

# **Vietnam's Continuing Legal Reform: Gaining Control Over the Courts**

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## **Abstract**

*While legal reform has been an integral part of Vietnam's economic reform program since the start, the story of Vietnam's most recent effort at reform of the courts and the prosecutors office begins with the Nam Cam scandal which reached high into the ranks of the public prosecutor's office, the police and the courts. The public reaction to the corruption scandal created the political impetus to quickly push the next step of reforms. The most recent reforms seek to centralize the administration*

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*and management of the courts, reign in the power of the prosecutors and police and create accountability within the legal system. This paper outlines those reforms and highlights some of the outstanding issues related to future further reform efforts.*

## I. INTRODUCTION

In October 2000, three men walked into the Z Café in Ho Chi Minh City and murdered Dung Ha, a notorious gangster from northern Hai Phong. Truong Van Cam (Nam Cam), godfather of organized crime in southern Ho Chi Minh City, ordered the hit to prevent Dung Ha from making in roads into Nam Cam's traditional territory. Nam Cam, the godfather of Ho Chi Minh City, had created network of gambling and prostitution rings with the protection of local police and local courts; Nam Cam's "friends," however, occupied positions in the upper echelons of the Vietnamese legal system.<sup>1</sup> Nam Cam's subsequent arrest in Ho Chi Minh City by central government authorities in December 2001 uncovered corruption high into the ranks of the police, the public prosecutor's office, as well as the courts. The arrests of the a former Chief Prosecutor, a sitting Deputy Chief Prosecutor, a Vice Minister of the Ministry of Public Security and the Deputy Chief of Police of Ho Chi Minh City highlighted the degree the courts, the public prosecutor's office, and the police had become compromised by corruption.<sup>2</sup>

The implication of the scandal—that the entire justice system is corrupt—set the tone for Vietnam Communist Party (VCP)

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<sup>1</sup> See Margot Cohen, *Murder and Mystery*, FAR E. ECON. REV., July 4, 2002 at 56 (describing in detail the Dung Ha murder and the personalities involved).

<sup>2</sup> See *Canh cao Mot Kiem sat Vien Lien quan Den Vu Nam Cam [Punishment for a Prosecutor Linked to Nam Cam Scandal]*, VNEXPRESS, Sept. 20, 2002, <http://vnexpress.net/Vietnam/Phap-luat/2002/09/3B9C0633/> (last visited Sept. 26, 2002); *Top State Prosecutor Exits Due to Criminal Gang Links*, VIETNAM NEWS, Sept. 11, 2002, <http://vietnamnews.vnagency.com.vn/2002-09/11/Stories/12.htm> (last visited Sept. 17, 2002); *Vu Nam Cam: De nghi Ky luat Pho Giam doc Cong an TP HCM [Nam Cam Affair: Punish the Deputy Director of HCMC Police]*, VNEXPRESS, Sept. 7, 2002, <http://vnexpress.net/Vietnam/Phap-luat/2002/09/3B9BFF58/> (last visited Sept. 17, 2002); *Kiem diem Vien Truong VKSND, Quan 4 [Self-Criticism of Chief Prosecutor of District 4]*, VNEXPRESS, July 15, 2002, <http://vnexpress.net/Vietnam/Phap-luat/2002/07/3B9BE280> (last visited Sept. 17, 2002); and *Vietnam Da Xuat hien Toi pham co To Chuc o Trinh do Cao [High-Level Organized Crime Makes Its Appearance in Vietnam]*, VNEXPRESS, June 15, 2002, <http://vnexpress.net/Vietnam/Phap-luat/2002/06/3B9BD2B6/> (last visited Sept. 17, 2002).

pronouncements on system reforms, as well as public commentary by party officials. The VCP issued instructions to the normally docile National Assembly to approve a controversial reform of administration of the court system and the public prosecutor's office during the spring of 2002.<sup>3</sup> This paper highlights the changes in the court system in light of the tension between centralization and decentralization within the legal system as well as the perceived need to regain control over some portions of the system that were out of control of the central government.<sup>4</sup>

The most recent round of reform (2002) was, in fact, two different sets of reforms. The first centralized authority over the court system and personnel in the Supreme People's Court and away from local governments.<sup>5</sup> The second reform reigned in the broad ranging authorities of the public prosecutor's office by eliminating some of its broader

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<sup>3</sup> Nghi Quyet 08 cua Bo Chinh tri Ve Mot so Nhiem vu Trong Cong Tac Tu phap Trong Thoi gian toi [Politburo Resolution No. 8 On A Number of Responsibilities of the Legal System in the Near Future], Communist Party of Vietnam, 08-NQ/TW, Jan. 2, 2002 [hereinafter Politburo Resolution No. 8]. See also Vo Chi Cong, *Thay Gi Ve Cong tac To chuc va Quan ly Can bo Qua Vu an Truong Van Cam* [What Can Be Seen About Organizing and Managing Cadres Through the Truong Van Cam Affair], in TAP CHI CONG SAN Sept. 2002, [http://www.cpv.org.vn/tccs/262002/03\\_vochicong.htm](http://www.cpv.org.vn/tccs/262002/03_vochicong.htm) (last visited Sept. 27, 2002).

<sup>4</sup> The reform path being pursued by the government of Vietnam with respect to the courts is consistent with a "thin," or procedural, rule of law as applied by Professor Randall Peerenboom to China. Peerenboom described thin rule of law as theory that "stresses the formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic. . . . In contrast to thin versions, thick or substantive conceptions begin with the basic elements of a thin conception. Thick versions then incorporate elements of political morality such as particular economic arrangements (free market capitalism, central planning, and so on), forms of government (democratic, single party socialist, and so on) or conceptions of human rights (liberal, communitarian, collectivist, "Asian Values," and so on)." Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule Of Law In China*, 23 MICH. J. INT'L L. 471, 472 (2002).

<sup>5</sup> Luat To chuc Toa an Nhan dan [2002 Law on the Organization of the People's Court], Law No. 33/2002/QH10 (Apr. 2, 2002) [hereinafter 2002 Law on the Organization of the People's Court]. Many of the issues facing the courts in Vietnam are not dissimilar from the challenges facing the legal system in the People's Republic of China. For a comprehensive description of court reform and the legal system in the PRC, see generally STANLEY B. LUBMAN, *BIRD IN A CAGE—LEGAL REFORM IN CHINA AFTER MAO* (1999). See also RONALD C. BROWN, *UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS* (1997); Peter H. Come, *Creation and Application of Law in the PRC*, 50 AM. J. COMP. L. 369 (2002).

investigatory and oversight powers and emphasizing its role of police oversight.<sup>6</sup> Although the ultimate efficacy of these reforms will not be known for some time, they mark an important step towards independence of the judiciary and judicial system.

This article begins with a brief overview of Vietnam's legal structures and institutions before the most recent reform. The article then provides an overview of the central institutional structures of Vietnam's legal system, including the Supreme People's Court, the People's Office of Supervision and Control,<sup>7</sup> and the Ministry of Justice. This overview also includes a discussion of institutional competition between central and provincial governmental institutions. Finally, the paper turns to the recent reforms of the court system and the Office of Supervision and Control and the potential impacts that reorganization may have on issues such as institutional competition, independence of the judiciary and the relationship between the judicial system and the role of the Communist Party of Vietnam.

## II. VIETNAM'S LEGAL SYSTEM: AFTER THE 1992 REFORMS<sup>8</sup>

Vietnam's current attempts to centralize control over the legal system are actually rooted in a previous reform and reorganization that

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<sup>6</sup> *Luat To chuc Vien Kiem sat Nhan dan* [Law on Organization of the People's Office of Supervision and Control], Law No. 34/2002/QH10 (Apr. 2, 2002) [hereinafter April 2002 Law on the Organization of the People's Office of Supervision and Control]. Generally, the Vietnamese governmental structure mimics that of the People's Republic of China. Both have a system that vests all formal power with the National Assembly, which then delegates that authority to three separate branches, including the government, the courts and the procuracy. Unlike in Vietnam, organization of the Supreme People's Procuratorate in China is done at the provincial level. See CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA ch. VII, art. 130 (April 12, 1988). The highly centralized nature of the organization of the People's Office of Supervision and Control in Vietnam is similar to that of the Directorate of Public Prosecutions in Russia. See CONSTITUTION OF THE RUSSIAN FEDERATION ch. 7, at 129 (December 25, 1993). Thanks to Erik Jensen for pointing this out.

<sup>7</sup> The People's Office of Supervision and Control is the equivalent of the People's Prosecutor or the People's Procuracy.

<sup>8</sup> For a more general description of the current state of Vietnam's legal system, including descriptive data on court activity, see Brian J.M. Quinn, *Legal Reform and Its Context in Vietnam*, 15 COLUMBIA J. ASIAN L. 219 (2002).

took place in 1992.<sup>9</sup> Prior to that point, the court system was organized along the Soviet lines, with judges and prosecutors elected at the local level.<sup>10</sup> Rather than having a national system of vertically-integrated courts and prosecutors, prior to 1992 the court system was organized principally at the local level around the concept of the administrative unit.<sup>11</sup> During the period of central planning, law and legal rules were de-emphasized relative to the five-year plan and arbitrary bureaucratic power. As a result, the courts were highly decentralized at the lowest administration and production levels.<sup>12</sup> In practice, judges and courts prior to the beginning of economic reform were highly parochial, primarily focused on maintaining good relations with local Party cadres, leaving concern for the quality of legal opinions a distant second place.<sup>13</sup>

Efficient markets require information and predictability about the underlying “rules of the game.” The bureaucratic structure created under central planning placed a premium on arbitrariness and non-disclosure of information. When Vietnam embarked on its program of market-oriented economic reform in 1986, the shortcomings of its socialist legal system became painfully obvious. Where previously a parochial and political legal system seemed appropriate, in the market economy such an organizational strategy began to look increasingly like a hindrance to growth and investment.

In an effort to facilitate market reforms and improve Vietnam’s economic climate, the National Assembly initiated sweeping reforms to the Vietnamese legal system. The first laws passed related to government organization, principally the organization of the courts and the People’s

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<sup>9</sup> *Luat To Chuc Toa An Nhan Dan* [Law on the Organization of the People’s Courts], Law No. 02L/CTN (Oct. 6, 1992) [hereinafter 1992 Law on the Organization of the People’s Courts].

<sup>10</sup> Bui Ngoc Son, *Tu Tuong Ho Chi Minh ve To chuc Toa an va Y nghia Hien nay* [Ho Chi Minh Thought on Organization of the Courts and its Present Day Meaning], *NGHIEN CUU NHA NUOC*, Feb. 2002, at 25.

<sup>11</sup> *Id.* at 24.

<sup>12</sup> During the ten-year period prior to the beginning of economic reform (1976-1986), the Vietnamese National Assembly passed only 10 laws and 15 ordinances. An ordinance has the effect of a law, but is not approved by the National Assembly. Most of legal documents and organization done during this period came in the form of Communist Party directives and decrees from the Council of Ministers. See Pham Duy Nghia, *VIETNAMESE BUSINESS LAW IN TRANSITION* (The Gioi, 2002) at 41.

