rule of law concept nor the proletarian dictatorship concept was directly mentioned. Rather, this article provides that the state should govern society by the law and follow the principle of socialist legality as well. According to Dinh Gia Trinh (1961 cited in Gillespie 2005, p. 47), socialist legality (“*phap che xa hoi chu nghia*”) is the main socialist legal principle. It was defined in Vietnamese legal literature during the 1960s as a tool of proletarian dictatorship to defeat enemies and to protect the revolution and collective democratic rights in order to organise, manage and develop a command economy.

The policy report of the 8th National congress of CPV in 1996 reaffirmed the necessity of building up a state governed by law in Vietnam. The term “socialist state governed by the rule of law” was finally accepted and mentioned in policy reports of the CPV and the legal system of Vietnam since the 9th National congress of the CPV in 2001. Accordingly, the rule of law concept latterly was stipulated in the amendment of 1992 Constitution on December 2001. In China, the Amendments of Constitution in March 1999 also proposed the concept of “*socialist rule of law*” (see Chen 2000). Therefore, it can be said that the progress of accepting the rule of law in Vietnam is similar to that of China.

In short, after a long time, the leadership of Vietnam eventually supports the rule of law reform. As a result, the rule of law concept has been gradually accepted and institutionalized in the Vietnamese legal system. In the following section, I will try to explain how this concept has been understood in the legal literature of Vietnam and what are the differences between the concept of the rule of law originated from Western countries and the concept of “*socialist rule of law*” being built in Vietnam.

II.2. Legacy of socialist law

Before adopting socialist law, Vietnam was under the influence of French civil law as Vietnam was a colony of France. The French civil-law system which was introduced in Vietnam by the French invaders, however, was not widely implemented in Vietnam's society. Except the South of Vietnam which was directly ruled by the French, the central and northern regions of Vietnam were influenced by two parallel administrative systems: the French colonizers and the feudal dynasty. Consequently, there were also two effective parallel legal systems. The civil-law system originating from metropolitan France was applied to French or European individuals, while the feudal Code and the customary rules and practices continually governed indigenous Vietnamese people (Gillespie 1994). Moreover, unlike the reception of Western laws in Japan or other East Asian countries, the French laws had never been accepted by Vietnamese people because they were not transplanted voluntarily, but were imposed by a colonist regime in order to protect property and privileges of the French (see: Pham Duy Nghia, 2002). The French colonists also set up a court system that was separated from the administrative system, but handled only limited cases regarding the French or foreigners. Nonetheless, as indicated by Pham Duy Nghia (2002), the creation of new institutions such as a court system in order to enforce the modern law appears to be the most important French civil law legacy in Vietnam.

The socialist law borrowed from the former Soviet legal system was applied first in the North of Vietnam after the end of the anti-French war in 1954 and parallel with the adaptation of the Soviet economic model. After the end of the anti-American war (1975), the socialist centrally planned economy was launched extensively from the North to the South of Vietnam. As a consequence, the Vietnamese legal system was under the influence of Marxist-Leninist ideology. This ideology supposes that law has a class element that reflects state ownership over the means of production. In this context, the private law such as civil law or commercial law was underdeveloped. In contrast, public laws such as criminal and administrative law were overwhelming.

It is worth to note that due to the requirements of planning and directing the economy, the administrative bodies were expanded rapidly in terms of both the number of organs and officials as well as their competence. While the state was not concerned with private laws, the administrative organs used widely under-law regulations and directives to monitor the economy as well as the entire society from the central level to grassroots levels. In such situation, there is a common view that people are only allowed to carry out activities

stipulated specifically in laws or regulations. Moreover, collectivism replaced individualism in Vietnamese society at that time. The collective mastery was seen as one of the main characters of socialism in Vietnam since 1950s (Pham Van Dong 1952, cited in Gillespie 2005, p. 49). This doctrine enabled people to live harmoniously without the laziness, individualism, selfishness and corruption associated with the “old society”. Therefore, Gillespie (2005) argues that the collective mastery doctrine was hostile to private legal rights because it rejected civil society or individual space outside the state and collective orbits as bourgeois individualism.

Besides the collective mastery doctrine, socialist law also provides for the principle of proletarian dictatorship validating Communist Party leadership within the state and the society of Vietnam. Socialist legal doctrine, based on Lenin’s assertion in his book “State and revolution” (1918), proposed that democracy is only possible when the working class centralizes its power in its Party (Dinh Gia Trinh 1964). This is because Lenin believed that democratic rights were better safeguarded by proletarian dictatorship that empowered the ‘ruling class’ to supervise state organs directly through their proxies: the Communist Party and mass organizations (Gillespie, 2005, p. 48). Therefore, the CPV organs directly interfere in economic activities as well as other fields of society. Resolutions and directives given by the CPV organs even were superior to laws, especially in the period of war. The law at that time was only considered as a supplemental instrument.

In the context of Vietnam recently, some authors suggested that to appreciate the reality of individual rights, especially economic rights provided in the Constitution and the laws of Vietnam, it is necessary to regard official policies as well as unofficial policies of the CPV (Gillespie 1994, Pham Duy Nghia 2002). Strikingly, analyzing the rule of law in post-communist countries, Czarnota (1997) claims that the law is still playing a main instrumental role in the process of reshaping the society and institutions in the post-communist countries. In the existing Vietnamese legal literature, the notion that the law is an instrument of State and Party’s policy is still dominant in both legal researches and practices. For example, all university course books on the theory of the state and law¹⁹ still emphasize that law must be the institutionalization of policies and directives of the CPV. Though there are some efforts to separate the leading role of CPV and the governing role of state, the CPV committees at all

¹⁹ E.g.: some textbooks such as “The rule of law and civil society”, Institute of Social Science Information, 1991 or “theory of State and Law” Faculty of law, Vietnam National University, 2001.

levels with discretionary powers strongly interfere in the organization and operation of state organs.

In summary, the socialist law imported into Vietnam from the former Soviet legal system can be characterized as follows: (i) the domination of public laws over private laws, (ii) the domination of collective interests over individual rights, (iii) law is not above and constrains the arbitrary powers of the Party and state but rather serves as an instrument to implement policies of the Party and (iv) the Party leadership was legally validated.

II.3. Confucian values and socialist law

As analysed in chapter II, to understand the legal system of East Asian countries in general and Vietnam in particular, it is necessary to examine the historical development of the legal systems in relation with other formal institutions in those countries. Vietnam as well as other East Asian countries has been influenced by Confucian values. In the next chapter (chapter IV), I will explain in detail the impact of Confucian values on the current legal system and the rule of law reform in Vietnam. Therefore, in this section, I focus only on scrutinizing the compatibility between Confucian values and the socialist legal principles.

It is worthy to note that while the leaders of Vietnam tried to import socialist legal system originated from the former Soviet Union, they also realized the necessity of localizing socialist law in order to make it compatible with traditional culture that is based on Confucian values. For example, emphasizing the importance of historical conditions in building Vietnamese socialism, Ho Chi Minh (1995, cited in Gillespie 2005, p. 50) claimed that:

“We are not like the Soviet Union; they have different habits and customs, history and geological conditions. We can take another road to socialism” (p. 338).

Inspired by Ho Chi Minh’s thought, many Vietnamese leaders discovered that the imported Soviet socialist laws could not easily displace Confucian values and traditional practices (see Hoang Quoc Viet 1964). Some others even condemned the way of parrot-fashion²⁰ transplanted socialist law that is harmful to Vietnamese culture (e.g. Truong Chinh 1948, cited in Gillespie 2005, p. 50). Strikingly, many economists recently criticize the careless introduction of a foreign legal system without taking into account the particularities and actual

²⁰ Parrot – fashion in Vietnamese means mechanically imitating or repeating without carefully thinking and thoroughly understanding.

conditions of the country and its people (e.g.: Cooter 1996, Voigt 1999b, Berkowitz, Pistor and Richard 2003).

It can be said that the combination of socialist legal principles and Confucian moral values and practices to govern the society is the approach that Vietnam applies to transplant the socialist law into the particular cultural conditions of Vietnam. Of course, in such a situation, there were both convergence and divergence between the Confucian values and socialist law principles. According to Gillespie (2005, p. 53), Confucian values, which he calls “pre-modern moral principles” in Vietnam, and socialist law converged in three areas, namely: (i) raising public interests over individual interests, (ii) promoting the state to lead society, and (iii) treating law as a tool to maintain social order.

First, both socialist law and Confucian values gave priority to state or public interests over individual interests and private rights in society. As mentioned earlier, socialist law hostilely rejected civil society and private legal rights and replaced individualism with collectivism. Similarly, private rights and interests in ancient Vietnam were not much supported and recognized by Confucian values. As dominant ideology directing the behavior of both state authorities and individuals in society, Confucian values and norms were institutionalized in the ancient laws of Vietnam. In ancient Vietnamese laws, the privileged position and interests of state’s representatives, specifically the King and his mandarins, were assured (Phan Dai Doan 1999). As stipulated in many ancient law codes of Vietnam (e.g.: the Le code of the 15th century), violations of the King’s interests and collective values in society were the most serious offences (Nguyen Quoc Viet 2000). Notably, instead of protecting private rights, ancient law of Vietnam focused on defining the obligation of individuals in society. Studying private commercial rights of Vietnam, Gillespie (1994) claims that in Vietnam, the division between moral and legal rights is blurred because private legal rights have traditionally been subordinated to and fused with an overriding moral obligation owed to the central political authority and family.

Second, socialist legal doctrine and Confucian values suppose that society should be governed directly by state leadership and the Party instead of by laws. The socialist legal literature inspired from Marxist theory considers socialist law as a part of the superstructure reflecting the will of ruling class – the proletariat in socialist society. As a representative of the ruling class, the Party determined the content of law. Furthermore, as already mentioned, the socialist legal doctrine enabled the Party and state to use both laws and directives as instruments in adjusting society. Whereas socialist law aims at building a society based on

Party leadership, Confucianism required that people should conform to hierarchical social order based on three kinds of relationships: ordinary people must conform to the King and the Mandarins, children must conform to their father and wife must conform to her husband. Consequently, unconditional obedience of state authority is a natural obligation of all individuals in society.

Third, and finally, the main purpose of socialist law as well as of Confucian values is to maintain social order. Marxist-Leninist ideology divides society into the ruling class and the ruled class. In socialist society, the ruling class is the proletariat. Socialist law, therefore, should protect the social order based on the dictatorship of the proletariat. Similarly, Confucianism considers human society as spontaneous hierarchical social order consisting of the ruling class and the ruled class. Good governance means that the state is able to stabilize the hierarchical social order and to harmonize society. As a result, in Vietnam and other East Asian countries nowadays, the stability, security and order of state as well as the growth of economy are more important than individual rights (see Pham Duy Nghia 2003).

Obviously, there is an incompatibility between the imported socialist law and Confucian values. Marxism–Leninism is opposed to the notion that culture plays a role in determining the characteristics of legal systems. Particularly, Marx (1969/1877 cited in Gillespie 2005, p. 50) supposed that socialist law is antipathetic to the neo-Confucian and “feudal” culture of East Asian society. For instance, Marxist materialism discredited Confucian idealism with regard to the state power in which the power of the ruler is entrusted by Heaven. However, as Gillespie (2005) observes, the divergence between imported socialist law and Confucian values did not especially matter in the command economy, where the state primarily used discretionary powers to order society.

II. 4. The “socialist rule of law” concept

As already mentioned in chapter II regarding the definition of the rule of law, the concept of the rule of law still has been inadequately understood in Vietnam recently. The Vietnamese legal literature simply regards the rule of law as legal compliance by all members of society, including the State. There has been a common opinion in Vietnam as well as in other East Asian countries that the rule of law in the West is also an imperfect one and it can be obtained by various ways (Hager 2000). Therefore, in the policy of the Communist parties of both Vietnam and China, the leadership declared that they would build their own “socialist rule of law” state with some differences from that of Western countries. Vietnamese leaders may

have borrowed the concept “socialist rule of law” previously used by some authors in the former Soviet Union such as Nersesjan and Kudrjavsev²¹. In line with Marxist theory, many authors in Vietnam and China as well even argued that the rule of law in socialist state will be at higher degree and more perfect than the rule of law under capitalism (Tran Duc Luong 2002, Chen 1999)²².

By reviewing some opinions of Vietnamese legal and political researchers (e.g. Dao Tri Uc 2002, Le Thanh Van 2002, Tran Duc Luong 2003,) and drawing from recent CPV’s policies, notably from the policy report of the 9th National Congress of the CPV in 2001, I suppose that the socialist rule of law being built in Vietnam have some characteristics as follows: (i) supremacy of Constitution and law, (ii) equality of all people before the law, (iii) respect of human rights as well as community values and social order, (iv) democratic centralization of state powers, (v) sole leadership of CPV in the state and society and (vi) assurance of legally private property rights as well as the decisive role of state and collective ownership. In my point of view, there are three significant differences between Western countries and Vietnam in terms of crucial components of the rule of law (see Table 3.1).

Table 3.1 Differences between the rule of law in Vietnam and that in the West

In the West	In Vietnam
Pluralist democracy	Non-pluralist democracy
Separation of state powers	Centralization of state powers
The superiority of individual rights	Assurance of individual rights as well as state interests and public order

²¹ The authors’ names are transcribed into Vietnamese in the textbook “The rule of law and civil society” which is published in Vietnamese.

²² Such viewpoints are based on the Marx’s theory of historical development of human society. In view of Marx, relations of production constitute the economic structure of society on which legal and political superstructure emerges. At a certain stage of development, the material productive forces of society come into conflict with the existing relations of production. This conflict in turn, brings about social revolutions in which the entire legal and political superstructure has been more or less transformed. The new higher relations of production in new society determine the more perfect superstructure (including the state).

The first difference is that while all western countries apply the concept of pluralist democracy in their politics, Vietnam' leadership recently reconfirmed the one-ruling party system. Article 4 of the 1992 Constitution provides that the CPV is the sole leading force in the state as well as the society of Vietnam. Some formal documents of the CPV and the State regarding political reform also emphasized that political reform is not allowed to create pluralism or undermine the leading role of the CPV (Truong Trong Nghia 2000). I can find two possible reasons for the sole leading role of the CPV. First, this is due to the impact of socialist legal thought as analysed above, especially the principle of proletarian dictatorship by which Party leadership was legally validated. It is noteworthy that the Vietnamese leaders always suppose the Marxist – Leninist theory and Ho Chi Minh thought to be infallible and eternal. For example, Truong Chinh (1968 cited in Gillespie 2005, p. 51) even said that:

“Marxist doctrine is omnipotent because it is true. It is complete and harmonious” (p. 547).

Second, it was the fact that the Communist party of Vietnam successfully led the country to independence and won glorious victory in the wars against France and the U.S. The Party therefore has been portrayed as an infallible moral example (Gillespie 2005) or embodiment of the wisdom, quality, and the quintessence of the nation (Nguyen Phu Trong 1999). As a result, apart from the Communist Party, Vietnamese people have not accepted any opposition groups or organizations (Nguyen Duc Binh 2006). That is why in order to strengthen Party leadership, the Political Report to the 9th Party Congress in 2001 proposed the following measures: (i) forge revolutionary ethics, (ii) combat individualism, (iii) promote exemplary behaviour, and (iv) concentrate on self-improvement. It is worthy to note that the sole leading role of the CPV is also an “untouchable subject” or “forbidden zone” in legal and political debate in Vietnam²³.

To sum up, the sole leading role of the CPV is a prominent feature of the socialist state governs by the rule of law in Vietnam. The international commission of Jurists in 1977 also supposed that human rights and the rule of law could be endangered by ineffective attempts to duplicate multi-party system without regarding cultural traditions and the historical development of particular countries. For this reason, the commission suggested that the rule of law and human rights could be obtained in the one-party system. However, it is necessary to safeguard some democratic principles such as: (i) freedom of election for alternative

²³ However, in recent political discourse contributing to the draft of policy report of the forthcoming 10th Party Congress, the term “pluralism” (đa nguyên) appeared in some newspapers such as Vietnam net or Tuoi tre online.

candidates, (ii) maintaining channels of popular criticism and review, (iii) utilizing all sources of information and advice for party's policies, (iv) independency of judiciary, the mechanism to review and investigate administrative activities and procedures, and (v) the right to form special interest associations²⁴.

The second difference would be that under the rule of law, Vietnam still applies the principle of centralization of powers whilst almost Western countries apply the doctrine of separation of powers. Given the reason that all state powers in Vietnam belong to the entire Vietnamese people, such powers should be centralized to state organs whose members are directly elected by the people, namely the National Assembly of Vietnam (hereafter NAV) at the central level and the people council at local levels. Then the NAV will entrust a part of its power to the executive and the judicial branch whose leaders are appointed by the NAV. The executive branch (specifically administrative organs at central to local levels), and the judicial branch (the people's court system and the people's state organs of control), therefore, are responsible to submit a report annually to the NAV, and shall be criticized, questioned and dismissed by the NVA. (See more details in Dao Tri Uc 1997, 2002; Bui Xuan Duc 1997; Truong Trong Nghia 2000, Le Thanh Van 2002).

The third significant difference between the rule of law in Vietnam and that of the West rests on in the way of understanding and protecting human rights. Although protection of human rights is considered as a component of the socialist rule of law in Vietnam, private rights are still less regarded than the state interests and social order²⁵. In the 1992 Constitution, Article 50 provides that:

“All human rights namely economic, politic, cultural, social and private rights of people shall be respected and promulgated in the Constitution and laws. Individuals shall execute their rights within the framework of laws and with regards to state interests, social and moral values as well as other individual's interests”

²⁴ See detail in the conclusion of the Meeting of International commission of Jurists in April 1977, cited in Alsion (1981).

²⁵ In chapter II, I have already mentioned the protection of human rights and private rights as one of the main features of the rule of law. In this chapter, I will focus on analysing how the leaders of Vietnam deal with the relationship between the private rights on the one hand, and the state interests and social orders on the other hand.

Gillespie (1994) claims that Vietnamese lawmakers and bureaucrats often have neither an academic nor a cultural understanding of the concept of natural rights, liberalism, and the sharing of legal rights between the individuals and the state that exists in Western democracies. In Vietnam, it is frequently argued that human rights are not superior to “national sovereignty”, and that the “American ” or “Western style” of human rights is not suitable for the present economic, political and cultural conditions of Vietnam (e.g.: Hoang Van Hao 2001, Vu Cong Giao 2002). Method and degree of implementing human rights must be stipulated in laws or under-law regulations. The implementation of private rights also depends upon the reality of society and upon condition that such private rights do not interfere with national sovereignty, cultural values, social security and order.

Strikingly, article 50 of the 1992 Constitution does not factually protect individual rights against the infringement of arbitrary powers by the state authority. One of the main reasons is the Vietnamese court system that cannot recognise the existence of private rights by drawing a general inference from the constitution, or even from the general principles of the laws (Pham Duy Nghia 2002). Consequently, Vietnamese citizens cannot directly refer to basic human rights stipulated in the Constitution for their interaction in society, but have to refer to numerous and complicated under-law regulations. They are thus likely to be charged with sanctions such as administrative fines or penal offence in the cases that their particular activities are not expressly authorised by under law regulations. This situation is especially true in economic activities because many business activities in a market economy can not be explicitly and immediately stipulated by constitution and laws.

Furthermore, as already pointed out, the recognition of private rights, especially private ownership, is somewhat difficult under the socialist legal doctrine, which is still a domain of political thinking in Vietnam. The public ownership of means of production is the most fundamental characteristic of traditional socialism. As a consequence, although the 1992 Constitution entrusted individuals with the private ownership of their income, savings, residential houses, living and production means, funds and other assets in business, it also provided that the state ownership and collective ownership still play the decisive role and that State-owned enterprises (SOEs) should play the leading role in economy. This provision of the 1992 Constitution has created more priorities for SOEs over private sectors in Vietnamese economy. It is the fact that even after more than ten years of Doimoi, many Vietnamese leaders still have expressed less sympathy for private ownership and capitalism because they are the roots of people exploitation (e.g. see Nguyen Duc Binh 2006). This is because after a

long time of building socialism, Vietnamese leaders have been deeply influenced by Marx's theory of surplus value and capitalist exploitation which shows that the separation of workers from the means of production allowed capitalists to pay them less than the value of their work.

In summary, it should be clear from such discussion that while promoting economic reform, the leaders of Vietnam have gradually adopted the rule of law as an indispensable way of governance in order to create a socialist society with democracy, justice, prosperity and civilization. However, the historical and actual environment of Vietnamese socialist law and informal institutions may bring about some differences between the concept of the rule of law in the West and that in Vietnam. The following sections of this chapter will focus on assessing the failure of the rule of law in Vietnam. I will try to answer the question that what are the main dilemmas and obstacles to the rule of law reform in Vietnam.

III. The dilemmas of transition to the rule of law in Vietnam

III.1. Informal institutions vs. the rule of law

As already explained in chapter 2, many transition countries have failed to transplant the rule of law which originated from the West. There is plenty of literature analysing benefits and impacts of the rule of law on economic development²⁶, thus policy makers in these countries believe that transplantation of the rule of law is feasible. However, the actual shadowy situation of the rule of law in many transition countries shows that expecting a transition society to familiarize itself with a considerably different legal system within a few years or even a few decades is all a naive dream (e.g. see: Stiglitz and Hoff 2002 or Gelman 2000, 2003).

Arguably, if policy makers in transition countries insist on transplanting western legal systems as well as the rule of law regardless of the impact of informal institutions, there will be a shadow of doubt of effectiveness of such transplantation. For example, when analysing the effectiveness of the rule of law, Cooter (1996) distinguishes “the rule of state law” with “the rule of law state” and supposes that if state laws are compatible with social norms, most people perceive law as just and obey the law out of respect, which, in turn, would lead to the

²⁶ E.g. The works of Hayek 1960, Ghai 1986, Knack and Keefer 1995, La Porta et al. 1997, Barro 1999, Gwartney et al. 2000 and Voigt 2003, 2004

“rule of law state”. On the contrary, if the laws are incompatible with social norms, people see law as unjust and irrelevant. Consequently, they disobey the law or obey it out of fear of punishment, which creates the “rule of state law”. By analysing behaviours of people who belong to Chinese clans, Zhou (2001) shows that law could only play a marginal role in the life of the Chinese people. According to him, even in many regions of China today, law is still conceived as criminal law and regarded negatively by most China's less-educated population. This is because in traditional Chinese society, law was necessary to deter and punish criminal acts and daring attempts challenging the privileges of the emperor and his bureaucrats. He concludes that although it is necessary for Chinese society to have the rule of law in order to regulate the current economic, social and political life, but the negative impression of law is still a major impediment to people's appreciation of the proper function of law in a modern society.

The conclusion of Zhou (2001) is also true for the case of Vietnam. Under the influence of Confucianism, the moral norms of Confucianism played the most important role in regulating society. Such Confucian moral norms still heavily influence the current legal system of Vietnam. These rules may positively supplement and support formal law but many of them challenge and contradict formal law. By analysing the Commercial Law 1997, Pham Duy Nghia (2005) claims that many Western commercial legal norms introduced capitalist political and economic ideals that were incompatible with the small-scale family structures and sentimental bonds that characterise Vietnam's legal culture. Consequently, there may be a lot of formal rules (including law and under-law regulations) recently passed by government, but Vietnamese people still follow the traditional ethical rules and norms. Therefore, there is a saying that “there is a forest of law but people live with forest law” (forest law refers to the informal rules).

As already mentioned in section II about the relation between socialist law and Confucian values, the divergence between the formal legal system and the social moral norms did not significantly matter in the command economy because the government primarily used discretionary powers to order society. However, the Doimoi have created an open market economy as well as further democracy in society, thus the Vietnamese government could not use arbitrary commands to govern society as before. The Party and government realized the necessity of governing all social activities by laws. For example, the report of Sixth Party Plenum in March 1989 emphasised that the state has to manage all activities in social life by laws and in accordance with the Party's direction and policies. However, as analyzed earlier,

legal importation regardless of local conditions only leads to the incompatibility between formal rules with domestic cultural norms which undermine the rule of law reform. All in all, the policy makers in transition countries like Vietnam are facing a dilemma in transplanting the western rule of law into their society. On the one hand, the development of market economy and strengthening democracy urgently requires political reform, including the transition toward the rule of law as a pre-condition. On the other hand, the rule of law reform meets the resistance of informal institutions rooted in the society of Vietnam.

In the next chapter (chapter 4), I will explicitly explain this dilemma in the case of Vietnam. I will indicate that due to influences of Confucian values, Vietnam will also face the dilemma of the transition to the rule of law. In order to overcome this dilemma, the core components of the rule of law should be introduced gradually into Vietnam. However, during the transition to the rule of law, policy makers of Vietnam are also facing the dilemma of the strong state. The following section examines that dilemma.

III.2. The dilemma of the strong state

As has been mentioned already in chapter I, the dilemma of the strong state emerges when individuals rely upon a strong state to secure their private property rights and contracts. But they are also in fear of expropriation from the strong state (Weingast 1993b). In a transitional country (for example Russia), although there are also some fundamental institutions of an open market economy such as private property rights, economic freedom, the state has been incapable of protecting private property rights and enforcing contracts. Therefore, individuals opt for informal institutions to protect their property rights as the case of underground economy in the relation with mafia (see e.g.: de Soto 1989, Voigt and Kiwit, 1999). This situation also holds true for the case of Vietnam. For example, on 25th February 2003, The People's court of Ho Chi Minh city opened a criminal trial against Nam Cam – Vietnam's most notorious mafia boss, who has been in charge of the leading criminal empire in order to illegally protect the gambling activities in the city.

Nevertheless, both government and individuals in transition countries can bear costs due to state incapability in protecting property rights and enforcing contracts. On the one hand, it will be costly in the long run for individuals, especially entrepreneurs, to maintain their business under such a pillar of informal institutions. On the other hand, the economic development will be influenced negatively because entrepreneurs, both domestic and foreign investors, will thus invest less or simply shift their activities to the countries where the state

has enough competences in protecting their assets. Thus, not only the individuals but also the leadership of transition countries will have strong incentives to strengthen the strong state. Strikingly, in the past, individuals as well as policymakers in transition countries generally and in Vietnam particularly experienced the failure of socialist planned economy in which the strong state directly managed the economy, abolished private sectors and thus confiscated private capital assets. Consequently, the dilemma of the strong state, as argued by Weingast, is visible in many transition countries like Vietnam.

In my judgment, in transition countries, there is a second dilemma of the strong state. On the one hand, it seems to be evident in many countries, especially in East Asian countries, that a state with strong authority and sufficient capacity has been able to successfully promote economic growth. On the other hand, the authoritarian state leads to the abuse of state powers which hinders economic performance. The difference between the notions of strong state developed by Weingast and that I refer to in the second dilemma relies on the distinction between the protective function of the state and its productive function. In its protective function, the state serves merely as an enforcement mechanism of contract and property rights. In its productive role, the state serves as agency acting in pursuit of country's prosperity and growth. The strong state here can be understood as a state having strong capacity and authority to maintain social order and endorse economic growth.

Contrary to the planned economy in which the state management plays a decisive role, in market economies, the autonomy of enterprises plays a more important role than state management. However, it seems to be naïve to argue that when a market economy expands in transition countries, the sphere and degree of state influence will decrease. On the contrary, in view of Fukuyama (2004), increasing the basic strength of state institutions and functions that only government can provide is the most urgent for the majority of developing countries. In his book "State-Building: Governance and World Order in the 21st Century" (2004), Fukuyama believes that weak or failed states are the sources of many of the world's most serious problems. Thus, he wrote:

"Policymakers in the development field should at least swear the oath of doctors to 'do no harm' and not initiate programs that undermine or suck out institutional capacity in the name of building it" (2004, p. 42)

Apparently, the leaders in East Asian countries firmly believe that with Asian values such as authority and hierarchical order, a strong state has supported the economic success in the East

Asia. Many of them have accepted Lee Kuan Yew's premise of social modernization in Singapore, which argues that Asian orientations toward authority and hierarchy might facilitate the development of modern economic structures although such orientations would be less consistent with democratic politics (Dalton and Ong 2002, p.16). That is why, according to Jayssuriya (2001), the ideology of Asian values embodies an attempt to have a strong state as well as a well developed free market. In order to gain fast economic development, leaders of transition countries thus have a tendency to build the strong state.

However, leaders and policy makers are also anxious for the strong state. They can easily foresee that a strong state without effective constraint mechanism will lead to the arbitrariness among officers who want to misuse state powers for their own interests. This is because, according to the underlying assumption of the economic approach, individuals always seek for self-interest. In analyzing the transition of Russia, Stiglitz and Hoff (2002) warn the policy makers of a danger from the state's agents who get benefits from Big Bang reform. These agents want to maintain the situation of no rule of law state. More remarkably, corruption is a consequence of inefficiency and arbitrariness. Therefore, Ackerman (1999, p. 194) claims that corruption can be controlled indirectly by limits on political powers.

Furthermore, the arbitrary political system can induce insecurity and unpredictability, or at least a much higher cost in the efforts to predict policies and their impact. Accordingly, entrepreneurs will feel that they are putting their business at risk if they invest in countries having an arbitrary system. It is also shown that arbitrariness in the rule-making and rule-implementing process has led to rapid changes of the laws and policies in the transition of Vietnam. This might be a reason for the reduction of foreign investment into Vietnam in recent years (Nguyen Quoc Viet, 2004). Similarly, as demonstrated in the Report of the World Economic Forum (WEF) regarding national competitiveness in 2004, low rankings of some institutional variables such as transparency and stability of law (Vietnam was on rank 94 of 104 countries listed) and corruption (97th /104) resulted in the low level of Competitiveness Index of Vietnamese economy (77th /104). Especially, this level significantly deteriorated in comparison with the ranking of Vietnam in 2003 (60th /102).

Arguably, the strong state is regarded as a double-edged sword. On the one hand, it contributes to attaining objectives of economic development pursued by the leaders. On the other hand, it also creates obstacles for development, such as arbitrariness, corruption, etc. in the state apparatus. Furthermore, social stability and public order are also seen as double-edged tools in the hand of policy makers. This issue will be analyzed in details below.

III.3. Social stability and public order vs. private rights

It is evident that productivity and creativity are necessary conditions for economic growth. These conditions will not be attained unless individuals can completely enjoy their private rights. As mentioned already, in many former socialist countries and in Vietnam, under the influences of centrally planned economy and socialist legal doctrine, collectivism replaced individualism. Protecting private rights was regarded as a legacy of bourgeois individualism and thus was not paid much attention in economic policy as well as in socialist legal system. The economic and social crisis in socialist block in the 1980s proved that this socialist approach to private rights was wrong. Accordingly, in order to promote social-economic development, the leaders and policy makers in transition countries should carry out political reform which liberates private rights. In turn, these rights can promote a large number of individuals to engage in productive and creative activities.

However, the leaders and policy makers, especially those in Asian countries, are afraid of their political uncertainty that is regarded as a consequence of radical political reform. It is because they found convincing evidence from the political reforms in Central and Eastern Europe (CEE) and the former Soviet Union. Through such political reforms, the leaders of these countries have expanded economic and political freedoms to their citizens. But the citizens take advantage of these freedoms to overthrow their leaders. Drawing lessons from their counterparts, the leaders of Asian countries want to maintain political institutions embedding political order and stability, and tend to choose a gradual reform in political area. The consequence of this approach is a parallel existence of the economic order regulated by law and the political sphere unbound by any legal constraints, which Jayasuriya (2001) calls a “dual state”. In view of Jayassuriya, it means that economic liberalism is enjoined to political illiberalism in the “dual state” (2001, p. 120).

