THE VIETNAMESE LEGAL SYSTEM
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VIETNAM STUDIES

LAW AT WAR: VIETNAM
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The Vietnam Environment

The Republic of Vietnam is a long, narrow country on the eastern coast of the Southeast Asia mainland. Roughly the size of Florida, its terrain features are much more diverse. The Annamite Cordillera, a rugged jungled mountain chain, stretches for two-thirds of the length of the country and occupies most of the land. Bordering the mountains, along the coast of the South China Sea, is a narrow, fertile strip of lowland. South of Saigon and covering the southern one-third of the country is the Mekong Delta, a vast, semi-flooded alluvial plain which has long been a major rice producing region for Southeast Asia. The principal road and rail networks run ' north-south, hugging the coast. Route 1, the most important highway, is a two-lane paved road extending most of the length of the country. While there is heavy local traffic on the roads, most long distance travel is by air. The mountainous regions west of the coast are largely undeveloped and insecure. It has recently been estimated that South Vietnam has a population of eighteen million, which would be an increase of about three million in the last decade. The greatest number of people are concentrated in the Mekong Delta and along the narrow coastal plain. The majority of the people are ethnic Vietnamese, but there are several minority groups, the most significant being the Montagnards of the Central Highlands and the Chinese of the Cholon district of Saigon. Each of these groups maintains its own social customs and, to a certain extent, its own laws. While seldom doctrinaire in their beliefs, the Vietnamese profess many religions. Most are at least nominal Buddhists, but the Catholics, who comprise about 10 percent of the population, have been prominent in the political leadership of the country. Several minor sects have also been politically active, even to the extent of supporting private standing armies, such as those of the Hoa Hao and the Cao Dai. Perhaps the most significant development in Vietnamese society (during the fifties and sixties) has been the growth of the refugee population. The first great wave of Tonkinese refugees fled from the northern part of Vietnam shortly after the Communists came to power. While many of these people were peasants and laborers, many others were educated teachers, professionals, and political figures. This leadership class was generally anticommunist. The Tonkinese from the north quickly became active in the political affairs of the south, where their activities often aroused the resentment of native southern leaders who were Cochin Chinese. This rivalry was a significant factor in the political turmoil of the early sixties in Saigon. A second wave of refugees was created during the widespread heavy fighting of 1965-1971 in the south of the republic. Thousands of South Vietnamese were uprooted several times in the course of successive campaigns. The influx of refugees fleeing from the countryside placed an enormous burden on the city governments and social agencies which care for the refugees. As families became separated, possessions lost, and people crowded into the refugee camps, it was only natural that respect for law and order, already much diminished, should deteriorate further. The problems of administering to the refugees' needs mounted. Administratively, South Vietnam is divided into provinces, roughly similar to U.S. counties. Each province is subdivided into districts. All but the most remote districts have at least one major town and many villages, which are made up of hamlets. The Vietnamese are an agrarian society whose loyalties have always been decidedly local. For those who have not been uprooted by the war, life centers around the family and the hamlet. Beyond the village any sense of personal responsibility toward society tends to dissipate rapidly. While a spirit of nationalism is growing, it is as yet but a thin veneer on the daily lives of many of the people. There are thousands of villages in Vietnam, and often the laws most relevant to the villagers in their dealings with each other are the laws of local custom, based on ancient tradition and strongly influenced by spiritism. These laws are interpreted and administered by the village leaders, who are the only legal authority for most of the population. Thus the ancient Vietnamese adage, "The laws of the emperor yield to the customs of the village," continues to be a valid reminder for anyone attempting to analyze the role of law in Vietnamese society today

The Chinese Influence

A major influence on the Vietnamese attitude toward law is Confucianism, introduced by the Chinese during the eleven hundred years they dominated Vietnam before 938 A.D. Confucianism is an ethical concept which the Chinese applied to societal organization as well as to their personal lives. The patriarchal family was the model for a perfect society, and Confucianist doctrine prescribes for its support the duties and obligations owed by child to parent, wife to husband, younger to older, and of all to the father as the senior representative of the family group. As the father-figure of the empire, the emperor exercised absolute parental authority over his subjects through a bureaucracy of mandarins-his personal representatives. In the person of the emperor resided all political, religious, and legal authority. His nearly omnipotent role was the logical result of Confucianist doctrine that taught not to follow certain abstract principles, in the Western sense, but to accept the authority of certain people. The notions of individual rights and abstract justice were absent. The emphasis was upon the duties and relationships between people to achieve social harmony and stability in the state. A central precept of Confucianism is the achievement of social harmony through adaptation: the ideal solution of conflict is settlement by negotiation and adjustment; any position can be changed; no commitment is final. This philosophy has remained a dominant theme of society and a key to the Vietnamese view of life. A prudent man learns to adapt to changing circumstances and tries to ameliorate unpleasant situations. As political fortunes change, so do political loyalties; such reversals of allegiance are considered in terms of prudence rather than disloyalty. If you ask a Vietnamese a question and he thinks that the true answer might cause you to feel embarrassment or anger, he may respond in a manner he hopes will please you, even if the answer does not correspond to the facts as he knows them. Such responses are considered in terms of politeness, rather than untruthfulness. While honesty is an admired virtue, in the Vietnamese scale of values it would be considered foolish to sacrifice one's own well-being or family interests for the sake of being scrupulously fair to strangers. When the U.S. military lawyers looked at Vietnam in 1965 they recognized the need for a thorough understanding of Vietnamese values and mores. The same could be said of Vietnamese legal philosophy and jurisprudence. The achievement of independence from the Chinese had not substantially changed Vietnamese law. Under the Chinese, Confucianism was almost synonymous with the law. It was the official state ethical code and the dominant intellectual tradition of the Vietnamese mandarins, the scholar-bureaucrats who administered the country. The Vietnamese dynasties that succeeded the Chinese retained the form and apparatus of the mandarin government, including the laws by which the Chinese had ruled Vietnam. The Vietnamese Hong Duc Code of the Le Dynasty, promulgated in the fifteenth century, was modeled on the Chinese T'ang Dynasty (618- 807) Code. The Vietnamese Gia Long Code of 1815 was a bodily re-enactment in the Chinese language of the Manchu Dynasty Code of the seventeenth century. The scholars who adopted the Chinese codes for Vietnam may have felt they were performing a valuable service, but imposition of the foreign law served to alienate the people from the law and from those who administered it.

