

CHAPTER 1

HISTORY OF JUDICIARY SYSTEM UNDER VIETNAM'S CONSTITUTIONS

I. JUDICIARY SYSTEM UNDER THE 1946 CONSTITUTION

Following the victory of the 1945 August Revolution, Vietnam regained its independence after nearly a century under the French colonial and feudal rules. On 2nd September 1945, President Ho Chi Minh read the “Declaration of Independence” marking the birth of the Democratic Republic of Vietnam.

Promptly after the “Declaration of Independence”, various measures and policies have been taken with a view to building up and consolidating the State of the Democratic Republic of Vietnam. The first general election was successfully held on 6 January 1946 paving the way for the passage of the first ever constitution in Vietnam’s history by the 1st National Assembly of the Democratic Republic of Vietnam on 2 March 1946.

Military courts¹ were created under Decree No. 13 dated 8 September 1945 and Decree No. 21 dated 14 February 1946 of the Chairman of the Government of Vietnam. In accordance with these legal instruments, military courts were set up in most key provinces and cities of the country.

Also under these decrees, the military courts will, upon their trial, consist of one chief justice and two judges. The chief justice and one of the two judges must be a military commissioner and a political commissioner nominated by the Minister of Justice subject to the consent of the Minister of Interior, while the remaining professional judge was jointly appointed by the chairman of the local administration

¹ This term may also be translated as “military tribunals”.

committee as delegated by the Minister of Interior and the attorney general of the Court of Appeal as delegated by the Minister of Justice. In addition, a military commissioner or a member of the reconnaissance board may act as a public prosecutor. The military courts hold open hearings (except in some special cases). The accused may defend himself or request for a [third party] defender.

System of ordinary courts was established later as compared with the military courts. In this context, Decree No. 13 dated 24 January 1946 was seen as a cornerstone for the formation and solidification of the revolutionary judiciary system. Under this decree, the ordinary judiciary system included the *Courts of Appeal, Court of First Instance, Courts of Primary Adjudication*² and *communal boards of justice*. Since that moment, the court system was structured to be separated from administrative or executive bodies (with some exceptions where courts were not, due to different reasons formulated at certain districts or prefectures)

The Courts of Appeal were set up at regional level. Vietnam was then divided into three regions namely the Northern Region, the Central Region and the Southern Region. In each region, a Court of Appeal was created with jurisdiction over appeals against judgements or verdicts which were rendered by the Courts of First Instance. During the appellate hearings of crimes and misdemeanours, the trial panel was designed to consist of 5 members, namely one chief justice, two judges and two people's jurors³. The general attorney and deputy general attorney served as public prosecutors. The people's jurors were vested with voting power to decide cases. In case where the defendant appeared in court without any defenders, a barrister would be designated by the chief justice to provide defence.

The Courts of First Instance entertained jurisdiction over first instance trial of crimes and misdemeanours, civil and commercial cases within their respective localities. In handling civil and commercial cases, only one chief justice would adjudicate while the hearings of misdemeanours required the presence and opinions of two people's jurors. By the contrary, the hearing panel of [serious] criminal cases should include 5 members namely, one chief justice, two judges, and two people's jurors. The public prosecutors will be present as the accuser.

The Courts of Primary Adjudication were created in districts (prefectures).

² This term may also be translated as "inferior courts".

³ This term may also be translated as "assessor" or "juryman".

At communal level, the communal boards of justice were formulated with three members chosen among the standing members of the communes' administrative committees namely, the chairman, vice chairman and secretary. The communal boards of justice were entitled to conciliate all types of civil and commercial disputes, impose sanctions against minor [or petty] offences and enforce orders given by judges of superior courts.

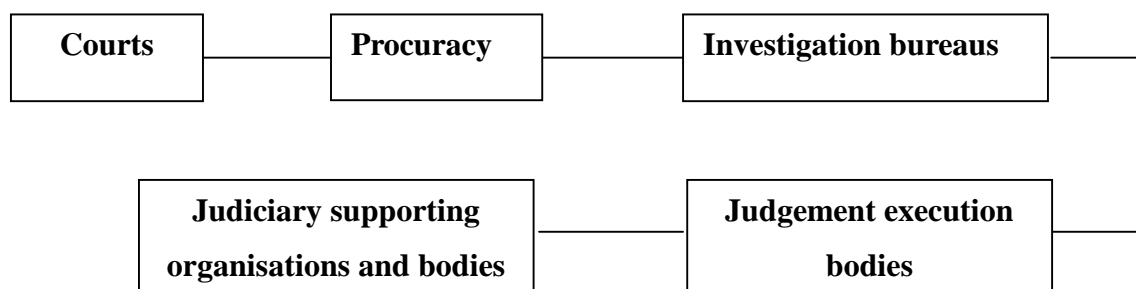
Decree No. 13 dated 24 January 1946 also elaborated recruitment and appointment of judges and their rights and obligations. In general, all judges having good ethics, capacity and eligibility will be asked to take an entry exam or be considered by a council designated by the Minister of Justice.