Remarkably, such gradual approach to political reform will result in some puzzles. One question is whether with gradual political reform, individuals will eventually be able to enjoy their rights completely. North and Weingast (1989) point to the importance of institutional constraints so that government can make binding commitments. It is evident in many Western countries that if state leaders are restrained by an effective constraint mechanism, they cannot abuse state authority to prevent citizens from enjoying their private rights, for example, to their property rights. However, there may be a difficulty in creating an accountable political institution in transition countries like Vietnam or China by gradual reform. Roland (2004) distinguishes slow-moving, i.e., gradually and continuously institutional changes and fast-

moving institutional changes that experience rapid, discontinuous changes. The change of social norms that evolve in the interactions of humans in society would be slow-moving institutional change. If the interests of the agents are not sufficiently in favor of a large institutional change, it is not implementable. If slow-moving social norms are an important determinant of political interests, it may be very difficult to implement large changes of political institutions in a peaceful way. For example, Zhou (2001, p. 1) argues that in the case of China, where there is no tradition of checks and balances on government power, it is hard to see success in gradual reform due to resistance from vested interests and uncertainty in the social and political dynamic. For Zhou, it is also probably impossible to establish a government with checks and balances through a violent revolution in China currently. Yet, it could be argued that the West only gradually created that tradition of checks and balances as well as the rule of law in hundreds of years.

Moreover, with the ultimate aim of keeping political stability to develop national economy, the leadership in both China and Vietnam frequently appreciates social order, which is considered as a pre-requisite for people's subsistence, over other private rights. For example, in "The Chinese White Paper" regarding human rights (cited in Ghai 2000, p. 21), the Chinese government claims that the people's right to subsistence will be threatened in the event of social turmoil or other disasters and those are the fundamental wishes and demands of the Chinese people. Therefore, the urgent tasks of Chinese government are maintaining national stability and concentrating their efforts on developing productive force. Similarly, many state leaders in Vietnam argue that Vietnamese people should sacrifice their individual rights to the social order and economic growth of their countries (Pham Duy Nghia 2003). In my viewpoint, the above arguments of Chinese and Vietnamese leadership are inspired from Marxist views on the evolution of human history. In his "Speech at the Graveside", Marx (1883) told a simple fact that, mankind must first of all eat and drink, have shelter and clothing, before it can pursue politics, science, religion, art, etc. Therefore, the production of the immediate material means of subsistence and consequently the degree of economic development form the foundation upon which the state institutions, the legal conceptions, the art and even the religious ideas have evolved.

Due to the pursuit of "public order" objectives, according to Jayasuriya (2001, p. 109), state leadership in East Asia such as in those in Singapore and Malaysia can suspend even the often rudimentary civil and political rights contained in the constitutions. The question is whether it is considered legitimate if the leaders use that power. Jayasuriya shows that quite often, these

objectives have been enabled by emergency or internal security provisions within the constitution in these countries. Such constitutional provisions give public authorities far-reaching power to suspend normal legal and political processes. In his judgment, the state in East Asia is perceived as abstract entity acting in the general interest to impose rules upon society. Such a state might guarantee legal equality and civil rights, but these are entitlements granted by the state rather than rights achieved by political actors working through the state. Thus, he believes that the general interests of the state are superior to individual rights (p.121). Consequently, in many transition countries such as China and Vietnam, individual rights provided in the constitution cannot override the interest of the state (Nguyen Quoc Viet, 2004).

To sum up, in the transition process to the rule of law in Vietnam, there may be a dilemma regarding the choice between promoting private rights or maintaining social order and political stability. In order to solve such dilemma, Vietnamese leadership should find the way to harmonize public order and private rights. In addition, it is necessary to harmonize the interests among various groups in Vietnam. This task leads to the problem of coordination that will be discussed below.

III.4. The Coordination problem

The transition to the rule of law requires group action and thus, according to Olson (1965), creates the problem of collective action. Weingast (2003) tries to clarify this problem by using “equilibrium institution approach to the rule of law”. According to him, the leaders will have incentives to stick to the rule of law only when they risk being deposed by citizens. Therefore, citizens must have the power to “police” behaviour of the state in accordance with the laws. However, when policing the state, citizens face the problem of coordination. It is argued that not only in the rule of law reform, but people in whole society always face the problem of coordination. In their social interaction, one side can never be certain of what the other side is about to do (e.g. Voigt 1999b, p. 89).

The coordination problem is due to the divergences of the people’s positions in society, which makes it difficult for them to get common views and interests (see Weingast 2003). Consequently, there are great differences in how people view the appropriate role of the state, political structure and citizen rights (p.110-111). These profound differences, in turn, hinder citizens’ coordination against the state. For the emergence of the rule of law, Weingast thus suggests a coordination device which he calls a pact laying down citizens’ rights and a set of

public decision making rules. However, it is necessary to satisfy three further conditions: (i) parties in the pact must agree that they are better off in the pact than without it; (ii) parties agree to change their behaviour so that the others simultaneously doing so and (iii) parties must be willing to defend not only the parts of the pact benefiting themselves but also the parts benefiting others against state transgression (Weingast, 2003, p. 111 - 112). Yet, there may be another coordination dilemma because it seems to be impossible to convince all parties (or interest groups) that they will be better off in the Weingast's "rule of law" pact. Furthermore, it can be questioned how parties could be able to go beyond their uncertainty about the behaviour of the others in the pact in order to be willing to defend the others from state transgression.

To explain this dilemma, I assume that a specific society consists of two citizen groups: a privileged group and a less privileged group. The privileged group tends to oppose the rule of law because of two reasons: First, in the view of privileged group, they will not be better off after the reform towards the rule of law. The rule of law reform only induces uncertainties for their life, thus they resist any change. However, not only the privileged group but also the society as a whole tends to oppose social and institutional change due to the same reason. I will analyse this problem in details in the next chapter.

Second, there is the fact that privileged group could earn more benefits from the no rule of law. According to economists, people always act in their self-interest. Presuppose that the rule of law is a zero sum game, the privileged group thus regards any move towards the rule of law as an outcry of the less privileged members in pursuit of reallocation benefits resources of the society. This may undermine the privileged group interests (Zhou 2001). For such reason, the privileged group will have negative view and oppose the reform to the rule of law as in the case of Russia (see e.g.: Stiglitz and Hoff, 2002). Given the facts of economic reform in China, Peereenboon (2002) also observes that economic reforms in China have fostered clientelist and corporatist arrangements in which the newly emerging social groups such as business people form alliances with the government. They are neither liberal nor predisposed toward democracy since they frequently are more interested in guarding jealously their privileged access to power than in broader political reforms.

Nguyen An Nguyen (2006) makes similar observations with regard to Vietnam, where there is an increasing threat of reform distortion made by interest groups. Before Doimoi, he points out that, on the one hand, there were no independent interest groups in the planned economy who were strong enough to influence the policies made by government. On the other hand, it

was difficult to influence state policy since there was a high degree of centralization of state powers. After Doimoi, when the market economy emerged in Vietnam, interest groups expand more and more rapidly and they get giant benefits from influencing state policy. As pointed out by Nguyen An Nguyen, there are conservative interest groups who get benefits from their privileged position in society. Therefore, they obstruct the reform progress. Although their benefits are very small in comparison with the whole reform benefits, the less privileged groups who can receive reform benefits, however, have no way to influence state policies.

Obviously, the rule of law may not be a zero sum game. Its introduction can improve the situation of both the upper and the lower class. It is worthy to note that because of the distrust among people in a lawless society, more and more people within the privileged groups will also realize that playing by certain rules would actually be in their own interests. For such reason, they will support the rule of law. Consequently, if they can get rid of their short-sighted interests, members of the privileged group would defend the rule of law system that provides for predictability and certainty. However, by using the well-known mechanism of divide and conquer, a dictator can take the advantage of envious disputes between privileged groups and less privileged groups to delay the transition process to the rule of law in particular and political freedom in general. Weingast (2003) shows that, on the one hand, the dictators can transgress the rights of some citizen groups. On the other hand, they make their efforts to protect privileged interests for other citizens in order to retain their support sufficient in number to keep them in power (2003, p. 111). As a result, the obstacle to the emergence of the rule of law is the arbitrary and discretionary powers of government which hinder the people effort to solve their coordination problem.

To summarize, the arguments in this section emphasize the importance of constraint mechanisms of the state powers which have been already mentioned in chapter II. In order to overcome the coordination dilemma of the transition to the rule of law, it is in need of an efficient constraint mechanism in order to limit arbitrary powers of government. However, in the next section, I will show that the political and institutional reform in Vietnam has failed to establish an effective mechanism in constraining arbitrary powers. As a result, arbitrary discretion of government can be regarded as a current main obstacle to the rule of law reform in Vietnam.

IV. Arbitrary discretion of government: obstacle to the rule of law in Vietnam

As discussed in chapter II, the rule of law protects individuals against arbitrary use of state powers since state authorities are also bound by the law themselves. In Dicey's lecture about the law of the constitution, he was especially concerned with the constraints of official arbitrary discretion and regarded it as a crucial condition for the development of the rule of law. Similarly, Hayek (1960, p. 213) also realizes that the problem of discretionary powers as it directly affects the rule of law is not a problem of the limitation of the powers of particular agents of government, but of the limitation of the powers of the government as a whole. In section II of this chapter, I argued that the socialist law transplanted in Vietnam could not constrain the arbitrary powers of the Party and governmental organs. Recently, abuse of arbitrary powers is still a main obstacle to the transition to the rule of law in Vietnam. In this section, I explain how arbitrary powers of government influence promulgation, interpretation and implementation of laws and regulations in Vietnam. The main argument in this section is that widespread arbitrary discretion of government currently impedes the rule of law reform, infringes individual rights and therefore hinders the transformation to a market economy in Vietnam.

IV.1. Arbitrary discretion in the rule making process

In the transitional process of Vietnam, laws and regulations have been seen as crucial tools of the state in governing the society by the rule of law and promoting economic development. In addition, the legal system is aimed at satisfying contemporary requirements of international integration of Vietnam. Thus, the legal reform took place very early and contributed significantly to the economic development in Vietnam recently. As a result, a large number of laws and regulations have been issued since the "Doimoi". However, as I already mentioned in chapter I, there are many shortcomings and deficiencies of legal institutions in Vietnam. There always have been the complaints that the laws and regulations in Vietnam are issued rapidly, but inconsistently, incompletely and inefficiently. According to Le Thanh Van (2002) and Tran Duc Luong (2003), the backwardness of the Vietnamese legal system is due to rapid changes in economy and society. Some other authors, for example Pham Duy Nghia (2002), emphasize the legacy of former Soviet socialist law and the incompatibility between social norms and rules currently imported from Western legal systems. In my judgment, arbitrary discretion in the rule-making process causes the backwardness of the Vietnamese legal system.

According to the 1992 Constitution, the National Assembly of Vietnam (NAV) holds the supreme legislative power and decides the most important issues of the nation. The NAV implements its duties and competences through promulgating a Constitution, Laws and Resolutions and supervising the observance of those legal documents²⁷. Especially, Resolutions of the NAV are used not only to solve important issues of the nation but also to amend Laws and even the Constitution. For example, the 1992 Constitution is amended through the Resolution No 51-2001/NQ-QH 10 issued by the NAV on 25th December 2001. Although the NAV has a great deal of powers and competences, almost all NAV representatives, however, have no permanent professional positions. This is because the NAV meets twice a year and term of each session is about one month. For such reason, there are two weaknesses in the legislation of Vietnam.

First, most of the drafts of law in Vietnam are not prepared by parliament members, but by other government organs such as various ministries in government. The law-making process in Vietnam can be briefly described as follows. The government delegates a group of officials who work at a certain governmental organ to draft the law. After much discussion among concerned ministries, departments, social organisations and local authorities, the final draft law will be submitted to the NAV for voting and issuing²⁸. In recent years, many draft laws have been publicized to gather public opinions before being submitted to the NAV. However, the rule-making process is mainly a procedure of bargaining and compromising among ministries, their departments and local authorities. For this reason, the laws frequently reflect state interests rather than common interests of every individual in society.

Second, because the NAV representatives are lacking professional skills and time, the NAV frequently delegates powers of supplementing, guiding and interpreting laws to administrative bodies. Although these powers of governmental organs are also stipulated in the 1992 constitution and many laws (e.g.: the 1996 Law on promulgation of Legal documents), they are commonly so vague and broad that it is difficult to define their limitations. This leaves arbitrary discretion to the governmental bodies in executing laws as analysed in the next section. Therefore, the effectiveness of a law entirely depends on the behaviour of governmental organs. For instance, in order to implement a law, it is in need of under law guidelines. However, in some cases, although the law was enacted for two or three years, guidelines still have not been promulgated, which leads to inefficacy of the law. Analysing

²⁷ The 1992 Constitution, Articles 83 and 84

²⁸ The process of rule making is regulated in the Law on promulgation of legal document issued in 12/11/1996.

the laws and regulations on foreign investment in Vietnam, Schot (1996, p. 33) claims that there are a lot of stipulations, but no factual implementation. In short, Vietnam has failed to create an effective legislature which many economists regard as a direct driving force of growth and development (UNDP 1997, Gonzalez and Mendoza 2002).

Because many state organs can promulgate laws and regulations, the legal framework of Vietnam commonly is very complicated. According to the 1996 Law on promulgation of Legal documents (the 1996 LOPLD) issued on November 12th 1996, the Vietnamese legal system is structured in the hierarchical order as follows.

- (i) Constitution, laws and resolutions issued by the NAV;
- (ii) Ordinances and resolutions enacted by Standing committee of the NAV;
- (iii) Decisions of the President;
- (iv) Degrees, resolutions and decisions of the Government and the Prime Minister;
- (v) Decisions, directives and circulars issued by Ministries;
- (vi) Resolutions and decisions made by the Supreme people's Court and the Supreme people's Prosecutor; and
- (vii) Resolutions, decisions and directives issued by local administrative authorities i.e., people's council and committee of provinces, districts and communes.

All legal documents mentioned above are regarded as official sources of Vietnamese laws and implemented directly by administrative authorities or judges to regulate specific relationships or to solve disputes in society. Additionally, there are a large number of administrative documents issued by officials in government's organs at central and local levels, for example announcements or guideline and directive letters. Strikingly, in the Chinese legal system, such kinds of normative documents also dominate. As Wang (2000) points out, although these documents are not binding in theory but in reality often serve as agency's "secret weapon" in regulating society. In Vietnam, there are a lot of normative documents which are contrary to the constitution and laws. However, it is very difficult to remove them because Vietnam has no judicial review mechanism. Rather, all superior governmental organs are entrusted the power of removing or suspending illegal normative documents which are issued by inferior

ones. For example, Article 82 of the 1996 LOPLD provides the Standing Committee of NAV with the power of supervising and reviewing normative documents as follows:

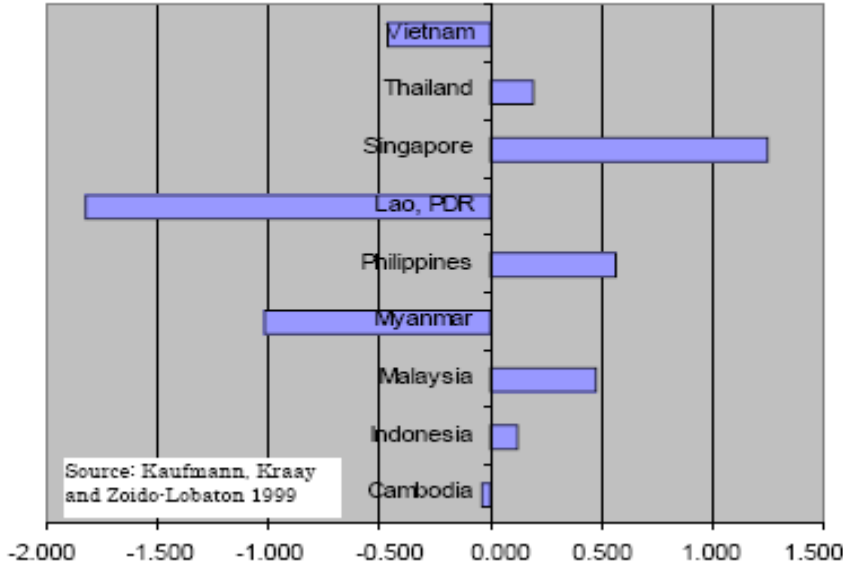
“The Standing Committee of NAV shall repeal whole or a part of normative documents issued by Government, Prime minister, Supreme People’s Court, Supreme People’s organs of Control if those documents are contrary to Ordinances and Resolutions of the Committee; suspend the implementation of whole or a part of those documents if they are contrary to constitution, laws and resolutions of NAV and submit to NAV to repeal them”.

One could thus say that Vietnam has a very broad system of judicial review. Yet the judicial system of Vietnam cannot review legislation as well as normative documents issued by the government. Remember that the U.S. has broad judicial review mechanism as every court can strike down legislation as unconstitutional. Moreover, while the power of reviewing normative documents is entrusted to various organs at both central and local levels, there is still lack of transparent procedures for appealing and examining the normative documents which are supposed to be illegal. Consequently, most of governmental organs could not use this power. For example, the NAV and its Standing Committee have never exercised this power in reality.

Since laws and regulations frequently reflect and protect interests of governmental officials, this has led to the aforementioned problems of great contradiction and rapid changes in the legal system. More seriously, the governmental agencies and local authorities seem to deliberately or undeliberately issue under-law regulations violating private rights and interests of individuals or enterprises which are stipulated in the constitution or laws. Infringement of business rights is an example for this kind of violation. For instance, although freedom of business has been stipulated in the 1992 Constitution and many laws since Doimoi, governmental organs issued many under-law regulations providing more than 300 kinds of licenses, permits and their derivatives. Such legal documents seem to be unuseful for state management, but they cause difficulties and unnecessary costs for investors. According to Pham Duy Nghia (2002), many of these licenses, for example the license for typing, license for photocopying, or license for portrait painting, are not based on any laws. None of these permits could be annulled or suspended until enacting the Enterprises Law in 1999. It is worthy to note that reviewing the legality of regulations and normative documents does not fall within the competence of administrative courts in Vietnam because these courts only examine the specific administrative decisions, which will be mentioned in chapter 6. Strikingly, many studies (e.g. Johnson *et al.* 1998, Kaufmann *et al.* 1999, and Djankov *et al.*

2001) demonstrate that in many countries, people are also facing regulatory burden. According to the survey of Kaufmann et al. (1999), Vietnam, Laos and Myanmar stand in as the economies with the heaviest regulatory structure in the Southeast Asian region (see Figure 3.1).

Figure 3.1: Index of regulatory burden in Southeast Asian (higher score = lesser burden)



Source: Kaufmann et al. 1999, cited in Gonzalez and Mendoza (2002)

Johnson et al. (1998) show evidently causal links between regulatory burden with corruption and the unofficial economy. These links can be found in the case of Vietnam. In Vietnam, the complex legal system can cause difficulties for individuals, especially for private enterprises in searching and understanding laws and regulations. Individuals thus respond to such complex legal systems in two ways. First, they will bribe officials just to get possible instructions or to assure that all their activities will not be sanctioned. Secondly, they will carry out their activities without regarding whether their business is illegal or not. The fact that more than 80% of private houses in Vietnam were built without permits is the best example for this situation²⁹. In order to get a license for building a house, Vietnamese individuals have to submit documents to several organs and meet a lot of officials, which costs a lot of time and money. Consequently, individuals often build their house without permission and are willing to bear administrative sanctions (normally having to pay a certain amount of money) instead of legally following the burdensome procedure for getting permits

²⁹ This data was announced officially in the meeting of NAV as an alarmingly increase of breaking the law in the field of building activities – VN express news.

of house building. This fact illustrates the failure of the formal legal system in transition countries as I already mentioned in chapter 2.

In summary, the reality of burdensome regulatory structure in Vietnam manifests the failure of the National Assembly in performing its supreme rule-making power. Therefore, the NAV has to de-facto entrust more arbitrary powers to executive bodies, which is described by Lipson (1997) as rule by the bureaus rather than rule by law. The next section will illustrate Lipson's view by explaining how Vietnamese executive bodies abuse arbitrary powers in the rule executing process.

IV.2. Arbitrary discretion in the rule executing process

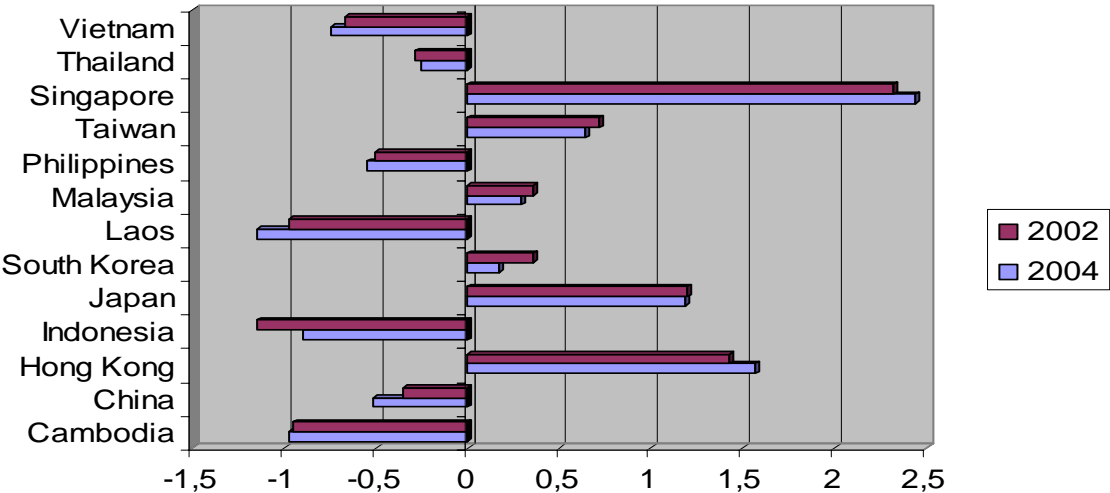
In Vietnam currently, arbitrary discretion exists not only in rule-making process but also more seriously in the field of rule execution. When implementing laws and regulations, governmental officials must follow the principle of “ultra vires” which was regarded as the main principle to restraint authorities under the laws. Generally, this principle means that the state exercises its power within legal limitation. In administrative affairs, the principle means that governmental organs or authorities are not allowed to do anything, except that which is expressly permitted by laws or under-law regulations. However, it is evident in Vietnam that many governmental organs as well as officials are likely to exercise arbitrary powers beyond what they are permitted to do. In my point of view, arbitrary discretion in implementation of laws can be due to three following reasons.

First, as discussed above, laws and even under-law regulations in Vietnam are so vague that they can be interpreted and implemented in various ways. Consequently, officials can have arbitrary powers in executing such laws and regulations. They may use these favourable powers for their own interests, thus bribery and corruption have become rather widespread. A recent example is the trial of Nam Cam case in 2003 in Vietnam. In this case, many senior officials including members of the CPV's Central Executive Committee, the vice-president of People's Supreme Procuracy, the vice-minister of Police were convicted of corruption crime.

There is a fact that although Vietnamese legislators in recent years have tried to improve regulations on administrative procedures, they are still not transparent and cannot force officials abiding by the laws, which makes bribery and corruption much more serious. In Governance Matters IV (2005), Kaufmann et al. construct measures of six dimensions of governance including a *Control of Corruption* indicator. Aggregating many sources of data on

perception of corruption, this indicator measures the exercise of public power for private gain, including both petty and grand corruption and state capture. According to this study, Vietnam, Laos, Cambodia and Indonesia are facing pervasive corruption (see Figure 3.2). Additionally, the Control of corruption index of 2004 slightly declines in comparison with that of 2002.

Figure 3.2: Control of Corruption in East Asia (2002 and 2004)



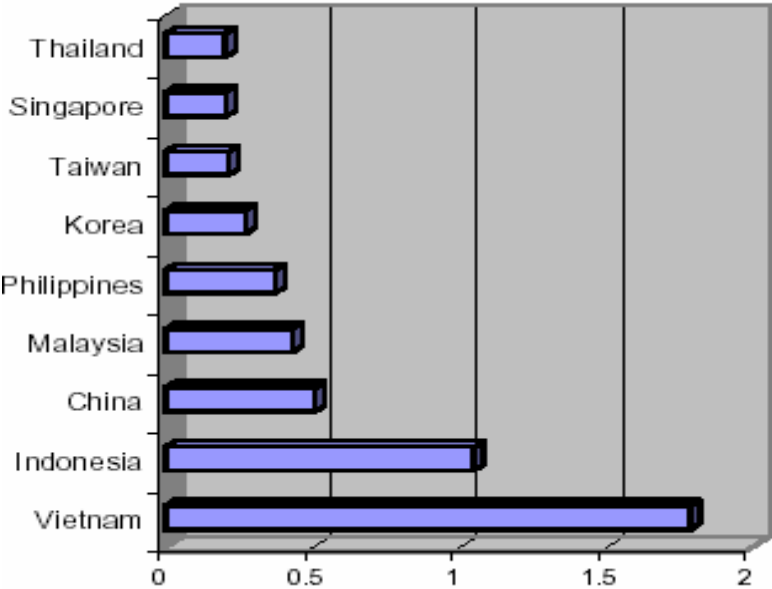
Source: Kaufmann, Kraay, and Mastruzzi (2005)

Second, as discussed in chapter I, the CPV and the State of Vietnam have developed a model of a so-called “socialism-oriented market economy” where the state sector should dominate the economy. Thus, there is confusion between the economic management of government and the business management of SOEs. It is the fact that SOEs of Vietnam have had many favours in comparison with private enterprises. For example, the 1995 Law on State-owned Enterprise (LSOEs) gives SOEs many priorities and preferential conditions such as financial supports, unpaid access to land, and infrastructure. Moreover, many decisions or directives issued by officials in ministries and local governments also give SOEs a great deal of favour. For example, the official letter No 1124 issued by the Ministry of Construction requires the government construction projects to use seven types of product provided by the SOEs belonging to this ministry³⁰. Contrary to SOEs, the private enterprises in Vietnam not only have not received any governmental favours, but also face many difficulties due to burdensomeness of administrative procedures. As indicated in the survey of Djankov et al.

³⁰ See VnExpress 28th July 2003, available at <http://vnexpress.net/Vietnam/Home/>

(2001), the cost of business registration as a fraction of GDP per capita in Vietnam is the highest in East Asia (see Figure 3.3).

Figure 3.3: The cost of Business registration as % of per capital GDP in East Asia (1999)



Source: Djankov et al. (2001)

Third, governmental officials in Vietnam are lacking good legal knowledge and administrative skills. During the war period, appointment of officials was based on their combat achievements, but not their good education. For a long time of the centrally planned economy, the State paid little attention to introducing or training laws and administrative skills of its officials. The incomprehensiveness of officials makes arbitrary discretion in executing laws and regulations more serious because they do not realize the sphere of their discretion. Consequently, governmental officials at central and local levels easily violate the laws or even the basic private rights while executing their duties and competences.

To sum up, there are three main reasons which result in unrestricted arbitrary discretion in administrative affairs namely: (i) ambiguous legal system, (ii) policy of “socialism-oriented market economy” and (iii) the lack of legal knowledge and governance skills. However, the deep reason is due to influences of socialist law legacy as well as Confucian values as I mentioned in section 2 of this chapter. In the next chapter, I will explain in more detail the influences of the Confucian values and illustrate that they are the causes of arbitrary discretion in Vietnam.

V. Conclusions

The studies as well as the debate of the rule of law always draw attention of politicians, philosophers and researches. There is broad consensus among academics and policymakers in transition countries that the rule of law reform matters for economic development. There is also growing awareness among them that consensus is unlikely to ensure success of the rule of law reform. On the contrary, transition countries are still facing many dilemmas and obstacles in this transition process. With the purpose of clarifying dilemmas and obstacles to transition to the rule of law, this chapter provides an empirical analysis of the rule of law reform in the case of Vietnam.

First, the chapter explains that local economic, political and social conditions of Vietnam play a very important role in the transition to the rule of law. To meet the requirement of a market economy, the leadership of Vietnam has improved the legal system and especially adopted the rule of law reform. However, Vietnamese leaders consistently build a socialism-oriented state governed by the rule of law under the leadership of the Communist Party. Moreover, the legacies of socialist law and Confucianism also have impacted on the way of building up the rule of law in Vietnam. Consequently, the rule of law model in Vietnam is dissimilar to those of Western countries. There are three characteristics which make the socialist rule of law in Vietnam different from those in the West, specifically: (i) non-pluralist democracy, (ii) centralization of state powers, (iii) assurance of individual rights as well as state interests and public order.

Second, as I argued, both Vietnamese citizens and their leadership are facing many dilemmas and obstacles in the transition process. Arbitrary discretion of government stands out as a main obstacle to the rule of law reform of Vietnam currently. Therefore, restraining arbitrary discretion of government can be regarded as a significant step in the process of transformation to the rule of law and market economy in Vietnam.

In conclusion, this chapter provides an overall picture of the rule of law reform in Vietnam. The following chapters of my thesis will try to explain in more detail the role of informal institutions and delegation of power to independent court in the process of transition to the rule of law. Specifically, I will answer some questions such as: (i) why and how the Confucian values matter in the transition to the rule of law and (ii) how to make an independent court system in order to effectively restrain arbitrary power and protect human rights and civil liberty.

Chapter 4

Do informal institutions matter? Confucian values and the transition to the rule of law in Vietnam

“From the viewpoint of structural policy, it is of the utmost importance to understand to what extent policy makers can influence directly informal institutions, and within what timeframe; the extent to which informal institutions adjust to formal institutions; and the extent to which the stock of informal institutions will undermine specific public policy initiatives. Questions of this nature are of paramount importance for policies of economic development or transitions to markets...” (Eggertsson, 1997, p. 1192)

I. Introduction

The relationship between institutions and development is a main concern of the NIE. Dealing with the question of how do institutions matter in changing our society, North (1990, p. 107) supposes that institutions are the underlying determinants of the long-run performance of economies. Since 1995, the “Index of Economic Freedom” produced by the Heritage Foundation has empirically illustrated North’s supposition. The index includes the broad array of institutional factors determining a free-market economy, namely: trade policy, fiscal burden, government intervention, monetary policy, capital flow and foreign investments, banking and finance, wages and prices, property rights, regulations, and black market activity. Year after year, the index shows that there is a strong positive correlation between the institutional factors of economic freedom and economic growth. For that reason, there are many calls for the development of new institutions in the process of transition from a planned market economy to a free and open market economy. It can be argued that the rule of law reforms in many transition countries are a process of institutional change to make their formal institutions to be compatible with a free market economy. Emphasizing the importance of institutional reform in transition economies, Voigt and Engerer (2001) even claim that

“institutional change was seen as a precondition for economic transition, rather than one the tasks thereof” (p. 150). Given the significance of institutions for economic development, the first question that will be dealt with in this chapter is how institutions change.

As already analysed in chapter I, it is evident that inherent informal institutions existing in transition countries influence considerably the transition processes. Many of the centrally planned economies suffered from fundamental inconsistencies between formal and informal institutions (Feige 2003). This chapter is aimed at explaining the role of informal institutions on institutional change. Therefore, the next question is how informal institutions constrain and shape transition processes to the rule of law.

In order to answer such questions, this chapter focuses on clarifying two main issues. In the first section, I review the NIE literature concerning the role of informal institutions in institutional change generally and in transition to the rule of law particularly. The chapter highlights that, due to the influence of informal institutions in a specific society, policy makers in transitional countries are facing a dilemma: on the one hand, the development of a market economy requires political reform, for example the transition to the rule of law is considered as a pre-condition to achieving a market economy. On the other hand, the emergence of the rule of law faces resistance from informal institutions such as Confucian values that are rooted in transitional societies. In my judgment, in order to overcome this dilemma, the transition to the rule of law in such a society must be gradual. In other words, institutional elements of the rule of law should be established progressively. I hypothesise that if some of informal institutions of a transition society are not totally contrary to the basic components of the rule of law, those institutions can harmonize with new formal institutional arrangements emerging from the rule of law reform. Another hypothesis in this chapter is that if some elements of informal institutions which are not compatible with the rule of law, but still influence considerably people’s lifestyle, they should not be changed immediately.

