

Article

Legal Interpretation and the Vietnamese Version of the Rule of Law

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ABSTRACT

This paper aims to present a picture of legal interpretation in Vietnam and its implications for the reform process. As Vietnam integrates itself fully into the global economy, the international community continually urges Vietnam to change its system to adhere to the rule of law. Although the definition of 'rule of law' is still subject to debate, it is widely agreed that a rule-of-law society is one in which law is transparent, coherent, consistent, and understandable. In these systems, legal interpretation is important in ensuring that law is applied equally to everyone. Efficient legal interpretation, in turn, requires certain institutional settings and principles. I will examine these issues in the context of the Vietnamese transitional legal system where law is not necessarily associated with enforceability and legal interpretation and explanation are still treated as processes supplementary to lawmaking.

The paper starts with an overview of the legal system, as this is the framework in which legal interpretation operates. It will then assess various factors that inform and shape legal interpretation, including legislative and institutional settings, community norms and traditional practice, and international influence.

Keywords: Vietnam, Legal Interpretation, Transitional Legal System

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I. INTRODUCTION

Initiated in 1986, the Doi Moi (Renovation) program has remarkably changed the face of Vietnam. In tandem with economic reforms, the legal system has also undergone numerous changes in the last two decades. The government has launched many ambitious legal reform projects, and law has been constantly mentioned as a basis for directing public and private behavior. As a consequence, the role of law in society has been improved. Yet, this transitional period poses a number of unprecedented challenges for the Vietnamese legal system. Chief among them is legal interpretation.

This paper aims to present a picture of legal interpretation in Vietnam and its implications for the reform process. As Vietnam integrates itself fully into the global economy, the international community continually urges it to change its system to adhere to the rule of law. While rule of law is an expansive topic and its definition is still subject to debate,¹ it is widely agreed that a society characterized by the rule of law is one in which law is transparent, coherent, understandable, and enforceable. Under such systems, legal interpretation is important in ensuring that law is applied equally to everyone. Efficient legal interpretation, in turn, requires proper legal infrastructure. In other words, legal institutions should be subject to certain operating principles in order to ensure that legal interpretation safeguards the ultimate value of legal norms. I will examine these issues in the context of the contemporary Vietnamese legal system.

It should be borne in mind that the concept of rule of law was recently introduced to Vietnam where the legal system has its own history and tradition. The legal ideologies that provide the foundation for the establishment and operation of Vietnamese legal institutions significantly differ from those of rule-of-law systems. These ideologies include the concepts of 'legal explanation' and 'legal application', which can be regarded as the Vietnamese equivalences of legal interpretation. At the same time, these concepts have their own features and variations. To avoid confusion, I will generally use the term 'legal interpretation' in this article. It refers to the interpretation of legal texts by state authorities. 'Legal explanation' and 'legal application' are used to reflect specific local understandings. A combination of all these terms, however, can be used where appropriate.

This paper starts with an overview of the legal system, as it is the framework under which legal interpretation operates. It will then assess various factors that inform and shape legal interpretation, including

1. Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 336, 338-40 (Erik G. Jensen & Thomas C. Heller eds., 2003).

legislative and institutional settings, community norms and traditional practice, and international influence. In addition to written sources, my analysis is based on various informal exchanges with government officials, judges, and legal practitioners. My personal experience as a legal academic, a private lawyer, and a legal development practitioner also provides insight into the subject matter.

II. THE LEGAL SYSTEM IN A NUTSHELL

A. *Soviet Legal Ideologies*

Vietnam's current legal structure is built on a foundation of Soviet ideology. Law represents the will of the ruling class and is an instrument to adjust social relations.² Because the Communist Party is the leader of the ruling class, Party supremacy over state and law is recognized as a constitutional principle.³ A sub-set of this principle is the notion of 'state management' of society. Based on the Party's policy guidance, the state uses law as a tool to govern society. Unlike traditional rule of law societies where separation of powers exists, in Vietnam state power is regarded as inseparable. The state exercises its power through three branches, namely the legislative, the executive and the judiciary. There is a division of tasks and cooperation between the branches. '*Phap che xa hoi chu nghia*' (socialist legality) and '*tap trung dan chu*' (democratic centralism) are the underlying principles of the legal system.⁴ These Soviet legal principles are entrenched in Vietnam and shape the nature of legal interpretation. Recent reform has introduced the concept of '*Nha nuoc phap quyen*' (law-based state), and borrowed certain aspects of the rights-based approach in Western commercial law.⁵ How this new development influences legal interpretation is still subject to further exploration. I will discuss this below.