<sup>13</sup> See Bui Ngoc Son, *supra* note 10, at 24 (describing the election process as a mere formality (*rat hình thức*) and the judges produced by the process as unable to guarantee their substantive knowledge of the law and lacking moral fiber).

Office of Supervision and Control (State Prosecutor).<sup>14</sup> The 1992 government reorganization created a government with three separate branches, the Government, the Supreme People's Court, and the People's Office of Supervision and Control, with all three deriving their power from the National Assembly.<sup>15</sup>

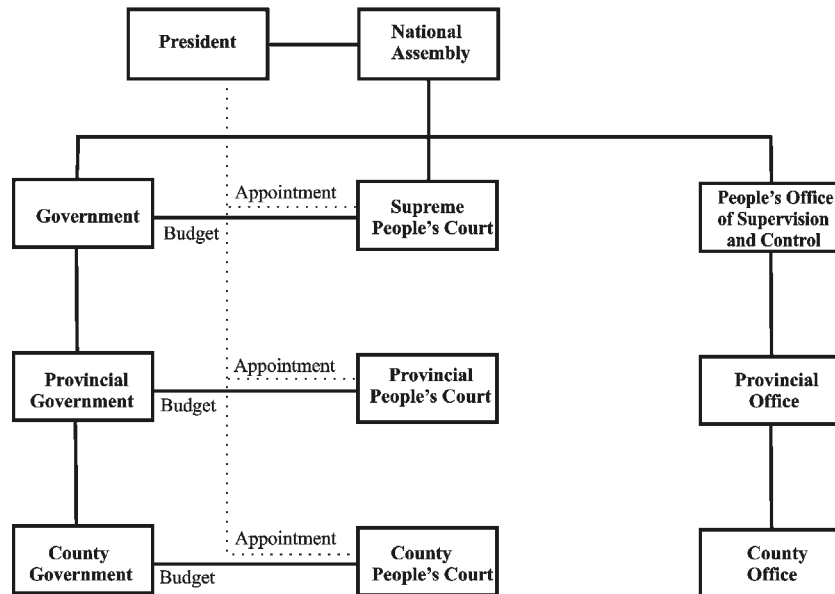
One of the hallmarks of this first reform effort was to begin a process of centralization of authority over a legal system which had previously been entirely under local control. For example, the Office of State Prosecutor was established in a vertically integrated structure. Following the 1992 reform, the Chief Prosecutor had direct control over all of the prosecutors in the Office of Supervision and Control at central, provincial and local levels. Controls over the courts remained more decentralized, however, with local governments maintaining inordinate control over their operations and management. Unlike his counter-part in the State Prosecutor's Office, the Chief Judge of Supreme People's Court had much less control over the selection of judges and operation of the provincial and local courts, which were for the most part left in the control of provincial and local government.

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<sup>14</sup> The first five pieces of 1992 legislation included: (1) the Constitution of 1992; (2) Law on the Organization of the National Assembly; (3) Law on the Organization of the Government; (4) Law on the Organization of the People's Courts; and (5) the Law on the Organization of the People's Office of Supervision and Control. CAC LUAT CUA NUOC CONG HOA XA HOI CHU NGHIA VIET NAM [LAWS OF THE SOCIALIST REPUBLIC OF VIETNAM] 1833 (NXB Chinh Tri Quoc Gia, 2000).

<sup>15</sup> Observers will note that Vietnam's Communist Party maintains a shadow structure that permeates all three branches of government as well as the National Assembly. The Party is able to exert its authority over the country through its manipulation of the formal structures. The Party and its role in exerting its power is an important undercurrent throughout the consideration of the reform of Vietnam's legal system and creates a tension that will be investigated at greater length later in this paper. For description of the powers of the National Assembly see HIEN PHAP NUOC CONG HOA XA HOI CHU NGHIA VIET NAM NAM 1992 [1992 CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIET NAM], 68 LCT/HDNN8, ch. 6 (Apr. 18, 1992) [hereinafter 1992 CONSTITUTION].

### Administration of Vietnam's Legal System



#### A. 1992: First Attempt to Centralize Authority Over the Courts

The 1992 reforms began a slow process of centralizing control over the local courts, but still left a large degree of control over the operation of the court systems in the hands of local officials. The continued decentralized nature of the courts reinforced the influence of local governments over the judiciary, thereby perpetuating some of the negative parochial aspects that the 1992 reforms had intended to address.

While the budgeting of the Supreme People's Court is undertaken directly by the National Assembly, the Supreme People's Court had limited budgetary authority over its provincial and local courts. Article 16 of the 1992 organizational law left the day-to-day operations of the courts in the hands of the Ministry of Justice.<sup>16</sup> With Vietnam's decentralized

<sup>16</sup> Article 16 provides:

Management of Provincial People's Courts from an organizational standpoint will be guaranteed by the Ministry of Justice in conjunction with the Chief Justice of the Supreme People's Court. Regulations relating to the relationship between the Ministry of Justice and Chief

bureaucratic system, this meant that local government assumed responsibility for administrative management of the courts and non-judicial personnel.<sup>17</sup> As a result, while local and provincial courts were, in principle, independent of local government, in practice they relied on local governments for access to the financial resources required to undertake their day-to-day activities.

After the 1992 reorganization, judges were no longer locally elected. The National Assembly appointed the Chief Judge at the Supreme People's Court in Hanoi. All other inferior judges, on the other hand, received their appointments from the President.<sup>18</sup> These appointments were for a period of five years, after which a sitting judge had to go through a reappointment process.<sup>19</sup> Pulling the authority over appointments away from local governments, demonstrates the clear intent of the 1992 reorganization was to begin to professionalize judges and the judiciary.<sup>20</sup>

Bureaucratic inertia, however, quickly reversed the key component of the 1992 reorganization. In a recent interview, President Tran Duc Luong admitted that his office was too overloaded with work and lacked the staff to adequately nominate and review the work of all of the nation's

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Justice of the Supreme People's Court will be promulgated by the Executive Committee of the National Assembly.

1992 Law on the Organization of the People's Court, *supra* note 9, ch.1, art. 16.

<sup>17</sup> Budgetary authority for all government operations at the provincial level, including tasks assigned by the central government, are left to the provincial government. *See* *Luat Ngan sach Nha nuoc* [Law on the Government Budget], Law No. 47 L/CTN, ch. 3, art. 31 (Apr. 3, 1996).

<sup>18</sup> The President is elected by the National Assembly and has a mostly ceremonial function as head of state. His power to appoint inferior judges is one of the few constitutional powers that he has. *See* 1992 CONSTITUTION, *supra* note 15, ch. 7, art. 102, § 8.

<sup>19</sup> *Id.* ch. 3, art. 19.

<sup>20</sup> Article 38 of the 1992 organization reform assigned responsibility over sitting judges in the following manner:

The Chief Justice of the Supreme People's Court is elected by the National Assembly and may be removed by them on the petition of the President. ... Deputy Justices and Judges of the Supreme People's Court, Chief Judges and Deputy Chief Judges, and Judges of the Provincial, County, Village, and City levels as well as military judges serve at the pleasure of the President.

1992 Law on the Organization of the People's Court, *supra* note 9, ch. 5, art. 38.

judges.<sup>21</sup> As a result, local governments were granted the authority to select and appoint judges, who would then be approved by the President. The President's role was reduced to rubber-stamping provincial and local appointments.

At the provincial level, the Minister of Justice, on the advice of the local director of the Department of Justice, was responsible for nominating judges to the President.<sup>22</sup> At the district and county levels, the head of provincial local Department of Justice was responsible for nominating judges to the President.<sup>23</sup> Provincial and local departments typically maintain only a formal reporting relationship with their parent Ministry. Personnel and budgetary matters lie largely within the prerogative of the provincial governments through their Departments of Justice.<sup>24</sup> Thus, the effect of the decision to centralize the selection process of judges at Presidential level was ultimately to reconsolidate local power over the judiciary.

While the local debate regarding the courts makes much of the constitutional independence of the Supreme People's Court from the Government at the national level, there is little evidence that judges see themselves as independent from the government or its apparatus.<sup>25</sup> Rather

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<sup>21</sup> Ba Tuan, *De Chanh an TANDTC Co Dieu kien Bo nhien Tham phan Duoc Xac thuc Hon* [Allowing the Chief Justice of the Supreme People's Court the Ability to Nominate Judges Will Be More Realistic], PHAP LUAT, Mar. 19, 2002, at 2.

<sup>22</sup> Phap Lenh Ve Tham Phan va Hoi Tham Toa An Nhan Dan [Ordinance Regarding Judges and the People's Jury], Law No. 16 L/CTN, ch. 3, art. 22 (May 26, 1993) [hereinafter 1993 Ordinance Regarding Judges and the People's Jury].

<sup>23</sup> *Id.*

<sup>24</sup> A 1993 resolution directs that the budgetary and administrative authority over local courts will lie with the Ministry of Justice and its provincial Departments of Justice. Nghi Dinh: Ve Chuc nang, Nhiem vu Quyen han Ve To chuc Bo may cua Bo Tu phap [Resolution: Regarding Responsibilities, Duties and Limitations of the Organization of the Ministry of Justice], Office of the Government, 38-CP, June 4, 1993.

<sup>25</sup> Tri argues that particularly at the local level, judges tend to identify their institutional loyalties as lying with the local government. Tri notes that this constitutional blurring influences outcomes and becomes especially troublesome in the Administrative Courts where judges are required to review alleged abuses of power by local officials. Vu Tien Tri, *Mot so Van de Lien quan Den Viec Sua doi, Bo sung Luat To chuc Toa an Nhan dan Nam 1992* [A Number of Issues Related to Amending and Revising the 1992 Law on the Organization of the People's Courts], NHA NUOC VA PHAP LUAT at 24 (Feb. 2002).

Other local commentators have noted that the rapid development of new laws and government regulations and the secretive nature of government often leaves judges in the dark as to the current status of the law. As a result, when faced with unfamiliar cases

than strengthening the independence of the judiciary *vis a vis* local governments, the 1992 reorganization simply reinforced the power of local governments over the judiciary. While the reform was intended to bring local courts under central control, there remained many potential levers of influence which local government could use to affect the outcome of proceedings. Indeed, it seems to be well understood locally that the courts would not be independent of local political control, but rather would serve local political needs.<sup>26</sup>

The most important lever of control available to local governments was clearly the power over reappointments. Judges are very sensitive to the precariousness of their positions and their need for reappointment. At the end of the five-year appointment, each judge is required to submit a petition for re-employment.<sup>27</sup> A committee, including representatives of various government departments, the People's Council, and the People's Court, reviews the petitions and makes recommendations to the People's Council, which then reappoints judges for an additional five year term.<sup>28</sup> As in most other decision-making bodies in Vietnam, the Reappointment Committee operates by consensus.<sup>29</sup> This system creates ample

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and new situations, judges tend to defer to the provincial or national governments, often seeking an informal opinion on the state of the law. Tran Quoc, *Please All Rise for the Honourable Judge*, VIETNAM INVESTMENT REV., Nov. 9, 1998 (Vietnam Investment Database CD-ROM, rel. Aug. 2001) [hereinafter Quoc, *Please All Rise*].

