

The Socialist Precedent

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Judicial precedent is virtually a synonym of common law that has now gone global. Apart from Anglo-American common law and Continental civil law, socialist law has now adopted precedent. Vietnam created a formal and functional system of precedent, Laos empowered its Supreme Court to develop precedent, and China adopted a precedent-like practice called “guiding cases.” Marxist legal positivism, socialist legality, democratic centralism, and the assumption on the simplicity of substantive law and the “socialist life” seem to render the creation of precedent in the socialist legal system incomprehensible. Focusing on Vietnam, this Article aims to explain why precedent emerges in socialist law and to situate this practice within comparative theorization about precedent. It argues that the creation and function of precedent in the socialist legal system is due to the impact of the global diffusion of precedent, the dynamic adaption of the socialist jurisprudence, institutional structure, substantive law, and the transitional society. This precedent system is informed by the global idea of precedent, but is determined by socialist jurisprudence as the consequence of path dependency, and therefore presents a distinctive modern type of precedent, characterized as “socialist precedent.” This Article adopts epistemological pluralism—the integration of insights from complexity science, legal theory, post-modern and global comparative law, and literature on comparative precedent—and empirical qualitative methodology—the use of original resources and extensive interviews with local jurists.

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Introduction

Judicial precedent, "an adjudged case or decision of a court of justice, considered as furnishing an example or rule for the determination of an identical or similar case afterwards arising, between the same or other parties, in the same or another court, or a similar question of law,"¹ is nearly a synonym of common law, but is now a global phenomenon. Common law jurisdictions rely heavily on gigantic and complex amounts of

1. HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS, OR, THE SCIENCE OF CASE LAW 2 (1912). In this Article, "judicial precedent" is henceforth addressed as "precedent."

precedents, leading to efforts to systematize the law of precedent to guide research and legal practice.² In civil law jurisdictions, legal positivism, legal statism, and a different concept of separation of power induce the codification of legal rules by the legislature and prevent judges from making law.³ But, legislative law may be generic and vague, and this creates the space for judicial innovation, e.g., making precedent. Precedents are, in fact, widespread in both common law and civil law jurisdictions. To illustrate, the influential work *Interpreting Precedents* examines precedents in Germany, Finland, France, Italy, Norway, Poland, Spain, Sweden, the United Kingdom, the United States, and the European Union.⁴ Apart from national use, globalization also engenders universal “invocation of international decisions as precedent,” from international investment arbitration, to international criminal law, to international human rights, and to international trade.⁵

Globalization now diffuses the idea of precedent into the third modern legal system, namely socialist law. Socialist law has its roots in Marxist-Leninist social-economic theory and Soviet law.⁶ During the Cold War, major comparative legal works included socialist law as the third modern legal family, together with common law and civil law.⁷ Following the collapse of the Soviet Union in the late twentieth century, only five socialist countries remain in the world (namely China, Cuba, Laos, North Korea, and Vietnam). Although their legal systems have been continually shaped by fundamental features of socialist law,⁸ socialist law has virtually disappeared from mainstream comparative law scholarship after the Cold War. However, in the early twenty-first century, the interest in socialist law seems to have made a return, which may be due to the dynamics of

2. See BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 21 (2016) (“Following established precedents helps keep the law settled, furthers the rule of law, and promotes both consistency and predictability.”).

3. See generally JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (3d ed. 2007).

4. See generally *INTERPRETING PRECEDENTS: A COMPARATIVE STUDY* (Neil MacCormick & Robert S. Summers eds., 1997). For precedents in civil law countries, see also VIRGILIO P. ALCONERA, *PRECEDENT IN CIVIL LAW: OBLIGATIONS & CONTRACTS* (2009); see generally MARÍA JOSÉ FALCÓN Y TELLA, *CASE LAW IN ROMAN, ANGLOSAXON AND CONTINENTAL LAW* (Stephen Churnin trans., 2011); Vincy Fon & Francesco Parisi, *Judicial Precedents in Civil Law Systems: A Dynamic Analysis*, 26 *INT’L REV. L. & ECON.* 519 (2006).

5. See Harlan Grant Cohen, *Theorizing Precedent in International Law*, in *INTERPRETATION IN INTERNATIONAL LAW* 268, 269 (Andrea Bianchi et al. eds., 2015).

6. For features of socialist law, see W. E. Butler, *What Makes Socialist Legal Systems Socialist?*, 13 *J. COMP. L.* 1, 7–10 (2018).

7. See RENE DAVID & JOHN E.C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 14–18, 119–21 (Stevens & Sons, Ltd. 1968) (1964); KONRAD ZWIEGERT & HEIN KÖTZ, *INTRODUCTION TO COMPARATIVE LAW* 63–75, 296–358 (Tony Weir trans., Oxford Univ. Press 2d ed. 1987) (1977).

8. See William Partlett & Eric Ip, *Is Socialist Law Really Dead?*, 48 *N.Y.U. J. INT’L L. & POL.* 463, 502 (2016).

socialist law in the current socialist states⁹ and the continuing influence of socialist law in former socialist states.¹⁰

One aspect of the dynamics of contemporary socialist law is the adoption of precedent and precedent-like systems—Vietnam creates the precedent system, Laos empowers its supreme court to develop precedents, and China creates the guiding cases system. Fundamental notions in socialist legal theory (Marxist legal positivism, socialist legality, democratic centralism, and the simplicity of the “socialist life” and substantive law) seem to render the creation of precedent in a socialist legal system incomprehensible.

This study tries to understand the creation of precedent in socialist law with a focus on Vietnam. I chose to focus on Vietnam because the country has a functioning and binding precedent system: as indicated below, since 2015 the Supreme People’s Court of Vietnam (SPCV) has created a formal system of precedent, issuing twenty-seven precedents, which have been widely applied by other courts throughout the country. In addition, the focus has a pragmatic reason: I am able to access the original material and interview relevant local people.

This Article aims to explain why precedent emerges in socialist law and to situate this practice within comparative theorization about precedent. It argues that the creation and function of precedent in the socialist legal system is due to the impact of the global diffusion of precedent, the dynamic adaption of the socialist jurisprudence, institutional structure, substantive law, and the transitional society. This precedent system is informed by the global idea of precedent, but is determined by socialist jurisprudence as the consequence of path dependency, and therefore presents a distinctive modern type of precedent, characterized as “socialist precedent.”

This study adopts epistemological pluralism. Epistemological pluralism holds that “some natural phenomena cannot be fully explained by a single theory or fully investigated using a single approach. As a consequence, multiple approaches are required for the explanation and investigation of such phenomena.”¹¹ The question of precedent in socialist law is multi-dimensional as it touches on ideology, law, courts, and society, and is hardly understood by a monist approach or a single theory. This study, therefore, intertwines insights from complexity science,¹² legal theory,

9. See generally *SOCIALIST LAW IN SOCIALIST EAST ASIA* (Fu Hualing et al. eds., 2018).

10. Rafał Mańko, *Survival of the Socialist Legal Tradition? A Polish Perspective*, 4 *COMP. L. REV.* 1, 2, 20–21, 27–28 (2013); see generally Alan Uzelac, *Survival of the Third Legal Tradition?*, 49 *SUP. CT. L. REV.* 377 (2010).

11. Stephen H. Kellert et al., *Introduction: The Pluralist Stance*, in *MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE, SCIENTIFIC PLURALISM* vii (Stephen H. Kellert et al. eds., 2006).

12. Complexity science or complexity theory, a type of systems theory, is derived from natural science and subsequently expanded to different areas of social science and, recently, into legal studies. It is not a unified theory, but it includes diverse ideas. One important idea is that of “complex adaptive systems,” which are systems composed of

post-modern and global comparative law, and literature on comparative precedent. These pluralist intellectual sources can mutually reinforce and supplement the explanation and investigation of the emergence of precedent in a socialist world.

This Article adopts a qualitative empirical methodology. It is drawn from original resources and data available in the Vietnamese language, including constitutions, legislations, regulations, precedents, reports, and scholarly and juristic commentaries. In addition, it is underpinned by extensive interviews¹³ in Hanoi with a retired Deputy Chief Justice of the SPCV,¹⁴ a legal scholar serving as a member of the Court's Advisory Board for Precedent,¹⁵ an officer of the Court responsible for administrative affairs related to precedent,¹⁶ a researcher of the Court,¹⁷ and a practicing lawyer.¹⁸

This study makes both empirical and theoretical contributions to the existing scholarship. The in-depth analysis of the unique experience of precedent in socialist law enriches comparative empirical knowledge of precedent and the dynamism of social law in the contemporary world. The addition of the new modern type of 'socialist precedent' complicates the theory of precedent.

I. Precedent and Socialist Legal Theory

The idea of precedent seems contradictory to the socialist legal theory. One scholar compares socialist legal theory with Western European development and states, "socialist legal theory, in contrast, continued to reject any role for precedent."¹⁹ To begin with, precedent is at odds with a socialist understanding of the nature of law. Marxist historical materialism conceptualizes law as the "superstructure," or the expression of the economic relationships, in which the exploiting class uses law as an

numerous interactive elements and capable of responding to changes in the internal context and external environment. For complexity theory, see generally John Urry, *The Complexity Turn*, THEORY, CULTURE, AND SOC'Y, Oct. 2005, at 1. For "complex adaptive systems," see Heinz Georg Schuster, COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION, in COLLECTIVE DYNAMICS OF NONLINEAR AND DISORDERED SYSTEMS 359–68 (G. Radons et al. eds., 2005). For legal complexity, see J. B. Ruhl, et al., *Harnessing Legal Complexity*, 355 SCI. 1377–78 (2017).

13. Due to the sensitive nature of the issues, interviewees remained anonymous, but other details are specified.

14. Interview with a retired Deputy Chief Justice of the Supreme People's Court of Vietnam, in Hanoi, Vietnam (Apr. 5, 2018) (hereinafter Justice Interview).

15. Interview with a legal scholar, a member of the Supreme People's Court's Advisory Board for Precedent, in Hanoi, Vietnam (Apr. 4, 2018) (hereinafter Scholar Interview).

16. Interview with an officer of the Supreme People's Court of Vietnam, in Hanoi, Vietnam (Apr. 5, 2018) (hereinafter Officer Interview).

17. Interview with a researcher of the Supreme People's Court of Vietnam, in Hanoi, Vietnam (Apr. 6, 2018) (hereinafter Researcher Interview).

18. Interview with a practicing lawyer in Hanoi, Vietnam (Apr. 7, 2018) (hereinafter Lawyer Interview).

19. ZDENEK KÜHN, *THE JUDICIARY IN CENTRAL AND EASTERN EUROPE: MECHANICAL JURISPRUDENCE IN TRANSFORMATION?* 134 (William Simons eds., 2011).

instrument to maintain the existing economic conditions and control the exploited class.²⁰ So, unlike Dworkinism, a Marxist version of legal positivism conceives law not as something morally justifiable but as something the officials consider constituting and instrumental to the existing economic relations, whether the relations are just or harmful.²¹ Socialist law therefore boils down to “a set of commands to be religiously observed.”²² This contradicts the very precedential notion that judges can innovate morally justifiable rules which will bind the subsequent decisions in similar cases.

In addition, the concept of precedent goes against the concept of “socialist legality.” The Soviet concept of “socialist legality” (*sotsialisticheskaya zakonnost*) “is defined as a strict observation of law by all agencies of the state, social organizations, institutions, government officials, and citizens.”²³ It is different from the Western concept of the rule of law in several significant aspects. First, socialist legality focuses mainly on the strict observation of law by citizens and government offices and “is not a meta-legal principle binding the legislative power.”²⁴ Second, the emphasis on the observation of law by citizens and government offices “indicates that socialist legality is not primarily intended to limit administrative power in relation to citizens.”²⁵ Instead, socialist legality underlines the implementation of law as a tool for realizing the communist party’s policy and for “social engineering.”²⁶ In this regard, socialist legality is the socialist form of rule by law rather than the rule of law. Third, according to the concept of socialist legality, law derives from the state and therefore law means written law or positive law.²⁷ In theory, socialist legality would not tolerate precedent.

Moreover, the socialist concept of “democratic centralism” makes precedent unthinkable in socialist law. The Leninist doctrine of “democratic centralism” aims to combine “democratic” discussion and centralized decision and action. After “democratic” discussion, superiors will

20. HANS Kelsen, *THE COMMUNIST THEORY OF LAW 2* (Praeger Publishers 1976) (1955); Inga S. Markovits, *Civil Law in East Germany—Its Development and Relation to Soviet Legal History and Ideology*, 78 YALE L.J. 1, 4 (1968).

21. Brian Leiter, *Marx, Law, Ideology, Legal Positivism*, 101 VA. L. REV. 1179, 1192 (2015); see also Zdeněk Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, 52 AM. J. COMP. L. 531, 540 (2004) (citing Central European jurists’ view that “in socialism, according to its official ideology, jurisprudence was still dominated by rule-positivism”).

22. Inga Markovits, *Socialist vs. Bourgeois Rights—An East-West German Comparison*, 45 U. CHI. L. REV. 612, 629 (1978).

23. Samuel Kucherov, *Socialist Legality*, in *ENCYCLOPEDIA OF SOVIET LAW* 706 (F. J. M. Feldbrugge et al. eds., 1985).

24. *Id.*

25. *Id.*

26. *Id.*

27. Nguyễn Xuân Tùng, *Bàn về “nguyên tắc pháp quyền Xã hội chủ nghĩa”* [Commenting on the “Principle of Socialist Rule of Law”], BỘ TƯ PHÁP [MINISTRY OF JUSTICE] (Oct. 13, 2011), <https://moj.gov.vn/qt/tintuc/Pages/nguyen-cuu-trao-doi.aspx?ItemID=1463> [https://perma.cc/MX3F-ZKFZ].

issue a decision which requires unquestioning obedience from their inferiors.²⁸ Applied in state institutional design, this principle rejects the separation of powers, subordinates the judiciary to the legislature and the government, and subjects local courts to the control of a powerful centralized super court.²⁹ The consequence is that courts are not allowed to make law and must apply legislative and administrative regulations. Therefore, in the view of socialist legal scholars, “for precedent to be a source of socialist law would go against the principle of democratic centralism.”³⁰

Finally, the conception of the simplicity of “socialist life,” and consequently of substantive law, makes precedent unnecessary.³¹ Imre Szabó, a prominent socialist scholar, states that “Socialist law should be characterized by, if anything, a certain simplicity because of the increasing simplification of the social conditions it regulates.”³² In former socialist Central Europe, it is said that the one-party rule, a planned economy, and the penetration of the communist ideology throughout the society simplified social relations due to “the absence of complicated commercial rules, bankruptcy rules, [and] vulgarization of the domestic legal tradition.”³³ “Simple socialist climate, thus, also made law relatively uncomplicated There was no need to think critically about the law, the problems of its interpretation, the function of the judge, etc.”³⁴

Despite the theoretical antagonism between precedent and socialist legal theory, precedent or precedent-like systems do emerge in the contemporary socialist legal system. China has created a precedent-like system called “guiding cases.”³⁵ China’s guiding cases refer to “rulings and judgments that have already come into legal effect” released by the Supreme People’s Court of China which “People’s courts at all levels should refer to . . . when adjudicating similar cases.”³⁶ By January 3, 2017, the

28. A. Nove, *Some Aspects of Soviet Constitutional Theory*, 12 MOD. L. REV. 12, 19. (1949).

29. Partlett & Ip, *supra* note 8, at 502.

30. Zdenek Kühn, *Precedent in the Czech Republic*, in PRECEDENT AND THE LAW 378 (Ewoud Hondius ed., 2007).

31. *Id.* at 375.

32. Imre Szabó, *The Socialist Conception of Law*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ONLINE (U. Drobnig et al. eds.), http://dx.doi.org/10.1163/2589-4021_IECO_COM_020103 [<https://perma.cc/5WMP-UMMN>] (last visited Nov. 21, 2018).

33. Kühn, *supra* note 30, at 373.

34. *Id.*

35. Jia Mark, *China Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213, 2213 (2016).

36. 最高人民法院关于案例指导工作的规定 [Provisions of the Supreme People’s Court Concerning Work on Case Guidance] (passed by the Adjudication Committee of the Supreme People’s Court, Nov. 15, 2010, effective Nov. 26, 2010) China Guiding Cases Project, English Guiding Cases Rules (June 12, 2015 Edition), <http://cgc.law.stanford.edu/guiding-cases-rules/20101126-english/> [<https://perma.cc/J9XS-VL5L>] (last visited Jan. 1, 2020).

Court issued 77 guiding cases in 15 sets.³⁷ The introduction of something akin to common law into the socialist world is unusual, which explains why this move “has captured the attention of the world outside of China.”³⁸ The Stanford Law School launched the *China Guiding Cases Project*.³⁹ “Universities such as Yale, Stanford, and the City University of Hong Kong as well as institutions such as the European Union have held training programs with [Chinese] Court staff on the case method.”⁴⁰

Laos also empowers its Supreme People’s Court to develop precedents. The Law on People’s Court provides that

The judgment of the People’s Supreme Court on matter that is not clearly defined by the laws, civil commercial, family and juvenile cases that are not defined by laws or has defined but it is unclear shall be considered as a precedent of which all levels of People’s Courts shall comply with until such matter is regulated by a law. For the judgment of court of cassation, regional courts will be a precedent only when there is an instruction from the People’s Supreme Court.⁴¹

However, the practice of this power is limited—“the Supreme Court does not regularly publish its decisions, so even if this power should be exercised, there is a low likelihood that it could be useful means of further developing the country’s written legal framework.”⁴²

Vietnam has employed a bolder move to adopt a real and functioning precedent system. This experience has generated significant attention among local legal scholars, lawyers, and international actors.⁴³ Particularly, the United States Agency for International Development has assisted Vietnam through “a comprehensive training program on legal and judgment writing and the use of precedent.”⁴⁴ The Vietnamese precedent system is examined in greater detail in the following parts.

37. Mo Zhang, *Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China*, 26 WASH. INT’L L.J. 269, 271 (2017).

38. Susan Finder, *How the Supreme People’s Court Uses Case Law & Other Sources When It Guides the Lower Courts*, SUPREME PEOPLE’S CT. MONITOR (Mar. 8, 2017), <https://supremepeoplescourtmonitor.com/tag/guiding-cases/> [https://perma.cc/KR3F-CK9M].

39. Stanford Law School, *China Guiding Case Project*, <https://cgc.law.stanford.edu/> [https://perma.cc/Q4GS-93C4] (last visited Dec. 31, 2019).

40. Susan Finder, *Case law Chinese Style—Where Is It Going?*, SUPREME PEOPLE’S CT. MONITOR (Jan. 18, 2015), <https://supremepeoplescourtmonitor.com/2015/01/18/case-law-chinese-style-where-is-it-going/> [https://perma.cc/ZN47-LFN5].

41. Law on the People’s Court No. 9 2009, art. 12 (Laos).

42. Ministry of Justice & UNDP Lao PDR, *Law Making Process in Lao PDR—A Baseline Study* 1, 9 (2015), <https://www.la.undp.org/content/dam/laopdr/docs/Reports%20and%20publications/2015/2015-12-15%20Baseline%20report-final%20version.pdf> [https://perma.cc/8Y2W-RFRX].