The French Influence

French rule imposed yet another alien layer of law on the Vietnamese but it did not totally replace Chinese law or ancient customary law. The French administered Vietnam as three separate regions: Tonkin, now North Vietnam, the capital at Hanoi, as a protectorate; Annam, central Vietnam, its capital Hue, as a protectorate; and Cochin China, southern Vietnam, its capital Saigon, as a colony. One result is that each region today has its own legal code, and there is still no single comprehensive Vietnamese civil, criminal, procedural, or other code. The French protectorate at Tonkin made few concessions to the appearance of native autonomy. The important executive powers were vested in a French Resident-Superior at Hanoi who governed in the name of the emperor. French resident officers in the larger towns

directly controlled the local administration. They attempted to work through the mandarinate and to preserve the institution for administrative purposes, but on terms consistent with French needs. The traditional judicial system was retained and applied using the mandarinate as a front. By degrees Tonkin was subjected to modified French codes: a Code of Criminal Procedure in 1917, a Penal Code in 1921, and a Civil Code in 1931. In Annam the emperor and his officials were left in charge of internal affairs, except for customs and public works, but they functioned under the close scrutiny of the French, whose rule was somewhat less direct than in Tonkin. All of the acts of the emperor, except on some minor matters of religion, eventually became subject to French approval. In Annam, the Cia Long Code was applied until promulgation of the Penal Code for central Vietnam in 1933, a Criminal Procedure Code in 1935, and a Civil Code in three parts between 1936 and 1939. All were basically French codes modified to suit local customs and the requirements of administration in Annam. The French drafters of the codes for both Annam and Tonkin went to great lengths to ascertain conscientiously what Tonkinese and Annamese customs really were and to exclude inappropriate provisions copied slavishly into the Gia Long Code from Chinese texts. Cochin China, which had been under French domination for some twenty years longer than Tonkin and Annam, became in 1862 a colony under French law, while Tonkin and Annam remained as protectorates, each under the nominal reign of its emperor. Cochin China was administered directly by a French-staffed civil service under a governor and a colonial council. The colonial council was composed half of Frenchmen and half of Vietnamese, the latter elected on a limited suffrage and the former by the French civil servants working in the colony. As a colony, Cochin China sent its own dele-gate to the Chamber of Deputies in Paris. In 1879, attempts to govern through a controlled mandarinate were abandoned and French administrators were placed at the head of each province. The mandarins had been permitted to apply the Gia Long Code as far as they knew it in the absence of printed texts. The French administrators applied French law and a French translation of the Gia Long Code, and, when these did not cover the situation, the ancient Hong Duc Code. When French administrators were substituted for the mandarins, the Penal Code of France became the basis for civilian law until the Modified Criminal Code was published in 1912. Many statutes enacted in France were interpreted as applying automatically to Cochin China, as to all other full colonies. The Civil Code of France was followed by the French courts in Cochin China, local modifications having been published as early as the Precis of 1883. The old Vietnamese laws remained in an uncertain state of coexistence with the laws of France even after the publication of the various codes by the French. The applicability of the codes was not territorial, but ratione personae. Each person carried his own law with him and the regional codes applied only to natives of the region. A stranger, for example an Annamese in Tonkin, was subject to his own law in civil disputes and to French law if charged with a crime. A Frenchman, or another foreigner, would be subject to French law in all matters. Furthermore, the applicability of the law was, to a degree, a matter of choice, as anyone could elect the protection of French law in place of the traditional Vietnamese law that still coexisted with the French codes. There were French courts and Vietnamese courts, but the former enjoyed an overriding jurisdiction. The Vietnamese courts were composed of the courts of the native provincial administrators, sitting as magistrates as they had done under the Chinese system of the Gia Long Code, except that in Cochin China the judges of the Vietnamese courts were Frenchmen until 1921, when a few Vietnamese magistrates were appointed to hear criminal cases according to French law in the vernacular of the accused. In civil cases, litigants had a choice between French and Vietnamese judges, even when they sought to be judged by traditional Vietnamese law in preference to the statutes of the colonial regime. However, if one party was not Vietnamese, jurisdiction lay exclusively with the French court. The only appellate courts were French, and the only procedure for appeal under the traditional Vietnamese system was by petition to the throne. While all of the codes published by the French for Annam and Cochin China were still in effect in the Republic of Vietnam, they were no more successful in bringing the law to the people than were the Chinese codes which preceded them. The conglomeration d customary, Chinese, and French laws and the cumbersome dual systerm of administration did little to enhance the

