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# **ADMINISTRATIVE DIVISION COURT IN VIETNAM:**

## **MODEL, JURISDICTION AND LESSONS FROM FOREIGN EXPERIENCES**

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Center for Asian Legal Exchange



**ADMINISTRATIVE DIVISION COURT  
IN VIETNAM**

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LESSONS FROM FOREIGN EXPERIENCES**

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**ADMINISTRATIVE DIVISION COURT  
IN VIETNAM**

**MODEL, JURISDICTION AND  
LESSONS FROM FOREIGN EXPERIENCES**

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## **DEDICATION**

In Memory of My Sister *Pham Bich Van*,

A Forever Young 10 Year-Old Girl, died in *Hai Phong* City before Vietnamese War End,

To My Dearest Daughters (TAKARAMONO), *Linh Chi* (靈芝) & *Linh Dan* (SONY),

And All My Beloved!

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ADMINISTRATIVE DIVISION COURT IN VIETNAM  
MODEL, JURISDICTION AND LESSONS FROM FOREIGN EXPERIENCES

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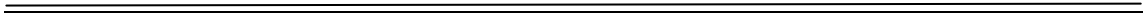
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## ACRONYMS AND ABBREVIATIONS

ACLL	Administrative Case Litigation Law (Japan)
ADB	Asian Development Bank
ADC(s)	Administrative Division Court(s)
AJB	Administrative Jurisdiction Body
AJI	Administrative Jurisdiction Institute ( <i>Vien Tai Phan Hanh Chinh</i> )
ALL	Administrative Litigation Law (China)
ALRS	Administrative Law Review System
APL	Administrative Procedural Law
BTA	(Vietnam-America) Bilateral Trade Agreement
CALE	Center for Asian Law Exchange
CCP	Chinese Communist Party
CPV	Communist Party of Vietnam
DRV	Democratic Republic of Vietnam
FLA	Foreign Legal Assistance
IMF	International Monetary Fund
JICA	Japanese International Cooperation Agency
JRAA	Judicial Review of Administrative Action
LDM	Law and Development Movement
LOCD	Law on Complaints and Denunciations
LOPC	Law on Organization of People's Court
MOJ	Ministry of Justice
NGOs	Non-Government Organizations
OPHIT	Ordinance on Personal High Income Tax
OPJA	Ordinance on People's Judges and Assessors
ORAV	Ordinance on Resolving Administrative Violation
OSAC	Ordinance on Settlement of Administrative Cases (Vietnam)
OSCCD	Ordinance on Settlement of Citizen's Complaints and Denunciation (1991)
PRC	People Republic of China
ROL	Rule of Law
SIDA	Swedish International Corporation Development Agency
UN	United Nation
UNDP	United Nation Development Program
USAID	United State Agency for International Development
WB	World Bank



## ABSTRACT

The Model and Jurisdiction of Administrative Division Courts (ADCs) in Vietnam over the past ten years have revealed many defects that fail to fulfill the requirements of the Rule Of Law (ROL) and Judicial Independence as well as performed Judicial Reform Strategy up to 2020 as promoted by CPV (2005). Along with the requirements for implementing the Vietnam-America BTA and WTO's regulations (2006), particularly with the vigorous support for current prevailed models, the ADCs Model has faced great challenge for its existence. This dissertation explores *why the ADCs Model and Jurisdiction have been harshly criticized and what are the components that need to be reformed?* by addressing *four research questions* in four subsequent Chapters.

The author argues that the existing ADCs Model is not an ideal model for protecting individuals and entities including foreign partners from malpractices of administration. It is only an *interim* solution in the transitive period and no longer appropriates in the context of post-WTO Accession and the ROL Era. The author supports the establishing of an AJB attached to Government (*appellate system*) in parallel with Regional Administrative Courts (*judicial review system*) to ensure its independence from Governing Agencies and Ruling CPV. In addition, the author recommends the necessity of training legal human resources, including professional administrative judges as *a key factor*. The author concludes that the reform of ADCs Model today needs to be conducted concurrently with the transplanting of an *Informal Institution of ROL*, in line with civil law thinking, to achieve the harmonization and democratic values set forth by *State governed by ROL of Vietnam*. To reform the administrative law system by means of Foreign Legal Assistance (FLA), it is necessary to approach the basic theory and *paradigm*, particularly those relative to the mechanism of *institutional change* under the view of economic study. This reform should be *gradualist* and a *continuous learning process*

## INTRODUCTION

*“The character of an administrative law system varies according to the general character of the legal system of the country that forms its foundation...The fundamental difference between the main administrative law systems in the world may be said to lie in their respective mechanisms for the review of administrative acts”<sup>1</sup>.*

**(Itsuo Sonobe – Justice, Supreme Court of Japan, 1983)**

*“Step-by step reforming Model of People’s Courts at all levels and preparing conditions for establishing Regional Courts for settlement of administrative cases; Enlarging the adjudicative jurisdiction of the court in handling administrative lawsuits”<sup>2</sup>.*

**(Resolution No 49 NQ/TW (2005) on Judicial Reform Strategy up to 2020  
by the Politburo of Vietnamese Communist Party)**

### 1. Background

The foundation and inauguration of the Administrative Division Courts within People’s Court System (*hereinafter as referred to ADCs*) over past ten years marked an epoch-making step toward the improvement of the Administrative Law Review System (*hereinafter as referred to ALRS*) in Vietnam. This achievement undeniably resulted from a wide range of Legal and Judicial Reforms in the push towards democratic values, *Nha nuoc Phap quyen* (Law-Based State) and the protection of people’s legal rights and interests. However, as some foreign scholars comment: *“Vietnamese ALRS needs to be much more independent from the Government and the Ruling Communist Party in order to have credibility and legitimacy”<sup>3</sup>.*

ALRS in Vietnam functions differently to that which is rooted in Western countries and is possibly criticized for ineffective protection to the citizen’s rights due to its inheritance of socialist law traditions, which can be characterized by a system of State Power Concentration and One Party Rule<sup>4</sup>. It is too simplistic and subjective to make a judgment in terms of success or failure on the effectiveness of a system that differs from a Western democratic model without taking in to account the historical background of the country, the legal traditions, as well as the domestic complexities of

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<sup>1</sup> See John Owen Haley & Hiroshi Hokama eds, 19 Law in Japan, An Annual (1986). Kevin Hansen translated from I Gendai Gyoseiho Taikei (The System of Modern Administrative Law, Volume 1), I.Ogawa, H.Shiono, I.Sonobe eds, pp.121-146 (1983)

<sup>2</sup> Resolution No 49 NQ/TW dated on June, 2<sup>nd</sup> 2005 by Politburo of CPV on Judicial Reform Strategy up to 2020 in Ho Chi Minh National Political Institute, Official Documents of Party and State on Reform of State Apparatus, 15 (2005)

<sup>3</sup> See Law Professor John Reitz advising Vietnam on reforming its court system in University of Iowa News Release, available at [http://news-releases.uiowa.edu/2007/november/110207reitz\\_reform.html](http://news-releases.uiowa.edu/2007/november/110207reitz_reform.html)

<sup>4</sup> This can share the common with Chinese ALRS. See Yong Zhang, Comparative Studies of Judicial Review System in East and Southeast Asia, Preface XXI, (1997)

transitional country such as Vietnam. Criticism leveled at Vietnam on its ADCs Model has recently increased, along with requirements for implementing the Vietnam-America BTA and the WTO regulations, particularly in regards to the strong support for the model of Administrative Jurisdiction Body attached to Government (AJB) or Administrative Tribunals. In the time being, very existence of the ADCs Model has met great challenges.

From a theoretical perspective, Judicial Review of Administrative Action (JRAA) known as an expanding body of administrative law is currently being developed throughout the world. Vietnamese administrative law, for a quite a long period of time, was criticized for its slow development, largely due to the absence of an impartial judicial body protecting the people from the malpractices of a powerful administration. Even now, it still lacks a modern theory relative to the court's model and jurisdiction for JRAA, a theory of active and adjudicative administration and so on. Like any other law field in the transitional period, contemporary Vietnamese administrative law has been constructed by means of legal transplantation, historically derived from China, France, and the former Soviet Union and more recently East Asia and Western countries.

Regarding legal scholars known as effective transferors of foreign laws and theories into their own transitional country, Vietnam still lacks quality administrative law scholars, with the ability to learn the theory arrived at by Western learning and successfully "*absorb that total personality make-up that gives birth to those conclusions*"<sup>5</sup>, a lesson learnt through the experiences Japanese scholars in studying foreign laws. An outstanding issue in over the past ten years is the gradual change of legal perception towards the JRAA among Vietnamese scholars, historically influenced by Soviet legal thinking and those recently absorbed in legal thought from the West and East Asia. One of the most difficult tasks of Vietnamese scholars is how to consult with the Government to achieve the best court model and jurisdiction for JRAA and how to avoid constructing this model from a mishmash of borrowed models and theories.

Such implications, as well as the fact that each legal system in the world can not be successfully developed in total isolation both from legal development elsewhere and traditional values domestically, make a doctoral dissertation entitled "**Administrative Division Court in Vietnam: Model, Jurisdiction and Lessons from Foreign Experiences**" an important contribution on contemporary ALRS for the emerging market economy of Vietnam. In addition, as a respected Japanese legal assistance specialist predicted: "*the need for clearer philosophy of legal assistance*" and "*the need to further clarify the purpose of legal assistance*" have been seen as "*a new trend of thoughts emerging inside Japan*"<sup>6</sup>, this dissertation will attempt to consult with foreign sponsors the

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<sup>5</sup> See Prof. Y. Yanase, Gakkai Tembo "Gyoseiho" (Academic Prospective "Administrative Law"), Public Law No 7, 130 (1951). It is cited by Itsuo Sonobe, Comparative Administrative Law: Trends and Features in Administrative Law Studies (Japan). See supra note 1, at 57

<sup>6</sup> Aikyo Masanori, Human Rights and Democracy in Vietnam: Some Thoughts on the Philosophy of Legal Assistance, in Y. Matsuura ed, The Role of Law in Development: Past, Present and Future, pp.78-79 (2005).

promotion of Foreign Legal Assistance (FLA) Projects toward ALRS – a potential field for legal assistance, but one that has not been included in many projects to date.

## **2. Purposes, Previous Research & Current Research Questions**

### **2.1. Purpose and Attraction**

Vietnamese law identity, as described by foreign scholars, is a traditional legal system with Confucian-inspired and Chinese legalism<sup>7</sup>. This research is based on the main idea that all legal traditions characterized by the mixture of Confucian heritage, French-inspired civil origin and previous Soviet influences, should not be simply wiped clean and new Western models and theories carelessly imported without considering its harmonization.

**Given the background of the research topic selection, this dissertation serves three major purposes described below:**

*The first purpose* is to explore and analyze the theoretical and historical aspects of ALRS in Vietnam in general and of the model of ADCs in particular. This dissertation focuses on exploring why the existing ADCs model has been strongly criticized, how its jurisdiction has been improved over the past ten years, and what challenges its existence faces in the future.

*The second purpose* is to study foreign administrative law theory regarding the court's models and jurisdiction over settlement of administrative lawsuits, known as a very important and expanding body of administrative law in the new era of the ROL. Although this dissertation does not take on the ambitious task of conducting a comparative study of ALRS around the world, it pours much effort into the drawing together of some worthy experiences from three selected countries: France, China and Japan.

*The third and ultimate purpose of this dissertation* is to contribute an academic view to the controversial issues regarding the existing ADCs Model, and to a certain extent, act as a legal transferor for improving modern administrative law studies in Vietnam. Some recommendations on the court's model and jurisdiction as well as the projects of FLA thereof will also be put forward in this dissertation.

#### **Three main attractions of study:**

*Firstly*, it concerns the *controversial character* of the existing ADCs Model. Anywhere, it is common that when a resolution is finally chosen by authority or lottery, it may be either supported and praised or protested and criticized. The choice of the model of ADCs in Vietnam may fall into the latter. It should be emphasized that the final choice of the ADCs Model among four proposed models (1996) did not complete the legal debates among scholars, but also started a controversy that continues today.

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<sup>7</sup> See Pip Nicholson, Roots and Routes: Comparative Law in Post-Modern World, Asian Law Centre's Brown Bag Lunch Seminar, 2001

*Secondly*, this research topic is attractive due to its *theoretical and historical* perspective. The introduction of the ADCs Model entailed not merely the issue of finding a practical resolution for protecting people’s legal rights from maladministration, but also the issue of theoretical conflict between the former Soviet influences and newly Western impacts. In addition, Vietnam has quite a complex history of legal transplantation and a strong sense of contributing its own theory. For such reason, Vietnamese administrative law theory needs to further catch up with the mainstream of the ROL today.

*Finally*, the *practical and applicable aspects* also draw on this research. *David Nelken* suggests that: “*Borrowing other people’s law is seen as just a method of speeding up the process of finding legal solutions to similar problems*”<sup>8</sup>. It will be true in case of a correct choice; however, in some cases it may not speed up this process but by contrast hold back social development. Like any Vietnamese legal research taken recently, what this research concluded is hopefully applicable and in accordance with the current context.

## **2.2. Previous Research**

At the time of completion of this dissertation, there was only one published doctoral dissertation entitled: “*The Court’s Jurisdiction over Settlement of Administrative Cases – Guarantee of Justice in the Relationship between State and Citizen*” (2004) by Prof. *Nguyen Thanh Binh*, Chief of Lawyer Training, Department of Judicial Academy.

In a Master’s thesis entitled: “*Improving Mechanism for Settlement of Administrative Disputes: An Important Contribution to Public Administration Reform in Vietnam Today*” (Pham Hong Quang, GSL, Nagoya University, 2002), the author poses **the main research question** “*why does the former have a reciprocal relation with the latter and how does it impact on the latter?*” for confirmation of the “*continuous learning process*” of the contemporary administrative and judicial reforms in Vietnam including the reform of ALRS.

## **2.3. Current Research Questions & Hypothesis**

This Doctoral Dissertation continues following the mainstream of reforming ALRS in the context of decisively carrying out the Judicial Reform Strategy promoted by CPV (2005). The core research question of this dissertation however is “*why has the existing ADCs model and its jurisdiction over the past ten years been greatly controversial and why does it need to be superseded by other better model?*” This dissertation more deeply investigates the theoretical issues of administrative law regarding the administrative court model, grounds and scope for judicial review, the judgment’s effect, the theory of adjudicating and the governing function within the

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<sup>8</sup> David Nelken, *Legal Transplants and Beyond: Of Disciplines and Metaphors*, in Andrew Harding & Esin Orucu eds, *Comparative Law in 21<sup>st</sup> Century*, pp. 26-27 (2002)

administration. In order to investigate the experiences of other nations, three main countries have been selected for case study - France, China and Japan.

This is the first dissertation that directly discusses the ADCs Model as well as its Jurisdiction in Vietnam since the revised LOCD (2005) and OSAC (2006) were implemented, so as to fulfill the requirements for WTO Accession (November, 2006). This dissertation also contributes to academic argument on developing the legal concept of *Jurisdiction* over settlement of administrative lawsuits in Vietnam. Furthermore, this study involves the analyzing of a considerable number of Vietnamese case-studies (*including the latest published SPC's Supervisory Judgments, 2008*) and also foreign experiences to support for the debatable issues. This study is particularly closely attached to the requirements of FLA Projects and of the transplanted of the ROL in Vietnam today. **(Originality)**

**While carrying out the research, the below four main research questions were considered, each addressed in following chapters:**

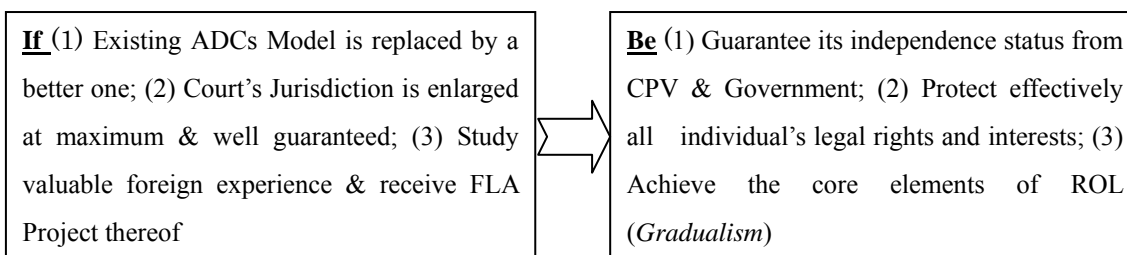
*Firstly*, why was the ADCs model finally chosen by Vietnamese leadership (*December, 1995*) even though its choice has been strongly criticized?

*Secondly*, why has the Jurisdiction of ADCs continued to be strictly criticized for the lack of credibility and legitimacy even though it was enlarged incrementally over the past ten years?

*Thirdly*, why does the reform of Vietnamese ADCs Model and Jurisdiction need to learn from foreign experiences and receive the FLA Projects thereof?

*Finally*, can the existing ADCs Model survive the strong criticism and equally strong supports other models?

**Hypothesis:**



**3. Main Contents**

To serve the above four questions, this dissertation groups all analyses and arguments in four Chapters as follows:

**Chapter I** *explores* the first question *why was the ADCs Model finally chosen by Vietnamese leadership (December, 1995) even though its choice has been strongly criticized?*

**Firstly**, this chapter *analyzes* the gradual change of legal perception towards JRAA among Vietnamese scholars, that was historically influenced from Soviet legal thinking and then more recently influenced by and legal thinking absorbed that from the West and East Asia. It leads to the

appearance of four proposed court models (*before July, 1996*), known as 1) the Model of Administrative Court as an Independent System formed by National Assembly; 2) the Model of Administrative Court as an Independent System attached to Government; 3) the Model of a Semi-Independence Administrative Court; and 4) the ADCs Model.

**Secondly**, this chapter *argues* that, although the ADCs Model was finally approved by National Assembly due to its *Constitutionality* and *Feasibility*, it is regarded as an interim solution or the compromise in the transitive period. It is strongly criticized among scholars and people due to the following reasons:

(1) It fails to fulfill the requirement of a clear distinction between adjudicative and governing functions within the administration, between the administrative jurisdiction and judicial jurisdiction as well as the appellate system and judicial review system recognized in contemporary administrative law theory.

(2) It does not guarantee the requirement of Judicial Independence, known as one of the core ROL elements, as it makes the local ADCs considerably dependent on local governments as well as CPV Executive Committees at the same level.

(3) It does not meet the demands of Judicial Reform Strategy promoted by CPV recently, such as the requirement of international integration after Vietnam's Accession to the WTO, or of the Vietnam-America BTA that requires an independent model for JRAA with the transparent and impartial proceedings.

The main argument reveals that the ADCs Model is "*not really an ideal model*"<sup>9</sup> as frankly admitted by Ex-General State Inspector, *Quach Le Thanh* (1997) and needs to be reformed in accordance with the current context.

**Finally**, it points out the taxonomy of controversial models in the present time, raising questions such as whether Vietnam should (i) change to a completely new model with some relevant amendment of the Constitution; (ii) maintain the existing model with some appropriate changes (*structural reform, jurisdiction*); (iii) reconstruct the existing model (*for judicial review*) and create new quasi-judicial AJB (*for appellate system*) with improvement of jurisdiction, training professional judges.

**Chapter II** addresses the second research question *why has the Jurisdiction of ADCs continued to be strictly criticized for the lack of credibility and legitimacy even though it was enlarged incrementally over the past ten years?*

**Firstly**, this chapter argues with the concept of *Jurisdiction* given by Prof. *Nguyen Thanh Binh*<sup>10</sup> (2004) that aims to contribute an academic view to build up a contemporary administrative

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<sup>9</sup> See Thanh tra Nha nuoc, *De tai nghien cuu khoa hoc cap Nha nuoc: Toa Hanh chinh-Van de Ly luan va Thuc tien*, [National Research Project: Administrative Court-Theory and Practice], 25 (1997)

<sup>10</sup> So far, there is only a published doctoral dissertation in Vietnamese language titled: "*The Court's Jurisdiction over Settlement of Administrative Cases – Guarantee of Justice in the Relationship between State and Citizen*" (2004) by Prof. *Nguyen Thanh Binh*,

law concept in Vietnam.

**Secondly**, it analyzes the characteristics of the jurisdiction of ADCs and its gradual enlargement over the past ten years<sup>11</sup>. Such enlargement is still limited and fails to fulfill the requirement of ALRS reform.

**Finally**, it focuses on analyzing the criticism and controversy on the jurisdiction of ADCs. It is strongly criticized largely due to the below reasons:

(1) People cannot take any administrative matter to the ADCs, except those enumerated in Article 11 of OSAC (2006). The *standby* provision that allows people to take other lawsuits provided by laws and treaties is considered as a threat to Judicial Independence since in many practical cases, the National Assembly's Standing Committee or Government can decide what kinds of administrative matters may be handled out by courts.

(2) People are not allowed to sue an illegal, even unconstitutional norm or regulation. In fact, there are numerous against people's legal rights and interests<sup>12</sup>. Besides this, public interest lawsuits are also unfamiliar and always out of court's jurisdiction.

(3) To be resolved by ADCs, the claims must experience the compulsory *pre-litigation* period taken by the original agency or authority, which creates obstacles for accessing a lawsuit. The latest revised OSAC 2006 once again narrows the way of initiating a lawsuit by providing more exceptional cases that *the first time settlement decision* must be submitted. Thus, it is regarded less progressive, even "*a back step*" compared with the revised OSAC 1998.

(4) Many errors of law, such as contradiction, overlapping, lack of clear provisions, and the slow issuance of guidance regulations by Ministries<sup>13</sup> are two of the main factors infringing people's legal rights and interests.

(5) Due to the lack of concrete provisions regarding the content of judgment, the local ADCs often make mistakes in issuance of extreme discretionary judgments. In some cases, it also encroaches upon the administration and makes damages for people concerned.

To support more evidences and analyze the change of legal thinking of Vietnamese judges, this Chapter pours much effort into introducing some case-studies, particularly some SPC's *Supervisory* Judgments newly published under the help of JICA and the STAR-Vietnam Project.

Chief of Lawyer Training Department of Judicial Academy

<sup>11</sup> Such as, the scope of accepting cases increases from 7 (1996) to 9 (1998) and up to 21 (2006) with a *standby provision* stating that "*other lawsuits as prescribed by Vietnamese law or treaties*" (OSAC, Art 11); the revised OSAC (1998, 2006) allows people to take a lawsuit to court in case of receiving no reply from the administrative agency for reconsideration (Art 2, 30)

<sup>12</sup> Such as, those prohibiting students from Music School to perform in Pub or Discotheque, banning each person to register no more than one motorbike, prohibiting people whose height under 145cm, weight under 40kg, are not allowed to drive motorbikes, banning the three-wheel motorbike as a mean of transportation and so on. Some of mentioned regulations have just been abandoned. According to statistic by Department of Checking Legal Norms of MOJ, about 6.300 Legal Documents were illegal. See Gan 6.900 Van ban trai Phap luat da duoc ban hanh, [About 6.900 Illegal Norms or Regulations were enacted], <http://vnexpress.net/GL/Phap-luat/2008/11/3BA08CB1/>

<sup>13</sup> See A Case Regarding Personal Income Tax Decision to Mr.K.S (Japanese) in *Hanoi* (1998) in Chapter II, II.2.2



**Chapter III** satisfies the third question: *why does the reform of Vietnamese ADCs Model and Jurisdiction need to learn from foreign experiences and receive the FLA Projects thereof?*, particularly why three countries as France, China and Japan are chosen for this study.

**Firstly**, it analyzes the self-identity of Vietnamese administrative law regarding JRAA and the motivations to its current reform.

**Secondly**, for each of the above three countries, this Chapter explores the main characteristics of court's models and jurisdiction, and discusses what Vietnam should learn. Some case-studies are also analyzed for further understanding of these ALRS. Among them, (1) France shares some common areas, since French administrative law theory and *Conseil d'Etat* Model used to appear in Vietnam (*due to nearly one-century colony*) and in the South Republic of Vietnam (before 1975); (2) Chinese ALRS characterized by the existence of ADCs (*since 1989*) with limited jurisdiction shares many common debates with Vietnam; (3) Japanese experiences on Justice Reform since 2001, and Amendments of ACLL (2004) are very useful for Vietnam in its future codification of this law.

**Finally**, it identifies the difficulty, but potentiality of FLA Projects toward the reform of ADCs Model and Jurisdiction in Vietnam and makes some recommendations for future development.

**Chapter IV** summarizes and addresses the last research question: *can the existing ADCs Model survive the strong criticism and equally strong supports other models?*

**Firstly**, this chapter gives a brief introduction to the current transplantation efforts of ROL as well as Judicial Reform Strategy up until 2020.

**Secondly**, it analyzes some contemporary models strongly supported by Vietnamese scholars and foreign sponsors, particularly the Model of AJB attached to Government, the Model of Regional Administrative Courts, Administrative Tribunals and so on.

**Finally**, it concludes the necessity of replacing the current ADCs Model, and recommends some solutions for establishing *the new model with enlarged jurisdiction* to better protect people's legal rights and interests. It strongly supports the setting up of the AJB attached to Government and the reforming of the current ADCs Model in line with the foundation of Regional People Courts.

In addition, the necessity of training human resources, including administrative judges with high-quality and professional skills rather than political requirements, as well as improving the legal framework regarding ALRS in the post-WTO Accession will be focused on for recommendation.

#### **4. Methodology**

This dissertation uses four major research methods, namely the *Analytical*, the *Comparative*, the *Synthetic* and the *Descriptive*.

*Comparative and Analytical* methods are mostly used as a complementarily to one another in this study, where both the theoretical and historical aspects of the Vietnamese ADCs Models and Jurisdiction are explored from Chapter I to Chapter IV. In particular, they are mainly used in Chapter III to explore the court's model and its jurisdiction of the three main countries- France, China and Japan.

*Descriptive and Synthetic* methods are also used extensively in Chapter I and Chapter II to briefly introduce the defect of ALRS before 1996, discuss the settlement of administrative lawsuits over past ten years and to describe the grounds, the scope of the judicial review, the court's jurisdiction over the administrative matters, territorial units, and adjudicative levels (*from first-instance, appeal, supervisory or review trials*).

*Analytical and Synthetic* methods are implemented in Chapter IV to support the originality of this study as well as to propose the relevant solutions for the reform of existing ADCs Model. These methods are also used in Chapter III to summarize the urgent need for conducting FLA Projects regarding ALRS in Vietnam.

## **5. Materials**

The *primary and most important* sources of material used for this study are the published books, monographs and scholarly articles mostly in English and Vietnamese. Some Japanese were also used when necessary to access original Japanese sources related to the topics at hand. A variety of materials available on the internet websites from a range of providers also served as indispensable sources.

*Other important* sources include overseas and domestic legal documents related to the research topic. A considerable number of the domestic case studies, administrative judgments (*including SPC's Supervisory Judgments recently published*) as well as Annual Reports by the Vietnamese SPC or other state agencies regarding the discussed issues were also accessed for the purpose of this study. In addition, some relevant case-studies and judgments of France, China and Japan are collected and contributed for discussion.

*Finally*, the this investigator carried out primary research through a series of interviews with relevant legal scholars, lawyers, the responses which provided some very useful insight, assisting to achieve the goals set forth by the research.

## CHAPTER I

# ADMINISTRATIVE DIVISION COURT MODEL: THE START OF THEORETICAL CONTROVERSY

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### Introduction

*“Judicial Review System has been recently introduced by a number of developing countries in East and Southeast Asia. Although the political systems or government structures differ among those countries, a judicial review system has become an essential system for those countries which are modernizing their economy and joining international society”*<sup>14</sup>.