It is noteworthy that this Decree had affirmed the participation of "people's jurors" although their competence was still limited. For example, during the trial, people's jurors could only give their comments and recommendations to the hearing judges but were not able to determine whether to take judicial proceedings or supervise how verdicts or judgements were adopted. Such a limited participation may be viewed as the inheritance and temporary reliance on several laws and statutes previously issued during the first days of the new regime.

In order to secure a constitutional right to self-defence by the accused, the laws of the Democratic Republic of Vietnam promulgated in this period have specified and broadened the scope of defence during trials. In particular, a Decree issued on 10 October 1945 made stipulations on the organisation of bar associations whereby, lawyers' organisations which were set up in pre-revolution periods were temporarily unchanged with rights to provide defence in all provincial courts and higher courts and military courts.

II. JUDICIARY SYSTEM UNDER THE 1959 CONSTITUTION

On 31 December 1959, the National Assembly of the Democratic Republic of Vietnam adopted a new Constitution in replacement of the 1946 Constitution. Under the 1959 Constitution, the judiciary system included the following components:



Courts

In April 1958, the National Assembly of the Democratic Republic of Vietnam decided to establish the Supreme Court and the Central People’s Public Prosecution Institute in an effort to split the court system and Public Prosecution Institutes from the Ministry of Justice. This development was seen as one of the significant reforms of the organisational structure of the court system. For the first time in their history, the courts became independent from the executive bodies and the Public Prosecution Institutes were separated from the court system.

Under the 1959 Constitution, the Supreme Court, local courts and military courts were institutionalised as adjudicating bodies of the Democratic Republic of Vietnam. In special cases, special court(s) may be set up under a resolution of the National Assembly (Article 97).

Based on the 1959 Constitution, the National Assembly of the Democratic Republic of Vietnam passed the Law on the Organisation of the Courts on 14 July 1960.

Pursuant to the aforesaid legislation, the court system was designed to include:

- a) Supreme Court;
- b) Local courts;
- c) Military courts; and
- d) Special courts which are to be set up under special circumstances.

Principles of operations: After the introduction of the 1959 Constitution, the court system has experienced strong developments toward a better promotion and assurance of democracy and social justice. The 1959 Constitution and various laws which were enacted on the basis of this Constitution have laid out major principles of operations such as an obligatory participation by the jury in the court hearings; equal

rights between the judges and the jurors; independence and strict compliance with the law by the courts during their trials; admissible use of mother tongue before the courts; holding open hearings except otherwise provided by the law; securing the accused's right to defence.

Procuracy⁴

The Procuracy system was created in 1960 under the Law on the Organisation of the Procuracy adopted by the National Assembly of the Democratic Republic of Vietnam on 15 July 1960 in pursuance to the 1959 Constitution.

The Procuracy system consisted of:

- a) Supreme Procuracy;
- b) Local procuracies (at provinces, districts and autonomous regions); and
- c) Military procuracies.

The Supreme Procuracy and local procuracies performs their assigned tasks by:

- a) Controlling the law obedience in resolutions, decisions, circulars, directives and other measures taken by relevant bodies of the Council of Government and local authorities; controlling the law obedience by State employees and citizens;
- b) Investigating criminal offences and bringing juridical proceedings against criminals and offenders;
- c) Controlling law obedience in investigations to be carried out by the police and other investigation bureaus;
- d) Controlling law obedience in trials by the courts and enforcement and execution of judgements;
- e) Controlling law obedience in detention camps; and
- f) Prosecuting or participating in important civil proceedings which relate to the interests of the State and the people.

In reviewing the procuracy system during 1960-1975 in comparison with the previous period, we may come into the following conclusions:

- Unlike the pre-1958 Public Prosecution Institute, the Procuracy was

⁴ This term may also be translated as "the People's Office of Supervision and Control".

structured as a close system independent from both executive bodies and the courts. Before 1958, the Public Prosecution Institute was treated as a part of the executive branch and the court system.