image of the law or the central government in the eyes of the average farmer in his hamlet. Significant advances were made under the French, but even to those Vietnamese who were exposed to the law and who understood its workings, it must have seemed that the "rule of law" meant simply the rules of the governing political power, imposed on a population whose only participation in the legal process was passive obedience. A MACV Staff Study of 31 May 1965 summarized the effect of French law upon the Vietnamese as follows: Under the French an effort was made to establish a judiciary apart from administration, and this brought French officials deeply into the Vietnamese judicial system, according to the 1962 Michigan State University study of RVN. "Thus the social structure was penetrated and fractured at the district and village levels. The canton chiefs and village elders were stripped of their police and judicial powers, which were given to the French policemen and judges." This led to further separation of the people from the law. The Michigan State University study noted "the introduction of a new legal code had upset the social structure of Vietnam. The Vietnamese were bewildered by both the form and the content of the new French law, which was rigid where Vietnamese law was known for its flexibility. The majestic slowness of the French judicial procedures were in marked contrast to the quickness of traditional justice." One of the main Vietnamese grievances against the French was the substitution of French laws for the Vietnamese code. "French law was completely out of harmony with traditional law and custom." The French heritage remains heavy in the entire legal system, military and civilian. The older, more renowned lawyers and judges are often found to be French educated, French and non-English speaking. Professional works are often published in French. The French trappings as well as institutions are adapted by the Vietnamese, and these are superimposed over the Vietnamese society without much change. The Code Napoleon influence is naturally strong, and the civil code system, as distinguished from the common law, is employed. Trial by jury is not employed, the technique of cross-examination is severely limited, and the authority of an examining magistrate is much enlarged as compared with US or common law practice. One former French governor wrote: "We have destroyed the past and not built anything to replace it . . . It was with a handful of Frenchmen, under a killing climate, that we attempted to apply our laws to two million people belonging to a Chinese civilization which had stood against two thousand years of revolution. Following its putative independence from France under the Elysee Agreements of 1949, the Vietnamese legal system remained much the same as it had been under the French, except that on 16 September 1954 the courts and legal system were completely taken over by the Vietnamese. With the appointment of Ngo Dinh Diem as premier in 1954 and the departure of Emperor Bao Dai in 1955 there began the promulgation of a long list of emergency decrees designed to control the population and resources and to protect the state under insurgent conditions. Seven different constitutions were promulgated, suspended, and replaced as a result of a series of coups and countercoups. In 1964 alone seven different governments came and went.

The Vietnamese Constitutions

The first constitution was promulgated on 26 October 1956, a year after the Republic of Vietnam was proclaimed, with Diem as president. It provided for separation of executive and legislative powers, but in practice the legislative power was insignificant. There was no separate autonomous judicial branch; the court system was under the supervision of the executive branch through what was then called the Department of Justice. The relationship between the executive and legislative branches was not clearly defined, and the executive, under President Diem, quickly became predominant. Under the constitution the president was vested with broad emergency powers to rule by decree between the short sessions of the legislature, and, in time of war, internal disturbance, or financial or economic crisis to exercise extraordinary power to institute any appropriate measures. While the constitution did provide for some checks on executive power, they were largely ineffectual. President Diem's regime came to a violent end on 1 November 1963, victim of a successful coup. The 1956 constitution was replaced by a hastily drawn provisional charter on 4 November 1963. All executive and legislative power was placed in the hands of a Revolutionary Military Council headed by Major General Duong Van Minh. Since all power

was centralized and exercised by the generals, the provisional charter had little legal significance. A second provisional charter replaced the first provisional charter on 2 July 1964. This was soon followed by a third provisional charter on 16 August 1964. Both the second and third charters stressed the supremacy of military leadership and executive power. Major General Nguyen Khanh, who had unseated General Minh in January 1964, became chairman of the Revolutionary Military Council, which was the supreme organization of the nation. The charter of 16 August 1964 was withdrawn because of severe criticism that it provided for a military dictatorship. It was replaced by the fifth constitution, the provisional constitution of 20 October 1964, which provided for a transfer of authority to a civilian government. The civilian government proved ineffective and relinquished its authority in June 1965 to a group of military leaders headed by Air Vice Marshal Nguyen Cao Ky. This group established the National Leadership Council, a ten man military directorate, with Major General Nguyen Van Thieu as chairman, a position comparable under the circumstances to that of chief of state. On 19 June 1965 the committee named Air Vice Marshal Ky as prime minister and proclaimed the sixth constitution, another provisional charter. In September 1966, a constituent assembly was elected by nationwide ballot to draft another constitution providing for the return to civilian government. The drafting committees consulted many constitutions, particularly the French, American, Japanese, and Korean, and were aided in their work by advice from the United States. The seventh constitution since the constitution of 1956 was proclaimed on 1 April 1967. It provided for a president, a bicameral legislature, and an independent judiciary. Checks and balances between the three branches were set out.

Decree Law

With South Vietnam in a state of almost constant warfare and political upheaval since 1954, the government came to rely increasingly on the use of emergency executive decrees as a means of controlling the people and resources and preserving order in the state. In Vietnamese terminology, a decree was an edict by the executive power, namely the president of the Republic or the prime minister, countersigned by one or more ministers. As a general rule, any decree had to be based on a previous law, that is .on an act of the National Assembly. The president or the prime minister had the power to introduce a proposal of decree law. The legal office at the office of the president of the republic was in charge of contacting the minister involved for necessary discussion, exchange of ideas, and draft of the decree law concerned. The draft was then sent to the Council of Ministers for deliberation, and, if approved, it was promulgated by the president and published in the Republic of Vietnam official gazette. The decrees usually did not formally replace existing law, but added to it. If there was conflict between an existing law and a new decree, the new decree controlled. Decrees were often vague in language and far-reaching in scope. For example, the 1962 law for the protection of morality prohibited abortion, sorcery, animal fights, smoking by persons under age eighteen, prostitution, which was defined as "voluptuous activities," dancing, and beauty contests. Article 4 stated, "Dancing at any place is forbidden. All various styles of dance which are harmful to the good customs and nice traditions, and all beauty contests are banned." There were hundreds of decrees, affecting every aspect of Vietnamese life. Representative decrees designed to control the resources of the country were those regulating the stocking of goods, the distribution of food, the provision of security measures for rice truck convoys, and the possession and use of pharmaceuticals, medical supplies, batteries, sulfur, steel pipes, cotton seed, soybean oil, and currency. Among the decrees regulating the life of the people were decrees placing strict controls on the press, requiring government permission for all meetings, including family gatherings, enlarging police powers to search, seize, and arrest, and controlling the use of roads and other transportation facilities. Decrees aimed most directly at suppressing insurgency were those which defined crimes against the state security, forbade membership in the Viet Cong, defined and punished "subversive acts," defined and prescribed the death penalty for "hooliganism" and other offenses,