**(M.Scheltema, Comparative Studies on Judicial Review System  
in East and Southeast Asia, 1997)**

*“The choice of Administrative Division Court Model (ADCs) may be relevant in the current context of political, legal and social economic conditions in Vietnam, but it was not really an ideal model”*<sup>15</sup>.

**(Quach Le Thanh - Ex-General State Inspector of Vietnam, 1997)**

Chapter I addresses the first research question *why was the ADCs Model finally approved by National Assembly (Dec,1995), even though its choice has continued to face strong criticism*. It first explores the under development of Vietnamese administrative law regarding Judicial Review over the past 50 years, characterized by the existence of a “*minister-judge*” mechanism, and analyzes the change of legal perception toward JRAA between scholars who were previously influenced from the Soviet legal system and those who have recently absorbed Western laws and ideology. It mainly argues that the choice of the ADCs Model was only an interim solution or a compromise in the transitional period due to its lack of a mature theory, judicial independence as well as its failure in the performing of Judicial Reform Strategy promoted recently by CPV.

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<sup>14</sup> M.Scheltema, Some Introductory Remarks, Judicial Review: The Need for International Cooperation, in Yong Zhang ed, Comparative Studies on Judicial Review System in East and Southeast Asia, 1 (1997)

<sup>15</sup> Quach Le Thanh, Bao cao Tong thuat De tai nghien cuu khoa hoc cap Nha nuoc: Toa Hanh chinh-Van de Ly luan va Thuc tien, [General Report of National Research Project: Administrative Court-Theory and Practice], 25 (1997)

## I. Overview of Administrative Disputes Resolution in Vietnam Prior to 1996

### 1. Under Development of Vietnamese Administrative Law Regarding Judicial Review

The concept of Administrative Law that involves only the study of “*how the system of governments which is neither legislatures nor courts make decisions*”<sup>16</sup> seems not to be accurate in the modern sense, since the growth of domestic judicial review in the end of the 20<sup>th</sup> century, as *Tom Ginsburg* comments, has shown “*an expanding body of administrative law*”<sup>17</sup>. Regardless of the role of administrative courts in the continental legal system, courts in the UK, the US and many other common law countries have a “*growing activism in checking the government*”<sup>18</sup>, especially since the 1980s. JRAA is known as the main part of administrative law, aiming to undertake “*the prime purpose*”<sup>19</sup> of protecting citizens against the malpractices of administration.

Based on a definition such as that above, Vietnamese administrative law and its studies may be criticized for being under development, especially for not effectively protecting people’s rights and interests provided by law.<sup>20</sup> All administrative disputes were resolved within the administrative system or by the system of Inspectorates until the birth of ADCs in July, 1996.

To fully understand the development of ALRS in Vietnam, this section first gives an outlook of comparative studies of administrative law around the world, since comparing public law becomes a “*joint venture*” project and a central subject of study for the 21<sup>st</sup> century, particularly for Southeast Asia known as “*a region with an abundance of legal traditions*”<sup>21</sup>. As a result, Vietnam has been able to gain valuable overseas experiences and readily join the mainstream of such developments. The next section will focus on analyzing the under development of Vietnamese administrative law due to its considerably long history of lacking a judicial review system.

#### 1.1. Outlook of Comparative Studies of Administrative Law

Administrative law is concerned with how the state machinery operates from a legal standpoint and is therefore by definition a part of public law. Public law serves both, to define and control power in the hands of government. It is concerned with the relationships within government and those between government and individuals. In civil law countries, separate administrative courts adjudicate claims and disputes between the various government branches and citizens, and many

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<sup>16</sup> See J.Beatson & M.H.Mattews, *Administrative Law: Cases and Materials*, 3 (1989)

<sup>17</sup> Tom Ginsburg, *Judicial Review in New Democracies*, 4 (2003)

<sup>18</sup> Ibid

<sup>19</sup> Mark Aronson & Bruce Dyer, *Judicial Review of Administrative Action*, 2 (2000)

<sup>20</sup> See Nguyen Duy Gia, *Thiet lap Tai phan Hanh chinh o nuoc ta*, [Establishment of Administrative Jurisdiction in Vietnam], 137 (1995)

<sup>21</sup> Andrew Harding, *Comparative Public Law: Some lessons from South East Asia*, in A.Harding & E.Orucu, *Comparative Law in the 21<sup>st</sup> century*, 249 (2002)

civil lawyers specialize in public law. Conversely, in Great Britain and the US, public law is not quite as clearly demarcated. Under the common law approach, the same courts handle public and private litigation. As mentioned above, the development of administrative law is a comparatively recent occurrence in common law countries, also in former Socialist and transitional countries. It is a result of modern manifestations, such as the impact of legal transplantation, the media, law firms, and the fact that people and activities are not confined to national boundaries.

*Zweigert and Kotz* – the famous German comparatists – emphasize the legal mechanisms and the way of legal thinking to achieve them (*the norms, concepts and institutions*) are the most important features of difference between legal systems in the world. By citing *Gustav Radbruch's* words “*sciences which have to busy themselves with their own methodology are sick science*”, they argue and find the comparative law as a new method “*preeminently adapted to putting legal science on a sure and realistic basis*”<sup>22</sup>. The comparative study of administrative law, known as a fundamental legal science, can be examined briefly in the common law, civil law system and in the previous Marxist world as below:

**In the common law system**, the earliest definition of administrative law was that of the Jurist *Austin*, to whom constitutional law merely determined what person or classes of person bore the sovereign power, while administrative law determined the modes to and in which the sovereign powers were exercised<sup>23</sup>. However, *Dicey* in his book “*Law of Constitution*” (1885) completely denied the existence of English administrative law<sup>24</sup>, due to his “*dislike*” of the French *Droit Administratif* that creates *Conseil d'Etat* and separates administrative courts from ordinary courts. In addition, he supported the unity in the administration in private and public sector as the prime virtue of the English system, which for him was most compatible with the notion of the ROL. The recognition of administrative law was made by Professor *Wade H.W.R.*, who argued that the main defect of English administrative law was its failure to recognize its own potentiality, and the *pitch* of administrative law proper is “*how far can the law control the innumerable discretionary powers which Parliament has conferred on the various authorities*”<sup>25</sup>.

In England, adjudication on administrative matters is, generally speaking, in the hands of the ordinary court, it being a unitary system of judicature, which knows of no *clear-cut* distinction in the administration of private and public law. Since the Second War World, the introduction of new social services, such as national insurance, town planning, housing, transport and so on has involved both delegated legislation and administrative justice. Since then, many new developments have taken

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<sup>22</sup> K.Zweigert & H.Kotz, *An Introduction to Comparative Law*, 33 (1998)

<sup>23</sup> Z.M.Nedjati & J.E.Trice, *English and Continental System of Administrative Law*, 2 (1978)

<sup>24</sup> Dicey asserted that the words of “*administrative law*” are unknown to English judges and counsels and in England, “*the system of administrative law and the very principles on which it rests are in truth unknown*”. See *Ibid*, at 4

<sup>25</sup> Z.M.Nedjati (1978), at 1.

place in the field of administrative law. In 1969, the Law Commission submitted the “*Report on Remedies in Administrative Law*” to the *Lord Chancellor*, which emphasized the need for the formulation of a systematic and comprehensive body governing the proper exercise of administrative power. The need to reform English administrative law has been made urgent by Britain’s entry in to European Council (EC), which is bound to bring continental institutions into a more visible juxtaposition with English institutions. Up to now, many common law countries have already set up special administrative divisions for resolving administrative lawsuits and brought their systems closer to the system of continental law.

**In the continental law system,** French *Droit Administratif* has become perhaps the most important model for administrative jurisprudence in the modern world. In late 1799, Napoleon created the Council of State (*Conseil d’Etat*) which was patterned somewhat on Council of King (*Conseil du Roi*) of pre-revolutionary times to serve an advisory role and also in resolving difficulties arising in the court of administration that was eventually to become the most important area of administrative law. There are two remarkable points: (1) The jurisdiction of the administrative courts culminating in the *Conseil d’Etat* started to be developed primarily by *case-law* and proceeded to evolve by means of a combination of jurisprudence and statutory provision; (2) The leading case known as the *Cadot* (1889), in which the *Conseil d’Etat* decided that a plaintiff no longer had to take his case first to the ministries, and then, if dissatisfied, to the Council, rather, he could go directly to the Council for justice. *James Garner* in his early work namely “*French Administrative Law*” (1924) confirmed that the existence of a body of administrative law in France that separates the public law and private law, the administrative courts and civil courts, distinguishes fundamentally the legal system of France from that of the Anglo-Saxon system.

Continental countries, such as Belgium, Holland, Germany, Italy, Greece, and Turkey, all have separate systems of administrative courts. However, there are also some significant differences between particular national systems. For instance, (1) Unlike the French *Conseil d’Etat*, the German administrative court is purely a court with administrative jurisdiction and is not concerned with advisory matters; (2) The administrative courts in France not only have jurisdiction to annul an administrative act but also to give other relief, such as the award of damages as a consequence of an unlawful administrative act. The courts in Belgium, Germany and Italy on the other hand are limited to annulment suits. The proceedings against the administration for damages are reserved to ordinary courts.

**In the previous Marxist world,** some outstanding features of administrative law can be seen:

**Firstly,** elsewhere in the Soviet world, the earlier pre-Marxist administrative law patterns are more pointedly continental law in character. Soviet law theory originated from *Tsarist* Russia before 1917, and date back to French and German influences during the conquest of *Napoleon* in

Europe during the first half of the 19<sup>th</sup> century. In Yugoslavia, the earlier regime closely paralleled the French system while in Czechoslovakia and Poland, the systems were inspired by the *Austro-Hungarian* pattern which bore a resemblance to the French system. Romania, through its independent history tended to follow the Belgian tradition in which administrative litigation fell to the lot of regular courts<sup>26</sup>.

**Secondly**, the key elements in its system are either structural in character or akin to civil rights. These include the equality of citizens under the law, the idea of socialist legality, public participation in the administration of state activities, democratic centralism, collective conduct of state administration, socialist planning and the leadership of state administrative organizations.

**Thirdly**, regarding the protection of individuals' rights, while not totally lacking, it is not nearly evident. Such remedies are most notable in the procedures for administrative complaints. There exist numbers of specialized administrative courts or commissions, which have jurisdiction in a few categories of disputes. Particularly important among these is the system known as *Arbitrazh* (*State Arbitration*).

**Finally**, an interesting and unique means of resolution of disputes is *via* general supervision by the *Procuracy*, including the process of bringing a violation of one's legal rights to its attention.

It should be noted that in societies which emphasize *statism* such as China and Vietnam, the scope of administrative legal control is even more extensive. Before joining the Marxist orbit, the two countries also adopted a system of civil law, but it is not clear that administrative law played an appreciable part. Since they are now in a transitional period, both countries have their own development policies. However, they cannot avoid reciprocal impacts of the remaining Marxist features, the influence of civil law as well as the national traditions. The following section will centrally analyze the under development of Vietnamese administrative law over the past 50 years.

## **1.2. Some Analyses on the Under Development of Vietnamese Administrative Law**

**Looking back at its historical development, the following outstanding remarks of Vietnamese administrative law can be drawn:**

**Firstly**, modern history has witnessed the foundation of DRV (1945) which ended nearly a century of French colonization. Vietnam then experienced thirty years of suffering from fierce wars to liberate the country. Consequently, Vietnamese administrative law during this period was strongly influenced by wars and primarily aimed to serve revolutionary tasks. Administrative law was adopted as an effective instrument in the hands of the government, to contribute to land and agricultural reforms during 1953-1954, trade and industrial reforms, nationalization of ownership, in which individuals were prohibited from owning means of production, land, and all private

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<sup>26</sup> See H.B.Jacobini, *An Introduction to Comparative Administrative Law*, 145 (1991)

management<sup>27</sup>. It should be noted that French influences remained in administrative law in the early years of the DRV's foundation in legal ideology, concepts, terminology and studies. After the victory of French War in 1954 and the Northern Vietnam push towards socialism, administrative law was strongly influenced by CCP ideology and law until the end of 1950s. From 1960, it followed completely the Soviet Union and Socialist Block. During this time, people were not necessarily satisfied with government's decisions, nor did the government completely ignore the will of the people. In fact, the Inspectorates was set up and inaugurated in 1945 to deal with the complaints of the people, however due to reasons laid down by wars and the revolutionary legacies of these laws, such disputes seemed less developed and thus, administrative law lacked grounds for reviewing them.

**Secondly**, Vietnamese administrative law, after the liberation of the country (1975), can be divided into two stages, the first is up until the end of the 1980s and second is from the early 1990s up until present.

**Administrative law in the former**, particularly under the Constitution 1980, fully copied Soviet ideology and institutions that aimed to contribute to the socialist regime in which collectivism was highly concentrated. Since administration had played an important role in ruling the country through the five-year state plans, many legal norms were issued but not treated as laws, because they did not provide for satisfactory methods of enforcement and only imposed *one-sided* duties on enterprises and citizens. Disputes between people and the state did not draw much attention, while those among enterprises were resolved under the form of arbitration described as being "*just like taking money from one pocket and putting it in to another pocket, both pockets belonging to the state*"<sup>28</sup>. All administrative disputes were resolved by the original or upper level agencies, or the system of Inspectorates that formed a so-called "*minister-judge*" mechanism.

**Administrative law in the latter**, particularly since the first half of 1990s until present, has developed incrementally in both the aspect of governing and protecting people's rights and legitimate interests. This demonstrates a "catching up" with the full meaning of administrative law that was marked by the perception to JRAA, resulted in the creation of the ADCs in 1996, making a great contribution to set up "*Nha nuoc Phap quyen*" (Legal Based State) in Vietnam.

**In short**, regarding the protection to individual rights, Vietnamese administrative law is blamed for less development. The theory of active and adjudicating administration as well as the necessity of courts reviewing administrative activities was unfamiliar to Vietnamese governors and scholars due to the deep influences by Socialist legality and Soviet law, particularly in *Stalinist* period.

**To explain the less development of Vietnamese administrative law and its critiques, three**

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<sup>27</sup> See Vu Dinh Hoe, *Lich su Nha nuoc va Phap luat Vietnam*, [The History of State and Law of Vietnam], 156 (1967)

<sup>28</sup> Michael Bogdan, *Comparative Law*, 204 (1994)



**main points could be analyzed as below:**

**Firstly**, like any other branch of law, Vietnamese administrative law before *Doimoi* (1986) was a tool of class struggle and served for revolutionary tasks.

Vietnamese law students, historically, were solely taught *Marxist-Leninist* philosophy and *Marxist* theory of state and law. The doctrine of “*withering away of law*”, the concept and function of law in which the idea that law is an instrument for class rule is known as one of the biggest contentious themes. *Marxists* defined law as a form of regulation and consolidation of production relationships and also of other social relationships of class society. Law depends on the apparatus of state power of the ruling class, and reflects its interests. Thus, this definition stresses the class nature of law: every law is the law of the ruling class. Based on *Marxism*, *Lenin* developed *Marxist-Leninism* in which the core ideological feature is, the belief in the necessity of a violent overthrow of capitalism through communist revolution, to be followed by a dictatorship of the proletariat as the first stage of moving towards communism, and the need for a vanguard party to lead the proletariat in this effort.

*Marxist-Leninism* ideology was transplanted into Vietnam by *Nguyen Ai Quoc*, Communist International after the death of Lenin (1924). Vietnam followed the Soviet model in the early 1930s when the model was set up in some middle provinces. However, the *August Revolution* of 1945 did not form a State of proletariat dictatorship but a Democratic Republic with the participants of a number of non-communist groups. It is easy to identify that laws in Vietnam (*including administrative law*) since the birth of DRV all served the revolutionary work during each period. When an early revolutionary state was born and faced the complicated “*three-front battle*” and other obstacles internally, particularly the prolonged war against the French imperialists, the 1946 Constitution was regarded as the most effective tool for gathering all of society’s classes. Law on land reforms in the first half of the 1950s and collectivism, although involving some mistakes and criticisms, was really a product of class struggle between the peasants and landlords that, to some extent, resulted in “*peasants having farms*” and also the whole revolutionary victory. In the period of building socialism in the North after 1954, particularly in the transition to socialism after 1975, law was in hands of the proletariats so as to carry out collectivism, a planned central economy, the building up of a socialist culture and morality, the protecting of people’s legal rights and the punishing of treasons, *counter-reactionary* crimes and so forth.

**Secondly**, Vietnamese administrative law, since the 1960s, had totally developed in line with the family of socialist administrative law, and served for state policy and a centrally planned economy.

After 1954, particularly at the end of the 1950s, the Chinese influence greatly declined due mainly to reasons including the failure of the reunification of Vietnam by the *Geneva Agreement* of 1954, which consequently lead Hanoi to become more independent of both China and Russia; the

convulsion and chaos in China created by the “*Chinese Cultural Revolution*”; the Sino-Soviet, which conflict altered the world Communist movement; and China’s refusal of the Soviet proposal for a United Communist effort against the US in Vietnam. Since the 1960s, the Soviet Union replaced China in actively influencing Vietnamese laws and society. Administrative law and its study can be found in many Soviet sources and Vietnamese writings in this period and its development completely follows the line of socialist administrative law. Great numbers of Vietnamese students were sent to study the socialist law in the Soviet Union and Socialist Eastern Europe, and the Russian language became a compulsory subject at all Vietnamese schools and universities. 78.7% of Soviet writings and publications on the legal universe of Northern Vietnam is accounted for by the decade between 1955-1965<sup>29</sup>.

The Vietnamese Constitution of 1959, although not identical, was heavily influenced by the Soviet model with the birth of the Procuracy system, courts and local organs. This can be seen in comments by *Shchetini B.V*, a Soviet writer: “*Despite differences in name, local organs of rule in all countries of people’s democracy are Socialist in type and in this respect are related to the local organs of State rule in the USSR even though they differ in political form and level development*”<sup>30</sup>. In the Constitution of 1980, Vietnam fully copied the Soviet model and applied the “*dictatorship of the proletariat*”, a dominant socialist state model. In the post *Stalin* epoch, the concept of “*many roads to socialism*” acquired doctrinal respectability, academic exploration of the distinctive attributes of socialist experimentation became safe and fashionable in the Soviet Block and heavily impacted Vietnamese law studies.

It can *thus* be concluded that Vietnamese administrative law served the building of socialism in different stages that for the most part lacked a main forum for protecting individual rights and interests. Two fierce wars lasting thirty years made the “*individual*” or “*personal*” (*Cai toi*) become insignificant in the nation’s identity and benefits. The trespass of the administration in the centrally planned economy and the lack of judicial review also made legal scholars, who were influenced by Soviet ideology, embarrassed in their studies and their search for a modern law theory in accordance with Vietnamese development in the transitional period.

**Finally**, Vietnamese administrative law left a vacancy in the theory of distinction between active and adjudicating administration of JRAA, which was known as an expanding body of administrative law.

As mentioned above, Vietnamese administrative law, like its Soviet mentor, was always a reflection of “*the cultural ethos of the polity in which it develops*”, and tended to emphasize the

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<sup>29</sup> See George Ginsburgs, Soviet Sources on the Law of North Vietnam, *Asian Survey*, Vol.13, No.7, 660 (1973), available at <http://www.jstor.org/pss/2642704>

<sup>30</sup> See B.V.Shchetini, Some Questions of the Work of Local Organs of State Power in Countries of People Democracy, 215 (1961). Cited by George Ginsburgs, Administration and Local Government in Northern Vietnam 1945-1954, 10 *The China Quarterly*, 204 (1962)

“governing” function rather than the “adjudicating” function. In Vietnam, until July 1996, there was no administrative cases taken to courts. As inspired by the traditional socialist legal theorist that “*the interest of the governors and the governed in socialist society were almost the same*”, therefore “*there would be no conflicts of interests between them*”, Vietnam refused to create an external body for resolving administrative disputes. All disputes between the governors and the governed had been settled through the “*administrative level*”.

It is worth noting that Vietnamese administrative law, with nearly a century of French colonial influence, was inevitably shaped by French legal thinking. For this reason, while seeking a way for developing administrative law theory since the collapse of Soviet Union and Socialist Eastern Europe, Vietnam has apparently turned back the civil law tradition. The fundamental principle of French administrative law shows that the administration itself includes two co-existing sides: “*active administration*” and “*adjudicating administration*”<sup>31</sup>. Neville Brown affirms that the “*judicial functions are distinct and will always remain separate from administrative function*”<sup>32</sup>. Neil Hawke also argues that there should remain a clear distinction between those administrative agencies responsible for the “*initiation of governmental or other administrative action*”<sup>33</sup> and those which are “*adjudicative agencies*” responsible for the adjudication or resolution of disputes arising from administrative actions. A study of French Administrative Law shows that, its development has consisted principally of the working out of remedies for the protection of the private individual against the arbitrary and illegal conduct of administrative authorities, and of the extension of the control of administrative courts over authoritative acts. Thus, French administrative law, as James Garner comments, is a separate and distinct body from the civil law, “*together with a separate and distinct body of tribunals charged with deciding controversies between administration and private persons and of resolving conflicts of competence between the administrative and civil courts*”<sup>34</sup>.

In order to improve ALRS in the early 1990s, the study of the French law theory and administrative court model seemed to be very much an area of concern by Vietnamese scholars. Since 1996, some limited administrative lawsuits resolved by ADCs in parallel with those settled by administrative agencies remarked the new perception of the JRAA that had never been known in Vietnam.

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<sup>31</sup> See Neil Hawke, *An Introduction to Administrative Law*, 142 (1989)

<sup>32</sup> See L.Neville Brown & John S. Bell, *French Administrative Law*, 46 (1998)

<sup>33</sup> Neil Hawkw (1989), p.19

<sup>34</sup> Jame W.Garner, *French Administrative Law*, 6 *The Yale Law Journal*, Vol.33, 597 (1924)

## **2. Administrative Disputes Resolution Prior to 1996: Main Characteristics and Criticisms**

### **2.1. Main Characteristics**

Since the birth of DRV (1945), the Ruling Party and Government have paid attention to the rights of people to make complaints and denunciations toward all state management activities. This was clearly provided for through four Vietnamese Constitutions (1946, 1959, 1980 and 1992). Accordingly, Vietnamese citizens have the right to make complaints against administrative decisions or actions made by state agencies or authorities that might be considered illegal, irrational and infringing on their legitimate rights.

#### **The main characteristics of the previous ALRS will be described next:**

**Firstly**, people are able to make complaints and denunciations in all fields of administrative management activities. The term “*administration*” in Vietnamese refers to the “*implementation of law*”, the governing of the state administrative apparatus, but not the legislative body nor people’s court. According to this, “*state administrative management*” includes a variety of fields in society, such as land, culture, customs, tax, foreign affair, public transportation, population and labor, science, technology. During the performing of public functions in such a field, state authorities may render a certain illegal, irrational decision or action that is objected to by the people concerned.

**Secondly**, agencies that first rendered the disputed administrative decisions or actions or the upper-level agencies are empowered to settle these complaints. This mechanism is known as the “*minister-judge*” mechanism that lacked an independent judicial organ to deal with these disputes objectively and impartially. State Inspectorates attached to Government are defined as state agencies empowered to settle complaints, but their competence was still limited.

**Thirdly**, citizens, at the same time, are allowed to make complaints to various kinds of state agencies. These complaints are then forwarded to a certain competent agency. It takes much time to receive a reply. Five types of administrative agencies are vested with powers for reaching a final review in decisions.<sup>35</sup> Meanwhile agencies that are in fact held responsible are not clearly defined.

**Finally**, the process in the settlement is not announced in public, citizens do not know which agencies are presently competent to deal with their complaints.

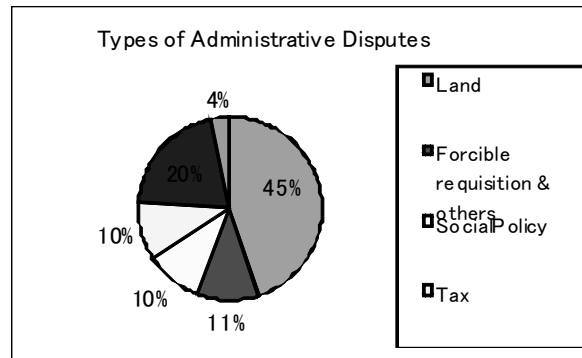
**Some main types of administrative disputes are shown below<sup>36</sup>:**

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<sup>35</sup> See OSCCD 1991, Art 10-17

<sup>36</sup> See Report on Implementation of OSCCD 1991 by State Inspectorate (January, 3<sup>rd</sup> 1998), pp 8-13.

**Chart 1: Type of Administrative Disputes**



Complaints concerning land management were presented at most localities and accounted for 45% of the total number of petitions. Among these, the disputes are listed as *farm land disputes* arising since the “*land reform*” policy in 1954-1956 in North of Vietnam and in 1976 in the South; *forest land disputes* arising between people and state-managed farms or army units; ancestor’s inherited land; the land of pagodas, temples and the others that constituted around 30% of total land disputes. The remaining 15% of disputes are those related to claims for state compensation for dispossessed land-use rights for public purposes. The complaints relating to forcible requisitions, purchases or confiscation of urban housing involved in the socialist transformation policy, people’s property that was appropriated by the State through two wars, claims for granting permissions of building, and repairing urban houses make up about 11% of the total petitions. Complaints involving social policies, such as the war-disabled soldiers and martyr’s policy, Vietnamese heroic mothers policy, retirement petitions, state bank loans to very poor farmer families and claims for tax collection policy equally counted for 10% of the total petitions. Complaints concerning responsibility of other state agencies, such as the procuratorates, court, police and political-social organizations that were sent to administrative agencies, made up 20.36% of total petitions. The remaining 3.64% is placed under the “other disputes”.

From 1986 to 1990, the total numbers of petitions sent to various administrative agencies were over 700,000 in which 58% were resolved. In 1990, the number of petitions was about 80,000, but the nature of complaints seemed more complicated and serious. Below is a table showing settlement of administrative complaints from 1991 to 1996:

**Table 1: Settlement of Administrative Complaints from 1991 - 1996**

Year	Total petitions	Resolved	Percentage
1991	62.161	40.405	65%
1992	95.737	71.324	74.5%
1993	105.761	86.512	81.8%
1994	98.186	83.546	85.08%
1995	88.173	73.250	83.08%
1996	106.263	87.667	82.5%

## 2.2. Criticisms

### 2.2.1. Lack of Judicial Review

The previous so-called “*minister-judge*” mechanism was influenced by the Soviet Union, in which the administrative agencies were handed over the competencies of both giving administrative decisions while performing the public power, and also making final judgments thereof.

Under the regulation of OSCCD (1991), from articles 10-17, administrative agencies vested in settlement of disputes consisted of agencies that first rendered an administrative decision (*original agencies*), the upper-level agencies, and the system of State Inspectorate at all levels. The settlement of administrative disputes is conducted by both administrative agencies and State Inspectorates and is regarded as a “*three-level system*” for review as follows:

**In the first level**, the original agency would be in charge of reconsideration when certain complaints appeared.

**In the second level**, if the original agency is the People’s Committee, the Chief Inspector at the immediate-higher level would be vested in the settlement. If the original agency is the agency belonging to People’s Committee, Chief Inspector at the same level would be the competent authority. In a case where the original agency is the agency belonging to a certain ministry (*or of ministerial level*), the competent authority would be in hands of Chief Inspector of the ministerial level.

**In the last level**, the final settlement competence belongs to the Chairman of People’s Committee, Minister (*the Head of ministerial level*), and General State Inspector. The General State Inspector also has the final competence on taking consideration and reviewing all dispositions made by Ministers or the Chairman of People’s Committee.