43. See generally *Vietnam has applied court precedents*, LAWYER VN (Nov. 26, 2015), <http://www.lawyervn.net/en/dispute/dispute-resolutions/vietnam-has-applied-court-precedents.html> [https://perma.cc/4YWT-MGPL]; Nguyen Quang Vu, *New sources of law in Vietnam—Court precedents and equity*, VIET. BUS. L. (Jan. 11, 2016), <https://vietnam-business-law.info/blog/2016/1/11/new-sources-of-law-in-vietnam-court-precedents-and-equity> [https://perma.cc/LW7S-6DGD].

44. USAID *Helps Vietnam Strengthen the Rule of Law through Advancing Use of Precedent*, USAID (Aug. 17, 2017), <https://www.usaid.gov/vietnam/program-updates/aug-2017->

II. The Emergence of Precedent in a Socialist Legal System

A. Legacies

The current precedent system was not created in a vacuum. Local scholars have revealed the legacies of precedent in imperial Vietnam.⁴⁵ The Hồng Đức Code of the Lê dynasty⁴⁶ enacted in the fifteenth century has several provisions which summarize certain cases concerning land issues and abstract from these general rules.⁴⁷ The *Hoàng Việt Luật Lê* (*Hoàng Việt Law and Precedents*) of the Nguyễn dynasty, enacted in 1815 as its name indicates, includes two elements: law (*luật*) and precedents (*lê*). Precedents are prior judgments are considered significant and therefore are incorporated in the Code.⁴⁸

Precedents were also applied in Vietnam under the French colonial legal system. Precedents were published in colonial legal periodicals, such as *Journal judiciaire de l'Indochine* and *Revue Indochinoise Juridique Et Économique* or compiled by colonial authorities in volumes such as *Recueil De Jurisprudence Générale En Matière Administrative, Pénales, Civile, Française Et Indigène*.⁴⁹ Precedents were also applied under the Republic of Vietnam in the South during the Vietnam War period.⁵⁰ Precedents were compiled in such volumes as *Ấn lệ Vững tập: Recueil de Jurisprudence 1948-1967* by Justice Trần Đại Khâm.⁵¹ Justices Trần Thúc Linh and Nguyễn Văn Thọ also translated and published in Vietnamese Henri Capitant's *Les Grandes Arrêts De La Jurisprudence Civile*.⁵² These practices stemmed from the fact that France's precedents were used under the Republic of Vietnam.⁵³

Under the current Socialist Republic of Vietnam, there are several antecedents which are instrumental to the SPCV's precedent initiative.⁵⁴

usaid-helps-vietnam-strengthen-rule-law-through-advancing-use-precedent
[<https://perma.cc/J992-NCLR>].

45. HUỖNH CÔNG BÁ, ĐÌNH CHẾ PHÁP LUẬT VÀ TỔ TỤNG TRIỀU NGUYỄN (1802–1885) [Legal Institutions And Litigation in Nguyễn Dynasty] 66 (2017); Trương Thị Hòa, *Ấn lệ—kỹ thuật pháp lý được áp dụng ở Việt Nam từ lâu đời* [Precedent-A Legal Technique Applied in Vietnam Long Ago], <https://drive.google.com/file/d/0ByMlnVjvIMWvWHNjcTBhVGvZUE/view> [https://perma.cc/VU76-CDY2].

46. On this code in English, see generally NGUYEN NGOC HUY & TA VAN TAI, *THE LÊ CODE: LAW IN TRADITIONAL VIETNAM: A COMPARATIVE SINO-VIETNAMESE LEGAL STUDY WITH HISTORICAL-JURIDICAL ANALYSIS AND ANNOTATIONS* (Tran Văn Liêm Trans., 1987).

47. Trương, *supra* note 45.

48. *Id.*

49. *Id.*

50. *Id.*

51. TRẦN ĐẠI KHÂM, *ẤN LỆ VỮNG TẬP: RECUEIL DE JURISPRUDENCE 1948–1967* (1968).

52. TRẦN THÚC LINH & NGUYỄN VĂN THỌ, TRANS, *NHỮN ẤN LỆ QUAN TRỌNG TRONG DÂN LUẬT* [GRAND JURISPRUDENCES IN CIVIL LAW] (unknown date).

53. Trương, *supra* note 45.

54. Dương Bích Ngọc & Nguyễn Thị Thủy, *Vấn đề Áp dụng Ấn Lệ ở Việt Nam* [The Application of Precedent in Vietnam] 5 TẠP CHÍ LUẬT HỌC 37, 43 (2009), <https://tailieu.vn/doc/bao-cau-van-de-ap-dung-an-le-o-viet-nam-1465416.html> [https://perma.cc/Y4ZW-9G3H]; Bùi Tiến Đạt, *Áp dụng án lệ - Nhu cầu tất yếu trong điều kiện cải cách tư pháp*

First, in its annual summaries, the Court worked out from trial experience general guiding principles for the unified application of law in the future.⁵⁵ Second, the Court's cassation decisions include general legal rules which can potentially be converted into precedent.⁵⁶ Since 2004, the Court has regularly published their cassation decisions in many volumes.⁵⁷ Finally, the Court has often issued legal instruments called "resolutions" to guide local courts in legal application when positive law does not fit the social reality.⁵⁸

B. Establishment

In 2005, the Politburo of the Communist Party of Vietnam issued two important resolutions: Resolution No. 48 on law-making strategy⁵⁹ and Resolution No. 49 on judicial reform strategy.⁶⁰ The former explicitly mentioned the possible application of "precedent,"⁶¹ while the latter went a step further and ordered the SPCV to be responsible for developing precedent.⁶²

The party's initiative activated the scholarly and juristic debate on precedent in Vietnam.⁶³ Some argued that precedent is not suitable for Vietnam for these reasons: Vietnamese law relies mainly on statutory law; the application of precedent will create "arbitrary trials"; positive law can change to suit the social context, and so precedent is not necessary; and the SPCV's decisions may not be correct, and hence cannot be used as

và xây dựng nhà nước pháp quyền ở Việt Nam [Application of Precedent: Imperatives in the Context of Judicial Reform and Building the Rule of Law State in Vietnam] 25 TẠP CHÍ KHOA HỌC ĐHQGHN-LUẬT HỌC 195, 197 (2009).

55. Bùi, *supra* note 54, at 197.

56. *Id.* at 197–98.

57. For the most recent publication, see THE SUPREME PEOPLE'S COURT, TUYÊN TẬP CÁC QUYẾT ĐỊNH GIÁM ĐỐC THẨM CỦA TÒA ÁN NHÂN DÂN TỐI CAO VỀ HÌNH SỰ, DÂN SỰ VÀ KINH TẾ TỪ 2013 – 2016 [COLLECTION OF CASSATION DECISIONS BY THE SUPREME PEOPLE'S COURT ON CRIMINAL, CIVIL, AND ECONOMIC CASES, 2013–2016] (2016), <https://tiki.vn/tuyen-tap-cac-quyet-dinh-giam-doc-tham-cua-toa-an-nhan-dan-toi-cao-ve-hinh-su-dan-su-kinh-te-2013-2016-p6039657.html> [<https://perma.cc/FCH5-AKB6>].

58. Justice Interview, *supra* note 14.

59. See Nghị Quyết 48-NQ/TW Về Chiến lược Xây dựng và Hoàn thiện Hệ thống Pháp luật Việt Nam đến năm 2010, Định hướng đến năm 2020 [Resolution No. 48 NQ/TW on Strategy of Building and Perfecting the Legal System of Vietnam to 2010 with the View to 2020] (issued by Politburo, Mar. 24, 2005) [hereinafter Resolution No. 48].

60. See Nghị Quyết số 49-NQ/TW của Bộ Chính trị về chiến lược cải cách tư pháp đến năm 2020 [Resolution No. 49 NQ/TW on Strategy for Judicial Reform until 2020] (issued by Politburo, Jun. 2, 2005) [hereinafter Resolution No. 49].

61. Resolution No. 48, *supra* note 59, at art. II §§ 1.4, 1.5.

62. See Resolution No. 49, *supra* note 60, at art. I § 1 & art. II § 2.1.

63. *Có nên xử theo án lệ - Bài 2: Người ủng hộ, người phản đối* [Should precedent be applied in trial? Article 2: Some Support, Some Oppose], PHÁP LUẬT (Sept. 28, 2010), <http://plo.vn/thoi-su/co-nen-xu-theo-an-le-bai-2-nguoi-ung-ho-nguoi-phan-doi-346529.html> [<https://perma.cc/5KLS-9TQ6>].

precedent for subsequent trials.⁶⁴ Other opposing reasons are more ideological in nature. To illustrate, the Chairperson of the National Assembly's Judicial Committee, who is also one of Deputy Chief Justices, insists that precedent is not consistent with the socialist concept of the nature of law which only endorses positive law.⁶⁵

In contrast, the majority of scholars and many other jurists have supported the creation of precedent in Vietnam.⁶⁶ A survey by the SPCV indicates that local courts in sixty-three provinces agreed with this practice.⁶⁷ Importantly, the Chief Justice was highly supportive of this practice.⁶⁸ The supporting reasons can be grouped into three categories: historical, realistic, and transnational. First, precedent was not alien to Vietnamese legal history.⁶⁹ Second, the application of precedent stems from the real needs of the current legal system to: perfect the legal system because written law may not be clear and may not anticipate different actual circumstances; unify the application of the law; ensure the equality of every citizen under the law; enhance the role of the courts in legal interpretation; promote the capacity and independence of judges; and ensure the predictability of the law.⁷⁰ The actual domestic concerns are the most consequential to the creation of the precedent system.⁷¹ Third, the transnational arguments include: as a member of the World Trade Organization, Vietnam may become involved in international commercial disputes in which precedent may be applied; Vietnamese citizens or organizations may become involved in disputes in common law countries, such as the US or the UK; precedent has become the global trend, which is used even in civil law countries;⁷² and former socialist countries in Eastern Europe have also adopted precedent.⁷³ These arguments mainly stem from the fact that Vietnam has become deeply integrated into the global community.

In response to the majority's endorsement, the Chief Justice promulgated the *Decision on Approving the Project on "The Development of Precedent of the Supreme People's Court"* on October 31, 2012.⁷⁴ The Decision justified the project on the basis of implementation of the party policies on judicial

64. Trần Lê An Nguyên, *Án lệ trong lịch sử pháp lý thế giới và áp dụng ở Việt Nam* [Precedent in the Legal History of the World and Its Application in Vietnam], *VÌ CÔNG LÝ* (Nov. 4, 2015), <http://vicongly.com/xem/17674/an-le-trong-lich-su-phap-ly-the-gioi-va-ap-dung-o-viet-nam.html> [https://perma.cc/D3GE-UQDS].

65. Scholar Interview, *supra* note 15.

66. *Id.*

67. *Id.*

68. *Id.*

69. Trương, *supra* note 45, introduction.

70. Bùi, *supra* note 54, at 198–99.

71. Justice Interview, *supra* note 14.

72. Dương & Nguyễn, *supra* note 54, at 40–41.

73. Scholar Interview, *supra* note 15.

74. See Quyết Định Phê duyệt Đề án “Phát triển án lệ của Tòa án nhân dân tối cao” [Decision on Approving the Project on “The Development of Precedent of the Supreme People's Court”] art. 1 §§ 2 & 1.3(a) (promulgated by the Chief Justice of the Supreme People's Court., Oct. 31, 2012) [hereinafter Decision].

reform, including the possible application of precedent.⁷⁵ The primary concern of this Decision is to develop the cassation decisions of the SPCV into precedent.⁷⁶ It articulates the “general goals,” “specific goals,” “directive opinions,” resolutions for the development of precedent (including the proposals for constitutional reform), the methods to select and publish the cassation decisions as precedent, and the methods to instruct lower courts on precedent application.⁷⁷ The Decision also includes two appendices. One appendix clarifies the meaning of related legal terms.⁷⁸ The second appendix introduces main features of precedent in three common law countries (namely the US, the UK, and Australia) and three civil law countries (namely France, Germany, and Japan).⁷⁹

In early 2013, Vietnam released a draft of an amended constitution for public consultation.⁸⁰ During this process, according to a report by the SPCV, many members of the judicial community proposed including the role of the SPCV in developing precedent in the constitution.⁸¹ The new Constitution enacted in late 2013, however, is silent about precedent. The justification for that silence was that international experience indicates that it is not necessary to mandate the application of precedent in the constitution.⁸²

To implement the new 2013 Constitution, the National Assembly adopted the new Law on Organization of People’s Court on November 24, 2014, a kind of organic constitutional law.⁸³ The Law allows the highest court’s Council of Justices “to select its cassation trial decisions and judgments and decisions of courts which have taken legal effect and are of standard nature, summarize and develop them into court precedents and publicize court precedents for courts to study and apply”⁸⁴ To create a unified and comprehensive legal framework for the precedent system in Vietnam, the Council of Justices enacted the *Resolution of the Supreme People’s Court on Process for Selecting, Publishing and Adopting Precedent* on October 28, 2015.⁸⁵

75. See *id.* at art. 1 §§ 1(b), 2, 3(b).

76. See *id.* at art. 1 §§ 1(b), 2.

77. See *id.* at art. 1 §§ 1(a), 1(b).

78. See *id.* at app. 1.

79. See *id.* at app. 2 §§ 1, 2.1.

80. See Ngọc Sơn Bui, *Contextualizing the Global Constitution-Making Process: The Case of Vietnam*, 64 AM. J. COMP. L. 931, 945–46, 950 (2016).

81. Báo Cáo Tổng Hợp Ý Kiến Của Ngành Tòa Án Về Dự Thảo Sửa Đổi Hiến Pháp Năm 1992 [Report on Opinions of the Courts on the Draft Amendments to the 1992 Constitution] art. III § 9 (issued by the Supreme People’s Court., March. 29, 2013).

82. Scholar Interview, *supra* note 15.

83. Law on Organization of People’s Courts (Nov. 24, 2014) (Viet.).

84. *Id.* at art. 22.

85. Nghị quyết về quy Trình Lựa Chọn, Công Bố Và Áp Dụng Án Lệ [Resolution Regarding the Selection, Announcement and Application of the Order] (issued by the Council of Justices of the Supreme People’s Court., effective June 18, 2019) [hereinafter Resolution].

C. Formal Features

This exposition of the formal features of the Vietnamese precedent system, as presented in the above Resolution, is adapted from a framework of a comparative study of precedent articulated by D. Neil MacCormick and Robert S. Summers.⁸⁶ I will focus on the definition, rationales, creation, authority, application, and departures.

1. *Definition*

The Resolution defines that:

Precedents are arguments and rulings written on effective judgments or decisions of the courts that are selected by the Council of Justices of the Supreme People's Court and published by the Chief Justice of the Supreme People's Court in order for other courts to study and adopt them when deciding later cases.⁸⁷

This definition refers to substantive, procedural, and functional natures of precedent. Substantively, the effective judgments or decisions of any courts can be converted into precedents.⁸⁸ Procedurally, these judgments or decisions can only become precedents when they are selected and formally released by the highest court.⁸⁹ Functionally, a precedent is cited as a precedent in subsequent similar cases.⁹⁰

2. *Rationales*

The rationales for precedents in both common law and civil law jurisdictions are juridical uniformity, equal treatment of individuals under the same cases, and the protection of several formalist and proceduralist features of the rule of law (e.g., security under the law, legal certainty, or predictability).⁹¹ These ideas are also used to justify the precedent system in Vietnam. For example, the Vietnamese experience resonates “one commonly accepted rationale for the doctrine of precedent—providing equal treatment for litigants.”⁹² The Vietnamese precedent is also created to ensure that cases which have similar legal facts will be handled similarly.⁹³ The justification for this is “to ensure equality of every citizen and organization before the law.”⁹⁴

In addition to the general rationales, Vietnam has specific rationales for creating the precedent system. The Precedent Project sets out the goal

86. These selective comparators are a selective adoption from the comprehensive list of comparators of precedents in *Appendix*, in *INTERPRETING PRECEDENTS*, *supra* note 4, at 551–61.

87. Resolution, *supra* note 85, at art. 1.

88. *Id.* at art. 6.

89. *Id.*

90. *Id.* at art. 8.

91. See Zenon Bankowski et al., *Rationales for Precedent*, in *INTERPRETING PRECEDENTS*, *supra* note 4, at 486–88.

92. See Douglas E. Edlin, in *COMMON LAW THEORY* 1, 3 (Douglas E. Edlin ed., 2007).

93. Resolution, *supra* note 85, at art. 2.

94. Decision, *supra* note 74, at art. 1.

of the development of precedent “to enhance the quality of the judgments and decisions of the entire court system.”⁹⁵ For this goal, the precedent system is created to: “prevent arbitrary will of judges when applying the law”; “increase skills and quality of judges’ trial”; consolidate the base for judicial judgments; “ensure that the number of judgments and decisions repealed by the superior courts will decrease”; and standardize the writing of court’s judgments.⁹⁶ These specific rationales reflect the reality that the quality of judicial judgments in Vietnam is low, which can demonstrated by the numerous cases repealed by the superior courts. To illustrate, the rates of repealed cases in 2014 are as follows: criminal cases 0.6%; civil cases 1%; and administrative cases 3.77%.⁹⁷

3. *Creation*

Precedents are selected, reviewed, and approved through a formal complicated procedure on a set of established criteria. The Resolution provides for three criteria for selecting precedents. Accordingly, a precedent must contain arguments to clarify the provisions of the law which have differing interpretations and analyse and explain legal issues or events, and legal principles and guidelines to be followed in a specific situation; have normative value; and ensure the consistency of law in adjudication and the same settlement results from the two cases having the same facts or events.⁹⁸

The Resolution allows for a wide range of actors to submit to the SPCV proposals for converting judgments into precedents, including judgments from superior people’s courts, province-level people’s courts, and every individual, agency, and organization.⁹⁹ The SPCV will review, select, and decide on the proposals for precedent.¹⁰⁰

Once the proposals for precedent are considered by the SPCV, they will then go through the procedure for public discussion, which involves: the publication of the proposals in the SPCV’s juridical review and website for public discussions in two months; holding conferences and workshops where legislators, experts, and practitioners will be invited to participate in discussion; and the SPCV’s legal department’s report, review, and assessment of the discussions.¹⁰¹ Afterward, the proposals of precedent will be discussed by the Advisory Board for Precedent. This Board is created by the SPCV, consisting of nine members chosen from representatives of the SPCV itself, the Ministry of Justice, the Supreme People’s Procuracy, the Vietnam Bar Federation, leading legal experts, and other relevant

95. *Id.*

96. *Id.*

97. Châu Hoàng Thân, *Thách thức và định hướng triển khai áp dụng án lệ ở Việt Nam* [Challenges and Directions for Implementation of Precedent in Vietnam], 334 TẠP CHÍ NHÀ NƯỚC VÀ PHÁP LUẬT 11, 14–15 (2016).

98. Resolution, *supra* note 85, at art. 2.

99. *Id.* at art. 3.