Soviet legal thinking also includes a theory on '*giai thich phap luat*' (legal explanation or clarification) which is known to a small group of legal scholars and elite legal officials. The noteworthiness of this concept is that it is opaque, and is not entirely equivalent to legal interpretation. There are two main schools of thought on '*giai thich phap luat*'. One believes that '*giai*

2. Le Minh Tam, *Ban Chat, Dac Trung, Vai Tro, Cac Kieu va Hinh Thuc Phap Luat* [Nature, Features, Role, and Forms of Laws], in GIAO TRINH LY LUAN NHA NUOC VA PHAP LUAT [Textbook on Themes of State and Law] 66, 66 (Hanoi Law University ed., 2004) (Viet.).

3. Constitution of the Socialist Republic of Vietnam, art. 4 (1992) (Viet.).

4. For detailed discussion and analysis of these concepts, See JOHN S. GILLESPIE, TRANSPLANTING COMMERCIAL LAW REFORM, DEVELOPING A 'RULE OF LAW' IN VIETNAM 74-78 (2006).

5. For example, Resolution No. 48-NQ/TW of the Political Bureau Setting out Strategy to Develop the Legal System until 2010, and Goals for 2020 includes the principle of freedom to do business. Citizens can do everything that is not prohibited by law.

thich phap luat’ is formal explanation or clarification (*giai thich chinh thuc*) of the text of the law by authorized government agencies.⁶ It is unclear whether the court is recognized as an ‘authorized government agency’. The explanation becomes legislation itself, and thus legal explanation is regarded as a supplementary process to lawmaking. The other school of thought takes a broader approach and is of the view that ‘*giai thich phap luat*’ includes not only legislative clarification, but also explanation of how law is applied to specific situations (‘*giai thich tinh huong*’ or situational interpretation). This form of ‘*giai thich phap luat*’ is conducted by the court and other authorities. The latter view seems to be closer to the conventional understanding of legal interpretation in the West.⁷ However, only the former view is reflected in legislation as discussed below.

According to this theory, legal explanation has multiple purposes. It helps fill in the gaps between law and real life problems, and consequently informs revisions or changes in legislation.⁸ In addition, it also aims to increase the legal consciousness of ordinary citizens, and to promote the values of law.⁹ A recently modified version of legal explanation claims that it also contributes to the improvement of transparency and consistency in the legal system.¹⁰

B. *The Civil Law System*

As the legacy of being a French colony, Vietnam now has a civil law system. Law is a broad term that represents various types of legislation issued by government authorities in written form. All three branches of state power are entitled to produce legislation. Recent decentralization further adds the legislative and executive branches at the local level to the list of law makers. The 2008 Law on Promulgation of Legal Normative Documents (the

6. See Nguyen Nhu Phat, ‘Giai Thich Phap Luat o Vietnam – Cong Cu Dam Bao Tinh Minh Bach Cua Phap Luat’ [Legal Interpretation in Vietnam – A Tool to Ensure Legal Transparency], paper presented at Conf. on Legal Interpretation, Hanoi (Feb. 2008) (Viet.).

7. Scholars who are for this view include Hoang Kim Que, Tran Ngoc Duong, and Nguyen Cuu Viet. ‘Mot So Van De Ve Giai Thich Phap Luat: Quan Niem va Vai Tro, Y Nghia Trong Thuc Te’ [Some Issues on Legal Explanation: Concept, Role and Implication], ‘Giai Thich Chinh Thuc Hien Phap, Luat, va Phap Lenh o Nuoc Ta Hien Nay: Thuc Trang va Giai Phap’ [Formal Explanation of Constitution, Laws, and Ordinances in Vietnam Today: Practice and Solutions], ‘Vai Net Ve Khai Niem Giai Thich Phap Luat, Quy Dinh Ve Giai Thich Phap Luat, va Thuc Tien Giai Thich Phap Luat o Vietnam [Highlights of the Concept of Legal Explanation, Regulations on Legal Explanation, and Practice of Legal Explanation in Vietnam] – papers presented at Conf. on Legal Interpretation, Hanoi, (Feb. 2008).