Thus, according to the previous mechanism, there were no independent judicial organs vested in settlement of disputes. Although Inspectorates held a settlement function provided in both the Ordinance on Inspection and the OSCCD, in practice, they are only a “*helping hand*”<sup>37</sup> to the

<sup>37</sup> See Per Bergling et al, *The Vietnamese Legal System*, 74 (1998)

Chairman of People's Committees that failed to act as independent organs to protect people infringed against.

### **2.2.2. Imperfection of Legal Norms**

In Vietnam, the substantive laws applied to settle administrative disputes consist of a great number of legislative regulations. However, they are still imperfect, non synchronous and sometimes make the competent organs confused, bringing settlement to a standstill.

#### **To be concrete, its imperfections can be identified as follows:**

**Firstly**, there was a lack of legal regulations concerning the complaints that were closely connected to the revolutionary periods prior to reunification of the country (1975). This lack of regulation included duties of the State regarding borrowed properties of people through two wars<sup>38</sup>, the agricultural land reform in 1953-1954, the management of "non-owner houses" after liberation of the country and so on. This period was characterized by the application of policy decisions of Party, and state plans aiming to encourage people's revolutionary enthusiasm, so that some policies or measures were seen as "*compulsory and temporary*" that inevitably violated the justice of certain people or groups. In the process of building the country after liberation, due to the lack of state policies that were based on enacting the legislative regulations involving the alleged issues, it became difficult for competent agencies to deal with such disputes.

**Secondly**, there appeared to be overlapping and contradictory legal regulations. The OSCCD and the Ordinance on Inspection were the legal basis for settlement of administrative disputes before the establishment of the ADCs, but in fact, they contradicted some legislative documents, including the Law on Land, and the numbers of ordinances concerning the different fields of state management. For instance, while the State Inspectorate was stipulated in both ordinances as an agency in competence of dealing with all disputes, the Law on Land defined the People's Committee at all levels as the only agency empowered to settle land disputes at locality<sup>39</sup>. In cases of disputes arising in the field of housing, "*firmly structured objects*" or "*long termed growing trees*", the competence was in the hands of the people's court<sup>40</sup>. Moreover, the regulations concerning the settlement competence were different among legal norms while the Law on Enacting Legal Norms<sup>41</sup> aiming to deal with such overlapping and contradictions was not enacted. This caused many difficulties in determining which proper law should be followed. The OSCCD provided that five agencies were empowered to reach the final review decision<sup>42</sup>, but this could not be carried

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<sup>38</sup> State loaned money, gold, rice or some other properties of people to serve the revolutionary works through two wars. After liberation, people made complaints to State for giving back, but it still lacks of legal regulations concerning on these fields.

<sup>39</sup> Law on Land, Art 6, 9, 21

<sup>40</sup> Law on Land, Art 22

<sup>41</sup> Luật ban hành Văn bản Quy phạm pháp luật, [Law on Enacting Legal Norms] was first enacted on November, 12<sup>th</sup> 1996

<sup>42</sup> Supra note 35

out properly due to an unclear distinction, leading to the renouncement and avoidance of responsibility by the competent agencies.

**The third imperfection** concerned the obsolete regulations that failed to deal with the rapid change of society. After the *Doi Moi* policy, Vietnam shifted to a market oriented economy with the appearance of a wide range of reforms that required the new legal framework to adjust to continuous changes. When disputes arose, especially in fields such as foreign investment, environment protection, business or urban development, the competent agencies became puzzled as they were unable to find regulations concerned with such disputes.

**The final imperfection** is concerned with the non-feasibility of legal regulations. The administrative agencies were obliged to render a review decision, but no compulsory period of time was defined. State Inspectorates were empowered to settle disputes, but in fact, they appeared to have carried out “consultative” functions for People’s Committees, giving proposals or solutions rather than giving real review decisions.

### ***2.2.3. Defect of Settlement Proceedings and Failure of Implementation***

OSCCD 1991 provided for reviewing procedures by stipulating that a complaint had to be made within six months from the day the administrative decision was completed, except in certain cases provided by law<sup>43</sup>. The competent agency in the *first-instance* has to settle the complaint within 30 days after the day on which the application for review was made. In other instances, the application has to be settled within 60 days after the complaint was made.<sup>44</sup> Thus, the State Inspectorate is not the competent agency for resolving complaints in the *first-instance*. After receiving complaints, the inspectorate agency notifies the discontent citizen and sends complaints to the authorities concerned<sup>45</sup>. The remaining problem was that people did not know where to turn with their complaints. Complaints were sent to various agencies; it is estimated that 30 percent<sup>46</sup> of complaints are in fact never settled at all, because they are sent to the wrong address. It takes at least three to four months at each level to settle a normal complaint, provided it is sent to the competent agency to begin with. Thus, a great number of administrative complaints are not settled within the time limit while the administrative disputes are growing in number and becoming more complicated in accordance with changes in society. This makes settlement come to a standstill and causes a great amount of damage to the people as well as the prestige of administrative agencies.<sup>47</sup>

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<sup>43</sup> OSCCD 1991, Art 19

<sup>44</sup> OSCCD 1991, Art 22

<sup>45</sup> OSCCD 1991, Art 21

<sup>46</sup> See Le Binh Vong, *Mot so van de ve Tai phan hanh chinh o Vietnam*, [Some Issues on Administrative Jurisdiction in Vietnam], 81 (1994)

<sup>47</sup> *Supra* note 36, at 9



Under this mechanism, the democratic rights of complainants are not ensured because they have no chance to examine and freely give their own opinions to the administrative agency empowered to settle their complaints. All settlements are not in public view and the arguments among parties in supply of evidence are not provided. People therefore have no other choice other than patiently wait for a reply from the competent agency as “*granting a boon*”<sup>48</sup>.

#### **2.2.4. Capacity Limitation of State Officials and People’s Legal Awareness**

**Firstly**, the outstanding problem here is the limited legal capacity of state officials in dealing with disputes. The disputes arising in the localities, such as the commune and district level, account for 60-70% of the total, however the number of inspectors in these levels is limited to two or three, some rural areas in fact only one inspector who deals with disputes. The inspectors in localities lack the chance to improve legal knowledge as well as other specialized knowledge necessary for dealing with disputes.

The administrative agencies that rendered the complained decisions did not pay much attention to the settlement of disputes. Although each agency, such as the People’s Committee, had the “*Board of Receiving People’s Petition*” a board that files and deals with people’s complaints, the coordination between this Board and the agency in settlement was unsatisfactory. Some of these boards delegated this task in its entirety to the inspectorates, which in fact held no real power. The heads of agencies did not at times directly resolve complaints but delegated them to assistants to render the announcement to the people concerned. Mistakes were at times made in promulgating legal documents in both formality and substantiality that led to a lowering in the effectiveness of the settlement mechanism as well as the distrust of the people.

The State officials dealing with disputes at times did not act in the right way according to law, favoring instead the person they liked. At the locality, especially in the countryside, due to the impact of “*relative and neighboring relation*”, negotiation was almost always applied in simple cases, while the more complicated cases were ignored, or those cases that were solved, were done so in a compulsory manner. Consequently, settlement of who was right or wrong was often reached in an unclear way.

**Secondly**, concerns the limitation of legal knowledge amongst the people and their nonsupport towards state officials. The survey pointed out that 70% of those sharing settlement defects belong to administrative agencies, with the remainder belonging to people who make complaints<sup>49</sup>. The legal knowledge of the people is still substandard, and is believed to be caused by ineffective legal education and promulgation. People do not know what agency to deal with for such disputes or which procedures should be applied. Consequently, that after waiting impatiently

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<sup>48</sup> See Dinh Van Minh, *Y nghĩa khoa học và thực tiễn giải quyết khiếu nại theo cấp Hành chính*, [The scientific and practical implication of settlement of complaints by administrative agencies] in *Thanh tra Nhà nước*, supra note 9, at.193

<sup>49</sup> *Ibid*, at 9

for reply of appeals, they became disappointed or sometimes display serious outbursts of anger. This has been demonstrated with gatherings of great numbers of people in front state local agencies as well as central agencies to put pressures to deal with the disputes<sup>50</sup>. Negative action has also occurred at commune levels<sup>51</sup>.

The common phenomenon was the antipathy and non-support of people towards bureaucracy. People did not often believe in the way of settling disputes by competent local agencies<sup>52</sup>, so they chose to both send petitions to the central level for review and to find another way by using “*close, relative relationships*” in considering matters. Moreover, unlike Westerners, the Vietnamese prefer mediation to litigation. They are respectfully patient to wait for a reply from state agencies, and to some extent, passive in protecting themselves from administrative abuses that inevitably contributed for so long during the previous mechanism.

**To conclude**, the previous mechanism exposed a lot of negatives that needed to be reformed to adapt to new social changes. The next section will continue analyzing the indispensable need for new a perception to JRAA as well as the setting up of an ADCs Model in July, 1996.

## II. New Perception to Judicial Review of Administrative Action in Vietnam

JRAA is a very popular legal concept closely attached to the ROL that originated in the common law system. Accordingly, it is an indispensable concept for retaining administrative agencies, while exercising great discretionary powers on a day-to-day basis within legal bounds. JRAA, which was adopted in Vietnam under the civil law thinking and under the name of “*Tai Phan Hanh Chinh*” (Administrative Jurisdiction), takes on a wide range of meanings and has been heavily debated by legal scientists. The majority assumed that along with the birth of ADCs in July, 1996, it has essentially marked the formation and development of JRAA in Vietnam. However, some researchers looked back over Vietnamese history and considered that it had already existed for quite a long period, “*even in Vietnamese Feudalism*”. This paper consequently gives in to curiosity and examines whether or not JRAA existed historically.

### 1. Whether Judicial Review of Administrative Action Existed Historically in Vietnam

#### 1.1. Trace back to Vietnamese Feudalism Regarding Settlement of People’s Claims

*Nguyen Thanh Binh*<sup>53</sup> absorbed the legal concept of “*Tai Phan Hanh Chinh*” in a broad

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<sup>50</sup> Le Binh Vong (1994), p. 80.

<sup>51</sup> Supra note 36, at 9-10

<sup>52</sup> Because they think that the local agency may be not impartial and objective to deal with complaints. In fact, the result of correct complaints constitutes 57.54%, the both correct or wrong complaints makes 24.20%, the wrong complaints is about 18.26%. See Ibid, at 7

<sup>53</sup> He now is the Chief of Lawyer Training Department, Judicial Academy. His doctoral dissertation titled: “*The Court’s Jurisdiction over Settlement of Administrative Cases – Guarantee of Justice in the Relationship between State and Citizen*” was published in

sense and dated its existence back to Vietnamese feudalism with the aim of proving that it used to appear in some similar activities. Obviously, it is far from the substantial meaning of this concept as will be analyzed later. However, to fully understand the historical development of ALRS as well as to support topical discussion, this section finds necessity in briefly introducing the settlement of people's claims by Vietnamese Kings in Feudalism.

Confucianism ruling in Vietnamese feudal regimes invested the paramount state power to the King as a "*Mandate of Heaven*". Accordingly the King was expected to treat his people like his children, with full compassion and protection. Turning back to Vietnamese feudal regimes, since Vietnam's Independence from its Chinese Ruler in 938, it is true that although people were not regarded as citizens in modern sense, some "*sage Kings*" also practiced good governance policies to develop the country, such as a censorial system to supervise the kings rulings and considerably concern people's claims toward local mandarins.

**In the Ly King period (1010-1225)**, King *Ly Thai Tong*, from his ascending to the throne in 1028, remarkably improved the state organization and "*put the bell along the road of King Palace that people could ring for complaining the misconducts of the local feudal power*"<sup>54</sup>. In 1158, King *Ly Anh Tong* also allowed to "*put the big box in the center of the King Palace's yard then people can leave their petitions*"<sup>55</sup>.

**In the Tran King period (1226-1400)**, the Kings appointed some agencies and authorities in charge of settlement of people's complaints. King *Tran Nhan Tong* (1278-1293) allowed people to directly meet and present their complaints to him when he traveled incognito in localities.

**In the Early Le King period (1428-1527)**, the first feudal law code namely *Hong Duc (1483)* consisted of 722 articles in which there were many articles concerning the administrative complaints and denunciations toward the central and local authority's misconducts. People were able to directly or through a representative acting their behalf, initiate lawsuits from the grass roots to the central level. Under this Code, an important element of the bureaucracy was the "*Sovereign Council*" which had both administrative and judicial functions. Subject to royal prerogative, the Sovereign Council controlled provincial administration<sup>56</sup>. *Bui Xuan Dinh* comments in his work "*Vietnamese Feudalism: State and Law*" that the *Hong Duc* Code was the first legislation providing in detail claim proceedings, the competence delimitation of local authority to avoid the stagnation of petitions at the local level as well as the jumping to centre<sup>57</sup>. He evidenced article 672 of this Code

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<sup>54</sup> See *Dai Viet Su Ky Toan Thu*, Volume 1, 35 (1983)

<sup>55</sup> *Ibid*, at 45

<sup>56</sup> M.B.Hooker, *A Concise Legal History of South East Asia*, 74 (1978).

<sup>57</sup> *Bui Xuan Dinh, Nha nuoc va Phap Luat thoi Phong Kien Vietnam*, [Vietnamese Feudalism: State and Law], 65 (2005)

that prohibited local authority to refuse people's claims and allowed them to jump petitions to a higher level. Another additional provision also provides that "*any authority that violates the law will be beaten by cane or dismissed from his current post*"<sup>58</sup>. Being deeply Confucian influenced, article 3 and 4 of *Hong Duc Code* established certain categories of persons as privileged. They included relatives of the sovereign and those in his immediate service, certain officers of the state and persons whose virtue and wisdom had been officially recognized. Accordingly, these persons could be punished only by the sovereign and complaints against them had to be made in a special form to the sovereign. The imposition of sanctions was at the sovereign's discretion.

**In the Le-Trinh period (1527-1789)**, under the ruling of King *Hy Tong* (1680-1705) and King *Du Tong* (1705-1729), although the legislation (codification) was not as developed as that of *Hong Duc's*, as *Bui Xuan Dinh* comments, "*this seems the most flourishing period of dealing with people's claims and denunciation*"<sup>59</sup>. A Chinese-like censorial system was set up in both the centre and localities. At central level, "*Ngu Su Dai*" (Central Censorate) was known as "*the eyes and ears*" of State that supervised all high-ranking mandarins' activities and punished those who conducted illegal actions based on people's claims or denunciations. At the local level, "*Hien Ty*" and "*Giam Sat Ngu Su*" (Surveillance Agencies) were empowered to deal with claims related to local mandarins, punishing authorities involved in bribes, corruption and misconduct against their status as people's fathers. A lot of imperial directives were enacted in this period to regulate in detail the claims proceedings, competence and standards of local censors. Such imperial directives include 13 Surveillance Inquiries and 44 additional provisions by King *Le Huyen Tong* (1663), which provided the proper proceedings to avoid the stagnation of petitions and punish authorities taking advantages of resolving claims for their own profits<sup>60</sup>. A further two imperial directives (1739) prohibited the jumping of petitions to a higher level or making bribes to authorities dealing with concerned claims. Ten standards of local censors (1731) which required those having a high degree of Confucian examination replace the fatherhood system and a regulation on limited time of one month to deal with tax claims (1726)<sup>61</sup> are further examples of imperial directives implemented during this period.

**In the Nguyen King period (1802-1858)**, King *Minh Mang* in 1827 set up further Regional Surveillance Agencies (*Giam Sat Ngu Su Dia Phuong*) and *Tam Phap Ty* at the central level which functioned as legal advisers to the King in solving people's complaints and also a solver in commission. In cases of necessity, the King sent representatives to inspect the designated localities and gather people's petitions. It should be noted that "*Ngu Su Dai*" or "*Tam Phap Ty*" was similar to the Chinese Censorate, but not exactly the same, since it had mixed functions of surveillance, control,

<sup>58</sup> Quoc trieu Hinh Luat, [Hong Duc Code], 229 (1991).

<sup>59</sup> Bui Xuan Dinh (2005), p.128

<sup>60</sup> Supra note 54, at 297

<sup>61</sup> Lich Trieu Tap Ky, Vol. 2, 119 (1975)

sanction and consultant. As *Woodside* commented, the *Nguyen* Censorate was officially a full copy of Chinese (Ch'ing) Censorate Model in 1832 under its name *Do Sat Vien*. It held the supreme control to six ministries (*Luc Bo*, as the Interior, Rites, Finance, Public Works, Justice, Wars) and all local agencies through Regional Surveillance Agencies. Thus, *Do Sat Vien* (or *Nguyen* Censorate) along with *Tam Phap Ty* (the Inspection and Advisory Agency) and *Dai Ly Tu* (the Supreme Court) constructed the judicial system in this period.

The *Gia Long* Code (1815) was a faithful reflection of the laws of *T'ang* and the latter *Ch'ing* with 938 articles including many provisions related to people's claims and procedures that made them easier to initiate a lawsuit. The administrative law filed, Book One of *Gia Long* Code provided the system of government administration (art.13), the succession to rank (art.49), the collusion and misconduct of officers and the right of people for claims. Book Two regulated the conduct of the magistracy. Article 59 is interesting in that it especially imposed a duty on the magistrate to fully know the laws and to administer them in the proper spirit. Penalties, including fines and caning, were imposed where an authority failed to satisfy his superiors, in the execution of the sovereign's edicts, or committed wrongdoings, such as destroying the office seals, making errors in public documents, neglecting to make a proper report, using an official seal improperly and so forth. However, as already mentioned, due to deep influences by Confucian hierarchical order, this Code also gave many favorable provisions to "superior men" in cases of law violation. A government officer, for example, was punished far more severely than an ordinary person (art.275). Specific classes involving superior and inferior officers (art.276), and the striking an individual of the royal blood (art.274) clearly demonstrate the hierarchy embedded in these laws.

**To conclude**, it is apparent that Vietnamese Kings, albeit not all of them, to certain extent, paid attention to the resolving of people's claims and the self-control of their ruling by codifying and setting up some institutions like the *censorate*, inspectorate agency model. Regarding the aspect of protecting people from administrative power, the concept of administrative justice derived from the West was quite unfamiliar in Vietnamese feudalism. Instead, due to vigorous influences from East Asia's Confucianism, Vietnamese administrative review has its own characteristics, although some commonalities can be shared with that of China. The *Nguyen* Censorate came later than its Chinese predecessor. Until 1832, although primitive and Confucian in style, Vietnam seems to have three independent institutions that may challenge state authority – namely: *Do Sat Vien* (*Nguyen* Censorate – Supreme Control), *Tam Phap Ty* (Inspection and Advisory) and *Dai Ly Tu* (Supreme Court). Nevertheless, Vietnam had no administrative courts like that which existed in Nationalist China. Since the birth of the Independent DRV, some Soviet concepts and institutions, such as administrative justice, socialist legality, and the *procuratura* were actively imported into Vietnam and were integrated with Confucian tradition. Legacy of French colonialism also remains. The next section continues briefly introducing the court's jurisdiction over administrative cases since French Colony up

to 1975.

## 1.2. Court Jurisdiction over Administrative Cases Prior to 1975

Due to the wars and the differences in legal ideology, there has been little Vietnamese legal research carried out regarding this issue. Mentioned only in modern history, *Vu Thu*<sup>62</sup> by making references to numbers of previous legal provisions argued that JRAA, in the aspect of the judicial court which granted the jurisdiction to hear administrative cases, originated in the French colony and existed in Vietnam immediately after the foundation of DRV in 1945. Furthermore, the most recent research by the Government Inspectorate Review Institution (2006) also supported the ideal that *Tai Phan Hanh Chinh* in Vietnam had been derived from the French colonization during the 1920s with the enactment of Decree (1921) by French Government. This decree provided that all administrative disputes arising in Vietnam were in the hands of both *Conseil d'Etat* and *Dong Duong Administrative Jurisdiction Council*<sup>63</sup>. However, the subjects addressed to judgments were limited to French state officials. This research also referred to some documents enacted within the French colony in the South of Vietnam before 1954 that founded an independent administrative jurisdiction body, and included Administrative Court such as the Order 02 (1950).

**To provide more evidence for the court jurisdiction over administrative cases in this period, some analyses should be given as below:**

**Firstly**, in the period of French colony, the territories in which French sovereignty was directly exercised (*Cochin-China*) had quite distinct types of administration in comparison with that of the French protectorate (*Annam, Tonkin*), the former providing for single and the later for a mixed form. In *Cochin-China*, all legislative and judicial powers were directly in hands of the French law (*Statut Francais*) applied to French citizens, while *Statut Annamite*<sup>64</sup> applied to indigenous persons and *asiatiques assmiles*. French laws were always applied in cases of disputes between two laws or parties. In *Annam* and *Tonkin*, French power was exercised indirectly since the indigenous law codes (*as Code of Gia Long, 1815*) and tribunals were still retained. In *Tonkin*, the influence of the protecting power was exercised far more directly in judicial administration and the reform of substantive law after Royal Ordinances (1886,1889) devised a mixed *French-Tonkinese* system of jurisdiction and distributed legislative and administrative power between French delegates and *Tonkinese* ministers. However, the over-all control of all indigenous justice was transferred to the *Resident Superier* in the case of *Tonkin* (1900) and *Annam* (1901)<sup>65</sup>.

<sup>62</sup> See Vu Thu, *The Foundation and Development of Administrative Justice in Vietnam*, 10 *Legislative Studies*, 26 (2003)

<sup>63</sup> Nguyen Tuan Anh & Tran Van Long, *Mot so Quan niem chung ve Tai phan Hanh chinh*, [Some Common Concepts on the Administrative Jurisdiction], *Bulletin of Government Inspection Review Institution (GIRI)*, 14 (2006)

<sup>64</sup> Statutes promulgated en bloc in *Cochin-China* by Governor's *Arrete*, modifying the French Codes for the colony, abolishing the indigenous penal laws, codifying the *statut personnel* of *Annamites*

<sup>65</sup> See M.B.Hooker (1978), pp.153-173.

Thus, regarding the settlement of administrative cases, the French *Conseil d'Etat* model and French substantive laws were applied to deal with cases involving French officers, not for indigenous persons. It should be regarded as an expansion of French *Conseil d'Etat* jurisdiction out of French borders, not an establishment of a new mechanism for resolving administrative litigations in Vietnam since Vietnamese officers' claims were always out of this court jurisdiction. However, as the group of researchers of the Government Inspectorates evidenced the establishment of *Dong Duong* Administrative Jurisdiction Council, and the delimitation with *Conseil d'Etat* under the Decree on May, 6<sup>th</sup> 1921 and its revisions in 1928, 1932, it is undeniable that it brings Vietnamese legal system in general and ALRS in particular much closer to French origin. It also explains why among foreign donors, France was the most influential partner in the study and foundation of the administrative court model in Vietnam. Like colonial legal transplantation elsewhere in East Asia, the imported French colonial laws covered a "thin veneer"<sup>66</sup> of Western legal ideology. In Vietnam, although political events after 1945 may have brought further changes in Vietnamese law, as *David* and *Brierley* commented, "the socialist codes are in essence civil law documents"<sup>67</sup>.

**Secondly**, in the early days of DRV, to support the view that judicial courts granted the jurisdiction to hear administrative cases historically existed in Vietnam, *Vu Thu* evidenced the Decree 41/SL issued by Government of DRV on October, 3<sup>rd</sup> 1945 saying that, the Ministry of Justice was assigned to manage the model of administrative court set up under the French colonial regime. However, in fact, it dealt with no cases, since Vietnam, right after was involved in French resistance war for nine years and the French court model was gradually replaced by a Socialist type. He also provided further proof that Article 120 of Law on Direct Tax (*June, 18<sup>th</sup> 1949*) allowed taxpayers to bring administrative cases to the judicial court in the case of disagreement with their tax assessment. However, these provisions also could not, in reality, be performed.

*Vu Thu*'s arguments seem reasonable when he quoted more legal provisions such as Law 04 on Election of Local People's Councils and People's Committee (1957) that allowed people to bring action against State officials in court where their names were omitted from the list of voters (Art 15). This was reconfirmed in Article 11 of the Ordinance on Procedure for Resolving Civil Cases (1989), which states that the People's Court has jurisdiction to hear cases relating to complaints such as the list of voters, complaints regarding the inaction of state agencies to register civil status.

**Finally**, below is an overview of the period of the Vietnam Republic in the South before 1975, with some outstanding remarks that should be considered:

*First of all*, the Geneva Conference ended on July, 21 1954 with an agreement on the division of Vietnam into two territories at the seventeenth parallel. As commented by *Williams*, "the

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<sup>66</sup> See S H Roberts, *The History of French Colonial Policy 1870-1925*, pp.64-75 (1963)

<sup>67</sup> David Rene & Brierley J.E.C, *Major Legal System in the World today*, 207 (1985)

*communist regime in North Vietnam, led by Ho Chi Minh*” regarded the government of the South “*as little more than an American puppet regime*”<sup>68</sup>. In fact, the US, took advantage of the French defeat in the North, and had simply replaced France to set up a *new* imperialist colony in Southern Vietnam<sup>69</sup>. A year after the Republic of Vietnam was proclaimed, the first Constitution was promulgated on October, 26<sup>th</sup> 1956, with *Ngo Dinh Diem* as President. This arrangement formed the “*First Republic of Vietnam*”. President *Diem*’s Regime came to a violent end in 1963, after which followed a Military Government headed by General *Duong Van Minh* until 1967. The new Constitution on April, 1 1967 provided a presidential system based on the Separation of Power that formed the “*Second Republic of Vietnam*” until 1975. An interesting question for discussion here is whether the legal system in Southern Republic was similar to that of US or “*common law*” in nature, or whether the French administrative court model still remained, and if so, why?

It should be noted that Constitutions were frequently changed with seven revisions that at times looked like the US model, although not quite the same, and other times resembled a model of military dictatorship. While the first Constitution provided for some checks on executive power, no separate judicial branch was set up since the court system was under the control of the executive branch namely Department of Justice. The last Constitution provided a president, bicameral legislature, independent judiciary and checks and balances between the three branches<sup>70</sup>.

Regarding the model and jurisdiction over administrative lawsuits, as a direct result of the separate administration of *Cochin-China* and *Annam* under French colony, the court system in Republic of Vietnam still adhered to the French model, known as a *dual system* of judicial and administrative courts, each having its own hierarchy and culminating in an appeal court. The highest judicial court was the *Cour de Cassation* and the highest administrative court, the *Conseil d’Etat*. After 1967, the control of the court system was changed from the Ministry of Justice to the Supreme Court, however, the judicial system remained French “*in tone*” and the functions of the lower courts were virtually unchanged. The common law concepts were still alien to Vietnamese jurisprudence, while its codification - such as the administrative code, the code on the expropriation of properties for public uses, the housing code and so on - was generally done so in the civil law thinking. In addition, trial proceedings were, unlike those in the US characterized by direct confrontation and cross-examination, and inquisitorial in nature.

**To conclude**, all above evidence suggests that JRAA historically appeared in Vietnam. However, a lack of both scholarly research and effective legislation in this area after 1945 proves that legal theory on JRAA as well as a real legal institution guaranteed for its existence was

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<sup>68</sup> Michael.C.Williams, *Vietnamese at Crossroad*, 13 (1992)

<sup>69</sup> National Administration Institute, *Giao trinh Lich su Hanh chinh Nha nuoc Vietnam*, [The Textbook of Vietnamese State Administration History], 411 (2005)

<sup>70</sup> See Major General George S. Prugh, *Law at War: Vietnam 1964-1973*, 22 (1975)



definitely absent in Vietnam until the bloom of legal research related to a Law-Based State and search for an administrative court model after the VII CPV's Congress (1991).