In the second section, the aforementioned theoretical considerations will be illustrated through assessing the impact of Confucian values on the transition to the rule of law in Vietnam. As I argued in chapter II, the dilemma of transition to the rule of law in Vietnam may be due to the existence of informal institutions in Vietnamese society, not least Confucian values. Thus, based on the World Values Survey (1995-98, 2001) and the Pew Global Attitude Survey (2003) regarding common opinions and values in Vietnamese society, section 3 of this chapter presents some empirical evidence showing the impacts of Confucian values on the rule of law reform in Vietnam recently. The last section provides some concluding remarks.

II. Institutional Change and the role of Informal institutions

II.1. The NIE approaches on institutional change

Why do institutions change? According to old approaches of the New Institutional Economics, especially the game theoretic approach, economic efficiency was seen as the main force of institutional change. These approaches are based on the assumption that as collective choice made by self-interested individuals determines institutional change, the existing institutions reflect economic efficiency (see: Coase 1960, Demsetz 1964, Pejovich 1972). As an economic historian, North (1990, p. 84) suggests that institutional changes are mainly due to changes in relative prices and in preferences or tastes. The changes in relative prices might be exogenous but most of them will be endogenous as consequences of the ongoing maximizing efforts of entrepreneurs both in the economic and the politic field. However, North (1981, 1990) also points out that due to transaction costs and cognitive capacities, the abilities of rational actors to make optimal choices are restrained. Furthermore, recently it has been recognized that efficiency considerations alone do not always account for institutional change (see Furger 2001). Therefore, the game theoretic approach must be extended to study institutions as a “product of an historical process” (Greif 2001). Most notably, Greif (2003) claims that history has a hold on the direction of institutional change because it is encapsulated in institutional elements. He wrote:

“Institutional elements inherited from the past, such as beliefs, communities, political and economic organizations and their capacities, and internalised norms transcend the situations that led to their emergence. They reflect and embody shared, common beliefs and knowledge among members of the society, they constitute mechanisms to coordinate their actions and expectations, and they are embodied in individuals’ utility functions and cognition” (p. 25).

In order to resolve the shortcomings of the old approach, there are two new approaches of the NIE on explaining institutional change. The first approach, which is led by North (1981, 1990), argues that the direction of institutional change may significantly be affected by cultural factors and path dependence plays a very important role (see more detail in North 1981, 1990; Greif 1994, 2003; Schlüter 2000; and Fuger 2001). Especially, North (1981, 1990) sees ideology and path-dependence as significant determinants for institutional change. This is because, under conditions of uncertainty, individuals will resort to heuristics, past experience, imitation, and analogical thinking (Furger 2001, p. 3). In other words, under

conditions of uncertainty, individuals' beliefs and ideologies matter for institutional change. Ideologies, according to North (1981, p. 48), "are efforts to rationalize the behaviour pattern of individuals and groups". Ideology matters for institutional by: i) reducing complexity, ii) resolving free-riding problems and iii) reducing transaction costs. Furthermore, ideology buttresses institutions by providing them with an "ideological base" (Schlüter 2000, p. 7). With the path-dependency approach, North (1990, p. 6) notices that cultural constraints not only connect the past with the present and future, but also provide us with a key to explaining the path of history change.

The second approach, which is led by Knight (1992), considers institutional development and change as the result of social conflicts in a society and the way in which such conflicts are resolved. In his book, "Institutions and social conflict" (1992), Knight supposes that the "distributional effects" of institution and the "relative bargaining power of actors" in society play a decisive role for institutional change. Thus, he opposes the explanation of institutional change that refers to social efficiency or Pareto superiority and compensation. For example, Knight (1992, p. 13) believes that the emphasis on collective benefits in theories of social institutions fails to capture crucial features of institutional change. Instead, he shows that in order to explain institutional development and change, we must look at strategic social conflict and mechanisms to solve such conflict (1992, p. 123). Applying Knight's approach, Voigt (1999b) provides a theory analyzing the change of constitutions. He considers constitutional change as the outcome of a bargaining process between the rulers and various opposition groups. He thus suggests that the establishment of opposition groups who could overcome the organization dilemma is regarded as a prerequisite for constitutional change.

In a similar line, Acemoglu et al. (2002) also affirm that the process of institutional change involves the conflict between different groups, namely the rulers and groups receiving privileges from the rulers on the one side, and the citizens at large or new groups on the other side. To illustrate their view, Acemoglu et al. (2002) analyse the social conflict in the context of the emergence of capitalist institutions. Their hypothesis is that West European growth during this period reflects the combination of growth chances created by the Atlantic trade and the emergence of economic institutions. These institutions secure property rights to a broad cross-section of society and allow free entry into profitable businesses. The economic institutions, in turn, resulted from the development of political institutions constraining the power of the monarchy and other groups allied with the monarchy. In Acemoglu et al. (2002), such political and economic institutions are called the "capitalist institutions".

Acemoglu et al. further argue that “capitalist institutions” needed the nascent bourgeoisie to gain strength and that Atlantic trade contributed to economic change indirectly by enriching segments of the bourgeoisie and inducing institutional change. The nascent bourgeoisie wants these institutions, while the monarchy typically opposes them. As a result, there will be frequent conflicts over the control of political power and the state, and on how to reform institutions (Acemoglu et al 2002). Similarly, Olson (1982) also argues that interest groups organized by those who benefit from the existing economic institutions are likely to invest in ensuring that the political system will lead to their perpetuation.

Strikingly, there are many similarities between the Marxist theory and the second approach in explaining institutional change. According to Przeworski (2003), the causal relations between the “forces of production” and the “relations of production” which constitute the “base,” as well as the relations between the “base” and the superstructure are the cornerstones of Marxist theory. In “The communist manifesto”, Marx and Engels (1848) profoundly argued that social change initiates from the revolution of the “forces of production” that leads to the change in the “relations of production”. More specifically, Marxist historical materialism theory shows that due to economic growth, the relations of production do not satisfy the requirements of the development of the forces of production. Consequently, a social revolution will come about in order to make relations of production as well as the superstructure of society more suitable with the growth of forces of production. The social revolution advanced by class conflicts leads to new social order with new ruling classes and new ruled classes. In the new social order, the dominant institutional arrangements favour the benefit of ruling class. In vol. III of the “Capital”, Marx wrote:

“it is in the interest of the ruling section of society to sanction the existing order as law and to legally establish its limits given through usage and tradition. Apart from all else, this, by the way, comes of itself as soon as the constant reproduction of the basis of the existing order and its fundamental relations assumes a regulated and orderly form in the course of time.” (p. 793).

It is worthy to note that Marxist theory as well as the two NIE approaches of Knight (1992) and North (1981, 1990) suppose that institutional change is not easily accomplished. According to Marx (1986, p. 187-8, cited in Knight 1992), institutional change was not a smooth path of increasing improvement. Instead, it was a sequence of fluctuations between stability and substantial change. In the view of North (1981), although the formal rules might change very quickly, informal institutions are much more impervious to deliberate policies. Consequently, he points out that a combination of the formal rules with the associated moral

and ethical codes of behaviour underlies the stability of institutional arrangements and makes them slow to change. Such a combination produces in grown patterns of behaviour which, like the capital stock, tend to be changed only incrementally (North, 1981, p. 205). Knight (1992) supposes that informal institutions can limit the number of feasible alternatives from which formal institutions are developed. This is because informal rules influence the distribution of resources that in turn, affects the power asymmetries in the social conflict. In other words, formal institutions are designed and created in the foundation of informal convention and norms (Knight 1992, p. 171-172). He further suggests that informal rules continue to emerge and change within and around the formal rules as the unintended consequences of everyday social interaction (p.173). The next section will explain why changing institutions is difficult.

II.2. The cost of institutional change

From reviewing the two approaches on institutional change in above section, it can be realized that it is difficult to bring about institutional change, especially changing informal institutions. North (1981, 1990) suggests that the costs of producing efficient institutions make it hard for institutional change to occur. In my judgment, there are three reasons inducing change of informal institutions to be very costly. First, when individuals try to overcome inefficient informal institutions, they face the problem of collective action. As Olson (1965) indicates in “The logic of collective action”, collective action is difficult and problematical. Consequently, it is costly for individuals to overcome collective action problem since changing institutions requires group action. Therefore, Knight (1992, p. 9) supposes that the problem of institutionalisation can be conceptualised as a problems of collective actions. Second, it is also costly to change informal institutions because of a kind of “start-up cost”, including the fear of and resistance to the unfamiliar (Olson 1982, p. 38). In order to reinforce his viewpoint, Olson also adduces a very famous argument of Machiavelli in “The Prince” (1961) that:

“There is nothing more difficult to arrange, more doubtful to success, and more dangerous to carry through, than to initiate a new order of things... Men are generally incredulous, never really trusting new things unless they have tested them by experience.” (p. 51)³¹

Obviously, informal institutions induce “start-up costs” for institutional change. According to Greif (2003), this is due to the fact that by reflecting, generating, and maintaining internalised norms, beliefs, and a compatible pattern of behaviour, informal institutions provide much of

³¹ Cited in Olson 1982, p. 38

the order to which individuals aspire. Thus, he supposes that individuals would tend to respond to the demands of a new order and new institution while clinging to the beliefs and norms central to institutional elements inherited from the past (p. 28-29).

Third and finally, informal institutions can induce “psychological cost” for institutional change. The elements of informal institutions such as conventions, norms and beliefs that were internalised in the past are properties of individuals, parts of their identity, thus changing one’s identity or one’s conception is psychologically costly. This implies that one would want to prevent such change (Greif 2003, p. 29). In the world today, we can easily witness various calls for preserving identity of one continent, nation, region, ethnic group, and even special group of people from the globalisation and westernisation, including institutional change.

Although informal institutions induce costs for institutional change, many theoretical and empirical studies demonstrate that in fact it can be more beneficial to maintain existing informal institutions than to introduce new formal institutions (see e.g.: North 1981, 1990; De soto 1989, Ellickson 1991; Knight 1992; Putnam 1993; Voigt and Kiwit 1999, and Fuger 2001). Those studies show that many informal institutions persist because they can efficiently reduce transaction costs. For example, in the view of North (1990), the main function of institutions is to reduce transaction costs in the economy. Knight (1992) regards reduction of transaction cost as the main advantage of informal institutions. According to him, despite providing bigger distributional advantage, people still do not rely on formal institutions due to the costs of reliance on the state to ensure that advantage. He wrote:

“Strategic actors face a trade-off between distributional gain and the costs of external sanction. Given the choice between a stable informal rule that provides a smaller distributional advantage and the pursuit of a potentially more beneficial formal rule with the requisite costs of external sanction, those actors may choose to rely on the informal convention and forgo recourse to the power of the state. For the weak, it is a mixed blessing; for the strong, it is a last resort” (p. 208).

Regarding noncompliant behaviours as specific informal institutions in the transition countries, De Soto (1989) argues that those behaviours that circumvent burden regulations in transition countries effectively reduce transaction costs. Examining the case of Shasta County, Ellickson (1991) gives an empirical example criticising legal centralism which emphasizes the superiority of law and formal institution and does not appreciate the role of informal institutions. According to Ellickson, informal institutions play a very important role in stipulating social interaction in Shasta County. Thus, he suggests a mixed system of informal

rules and formal legal rules in a manner that minimizes transaction costs (1991, p. 240-264). Other empirical studies such as Putnam (1993) illustrate that “social capital” serves reducing transaction costs. In the view of Putnam, social capital takes the form of trust and social norms and makes cooperation easier.

Another advantage of informal institutions is that they put constraints on the behaviour of economic agents and reduce the risk of opportunistic behaviour. Therefore, according to North (1981), informal institutions can promote economic performance by creating social stability. He argues that:

“strong moral and ethical code of a society is the cement of social stability which makes an economic system viable” (1981, p. 47).

A similar argument can be found in Knight (1992). According to Knight, the stability produced by institutional arrangements is a major focus of public choice theory. He supposes that if no one wants to deviate from the institutional rules and that everyone else is also complying with those rules, the institution will be in equilibrium. Thus he suggests that social outcomes of institutions may be stable even if they are neither socially efficient nor Pareto optimal (p. 37).

To sum up, to understand why and how institutions change and how this change can promote economic development, especially in transition economies, it is necessary to scrutinize informal institutions rooted in these economies and their interaction with new formal institutions and policies. Due to various influences of informal institutions, the transition process to the rule of law seems to be different among transitional countries. The next section will focus on analysing influences of informal institutions on the transition to the rule of law.

II.3. Informal institutions and the transition to the rule of law

In the previous section, I analysed the role of informal institutions on the course of institutional change by reviewing some of the NIE studies, notably those of North (1981, 1990) and Knight (1992). In this section, I explore the role of informal institutions for a particular kind of social and institutional change, namely the process of transition to the rule of law.

As I already mentioned, paralleling with the economic reform, transitional countries have supported the political and institutional reform in order to transform from “rule of man” states

(dictatorial regime) to “rule of law” states. This is because rule of law reform creates the foundation for economic development (see e.g.: Hayek 1960; Ghai 1986; and Barro 1999). However, as I have also already argued, many countries have failed in their transition to the rule of law. For instance, it is evident that mass privatisation in Russia did not lead to the emergence of the rule of law, but it did prolong the absence of the rule of law (Stiglitz and Hoff 2002, Voigt and Kiwit 1995, 1999). According to Feige (2003), many of the transition economies have yet to establish the rule of law, and suffer instead from the legacy of arbitrary discretion that encouraged noncompliant behaviour. This judgment can be illustrated by the World Bank’s (1996 cited in Feige 2003) estimates of unofficial activities. Specifically, in a sample of Central and Eastern European countries, the underground economy increased from 18 to 22 percent between 1989 and 1994. For a sample of NIS countries, the underground economy appeared to grow from 12 to 37 percent during the same period. A similar empirical finding in Voigt (2003c) shows that rule of law, constitutional democracy and market economy, the core formal institutions of free society, are hardly implemented in the Muslim world. The contemporary situation in Iraq seems to undermine a belief of Americans who think that they can pay their money and even their life to change the regime and force people in other countries to accept new democracy-institutions (i.e., the American democracy style).

From the aforementioned situation of the rule of law reform, one can raise some questions. For example, why does the rule of law reform fail in many transition countries? More precisely, why does the state of “no rule of law” such as arbitrary discretion, noncompliant behaviours, corruption, etc still persist regardless of many efforts and determinations of host countries as well as international support in order to put the rule of law into practice? In order to answer these questions, many recent studies seek for an explanation from the role of legal origins. Those studies try to find evidence illustrating that the countries with Common law origins have better legal institutions and thus exhibit better protection of economic freedom than those with Civil law origins (e.g. see: La Porta et al. 1998, 2000 and 2003, Glaeser and Shleifer 2001, Djankov et al. 2002).

However, some others do not stress legal origins, but examine the “initial conditions” of applied countries. For example, Acemonglu et al. (2000) propose a theory of “colonial origins” to argue that the western colonizers used different policies for different colonies. These policies seem to be determined by the feasibility of colonial settlement. If the conditions in the colonies (e.g. settler mortality rate) are favourable to settlers, they will create good institutions, but if they could not well settle, they will create institutions apt to exploit

the indigenous populations (Acemoglu et al. 2000, p. 5). Therefore, the authors suppose these institutional choices to be locally optimal in the sense that equilibrium institutions are likely to have been designed to maximize the rents to European colonists, not to maximize long-run growth for the colonies. Having realized the importance of local conditions, Berkowitz et al. (2003) and Pistor (2004) explain that the failure of transplanting western legal systems to transition countries is due to the fact that policymakers in these countries do not take into account the impact of initial conditions that can have a negative long run influence on the quality of new legal institutions.

Similarly, Stiglitz and Hoff (2002) and Gelman (2000, 2003) claim that the prevalence or dominance of the informal rules and norms over formal institution of political regimes that creates obstacles to the rule of law is a typical outcome of many post-authoritarian transitions, especially in post-soviet regimes. A similar argument can be found in Voigt (1999b, 2003c). In chapter V of his book “Explaining Constitutional Change” (1999), he supposes that shared moral norms will be a necessary prerequisite for being capable of establishing an effective legal system in general and a successful constitution in particular. Based on a game theoretic analytical framework, he further argues that the possibility of a society’s members of effectively constraining the ruler and therefore establishing the rule of law depends upon their capability of bringing internal institutions, i.e., informal institutions about (1999, p. 94-99). However, the success in bringing about such informal institutions differs in degree from place to place. Furthermore, in many countries like Muslim societies, informal institutions do not constrain but buttress the powers of ruler. Accordingly, having considered institutional reforms in Muslim societies, Voigt (2003c) claims that the impediments of informal institutions rooted in Muslim societies make it difficult to implement the rule of law in those countries.

In short, it is supposed that when the formal contents of the rule of law is not compatible with the informal institutions in a transitional society, the transition to the rule of law may fail. For such reason, policy makers in many transition countries are facing a dilemma. On the one hand, the development of the market economy requires political reform in which the transition to the rule of law is considered as a pre-condition. On the other hand, the emergence of the rule of law faces the resistance of informal institutions rooted in transition societies. In this context, how can a country surmount such dilemma? What are solutions to the conflict between the rule of law and informal institutions?

In my viewpoint, the only way for overcoming such dilemma is to make the rule of law reform compatible with informal institutions of society. This is because it is under the necessity of making a “close fit” between the “supply” and the “domestic demand” for the overall effectiveness of legal and institutional reform (Berkowitz et al.2003). Moreover, the constitutional rules (as well as the legal system as a whole) chosen by a given society need to be compatible with its internal institutions (Voigt 1999b).

The next question is how to modify the rule of law to make it consistent with the informal institutions in society. To my opinion, such modification is only accomplished by using the mechanism of “gradual refinement of institutional design” developed by Greif (2003). According to Greif, institutional change does not necessarily imply a wholesale systemic change. Such a change can be accomplished through institutional refinement, through changing, introducing, or manipulating a particular institutional element. He presents his views as follows:

“The tendency for institutional refinement reflects the fundamental asymmetry between existing institutional elements and alternative ones and the local learning that institutions imply. The former imply that it is much easier to change a particular institutional element or add new ones to an existing institution rather than attempt to create a completely new set of institutional elements, a new institution” (p. 38).

Based on Greif’s argument, I suppose that the rule of law reform should be implemented gradually. It is my contention that because the rule of law is a formal institution with various elements, the transition countries should apply these elements partly to the existing institutions rather than copy entirely the Western model.

It has been argued that such gradual transition does not lead to the most efficient model of the rule of law. But the counter argument is that the rule of law in many western countries currently is still not perfect (e.g. Hager, 2000). Thus, there is not the most efficient model for the transition to the rule of law at all. Additionally, even in the West, the rule of law also took a couple of hundred years to develop. Furthermore, as sociological institutionalists like Hall and Taylor (1996) argue, something would happen because cultural style and expectations accepted worldwide demand them, not because they most effectively achieve the goals of rational actors. Therefore, in structuring the rule of law institutions in a particular society, actors will be motivated more by conceptions of what they believe to be appropriate than by conceptions of what would be effective. Many of the institutional forms and procedures used

by modern organizations were not adopted simply because they were most efficient. Rather, they should be seen as culturally specific practices (Hall and Taylor 1996, p. 946-947).

In order to illustrate the theoretical considerations in above section, the following section gives an empirical analysis regarding the influence of Confucian values on the transition to the rule of law in Vietnam. First, I will scrutinize the historical development of Confucianism in Vietnam. Second, I will analyse the way in which Confucian values may influence the current society generally and legal system particularly of Vietnam. Finally, based on the data in the latest waves of the World Values Survey (1995-98, 2001) and the Pew Global Attitude Survey (2003), I will take an empirical test of Vietnamese opinions and acceptances relating to some features of Confucian values in Vietnam currently.

III. Confucian values and the transition to the rule of law in Vietnam.

III.1. Historical development and clarification of Confucianism in Vietnam

For one thousand years (207 BC -939), Vietnam was a part of China. Chinese officials administered the territory and attempted to assimilate the Vietnamese population into Chinese civilization, which was, at that time, one of the most advanced civilizations in the world. As a result, Chinese political and social institutions were introduced into Vietnam. In such process, Confucianism as well as Taoism and Buddhism which are three dominant religions in China merged into the indigenous institutions of Vietnam.

However, under some early independent dynasties, Confucianism still did not play a dominant role in Vietnamese society, but simply existed in harmony with other religions (Pham Duy Nghia, 2003). Some scholars even suggest that Buddhism and Taoism penetrated more successfully than Confucianism during the early independent time of Vietnam (Phan Dai Doan et al., 1999). Since the Le dynasty, the rulers of Vietnam regarded Confucianism as an ideological instrument to strengthen their power. It is worth noting that, under the rule of the King Le Thanh Ton (1460-1497), Confucianism fully flourished and played a dominant role in society in terms of education, governance and law (Phan Dai Doan et al, 1999, p. 284). Overall, although Confucianism rose and fell from the 16th to 19th century, it remained dominant until the beginning of the 20th century.

What are the contents of Confucianism? Why and how did Vietnamese rulers and people adopt Confucian values? The doctrine of Confucius (551 BC – 479 BC) was mentioned in the four classical texts and in five canonical books. His most important collective books, however, are *Analects* which were written about 500 BC. In his works, Confucius teaches people to become an honorable man. As a man of honor, people should follow four rules to achieve self-perfection including: (i) to cultivate himself; (ii) to run his family; (iii) to rule the country; and (iv) to pacify the world. In addition, people should adopt three important sets of social relationships in society (i.e. between King and citizen, father and son, and husband and wife). Remarkably, Confucianism is a doctrine of morality because it convinces people to practice five cardinal virtues in order to become moral man, namely humanity, equity, urbanity, intelligence and honesty.

Strikingly, not only being regarded as a religion, Confucianism was also conceived as a theory of state governance. This feature makes Confucianism different from Taoism or Buddhism. Living in the time of wars and disorders, as a teacher, Confucius was interested in bringing stability back into society³². He hoped to bring China back to the peaceful day of the “sage Kings”. Therefore, his books propose the way to govern peacefully society and to strengthen power of the rulers. That is why except Confucianism, the Vietnamese rulers did not regard Buddhism or Taoism as an instrument of governing society in feudal period of Vietnam. Confucianism, therefore, was seen as a set of formal institutions imposed by the king and his mandarins, which conveyed numerous principles to rule society.

First, Confucianism proposed a principle of “Mandate of Heaven” which means that the fate of one person, one family or one regime is arranged by supernatural forces - Heaven. Accordingly, the power of the King and government as a whole originated from the “Mandate of Heaven”. The king is considered as the son of Heaven and to be morally perfect. In such a society, social improvement starts with the King and works its way down to the people. The King then takes responsibility for the entire well being of society. Furthermore, according to Confucius, human society is under a spontaneous hierarchical order in which people are treated unequally. People are divided into some classes, notably the ruling class and the ruled class. People must be subject to hierarchical order that includes three sets of main relationship in society, specifically: ordinary people must be subject to the King and Mandarins, children

³² Though the exact publication date of the first complete *Analects* cannot be pinpointed, it was probably finished during the warring state period in ancient China. See more detail in Tutor Gig Encyclopaedia, available at: http://www.tutorgig.com/ed/Analects_of_Confucius

must be subject to their father and the wife must be subject to her husband. Such hierarchical order was called the imperatives of Heaven. Confucius said:

“Unless one recognizes the imperatives of Heaven one cannot be a noble man” (Analects³³).

Therefore, according to Confucianism, loyalty to the rulers is the very first moral requirement of every person. One might argue that, in a broad sense, Vietnamese interpretations of Confucianism differed from those of the Chinese in regard to the degree of loyalty extended to a ruler. In Vietnam, loyalty to a monarch was conditional upon his success in defending national territory. This is because Vietnamese people in the course of historical development always faced the threat of being conquered. At the present time, because the Communist party has successfully gained and protected the independence of Vietnam, many people in Vietnam respect the party and to this day recognize its mandate to govern Vietnamese society.

Additionally, Confucianism in Vietnam supposes that the power of the emperor was not absolute. On the contrary, with the view that the ruler was a god-king with virtually unlimited powers, Confucianism stressed that the behaviour of the ruler himself was bound by a set of broad political principles. For example, Confucianism required compassion and concern for the needs of his people. Thus, if the rulers fail to live up to those standards and oppress the people, then he would lose the "Mandate of Heaven" and could be deposed. The rulers must be careful with their governance and interested in their people. Confucius even argued that rulers must govern people carefully and should try to ensure that there will be no complaints in villages and families (cited in Phan Dai Doan, et al. 1999, p. 276). In Analects, *ibid.* there was a well-known idea of Confucius regarding the relationship between governance and people as follows:

Tzu Kung asked about government. The Master said, "Enough food, enough weapons and the confidence of the people." Tzu Kung said, "Suppose you had no alternative but to give up one of these three, which one would be let go of first?" The Master said, "Weapons." Tzu Kung said, "What if you had to give up one of the remaining two which one would it be?" The Master said, "Food. From ancient times, death has come to all men, but a people without confidence in its rulers will not stand."

³³ Analects, translated into English by Muller (2004). Available at: <http://www.hm.tyg.jp/~acmuller/contao/analects.htm>

Inspired from such words of Confucius, the most famous Confucianist of Vietnam, Nguyen Trai (1380-1442), metaphorically compared a regime with a boat in order to suggest that rowers are the people, but the boat can be capsized by the people.

Second, Confucianism stressed that the ruler was obliged to pursue “moral governance”, which means that the rulers must govern society by their own moral characteristics. Therefore, rulers must have both talent and morality. Furthermore, Confucianism was unique in its concern for the selection of talented and virtuous individuals to serve in the bureaucracy. Under feudal regime, Vietnamese officials were not chosen exclusively from the landed aristocracy, as in much of the rest of the world, but through a series of civil service examinations which tested the students in their knowledge of Confucian political, social and moral principles. With regard to this issue, Confucius said, “If ones excels at one's studies, one can become a mandarin” (cited in Huu Ngoc, 2004). According to Huu Ngoc, these words of Confucius imply that there is a choice of values: for a scholar, the reason to study is mandarin. Mencius, a student of Confucius, also distinguished between an educated ruling class who were responsible for the interests of the “people” and the larger mass of those who worked with their hands and lacked the education and training needed for them to take an active part in government (Mencius 3A, cited in De Barry, 1988, p. 178).

In Vietnam, the Ly dynasty established National School (Quoc Tu Giam), which is regarded as the first university of Vietnam, in 1070. Then in 1075, the School held the first Confucian examination. The system is by no means totally egalitarian or democratic in the modern sense. For example, girls were not permitted to sit for the examinations because it was assumed that their place was at home. Furthermore, unlike Neo-Confucian in China which allowed self-critics and protest (De Barry 1988, p. 161), Confucian education and examination system in Vietnam failed to develop a critical thinking among scholars and educated officers. However, this system did lay the foundation for an educated bureaucracy to administer the state and thus restrict the power of the emperor and his court. Importantly, this system provided an opportunity for bright children who are descended from peasant to escape hard works of rural life and rise to an influential position in Vietnamese society.

As I already mentioned in chapter III, despite adopting socialist law, Confucian traits were still discernible in Vietnam during the time of the communist rule. For example, many of the first-generation communist leaders came from scholar-official backgrounds and were well-versed in the traditional requisites of "talent and virtue" (*tai duc*) necessary for leadership. It should be noted that Ho Chi Minh was a Confucian scholar. He was born in a Confucian

family and was trained on Confucian doctrine by his father³⁴. Ho Chi Minh frequently stressed the importance of moral leadership (Nguyen Khac Vien 1974; Quang Can 2001). One of his famous statements is that:

“a person who has virtue but no talent is likely to do every wrong, but a person who is talented but has no virtue is useless” (Ho Chi Minh 1995, p. 338).

Vo Nguyen Giap, Le Duc Tho and Mai Chi Tho descended from intellectual families. They were samples representing incorruptible and effective administrators as well as moral leaders of Vietnam. The relationship between the government and the Vietnamese people was also deliberately structured under Confucian values. According to Ho Chi Minh, officials are servants of people. Therefore, he said that his ultimate aspiration is to “enable the people to use democratic rights and to enjoy democracy”³⁵.

Third, Confucianism gave prominence to governing by means of virtue and self-cultivation rather than by law and punishment. According to Chow (2003), in the traditional culture of China, Confucian ethics had more influence than laws in guiding people’s behavior. Chinese children in school were taught to obey the ethical rules of Confucius more than the law of the government. Therefore, when there is a conflict between law and ethics, the correct behavior should follow Confucian ethics that was regarded to be more effective than law (Modde and Morris, 1967). For example, Confucius said:

"If you govern the people legalistically and control them by punishment, they will avoid crime, but have no personal sense of shame. If you govern them by means of virtue and control them with propriety, they will gain their own sense of shame, and thus correct themselves." (Analects, *ibid.*)

In contrast, as I argued in chapter II, the legalist school, an alternative theory discussing the governance in ancient China, believed that without a set of strong laws with harsh punishments, society would go out of control. This contradiction between Confucianism and Legalism is because whereas Confucianism believed that people were naturally good, Legalism supposed that they were naturally bad and that people only reacted to their craving for pleasure and the fear of pain and punishment.

³⁴ See a deeper discussion by Duong Tung in Ho Chi Minh – a Personality - a Person, Communist review, No 47, 2003.

³⁵ See “100 statements of HoChi Minh about Democracy”, cited in Nguyen Khac Mai, 2006.

Fourth and finally, Confucianism is a theory of social order rather than of economic development. In “the religion of China” (1951), Weber claimed that Confucianism lacks the “spirit of capitalism”. According to him, capitalism at the level of individual citizens constitutes a particular mode of economic life. In such a mode, citizens take guidance from specific norms, which Weber (1976) called “capitalist rules of action”, emphasizing the rational pursuit of individual interests and economic prosperity. In “The Protestant Ethic and the Spirit of Capitalism”, Weber (1904-05) also suggested that the Protestant reformation emphasized an individualistic, rational, cause-and-effect outlook. As Dalton and Shin (2000, p. 5-6) point out, upon becoming pervasive, the “spirit of capitalism” endorsed economic advancement in Great Britain and other regions of Europe by promoting the Commercial Revolution.

On the contrary with the “spirit of capitalism”, Confucianism disregarded the economic interests. If Puritanism encourages one to acquire as much wealth as one needs to live well (Fukuyama 2001, p. 1131), Confucius argued that the “superior man” should stay away from the pursuit of wealth. According to Confucius, the superior man should be aware of righteousness while the inferior man may be only aware of gain. He said:

"I can live with coarse rice to eat, water for drink and my arm as a pillow and still be happy. Wealth and honors that one possesses in the midst of injustice are like floating clouds."(Analects, *ibid.*)

Similarly, Mentius (371-289 BC), a brilliant student of Confucius argued that a man who does business is unmoral, and a man who behaves morally can not become rich businessman (cited in Phan Dai Doan, et al.1999, p. 288). Therefore, becoming a civil servant is preferable to becoming a businessman and carries a much higher status class. Moreover, as Weber argues, Confucianism inhibited economic success in East Asia because it discourages competition and innovation (cited in Dalton and Shin 2004, p. 7). This is because Confucianism is oriented toward the past, an attitude that conflicts with an orientation toward the future and the expectation of continual change.