100. *Id.*

101. *Id.* at art. 4.

bodies.¹⁰² On the basis of this Board's recommendation, the SPCV will discuss and approve the proposals of precedent at its plenary meeting, which is then followed by a formal promulgation by the Chief Justice.¹⁰³

The standardized form of the precedent includes the following elements: the names of the cases decided by the court; the number of judgments or decisions of the courts which have precedential value; keywords of legal issues solved in the precedent; recitation of the facts of case and judgments related to the precedent; and identification of legal issues resolved which have guiding value.¹⁰⁴ Precedent will be then published in SPCV's juridical review and its website, sent to courts, and included in the Precedent Volumes and published.¹⁰⁵

4. *Authority*

Comparative law scholars distinguish "bindingness, force, further support, and illustrativeness or other value[s] of a precedent."¹⁰⁶ Vietnamese precedent does not merely have "force" or provide further support, nor is it merely illustrative—rather, it has a binding effect. Scholars further identify two forms of formal bindingness: "(i) '[s]trictly binding'—must be applied in every case; (ii) defeasibly binding—must be applied in every case unless exceptions apply."¹⁰⁷ Within these categories, the Vietnamese precedent has the authority of defeasible formal bindingness. The Resolution authoritatively provides that "Judges and jurors *must study and apply case law, ensuring that cases of similar legal circumstances must be handled the same way.*"¹⁰⁸ That means precedent has a formal binding effect. However, this formal bindingness is defeasible, as the Resolution provides that "if precedent is not applied, the court *must* analyze, rationalize, clarify, and provide clear reasons in its judgement and decision."¹⁰⁹

5. *Application*

When a precedent is applied, the court, in its judgment, must cite, analyze, and clarify these elements in the precedent: the number of judgments of courts which have precedential validity, similar facts and issues specified in the precedent, and legal issues solved in the precedent.¹¹⁰ The highest court also issued an official document instructing all courts on the application of precedent.¹¹¹ To support the application of precedent by

102. *Id.* at art. 5.

103. *Id.* at art. 6.

104. *Id.* at art. 7.

105. *Id.*

106. Aleksander Peczenick, *The Binding Force of Precedent*, in INTERPRETING PRECEDENTS, *supra* note 4, at 463.

107. *Id.*

108. Resolution, *supra* note 85, at art. 8 (emphasis added).

109. *Id.* (emphasis added).

110. *Id.*

111. Công văn số 146/TANDTC-PC về việc viện dẫn, áp dụng án lệ trong xét xử [Official Document No. 146/TANDTC-PC on Instruction of Citation and Application of

local courts, the Chief Justice even issued a circular, which mobilizes for an “emulation movement” “to enhance the quality of courts’ adjudication and decision in order to create sources for precedent.”¹¹² Furthermore, the highest court also held physical “training conferences” in different regions and an online nation-wide conference to instruct local courts on precedent application.¹¹³

6. Departures

The idea of a departure¹¹⁴ from precedent involves three issues: non-application, abolition, and contestation of precedents. Firstly, the Vietnamese precedent system anticipates three situations in which a precedent may not be applied, namely: the precedent is not applicable because the case under consideration does not have similar legal facts; the precedent is no longer appropriate due to a change in positive law (new enactments or revisions of legislations of the National Assembly or regulations of the Government); the precedent is no longer apposite due to a “change of circumstance” or change in political, social, and economic conditions.¹¹⁵ Secondly, the Resolution allows for the formal abolition and replacement of a precedent by legislative and regulatory law, or by a decision of the highest court. When there are statutes and regulations of the National Assembly and the Government to fill in the legal gap, precedent will be automatically abolished.¹¹⁶ In addition, the Council of Justices may consider the abolition of a precedent when it is no longer appropriate due to a “change of circumstance” even though a written law is not available to fill in the legal lacuna.¹¹⁷ Thirdly, the fact that the Resolution allows for the abolition and replacement of the published precedents provides room for scholarly and juristic contestations and debates about them. National law reviews, online media, conferences, workshops, among others, can operate the discursive platforms.

Precedent in Trial] (issued by the Supreme People’s Court, July 11, 2017), <https://thuvienphapluat.vn/cong-van/Bo-may-hanh-chinh/Cong-van-146-TANDTC-PC-2017-vien-dan-ap-dung-an-le-trong-xet-xu-354543.aspx> [https://perma.cc/ZB9Z-YKGU].

112. Chỉ thị 04/2016/CT-CA ngày 30/5/2016 tăng cường công tác phát triển công bố áp dụng án lệ trong xét xử [Direction No. 04/2016/CT-CA on Enhancing the Development, Publication, and Application of Precedent in Trial] (promulgated by Chief Justice of the Supreme People’s Court., May 30, 2016), <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Chi-thi-04-2016-CT-CA-tang-cuong-cong-tac-phat-trien-cong-bo-ap-dung-an-le-trong-xet-xu-313016.aspx> [https://perma.cc/WH8T-FVU6].

113. Officer Interview, *supra* note 16.

114. This idea is drawn on and modified from Robert S. Summers & Svein Eng, *Departures from Precedent*, in *INTERPRETING PRECEDENTS*, *supra* note 4, at 519.

115. Resolution, *supra* note 86, at art. 9.

116. *Id.*

117. *Id.*

D. The System in Practice

1. Number

By April 2020, thirty-seven precedents have been officially issued and published in the SPCV's precedent website.¹¹⁸ The Chief Justice issued decisions to promulgate the first set of six precedents on April 6, 2016,¹¹⁹ the second set of four precedents on October 17, 2016,¹²⁰ the third set of six precedents on December 28, 2017,¹²¹ the fourth set of eleven precedents on October 17, 2018, the fifth set of three precedents on 9 September 2019, and the sixth set of eight precedents in February 25, 2020.¹²² While the proposals for precedent are numerous, the number of the released precedent is rather small, which can be attributed to the low quality of the proposals.¹²³ The Court seems cautious in considering the precedential quality of judicial judgments to convert them into precedent.

2. Types

The majority of precedents are on private law, civil law, and business and financial law. In more detail, there are nineteen precedents on civil law (e.g., land and inheritance disputes); eight precedents on business and commercial law (e.g., disputes over credit contracts and good contracts); six precedents on criminal law (e.g., murder, robbery, and embezzlement); two precedents on administrative law (e.g., petitions against administrative

118. Trang điện tử án lệ [Precedent Website], Supreme People's Court, <https://anle.toaan.gov.vn>.

119. Quyết định số 220/QĐ-CA về việc Công bố Án Lệ [Decision No. 220/QĐ-CA on Promulgation of Precedent] (promulgated by Chief Justice of the Supreme People's Court, Apr. 6, 2016), <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Quyết-dinh-220-QĐ-CA-cong-bo-an-le-2016-310639.aspx> [<https://perma.cc/V26H-QZ8N>].

120. Quyết định số 698/QĐ-CA về việc Công bố Án Lệ [Decision No. 698/QĐ-CA on Promulgation of Precedent] (promulgated by Chief Justice of the Supreme People's Court, Oct. 17, 2016), <https://thuvienphapluat.vn/van-ban/Thu-tuc-to-tung/Quyết-dinh-698-QĐ-CA-cong-bo-an-le-2016-326627.aspx> [<https://perma.cc/R7DB-LYNW>].

121. Quyết định số 299/QĐ-CA về việc Công bố Án Lệ [Decision No. 299/QĐ-CA on Promulgation of Precedent] (Promulgated by Chief Justice of the Supreme People's Court, Dec. 28, 2017), <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Quyết-dinh-299-QĐ-CA-2017-cong-bo-an-le-370829.aspx> [<https://perma.cc/8KGE-UJ38>].

122. Quyết định số 199/QĐ-CA về việc Công bố Án Lệ [Decision No 199/QĐ-CA on Promulgation of Precedent] (Promulgated by Chief Justice of the Supreme People's Court, Oct. 17, 2018), <https://www.toaan.gov.vn/webcenter/portal/tatc/chi-tiet-chi-dao-dieu-hanh?dDocName=TAND047839>; Quyết định số 293/QĐ-CA về việc Công bố Án Lệ [Decision No 293/QĐ-CA on Promulgation of Precedent] (Promulgated by Chief Justice of the Supreme People's Court, Sept. 9, 2019), <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Quyết-dinh-293-QĐ-CA-2019-cong-bo-an-le-423854.aspx> [<https://perma.cc/WVM2-VG4L>]; Quyết định số 50/QĐ-CA về việc Công bố Án Lệ [Decision No 50/QĐ-CA on Promulgation of Precedent] (Promulgated by Chief Justice of the Supreme People's Court., Feb. 25, 2020), <https://thuvienphapluat.vn/van-ban/Thu-tuc-To-tung/Quyết-dinh-50-QĐ-CA-2020-cong-bo-an-le-435698.aspx> [<https://perma.cc/88KX-U8X3>].

123. Officer Interview, *supra* note 16.

decisions on land issues); one precedent on family law (divorce); and one precedent on labor law (termination of labor contract).¹²⁴

3. *Sources*

Although judgments and decisions of any court can be converted into precedents, most released precedents are drawn from the cassation decisions of the Supreme People's Court; only two precedents have been converted from the appeal decisions of the provincial court of Ho Chi Minh City; and one precedent was developed from an appeal decision by the High Court in Hanoi.¹²⁵ A possible explanation for this is that judgments and decisions of local courts may not meet the precedential criteria. My hand-collected data indicates that the legal facts and the first trials from which precedents were introduced happened largely in the capital Hanoi (in seven cases) but are also scattered in other cities and provinces throughout the country from North to Central to South. The temporal distance between the precedent and the original judgment is mostly within five years. The precedents are drawn on recent judgements rendered around the 2010s. The exception to this trend is Precedent 23, which is based on a judgment from 2009.¹²⁶

4. *Related Legal Rules*

All precedents cite existing legal rules in positive law, including, among others: Codes (Civil Code, Criminal Code, and Civil Procedure Code); Statutes (Land Law, Law on Marriage and Family, Law on Credit Organizations, Commercial Law, and Administrative Procedure Law); other legislation (National Assembly's Standing Committee's Resolution No. 58/1998/NQ-UBTVQH10); administrative regulations (State Bank's Circular No. 12/2010/TT-NHNN, State Bank's Decision No. 1627/2001/QĐ-NHNN, State Bank's Decision No. 226/2002/QĐ-NHNN, Government's Decree 197/2004/ND-CP, and Government's Decree No. 11/2012/NĐ-CP); and an international legal instrument (International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits UCP 600).¹²⁷

5. *Application and Departures*

According to the SPCV's report, by July 31, 2018, 181 decisions and judgments of courts throughout the country have applied precedents.¹²⁸ Precedent 08 was cited most, at 125 times.¹²⁹ This may be because the

124. For more details, see *infra*, Appendix.

125. *Id.*

126. *Id.*

127. For more details, see TOÀ ÁN NHÂN DÂN TỐI CAO [SPCV], ÁN LỆ VÀ BÌNH LUẬN [PRECEDENTS AND COMMENTARIES] (Labor Publishing House 2018).

128. TOÀ ÁN NHÂN DÂN TỐI CAO [SPCV], BÁO CÁO SƠ KẾT CÔNG TÁC LỰA CHỌN, CÔNG BỐ VÀ ÁP DỤNG ÁN LỆ TRONG XÉT XỬ [PRIMARY REPORT ON THE SELECTION, PUBLICATION, AND APPLICATION OF CASE LAW IN TRIALS] (2018) draft, (on file with author).

129. *Id.*

precedent creates a new rule allowing stakeholders to make an agreement on the rate of interest, which would involve most disputes over goods contracts. Most of the cited precedents were released in the first batch, while most of non-cited precedents were released in the last batch. Understandably, precedents take time to be applied. There is also an example of departure from precedents. The court of the Cần Thơ City rejected application of Precedent 02 for the reason that the case it was handling does not have similar basic legal facts.¹³⁰

E. Functions

1. *Judicial Protection of Justice*

Vietnamese precedent indicates the role of the judiciary in protecting justice or fairness. Precedents were selected on the basis of whether they can protect justice.¹³¹ Most precedents are based on the highest court's repeal of appeal decisions or judgements, mainly for the reasons that they fail to protect the legitimate rights and interests of the parties and other concerned persons.¹³² Upon examination, the precedents try to protect the interests of parties and concerned persons. For example, Precedent 10 clarifies the conditions in which citizens can sue administrative authorities, by which it protects the legitimate rights and interests of citizens.¹³³

In the same vein, precedents regarding civil law issues try to protect fairness and the rights and interests of the parties, especially the weak parties, in the society. For example, Precedent 05 rules that when a court decides to distribute the dividend of inheritance it shall consider the rights and interests of the heir who does not consent with the inheritance distribution, but contributes to managing and embellishing the estate.¹³⁴ This law tries to protect the legitimate interests of the heir by requiring the court to take into account his or her contribution to the estate.¹³⁵

130. Đỗ Thanh Trung, *Hoạt động áp dụng án lệ của Tòa án: Một số bất cập và hướng hoàn thiện* [Courts' Application of Case Law: Some Shortcomings and Directions for Perfecting], TẠP CHÍ TÒA ÁN NHÂN DÂN ĐIỆN TỬ (Jan. 8, 2018), <https://tapchitoaan.vn/bai-viet/an-le/hoat-dong-ap-dung-an-le-cua-toa-an-mot-so-bat-cap-va-huong-hoan-thien> [<https://perma.cc/P44Y-9ZA6>].

131. Officer Interview, *supra* note 16.

132. See Nguyen Hong Hai, *Court precedents in Vietnam: A View From the Building of the 2015 Civil Code*, VIET. L. & LEGAL F. (July 31, 2017), <http://vietnamlawmagazine.vn/court-precedents-in-vietnam-a-view-from-the-building-of-the-2015-civil-code-5959.html> [<https://perma.cc/EEZ2-GKLH>].

133. Án lệ số 10/2016/AL [Precedent No. 10/2016/AL] Supreme People's Court (2016) (Viet.).

134. Án lệ số 05/2016/AL [Precedent No. 05/2016/AL] Supreme People's Court (2016) (Viet.).

135. LNT & Partners, *Một số bình luận về 10 án lệ được công bố bởi Hội đồng Thẩm phán Tòa án nhân dân tối cao* [Some Comments on the Ten Precedents Released by the Supreme People's Court's Council of Justices], VIETNAM LAW INSIGHT, at 12, https://vietnam-lawinsight.files.wordpress.com/2016/11/lnt_binh-luan-an-le_vn_10112016.pdf [<https://perma.cc/P4CQ-WNV3>].

Similarly, precedents on commercial and business law try to protect the interests of stakeholders in the market. For example, Precedent 13 establishes the rule that a Letter of Credit shall still be valid even if the contract for an international sale of goods, which is the base of the Letter of Credit, is cancelled.¹³⁶ This precedent draws on the UCP 600 to consider the request for opening a Letter of Credit as a separate transaction and is not affected by the cancellation of the contract for the international sale of goods.¹³⁷ The precedent tries to protect the interest of the purchaser.¹³⁸

2. *Judicial Interpretation of Law*

The precedent indicates the second function of the courts in the legal system, namely legal interpretation. In this regard, precedent does not create totally new legal rules but clarifies and interprets ambiguous and general provisions in legislations which are the sources of different understandings and judicial applications.¹³⁹ The two public precedents prominently illustrate this type of judicial legal interpretation.

Let us illustrate by one example. Precedent 01 interprets two articles in the Criminal Code of 1999, namely Article 93 on the offence of “murder” and Article 104 on the offence of “intentionally causing injury resulting in death.”¹⁴⁰ In reality, the difference between “murder” and “intentionally inflicting injury” which leads to human death is blurred, as both crimes have similar consequences, similar intents, and rather similar actions (such as beating, stabbing, and shooting), which has confused judicial actors and created different understandings and applications among courts.¹⁴¹ Precedent 01 generates a precedential base to distinguish the two crimes, namely the subjective intention of the offender.¹⁴² If the offender has the intention to kill the victim, he or she has committed the crime of “murder” regardless of whether the victim is dead or not; if the offender just has the intention to inflict injuries on the victim (such as inflicting injuries on a victim’s legs and hands instead of inflicting injuries on vital organs which could lead to human death”), and the victim’s death is beyond the offender’s expectation, then the offender is considered to have committed the crime of “inflict injuries” rather than “murder.”¹⁴³

136. Án lệ số 13/2017/AL [Precedent No. 13/2017/AL] (Supreme People’s Court) (2017) (Viet.).

137. *Id.*

138. *Id.*

139. Trương Hoà Bình, *Developing and Applying Court Precedents: A Clear Roadmap Ahead*, VIET. L. & LEGAL F. (Oct. 29, 2015), <http://vietnamlawmagazine.vn/developing-and-applying-court-precedents-a-clear-roadmap-ahead-5058.html> [https://perma.cc/9WWB-MB8N].

140. LNT & Partners, *supra* note 135, at 4.

141. *Id.*

142. Án lệ số 01/2016/AL [Precedent No. 01/2016/AL] (Supreme People’s Court) (2016) (Viet.).

143. LNT & Partners, *supra* note 135, at 4–5.

3. *Judicial Law-Making*

Vietnamese precedent demonstrates the third function of the judiciary in the legal system, namely to develop new legal rules. Precedent does not merely interpret existing rules and principles in legislation, it also creates new legal rules which bridge the vacuum in the positive law and even contravene the existing positive law.¹⁴⁴ These new rules are generally reflective of the social reality.¹⁴⁵ Most private precedents belong to this type of judicial legal innovation.¹⁴⁶

To illustrate, Precedent 02 develops a new legal rule to fill the legal vacuum. According to the Land Law of 1993, foreigners, including Vietnamese people living overseas, are only allowed to rent land.¹⁴⁷ But, the reality is that Vietnamese living overseas often receive the land use right as the *de facto* owners but assign other Vietnamese persons residing in Vietnam to sign the transfer contract, who subsequently transfer the land use right to the third party.¹⁴⁸ This structure creates disputes. According to Article 129 of the Civil Code, a contract that is undersigned to conceal another transaction is a false contract and therefore invalid.¹⁴⁹ Article 137 of the Code deals with the consequence of the invalid transaction, providing that, “When a civil transaction is invalid, the parties restore everything to its original state and shall return to each other what they have received.”¹⁵⁰ But, this Article leaves a gap regarding how to handle the consequence. Precedent 02 fills in this gap by creating a new rule which allows the court to take into account the contribution of the assigned persons and “equal shares on the increased value of the land use right” in case the contribution could not be identified precisely.¹⁵¹

Several other precedents regarding civil legal issues develop new rules which contradict the Civil Code’s provisions on the written form and formality of a valid contract.¹⁵² These new rules reflect the common reality in Vietnam that daily civil transactions are often verbal or informal.¹⁵³ These precedents require the court to take into account the actual actions of the parties as they indicate the parties’ will to validate the contract,

144. See Nguyen Hong Hai, *supra* note 132.

145. See *id.*

146. See *infra* accompanying text.

147. Luật Đất đai [Land Law] art. 80 (promulgated by the National Assembly, July 14, 1993, effective Oct. 15, 1993).

148. LNT & Partners, *supra* note 135, at 5.

149. CIVIL CODE [CIV. C.] art. 129 (2005) (Viet.).

150. *Id.* at art. 137.

151. Án lệ số 02/2016/AL [Precedent No. 02/2016/AL] (Supreme People’s Court) (2016) (Viet.).

152. Án lệ số 03/2016/AL, 04/2016/AL, 07/2016/AL, 15/2017/AL, and 16/2017/AL [Precedents Nos. 03/2016/AL, 04/2016/AL, 07/2016/AL, 15/2017/AL, and 16/2017/AL] (Supreme People’s Court) (2016) (Viet.).