8. To Van Hoa, Mot So Van De Ly Luan Ve Giai Thich Phap Luat [Some Theoretical Issues in Legal Explanation], Do Van Chinh, ‘Ban Ve Giai Thich Phap Luat’ [Discussion on Legal Explanation], papers presented at Conf. on Legal Interpretation, Hanoi (Feb. 2008).

9. Nguyen Minh Doan, ‘Ve Cach Thuc Giai Thich Phap Luat’ [On Techniques to Explain Laws], paper presented at Conf. on Legal Interpretation, Hanoi (Feb. 2008) (Viet.).

10. Nhu Phat, *supra* note 6, at 4.

2008 Law) lists twelve types of statutory instruments that are issued by different authorities.¹¹

Although this system provides considerable flexibility for the state to use legislation to respond quickly to economic and social changes, it presents the inherent problem of a jungle of regulations, which is both inconsistent and fragmented. The National Assembly (NA) and its Standing Committee (SCNA), as the legislature, is authorized to promulgate Constitution, Laws and Ordinances. These documents are regarded as having the highest legal validity. Yet, they are often abstract (*luat khung* or 'framework' law) and thus require specific guidance for application. The Government and its various ministries then must issue inferior documents including Decrees and Circulars to support the implementation of such laws. Because legislation is drafted by different agencies, it is very common to find conflicts between sub-law regulations and laws or even the Constitution.¹² Each ministry can also inject its own interests in the drafting process, which further increases inconsistency. The ambitious public administration reform program launched by the Party and the Government has not been seen as a great success in delineating relations of authority or improving accountability.¹³

Considerable efforts have been made to address this problem. Reviewing and assessing the legitimacy of regulations is now mandatory, and a new unit has been established within the Ministry of Justice to perform this function.¹⁴ It has been discovered that approximately 12% of the reviewed legislation violates substantive or procedural laws. The Ministry of Justice has also been successful in abandoning a number of regulations that have received serious criticism from the public.¹⁵ The attempt, however, is arguably a mere provisional reaction that further strains the limited resources at the Ministry of Justice in response to a highly challenging task.¹⁶ No structural reform has been initiated to tackle the root cause of the problem.

In addition to the above, the contemporary Vietnamese legal system has also been constructed from traditional community practice, Confucian norms

11. Vietnam Documents Law on the Promulgation of Normative Documents, art. 2 (2008) (Viet.).

12. In the period from 2002-2005, the Government and ministerial-level authorities had to issue approximately 4,000 documents to provide implementing guidance for laws and ordinances. See Nhu Trang, Van Ban Van 'Vo Tu' Trai Luat [Sub-law Regulations are still 'Innocently' Inconsistent with Laws] (Aug. 27, 2005, 5:51 AM), <http://www.vnexpress.net/GL/Xa-hoi/2005/08/3B9E18B6/> (Viet.).

13. Thaveeporn Vasavakul, *Rebuilding Authority Relations: Public Administration Reform in the Era of Doi Moi*, report submitted to the Asia Development Bank, Hanoi (Dec. 2002).

14. Decree No. 135/2003/ND-CP (2003).

15. 12% So Van Ban Kiem Tra Co Dau Hieu Trai Luat [12% of the Checked Documents Shows Signs of Violation], LAO DONG NEWSPAPER, Nov. 22, 2008, at 271.

16. See also Tran Hieu, Kiem Tra, Xu Ly Van Ban Quy Pham Phap Luat Phai Lam Thuong Xuyen [It is Necessary to Regularly Check the Legitimacy of Legal Normative Documents], THE PEOPLE'S DEPUTY DAILY (Dec. 14, 2008), available at <http://www.nguoidaibieu.com.vn/Trangchu/VN/tabid/66/CatID/7/ContentID/58391/Default.aspx>.

and liberal Western influence.¹⁷ All these factors shape the way law is interpreted.