There is a fact that such a Confucian ethic led to stagnation in the economy of Vietnam under feudal regimes (and perhaps also in other East Asia countries) from the 17th to 19th centuries. As a result, at the end of 19th century, the last feudal regime of Vietnam (the Nguyen dynasty) could not deal with a far superior economy and force from the West. Vietnam was a colony of France until September 1945. During the colonial period, some Vietnamese

Confucians (e.g. Phan Boi Chau and Phan Chu Trinh) made effort to modernize Confucianism in order to gain independence for Vietnam, but they were not successful. Thenceforth, Confucianism has lost its role as formal institution in society of Vietnam and is dominant only in informal institutions. It is in that form that Confucian values still have an effect in the current transition to a market economy and the rule of law.

III.2. The impact of Confucian values in Vietnam currently

As discussed in above section, for a long time, Vietnam was under the influence of a Confucian pillar and Confucianism principles were regarded as formal rules in governing society. Hence, various features of Confucianism, which are commonly called Confucian values, may still have effects on the legal system and political institution in Vietnam presently.

What constitute Confucian values in society today? How do such values influence the transition to the rule of law in Vietnam? Recent scholarship has proposed a variety of elements that might constitute Confucian values in Vietnamese society today. For instance, in the view of de Bary (1998) and Hager (2000), respect for superior and nobleman is the most important character of Confucianism. Shin and Dalton (2004) see appreciation for hierarchy and concern for collective well being as two key features of Confucian values. According to Ornatowski (1996), Confucian values will refer to: (i) a high public regard for education and the widespread use of meritocratic entrance exams for placing talent in society; (ii) an emphasis on mutual obligations between superior and inferior within social organizations based upon actual or quasi-family ties, where the prime virtue of the superior is benevolence and of the inferior is loyalty; and (iii) an overall stress on “social harmony” rather than individualism. As De Bary (1998) points out, the aforementioned Confucian values have both positive and negative aspects. Some of these aspects will be discussed in detail below.

Hierarchical and authoritative order

As mentioned earlier, under Confucian pillar, the king constituted the state to govern society under the mandate of Heaven. The king held absolute power and competence while ordinary people had to obey king’s orders as an unconditional obligation. Consequently, in historical political arrangements of many East Asian countries, there was no notion of separation of powers and the authorities (the King or Mandarin) could execute all state’s powers, including creating laws and executing them by themselves. That is why in the feudal legal system of

Vietnam, there was the dominance of administrative rules made by mandarins. For example, Haines (1984, p. 309) claimed that law made by the mandarins became “natural law” for all people of Vietnam in the time of the Le dynasty. Hence, the conception of pluralism or the doctrine of separation of powers is difficult to be accepted in Vietnam presently. A similar finding in Flanagan and Lee (2000) also suggests that authoritarian values in Japan and Korea have been detrimental to democratic orientations. However, with the case of Singapore discussed in chapter III, authority and hierarchy might facilitate the development of modern economic structures although they would be less consistent with democratic politics.

Notably, there is an inherent contradiction of Confucianism in terms of hierarchical order. On the one hand, Confucianism aims at promoting a hierarchical social order, on the other hand, it stresses the importance of people as the basis of the state. This situation leads to what is called “the trouble of Confucianism” (see de Bary, 1998). Creel (1960) also argues that some aspects of Confucianism are compatible with democracy, specifically its instruction to political leaders to maximize the wealth and happiness of the people, a preference for persuasion rather than force. For example, following the view of Mentius (371-289 BC), the rulers should respect the people’s desires, love what the people love, and hate what the people hate. When asked who plays the most important role in society, he replied: first come the people, then comes the state, and the king is negligible. In this sense, the state belongs to everyone, which is a notion of democracy. For the case of Vietnam, in the feudal ages, only scholars of Confucianism - but not of Buddhism and Taoism - could practice certain kinds of liberal protests and criticism against the king. This aspect plays a very positive role in the current political and institutional reform in Vietnam. Since the CPV holds the sole leading role in Vietnamese state and society, there are no opposition groups. For such reason, the CPV and Vietnamese government may not be pressured by opposition parties in promoting the rule of law reform as well as transformation to market economy. However, the protest and criticism of government policies among individuals in society, especially among intellectuals can be seen as alternatives.

Confucian ethics and law

In above section, I explained that Confucianism argued that laws had no supremacy in society, whereas innumerable Confucian ethical norms and principles played a decisive role. According to Modde and Morris (1967), Confucians regard laws as no better than the men who create and execute them. The moral training of the ruler and his officials counts for more than the devising of a clever legal machinery. On the one hand, this means that the King and

his mandarins should govern society mainly by setting their moral examples rather than laws or punishments, which have only a subordinate role. On the other hand, this means that the King and officials should be educated in order to become a moral example. Therefore, self-cultivation was expected to take the place of laws and punishments as a means to rule society. Crime was seen as symptomatic of an absence of virtue that produces conflict. In Vietnam, many leading scholars of Vietnamese Confucians promoted the use of “li” that may be understood as a correct performance of all kind of moral and religious ritual to govern a country (Pham Duy Nghia 2002). Such a system imposes on the individual and the state the responsibility of bringing all members of society to a condition of self-imposed moral rectitude in which behavior is defined in terms of collective, rather than individual good. On the contrary with the West, where law is the guarantee of rights that all may claim, in Vietnam the law is concerned with duties that all must fulfill.

In the history of Vietnam, and even today, moral norms (“li”) and customary rules heavily influence the legal system. These rules may positively supplement and support formal law, but many of them can challenge and contradict it (Pham Duy Nghia 2003). Indeed, Vietnamese people still follow the ethical rules and norms despite the fact that many formal rules (e.g.: laws and under-law regulations) have been recently passed in Vietnam. Chow (2003) also finds a similar situation in China where the legal behaviour of the people follows a historical and cultural tradition. Moreover, he supposes that such behaviour can hardly be affected simply by changes in formal institutions such as the enactment of new laws, and the introduction of new legislative procedures, new courts and new enforcement systems.

Strikingly, the Confucian governance did not create an independent judicial administration. In Vietnamese history, there has not been any kind of court system and judges which were independent and separate from the administrative system. Therefore, if a dispute among people arose, they went to an official who decided the case mainly based on his knowledge of Confucian ethics and custom in the region. It is worth noting that there was also a mechanism of solving disputes between officials and the people. Frequently, ordinary people would submit their complaints against officials to higher officials. In some particular cases involving important officials or the royal family, even the king himself held hearings and gave judgments. Such dispute solving mechanism still exists in the legal institutions of Vietnam today. For instance, although Vietnam established an administrative court in 1998, many Vietnamese people prefer solving their disputes at administrative organs to bringing their claims to court.

Social harmony

Regarding the aim of governance, Confucian values stress the importance of “social harmony”. This concept means that the welfare of social organism as a whole depends upon the harmonious cooperation among all of its units and of the individuals who comprise these units. In other words, society should be like a magnified family, the members of which, though differing in their status and functions, all work in harmony for the common good (Bodde 1953, p. 45-47). Thus, the Confucian concept of social harmony promotes a peaceful world in which everyone knows their rights and obligations and does effortfully to accomplish them.

By promoting social harmony, Confucius and his students hoped to create a society without conflict between the governing and the governed. To some extent, this leads to a peaceful, well-being and prosperous society. Furthermore, it increases personal ties and belief among people, which are bases for other collective activities both in economic and political life. For example, Fukuyama (1995) believes personal trust to be extremely important in a market economy. In the political field, Putnam (1993) and Voigt (2003) assume that the levels of personal trust may influence the degree to which democracy is sustainable. The idea behind this presumption is that the degree of democracy, especially pluralist democracy, depends upon the tendency to act cooperatively which in turn is proxied by the amount of trust people have in each other. According to Putnam (1993), high levels of cooperation, trust, and reciprocity characterize a high degree of democracy in northern Italy. In contrast, defection, distrust, and opportunism epitomize the lower level of democracy in southern Italy. Notably, these differences result in the higher economic development in the north than in the south of Italy.

Nevertheless, Putnam (1993) also supposes that hierarchical organizations such as the Catholic Church are obstructive to the emergence of trust and reciprocal cooperation. Similarly, La Porta et al. (1997) find that countries with more dominant hierarchical religions have lower rates of participation in civic activities and professional associations which are conducive to pluralist democracy. As I have already mentioned, Confucianism promotes a social order based on hierarchy which undermines personal trust, thus Confucian value of harmony has a converse effect in practice. On the one hand, it strengthens personal trust in closed hierarchical organizations such as: family and clan, commercial firm, village etc, on the other hand, it hampers personal trust among members of different organizations in society.

Hence, it can be argued that, under the ideal of Confucian social harmony, the level of personal trust in society as a whole is indeed low.

To summary, Confucianism was introduced very early and had a long development history in Vietnam. Despite the rise and fall of Confucianism in Vietnam, Confucian values have not disappeared in Vietnam, but have developed into informal institutions. Social order, Confucian ethics and social harmony are three main features of Confucian values significantly influencing political and institutional reforms in Vietnam today.

III.3. Confucian values and the rule of law – an empirical test

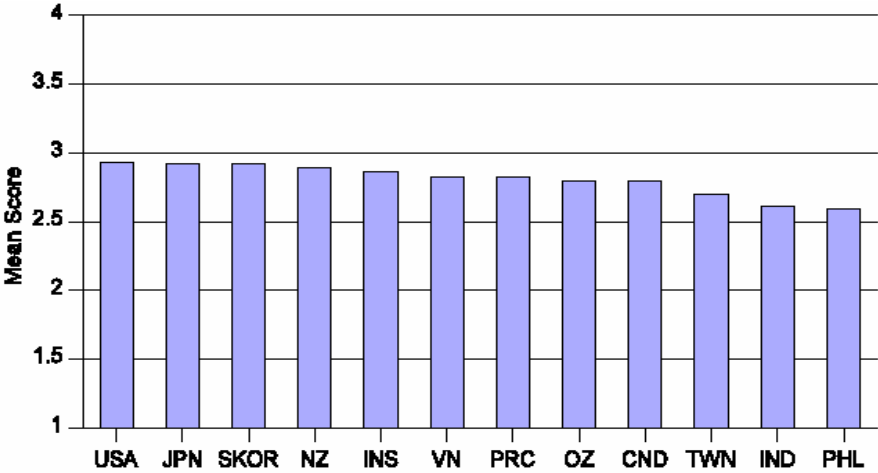
It is claimed that public opinions in society frequently reflect social values. Therefore, in this section, I examine Vietnamese opinions and acceptances with regard to various features of Confucian values and the rule of law. It is difficult to collect reliable data on this. In this study, I use data given in the latest wave of the World Values Survey and the Pew Global Attitude Project 2003.

First, I will examine how the Vietnamese people evaluate democracy. Based on the World Values Survey from 1995-1998 and 2000-2001, Dalton and Ong (2002) compared public support for democracy in the Pacific Rim. To evaluate public support for democracy, four items were given namely: i) having strong leaders govern without democratic institutions is good, ii) a government by experts is good, iii) army rule is good, and iv) a democratic system is good. The pro-democratic responses are those that disagree with the first three items, and agree with the fourth. Accordingly, the supports for democracy in Pacific Rim score from 1.0 to 4.0. Score 1.0 means non support for democracy or anti democratic and score 4.0 in the scale means the highest level of support for democracy.

Figure 4.1 makes clear that although the variance in the mean score seems to be rather small, support for democracy in Vietnam is comparatively high. Obviously, it is not realistic to think that when Vietnamese express support for democracy that carries the same meaning as when citizens are surveyed in established, advanced industrial democracies (Dalton and Ong 2002). Compared with other countries where Confucian values rooted, Vietnam ranks lower than Japan and South Korea and higher than Taiwan and the Philippines. It could be argued that support for democracy is a function of economic development. This appears to be the case, however, only for Japan and South Korea. It is not true for the cases of Taiwan and the Philippines because both countries have introduced a market economy earlier than Vietnam

and have a GDP per capita much higher than that of Vietnam. Therefore, although Vietnam remains in the lower level of economic development, the Vietnamese public supports institutional reform to democracy and the rule of law.

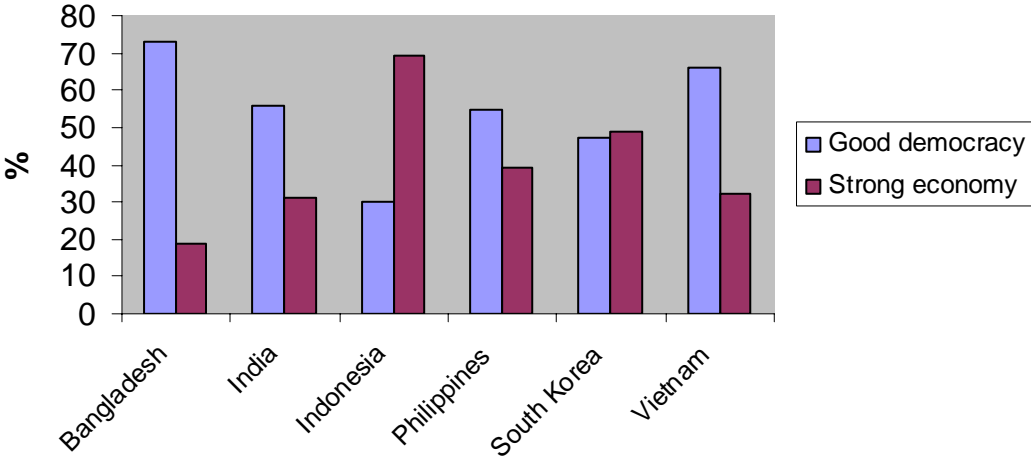
Figure 4.1: Support for Democracy Index by Nation



Source: 1995-98, 2000-2001 World Values Surveys, cite in Dalton and Ong (2002).

Figure 4.2 compares attitude of Vietnamese people with those in other Asian countries when answering the question of whether it is better to have a good democracy or a strong economy. Clearly, Vietnamese people prefer good democracy to strong economy. The number of Vietnamese correspondents who favor good democracy is twice as high as those who opt for a strong economy. Again, the Pew Global Attitude survey shows that support for democracy in Vietnam is comparatively high.

Figure 4.2: Support for Democracy or strong economy

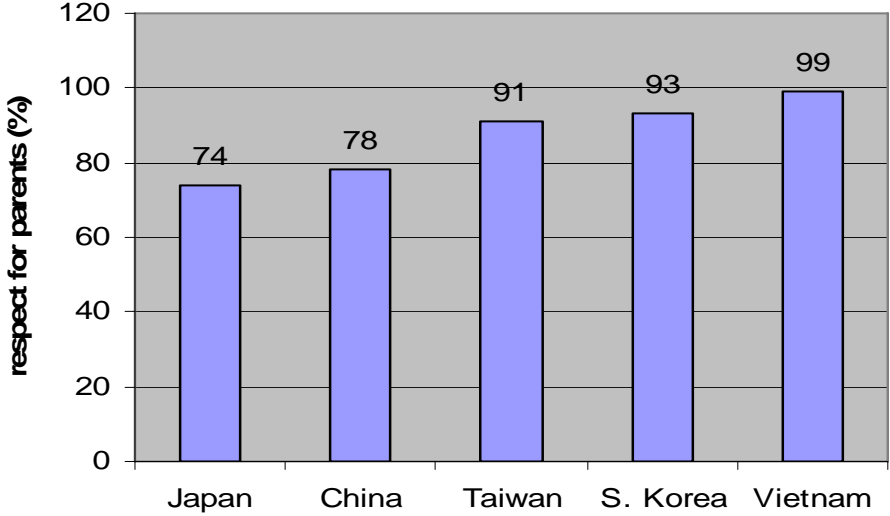


Source: Pew Global Attitude Project (2003)

Second, as mentioned above, the level of personal trust and democracy are likely to be positively correlated. It is interesting to note that most Vietnamese people are skeptical about personal trust – 59% of the respondents say that one needs to be careful in dealing with other people. More importantly, there is no relationship between trust and people's support for democracy in Vietnam. According to Dalton and Ong (2002), such a relationship cannot be found in China, Taiwan and South Korea either. There are two presumptions drawn from this fact. First, if the aforementioned hypothesis of Putnam – Voigt is true, it will not be easy to establish pluralist democracy in Vietnam due to the low level of personal trust although the support for democracy in Vietnam is relatively high in the region. Second, as explained earlier, a low level of trust in society can be the consequence of a high regard for hierarchical order. This seems to be true in Vietnamese society because there is a low degree of trust among the people regardless of Confucian efforts in promoting social harmony. Thus, Confucian value of harmony has converse effect in reality of Vietnam.

For such reason, I suppose that the Vietnamese people will support hierarchical order. In Vietnamese tradition, family is the basis of society. The family is regarded as a small society with hierarchical order in which parents have great power over their children. Filial piety is conceived as the main obligation of children. Therefore, the World Values Survey measures the degree of respect for Parents. Their result clearly illustrates my supposition. Specifically, more than any other of the Confucian societies, Vietnamese people answer that parents are to be respected regardless of their quality and fault. Additionally, as observed by Dalton and Ong (2003), 56% of Vietnamese correspondents say that obedience is a quality that children should be encouraged to learn. If the degree of respect for parents reflects the degree of hierarchical order in society, it is possible to say that Vietnamese people still have high regard for hierarchical order.

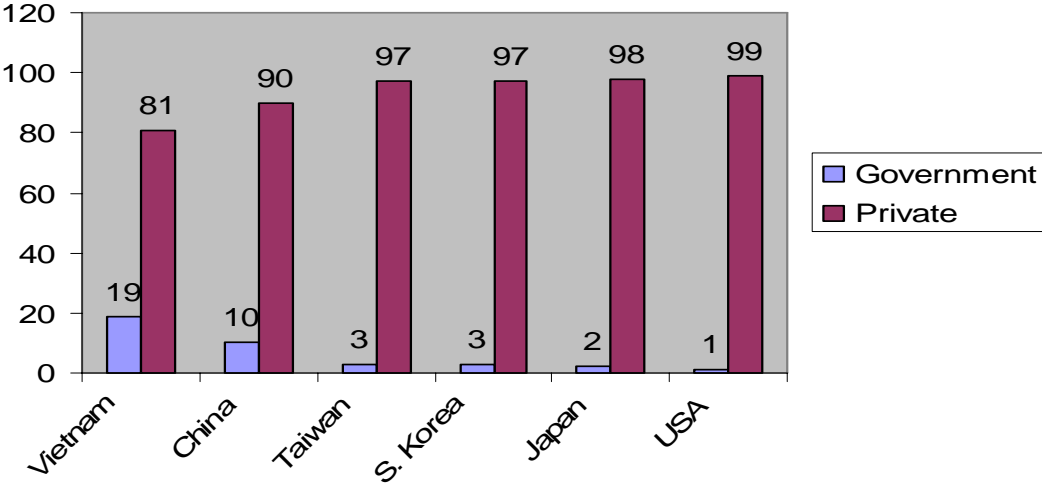
Figure 4.3: Respect for Parents in East Asian Countries



Source: 2001 and 1995-98 World Values Survey, cited from Dalton et al, 2001.

Third, I argued in chapter II that one important component of the rule of law is the respect for (private) property rights. Confucianism, as mentioned above, disregards individual economic rights and values state interests over individual rights. The World Values Survey provides data regarding the Vietnamese opinion about privately owned business and state-owned business. As is clear from Figure 4.4, although the percentage of Vietnamese who support privately owned business is slightly lower than those in other East Asian countries and the U.S, most of the respondents (81%) are in favour of private ownership. Only 19% of the Vietnamese respondents still endorse state-ownership. The survey also shows that, on the contrary with traditional notion of Confucianism, there is a high respect for private property rights among Vietnamese people. Thus the goal of buttressing institutional reform toward economic liberalization and the rule of law, which endorses private property rights, is feasible.

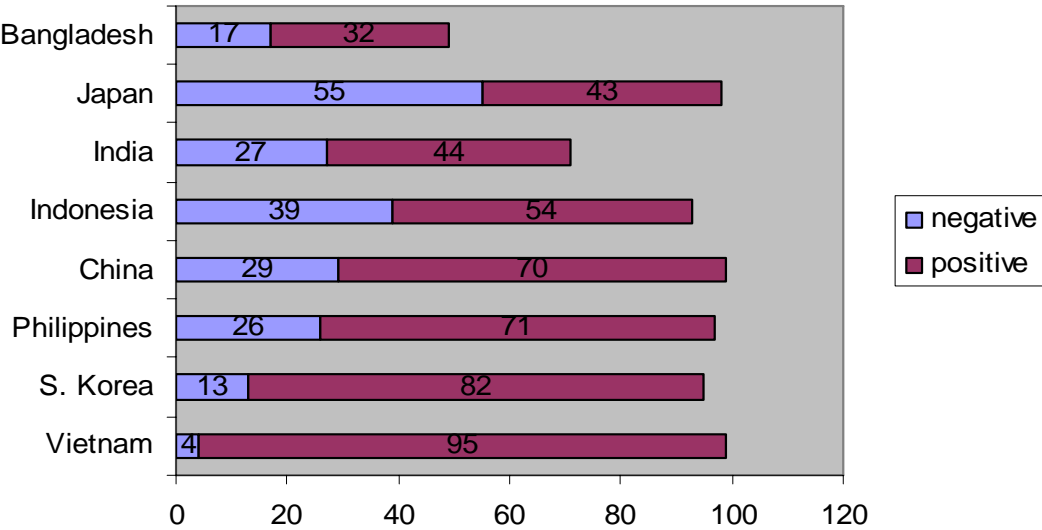
Figure 4.4: Support for privately owned and government owned business (%)



Source: 2001 and 1995-98 World Values Survey, cited in Dalton & Ong, 2001.

It is worth noting that although the percentage of Vietnamese who favour privately owned business is slightly lower than those in other East Asian countries, the support for free market economy is relatively higher than those in other East Asian countries, according to the results of the Pew Global Attitude Project (2003). In this survey, 95% of Vietnamese respondents say that they are better off in a free market economy. The number of negative answers is 4% (see figure 4. 5).

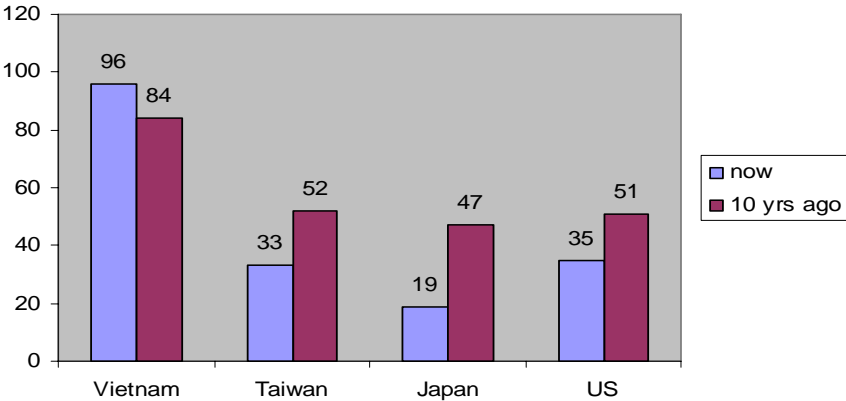
Figure 4. 5: Free market economy is good or bad in Asia



Source: The Pew Global Project Attitude, 2003

Forth and finally, in order to see how the Vietnamese people are content with the current political regime, we can observe the degree of Vietnamese confidence in political institutions. According to the World Values Survey, almost all Vietnamese support the current political institutions. The level of support is even higher in comparison with ten years ago (from 84% to 96% of all correspondents). But the most surprising result is that Vietnamese people seem to have more confidence in the current political regime than the populations of other democratic regimes in East Asia, for example Japan and Taiwan as well as the US (see figure 6).

Figure 4.6: Confidence in political institution



Source: 2001 and 1995-98 World Values Survey, cited in Dalton & Ong, 2001.

Similarly, the data from the Pew Global Attitude Project (2003) also show that Vietnamese people seems to be content with their current social life. Vietnam is among the top countries of the world where the majority think that many aspects of their life have been improved, such as: job opportunities (92%), working condition (85%), availability of food and modern medicine (91% and 95% respectively), and affordable health care (76%). There are only two problems that, in the view of Vietnamese people, are getting worse namely, spread of diseases (64%) and the gap between the rich and poor (51%). In such a situation, it is unfeasible to exploit “shock reform” in the field of political reform that has been implemented in Central-East Europe and former Soviet Union. However, public opinion in Vietnam also supports further political reform. When asked about further reforms, the majority of Vietnamese respondents (54%) say that stronger measures should be applied toward societal reform and another 30% says society must be gradually improved through reforms (Dalton and Ong, 2001).

IV. Conclusion

In short, based on the institutional economics perspective, the chapter regards Confucian values as dominant informal institutions in Vietnamese society. Informal institutions exist in society in various types such as conventions, norms, customs, ethical codes, religious rules, etc. Reviewing two recent approaches of the NIE on institutional change, the chapter examines the role of informal institutions on institutional change. Due to the influence of informal institutions, policy makers in transition countries are facing a dilemma. On the one hand, the development of the market economy requires political reform in which the transition to the rule of law is considered as a pre-condition. On the other hand, the emergence of the rule of law faces the resistance of informal institutions rooted in transition societies. To deal with such dilemma, it is supposed that the transition to the rule of law should be gradual.

Using data given in the World Values Survey (1995-98, 2001) and the Global Attitude Project (2003), this chapter highlights current Vietnamese attitudes towards Confucian values and the rule of law. The empirical evidence in these surveys shows that: (i) There is a consensus of democratic reform, including the transition to the rule of law in Vietnam currently; (ii) Based on the hypothesis of Putnam (1993)-Voigt (2003) that levels of personal trust can influence the degree to which pluralist democracy is sustainable, I found that it will not be easy to establish pluralist democracy in Vietnam or East Asian due to the low level of personal trust there; (iii) Vietnamese respondents claim that parents should be respected regardless of their qualities and faults. Therefore, if the degree of respect for parents reflects the degree of hierarchical order in a society, it is possible to say that Vietnamese people still have high regard for hierarchical order; (iv) In contrast with traditional notion of Confucianism that disregards economic rights, respect for private property rights has gradually increased among Vietnamese people. The institutional reform toward economic liberalization and the rule of law, which endorses private property rights, is therefore feasible; and (v) Due to the high level of Vietnamese confidence in the current political regime, it seems to be unfeasible to consider so-called " shock reform" in political reform, which has happened in Central - East Europe and the former Soviet Union. However, public opinion in Vietnam also supports further political reform. From taking such empirical tests, it is obvious that Confucian values do matter in the transition to the rule of law in Vietnam. In the next two chapters, I focus on explaining the role of delegation of powers to independent courts in transition of Vietnam.

PART II

**DELEGATION OF POWERS TO INDEPENDENT COURTS IN
TRANSITION TO THE RULE OF LAW IN VIETNAM**

Chapter 5

Delegation of powers to Independent courts in Vietnam: a theoretical consideration based on the P- A approach

“Without judicial independence, there is no rule of law, and without rule of law the conditions are not in place for the efficient operation of an open economy, so as to ensure conditions of legal and political security and foreseeability” (Jarquín & Carrillo 1998, p. vii).

“In order to fulfil its role as the guardian of the rule of law, the judiciary has to be independent from the other branches of government” (Aaken, Salzberger and Voigt 2003, p. 2)

I. Introduction

In the traditional literature of Law and Economics, especially on constitutionalism, judicial independence (hereafter JI) is regarded as a tool to prevent arbitrary action of government. According to Feld and Voigt (2002), JI keeps the government officials' acts within the limits laid down in the constitution and the laws. Therefore, an independence of judiciary, as pointed out by Aaken et al. (2003), is conceived as the “guardian” of the rule of law. Additionally, Weingast (1993) realizes that representatives of government have motives of promising not to infringe into citizens' property rights. Yet their promises will not be perceived as credible if lacking a mechanism constraining their activities. Therefore, rational governments have an interest in establishing an institutional constraint mechanism that could help them to keep their promises credible. The reason is that such a mechanism makes their promise breaking costly. Rational governments thus will be interested in promoting JI which has been seen as the most effective constraint mechanism.

The central question here is how to create judicial independence. Although many governments, NGOs and international organizations in the world have been endorsing JI, it is still debated how to implement an impartial and independence judiciary. In order to find answers to this question, in this chapter, I scrutinize the theoretical foundations for having JI namely the separation of powers and the delegation of powers. Cooter (2000) and Mueller

(1996, 1999), the two major recent contributions on Law and Economics, regard the democratic constitutional scheme as a series of Principal - Agent relationships wherein the people rely on politicians as agents to satisfy their collective demands. If the people are the principal on whose behalf the constitution is created, argues Ginsburg (2001), constitutional adjudication should reflect the need to monitor these political agents. Above, it is argued that judicial independence exists to prevent politicians from renegeing on their promise and bargains with citizens laid down in constitution and law (Weingast 1993, Feld and Voigt 2002, Aaken et al. 2003). However, it is also likely that politicians and legislators seek to grant authority to independent judges in order to benefit them narrowly rather than citizens broadly (Landes and Posner 1975). Therefore, by reviewing the P – A approach, this chapter aims at explaining the motivation of politicians in creating judicial independence.

As already mentioned in chapters II and III, Vietnam is in the transition process to the market economy and the rule of law. Yet, policy makers in Vietnam also face the dilemmas of transition to the rule of law, most notably the dilemma of the strong state. Strikingly, with the aim of further promoting the renovation known as “Doimoi” and maintaining their leading roles in society, the leaders of Vietnam should promise that they will democratically govern society under the rule of law and indeed respect human rights³⁶. Of course, they need to make such promises credible. Furthermore, the party leadership also wants to protect their reputation gained from the historical struggles for the independence of Vietnam. It is worthy to note that most recent criticisms of obstacles to the transition in Vietnam have not stressed the leading role of the Communist party, but have focused on the moral degeneracy and arbitrary discretion among the leaders and officers of government and the party, which reduce the reputation of the Communist party (e.g. Dao Tri Uc 2002, Le Duc Binh & Pham Ngoc Quang 2003 and Nguyen Quoc Viet 2004). For the above reasons, there is a consensus among the party’s leaders on creating an efficient mechanism for constraining and supervising officers’ activities namely JI. However, the findings in this chapter show that in order to make Vietnamese judiciary system independent, Vietnamese leadership seems to be in support of using delegation of powers rather than separation of powers.

This chapter is organized as follows. In the next section, I briefly describe the P-A approach. Section 3 analyses two theoretical bases for making the judiciary independent, namely separation of powers and delegation of powers. In section 4, I explain why in the current social and political context of Vietnam, the theoretical approach of delegation of powers is

³⁶ See: Draft of Policy Report to the forthcoming 10th Congress of the CPV

likely to be accepted by Vietnamese policy makers in building judicial independence. A conclusion is at the end of the chapter

II. Review of Principal-Agent approach

II.1. Definition

The theory of Principal – Agent focuses on analysing the grant of authority from a principal to an agent that empowers the latter to act on behalf of the former, and the relationship between them (Hawkins et al. 2004, Bergman and Strom 2000, Lyne and Tierney 2002, etc). *Principals* are the actors within a hierarchical relationship in whom authority ultimately rests (Bergman and Strom 2000, Lyne and Tierney 2002). *Agents* are the actors who are hired and fired by principals. Agents are conditionally designated to perform tasks in the name of the principals. For example, in domestic politic affairs, the relationship between people and the government is a P-A relation in which people are the *principal* and government is an *agent*. In a relation between a minister and the civil servants who work in her directorate, the minister is the *principal* and each civil servant is an *agent*. Similarly, in an international relationship between a country and an international organization, the country is the *principal* and the international organization is the *agent*.