<sup>26</sup> In answering questions before the National Assembly Chief Judge Trinh Hong Duong complained that there were not sufficient guarantees in the system to ensure that judges and jurors might carry out trials independently and in accordance with the law. The result he complained was that trials were being carried out in a haphazard manner [*"Xu the nao, cung duoc."*] Khanh Linh, *To chuc va Hoat dong Cua Toa an Nhan dan* [Organization and Operation of the People's Courts], NGHIEN CUU LAP PHAP at 8 (Mar. 2002). Also, during an interview, the Communist Party Chief of Thanh Hoa Province made it clear that instructions to the judiciary for pursuing a corruption case originated from his office. *Thanh Hoa Co Kien Quyet Xu Ly Vu An Kinh Te Lon Nhat Tu Truoc Toi Nay Cua Tinh?* [Can Thanh Hoa Province Forcefully Prosecute Its Largest Ever Economic Crime?], PHAP LUAT, July 16, 2001 at 1.

<sup>27</sup> Interview with Phan Tanh, Deputy Chief Judge, HCMC People's Court, in Ho Chi Minh City, Vietnam (July 31, 2001).

<sup>28</sup> By statute, the committee is composed of the Director of the Provincial Department of Justice (Chair), two representatives of the Provincial People's Court, a representative of the Provincial Fatherland Front (Communist Party Front organization), and a representative of the local Lawyers' Association. See 1993 Ordinance Regarding Judges and the People's Jury, *supra* note 22, ch. 3, art. 23.

<sup>29</sup> Interview with Phan Tanh, Deputy Chief Judge, HCMC People's Court, in Ho Chi Minh City, Vietnam (July 31, 2001).

opportunity for local government officials to stop appointments should they feel the need to discipline errant judges. As a result, there is a large incentive for local and provincial judges to be sensitive to the needs of local government officials.

Potentially as devastating to sitting judges is the power of local Departments of Justice, through the Ministry of Justice, to have sitting judges transferred to other geographic regions of the country.<sup>30</sup> Vietnamese officials are notorious for eschewing postings away from their home provinces. The prospect of being shipped to a far-away province as a penalty for resisting local officials is probably sufficient to keep the potentially errant judge in line.<sup>31</sup>

Local Communist Party Committees and provincial governments have other levers of influence over the outcomes of cases of interest.<sup>32</sup> Judges serve together with “citizen jurors” on a panel, consisting of one professional judge and two jurors for criminal trials.<sup>33</sup> Judges together with the “citizen jurors,” must decide cases based upon a majority vote.<sup>34</sup> “Citizen jurors” are selected by The Fatherland Front, a Communist Party

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<sup>30</sup> The Minister of Justice has the authority to order transfers of sitting judges to any locality in the country. *Id.* ch. 2, art. 15.

<sup>31</sup> While the threat of transfer exists under the provincial system, there is no reason to think that in the alternative, where a central judiciary is responsible for assignments, that a similar transfer threat would not also exist. Notably, the national government is now considering the institution of a national civil service system that would require government officials to rotate throughout the country rather than stay in one province for their entire careers. *See Party to Renew Structure, Discipline and Personnel*, VIETNAM NEWS, Aug. 26, 2002), available at <http://vietnamnews.vnagency.com.vn/2002-08/24/Stories/04.htm> (last visited June 3, 2003).

<sup>32</sup> While most cases in the judicial system—marriage and family cases and run-of-the-mill commercial disputes—will elicit little or no interest from government or Party officials, there are certain types of cases that will attract an inordinate attention from the authorities. These cases include those political in nature or those corruption cases where government or Party organizations or individuals associated directly with the government or Party are implicated.

<sup>33</sup> In serious or complicated cases, the court sits with two judges and three “citizen jurors.” *See Sua doi, Bo sung Mot so Dieu Cua Bo Luat To tung Hinh su* [Amendments to the Law on Criminal Procedure], 5 L/CTN January 2, 1993, ch 18, art 160.

<sup>34</sup> Reliance on a majority vote is notable in that in almost all other aspects of Vietnamese government, consensus decision-making, rather than a simply majority, is the norm. *See Sua doi, Bo sung Mot so Dieu Cua Bo Luat To tung Hinh su* [Amendments to the Law on Criminal Procedure], 5 L/CTN January 2, 1993, ch 1, art 18.

front organization, to serve five-year terms.<sup>35</sup> During that five-year term, citizen jurors serve at the pleasure of the Fatherland Front and the People's Council.<sup>36</sup> The selection criteria for the Fatherland Front emphasize political loyalty and reliability. Control over a majority of votes of any particular judicial panel effectively ensured the local Communist Party authorities, through the Fatherland Front, the ability to control the outcomes in cases in which the Party had a strong interest.

In addition to situations where local governments exert indirect influence over judge panels, local governments often have the opportunity to affect more directly the outcome of cases in which they have an interest. The rapid development of laws and government regulations and the bureaucratic nature of governance often leave judges in the dark as to the current status of the law in Vietnam. As a result, when faced with unfamiliar cases and new situations, judges often defer to the interpretations of provincial officials, often overtly seeking their opinion on the state of the law.<sup>37</sup>

Finally, and most clearly, following the 1992 reforms, local governments maintained direct authority over budgets for local courts. Judges and court personnel remained directly financially dependent on the local directors of the Department of Justice. This financial dependence no doubt resulted in increased leverage over the operation of courts and the outcome of particular cases of interest.

While the 1992 court reorganization was intended to centralize authority over provincial and local courts, the hazy line of separation between local government and the judiciary ensured that local governments would remain in control over both the procedural and substantive operations of the courts.

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<sup>35</sup> 1992 Law on the Organization of the People's Court, *supra* note 9, ch. 5, art. 39.

<sup>36</sup> 1993 Ordinance Regarding Judges and the People's Jury, *supra* note 22, ch. 4, art. 30.

<sup>37</sup> Quoc, *Please All Rise*, *supra* note 25. Where the government is a mere disinterested observer, asking for the opinion of the government might not be so critical. Where the local government has an obvious stake in the outcome—for example, in a commercial dispute involving a provincially-owned state enterprise—its interpretation of the current state of the law becomes less credible.

B. *Centralization of the People's Office of Supervision and Control*

The People's Office of Supervision and Control ("People's Office"), like the Supreme People's Court, is administratively distinct from the Ministry of Justice and reports to the National Assembly on a semi-annual basis.<sup>38</sup> In codifying the People's Office of Supervision and Control with the bureaucracy, however, the National Assembly took a very different tack than it did with regard to the organization of the courts. Where the courts remained, for the most part decentralized, the People's Office was highly centralized. In part, this design was likely intended to assist the People's Office in carrying out its government oversight function.

The Ordinance on the People's Office of Supervision and Control seems to have been written with the intent of creating an institution independent of other branches of government. Article 7 of the Ordinance indicates that procurators at all levels are responsible only to the Chief Procurator through a unified (*thong nhat*) management system.<sup>39</sup> In Vietnam's bureaucratic parlance, a unified management structure indicates management over the provincial offices of the agency in question is not delegated to provincial and local governments. Article 13 of the Ordinance on the People's Office of Supervision and Control assigns to the Chief Procurator power over appointments of all procurators throughout the country.<sup>40</sup> Unlike the process for selecting judges, there is no role for local governments in the appointment process for a local procurator.<sup>41</sup> While provincial chief procurators are required to appear before Provincial People's Councils in order to report work progress and answer inquiries, provincial governments have no formal authority to remove procurators who do not heed their wishes.<sup>42</sup> Where the Supreme

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<sup>38</sup> 1992 CONSTITUTION, *supra* note 15, ch. X, art. 139.

<sup>39</sup> Phap lenh Ve Kiem sat Vien Vien Kiem sat Nhan dan [Ordinance on Procurators of the People's Office of Supervision and Control], No. 15 L/CTN (May 26, 1993), ch. 2, art. 7 [hereinafter Ordinance on Procurators].

<sup>40</sup> *Id.* ch 2, art 13.

<sup>41</sup> *Id.* ch. 2, art. 13; ch. 3, art. 17.

<sup>42</sup> Luat To chuc Vien Kiem sat Nhan dan [Law on the Organization of the People's Office of Supervision and Control], Law No. 03 L/CTN, ch. 1, art 7 (Oct. 10,

People's Court shared administrative control over provincial courts with local governments, the People's Office is independent.

While the Chief Procurator, like the Chief Justice, faces a five-year limit on his term of appointment, none of the inferior prosecutors face a similar limitation.<sup>43</sup> The term limitation and the reappointment process that acts to constrain potentially errant judges does not exist in the same form with regard to procurators at the local levels.

The 1992 reorganization of the legal system also involved the codification of the role of the People's Office of Supervision and Control. Through the 1992 Law on the Organization of the People's Office of Supervision and Control, the National Assembly designated the People's Office as the agency with the task of carrying out public prosecutions, including, but not limited to, regulating and limiting the actions of the government at all levels.

Article 137: The Supreme People's Office of Supervision and Control supervises and controls obedience to the law by Ministries, organs of ministerial rank, other organs under the government, local organs of power, economic bodies, social organizations, people's armed units and citizens; it exercises the right to initiate public prosecution, ensures a serious and uniform implementation of the law.

The local Offices of Supervision and Control and the Military Offices of Supervision and Control supervise and control obedience to the law and exercise the right to initiate public prosecution within the bounds of their responsibilities as prescribed by law.<sup>44</sup>

The 1992 law and subsequent implementing ordinance provided the Office of Supervision and Control with very broad powers of investigation and prosecution. The mandate to investigate and prosecute in compliance with "the law by Ministries, organs of ministerial rank,

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1992) [hereinafter October 1992 Law on the Organization of the People's Office of Supervision and Control].

<sup>43</sup> *Id.*

<sup>44</sup> 1992 CONSTITUTION, *supra* note 15, ch. X, art. 137. Similar language about the responsibilities and duties of the People's Office of Supervision and Control appears in the Law on the Organization of the People's Office of Supervision and Control. See October 1992 Law on the Organization of the People's Office, *supra* note 42, ch. 1, art 1.

other organs under the government, local organs of power, economic bodies, social organizations, people's armed units and citizens" gave the People's Office very broad oversight authority over all government action.<sup>45</sup>

Where the People's Office is able to identify potential actions or practices undertaken by state agencies not conforming with the law, the People's Office can issue instructions and orders to those offices to stop illegal activities and to amend practices that it deems illegal.<sup>46</sup> This review can take the form of an instruction to rescind or amend policies or actions deemed illegal with an accompanying threat to pursue prosecution should the local authorities not comply.<sup>47</sup> In practice, this has meant that the People's Office reviews government decisions and policies at all levels for their appropriateness in relation to the law. Rather than actually pursuing prosecutions, the People's Office will negotiate with local administrative agencies to reach a conclusion that it can justify as complying with the letter of the law or regulation.<sup>48</sup>

While the very broad oversight powers of the People's Office might be rationalized in the context of government affairs, they are more difficult to justify in the context of private disputes. Clearly, the broad

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<sup>45</sup> 1992 CONSTITUTION, *supra* note 15, ch. X, art. 137.