## **2. Looking for Model of Law-Based State and of Judicial Review of Administrative Action**

### **2.1. From Socialist Legality to Socialist Law-Based State**

The doctrine of socialist legality was actively imported into Vietnam during 1960s-1970s. Socialist legality was developed in Soviet society *from* a dictatorial trend that advocated the use of law and legal institutions to suppress all opposition to the regime *to* a new trend (*after 1960*) that stressed the need to protect the procedural and statutory rights of citizens, while still calling for obedience to the state. Under the *Gorbachev* regime by late 1986, it stressed anew the importance of individual rights in relation to the state and criticized those who violated the procedural laws in implementing Soviet justice.

Socialist legality officially became a constitutional principle under the Vietnamese Constitution of 1980. Article 12 stated that “*State manages society by means of laws that endlessly strengthen the socialist legality*”. It invested the CPV and State with prerogative powers to substitute policy for law. Until the early of 1990s, Vietnam totally applied the “*dictatorship of the proletariat*”- a dominant model in the whole socialist system.

Looking back at the Soviet context during the mid-1980s, *Mikhail Gorbachev* introduced a series of constitutional changes designed to formalize economic and social liberalization (*perestroika*) without fundamentally disrupting Communist Party Power. While looking for an appropriate ideology to fulfill the current social changes, Soviet law makers turned back *Rechtsstaat* theory and developed a constitutional doctrine – *Pravovoe Gosudarstvo* – that proclaimed the supremacy of law and the constitution.

Parallel to the German *Rechtsstaat*, *Pravovoe Gosudarstvo* promoted the implementation of state policy through legislation. Contrasting with the ROL, it denies social customs and precedents derived from sources outside the state that can check political and bureaucratic powers. If there were no written legal norms, the state was powerless to govern or change any situation. Besides this, the law was defined as an instrument of the government. *Pravovoe Gosudarstvo* also required all government actions to be bound by law. Nevertheless, as *Johnz Gillespie* comments, it fundamentally differed from *Rechtsstaat* in that it “*radically departed from Leninist socialist legality with its emphasis on Communist Party paramountcy and legal exceptionalism*”<sup>71</sup>. In “*Political Report*” to XXVII Party Congress (February, 25<sup>th</sup> 1986), *Gorbachev* made three basic points related to *Pravovoe Gosudarstvo*, to role of law, and role of courts in controlling administrative acts. Among them, an important point was that, in order to protect the state and all individual's legal rights and

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<sup>71</sup> John Gillespie, Concepts of Law in Vietnam, in Randall Peerenboom ed, Asian Discourse of Rule of Law, 151 (2004)

interests, it was essential that to improve the work of procurators, the courts and the *advokatura* (lawyers) and to prepare “the law envisaged by the Constitution on the procedure for appealing to court the illegal acts of officials which infringed upon a citizen’s rights”<sup>72</sup>. This law was then enacted in July, 1987 based on the article 58 of USSR Constitution of 1977.

Vietnam in the early 1980s was in a total economic, socio-political and ideological crisis. After decades of socialist orthodoxy, during the V Congress of CPV (1982), it was being controversially debated whether revolutionary ideology should continue to dominate legal thinking. Many arguments were made for the separating of the CPV from the day-to-day running of the government and governing society through law rather than moral rules or administrative orders. The VI CPV Congress (1986) made an epoch for *Doimoi* in which the central planning economy was replaced by the market economy and law rather than morality that governs all society. The Party-State recognized that the socialist legality could no longer regulate a mixed-market economy. The Chairman of the National Administration Institute, *Doan Trong Truyen*, admitted that Vietnamese lawmakers, while searching for a new legal ideology, turned once again to the Soviet Union for inspiration<sup>73</sup>. *Pravovoe Gosudarstvo* was strongly welcomed by Vietnamese leaders, and later officially introduced in the VII CPV Congress (1991) by General Secretary *Do Muoi*. In Vietnamese legal terminology, it was called *Nha nuoc Phap quyen* and shares some common points with *Pravovoe Gosudarstvo*, such as: (1) It requires a stable, authoritative and compulsory law; (2) All individuals and entities are equal to law; (3) Law is used to constrain and supervise the administration and enforcement (4) It still keeps the sole Communist Party Ruling, although it clearly defines Party as a policy-maker while leaving State to enact and implement under Party’s guidance. However, the main difference with the Soviet *Pravovoe Gosudarstvo* is that Vietnamese legal theorists did not abandon the principle of socialist legality. Instead, they attached the term “socialist” and constituted a *Socialist Law-Based State*.

It is remarkable that although the ideology of Law-Based State had been introduced in 1991, the doctrine of socialist legality was still dominant and recognized by the Constitution of 1992. Until December, 2001, article 2 of the Constitution said that “*The Socialist Republic of Vietnam is a Socialist Law-Based State of the People, by the People and for the People*”. While socialist legality promotes party paramountcy and state bureaucratic management, *Nha Nuoc Phap quyen* advocates limiting party and state power with law. The juxtaposition and interaction between socialist legality and *Socialist Law-Based State* make ideological debates among policy-makers and scholars and forms a type of *statist* socialism.

*Dao Tri Uc* and his State and Law Institution recently introduced a book entitled “Model

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<sup>72</sup> See Donald D. Barry, Administrative Justice: The Role of Soviet Courts in Controlling Administrative Acts, in George Ginsburgs ed, *Soviet Administrative Law: Theory and Policy*, 63 (1989)

<sup>73</sup> See Doan Trong Truyen, *Ve Cai cach Bo may Nha nuoc*, [On the Reform of the State Apparatus], 50 (1991)

of Organization and Operation of *Socialist Law-Based State*” (2007) that makes a full analysis of its model and characteristics in the current context. This book presents six characteristics of *Vietnamese Socialist Law-Based State* as follow<sup>74</sup>: (1) It is a State of People, by the People and for the People. It relies on *Lenin*’s assertion that democracy is only achieved where the working class centralize power in their hands; (2) State organs and all individuals must respect and act within the Constitution and Laws; (3) It governs society by laws and guarantees the supremacy of laws in society. It separates Party’s Guidance and State’s Governance and all Party activities are under the control of law; (4) It respects and protects all people’s rights and legal interests and maintains the democratic relationship between State and citizens; (5) It is constructed under the principle of Power Concentration, but clear distinction among three State Powers: Legislative, Executive and Judicial. All State Power is unified and centralized in the hands of the National Assembly. Independence of Courts is recalled by government, particularly at localities to resolve all disputes incompatible with the principle of Legality; (6) It is under the sole leadership of CPV.

## **2.2. Indispensable Need for Judicial Review of Administrative Action**

The ALRS prior to 1996 apparently exposed many defects that needed to be replaced. The establishment of an administrative court model undoubtedly aimed to carry out the main objectives of the Legal and Judicial Reform after the VII CPV Congress<sup>75</sup>, building up the model of *Socialist Law-Based State* as well as the democratic mechanism in Vietnam. In order to explain the indispensable need for the creation of an administrative court model, this paper takes in consideration some aspects as outlined below:

### **2.2.1. Political and Democratic Aspects**

The Declaration of Independence by President *Ho Chi Minh* (Sep, 2<sup>nd</sup> 1945) gave birth to the DRV as well as acknowledged the human and democratic rights of citizens<sup>76</sup>. Through four Constitutions, these rights have been prescribed, however, some of them have been violated<sup>77</sup>. Violations have been made especially in the relation between the state and citizens. The previous mechanism revealed many shortcomings, such as the lack of opportunity for people to directly debate with the administrative agency when disputes arise; and the lack of an independent organ to resolve objectively and impartially of disputes that failed to catch up with the democratization process emerging after *Doi Moi* 1986. Along with the development of the economy, social life, legal

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<sup>74</sup> See Dao Tri Uc ed, *Mô hình tổ chức và hoạt động của Nhà Nước Pháp Quyền Xã Hội Chủ Nghĩa Việt Nam*, [The Model and Operation of Vietnamese Socialist Law-Based State], pp.229-311 (2007)

<sup>75</sup> The term of the VII CPV Congress from 1991 to 1996. The Judicial Reform was conducted from the end of 1992. See *Đề tài khoa học: Cải cách Hệ thống tư pháp ở Việt Nam*, [National Project No 92-98-353: Judicial System Reform in Vietnam], 71 (1993)

<sup>76</sup> Declaration of Independence (September, 2<sup>nd</sup> 1945) by President Ho Chi Minh: “ *Men are born and remain free and equal in rights*”

<sup>77</sup> Nguyen Duy Gia (1995), p.137

science and information technology, people have opportunity to fully understand what legitimate rights infringements they were dealt through administrative malpractice, and they try to look for measures to correct them. This trend can be illustrated by the number of petitions increased and some reactions by the local people occurred in some provinces in the early 1990s<sup>78</sup>. As a result, the birth of an administrative court model will be a fruit of the democratization process. According to this, the administrative court is empowered to deal with complaints about administrative abuses by state officials. Thus, people for the first time can take state officials as defendants before a judicial court, directly give their opinions and contribute discussion that they had never known before.

*Regarding the political aspect*, current Vietnamese state machinery has been based on the principle of democratic centralism, but with a clear distinction among the legislative, executive and judicial powers. The legislative power is centrally in hands of the highest representative organ, namely the National Assembly, while the executive power remains in hands of the government and judicial power belongs to both system of courts and procuratorate agencies.

In the years of self- adaptation with reforms, the National Assembly played a stronger role than in the past by seriously debating and revising proposed legislation. The Government also “*had some latitude in implementing policies*” and the Courts were given much stronger power in judgment of not only criminal, and civil but also economic, and labor matters involved. The previous mechanism limited the competence of resolving disputes within only administrative agencies surely exposed the inevitable defects. Therefore, the creation of an administrative court model handling disputes is an indispensable requirement, aiming to perform the principle of Power Concentration, but clear discrimination among State Powers in which the Executive Power cannot exceed the other powers and must be bound by Judicial Power.

### ***2.2.2. Economic and Administrative Management Aspects***

After the *Doi Moi* policy, Vietnam shifted into a market oriented economy with multi-economic sectors and multi-ownership of means of production , which has made fundamental changes. The Constitution of 1992 provided the right of private ownership, and freedom of enterprise. Land in Vietnam belonged to the state, but people were allowed to transfer land-use rights. The change in the economic situation happened quickly and has in turn lead to the changes in the legal relation between people and the state and among people. This also makes the number of disputes higher as well as the nature of disputes more complex. Thus the previous mechanism featured by “*internal control*” seemed to be not an effective way to protect people’s rights and needed a replacement.

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<sup>78</sup> Some provinces were “*hot places*” of disputes, such as Ha Tinh, Ha Tay, Nghe An , Ben Tre, Dong Thap ...etc. See Bao caokiem diem ba nam thuc hien Phap lenh khieu nai, to cao 1991, [Report on three year’s Implementation of OSCCD] by General State Inspectorate, 4 (1995)

Furthermore, the modern administrative law clearly discriminates governing functions from adjudicating functions within the administration itself<sup>79</sup>. Looking back at the Vietnamese administrative law's history, it seems that the former is in excess of the latter. The concept of "*adjudicating function*" was not understood in its concrete meaning. It is more correct to talk about the function of "*self-reconsideration*" by a state agency or of performing "*non-judicial function*" to deal with disputes by the Inspectorates. The previous mechanism did not provide grounds for judicial review. A foreign idiom states "*prevention is better than a cure, so good administration is better than remedies for bad administration*"<sup>80</sup>. Thus, in the case of Vietnam, while the administration has many remaining shortcomings leading to the high number of disputes, the application of judicial review embodied by the administrative court shall force the administration to fulfill its role in a good manner, if it does not want to be a defendant in a court.

### **2.2.3. Legal and International Integration Aspects**

Vietnam's legal system was for a long time heavily influenced by the former Soviet Union and the *Stalinist* period. Since the sharing of a common idea that "*there were no opposition of interests between the state and citizens*"<sup>81</sup>, the concept of "*conflict*", "*dispute*" or "*administrative litigation*" are not used to express the relation between the state and people. The term "*complaint*" was used instead. The state, while governing country may correct its mistakes if people complain. The relationship between the state and people is not regarded as a legal relationship, since most state activities are controlled by Party directives or State plans. Law documents are limited in some fields that cannot afford to control the legal relationship between people and state. The creation of administrative courts thus has changed considerably the relationship between state and citizens, placing people and state (officials) on an equal footing before the court. This aims to meet the demand of improving Vietnamese legal documents that were still imperfect.

*In the aspect of international integration*, it is true that international contacts are much more frequent than they ever were before and the legal system of each country cannot be developed in total isolation from those elsewhere. Consequently, many former socialist countries have introduced a western-style legal system<sup>82</sup>. Vietnam, as well as the other developing countries, have been heavily influenced by the form of judicial review originating in western countries. The ALRS in these countries have been improved gradually "*to follow their own paths*"<sup>83</sup>, based on the differences in their own historical, political and economic conditions. Thus, in Vietnam, along with

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<sup>79</sup> L.Neville Brown & John S.Bell (1998), p.288

<sup>80</sup> Patrick Neill, QC, Administrative Justice – Some Necessary Reforms, 8 (1988)

<sup>81</sup> See Rene David & John.E.C.Brierley (1985), p.285

<sup>82</sup> Michale Bordan (1994), p.209

<sup>83</sup> Yong Zhang, Comparative Studies on Judicial Review System in East and Southeast Asia, 259 (1997)

carrying out the recent *open-door* policy and expanding its international cooperation, the establishment of administrative courts aims to help Vietnam catch up with the mainstream of ALRS around the world.

### 2.3. Legal Perception to Judicial Review of Administrative Action

The administration itself has “*an intricate interlocking of judicial and administrative functions*”<sup>84</sup> that is popularly accepted in the contemporary Vietnamese legal concept. Empowered to exercise great discretionary powers, the administration has the inherent potentiality to infringe upon the rights of citizens at any moment. Therefore, there is an indispensable need for keeping administrative powers within their legal bounds, preventing “*the powerful engine of authorities from running amok*”<sup>85</sup>, so that people’s rights and legitimate interests can be effectively protected from their abuses.

Judicial review, in a general sense, means “*a system of judicial control over administrative and judicial acts*”<sup>86</sup> by the competent court. JRAA is accordingly determined as a part of judicial review under the aspect of administrative law that is clearly discriminated from judicial review of constitutionality under that of constitutional law<sup>87</sup>. There has been a long history of experience of JRAA in both common law and continental law<sup>88</sup>, in which it was believed that the courts “*should exercise a general superintending control over the action of administrative agencies and that the process of judicial review should be relied on to correct any error of administration*”<sup>89</sup>. Thus, except for the competence of review vested in the judicial court there is no need to further discuss this, the questions arising here are: What grounds need to address JRAA?, Should judicial review be applied to correct *any error of administration*?, and Should the grounds of judicial review be threefold: *illegality, irrationality and procedural impropriety* or not? Principally, the role of courts is limited to review only the legality of administrative actions and the judges are not concerned with the “*merits*”<sup>90</sup> in the sense of the rightness or the wrongness of appealed actions<sup>91</sup>. In other words, judicial review is not to examine the rationality, but “*the recognition and correction of the*

<sup>84</sup> Carleton Kemp Allen, *Administrative Jurisdiction*, 60 (1956)

<sup>85</sup> Mark Aronson & Bruce Dyer (2000), p.2

<sup>86</sup> *Ibid*, at 238

<sup>87</sup> JR of Constitutionality while examines the conformity of various State activities, mainly legislative actions, to Constitution, JRAA deals with the actions made by administrative agencies whether in conformity with Constitution or ordinary law. See Yong Zhang (1997), p.5

<sup>88</sup> C.T.Emery & B.Smythe, *Judicial Review*, 29 (1986)

<sup>89</sup> Frank E. Cooper, *Administrative Agencies and the Courts*, 305 (1982)

<sup>90</sup> See Patrick Neill, OC, *Administrative Justice*, 210 (1988)

<sup>91</sup> *Ibid*, at 212

illegality”<sup>92</sup> thereof. In addition, some questions concerning whether or not the constitutionality of delegated legislation for judicial review, or what appropriate model should be applied to review administrative actions are undoubtedly influenced much by the birth and development of ALRS.

*Le Binh Vong* and *Nguyen Duy Gia* who both studied in the former Soviet Union and Eastern Europe are regarded as the earliest legal scholars to have started researching JRAA, which was adopted in Vietnam and who supported the foundation of the AJB in Vietnam in the early 1990s.

*Le Binh Vong* had already realized the defects of Vietnamese administrative law, which for a quite long period lacked judicial review to protect infringed people from malpractices of administration. He found the reason was led by deep influences from the Soviet legal theory during the *Stalinist* period<sup>93</sup>. Traditionally, he recognized that in former socialist states, complaints were not brought to courts, and the infringed people lacked opportunity to protect themselves more impartially by judicial channels. However, he conceded that this did not mean, *administrative justice* that “denotes court review of the legality of administrative acts”<sup>94</sup> has never appeared in the Soviet context. After the Stalinist period, some Eastern European countries of the socialist camp that “conflicted with Soviet leaders”, even the USSR thought it necessary to undertake some reforms to carry out socialist democracy. Some of these countries, before they became socialist, had once established administrative courts that held the government to account in the eyes of the law. These countries such as Hungary (1957), Czechoslovak (1955), Poland (1960), Bulgaria (1970) or Romania (1967) reestablished the former administrative courts and enacted administrative procedure code. He provided evidence that even in the former Soviet Union, especially after the enactment of the Constitution of 1977, the judicial review system that was developed was marked by a renovation period from 1986 and one year later, Law No 26 was enacted to allow people to appeal to the court the against unlawful decisions or actions made by state agencies. Thus, he suggested the inevitable need for Vietnam to create an independent AJB system that restrained state power and made changes to the relationship between State and citizens, placing them in an equal status before the court. He strongly supported the model of an independent administrative court, either attached to the National Assembly or Government rather than within the People’s Court System - a topic that will be discussed further in the next section.

*Nguyen Duy Gia* started his views from the Marxist-Leninist ideology. He pointed that, according to its theory, “the socialist state which exists in the interest of all and not that of a privilege class”<sup>95</sup> and “all individual rights and interests are automatically protected”<sup>96</sup> and that this lead to

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<sup>92</sup> Mark Aronson & Bruce Dyer (2000), p.494

<sup>93</sup> *Le Binh Vong* (1994), p.89

<sup>94</sup> *Ibid.* See also George Ginburgs, *Soviet Administrative Law: Theory and Policy*, 65 (1989)

<sup>95</sup> Quoted from Rene David & John E.C.Brierley (1985), p.210

<sup>96</sup> *Id.*, at 285

the “*non-existence of disputes arising between state and citizens*”<sup>97</sup>. During the process of exercising public power, if the state agencies receive complaints from people concerned by virtue of causing damages, the said agencies or higher levels are then immediately empowered to deal with it. This would be reasonable if such agency was fair and impartial enough to protect those people infringed against. On the other hand, such power can be a threat, not only for the administration but also for society. In his well-known book “*The Establishment of Administrative Jurisdiction in Vietnam*” (1994), *Nguyen* frankly realized that, through four Vietnamese Constitutions, although people’s legal rights and interests have been completely prescribed, some have in fact been violated<sup>98</sup>, especially in the relationship between the state and citizens. He argues that the previous mechanism for the settlement of administrative disputes has revealed a lot of shortcomings and needs to be reformed. He quoted the number of petitions was getting higher and some *negative* reactions by local people had occurred in some provinces in the early 1990s providing support for the imperative of a judicial review system.

JRAA (or Administrative Jurisdiction) is accepted in Vietnam by the name of “*Tai phan Hanh chinh*” and takes on a number of meanings, and involves a great deal of discussion among scholars. Administrative jurisdiction, in a broader sense, is regarded as the judgment of the state towards all disputes arising in the field of administrative management, and thus it includes both the settlement of administrative disputes and the handing out of violations in the administrative management field.

*Nguyen Duy Gia* gives the definition of “*Tai Phan Hanh Chinh*” in a narrow sense, as the settlement of administrative litigation of people toward administrative decisions or actions made by the state authorities applied to the “*judicial litigation procedure*” and the consultative activities<sup>99</sup> to the government. Although there was no integration with the Western concept of JRAA, which may be viewed as a problem, the concept of “*Tai Phan Hanh Chinh*” accepted in Vietnam in a narrow sense, to certain extent, is close to it. According to this concept, a judicial court should be empowered to deal with administrative disputes arising between people and authorities, and “*Tai Phan Hanh Chinh*” cannot be implemented without the existence of a court to deal with such disputes<sup>100</sup>.

“*Tai Phan Hanh Chinh*” imported into Vietnam has some characteristics as follows: (1) It is exercised by the court’s model empowered to deal with disputes differentiated from those<sup>101</sup> of criminal, civil, economic or labor matters; (2) It defines no grounds for review of constitutionality of

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<sup>97</sup> *Nguyen Duy Gia* (1995), p.136

<sup>98</sup> *Ibid*, at 137

<sup>99</sup> Consultative function to Government like the function of *Conseil d’Etat* in France. *Ibid*, at 15

<sup>100</sup> *Ibid*, at 17

<sup>101</sup> Administrative jurisdiction is quite different from judicial jurisdiction. See *Le Binh Vong* (1994), p.37



legislative actions as well as the rationality of litigated administrative decisions or actions. It is bound to review only the legality of administrative decisions or actions made by the ministerial level agencies and downwards<sup>102</sup> in the limited fields<sup>103</sup> of administrative management.

**In short**, *Tai phan Hanh chinh* was totally adopted by the CPV and State, however, the question of what kind of models should be the best applied was hotly debated among scholars in the early of 1990s. This paper continues analyzing the legal debate on looking for the best model (before 1996), and discusses whether the final choice of ADCs (since July, 1996) is an interim or eternal solution. It also reveals that the birth of ADCs Model launched a constant theoretical controversy among Vietnamese legal scholars that has continued up to the present time.

### **III. The Birth of Model of Administrative Division Courts: Interim or Eternal Solution**

#### **1. Proposed Models and Analyses: Theoretical Conflict and Divergence**

The necessity of setting up the Administrative Court Model became an urgent requirement for the process of Legal and Judicial Reforms. It was officially emphasized in Resolution 8 of the VII CPV Congress that “*there must strongly promote the establishment of an administrative court system to deal with people’s complaints toward administrative decisions*”<sup>104</sup>. Before the birth of ADCs in 1996, four models were proposed based on both their advantages and disadvantages to the Vietnamese context at that time.

##### **1.1. Model of Independent Administrative Court Formed by National Assembly**

The model of an independent administrative court was suggested by scholars influenced by German and Swedish systems and by a team of legal experts who were assigned to drafting the law on the administrative court’s organization in 1993. According to this model, the AJB should be named “*Toa An Hanh Chinh*” (Administrative Court) established by the National Assembly.

*Le Binh Vong* suggested that the administrative court system in Vietnam should be divided into two levels: a central and provincial level, separating it from the both existing people’s courts and the executive organs in which the provincial courts are in competence of dealing with in *first-instance* cases, while the central level court deals with appeal trial cases. The Chief of the Central Administrative Court would be approved and dismissed by the National Assembly and responsible for all judgment works to it. All other judges would be presided over and dismissed by

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<sup>102</sup> See OSAC, Art 12. See also Nguyen Duy Gia (1995), p.45

<sup>103</sup> See OSAC, Art 11

<sup>104</sup> See the Resolution No 8 of the VII CPV Congress (1995), available at <http://www.cpv.org.vn>

the President<sup>105</sup>. He argued that the biggest advantage of this model was that it clearly discriminated the adjudicating functions from governing functions. Thus, the objectivity and promptness in the litigating procedures could be gained, since it was possible avoid strong influences from the Executive Branch, particularly at local levels. Vietnamese scholars who supported this model were in favor of the independence of the judiciary and the independent status of the judges. *Hoang van Hao* confirms that the “*adjudicating function must be in the center of judicial power*”<sup>106</sup>. *Dinh Van Mau* goes further, considering that this court should be empowered to judge the unconstitutionality of legal norms or hand over the claims for State compensation.

This model, however, was rejected because of two main problems, namely, its unconstitutionality and the difficulty in its implementation. Since the Vietnamese Constitution of 1992 provided that “*the Supreme People’s Court is the highest judicial organ*”, the appearance of a Central Administrative Court would have lead to the co-existence of two *highest judicial organs*, a situation that would have been completely unconstitutional. In addition, this model failed to deal with the objectives of public administration reform at that time, such as making the state machinery not less expansive but more bulky. Vietnamese lawmakers also took into consideration of the limited condition of the budget and the demand for immediately resolving the growing number of disputes, consequently they refused this model.

### **1.2. Model of Administrative Court as Independent System Attached to Government**

The model of administrative court under the Government suggested by scholars influenced by the French system and by most of the legal experts currently working in State Inspectorates (*former name of Government Inspectorate*). This suggested model is based on the idea that Prime Minister is the top executive power, responsible for the entire executive work of the National Assembly, so that both the administrative and adjudicating jurisdictions must be integrated in the hands of the Prime Minister. According to this model, the term “*administrative court*” may be not used in the strict meaning of a “*court*”. To be concrete, this model seems a further development of the existing State Inspectorate and is reminiscent of the model of *Conseil d’Etat* in France. At the central level, the State Inspectorate would be the “*Centre Administrative Court*” with two main functions: “*consultative*” to the government and “*adjudicative*” to a lawsuit. The name might be called the “*Administrative Legal Institute*” or “*Administrative Jurisdiction Institute*”. Accordingly, the Head of this organ would be approved by the National Assembly based on the proposal of the Prime Minister, and designated and dismissed by President. All other judges would be presided over and dismissed by Prime Minister. At the local level, these organs would be divided either at the provincial level and

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<sup>105</sup> Le Binh Vong (1994), p.117

<sup>106</sup> See Dai hoi Dang VIII & Mot so van de cap bach NN & PL, [The VIII CPV Congress & Some Urgent Issues on State & Law], 72 (1997)

some regional levels or at the district and provincial levels in a way that completely separates them from the local administrative organs. The Ex-General Inspector, *Quach Le Thanh*, strongly supported this model when he believed that this model could benefit from ensuring that the unified administrative power in the hands of the Prime Minister as well as to some extent the objectivity of settlement, since these organs would be subordinate to the Prime Minister, yet independent of the executive organs. *Dinh Van Mau* suggested that for the French administrative law doctrine, the administration always included within itself the two interlocked and inseparable parts of “*the governing*” and “*the adjudicating*”, and considered the administration has proved in most countries historically that the administrative jurisdiction originated from it. *Dinh Van Minh* in his book “*The Comparative Administrative Jurisdiction*” (1995) seemed to be very passionate about the French model and French administrative law theory, and showed that administration itself holds two integrated functions in which judicial functions are distinct and always remain separate from administrative functions. Like other supporters, he believed that this model could be able to implement at immediately, because the organization and personnel of the existing State Inspectorates could automatically be transferred to such mentioned organs.

Nevertheless, this model was also refused. The protestors considered that, although the organs dealing with administrative disputes would have been independent from the executive organs at the local level, the question of whether objectivity could have been firmly guaranteed, since it still depended much on the Head of Executive Power was raised. Except for the Chief of central level organs, all judges are appointed and dismissed by Prime Minister. Furthermore, the Vietnamese political system is based on the principle of Power Concentration, but clear distinction between the three state powers, therefore setting up such an organ to deal with disputes makes the Prime Minister and his organ system encroach upon the judicial power exercised by the court system. Concurrently, it contradicts with the Constitution in the provision that places the SPC as the highest judicial organ and the other People’s Courts are the sole judicial organs in Vietnam.