153. Phạm Thị Thúy Kiều, *Một số ý kiến về hợp đồng vô hiệu do vi phạm điều kiện hình thức* [Some comments on the Contracts invalid for violating the conditions of form], TẠP CHÍ DÂN CHỦ VÀ PHÁP LUẬT (Sept. 30, 2019), <http://tcdcl.moj.gov.vn/qt/tintuc/Pages/thi-hanh-phap-luat.aspx?ItemID=373> [<https://perma.cc/V97A-9HEQ>].

rather than only considering the written form and formality of the contract. For example, Precedent 03 develops a new rule contradictory to Article 689 of the 1995 Civil Code. This Article requires that, “The contracts on land use right transfer must be made in writing, and notarized or certified in accordance with law.”¹⁵⁴ The precedent, however, requires the court to take into account the actual actions of the parties (for example, “the married couple has been using the household continuously, stably and publicly, and registered for, received the Certificate of the land use right”)¹⁵⁵ to validate this contract although its formal requirement is not met pursuant to the Civil Code. Similarly, Precedent 04 focuses on the actual actions of the partner of a married couple (receiving the money, managing, and using the household and land publicly) to validate the contract she did or she did not sign.¹⁵⁶

In the same vein, several business and commercial precedents demonstrate judicial law-making. Precedent 09, for example, fills in the gap in the existing positive law. The related legal rule is Article 306 of the 2005 Commercial Law, which provides that:

where a contract-breaching party delays making payment for goods or payment of service charges and other reasonable fees, the aggrieved party may claim an interest on such delayed payment at the average interest rate applicable to overdue debts in the market at the time of payment for the delayed period, unless otherwise agreed or provided for by law.¹⁵⁷

This Law, however, is silent about how to calculate “the average interest rate.” This has caused confusion and resulted in different applications of the rule: courts in different cases have relied on different standards like the average interest rate of commercial banks, the interbank interest rate, or the basic interest rate of the State Bank.¹⁵⁸ The precedent bridges this gap by establishing a new rule that the interest rate shall be based on the average interest rate of three local banks.¹⁵⁹

Precedent 08 presents another dimension of judicial law-making in the area of business and commercial law. It both interprets the existing law and creates a new precedential rule which is contradictory to the existing positive law. The related legal rule is Article 305 of the 2005 Civil Code, which provides that: in cases where the obligor delays making payments, such obligor “must pay interest on the unpaid amount at the basic rate announced by the State Bank, unless otherwise agreed upon or

154. Civ. C. art. 689 (1995) (Viet.).

155. *Án lệ số 03/2016/AL* [Precedent No. 03/2016/AL] (Supreme People’s Court) (2016) (Viet.).

156. *Án lệ số 04/2016/AL* [Precedent No. 04/2016/AL] (Supreme People’s Court) (2016) (Viet.).

157. *Luật Thương Mại* [Commercial Law] (promulgated by the National Assembly, Jun. 14, 2005), art. 306.

158. LNT & Partners, *supra* note 135.

159. *Án lệ số 09/2016/AL* [Precedent No. 09/2016/AL] (Supreme People’s Court) (2016) (Viet.); Civ. C. art. 305 (2005) (Viet.).

provided for by law.”¹⁶⁰ The precedent interprets the phrase “corresponding to the period of delayed payment” to mean that the client must continue to pay the amount of the original debt, the interest on the original debt, and the outstanding debt interest until the original debt is paid, including the time after the first trial.¹⁶¹ But, the innovative rule created by the precedent is that the rate of interest is according to the agreement of the stakeholders, not “the basic rate announced by the State Bank at the time of payment” as provided by the Civil Code.¹⁶² The rule, therefore, respects the will of the stakeholders.

III. Explanatory Factors

The precedent system in Vietnam is shaped by multiple factors. One important factor is the impact of the global diffusion of precedent. In this regard, legal diffusion theory is relevant. However, legal diffusion theory alone cannot explain why a society is receptive to the global idea of precedent.¹⁶³ There must be something dynamic inside Vietnamese legal thinking, the legal system, and society which renders the adoption of precedent possible. The understanding of Vietnamese precedent, therefore, must be situated within the broader context of jurisprudential, institutional, substantive, and sociological dynamics. This is connected to the insights from post-modern comparative law and complexity theory. The explanatory factors of the Vietnamese precedent system include the following.

A. The Global Diffusion of Precedent

Literature of global comparative law suggests that global legal diffusion is an important factor of legal change.¹⁶⁴ Legal change in Vietnam has also been animated by global legal diffusion.¹⁶⁵ This presents the capacity of exogenous adaption of the Vietnamese legal system. The creation of precedent in Vietnam is also the consequence of the impact of the global diffusion of precedent.¹⁶⁶ The diffusion of precedent in Vietnam can be explained within the diffusion formula proposed by William

160. Civ. C. art. 305 (2005) (Viet.).

161. *Án lệ số 08/2016/AL* [Precedent No. 08/2016/AL] (Supreme People's Court) (2016) (Viet.).

162. *Id.*; Civ. C. (Viet.).

163. See, e.g., William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 *DUQ. L. REV.* 35, 52 (2011).

164. See generally Sue Farran & Christa Rautenbach, *Introduction*, in *THE DIFFUSION OF LAW: THE MOVEMENT OF LAWS AND NORMS AROUND THE WORLD* (Sue Farran et al., eds., 2015).

165. John Gillespie, *Localizing Global Competition Law in Vietnam: A Bottom-Up Perspective*, 64 *INT'L & COMP. L.Q.* 935, 938 (2015).

166. See Thi Mai Hanh Do, *Evaluation of the applicability of Common Law Approaches to Precedent in Vietnam*, U. WOLLONGONG 1, 4 (2011), https://pdfs.semanticscholar.org/d69f/cbb172dd7713e25bf9cdf53db9dc51d2f38b.pdf?_ga=2.222836187.1912564785.1585707612-710192141.1585707612 [<https://perma.cc/X25S-DKVE>].

Twining: sources, levels, formal or informal mechanisms, objects, agency, timing, power and prestige, and impact.¹⁶⁷

To begin with, the sources of the diffusion of precedent in Vietnam are diverse, which deviates from the standard case of bipolar diffusion from a single exporter to a single importer.¹⁶⁸ Vietnam is inspired by the idea of precedent and its practice in different common law and civil law countries, without attaching to any particular national legal system.¹⁶⁹ This presents the capacity of the legal system to adapt to the broader changing international legal landscape, which is due to the fact that Vietnam has become deeply integrated into the global community. Therefore, to justify the application of precedent in Vietnam, the SPCV, lawyers, and scholars have referred to a wide range of transnational experiences. For example, Chief Justice Trương Hoà Bình advocates for the creation of precedent in Vietnam by referring to “the recognized meaning and values of precedent according to international experience” of both common law and civil law countries.¹⁷⁰ In the same vein, local scholars suggest “If precedent is applied in Vietnam, we should not entirely apply the legal system of any particular countries. Rather, we should learn from the experience of many different countries, especially the countries which have had the developed systems of precedent and inserted deep and wide influences on other countries.”¹⁷¹

On the level of interaction, although cross-level transfers are evident in other areas (such as the incorporation of international human rights law into the national constitution), the diffusion of precedent in Vietnam exemplifies the standard paradigm of the municipal legal system.¹⁷² The adoption of precedent in Vietnam illustrates the municipal interaction between the Vietnamese socialist legal system, and the common law and civil law systems.¹⁷³

The diffusion of precedent in Vietnam is both formal and informal. The adoption of the term and concept of precedent in formal legal

167. WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* 279 (2009).

168. See William Twining, *Social Science and Diffusion of Law*, 32 J. L. & SOC'Y 203, 205 (2005).

169. Trương Hoà Bình, *Judicial Independence in the Socialist Rule-of-Law State to Ensure Courts Duly Exercise Judicial Power*, COMMUNIST REV. (Dec. 29, 2014), <http://english.tapchicongsan.org.vn/Home/Politics/2014/763/Judicial-independence-in-the-socialist-ruleoflaw-State-to-ensure-courts-duly-exercise.aspx> [<https://perma.cc/R9LK-3MHA>]. *Id.*

170. Trương Hoà Bình, *Thực hiện tốt nhiệm vụ phát triển án lệ, bảo đảm áp dụng thống nhất pháp luật trong hoạt động xét xử của tòa án nhân dân* [Good Exercise of the Duty to Develop Precedents to Ensure the Uniform Application of Law in People's Courts' Trial, TRƯỜNG ĐẠI HỌC KIỂM SÁT HÀ NỘI, <http://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/120/764> [<https://perma.cc/2NWC-6PGU>] (last visited Apr 22, 2020).

171. Dương & Nguyễn, *supra* note 54, at 41.

172. TWINING, *supra* note 167, at 279.

173. See Trương Hoà Bình, *supra* note 170.

instruments indicates that the diffusion of precedent is formal.¹⁷⁴ But, the diffusion is also through different informal mechanisms. The first is through “learning tours.” The SPCV sent delegates to different countries (such as the UK, US, Australia, Japan, and Korea) to study their experience of precedent.¹⁷⁵ The second mechanism is through legal aids. Operating as “law and development” actors, foreign governments have provided financial assistance through programs such as the US’s Fulbright, Australia’s Awards–Endeavour Scholarships and Fellowships, and Japan’s International Cooperation Agency Scholarship, for Vietnamese jurists to study overseas,¹⁷⁶ who have later carried and diffused foreign legal ideas, including the ideas of precedent, in the country. The third mechanism is through juristic commentaries on foreign experiences of precedent, which are presented in national law journals, conferences, and workshops.¹⁷⁷

What is diffused in Vietnam is the *idea* of precedent itself, together with some other ideas justifying it—not particular rules, institutions, or procedures of producing precedent. Vietnam is inspired by the precedential idea that the same cases should have the same rules and that courts should develop and apply these rules. In addition, the application of precedent in Vietnam is justified by the idea of equality before the law, which suggests that all citizens are subject to the same due process.¹⁷⁸

The diffusionist argument of “parent” legal systems is resonated in Vietnam. Vietnam tends to reference the experience of precedent in developed and powerful countries. To illustrate, the project of precedent adopted by the SPCV refers to the precedent experience in the US, UK, Australia, Germany, France, and Japan. Scholarly writings and commentaries proposing the application of precedent in Vietnam have also been dominated by the reference to the experience of these countries.¹⁷⁹

174. It is very clear from the discussion above that several legal instruments are enacted to create the system.

175. Officer Interview, *supra* note 16.

176. BUI NGOC SON, LEGAL EDUCATION IN TWENTY-FIRST CENTURY VIETNAM: FROM IMITATION TO RENOVATION, in *LEGAL EDUCATION IN ASIA: FROM IMITATION TO INNOVATION* 276, 293–94 (Andrew Harding et al. eds., 2017).

177. An April 13, 2018 search of the term “án lệ” (precedent) on the website of the Library of the Hanoi Law University yielded 130 materials. Author’s search at <http://thuvien.hlu.edu.vn/> [<https://perma.cc/FS5T-PKNQ>].

178. See Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210, 1223 (1997).

179. See Trần Thị Diệu Hương, *Án lệ trong hệ thống pháp luật thông luật Anh kinh nghiệm cho việc hoàn thiện quy định về án lệ ở Việt Nam* [Precedent in the English Legal System and the Experience for Perfecting Regulation on Precedent in Vietnam], 2 DÂN CHỦ VÀ PHÁP LUẬT 57 (2017), <https://thegioiluat.vn/bai-viet-hoc-thuat/An-le-trong-he-thong-phap-luat-thong-luat-Anh—Kinh-nghiem-cho-viec-hoan-thien-quy-dinh-ve-an-le-o-Viet-Nam-5984/> [<https://perma.cc/QMN4-8VLH>]; Nguyễn Văn Nam, *Án lệ trong hệ thống pháp luật dân sự các nước Pháp, Đức và việc sử dụng án lệ ở Việt Nam* [Precedent in the Civil Law System in France and Germany and the Application of Precedent in Vietnam], 6 NGHIÊN CỨU LẬP PHÁP 55 (2011), <http://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/81/346> [<https://perma.cc/X48F-R5QK>]; Lê Mạnh Hùng, *Án lệ trong hệ thống tòa án Australia và kinh nghiệm cho Việt Nam trong việc phát triển án lệ* [Precedent in Australian Court System and Experience for the Development of Precedent in Vietnam], 6 LUẬT HỌC 68

This can be explained by two reasons. First, diffusion theories suggest that successful lessons will create incentive for learning.¹⁸⁰ In this regard, the party, the court, and jurists in Vietnam may long to establish a system of precedent drawing from the lessons in developed countries in the hope that Vietnam will achieve similar success in legal and socioeconomic development. Second, Vietnamese officials and jurists are more familiar with the legal experience of the aforementioned countries, because these countries have more influence on Vietnamese legal reform and legal education through legal aid programs.

Agents of diffusion of precedent in Vietnam include not only state actors, such as the SPCV, but also Vietnamese jurists. Both the previous and current Chief Justices of the SPCV are highly supportive of the application of precedent in Vietnam.¹⁸¹ This, however, does not mean that the creation and development of the system is determined by their personal references or policy. They inevitably engage in complex interactions with numerous legal agents. The emergence of precedent is better understood as driven by, among other factors, the dynamic interactions of different legal agents in the Vietnamese legal system. The creation of the formal system of precedent is generated by the discursive interactions of judges, officials, legislators, legal scholars, lawyers, and others in different fora. Especially, in recent years, there are a number of Vietnamese jurists receiving foreign post-graduate education in common law countries, such as the UK, the US, and Australia, and in civil countries such as France, Germany, and Japan.¹⁸² These students are adaptive to international legal thinking, including the thinking about precedent.¹⁸³ After returning to Vietnam, they work for the government, the courts, law schools, and law firms, and their local writings and their interactions with other jurists and governmental actors contribute to the diffusion of the idea of precedent throughout the country.¹⁸⁴ Particularly, one officer who assisted the SPCV to design the precedent proposal received post-graduate legal education in Australia.¹⁸⁵

Twining states that “*reception usually involves a long drawn out process which, even if there were some critical moments, cannot be understood without reference to events prior and subsequent to such moments.*”¹⁸⁶

(2011), <http://vusta.vn/chitiet/tin-tuyen-sinh-dao-tao/An-le-trong-he-thong-toa-an-Australia-va-kinh-nghiem-cho-Viet-Nam-trong-viec-phat-trien-an-le-1011> [<https://perma.cc/VV9G-N3XC>].

180. See Beth A. Simmons & Zachary Elkins, *The Globalisation of Liberalisation: Policy Diffusion in the International Political Economy*, 98 AM. POL. SCI. REV. 171, 175, 182–84 (2004).

181. Officer Interview, *supra* note 16.

182. Mark Sidel, *A New Generation and New Thinking in Vietnamese Legal Scholarship*, 11 ASIAN J. COMP. L. 193, 195 (2016).

183. *Id.* at 193.

184. *Id.* at 195–96.

185. Officer Interview, *supra* note 16.

186. TWINING, *supra* note 167, at 283.

2015 was the critical moment in Vietnam when precedent was formally adopted with the enactment of the Resolution. Yet, the eventual adoption of precedent in Vietnam has been the culmination of a ten-year process, beginning with the party's initiative in 2005, followed by many other formal and informal activities, including scholarly advocacy, conferences, workshops, design of the precedent project, legislation, and approval by the SPCV.

B. Jurisprudential Dynamics

The post-modern scholarship in comparative jurisprudence underlines the consequential role of fundamental ideas and principles in shaping the nature of law and legal institutions.¹⁸⁷ The implication is that legal change significantly depends on the change in a jurist community's understanding of the nature of law, and concepts and principles underpinning their particular legal system. In this regard, I contend that the emergence of precedent in Vietnam is shaped by four new jurisprudential patterns: (1) the flexibility of Marxist legal positivism; (2) the decline of "socialist legality"; (3) the rise of "socialist rule of law state"; (4) and the emergence of new judicial concepts.

1. *The Flexibility of Marxist Legal Positivism*

The emergence of precedent in Vietnam is due to the change in the understanding about the nature of law among the Vietnamese jurist community.¹⁸⁸ Marxist legal positivism once dominated Vietnamese jurisprudence but is now flexible. Vietnamese textbooks called "Theory of State and Law" define the nature of law in the Marxist sense as the rules expressing the will of a ruling class.¹⁸⁹ However, the diffusion of legal ideas from the western world (thanks to different channels, such as internet, translation of western books, foreign legal education, and exchange programs) mollifies this Marxist positivist conception of law in Vietnam. The Vietnamese jurists have now explored western legal naturalism and western alternative concepts about the nature of law and softened their Marxist view accordingly.¹⁹⁰ While the idea that law is the tool for the

187. William B. Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1896–97 (1995).

188. Scholar Interview, *supra* note 15.

189. See, e.g., Lê Minh Tâm, *Đối tượng và Phương Pháp Nghiên cứu của Lý Luận Nhà nước và Pháp Luật* [Subjects and Methodology of Theory on State and Law], in GIÁO TRÌNH LÝ LUẬN NHÀ NƯỚC VÀ PHÁP LUẬT [TEXTBOOK ON THEORY OF STATE AND LAW] 16 (Lê Minh Tâm ed., 2003).

190. Đỗ Đức Minh, *Tìm hiểu học thuyết pháp luật tự nhiên* [Studying Natural Law Theory] 6 NGHIÊN CỨU LẬP PHÁP 15 (2014), <http://lapphap.vn/Pages/TinTuc/207860/Tim-hieu-Hoc-thuyet-Phap-luat-tu-nhien.html> [<https://perma.cc/HH3M-T58Y>]; Nguyễn Xuân T. ng, *Luật tự nhiên trong quá trình xây dựng nhà nước pháp quyền xã hội chủ nghĩa tại Việt Nam* [Natural Law in Building the Socialist Rule of Law State in Vietnam], 3 LUẬT HỌC 58 (2010), <https://tailieu.vn/doc/bao-cau-luat-tu-nhien-trong-qua-trinh-xay-dung-nha-nuoc-phap-quyen-xa-hoi-chu-nghia-tai-viet-nam-1351019.html> [<https://perma.cc/7D9S-N5A4>].

ruling class is not abandoned, Vietnamese jurists now understand the nature of law as associated with justice and reason.¹⁹¹ This view is even adopted by members of the political elite—the Prime Minister, for example, in his address in 2014 stated, “The law must guarantee justice and reason.”¹⁹²

When the nature of law is understood as something that is derived from justice and reason, this creates the jurisprudential basis for the emergence of precedent. The logic is that if the normative foundation of law derives from justice and reason, when positive rules are absent or vague, judges can draw on legal reasoning to develop precedential rules.