declared a state of emergency, declared a state of siege, declared martial law, and declared war. (See Appendix B.) A survey of the decrees does, however, reflect the efforts of the various governments of South Vietnam to meet the insurgency and invasion threats and at the same time to preserve a reasonable measure of freedom, disrupting the normal patterns of life of the citizens as little as necessary, and giving considerable obeisance to formalism and legal reasoning, which Vietnamese officials, jurists, lawyers, and politicians believed their legal institutions required. That the efforts frequently failed was due to a variety of reasons, one of which was the basic inability of the law enforcement machinery to take on the tasks necessary to support wartime decrees in a war-disrupted country. Another reason was the lack of tradition to support obedience to or respect for the law. A third was that often the decree sought to build upon a foreign, primarily French, law without full knowledge of that law, its modernization, or its wartime application. There was also an apparent belief that severesounding laws would not have to be applied as threatened. It is noteworthy that throughout most of the war the decrees, and the courts in enforcing them, declined to take the position that a state of war existed or that wartime penalties should be imposed. From a legal standpoint, among the most controversial decrees were those that provided for the detention of individuals who were considered dangerous to national security. This category of civilian security suspects consisted of civilians arrested by the police or security guards, or persons detained as a result of military operations who were not readily classifiable as innocent civilians or prisoners of war. Civilian security suspects were initially investigated by the police. If it appeared that they were innocent, they could be released by the police chief, the district chief, or the province chief. If there was sufficient evidence for trial they were turned over to the military courts, which, as in most civil law countries, had jurisdiction over all national security offenses. If there was insufficient evidence for trial but an individual was nevertheless deemed dangerous to security, he was held for "processing" by the province security committee. This committee consisted of the province chief, the deputy chief for security, the prosecutor (the only legally trained member of the committee), a National Police representative, a Military Security Service representative, the sector S-2 (a Vietnamese military intelligence officer), and one person representing the Regional Forces and Popular Forces. These conlmittees had the authority to release a suspect, to order him to live in a certain area, to banish him from a certain area, or to incarcerate him in a re-education center for a period of up to two years, such periods being renewable indefinitely. If the committee decided to incarcerate an individual, the recommendation was sent to the Central Security Committee in Saigon, which forwarded it to the Minister of the Interior for signature. The Minister of the Interior, who often was an attorney or judge, was responsible for the internal security of the state. Proceedings of a security committee were not judicial in nature, although the committee could allow a suspect to be present and be represented by counsel. Periods of confinement varied: some were for as little as three months, others were extended beyond the original two years. The duration of confinement was influenced by the inadequate facilities for the numbers involved, and ultimately the normal period of confinement for political prisoners, those considered enemies of the state, often including Viet Cong, was between six months and a year. The result was an anomalous situation in which a member of the Viet Cong, taken in combat and dealt with as a prisoner of war, could go to a prisoner of war camp, where he would be treated according to the Geneva Conventions of 1949, but where he would also be likely to remain until the war came to an end; on the other hand, a member of the Viet Cong picked up by the police in a city or village search would likely be sent to a re-education center, where he would be treated as a pretrial criminal, without Geneva Convention benefits, but where he probably would be confined for as little as six months and then set free without a trial. The courts played no part in sending individuals to the re-education centers, nor could a prisoner seek release through the courts. The common law concept of habeas corpus was alien to Vietnamese jurisprudence, as it is generally in the civil law system. This is not to say that no effort was made to prevent unjust confinement or to release those who might be confined without sufficient cause. The re-education centers were operated by the Ministry of the Interior, but the Ministry of Justice had constitutional responsibility for supervising detentions which were under its control. There was co-

operation between the two ministries, and Ministry of Justice prosecutors were able to inspect the prisoners, review confinement records, and report to the Minister of Justice, who could recommend that prisoners be released. A prisoner or his relatives who felt that a detention was unjust could complain to the prosecutor, who would conduct an investigation. Under the terms of the 1967 constitution, many of the emergency decrees promulgated earlier were of questionable validity. Yet with few exceptions they remained in effect, and additional decrees were promulgated, further concentrating power in the executive. On 10 May 1972 President Thieu declared martial law. The constitution authorized the president to declare "a state of emergency, curfew or alert" which the legislature must rati£y, amend, or reject within twelve days, but there was no specific provision for a declaration of martial law. Some legislators, therefore, thought the decree of 10 May unconstitutional, but it was not rejected. On 28 June the National Assembly passed a bill delegating to President Thieu the sole power to decide by decree any necessary measures in the fields of security, defense, economy, and finance "for a six-month period." Later decrees directed measures to be taken and penalties to be given for violations of "security and public order during wartime or . a state of martial law." These decrees were largely variations upon themes of earlier decrees setting forth security measures. The decrees were emergency political measures taken by a government at war-a war that raged the length and breadth of the country, where the enemy mingled with the citizenry, where political and social institutions were as much targets as were military forces. In order to cope with this situation, measures were enacted regulating virtually every aspect of political, economic, and social activity. Some decrees were detailed; others were sweeping. Generally, decrees gave the government sufficient authority for effective action in the area of national security. In terms of legal craftsmanship, the law and procedures prescribed were often lacking in definiteness, coherence, and uniformity. The profusion of decrees alone would make any comprehensive analysis of their impact on the legal system extremely difficult. Many of the measures enacted envisioned legal concepts unfamiliar to American attorneys, while some decrees contained Western terms which had no precise correlation in Vietnamese jurisprudence. Some of the decrees were secret, and others were not publicized. Since many previously enacted decrees and statutes remained in effect, at least nominally, there were inevitable conflicts between provisions of the different decrees, codes, and the latest constitution. Drafting executive orders, which are in the nature of legislation, is always a difficult task. On the one hand, the exigencies of the situation must be met, but on the other hand, the measures taken must be within the limits of constitutional authority and should be reconciled with previous policies and laws of the government. This exacting work requires time, favorable working conditions, and an adequate pool of experienced attorneys, none of which was readily available in Vietnam during the war.