### **1.3. Model of Semi-Independence Administrative Court**

The model of a semi-independent administrative courts is a compromise by legal experts who are in favor of setting up an independent administrative court system but carefully considered whether it was against the current Constitution. According to this model, the two administrative court levels would be divided: (1) At the central level, Central Administrative Court would be attached to the SPC. It would be formed by National Assembly, but under the direct control of the SPC. The SPC would be able to review all its judgments.

(2) At the provinces, the administrative courts would be formed separately to the provincial people’s court system. The Central Administrative Court would directly control their adjudicating works and personnel. Some legal experts supported this view and considered that such a

model would avoid constitutional constraints, since it did not contradict Article 134 of the Constitution which provides that the SPC is the highest judicial body in Vietnam<sup>107</sup>.

In fact, the military court system has been formed along similar lines to this model with three levels: the centre, the military zone and the regional levels. However, since this suggested model is divided into only two levels (*the central and provincial*), it would not be able to avoid an overload in administrative cases, which would cause a degree of inconvenience for people residing in rural and highland provinces. Moreover, due to budgetary constraints, infrastructure, and personnel, and issues such as the training of administrative judges, this model was also finally refused by Vietnamese lawmakers.

#### **1.4. Model of Administrative Division within People's Courts (ADCs)**

This proposed model is similar to the Chinese court model established in 1989. The only difference can be seen in that while ADCs are formed in the people's courts at all levels in China, no administrative divisions would be created within people's courts of Vietnam at the district level. According to this model, an administrative division would be established in each provincial people's court and in the SPC. In each district people's court, one special judge would be assigned to resolve administrative cases.

This model, was not in fact strongly supported by the majority of scholars, particularly by those working in Government Inspectorates and those advocating the foundation of an independent administrative court system. It also revealed some mistakes that will be fully analyzed the next section. However, Vietnamese leadership and law-makers, on the basis of analysis concerning the current Vietnamese socio-political, legal and economic conditions, strongly supported this model and considered its defects to be quickly rectifiable. The next section will analyze the reason why this model was regarded as the best choice and introduce its foundation in July, 1996 and its subsequent operation.

### **2. Choice of ADCs Model**

#### **2.1. Rationale**

The model of ADCs was very attractive to both the leadership of the country and the lawmakers, taking two main advantages into consideration - namely the issue of constitutionality and feasibility.

##### ***2.1.1. Issue of Constitutionality***

**First of all**, it ensures the conformity with the existing Constitution as well as the mode of organizing state power. Article 134 of Constitution 1992 states that:

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<sup>107</sup> Truong Khanh Hoan, Nang cao Hieu qua hoat dong cua Toa hanh chinh, [Improvement of the Effect of Administrative Division Court], The Journal of Law Research, 39 (2001)

*“The Supreme People's Court is the highest judicial organ of the Socialist Republic of Vietnam. It supervises and directs the judicial work of Special Tribunals and other tribunals, unless otherwise prescribed by the National Assembly at the establishment of such Tribunals”*

According to this, the ADCs are established within people's courts to deal with administrative disputes. Thus, the mechanism for settlement of administrative disputes in Vietnam, apart from being in the hands of administrative agencies and the inspectorate system, was assigned to the judicial courts. This choice could avoid creating another independent administrative court system, like the continental law model, therefore, there is no need to change any provision of the existing Constitution.

**Secondly**, in line with article 134 of Constitution 1992, economic divisions within the people's court system was already established in 1995, which strongly confirmed the imperative of creating such ADCs at that time. Along with the proposal of setting up labor division courts at the same time, it ensures the constitutional principle that the judicial courts are empowered to hand out all legal disputes in Vietnam, in which the SPC holds the supremacy supervision. It was strongly supported by *Nguyen Duy Gia* when he emphasized that *“the administrative jurisdiction shall not be named unless the competence to review belongs to the administrative division in a judicial court and vice versa”*<sup>108</sup>.

### **2.1.2. Issues of Feasibility**

As *Dang Quang Phuong* argued, this model is easier to carry out in the present situation because the system of the people's court exists, so that the objective of not making the state machinery more bulky can be achieved, as can the urgent requirement for settlement of administrative disputes be implemented sooner<sup>109</sup>. The economy of this model can be easily realized by the availability of court facilities, such as courtrooms, headquarters, administrative and technical staff.

In addition, obtaining experience in the setting of the economic division court as before, along with the setting up of a labor court division at the same time, ensures the integration in the settlement of all legal disputes. Concurrently it also creates a good environment for administrative judges to learn from other special judges, such as civil judges, since administrative litigation has common points with civil litigation.

However, this model has also revealed some negative points, such as it does not ensure the prompt settlement of disputes due to the problem of training administrative judges. At the same time, the people's court system now has to undertake large amounts of criminal, civil, economic, and labor cases, so that it fails to meet the requirement of timely dealing with all disputes. Some negatives

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<sup>108</sup> See *Nguyen Duy Gia* (1995), p.17

<sup>109</sup> He now is Vice Chief Justice of SPC of Vietnam. See *Dang Quang Phuong*, *May Y kien ve Mo hinh to chuc Toa hanh chinh*, [Some Opinions of Administrative Court Model], in *Thanh tra Nha nuoc*, supra note 9, at.136

have been acknowledged, however the leadership, as well as lawmakers seem to be very attracted by the advantageous sides, and hope the negative points will be rectified one by one in the future. They felt that even if any other model were applied, they did not think all defects could be immediately rectified. The personnel factor, such as the remaining problem of administrative judges, is a good example. They compared the system with several foreign countries that developed their administrative litigation over a long period, such as France, which took over 200 years, as well as countries that are currently developing a judicial review system such as China, Indonesia, Malaysia and Thailand. They believe that the shortcomings can be eliminated by continuing to maintain the existing mechanism, but pouring a great deal of effort into improving the entire legislative regulations, including the field of settlement of administrative disputes as well as the quality of judges and other persons in charge.

The 7<sup>th</sup> session of the VIII National Assembly (October, 28<sup>th</sup> 1995) approved the Law on the Amendment of LOPC in which the ADCs were established within the people's court system<sup>110</sup>. This marked for the first time, the appearance of a judicial organ dealing with administrative disputes in Vietnam. The OSAC enacted by National Assembly's Standing Committee shortly after<sup>111</sup> became the fundamental legal basis for the ADCs dealing with administrative lawsuits from July, 1996.

It should be noted that, although ADCs Model was founded and inaugurated in 1996, it did not end the legal debate related to the model for the settlement of administrative disputes. By contrast, it marked the start of continuous theoretical controversy among Vietnamese scholars continuing until present.

## **2.2. Its Foundation and Operation (since July, 1<sup>st</sup> 1996)**

### **2.2.1. Legal Basics**

Some important legal documents regarding the settlement of administrative cases are as follows: (1) the Constitution of 1992 and its Amendment in 2002: Article 74, 134; (2) Amendment of Law on Organization of People's Court (LOPC, 1995, 2002); (3) Ordinance on Settlement of Administrative Cases (OSAC, 1996) and its Amendment in 1998, 2006; (4) OSCCD (1991) and LOCD (1998, 2005); (5) Circular No 39/KHXX (July, 6<sup>th</sup> 1996) of SPC on guiding the implementation of some provisions of OSAC; (6) Circular No 07/HC (August, 9<sup>th</sup> 1996) of SPC on guiding some issues regarding the administrative complaint resolutions; (7) Resolution No 03/NQ-HDTP (April, 14<sup>th</sup> 2003), Resolution No 04/NQ-HDTP (August, 4<sup>th</sup> 2006) of SPC on guiding some legal provisions of OSAC; (8) Various substantial laws...etc.

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<sup>110</sup> See Amendment of LOPC enacted on October 28<sup>th</sup> 1995, Art 1.

<sup>111</sup> Phap lenh giai quyet vu an Hanh chinh, [Ordinance on Settlement of Administrative Cases, OSAC], first enacted on May, 21<sup>st</sup> 1996

Thus, regarding Administrative Remedy, unlike continental law countries and also Japan and China, Vietnam lacks fundamental laws, such as Administrative Litigation Law, State Compensation Law, Appeal Law, Administrative Procedural Law. The Law on Civil Judgment Execution which includes administrative judgments has just been approved by the XI N.A (Nov, 14<sup>th</sup> 2008) and come into effect on July, 1<sup>st</sup> 2009.

### **2.2.2. Court Organization**

The structure of the Vietnamese People's Court System is shown in Appendix 3. It should be noted that the Constitution of 1959 and LOPC1960 completely replaced the structure of the old court system based on jurisdiction level (*cap xet xu*) to that of three administrative territorial units (*don vi hanh chinh lanh tho*), namely: (1) People's Court at district level; (2) People's Court at provincial level; and (3) SPC.

The organization of three levels of people's courts regarding the settlement of administrative cases can be described as below:

**Firstly**, in the people's courts at the district level, there is no administrative division. They are the lowest courts in the people's court hierarchy that are organized at the locality in equivalent with each district unit. There are a total of 658 district people's courts in the entire country, in which the number of judges is 2643<sup>112</sup>. The number of administrative judges is around 658. Since there is no administrative division within each district court, one administrative judge is appointed to hear cases.

District people's courts are the courts of first instance. Regarding the administrative jurisdiction, district people's courts are empowered to hand out the cases related to administrative decisions of state agencies and their officials at district or lower levels (*wards or villages*) within the localities. Like provincial people's courts, their administrative jurisdiction is limited by statutes in enumerated administrative cases. More analysis and discussion will be given to this topic in Chapter II.

**Secondly**, in each people's court at the provincial level, one administrative division is established. The number of provincial people's courts is changed from 64 to 63 for the time being, because *Hatay* Province was already merged with *Hanoi* on August, 1<sup>st</sup> 2008. The number of provincial administrative judges is about 953 of the total number of 2931 court staff.

Provincial people's courts, unlike the supreme and district levels, are both the courts of first instance and appeals. They share the same structure as the SPC in that they consist of five special divisions – the criminal, civil, economic, labor and administrative law. Article 27 of LOPC states that: “*National Assembly's Standing Committee, in case of necessity, will decide to form other divisions of provincial people's courts based on the recommendation made by SPC's Chief Justice*”.

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<sup>112</sup> This statistic is made by Le Van Minh, Vice Chief of Department of Court Staff Management, SPC. See Le Van Minh, Xay dung doi ngu tham phan theo tinh than cai cach tu phap, [Improving the Vietnamese Judges in line with the Judicial Reform], in SPC, Research Project on Finding Solutions to Improve Settlement of Administrative Cases in line with Judicial Reform, 2005

*As a court of first instance*, provincial people's courts have been given the jurisdiction to hand out administrative cases involving administrative decisions of some state agencies and their officials at the central and provincial levels, and district levels in cases of necessity. According to the existing law, provincial people's courts exercise their administrative jurisdiction by ADCs and administrative judges specialize in hearing only administrative cases. However, the fact that there is an overload of other cases (*civil lawsuits*), and the lack of provincial judges leads to judges of ADCs becoming appointed to hear not only administrative cases but also civil and labor lawsuits.

*As a court of appeal*, provincial people's courts also have the jurisdiction to open appeal trials toward the judgment made by district people's courts. Unlike SPC with the creation of Administrative Appeal Court, there is no such Appeal Division at the provincial level. Apart from hearing an administrative case under the appeal procedure, provincial ADCs are also empowered to retrial the lower court's judgments, which have already come into legal effect under the *supervisory* or *review* procedure.

**Thirdly**, the SPC is the highest jurisdiction body and empowered to supervise and provide guidance on the adjudication work of the entire Vietnamese court system. It is headed by a Chief Justice who is elected, released from office or dismissed by the National Assembly upon the proposal of the State President for a five-year term. Deputy Chief Justices and all Judges of SPC are appointed, released from office or dismissed by the State President. The Judge Council of SPC, according to article 21 of LOPC (2002), shall not exceed 17 members in total. The number of SPC Judges is about 102 in a total of 495 court staff.

The SPC, under the Amended Constitution (2002) and LOPC (2002), no longer has jurisdiction of the so-called "*the first instance and final instance procedure*". Two main reasons for the abolition of this regulation are as follows: (1) It aims to ensure the rights to appeal of litigation parties; (2) It is in line with the trend of Judicial Reform recently in which SPC should be enhanced its jurisdiction in terms of supervising all lower court's judgments (*through appeal trials and other supervisory or review trials*), and making guidance to all court system on how to apply the law properly rather than hearing the cases at the first instance. The main guidance made by the Judge Council of the SPC regarding the settlement of administrative cases is known as Resolutions (*Nghi quyết*), such Resolutions include Resolution No 03 /NQ-HDTP (2003) and Resolution No 04/NQ-HDTP (2006). A question that should perhaps be raised is whether these Resolutions are considered state laws or some kind of precedents.

*As a court of appeal*, the Appeals Division of the SPC is set up and located in some main cities throughout the country. Locations of these courts include *Hanoi, Danang, and Ho Chi Minh*, and it is their task to hear appeals of cases in which judgments of the immediate lower tier courts, have not yet become legally effective, and have yet been appealed or protested against in accordance with the provisions of procedural law.



As a court supervising all lower court judgments, the Administrative Division of the SPC was established and officially inaugurated on July 1<sup>st</sup> 1996. This Division conducts reviews on errors of law (*cassation or supervisory trial*) or on newly discovered facts (*review trial*) in which “legally effective judgments have been protested in accordance with provisions of procedural law”.

The main difference between the two above procedures is that while the SPC can open an appeal trial based on an appeal petition (*don khang cao*) of the concerned parties, the supervisory and review trials are only opened in cases that have had an inquiry (*khong nghi*) initiated by certain judicial officials, such as the Chief Justice of the SPC or Provincial Courts, the Chief Procurator of the Supreme Procuracy or Provincial People’s Procuracies<sup>113</sup>.

### **2.2.3. Trial Panel and Participation of Procurators**

This section focuses on analyzing the trial panel’s participation, including the administrative judges, people’s assessors and the procurators in the process of resolving administrative lawsuits.

**Firstly, regarding the administrative judges**, article 15 of OSAC (2006) provides the participation of the judges in each trial level as follows: (1) The *first-instance* trial panel is composed of one judge and two people’s assessors. In special cases, it may be composed of two judges and three people’s assessors; (2) The *appellate* trial panel is composed of three judges; (3) The *supervisory* or *re-trial* panel of a provincial court shall be the judge’s committee of this court. The participation of this committee must be at least two thirds of the total members (*the total number of this committee does not exceed 9*<sup>114</sup>); (4) The *supervisory* or *re-trial* council of the ADC of the SPC is composed of three judges; (5) The *supervisory* or *re-trial* council of the SPC shall be the judge’s council of the SPC. The participation of this council must be at least two thirds of the total members (*the total number of this council does not exceed 17*<sup>115</sup>)

Under LOPC (2002), the Chief Justice of the SPC shall be elected, released from office or dismissed by the National Assembly upon the proposal of the State President. The Deputy Chief Justice and Judges of the SPC shall be appointed, released from office or dismissed by the State President. Judges of local people’s courts shall be appointed, released from office or dismissed by the Chief Justice of the SPC upon the recommendation of the Judge Selection Committee<sup>116</sup>. The appointment of judges does not only consider their professional quality but also their morality and political status. Almost all judges are members of the CPV. To be appointed as a judge, apart from the requirement of professional quality the candidate, such as the graduation from a law university,

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<sup>113</sup> See OSAC 1996, Art 68

<sup>114</sup> LOPC, Art 29, section 1.b

<sup>115</sup> LOPC, Art 21, section 3

<sup>116</sup> LOPC, Art 40, section 1,2,3

or having a certificate on judge training from a course at the Judicial Academy, the candidate must have a certificate of completion for the political courses granted by the Ho Chi Minh National Political School<sup>117</sup>. The judge candidates must be also strongly supported by Communist Party Cells or Executive Committees of the CPV. For this reason, many foreign observers suspect the independent status of judges dealing with administrative lawsuits, and regard the close link with the Communist Party as a threat to judicial independence.

Up until the time of writing this dissertation, there were about 4,000 judges in the entire court system, including 102 judges of the SPC. In comparison to this amount, which was allocated by the National Assembly's Standing Committee in 2003, the people's court system alone needs approximately 1,000 judges. Currently, there are only three judges in the ADC of the SPC. In most provincial ADCs, the number of administrative judges does not exceed three<sup>118</sup>. In district courts, there is only one judge specialized in dealing with administrative lawsuits. Thus, it should be emphasized that the number of administrative judges is very limited, particularly in district courts. Administrative judges are also inexperienced in dealing with lawsuits, particularly those arising in new dispute fields, such as intellectual property, competition, financial service, international trade, and land compensation. Many local administrative judges still lack an LL.B degree and they have to follow the *in-service* training courses held by law universities to fulfill this requirement. Since 1996, deriving from the requirement of setting up the ADCs to deal with disputes as soon as possible, most administrative judges have been transferred from judgeships dealing with civil or criminal cases. Some of these judges are still not well trained, and lack knowledge especially in regards to administrative management and information technology.

The settlement of administrative cases relates closely to legislative regulations and Party policies in all governing activities, whereas the legal provisions are scattered, even overlapping and contradicting with each other, so that the judges must pour a great deal of effort into catching up with such requirements. The administrative judges and the litigated state agencies are often in close relation. Judges are subjected to statute law and are not allowed to be indifferent to the policies of CPV and State. The judges are designated by the State President, or Chief Justice of the SPC for a term of five years and not for a lifetime<sup>119</sup>. In addition, the salary of judges is still low. All of the above-mentioned matters possibly provide a disincentive for judges to be active in their jobs, as well as discourage them from being brave enough to stand beside people to protect law and justice. Some state officials may feel uneasy to be taken as defendants in administrative cases, consequently

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<sup>117</sup> See Thong tu lien tich 01/2003/TTLT-TANDTC-BQP-BNV-UBMTTQVN, [Joint Circular No 01 on April, 1<sup>st</sup> 2003 by SPC, Ministry of Defense, Ministry of Home Affairs, Central Committee of Vietnamese Fatherland Front], Part I

<sup>118</sup> This statistic made by SPC in 2007. See SPC, Report on Assessment of Current Legal and Institutional Framework for Administrative Court funded by Government of Vietnam-UNDP-Danida -Sida, Project VIE/02/015, 43 (2007)

<sup>119</sup> See LOPC (October, 6<sup>th</sup> 1992), Art 38. According to its amendment (2002), the Chief Justice of SPC is empowered to designate the local judges. The judges of SPC will be designated by President of State

placing pressure on the judge in charge<sup>120</sup>. Such actions also heavily influence the effectiveness of the ADCs's settlement.

**Secondly, regarding the people's assessors**, it should be emphasized that the participation of people's assessors in any trial proceeding is a Constitutional principle. This principle originated in article 64 of Constitution 1946, under the name "*Phu tham nhan dan*" (People's Judge Assistant). From the Constitution of 1959, which fully copied the Soviet model. The name of the principle has since been changed to "*Hoi tham nhan dan*" (People Assessor). The main difference between these principles is that while the former defines participation as an assistant of judges, the latter implies equal status between judges and assessors during trials, as laid down in article 129 of the Constitution: "*In the conduct of justice, assessors have the same power as the judges*". This seems unreasonable when the OSAC provides the *first-instance* trial with the participation of one judge and two people's assessors whereas the vote for judgment is decided by a majority. Hence, with the principle of equal voting, the people's assessors who lack major legal knowledge in comparison with the judges, contribute two thirds of reaching a final judgment. However, the fact that the judge in charge solely controls the trial from the beginning to the end and the people's assessors do not give any reaction surely weakens their roles in regards to being equal to judges as provided by law.

**Finally, regarding the procurators**, the participation of procurators in administrative litigation is different from that of criminal cases and may surprise Western observers, since the procurators do not function as "*prosecution*" as in the criminal cases, but in "*supervision of judicial activities*"<sup>121</sup>. Excluding cases that the Chief Procurator acts as a litigant to initiate the administrative cases on behalf of minors or persons who have physical or mental defect<sup>122</sup>, the participation of procurators seems unnecessary. This participation may even cause a disadvantage for litigants since the procurator is inevitably in favor of state agency and acts like "*the third judge*" when he is allowed "*to put questions after judges*"<sup>123</sup> in the "*interrogating procedure*"<sup>124</sup>, attend litigation proceedings at any time<sup>125</sup>, and the absence in court is not allowable<sup>126</sup>. Discussion on whether participation of the procurators in administrative lawsuits should or should not be compulsory is still going on.

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<sup>120</sup> See Ap luc cua Tham phan trong viec Giai quyet Vu an hanh chinh, [The Pressure on Judges in dealing the Administrative Lawsuits], available at <http://www.vnexpress.net/Vietnam/Phap-luat/2002/02/3B9B93751>

<sup>121</sup> Constitution 1992 (revised 2002), Art 137

<sup>122</sup> OSAC, Art 18

<sup>123</sup> OSAC, Art 46, section 2

<sup>124</sup> Ibid

<sup>125</sup> OSAC, Art 18

<sup>126</sup> OSAC, Art 43, section 3

### 3. Theoretical Conflict and Controversy

#### 3.1. Model of ADCs: Interim or External?

Right after the ADCs Model was set up and inaugurated in July 1996, *Quach Le Thanh*, Ex-General State Inspectorate, in the National Research Project entitled “*Administrative Court: Theory and Practice*” (1997), admitted frankly that although this model may be relevant in the current context of legal, political, and socio-economic conditions, it was not really an ideal model<sup>127</sup>.

Anywhere, it is common that when any resolution or object is finally chosen by authority or lottery, it may be either supported and praised or sometimes protested and criticized. The choice of ADCs Model in Vietnam falls in to the latter. As analyzed in the last section, it should be emphasized that before this model was finally approved, there were four proposed models. Each model displayed both advantages and disadvantages; however, the final choice of ADCs did not end the legal debate among Vietnamese scholars, rather, it started a controversy that still continues. By examining the below main issues, this section answers the question of whether the choice of this model was interim or external, and discovers why it is still strongly protested:

**Firstly**, this model fails to fulfill the requirement of clear distinction between the administrative jurisdiction (*tai phan hanh chinh*) and judicial jurisdiction (*tai phan tu phap*) – between the adjudicative and governing functions within the administration..

In May 1993, Prime Minister delegated the State Inspectorate to preside over and cooperate with the MOJ, the Ministry of Home Affairs and the SPC to research and draft a Law on the Organization of Administrative Court. This means that prior to 1996, there was a strong tendency of setting up an independent administrative court system. It was apparent that many scholars working in the Government Inspectorate System were deeply influenced by French administrative law theory regarding the clear distinction between the active and adjudicating administration and the French administrative court model.

The State Inspectorate evidenced Article 13 of the famous Law of 16-24 (August, 1790) which was in part inspired by the *Montesquieu* theory of Separation of Power, stating that: “*Judicial functions are distinct and will always remain separate from the administrative functions*”. This article was also confirmed by Decree (in 1795) stating: “*The prohibition is renewed against the courts taking cognizance of the acts of the administration of whatever kind they may be*”<sup>128</sup>. This means that the judicial court cannot interfere with the work of the administration, or in other words, the judicial jurisdiction is strictly separated from the administrative jurisdiction. If any malpractice by the administration occurs, it may be reviewed by a “*special body*” holding an adjudicating function within the administration, but absolutely independent from the governing system. Thus, in France, the judicial control of the administration is entrusted to a specialist corps of judges who sit in

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<sup>127</sup> Supra note 9

<sup>128</sup> See L.Neville Brown & John S.Bell (1998), pp.44-127

special courts. These specialized administrative jurisdictions are under the supervision, not of the ordinary judicial courts, but of the *Conseil d'Etat* as the Supreme Administrative Court.

Partial to French theory and models, Vietnamese scholars expected to set up an independent administrative court system for judicial control of the administration. They suggested that at the central level, the central administrative court may be attached to Government or may be formed separately by the National Assembly to clearly distinguish it from the existing People's Court System. Creating such a model would ensure the characteristic of administrative jurisdiction in comparison with that of judicial jurisdiction.

After more than two years researching this model in great depth, it was totally rejected by Vietnamese lawmakers, due to its unconstitutionality and unfeasibility at that particular time. As fully analyzed in the last section, the model of ADCs was finally selected. It is apparent that this choice disappointed many scholars and left behind a legal controversy that continues to the present day. For these scholars, the establishment of the ADCs has completely separated the administrative jurisdiction from the governing activities that naturally possesses an interlocked relationship within the public administration itself. At the same time, it fails to distinguish the administrative jurisdiction from the judicial jurisdiction and creates confusion. They demonstrate that administrative litigation proceedings are heavily influenced by and almost copy civil litigation proceedings. The administrative judges are not judges specializing in settlement of administrative lawsuits, rather judges that have been transferred from civil or criminal courts, a fact that absolutely fails to meet the requirements of dealing with complicated cases.

**Secondly**, this model fails to fulfill the requirement of judicial independence.

Vietnamese scholars consider that the dependence of ADCs on the local governments is the greatest threat to judicial independence. Article 17 of LOPC (2002) states that: "*The SPC shall administer Local People's Courts in term of organization in close cooperation with Local People's Council*". Some other legal norms also detail the dependent relationship between the local people's court and local government, such as: (1) the appointment of local judges through the Judge Selection Committee at the Provincial Level with the participation of the Local Government Members<sup>129</sup>; (2) the report on the performance of local courts to the People's Council at the same level<sup>130</sup>; (3) the arrangement of personnel organization for the local courts; (4) the building of infrastructure (*granting land*), and equipment for the local court office facilities<sup>131</sup>. Such dependent relationships apparently cannot ensure the court's independence in dealing with administrative lawsuits regarding local government decisions.

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<sup>129</sup> Ordinance on Judges and People's Assessors (October, 4<sup>th</sup> 2002), Art 27

<sup>130</sup> LOPC (2002), Art 29, section 2.d

<sup>131</sup> Resolution No 132/2002 dated on April, 4<sup>th</sup> 2002 by National Assembly's Standing Committee, Art 2 relative to the requirement of SPC in the Cooperation with Local People's Council in Control of Local People's Court System

This model is directly impacted by the doctrine of State Power Concentration and the principle of Democratic Centralism controlling the entire operation of the Vietnamese state apparatus. Vietnamese scholars comment that the success of the Constitution of 1992 was to re-conceptualize this doctrine in which the “*State of Proletariat’s Dictatorship*” was replaced by “*Socialist Rule of Law State*”. To a certain extent, it absorbs some elements of the doctrine of Separation of Power. It is said in Vietnam that it is better to say Division of State Power rather than Separation of Power. Thus, the existing ADCs Model does not guarantee in essence the independence of judiciary upon the legislation or its execution. The extreme dependence on the local governments as mentioned above is the result of State Power Doctrine strictly provided by Constitution. In addition, the principle of Democratic Centralism also places the local courts in a complicated relationship with the local governments, the superior state agencies, the CPV organs and so forth that can not avoid losing their real independence.

This model is also severely controlled by the CPV’s leadership. Most judges are members of the CPV and are required to demonstrate both a professional quality and a moral, political quality. Local Courts are frequently under the leadership of the CPV’s Executive Committee at the equivalent level and follow their guidance in some complicated or politically involved cases. For such reason, it is reasonable to restructure the current ADCs system to guarantee its independence from the Ruling Party.

**Thirdly**, this model fails to meet the demands of the judicial reform carried out by CPV and State.

The Party and State have already realized the disadvantage of the existing ADCs Model, as it fails to fulfill the people’s expectations in the protection of their legal rights and interests. In the Judicial Reform Strategy to 2020, the Politburo of CPV frankly admitted that: “*we should step by step reform the people courts at all levels*”, and “*prepare for the establishment of the regional administrative courts at localities*”<sup>132</sup>. Thus, the CPV recognized that the existing model was inappropriate, due to its extreme dependence on the local government under the administrative unit and should be replaced by a new reformed court system. However, as to what kind of reformed model would be desirable to catch up with the goal of judicial reform and achieve real judicial independence is still a topic of great controversy.

