

AN INVESTIGATION AND ANALYSIS ON THE FEATURES OF THE LEGAL SYSTEM IN THE VIETNAMESE SOCIALIST STATE GOVERNED BY THE RULE OF LAW

UMA INVESTIGAÇÃO E ANÁLISE SOBRE AS CARACTERÍSTICAS DO SISTEMA JURÍDICO NO ESTADO SOCIALISTA DO VIETNÃ GOVERNADO PELO ESTADO DE DIREITO

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Abstract: The rule of law is a prerequisite to establish a stringent and effective legal system. Since recognizing the orientation to change the Vietnamese State into the Vietnamese Socialist State Governed by the Rule of Law in 2001, in the midst of industrialization and modernization, Vietnam has witnessed the most active period of making laws ever in the history since the foundation of the country in 1945. Although having a diverse legal system, there has not been a rule of law required for an industrialised society. Therefore, a far-sighted vision is needed in order to build a legal system based on the rule of law, which ensures justice for everyone in the society.

Keywords: Vietnam. rule of law. legal system.

Resumo: O estado de direito é um pré-requisito para estabelecer um sistema jurídico rigoroso e eficaz. Desde que reconheceu a orientação de transformar o Estado vietnamita em Estado socialista vietnamita regido pela lei em 2001, em meio à industrialização e modernização, o Vietnã testemunhou o período mais ativo de criação de leis da história desde a fundação do país em 1945. Apesar de

ter um sistema jurídico diversificado, não houve um estado de direito exigido para uma sociedade industrializada. Portanto, é necessária uma visão de longo prazo para a construção de um sistema jurídico baseado no Estado de Direito, que garanta justiça para todos na sociedade.

Palavras-chave: Vietnã. estado de direito. sistema jurídico.

1. Introduction

Building a legal system must be together with the rule of law. The economist Milton Friedman, after reviewing the transformation from the centrally planned economy to the market economy in more than a decade of the former socialist countries, cautioned: *“You can describe that in three words: privatize, privatize, privatize. But I was wrong... It turns out that the rule of law is probably more basic than privatization”* (Milton F., 2002). Aware that the reform of the institution is necessary for the transformation into a market economy, instead of urging the privatisation, sponsors have chosen to support the building of the state, other bases for nation administration, and the rule of law.

In Vietnam, the external urges and supports mingle with the internal efforts to build a social order controlled by the law. Since amending the Constitution and recognising the orientation to develop the Vietnamese State into the Vietnamese Socialist State Governed by the Rule of Law in 2001, for the last two decades, the country has witnessed very strong period of make laws, perhaps the strongest ever since the foundation of the country in 1945. Vietnam has also begun building the radical bases for an industrialised society by frequently introducing several massive laws which have been influenced by the Western world (Pham D. N., 2011).

The introduction of laws shows the great efforts to establish the rule of law, where the right to property, the freedom of contracts, and the access to justice of the people are ensured, and the freedom of competition is based on reliable code of conduct. These are the fundamental differences between an industrialised country and an underdeveloped country where laws are so many but under the control of a small privileged, crony population, and, thus, all the nation resources are controlled by these interest groups. Then, the legal system becomes a tool to protect the powerful, and prevents people from accessing justice, resources, and opportunities. Given that, like countless other developing countries, Vietnam would have refineries and high-speed rails, but would not have the rule of law required for an industrialised society. Therefore, the advice by M. Friedman should be carefully considered so as to build the legal system of Vietnam with a further-sighted vision, which means establishing the rule of law, ensuring justice for everyone.

2. Review of Literature and Methodologies

2.1. Review of Literature

In Legal Science, the term “rule of law” is considered the core to each society in order to protect individuals from the autocracy of the governments and to allow individuals their dignity.

There are many definitions of “rule of law”. The Concise Australian Legal Dictionary defines “Rule of law” as a principle which everyone, and all the organisations, including governments, have to apply together with laws. The Black Law Dictionary defines “Rule of law” as an absolute state where laws are imposed on all citizens regardless of their power (Nguyen X. T., 2010). Therefore, the term “rule of law” refers to a “mechanism to organise”, according to which the society is administrated on the basis of respecting laws.

Richard H. Fallon (1997) in his article titled “*The Rule of Law as a Concept in Constitutional Discourse*” has summarised “five fundamental elements of rule of law” (Richard H. F., 1997):

“The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.”

“The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part”.

“The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.”

“The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.”

“The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.”

The term “The socialist rule of law” is newly formulated in the fields of politics and legal science in the context where Vietnam is making efforts to complete the theories on building and completing the socialist state governed by the rule of law of the people, by the people, and for the people. The term “rule of law” or “the socialist rule of law” mostly appear in the documents by the Communist Party of Vietnam as a constituent of the theories and the orientation to build and complete the socialist state governed by the rule of law (Nguyen X. T., 2010). Nevertheless, all the contents in the documents with the term “the socialist rule of law” clearly display the five fundamental elements as mentioned above.