<sup>46</sup> *Luat To Chuc Vien Kiem Sat Nhan Dan* [Law of the Organization of the People's Prosecutor], No. 03 L/CTH, ch. 2, art. 8-10 (Oct. 10, 1992). *See also Quoc hoi Phai Lam Chuc Nang Chinh La Lap Phap* [National Assembly Must Write the Laws], TUOI TRE, June 21, 2001, at 1.

<sup>47</sup> *Luat To Chuc Vien Kiem Sat Nhan Dan* [Law of the Organization of the People's Prosecutor], No. 03 L/CTH, ch. 2, art. 8-10 (Oct. 10, 1992).

<sup>48</sup> A recent example of the People's Office flexing its power in this regard occurred in Ho Chi Minh City in 2001. In an attempt to more effectively manage the resolution of citizen complaints, the mayor of Ho Chi Minh City delegated the authority to resolve citizen complaints to the Inspector General's Office. The People's Office soon after issued an opinion that the mayor could only delegate individual cases for resolution, could not delegate authority to resolve all cases, and ordered the mayor to rescind his delegation of authority. *De Nghi Bai Bo Mot So Noi Dung Trong Viec Uy QUYEN GIAI QUYET Khieu Nai* [Recommendation to Change Some Methods for Delegating the Resolution of Complaints], SAIGON GIAI PHONG, June 3, 2001, at 5.

In another example, the Provincial Office of Supervision in Gia Lai Province reviewed 270 provincial government decisions and policies and found 86 to be in violation of existing law. In response, the People's Office ordered the offending policies and decisions rescinded. This order was then followed by a series of negotiations between the city administration and the People's Office in an attempt to find an outcome that would satisfy the People's Office. *Nhieu Van Ban Sai Pham Da Duoc Huy Bo* [Many Incorrect Documents Are Rescinded], PHAP LUAT, July 27, 2001, at 1.

investigatory powers were a vestige of central planning when all social relationships were, one way or another, state sponsored. However, since the beginning of economic reform, Vietnam has developed a multi-sectored society where non-state actors and non-state relationships are as important, if not more important, than state relationships.<sup>49</sup> In that light, the power of the People's Office to investigate private and commercial relationships seems out of place and overly intrusive.

For example, in civil cases, the People's Office has the prerogative to participate in any part of judicial proceedings with the exception of settlement conferences.<sup>50</sup> Usually, its participation involves no more than a review of the case file and listening to evidence and argument between private parties.<sup>51</sup> At the conclusion of the argument by both sides, the People's Office makes a recommendation to the trial judge about the resolution of the dispute.<sup>52</sup> Where there are questions of criminal wrongdoing raised by the proceeding, the People's Office has the right to conduct investigations and prosecute.<sup>53</sup> The role of the People's Office in civil disputes has resulted in the "criminalization" of common civil matters, and the criminal prosecution of parties to civil disputes.<sup>54</sup>

The source of the investigatory powers into both public and private acts can be tied directly to the institutional independence of the People's Office. Whereas the Supreme People's Court and its inferior courts were designed to remain captured by local bureaucracy, the People's Office was organized with the exact opposite intention. By keeping it formally independent of local government controls, the People's Office would be

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<sup>49</sup> The size of the state sector is surprisingly small. According to the World Bank, in 1999 only 8.7% of the workforce was employed in the state sector. The World Bank, Vietnam Development Report 2001: Vietnam's Pillars of Development, table 1.3, available at [http://www.worldbank.org.vn/data\\_pub/reports/Bank1/rep23/appe\\_t3.htm](http://www.worldbank.org.vn/data_pub/reports/Bank1/rep23/appe_t3.htm) (last visited Oct. 14, 2002).

<sup>50</sup> Luật Tố Chức Viện Kiểm Sát Nhân Dân [Law of the Organization of the People's Prosecutor], No. 03 L/CTH, ch. 4, art. 16-17 (Oct. 10, 1992).

<sup>51</sup> Interview with Phan Tanh, Deputy Chief Judge, HCMC People's Court, in Ho Chi Minh City, Vietnam (July 31, 2001).

<sup>52</sup> Interview with Phan Tanh, Deputy Chief Judge, HCMC People's Court, in Ho Chi Minh City, Vietnam (July 31, 2001).

<sup>53</sup> See October 1992 Law of the Organization of the People's Office of Supervision and Control, *supra* note 42, ch. 4 (describing the role of the prosecutor in both criminal and civil trials).

<sup>54</sup> For examples of criminal prosecutions of parties to civil disputes, see *Nguoi Bi Hai Co Duoc Boi Thuong?* [Will Those Who Have Been Injured Be Compensated?], NGUOI LAO DONG, June 12, 2001 at 1.

able to carry out effective oversight over the operations of government providing the National Assembly a check on the power of government.

A decade after the 1992 reforms, there is no evidence that the independence sought for the People's Office brought about the intended result. Rather than focusing on criminal prosecutions, since the 1992 reform, the People's Office, focused much of its effort on supervision and investigation of local government. The emphasis on government oversight, while formally required, was never truly accepted by the government. By 2001, the increasing breadth of non-prosecutorial activities of the People's Office became the subject of a significant amount of public discussion as to whether the State Prosecutor's broad-ranging non-prosecutorial powers should be curbed.<sup>55</sup> The State Prosecutor's independence became a troublesome source of criticism that would lead to a second restructuring of the office.

### III. 2002 REFORM OF THE LEGAL SYSTEM

Over the past three years, Vietnam newspapers have offered the reading public a stream of stories and exposés detailing false prosecutions and the criminalization of economic and civil disputes.<sup>56</sup> Public discussion surrounding the failure of the courts and public prosecutors and the burgeoning Nam Cam scandal probably pushed the reform agenda along much faster than might have been otherwise anticipated. Truong Van Cam, or Nam Cam, is a Ho Chi Minh City-based mafia boss who was able to escape arrest and prosecution for years thanks to corrupt police and

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<sup>55</sup> *Quoc hoi Phai Lam Chuc Nang Chinh La Lap Phap* [National Assembly Must Write the Laws], TUOI TRE, June 21, 2001, at 1.

<sup>56</sup> At a judicial reform conference in Phan Thiet in Feb. 2002, the former director of Hanoi's Department of Justice commented that the quality of judiciary during trial was so poor that, "[I]f I were one of the people, I wouldn't stand for it." Khanh Linh, *To chuc va Hoat dong Cua Toa an Nhan dan* [Organization and Operation of the People's Courts], NGHIEN CUU LAP PHAP at 8 (Mar. 2002). See, e.g., Nghia Nhan, *Quoc hoi Ban Cach Khac phuc Oan sai Trong To tung* [National Assembly Discussing Righting Injustice in Prosecutions], VNEXPRESS, Dec. 12, 2001, available at <http://vnexpress.net/Vietnam/Phap-luat/2001/12/3B9B70D5/> (last visited Sept. 17, 2002); Den bu Cho Nguoi Bi Oan sai Trong To tung Hing su [Compensation for People Suffering Unjust Criminal Prosecution], VNEXPRESS, Feb. 22, 2001, available at <http://vnexpress.net/Vietnam/Phap-luat/2001/02/3B9AE18F/> (last visited Sept. 17, 2002).

prosecutors who provided him protection.<sup>57</sup> His arrest in December 2001 revealed that corruption in the legal system was extensive; not limited to the lower courts, but reaching up as high as a former Chief Prosecutor and a sitting Deputy Chief Prosecutor.<sup>58</sup>

In the aftermath of the Nam Cam affair, a political report of the Communist Party laid out the general sense of urgency to deal with the inadequacies in the judicial system. The Party's report called on the government to:

[R]eform the organization, and improve the quality and performance of judicial agencies, enhance the sense of responsibility of judicial agencies and staff in investigation, arrest, imprisonment, detention, prosecution, trial, and court decision execution, avoid unjustifiable or inaccurate cases. The people's procuratorates are to effectively implement its prosecutorial and procuratorial functions over judicial activities. To restructure the system of people's courts, rationally delineate powers of courts at all levels. To reinforce the pool of judges and people's jurors both quantitatively and qualitatively. To reorganize investigatory and enforcement agencies on the principle of "less doors." To establish judiciary police.<sup>59</sup>

In January 2002, the Politburo of the Vietnam Communist Party followed up its political report and issued Resolution 8, calling for further reform of the legal system to address some of the shortcomings made apparent by recent events.<sup>60</sup> During its Spring 2002 session, the National

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<sup>57</sup> *Top State Prosecutor Exits Due to Criminal Gang Links*, VIETNAM NEWS, *supra* note 2; *Vu Nam Cam*, VNEXPRESS, *supra* note 2; and *Nhieu Tinh tiet Vu "Chay an" Tai TP HCM Chua Duoc Lam Ro [Many Details of the "Running Cases" Affair in HCMC Still Unclear]*, VNEXPRESS, Sept. 3, 2002, <http://vnexpress.net/Vietnam/Phap-luat/2002/09/3B9BFCC8/> (last visited Sept. 17, 2002).

<sup>58</sup> *See Canh cao Mot Kiem sat Vien Lien quan Den Vu Nam Cam [Punishment for a Prosecutor Linked to Nam Cam Scandal]*, VNEXPRESS, Sept. 20, 2002, <http://vnexpress.net/Vietnam/Phap-luat/2002/09/3B9C0633/> (last visited Sept. 26, 2002); *Top State Prosecutor*, VIETNAM NEWS, *supra* note 2; *Vu Nam Cam*, VNEXPRESS, *supra* note 2; *Kiem diem Vien Truong VKSND, Quan 4*, VNEXPRESS, *supra* note 2; and *Vietnam Da Xuat hien Toi pham co To Chuc o Trinh do Cao*, VNEXPRESS, *supra* note 2.

<sup>59</sup> Vietnamese Party Congress Political Report (Apr. 19, 2001), 2001 WL 19599575, at 35.

<sup>60</sup> Politburo Resolution No. 8, *supra* note 3.

Assembly addressed reform of the People's Courts and the People's Office of Supervision and Control through passage of a new series of laws.<sup>61</sup> The underlying theme of the changes was to further the process of creating a professional, responsible, and accountable judicial apparatus. Professionalization of the court system is also an attempt to wrestle authority over local courts away from local governments and redirect it towards the Supreme People's Court in Hanoi, thereby improving accountability and quality of the courts' work. At the same time, the National Assembly pruned the powers of the People's Office, of Supervision and Control reigning in the potentially abusive prosecutorial powers while increasing its oversight of the police.