**In short**, it can be concluded that this model is regarded as an interim resolution or compromise during a transitive period. The negative side of this model in the theoretical aspect as well as its shortcomings in trial practice over past ten years once again has caused the legal controversy of the administrative court model to become a hot issue. Like any socialist transitional

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<sup>132</sup> See Nghi Quyet 49 NQ/TW (May, 24<sup>th</sup> 2005) Ve Chien luoc Cai cach Tu phap den nam 2020, [Resolution No 49 dated on May, 24<sup>th</sup> 2005 on Judicial Reform Strategy up to 2020], in Official Documents Regarding the Reform of State Apparatus by CPV, 25 (2005)

country, it is closely relative to the process of transplanting the ROL and requires a great deal of time and effort by the country's leadership in their domestic reforms.

### 3.2. Taxonomy of Controversy Regarding Court's Models

Since the birth of ADCs in July, 1996, although many different opinions have been given, the taxonomy of controversial models can be identified as follows: (1) should change be made through an absolutely new model with some relevant amendment of the Constitution; or (2) should the existing model be maintained with some appropriate changes (*structural reform, jurisdiction*); (3) should the existing model (*for judicial review*) be reconstructed and a new quasi-judicial AJB (*for appellate system*) be created with improvements of jurisdiction, training professional judges and so on.

**Regarding the first opinion (1)**, Vietnamese scholars who previously did not support the model of ADCs seriously criticized it and wanted it to be replaced by a new model. In their opinion, there needed to be an independent administrative court system that was completely separated from administrative agencies, coexisting in parallel with the people's court system to deal with disputes.

Some scholars stated that, in Vietnam, the National Assembly was the highest state organ, therefore the administrative courts must be established by the National Assembly while the Chief Justice of the Central Administrative Court should be selected only by National Assembly also. This arrangement aimed to empower administrative courts not only to deal with particular administrative decisions or actions, but also to review the constitutionality and legality of any legal norm relative to litigation<sup>133</sup>. These opinions also want any administrative decision or action made by state agencies and officials including those by Prime Minister, Ministers to be judicially reviewed. This view supports the German model of independent administrative courts and calls for changes in some Constitutional provisions. Furthermore, some scholars studying from common law countries also want to introduce the model of administrative tribunals to diversify many channels for people to protect themselves from administrative abuses.

**Regarding the second opinion (2)**, this model was strongly supported by CPV and lawmakers, which explains why ADCs Model was created sooner than expected. Scholars supporting this model insisted that administrative lawsuits and all other legal disputes must be in hands of the judicial people courts<sup>134</sup>.

Those against this model, believing that it may not ensure the characteristic of administrative litigation, showed that the same discussion used to appear when Economic and Labor Division Courts were established. They argued that if the administrative court system should be set up separately in order

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<sup>133</sup> Le Binh Vong, Bao cao tong thuat De tai KH Toa Hanh chinh, [General Report on National Project on Administrative Court], 34 (1997)

<sup>134</sup> Nguyen Duy Gia (1995), p.137

to ensure the characteristic of the settlement of administrative disputes, the criminal, civil, economic or labor court system would also have to be separated, since each of them also had their own characteristic.<sup>135</sup> Although clearly identifying the shortcomings, they always believed that it would be gradually recovered in the future by pouring large amounts of effort into improving the entire set of legislative regulations, the quality of judges as well as the judgment execution.

**Regarding the last opinion (3)**, *firstly*, many scholars have been in favor of the *quasi-judicial* AJB model which is formed and subordinated to the Prime Minister but separated from executive organs. They desired to upgrade the existing Government Inspectorates to become *Administrative Courts* belonging to the Executive Branch. According to this model, this agency would have two functions: 1) “*dealing with disputes*” and 2) “*making legal consultation to the government*” like the French model of *Conseil d’Etat*. They believed that the dependence on Executive Power could be recovered by creating administrative courts independently of the ministries. The Chief Justice of the *Central Administrative Court* is proposed by the Prime Minister but approved by the National Assembly and designated by the State President. The *local administrative courts* would not depend on local people’s committees or the MOJ, but be directly controlled by the *Central Administrative Court*. Administrative judges would be appointed by the State President or Prime Minister<sup>136</sup>. Furthermore, since the *Central Administrative Court* cannot belong to the SPC, and so as to avoid the coexistence of the so called “*two Supreme Courts*”, it could be renamed “*Administrative Legal Institute*”<sup>137</sup>, and with some changes to the Constitution to adapt with such demands. *Secondly*, apart from setting up an AJB attached to the Government as a new appellate system, they wanted to reconstruct the existing ADCs for judicial review to guarantee the independence of the judiciary. These scholars support the reform of the ADCs Model and argue that it should be conducted concurrently with the transplant of ROL, particularly with the informal institution approach to the ROL in Vietnam at present. This dissertation supports this tendency of reforming the current ADCs Model in which new elements (*institution*) should be added in harmonization with the existing elements, also in need of upgrading so as to avoid any shock through sudden changes.

**To conclude**, the legal controversy regarding the administrative court model has continued until present. It is known as a conflict between radical and conservative reformers. The CPV has recently recognized the necessity of reforming the court structure to achieve judicial independence in resolving administrative lawsuits, a move that creates a very good opportunity for the development of academic debates. The taxonomy of controversy regarding the administrative courts indicates the recent active transplantation of foreign legal theories and models in Vietnam. Surely, it has positive impacts on

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<sup>135</sup> Ibid, at 187

<sup>136</sup> Nguyen Nien, Mot vai Y kien thanh lap Toa Hanh chinh, [Some Opinions on Setting up Administrative Court] in Thanh tra Nha nuoc, supra note 9, at 85.

<sup>137</sup> It means “*Phap vien Hanh chinh*” in Vietnamese. See Le Binh Vong (1994) p.42



the future development of Vietnamese ALRS as well as the contemporary administrative law. More discussions about challenges for the existence of ADCs, the support for other prevailing models as well as the recommendations for both the creation of a new appellate system (*AJB attached to Government*) and the reform of the judicial review system (*Regional Administrative Courts*) will be presented in Chapter IV.

### **Concluding Remarks**

The foundation of ADCs in 1996 marks a new perception of JRAA among Vietnamese scholars who were historically influenced by socialist legal thinking the more recent absorbing of the idea of ROL, which was transplanted from the West. The choice of ADCs Model was the corollary of a *Socialist Law-Based State* led by Ruling CPV. For more than ten years, this model has, to a certain extent, contributed to improving the democratic process and protecting people from maladministration. Nevertheless, it is not an *ideal* model and is strongly criticized for lacking judicial independence, thus failing to fulfill the requirement of post-WTO Accession (2006) as well as the ROL in the 21<sup>st</sup> century. This Chapter concludes that the existing model is only an interim solution in the transitional period and is no longer appropriate for the current circumstances. To provide more evidence, the next Chapter will explore the defects of its jurisdiction and some critical controversies thereof.

## CHAPTER II

# JURISDICTION OF ADMINISTRATIVE DIVISION COURTS: CONSTANT CONTROVERSY AND PRACTICAL REMAINS

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### Introduction

*“The principle of legality prescribes a line of conduct for the administration from which it can not depart without committing an excess of power. Any violation of the principle can be a ground for review and will make the acte administratif void”<sup>138</sup>.*

**(Neville Brown & John Bell, French Administrative Law, 1998)**

*“In Vietnam, the Courts have jurisdiction over the legality of the administrative decisions or actions made by administrative agencies or authorities infringing the citizen’s legal rights and interests. The determination of court’s jurisdiction must be based on the fundamental principle of current State Power Mechanism”<sup>139</sup>.*

**(Nguyen Thanh Binh, Judicial Academy of Vietnam, 2004)**

Chapter II explores the second research question *why has the ADCs Jurisdiction*, although it was expanded in two revised OSAC (1998, 2006), *still been strongly criticized for the lack of credibility and legitimacy?* It first argues in accordance with the legal concept of Jurisdiction over settlement of administrative lawsuits as given by Prof. *Nguyen Thanh Binh* so as to provide an academic view to improve contemporary administrative law concepts in Vietnam. It then explains some limited revisions regarding the extent of enumerated administrative matters judicially reviewed, the permission of taking a lawsuit even with no reply from original agencies (*with exception*). These revisions thus fail to fulfill the expectations of legal scholars as well as people who have been infringed against. To provide more evidence on the defects of ADCs Jurisdiction, this Chapter arranges five main arguments, addressing issues such as whether the mandatory pre-litigation period should be abandoned, whether the time and scope of judicial review should be extended, and whether the court’s jurisdiction over issuing judgments and recovering any error of law should be enhanced. As support for these arguments, some selected case studies throughout the country,

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<sup>138</sup> L. Neville Brown & John S.Bell (1998), p.239

<sup>139</sup> Nguyen Thanh Binh, Tham quyen xet xu khieu kien hanh chinh cua Toa an Nhan dan – Su bao dam cong ly trong quan he giua Nha nuoc va cong dan, [Jurisdiction over Settlement of Administrative Lawsuits – Guarantee of Justice in the Relationship between State and Citizens], pp.82-83 (2004)

particularly some of the most recently published Supervisory Judgments by SPC are fully analyzed. This Chapter reveals that the determination of the court's jurisdiction is based on the fundamental principle of the Vietnamese State Power Mechanism. It is not possible to avoid some conflict with current transitive conditions and needs to be reformed gradually.

## I. Administrative Division Court's Jurisdiction: Its Enlargement and Debates

### 1. Legal Concept

There is no common concept of administrative law in the world concerning the court's jurisdiction over administrative litigation due to the various types of court models and tribunals empowered to deal with such litigations in existence.

**In England**, the Judicature Act of 1873 and 1875 ended the competing jurisdictions of the courts of common law and the courts of the Chancery. All most all English litigants became able to choose between different procedures available in the same ordinary court such as a writ, or an application for judicial review<sup>140</sup>. Recently, the administrative court known as a specialist court, a part of the Queen's Bench Division of the High Court, was established to hear public and administrative law cases, including "*claims for judicial review of inferior courts and tribunals, public bodies and persons exercising a public function*", "*appeals by way of case stated from ministers, tribunals and other public persons*"<sup>141</sup>. This new body as well as the choice of procedure now turns upon a distinction between public and private law that has been criticized by people such as by H.W.R Wade, who describes it as a "*dividing line impossible to draw with certainty*"<sup>142</sup>.

**In France**, due to the existence of the dual system of administrative courts on the one hand and civil and criminal courts on the other, it may raise a critical problem among French litigants at the threshold of their rights to obtain redress as to which of the two courts must handle the case. It cannot be avoided that case are sometimes brought before the wrong court jurisdiction, and thus there is nothing obtained except another decision from the court of conflicting jurisdiction.

To completely define the administrative court's jurisdiction over administrative cases, *Neville Brown* and *John Bell* in the productive book of "*French Administrative Law*" searched for some criterions such as: (1) the State as a debtor, under which the *Conseil d'Etat* denied the ordinary court's competence to condemn the state to any money payment (*damage compensation*); (2) the criterion of "*the act of public authority*" that draws the distinction between the actions of public authority and of mere acts of management in which the former is out of the jurisdiction of the ordinary courts and the latter is within it; (3) the criterion of "*public administration*" (*gestion*

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<sup>140</sup> L.Neville Brown and John S.Bell (1998), p.127

<sup>141</sup> See Beverley Lang, Q.C ed, *Administrative Court: Practice and Theory*, pp.3-4 (2006)

<sup>142</sup> See H.W.R Wade, *Administrative Law*, pp. 682-695, (1994). It is quoted by L.Neville Brown and John S.Bell (1998)

*publicque*) as a distinct from “*private administration*” in which the latter, due to its processes used as same as the private citizens, comes therefore within the scope of ordinary courts. On the other hand, the disputes arising out of its *gestion publicque* (the former) belongs to the administrative courts<sup>143</sup>.

**In Vietnam**, as analyzed in Chapter I, the model of ADCs with an exception (*no administrative divisions at district level*) was chosen for resolving administrative cases. As a result, there needs to be a proper legal concept and clear delimitation of the court’s jurisdiction over administrative cases with that of other civil, criminal, labor or economic lawsuits.

So far, there is only a doctoral dissertation written by *Nguyen Thanh Binh*<sup>144</sup> that specializes on the court’s jurisdiction on resolving administrative cases in Vietnam. He analyzes the legal concept of the court’s jurisdiction over administrative cases based on some ideas of French administrative law. He uses the term of “*competence*” in the French language and divides it into the following three categories: (1) the competence over the nature of administrative matters (*competence materielle*); (2) the competence over the territorial units (*competence territoriale*); (3) the competence over the standing of the parties (*competence terrinalle*)<sup>145</sup>. He quotes *Gustave Peiser*’s definition of the court’s jurisdiction in a narrow sense, which limits the competence of administrative judges in resolving a certain administrative dispute<sup>146</sup>. Furthermore, he also refers to *Wolf Rudiger*, a German professor who classifies the court’s jurisdiction over adjudicative objects, places and court’s hierarchy<sup>147</sup>. Regarding what content the court can review, it is a common view among Vietnamese scholars<sup>148</sup> that the court can examine the legality of an administrative decision that may infringe upon people’s rights and legal interests. From several analyses, he presents the concept on the court’s jurisdiction over administrative cases as follows:

*“It is both a legal right and duty of the court on behalf of state power in examining and judging the legality of a certain administrative decision or action under the judicial proceedings that aims to well protect the right and interest of individuals and entities”*<sup>149</sup>.

The above definition on the court’s jurisdiction over administrative lawsuit leaves behind the below arguments:

**Firstly**, it does not clearly distinguish the adjudicating function from governing function of administration, although the author refers to some elements of the French administrative law concept.

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<sup>143</sup> L.Neville Brown and John S.Bell (1998) pp.129-130

<sup>144</sup> Supra note 53

<sup>145</sup> See Nguyen Thanh Binh (2004), p.38

<sup>146</sup> Gustave Peiser, Administrative Law (Vietnamese translation), 227 (2000).

<sup>147</sup> Ibid, at 41

<sup>148</sup> Such as Hoang Van Hao, Dao Tri Uc, Tran Ngoc Duong. See Dai hoi Dang VIII va Mot so van de cap bach ve Nha nuoc va Phap luat, [The VIII CPV’s Congress and Some Urgent Issues on State and Law], pp.206-207 (1997)

<sup>149</sup> Ngyen Thanh Binh (2004), p.48

In addition, the distinction with the jurisdiction of other courts (*such as with other civil lawsuits*) is also not clear. *Dinh Van Mau* raises the question: “what is the scope of the adjudicating function?” He considers whether it is possible for the court to annul an unconstitutional legal document or deal with state compensation for any illegal acts<sup>150</sup>. It is true that while dealing with another lawsuit, civil, labor or criminal, the court is often faced with the embarrassing question of whether it can actually annul an illegal administrative act. In addition, the issue of state compensation is also unfamiliar to Vietnamese scholars and practitioners in both the theory and practice.

**Secondly**, to collate with three criterions of the court jurisdiction over administrative lawsuits by *Neville Brown* and *John Bell* as mentioned above, this definition says nothing about the nature of “*public authority*” of the litigated acts, the distinction of “*public administration*” from “*private administration*” as well as the standing of state as a subject of compensation. *Hoang Van Sao* comments that in order to define the court jurisdiction over administrative lawsuits, it needs to be based on a clear distinction between the judiciary (*quyen tu phap*) and execution (*quyen hanh phap*), “*public administration*” and “*mere acts of management*”, judicial review by ordinary courts and by administrative courts<sup>151</sup>. He shares some common views with French law insofar as disputes arising within public administration (*except mere acts of management*) do not belong to administrative court and emphasizes the feature of “*public authority*” as a litigated subject. Regarding the nature of “*public administration*”, French administrative law provides that “*some administrative decisions are not within the jurisdiction of the administrative courts because they constitute acts of state*”. An early example of this category was the refusal by *Conseil d’Etat* to adjudicate upon the removal of *Napoleon III*’s cousin from the list of army officers by the government of the Third Republic. To make a concrete legal concept on court’s jurisdiction, *Hoang Van Sao* complements the term of “*administrative disputes*” distinguished with other private legal disputes as objects to review by administrative courts. Furthermore, regarding the feature of “*public authority*”, he also adds the subjects of an administrative litigation in which one of the parties must be always a “*public official or agency*”. However, studied and influenced by German administrative law theory, he agrees totally that an inquiry for damage or state compensation may be out of the administrative court’s jurisdiction but falls within the competence of ordinary courts.

**Thirdly**, it says nothing about the Vietnamese court model handling such administrative disputes as well as the kind of judgment that should be rendered by a competent court. The former can be easily understood due to the characteristics of the Vietnamese court model. Vietnam has no independent administrative court, rather ADCs like China. However, the model is not exactly the same as China’s model, since the administrative division is not established at district courts. For this

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<sup>150</sup> Ibid, at 44

<sup>151</sup> Hoang Van Sao, *Tham quyen xet xu cua Toa an Nhan dan*, [The Jurisdiction of People’s Court over Administrative Lawsuits] in Hoang Van Sao ed, *Textbook of Vietnamese Administrative Litigation Law*, 67 (2007)

reason, some confusion in legal terms is sometimes created, on whether one should refer to them as the “*Jurisdiction of Vietnamese Administrative Courts*”, the “*Administrative Division Courts*” or of “*Vietnamese People’s Courts over Administrative Cases*”. Another discussion on the *given* legal concept falls on the content of judgment. While reviewing an illegal administrative decision, whether courts are able to revise or annul it. This defect is apparently caused by the vacancy of legal provisions regarding the administrative judgment in OSAC that will be further discussed later in this Chapter.

**Last but not least**, this research finds it necessary to make clear the term of “*judicial proceedings*” in the alleged definition. “*Judicial proceedings*” in Vietnamese legal term is known as the court’s proceedings over resolving administrative cases including five periods, namely initiation and registration of lawsuits; trial preparation; *first-instance* session; appeal trial and supervisory or review trial; and judgment’s execution. This is distinguished from the “*administrative proceedings*” in the process of administrative agencies or government inspectorates dealing with a certain administrative complaints. Derived from the perception of Vietnamese scholars in terms of an independent law branch, there is a clear distinction between administrative law (*Luat hanh chinh*) and administrative litigation law (*Luat to tung hanh chinh*). As a result, the former includes substantive rules related to the executive branch, public administration and law application in all fields of administrative managements. By contrast, the latter mostly concerns the procedural rules related to the court’s jurisdiction over resolving administrative disputes that arise between governors and the governed<sup>152</sup>. Thus, although administrative litigation law is recognized as an independent law branch and a separate law subject, it is closely attached to the main content of administrative law. However, the biggest discussion here is while some countries such as France and China clearly define grounds for judicial review<sup>153</sup>, Vietnamese law (OSAC) leaves it vacant. To explain this vacancy, Vietnamese lawmakers consider that grounds for review can be found in the substantive legal provisions concerning the competence and liability of the governors in administrative law. Accordingly, there is no need to add any provision regarding grounds for review in OSAC. In fact, this vacancy leads to the discretions of judges in resolving certain cases and fails to fulfill the people’s expectations.

**To conclude**, in order to approach properly the legal concept of court’s jurisdiction over hearing administrative cases in Vietnam, by analyzing the concept distributed by Prof. *Nguyen Thanh Binh* and making references to classified criterions of French administrative law by *Neville*

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<sup>152</sup> See Pham Hong Quang, Nguyen Manh Hung, Tran Thi Hien, Khoa hoc Luat to tung hanh chinh va Luat to tung hanh chinh Vietnam, [Administrative Litigation Law as a Legal Science and An Independent Law Branch] in Hoang Van Sao ed, Textbook of Vietnamese Administrative Litigation Law, pp.7-62 (2007)

<sup>153</sup> French Administrative Law clearly defines Grounds for Review, such as *L’inexistence*; *Incompetence*; *Vice de form*; *Violation de la loi*; *Detournemet de pouvoir* (or abuse of power). See L.Neville Brown and John S.Bell (1998), p.246. Article 54 of Chinese ALL provides the court’s jurisdiction to quash illegal administrative decisions in cases of being lack of essential evidence, violation of legal procedures, *ultra vires* or abuse of power and so on

*Brown and John Bell*, the below features should be considered:

- (1) In Vietnam, such jurisdiction belongs to ADCs with exception;
- (2) Two parties involving the settlement process at courts, in which one of the parties must hold the nature of “*public authority*”. State or any state agency can be a “*debtor*” (*regarding the redress of damages*) or any defendant;
- (3) Disputes before the court must be in the nature of an “administrative dispute” arising out of “private administration”;
- (4) Objects of court review are particular administrative decisions or actions that directly infringe people’s legal rights and interest. In Vietnam, mere acts of public administration, legislative norms, military or diplomacy acts are out of the court’s jurisdiction;
- (5) Ground for review is to examine only the legality of litigated administrative decisions or actions. The rationality or constitutionality is out of judicial review;
- (6) Procedure for review is a judicial proceeding with the compulsory participation of procurators;
- (7) During the resolving of cases, the court can declare annulment of any illegal decision and redress damages.

Since many issues regarding the court’s jurisdiction have been exhaustively discussed in Vietnam, no concrete legal concept thereof can be provided. It would better to identify clearly its features in reference to that of foreign laws. Nowadays, the tendency of establishing *quasi-judicial* AJB to handle administrative lawsuits (*the appellate system*) is increasing around the world and is strongly supported by Vietnamese scholars (*the creation of AJB attached to Government*). Furthermore, the necessity of reconstructing ADCs Model in to Regional Courts (*the reform of judicial review system*) is also highly recommended at present. Thus, the legal concept of Jurisdiction over Settlement of Administrative Lawsuits should be extended so that it involves not only judicial courts, but also an AJB system like a *quasi-judicial* organ. The grounds for review are not only limited to examine Legality, but Constitutionality and *Merit*, and the objects of lawsuits should be all administrative matters, including the legal norms and damages caused by State agencies or public servants.

## **2. Grounds for Jurisdiction over Administrative Litigation**

### **2.1. Principle of Legal Examination: Legality or Rationality**

*Max Weber* first raised the issues of legality and legitimacy at the start of Germany’s *Weimar* Republic in his published “*Economy and Society*” (1914). He professed his doubts over the efficacy of the status of legal authority and the existence of rational formal law as the 19<sup>th</sup> century state governed by the liberal ROL, the *Rechtsstaat*, was eclipsed by the administrative or welfare state. The legality and legitimacy’s issues were further developed by a German social scientist, *Carl*

*Schmitt*, in his famous book of the same title<sup>154</sup>, in which to resolve the arbitrariness and incoherence of authority, he claims, by admitting that there are pre-constitutional and pre-legal substantive values or concrete decisions to which appeals might be directed, when the formal rules of a liberal or social democratic regime collide or appeal are vulnerable. Principles of legality and legitimacy require a strong substantive law for binding authority within his discretion and a mechanism for reviewing legality (*by administrative courts*) or constitutionality (*by constitutional courts*) of authority's acts. Granted the above implication, as *John P. McCormick* comments<sup>155</sup>, it is fairly astonishing that legality and legitimacy has not appeared in England before now.

This should be traced back to the principle of legality in French administrative law. This basic principle or another *so-called* principle of control by courts over administration is that the administration must be compelled to observe the law (*as subjected to ROL, understood in Dicey's sense*), and the proceedings of annulment (*recours en annulation*) are found ultimately on a violation of this principle. *Neville Brown* and *John Bell* distinguished it with English doctrines of *ultra vires* that there be no question of a mere observance of statutory limitations, and it also goes further than observance of the common law principle of natural justice. French administrative law clearly defines the grounds for reviews under this principle, such as *l'inexistence; incompetence; vice de form; violation de la loi*<sup>156</sup>.

In China, a basic principle stipulated in the article 5 of ALL is that: "*In handling administrative cases, the people's courts shall examine the legality of specific administrative acts*". The result of court's judgment can be annulment of any specific administrative act that is judged to be unlawful<sup>157</sup>. Article 54 of this law also defines in detail the scope of examining the legality, such as lack of essential evidence, violation of legal procedures, *ultra vires* or abuse of power.

In Vietnam, the principle of legality is basically applied for the reviewing of any litigated administrative decision or action that can be found in several legal norms, such as article 1 of LOCD (1998, 2005); article 1 of OSAC (1996, 2006). However, the grounds for reviewing the legality are not completely regulated. Some Vietnamese researchers<sup>158</sup> argue that due to the lack of legal norms grounding such a review, the court is often puzzled with its conclusion whether or not the litigated decision is lawful and is inclined to render a discretionary judgment. Furthermore, since the administrative procedural law is in the process of being drafted, Vietnam lacks of substantive norms

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<sup>154</sup> Carl Schmitt, *Legality and Legitimacy*, (2004). The first edition was published in German language in 1932.

<sup>155</sup> See John P. McCormick, *An Introduction to Carl Schmitt's Legality and Legitimacy*, in Carl Schmitt (2004), Preface XVI

<sup>156</sup> L. Neville Brown & John S. Bell (1998), p.240-247

<sup>157</sup> See Yong Zhang, *Comparative Studies on Judicial Review System in East and Southeast Asia*, 47 (1997)

<sup>158</sup> See Nguyen Van Quang, *Ve xac dinh can cu tinh hop phap cua Quyet dinh hanh chinh trong xet xu hanh chinh*, [Defining the Grounds for Review of Legality of Administrative Decisions in Resolving Administrative Cases], in 5 *Luat hoc* [Jurisprudence Review], 18 (2004)



for reviewing what kind of administrative decision is considered legal. Here, it is worthy mentioning that in Vietnam, apart from the role of the National Assembly's Standing Committee and Executive Organs in the interpretation of law, SPC also exercises the main function of making judicial interpretation and guidance for the entire court system under Guidance Resolutions (*Nghi quyet*) or Official Circular (*Cong van*). Although they have no legal effect as laws, the inferior courts traditionally regard them as *de facto* norms that more or less reduce the supremacy of law as well as bring to the surface unavoidable inadequacies. Other instructions by the SPC can be found in the Annual Report on Adjudicating Work, or in some Supervisory Decisions<sup>159</sup> by the SPC's Judge Council which help the inferior courts to resolve the same encountered issues. The following section will analyze the grounds for review based on such instructions as well as some scholarly articles concerned. To examine the legality, this section falls into two main categories, namely the substantive and procedural requirements.

### ***2.1.1. Examination on Substantive Requirements***

Article 37 of OSAC provided the time of 60 days for trial preparation from the registration date of the lawsuit (*with regard to complicated cases, the above time limit shall not exceed 90 days*). Thus, in this period, the most important task of the competent judge is to examine both the substantive and procedural requirements of a litigated decision or action. Regarding the former, the following three main questions should be examined deeply: (1) Whether authority who rendered litigated decision is a legal subject; (2) Whether the content of litigated decision is lawful<sup>160</sup>; (3) Whether there is any error of law.

**For the first question**, the judge has to *first* examine whether the concerned authority has competence regulated by law. *Secondly*, although his competence is possibly recognized by law, whether he exceeds his limits of power or inclines abuse of such power. This can compare with the common law term of *ultra vires* as well as the doctrine of discretion known as the basic grounds in most administrative law system around the world. *Thirdly*, the judge also must consider whether the concerned authority fails to perform legal duties (*though in some cases, he does not deliberately violate*).