Resolution no. 48-NQ/TW dated on 24/5/2005 by the Political Bureau recognised *“The socialist rule of law principlee are gradually appreciated and are taking effects”*. The Resolution is to state the goal of establishing the Vietnamese Socialist State Governed by the Rule of Law.

The Documents of the 11th National Congress of the Communist Party of Vietnam required that *“The organization and operation of the Government should continue to be renewed in the direction of building a unified, transparent, clean, strong, effective, and efficient administration; with compact organization; increasing democracy and the rule of law in the administration of the Government; improving the capacity to forecast, respond, and promptly solve new problems”* (the Communist Party of Vietnam, 2011). The Documents of the 12th National Congress of the Communist Party of Vietnam, in the section of *“Establishing and completing the Socialist State Governed by the Rule of Law”* required the Government to *“perfect the rule of law democratic administrative institution, stipulate the responsibilities and accountability mechanisms of state agencies; and drastically reduce and abolish administrative procedures that cause troubles for people and businesses”* (the Communist Party of Vietnam, 2016).

The theory of construction and improvement of the Vietnamese Socialist State Governed by the rule of law has been continuously oriented and developed by Vietnam through the Resolutions of the National Congress of the Communist Party of Vietnam (terms IX, X, XI, XII), and the Party Platform. Therefore, the first definition states that the content of "the socialist rule of law" is "the principle of the socialist state governed by the rule of law". Therefore, the content of the socialist rule of law includes all the requirements and principles of the Vietnamese Socialist State Governed by the rule of law¹ as usually used in the Summary Report of 30 innovations of the Communist Party of Vietnam.

According to the second definition, it can be affirmed that the Legislation, the Rule of Law and the State Governed by the Rule of Law are the concepts in the fields of politics and legal science but do not share the same contents. The terminology *“The state governed by the rule of law”* used in Vietnam is a concept to refer to a state that administrates society by law and administrates itself using law. The state apparatus puts itself under the law. Thus, the rule of law is a concept with a broader scope of regulation, not only a model of state organization but also a model of social organization. The rule of law can apply to both public life and civil society. In particular, the rule of law in civil society is the power of law, and citizens are the subjects who use the power of law to protect their rights and freedoms. According to the rule of law, public authority is subject to the control of the law. Thus, the concept of rule of law has broader and richer connotations than the concept of "the socialist state governed by the rule of law" (Nguyen X. T., 2010).

The socialist rule of law requires the absolute rule of law as the limitation of the influence of arbitrary use of power; the establishment of a synchronous, unified, feasible, public and transparent legal system; and the ensurance of integrity in the adjudication process, and rigorous and reasonable procedural principles in order to find out the truth.

2.2. Methodologies

The article employs two common methods in legal science research: (1) Secondary data analysis method; and (2) Comparative method.

The secondary data analysis method is based on the analysis of available documents and data to provide the correct analysis and perception of events and phenomena. The comparative method helps to compare and contrast changes in legal regulations along with economic, political, and social changes to draw valuable and valid conclusions.

The combination of these two methods helps to bring out the features, strengths, and shortcomings of the Vietnamese legal system as well as suggests suggestions for solving outstanding problems of the legal system.

3. A discussion on the features and existing drawbacks of the legal system in the Vietnamese Socialist State Governed by the Rule of Law

A legal system of diverse sources

As a system, laws can be considered as consisting of many legal provisions put in orders, sometimes too rigidly, in legal institutions, which, depending on the classification, form a multitude of fields of laws. According to the theory of socialist legislation from the Soviet era, the legal system is divided into branches of law, sometimes corresponding to the sectors of the administrative apparatus. In that view, the Communist Party and the State see law as a tool to manage the society. After two decades of reform in Vietnam, despite many innovations, in the general understanding on the legal system of Vietnamese people, the emphasis is still laid on the system of provisions recognised in legislative documents. The total number of types of documents under the Law on Promulgation of Legislative Documents in 2020 has reached 15.

If we consider the legal system as just one element in the rule of law, aiming at the respect of laws, it seems to be incomplete. In the activity of discovering the law in social life, the unreasonable old provisions are eliminated, replaced by newer ones. The legal system is therefore not static, but dynamic, non-stop, and reformist. The legal system should always realise the new and gradually comply with the mentioned rules to be more in line with the justice of nature. The

parties contributing to the legal system, therefore, in addition to legal documents, are also the researchers' theory of jurisprudence, and the fairness that the judge feels. These diverse sources of laws all make up a stable legal system whose origin is from natural laws.

In addition, if the law is seen as a social institution, recording the standards of behavior in place of humans, then the legal system also includes institutions that contribute to law enforcement, such as law enforcement agencies to ensure law enforcement, and agencies to ensure and maintain justice in the enforcement of laws. Then, building a legal system could not be separated from building a court system, investigating agencies, prosecuting agencies and other judicial support agencies. If this is the case, Vietnam has witnessed a decade of formulating legal documents with a steadily increasing rate, but the "introduction" of independent courts and law enforcement institutions is still unsatisfactory. The debate over cases unsatisfactorily settled by the highest level of court and over the National Assembly's supervision of court judgments, and the vague regressions in the reform of the people's procuracy prove indecisive and not determined enough to build a legal system which is independent and strong enough. In relation to the strength of the Government, Vietnam's court is in a much more modest position.