III. THE LEGAL FRAMEWORK OF *GIAI THICH PHAP LUAT* (LEGAL EXPLANATION/CLARIFICATION) AND *AP DUNG PHAP LUAT* (LEGAL APPLICATION)

As mentioned above, the legal framework of regulatory explanation reflects Soviet legal theory. It is worth noting that only three among the twelve types of statutory instruments are subject to legal explanation. In other words, not every piece of legislation or legal text can be formally explained. According to Article 91 of the Constitution, the SCNA is entitled to explain or clarify the Constitution, laws and ordinances. The 2008 Law sets out detailed procedures for the explanation of these documents.¹⁸ As a result, the current framework contains a big gap since it does not say how the remaining nine types of statutory instruments should be explained if should different understandings of their texts arise. Official clarification of a law or an ordinance takes the form of a resolution by the SCNA. This document is then treated as a statutory instrument.

With regard to the judiciary, regulations dictate that a court's role is to apply laws (*ap dung phap luat*). Under the Law on Organization of People's Court, the Supreme People's Court (SPC) and its Judicial Council have a mandate to instruct and guide lower courts to apply law consistently. There have been heated debates and calls for clarification and distinction between the concepts of law explanation and law application. Some scholars and practitioners argue that the court is actually interpreting law while others believe that the SPC explains law like other government agencies.¹⁹ The later view seems to be justified by the 2008 Law according to which the SPC performs its mandate by issuing Resolutions and Joint-Circulars with other government agencies, including the procuracy. The promulgation of these statutory instruments must follow procedures prescribed for legislative drafting.²⁰ To this extent, the SPC is treated as an administrative agency that takes part in lawmaking like other government institutions.

To make the picture complete, recent reform policy also stresses the importance of improving judicial function. The SPC has been called on to develop a system of court precedents.²¹ Yet, it is still unclear how the

17. For detailed discussion, See GILLESPIE, *supra* note 4, at 40-49, 62-68 (Viet.).

18. Vietnam Documents Law on the Promulgation of Normative Documents. Ch. X.

19. Do Van Chinh, Ban Ve Giai Thich Phap Luat [Discussion on Legal Explanation], and other papers presented at Conf. on Legal Interpretation, Hanoi (Feb. 2008) (Viet.).

20. Vietnam Documents Law on the Promulgation of Normative Documents, art. 69 & 74.

21. Res. No. 49-NQ/TW, (2005), of the Central Comm. of the Communist Party on Strategy to Reform Judicial System Until 2020.

concept of judicial precedent is understood in Vietnam. Discussion below will further illustrate this point.

IV. THE PRACTICE OF LEGAL INTERPRETATION

Despite a confusing legal framework, legal interpretation has arisen as a natural need or unintended consequence of economic and social development in Vietnam. In all three branches of power, interpreting law is an ongoing struggle.

A. *Legal Explanation and Interpretation by the Legislature*

Although the SCNA has the constitutional right to explain the Constitution, laws and ordinances, it has exercised this right only six times.²² These cases represent a mix of legislative function and more genuine interpretation by the SCNA. Of the former category are four pieces of supplementary legislation that provided implementing guidance for the Civil and Criminal Procedure Codes,²³ and a similar Resolution that clarifies the legislative discretion of the General State Auditor.²⁴ Meanwhile, a Resolution that interprets one particular provision of the Commercial Law came about as the consequence of a deadlocked arbitral case at the Vietnam International Arbitration Centre.²⁵

In an attempt to justify limited law explanation by the SCNA, legal scholars point out that the SCNA is already overwhelmed with more important work. The SCNA also participates in the legislative drafting process. When laws are promulgated, they are deemed to be complete and reflections of the SCNA view. Therefore, no further explanation is necessary.²⁶ This implies a lack of awareness about the need for legal interpretation. Arguably, it is attributable to the Soviet notion of instrumentalist law.