In fact, Vietnamese administrators have a wide degree of discretion in their own field of management. The Chairmen of People's Committees, for example, enjoy a discretionary power in granting and recovering lands, imposing fines, compulsory measures and granting and withdrawing licenses. Other areas include custom officers, polices, tax officers in their dealing with everyday life administrative violations. However, Vietnamese administrative law leaves a great vacancy in both legal theory and provisions on determining whether such discretion can be judicially reviewed and

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<sup>159</sup> So far there were two publications, Volume 1 (2004) and Volume 2 (2008). However, the number of administrative cases is still limited

<sup>160</sup> See Nguyen thi Thuy, *Giai doan chuan bi xet xu*, [The Period of Trial Preparation], in Hoang Van Sao ed (2007), p.241

the grounding for their scope.

**For the second question**, the judge *at first* must consider whether the litigated administrative decision falls in to the category of the legality or rationality. As a general principle, a certain administrative decision is compulsorily required to ensure both of them, however the court's jurisdiction is limited to examine only the legality. *Secondly*, the judge, by collating the concerned existing laws, examines whether the content of litigated decision is in accordance with such legal provisions. The most important task for the judge is to find out the concise and effective legal provisions, since they are sometime overlapping and scattered. In addition, the judge has to determine whether there is sufficient reason to explain the making of such decisions. Since the Vietnamese procedural system is inquisitorial, article 5 of OSAC requires the responsibility of the burden of proof to belong to both parties, and accordingly a litigated administrative decision will be sentenced unlawful if there is insufficient reason proving its contents in accordance with existing laws. *Finally*, though a litigated decision satisfies the legality for such a review, it may run out of the court's jurisdiction because it is not in the scope of "*enumerated cases*" provided by OSAC, and not the so-called "*original administrative decision*"<sup>161</sup>. This point will be further discussed later.

In trial practice, a great number of claim petitions are returned due to their failure to fulfill the above conditions. A majority of legal scholars are against law-makers in terms of the limitation of administrative cases judicially reviewed by the article 11 of OSAC, although they are continuously expanded from 7 cases (1996), to 9 cases (1998) and to 21 cases (2006). Regarding the review of the legality or rationality, since the fact that many petitions concerning the decision on land compensation or resolving land disputes were refused, it raises the debate among Vietnamese scholars on whether the rationality of an administrative decision is also judicially reviewed<sup>162</sup>. They refer to Chinese experiences in Art 54, section 4 of ALL stipulating that: "*if an administrative penalty is obviously unfair, it may be amended by court's judgment*". Thus, Chinese law provides an exception concerning the power of inquiry of the court, which enables it to conduct an examination in to the rationality, the appropriateness of the administrative penalty imposed by the administrative organs. In other words, *inquiry in to the legality of the act* is the general principle while *inquiry in to the rationality* is the exception. However, an opposite idea by *Vu Thu*<sup>163</sup> is that whether the courts, by reviewing the rationality of such administrative decisions, deeply interfere and pass over the administration. Some others support the idea that in the pre-litigation period, the administrative agencies were already empowered to examine both the legality and rationality of their own decisions,

<sup>161</sup> See Nghi quyet 04/NQ-HDTP (August, 4<sup>th</sup> 2008), [Resolution 04/NQ-HDTP on Guiding some provisions in Revised Ordinance on Settlement of Administrative Cases dated on April, 5<sup>th</sup> 2006], section 2

<sup>162</sup> See Dinh Van Mau & Pham Hong Thai, Tai phan Hanh chinh in Vietnam, [Administrative Jurisdiction in Vietnam], 90 (1995)

<sup>163</sup> See Vu Thu, Tinh Hop phap va Hop ly cua Van ban Phap luat va Cac bien phap xu ly cac khiem khuyet cua no, [Legality and Rationality of Legal Documents and Solutions for Recovering Defects], in 1 State and Law Journal, 15 (2003)

therefore the judicial review of rationality was not necessary to put to the court<sup>164</sup>.

**For the issue of error of law**, the prerequisite for a successful judge a full legal knowledge regarding the litigation process and Vietnamese statutory law system. Article 2 of the Law on the Enactment of Legal Norms (2001) provided a wide range of state organs from the central to the local level empowered to issue normative documents with different legal effects. However, though the achievements in legislative work have been highly appreciated recently, they still lack effective legal documents in the field of administrative law, including procedural law. A considerable number of administrative legal provisions are classified as “under-law regulations” (*van ban duoi luat*), such as Ordinances (*by National Assembly Standing Committee*), Decrees (*by Government*) and Circulars (*by Ministries*). Moreover, Vietnam lacks some very important laws relating to Administrative Remedies and Administration Sanctions. To recover errors of law, the SPC often issues guidance for inferior courts by Resolutions or Annual Reports that can not avoid undermining the effect of legislation as well as encouraging the discretion of judgments.

In the practice of adjudicating works, some errors of law can be found such as the following: (1) there were some fields of disputes grounded by no legal norms, particularly those arising in the land and social policy during the wars and those appearing recently in the land compensation policy; (2) on the other hand, there were some legal norms adjusting the same matters but contradicting and overlapping with each other; (3) some of them are also too abstract or ambiguous thus requiring a clear interpretation. However, such interpretative documents, are not regarded as state laws and strong enough to compel authority to properly apply and ensure its integrated application throughout the country. In practice, such documents may not always be available leading the authority to have no other choice but applying the general principle and making discretionary decision. There is a saying in Vietnam currently that: “*Vietnam has a forest of laws but People often live with forest-law*”. This means that due to the errors of law and the tendency of wide ranging discretion by authorities, people prefer to rely to a large extent on informal behaviors such as social norms or family rules to solve their daily administrative disputes.

There is a commonly known fact in Vietnam that the law documents cannot be applied in practice without interpretive documents, such as the Circulars made by various ministries. Administrative law documents have no provisions concerning the application of the retroactive effect. Meanwhile, article 76 of Law on Enactment of Legal Norms (2001) limits “*only in extremely necessary cases, a legal document may have a retroactive effect*”. In practical trial over administrative cases, such as tax-law cases, due to the lack of interpretative documents by the Ministry of Finance, the tax officers often have a wide degree of discretion to determine tax collection. Accordingly, the court is also reluctant to deal with such a case and give discretionary

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<sup>164</sup> See Nguyen Hoang Anh, *Moi quan he giua Khieu nai Hanh chinh va Khoi kien Hanh chinh*, [The Relationship between Administrative Complaints and Administrative Litigation] in Hanoi National University, Faculty of Law's Research Project, 53 (2006)

judgment, inevitably infringing upon the rights of individuals or organizations. This will be further introduced in the Vietnamese Case-Study Analyses<sup>165</sup> later in this Chapter..

### **2.1.2. Examination of Procedural Requirements**

Regarding the examination of procedural requirement, two main questions should be carefully determined by the competent judges: (1) Was such a litigated decision issued under concrete administrative procedures ensuring transparency, openness and fairness?; (2) Did the form of such litigated decision contain any mistake, such as signatures, seals and other technical requirements and are there any marks of *erasure* or correction from the original?<sup>166</sup>.

**For the first question**, it should be noted that, with the exception of the Law on Enactment of Legal Norms (2001) and Decree 135/ND-CP (2003) providing the examination and revision of legal norms to ensure the legality, regarding the issuance of particular administrative decisions, there are no general legal norms stipulating it. Since the Vietnam-America BTA came in to effect in December, 2001 and Vietnam is now already a member of the WTO, it requires a great deal of effort by the Vietnamese government to improve the administrative procedures, in which Chapter VI of the Vietnam-America BTA requires the transparency and the rights of bringing any illegal administrative decision or action to the court at any period<sup>167</sup>. However, such requirements were only met in a limited way in the two latest revised LOCD (2005) and OSAC (2006). As mentioned, the Administrative Procedural Law is in the process of being drafted and reveals many defects and debates. In addition, the concept of transparency and some other common law concepts like natural justice or due process recently imported into Vietnam are still unfamiliar and continually discussed.

In trial practice, the judge has to examine various kinds of particular litigated administrative decisions, such as the decision to impose fines against administrative violations; the decision to apply administrative compulsory measures as in the form of re-education at localities; the decision on granting or withdrawing permits and licenses; tax-collection decisions; the decision on forcible requisition, on land recovery and so on. The problem is that the procedure of enacting each decision is different and lies upon various *under-law* regulations, namely Government Decrees, Circulars of one or more related ministry. The administrators, while dealing with each particular case cannot avoid any procedural mistake, such as enacting a decision on the imposing of a fine of over 100.000 VND (*equivalent to 7 USD*) without the procedure of making a report (*lap bien ban*)<sup>168</sup>; enacting a decision on imposing a fine that exceeds ten days since the date of making report<sup>169</sup> and so forth. The judge is

<sup>165</sup> See Annulment of Administrative Decision on Personal Income Tax to Mr. K.S (Japanese Nationality) in Hanoi City. Appeal Judgment No 112/HCPT by Appeal Administrative Court located in Hanoi dated November, 7<sup>th</sup> 1998

<sup>166</sup> Nguyen thi Thuy (2007), p.241

<sup>167</sup> Vietnam-America Bilateral Trade Agreement consists of VII Chapters and 72 Articles. See Government Inspectorate, Hiep dinh thuong mai song phuong Vietnam – Hoaky va Co che giai quyet khieu kien hanh chinh o Vietnam, [Vietnam – America BTA and Mechanism for Resolving Administrative Litigation in Vietnam], pp.102-109, (2004)

<sup>168</sup> See Ordinance on Resolving Administrative Violation (2002), Art 55

<sup>169</sup> Ibid, Art 56

often faces confusion when determining whether such a decision can be annulled regardless of it being still legal under substantive requirements.

The SPC has already made instructions that: (1) While dealing with a litigated decision, the judge is required to examine whether the process of making an administrative decision or conducting an administrative act complies with all steps and procedures prescribed by concerned norms. Administrative decision must be legally in written form; (2) All procedural requirements must be strictly followed and any breach of such requirements will make the concerned decisions or actions immediately invalid. Thus, in general, Vietnamese law recognizes the procedural requirements as the basic ground for reviewing the legality and allows the court to declare a certain decision or action unlawful if it fails to fulfill such procedural requirements. However, some scholars consider that instruction by the SPC is, although strict on the one hand, still abstract, since it does not clearly classify the nature of procedural mistakes<sup>170</sup>. The second question will continue this discussion.

**For the second question**, since an administrative decision must be shown legally in written form, the judge has to examine any mistake that may be caused in the form of a legal document. Except for some *erasure* or correction in the form of decisions without rational explanation or having any fraud that must be considered as an unlawful decision, some minor procedural mistakes (*or technical mistakes*) may not invalidate such a decision, therefore there is no need to annul it.

The judges, in their adjudicating work, are faced with many situations where they must decide whether they should quash a decision that is wrong in the written form, but completely legal in the substantive contents. Some follow the SPCs guidance in term that “*any breach of procedural requirement makes a litigated decision invalid*”, deciding to annul the decision. Some argue that the minor procedural mistakes have no influence on the validity of such a decision, on the standing of parties and cause no harm to the substantive rights, therefore should be confirmed legal.

Some scholars refer to Chinese experiences on the classification of the administrative procedure into legal and non-legal type, in which the former is stipulated by law and applies compulsorily, while the latter can be regarded as customary rule<sup>171</sup>. Accordingly, any decision in the case of violating the former will be invalid and *vice versa*. Article 107 of the draft law on administrative procedure of China proposes that certain administrative decisions are invalid only when they have serious and clear errors of substance or procedure. In addition, this law clearly defines the form, contents as well as the legal effect of administrative decisions that totally support the Vietnamese scholar’s arguments regarding improvement of such issues.

**To conclude**, Vietnamese administrative law empowers ADCs to review only the legality of

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<sup>170</sup> See Le Xuan Than, *Mot so y kien ve to chuc va hoat dong cua Toa hanh chinh*, [Some Ideas on the Organization and Operation of Administrative Courts], 7 *State and Law Journal*, 33 (2007). See also Nguyen thi Thuy, *supra* note 160

<sup>171</sup> See Nguyen Van Quang, *Comparative Study of System of Review of Administrative Action by Courts and Tribunal in Vietnam and Australia*, 201 (2006). (Unpublished documents). He quoted L. Feng, *Administrative Law Procedures and Remedies in China*, 190 (1996)

certain administrative decisions or actions. Looking at Chinese experiences, some Vietnamese scholars wish to study: (1) the way Chinese courts, in general principle, adopt the inquiry into the legality of the acts while allowing the court to examine rationality as an exception. In fact, the two countries share many commonalities regarding the unreasonableness of decision on administrative penalties, particularly on the land dispute resolutions; (2) the process of issuance of administrative procedural law in which the form, content and legal effect of a particular administrative decision as well as the ground for reviewing it should be clearly defined.

Vietnam currently lacks many effective laws regarding the administrative dispute resolutions. To examine the legality, the judges are often embarrassed with the error of law. They follow the SPC's instructions, but they can not avoid leaning towards their own discretion and rendering unlawful judgments. While handling out some lawsuits, the judges sometimes find illegal norms that completely infringe upon the legal rights of individuals and organizations. However, they are outside of judicial review. The next section will further discuss on the power of inquiry into legal norms that to a certain extent also share commonalities with that of China.

## **2.2. Non-Power of Inquiry in to Legal Norms**

In China, the power of inquiry in to legal norms is vested in the People's Congress and its Standing Committee of the same level and the Government at a higher level. The courts are not entitled to review the constitutionality or legality of any norm, even if a concrete case is lodged. In the case where a judge discovers that an administrative regulation or rule to which the defendant accorded is contrary to the superior legal norms made by the State Council, the only thing he can do is to report it to the SPC, then the SPC will ask the State Council to make a judgment on the issue. However, there has recently been criticism among Chinese scholars about this issue as a limit of the ROL in China. Chinese scholars study Japanese experiences in cases where, although the legislative activities which are excluded from the subjects of issue, after a plaintiff has lodged a lawsuit against an administrative act, the judges can review if the legal norms to which the defendant referred violated Constitution or other superior rank legal norms, and SPC holds the final power for such a review<sup>172</sup>. As a consequence, Chinese courts may, to a certain extent, examine the legality of some local and departmental legal norms directly related to the legality of a certain litigated administrative decision.

Vietnam, up to date, has no mechanism for reviewing the constitutionality and legality of legislative norms, although this issue was discussed before the foundation of the ADCs in 1996 and has been revived recently. There were a number of reasons why Vietnamese lawmakers refused to empower the courts to carry out such a review:

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<sup>172</sup> Yong Zhang (1997), p.77. See also Japanese Constitution 1947, Art 81

**Firstly**, the Vietnamese political system is constructed under the doctrine of Power Concentration and One Party Ruling. Article 84 of Vietnamese Constitution, Law on the Supervision of National Assembly (2004), Article 81 of Law on Enacting Legal Norms stipulates the supreme supervision power of National Assembly over the observance to the Constitution and laws of all state organs, organizations and individuals, including the enactment of legal norms. Hence, if the court is entitled to review statutes of National Assembly, it will contradict the existing Constitution. Meanwhile, the amendment of the Constitution is always a complicated issue.

**Secondly**, Vietnam already has a mechanism for reviewing the constitutionality and legality of any legislative norm by various channels under the supreme supervision of the National Assembly. These mechanisms include: (1) National Assembly as Supreme Control; (2) National Assembly's Standing Committee and Nationality Council and Committees of the National Assembly holding a function of Supervision; (3) Administrative Organs as Internal Control; (4) Government Inspectorates holding Inspection and Advice; (5) People's Procuracy performing Supervision of the enactment of legal norms from ministerial rank downwards<sup>173</sup>.

In general, the National Assembly can annul entire laws, resolutions, or legal documents of its Standing Committee, State President, Government, Prime Minister, SPC and Supreme People Procuracy or parts thereof, which is contrary to the Constitution, its laws and resolutions.

The National Assembly's Standing Committee can annul a document of Government, Prime Minister, SPC or Supreme People Procuracy which is contrary to its ordinances and resolutions; and can annul parts of or entire "wrong resolutions" of the *provincial-level people councils*.

The Prime Minister can annul parts of or entire legal document of ministers, the Heads of ministerial-level agencies, the heads of agencies attached to Government and the *provincial-level people committees* which is contrary to Constitution, laws and legal documents of higher-level state agencies

The People's Procuracy is entitled to suspend and propose to the competent state agency to annul unlawful legal norms made by Ministers, Heads of the ministerial-level agencies, Heads of agencies attached to Government, local people councils and people committees

Government Inspectorates are required to help the government at the same level to supervise and recommend it to review the legality of administrative norms.

Furthermore, the Vietnam Fatherland Front and its member organizations and all individuals through their legal rights provided by Constitution can make any recommendation to the validity of legal norms. As such, by implication, Vietnamese law-makers consider that the above mechanism for reviewing the constitutionality and legality is well guaranteed, therefore there is no need to provide the courts powers for review.

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<sup>173</sup> See Law on Enacting Legal Norms (2002), Art 81-85

**Thirdly**, Vietnamese law-makers affirm that the ADCs have been established for reviewing the legality of a particular administrative decision or action that directly influences the legal rights of a particular subject. In the case where an administrative norm is discovered to be unconstitutional or illegal, they can recommend to the competent state agency for annulment as provided by law. Moreover, since the administrative decision of legislative character is regarded as a decision of “*internal administration*”, the court cannot therefore interfere with such *internal* decisions. However, regarding democracy and the absolute protection of all individual’s rights enhanced by the recent addition of ROL, this view seems to be currently under great challenge.

**Finally**, by also looking at foreign experiences, Vietnamese lawmakers present some countries that exclude the legislative activities from the ground of JRAA as evidence. Some scholars influenced by German views argue that the administrative decisions holding a legislative nature can be directly controlled by the representative organs under the legislative process. Therefore, the court is out of such review’s competence. *In principle*, some other countries, such as Japan and China, also do not recognize the judicial review of legislative activities. It can be realized that the extent of the scope of the subjects depends on the governmental structure and the characteristics of the statutory laws. Some of the above-mentioned countries have a completely different nature to each other, in particular the difference between China and Japan. However, it is worthy to mention that there always appears to be an exception for such a review in these countries. Japanese judges, for example, are allowed to review certain administrative norms while handling concrete administrative cases. German administrative courts can judge the legality of an administrative norm that grounded in law, which is basic for enacting such litigated administrative decisions.

**In short**, Vietnamese lawmakers have their own reasons for excluding the judicial review of legal norms. However, a number of scholars still strongly support the broadening of the scope of the court’s jurisdiction as much as possible, including the previously mentioned issue as well as the review of all fields of administrative management<sup>174</sup>. Some foreign observers consider that Chinese experiences are worthy for the Vietnamese law-makers to follow. However, the review of constitutionality and legality of legal norms and its effects is still unfeasible in these two countries in the current context.

### 3. Objects to Judicial Review

Article 2 of OSAC (2006) stipulates that:

*“Individuals, state agencies and organizations shall have the right to initiate administrative lawsuits against administrative decisions or administrative actions...Cadres and public servants holding the post of department directors and equivalent or lower post as defined by law on public employees shall have the right to initiate administrative lawsuits against the*

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<sup>174</sup> Nguyen Hoang Anh (2006), at 36



*disciplinary decision on job dismissal...”.*

Thus, the disciplinary decision on job dismissal, although in nature is an administrative decision, it has its own characteristics. These include: (1) it arises in the “*internal relation*” of the administration; (2) the subject is always officials or public employees; (3) it may infringe the right of having jobs as one of the basic legal rights of citizens provided by Constitution<sup>175</sup>. For such a reason, Vietnamese lawmakers divide the objects for judicial review into three types as fully analyzed below.

### **3.1. Individual Administrative Decisions**

The concept of administrative decisions in Vietnamese legal terms has a broad sense. Accordingly it is defined as a “*written decision*” issued by a state agency or a competent person that is applied once or many times, to one or several particular subjects or any subject concerned, for a specific matter in the field of administrative management. Vietnamese administrative law science classified it in to three types. These three types are: 1) the administrative decision of legislative character (*Quyết định quy phạm*); 2) the decisive decision (*Quyết định chủ đạo*, like regulations or guidance concerning the implementation of state’s policies at locality) and 3) individual administrative decisions (*Quyết định cá biệt*).

Principally, all administrative decisions should be addressed for judicial review in cases infringing on the legal rights and interests of all individuals and organizations. However, as mentioned in the last section, Vietnamese lawmakers consider that two of the former may be illegal and irrational, but not directly cause damages for such a *concrete* subject. In addition, Vietnam has its own mechanism to review such kinds of decisions through various channels; therefore, only individual administrative decisions are subject to judicial review.

It is noted that Vietnamese law does not allow all individual administrative decisions to be reviewed by the courts. Some main requirements that should be figured out are as follows:

**Firstly**, it must be enacted by administrative agencies or competent persons applied one time, to one or several subjects concerned and must directly impact on the legal rights and interests of these subjects. Some scholars debate that (1) whether some kinds of written documents issued by administrative agencies or authorities, like public letters (*cong van*), notices (*thong bao*) or reports on specific matters (*bao cao*) can be reviewed by courts in cases of violating the rights of people concerned; (2) whether a certain illegal administrative decision, although people concerned benefit, can be reviewed by courts<sup>176</sup>.

*For the first question*, the SPC has recently provided guidance for such kinds of legal documents. Although they fail to satisfy the requirements of an administrative decision in both the

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<sup>175</sup> See Hoang Van Sao ed (2007), pp.84-85

<sup>176</sup> Ibid, at 83

substance and form, it still forces people to follow, and consequently they are directly influenced and face damages. For such a reason, it must be reviewed by the courts if it satisfies other conditions (*as enumerated matters in the article 11 of OSAC*). To some certain extent, it can be compared with the administrative guidance in Japan and involves the question of whether such an administrative guidance can be judicially reviewed.

*For the second question*, it was once fact that some state agencies already knew that their issuance of decision was illegal (*such as granting lands or some license without the correct competence provided by law*). However, the concerned people also received benefits from such illegal decisions, so they did not bring any claim to court. In this type of case, although the administrative decision was illegal and necessarily annulled, the courts had no way to open a lawsuit. Some opinions refer article 18 of OSAC providing the right to institute administrative lawsuits (*quyen khoi to*) of procurators, however this provision also limits the right of procurators in case of such decisions “*concerning on the minors, the physically or mentally handicapped, if no body initiates the lawsuits*”.

**Secondly**, it must be an administrative decision rendered for the first time (*the original administrative decision*). Section 2 of Resolution 04/NQ-HDTP (2006) interprets four kinds of original decisions, aiming to distinguish between the decision on settlement of claims for the first and second time by superior agencies.

To be in accordance with some requirements of the Vietnam-America BTA and WTO regulations, the Revised LOCD (2005) abolished the rights of final settlements as well as the final settlement decisions made by the Chairman of Provincial People’s Court, by Ministers and the Prime Minister. Article 2 of OSAC (2006) also provides that the individuals have the right to initiate lawsuits in courts, in cases where they have lodged complaints with the competent persons to settle complaints for the first or second time but their complaints remain unsettled beyond the time limit provided by law, or their complaints have been settled but they disagree with the settlement decision at the first or second time. Thus, whether or not a complaint settlement decision is enacted or not (*with an exception regarding the land issue*<sup>177</sup>), individuals can initiate a lawsuit. However, the object of judicial review here is not in the name of complaint settlement decision, but the *original administrative decision* as mentioned above.

An argument has been raised as to whether a certain part of the settlement decision is regarded as an original administrative decision, therefore can be taken to courts. For example, in a part of the settlement decision, the settlement agencies change the amount of fined money and it is protested by people concerned.

**Finally**, it must be in the scope of the enumerated matters provided by OSAC (2006). It

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<sup>177</sup> See Law on Land 2003, Art 136 section 2. See OSAC (2006), Art 2 section 2

allows all individuals to take administrative decisions arising in 21 matters that will be fully analyzed in the next section of court's jurisdiction over enumerated matters.

**In summary**, a certain administrative decision that satisfies the above three requirements can be an object of judicial review. In the theory of Vietnamese administrative law, the concept of administrative decisions still remains unclear and inconsistent. Article 2, section 1 of OSAC provides the litigated administrative decision must be enacted by a certain administrative agency or competent person within such agencies. This provision leads to a number of arguments, such as: (1) whether any decision made by an agency of CPV, a wide range of social organizations, like Fatherland Front, Youth Union ...can be taken to courts; (2) whether any decision made by Vietnamese diplomacy representative organs located overseas (*such as embassy or consulate*) can be judicially reviewed and so on. These organizations are not administrative agencies; however, their decisions cannot avoid infringing upon the legal rights of some concerned subjects. Regarding the aspect of State Will and Power, in any certain administrative decision, it cannot be in name when it is made for personal purposes<sup>178</sup>. As this implies, when an authority takes bribes and renders an illegal decision, such as granting license for construction or imposing administrative penalty, the question arises of whether this issue can be taken to the administrative court or other judicial courts. In trial practice, a great number of petitions are returned due to being out of the scope of the court's jurisdiction which inevitably makes people disappointed with the ADCs.

### 3.2. Job Dismissal Disciplinary Decisions

Disciplinary decisions on job dismissal, by nature is a kind of written individual administrative decision, but is bound to a concrete subject, such as cadres and public servants. It is one of the most serious disciplinary decisions among the six provided by the Ordinance on Cadres and Public Servants<sup>179</sup>. Since it reaches beyond the control of "*internal administration*", and considerably infringes the citizen's right of having jobs, it must be judicially reviewed

Article 2, section 2 of OSAC limits the only "*the cadres and public servants holding the post of department directors and equivalent, or lower post as defined by the legal norms on public servants*" can take a lawsuit.

**First of all**, the concept of cadres and public servants in Vietnamese administrative law remains a controversy. It has been in discussion on what clearly classifies cadres and public servants, public servants working in the state agencies (*like the ministry, people's committee...*) and those

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<sup>178</sup> Pham Hong Thai, *Giao trinh Luat Hanh Chinh va Tai phan Hanh chinh Vietnam*, [Textbook of Administrative Law and Administrative Litigation Law], National Administration Institution, 339 (2006)

<sup>179</sup> Ordinance on Cadres and Civil Servants was first enacted in 1996. Its latest revision was in 2003. According to this Ordinance, Art.39, 6 forms of disciplinary measures as (1) Reprimand (Khien trach); (2) Warning (Canh cao); (3) Reduction of Salary (Ha luong); (4) Reduction of Public Servant Status (Ha ngach); (5) Dismissal of High Position (Cach chuc); (6) Job Dismissal ( Buoc thoi viec). On November, 13 2008, National Assembly approved New Law on Cadres and Public Servants. It comes in to effect July, 1<sup>st</sup> 2009.

working in other fields of public services (*like university, hospital...*). In the case where a professor of a university is dismissed from his job, the question arises of whether he can take a lawsuit to the courts. Article 1 of the existing ordinance does not give any concrete concepts of the cadres and public servants as well as provides no distinction among them. In principle, people who work in the party's agencies fall in to the category of "*cadres*", and never receive a disciplinary decision on job dismissal. Instead, the most serious disciplinary measure for them is to be discarded from membership of CPV. They are always out of the plaintiff of a lawsuit.

**Secondly**, the discussion of why the existing law limits only "*the cadres and public servants holding the post of department directors and equivalent, or lower post*". The term "*Department Director*" (*Vu truong*) refers to the leader of some departments within ministries, ministerial equivalent agencies, or agencies belonging to government. Thus, Ministers, Vice Ministers, Heads of Ministerial Equal Agencies and some other superior authorities at the central level are not subject to administrative lawsuits. For such explanations, Vietnamese law-makers consider that these people have quite a different procedure of appointment and dismissal, particularly under the promotion of the CPV.