- Functions and tasks of the Procuracy were better specified with an expanded scope of powers given the previous Public Prosecution Institute;
- The procuracy system was better organised and more complete as compared to the Public Prosecution Institute.

By 1974, the Supreme Court issued a circular dated 16 September 1974 which specified circumstances where the participation of defenders in the trial process is obligatory:

- 1) The accused may be sentenced to life imprisonment or to death;
- 2) The accused is an adolescence [or juvenile] or physically or mentally impaired persons who committed serious crimes;
- 3) Important or complex cases which may have considerable impacts on the public.

Thus judiciary activities which are undertaken in support of the courts' hearings have experienced continuous developments aimed at better securing democracy and social justice.

Before 1946, only lawyers might act as defenders for the accused. However, since 1949, the accused has been able to request citizens other than the lawyers to protect their interests. Furthermore, prior to 1961, the defenders could only appear in the Courts of First Instance or the Courts of Appeal while since 1961, the defenders may protect the interests of the accused at all types of hearings.

III. JUDICIARY SYSTEM UNDER THE 1980 CONSTITUTION

On 18 December 1980, the National Assembly of Vietnam enacted a new Constitution to replace the 1959 Constitution. Since the 1980 Constitution was introduced after the victory of the anti-American Resistance and at the beginning of national reunification and rehabilitation, but before the start of the renovation, the judiciary system of this period was characterised by two features:

First, under the 1980 Constitution, and other laws and ordinances promulgated

in this period, the court system still consisted of courts at three levels (namely, the Supreme Court, provincial courts and district courts) and military courts. The procuracy system was also organised at three levels (national, provincial and district levels) and included military procuracies. However, tasks, functions and powers of judiciary bodies were better elaborated given those stipulated under the 1959 Constitution. Belows are a number of crucial and underlying supplements:

As regard the functions and powers of the procuracies, the new laws reaffirmed different functions of these bodies *with emphasis on their role as a public prosecutor*. Article 138 of the 1980 Constitution states: “The People’s Supreme Procuracy of the Socialist Republic of Vietnam shall control compliance with the law by ministries and other bodies affiliated to the Council of Ministers, local authorities, social organisations and armed forces, State employees and citizens; *exercise rights to public prosecution*; and ensure a strict and uniform observance of the law”.

In respect of the role of lawyers, the 1959 Constitution only stipulates [that]: “The right to defence shall be secured for the accused”, while the 1980 Constitution went further to specify [that]: “The right to defence shall be secured for the accused. The lawyers’ organisation shall be established to provide legal supports to the accused and parties concerned”. In practice, in the period when the 1959 Constitution was still in force, bar associations were almost in absence. Instead, lawyers could only appear in important criminal proceedings. On the other hand, as barristers practised under the instructions from the courts and remunerated by the courts, it was hardly to ensure their independence from the courts.

By 1984, a number of bar associations resumed their operation in localities. These lawyers’ organisations operated under the instruction from the Ministry of Justice and local Justice Departments and were independent from the courts. However, the practices of lawyers in courts were than not popular and were sometimes seen as nominal only.

One of the outstanding achievements recorded in this period by the judiciary system was its nation-wide formation and structural consolidation with focus on maintaining political stability, security and public policy. On the other hand, due to the old ways of thinking, heavily bureaucratic and centrally commanding mechanisms, and strong influence of the models of judiciary systems adopted in the former Soviet Union and the eastern block, the judiciary system in Vietnam was plagued with numerous shortcomings and weaknesses. There was a severe shortage of qualified and capable

staff with in-depth legal knowledge. Such a limited human resource consequently caused poor efficiency in investigation, prosecution and trials or even violations of law or the legitimate interests of ordinary citizens. An over-dependence of the judiciary bodies on Party's committees and executive branch was also considered as one of the reasons restricting the independence in investigation, prosecution, trials and enforcement of judgements. Procedural laws were found incomplete for important pieces of legislation such as Criminal Procedural Code and Civil Procedural Code were not in existence. A significant number of procedures were only stipulated in circulars, directives or guidelines of the Supreme Court or jointly issued by the Supreme Court, Supreme Procuracy and Ministry of Interior (Ministry of Police). Many jurisdictions such as those over economic, commercial, labour and administrative disputes were still absent that made the protection of citizens' interests limited and inconvenient.