22. The SCNA has never formally interpreted the Constitution, while the Ministry of Justice has referred to the Constitution a number of times to overturn legislation by other ministries for the reason that they are unconstitutional. Discussion on constitutional protection has been initiated in Vietnam recently. However, I will exclude the issue of constitutional interpretation from discussion in this paper.

23. Res. No. 388/2003/NQ-UBTVQH11 (2003), Res. No. 58/NQ-UBTVQH10 (1998), Res. No. 755/2005/NQ-UBTVQH11 (2005), and Res. No. 1037/2006/NQ-UBTVQH11 (2006).

24. Res. No. 1053/2006/NQ-UBTVQH11 (2006).

25. Vietnam Chamber of Commerce and Industry (VCCI), *Doi Dieu Ve Thuc Trang Giai Thich Thich Phap Luat O Vietnam* [Some Issues on the Practice of Legal Explanation and Interpretation in Vietnam], Conf. on Legal Interpretation, Hanoi (Feb. 2008) (Viet.).

26. Vo Tri Hao, *Vai Tro Giai Thich Phap Luat Cua Toa An* [Role of Court in Explaining Law], 3 J. LEGAL SCI. 15 (2003) (Viet.).

B. *Legal Interpretation by the Executive*

Interpretation by the executive is perhaps the most active area of legal interpretation in Vietnam.²⁷ This is probably due to the fact that statutory documents issued by the executive constitute the main source of working legislation. Yet, the system is highly fragmented and spontaneous.

Driven by a state management mentality, government authorities often use regulations for their comfort and convenience. The approach of '*khong quan duoc thi cam*' (if it is not manageable, banning is the solution) is a typical example of this practice. It is common to see local authorities '*xe rao*' (break the fence) or breach national laws to fulfill local interests.²⁸ In these circumstances, legal interpretation can also be utilized as a correctional measure for poorly drafted laws.²⁹ Government ministries also use their discretionary powers to set situational policies that are inconsistent with the spirit of the laws.³⁰ This has sometimes stirred public debate over whether the 'rule of law' should apply not only to ordinary citizens but also to government authorities.³¹

Within the business community and among legal practitioners, seeking interpretation is a part of daily work. In most situations, they consult government ministries or executive agencies about the meaning and implications of legislation. For instance, matters of intellectual property are referred to the National Office of Intellectual Property,³² while tax authorities are approached for clarification of taxation rules. Interpretation can be done ad hoc, verbally or in written form, and results can vary greatly. This mechanism makes the system bifurcated and produces different consequences. Ordinary citizens and small- and medium-sized businesses (SMEs), tend to simply avoid or ignore the law when it is opaque. If

27. *Id.* See also VCCI, *supra* note 25 & Pham Tuan Khai, *Giai Thich Phap Luat – Cach Nhin Cua Hanh Phap* [Legal Interpretation from the Perspective of the Executive], Conf. on Legal Interpretation, Hanoi (Feb. 2008) (Viet.).

28. Vo Cong Khoi, *Cong Tac Ban Hanh Van Ban Quy Pham Phap Luat Cua Chinh Quyen Dia Phuong Voi Kha Nang Giai Thich Phap Luat* [Legislative Work of Local Authorities and Its Connection with Legal Explanation Ability], Conf. on Legal Interpretation, Hanoi (Feb. 2008) (Viet.).

29. For a specific example, see the case of Ministry of Natural Resources and Environment interpreting regulations on the use of formal land titles to validate land transactions in Hanh Nhung, '80,000 Giay Trang Sau Ngay 01/01/2008 Tai TPHCM: Con Duoc Giao Dich Hay Khong?' [Whether 80,000 'White Papers' in HCMC are Still Valid for Transactions After 01/01/2008], Sai Gon Giai Phong [Sai Gon Liberation], Dec. 26, 2007, <http://www.sggp.org.vn/xahoi/2007/12/137337/> (Viet.).

30. Truong Thanh Duc, *Luat Cho – Khong Dam, Luat Cam – Duoc Lam?* [Law Permits - Dare Not Do, Law Prohibits – Do?], THE SAIGON TIMES, May 4, 2009 (Viet.).