Although these efforts had the blessing of the Communist Party, they were nonetheless controversial. Of all the reforms, none was more controversial than reform of the People's Court—parties both for and against the reforms claimed that either passage or defeat of the reorganizations would benefit the cause of 'judicial independence.'

#### A. *Reform of the Court System*

The reform package approved by the National Assembly had a number of main themes. Most important were the aims of increasing the level of independence, professionalism, and accountability within the courts. The primary means of achieving these goals was the centralization of the overall administration of the courts, including the appointment process for judges at the local level. The centralization of what was previously a very decentralized system proved to be quite controversial and met with opposition from local government representatives.

##### 1. *Nurturing Judicial Independence*

The centerpiece of Article 38 of the new Law on Organization of the People's Courts (2002) ("LOPC (2002)") is a judicial independence provision stating that "interference with the work of judges and citizen jurors is strictly forbidden."<sup>62</sup> In addition to this statement of

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<sup>61</sup> 2002 Law on the Organization of the People's Courts, *supra* note 5 and April 2002 Law on the Organization of People's Office of Supervision and Control, *supra* note 6.

<sup>62</sup> 2002 Law on the Organization of the People's Courts, *supra* note 5, ch. 4, art. 38. The Vietnamese Communist Party operates shadow structures that accompany all political institutions in Vietnam. The notion of "independence," then, is a term bounded

independence, the law also included structural changes to the administration and management of the courts and court personnel that may go a long way towards creating the bureaucratic space required to nurture the beginnings of judicial independence.

The 1992 Law on Organization of the Courts turned administrative responsibility for provincial and local courts over to the Ministry of Justice and local governments, placing them effectively beyond the control of the Supreme People's Court.<sup>63</sup> Consequently, the Supreme People's Court was left with little institutional capacity beyond its own offices in Hanoi. Under the 1992 system, budgeting and management of court personnel for the provincial courts would typically be run through the Ministry, rather than the Supreme People's Court.<sup>64</sup> In turn, the Ministry delegated responsibility for budgeting and personnel management of the local courts to provincial governments.<sup>65</sup> As described earlier, this facilitated the ability of local governments to exert undue influence over the courts through their control over court budgets and administration.<sup>66</sup>

A critical component of Vietnam's 2002 reform included the centralization of management of court personnel and budgets under the Supreme People's Court in Hanoi. New Article 45 of the LOPC (2002) places administrative control over the courts in the hands of the Supreme People's Court.<sup>67</sup> Article 46 of the LOPC (2002) reinforces the centralization of management of the courts by giving the Supreme People's Court power over the administration and budgeting of all the People's Courts.<sup>68</sup> At the provincial and local level, these reforms remove

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by influence of the Party. As a result, the fact that local Party cells exert influence over court proceedings is a practical reality. The exhortation in Article 38 is generally directed at other government agencies and persons.

<sup>63</sup> 1992 Law on the Organization of the People's Courts, *supra* note 9, ch. 1, art. 16.

<sup>64</sup> Articles 13-14 discuss in general terms the Ministry of Justice's management of court personnel. *See* 1993 Ordinance Regarding Judges and the People's Jury, *supra* note 22, ch. 2, art. 13-14.

<sup>65</sup> Budgetary authority for all government operations at the provincial level, including tasks assigned by the central government, are left to the provincial government. *See* Luật Ngan sach Nha nuoc [Law on the Government Budget], Law No. 47 L/CTN, ch. 3, art. 31 (Apr. 3, 1996).

<sup>66</sup> *See supra* Part II.A

<sup>67</sup> 2002 Law on the Organization of the People's Courts, *supra* note 5, ch. 6, art. 45.

<sup>68</sup> *Id.*

important budget and administrative leverage over the courts away from local governments and place it with the Supreme People's Court in Hanoi. Curbing the authority of the provincial governments over the courts effectively takes the administration of justice away from the provinces and places management into a central court system.<sup>69</sup>

Needless to say, provincial governments were hesitant to accept a change that would result in the diminution of their power over the local judiciary. The argument put forth by opponents to the centralization of management authority over the courts was two-fold. First, opponents argued that if the Supreme People's Court in Hanoi had direct management authority over the Provincial People's Courts that this would result in tight (*khep kin*) management over operations and decisions of the lower courts, thereby threatening their judicial autonomy.<sup>70</sup> During debates over this particular change, provincial government representatives seemed most concerned about maintaining the "independence" of the judiciary and "judicial autonomy."<sup>71</sup>

Provincial representatives predicted that the proposed change would result in local courts becoming dependent on the Supreme Court. This dependence would affect their ability to act independently of the Supreme Court, resulting in unjust decisions should the Supreme Court have an "improper" understanding of the proper legal outcome.<sup>72</sup> "Improper", here, is best understood as legal outcomes over which local Party and government officials have little control. "Independence," in this context, is better understood, not as judicial independence as the term is typically defined in legal reform discourse, but rather in the context of

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<sup>69</sup> While the Vietnamese are now centralizing their court system, the court system in the People's Republic of China remains decentralized, with provincial governments maintaining authority and responsibility over judges and courts at the provincial level. See BROWN, CHINESE COURTS, *supra* note 5, at 156-57.

<sup>70</sup> See, e.g., *De Cac Co quan Tu phap Hoat dong Doc Lap va Cong bang* [Allowing All Offices to Operate Independently and Equally], TUOI TRE, Mar. 20, 2002, at 6; Ba Tuan, *Sua Luat Lieu Co Giam Oan, Sai?* [Will Changing the Law Reduce Problems, Mistakes?], PHAP LUAT, Mar. 20, 2002 at 2; D. Hoc, *Phai Dam bao Tinh Doc lap Xet xu cua Toa an* [We Must Guarantee the Independence of the Courts], NGUOI LAO DONG, Mar. 20, 2002, at 2; and Nguyen Hoai Nam, *Luat To chuc Toa an Nhan dan (sua doi)* [The Law on the Organization of the People's Court (Amended)], TAP CHI NGHIEN CUU LAP PHAP at 20 (Mar. 2002) [hereinafter Nam, *Law on the Organization of the People's Court (Amended)*].

<sup>71</sup> Hoc, *supra* note 70, at 2.

<sup>72</sup> *Nhieu Y kien Tranh luan Ve Mot Du an Luat* [Many Debating Ideas About a Proposed Law], DAU TU, Mar. 27, 2002, at 1.

decentralization. In the decentralized system, the provincial judiciary was hardly independent of local government, but it was independent of central authority and central interpretations of law.

During the debate on the reorganization of the courts, the Minister of Finance (representing Ho Chi Minh City) emphasized that creation of central administrative power over the lower courts would disrupt the independence of the courts. He argued “with this guy ordering that guy you can’t have independence, because with a leadership structure, the lower levels have to listen to the higher levels.”<sup>73</sup>

The second, and more formal, argument against centralizing administrative control over the courts was based on the constitutional premise that the courts are distinct from the government.<sup>74</sup> A National Assembly Deputy from Ho Chi Minh City argued against the change: “According to the Constitution, the courts are trial courts, not an administrative agency.”<sup>75</sup> The sitting Minister of Justice argued that the current Constitution does not specify that courts have any administrative management function, only that they will “organize, guide, and finalize all court proceedings.”<sup>76</sup> Moving administrative and management authority of the courts away from his ministry would result in an act contrary to the Constitution in the Minister’s eyes.<sup>77</sup> This argument, of course, neglected the obvious fact that in the absence of central administration of provincial courts, provincial courts will be administered by provincial governments, thereby destroying any theoretical separation of powers between the different branches of government.

In addition to the centralization of administration of the courts, the 2002 reform undertook a substantial change in the selection and appointment process for judges. Articles 24 and 40.3 of the LOPC (2002) shift the power to appoint lower court judges from the President to the

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<sup>73</sup> Hoc, *supra* note 70.

<sup>74</sup> Nam, *Law on the Organization of the People’s Court (Amended)*, *supra* note 70, at 21.

<sup>75</sup> Hoc, *supra* note 70, at 2.

<sup>76</sup> *Id.*

<sup>77</sup> The counter-argument, that the constitution requires separation of government and court functions, indicating full vertical administration and management of the courts, did not get much attention. The constitutional argument for vertical administration is fleshed out by Nguyen Hoai Nam. See Nam, *The Law on the Organization of the People’s Court (Amended)*, *supra* note 70, at 22.

Chief Judge of the Supreme People's Court.<sup>78</sup> Previously, the National Assembly appointed the Chief Judge, while all other judges were appointed by the President.<sup>79</sup> Moving the appointment power over judges from the President directly to the Chief Judge was extremely controversial because it took additional levers of influence away from local government.<sup>81</sup> In what seems to be a compromise, the provincial governments still maintain some control in naming the chief provincial judge.<sup>82</sup>

The principle challenge by opponents to this change was again constitutional. The 1992 Constitution conferred the power of appointment to the President. Opponents argued that moving the appointment authority from the President to the Chief Justice would be illegal without an amendment to the Constitution.<sup>83</sup> In strictly legal terms, the constitutional argument seems powerful. The fact that it was not strong enough to carry

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<sup>78</sup> 2002 Law on the Organization of the People's Courts, *supra* note 5, ch. 4, art. 40.3.

<sup>79</sup> 1992 CONSTITUTION, *supra* note 15, ch. 7, art. 102, § 8.

<sup>81</sup> That this issue would be so controversial is surprising since the Communist Party had explicitly suggested that any reform of the judiciary should include a transfer of the appointment power from the President to the Chief Judge. See *Nghi Quyét 08 của Bộ Chính trị Về Một số Nhiệm vụ Trong Công Tác Tư pháp Trong Thời gian tới* [Politburo Resolution No. 8 On A Number of Responsibilities of the Legal System in the Near Future], Communist Party of Vietnam, 08-NQ/TW, Jan. 2, 2002, as quoted in Nam, *The Law on the Organization of the People's Court (Amended)*, *supra* note 70, at 20.

<sup>82</sup> 2002 Law on the Organization of the People's Courts, *supra* note 5, ch. 2, art. 24.7.

<sup>83</sup> The 1992 Constitution was amended just four months before the Law on the Organization of the Courts was passed, but the amended Constitution did not change the President's constitutional authority to appoint judges. See *Nghi Quyét Số 51/2002/QH10 Về Việc Sửa đổi, Bổ sung Một số Điều của Hiến pháp nước Cộng hòa Xã hội Chủ nghĩa Việt Nam năm 1992* [Resolution No. 51/2002/QH10 Amending and Revising A Number of Articles of the 1992 Constitution of the Socialist Republic of Vietnam], No. 51/2002/QH10 (Dec. 25, 2001).

the day, however, says more about the importance of constitutions as a source of legal authority in Vietnam.<sup>84</sup>

While the new law confers appointment power on the Chief Judge, his power to appoint judges is not unfettered. Prospective judges must first be approved by one of a series of Nominating Committees.<sup>85</sup> The composition of the recently designated Nominating Committees sends an ambiguous signal. For example, the Nominating Committee responsible for nominating judges for positions at the Supreme People's Court and the Military Courts consists of the Chief Judge, presiding as chairman, representatives of the Ministry of Defense, the Ministry of Public Security, the Fatherland Front, and the executive committee of the Vietnam Lawyer's Association.<sup>86</sup>

What is surprising about the make-up of this committee is the obvious power given to the security ministries in the selection of the country's judges, and the absence of any role for the Ministry of Justice, which until recently had a large say in the selection of judges.<sup>87</sup> It is unclear exactly what the long-term implications of the increased role of the Defense and Public Security apparatus will be. These ministries are considered politically loyal to the Party and their participation will, no doubt, ensure that future nominations remain under the control of the Party apparatus.