IV. JUDICIARY SYSTEM UNDER THE 1992 CONSTITUTION

Since 1986, Vietnam has embarked on a course of renovation. In this context, on 15 April 1992, a new Constitution (which is currently in effect) was passed by the Vietnam National Assembly to replace the 1980 Constitution. The 1992 Constitution marked the start of *Doimoi* (Renovation) in Vietnam. Under the 1992 Constitution, judiciary system was mainly governed by 15 Articles of Chapter X - Courts and Procuracies

Fundamental changes were introduced to the judiciary system, in particular:

The previous scheme under which judges were elected was no longer in existence and replaced with a new scheme whereby judges are to be appointed. This movement has been seen as a considerable step forward aiming to ensuring independence of judges during their trials and building up staff of professional and qualified judges. Article 128 of the 1992 Constitution stipulates on the appointment, dismissal and removal of judges. Apart from the Presidential Decree No. 13 issued in 1946 concerning the organisation of courts and grades of judges, the 1993 Ordinance on Judges and Jurors was the second important legislation of the State of Vietnam making detailed provisions and introducing considerable changes of the judges' status. Article 1 of this Ordinance states: "Judges shall be appointed under the laws to try cases which fall under the courts' jurisdiction". Subject to Article 4 of the Ordinance, criteria to be met for selection and appointment of judges include: being Vietnamese citizens and

loyal to the Fatherland; having good ethics, integrity, honesty, legal knowledge and law obedience, and good health to fulfill the assigned tasks and duties. Also under this Ordinance, apart from political and moral, professional qualification (particularly legal knowledge). was given a strong emphasis and specified in detail. For example, judges of the Supreme Court must graduate from court colleges or law universities with 8 years and more serving in the legal sector and a capacity to adjudicate cases which are subject to the jurisdiction of the Supreme Court; judges of the provincial courts must graduate from court colleges or law universities with 6 years and more serving in the legal sector and a capacity to adjudicate cases which are subject to the jurisdiction of the provincial courts; judges of the district courts must graduate from court colleges or law universities with 4 years and more serving in the legal sector and a capacity to adjudicate cases which are subject to the jurisdiction of the provincial courts. In order to select qualified judges, councils for selection of judges were created at all levels with responsibilities for both (i) selecting eligible and capable citizens to submit to the State President for his consideration and appointments of judges, and (ii) handling with discipline cases and disqualification of judges to submit to the State President for his dismissals. Court judges at all levels, including chief justices and deputy chief justices (but excluding the Chief Justice of the Supreme Court who is elected by the National Assembly) are appointed by the State President. This is viewed as a completely new scheme which has been introduced for the first time since the 1945 August Revolution.

Courts are also vested with additional jurisdictions over economic, labour, and administrative cases. As a result, economic court, labour court and administrative courts were created as new institutions of the country's court system. Previously, these are of jurisdiction were belonged to the executive bodies. The readjustment is aimed at avoiding "playing and blowing whistle" and handling disputes in a prompt and effective manners, and hence protecting the legitimate rights and interest of citizens, step-by-step democratising judiciary activities. Under the existing laws, the Supreme Court includes Criminal Court, Civil Court, Courts of Appeal, Economic Court, Labour Court and Administrative Court. This internal structure is also present at provincial level. On their part, the jurisdiction of district courts is also expanded to cover criminal, civil, economic, labour and administrative cases.

As regard the lawyers' status, Article 132 of the 1992 Constitution states: "The rights of the accused to defence shall be guaranteed. The accused may either conduct his own defence or request others to defend in his favour. Lawyers' organisations shall

be set up to help the accused and the parties concerned to protect their legitimate interests and contribute to the safeguarding of socialist legality". In this spirit, the 1987 Ordinance on Lawyers' Organisations was the first legislation enacted by the State of Vietnam to govern lawyers' practice of law. It is a new development of perception and represents a stronger stress on the role of lawyers in protecting the legitimate interests of citizens and helping to ensure the law obedience by the courts. The State of Vietnam is currently reported to draft a law on lawyers' organisation. Under the existing Ordinance on Lawyers' Organisation and Bar Association Statute, lawyers may be defined as professional defenders who practice as members of the bar associations. To be admitted to the bar association, a person is required to be a citizen of the Socialist Republic of Vietnam with good qualifications and ethics, honesty, impartiality and willing to fight for truth. A potential lawyer must also graduate from a law university or equivalent law education institutions and must be of good health to fulfill his duties. In guaranteeing the impartiality of lawyers' activities, it is stipulated that members of the courts, procuracies, police, State Inspectorate, and customs offices will be prohibited from bar associations. At present, bar associations have been set up in all 61 provinces and cities under central authority in Vietnam. Each bar association consists of several dozens of lawyers. It is the lawyers' activities that help to create a fresh image of the courts' hearings.