An important point is that principals and agents are mutually constitutive. The actors are defined only by their relationship to each other. The relations between a principal and an agent are always governed by a contract, even if this agreement is implicit (never formally acknowledged) or informal (based on an unwritten agreement) (see Lyne and Tierney 2002). Contracts are “self-enforcing agreements that define the terms of the relationship between two parties” (Lake 1996, 7)³⁷.

Remarkably, the ideas underlying the P-A model are not new. In the *Wealth of Nations* (1776), Adam Smith analyzed the divergent interests between the directors and proprietors of joint stock companies. He wrote:

“The directors of such companies...being the managers rather of other people’s money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which the partners in a private (company) frequently watch over their own....

³⁷ Cited in Hawkins et al 2004

Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company” (Smith 1776, book 5, ch. 1 cited in Gutner 2004).

Coming to the 20th Century, some scholars posed the classic agency problem. For example, Adolf Berle and Gardiner Means (1932 cited in Gutner 2004) examined implications of the separation of management and control of modern corporations. They gave one key conclusion that “in the corporate system, the ‘owner’ of industrial wealth is left with a mere symbol of ownership while the power, the responsibility and the substance which have been an integral part of ownership in the past are being transferred to a separate group in whose hand lie control”.

However, the development of a more formal agency theory has its roots in the 1970s. Classic explications of agency theory can be found in a 1972 article by Alchian and Demsetz (see Gould 2003a), which is concerned with the problem of actors shirking contracted responsibilities and the role of the monitor in inducing individual “team members” to contribute their individual input. Much of the literature assumes the central problem is how to induce the agent to maximize the principal’s welfare, and it also recognizes that there are costs to the various control mechanisms.

Agents receive conditional grants of authority from a principal, but this defining characteristic does not imply that agents always do what principals want. In the P-A literature, analysts have typically assumed that agents have no independent influence, and therefore, adverse agent characteristics can be controlled by principals. However, one interesting aspect of P-A relationship is the divergence of interests between the principal and the agent, which results in a cost or loss. In other words, the principal and the agent may not consistently share the same preferences about all activities related to their relation. With the possibility for different preferences, the principal can incur losses from unintended consequences provoked by the agent. For example, principals incur agency losses when agents engage in undesired independent action or when they themselves expend resources to contract with or monitor and control those agents. Some related concepts of agency losses will be discussed in greater detail below.

II. 2. Autonomy and Discretion

Autonomy is the range of potential independent action available to an agent after the principal has established mechanisms of control. That is, autonomy is the range of maneuver available to agents after the principal has selected screening, monitoring, and sanctioning mechanisms

intended to constrain their behavior. Autonomy and slack differ in subtle ways: autonomy is the range of independent action that is available to an agent and can be used to benefit or undermine the principal, while slack is undesired behavior actually observed (Hawkins et al. 2004, p. 10).

Discretion is a dimension of the contract between a principal and an agent. Discretion entails a grant of authority that specifies the principal's goals but not the specific actions the agent must take to accomplish those objectives. In other words, discretion is an alternative to rule-based delegation. Whereas discretion gives the agent the leeway that the principal deems necessary to accomplish the delegated task, autonomy is the range of independent action available to the agent. Greater discretion often gives agents greater autonomy, but not always. Discretion is something the principal intentionally designs into its contract with the agent, autonomy is an unavoidable by-product of imperfect control over agents (see more in Hawkins et al. 2004, p. 8-9). P-A theory is a framework, of course, and does not itself specify general propositions about what the agents will do with the autonomy they possess (Lake and McCubbins, 2004, p. 3). An agent thus can use its autonomy to benefit or damage principals. Given that the delegatee in domestic delegation of powers is a judiciary system, in my point of view, judicial discretion and autonomy are manifestations of judicial independence. Judicial autonomy and discretion will be discussed thoroughly in section 3 of this chapter.

II.3. Agency slack

Agency slack is independent action by an agent that is undesired by the principal. Slack occurs in two primary forms: *shirking*, when an agent minimizes the effort it exerts on its principal's behalf, and *slippage*, when the structure of delegation itself provides perverse incentives for the agent to behave in ways inimical to the preferences of the principals, in other words, when an agent shifts policy away from its principal's preferred outcome and toward its own preferences (see Hawkins et al. 2004).

According to Kiewiet and McCubbins (1991)³⁸, a principal faces three specific difficulties when delegating. First, the agent can *hide information* from his principal whose revelation would hurt the agent and help the principal. Second, the agent can do things behind the principal's back, *concealing actions* that the principal would sanction if she only knew. Third, the principal faces *Madison's dilemma*, where the need to delegate authority may give powers to the agent that can be used against the principal. As Moe (1984, 757 cited in Lyne and

³⁸ Cited in Nielson and Tierney 2003

Tierney 2002) explains, “The logic of the principal-agent model, therefore, immediately leads us to the theoretical issues at the heart of the contractual paradigm: issues of hierarchical control in the context of information asymmetry and conflict of interest”. Lyne and Tierney call the agency problems associated with hidden action (conflicts of interest) and hidden information “*ordinary agency losses*”.

The agent's influence has often been identified in the delegation literature that agents have an informational advantage over their principals (e.g., Niskanen 1971 cited in Hawes 2003, Bernhard 2002, Woods 2003, Cortell and Peterson 2004, Gould 2003, Hawes 2003 and Pollack 1997). Scholars commonly assume that principals are ignorant of their agents' activities, partly because specialization and expertise are primary reasons for delegation in the first place and partly because monitoring is costly. Hawes (2003) cites words of Kiewiet and McCubbins (1991, p. 25) that:

"In a wide variety of agency relationships, the agent possesses or acquires information that is either unavailable to the principal, or prohibitively costly to obtain. The agent has incentives to use this information strategically..."

In fact, the agent can utilize this informational advantage in its favour by introducing policy proposals for the principals to accept. In other words, capacity for information collection would derive from the existence of a staff with a specific expertise. To the extent that specialization is part of the motivation for delegating to an agent, the agent can act opportunistically by failing to disclose actions or information that might be beneficial to the principal. In addition, specialization also typically inhibits the principal's ability to use the option of contracting with other agents as a disciplining device to control the first agent. Obviously, agents often possess the possibility for hidden information, which results in agency slack. Therefore, there is a central trade-off between the gains from delegation and the agency losses that arise from the opportunistic behavior of the agent.

Conflicts of interest are also endemic in principal-agent relationships. According to many scholars, since the interests of principal and agent are never completely coincident, there will always be agency slack between what the principal wants and what the agent does (e.g. Williamson 1985, Nielson and Tierney 2003, Gould 2003a). For example, Williamson (1985) famously defines this problem as “self-interest seeking with guile” (cited in Hawkins et al. 2004). Similarly, Kiewiet and McCubbins (1991)³⁹ argue:

³⁹ Cited in Pollack 1997

“Delegation ... entails side effects that are known, in the parlance of economic theory, as agency losses. There is almost always some conflict between the interests of those who delegate authority (principals) and the agents to whom they delegate it. Agents behave opportunistically, pursuing their own interests subject only to the constraints imposed by their relationship with the principal” (p. 5).

In sum, conflicts of interest can give agents incentives to act against the wishes of their principals. Furthermore, information asymmetries give agents the ability to act against their principals without fear of retribution. Obviously, some agency slack is to be expected in all delegation relationships. In the following, I address mechanisms for controlling agents.

II.4. Mechanisms of Control

As discussed previously, principals often face a trade-off between limiting agency slack and benefiting from an agent’s expertise. Thus scholars have been interested in how principals may design certain types of procedures to control an agent (see Lake and McCubbins 2004, Hawkins et al. 2004, Nielson and Tierney 2002, etc). Commonly, principals attempt to structure the incentives of agents *ex ante* so that it is in the interests of the agents to carry out principals’ desires faithfully *ex post*. Remarkably, the form of delegated authority is not given or fixed, but rather is endogenous to the agency relationship. With this view, it is largely designed by the principal to minimize the opportunistic behavior of the agent. However, principals cannot anticipate every contingency, not least where agents are granted broad discretion or when the interests of the principals themselves shift over time. As a result, the principals cannot anticipate the agents’ action when they design the initial contract. In general, principals possess at least four tools to help them design self-enforcing contracts and thus mitigate agency slack.

First, the principal can carefully screen the potential agent. Such *screening and selection* mechanisms may enable the principal to employ agents whose interests are similar to those of the principal, or agents who have demonstrated obedience and diligence in the past. In other words, the principal attempts to select an agent with sympathetic preferences. By selecting such a sympathetic agent, the principal can grant the agent greater discretion and employ less costly monitoring mechanisms while still minimizing agency slack.

Second, principals can use *ex post monitoring*, typically specified in the delegation contract, to reveal information about the agent’s actions. The principal can *monitor* agent’s actions, either directly through “police patrol oversight” mechanisms or by inducing third parties to

perform the oversight functions and thus mitigate the cost of monitoring through “fire alarm oversight”. Fire alarms are typically more efficient, as the principal does not need to expend resources searching for slack where it may not exist, and potentially more effective, as parties harmed by the agent typically have strong incentives to publicize shirking and slippage (McCubbins and Schwartz 1984 cited in Hawkins et al. 2004).

Third, the principal may employ *contracting* arrangements that include credible commitments to punish or reward the agent for specified behavior. For instance, principals can draft new contracts with the agent, requiring modified behavior to achieve anticipated reward, or insuring punishment if behavior is not consistent with the interests of the principal.

Fourth and finally, principals can construct *checks and balances* that require coordination or competition between two or more agents. If designed properly, checks and balances can reveal information to the principal about agent behavior and can also inhibit agent behavior that is detrimental to the principal. Such a mechanism is applied to solve the shortcoming of the separation of powers which I will discuss in detail in the following section.

Briefly, scholars applying principal-agent analysis to the study of political science have been interested in why principals delegate to agents, how principals try to control agents and what the consequences of that delegation might be. From reading the literature, I have found that principals may not always perfectly control agents which creates opportunities for agents to develop autonomy and deviate from principal preferences. The principals, in turn, try to establish an efficient constraint mechanism to minimize the opportunistic behavior of the agent. In the next section, I apply these arguments to highlighting how JI can be established under the P - A approach.

III. Separation of powers and Delegation of powers – theoretical bases of JI

III.1. The separation of powers

The term separation of powers can be defined as a division of the legislative, executive, and judicial functions of government among separate and independent bodies. Such a separation limits the possibility of arbitrary excesses by government since the sanction of all three branches is required for the making, executing, and administering of laws⁴⁰. As argued by

⁴⁰ See the term “separation of powers” in Britannica Concise Encyclopaedia. (2005)

Montesquieu (1748 cited in Salzberger, 2001, p. 6), history reveals that this functional division among governmental bodies has always existed, regardless of the era (or at least long before separation of powers was under discussion) and type of regime.

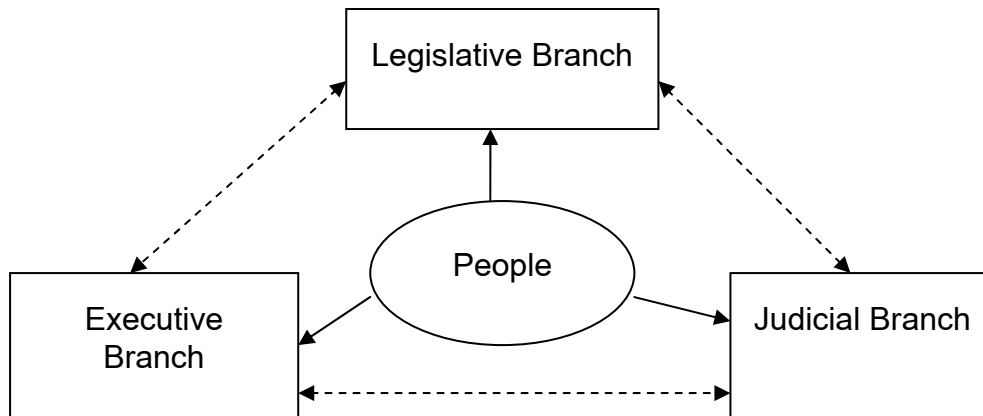
Notably, the doctrine of separation of powers has a long history. We can trace it back to the views of Plato, Aristotle, John Locke and so on to find various arguments relating to this doctrine. But the most influential philosopher who provided a systematic theory of separation of powers is Montesquieu. In the *L'Esprit des Lois* (1748), Montesquieu wrote:

“When the legislative and executive powers are united in the same person ... there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor” (Montesquieu, 1748)

The separation of powers can also be explained in the view of Principal – Agency theory. As mentioned above, P - A theory assumes that due to the coordination problem, citizens (as principals) tend to delegate authority to government (as an agent), and government exercises powers on behalf of its citizens. However, citizens will incur agency costs resulting from delegation of authority to government. As Posner (2001) shows, the problem is that the agent may use its power to pursue its own goals rather than the principal's. He also suggests that in order to minimize the “agency costs”, the principal sets up laws and institutions designed to monitor the agency and sanction it when it acts improperly (2001, p. 6). This explains why separation of powers should be qualified by the doctrine of “checks and balances” which will be discussed in detail below.

A similar argument can be found in Salzberger (2001). With the classical view of separation of powers, he claims that one way to reduce these agency costs is to divide the agency into separate sub-agencies, creating different incentives for each. In that way, while legislators act to maximize their political powers and chances of re-election, administrators and judges have different incentives, as a result of different institutional arrangements (Salzberger 2001, p. 6). Furthermore, Macey (1988 cited in Salzberger, 2001) adds that the reduction of agency costs would be more significant if the division of powers would not only be by separation of agencies but also by assigning each agency a different governing function.

Chart 5.1: Separation of powers under PA theory



Under the P - A approach, the principle of separation of powers can be described by relying on Chart 5.1. A look at this chart shows that each branch of the state is granted a certain authority from the people. However, in order to reduce agency slack, these branches are not totally independent in exercising their authorities. Instead, they share powers with other branches through a “checks and balances” mechanism.

In the world today, under the doctrine of the separation of powers, most nation-states have established three separate branches of their governments, namely the legislative branch, the executive branch and the judicial branch. A legislative branch (or legislature) is a governmental deliberative body with the power to adopt law. Legislatures are known by many names, for example parliament, congress, and national assembly. An executive branch is charged with implementing, or executing, the law. The third branch is judicial system with the function of law interpretation and dispute settlement. Regarding the relationship among the three branches, the traditional literature of separation of powers stresses the relation between legislative and executive branches. The relation between the legislative branch and the executive branch depends upon the way in which government is organized, specifically whether it is a parliamentary or a presidential system. In parliamentary systems, the legislature is formally supreme, and appoints the executive. In presidential systems, the legislature is considered a branch of government which is equal to, and independent of, the executive. In addition to enacting laws, legislatures usually have exclusive authority to raise taxes and adopt the budget. The consent of the legislature is also often required to ratify treaties and declare war.

The strict application of the doctrine of separation of powers induces the presidency system in the US, in which the president has a powerful position in the relation with other organs. The president of the US functions in many capacities: head of state, head of government, commander in chief of the armed forces, and leader of the president's political party. The president is thus the most unifying force in a political system in which power is highly dispersed, both within the government, and between the government and the people. It is supposed that the presidential system of the US preserves the doctrine of separation of powers by rigidly following its principle and therefore genuinely protects democracy and liberty. In fact, by examining the historical development of the US presidential system, many scholars have argued that a powerful presidency is harmful to new democracies. For instance, Linz (1990, p. 55) states that a careful comparison of parliamentarianism with presidentialism leads to the conclusion that the former is more conducive to stable democracy than the latter. Rice (1884) presumed that Montesquieu opposed concentrating power in a single person, rather than a single source. He then argued that a parliamentary system, which would not comply with the strict doctrine of separation of powers, would nevertheless be consistent with Montesquieu's philosophy.

As mentioned above, the P-A theory shows that in order to minimize the “agency costs”, it is in need of a system of shared powers known as checks and balances. This is also because separation of powers could not be absolute, otherwise it will lead to abuse of power in each branch of government. It is thus necessary to create a mechanism by way of which actions of state organs will be monitored by other organs which will reduce the overall level of harm (Voigt 2003a, p. 2). Supporting the mechanism of checks and balances, Madison (1788) argues that the three branches should not be so far separated as to have no constitutional control over each other. The system of checks and balances is designed to allow each branch to restrain abuse by each other branch. Some other studies as Brennan and Hamlin (2000) have supposed that the model of checks and balances is, in fact, a set of institutional arrangements differing from the idea of the separation of powers. Such mechanism, which Brennan and Hamlin call “division of powers”, relates to institutional devices that attempt to spread a single power across a number of individuals or bodies while separation of powers serve to unbundle powers and place each power in the hands of different agents or bodies (2000, p.13). Salzberger (2001) argues that an optimal structure of separation of powers would adopt the checks and balances doctrine with respect to the functional level, and the independence doctrine with regard to the personal. From analyzing transaction costs of decision making, he believes that a majority rule, which is frequently employed for decision-

making in legislature, creates grim results of cycling or arbitrariness. Therefore, in his view, it is necessary to allow additional bodies to take part in the decision-making. These agents should have different decision-making processes, incentives and representation structures (2001, p. 10). The establishment of independent constitutional review mechanisms in many countries is the best illustration for his view

III. 2. The delegation of powers

In Britannica encyclopaedia, the meaning of the term “Delegation” is: (i) the act of empowering to act for another and (ii) a group of persons chosen to represent others⁴¹. According to Catholic encyclopaedia, the term “Delegation” means the commission to another of jurisdiction, which is to be exercised in the name of the person delegating. Jurisdiction is defined as the power of anyone who has public authority and pre-eminence over others for their rule and government⁴². Delegation is, therefore, a grant of powers from an authoritative entity to their subordinates who carry out specific task on behalf of delegator.

The concept of delegation of powers is well discussed in the framework of PA theory. From the principal - agent perspective, according to Hawkins et al. (2004), delegation of powers is a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former. This grant of authority is limited in time or scope and must be revocable by the principal (p. 7). The authors also added that in order to become a principal, an actor must be able to both grant authority and rescind it.

Furthermore, as discussed above, in the literature on the P-A theory, delegation of powers should be accomplished through contracts. Some scholars argue that a principal delegating to an agent is an extreme form of a relational contract (e.g. Williamson 1985, cited in Hawkins et al 2004, p. 8). In the domestic politics arena, the constitution is regarded as a kind of contract in which a principal such as a legislative body delegates authority to an agent. Because there are two levels of constitutional choice, namely constitutional and post-constitutional choice, thus there are also constitutional delegation of powers and post-constitutional delegation of powers. The former occurs when the drafters of the constitution assign powers to certain bodies and the later occurs when agents exercises certain powers

⁴¹ Term “Delegation” in Britannica encyclopaedia, 2005, available at: <http://www.britannica.com/dictionary>

⁴² Term “Delegation” in Catholic encyclopaedia, available at: <http://www.catholicity.com/encyclopedia/d/delegation.html>

which are not constitutionally assigned to them (Salzberger & Voigt 2002, p. 212). Salzberger and Voigt argue that if the legislature drafts the constitution, constitutional delegation and post-constitutional delegation are very similar in scope.

Why does a principal have incentives to delegate its power to an agent? The literature on delegation of powers both in the domestic and the international arena shows that there are some common incentives for delegation, namely (i) specialization, (ii) resolving the dilemma of coordination; (iii) stable policy agreement; (iv) resolving disputes between principals; (v) mitigating the time inconsistency problem to enhance credibility (vi) reducing delegator's workload, (vii) maintaining legitimacy (e.g. see Epstein and O'Halloran 1999; Lake & McCubbins 2004; Hawkins et al. 2004; Voigt & Salzberger 2001, 2002). Some of those benefits will be clarified below.

First, specialization can be seen as a main incentive for principals to delegate powers. Analysing benefits of delegation, Hawkins et al. (2004) argue:

“Rather than performing an act itself, the principal delegates authority to a specialized agent with the expertise, time, political ability, or resources to perform a task. Without some gains from specialization, there is little reason to delegate anything to anybody. In turn, the greater the gains from specialization, the greater the incentives to delegate. Gains from specialization are likely to be great when the task to be performed is frequent, repetitive, and requires specific expertise or knowledge” (Hawkins et al., 2004: 17-18).

By explaining why a firm will make or buy decisions, Epstein and O'Halloran (1999) also find that delegation to specialized agency benefits the legislature which in their case is U.S. Congress. They argue that if Congress delegates to an agency, the agency may be able to produce better results for the legislators because of its access to expertise (1999, p. 7-8).

Second, delegating authority to a specialized agent can also solve the dilemmas of coordination. For instance, a parliament consisting of politicians with various preferences is unlikely to reach a stable agreement on policy due to the problem of collective action. Furthermore, the fact of agreement is typically more important than which policy is selected, thus the parliament can reduce transactions costs through granting authority to a neutral agenda-setting agent to induce equilibrium (see Hawkins et al. 2004: 20-23). Regarding the dilemmas of coordination, Epstein and O'Halloran (1999) supposes that bicameralism and supermajority requirement in the Congress hamper speediness and flexibility of congress's

actions. Congress thus can delegate its authority to other agencies to “escape” this dilemma (p. 8-9).

Third and finally, it is the increasing recognition that credibility is a significant variable that principals should take into account when they delegate authority to an agent. As Voigt (2004) pointed out, credibility can be an important asset of a government. If a government that promises to enforce private property rights is credible, then actors will invest more than if the government was not credible (p.3). Rational actors thus assume that every body will be better off if government’s credibility is high. This is because the higher level of investment leads to additional income for governed actors and high tax revenue for government as well (see in detail in Voigt et al. 2005, p. 4).

According to Hawkins et al. (2004), problems of credible commitment arise under what economists call the time inconsistency problem – actions that are in a political actor’s long term interest may not be in its interest at any particular moment. To illuminate this view, the authors provide a situation that politicians may have incentives to satisfy the demands of their constituents for more services and less taxes through deficit spending in the short run, although there are advantages in the long run to a balanced budget. Accordingly, principals can mitigate the time inconsistency problem by delegating policy to enforcing agents with high discretion and, typically, more extreme preferences so that, left to their own devices, the agents will move policy in the direction of long-term rather than short-term political success.

In short, there are a variety of benefits from delegation of powers. However, rational delegators will transfer their authority only if the possible cost of delegation, such as monitoring cost, residual loss, adverse selection, can not outweigh such benefits of delegation of powers (e.g. see Salzberger and Voigt 2002, p. 214). Especially, principals will incur great costs of delegation when agents engage in undesired independent action (Hawkins et al, 2004, p. 10). Thus, rational powerful delegators such as legislators will scrutinize conditions for assigning its powers to independent agency in both domestic and international level.

III.3. Separation of powers and judicial independence

In the abstract, judicial independence (JI) can be acquired when a decision of the judges is impartial and not influenced by other branches of government or by private or political interests. Therefore, JI requires that the judge’s decision should be implemented regardless of whether they are in the (short-term) interest of other government branches (Feld &Voigt

2003, p. 2). Feld and Voigt (2003) added that judges do not have to bear negative consequences as the result of their decisions, for example they should not be expelled, paid less or be made less influential. Similarly, Cooter (1999) claims that given JI, judges can make their decisions based on what they think are right, but costs them nothing. Salzberger (2001) supposes that the independence of the judiciary consists of both “dynamic independence” that means the subject of independence and “fundamental independence” that refers to the subject’s behaviour (or decision) of independence. With dynamic independence, judges as a subject must be independent from objects, including (i) the litigants and (ii) the government. With fundamental independence, the judges, when giving a judgement, are not influenced by the desires of the government regarding the case being decided (Salzberger 2001, p. 1).

It is believed that the independence of the judiciary is based on the original doctrine of separation of power (see Montesquieu 1748; Hamilton, Madison and Jay 1788; Moore 1990). For example, Moore (1990, p. 19) claims, “an independent judiciary is a critical component of the principle of separation of powers”. He also indicates that a genuinely independent judiciary requires not only a doctrine of judicial review, but also scrupulous protection of the independence of the judiciary in form and in fact. Details of appointment, tenure, salary, status, training and removal all must be resolved to preserve and strengthen that independence. Similarly, the selection of the judiciary must not be on a partisan basis and should ensure the selection of the most qualified legal experts (Moore 1990, p.10).

However, some other authors claim that judicial independence is not derived from the original views of separation of powers, but resulted from applying the system of “checks and balances” (e.g. Hayek 1960, La Porta et al. 2003, Salzberger and Voigt 2002). In such a system, the judiciary also should take part in performing small portions of the legislative and the administrative functions, just as it should not exclude the other branches from taking up some of the adjudication function as well (see Marshall 1971, p. 117-123, cited in Salzberger 2001). Therefore, La Porta et al. (2003) distinguish two ways in which checks and balances are played by the courts, namely judicial independence and judicial review.

As I already mentioned above, the presidential systems indeed do not successfully apply the doctrine of the separation of powers than the parliamentary systems. A recent empirical study by Hayo and Voigt (2003) also demonstrates that the presidential systems are not highly correlated with high levels of independence of judiciary. In contrast, there is evidence showing that presidential systems are characterized by a lesser degree of de facto JI than

parliamentary systems (Hayo and Voigt 2003, p. 27). Similarly, Salzberger (2001) claims that the system of government in the US did not cover all the structural elements securing judicial independence, although it was constructed on the concept of separation of powers. The development of the US presidential system, therefore, seems to undermine the doctrine of separation of powers and judicial independence in the reality of the US political life.

III.4. Delegation of powers and judicial independence

Traditionally, P-A theory explained that representatives of a government could delegate competence to a domestic administrative agency (e.g. see Epstein and O'Halloran 1999; Bendor and Hammond 2001; Bernhard 2002; Alesina and Tabellini 2003). Correspondingly, JI seems not to be relevant to P-A theory or theory of delegation of powers. However, the new approach developed by Salzberger and Voigt (2002) regards the independence of judiciary under the theoretical framework of delegation of powers. In their view, although legislatures frequently delegate their rule-making powers to administrative or executive agencies, the delegatee can be the judiciary, a parliamentary committee, a local authority, a public corporation or an international organization as well (2002, p. 213).

If JI is a result of delegation of powers, the question here is why politicians have incentives to assign authority to an independent court. In my view, this is because of the fact that delegation of powers to independent judges induces benefits for society in general and for delegators in particular. The main function of the judiciary is to interpret the law in order to solve conflicts between various parties in society. Delegation to an independent judiciary thus is in the interest of legislators to solve such disputes and therefore to assure all parties activities according to the laws. Given this assumption, Feld and Voigt (2003, p. 2) discuss the benefit of JI through three archetypical conflicts, namely (i) conflict between citizens in which all contracting parties can save transaction cost in expecting independent courts to be impartial, (ii) conflict between government and citizens in which it is the function of an independent judiciary to adjudicate and check whether the representatives of the state have followed the laws or not, and (iii) conflict between various government branches which an independent judiciary can keep within the rules laid out in the constitution.

JI not only plays a very important role in resolving a dispute, but also prevents parties, both government and citizens, from violating the law and therefore reduces the number of disputes in advance. This is because if such violators could not influence the judges' decision, they are likely to incur more burdened costs. For example, in addition to some normal costs such as

the court's fee; the costs of preparing a defence, there are often some costs of appealing to the independent court such as the threat of losing a case; the fear of creating an unfavourable precedent, and finally the reduction of their reputation. Therefore, if other incentives are not taken into account, potential violators will choose to honor the laws and their contracts.

Enhancing the credibility of their promises, and thus gaining reputation is another strong incentive for politicians in delegating powers to independent judiciary. Feld and Voigt (2003) suggest that an independent judiciary may be seen as an efficient tool of politicians to turn their promises into credible commitments. In order to succeed in establishing policy credibility, it must also be costly for politicians if withdrawing authority from their agents (judiciary system) or overturning their specific decisions, otherwise there is nothing to prevent them from promising to act in the long-term interest but then giving in repeatedly to short-term temptation (see more detail in Hawkins et al., 2004). Therefore, legislators delegate powers to an independent judiciary to monitor their behaviours.

Based on the P-A theory on delegation of powers, I argue that the delegation of powers to independent judiciary brings about judicial discretion and judicial autonomy. Judicial discretion means that the judge is not required by statute or precedent to make a predetermined decision; but is able to make a decision within a range of decisions⁴³. As mentioned in section II, in a principal – agent relationship, discretion entails a grant of authority that specifies the principal's goals but not the specific actions the agent must take to accomplish those objectives. In the specific relation between legislator and its agents such as administrative bodies, discretionary authority of agents depends upon a decision made by a legislative body. For example, in the case of the US, Epstein and O'Halloran (1999, p. 7) show that Congress can write either detailed legislation that leaves the executive with little latitude in implementation or vague laws that leave executive actors with broad discretionary powers. Similarly, Voigt (2005, p. 4) supposes that the degree of discretion allocated to the judiciary will depend upon a strategic game played between judges and the representatives of the other government branches. In his argument, the main driving force is the number of veto-players found in political system, namely the number of legislative chambers that need to consent to fresh legislation. The higher their number is, the more discretion the judiciary will have.

⁴³ See the term "Judicial discretion" in Tutorgig encyclopaedia, 2005

With respect to judicial discretion, the principals (legislators) however are expected to assign more discretionary authorities to judges than to executive actors. This is due to the fact that the higher judicial discretion will be, the better it serves the interests of the principals. First, in order to solve their disputes, the P-A theory shows that principals select (or create) agents who are known to be impartial and, more importantly, possess a high degree of discretion. Agents that are expected to be biased or constrained to decide disputes on anything other than “the facts,” are likely to be unacceptable to one or both parties to the agreement. At the same time, since the principals themselves disagree on what the contract implies, it is difficult to provide an exact instruction for the agent in solving disputes. Accordingly, the agent should be allowed to make its own decisions. Legislators, therefore, go to considerable lengths to select (or create) impartial judges with relatively high judicial discretion.

Second, in order to enhance credibility, higher level of discretion granted to the court is necessary. This is because the agent has discretion, thereby principals can bind their hands to long-term policies that they have incentives to overturn. For example, Landes and Posner (1975) emphasize that due to JI, legislators cannot easily change laws although they are under pressure of interest groups. This, in turn, makes promises of legislators more credible in the sense that it will remain the valid legislation for a number of years. Furthermore, Landes and Posner argue that JI can prevent future legislators from deviating from earlier statutory bargains and thus increase the present value of legislation to interest groups. Therefore, rational politicians will seek to maintain independent courts in order to enhance the benefits that a legislator can obtain from legislation.

Judicial autonomy is the range of potential independent action available to a court system and its judges. Judicial autonomy thus can be regarded as the degree to which the judiciary can implement its preferences without being corrected by one of the other branches (Voigt, 2005). In my judgment, granting a certain degree of autonomy to judges is also in the interests of legislators. This is because the autonomy of the judges increases the likelihood that over some unknown number of future disputes regarding unforeseen issues, an individual principal is likely to “win” as many times as it “loses”. This permits the agreement to go forward on a “risk neutral” basis (see Hawkins et al. 2004, p. 25). Therefore, judges, to whom the legislators even permanently transfer authority to deal with their unforeseen disputes, should receive a great deal of autonomy. A striking illustration for this argument is the case of judges in a constitutional court.

