

## *A New Generation and New Thinking in Vietnamese Legal Scholarship*

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This Issue of the *Asian Journal of Comparative Law* on constitutional law and constitutional conflict in Vietnam can be lauded on several fronts. The quality of the articles is excellent. They shed new light and move our understanding forward on key issues in Vietnamese constitutional development. The articles highlight the public law issues that are too often overshadowed by economic issues in the discussion of Vietnamese constitutionalism. For all these reasons and more, this Special Issue is a signal occasion.

In this brief commentary, however, I want to highlight a different point. This Issue (and the gathering at the National University of Singapore Faculty of Law that preceded it) marks a new generational step in the study of Vietnamese law. That, for me, is one of the key features of this publication. Vietnamese scholars, including Vietnamese scholars of a new generation, are moving to the forefront of research and publishing on the law of their homeland, with a sophisticated and nuanced, contextualized understanding of their country and its complex constitutional struggles that furthers our understanding of both Vietnam and its legal system.

Going back to the 1960s and 1970s, our scholarly understanding of Vietnam and its legal system from outside Vietnam was rooted in the fine work of an earlier generation. Most of those scholars were Vietnamese, and most of them were forced out of their homeland by conflict in Vietnam. Ta Van Tai (writing from Harvard Law School), Nguyen Phuong-Khanh (writing from the Library of Congress), Nguyen Ngoc Huy, and a few others greatly furthered our understanding of Vietnamese legal history, the evolution of thinking about rights in Vietnam, and the development of law in both the Republic of Vietnam and the Democratic and then Socialist Republic of Vietnam.<sup>1</sup>

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1. See e.g. Ta Van TAI, “The Status of Women in Traditional Vietnam: A Comparison of the Code of the Le Dynasty (1428-1788) with the Chinese Codes” (1981) 15(2) *Journal of Asian History* 97; Ta Van TAI, “Vietnam’s Code of the Lê Dynasty (1428-1788)” (1982) 30(3) *American Journal of Comparative Law* 523; Nguyen Ngoc HUY, Ta Van TAI & Tran Van LIEM, *The Le Code: Law in Traditional Vietnam: A Comparative Sino-Vietnamese Legal Study with Historical-Juridical Analysis and Annotations* (3 vols., 1987); Phuong-Khanh NGUYEN, *Vietnamese Legal Materials, 1954-1975: A Selected, Annotated Bibliography* (Library of Congress, 1977); Phuong-Khanh NGUYEN, “Introduction to the 1980 Constitution of the Socialist Republic of Vietnam” (1981) 7(1) *Review of Socialist Law* 347; and

Even earlier, the scholar and journalist Bernard Fall had provided early and valuable analysis of Vietnamese constitutional and legal developments in the 1950s and 1960s.<sup>2</sup>

Taken together, this field of Vietnamese legal studies could not have had a brighter and more sophisticated start in the United States and other countries, but for one factor – the fine work of Vietnamese scholars writing and publishing in Vietnam was not generally available to western readers until much later. Our field is now redressing that scholarly gap, even scholarly injustice, through the use of research and commentary by eminent Vietnamese scholars who were based in both Saigon and Hanoi in the 1950s and 1960s (and 1970s and 1980s in Hanoi).

The second generation of research and publishing on Vietnamese law outside Vietnam can be generally said to have begun in the late 1980s and early 1990s, with the work of John Gillespie, Pip Nicholson, Mark Sidel, and a few others.<sup>3</sup> Those three, however, may be regarded as some of the key figures in that later renaissance of scholarly work on Vietnamese law – a new opening on the scholarly front that was made possible by legal reforms in Vietnam and the gradual opening of Vietnam to foreign research. Their work has helped propel the field forward in different areas, because like the scholars of the first generation their work explores different aspects of the changing nature of Vietnamese law and Vietnamese legal thought – from dispute resolution to judicial reforms to commercial law reform to human rights to the emergence of a regulatory framework for civil society to, of course, constitutional development.

With the publication of this Issue of the *Asian Journal of Comparative Law* and other recent publications that have appeared, we now greet a new generation, in which Vietnamese scholars publishing abroad are coming to the center and to the front of our understanding of Vietnamese law. This group of generally younger scholars is diverse in viewpoint and interests. They do not all share similar methodological approaches. Some would say that they are not even all in the same generation (one or two are a bit

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Phuong-Khanh NGUYEN, “The Criminal Code of the Socialist Republic of Vietnam” (1987) 13 *Review of Socialist Law* 103.