2. *The Fall of “Socialist Legality”*

In addition to the flexibility of Marxist legal positivism, the rise of precedent is jurisprudentially originated from the fall of the concept “socialist legality.” The Soviet concept of socialist legality was first introduced in Vietnam during the third congress of the Vietnam Workers Party (the communist party) in 1960.¹⁹³ With the enactment of the 1980 Constitution, socialist legality became a constitutional principle.¹⁹⁴ The 1992 Constitution, enforced until 2013, continued to confirm that “the state administers the society by law and constantly strengthens the socialist legality All State agencies, all economic and social organisations, the people’s armed forces units and all citizens shall strictly abide by the Constitution and the law”¹⁹⁵ To enforce this principle, the Law of Organization of the People’s Courts of 2002 stipulated that the foremost function of the court system was “to protect socialist legislation.”¹⁹⁶ Socialist legality was also a prevailing conceptual model for political and legal discourse in Vietnam around the 1970s and 1980s.¹⁹⁷

Yet, in recent years, the concept of socialist legality significantly declined in Vietnam. It formally disappeared in the new Constitution

191. Nguyễn Xuân Tùng, *Pháp luật phải bảo đảm được công lý và lẽ phải* [Law Must Guarantee Justice and Reason], BÁO ĐIỆN TỬ PHÁP LUẬT THÀNH PHỐ HỒ CHÍ MINH (Jan. 2, 2014, 2:28 PM), <http://ttvtpl.hou.edu.vn/index.php/vi/news/Nghien-cuu-bai-viet/Phap-luat-phai-bao-dam-duoc-cong-ly-va-le-phai-40/> [https://perma.cc/XP9K-Z8N4].

192. *Thông điệp năm mới của Thủ tướng Nguyễn Tấn Dũng* [New Year Address of Prime Minister Nguyễn Tấn Dũng], CÔNG THÔNG TIN ĐIỆN TỬ CHÍNH PHỦ (Jan. 1, 2014, 8:39 AM), <http://baohinhphu.vn/Cac-bai-phat-bieu-cua-Thu-tuong/Thong-diep-nam-moi-cua-Thu-tuong-Nguyen-Tan-Dung/189949.vgp> [https://perma.cc/Q2KM-6GY4].

193. John Gillespie, *Changing Concepts of Socialist Law in Vietnam*, in ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM 45, 47 (John Gillespie & Pip Nicholson eds., 2005).

194. HIẾN PHÁP [CONSTITUTION] 1980, art. 12 (Viet.).

195. HIẾN PHÁP [CONSTITUTION] 1992, art. 12 (Viet.).

196. Law on Organization of People’s Courts (Nov. 24, 2014), at art. 1 (Viet.).

197. Nguyễn Xuân Tùng, Bàn về “nguyên tắc pháp quyền Xã hội chủ nghĩa” [Commenting on the Principle of Socialist Legality], MINISTRY OF JUSTICE [(Oct. 13, 2011), <https://moj.gov.vn/UserControls/News/pFormPrint.aspx?UrlListProcess=/qt/tintuc/Lists/NghienCuuTraoDoi&ListId=75a8df79-a725-4fd5-9592-517f443c27b6&SiteId=b11f9e79-d495-439f-98e6-4bd81e36adc9&ItemID=1463&SiteRootID=b71e67e4-9250-47a7-96d6-64e9cb69ccf3>] [https://perma.cc/S5BZ-N6GZ].

enacted in 2013.¹⁹⁸ Accordingly, the Law of Organization of the People's Courts of 2014 removed the courts' function of protecting socialist legality.¹⁹⁹ The concept of socialist legality has no longer been prominent in the discourse of politicians, nor legal scholars.²⁰⁰

The fall of the concept and principle of socialist legality is consequential to the rise of precedent in Vietnam. With the decline of socialist legality, the idea of strict observation of positive law by citizens is abated, which allows citizens and lawyers to refer to justice in their legal reasoning, which in turn is the necessary jurisprudential condition for the rise of precedent.²⁰¹ In addition, with the decline of socialist legality, the source of law is not necessarily found in written legal texts. This creates the conditions for the introduction of precedent as the unwritten source of law.

3. *The Rise of "Socialist Rule of Law State"*

To survive, the socialist legal system in Vietnam must be sensitive to the changing international legal discourse in which the concept of "socialist legality" is alien. The legal system is jurisprudentially adaptive enough to incorporate the prevailing concepts of the rule of law in international legal discourse and marry them with the local concept of "socialist legality."²⁰² The dynamic jurisprudential interaction generates the mixed and ambiguous concept called "socialist rule of law state," the new jurisprudential base for the emergence of precedent.²⁰³

The concept of "socialist rule of law state" was adopted via a constitutional amendment in 2001 after dynamic debates among legislators, politicians, legal scholars, and other intellectuals.²⁰⁴ Since then, the "socialist rule of law state" has operated as the loose framework for reformist legal discourse in Vietnam.²⁰⁵ The *mélange* between the "socialist legality" and western ideas of the rule of law has resulted in competing concepts and principles under the rubric of the "socialist rule of law state," namely: law as the tool for state's management, stringent enforcement of

198. HIẾN PHÁP [CONSTITUTION] 2013, art. 12 (Viet.).

199. Law on Organization of People's Courts (Nov. 24, 2014), at art. 1 (Viet.).

200. Thiem H. Bui, *Deconstructing the 'Socialist' Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam's Constitutional Reform Process*, 36 CONTEMP. SOUTHEAST ASIA 77, 83–84 (2014).

201. Pham Duy Nghia & Do Hai Ha, *The Soviet Legacy and Its Impact on Contemporary Vietnam*, in SOCIALIST LAW IN SOCIALIST EAST ASIA 125 (Hualing Fu et al. eds., 2018).

202. For different western concepts of the rule of law, see Richard Fallon, "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7–10 (1997).

203. On the mixture between socialist legality and socialist rule of law state, see Pham Duy Nghia & Do Hai Ha, *supra* note 201, at 130–31.

204. See MARK SIDEL, THE CONSTITUTION OF VIETNAM: A CONTEXTUAL ANALYSIS 120 (2009).

205. Thiem H. Bui, *supra* note 200, at 77–78.

the law, the supremacy of the constitution, law representing common values, equality under the law, and protection of human rights.²⁰⁶

The adoption of precedent must be situated within that evolution of jurisprudence in Vietnam which leads to the advent of the vague concept of “socialist rule of law state.” To illustrate, the incorporation of the idea of equality under the law as the core value of the socialist rule of law state is suggestive of the precedential idea that the same legal rules must be applied to the same legal events and facts. Furthermore, the concept of human rights is also consequential to the emergence of precedent. Understandably, the universal idea of human rights has provided jurisprudential justification for the development of precedent.²⁰⁷ Finally, the framework of “socialist rule of law state” also incorporates requirements of formalist rule of law, such as stability, transparency, and predictability,²⁰⁸ which is suggestive of the creation and development of the precedent system. To illustrate, the Chief Justice justifies the application of law in Vietnam in this manner:

The application of precedent is the effective way to rectify the shortcomings of the law, ensure the uniform application of the law in trial, create the stability, transparency, and predictability in courts’ judgments, by which to guide the behaviors of not only parties in the cases but also the social community.²⁰⁹

4. *New Judicial Concepts*

The fourth new jurisprudential pattern concerns new concepts about the judiciary. Within the framework of “socialist rule of law state” new normative principles and ideas about the court system have emerged together with other concepts, such as “human rights” and “justice,” which are consequential to the creation of the precedent system.²¹⁰ This conceptual change is presented in the new Law on Organization of People’s Court.

206. Đỗ Ngọc Hải, *Bàn về pháp chế xã hội chủ nghĩa trong điều kiện xây dựng và hoàn thiện nhà nước pháp quyền xã hội chủ nghĩa Việt Nam* [Commenting on Socialist Legality in the Context of Building and Perfecting the Vietnamese Socialist Rule of Law State], TẠP CHÍ ĐIỆN TỬ TỔ CHỨC NHÀ NƯỚC (Oct. 29, 2013, 11:53 AM), http://tcnn.vn/Plus.aspx/vi/News/125/0/1010067/0/5042/Ban_ve_phap_che_xa_hoi_chu_nghia_trong_dieu_kien_xay_dung_va_hoan_thien_nha_nuoc_phap_quyen_xa_hoi_chu [https://perma.cc/TZC9-VEV3].

207. Nguyễn Quang Thành, *Án Lệ Và Việc Áp Dụng Án Lệ Để Bảo Vệ Quyền Con Người Ở Việt Nam Hiện Nay* [Precedent and The Application of Precedent to Protect Human Rights in Today’s Vietnam], 4 *LUẬT HỌC* 45 (2017), <http://www.vjol.info/index.php/tclh/article/view/35562> [https://perma.cc/PW8R-BGA8].

208. Hà Hùng Cường, *Hoàn Thiện Hệ Thống Pháp Luật Đáp Ứng Yêu Cầu Xây Dựng Nhà Nước Pháp Quyền Xã Hội Chủ Nghĩa* [Perfecting the Legal System to Meet the Requirements of Building the Socialist Rule of Law State], *TRANG THÔNG TIN ĐIỆN TỬ CỦA TẬP CHÍ DÂN CHỦ VÀ PHÁP LUẬT*, <http://tcdclp.moj.gov.vn/qt/tintuc/Pages/70-nam-nganh-tu-phap-viet-nam.aspx?ItemID=15> [https://perma.cc/2ZVX-M5UD] (last visited Mar. 25, 2020) (discussing formalist requirements of the socialist rule of law state).

209. Trương Hoà Bình, *supra* note 170.

210. See *infra* accompanying text.

The first jurisprudential change concerns the reconceptualization of the nature and role of court. The Law redefines courts as “judicial bodies” which “exercise judicial power,”²¹¹ which echoes Article 102 of the new Constitution.²¹² In the context of Vietnam’s rejection of the Montesquieuan government²¹³ in favor of concentrated power,²¹⁴ that definition has a substantive meaning: institutions other than courts cannot exercise judicial power, which enables the operational independence of the judicial power. Vietnamese leadership also recognizes this operational dimension of judicial independence. To illustrate, Chief Justice Trương Hoà Bình explicitly writes in the official journal of the communist party, that: “In relations with other power branches, judicial independence [in Vietnam] is demonstrated most apparently in non-interference in the work of courts, judges and trials of judges.”²¹⁵ This statement presents the change in understanding about the nature of the judicial power among Vietnamese political elite, and also is a response to the reality that non-judicial bodies (including the governmental institutions and the party institutions) have often interfered into the practice of the judicial power by courts.²¹⁶

The second jurisprudential change concerns the role of the courts in upholding justice and protecting human rights.²¹⁷ The Law defines the foremost role of the courts as “to safeguard justice, human rights,”²¹⁸ which restates a constitutional provision.²¹⁹ In the context of Vietnamese authoritarianism where courts were defined as the instrument to protect the regime and state interests,²²⁰ the constitutional and legal mandate of courts as the bodies to protect justice and human rights presents a significant jurisprudential development. The Chief Justice explains that this change presents the regime’s “appropriate understanding about the courts.”²²¹

211. Law on Organization of People’s Courts (Nov. 24, 2014), at art. 2 (Viet.).

212. HIẾN PHÁP [CONSTITUTION] 2013, art. 102 (Viet.).

213. See generally CHRISTOPH MÖLLERS, *THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS* (2013).

214. Bùi Văn Học, *Tam quyền phân lập không phù hợp với thể chế chính trị ở nước ta* [Separation of Three Powers is not Suited to Our Political System], AN NINH THỦ ĐỘ (Sept. 9, 2013, 8:16 PM), <http://anninhthudo.vn/chinh-tri-xa-hoi/tam-quyen-phan-lap-khong-phu-hop-voi-the-che-chinh-tri-o-nuoc-ta/515038.antd> [https://perma.cc/7BP8-UGK2].

215. Trương Hoà Bình, *supra* note 169.

216. See Mark Sidel, *Property, State Corruption, and the Judiciary: The Do Son Land Case and Its Implications*, in STATE, SOCIETY AND THE MARKET IN CONTEMPORARY VIETNAM: PROPERTY, POWER AND VALUES 124 (Hue-Tam Ho Tai & Mark Sidel eds., 2013); Pip Nicholson & Nguyen Hung Quang, *Independence, Impartiality and Integrity of the Judiciary in Vietnam*, in ASIA-PACIFIC JUDICIARIES: INDEPENDENCE, IMPARTIALITY AND INTEGRITY 372–93 (H. P. Lee & Marilyn Pittard eds., 2017).

217. For judiciary as the venue to pursue justice, see generally GEORGHIOS M. PIKIS, *JUSTICE AND THE JUDICIARY* (2012).

218. Law on Organization of People’s Courts (Nov. 24, 2014), at art. 2 (Viet.).

219. HIẾN PHÁP [CONSTITUTION] 2013, art. 102 (Viet.).

220. HIẾN PHÁP [CONSTITUTION] 1992, art. 126 (Viet.).

221. Trương Hoà Bình, *supra* note 169.

The changes in normative principles of the judiciary are consequential to the development of precedent. The independence of the judicial power is the institutional base for expanding the judicial power through developing precedent. The courts' role of protecting justice and human rights allows courts to vindicate general principles consistent with justice and peoples' rights to decide cases when statutory law is absent or ambiguous, by which the courts can develop precedent. This also explains the actual role of the judiciary in protecting justice as an important qualitative feature of the released precedents.

In addition to new concepts about the nature and role of the courts, the Constitution and the Law on Organization of the People's Courts also introduce new principles and concepts about judicial procedure, namely judicial independence, adversarial trials, and legal equality, which are conducive to the development and practice of precedent.²²²

First, the Constitution further consolidates the operational independence of the judiciary, providing that "During a trial, the Judges and Assessors are independent and shall obey only the law. Agencies, organizations or individuals are prohibited from interfering in a trial by Judges and People's Assessors."²²³ The Law goes further to provide protection for this principle: "Individuals, agencies and organizations that commit acts of interfering in trials conducted by judges and assessors shall, depending on the nature and severity of their acts, be disciplined, administratively sanctioned or examined for penal liability in accordance with law."²²⁴ This constitutional and legal protection of functional judicial independence is important for development of precedent because this allows courts to follow only law in their trials and prevents the possible intervention of senior judges, local government, and the application of party policy when statutory law is ambiguous.²²⁵

Second, the new constitutional principle of adversarial trials is introduced: "The adversarial principle shall be guaranteed in trials."²²⁶ This is also confirmed by Law.²²⁷ The introduction of the principle of adversarial trials, a feature of common law,²²⁸ into the Vietnamese socialist legal system, characterized by highly inquisitorial trials,²²⁹ is notable. This is consequential to the development of precedent since adversarial trials

222. See *infra* text accompanying notes 223-32.

223. HIẾN PHÁP [CONSTITUTION] 2013, art. 103 (Viet.).

224. Law on Organization of People's Courts (Nov. 24, 2014), at art. 9 (Viet.).

225. Note that in Vietnam, party policy has been used as the base for judicial decisions. See Pip Nicholson, *Renovating Courts: The Role of Courts in Contemporary Vietnam*, in *ASIAN COURTS IN CONTEXT* 547, 557 (Jiunn-rong Yeh & Wen-Chen Chang eds., 2015).

226. HIẾN PHÁP [CONSTITUTION] 2013, art. 103 (Viet.).

227. Law on Organization of People's Courts (Nov. 24, 2014), at art. 13 (Viet.).

228. See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

229. TIM LINDSEY & PIP NICHOLSON, *DRUGS LAW AND LEGAL PRACTICE IN SOUTHEAST ASIA: INDONESIA, SINGAPORE AND VIETNAM* 252 (2016).

elevate the role of lawyers vis-à-vis prosecutors and judges in the judicial proceedings.²³⁰ This role allows them to refer to justice in their legal reasoning and seek for previous similar judicial decisions and argue for their application.

Third, the Constitution guarantees the principle that “all people are equal before law,”²³¹ and the Law further provides for the application of the principle of equality in legal proceedings: “Courts shall conduct trials on the principle that everyone is equal before law, regardless of his/her ethnicity, sex, belief, religion, social class and position; individuals, agencies and organizations are all equal before court.”²³² This principle is suggestive of the application of precedent. Equality before law would mean that similar cases must have similar judicial decisions.

C. Institutional Dynamics

The development of precedent in Vietnam is a part of a project of court reform, which is in turn a part of broader projects of institutional reforms to construct the “socialist rule of law State.”²³³ The advent of precedent must be situated within new institutional changes to the court system. The new Law on Organization of People’s Court basically remains the socialist style of judiciary²³⁴ but introduces important changes consequential to the creation and operation of the precedent system. Understandably, the system of precedent has been established and became functional only after these changes to the judiciary happened.

The overall structure of the court system has significantly changed. While the previous law provided for a three-layered system of ordinary courts,²³⁵ the new Law establishes a four-layered system comprised of: (1) the supreme people’s court; (2) the superior courts; (3) the province-level courts; and (4) the district-level courts.²³⁶ Notably, there are important changes to the Supreme People’s Court, the main body for developing precedent. The general trend is to make the highest court not as a court of ordinary trials, but as the institutional locus to ensure the uniform application of law, develop precedent, and supervise and manage lower courts.²³⁷ This is achieved by the following reforms.

First, one of the foremost functions of the court is “[t]o select its cassation trial decisions and judgments and decisions of courts which have

230. See KAGAN, *supra* note 228, at 105–06.

231. HIẾN PHÁP [CONSTITUTION] 2013, art. 16 (Viet.).

232. Law on Organization of People’s Courts (Nov. 24, 2014), at art. 12 (Viet.).

233. HIẾN PHÁP [CONSTITUTION] 2013, art. 2 (Viet.); see Bui, *supra* note 200, at 77.

234. For an examination of the introduction of the socialist style of the judiciary into Vietnam, see generally PIP NICHOLSON, *BORROWING COURT SYSTEMS: THE EXPERIENCE OF SOCIALIST VIETNAM* (2007).

235. Law on Organization of People’s Courts (Feb. 4, 2002), at art. 2 (Viet.).

236. See LNT & Partners, *The New Law on Organization of People’s Court*, Viet. L. Insight (May 19, 2015), <https://vietnamlawinsight.com/2015/05/19/the-new-law-on-organization-of-peoples-court/> [https://perma.cc/5GMV-AWKM].

237. See *id.*

taken legal effect and are of standard nature, summarize and develop them into court precedents and publicize court precedents for courts to study and apply in trial.”²³⁸ Second, the court no longer hears appellate trials, and therefore the internal structure of the highest court no longer has special tribunals and appellate tribunals. Third, as the consequence of the two former changes, the number of judges in the court has been significantly reduced from 120, according to the previous law, to a maximum of 17 pursuant to the current law.²³⁹ Fourth, the appointment process has changed: the Chief Justice is appointed by the National Assembly as done previously,²⁴⁰ but the rest of the judges of the court must be approved by the National Assembly before being appointed by the President of State.²⁴¹ In reality, the presidential appointment is formalistic. Backed by the approval of the National Assembly, the highest body of the state which is popularly elected by the people,²⁴² the 17 judges of the Supreme People’s Court, constituting the Council of Justices, have a more legitimate base of power, including the power to develop precedent.