As pointed out by P-A theory, the discretion and autonomy of an agent can not only benefit but also damage principals. Therefore, the discretion and autonomy of judges who are independent from most other decision-makers can constitute a great danger. For example, as indicated by (Voigt, 2005, p. 2), judges could damage principal's benefit such as: (i) render decisions only with delays, (ii) render decisions that neglect much of the available evidence, (iii) render decisions that rely on irrelevant legislation, and (iv) render decisions that are patently false. Apparently, if the delegation of powers can create an opportunity for agents to develop autonomy and act against the interests of their principals, principals will incur agency loss. The greater the gains from delegation, the greater the agency losses principals will tolerate. With respect to the relation between legislators and executive agency, however, P-A theory suggests that principals are not helpless in the face of agency losses. Rather, they shape the formal institutional design of delegation to reduce losses. They determine the powers delegated to agencies and the degree of statutory discretion they enjoy in making their decisions (e.g. see Epstein and O'Halloran, 1999).

However, to guarantee independence of judiciary, legislators are not allowed to infringe arbitrarily on discretion and autonomy of judges. Given the fact that judges' autonomy may infect their decisions with bad outcomes for principals as mentioned above, and the possibility that judges do not decide the case according to the letter of the law, judicial accountability thus must be taken into account. Salzberger (2001) suggests that in addition to JI, some levels of accountability of judges are necessary from the general public. Similarly, in a report of the World Bank on Peru's institutions and governance, it is recognized that independence of judges should be balanced by accountability, and that in the end, the judiciary also does provide a public service which is answerable to the public for the quality of its output (World Bank 2002, p.112). The main concern here is not whether the judiciary is independent, but rather how independent it should be. That is why Santiso (2003) raises a question of how much JI is enough and how much is too much. Fiss (1993 cited in Santiso 2003) also suggests that achieving "the right degree of independence" is a challenging task for any democracy.

In contrast to above viewpoints, Voigt (2005) claims that there is no trade off between JI and judicial accountability. This is because the most important difference between the two concepts, as explained in Voigt (2005, p. 5), is that an accountable judge will have to incur extra costs if she disregards or violates the law whereas a dependent judge will have to incur extra costs although she meticulously follows the letter of the law. Therefore, JI and judicial

accountability can be complementary means towards achieving impartiality and, in turn, the rule of law.

To sum up, JI can be explained by the theories of separation of powers and delegation of powers. Traditionally, arguments of JI are mainly related to the theory of separation of powers. The more rigid the separation of powers is the more independent judges are. However, it is evident that presidential systems which are regarded as a rigid exercise of the separation of powers do not seem to lead to high degrees of factual JI. When explaining JI, scholars seem to pay less attention to the theory of delegation of powers. In this section, inspired from a recent study made by Salzberger and Voigt (2002), I argue that JI can be regarded as a result of domestic delegation of powers. It is worthy to note that rational legislators will transfer authority only if the costs entailed in the delegation are outweighed by the benefits of delegation (Salzberger and Voigt 2002, p. 214). In the following section, I focus on analyzing the possibility of delegating independent powers to the court system of Vietnam.

IV. Delegation of powers to independent courts in Vietnam

IV.1. Centralization of powers and delegation of powers

As I have already mentioned in chapter III, the socialist rule of law in Vietnam does not apply the principle of separation of powers, which is different from the rule of law in the West. In Vietnam, all powers belong to the NAV. The question here is why the leadership of Vietnam does not have incentive to apply the separation of powers in transition to the rule of law.

First, the alleged reason is that all state powers in Vietnam should belong to the entire Vietnamese people and therefore should be centralized into its representative bodies (Nguyen Thanh Binh 1992, Bui Xuan Duc 1997, Le Xuan Luu 2004). Article 6 of the 1992 Constitution provides that the Vietnamese people use their powers through the National Assembly and the People's Councils which represent the will and aspiration of the people. Both executive and judicial branches are accountable to the National Assembly at the central level and the People's Councils at the provincial and district levels. According to Nguyen Thanh Binh (1992), the 1992 constitution of Vietnam does not provide for the separation of powers because the separation of powers is only compatible with bourgeois society where there are various parties holding separate branches of state powers. This means that the

separation of powers should go along with the multiparty system which contrasts with the characteristic of the state of Vietnam. Strikingly, although there is no official and public debate about the viewpoint that separation of powers can be only applied in bourgeois states, it is naturally accepted not only in Vietnam but also in other former socialist states (Le Tuan Huy 2005).

Second, as pointed out by Le Tuan Huy (2005), in some specific conditions or periods, the centralization of powers has some advantages over the separation of powers, for example: (i) the centralization of powers allows the leadership to give decisive, immediate and effective actions, (ii) the centralization of powers does not allow impeding sound trends of reform and (iii) the centralization of powers may induce central organs to give necessary adjustments that the local bodies can not resist. That is why Le Xuan Luu (2004) believes that the leaders of Vietnam currently apply the principle of centralization of powers in order to ensure that their reform is implemented consistently from the central to the local level.

On the contrary to the centralization of powers, many studies show that the separation of powers can put the current reform in Vietnam at a disadvantage. For example, applying the principle of separation of powers regardless of its appropriateness concerning the particular conditions of Vietnam might result in a struggle for power among state bodies, which is harmful to the social stability and economic development (Le Tuan Huy 2005). Furthermore, in the book “Some basic theories of state and law” of the Institute of State and Law, there are some criticisms of applying the separation of powers in Vietnam, namely: (i) state powers must belong to the entire people and are under the party leadership, thus such powers cannot be separated (ii) the separation of powers leads to a power struggle which may bring about disorder in society and many other negative consequences in the reform process and (iii) the separation of powers infringe the rights of the Vietnamese people because it allows state leaders (e.g. the president) to veto the law or dissolve their representative bodies – the NAV (1995, p. 54).

However, there are some deeper reasons for maintaining the principle of centralization of powers in the transition to the rule of law in Vietnam. First, the 1989 Tiananmen Square upheaval in China and the volatile situation in the Soviet Union and Eastern and Central European countries by the end of the 1980s were events that induced the CPV to pursue the target of maintaining political stability and social order (Nguyen Minh Can 2001, Le Tuan Huy 2005). Therefore, the CPV validated the strategy of maintaining orderliness and democratic centralism during transition. In the speech on National Day (September 2, 1990),

Do Muoi, who at that time was the chairman of the Council of Ministers, mentioned the relationship between economic and political reform as follows:

“Successes in economic renovation will create favorable conditions to renovate the political system. However, political renovation cannot be left until the completion of economic renovation. We have to renovate step by step the political system so that along with the propulsion of economic renovation, political and moral unity of our people and society will be strengthened. Renovation will be impossible without the practice of democracy and ensuring the role of the people as master of the country in national construction... However, democracy must go hand in hand with law and discipline; it must not be separated from centralism. We oppose bureaucratic centralism but not democratic centralism.”⁴⁴

Second, the reason that the CPV often gives to protect the policies of gradual political reform and centralization of powers is because the CPV wants to prevent “plots of peaceful movement” (*dien bien hoa binh*). The policy of preventing “plots of peaceful movement” was initially proposed in China and aimed at opposing the foreign policy strategy that the Foreign Secretary of the U.S. - John Foster Dulles – proposed in the 1950s. According to Dulles, in addition to the policy of preventing the expansion of the Communist block, it is necessary to support attempts on overthrowing the Communist regimes through peaceful means. He emphasized that the U.S. and its allied countries need to put efforts into eliminating Communism. The collapse of the Communist block in the 1990s and the recent peaceful revolutions in some countries of the Commonwealth of Independent States (CIS) increasingly cause the anxiety of “plots of peaceful movement” for the leadership of Vietnam. The aim of peaceful movement in Vietnam currently, argues by Nguyen Phu Trong (2005), is opposing the socialist orientation, the party leadership and at the end overthrowing the current political regime. Therefore, for the purpose of maintaining political stability and social order and preventing the “peaceful movement”, the CPV should make more effort into protecting its sole leading role in society, strengthening state powers (see: Nguyen Phu Trong 2005).

In order to maintain its leading role, the CPV of Vietnam must be organized under the principle of democratic centralism (Do muoi 1990, Nguyen Phu Trong 2005). Party documents indicate that democratic centralism was introduced to consolidate central Party control over regional Party cadres, state officials and the general public (Le Van Luong 1960;

⁴⁴ Cited in Vietnam News Agency in English, September 1, 1990

Nguyen The Phung 1960 cited in Gillespie 2005). Article 10(f) of the CPV Statute 1960 explains the meaning of such principle as follows:

Individual Party members must obey the Party organisations. The minority must obey the majority. Lower organisations must obey higher organisations. Party organisations throughout the country must obey the National Delegates' Congress and Central Executive Committee (Le Van Luong 1960, p. 33 cited in Gillespie 2005).

Accordingly, the leaders of each party organization must be accountable to the higher party body. The power to set national policies belongs to the National Party Congress that recently deputizes for about 3.000.000 party membership. The National Party Congress elects members to the Central Executive Committee (about 150 members). Members of the Central Executive Committee in turn occupy the highest positions in the key state organs such as the NAV, government, supreme people's court, supreme people's procuracy etc. Furthermore, the CPV members also predominate in the National Assembly (about 80%), which is the sole body of Vietnam having the power to enact the constitution and laws.

As analysed in chapter III, the main obstacle to the transition to the rule of law in Vietnam is abuses of arbitrary powers. It is worthy to note that most recent criticisms have not stressed the leading role of the Communist party, but have focused on the moral degeneracy and arbitrary discretion among the leaders and officers of government and the party, which hinder the reputation of the Communist party (e.g. Dao Tri Uc 2002, Le Duc Binh & Pham Ngoc Quang 2003 and Nguyen Quoc Viet 2004). An important question is how to supervise the party and state powers in Vietnam. It could be argued that in order to ensure that all powers belong to the Vietnamese people, it is necessary to: (i) confine the powers of the party and state bodies by general rules laid down in the law, especially in constitution and (ii) supervise and balance state powers through delegation of powers to restrain arbitrary powers.

It is noteworthy that under the rule of law, the party affirms that its organization and members should operate under the supervision of the Vietnamese people and within the framework of the constitution and law. For example, the policy report of the 6th National Congress in 1986 states that although the party holds the leading power, all party members and organizations must obey the law. The party does not allow anyone to infringe upon the law, all illegal activities need to be sentenced (1986, p. 120, 121). The 1992 Constitution also recognizes the sole leading role of the CPV as well as requires all party organizations to act in accordance with the law. Article 4 of the 1992 constitution provides that:

“The Communist Party of Vietnam, the vanguard of the Vietnamese working class, the faithful representative of the rights and interests of the working class, the toiling people, and the whole nation, acting upon the Marxist-Leninist doctrine and Ho Chi Minh’s thought, is the sole force leading the state and society. All Party organizations must operate within the framework of the Constitution and the law”.

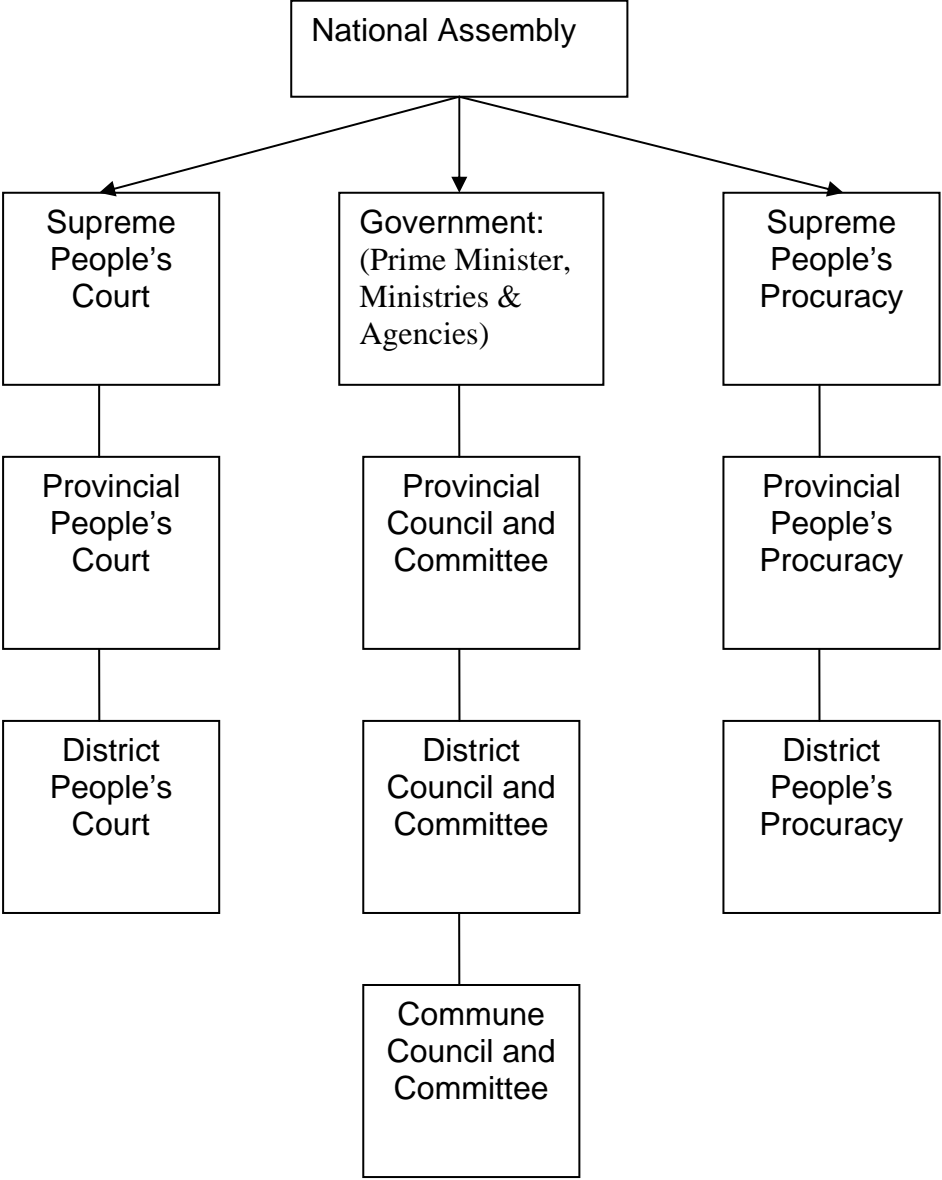
Furthermore, despite having the sole leading role in society, the CPV should restrain itself from intervention in activities of state organs. In recent years, the Party has diminished its role in the daily management of government. More importantly, the CPV seems to be willing to accept constitutional limits on its power. Therefore, in the near future, Vietnam can establish an independent constitutional review mechanism⁴⁵, expand direct local elections, and further strengthen powers of the National Assembly.

Since the 7th National Congress of the CPV in 1991, the principle of centralization of powers has been adjusted to the rule of law. It is argued that under the rule of law, the NAV should be a supreme state body, but not a totalitarian body (see Le Minh Thong, 2005). According to Le Minh Thong, there is a consensus among legal experts and politicians of Vietnam that all powers should belong to the entire Vietnamese people. Yet there is still an ongoing debate regarding the question how the Vietnamese people can transfer their powers to the state. Some authors suppose that the Vietnamese people should delegate their authority to three separate state branches: the legislative branch - national assembly, the executive branch - prime minister and ministers, and the judicial branch - the people court and procuracy system (e.g. Nguyen Dang Dung 2001, Le Thanh Van 2002, Le Minh Thong 2005). Indeed, this approach suggests the application of separation of powers, but it has not been accepted by the Vietnamese leaders. On the contrary, some others claim that the Vietnamese people should grant their authority only to the NAV because it is the sole state body elected directly by the people (see e.g. Dao Tri Uc 1997 and 2002, Truong Trong Nghia 2000). Consequently, the NAV should hold the highest powers i.e., the power to promulgate the constitution and laws, to decide the most important issues of the country and so on. Moreover, the NAV should exercise supreme supervision of all activities of the state. Other state bodies, therefore, are responsible to submit the reports annually to the NAV. The heads of other central bodies such as the prime minister and ministers, Chief Judge of the supreme people’s court and president of the supreme people’ procuracy can be criticized, questioned and dismissed by the NVA members.

⁴⁵ Notably, the policy report to the 10th National Party Congress mentions a consideration of establishing a constitutional review body in Vietnam.

Obviously, the principle of separation of powers has not been accepted and applied in the transition to the rule of law in Vietnam. By contrast, the supreme state powers belong to the NAV which is regarded as the highest governmental body. At the central level, both executive and judicial branches are accountable to the National Assembly. In the transition to the rule of law, although the state powers should be centralized, it is in need of a reasonable division of works and responsibilities among the organs of the state in order to implement legislative, executive and judicial functions. The NAV thus delegates a part of its powers to supreme bodies in executive and judicial branches of which leaders are appointed by the NAV. These supreme bodies in turn grant their authority to the lower state bodies in the same branch (see chart 5.2).

Chart 5.2: Centralization of state powers in Vietnam



In this section, I have argued that in transition to the rule of law in Vietnam, the delegation of powers to domestic independent courts is feasible. As mentioned already, the P – A theory shows that the degree to which rational legislators delegate their authority depends on how well the costs involved in the delegation of powers are outweighed by the benefits. The next section shows some benefits of the delegation of powers to independent judiciary system in Vietnam.

IV. 2. The motivation for delegation of powers to independent court in Vietnam

In 2002, the CPV and the National Assembly of Vietnam passed policies on reforming the judiciary system. Notably, in January 2002, the CPV issued the Resolution on Forthcoming Principal Judiciary Tasks (Resolution No. 8). This Resolution was concretized in some legislative documents, for example the Law on Organization of People's Courts dated 19 April 2002 (LOPC 2002), the Ordinance on Judges and People's Assessors of People's Courts dated 11 October 2002 (OJPA 2002). The CPV's determination of promoting independence of the court system can be inferred from Resolution No. 8. As emphasized in the Resolution, "judges and assessors shall be independent and only obey the law", and the courts are charged with securely keeping "the nature of the socialist state of the people, from the people and for the people, which is governed by the rule of law".

It is worthy to note that the judicial reform has led to significant changes in the legal system, which makes the judicial system of Vietnam more independent. For instance, the judiciary system has been reorganized so that the Ministry of Justice and other state organs (especially at local levels) have less control on courts' activities. The Supreme People's Court will have greater autonomy over appointment and dismissal of judges and assessors, although it has to consult various representatives of other state organs. Additionally, it will be delegated more powers in issuing guidelines and legal documents. Strikingly, the recent reforms allow the Supreme People's Court to control activities concerning administrative management, budgetary and personnel of the whole court system. The reforms concerning *de jure* JI in Vietnam will be mentioned in greater detail in chapter 6.

Why did the party leaders and legislators of Vietnam carry out the judicial reform which grants more independent powers to the court system? As analysed earlier, delegation of powers to independent court will be feasible only when Vietnamese leaders and legislators can maximize benefits from judicial independence. The following explains some benefits of delegating power to independent courts in Vietnam.

First, in the last decade, there were widespread criticisms of the judicial system of Vietnam by both the community of international investors and various interest groups (see e.g. Gillespie 1993; McKinley 2002; Nicholson 2002, 2003; Pham Duy Nghia 2002; and many Vietnamese newspapers⁴⁶). The survey made by the Pew Global Attitude (2003) shows that most of Vietnamese people highly appreciate a fair judiciary (80% respondents), but only half of the interviewees think that the Vietnamese government does well in this regard (2003, p. 64). Because of criticisms, the CPV and Vietnamese government should carry out judicial reform in order to regain their prestige in society.

Second, inspired from P-A theory, I suppose that the delegation of powers to independent judiciary will increase credibility of the leadership and legislators in Vietnam. As mentioned in the previous chapter, while looking for a solution to the dilemma of the strong state, Weingast (1993) realizes that representatives of government have motives for promising not to infringe upon citizens' property rights. In countries transforming from planned economy to open market economy like Vietnam, investors are still obsessive about government's arbitrary infringement upon their property rights in the past. Additionally, the arbitrary political system can result in insecurity and unpredictability, or at least a much higher cost in the efforts to predict policies and their impact. For such reason, entrepreneurs feel that their business will be risky if they invest into countries having an arbitrary system. As a result, governments tend to keep their promise of not infringing arbitrarily citizens' property rights.

Nevertheless, their promises will not be believable if lacking a mechanism constraining their activities. As pointed out by Weingast (1993), rational governments have an interest in establishing an institutional constraint mechanism that could help them to keep their promises credible. This mechanism makes promise breaking costly. In other words, if the expected utility from accomplishing is higher than from breaking their promise, representatives of government can be expected to stick to their promises. Judicial independence, thus, encourages citizens to trust in the relevance of the rule of law (Feld and Voigt 2003, p. 2). Furthermore, judicial independence is regarded as a tool to prevent arbitrary action of government. Therefore, through the promotion of JI, the leadership of Vietnam proves that they are trying to restrain their arbitrary actions and promote the rule of law. Accordingly, their credibility is likely to be enhanced.

⁴⁶ E.g. The article titled "Miscellaneous Lawyers Advocate Increased Role in Courts" on VnNews, April 2002; or the article titled "Chief Justice says People's Courts need overhaul" on VnNews, March 2002

In addition, as aforementioned, Landes and Posner (1975) argued that by delegating more powers to an independent judiciary, legislators could prolong the life span of legislative deals beyond their term. More specifically, an independent judiciary can enable legislators to do this by reducing the possibilities of post-contractual opportunism either by themselves or by their successors. Legislators, therefore, have a tendency to maintain judicial independence because their own rents will be higher. In Vietnam, the representatives of the NAV where the CPV members are dominant currently also expect that their legislation will have a lasting life even when the CPV gives up their dominance in the NAV. For instance, JI may prolong the life span of regulations on the sole leading role of the CPV and thus ensure the legitimacy of the party leadership in a certain extent. This explains why the leaders of Vietnam currently seem to opt for the delegation of powers to independent judiciary.

Third, JI could help government to persuade individuals to comply with their contracts as well as believe in the enforcement of the law (Feld and Voigt, 2002). This aspect plays a very important role on economic growth. Analysing the rule of law in China, Peerenboon (2000) argues that in many instances the leadership in China has no interest in the outcome of a particular case other than that it be fair. For example, whether Company A or Company B prevails in a commercial contract is not a matter of state concern. What matters from the central leadership's perspective is that the result be based on the law and reached through fair procedures rather than turning on personal connections with judges. Notably, if a government is incapable of protecting private property rights and enforcing contracts, individuals will opt for informal institutions to protect their property rights. It is the case of underground economy (see e.g.: de Soto 1989; Feige 1990; Voigt and Kiwit 1995). However, it will be costly for entrepreneurs to maintain their business under a pillar of informal institutions in the long run. Entrepreneurs will thus invest less or simply shift their activities to the countries where the state has enough competence in protecting their assets. Without judicial independence, argue by Jarquín & Carrillo (1998, p. vii), there is no rule of law, and without rule of law the conditions are not in place for the efficient operation of an open economy, so as to ensure conditions of legal and political security and foreseeability. Judicial independence, therefore, is a very important factor in promoting economic growth. It would be difficult to deny that rational governments (democracy or dictatorship) are always interested in economic growth. In the case of Vietnam or China, the reforms towards completion of legal institutions (e.g., delegating more authorities to independent judiciary) that advance the Party's development goals without endangering its survival seem easily to be accepted.

Fourth and finally, the leadership of Vietnam enhances judicial independence in order to ensure stability, and constrain the abuse of power and wayward local governments. As indicated earlier, the P – A theory pays attention to how principals may design certain types of procedure to control an agent. The theory suggests that principals should create laws and institutions that can monitor agents and sanction the abuse of power. The check and balance mechanism applied in many western countries plays a significant role in preventing the risk of abuse of power in the legislative, executive or judicial branches of government. However, this mechanism is not applied in Vietnam due to the centralization of powers. In principle, the NAV exercises supreme supervision over all activities of other state bodies, including the president, government, supreme people’s court and procuracy. Yet, the NAV is incapable of supervising all other state bodies, especially local governments. Therefore, the NAV should delegate authority to an independent agent to constrain arbitrariness of local governments. In 1996, the administrative courts were established to deal with the abuse of powers in administrative bodies. However, no state body has authority to supervise the activities of the NAV. Due to the lack of judicial review of the constitutionality of legislation, many authors have suggested that the transition to the rule of law in Vietnam calls for establishment of a constitutional review mechanism (Nguyen Dang Dung 2001, Pham Duy Nghia 2004, Le Minh Thong 2006). This mechanism can be implemented by a constitutional court belonging to the supreme people’s court or by a constitutional committee belonging to the National assembly. The leading constitutional experts should be nominated to these organs.

In short, the P – A approach on judicial independence shows that on the one hand, JI may benefit citizens because it prevents politicians from renegeing on the promise of not infringing citizen rights. On the other hand, politicians also have a great deal of benefits from delegating their authority to independent courts, especially increase in credibility. The analysis of motivations of the Vietnamese politicians in making JI tends to support the P – A approach.

V. Conclusion

In this chapter, I focus on providing some explanations for the delegation of powers to independent judicial system in the transition of Vietnam. First, based on the Principal – Agent theory, I analyse the theoretical foundations for making JI, namely separation of powers and separation of powers. According to the principle of separation of powers, people delegate their authorities to three different branches of government - legislative, executive and judicial

branches. This results in judicial independence. From the perspective of delegation of powers, the independence of courts, especially constitutional court, could be seen as a result of domestic delegation of powers made by rational legislators.

Second, the chapter discusses some main reasons for why in the transition to the rule of law, Vietnam does not apply the principle of separation of powers. By contrast, the leadership of Vietnam still uses the principle of centralization of powers in organizing their government. State powers are centralized into the NAV and people councils. However, in the rule of law, it is in need of a reasonable division of works and responsibilities among state's organs. Certainly, the party leadership and legislators of Vietnam will have a great deal of benefit from the delegation of powers to independent courts. Not least, JI may increase the credibility of the party leadership and legislators of Vietnam, promote economic development, and constrain abuse of power.

However, one might have doubts that the promise of making judicial independence in Vietnam will have the aforementioned effects because the creation of domestic independent agencies will often not be a credible commitment. In other words, although the CPV and the state leaders have incentive to promote an independent judiciary, it is not properly implemented in reality. The next chapter will examine the gap between de jure and de facto JI in Vietnam.

Chapter 6

The delegation of powers to domestic independent courts: de jure and de facto judicial independence in Vietnam

“The relationship between the lawmaking process and institutional reform is in the end very complex. Implementation problems are not unique to transition economies, as well-drafted laws fail to be implemented in practice in many settings around the world. Strengthening of institutions inevitably takes a major commitment of time and resources” (The World Bank 2005)

“It seems to be that, as soon as laws were passed, we (the National Assembly of Vietnam) lose them because they are not implemented in reality” (Nguyen Dinh Loc, a NA representative, complains that laws are not properly implemented by state officers)

I. Introduction

In the previous chapter, I analysed the theoretical foundations for making JI, namely the separation of powers and the domestic delegation of powers. I also explained why the leaders of Vietnam currently support using delegation of powers rather than separation of powers to promote JI. The crucial question raised in chapter V is whether politicians and legislators in Vietnam have incentives to make a promise to honor JI. I argued that the leaders of Vietnam indeed have incentives to endorse JI. Yet it may be the case that their promise of honouring JI is not credible. Voigt (2005) has a long discussion that due to the insufficient credibility of domestic delegation, rational nation-states will opt for delegating powers internationally. The creation of domestic independent agencies will often not be a credible commitment because such agencies can be abolished with relative ease (Feld and Voigt 2003).

Therefore, the central question of this chapter is whether the promise of delegating powers to independent courts in Vietnam is a credible commitment. To answer this question, the gap between the promise of promoting JI and the factual implementation of JI needs to be examined. In order to measure JI, Feld and Voigt (2003) distinguish two sets of indicators: JI

can be measured by looking at the letter of the law, which they call *de iure* JI and it can be measured by analyzing how JI is factually implemented, which is *de facto* JI. The lack of factual implementation of JI can make a considerable impact on economic development. For example, Feld and Voigt (2003) have found that the factual independence of the judiciary is significant for economic growth whereas *de jure* judicial independence is not a significant explanatory variable for economic growth. Examining the gap between *de jure* and *de facto* JI is thus necessary for the rule of law reform generally and judicial reform particularly in Vietnam. Adopting laws that cannot be enforced in practice is not only an inadequate beginning but also a counterproductive exercise that can even undermine public confidence in the rule of law (The World Bank 2005). Similarly, making a promise to honor JI that cannot be factually implemented does not increase, but even decrease government credibility.

The rest of this chapter will be organized as follows: in the next section, I will provide the theoretical background explaining the constitutional and judicial reform that has been taking place in Vietnam since 1992. Accordingly, the reason why the promise of delegating powers to domestic independent courts may not become a credible commitment will be examined. Section 3 will scrutinize the gap between *de jure* and *de facto* JI in Vietnam. The last section will present some concluding remarks of this chapter.

II. Some preliminary theoretical considerations

As already mentioned in the previous chapter, the party leaders and legislators of Vietnam have carried out judicial reform in order to make the court system more independent. How does such a reform take place? As I argued in chapter V, the delegation of powers is a possible choice for the politicians and legislators of Vietnam to promote JI. Based on P – A theory, I also claimed that a constitution is regarded as a kind of contract in which a principal (e.g. the politicians and legislators) delegates authority to an independent agent (e.g. independent judiciary). The delegation of powers to independent courts thus can be analysed in two levels of choice: constitutional and post-constitutional choices. In order to have a comprehensive assessment of the current judicial reform that promotes judicial independence in Vietnam, it is necessary to consider that reform in the context of political reform and constitutional change. Especially, the reasons for constitutional change in the transition period of Vietnam need to be examined. Applying the constitutional economics approach, which can be regarded as a special branch of Law and Economics and the NIE, Voigt (1999b) has

presented the theory of constitutional change in his book “Explaining constitutional change”. In this section, I will summarize the central features of his theory of constitutional change. The analysis of constitutional and judicial reform in Vietnam will be mentioned afterwards.

II. 1. The theory of constitutional change

When analyzing constitutional choices and reforms, the economics approach assumes that the relevant actors seek to maximize their individual utility. Yet such constitutional choices are also subject to certain constraints. As argued by Salzberger & Voigt (2002, p. 215), since passing a new constitution is usually not an individual choice but a collective one, the first step in analysing constitutional choice is to identify the relevant actors, their interests or preferences, and the constraints to which they are subject in making their choices.

In the view of Voigt (1999b, p. 87 - 88), conceptualizing the constitutions as social contracts cannot help much to explain the emergence and maintenance of them. Rather, the emergence of constitutions can be better understood if one defined them as a type of formal institutions which is based on spontaneously arisen internal institutions. Given the fact that many similar *de jure* constitutions bring about different constitutional realities in various societies, one can raise a question of why some governments remain within the constraints set down in the constitution whereas other governments frequently dispose of them. According to Voigt (1999b), these differences are due to the different internal institutions by which the respective constitutions are backed. Constitutions may only constrain politicians effectively if they are compatible with these internal institutions (p. 88). Hayek (1960) also argued that the common beliefs, which can be regarded as informal institutions, play a significant role for the establishment of viable formal institutions. He said:

“... a group of men can form a society capable of making laws because they already share common beliefs which make discussion and persuasion possible and to which the articulated rules must conform in order to be accepted as legitimate” (1960, p. 181)

Olson (1980, 1984) has a similar argument on the role of informal institutions in making constitutions. He suggests that the constitution itself rests on a more fundamental reality. Notably, the generally prevailing thinking of the time in a society inevitably influences how a constitution is interpreted. Therefore, any constitutional change that runs much against such reality will not factually enforced (Olson 1984, p. 93).

In chapter 3, I also argued that informal institutions play a role as a significant constraint on constitutional choice and reform. Additionally, another crucial factor determining constitutional choices is the relative bargaining power of various interest groups involved in such choices. As we have seen in chapter 3, the change of relative bargaining power of actors in society plays a decisive role in institutional change. This approach was developed by Knight (1992). He emphasizes that in order to explain institutional development and change, we must look at strategic social conflict and mechanisms to solve such conflict (p. 123). Voigt (1999b) applies the social conflict and social bargaining theories to explain constitutional change.