2. See e.g. Bernard B. FALL, “Constitution-Writing in a Communist State: The New Constitution of North Viet-Nam” (1960) 6 *Howard Law Journal* 157; Bernard B. FALL, “North Viet-Nam’s Constitution and Government” (1960) 33(3) *Pacific Affairs* 282; and Bernard B. FALL, *The Viet-Minh Regime: Government and Administration in the Democratic Republic of Vietnam* (Connecticut: Greenwood, 1975).
3. See e.g. Penelope (Pip) NICHOLSON, *Borrowing Court Systems: The Experience of Socialist Vietnam* (Leiden and Boston: Martinus Nijhoff Publishers, 2007) at 222–230; Pip NICHOLSON, “Vietnamese Legal Institutions in Comparative Perspective: Contemporary Constitutions and Courts Considered” in Kanishka JAYASURIYA, ed, *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London and New York: Routledge, 1999) at 257–82; BUI Ngoc Son & Pip NICHOLSON, “Activism and Popular Constitutionalism in Contemporary Vietnam” *Law and Social Enquiry* [forthcoming]; John GILLESPIE & Randall PEERENBOOM, eds., *Regulation in Asia: Pushing Back on Globalization* (London: Routledge, 2009); John GILLESPIE, “The Juridification of Cause Advocacy in Socialist Asia: Vietnam as a Case Study” (2013) 31 *Wisconsin International Law Journal* 672; John GILLESPIE, “Human Rights as a Larger Loyalty: The Evolution of Religious Freedom in Vietnam” (2014) 27(1) *Harvard Human Rights Journal* 107; Mark SIDEL, *Law and Society in Vietnam* (New York: Cambridge University Press, 2008); Mark SIDEL, *The Constitution of Vietnam: A Contextual Analysis* (Oxford and Portland, Oregon: Hart Publishing, 2009); and Mark SIDEL, “Analytical Models for Understanding Constitutions and Constitutional Dialogues in Socialist Transitional States: Re-Interpreting Constitutional Dialogues in Vietnam” (2002) 6(1) *Singapore Journal of International and Comparative Law* 42.

older). They differ, sometimes vociferously, among themselves in their interpretation of recent Vietnamese legal history and legal reforms in Vietnam. Nevertheless, individually and as a group, based in Vietnam, Australia, France, Singapore, the United States, and elsewhere, they are driving the study of Vietnamese law forward. They are, one might say, leading the “Vietnamization” of the study of Vietnamese law outside of Vietnam, just as, of course, Vietnamese scholars are leading the study of Vietnamese law within Vietnam.

With apologies to any I am missing, this group includes Bui Tien Dat, Vu Cong Giao, Vo Tri Hao, Nguyen Huong, Tran Kien, Bui Thi Bich Lien, Pham Duy Nghia, Pham Lan Phuong, Nguyen Hung Quang, Bui Ngoc Son, Bui Hai Thiem, Le Toan, Le Khanh Tung, and others. Not all, of course, are represented in this Issue of the *Asian Journal of Comparative Law*. And, inevitably, and with deepest apologies, I am no doubt neglecting to mention several other fine young scholars who should be mentioned. And of course I am focusing on those that have published outside Vietnam, usually in English. There are many accomplished younger scholars in Vietnam who should also be mentioned.

In this brief commentary, I cannot review all of their work, though that is a task well worth undertaking. Some of the most accomplished of this generation, for example Bui Ngoc Son, did not write a full article for this Issue of the *Asian Journal of Comparative Law*, although he played an instrumental role as its architect. In any case, let me indicate by direct reference to those among this group of scholars who are participating in this Issue what I think the contributions of this younger generation are turning out to be, and why I focus on the generational shift in Vietnamese law scholarship (particularly outside Vietnam) in this commentary.