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<sup>84</sup> The instrumentalist literature on socialist constitutionalism argues that Asian constitutions are aspirational documents rather than strictly legal documents. As aspirational documents they act as goals for government action and not rules governing state action. For an overview of that literature as it pertains to Vietnam and a countervailing view that Vietnam's constitutional dialogue is not instrumentalist see Mark Sidel, *Analytical Models for Understanding Constitutions and Constitutional Dialogue in Socialist Transitional States: Re-Interpreting Constitutional Dialogue in Vietnam*, 6 SINGJICL 42 (2002).

<sup>85</sup> 2002 Law on the Organization of the People's Courts, *supra* note 5, ch. 3, art. 29.

<sup>86</sup> Pháp lệnh Tham phán và Hội thẩm Tòa án Nhân dân [Ordinance on Judges and People's Jurors], No. 02/2001/PL-UBTVQH11, ch 3, art. 26 (Oct. 4, 2002) [hereinafter Ordinance on Judges and People's Jurors]. The Fatherland Front is a Communist Party front organization, with the Vietnam Lawyer's Association as one of its constituent members. The Vietnam Lawyer's Association is a socio-political group distinct from the Vietnam Bar Association which plays a familiar professional licensing function for lawyers. The Lawyer's Association is another Party front organization that has little to no real power to prevent the security ministries and the Communist Party from exerting complete control over the nomination of judges at the central level.

<sup>87</sup> See *supra* note 16 and note 22.

At the provincial level, while there was great effort exerted to remove the ability to appoint judges from Provincial governments, the Nominating Committees created other opportunities for local governments to continue to exert authority, albeit to a lesser degree than before. The provincial Nominating Committees are comprised of the Chairman of the Provincial People's Council, presiding as Chairman, the Chief Provincial Judge, and representatives of the provincial department of organization and personnel, the provincial Fatherland Front, and the Provincial Lawyer's Association.<sup>88</sup> While not maintaining direct control over the make-up of local courts, provincial governments have not given up their ability to exert control altogether.

The composition and process followed by these provincial Nominating Committees are significant for three reasons. First, the composition of the Nominating Committee at the central level differs dramatically from the committee at the provincial level. At the provincial level, the security services have no representation at all. Second, the provincial government holds the chairmanship of the committee instead of the provincial chief judge. Granting the chairmanship of this committee to the provincial government, rather than a representative of the courts, sends a clear signal that the provincial government remains in charge. Finally, the presence of the provincial department of organization and personnel reinforces the perspective of the provincial governments that judges are provincial government personnel and not independent of the provincial personnel system.

## 2. *Professionalization of the Judiciary*

There is a general understanding that the level of professionalism among judges, jurors and lawyers in Vietnam is still low.<sup>89</sup> Much of this poor reputation can be attributed to the history of the judiciary in Vietnam. Until 1992, judges were selected by local government and Party officials almost exclusively for their political loyalties and had little or no training in the law.<sup>90</sup> Prior to the beginnings of economic reform in the late

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<sup>88</sup> Ordinance on Judges and People's Jurors, *supra* note 86, ch. 3, art. 27.

<sup>89</sup> Nguyen Cong Binh, *Nguyen tac Bao dam Quyen Bao ve Quyen, Loi ich Hop phap Cua Duong su Trong To tung Dan su* [On the Principle of Guaranteeing and Defending Legal Rights of Litigants in Civil Suits], TAP CHI LUAT HOC at 3 (Feb. 2002).

<sup>90</sup> Bui Ngoc Son, *Tu Tuong Ho Chi Minh ve To chuc Toa an va Y nghia Hien nay* [Ho Chi Minh Thought on Organization of the Courts and its Present Day Meaning], NGHIEN CUU NHA NUOC, Feb. 2002, at 25.

1980's, a political-bureaucratic apparatus dominated Vietnam and legal institutions played a demonstrably inferior role.<sup>91</sup> Economic reform began to change the calculus of the individual's relationship with the state and other actors and, as a result, raised the status of the courts.

The 1992 court reform program responded to this demand by creating minimum qualifications for judges aimed at increasing professionalism within the ranks of the judiciary.<sup>92</sup> The 2002 reform marked a continuation by raising the minimum qualifications for judges and lawyers.<sup>93</sup> Previously, all that was required of judges was that they be of good moral character, loyal, and knowledgeable about the law.<sup>94</sup> Now, judicial candidates are required to have at least a Bachelor's Degree in Law and to have passed through a judicial training course.<sup>95</sup> The increase in the minimum requirements for judges is best examined alongside a similar increase in the requirements to practice law. In addition to a law degree, a 2002 ordinance governing the practice of law requires that a practicing lawyer pass a specialized training program (sponsored by the Ministry of Justice) before admission to the bar.<sup>96</sup>

As part of the effort to continue to centralize and professionalize the judiciary, mediation bodies at the enterprise and local levels were eliminated.<sup>97</sup> Until passage of the 2002 reform, mediation and mediation groups traditionally played an important role in the formal and informal

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<sup>91</sup> *Id.*

<sup>92</sup> Minimum qualifications for judges under the 1992 law and regulations included university or professional training in the law or a minimum of eight years of experience in the legal field. 1993 Ordinance Regarding Judges and the People's Jury, *ch. 3, art. 16*.

<sup>93</sup> 2002 Law on the Organization of the People's Courts, *supra* note 5, *ch. 4, art. 37.1*.

<sup>94</sup> 1992 Law on the Organization of the People's Courts, *supra* note 9, *ch. 4, art. 37*.

<sup>95</sup> 2002 Law on the Organization of the People's Courts, *supra* note 5, *ch. 4, art. 37.1*.

<sup>96</sup> Additional training requirements include courses on law practice, litigation, client advising, and legal ethics. *See* Huong dan Mot so Quy dinh cua Nghi Dinh 94/2001/ND-CP ngay 12-12-2001 cua Chinh phu Quy dinh Chi thiet Thi hanh Phap lenh Luat su [Guidance on a Number of Point of Resolution 94/2001/ND-CP of the Government's Detailed Enforcement of the Ordinance on Lawyers], Ministry of Justice, TT 02/2002/TT-BTP Jan. 22, 2002.

<sup>97</sup> 2002 Law on the Organization of the People's Courts, *supra* note 5, *ch. 1, art. 2*.

day-to-day dispute resolution processes in Vietnam.<sup>98</sup> As the legal system continues the process of formalization and as people become more familiar with accessing the legal system, the formal system draws in more and more disputes of all categories, thereby diminishing the relevance of the mediation teams.<sup>99</sup> The fact that their formal role in the judicial system was eliminated without much discussion is probably a sign that they had outlived their usefulness as an informal dispute resolution mechanism.

### 3. *Increasing Judicial Accountability*

Going hand in hand with an increase in professionalism in the legal field is a sense that judges need to be more accountable for their decisions. In recognition that some judges were less than precise with their interpretations of the law, the 2002 reorganization assigns tort liability to judges and citizen jurors for any damages that result from their misapplication of the law or mistakes that they make in the course of their duties.<sup>100</sup> While this provision clearly seems to be intended to encourage judges and jurors to take their positions more seriously than they have in the past, it may have unintended consequences in their application of the law. In future high-profile cases where the stakes are high, judges may be conservative in their rulings in order to prevent creating any personal liability for themselves. This reluctance to rule threatens to clog the courts because judges will seek advisory opinions from courts above. Alternatively, the potential sanctions for misapplication of the law could be so large that the threat will not be credible and will suffer as a result from under-utilization.<sup>101</sup>

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<sup>98</sup> Mediation teams were set up in administrative and production units in order to resolve minor civil disputes and minor violations of the law. See 1992 Law on the Organization of the People's Courts, *supra* note 9, ch. 1, art. 2.

<sup>99</sup> For data on growth of demand for the courts in Vietnam see Quinn, *Legal Reform*, *supra* note 8.

<sup>100</sup> 2002 Law on the Organization of the People's Courts, *supra* note 5, ch. 4, art. 37.4.

<sup>101</sup> For example, the Judge's Law in the People's Republic of China has a similar clause relating to punishment of judges who either abuse their position or are negligent. Rather than hold them accountable in tort, the Chinese law includes more credible sanctions, such as warnings, demerits, demotions, and dismissals. See BROWN, CHINESE COURTS, *supra* note 5, at 299.

It is unclear, however, what impact the application of personal liability for judicial mistakes will have on the corruption of judges and judicial personnel.<sup>102</sup> On one hand, the new penalty makes it possible to hold judges accountable for improper application of the law resulting from incompetence or corruption. On the other hand, the threat of personal liability might be too big of a sanction to be used credibly against judges with modest incomes. In the face of personal liability, low level judges might well be tempted to pass important and not-so important issues up the ladder in order to avoid potential liability, thereby putting additional stresses on the legal system.

B. *Reorganization of the People's Office of Supervision and Control*

The high-level of corruption in the People's Office exposed by the Nam Cam scandal made the People's Office an obvious target of the 2002 reform.<sup>103</sup> Even before the Nam Cam scandal arose, the People's Office was under pressure for a series of highly public instances of false prosecution, the continuing "criminalization" of economic and civil disputes, and a generally held belief that the People's Office was out of control and not responsible.<sup>104</sup> The Eighth Resolution succinctly stated the problem with the People's Office:

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<sup>102</sup> A judge assigned to the panel to hear the Nam Cam case was removed from the case when he became implicated in the scandal himself. Among other instances, Judge Le Van Ban is suspected of corruption for releasing the brother-in-law of Nam Cam on an earlier gambling charge. Although judges have not been held formally accountable for the Nam Cam scandal, judicial personnel have been widely implicated in a related "running cases" affair. See *Khong Cho Phep Tham phan Le Van Ban Xet xu Vu Nam Cam* [Judge Le Van Ban Will Not Be Allowed to Hear Nam Cam Case], VNEXPRESS, Sept. 24, 2002, <http://vnexpress.net/Vietnam/Phap-luat/2002/09/3B9C0837/> (last visited Oct. 14, 2002); *Duong Day "Chay an" TP HCM Lien quan toi Nam Cam* [HCMC "Running Cases" Ring Linked to Nam Cam], VNEXPRESS (Aug. 19, 2002), <http://vnexpress.net/Vietnam/Phap-luat/2002/08/3B9BF55A/> (last visited Oct. 14, 2002); and *Ky luat Hai Thu ky TAND TP HCM* [Reprimands for Two Secretaries in HCMC People's Court], VNEXPRESS (Mar. 12, 2002), <http://vnexpress.net/Vietnam/Phap-luat/2002/03/3B9B9F28/> (last visited Oct. 14, 2002).