31. Nguyen Ngoc Dien, *Dau Chi Co Dan Moi Phai Thuong Ton Phap Luat* [Not Only the People are Subject to the Rule of Law], SAI GON ECONOMIC TIMES, Jan. 20, 2008 (Viet.).

32. For specific examples, see Le Thi Nam Giang & Nguyen Minh Huong, *Mot So Y Kien Ve Giai Thich Phap Luat Tai Vietnam Qua Mot So Vu Viac Ve So Huu Tri Tue* [Opinions on Legal Interpretation in Vietnam that are Drawn From Experiences of Some Intellectual Property Cases], Conf. on Legal Interpretation, Hanoi (Feb. 2008) (Viet.).

avoidance is not possible, interpretation can become a bargaining process in which citizens or SMEs rely on relational transactions and personal relationships with state officials to seek favorable outcomes. This is where corruption is rampant. A small group of elite businesses that is more familiar with rule of law can use experienced lawyers and formal mechanisms to negotiate with government authorities on how legislation should be interpreted. This process is often law-based, and as a result, interpretation better reflects legal rules and meanings that protect private rights. Take the example of the Vietnam Business Forum that was set up under the auspices of the World Bank and the Consultative Group. Its working groups often include top lawyers who frequently review regulatory vagueness and inconsistency and press government authorities for clarification or revisions.³³

C. *Legal Interpretation by the Judiciary*

In traditional rule-of-law societies, courts are the only state bodies that have the mandate of interpreting legislation. To fulfill this function, courts are vested with appropriate jurisdictional and discretionary powers. There are certain techniques and criteria that courts use to ensure interpretation is legally and socially acceptable.³⁴

In Vietnam, the legal community has recently become vocal in calling for an increased role of courts in statutory interpretation.³⁵ Yet, the concept of legal interpretation, as discussed above, has not received proper attention at the policymaking level. The discretionary powers of courts are limited, and legislative style adds more confusion to the work of law application in the courtroom.

Since no interpretation techniques have been formally developed and applied in the court system, the practice of interpretation is complex and varies greatly from one courthouse to another. A good illustration of this problem is a bold statement by former Chief Justice Trinh Hong Duong at a National Assembly session: '*o ta voi luat le nhu the nay thi an dan su xu the nao cung duoc*' (based on our legislation, a judge can try a civil matter in whatever way s/he wishes). When encountering a difficult legal problem for which law does not provide a definite answer, judges often seek trial guidance from higher courts or even from the Party's office or executive

33. See also Vietnam Business Forum, <http://www.vbf.org.vn/workinggroup.aspx?x=1&c=1&y=5>.

34. John Gillespie, Reforming Statutory Interpretation in Vietnam, Conf. on Legal Interpretation, Hanoi (Feb. 2008).

35. Hao, *supra* note 26. See also Hoang Ngoc Tu, Luu Tien Dung & other papers presented at Conf. on Legal Interpretation, Hanoi (Feb. 2008).

branch. Inter-government consultation is also a common practice for the purpose of regulatory clarification especially with commercial matters. For example, judges often consult financial authorities on disputes that relate to securities transactions, or trade officials on foreign trade issues.³⁶

Since Vietnam has an inquisitorial tradition, judges are responsible for framing outcomes as to reconcile litigants' claims with state interests and broadcast ideologically correct educational messages to the people. Reforms that give lawyers rights to advocate for their clients' interests, even if this means opposing state interests, run into obstacles set up by judges who, by training and habit, are not disposed to arguments predicated on private legal rights.³⁷ A lack of clear law and interpreting rules also results in judges seeking alternative sources of guidance to reach their decisions. Informal application of community norms at lower courts is common in civil cases.³⁸ Further complicating the problem, judging can be a bargaining process in which litigants negotiate directly with judges for the final outcome. When corruption takes place, law interpretation has absolutely no meaning.³⁹