Vu Cong Giao and Tran Kien’s article on constitutional debate and the development of human rights thinking in Vietnam illustrates the special skills and talents that a new generation of Vietnamese legal scholars, writing for overseas audiences, brings to the development of legal scholarship on Vietnam. The authors integrate doctrinal and textual analysis of the *1992 Constitution of the Democratic Republic of Vietnam* (1992 Constitution) with political and policy discussion of human rights issues in Vietnam and a granular sense of the debate over human rights in the constitution during the discussions preceding the adoption of the *2013 Constitution of the Socialist Republic of Vietnam* (2013 Constitution). Writing in English for an audience abroad, he can bring together elite political positions with academic views and dissident views in a more detailed sense of these debates than may be possible within Vietnam, or that many foreign scholars would be able to muster.

Pham Lan Phuong writes about a crucial but unfortunately under-studied topic – the role of the procuracy. This is an institution that is not well understood outside the Soviet, Russian, Chinese, Vietnamese, and some similar one-party legal contexts. Consequently, most western discussions of it suffer from a textualist approach and superficial analysis. Phuong goes deeper into the Vietnamese debates on the role of the procuracy than have most other writers on this theme, producing a work that is detailed for the number of pages available for it but promises – in her dissertation and hopefully book to come – an even more textured and nuanced analysis of the winding road that the Vietnamese procuracy has followed and comparisons to the roads followed by their Chinese and other counterparts.

Pham Duy Nghia, who is certainly in spirit a new generation Vietnamese legal scholar even if his chronological age might put him slightly outside that generation, has written an article about the debates over economic reform in the 2011-2013 constitutional drafting process. The article provides a confident and sweeping overview of these sometimes bitter discussions along with the detail that perhaps only someone deeply embedded in the Vietnamese context could gather. Nghia brings together – as do other authors in this issue – elite debates, conflicting public views, the views of reformers, both permitted and prohibited, the role of the press and social media, and other actors to draw a picture that is more naturally painted than most western or other Vietnamese scholars could muster.

Le Toan contributes a highly detailed and nuanced treatment of the discussion of land ownership in the 2011-2013 constitutional debates. Land ownership in Vietnam, as anywhere else – but, sometimes, it seems, especially in Vietnam – incorporates profound economic, political, social, and emotional issues. It is at once a political, technical, and personal set of issues, both to those who live them in Vietnam and other countries around the world and to those who write about them. Toan tells a complicated story well, integrating the perspectives of political and economic actors, media, critical and dissident actors, academics, and authors into a detailed narrative of these debates.

Bui Hai Thiem carries perhaps the most difficult responsibility in this issue – writing about the issues of political reform in the 2011-2013 constitutional debates, and in particular the “third rail” of Vietnamese constitutional politics, the role of the Party as expressed in the constitution. This is not an understudied topic, in either legal scholarship within Vietnam or that published outside. But Thiem offers both a historical overview of the debates and provisions on Party leadership in Vietnamese constitutions, and a detailed discussion of the 2011-2013 debates on this crucial issue – including the views of Party elites, academics, and critical and dissident groups – that sets a new benchmark for future work on this all-important theme.

What this new generation does particularly well is to understand the context in which and about which they are writing. Their narratives of constitutional debate and struggle carry a confident fluency to them that we, or at least I, cannot match. They intuitively understand their context better than most external scholars do. They can blend Party, government, technocrat, academic, press, social media, and dissident perspectives with a seamlessness that is, when it works, impressive to read. It does not always work, but the promise, the possibility, is always there.

At the same time, these are early works by this new generation. They are at times overly doctrinal, overly technical, and overly textual. They could always benefit from even more nuance and even more detail about debate and conflict. At times, we wish for less doctrinal exegesis and more detailed discussion of ideological and political battles over law. To some degree, of course, that is always a function of space. But it is also a function of conflicting perspectives on quality legal scholarship. In the best situations, these scholars are undertaking the kind of scholarship that may often not be possible in Vietnam. One can only imagine the difficulties of producing a certain kind of scholarship (or academic writing) for publication within Vietnam and a different kind abroad.

Those conflicts, and the narratives of how such critical legal scholars become and remain scholars within a system that is – to put it mildly – unfriendly to approaches that are critical, analytical, and comprehensive with respect to viewpoint and actors (including dissidents), while writing more nuanced work in a foreign language for the world to read, are themselves a topic for discussion. The story of this new generation of Vietnamese legal scholars and their struggle to succeed in two often quite different contexts is a tale worth telling separate from the fine articles presented here.