<sup>103</sup> Vo Chi Cong argued that reform should not stop with the Office of Supervision, but should extend to the police. See Vo Chi Cong, *supra* note 3.

<sup>104</sup> President Tran Duc Luong made a speech to the Supreme People's Office of Supervision and Control in which he referred to many instances of false imprisonment, the criminalization of economic disputes, irregularities by the People's Office in

The work of the judicial offices does not yet meet the requirements of the current situation. Legal cadres are still too few in number, with poor professional skills and attitudes. A substantial negative proportion of them lack responsibility, lack capacity, and have a degraded morality. This is a serious problem that can negatively impact on the law and reduce the authority of the government.<sup>105</sup>

The reforms of the People's Office include a pairing of responsibilities and reduction in power of the Office, so that its focus is clearly on public prosecutions and reigning in the power of the police in the context of criminal prosecutions.<sup>106</sup> The 2002 reorganization of the People's Office attempts to create personal accountability within the Office by subjecting individual prosecutors to the same personal liability sanctions as judges.<sup>107</sup>

Although extensive, the 2002 reforms of the People's Office stopped short of pulling procurators from civil courts. Procurators will maintain their authority to participate in all civil, family, economic, administrative and labor cases before the courts. Procurators will also continue to have the right to appeal court decisions and the right to start prosecutions against parties to civil actions when the People's Office determines that there may have been criminal wrongdoing by one of the parties.<sup>108</sup> The ongoing intrusion of the People's Office into civil trials will continue to exacerbate the problem of criminalization of economic disputes.

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compliance with the law, and a general lack of responsibility among members of the People's Office. See Tran Duc Luong, *Vien Kiem sat Nhan dan Can Tap trung Thuc hien Chuc nang Kiem sat Hoat dong Tu phap* [People's Office of Supervision and Control Should Focus on Carrying Out Supervision of Legal Activities], NHAN DAN, Jan. 21, 2002, [http://www.cpv.org.vn/nghiencuu/daihoi9/6\\_tdl\\_vienkiemsat.htm](http://www.cpv.org.vn/nghiencuu/daihoi9/6_tdl_vienkiemsat.htm) (last visited Sept. 27, 2002).

<sup>105</sup> Politburo Resolution No. 8 On A Number of Responsibilities of the Legal System in the Near Future, *supra* note 3, quoted in Pham Tri Thuc, *Ve Du an Luat To chuc Vien Kiem sat Nhan dan (sua doi)* [Regarding the Amended Law on the Organization of the People's Office of Supervision and Control], TAP CHI NGHIEN CUU PHAP LUAT at 29 (Feb. 2002).

<sup>106</sup> April 2002 Law on the Organization of the Office of Supervision and Control, *supra* note 6.

<sup>107</sup> *Id.* ch. 1, art. 6 and ch. 9, art. 46.

<sup>108</sup> *Id.* ch. 4, arts. 21-22.

1. *Reducing the Scope of Authority of the People's Office*

The reduction in the scope of authority of the People's Office also marks an important reform. In addition to its authority to conduct public prosecutions, prior to 2002 the People's Office existed as a constitutional check against government power and in that capacity had the authority to investigate and supervise government activities to ensure that they were in accordance with current law.<sup>109</sup> This quasi-judicial review power gave the People's Office the ability to insert itself into the work of government at all levels. By the end of 2001, there was a general feeling that the People's Office was abusing its supervisory power to the detriment of legitimate government work.<sup>110</sup>

The dynamics of the discussion surrounding the reorganization of the People's Office were demonstrably different than those surrounding the reorganization of the People's Courts. In the case of the People's Courts, local governments and local government officials had their influence over the local judiciary at stake. There were few outside of the People's Office, however, with any real stake in maintaining the structure and powers of the People's Office. Supporters of the reform lauded the reduction in the investigatory and supervisory powers of the People's Office as an important step in Vietnam's legal reform.<sup>111</sup>

Opponents of reform maintained that the People's Office, acting as an arm of the National Assembly, was an important counterweight to the growing power of the government. Opponents also argued that constraining the Office's wide-ranging powers to investigate the government would be contrary to the development of proper rule of law in Vietnam because it would leave government to act without constraints.<sup>112</sup>

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<sup>109</sup> *Luat To Chuc Vien Kiem Sat Nhan Dan* [Law of the Organization of the People's Prosecutor], No. 03 L/CTH, ch. 2, art. 8-10 (Oct. 10, 1992).

<sup>110</sup> *See supra* note 48 for examples of the State Prosecutor's abuse of its supervisory powers.

<sup>111</sup> Pham Tri Thuc, *Ve Du an Luat To chuc Vien Kiem sat Nhan dan (sua doi)* [Regarding the Amended Law on the Organization of the People's Office of Supervision and Control], TAP CHI NGHIEN CUU PHAP LUAT at 28 (Feb. 2002).

<sup>112</sup> Mai Hien provides a representative argument on this point of view. *See* Ha Thi Mai Hien, *Chuc nang Kiem sat Chung Cua Vien Kiem sat Nhan Dan* [The General Investigation Powers of the People's Office of Supervision and Control], TAP CHI NGHIEN CUU PHAP LUAT at 31 (Oct. 2001).

With the strong support of the Communist Party, reform of the People's Office was firmly on the agenda and faced, in the end, little opposition. Reform of the People's Office involved a two-step process: the first, constitutional, and the second, legislative. In December 2001, the National Assembly amended the Constitution of 1992 and removed the authority of the People's Office to "supervise and control" government ministries and equivalent agencies. The amendment limited the supervisory and investigatory powers of the People's Office to the sphere of judicial activities, including the police.<sup>113</sup>

The legislative procedure involved rewriting the law that organized the People's Office. One of the most important reforms in the 2002 reorganization of the People's Office was the removal of the power of the People's Office to review the legality of all government documents.<sup>114</sup> The new structure of the People's Office redirects its efforts so that it looks much less like a large government oversight body and more like a traditional public prosecutor's office. The six enunciated powers of the People's Office after the reform are:

<sup>113</sup> Compare original and revised article 137 of the Constitution:

*Original:* The Supreme People's Office of Supervision and Control supervises and controls obedience to the law by Ministries, organs of ministerial rank, other organs under the government, local organs of power, economic bodies, social organizations, people's armed units and citizens; it exercises the right to initiate public prosecution, ensures a serious and uniform implementation of the law.

*Revised:* The Supreme People's Office of Supervision and Control shall exercise the right to initiate public prosecution and control of the judicial activities, ensuring that laws are strictly and uniformly observed.

...

The local People's Offices of Supervision and Control and the Military Offices of Supervision and Control supervise and control obedience to the law and exercise the right to initiate public prosecution within the bounds of their responsibilities as prescribed by law

The local People's Offices of Supervision and Control and the Military Offices of Supervision and Control shall exercise the right to initiate public prosecution and control of judicial activities within the scope of their responsibilities prescribed by law.

HIEN PHAP 1992 (SUA DOI) [REVISED 1992 CONSTITUTION], 51/2001QH10, art. 137.

<sup>114</sup> April 2002 Law on the Organization of the Office of Supervision and Control, *supra* note 6, ch. 1, art. 3.

1. Supervise according to the law and regulate the activities of the police and relevant criminal investigation agencies;
2. Investigate and prosecute cases of public corruption and abuse of power;
3. Prosecute criminal cases and supervise adherence to the laws during the process of trial;
4. Supervise adherence to the law during the resolution of civil, family, administrative, economic, and labor cases;
5. Supervise adherence to the law in the process of carrying judicial orders.
6. Supervise adherence to the law regarding imprisonment, detentions; manage and train those carrying out prison sentences.<sup>115</sup>

As part of this reduction of responsibilities, the People's Office lost its power to unilaterally issue resolutions and directives relating to government actions. Previously, the People's Office had the authority to conduct broad investigations of normal government operations. The People's Office could also issue resolutions and directives instructing agencies to cease and desist from implementing rules and regulations determined to be contrary to existing law. The amendment altered this power with language that makes it clear that the People's Office may not instigate investigations against government agencies, except when responding to a specific complaint.<sup>116</sup>

Notably, the People's Office maintains its role in civil and commercial disputes.<sup>117</sup> The proactive investigatory role taken by the

<sup>115</sup> *Id.* ch. 1, art. 3.1-3.6.

<sup>116</sup> *Cf.* April 2002 Law on the Organization of the Office of Supervision and Control, *supra* note 6, ch. 1, art. 4, with October 2002 Law on the Organization of the Office of Supervision and Control, No. 03 L/CTN, *supra* note 42, ch. 1, art. 4.

<sup>117</sup> While, in principle, trials are supposed to be public events, the new court rules expand the scope of privacy in trials to include trials where both parties have legitimate interests in keeping the topic of the dispute confidential, for example in certain commercial matters. Previously, trials were kept secret only when issues of national security were at stake. Though cases may be closed to the public prosecutors still have the right to insert themselves into private civil disputes and conduct investigations of the parties to those disputes, thus leaving open the possibility of further criminalization of economic disputes. *See* 2002 Law on the Organization of the People's Courts, *supra* note 5, ch. 1, art. 7.

People's Office in the area of civil disputes has been controversial and has left it open to charges that it seeks to criminalize economic and civil disputes.<sup>118</sup> It seems likely that the criminalization of economic and civil disputes will continue to be controversial.

### 1. *Increasing Supervision of the Police*

In the process of reducing the scope of the People's Office's reach, the 2002 reform reinforced responsibilities of the Office of Supervision and Control in the oversight of the police.<sup>119</sup> In a speech to the People's Office of Supervision and Control prior to passage of the legislation, President Tran Duc Luong made it clear that the expectation would be that the Office would focus its future efforts on oversight of police arrests and detentions with the object to prevent unjust arrests and detentions.<sup>120</sup>

The prior focus on government oversight was replaced by a new emphasis on public prosecutions and oversight of the police.<sup>121</sup> Among other things, the legislation clarified that the Office had the responsibility for investigating police misconduct, preventing false imprisonments and 'injustice'.<sup>122</sup> In order to stem potential corruption among the police like the kind made obvious in the Nam Cam scandal, the legislation included a number of key powers for the Office including the authority to instruct the police to change the investigating officer on particular cases, as well as authority to commence and end criminal investigations.<sup>123</sup>

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<sup>118</sup> See *supra* note 54 for examples of criminal prosecutions of parties to civil disputes.