Legal culture and ideology

It is not possible to establish a rule of law in a poor country like Vietnam by relying on advice from rich countries, by borrowing money from abroad to make laws, or introducing law enforcement institutions. Effective state and law in the words of Max Weber needed for an industrialised country are scarce institutions, appearing and earning success only in certain parts of the world, and under some certain conditions. The rule of law requires certain conditions to appear and to be sustainably maintained. Will these things happen in Vietnam in the next decades?

In the Eastern feudal legal tradition as well as in the thinking of the socialist legislation, people consider law as a tool of the state to establish social order and discipline at the will of the ruling persons. Over the last decade, Vietnam has literally adopted significant legal documents needed for the Government to administrate the country. However, the Vietnam's view of "the Socialist State Governed by the Rule of Law" focuses too much on "imposing laws", and Vietnamese people still respect the State, have tried to adopt new, convenient and appropriate administrative tools for the state to run the society, but the concept of "rule of law" may still be far away.

Vietnamese legal culture is seen as a historic marriage between feudal legal ideology and the socialist legal concept. The pure concept of using law as a tool for the State to administrate the society may prove a significant impediment to the introduction of the rule of law, where all citizens and all interest groups have equal opportunity to access resources and power within the country, if we do not have good solutions. Such equality of opportunities is based only on universal notions such as citizens or businesses, regardless of origins, backgrounds, religions, personal relationships, or ownerships (Richard H. F., 1997).

From the point of view that there is a need for laws as a management tool, it is not surprising that the Vietnamese Government has been a strong driving force behind the entire law-making process. The Government has been behind all the great legislative achievements of the past two decades since the Government needs legislation to represent the policies governing the country. The Government has become strong, in possession of great powers to administrate the country, all of which are legalized by laws. But without an appropriate centralisation of power in the elected bodies and the courts, there will be no forces powerful enough to monitor and enforce the accountability of the Government. The lack of accountability is one of the obvious weaknesses, showing that an increasingly dense legal system is needed, but not necessarily enough for the rule of law.

Weaknesses in the law enforcement

The two authors, Mr. and Mrs. Seidman, when writing the book *Assessing a bil in terms of public interest* (WB, 2003) offered very much discussion that the weakness of the elected body and the lack of multi-faceted debate culture on political choices on national policies can be the main causes of legislations with unclear policy purposes, of mismatching and incorrect state interventions, and of limited capability of law enforcement (Ann S. et al, 2003). Thus, a system of legal documents has increased rapidly in number, but been inconsistent in purposes and policy of intervention, has deprived itself of the opportunity to become feasible before being actually enforced. The capacity to reflect on policies of the whole society and the ability of the elected bodies to say "no" to unreasonable policy choices of the Government, as early as the proposing and drafting stages, may be a key point to make the legal system feasible.

4. Possible suggestions

After a law is enacted, it must be guaranteed to be enforced by law enforcement bodies. This is a point that has not been discussed much in recent years. In addition to the proposal to gradually disable the policy-making function of the Government, cabinet, and ministers, there is a need for the mindset to build a professional, bureaucratic administrative system – which means strict adherence to standards procedures of an organization and proven law enforcement capability.

Separating working politicians from professional administrative officials is perhaps a necessary condition for the establishment of effective law enforcement institutions. However, as Fukuyama (2004) admits, effective public administrative institutions are as mysterious as black holes in the internal organization of companies. People can quickly adopt models of such institutions as the Vietnam Competition Authority or the State Audit, but whether these enforcement institutions can work effectively is a tricky question (Pham. D. N., 2011).

5. Conclusion

Over the next decade, whether Vietnam can succeed in building the rule of law needed for the industrialisation or not significantly depends on the quality of its enforcement institutions. A legal system with too many provisions built in the past decade means very little, even in the next decade, without effective law enforcement institutions. Separating the policy making function of the Government from the law enforcement function of the administrative apparatus, and formulating a team of diligent, professional and highly legally disciplined civil servants may be the priorities in policies associated with the development of the legal system.

It is said that "a man enslaved to the law is a man of freedom" (Pham D. N., 2011). In the rule of law, where laws are transparent, predictable, and reliable, people will be less afraid of the influence by power, background, and money. That justice is ensured for anyone may still be a dream, in both rich and poor countries. However, if the foundations for justice are not laid soon, ten years will go by very quickly. The legal system that helps the state administrate the society may expand rapidly, but our nation will not go any further on the track to the rule of law. Controlling the State and enhancing the accountability of national governing institutions, especially that of the Government and the executive bodies, should be the focus in relation to the development of the legal system in Vietnam for the next decade.

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