For the purpose of analysing constitutional change, Voigt (1999b) begins with some assumptions. He assumes that government belongs to only somebody who has comparative advantage in violence and therefore can force others to pay for the collective goods supplied by him. The government services will be delivered by an autocrat. He also supposes that there is one latent interest group which could overcome the organization dilemma. The more the potential members of a latent interest group believe they are exploited and not gaining from the current regime, the easier it will be for them to get organized. Obviously, the members of these interest groups are unhappy with the distribution resulting from the current regime or the current constitution and oppose the autocrat. They will be the opposition groups.

Subsequently, Voigt (1999b) suggests that the establishment of opposition groups who could overcome the organization dilemma is regarded as a prerequisite for constitutional change. He regards constitutional change as the outcome of a bargaining process between the rulers and various opposition groups. With regard to the motivation of constitutional change, he hypothesizes:

“If a latent interest group whose interests have hitherto not entered into the constitution and who is thus not part of the constitutional faction has somehow managed to overcome the organization dilemma and if the non-opposition of that group is necessary for the constitutional faction in order to appropriate the exploitation surplus, then the (relative) power of the current constitutional faction has declined which will lead to constitutional change” (1999, p. 122).

The aim of the opposition is to change the distribution resulting from the constitutional rules in its own favour which implies a change of this constitution. Under the pressure of opposition groups, the rulers have three options: i) they can fulfil the demands of the opposition, ii) they can turn them down and iii) they can offer to negotiate (1999, p. 110). If

the rulers decide to offer to negotiate and the opposition accepts the ruler's offer, explicit negotiations will take place, which brings about constitutional change.

In short, in the process of constitutional making or change, it is necessary to consider the compatibility between the constitutional rules and informal institutions. Given that there is a broad range of constitutional rules compatible with the informal institutions of society, constitution making and constitutional change can be done by some form of bargaining between the organized groups who succeed in overcoming the organization dilemma. In Vietnam currently, the CPV plays the sole leading role in society, and pluralist democracy is not accepted. Creating opposition groups or opposition parties therefore is not allowed. The central question here is whether political and constitutional reform in Vietnam can be carried out without the establishment of opposition groups. The rest of this section will explain the constitutional change of Vietnam.

Above, analysis on constitutional change shows that the creation of opposition against current rulers should be regarded as a precondition for constitutional change (see details in Boudreaux and Pritchard 1993, Voigt 1999b). Some other authors such as Moe (1990) and Acemoglu et al. (2002) see political institutions as the choices of the winners of the struggle for political power. Acemoglu et al. (2002) suppose that the emergence of the opposition is a consequence of the economic development. For example, they regard the development of Atlantic trade as a reason for the expansion of the bourgeoisie whose interests and purposes differ from those of a monarchy. Due to the differences of interests and purposes, the bourgeoisie opposes the monarchy. When the bourgeoisie has political authority, they will design institutions that preserve their power.

On the contrary, in the book "Social Origins of Dictatorship and Democracy" (1966), Moore suggested that although the expansion of the bourgeois class resulted in democracy, this class frequently allied itself to the monarchy. Therefore, political reform depends not only upon the change of social classes in a society, e.g. the expansion of the bourgeois class, but also the relationship between various interest groups and the state. As Moore (1966) argued, in order to promote democratization, the existence of a middle class is not as important as its relationship with the state. Moore added that the middle class should be strong and independent from the state.

Since 1986, the economic renovation in Vietnam has also brought about significant changes in social structure. The emergence of a middle class, notably the emergence of the new

entrepreneurs, is a great change in modern society of Vietnam. However, in a recent study on the political change and the middle class in Vietnam, Gainsbrough (2002) claims that although the emergence of entrepreneurs is a new phenomenon in the business life of Vietnam, but it is not new in the political life. This is because many of entrepreneurs are former government officials or relatives of the leadership. According to Gainsbrough, there is little evidence showing that entrepreneurs pressurize government into political change. It is evident that the middle class also requires institutional reforms, especially those concerning the improvement of the business environment, the transparency of the legal system and legal institutions, etc. Yet their requirements cannot be regarded as opposition to the government. Certainly, the leaders of Vietnam are inclined to avoid negative consequences resulting from changes of social structure, i.e. the establishment of the opposition in the future. In addition, they also need the support of the middle class for the current economic renovation.

Therefore, from my point of view, it is not necessary to regard the opposition against the state leaders as a prerequisite for the constitutional change in the transition of Vietnam. This means that the existence of new strong interests groups that are independent from the government, e.g. entrepreneurs, may not be seen as a precondition for the constitutional reform in Vietnam. Although the existence of the opposition has not been found in Vietnam, the increasing pressure of the opposition in the future could force the leaders to propose political and constitutional change. The next section will analyse the role of actors concerned in the process of constitutional reform in Vietnam. The question here is who will propose the draft of new constitution in Vietnam and who will ratify it, and what are their interests and references.

II. 2. The process of political and constitutional reform in Vietnam

As I emphasized previously, it is necessary to change the thinking that Vietnam should carry out the political reform towards the model of Western democracy. Particularly, the emergence of the opposition against the state leaders cannot be regarded as a precondition for constitutional change in the transition of Vietnam. A similar view can be found in the book “Toward illiberal democracy in Pacific Asia” (1995) written by Bell and Jayasuriya. They argue that the motivation of political reform does not derive from the conflict of independent interests among social classes, but results from the internal conflict in the state. This implies that the process of political and constitutional reform in Vietnam is different from those in the West.

Analysing the process of constitutional making in the United States, McGuire and Ohsfeldt (1986, 1989, cited in Salzberger & Voigt 2002) examined the individual interests of delegates present at the Philadelphia Convention (whether debtors or creditors of the government, slave owners, Western landowners, potential exporters, or otherwise) in order to explain their voting and ratifying behavior. Salzberger & Voigt (2002, p. 216) have tried to explain the processes of constitutional reform in Israel and Central and Eastern Europe by examining the organizational or party interests. They assume that constitutional conventions made up of members of a parliament still stemming from a socialist regime will have different preferences from conventions comprised of newly-elected parliamentarians. In their view, the interests of members of ruling parties will differ from those of members of newly emerging parties. The constitutional changes in Israel and CEE thus resulted from the bargaining process between the members of ruling parties with members of newly emerging parties.

The process of political and constitutional reform in Vietnam is quite different from those in the West because Vietnam has only one party, namely the CPV. There are also many other political and social organizations such as the fatherland front, the trade union, the union of women, the union of youth, the association of peasants etc. None of them are in opposition against the state and the CPV, but are led by the CPV. The political and constitutional changes in Vietnam thus have been initiated by the leaders of the CPV.

In Vietnam, the leaders of the CPV and the state propose political and constitutional reforms. The proposals for political reform will be prepared by the Central Committee and the Politburo. Then policy proposals (e.g., the policy reports to the National Party Congress) will be discussed and approved by the National Party Congress, which takes place every five years and lasts one or two weeks. In the period between the National Party Congress sessions, the Central Committee is responsible for the policies of the CPV. With respect to constitutional reform, a group of experts in politics and law is commissioned to make a proposal of a new constitution or an amendment to the Constitution. The proposal will be publicized through mass media in order to get broad public views and comments. The party organizations, state organs and other political and social organizations can also help to collect citizens' opinions on the proposed constitution or the amendment to the constitution. The proposal then will be reviewed and passed at the National Assembly by at least two-thirds of its total membership.

From analysing the process of political and constitutional reform, it can be affirmed that the CPV plays a decisive role for political and constitutional change in Vietnam. Other political and social organizations representing the interests of various interest groups and the citizenry

at large can give their opinions and comments on the proposal of political and constitutional reform. Thus, political and constitutional change in Vietnam cannot be regarded as the process of negotiating or bargaining powers between opposite parties or interest groups in society on the one hand and the leaders of the CPV and government on the other hand. In other words, there is no bargain between the state leaders and the rest of society.

However, there is an internal bargaining process among the leaders of the CPV and the government organs. The reason is that in the process of political and constitutional reform, there is an increasing opposition of some party leaders and governmental officers at both central and local levels, who want to preserve the status quo and therefore challenge any political and constitutional reform. Olson (1982) regards the reaction of agents of existing institutions as the main impediment to institutional change. For Olson (1982), the capacity of organized groups for adjusting themselves to the existing institutions results in the persistence of inefficient policies. This is because such a capacity gives special interest groups a strong status-quo bias. Similarly, Acemoglu and Robinson (2002) claim that economic and institutional improvements may be blocked by political leaders fearing to lose influence. In their view, political institutions themselves are the causes of the absence of economic and political reforms as they grant decision-making power to those who have incentives to preserve the status quo.

According to Boudreaux and Pritchard (1993), the force and the development of the opposition against the proposed constitutional change play a very important role in the reform process. They point out that constitutional change is easier to take place in the case that today's opposition is weak but expected to be stronger in the future. The opposition of some CPV members and governmental officers to the proposed political and constitutional reform in Vietnam is increasingly strong. The reason is that they have lost many interests and powers due to the political reform and constitutional change.

In Vietnam, the political reform is a bargaining process between two competing factions within the party leaders and governmental officials, namely the reform group and the conservative group. The reform group has proposed political or constitutional reforms. Yet they have to bargain with the conservative group so that their proposed reforms can be passed and implemented in reality. This explains why over 20 years, the political reform and constitutional change in Vietnam could not be radical, but gradual. Furthermore, due to the resistance of the conservative group, many political and institutional reforms which are concretised in the constitution and laws have not been implemented seriously in reality. As

Mr Nguyen Dinh Loc, a NA representative, complains, “it seems to be that, after laws were drafted and passed, we (the National Assembly of Vietnam) lose them as they are not implemented in reality”⁴⁷. The judiciary reform of Vietnam in recent years is a typical example for this situation. Although the leaders of the CPV and the government have proposed judicial reform promoting JI, this policy has not been implemented properly. I will explain this problem in more detail in the following section.

II. 3. Is the promise of making JI in Vietnam credible?

As pointed out in chapter V, there are three reasons inducing the leaders of Vietnam to promote judicial independence, namely: (i) to regain their prestige and prevent a future opposition, (ii) to enhance their credibility in order to surmount the dilemma of the strong state and (iii) to assure the effective enforcement of the laws and to constraint the abuse of powers. For such reasons, the CPV and the government proposed policies of judicial reform, which are institutionalized in many new laws. It is expected that the judiciary system thus will be delegated more independent powers.

However, as mentioned above, the factual result of political reform generally and judicial reform particularly is a reflection of the bargain between the reform group and the conservative group. While the reform group wants to delegate more independent powers to the court system, the conservative group fears that too much a widening of powers of the courts could threaten the leadership of the Party. Consequently, Resolution No. 8 reflected the compromise between two groups. For example, Resolution No. 8 provides that the courts must abide not only by the laws, but also the orientations and policies of the CPV, and must serve the party’s political ends. This means that the courts have to be subservient to Party leadership on the one hand and independent on the other hand. The problem is how to separate the party leadership and the independence of the court system. The next section of this chapter will show that this is impossible.

Furthermore, because the judicial reform promoting JI will restrain arbitrary actions of government officers (not least in administrative bodies), some CPV members and government officers whose interests will be lost due to that reform will oppose it. For example, if the court system is more independent, it would be easier for judges to charge corrupt officers or those who abrogate illegal administrative documents. Therefore, many officers in the CPV and state organs oppose the delegation of more independent powers to the judiciary system. As a result,

⁴⁷ Cited in Tuoitre online, December 2005.

although the leaders of the CPV and government have carried out the judicial reform, their promise of delegating more powers to independent courts does not seem to be a credible commitment. That is why Voigt (2004) believes that rational governments should delegate relatively more powers internationally because the creation of domestic independent agencies will often not be a credible commitment (p. 2). Hence, my hypothesis in this chapter is that while some political and legal reforms that are aimed at making judiciary system more independent seem to be radical, their effects are moderated in practice.

For the purpose of examining the “gap” between the constitutional and judicial reforms and the implementation of these reforms, in the next section of this chapter, I compare JI stipulated in the laws with JI in practice. As mentioned above, I hypothesise that the policy makers in Vietnam promise to make judicial independence, but do not implement it. By using measurable indicators namely *de jure* and *de facto* judicial independence, the next section will give empirical evidence supporting this hypothesis. If my hypothesis is true, the level of *de jure* JI seems to be higher than that of *de facto* JI. Furthermore, it may be evident that the judiciary system in Vietnam is still lacking in independence in term of both *de jure* and *de facto*.

To assess judicial independence in one country, Feld and Voigt (2003) use a quantitative study with a new set of indicators, namely 12 variables of *de jure* JI and 8 variables of *de facto* JI. However, in the case of Vietnam, it is very difficult to make quantitative analysis because of lack of data and the complexity of the court system. Due to the same reason, Feld and Voigt (2003) also just focus on the highest court in the country. Additionally, some data, especially those relating to personnel issues and public expenditure, are regarded as secret documents in Vietnam. It is also impossible to collect data from the Internet because Vietnam’s data regarding the organization and operation of state organs updated in the Internet is not well developed. For such reasons, the qualitative analysis and case study seem to be more suitable for observing *de jure* and *de facto* judicial independence in Vietnam. Based on the current policy reports of the CPV and various legal documents, I will provide evidence signifying the degree of *de jure* JI in Vietnam. In regard to empirical evidence for the degree of factual JI, some real court cases (both criminal and civil) that took place in the last few years will be analysed. Additionally, the viewpoints of many Vietnamese leaders, lawyers and legal experts regarding the judiciary reform and JI in Vietnam will be also consulted.

III. The gap between de-jure and de-facto judicial Independence in Vietnam

III. 1. De-jure JI in Vietnam

The 1992 Constitution guarantees JI in Vietnam

If the court system is anchored in the constitution, argue Feld and Voigt (2003) that is a positive indicator for the de jure JI. If the constitution does not have general provisions stipulating for the organization and the operation of the courts, they may be easier to be stripped of jurisdiction; their basic structure and organization more likely to be altered; or they may even be destroyed by external forces. These pressures obviously may affect individual judges' activities. In Vietnam, the 1992 Constitution has one chapter (Chapter 10) providing for the organization and operation of judicial organs, including the court system. The Constitution also states that final decisions of the courts must be respected by all state organs, institutions, organizations and citizens, and seriously implemented by concerned parties (Article 136).

Additionally, the principle of independence of judges and assessors during a trial is also provided for in constitution. The 1992 constitution provides that "during a trial, the judges and assessors are independent and shall only obey the laws" (Article 130). This principle is also reaffirmed in the OJPA 2002 (Article 4). Article 38 of the Law on Organization of the People's Courts (2002) provides that "interference with the work of judges and people assessors is strictly forbidden". However, according to Sugiura Maski - a Japanese judge, these provisions can be understood that judges are independent only when they attend a trial. Rather, judges should be independent in all their works before and after the hearing. In recent years, as mentioned above, the most important policy document of the CPV regarding judicial reform - the Resolution No. 8 (section II, B, 1) provides for more autonomy of the People courts system. Currently the Supreme People' Court (hereafter SPC) has a higher degree of influence on administration of the court system. For example, the Supreme Court is vested more power in the activities concerning budget preparation for the whole judicial system, recruitment of court officials, appointment of judges and provisions of training for court staffs, etc.

Appointment procedure of judges

According to Feld and Voigt (2003), the appointment procedure of judges plays a very important role in making JI. They argue that the most independent procedure is appointment

by professionals (other judges or jurists). The least independent method is appointment by one powerful politician. In a study of the Asian Development Bank (ADB) regarding JI in 2003, the ADB remarks that countries with career judiciaries specifically, with the selection, appointment, and promotion of judges from within a judicial career system or civil service tend to promote the institutional independence of courts (p. 15). They have also found that most countries in South and Southeast Asia employ some form of career judiciary or mixed career and non-career mechanisms for judicial selection and appointment. However, in Cambodia, Lao PDR, and Viet Nam, the executive, legislature and political parties determine the selection, appointment, and promotion of judges. In these countries, the legal training, standards, and qualifications of judges tend to be lower than in countries with career judicial systems.

In Vietnam, with the judicial reform, the judiciary is also increasingly more independent of the executive in terms of appointment procedure. Before the reform, the system of appointing judges and lay assessors contributed to executive control over the judiciary. Based on the recommendations of a selection committee, the State President directly appoints the judges at all court levels. The recent judicial reform transfers the administration of the local courts from the Ministry of Justice to the Supreme Court. The Supreme Court therefore has a higher degree of influence on appointment of judges at all court levels. This is an initial step towards the enhancement of judicial autonomy. The table below shows how the reform provided for in the 1992 Constitution (revised in 2001) and Law on Organization of People's Court (LOPC) in 1993 and 2002 change the procedure of judges' appointment.

Table 6.1: Judicial reform concerning judges appointment procedures

Before 2002	Since 2002
<p>Chief Justice of the SPC to be appointed, removed, dismissed by the National Assembly on the advice of the President (Constitution 1992, Art. 103; LOPC 1993 Art. 38).</p>	<p>Chief Justice of the SPC to be elected, removed, dismissed by the National Assembly on the advice of the President (Constitution 1992 revised in 2001 Art.103; LOPC 2002, Art. 40).</p>
<p>President, on the advice of relevant especially constituted Judicial Selection Committee, appoint, remove or dismiss all other judges (LOPC 1993 Art. 38)</p>	<p>Judicial Selection Committee coordinates with the SPC Chief Justice recommend to the President to appoint, remove or dismiss SPC judges [Constitution 1992 revised in 2001, Art. 103; OJPA Art. 26]</p>
	<p>SPC Chief Justice acting on the advice of the relevant especially constituted Judicial Selection Committee to appoint, remove or dismiss provincial and district judges (LOPC 2002 Art. 25; OJPA 2002 Art. 27)</p>
	<p>SPC Chief Justice to appoint, remove or dismiss chief justices and deputy-chief justices of provinces and districts after receiving agreement from the Standing Committee of the relevant Local People’s Council (LOPC 2002, Arts. 25 and 40)</p>

According to the 1992 Constitution, the President presents a nomination (from among National Assembly members) for a position of the Chief justice of the Supreme People's Court to the NAV for approval. Then judges of the Supreme People’s Court are appointed by the President from among a list originally prepared by the Chief Justice of Supreme Court and the especially constituted Judicial Selection Committee which consists of representations from the Ministry of Home Affairs, the Viet Nam Central Father Front, and the Viet Nam Lawyers Association. Twice a year, the Chief Justice presents his reports on judicial tasks recently carried out by the judiciary before the National Assembly, and answers questions

raised by the NAV members concerning general judicial matters or particular cases. The Chief justices of local courts do the same before the local People's Councils.

According to Article 37 of the LOPC 2002, the criteria of judicial candidates include: (i) to be a holder of Vietnamese citizenship; (ii) to be loyal to the Fatherland and the Constitution; (iii) to have good qualifications and ethics, integrity and faithfulness, a strong sense of protection of the socialist rule of law; (iv) to have a Bachelor of Law degree and Certificate of Training in Professional Adjudication, and practical experience in accordance with provisions of laws and capacity to perform judicial works; and (v) to have good health so that the candidate can accomplish assigned tasks. Judges at the local level (province and district people's courts) are appointed by the Chief Justice of the Supreme Court from a list prepared by a Chief justice of the Court of the Province and the local judicial selection committee, headed by the Chairman or Vice Chairman of the Provincial People's Council with the participation of the Chief justice of the Provincial Court and representatives from a local Lawyers Association and Father Front at the provincial level.

Although the current appointment procedure is aimed at ensuring independence of judiciary from the executive, it may vest a great deal of control in the chief justice and judicial commission, which in turn may constrain the independence of individual judges. According to Luu Tien Dung (2003), with the current appointment procedure, the role of the Chief justice is very considerable. The nomination system thus depends on the will of court's leadership and possibly on personal relationships between judges, clerks and their leaders. It is also possible that Chief justices and higher court judges may abuse their power to influence the outcome of individual cases tried in lower courts. Furthermore, some international observers (e.g. ADB project 2003, Huifeldt 2002) suggest that the short terms of appointment for judges and lay assessors and the strong representation of provincial officials on their judicial selection commission frequently made judges and lay assessors subject to political pressures.

Unfavourable Judicial tenure

The tenure of judges and mechanisms of removal are important for securing judicial independence. There will be the most JI if judges are assured of life-time tenure. The independence of judges will be less if their term is renewable due to judge's incentive to please those who can reappoint them (Feld and Voigt 2003). In Vietnam, the term of judges at all levels, including Deputy Chief justices and Judges of the Supreme People's Court, and Chief justices, Deputy Chief justices and judges of the local courts, is five years and can be

renewable. The tenure of the Chief Justice of the Supreme People's Court depends on the term of the National Assembly (The 1992 Constitution, Article 128). In my judgment, the judicial tenure of 5 years is too short for assuring JI. The possible consequence is that instead of making impartial judgment according to the laws, judges will try to maintain good relations with local bodies so as to be reappointed.

As stipulated in the current laws of Vietnam (Article 29 and 30 of OJPA 2002), judges can be removed in several ways as follows:

- (i) Judges will be automatically released from duty when they retire
- (ii) Judges can be released from duty because of the reasons of health, family situation or other reasons which cause judges not to fulfil their duties.
- (iii) Judges can be dismissed if they have wrongful acts violating the laws or moral virtue.

In my judgment, the regulation that “judges can be removed due to other reasons which cause judges not to fulfil their duties” can be seen as a “hidden sanction” which threatens JI. In addition, as indicated by Luu Tien Dung (2003), there are three shortcomings of OJPA 2002 that influence negatively JI. First, the grounds for dismissal seem vague to some extent, for example, how is “a wrongful act” defined? Second, there is no provision allowing a removed judge to appeal. And third, there is no transparent procedure to determine justifications for removal within the judiciary before the matter is sent to a disciplinary committee for decision (p. 36).

Inadequate Judge's remuneration

In order to have impartial and independent judgments, judge's remuneration must be adequate and competitive. If salaries are not adequate in comparison with other jobs, there will be a problem with the quality of the judges because no well-skilled person wants to be a judge. As a result, the status of courts and judges is low or diminished and lacking in prestige. In turn, the rule of law is not held in high public regard. In Vietnam, although judges enjoy higher salaries than other public servants, this does not mean that judges are adequately paid. In fact, judges are still underpaid. The judicial salaries range from US\$40 per month for a district judge to US\$100 per month for a judges at Supreme Court (Luu Tien Dung 2003). The ADB report on JI (2003) also shows that in some countries, like those in Cambodia, Lao PDR, and

Viet Nam, remuneration is so low that judges often work second jobs in order to support their families. Lower court judges' salaries in most of the countries participating in this study fail to meet the minimally respectable standard of living.

Before 2002, the judicial budget at central and local levels in Vietnam was a part of the administrative budget proposed by government at the respective levels. Therefore, all benefits for judges, ranging from salary to the houses/apartments were subsidized by the executive. This leads to less JI because if members of one of the other government branches enjoy discretion in determining the judges' salaries, this raises incentives to take the preferences of these members explicitly into account. In 2002, the government transferred administrative authority over local courts including budget issues from the Ministry of Justice to the Supreme People's Court, in an effort to increase judicial independence. The SPC, however, should also cooperate with local people's councils for the management of local people's courts (LOPC 2002, Article 17)

Lack of Constitutional review

As mentioned in the previous chapter, there is no constitutional court and constitutional review mechanism in Vietnam. The Supreme Peoples' court is not granted the powers to interpret the constitution. The 1992 constitution gives the Standing Committee of the National Assembly the mandate to interpret constitution and laws. Therefore, what the court can do is to "apply the laws without interpretation of how the law should be understood" (Luu Tien Dung 2003, p.31). More importantly, the legislation made by the NAV cannot be nullified if they are not in accordance with the constitution.

In recent years, the leaders of Vietnam have been particularly interested in establishing a constitutional review mechanism. The judicial reform strategy 2006 – 2020 mentions the possibility of establishing a constitutional court in Vietnam. However, as pointed out by Mr. Tran Duc Luong, the state president of Vietnam, the strategy is long-term (during 15 years), thus does not clearly define the competence of constitutional court. The establishment of a constitutional court needs to be considered carefully so as being compatible with the reality of the future of Vietnam⁴⁸.

To summarize, it is evident that by carrying out judicial reform in recent years, the degree of de jure JI in Vietnam has been improved considerably, for example: (i) the principle of JI is

⁴⁸ See more detail in Labour newspapers, HoChiMinh Legal newspapers, 20th Oct. 2004.

guaranteed in the constitution and the laws, (ii) the executive branch has less control over the judicial system, and (iii) the Supreme People's Court has greater autonomy over appointment and dismissal of judges and people's assessors. However, through analysing various aspects of de jure JI, it is obvious that the domestic delegation of powers to independent courts in Vietnam is still inadequate. For example, some de jure JI indicators such as the indicators regarding judge's remuneration and constitutional review show that de jure JI in Vietnam is rather low.

III.2. De-facto JI in Vietnam

In many countries, although the principle of JI is guaranteed by the constitution, it has also long been understood that unwritten practices and understanding may undermine explicit constitutional provisions regarding the rule of law and the operation of courts (ADB 2003, p. 13). Therefore, the actual political life and government practices diverge from the explicit constitutional provisions for judicial independence. This statement also seems to hold true in the case of Vietnam. In this section, by analysing some criminal and administrative cases that were tried as well as interviews in newspapers, I illustrate that the de facto JI in Vietnam is very limited.

The Nam Cam case and the concept of "Judgment preparation"

Judgment preparation refers to a special procedure for solving criminal cases in Vietnam. In some complicated important criminal cases, an inter-agency commission, normally consisting of representatives of People's court, People's procuracy, police organ and the party body at the same level, will be established to give a guideline or supervise the trial. Although "judgment preparation" is not the procedure provided for by the Constitution or the laws, it is carried out frequently in Vietnam. According to Mr. Truong Vinh Trong, Vice President of the Steering Committee of Judicial Reform, "Judgment preparation" is necessary to some important criminal cases which have great impacts on social and political life of the country. Mr. Trong also emphasizes that when making judgments, judges are still independent⁴⁹. Similarly, Ms. Dong Thi Anh, Chief justice of Hochiminh City People's Court, argues that the purpose of "judgment preparation" is to reach a consensus in assessing evidences, but judges can independently issue a verdict according to the law.

⁴⁹ Cited in HoChiMinh legal newspaper, March 2002

However, Mr. Ha Xuan Tri, a former Director of Hai Duong Police, states, “you are not only responsible before the law, but also accountable to superior officials and party organs. If you do not follow their guidelines, you will be dismissed”. Furthermore, as remarked by Ngo Huy Cuong, the guidelines reached on the consensus among three bodies: Police, People’s Procuracy and People’s Court, where independence is required, will influence decisions of judges. Thus he concluded “This makes judges difficult to try objectively.”⁵⁰

The establishment of a committee for adjudication of the Nam Cam case in Ho Chi Minh City is the best example of “judgment preparation”. As mentioned in Box 6.1, this is the biggest criminal trial in Vietnam currently against the mafia’s activities. The outcome of the trial thus has had a great impact on society. In addition, the trial was politically sensitive due to the involvement of some highest ranking officials of the Communist Party. Therefore, the CPV organs in Ho Chi Minh City realized that it is necessary to establish an inter - agency committee for “judgment preparation”. This committee was headed by a vice-secretary of a local party organization, and consists of representatives of several departments and the Chief justice of Ho Chi Minh City Court. The aim of the committee is to “guide the trial of the Nam Cam case”⁵¹.

Box 6.1: The Nam Cam case

On 25th February, 2003, The People’s court of Ho Chi Minh city opened a criminal trial against Vietnam's most notorious mafia boss, known as Nam Cam, who has been in charge of a criminal empire whose influence extended into the highest ranks of the ruling Communist Party. Nam Cam was described by the court as a dangerous element to society who had bribed state officials to protect a network based on gambling, prostitution, drugs and protection.

On 5th May 2003, the trial committee consisting of 2 judges and 3 people assessors of Ho Chi Minh city court passed their judgment. The verdict found him guilty of murder, bribery and Nam Cam was sentenced to death. Another 154 people were on trial alongside Nam Cam, including several senior party officials, three of whom were given jail sentences including: (1) the former Deputy Police Minister Bui Quoc Huy – a member of the powerful Central Committee of the CPV, the highest-ranking government defendant - was given a four-year jail term for dereliction of duty. (2) The former head of state radio, Tran Mai Hanh who was also

⁵⁰ All these interviews were made by reporters of Vnexpress on 17th December 2001. Available at <http://www.vnexpress.net/Vietnam/Phap-luat/2001/12/3B9B7768/>

⁵¹ Cited in vnexpress, available at <http://vnexpress.net/Vietnam/Phap%2Dluat/2002/09/3B9C0212/>

a member of the powerful Central committee of the CPV, was sentenced to 10 years in jail, and fined more than \$8,000, after being convicted of receiving bribes, and (3) the former Deputy State Prosecutor Pham Sy Chien, who was convicted on the same charge, received six years in jail and was fined \$27,000.

The case is politically sensitive as it is being seen as a test of how serious the Communist leadership is taking its promise to eliminate the high levels of corruption which plague Vietnam currently.

Source: Vnexpress.net, BBCnews.com

Although there is no clear evidence showing that the activities of this committee interfered in the court affairs, but one may have doubts about the independence of judges as well as the autonomy of the court system in this specific case (Luu Tien Dung, 2003). The ADB report on JI also expresses the anxiety of the threat of being politically influenced in corruption trials. The authors of the ADB report frankly point out that:

“in Indonesia and Viet Nam, high-profile corruption trials of both government and private sector figures have been the flagships of government anti-corruption campaigns. While these exercises are intended to persuade the public that even the most powerful are not above the law, they run the risk of becoming politicized or being perceived of as politically influenced” (ADB, 2003, p. 9)

In a similar line, Hualing Fu (2003), a Chinese legal scholar, claims that the independence, fairness, and competence of the courts in China varies by type of case. Judicial independence may be limited in criminal cases with serious political overtones; in economic cases that affect powerful local enterprises; and in administrative cases in which a state organ is the defendant. Yet he also found that in ordinary cases as those in civil court, judicial independence is not impeded.

In the Nam Cam trial, the Chief justice of the Ho Chi Minh City court who was a member of the committee did have great influence on the outcome of this case because he could deliberately assign the case to certain judges in his court. Additionally, as mentioned in the previous section, the judges' term makes their decisions sensitive to both external and internal pressures. The de facto tenure of judges depends on how well they perform their duties according to their leaders' instructions. In other words, how long judges were kept in office and whether their term is extended thus much more depends on the satisfaction of the court

leaders. During a trial, judges as well as other related officials such as prosecutors are not only under the internal pressures of their leaders, but also under the external pressure of the CPV or other state organs. This will be seen in the next case.

Interference of the CPV's organs in the Tran Tuyet Dung trial

In my discussion about the transition process to the rule of law in Vietnam, I pointed out that the legacy of socialist law, namely the interference of the CPV in state affairs, still has great impacts on the transition currently (see details in chapter 3). For example, local party organs may influence the outcome of a trial and may discipline judges as well as prosecutors if their decisions do not conform to the party's guidelines. This is due to the fact that judges and prosecutors as well as other governmental officials, who commonly are party members cannot ignore the instructions of the party organs. Moreover, there was a bad practice normally accepted in the formal socialist legal system called "telephone law". This practice was a part of the legal framework of these countries, whereby the party and government leaders would habitually contact the judges to direct the results of a case (Luu Tien Dung, 2003, p. 8).