<sup>119</sup> The Nam Cam scandal, which implicated the Bui Quoc Huy, Chief of the Ho Chi Minh City Police, made it clear that corruption within the ranks of the police was rampant. See *Vu Nam Cam: De nghi Ky luat Pho Giam doc Cong an TP HCM [Nam Cam Affair: Punish the Deputy Director of HCMC Police]*, VNEXPRESS, Sept. 7, 2002, <http://vnexpress.net/Vietnam/Phap-luat/2002/09/3B9BFF58/> (last visited Sept. 17, 2002).

<sup>120</sup> Luong, *People's Office of Supervision and Control Should Focus on Carrying Out Supervision of Legal Activities*, *supra* note 104.

<sup>121</sup> Chapter 2 of the 1992 law described the powers and authority of the Office to supervise and oversee government ministries. The 2002 law deletes any references to supervision of ministries and replaces chapter 2 with a new chapter on the Office's public prosecution duties and oversight of criminal investigations. See April 2002 Law on the Organization of the Office of Supervision and Control, *supra* note 6.

<sup>122</sup> The term 'injustice' was left undefined, creating a large area of discretion within which both courts and bureaucrats can lose themselves. *Id.* ch. 2, art. 12.

<sup>123</sup> *Id.* ch. 2, art. 13.

This new authority over the conduct of police investigations, however, lies within the context of an existing bureaucratic structure where the People's Office has very little direct control or influence over the operations of the police. While the new law provides formal authority, real authority over the police and their activities remains within the direct government reporting lines: the provincial government Department of Public Security in the first instance, and with the Ministry of Public Security in the second. The provincial People's Office, with its centralized management structure is as many as four bureaucratic steps away from having any real influence over the operations of the police.<sup>124</sup> It is not yet clear that the new formal authority over the police can in any way be effectuated.

## 2. *Increasing Accountability of the People's Office*

When the 2002 reforms granted the People's Office additional powers over the police, members of the National Assembly recognized that insufficient oversight still existed over the People's Office. The former Minister of Planning Tran Xuan Gia, a member of parliament, compared the power of the People's Office to that of a soccer player wearing two uniforms—that of soccer player and referee.<sup>125</sup>

In what appears to be an attempt to limit the reliance of the People's Office on "resolutions" and "directives" and to increase personal accountability of individual prosecutors, prosecutors issuing resolutions and directives will be subject to potential criminal liability should their orders be invalidated.<sup>126</sup> In addition to limiting the ability to abuse its power, the creation of personal liability for prosecutors was intended to

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<sup>124</sup> The bureaucratic connection to the local police can be made by a provincial Office of Supervision moving vertically to the Supreme People's Office of Supervision in Hanoi, then over to the Ministry of Public Security and then down to the provincial government. See *supra* *Administration of Vietnam's Legal System* chart at Part II.

<sup>125</sup> Gia suggested separating the public prosecution functions from the police oversight functions in order to assure some restrictions on the power of prosecutors. See *Vien Kiem Sat co vua 'da bong' vua 'thoi coi'?*, [Is the Office of Supervision both a player and a referee?], TUOI TRE, Mar. 27, 2002, at 2.

<sup>126</sup> April 2002 Law on the Organization of the Office of Supervision and Control, *supra* note 6, ch. 1, art. 6.

raise the overall level of responsibility in the ranks of the prosecutors of the People's Office.<sup>127</sup>

In response to concerns from National Assembly deputies that personal liability might not be a sufficient deterrent for individual prosecutors, the legislation includes language that makes the provincial Chief Prosecutor personally liable for the actions of all his deputies, including local prosecutors and investigators.<sup>128</sup> The Chief Prosecutor and Deputy Chief Prosecutors now bear personal liability for cases of false imprisonment and illegal detention.<sup>129</sup>

The efficacy of these new accountability measures is yet to be seen. Indeed, the drafting of the potential sanctions was sufficiently vague as to ensure that a prosecutor can almost always avoid liability except in the rare case. For example, there is no reference to an independent, third party evaluation for the purposes of determining potential criminal liability for excessive prosecutions.<sup>130</sup> The People's Office maintains its position in the conduct of all criminal and civil trials, from which one may infer that the People's Office would be responsible for prosecuting its own officers. The potential conflict of interest may ultimately render the imposition of personal liability toothless.

Even if there were some avenue for bringing independent prosecutions, the liability sanctions for prosecutors may be too strong to be consistently credible threat. If personal liability is at all a real threat to prosecutors, it may have the effect of increasing centralization of the bureaucratic structure as lower levels of the bureaucracy increasingly seek the approval of higher levels in order to avoid liability.<sup>131</sup>

The long-term impact of the recent changes on the People's Office is still unclear. In its new form, the People's Office is more focused on public prosecutions and supervision of the police, with additional safeguards designed to increase accountability. Whether the responsibilities created by the 2002 reform will result in a different

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<sup>127</sup> Ba Tuan, *Quoc hoi Thao luan Thong qua Luat To chuc VKSND (Sua doi)* [National Assembly Debates Passage of Law on Organization of the People's Office of Supervision and Control], PHAP LUAT at 1 (Mar. 27, 2002).

<sup>128</sup> N.V. Hai, *Tu 1-10 Hai Dao Luat Moi Co Hieu luc* [Oct 1: Two Laws Go Into Effect], TUOI TRE, Mar. 26, 2002, at 6; April 2002 Law on the Organization of the Office of Supervision and Control, *supra* note 6, ch. 9, art. 46.2.

<sup>129</sup> April 2002 Law on the Organization of the Office of Supervision and Control, *supra* note 6, ch. 2, art. 15.

<sup>130</sup> *Id.* ch. 1, art. 6.

<sup>131</sup> Thanks to Erik Jensen for this point.

application of the law remains to be seen. Continued lack of oversight over the People's Office does not answer the question of whether the People's Office can be trusted to control itself.

#### IV. CONCLUSION

While the recent reforms covered much ground, there were a number of issues that were discussed, but then ultimately left out of the current round of reforms. Some of these issues included the creation of regional courts to replace the system of provincial courts,<sup>132</sup> creation of a juvenile and family court,<sup>133</sup> and creation of a constitutional court.<sup>134</sup> Another issue slated for resolution, but not yet addressed is the idea of a judicial police force to support the work of the courts, including enforcement of judgments.<sup>135</sup>

The work still to be done, in addition to the goal of creating an independent judicial system in the context of a socialist political system, are important components of creating a "thin," or procedural, rule of law.<sup>136</sup> While certainly not as aggressive an agenda as what might be proposed in the context of developing a "thick" rule of law, it is nevertheless a challenging agenda. Creating accountability within the legal system and placing restraints on the power of prosecutors, local government, and the courts are important and necessary efforts.

Although it is still much too early to reach any conclusions about the impact of the current series of reforms, one can say a number of things

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<sup>132</sup> Vu Tien Tri, *supra* note 25, at 24.

<sup>133</sup> *Id.* at 26. Over the period 1997-2001, family and marriage cases made up 469,291 of 857,000 cases in the civil courts (or 55% of all civil cases). *Qua tai an Dan su, Hon nhan va Gia dinh* [Overloaded with Civil, Marriage and Family Cases], NGUOI LAO DONG, Mar. 20, 2002, at 2.

<sup>134</sup> Le Cam, *Cai cach He thong Toa an Trong Giai doan Xay dung Nha nuoc Phap quyen Viet Nam* [Reforming the Court System During the Period of Constructing a Legalistic Vietnamese Government], NGHIEN CUU LAP PHAP at 27 (Apr. 2002). Of course, central to the conceptual framework of Vietnam's present parliamentary form of government is that the National Assembly, and not a court, is the ultimate arbiter of the meaning of the Constitution. See 1992 CONSTITUTION, *supra* note 15, ch. VI, art. 84.9.

<sup>135</sup> Tran Duc Luong, *Day Manh Cai cach Tu phap Dap ung Yeu cau Xay dung Nha nuoc Phap quyen Xa hoi Chu nghia Viet Nam* [Strengthening Legal Reform to Meet the Needs of Building a Socialist Legal Government in Vietnam], TAP CHI CONG SAN, Apr. 2002, available at [http://www.cpv.org.vn/tccs/10200201\\_tranducuong.htm](http://www.cpv.org.vn/tccs/10200201_tranducuong.htm) (last visited Sept. 27, 2002). [Cannot find on-line].

<sup>136</sup> Peerenboom, *supra* note 4 at 472.

with some degree of certainty. First, even though a major criminal and corruption scandal was an important catalyst in moving these reforms forward, none of the reforms undertaken will likely make a demonstrable difference in the problem of public corruption and corruption within the legal system, as they do little to address the underlying problem of public corruption. Rather, the efforts tend to focus on the peripheries of the problem of public accountability. Centralizing the courts and focusing the work of the public prosecutors may, in the end, be an important part of a long-term solution, but in and of themselves, the 2002 reforms will not provide the solution to public corruption in the courts.

Second, the relocation of administrative control over the courts may result in increased tensions between local courts and local governments as local governments continue to try to influence the outcomes of cases of interest and attempt to reestablish boundaries of influence over the courts. Over the long term, however, administrative independence from local and provincial governments will be an important part of creating a judiciary resistant to local political pressures.

While there may be increased independence from local governments, there is no indication that the courts will become independent of central authority as a result of the current reforms. Here, the reference to “central authority” refers not to the central government, but to the influence of the Communist Party organization over the activities of the courts and judicial officers. While attempting to isolate the courts from the influence of local government, the recent reforms do nothing to insulate the courts from the influence of central Communist Party authorities. This result is likely by design, not accident.

The reform of the legal process that Vietnam is currently undertaking will inevitably take it to a point where there will be an increasingly open contradiction between competing systems. On the one hand, the reform process strengthens the professionalism and independence of actors within the legal system, and reinforces a growing idea that the judicial system should exist independent of the political system.

On the other hand, both the political system and the role of the Communist Party remain firmly intact. From the point of view of the Party, the legal system operates solely to support the state policy and policies of the Party. Independence in that view is important, but is limited by the needs of the state and the Party. The Party’s ability to influence institutions, including the courts, at all levels lies at the heart of its power. Without the behind the scenes influence over institutions, the

Party would immediately lose leverage and its preeminent place in the political system.

At some point, as the expectations of both the public and the judicial system demand more and more accountability, this may openly conflict with the need of the Communist Party and local governments to be able to exert behind closed doors influence over proceedings before the courts. The Nam Cam scandal is but one example of this conflict. On the one hand, the arrest of Nam Cam exposed serious corruption throughout the government, corruption that must be dealt with severely. On the other hand, the Nam Cam gang is not the only source of public corruption in the country. Investigations related to this matter have been generally limited and have not reached as deeply into the ranks of Party leadership as they might have if the judicial system were independent in the way Western observers understand judicial independence.

Managing the potential conflict between an increasingly independent judiciary and a political system that places a premium on control is a dynamic process. How Vietnamese institutions manage the growing contradiction between the development of a rule of law and the continued charismatic rule of the Party is a challenge not limited to the courts, and one that remains to be met in the future.