The Ministry of Justice

Prior to the enactment of the 1967 constitution, the Ministry of Justice was the paramount legal institution in the government, with authority over all courts, judges, and prosecutors. There were statutory guarantees designed to promote independent decisions by judges in litigated matters, but the authority of the ministry included the power to supervise the administration of the court system, to appoint, transfer, and discipline members of the judiciary, and to exercise financial control over the judicial system. Under the 1967 constitution the judiciary became separate and independent from the executive branch of the government; the judiciary was granted an autonomous budget, and the Supreme Court exercised authority over all courts and judges. Other important responsibilities of the Ministry of Justice were retained within the framework of the 1967 constitution. Acting through its "prosecuting judges" (public prosecutors) the ministry prosecuted penal actions, and it could participate in civil actions if it determined such a course was warranted to protect the public interest. It advised the government on legal matters, drafted legislation, administered the prisons, controlled the judicial police, and was responsible for law reform. The responsibility of the Ministry of Justice as legal adviser to the

government was particularly significant since the various ministries did not have legal advisers or legal staffs of their own. Advice was requested on such matters as the civil rights of citizens, the exploitation of natural resources, administrative contracts, and government reorganization. The ministry might also be called on indirectly to advise province chiefs and provincial administrators, who did not have their own legal advisers. These officials normally sought advice from the Ministry of the Interior, which could in turn request assistance from the Ministry of Justice. Starting in the mid-1960s the Ministry of Justice conducted a vigorous campaign to modernize the laws and increase the use and efficiency of the legal process. In 1965 a Law Study Committee was named by the Minister of Justice for the purpose of unifying the - various legal codes that were in effect in the country. The committee, which was financially sponsored by such organizations as the Asia Foundation and the U.S. Agency for International Development, was chaired by the Minister of Justice and included prominent Vietnamese attorneys and judges. The committee worked for three years to review and redraft the criminal code, the civil code, and the codes of criminal, civil, and commercial procedure. The unified codes were forwarded to the legislature in mid-1969 for debate and vote. To ensure continuation of the work of the committee, it was institutionalized as a Law Center attached to the Ministry of Justice, with the Minister of Justice and the chiefs of the public law section, the civil law section, and the criminal law section of the ministry as members of the Law Center planning board. The Law Center continued the revision of the code of commerce, which was begun by the Law Study Committee, and began work on the administrative code, the code on the authentication of legal documents, and the code on the expropriation of properties for public use. Other projects slated were the revision of the military code, the labor code, and the housing code. The systematic study and revision of the laws by Vietnamese scholars will be a major step toward gaining the respect of the people for the law, thus forging a bond between the people and the government. The official and unofficial, formal and informal, personal and private support of the American military lawyers in Vietnam has contributed substantially to this process. A number of steps were taken by South Vietnam to promote the effective administration of the law by ensuring an adequate number of qualified personnel to perform legal functions. After 1967 the Supreme Court was responsible for the regulation and supervision of all judges. This responsibility was fulfilled through the activities of the judicial administration committee. The Supreme Court also established its own law and research center in 1969. Within its jurisdiction, the Ministry of Justice drafted regulations governing the careers of prosecutors and establishing the independent status of notaries, who were previously government officers under the control of the ministry. The ministry also took steps to increase the number of process servers in each province and to bring the judicial police directly under the control of the ministry.

The Court System

A direct result of the separate administration of Annam and Cochin China under the French is that historically South Vietnam has had two court systems, one centered in Hue, the other in Saigon. The ultimate court of appeal for both was the Cour de Cassation in Saigon, but each of the two systems administered a different code of laws and each had its own bar and law school. The courts in Vietnam adhered to the French model in that there were dual systems of judicial and administrative courts, each having its own hierarchy and each culminating in an appeals court. The judicial courts heard the traditional criminal and civil matters, while the administrative courts had jurisdiction over disputes between citizens and the state involving certain specialized areas of government action. The highest judicial court was the Cour de Cassation; the highest administrative court, the Council of State. There were also a number of specialized courts having cognizance of cases in such areas as employer-employee disputes; a juvenile court; agrarian courts; and a court to hear landlord-tenant disputes. Before the changes effected by the constitution of 1967, the judicial system of South Vietnam was wholly a part of the executive branch of the government, with the Minister of Justice as executive head of the legal