D. The Dynamics of Substantive Law

In contrast to the normative anticipation of socialist legal theory, substantive law in Vietnam is not simple. In response to a query at the session of the legislature, the Minister of Justice stated, “Our legal system is the most complicated in the world.”²⁴³ Vietnamese substantive law is complex in both a quantitative and qualitative sense. Notwithstanding an enormous amount of governmental regulations, much legislation has been enacted to deal with virtually all aspects of society. Quantitatively, the National Assembly term IX (1992–1997) enacted 41 statutes and 43 ordinances; the NA term X (1997–2002), 34 statutes and 40 ordinances; the NA term XI (2002–2007), 84 statutes and codes; the NA term XII (2007–2011), 67 statutes and 14 ordinances; and the NA term XIII (2011–2015), 37 statutes and seven ordinances from 2011 to September 2013.²⁴⁴

238. Law on Organization of People’s Courts (Nov. 24, 2014), at art. 22 (Viet.).

239. Nam Phuong, *Tòa Án Nhân Dân Trong Tiến Trình Cải Cách Tư Pháp* [People’s Courts in the Judicial Reform Process], *CÔNG LÝ* (Sept. 14, 2016, 8:15 AM), <http://congly.vn/hoat-dong-toa-an-cai-cach-tu-phap/toa-an-nhan-dan-trong-tien-trinh-cai-cach-tu-phap-172960.html> [https://perma.cc/7WUQ-966U].

240. Compare Law on Organization of People’s Courts (2002), at art. 40(1), 40(3) (Viet.) with Law on Organization of People’s Courts (Nov. 24, 2014), at art. 26, 72 (Viet.).

241. Law on Organization of People’s Courts (Nov. 24, 2014), at art. 26, 72 (Viet.). For details on the previous appointment system, see Pip Nicholson & Nguyen Hung Quang, *The Vietnamese Judiciary: The Politics of Appointment and Promotion*, 14 PAC. RIM L. & POL’Y J. 1 (2005).

242. HIẾN PHÁP [CONSTITUTION] 2013, art. 69 (Viet.).

243. T. Mai & C. Mai, *Pháp luật Việt Nam phức tạp nhất thế giới!* [Vietnam’s Most Complicated Law in the World!], *TUỔI TRẺ* (June 11, 2014, 3:05 PM), <https://tuoitre.vn/phap-luat-viet-nam-phuc-tap-nhat-the-gioi-612305.htm> [https://perma.cc/3334-QJF7].

244. Lê Minh Thông, *Đổi mới, nâng cao chất lượng công tác lập pháp của Quốc hội* [Renovate and improve the quality of legislative work of the National Assembly], *TẠP CHÍ CÔNG SẢN* (Feb. 10, 2014), <http://www.tapchiconsan.org.vn/web/guest/chi-tiet-tim-kiem/>

Qualitatively, an NA officer commented: “The substances of the laws have been increasingly extended, covering different areas of social life, ranging from law-making process to the areas of economy, society, culture, education, science, technology, environment, national defence, public security, international relations, state apparatus, administration, civil law, criminal law, judicial issues, and so on.”²⁴⁵

The creation of the precedent system in Vietnam is driven by the dynamics of substantive law. The speedy enactment of all this legislation unavoidably leads to the enactment of both general and vague provisions.²⁴⁶ The generality and ambiguity in positive law has generated different understandings and applications among different courts. This, in turn, creates the need to develop precedent to interpret positive law and unify the application of the law.²⁴⁷ This explains why the precedents have been issued to interpret general and vague provisions in the Criminal Code, the Administrative Procedure Law, the Civil Code, and the Commercial Law.²⁴⁸

E. The Dynamics of the Society

Long ago, Karl N. Llewellyn, one of the most important American legal realists, referred to his influential book, *The Case Law System in America*²⁴⁹ as a “study of the sociology of case law.”²⁵⁰ The understanding of the emergence of the precedent system in Vietnam must be also situated within the larger sociological context. The substantive law is not simple because the Vietnamese social life is not simple. Socioeconomic transitions during the last three decades in Vietnam have created social complexity and, consequently, legal complexity.²⁵¹ Market reform, urbanization, industrialization, the emerging of the middle class, migration, and regional and international integration have created new complex social relations and disputes, which require the response of substantive law.²⁵²

/2018/25793/%C4%91oi-moi%2C-nang-cai-chat-luong-cong-tac-lap-phap-cua-quoc-hoi.aspx.

245. *Id.*

246. Lê Kiên & V.V. Tuấn, *Luật tránh mù mờ, hạn chế ra thông tư* [Law should not be vague; circulars should be limited], *TUỔI TRẺ* (Mar. 27, 2017, 1:48 PM), <https://tuoi-tre.vn/luat-tranh-mu-mo-han-che-ra-thong-tu-1287233.htm> [<https://perma.cc/F8QT-5ACY>].

247. See Thi Mai Hanh Do, *Transplanting Common Law Precedents: An Appropriate Solution for Defects of Legislation in Vietnam*, (part 1), 25 *EUR. SCI. J.* 82, 90–91, 93 (2011).

248. See *infra* Appendix.

249. KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (Paul Gewirtz ed., Michael Ansaldi trans., 1989).

250. William Twining, *The Case Law System in America*, 100 *YALE L. J.* 1093, 1095 n.12 (1991) (book review).

251. See Nguyen Hong Hai, *Court Precedents in Vietnam: a view from the building of the 2015 Civil Code*, *VIET. L. & LEGAL FOR.* (July 31, 2017, 3:34 PM), <http://vietnamlawmagazine.vn/court-precedents-in-vietnam-a-view-from-the-building-of-the-2015-civil-code-5959.html> [<https://perma.cc/V3UP-4GS2>].

252. See *id.*; see also John Gillespie, *Exploring the Limits of the Judicialization of Urban Land Disputes in Vietnam*, 45 *LAW & SOC'Y REV.* 241, 241 (2011).

Substantive law cannot deal with all complex aspects of society in detail, and therefore is indisputably generic and ambiguous. This ambiguity generates the need to develop precedent to interpret it.²⁵³ In addition, due to social complexity caused by socioeconomic transition, positive legal rules cannot anticipate all social situations, and the existence of a legal vacuum is inevitable.²⁵⁴ This gives rise to the need to develop precedent to fill in the gap in positive law. The released precedents also reflect substantive determinants. Social complexity, created by three decades of socioeconomic transition and international integration, has resulted in the fact that most of the released precedents involve private law issues.²⁵⁵ The privatization of the economy and international economic integration create new private social relations regarding property, contract, and sale of goods, which cannot be fully addressed in statutory law and requires the development of private precedents.²⁵⁶ Particularly, many precedents involve land issues.²⁵⁷ This stems from the process of urbanization which generates new social relations regarding lands and complex legal disputes among land users and others.²⁵⁸

F. Consequence and Prospects

The precedent system expands judicial power. Three qualitative features of precedent illustrate this. First, precedent enables the judiciary to develop legal rules to protect the rights and interests of citizens. This judicial protection is, in many cases, at odds with the instrumental interests of the party and other state institutions, which aim to use courts as the platform to control the practice of fundamental rights and to protect political interests.²⁵⁹ Courts, therefore, have to dance between justice and politics. In this complex ballet, precedent is tolerated more in the areas of private law but is limited in the areas of public law as the latter is closer to political instrumental interests.

Second, judicial legal interpretation through precedent is at odds with the formal constitutional power of legal interpretation. The Constitution exclusively vests the power to interpret the law to the National Assembly's Standing Committee.²⁶⁰ However, the precedent system effectively allows the judiciary to interpret the law—a significant departure from the original constitutional text—which is an example of employing a “living

253. See Thi Mai Hanh Do, *supra* note 247, at 92–93.

254. See Hong Hai, *supra* note 251.

255. *Id.*

256. In different western countries, substantive law covered by precedents also includes many areas of private law. See Michele Taruffo, *Institutional Factors Influencing Precedents*, in *INTERPRETING PRECEDENTS*, *supra* note 4, at 437, 456.

257. Gillespie, *supra* note 252.

258. John Gillespie, *Social Consensus and the Meta-Regulation of Land-Taking Disputes in Vietnam*, J. VIETNAMESE STUD., Summer 2014, at 91, 92.

259. For political and administrative control of courts in Vietnam, see SIDEL, *supra* note 204, at 162.

260. HIẾN PHÁP [CONSTITUTION] 2013, art. 74 (Viet.).

constitution” in Vietnam.²⁶¹ This living constitutional practice stems from the nature of judicial power. To apply law to resolve disputes, courts must inevitably interpret law. So, Vietnamese courts always practice the de facto power of legal interpretation, but their legal interpretation only affects the particular cases they resolve.²⁶² The precedent system enables the judicial interpretation of law to have a general normative effect in subsequent trials.²⁶³ This considerably expands the judicial power of legal interpretation in the living constitutional order.

Third, the innovative creation of new legal rules presents a stronger expansion of the judicial power. The previous Constitution of 1992 provided that the National Assembly is the exclusive organ to practice the legislative power.²⁶⁴ This provision was revised in the new Constitution of 2013, which only states that the National Assembly shall practice the legislative power.²⁶⁵ That means it is not the exclusive body to make law. This provides the constitutional basis for law-making outside the National Assembly. But this constitutional change may be a response to the delegated legislation of the executive.²⁶⁶ The Constitution does not allow the judiciary to make law.²⁶⁷ Yet, the system and the practice of precedent indicate the judiciary’s living constitutional power to make law.

Vietnamese precedent, as a new legal property, is contestable. The formal system of precedent, its operation, and specific released precedents are subjected to discursive debates and contestations among the juristic community and citizens. On one hand, discursive actors value the *idea* of application of precedent in Vietnam, the enactment of the Resolution, and the release of precedents. They point out factors conducive to the operation of the precedent system, namely a legal framework for precedent selection, the support of SPCV leadership, and the adherence to the trial experience of local courts.²⁶⁸ Some are optimistic that “precedent” is now a

261. For comparative experience, see Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009).

262. See Aleksander Peczenik, *The Binding Force of Precedent*, in INTERPRETING PRECEDENTS, *supra* note 4, at 465.

263. See *id.*

264. HIẾN PHÁP [CONSTITUTION] 1992, art. 83 (Viet.).

265. HIẾN PHÁP [CONSTITUTION] 2013, art. 69 (Viet.).

266. For more details, see ỦY QUYỀN LẬP PHÁP—NHỮNG VẤN ĐỀ LÝ LUẬN VÀ THỰC TIỄN [DELEGATED LEGISLATION-THEORETICAL AND PRACTICAL ISSUES] (Tô Văn Hà & Nguyễn Hải Ninh eds., 2017). For comparative experience, see Hermann Pünder, *Democratic Legitimation of Delegated Legislation: A Comparative View on the American, British and German Law*, 58 INT’L & COMP. L.Q. 353 (2009).

267. See generally HIẾN PHÁP [CONSTITUTION] 2013 (Viet.).

268. Justice Interview, *supra* note 14; Officer Interview, *supra* note 16. See also Hành Thiện, *Áp dụng án lệ: Bước tiến tích cực trong cải cách tư pháp* [Precedent Application: A Positive Development in Judicial Reform], THANH NIÊN (Sept. 21, 2016, 9:19 AM), <https://thanhnien.vn/toi-viet/ap-dung-an-le-buoc-tien-tich-cuc-trong-cai-cach-tu-phap-746698.html> [<https://perma.cc/R7XG-7TW8>]; Thái Trung, *Bước đột phá trong cải cách tư pháp* [A Breakthrough in Judicial Reform], NHÂN DÂN (July 22, 2016, 8:44 PM), <http://nhandan.com.vn/phapluat/cai-cach-tu-phap/item/30200802-buoc-dot-pha-trong-cai-cach-tu-phap.html> [<https://perma.cc/H4MA-ZUU4>].

new legal term officially adopted in the Vietnamese legal system, conducive for its actual application, the evaluation of positive law, and the development of a new legal culture.²⁶⁹ In addition, juristic commentaries about the published precedents are rather positive.²⁷⁰ The SPCV has published a first volume of positive commentaries about the sixteen precedents.²⁷¹

On the other hand, the formal system created by the Resolution is embryonic, contestable, and amendable. Jurists have critically discussed the limitations and proposals for revising some points in the Resolution. For example, some comment that since a precedent includes a set of legal materials, it is not clear which elements have a binding effect.²⁷² The SPCV also reviewed the practice of the system and revised the Resolution to further clarify the authority of precedent, the criteria for precedent selection, and the contents of a precedent.²⁷³ Some identify the factors impeding precedent selection and application. One worry is that it is hard to select quality precedents due to the labyrinth of the general Vietnamese legal system.²⁷⁴ Another concern is the lack of qualified persons to select quality precedents.²⁷⁵ Some believe that Vietnamese judges have not been adequately trained to have the skills to determine basic legal facts that have similar features; this would result in different understandings of the same legal facts, and consequently different applications of the same precedent.²⁷⁶ It is also said that local courts acquiesce to, but are apathetic about, the application of precedent because the precedent is paternalistically imposed by the highest court, and because the local courts must handle cases filed to them even when positive legal rules are absent, which increases the burden on their already overloaded schedules.²⁷⁷ The number of applications of released precedents by local courts is considerable, but this does not necessarily mean that the legal reasoning in the precedents is persuasive or/and that local courts are willing to apply the precedents. The application is authoritatively required by a formal regulation of the highest court (the Resolution), which explains the considerable number of

269. Scholar Interview, *supra* note 15.

270. See, e.g., Nguyễn Thanh Mẫn, *Bình luận bốn án lệ hình sự ở Việt Nam hiện nay* [Comments on Four Criminal Precedents in Today's Vietnam], TẠP CHÍ TÒA ÁN NHÂN DÂN ĐIỆN TỬ (Apr. 3, 2019, 3:00 PM), <https://tapchitoaan.vn/bai-viet/binh-luan-trao-doi-gop-y/binh-luan-cac-an-le-hinh-su-o-viet-nam-hien-nay> [<https://perma.cc/SW4Y-22VU>].

271. TÒA ÁN NHÂN DÂN TỐI CAO [SPCV], *supra* note 127.

272. Đỗ, *supra* note 206.

273. TÒA ÁN NHÂN DÂN TỐI CAO [SPCV], *supra* note 128; Nghị quyết số 04/2019/NQ-HĐTP ngày 18/6/2019 của Hội đồng Thẩm phán TANDTC quy định về quy trình lựa chọn, công bố và áp dụng án lệ [Resolution of the Supreme People's Court on Process for Selecting, Publishing and Adopting Precedent] (promulgated by the Council of Justices of the Supreme People's Court, June 18, 2019), <https://thuvienphapluat.vn/van-ban/thu-tuc-to-tung/Nghi-quyet-04-2019-NQ-HDTP-ve-quy-trinh-lua-chon-cong-bo-va-ap-dung-an-le-293168.aspx> [<https://perma.cc/6YN8-PWES>].

274. Lawyer Interview, *supra* note 18.

275. Justice Interview, *supra* note 14.

276. *Id.*

277. Officer Interview, *supra* note 16; Researcher Interview, *supra* note 17.

citations of the precedents. In addition, the application stems from the practical consideration that if judges fail to apply precedents, their decisions and judgments may be repealed by the higher court, which holds up their promotion.²⁷⁸ Others have contested some published precedents.²⁷⁹ For example, some say that Precedent 01 is unnecessary because courts will naturally apply the rule it tries to establish.²⁸⁰

The contestability of the Vietnamese precedent system is comprehensible. As it emerges as a new pattern, it must interact with older established patterns. In a complex adaptive legal system, the interactions of the old and new emerging patterns are not necessarily complementary but competing and contradictory, and this creates discursive space for contestations. In addition, the precedent system is nascent and determined by the existing legal concepts, positive legal rules, legal agents, legal institutions, and legal instruments, which themselves have inherent limits. Prospectively, it may be adaptive endogenously to domestic legal and institutional reforms, and exogenously to the socioeconomic development and transnational engagement.²⁸¹ This system is, therefore, in progress, incomplete, changeable, and contestable. Contestability is consequential to its continuing survivability.

IV. The Socialist Precedent in Comparative Context

As the creation of the precedent system in Vietnam is informed by the global idea of precedent, it shares convergent features with precedents in common law and civil law countries. Due to path dependency, the precedent system is shaped by Marxist legal positivism, “socialist legality,” and “democratic centralism,” which still influence the Vietnamese legal system.²⁸² This generates divergent features of the precedent system in Vietnam, namely: the formal system of precedent, the inferiority of precedent as the source of law, the regulatory feature of the precedent system, the instrumental rationale for precedent, the centralized creation, the paternalistic application, the mandated effect, and the forced departure.²⁸³ These features suggest the existence of a new type of precedent which can be called “socialist precedent.” This part explains the logic of path

278. Researcher Interview, *supra* note 17.

279. Justice Interview, *supra* note 14; Lawyer Interview, *supra* note 18.

280. Lawyer Interview, *supra* note 18.

281. Vietnam and South Korea have exchanged their experience of precedent. Officer Interview, *supra* note 16. See also Trần Quang Huy, *TANDTC Việt Nam-TATC Hàn Quốc: Trao đổi kinh nghiệm ban hành, áp dụng án lệ trong thực tiễn* [Supreme People's Court of Vietnam and Supreme Court of South Korea: Exchange of Experience on Enactment and Application of Precedent in Practice], CÔNG LÝ (Nov. 14, 2017, 7:36 PM), <http://congly.vn/hoat-dong-toa-an/tieu-diem/tandtc-viet-nam-tatc-han-quoc-trao-doi-kinh-nghiem-ban-hanh-ap-dung-an-le-trong-thuc-tien-233684.html> [<https://perma.cc/WAG4-SHXM>].

282. See Ngọc Sơn Bui, *The Law of China and Vietnam in Comparative Law*, 41 *FORDHAM INT'L L.J.* 135, 191 (2017).

283. See *infra* accompanying text.

dependency, articulates the distinctive features of socialist precedent, and compares it with precedent in common law jurisdictions (particularly the US and the UK) and in civil law jurisdictions (particularly France and Germany) and the “guiding cases” in China.²⁸⁴

A. The Socialist Precedent

Legal diffusionists argue that reception “usually involves interaction with preexisting normative orders.”²⁸⁵ This legal observation is consistent with the theory of complex adaptive systems. Complex adaptive systems, including the legal ones, are self-organizing complex systems, because they “have a history. Not only do they evolve throughout time, but also their past is co-responsible for their present behavior.”²⁸⁶ Therefore, the self-organization of a complex adaptive system is “a result of interaction between the present state of the system, its history, and its environment.”²⁸⁷ In a complex adaptive legal system, this means that legal adaptation and evolution depends on legal history. This resonates with the notion of *path dependency* in law and economics: “Today’s road depends on what path was taken before.”²⁸⁸ Oliver Wendell Holmes also underlines that “[t]he rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know.”²⁸⁹

The Vietnamese legal system as a whole is a complex adaptive legal system. During the last three decades, the legal system became complex and capable enough to adapt to domestic socioeconomic transition and the changing international landscape.²⁹⁰ The Vietnamese legal system retains deep features that define the nature of the socialist legal system and the socialist constitutional regime.²⁹¹ But, this legal system is maximally sensitive to external events (domestic social economic changes and international dynamics), which enables the emergence of new legal properties, including the development of precedent.²⁹² Marxist legal positivism, “socialist legality,” and “democratic centralism” are still deeply embedded and shape the legal system as a whole, and the precedent system in particular.²⁹³

284. See generally Ngoc Son Bui, *supra* note 282, at 177.

285. TWINING, *supra* note 167, at 285.

286. PAUL CILLIERS, COMPLEXITY AND POSTMODERNISM: UNDERSTANDING COMPLEXITY SYSTEMS 4 (Routledge 1998).

287. Julian Webb, *Law, Ethics, and Complexity: Complexity Theory & (and) the Normative Reconstruction of Law*, 52 CLEV. ST. L. REV. 227, 234 (2005).

288. Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643 (1996).

289. Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1001 (1997).

290. See Brian J.M. Quinn, Note, *Legal Reform and Its Context in Vietnam*, 15 COLUM. J. ASIAN. L. 219, 223 (2002); see also Ngoc Son Bui, *supra* note 282, at 200.

291. Thiem H. Bui, *supra* note 200, at 78.

292. Quinn, *supra* note 290, at 223.

293. Ngoc Son Bui, *supra* note 282, at 153, 177.

Despite increased flexibility, Marxist legal positivism remains dominant in Vietnamese jurisprudence. Among other things, legal education plays an important role in this regard.²⁹⁴ Together with general ideological courses like Marxist-Leninist Philosophy and Ho Chi Minh Thought, the Soviet-style course called General Theory of State and Law has been taught as a compulsory course in virtually all law schools.²⁹⁵ The title of the course resonates Hans Kelsen's observation that "the Marxian theory of law is inseparably connected with the theory of state."²⁹⁶ Students are taught the nature of law as something expressing the state's will and associated with the formal enactment and approval of the state.²⁹⁷ Consequently, one scholar, an advocate for precedent in Vietnam, laments that the Vietnamese legal culture has not yet changed to understand the nature of law from a western perspective and as a consequence many jurists and judges in the country have failed to recognize the informal source of law, like precedent.²⁹⁸ This is mainly due to the continuing dominance of Marxist legal positivism in Vietnamese jurisprudence.²⁹⁹

The dominant influence of Marxist legal positivism determines two institutional features of the socialist precedent system in Vietnam. The first is the *formal recognition*: the whole precedent system is formally recognized by and created by the enactment of positive law.³⁰⁰ Therefore, despite the lack of a constitutional status, the formal system of socialist precedent has been created and implemented in Vietnam according to several statutes. The 2014 Law on Organization of People's Court, which empowers the highest court to develop precedent, is effectively a constitutional law, a kind of "constitution outside the constitution."³⁰¹ In addition, other important statutes about legal rules provide for the application of precedent when positive law or analogy of law is not available. To illustrate, Article 6 of the Civil Code of 2015 provides that when neither positive law, nor customary law, nor analogy of law, nor agreement between the parties is available, courts can apply "precedent and equitable reason."³⁰² Also, Article 45 of the Civil Procedure Code of 2015, which deals with "[the] rules for resolving civil cases without law provisions to apply," confirms that in

294. Ai Nhan Ho, *Legal Education in Vietnam: The History, Current Situation and Challenges*, 26 *LEGAL EDUC. REV.* 69, 79–80 (2016).

295. *Id.* at 79, 80.

296. HANS KELSEN, *THE COMMUNIST THEORY OF LAW* 1 (Scientia Verlag 1976) (1955).

297. Bui Thi Bich Lien, *Legal Education in Transitional Vietnam*, in *ASIAN SOCIALISM AND LEGAL CHANGE*, *supra* note 193, at 154–55 n.23.

298. NGUYỄN VĂN NAM, *LÝ LUẬN VÀ THỰC TIỄN VỀ ÁN LỆ TRONG HỆ THỐNG PHÁP LUẬT CỦA CÁC NƯỚC ANH, MỸ, PHÁP, ĐỨC VÀ NHỮNG KIẾN NGHỊ ĐỐI VỚI VIỆT NAM* [THEORY AND PRACTICE OF PRECEDENT IN THE LEGAL SYSTEMS OF THE UNITED KINGDOM, THE UNITED STATES, FRANCE, GERMANY, AND RECOMMENDATIONS FOR VIETNAM] 341–42 (2012).

299. Ngoc Son Bui, *supra* note 282, at 178.

300. CIV. C. art. 6 (2015) (Viet.).

301. For a comparative experience, see Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408, 415, 472, 473 (2007).

302. CIV. C. art. 6 (2015) (Viet.).

such situations “precedent shall be studied and applied.”³⁰³ Other legislations, such as Commercial Law (2005), Maritime Code (2015), Law on Negotiable Instruments (2005), and Law on Insurance Business (2005) also allow for the application of precedent.³⁰⁴

Marxist legal positivism also defines the second feature of the socialist precedent: the *inferiority* of precedent as a source of law in the socialist legal system.³⁰⁵ Statutory law remains the dominant source of law.³⁰⁶ This is why the SPCV carefully noted in its Decision on Precedent Project that [t]he use of precedent is only supplementary, after normative legal documents.³⁰⁷ In addition, due to the inferior status, precedent must be supported by some relevant rules in the existing positive law. This explains why the citation of relevant legal rules is essential in a precedent.

In addition to Marxist legal positivism, the concept of “socialist legality” still continues to underpin Vietnamese law. While it was formally removed in the constitution, and is less attractive in legal discourse, it has shaped the legal system and legal thinking in Vietnam for many decades and cannot be easily erased from either the legal structure or people’s minds.³⁰⁸ Despite the formal decline, the “spirit” of socialist legality still remains.³⁰⁹ The consequence of this is the prominence of statutes, regulations, and decrees in the hierarchical legal system.³¹⁰ This defines the *regulatory* feature of the socialist precedent system. In addition to the recognition in statutes, the socialist precedent system is systematically regulated by the SPCV. The 2015 Resolution, the form of regulation by the court, defines the meaning and principles of precedents, and systematically regulates different aspects of the precedent system (selection, effects, application, and termination) as we have seen.³¹¹

The influence of the concept of “democratic centralism” in the Vietnamese legal system is more explicit and stronger as it has been established

303. CODE OF CIVIL PROCEDURE art. 45 (2015) (Viet.).

304. Lê Mạnh Hùng, *Áp dụng án lệ trong giải quyết vụ việc dân sự tại Tòa án nhân dân* [Application of Precedent in Resolving Civil Disputes in the People’s Courts], TẠP CHÍ DÂN CHỦ VÀ PHÁP LUẬT (2017), <http://tcdepl.moj.gov.vn/qr/tintuc/Pages/thi-hanh-phap-luat.aspx?ItemID=219> [https://perma.cc/3NNG-S52W].

305. Decision, *supra* note 74, art. 1.

306. *Id.*

307. *Id.*

308. John Gillespie, *supra* note 193, at 54–55.

309. Bui Ngoc Son, *supra* note 282, at 158.

310. There are more than 150,000 regulations issued by different state bodies from the central to communal levels in the last three decades. *Id.* at 161. The Supreme People’s Court also has the authority to issue regulation with general normative effect. The court’s regulations include the *resolutions* issued by its Council of Justices and *circulars* issued by the Chief Justice. A January 18, 2018 search of the online data on Vietnamese law called *Thư viện Pháp luật* [Law Library] yielded 96,293 regulations issued by the SPCV from January 1, 1986 to January 18, 2018. Thư viện Pháp luật [Law Library], <https://thuvienphapluat.vn/> [https://perma.cc/GG2S-WVXN] (last visited Jan. 18, 2018).

311. See generally Resolution No. 03/2015/NQ-HDTP on Process for Selecting, Publishing and Adopting Precedents, Oct. 28, 2015 (Viet.).

as a constitutional principle, as opposed to the western doctrine of separation of powers. The principle of “democratic centralism” was first introduced in the first socialist constitution of Vietnam, enacted in 1959,³¹² and confirmed in the subsequent constitutions³¹³ and the current 2013 Constitution.³¹⁴ This principle shapes the external relationships of the courts with other state institutions, as well as its internal relationships. Externally, the highest court is subordinate to the legislature; it must report to the latter annually.³¹⁵ It does not have the formal power to interpret the Constitution and the law, as this power is vested in the standing committee of the legislature.³¹⁶ The SPCV also lacks constitutional review power. In contrast, the SPCV is supervised by the legislature.³¹⁷ “Democratic centralism” also shapes the internal structure of the courts. The structure of socialist courts generally is highly centralized: local courts are subordinate to the powerful SPCV.³¹⁸ The SPCV enjoys the powers to: supervise the adjudicating work of other courts, make overall assessment of the adjudicating practices of the other courts, ensure the uniform application of law in the conduct of trials, and manage the organization of people’s courts.³¹⁹

“Democratic centralism” shapes the following features of the socialist precedent in Vietnam. To begin with, it determines the *instrumental rationale* for the socialist precedent system. The precedent system operates as the centralized tool for the SPCV to control the work of local courts to improve the quality in their decisions given the grave concerns about a number of unjust cases decided by local courts.³²⁰ “Democratic centralism” also determines the *centralized creation* of precedent. The formal mechanism for selection, review, and approval of the guiding cases and precedent clearly illustrates this feature. The mechanisms allow a wide range of actors to propose precedent and open discussions, which exemplifies the “democratic” aspect of this principle. But after that “democratic” discussion, the decision is centralized: only the highest court has the power to determine and release the precedent. Another feature of the socialist precedent system defined by the principle of democratic centralism is *paternalistic application* of precedent. As the superior institution vis-à-vis local courts as the inferior institutions, the SPCV instructs the local courts nationwide on how to apply the precedents it has issued.³²¹ Local courts are also encouraged to seek guidance from the SPCV on how to apply

312. HIẾN PHÁP [CONSTITUTION] 1959, art. 4 (Viet.).

313. HIẾN PHÁP [CONSTITUTION] 1980, art. 6 (Viet.); HIẾN PHÁP [CONSTITUTION] 1992, art. 6 (Viet.).

314. HIẾN PHÁP [CONSTITUTION] 2013, art. 8 (Viet.) (“The State . . . practices the principle of democratic centralism.”).

315. *Id.* at art. 105.

316. *Id.* at art. 74.

317. *Id.* at art. 70.

318. See Partlett & Ip, *supra* note 8, at 502.

319. Law on Organization of People’s Courts (Nov. 24, 2014), at art. 20 (Viet.).

320. See Trương Hoà Bình, *supra* note 139.

321. Law on Organization of People’s Courts (Nov. 24, 2014), at art. 22 (Viet.).

precedents. A related feature is the *mandated effect* of precedent. The principle of democratic centralism requires centralized action: the inferiors have to obey the decisions by the superiors. In the socialist judiciary, this means lower courts have to follow the decisions by the highest court. In addition, the requirement of application of precedent is authoritative: lower courts “*must study and adopt*” (*emphasis added*) precedent.³²² Yet, as a “democratic” matter, the formal system allows lower courts to choose not to apply a precedent if they provide an explanation.³²³

Finally, democratic centralism defines the *forced departure* of the socialist precedent: precedent can be terminated by statute, regulation, or decree. Democratic centralism shapes the external institutional relationship of the courts.³²⁴ Accordingly, courts are subordinate to the legislature in the socialist constitutional order. As a “democratic” matter, subordinate institutions like courts are allowed to develop their own decisions to handle their departmental enterprises.³²⁵ However, as the “centralized” matter, courts are subordinate to the legislature, and consequently precedent is only supplementary and subordinate to legislative law.³²⁶ In addition, under the centralized “democratic” constitutional arrangement, courts are inferior to the executive or the government.³²⁷ Consequently, precedents can be forcibly terminated by governmental regulations and decrees.

The separate discussions of how different socialist concepts and principles shape the institutional properties of the socialist precedent is relevant and for clarificatory purposes. Jurisprudential complexity suggests that different concepts and principles interact with each other and shape the features of socialist precedent. The feature of forced departure is shaped by Marxist legal positivism’s relegating precedent to the inferior position in favor of positive law, the concept of socialist legality’s emphasis on written regulations, and the principle of democratic centralism’s subordinating the courts to the legislature and the government.³²⁸ Still, some features are determined more by a certain concept or principle than the others, and therefore the separate discussions are useful to identify this.

B. Socialist Precedent and Common Law Precedent in the United States

322. Resolution No. 03/2015/NQ-HDTP on Process for Selecting, Publishing and Adopting Precedents, Oct. 28, 2015, at art. 8.2 (Viet.).

323. *Id.*

324. HIẾN PHÁP [CONSTITUTION] 2013, art. 70 (Viet.).

325. See Law No. 80/2015/QH13 on Promulgation of Normative Documents, June 22, 2015, at art. 22 (Viet.), http://www.economica.vn/Content/files/LAW%20%26%20REG/80_2015_QH13%20Law%20on%20Promulgation%20of%20normative%20documents.pdf [<https://perma.cc/7Q7L-EUX8>].

326. See *id.* at art. 4 (designating judicial legal documents with a lower level of authority to statutes).

327. See *id.* (designating judicial legal documents with a lower level of authority to executive and government orders, decrees, and decisions).

328. Law on Organization of People’s Courts (Nov. 24, 2014), at art. 19 (Viet.).

and the United Kingdom

A formal system of precedent, like the socialist one, is not available in the common law in the United States and the United Kingdom. In the United States, precedent plays the central role in the legal system, but is mentioned nowhere in the Constitution.³²⁹ Without a constitutional status, the legitimacy of the precedent system lies on “unwritten norms that are validated by a mixture of acceptance and reasonable justice,”³³⁰ as argued by Richard H. Fallon, Jr. The precedent system in the United Kingdom is not different in this regard: “There is no statute law governing the use or citation of precedent.”³³¹ Rather, it is a “constitutional convention- that the decisions of the higher appellate courts are normative and binding upon the lower courts,” a long-established tradition due to the reasons of equality, legal predictability, and judicial efficiency.³³²

The socialist precedent is informed by transnational ideas of precedent, including ideas on the Anglo-American precedent, and therefore shares some similar ideas. To illustrate, like the common precedent, the socialist precedent is informed by the idea that prior judicial decisions should bind subsequent decisions on similar cases to ensure equal treatment of citizens.³³³ These ideational similarities are due to the impact of the diffusion of the ideas about the Anglo-American precedent in Vietnam.³³⁴

But the socialist precedent is differentiated from the Anglo-American precedent by several factors. First, different from common law jurisdictions, Vietnam does not have a well-established tradition of precedent (albeit having some legacies). Therefore, when the need for precedents emerges, the country has to enact statutes and regulations to govern the creation and operation of the precedent system.³³⁵ As explained previously, this is undergirded by socialist jurisprudence. Second, in the socialist experience, only the highest court enjoys the power to release precedent.³³⁶ So unlike the common precedent, which “is made by being used in

329. Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent*, 131 HARV. L. REV. 543, 546 (2017) (book review).

330. Richard H. Fallon Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 572 (2001).

331. Zenon Bankowski, D. Neil MacCormick & Geoffrey Marshall, *Precedent in the United Kingdom*, in INTERPRETING PRECEDENTS, *supra* note 4, at 315, 327.

332. THOMAS LUNDMARK, CHARTING THE DIVIDE BETWEEN COMMON LAW AND CIVIL LAW 358 (2012).

333. See Bui Thi Bich Lien, *Legal Interpretation and the Vietnamese Version of the Rule of Law*, 6 NTU L. REV. 321, 333 (2011).

334. See generally *id.* at 326–27 (describing the foreign influences on Vietnamese law).

335. See Ngoc Son Bui, *supra* note 282, at 153 (discussing why China adopted a civil law system instead of a common law one).

336. See Law No. 80/2015/QH13 on Promulgation of Normative Documents, June 22, 2015, at art. 21.

argument,³³⁷ the socialist precedent is made by articulation by a centralized source. Third, the socialist precedent, unlike the Anglo-American precedent, is not the primary legal source but is only supplementary to legislative law.³³⁸ Fourth, socialist law has a binding effect not because of the doctrine of *stare decisis*, but because of the authoritative mandate by a legal instrument of the highest court.³³⁹ Fifth, and finally, in common law in the US and the UK, there is no formal legislative law governing the abolition of precedent.³⁴⁰ Particularly, in the United States, academics have called for drawing on the Necessary and Proper Clause of the Constitution to abolish *stare decisis* by statute.³⁴¹ However, this proposal has not yet been adopted. Differently, the socialist systems allow legislation and governmental regulations to abrogate precedent, which is due to the distinctive socialist concepts and principles.³⁴² These differences stem from the fact that the socialist precedent system and the Anglo-American precedent system are underpinned by different legal principles and operated by different legal institutions.³⁴³

C. Socialist Precedent and Civil Law Precedent in France and Germany

The socialist precedent is also different from precedents in civil law in France and Germany. In France, according to the Code of Civil Procedure and the Civil Code, exclusive reference to precedent in judicial decision-making is illegal, although precedent is practiced as a custom.³⁴⁴ The adherence to the Montesquieuian model of strict separation of legislative and judicial powers and to the Rousseauian idea of statute as the embodiment of the *volonté générale* of the French nation relegates judges to mere law-apppliers.³⁴⁵ Germany went a different path. Despite the codification movement, the strong influence of the Historical School which conceives law as constituted by “a body of convictions and principles,” enables the development of precedents.³⁴⁶ Germany also has a statutory foundation for the development of precedent. Statutory provisions regarding appeals and referral (*vorlarge*) to other courts for determination engender the “vertical

337. John Gardner, *Some Types of Law*, in *COMMON LAW THEORY* 61, 67 (Douglas E. Edlin ed., 2007).

338. See Law No. 80/2015/QH13 on Promulgation of Normative Documents, June 22, 2015, at art. 4.

339. See, e.g., *id.* at art. 21.

340. See Michael S. Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 *YALE L.J.* 1535, 1569 (2000) (claiming that the U.S. Constitution does not mandate *stare decisis*).

341. See *id.* at 1541.

342. See John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis*, 30 *STAN. J. INT'L L.* 325, 325–26 (1994).

343. See *id.* at 335–36.

344. Michel Troper & Christophe Grzegorzczuk, *Precedent in France*, in *INTERPRETING PRECEDENTS*, *supra* note 4, at 103, 115.

345. Zenon Bankowski et al., *Rationales for Precedent*, in *INTERPRETING PRECEDENTS*, *supra* note 4, at 481, 482.

346. *Id.* at 483.

effect of precedents.”³⁴⁷ In addition, there are many statutes that seek to compel the judges of the same courts to follow the precedents of their own courts, creating the “horizontal effect of precedents.”³⁴⁸ Yet, except for constitutional adjudication, “there is no legislation requiring the use of precedent.”³⁴⁹

The socialist precedent shares some elements with the continental case. Like the civilian precedent, the socialist precedent is introduced to unify the application of law, to interpret the general and ambiguous provisions of positive law, and is secondary to statutory law.³⁵⁰ These similarities are due to the impact of the diffusion of the ideas about the civilian precedent in Vietnam and the shared general features of social law and civil law, especially the emphasis on statutory law.

However, the socialist precedent is fundamentally different from the continental precedent. Socialist law is underpinned by a fundamentally different normative commitment to “democratic centralism,” as opposed to the separation of power adopted in many civil law countries.³⁵¹ Consequently, uniformity in legal application in socialist law bears a different meaning: legal application must be uniformly directed, guided, and controlled by a centralized highest court, which is in turn under the control of the communist party, in order to make sure that party policy embodied in the law is implemented consistently.³⁵² The centralized institutional arrangement also leads to another difference between the socialist precedent and the civilian precedent: unlike civilian courts (particularly constitutional courts),³⁵³ socialist courts are not allowed to develop constitutional precedents, as the centralized arrangement prevents socialist courts from reviewing the constitutionality of legislation.³⁵⁴ Furthermore, the civilian precedent is not created through a formal process like the socialist precedent. In addition, unlike the socialist precedent, which has the binding effect as an authoritative mandate by the highest court, the civilian precedent normally serves a “persuasive role,” underpinned by the doctrine of *jurisprudence constante*.³⁵⁵ Finally, different from socialist precedent, there is no formal legislative law allowing the abolition of precedent in France and Germany. These differences are because the socialist precedent and

347. LUNDMARK, *supra* note 332, at 355.

348. *Id.* at 357.