The Tran Tuyet Dung case, as mentioned in box 6.2, illustrates how the party organs can have influence on the works of the Procurary in Vietnam and therefore the outcome of a trial. In this case, Mr. Huynh Hoang Son and Mr. Tran Tuan Kiet – two prosecutors who did not accept to handle the Tran Tuyet Dung case according to the guidance of the CPV's Inspection Committee in Bac Lieu province of Vietnam – are disciplined by and expelled from the Party.

Box 6.2: The Tran Tuyet Dung case

In April 1999, the Central Inspection Committee of CPV of Bac Lieu province inspected the budget of Bac Lieu during the time that Mrs. Tran Tuyet Dung was the chief of the Financial Department. In October 1999, the committee provided a report accusing Mrs. Dung for many criminal offences.

In July 2000, the local police began their criminal investigation regarding this case. After many prolongations of investigation, the police provided the results and conclusions of inspection, but the reasons that they gave were still insufficient for indictment.

In June 2002, the Central Inspection Committee of the CPV in Bac Lieu disciplined two prosecutors who directly handled this case and who were also party members. In September 2002, the committee issued a report accusing these prosecutors of "irresponsibility, reporting

the case unrighteously” because their views are dissimilar to those of the committee.

On 26th July, 2002, while examining the case, the President of Provincial People’s Procuracy issued a letter “asking guidance” of the Central Inspection Committee. On 30th December 2002, Bac Lieu People’s Procuracy brought in an indictment that is nearly similar to the guidances of the Central Inspection Committee of the CPV.

Bac Lieu People’s Court planned to try this case on 25th December 2002, and thus on 11th December 2002, two prosecutors – Mr. Huynh Hoang Son and Mr. Tran Tuan Kiet – were expelled from the Party.

On 26th December 2002, after two days of the trial, the Court still declared that evidence was insufficient to accuse defendants and returned the file of this case to the People’s Procuracy.

Source: The Pionernews, cited in VnExpress, dated on 27th January 2003

It is worthy to note that the reasons for punishment are vague and not explicitly provided for by the laws. In the disciplinary decision of the CPV dated 11th December 2002, the Committee states that Mr. Huynh Hoang Son has faults of: “irresponsibility in managing, inspecting the file, ignoring many important evidences which are shown in the report of the Central Inspection Committee of the CPV, reporting the case untruthfully...” For Mr. Tran Tuan Kiet, the decision accuses him of “providing subjective assessments, reporting documents relating to the case untruthfully and inaccurately, ignoring many evidences and proposing false solutions (not according to the guidances of the Central Inspection Committee of the CPV)”. Due to the vague provisions on disciplining officials, de-facto JI is limited.

Obviously, by putting pressure on their members who work at courts or the procuracy, the CPV organs at the local level can influence the outcome of the trial. Therefore, as pointed out by the lawyers who defended inditees in the Tran Tuyet Dung case, two prosecutors cannot be totally unprejudiced because of the pressure of Party’s discipline. In addition, these lawyers also strongly opposed what the President of the Provincial People’s Procuracy did during examining the case, namely asking the Inspection Committee of the CPV for guidance⁵². Notably, this procedure is not stipulated in the Code of Criminal Procedure.

Intervention of the CPV and government organs in implementing court decisions

⁵² See the trial report, cited in VnExpress dated on 26th December 2002.

In the Tran Tuyet Dung case, the judges and people's assessors of Bac Lieu court did not make a decision according to the guidelines of the CPV's inspection committee although they were under pressures from the party organs, for example the pressure of being expelled from the CPV. The CPV organs and other state organs not only pressurize the courts at the trials, but also intervene in enforcement of the courts' verdicts or decisions.

Mr. Nguyen Hoang Huy, former Director of the Verdict Executive Department of Hochiminh city said that: "Although many cases were tried by the Supreme Court, the verdicts can not be implemented just because of a hesitance or a complaint of a member of the CPV organs or even of a representative of the Parliament"⁵³. The following case can be seen as the best illustration of this situation. Mr Tri, President of a Provincial People's Procuracy, told reporters of Vnexpress a true story happened in his province. A woman stole vegetables, and a militiaman beat her to death. Then, the local court sentenced this militiaman to four years in jail. However, the verdict could not be implemented because the leader of the party committee did not agree to it. The reason that the leader of the party committee gave is that: "the militiaman is very active in preventing wrongdoings. If he is sentenced, who will seize wrong-doers?"⁵⁴

As argued by Feld and Voigt (2003), if the process of verdict implementation depends on some action of the other branches of government and this cooperation is not granted then the more frequently this has been the cases, the lower the degree of factual JI. In Vietnam, the process of verdict enforcement entirely depends upon the Verdict Executive Department which belongs to local administrative bodies. Many court's verdicts were not implemented because interventions of local governments or higher-level officials through directives or "unofficial letters". The lack of transparent proceedings for verdict enforcement and the red tape also result in the situation that many verdicts have not yet been executed. By the end of 2002, as observed by Mrs. Le Thi Thu Ba, vice-minister of Justice, 38.7% verdicts of civil cases have not been implemented⁵⁵. More seriously, the corruption of officials who are responsible for enforcing verdicts is rather widespread. It is reported that an official asked the plaintiff in a civil lawsuit to give him 100 million VND (about 6000 Euro) in order to enforce the verdict⁵⁶.

⁵³ Cited in VnExpress dated on 17th December 2001.

⁵⁴ Cited in VnExpress dated on 17th December 2001.

⁵⁵ Cited in VnExpress dated on 01st April 2003.

⁵⁶ Cited in Vnexpress dated on 4th July 2003.

Moreover, as remarked by Mr. Tri, the court system that was organized principally at the local level also makes JI fragile. Although the judicial bodies such as the courts or the procuracy are regarded as independent organs, they still have to maintain “good relations” with administrative bodies because their wages, rewards, houses, grants, etc. depend on administrative bodies. Additionally, as mentioned earlier, because the term of appointment is short and there is the participation of provincial officials in the committee of nominating judges and people’s assessors, the nominees often try to maintain good relations with local administrative bodies.

Administrative court is not really independent and effective

As motioned above, given the establishment of administrative courts, citizen can sue state bodies. Pham Duy Nghia (2002) remarks that the introduction of administrative courts is in retrospect a revolutionary idea in a traditional Confucian country in which the subject is to abide the king and its mandarins (p. 66). However, it seems to be difficult to build an effective and independent administrative court in reality. There are many obstacles undermining the expectation of a self confident and independent administrative court.

First, in principle, when an administrative body issues an illegal administrative decision which influences the benefit of individuals, they are entitled to sue that state body. However, in fact, it is very difficult to pursue an administrative lawsuit. Even it can be said that citizen’s suing against officials is similar to “egg’s fight against stone”. The following cases show what difficulties victims of arbitrary authorities might face.

Box 6.3: Enterprise suffers losses, but cannot sue authority

In 1999, the Customs of Hai Phong city seized the batch of imported paper worth US\$ 65.000 of Duc Tien Company (in Hanoi) whose manager is Mr. Tran Van Tien. Although Hai Phong Customs did not affirm that the import of Duc Tien Company was illegal, this body prosecuted Duc Tien Company to Hai Phong Police for smuggling. After half a year of investigation, due to lack of evidences the Police had to suspend the lawsuit. Mr. Tien received his goods, but he lost VND 800 millions. So far Mr. Tien has not yet received any compensation or apology from the state bodies that issued wrong decisions. He sued Hai Phong Customs for compensation to the administrative court, but the court refused to handle this case because it does not fall within the competence of the administrative court.

A similar example is the case of the owners of three enterprises Thai Hoa, Kim Diep and Nam Nho in Rach Gia town of Kien Giang province. They were prosecuted and imprisoned as Rach Gia Police suspected them of tax evasion. Eventually Rach Gia Police did not demonstrate evidence to accuse them, thus this state body has suspended the investigation. However, because the three owners were accused of criminal offences and imprisoned, their enterprises went bankrupt and they lost about VND 700 millions. They claimed Rach Gia Police to Kien Giang Police for damages caused by unjust accusation and imprisonment. They could not prosecute Rach Gia Police at the administrative court because this court has no competence to deal with their cases. After 17 days, Deputy Chief of Kien Giang Police issued an official document affirming that those accusation and detention were accordant with the laws, thus Rach Gia Policy had not to compensate the three enterprises.

Source: VnExpress, dated 17th May 2001

In the cases mentioned in Box 6.3, citizens want to claim compensation at administrative courts because their business was discontinued or went bankrupt due to the administrative decisions. However, their cases are not explicitly provided for in the Ordinance on the procedures for settlement of administrative cases 1996 (revised in 1999). Pursuant to Article 11 of this Ordinance, the administrative court has competence to handle the following administrative cases:

1. Petitions against decisions to penalize administrative violations;
2. Petitions against administrative decisions or administrative actions in the application of measures for compulsory dismantlement of dwelling houses, constructions or other firmly-structured objects;
3. Petitions against administrative decisions or administrative actions in applying or taking administrative measures under such forms as re-education in communes, wards or townships; putting into re-education schools, reformatory establishments or medical establishments; and administrative probation;
4. Petitions against disciplinary decisions on the dismissal of officials or public employees who hold the post of department heads and equivalent or lower-level posts;
5. Petitions against administrative decisions or administrative actions concerning land management;

6. Petitions against administrative decisions or administrative actions concerning the granting and withdrawal of permits and licenses in the fields of capital construction, production and business;
7. Petitions against administrative decisions or administrative actions concerning the forcible requisition, purchase or confiscation of properties;
8. Petitions against administrative decisions or administrative actions concerning the collection of taxes and tax arrears;
9. Petitions against administrative decisions or administrative actions concerning the collection of charges and fees;
10. Other petitions as prescribed by law.

Accordingly, it seems to be that those petitions in box 3 cannot be brought to administrative courts because: (i) a petition for compensation is not explicitly stipulated by the law and (ii) a wrong accusation does not come within the jurisdiction of the administrative court. Therefore, enterprises only can lodge complaints against those administrative bodies that issued wrong decisions to chief officer or superior officer of those bodies. For such a kind of administrative dispute settlement, complaints of citizen often are rejected or never settled because the chief officer or superior officer tends to protect their staff as well as the reputation of the administrative body. The case of three enterprises Thai Hoa, Kim Diep and Nam Nho in Rach Gia town of Kien Giang province is a good illustration for this situation.

Second, even when citizens can bring a suit against an administrative body, there is nothing to ensure that citizen will receive a fair judgment. Under either internal or external pressures, notably from the directives of court's president, local CPV organs, or "unofficial letters" of the leaders of state organs, the administrative judges are likely to issue decisions in favour of administrative organs. As observed by the Chief justice of the Administrative Court belonging to the Supreme People's Court - Mr. Vu Khac Xuong, judges of administrative courts often solve the cases that the defendants are superior officials. Consequently, they will reject complaints of individuals. In the view of Mr. Xuong, this is because the term of judge is five years, thus when considering reappointment, "their working attitude" will be examined first. It is obvious that the influence of local administrative bodies on judges in Vietnam is great. As Mr. Nguyen Van Thuan, vice president of the Legal Committee of the NAV complained:

“Even Chief Justices of local courts fear to work with presidents of People’s Committees, thus judges can not reject decisions of local governments?”⁵⁷

Third, it costs citizens a lot of time to pursue an administrative lawsuit as administrative trials are frequently suspended. There are two reasons for this fact. First, as explained by Mrs. Luu Thi Hoa - the Chief justice of the administrative court belonging to Hochiminh Provincial People’s Court - some local administrative bodies have not provided administrative courts with their documents and decisions, thus the court has to delay trials. In this aspect, administrative cases differ from civil cases in which parties are very active in providing evidences to the court. This is rather widespread in administrative cases at district level. The other reason may be simply due to the absence of representatives of administrative bodies - the defendants in the trial. The following case is a good example for this fact.

Box 6.4: The administrative trial was suspended due to the defendant’s absence.

Mr. Hoang Anh Tuan – one of 20 persons whose shops in Hochiminh city were compulsorily dismantled according to an administrative decision issued by the District People’s Committee – said: “My shop was dismantled, and I have made claims to many state bodies, even to the administrative court since, but my claims have not been solved”. The administrative trial was suspended three times. Once it was announced that one member of the board of judges was unintentionally busy. The next two times, the trial was suspended because of the absence of representatives of the District People’s Committee.

Source: Youth newspaper online, dated on 6th September 2004

It is worthy to note that the plaintiffs of administrative cases seem to be familiar with suspensions of judgment. A petitioner in an administrative case said that she had come to the court about ten times, but the court always announced that representatives of the People’s Committee were absent, thus the trial had to be suspended⁵⁸. She adds that the reasons for absence of representatives of local People’s Committee are not astonishing because the administrative bodies want to avoid decisions that are unfavorable to them. Consequently, since the pursuit of lawsuit costs people a lot of time and effort, many of them are discouraged and withdraw their complaints.

⁵⁷ Cited in Vnexpress, dated on 21st July 2003

⁵⁸ Cited in VnExpress, dated on 8th September 2004.

Fourth and finally, the mechanism for enforcement of administrative courts' verdicts and decisions is relatively unclear. In civil cases, if a defendant fails in a suit, but does not execute the verdict voluntarily, the plaintiff is entitled to require the defendant to enforce the verdict, even the plaintiff can use coercive methods. By contrast, in administrative cases, the execution of a verdict depends wholly on "self-consciousness" of administrative bodies. There is no authority having competence to force administrative bodies to execute verdicts. Therefore, if a defendant of an administrative case, for example the People's Committee, does not execute the verdict (i.e., does not issue new administrative decision replacing the wrong one) this committee will not bear any sanctions. Consequently, in many cases, although citizens spent a lot of time and effort for pursuing administrative lawsuits, and even if they win, they have to await a new decision of People's Committee for very long. And if the new administrative decision is still wrong, they will again have to pursue a new administrative lawsuit.

Despite the inefficiency of administrative courts in reality, their establishment and operation contribute greatly to the process of "building up the rule of law" in Vietnam. At least it has brought a chance for individuals to protect their rights and interests from the infringement of the government. The State President of Vietnam, Mr. Tran Duc Luong, recently asks for the expansion of the jurisdiction of the administrative courts in order to make sure that "all people realize that their peaceful lives, their fates and properties, moral and human dignity and values are put under the credible security of the law"⁵⁹. Establishing the judicial reviews on administrative actions outside the administrative system, the leaders and policy makers have tried to apply the idea of governing by law in Vietnam.

The problem of low wage

According to Feld and Voigt (2003), the factual incomes of judges also contribute to the degree of de-facto JI. However, the Asian development bank observes that the factual judicial remuneration in some Southeast Asian countries, especially in Lao PDR, Cambodia, and Viet Nam, is the lowest in the region and barely at or below basic subsistence levels (ADB 2003, p. 19). Moreover, in most of those countries, the problems resulting from low and inadequate

⁵⁹ See more detail in the article: Judicial Reforms for the Rule of Law, Nhan dan Newspaper, available at <http://nhandan.org.vn/vietnamese/>

judicial salaries are compounded by discrepancies in the salaries and benefits provided to higher and lower court judges. In Vietnam, there are nine salary scales for judges. The salary of a novice judge (the first salary scale) is VND 626.400 (about USD 45) per month. A judge of the ninth salary scale will receive VND 1.162.900 (about USD 100) per month. However, it is difficult to get the ninth salary scale because salary grade depends on length of service. Most judges are retired without having reached the ninth salary scale.

Judges need subsistence wages simply to live. However, the salary grade in Vietnam is not enough for judges to subsist. For example, given the factual miserable living condition of his staff, the Chief justice of Ho Chi Minh People's Court explains why his staff may have "negative behaviours" such as bribery. He shows that a court's secretary, who had to study law for five years, receives only VND 400.000 - 500.000 per month. She/he cannot manage to subsist on such a wage. More exactly, this amount is only enough for her/him to subsist seven days. She/he will only spend seven days to work at the court. For the rest of month, she/he has to do other works to sustain their life. But not all staff can get secondary works, the question is how they can live on such a starvation wage⁶⁰.

Briefly, in this section, I have tried to identify the gap between the de jure delegation of powers to independent courts which has been introduced in the current judicial reform and the factual level of JI in Vietnam. It is obvious that while the leaders of Vietnam seem to make efforts to increase JI through judicial reform, there is a little evidence that this reform has been effectively implemented in reality. Although the reform increased independence of the court system from local governments, there is no evidence that the court system and its judges will become independent of the influence of the local bodies and the party organizations over the activities of the courts and judicial officers.

IV. Conclusion

The aim of this chapter is to examine how some of the recent reforms in the Vietnamese court system take shape. First, applying the constitutional economics approach to constitutional change advanced by Voigt (1999b), this chapter explained the motivation of political and constitutional reform in Vietnam currently. I argued that the motivation of political and constitutional reform in Vietnam is quite different from that in the West. Such a reform is a

⁶⁰ Cited in Youth Newspaper, dated on 23rd June 2004.

result of an internal bargaining process among the leaders of the CPV and the government, namely between the reform group and the conservative group. Notably, due to the resistance of the conservative group, many political and institutional reforms which are concretised in the constitution and laws have not been implemented seriously in reality.

Second, I scrutinized the recent judicial reform which can be seen as a typical example for the political and constitutional reform in Vietnam. There is little doubt about many policies outlined in the reform that the courts are intended to be an active, independent player in the transition to the rule of law in Vietnam. The contemporary legal system provides for considerably improved *de jure* JI in Vietnam, for example, the constitutional guarantee of judicial independence or the less control of the government at both central and local level on judicial system. In particular, thanks to the reform, the court system in Vietnam is more self-managed than their predecessors. They are established so that the Ministry of Justice and other state organs have less affect on their work. This has been demonstrated by the Supreme People's Court's greater control over appointment and dismissal of judges.

However, the distinction between *de jure* and *de facto* JI indicates that it does not suffice to write JI in legal documents. Feld and Voigt (2003) show that issues like the average term length of judges, its deviation from the term lengths to be expected based on legal documents, effective removals of judges before the end of their terms as well as a secure income for judges appear to be more important for economic growth than *de jure* independence. Analysing those *de facto* JI indicators in Vietnam, this chapter shows that the promise of delegating more powers to domestic independent courts in Vietnam does not seem to be a credible commitment. In answering questions before the National Assembly, the former Chief Judge of the Supreme People's court of Vietnam, Trinh Hong Duong (cited in Khanh Linh 2002, p. 8), complained that there were not sufficient guarantees in the current legal reform to ensure that judges and assessors might carry out trials independently and in accordance with the law. Especially, much evidence presented in this chapter shows that although the leaders of Vietnam have tried to promote JI, the role of the CPV in the operation and organization of the court system remains firmly intact. Indeed, it seems to be well understood that the courts would not be independent from political control, but rather would serve political needs. Judicial independence in that view is important in the transition to the rule of law, but is limited by the needs and interests of government and the Party.

Chapter 7

Conclusion: Main Findings and Lessons for the Rule of Law Reform in Vietnam

Since the rule of law is regarded as a fundamental factor contributing to economic performance and the increase of prosperity, millions of dollars have been spent to promote the rule of law in many transition countries, yet the results have been limited. Given this, many efforts have been made in order to find out the reasons for the failure of the rule of law. The frequent explanations would point to the insufficient efforts of policy makers to do the reform or to the resistance of some interest groups who benefit from the absence of the rule of law. However, these explanations seem to be too simple and not satisfying. From my point of view, in order to understand why the rule of law reform has failed to reach its expectations in transition countries, two issues should be made clear. First, it is not sufficient to focus exclusively on the formal contents of those reforms provided for in many new constitutions or laws. Rather, it is necessary to analyse and understand the nature of an institutional framework, including both formal and informal institutions existing in a given society. Second, there is a “gap” between the institutional and constitutional reforms toward the rule of law and the factual implementation of these reforms. It is evident that, if the rule of law reforms in many transition countries are poorly implemented or not implemented at all, these reforms are not conducive to economic development.

This research is based on the approaches of Law and Economics and the NIE concerning a great deal of topics such as institutional change and constitutional change, the transition to market economy and the rule of law, the role of informal institutions and judicial independence in transition, etc. In my thesis, I have presented tools of analysis for understanding how informal institutions are relevant for the process of institutional change generally and the reform toward the rule of law in Vietnam particularly. I have argued that in order to understand why and how institutions change and how this change can promote economic development, especially in transition economies, it is necessary to scrutinize informal institutions rooted in these economies and their interaction with new formal institutions and policies. Due to influences of informal institutions, the transition process to the rule of law in different countries is likely to be different. The analysis in my thesis also

shows that the gap between the promise of making judicial independence, which is regarded as a significant step in the rule of law reform of Vietnam, and the factual JI is very great. It is worthy to note that de facto JI, but not de jure JI has impacted significantly on economic growth. The underlying message is the critical importance of focusing on the implementation process of the constitutional and judicial reform in Vietnam.

I. Main findings

Chapter 1 of my thesis introduced briefly the renovation process known as “Doimoi” (the transformation from centrally-planned economy to a market economy) in Vietnam. Since its inception, the Vietnamese economy has gained many achievements. Strikingly, the economic performance of Vietnam is even better than many other transition countries. However, the reform both in economic and political fields always faces various challenges. I suggest that in order to overcome various shortcomings of the reforms and to promote economic development, policy makers in Vietnam need to understand the nature of institutions and how they evolve.

In chapter 1, as a preparation for the study of particular problems in the transition to the rule of law in Vietnam, I surveyed the literature that looks at various aspects of this transition process. From the literature survey, it has been suggested that there are two theoretical gaps. First, very little attention has been paid in the existing literature regarding the question of how to advance the rule of law in a transition society where informal institutions play a dominant role. Second, it is still not clear in the literature whether policy makers in transition countries where pluralist democracy is not accepted (e.g. Vietnam or China) have incentives in the rule of law reform such as improving JI. My study has tried to solve these gaps.

In chapter 2, I examined the rule of law as a set of formal institutions originated in the West. Two important theoretical insights have emerged from that. First, a political system based on the rule of law embodies some components namely: (i) an equal treatment to all people before the law, (ii) constitutional and factual guarantees of basic human rights and property rights, (iii) a legal system that is fair, transparent, certain and general, and (iv) an effective mechanism constraining government discretion. These components are essential for the protection of citizens against the arbitrary state authority and lawless acts of both

organizations and individuals. They are formal institutional arrangements as they are stipulated in the constitution and the laws and rely on government enforcement mechanisms.

Second, the failure of the rule of law occurs when the institutional arrangements which are necessary to the rule of law are often corrupt, ineffective, unavailable, or do not correspond to the social reality and/or contemporary needs. Consequently, constitutionally established rights are not implemented in reality, inequitable treatment before the laws is normal, and actions and decisions of government are not based on general rules, but on arbitrary discretion. In such a situation, instead of believing in the formal legal system that is based on the rule of law, people tend to rely on social norms and informal practice to secure their rights.

In chapter 3, I selected Vietnam as a case study for the failure of the transition to the rule of law. Parallel with economic renovation, the leaders of Vietnam gradually endorse the rule of law reform. Vietnam consistently builds a socialism-oriented state governed by the rule of law under the leadership of the Communist Party. As a result, the concept of “socialist rule of law” has been gradually accepted and institutionalized in the legal system of Vietnam. Chapter 3 was aimed at explaining this concept. It is emphasized that the meaning of the “socialist rule of law” is only understood through analyzing the local conditions and circumstances of reform in Vietnam. Accordingly, I supposed that the socialist rule of law being built in Vietnam has the following characteristics: (i) supremacy of the Constitution and the law, (ii) equality of all people before the law, (iii) respect of human rights as well as community values and social order, (iv) democratic centralization of state powers, (v) sole leadership of CPV in the state and society and (vi) assurance of legally private property rights as well as the decisive role of state and collective ownership.

Chapter 3 also analyzes some main dilemmas and obstacles to the rule of law reform in Vietnam. The main argument is that when the formal contents of the rule of law are not compatible with the informal institutions, the transition to the rule of law is likely to fail. The prevalence or dominance of the informal institutions over formal institutions may create obstacles to the rule of law in many transition countries including in Vietnam. Additionally, it is evident that widespread arbitrary discretion of government currently impedes the rule of law reform, infringes individual rights and therefore hinders the transformation to a market economy in Vietnam. Arbitrary discretion of government thus appears to be a crucial obstacle to the rule of law.

Chapter 4 provided an analysis on the relationship between informal institutions and institutional change, which is a main concern of the NIE. Reviewing two recent approaches of the NIE on institutional change, I examined the role of informal institutions for the transition to the rule of law. From chapter 4, I have learnt that it is difficult to bring about institutional change, especially changing informal institutions due to the costs of overcoming inefficient informal institutions to produce efficient institutions, including the cost of collective action, the start-up cost and psychological cost. For such reason, I have looked for explanations for the lack of necessary rule of law reforms in many transition countries. Strikingly, I have been able to identify some reasons why many countries stick to the status quo of no rule of law or implement inefficient reforms. It is supposed that policy makers in many transition countries are facing a dilemma. On the one hand, the development of the market economy requires political reform in which the transition to the rule of law is considered as a pre-condition. On the other hand, the emergence of the rule of law faces the resistance of informal institutions rooted in transition societies. In my viewpoint, the only way for overcoming such a dilemma is to make the rule of law reform compatible with informal institutions of society. Therefore, the transition to the rule of law should be gradually implemented.

My illustrative case has been the impact of Confucian values on the transition to the rule of law in Vietnam. Confucianism was introduced very early and had a long development history in Vietnam. Despite the rise and fall of Confucianism in Vietnam, Confucian values have not disappeared in Vietnam, but have developed into informal institutions. Social order, Confucian ethics and social harmony are three main features of Confucian values significantly influencing political and institutional reforms in Vietnam today. This chapter pulled together a wide variety of sources of data and analyses given in the World Values Survey (1995-98, 2001) and the Global Attitude Project (2003) in order to highlight current Vietnamese attitudes towards Confucian values and the rule of law. From taking such empirical tests, it is obvious that Confucian values do matter in the transition to the rule of law in Vietnam.

In chapter 5, I analyzed how the introduction of market economy changes the incentives of the leaders of Vietnam in endorsing judicial independence. The principal-agent framework provides a starting point to explain the motivation of politicians in creating judicial independence. From the P – A perspective, the theoretical foundations for making JI, namely the separation of powers and the domestic delegation of powers are scrutinized. It has been pointed out that when politicians seek to grant authority to independent courts, the benefits and costs of the delegation of powers should be taken into account. Certainly, applying the P -

A theory to analysis of the cost and benefit of the delegation of powers is useful. With the case of delegation of powers to independent courts in Vietnam, it is rather obvious from the P - A perspective. I have shown some reasons why politicians of Vietnam have the incentives to implement judicial reforms. Three reasons are highlighted in this chapter, namely: (i) to regain their prestige and prevent a future opposition, (ii) to enhance their credibility in order to surmount the dilemma of the strong state and (iii) to assure the effective enforcement of the laws and to constraint the abuse of powers.

In chapter 5, I dealt with the question whether politicians in Vietnam have incentives to make a promise of delegating powers to independent courts, chapter 6 is concerned with the question of whether such a promise can be turned into a credible commitment. It has become clear in this chapter that the incentives of political decision-makers to honor JI are shaped by constitutional and post-constitutional choices. From the constitutional economics perspective, constitutional choice can be done by some form of bargaining between the organized groups who succeed in overcoming the organization dilemma. Particularly, the creation of opposition against current rulers should be regarded as a precondition for constitutional and political reform. With regard to the current constitutional reform in Vietnam, my analysis has shown that things are different. In Vietnam, the CPV plays the sole leading role in society, and pluralist democracy is not accepted. Political and constitutional choice in Vietnam thus results from an internal bargaining process between reform group and conservative group among the party leaders and governmental officials. Furthermore, due to the resistance of the conservative group, many political and institutional reforms which are concretised in the constitution and laws have not been implemented seriously in reality.

These findings are interesting and tend to support my conjecture that while some constitutional and judicial reforms that are aimed at making the judiciary system more independent seem to be radical, their effects are moderated in practice. Analysing the gap between de jure and de facto JI in Vietnam, I have shown that these reforms do not entirely ensure JI in reality. Especially, much evidence presented in this chapter shows that although the leaders of Vietnam have tried to promote JI, the role of the CPV in the operation and organization of the court system remains firmly intact.

II. Lessons

The analysis in my study shows a mixed picture of the transition to the rule of law in Vietnam since the renovation known as Doimoi took place in 1986. I hope that my analysis can help to further the rule of law reform in Vietnam. Yet, I do not believe that it is easy to design an efficient model for the rule of law reform and to implement such a reform in reality. Although there is broad consensus among academics and policymakers in transition countries that the rule of law reform is essential to a well-functioning market economy and matters for social-economic development, there is also growing awareness among them that consensus is unlikely to ensure success of the reform. On the contrary, as pointed out in my study, transition countries are still facing many dilemmas and obstacles to the rule of law.

A key lesson from this study is the need to understand the role of informal institutions on the transition to the rule of law. Many social-economic conditions in transition countries will lead both the political reform in general and the rule of law reform in particular to be different from those in the West. In my judgment, it will be inappropriate to transplant or “copy” mechanically the rule of law as well as legal system from Western countries. With regard to the rule of law reform in Vietnam, I argued that due to the influence of Confucian values, the transition to the rule of law must be gradual (“step by step” as the Vietnamese term could be translated). In such a transition process, the institutional elements of the rule of law should be established progressively. Yet, once we have found the way for the transition to the rule of law in Vietnam, the next and much larger project is to ask how far and how long does it take to complete that way. The study presented in this thesis is not enough to cover this issue. Further literature survey and more in-depth analysis would help to specify the priorities and strategies of the rule of law reform of Vietnam in the future.

The study in this thesis also shows that in the process of the rule of law reform, transition countries differ significantly among themselves, especially on the specific problems they are facing. The reform strategies and priorities for each country will depend on what particular problems it has to deal with. For example, arbitrary discretion of government stands out as a main obstacle to the rule of law reform of Vietnam currently. Therefore, restraining arbitrary discretion of government can be regarded as a significant step in the process of transformation to the rule of law and market economy in Vietnam. For this purpose, generating and implementing judicial independence plays a decisive role.

Therefore, a push for the delegation of powers to independent courts should be a central pillar of the rule of law reform in Vietnam. However, as this study shows, much remains to be done to increase both de jure and de facto judicial independence in Vietnam. Clearly, for the policy makers in Vietnam, understanding and addressing judicial reform along many aspects of the transition to the rule of law are critical for improving the legal system as a whole. With the CPV still playing a leading role in society, a dependent and ineffective judiciary system could slow economic growth, which is harmful to government credibility and party's prestige. An area which will require increasing attention is in a one-party system like Vietnam, how to separate the party leadership on the one hand and the independence in organization and operation of the state apparatus, including the court system on the other hand. In this study, I have not touched this important topic.

Another lesson is the need to put resources and emphasis on the implementation and enforcement of the rule of law reform. For instance, my study regarding the judicial reform of Vietnam suggested that the promise of delegating powers to domestic independent courts is evidently not a credible commitment because that promise fails to be implemented in reality. Closing the implementation gap should be an important objective of the rule of law reform in transition countries. In order to overcome the implementation gap of the domestic delegation of powers, it is suggested that rational governments will delegate relatively more power to international organizations. For the purpose of this research, it limits to analyzing the delegation of powers to domestic independent courts. Further research on the rule of law reform in Vietnam taking the possibility of international delegation into consideration need to be encouraged.

While much remains to be done, indeed, it is probably fair to say that Vietnam is on its way to the transition to the rule of law with the aim of moving the country to prosperity, democracy, justice and civilisation.

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