system having responsibility for organizing and supervising the courts, for administering the laws, and for defining the regulations governing the legal profession and the practice of law. While the 1967 constitution instituted major changes with respect to the prerogatives of the newly created Supreme Court, the judicial system remained French in tone and the functions of the lower courts were virtually unchanged. (Chart 4) Vietnamese trials are unlike those in the United States, which are characterized by procedural technicalities designed to protect the rights of the accused and direct confrontation and cross-examination of all pertinent witnesses before the court, and which permit aggressive participation by counsel at all stages of the proceedings. Vietnamese trials, like those of other civil law systems, are inquisitorial in nature. The function of the court is not to act as referee in a contest between opposing counsels, but to make a judicious inquiry as to the facts and then to apply the law so as to achieve substantial justice. Criminal cases are processed in two stages. The first stage of each case is the investigation, which may be a routine matter performed by police or other authorities, or may be an exhaustive compilation and analysis of evidence performed by an examining magistrate from the prosecutor's office over a period of several months. Once the investigation is complete, the case is forwarded to the prosecutor, who determines whether the case should be sent to trial. The second stage of the case, the trial, provides a forum for a disinterested review of the government's evidence and an opportunity for the court to examine the accused and call such witnesses as it, in its discretion, feels are relevant to the issues at hand. In simple and flagrante delicto cases there is little deliberation; in serious, complex cases the most important piece of evidence is often a voluminous dossier compiled by the prosecutor's office. Witness testimony before the court, if there is any, is apt to be abbreviated, with the president of the court asking all the questions. The president is in complete charge of the court; the participation of counsel is limited primarily to argument. In the military courts, trials seldom last more than a day, and it is not unusual for a field court to try more than a hundred desertion cases in a trial session of two or three days. In the eyes of the accused it is the prosecutor who is the dominant figure in the proceedings. Defense counsel does not usually participate actively in the pretrial stage of a case; it is the prosecutor's office which gathers the evidence and compiles the dossier upon which the case is tried, and it is the prosecutor who decides whether to send a case to trial. If a criminal case goes to trial there is a very high probability of conviction. At trial the prosecutor speaks from a raised platform, equal in height to the court's bench, while the accused and his counsel are at floor level. If the accused is convicted, the recommendation of the prosecutor carries great weight with the court in determining an appropriate sentence. In comparison with American practice, the role of defense counsel seems severely curtailed; yet defense counsel in Vietnamese courts performs an important function by assisting the court to apply properly the correct law to a case and by ensuring that any factors favorable to the accused are developed before the court. The impetus in a criminal proceeding is nevertheless clearly furnished by the government, with the prosecutor as the key figure in the administration of justice. Thus a heavy responsibility rests on the prosecutors to be scrupulously fair in safeguarding the rights of the accused as well as those of the state in order to maintain the credibility of the system. This need for objectivity on the part of the prosecutors is recognized by the Vietnamese, who accord them the title of "prosecuting judges" and classify them as judges rather than as practicing attorneys. (The prosecuting judges are members of the Ministry of Justice. The magisterial judges, who determine guilt or innocence and assess punishment, are members of the judiciary and are regulated and supervised by the Supreme Court.) There were five steps in the hierarchy of the judicial courts: (1) Cour de Cassation; (2) Courts of Appeal; (3) Courts of First Instance; (4) Courts of Peace With Extended Jurisdiction; and (5) Courts of Peace (or Justice of the Peace) . (Map 1) The Cour de Cassation sat in Saigon as the highest judicial court of appeal. It heard civil, commercial, and criminal appeals, and had jurisdiction to hear cases in which it was alleged that a lower court had abused its powers, was in conflict with the judgment of other courts in similar cases, or had made certain technical errors. There were two Courts of Appeal, one in Saigon, the other in Hue. Each was divided into two chambers, civil and criminal. Appeals in civil cases

were heard by a panel of three judges who heard misdemeanor cases; two citizen assessors were added to the panel in felony cases.

The Courts of First Instance, of which there were nine in May 1967, usually consisted of a presiding judge, a prosecutor, an examining magistrate, and a clerk. If the court was busy, as in Saigon, additional judges and other personnel could be added. These courts had jurisdiction to hear all civil, commercial, and criminal cases. They could also rehear cases from Courts of Peace With Extended Jurisdiction and from Courts of Peace.

The Courts of Peace With Extended Jurisdiction, of which there were twenty throughout the provinces in 1968, had jurisdiction over civil and commercial cases and all criminal cases except the most serious felonies. They also exercised control over the Courts of Peace. These courts consisted of a presiding judge and clerk. There was no examining magistrate or prosecutor. In some criminal cases two assistant judges might be added, but there was never a prosecutor present. The Courts of Peace consisted of a single magistrate (justice of the peace) and clerk. Frequently a district chief acted as magistrate. They tried minor civil cases and petty criminal offenses, conciliated disputes brought before them by citizens, and conducted investigations into serious criminal offenses. In 1966 approximately ninety of these courts had been established at district level and at some of the more isolated province capitals. Because of wartime conditions and budgetary restrictions, operations of the Courts of Peace were not emphasized. Endeavors were made only to provide each province with a Court of First Instance. The Council of State was the highest court of administrative appeal. It heard appeals from the decisions of the Administrative Court and the Appellate Court of Pensions. When asked to do so it could render legal advice to the government and assist in drafting laws and decrees. The Administrative Court heard cases brought by citizens against the government and disputes between government agencies. The Appellate Court of Pensions and the two Courts of Pensions took cognizance of complaints regarding allowances to disabled veterans. The specialized tribunals were the labor courts, which heard disputes between employers and employees; the juvenile courts for trial of delinquents under the age of eighteen, except in case of political offenses and "hooliganism," which were reserved for trial by the military field courts; the agrarian courts to handle litigation arising from agrarian reform laws; and the rent courts to hear landlord tenant disputes. Decisions of the agrarian courts were final. Appeals from decisions of the others were heard within the judicial court system.