In response to these challenges, the SPC has developed a system of trial guidance (*duong loi xet xu*) for lower courts. The instructions take the form of Resolutions, Joint-Circulars of the Judicial Council, or summaries in the SPC annual reports. Between 1986 and 2008, 33 Resolutions and 80 Joint-Circulars were issued for this purpose.⁴⁰ To a certain extent, SPC practice is the distillation and codification of adjudication. The 2008 Law, as mentioned earlier, made it clear that these documents are statutory instruments and are subject to the legislative process. The SPC will not be able to issue the documents without agreement from the Minister of Justice and the Chief Prosecutor.⁴¹

The extent to which the SPC exercises legal interpretation is still subject to debate. Many have argued that SPC judgments and decisions have the value of judicial precedents.⁴² A case commentary book was published that includes various examples according to which SPC judgments show

36. Interview with judges, Ho Chi Minh City Economic Court (Apr. 2008).

37. John Gillespie & Bui Thi Bich Lien, *Unacknowledged Legislators: Business Participation in Lawmaking in Vietnam*, in REGULATION IN ASIA: PUSHING BACK ON GLOBALIZATION (John Gillespie & Randall Peerenbom eds., June 2009).

38. John Gillespie, *The Emerging Role of Property Rights in Land and Housing Disputes in Hanoi*, (forthcoming).

39. See, e.g., the case of a district judge being prosecuted for demanding bribes from litigants. *Tham Phan TAND Quan Hoan Kiem Bi Bat Vi ... "An" Toilet* [Judge at Hoan Kiem District Court is Arrested for "Eating" Toilet], <http://www.vnmedia.vn/newsdetail.asp?NewsId=135049&CatId=4#> (Viet.).

40. Chinh, *supra* note 19.

41. Vietnam Documents Law on the Promulgation of Normative Documents. Art. 69 (2008) (Viet.).

42. Vi Tran - Gia Hi, *Nen Ap Dung An Le Khi Xet Xu?* [Should Precedents be Used in Trials?], PHAP LUAT THANH PHO HO CHI MINH [HO CHI MINH CITY LAW NEWSPAPER], Apr. 29, 2009 (Viet.).

interpretation of ambiguous provisions in the Civil Code.⁴³ Yet, skeptics also point out that court precedents tend to focus on ‘solutions’ for the cases rather than legal reasoning. This might be attributable to the fact that the SPC is expected to provide guidance for inferior courts. It is also common that SPC documents merely repeat the legislation without interpreting. In the worst case, they can be inconsistent with policy intention or the spirit of the law. Another shortcoming is that SPC instructions are often issued to respond to lower courts’ need for interpretation or complex cases that are under public scrutiny. As a result, they are narrow and can become outdated once the cases are settled. The limited number of Resolutions and Circulars that the SPC issues is insufficient to provide interpretation for all legal matters that come before the court.⁴⁴

V. INTERNATIONAL ASSISTANCE AND LEGAL INTERPRETATION

Discussion about legal development in Vietnam is incomplete without mentioning the contributions of the international community. USAID, DANIDA, and JICA are the most active donors that promote legal transparency and legal interpretation in Vietnam.

The USAID-funded STAR project supported the SPC’s publication of the first-ever two-volume compilation of cassation judgments.⁴⁵ The experiment has been recognized by the SPC as a step forward in laying a foundation for the development of judicial precedents.⁴⁶ A Danish project has taken a different approach that combines assistance with judgment publication and facilitation of public dialogue about legal interpretation. JICA had also sponsored a comprehensive study on judicial precedents.⁴⁷ It is interesting that the research produces a blended concept of judicial precedents that combines certain features of Western rule of law with local

43. Do Van Dai, *Luật Hợp Đồng Việt Nam – Bàn An và Bình Luận* [Vietnam Contract Law – Case Commentary] (2008) (Viet.).

44. Luu Tien Dung, *Ap Dung va Giai Thich Phap Luat o Vietnam* [Law Application and Explanation in Vietnam]; Duong Quoc Thanh, *Mot So Y Kien ve Giai Thich Phap Luat va Vai Tro Cua Toa An* [Some Opinions on Legal Explanation and Role of the Court]; Vu Van Ngoc, *Cac Phuong Phap Giai Thich Phap Luat Trong He Thong Thong Luat Va Viec Ap Dung Cac Nguyen Tac Nay Trong Viec Giai Thich Mot So Tinh Huong Phap Luat Ve Hop Dong Va Doanh Nghiep O Vietnam* [Methodologies for Legal Interpretation in Common Law Systems and the Application of These Principles in Interpreting Contract Law and Corporate Law in Vietnam], papers presented at Conf. on Legal Interpretation, Hanoi (Feb. 2008) (Viet.).