349. Robert Alexy & Ralf Dreier, *Precedent in The Federal Republic of Germany*, in INTERPRETING PRECEDENTS, *supra* note 4, at 17, 31.

350. Troper & Grzegorzczuk, *supra* note 344, at 112.

351. Ngoc Son Bui, *supra* note 282, at 153.

352. *Id.* at 193.

353. See, e.g., 60 YEARS GERMAN BASIC LAW: THE GERMAN CONSTITUTION AND ITS COURT, LANDMARK DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY IN THE AREA OF FUNDAMENTAL RIGHTS (Jürgen Bröhmer & Clauspeter Hill eds., 2010).

354. HIẾN PHÁP [CONSTITUTION] art. 70 (2013) (Viet.) (vesting the constitutional review power to the legislature rather than courts).

355. Fon & Parisi, *supra* note 4, at 519.

civil precedent are underpinned by different legal principles and, consequently, are locked in different institutional settings.

D. Socialist Precedent and Chinese Guiding Cases

China, another socialist country, has developed a system of “guiding cases” which shares some features with the Vietnamese socialist precedent system. But, at the same time, there is a significant divergence between the two systems.

The Chinese system of guiding cases shares some features with the Vietnamese system of precedent, due to the fact that the two countries have the same socialist legal system.³⁵⁶ Most notably, Chinese guiding cases and Vietnamese precedent are selected, reviewed, and approved through a rather similar formal process.³⁵⁷ Like the Vietnamese story, the Chinese guiding cases system is shaped by the principle of democratic centralism.³⁵⁸ Consequently, while local courts, legal scholars, lawyers, and others can suggest the proposals of guiding cases, the highest court retains the power to select, approve, and release guiding cases.³⁵⁹ In addition, as courts are subordinate to the legislature, guiding cases cannot replace legislation. Justice Tao Kaiyuan of the Supreme People’s Court of China remarked in November 2016 in the context of intellectual property that the creation of the Chinese guiding cases system “is not to create a new legal source, but to . . . uncover the broader consensus of the industry, to further refine legal rules and to provide better law for society.”³⁶⁰

Although the Chinese guiding cases system and the Vietnamese precedent system share common socialist features, legal engagement is not prominent. The Chinese guiding cases system was formally created before the Vietnamese socialist precedent system, in 2010 and 2015, respectively. In its project to develop precedent, the SPCV, however, did not make reference to the Chinese experience.³⁶¹ Also, the Chinese experience of guiding cases virtually disappears in scholarly writings about precedent in Vietnam.³⁶² The lack of this interaction can be explained by at least two factors. First, well-established and successful lessons create more

356. Ngoc Son Bui, *supra* note 282, at 189.

357. 最高人民法院关于案例指导工作的规定 [Provisions of the Supreme People’s Court Concerning Work on Case Guidance], *supra* note 36; 最高人民法院关于案例指导工作的规定实施细则 [Detailed Implementing Rules on the “Provisions of the Supreme People’s Court Concerning Work on Case Guidance”] (passed by the Adjudication Committee of the Supreme People’s Court on Apr. 27, 2015, issued on and effective as of May 13, 2015) China Guiding Cases Project, English Guiding Cases Rules, (June 12, 2015 Edition), <http://cgc.law.stanford.edu/guiding-cases-rules/20150513-english/> [<https://perma.cc/5NR8-PE3G>] (last visited, Mar. 26, 2020).

358. Ngoc Son Bui, *supra* note 282, at 193.

359. Zhang, *supra* note 37, at 289.

360. Susan Finder, *China’s Evolving Case Law System in Practice*, 9 TSINGHUA L. REV. 245, 257 (2017).

361. *Id.* at 253; Bui Ngoc Son, *supra* note 282, at 160.

362. See generally LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES (John Gillespie & Albert H. Y. Chen eds., 2010).

incentive for subsequent learnings, and as mentioned above, this logic explains Vietnam's looking at the precedent experience of the western developed countries.³⁶³ Second, Vietnamese jurists, due to the nature of foreign legal education, are more familiar with the legal experience of the western and developed countries than the Chinese legal experience.³⁶⁴

So, the convergent features of the two systems are more like the consequence of the natural transformation of socialist law. Socialist law in China and Vietnam has changed in response to the social complexity generated by socioeconomic transformation.³⁶⁵ Among other changes, the complex social relations and civil disputes, which cannot be fully addressed in general positive legal rules, require judicial development, such as the development of guiding cases and precedent.

Despite the convergent features, the substantial divergence is that Chinese guiding cases are not precedent like in the Vietnamese experience. The names of the systems are by no means insignificant. According to Deng Jinting, the SPCC "intentionally uses the word 'guiding (*zhidaoxing* 指导) *anli*' instead of '*panli*' to cautiously differentiate the guiding cases from normal cases and common law cases."³⁶⁶ Differently, Vietnam explicitly borrows the foreign term "precedent" to name the system.³⁶⁷ Yet, the divergence is not only terminological, but also substantial. The Chinese system only requires that lower courts "should refer" to the guiding cases, while the Vietnamese system mandates that lower courts must study and adopt precedent.³⁶⁸ So, Vietnamese precedents have a formal binding effect, while the Chinese guiding cases have a reference value. Moreover, while Chinese courts are only advised to refer to the adjudication in the guiding cases, Vietnamese courts are mandated to study all details in the precedent, including the adjudication and legal facts.³⁶⁹

The above differences must be situated within the divergence between Chinese legal exceptionalism and Vietnamese legal universalism. The aspirational trend toward legal exceptionalism in China incentivizes the country to differentiate itself from the rest of the world, especially the western world. This legal exceptionalism is a part of the broader context of the rising Chinese exceptionalism underpinned by economic development and "scientific achievements."³⁷⁰ These underpinnings, together with its

363. Ngoc Son Bui, *supra* note 282, at 170–71.

364. *See id.* at 169.

365. *See generally* LEGAL REFORMS IN CHINA AND VIETNAM, *supra* note 362.

366. Jinting Deng, *The Guiding Case System in China's Mainland*, 10 FRONTIERS L. CHINA 449, 472 (2015).

367. Bui Thi Bich Lien, *supra* note 333, at 331.

368. Deng, *supra* note 366, at 450; John Gillespie, Rethinking the Role of Judicial Independence in Socialist—Transforming East Asia, 56 INT'L & COMP. L.Q. 837, 857–58 (2007).

369. Bui Thi Bich Lien, *supra* note 333, at 326.

370. Te-Ping Chen & Josh Chin, *New Challenge to US Power: Chinese Exceptionalism*, WALL. ST. J. (July 25, 2017, 10:40 AM), <https://www.wsj.com/articles/new-challenge-to-u-s-power-chinese-exceptionalism-1500993643> [<https://perma.cc/6545-4N4J>].

influential role in the global economic and political order, make China now confident to move forward with its own developmental path. The aspiration to the “Socialist [legal] system with Chinese characteristics”³⁷¹ is the embodiment of Chinese exceptionalism in the legal area. The creation of the guiding cases system is a part of that trend to legal exceptionalism.³⁷² Consequently, the highest court refuses to refer explicitly to the foreign term and concept and developed a distinctive system of guiding cases. Legal exceptionalism also influences scholarly writings of many Chinese scholars who try to explain China’s guiding case system as “the case law with Chinese characteristics.”³⁷³

Rather than legal exceptionalism, legal universalism is the prevailing model of legal reform in Vietnam. Vietnam is not a big country and does not play an influential role in the global economic and political order like China does.³⁷⁴ Scholars have indicated that small states “are more vulnerable to the forces of globalization and thus more susceptible to, and dependent upon, the international community, and their vulnerability incentivizes them to curry favor with the international community by adopting its norms.”³⁷⁵ In this regard, the attachment to the globally spread values adopted by powerful and successful countries is the strategy for small countries like Vietnam to gain more international recognition and support. Thus, the country is willing to learn from global lessons and acknowledges this.³⁷⁶ Therefore, the legal instruments in Vietnam explicitly employ the term “precedent” rather than generate a local neologism. Moreover, legal universalism also explains the Vietnamese justification for the application of precedent drawing upon global concepts, such as equality under the law.³⁷⁷ Finally, unlike Chinese scholars, Vietnamese scholars are ardent to refer to the global experiences of precedent to propose its application in Vietnam³⁷⁸ rather than argue for a local model of precedent.

Conclusion

This Article has explained the emergence of the socialist precedent as the consequence of the impact of global diffusion of precedent, the dynamic adaption of the socialist jurisprudence, institutional structure, substantive law, and the transitional society. The socialist precedent shares some features with precedent in common law and civil law jurisdictions,

371. CCP Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law, CHINA LAW TRANSLATE (Oct. 28, 2014), <http://www.chinalawtranslate.com/fourth-plenum-decision/?lang=en> [<https://perma.cc/BU5J-HKQ4>].

372. *See id.*

373. Zhang, *supra* note 37, at 305.

374. *See generally* David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153, 209 (2016).

375. *Id.*

376. *See generally id.*

377. *See generally id.* at 178.

378. *See, e.g.,* NGUYỄN VĂN NAM, *supra* note 298.

but is determined by the different concepts and principles of socialist legal theory and therefore presents a distinctive, modern type of precedent. I conclude with further general reflections on the possibility of a dynamic approach to the comparative study of precedent drawing on this examination of socialist precedent. This dynamic approach is directed to the explanatory mode of inquiry and therefore focuses on the factors of the creation and use of precedents. There may be four types of such explanatory factors: jurisprudential, institutional, substantive, and sociological.

The jurisprudential factors refer to the general understanding about the nature of law and the underlying concepts, principles, and values of a particular legal system and constitutional system. For example, a tradition of legal naturalism is a favorable condition for the use of precedent, while a strong tradition of legal positivism may limit this practice. The second type is the institutional factors. Scholars have already explained the “institutional factors” that influence the creation and application of precedents.³⁷⁹ In this sense, the “institutional factors” refer to court structure and functions, which are highly important. A strong system of constitutional review may create more constitutional precedents than a weak one. But the dynamic approach would also consider non-judicial institutional factors that influence judicial-decision making. The external relationship of courts with the legislative and executive institutions may determine to what extent courts can apply precedent and what effects precedent can have. For example, juridical independence is a supportive factor of the use of precedent, while legislative supremacy may constrain it. In addition, the dynamic approach also considers the jurist community (e.g., judges, lawyers, legislators, legal scholars, and officials) who operate or affect the operation of the relevant institutions. The third type is substantive factors or the context of substantive law. When substantive law is simple, precedent may not be necessary or limited. But, when substantive law becomes sophisticated, precedent may play a more important role. Precedent may be used more in some areas of substantive law than the others. The final type of institutional factor is sociological factors. These include the level of economic development, the level of complexity of the society, the components of the population, and the level of litigation. When social relations are complex, which may be due to economic advancement and the movement of the population, the legal system may have vacuums and be ambiguous. Consequently, precedent may be used more in complex social relations environments. Litigious societies may generate more precedents.

379. See Taruffo, *supra* note 256, at 437.

APPENDIX

Vietnamese Precedents

Precedent No.	Types	Source	Related Legal Rules
01/2016/AL	Murder	Cassation Decision No.04/2014/HS-GĐT, 16 Apr. 2014	Point m, n, paragraph 1, Article 93, Criminal Code 1999; Paragraph 3, Article 104, Criminal Code 1999
02/2016/AL	Property dispute	Cassation Decision No.27/2010/DS-GĐT, 08 July 2010	Article 137 and 235, Civil Code 2005
03/2016/AL	Divorce	Cassation Decision No.208/2013/DS-GĐT, 03 May. 2013	Article 14, Law on Marriage and Family 1986; Article 242, Criminal Code 1995; Paragraph 2, Article 176, Civil Code 1995
04/2016/AL	Land dispute	Cassation Decision No.03/2010/QĐ-HĐTP 03 Mar. 2010	Article 14, Law on Marriage and Family 1986; Article 242, Civil Code 1995; Paragraph 2, Article 176, Civil Code 1995
05/2016/AL	Inheritance dispute	Cassation Decision No.39/2014/DS-GĐT, 09 Oct. 2014	Paragraph 1, Article 5, Article 218, Civil Procedure Code 2004
06/2016/AL	Inheritance dispute	Cassation Decision No.100/2013/GĐT-DS, 12 Aug. 2013	Article 93; point đ paragraph 1 Article 168, Civil Procedure Code 2004; Article 676 and 685, Civil Code 2005
07/2016/AL	Property dispute	Cassation Decision 126/2013/DS-GĐT, 23 Sept. 2013	Articles 81, 82, 83 Civil Procedure Code 2004; Resolution No. 58/1998/NQ-UBTVQH10
08/2016/AL	Dispute over credit contract	Cassation Decision 12/2013/KDTM-GĐT, 16 May 2013	Articles 471, 474, and 476 Civil Code 2005; paragraph 2 of Article 91, Law on Credit Institutions 2010; State Bank's Circular No. 12/2010/TT-NHNN; State Bank's Decision No. 1627/2001/QĐ-NHNN
09/2016/AL	Dispute over goods contract	Cassation Decision 07/2013/KDTM-GĐT, 15 Mar. 2013	Articles 34 and 37, paragraph 3 of Article 297, Articles 300, 301, 302, 306 and, 307, Commercial Law 2005; Articles 307, 422, 474, 476 Civil Code 2005
10/2016/AL	Land Complaint	Cassation Decision 08/2014/HC-GĐT, 19 Aug. 2014	Paragraph 1 of Article, paragraph 1 of Article 28, Administrative Procedure Law 2010; Articles 41, 42 Land Law 2003; Government's Decree 197/2004/ND-CP on compensation, support and resettlement when land is recovered by the State
11/2017/AL	Dispute over credit contract	Cassation Decision 01/2017/KDTM-GĐT 01 Mar. 2017	Articles 342, 715 Civil Code 2005; point 4, paragraph 19, article 1, Government's Decree No. 11/2012/NĐ-CP

12/2017/AL	Dispute over goods contract	Cassation Decision 14/2017/KDTM-GĐT 6 Jun. 2017	Paragraph 1 of Article 199, Article 202, paragraph 2 of Article 266 Civil Procedure Code 2004
13/2017/AL	Dispute over goods contract	Cassation Decision 7/2016/KDTM-GĐT 10 Nov. 2016	Article 3 Civil Code 2005; State Bank's Decision No. 226/2002/QĐ-NHNN; International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits (UCP 600) 2007
14/2017/AL	Land dispute	Cassation Decision 02/2011/DS-GĐT 17 Jan. 2011	Articles 125, 126, 470 Civil Code 2005
15/2017/AL	Land dispute	Cassation Decision 394/2012/DS-GĐT 23 Aug. 2012	Paragraph 2, Article 16 Land Law 1987; Paragraph 2, Article 170, Civil Code 2005
16/2017/AL	Inheritance dispute	573/2013/DS-GĐT 16 Dec. 2013	Paragraph 2, Article 170, Articles 234, 634, and 697 Civil Code 2005
17/2018/AL	Murder	Cassation Decision 07/2018/HS-GĐT 20 Mar. 2018	Paragraphs 1 and 2, Article 93, Criminal Code 1999
18/2019/AL	Murder	Appeal Decision 331/2018/HS-PT 28 May 2018	Point d, Paragraph 1, , Article 93, Criminal Code 1999
19/2018/AL	Embezzlement	Cassation Decision 09/2015/HS-GĐT 23 Apr. 2015	Articles 46, 47, 60, and 278 Criminal Code 1999
20/2018/AL	Labor dispute	Cassation Decision 01/2017/LĐ-GĐT 09 Aug. 2017	Articles 26, 27, 28, 29, Labor Code 2012
21/2018/AL	Property dispute	Cassation Decision 08/2016/KDTM-GĐT 20 May 2016	Article 426 Civil Code 2005; Articles 269, 302, 303 Commercial Law 2005
22/2018/AL	Dispute over insurance contract	Appeal Judgement 313/2016/DS-PT 16 Mar. 2016	Articles 407 and 409, Civil Code 2005; Article 21, Law on Insurance Business 2000 (amended in 2010)
23/2018/AL	Dispute over insurance Contract	Appeal Judgement 538/2009/DS-PT 31 Mar. 2009	Article 23, Law on Insurance Business 2000 (amended in 2010)
24/2018/AL	Inheritance dispute	Cassation Decision 27/2015/DS-GĐT 16 Oct. 2015	Articles 219, 223, and 226, Civil Code 2005
25/2018/AL	Dispute over deposit contract	79/2012/DS-GĐT 23 Feb. 2012	Article 358, Civil Code 2005
26/2018/AL	Inheritance dispute	Cassation Decision 06/2017/DS-GĐT 27 Mar. 2017	Article 623 Civil Code 2015; Article 36, Ordinance on Inheritance 1990
27/2019/AL	Land complaint	Cassation Decision 03/2018/HC-GĐT 16 July 2018	Article 94 Law on Organization of the People's Councils and People's Committees 2013; Article 7 Law on Complaints 2011
28/2019/AL	Murder	Cassation Decision 16/2018/HS-GĐT 25, Sept. 2018	Article 94 Criminal Code 1999
30/2020/AL	Murder	Appeal Judgement 280/2019/HSPT 16, May 2019	Articles 93, 202 Criminal Code 1999
31/2020/AL	Property dispute	Cassation Decision 05/2018/DS-GĐT 10, Apr. 2018	Articles 172, 188, 634 Civil Code 1995

32/2020/AL	Land dispute	Cassation Decision 19/2019/DS-GĐT 20, Aug. 2019	Articles 10, 50 Land Law 2003; Articles 164, 176, 177, 192, 196, 201 Civil Code 1995
33/2020/AL	Land dispute	Cassation Decision 34/2018/DS-GĐT 26, June 2018	Articles 176, 192, 196 Civil Code 1995; Article 184 Civil Code 2015
34/2020/AL	Inheritance dispute	Cassation Decision 58/2018/DS-GĐT 27, Sept. 2018	Articles 163, 181, 634, 646, 648 Civil Code 1995 Article 42 Land Law 2003
35/2020/AL	Land dispute	Cassation Decision 65/2018/GĐT-DS 06, Aug. 2018	Article 14 Land Law 1987; Article 26 Land Law 1993; Articles 38, 50 Land Law 2003
36/2020/AL	Dispute over credit contract	Cassation Decision 05/2018/KDTM-GĐT 18, May 2018	Articles 322, 343 Civil Code 2005; Articles 342, 411 Civil Code 2005
37/2020/AL	Dispute over insurance contract	Cassation Decision 28/2018/KDTM-GĐT 26, June 2018	Articles 285, 287 Civil Code 2005 Articles 5, 23 Law on Insurance Business 2000 (amended in 2010)