Chapter V of the 1967 constitution provided for a Supreme Court vested with "independent judicial power" and empowered to establish and administer regulations for the judiciary. It stated that the separate responsibilities of judges and prosecutors were to be clearly delineated and governed by separate regulations, with judges under the control of the Ministry of Justice. The Supreme Court was given extensive powers of review "to interpret the Constitution, to decide on the constitutionality and legality of decrees and administrative decisions," and to decide on the dissolution of political parties whose activities "oppose the republican form of government." Supreme Court justices could be removed from office only for "moral or physical incapacity, conviction, or violation of discipline." The first step in implementing the changes prescribed in the 1967 Constitution was taken on 17 October 1968, when the National Assembly elected nine justices of the first Vietnamese Supreme Court. Although the constitution provided for the appointment of six additional justices, none was nominated. Shortly after the Supreme Court took office the two existing "supreme courts," the Cour de Cassation and the Council of State, were suspended, and their functions were assumed by the new Supreme Court. The authority of the Supreme Court was extended beyond that of the Cour de Cassation in that the Supreme Court could

hear and decide exceptional pleas made at any stage of a pending case raising the constitutionality of law, decree, or administrative ruling. Supreme Court decisions were binding, and a ruling had the effect of stopping implementation of unconstitutional or illegal legislative enactments, administrative regulations, or administrative decisions from the date of publication of its decision.

The Military Courts

The military courts played a prominent role in the Vietnamese legal system. Under wartime mobilization, a substantial percentage of the population acquired military status, and all military offenders were tried by military courts, regardless of the nature of the offense or the circumstances under which it was committed. Military status encompassed not only active members of the regular armed forces but also members of auxiliary and quasi-military organizations, and even some civilians who worked closely with the military. If a crime was committed by a military member with a civilian accomplice, the civilian accomplice could be tried by the military court. Finally, all civilian security offenders were tried by military courts, in accordance with executive decrees defining security offenses and specifying the forum for trial. The chief of all legal services for the entire Vietnamese armed forces was the Director of Military Justice, an Army colonel who reported directly to the Minister of Defense rather than to the Army chief of staff. (Nguyen Mong Bich, who served as director of the Directorate of Military Justice horn 1964 to 1966, was elected one of the first nine justices of the Supreme Court.) The director gave advice to the Minister of Defense on all legal matters; studied and implemented the organization, operation, and administration of the military courts; recommended changes to the Vietnamese Code of Military Justice, which is modeled on the French Code de Justice Militaire; studied all problems of national and international law concerning the Vietnamese armed forces; and rendered legal assistance. These functions were carried out by the personnel of the Directorate of Military Justice, the Vietnamese equivalent of the Judge Advocate General's Corps. There were approximately fifty military justice corps officers, ranging in rank from first lieutenant to colonel. Most were law school graduates, but not all had completed the probationary period required for full admission to the bar. These officers could function as prosecutors, examining magistrates, or judges. They were assisted by bailiffs, clerks, and the judicial police. The directorate was charged with the investigation, preparation, prosecution, and trial of cases falling within military jurisdiction for all of the Vietnamese armed forces. The directorate also operated confinement facilities in each corps area for the detention of individuals awaiting trial by the military courts, which were located at Da Nang, Nha Trang, Saigon, and Can Tho. The Regular Military Courts were activated by Ordinance Number 8 of 14 May 1951 which promulgated the Code of Military Justice. The presiding judge in each court was a civilian, chosen from the local Court of Appeals. The alternate presiding judge was a field grade officer from the Directorate of Military Justice. The other members of the court were detailed from local military units. The prosecutor and his staff were Directorate of Military Justice personnel, but there was no military defense counsel. An accused could hire civilian counsel, or, if he did not have the means, civilian counsel would be appointed for him from the local bar. The jurisdiction of these courts was extensive. They had jurisdiction over all military personnel of the regular armed forces, all paramilitary personnel in a military status, and even some civilians who were granted the status of military personnel because of their connection with the armed forces, for violations of military law and ordinary criminal law. These courts could adjudge any penalty including the death penalty. Appeals from these courts were made to the Supreme Court. The military field courts were established by Decree Law 11/62 of 21 May 1962 to hear expeditiously jbgrante delicto cases in which the evidence was considered so clear or the offense was so simple that extensive pretrial investigation was not warranted. Under the Vietnamese concept, &ante delicto included not only cases of individuals actually caught in the act of committing an offense, but also cases in which individuals were caught having in their possession "any object, weapon, material

or document which could lead to the belief that he is the author of the crime or an accomplice thereof." Decree Law 4/66 assigned the field courts additional jurisdiction during the state of war over cases of bribery, influence peddling, embezzlement of funds, and illegal speculations, regardless of whether the accused was a civilian or a serviceman, and regardless of whether the accused was apprehended in flagrante delicto. Decree Law 15/66 assigned the military field courts jurisdiction over cases of desertion, encouraging desertion, and protecting and harboring deserters. Under Decree Law 11/62 the court included one presiding judge and four military jurors. There was no provision for objection and appeal and the judgment was executed immediately after being pronounced, provided the death penalty was not included. In 1970, however, the Supreme Court, empIoying the American idea of judicial review, decided that much of the jurisdiction, court composition, and procedure of the military field courts was unconstitutional. Under Decree Law 06/70, 23 June 1970, military field courts were vested with jurisdiction over deserters and accomplices, servicemen and assimilated servicemen apprehended in flagrante delicto, and their civilian accomplices and accessories in the case of all felonies and misdemeanors prescribed by the Code of Military Justice, the Code of Criminal Law, and other rules and regulations. The militarv field court was revised under the June decree to include one presiding judge and four associate judges. If the presiding judge was a civilian judge, he had to be a chief judge or an associate judge of the Court of Appeals; if military, he had to be of the rank of major or higher. The associate judges of the military field courts had to be professional military judges appointed by the Supreme Court. Decree Law 06/70 also provided for an appeal to the Supreme Court in all cases except desertion.