45. SPC website, <http://www.toaan.gov.vn/portal/page/portal/tandtc/545500/cbba>.

46. Ngo Cuong, *Van De Cong Bo Ban An, Quyét Dinh Cua Toa An Trong Boi Canh Cai Cach Tu Phap* [On the Publication of Court Judgments and Decisions in the Context of Judicial Reform], paper presented at workshop in Hanoi (Aug. 2009) (Viet.).

47. SPC & JICA, *Nghien Cuu Chung Viet-Nhat Ve Viec Phat Trien An Le Tai Vietnam*, [Vietnamese-Japanese Joint Study on the Development of Precedents in Vietnam], Thanh Nien Pub. H., Hanoi (2008) (Viet.).

understandings about court activity. It suggests that only cassation judgments by the Judicial Council of the SPC constitute precedents. Similar to legal interpretation, development of precedents is deemed to have multiple purposes. It is not only to ensure equality before the law and predictability for the development of a market economy, but also aims to establish unified court practice, to prevent subjective decision making, and to build capacity for judges. The research also reveals two uncompromising approaches to the practical value of judicial precedents. The first view holds that in a cassation judgment, only the legal reasoning that comes from legal interpretation has binding value for future cases. The other view argues that only trial policy that is developed from facts and is reflected in the outcome of the case has the value of precedent.⁴⁸

It is still early to offer a meaningful assessment of how this donor support affects the development of legal interpretation in Vietnam.

VI. CONCLUSION

In a rule-of-law society, the enforcement of laws is generally not a matter for discussion because enforceability is an integral feature of law. Legal interpretation is needed to give statutory norms meaning in specific contexts. The purpose of legal (or statutory) interpretation is therefore the opposite of lawmaking.⁴⁹

In Vietnam, law is not necessarily associated with enforceability. Under the formal system, legal explanation is still treated as a supplementary process to lawmaking. Ironically, while authorities struggle to ‘bring laws into life’ (*dua phap luat vao cuoc song*) in an evolving legal system, the interpretation of such laws has not attracted sufficient attention. Theories and principles of legal interpretation are still under-researched. There are various factors that contribute to this fact. Chief among them is the notion of instrumentalist law that makes legal terminology and concepts highly political. A small group of non-socialist trained legal scholars and elite officials has not been able to reconcile their new legal thinking with the traditional one.⁵⁰

It is hoped that rapid economic and social development in Vietnam will produce demand for a more sophisticated legal system in which legal norms are transparent, and legal interpretation provides protection of public and private orders. However, I would offer the cautious prediction that only when the role of law is considered more seriously, may we expect a rule of law-oriented society.

48. Interview with SPC officials in Hanoi (May 2009).

49. Gillespie, *supra* note 34.

50. Doan, *supra* note 9.

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法律解釋與越南的法治

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摘 要

本文旨在呈現法律解釋在越南的圖像及其在改革過程中的運用。當越南已完全地融合於全球經濟時，國際社群即持續地要求越南的法律系統必須遵守法治原則。雖然法治的定義仍處於爭辯的狀態，但大多人都同意法治社會是法律透明、連貫、一致與可被理解的地方。在這個制度中，法律解釋的重要性是在確保法律可被平等地適用於每一個人身上。其次，有效的法律解釋需要某些制度的條件和原則。本文將在越南轉型法律制度的脈絡下檢驗這些議題。在越南的轉型法律制度下法律並非與其執行及解釋有必要的相關性，法律的解釋仍僅被作是造法的補充程序。

本文首先鳥瞰越南的法律制度，其提供了一個法律解釋運作的架構。之後，本文評價許多非正式且型塑法律解釋的因素，這些因素包括了立法與制度的條件，社群的規範，傳統實踐與國際影響。

關鍵詞：越南、法解釋、轉型法律制度