The Law and the People

In theory, the Vietnamese court structure appears to extend nationwide in a highly sophisticated and comprehensive manner. In reality, however, the activities of most of the courts and virtually all of the civilian bar were limited to the principal cities. In the countryside, Courts of Peace were the only legal instrumentalities. These courts were not staffed by judges or qualified attorneys. The Justices of the Peace who presided over these courts, were provincial administrators, often military officers, lacking legal training and experience. Since there were few lawyers or judges at the local level, the average Vietnamese could not see the administration of the law as being substantially different from any other exercise of governmental authority. Traditionally, the Vietnamese have not relied on the law to settle their disputes or affirm their rights because they were not familiar with the law, and the legal apparatus was not easily available to them. A major factor in the remoteness of the law from the people had been the shortage of practicing attorneys in Vietnam. In 1967 there were only 193 fully qualified attorneys in all of South Vietnam. Of this small number, 150 practiced in Saigon, and thirty of the forty-four provinces had no lawyers at all. In addition to the practicing attorneys there were approximately 100 judges, a category which included prosecutors as well as magistrates. Only two schools produced lawyers in Vietnam, one at Hue and the other at Saigon. The Law School at Saigon had about 4,000 students, but only a fraction were studying law as U.S. students would know it. The others studied economics, public administration, political science, and international affairs. In 1964, for example, only twelve probationers were admitted to the bar for the entire country. In considering these figures it is well to remember that the demand for legal services in Vietnamese society has been vastly different from that of Western, or, more particularly, American society. The Vietnamese economy is not an industrial or commercial one. There are relatively few automobiles, insurance companies, and real estate transactions to generate legal business. Average income is low, but it takes relatively little to live on. In addition to these and many other factors that tended to keep the lawyer population low, lawyers in a civil law system are not expected to provide the same services in the same manner as do lawyers in a common law system such as that in the United States. Finally, there is much to be said for local, nonjudicial, and

prompt settlement of petty disputes and minor offenses, and this method has worked quite well in many instances in Vietnam. In any case, the law as symbolized by the operation of the legislature and the courts with the active participation of the citizenry, represented by qualified counsel, has not played a significant role in the forming or functioning of Vietnamese society. The role of law in society is relevant to the conduct of war in two respects. First, the law can play a vital part in the effort to control the people and resources of a country and to curtail subversive activities. If there are well-written laws, effective co-operation between the police and the courts, and an efficient method for processing cases at the local level, people soon become familiar with the requirements of wartime measures; they realize that the laws are being enforced and that those who violate them will be punished. This awareness promotes increased voluntary compliance by the great majority of the population, and it acts as a positive deterrent to those inclined to break the law. Second, and no less important, the law can help the war effort by effectively and justly operating within the courts at the local level, thus providing order as well as a highly visible symbol of the government's capability and its concern for the needs of the people. The need for personal security and a means for settling disputes are basic to organized society; by administering to those needs through the law, a government can engender loyalty and foster a spirit of participation and co-operation among the people that can pay high dividends in a counterinsurgency effort. In the Vietnam War, because of the existence of insurgency and counterinsurgency and because worldwide scrutiny was applied. to the struggling government of South Vietnam, law assumed even more importance than might have been expected. Insurgency characteristically capitalizes on existing law to shield insurgents, exploit weaknesses in the governmental and legal structure, and in general uses the nation's law to aggravate any division between the populace and the counterinsurgency forces. On the other hand, the government's forces look to the law for new powers and authority in order to control the insurgents, and in doing so can very easily further alienate the populace from its own government. Failure by the government to grasp the intricacies of the equation can easily lead it to increasingly oppressive rule and deeper complications in its effort to extricate itself from the insurgency. One of the most subtle but significant questions the government has to answer is how to combine all forces, military and civilian, in the solution of insurgency. Sharp or traditional lines of demarcation as to what is civilian and what is military are not apparent in such a situation. The commander who does not see and provide in his counterinsurgency plans for the role of such civilian agencies as the police, the prosecutors, the courts, the jails, and the law generally has likely foredoomed his military efforts. Communist forces have generally well understood the political military interrelationships, and the war in Vietnam was not in this regard an exception. The Free World forces, possibly in part because of the number and sovereignty of their components, seemed slower to grasp the significance of the role law plays in insurgency, slower to create the necessary civilian-military team, and slower to ensure that law supported them in their relations and operations involving the people of Vietnam instead of eroding or working against their goals. The goldfish bowl aspects of the Vietnam War-the constant presence, reporting, and commentary of a worldwide press relatively free to roam about South Vietnam within the protection of the Free World forces--contributed heavily to the influence that world opinion of law or its absence would have on the war effort of the Republic of Vietnam. To fight for its life while at the same time building a rule of law, to create a bench and bar and establish a civil service where none has existed is a tough task for any government. To do it under the constant and critical eye of a press that compares what it sees with what it expects of its own experienced and sophisticated governments further complicated the matter in Vietnam. Not only was it important to have a just administration of law; that administration had to appear just to the public media or the government would pay a price before world opinion. The enemies of the Republic of Vietnam, however, the Viet Cong and the North Vietnamese, were not tested in the same manner and consequently were in a position to gain considerable propaganda and political advantage. Recognizing these circumstances, and the opportunities as well as the dangers they presented, the MACV Staff Judge Advocate took steps early to bring the political-military aspects of law into focus.

CHART 4—JUDICIAL SYSTEM OF THE REPUBLIC OF VIETNAM