### **3.3. Administrative Actions**

An administrative action of administrative agencies or officials while performing the public power prescribed by law is also the object of judicial review<sup>180</sup>, understood as a "*concrete action*" or "*non action*" that might not be in conformity with the law and needs to be initiated in the court. In this case, it is identified as an illegal action or nonfeasance of the said agencies or officials, clearly discriminated from the alleged written decision, such as an action of withdrawing properties over limited competence, or the negligence of granting the construction or business licenses in demand seen as illegal "*non-action*".

During the dealing with the above litigations, the court can issue an order on suspending the implementation of that action (*injunctive order*), or an order on forcing the defendant administrator to perform their legal duties. The important notice concerning administrative actions addressed for judicial review is that the plaintiff must prove the direct damages caused by such administrative actions and the cause-effect relation thereof.

## **4. Court's Jurisdiction: Classification and Analyses**

### **4.1. Jurisdiction over Territorial Units**

#### **4.1.1. Supreme People Court**

The Revised OSAC (2006) abolished the section 3 of article 12 regarding the jurisdiction of "*the first instance and final instance procedure*" of SPC. However, this article stipulates nothing

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<sup>180</sup> OSAC, Art 2, 4, 12

about its jurisdiction over appeal, supervisory and review trials. It may create confusion for the readers that only local courts are empowered to deal with administrative cases.

To explain and distinguish its jurisdiction with local courts, one should refer to article 20 of LOPC (2002). According to this provision, SPC has jurisdiction: (1) to review an error of law (supervisory trial, *giam doc tham*) or review newly discovered facts (review trial, *tai tham*) in which the legally effective judgments or decisions by *district or provincial people's courts* have been protested; (2) to hear on appeal cases in which judgments or decisions of immediately lower courts (*provincial people's courts*) which have not yet become legally effective, have been appealed or protested.

#### **4.1.2. Local Courts**

**District People Courts**, in principle, are entitled to settle administrative cases under the *first-instance* procedure. It can review administrative decisions or actions taken by state agencies or authorities of the district or lower level on the same territory with the courts. In comparison with the old OSAC (1996, 1998), the latest regulations regarding the district court's jurisdiction can be identified as follows: (1) It empowers to district courts to deal with lawsuits related to lists of voters to elect National Assembly deputies or lists of voters to elect People's Council deputies made by voters list-making bodies on the same territory with the courts<sup>181</sup>; (2) In some complicated administrative cases, such as cases relating to land disputes, to many subjects of different territory or residing overseas, the trial panel of the district court can consist of two judges and three people's assessors (*compared with one judge and two people's assessors in normal cases*)<sup>182</sup>.

**Provincial People's Courts** have jurisdiction over both *first-instance and appeal* trials. In principle, provincial people's courts deal with lawsuits against administrative decisions or actions made by central state agencies as Ministries, the SPC, the Supreme Procuracy and so on, which are initiated by individuals whose place of residence or work are located on the same territory or by agencies or organizations which are headquarters on the same territory with the courts<sup>183</sup>. Article 12, section 2 of OSAC (2006) expands the jurisdiction of provincial people's courts over the following lawsuits: (1) It against decisions made by Chairmen of provincial people's committee to settle complains about the commendation or disciplinary decision by lawyer's association; (2) It against decisions on settling complaints about decisions on handling competition cases; (3) It falls under the jurisdiction of district courts but is picked up by provincial courts for settlement, such as a complicated lawsuit related to many subjects including residing oversea, the district judges are refused to handle out the cases provided by law<sup>184</sup>.

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<sup>181</sup> OSAC, Art 12, section 1

<sup>182</sup> OSAC, Art 15, section 1

<sup>183</sup> OSAC, Art 12, section 1

<sup>184</sup> See Resolution 04/NQ-HDTP (August, 4<sup>th</sup> 2006), section 8

#### **4.1.3. Delimitation of Court's Jurisdiction**

Delimitation of Court's jurisdiction falls in to two categories, namely: (1) the court's jurisdiction and the competence of superior administrative agencies dealing with claims at the second time (*hereafter as referred to superior agency*); (2) the jurisdiction among the courts.

**For the first category**, it should be mentioned on the compulsory procedure, namely *pre-litigation*. In this period, it requires the plaintiff to *at first* make a complaint to the administrative agency or authority who rendered such litigated decisions (*hereafter as referred to original agency*) within 90 days of the date of receiving the administrative decision or detecting illegal administrative actions<sup>185</sup>. The time limit for the first settlement of complaints by original administrative agency shall not exceed 30 days (*45 days in remote areas, 60 days in complicated cases*)<sup>186</sup>. Thus, since it is a compulsory step, there is no conflict of competence between the court and the original agencies.

*At the second step*, if individuals do not agree with the decision on settlement by the original agency, they can lodge a lawsuit to court within 30 days (*or 45 days in some special cases*)<sup>187</sup>. The Revised OSAC allows individuals, in the case of receiving no decision on settlement by the original agency, to initiate a lawsuit since the expiration of limited time for claim's settlement<sup>188</sup>. However, LOCD 2005 also allows them to continue making complaints to the superior administrative agencies. Thus, it may emerge a conflict of competence between this superior agency and the court when individuals lodge their petitions to both of them. Such a conflict can be delimited as follows: (1) For cases involving only one individual who simultaneously initiates a case to court and lodges a complaint to the superior agency, the jurisdiction belongs to the former; (2) For cases involving many persons who simultaneously initiate a case to court or lodge a complaint to the superior agency; or some of whom initiate a case to court, while the others lodge a complaint to superior agency, the competence belongs to the latter.

Along with LOCD 2005 which abandoned the final settlement by three administrative authorities (LOCD 1998)<sup>189</sup>, OSAC 2006 allows the court to open the trial, even if the *second-time* settlement decision by superior agency has been made, but still protested (*unless otherwise provided by law*)<sup>190</sup>.

**For the second category**, to settle the conflict of jurisdiction among courts, (1) Chief

<sup>185</sup> LOCD (2005), Art 31

<sup>186</sup> LOCD, Art 36

<sup>187</sup> OSAC, Art 2, section 1.a, Art 30, section 2

<sup>188</sup> OSAC, Art 2, section 1.b

<sup>189</sup> Three authorities render the final settlement as Chairman of People Committee, Minister, Prime Minister. See LOCD 1998, Art 23,25,28

<sup>190</sup> OSAC, Art 13, section 1.c

Justice of Provincial People's Court decides which District Court is in competence in case the concerned courts locate in the same province; (2) Chief Justice of SPC decides which Provincial Court, or which District Court is in competence in case the concerned courts locate in the different provinces<sup>191</sup>.

#### 4.2. Jurisdiction over Enumerated Administrative Matters

Since the early 1990s, Vietnamese scholars strongly debated whether the scope of administrative matters should be limited for judicial review. Some scholars who supported for the model of an independent administrative court proposed that the court should review all fields of administrative management, like Germany<sup>192</sup>. However, some of them also argued that, German administrative courts were granted the jurisdiction over limited cases in the early days of its establishment in the 19<sup>th</sup> century. When it developed and those concerned become more experienced, it was possible for it to be granted with broader jurisdiction<sup>193</sup>. Looking at Chinese experiences, when ADC was established in 1989, it was also granted to review only 8 administrative matters<sup>194</sup>. Furthermore, it included one “standby provision” that “*the people's courts shall accept other administrative cases which may be brought in accordance with the provisions of relevant laws and regulations*”. The Government Inspectorate of Vietnam was in charge of drafting OSAC from 1995. It was enacted by the National Assembly's Standing Committee in June, 1996 in which the principle of enumerated cases was provided in article 11. This article also limited to 8 the number administrative matters to be judicially reviewed, including one “standby provision” as in the case of the Chinese example, ALL saying that “*the court can have jurisdiction over other kinds of administrative decisions and actions prescribed by law*”<sup>195</sup>.

**To explain why the principle of enumerated administrative matters was adopted in OSAC 1996, Vietnamese lawmakers gave the below reasons:**

**Firstly,** Vietnam, at that time, had no experiences on JRAA. Some court's divisions such as

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<sup>191</sup> See OSAC, Art 13, section 3

<sup>192</sup> See Hoang Thanh Tung, Nhung van de tham quyen cua Toa Hanh chinh qua nghien cuu kinh nghiem cua Cong hoa lien bang Duc, [Some Issues on Administrative Court's Jurisdiction from the Study of German Experiences] in Thanh tra Nha nuoc (1997), supra note 9, at 45

<sup>193</sup> Ibid

<sup>194</sup> See ALL of China, Art 11

<sup>195</sup> Article 11 of OSAC 1996 provided 8 administrative matters for judicial review as follows: (1) Protest against decisions to impose fines against administrative violations or to apply measures for the compulsory dismantlement of the illegally built dwelling house, projects or firmly-structured objects; (2) Protest against decisions to apply administrative measures in the form of re-education at communes, wards or townships, putting in to reeducation schools, educational establishments, medical establishments or administrative custody; (3) Protest against decisions on dismissal, except those concerning People's Army and decisions on dismissal in accordance with the provisions of Labor Code; (4) Protest against decisions or administrative actions concerning the grant and withdrawal of permits and licenses in the field of capital construction, production, business and land management; (5) Protest against decisions on forcible requisition, forcible purchase and confiscation of assets; (6) Protest against decisions on tax collection and tax arrears collection; (7) Protest against the collection of charges and fees; (8) Protest against other kinds of administrative decisions and administrative actions as prescribed by law.

economic, labor and ADCs were established at almost the same time with the limitation of sufficient judges in both number and capacity. Therefore, if the court was empowered to review all administrative matters, it would not be able to avoid the overload of administrative cases and reduce the effect of newly established ADCs.

**Secondly**, the substantive administrative law was not sufficient grounds for all fields of administrative management. It lacked many legal norms for binding disputes arising in the field of land management, housing or social policies during the wars. Some other disputes emerging in the market economy have not been adjusted by law. If they were brought to courts, the judges would be unable to find the effective legal basics for review.

**Thirdly**, they considered that the judiciary could not interfere in all everyday administrative activities. They provided as evidence French administrative law that recognizes “*l’exception a l’Etat de Droit*”<sup>196</sup>. This meant that some administrative activities, as exceptions, could not be reviewed by the courts. They pointed out two trends of regulating the objects of judicial review in the world, one giving “*open*” provisions that limited some administrative matters out of court’s jurisdiction (*like France*), while the other issuing “*close*” provisions that limited some administrative matters in court’s jurisdiction (*like China and Vietnam*).

**Finally**, Vietnam had its own mechanism for legislation and law interpretation in which the Government is empowered to enact legal norms to supplement those not yet regulated by law. The standby provisions mostly appear in Vietnamese legal documents that allow Government to catch up with any change in each period. With this implication, Vietnamese lawmakers believe that the *standby provision* in Article 11 of OSAC could recover the defect of the principle of enumerated matters. In practice, to complement some new administrative matters should be judicially reviewed. The government enacted some decrees granting new jurisdiction to the courts<sup>197</sup>. However, this explanation was criticized since such Government’s decrees can be considered as unconstitutional and may threaten the independence of judiciary. The government cannot have more power than the National Assembly and its Standing Committee on legislation. Moreover, it cannot empower a court to review what is in the hands of its governance.

Article 11 of Revised OSAC 1998 did not include many new administrative matters for judicial review as supplemented by Government decrees. Although was it increased to nine matters in compared with the previous seven, it only rearranged the previous contents by separating the field of land management and the imposing of administrative violations into two independent clauses and still retained the standby provision<sup>198</sup>.

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<sup>196</sup> See Nguyen Hoang Anh (2006), p.33

<sup>197</sup> Such as, Decree 76/CP (November, 29<sup>th</sup> 1996) provided the court’s jurisdiction over administrative decision on granting the certificates of copyrights; Decree 63/CP (dated October, 24<sup>th</sup> 1996) concerning the trade mark registration, intellectual property; Decree 45/CP (July, 1<sup>st</sup> 1998) on the approval of technology transfer contracts and so on

<sup>198</sup> According to Article 11 of Revised OSAC 1998, enumerated administrative matters as follow: (1) Petitions against decisions to penalize administrative violations; (2) Petitions against decisions or actions in the application of measures for compulsory



Article 11 of the latest OSAC enlarges the court's jurisdiction over 21 administrative matters and the *standby provision* was also included<sup>199</sup>. Thus, the debate on enumerated cases seems to be endless. Some scholars are afraid that the list of enumerated cases will be continuously increased and there will be no way to prevent the interference of the Government in the field of judicial review. They suggest that it should only regulate what administrative matters are out of court's jurisdiction in line with Article 12 of Chinese ALL<sup>200</sup>.

**Regarding the present enumerated matters, followings items should be considered:**

**Firstly**, the administrative litigations concerning land management are always complicated issues. Section 17 of Article 11 says: "*The court has jurisdiction to settle lawsuits against administrative decisions or actions related to management in the cases of land assignment, land lease, land recovery, land requisition, permission for change of land use purposes, compensation, support, ground clearance, resettlement; grant or withdrawal of land use right certificates; and extension of land use duration*".

Thus, under this provision and also section 7.3 of Resolution 04/NQ-HDTP (2006) by the SPC, administrative decisions or actions concerning the settlement of land disputes are out of the court's jurisdiction. It always falls into the competence of claim settlements by local people's

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dismantlement of dwelling houses, construction or other firmly structured objects; (3) Petitions against decisions or actions in applying or taking administrative measures such forms as re-education in communes, wards or townships; putting in to re-education schools, reformatory establishments or medical establishments and administrative probation; (4) Petitions against disciplinary decisions on the dismissal of officials or public servants who hold the post of the department heads and equivalent or lower-level posts; (5) Petitions against decisions or actions concerning land management; (6) Petitions against decisions or actions concerning the granting and withdrawal of permits and licenses in the fields of capital construction, production and business; (7) Petitions against decisions or actions concerning the forcible requisition, purchase or confiscation of properties; (8) Petitions against decisions or actions concerning the collection of taxes and tax arrears; (9) Petitions against decisions and actions concerning the collection of charges and fees; (10) Other petitions as prescribed by law.

<sup>199</sup> According to Article 11 of Revised OSAC 2006, enumerated administrative matters as follow: (1) Lawsuits against decisions on sanctioning administrative violations; (2) Lawsuits against decisions on applying preventive measures to secure the handling of administrative violations; (3) Lawsuits against decisions or actions in applying measures to force execution of decisions on sanctioning administrative violation; (4) Lawsuits against decisions or actions in applying or taking administrative measures such forms as re-education in communes, wards or townships; putting in to re-education schools, reformatory establishments or medical establishments and administrative probation; (5) Lawsuits against decisions or actions in the application of measures for compulsory dismantlement of dwelling houses, construction or other firmly structured objects; (6) Lawsuits against decisions or actions concerning the grant or withdrawal of permits in the fields of capital construction, production and business, business registration certificates and certificates of practices; or lawsuits against other administrative decisions or actions related to trader's business and financial operations; (7) Lawsuits against decisions or actions related to international or domestic trade in goods; (8) Lawsuits against decisions or actions related to domestic and international financial transfer, services and service delivery; (9) Lawsuits against decisions or actions related to requisition, acquisition or confiscation of properties; (10) Lawsuits against decisions or actions related to the collection of taxes and tax arrear; (11) Lawsuits against decisions or actions related to the application of charges, collection of charges and fees, collection of land use levies; (12) Lawsuits against decisions or actions in the state management of intellectual property and technology transfer; (13) Lawsuits against decisions or actions in the state management of investment; (14) Lawsuits against decisions or actions taken by custom offices or officers; (15) Lawsuits against decisions or actions related to civil status management; (16) Lawsuits against decisions or actions of refusing to give notarization or authentication; (17) Lawsuits against decisions or actions related to management in the cases of land assignment, land lease, land recovery, land requisition, permission for change of land use purposes, compensation, support, ground clearance, resettlement; grant or withdrawal of land use right certificates; and extension of land use duration; (18) Lawsuits related to lists of voters to elect National Assembly Deputies or lists of voters to elect People's Council Deputies; (19) Lawsuits against disciplinary decisions on the dismissal of cadres or public servants who hold the post of department director, equivalent or lower posts; (20) Lawsuits against decisions of Chairmen of Provincial People's Committee on settling complaints about decisions of the Directorates or Commendation and Disciplinary Councils of Lawyer's Association; (21) Lawsuits against decisions on settling complaints about decisions on handling competitions cases; (22) Other lawsuits as prescribed by Vietnamese law and treaties to which the Socialist Republic of Vietnam is a contracting party".

<sup>200</sup> See Art 12 of Chinese ALL, (Enacted on April, 4<sup>th</sup> 1989; Effective on October, 1<sup>st</sup> 1990). More analyses will be given in the Chapter III

committees prescribed by the Law on Land (2003) and LOCD (2005). Furthermore, Article 135 of the Law on Land provides that the courts are entitled to review a land lawsuit in cases where the defendant shows his Certificates on Land-Use Rights. In fact, due to the lack of such certificates, disputes often arise. In addition, Article 2 of OSAC 2006 only allows the court to review land matters in section 17 of Article 11 in cases where the litigants have already received the settlement decision made by the chairpersons of local people's committees. To conclude, it seems to narrow the way people can take land lawsuits to court and encourages the administrators to resolve them.

**Secondly**, Section 9 of Article 11 provides the court's jurisdiction over the lawsuits against administrative decisions or actions related to requisition, acquisition or confiscation of properties. However, Resolution 04/NQ-HDTP (2006) limits the decisions or actions that emerged after 1991 to take to court (*when Government Decision 297/CT dated on October, 2<sup>nd</sup> 1991 was made*). Thus, in reality, many decisions or actions concerning requisition, acquisition or confiscation of properties during the wars or in the central planning economy are out of the court's jurisdiction.

**Thirdly**, Section 5 of Article 11 concerns the lawsuits against administrative decisions or actions in applying measures to force the dismantlement of dwellings, *construction* or other *firmly structured objects*. The concept of *construction* or other *firmly structured objects* are the abstract concepts in Vietnamese language, since they emerge in various forms in the current process of urbanization. The main task of the courts is to review the legality of the concerned administrative decisions, not to examine the nature, and quality of such *construction* or *firmly structured objects*. Therefore, it needs to be verified by special experts as well as by detailed regulations to avoid the court's discretion.

**Finally**, to fulfill the requirement of the WTO regulations and the Vietnam-America BTA, some new administrative matters are given to the court's review, such as the competition cases (section 21), the state management of investment (section 13), cases related to domestic and international financial transfer and services (section 8), cases related to domestic and international trade in goods (section 7) and to business and financial operations of private traders (section 6). Substantive laws in these matters have been created recently which, to a certain extent, reveal the defects and do not completely fulfill the international agreements. Moreover, the limit in capacity of judges is also a great challenge for reviewing such issues.

*Regarding the standby provision of section 22 in Article 11*, Resolution 04/NQ-HDTP (2006) made guidance as follows: If any decision or action out of the scope of 21 administrative matters taken to courts, the court will (1) open a trial in case it was regulated in other Vietnamese norms or in regulation of any international treaty to which Vietnam is a contracting party; (2) return petitions in cases where there is no such above regulations. In short, the enumerated administrative matters for judicial review are still in great discussion among Vietnamese scholars in which many of them strongly support for enlarging court's jurisdiction at maximum. In addition, the maintenance of

*standby provision* cannot absolutely resolve the issue of judicial independence when Government itself may continue regulating other emerging lawsuits.

### **4.3. Jurisdiction over Trial Proceedings**

#### **4.3.1. Examining the Standing**

Examining the standing of plaintiff and defendant is the priority work for competent judges in settlement of administrative lawsuits. For such a reason, it must be carefully examined and divided in to two main periods: (1) one is conducted right after a lawsuit is lodged. In the case of some requirements for their standings are not satisfied, the court will return the petition at once<sup>201</sup>; (2) the second is in the period of trial preparation (*60 days from the registration of the lawsuit*), the competent judge continuously examines their standings and other evidence. In the case of some requirements being satisfied, they will decide to open the case for trial. By contrast, they can make a decision on temporary suspension or suspension of that lawsuit<sup>202</sup>.

#### **Some requirements for the standing of plaintiff should be noted as follow:**

**Firstly**, the plaintiffs must be individuals, state agencies and organizations that their legal rights and interests are infringed against by a particular administrative decision or action (Article 1 of OSAC). Article 73 also provides the standing of foreign individuals or legal persons, except those prescribed by the international treaties, which Vietnam has signed.

It can be said that Vietnam studied most provisions of the Chinese ALL. Under Article 2 of the Chinese ALL, the plaintiff refers to only a citizen, a legal person or any other organization. Thus, the term of “*citizen*” may be misunderstood insofar as only Chinese citizens can lodge an administrative lawsuit. Article 70 clearly provides that: “*this law shall be applicable for foreign nationals, stateless persons and foreign organizations that are engaged in administrative lawsuits in PRC, except as otherwise provided by law*”.

To be a plaintiff, Vietnamese administrative law in general, requires his legal capacity included the legal age (*18 years*), health conditions (*such as, no mental diseases*). In case of minors or the disabled persons, the procurator can initiate a lawsuit. The plaintiff must prove his legal rights and interests directly infringed against by a concerned decision or action.

**Secondly**, the plaintiff must take a complaint to the original administrative agency for reconsideration. In other words, Vietnamese law strictly requires the plaintiff must experience a *pre-litigation* period before taking a lawsuit. This regulation fails to fulfill the requirement of Vietnam-America BTA and is still hotly debated, since it completely narrows the access of lawsuits. However, a better regulation of OSAC 2006 is that, though the requirement for firstly making claims to original agency is compulsory, the plaintiff can lodge a lawsuit if the claim settlement is not

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<sup>201</sup> See OSAC, Art 31

<sup>202</sup> See OSAC, Art 37 section 2

received within the limited time (*30 or 45 days*) as provided by Article 36 of LOCD 2005.

**Thirdly**, the plaintiff must meet the requirement of the limited time. Article 30 of OSAC stipulates the limited time “*shall be 30 days from the expiration of the time limit during which the claim is not settled, or from the date of receiving the settlement decision but he/she disagree with such decisions*”. This article also gives some exceptions, such as 45 days for “*deep-lying, remote areas where travel is difficult*”, or in the case of unavoidable difficulties, the duration of such difficulties shall not be counted.

**Finally**, the plaintiff is allowed the option of either lodging a lawsuit to courts or making a complaint to the superior agency. The delimitation of the court’s jurisdiction and competence of the superior agency was already analyzed in the last section.

**For defining the standing of defendant, the following remarks should be considered:**

**Firstly**, Vietnam may share the difficulty in determining the defendant’s standing with Chinese experiences due to the complexity of the administrative structure which covers various institutions. In Vietnam, the concept of administrative organs is slightly abstract. OSAC defines the defendant as an “*individual, agency or organization that has made the administrative decision or taken an action which is litigated*”<sup>203</sup>; and the litigated administrative decision as “*a written decision made by administrative agency or competent persons therein*”<sup>204</sup>. Thus, an *agency* in name of defendant is understood as an *administrative agency*. However, in fact, many litigated administrative decisions are not made only by administrative agencies, but by local representative agencies like the People’s Council, the National Assembly’s Office, the Office of State President, the Court, the Procuracy, and the agency attached to Government. These *agencies* are apparently not defined as *administrative agencies*. Furthermore, a considerable number agencies or organizations, like the agencies of the CPV, the Military, and the Father Land Front and its members, may render a decision as having infringed against the rights of the concerned people. As a result, the unclear concept may lead to misidentification of the defendant’s standing.

**Secondly**, the court may be confused as to decide whether the defendant is in the name of agency or in the name of the head of such agency. As such, both the decision on imposing administrative penalty and the decision on land confiscation are signed by the Chairman of Local People’s Committee, however, if litigations appear, the former will be in name of Chairman, while the latter will be in the name of the Local’s People Committee. Resolution 03/NQ-HDTP (2003) explained that it should follow such delimitation due to the jurisdiction over the former addressing to the Chairman of Local People’s Committee (*Article 29, Ordinance on Resolving Administrative Violations*), while the latter assigning to the Board of Local People’s Committee (*Article 24, Law on Land*).

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<sup>203</sup> See OSAC, Art 4, section 6

<sup>204</sup> See OSAC, Art 4, section 1

**Finally**, the court, in trial practice, is embarrassed to identify who the defendant of a lawsuit is, such as the Chairman of People's the Committee who was just retired or moved to another post after his rendering of a litigated decision, or a New Chairman who is currently holding the post. Resolution 03/NQ-HDTP also guided that the latter will be the defendant, because he is, on behalf of state power, required to inherit both legal rights and duties of the former. However, such explanation does not appear to be entirely satisfactory.

#### **4.3.2. On Evidences**

In comparison with the Chinese ALL that clearly provides the evidence in a separated chapter with six articles concerning the contents of evidence, the burden of proof on the defendant, the legal proceedings for gathering evidence and so on, OSAC of Vietnam regulates only the process of collecting evidence by courts in article 38.

In principle, evidence is understood as being "*written evidence*", such as administrative decisions, the decision on claim settlement, and other concerned documents depending on the nature of each lawsuit, such as the certificate of land use-rights, land maps, and the conclusion of experts. There is no official recognition of recording evidence. The duty of providing and supplementing evidence is in charge of the plaintiff, the defendant and the concerned persons. Apart of requesting evidence from the parties, Article 38 provides that the court may itself or mandate another court to conduct the examination and collect evidence.

#### **4.3.3. On Damage Compensation**

Unlike China, where the State Compensation Act was enacted in 1994 and the Chinese ALL also includes one chapter with three provisions concerning the state liability for administrative compensation, OSAC of Vietnam provides only one article for requiring the compensation in an administrative lawsuit. Article 3 reads: "*The person who initiates the administrative lawsuit may, at the same time, demand a compensation for their losses. In this case, the provisions of the civil legislation and the civil proceeding legislation shall be applied to settle such claims*".

Thus, the court will deal with this issue only when it is closely attached to the administrative decision that is being reviewed. If the plaintiff has an independent requirement for compensation, or fails to provide sufficient evidence for compensation, such lawsuit would be transferred to the civil court division.

Regarding the settlement of compensation in administrative lawsuits, the substantial provisions of Civil Code 1995 (revised 2006), Resolution 388/NQ-UBTVQH (2003), Decree 47/CP (1997) and a number of ministerial circulars are applied<sup>205</sup>. In principle, the agency, where the

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<sup>205</sup> See Duong Dang Hue, *Thuc trang Phap luat hien hanh ve Boi thuong thiet hai do Can bo, Cong chuc Nha nuoc gay ra*, [The current Legislation on Damage Compensation caused by Cadres and Public Servants] in *Phap luat va Chinh sach ve Trach nhien Boi thuong Nha nuoc o mot so nuoc*, [Law and Policy on State Compensation Liability in Some Countries], 163 (2007). See also Civil Code 1995, Art 623,624; Civil Code 2005, Art 619,620; Resolution 388/NQ-UBTVQH dated March, 17<sup>th</sup> 2003; Decree 47/CP dated May, 3<sup>rd</sup> 1997; Circular 01/TTLT-VKSNDTC-BCA-TANDTC-BTP-BQP dated March, 25<sup>th</sup> 2004; Circular 54/TT-BTCCBCP dated on June, 4<sup>th</sup> 1998 and so on.

wrongdoing public servants belong, first compensate for damages, then the head of such agency establishes a Board for compensation settlement. This Board will decide the amount of money and the method for returning compensated money by the concerned public servant. It is possible for the public servant to return the entire amount at once or by gradual reduction from his income that does not exceed 30% total of income per month.

In Vietnam, a draft law on state compensation has been made and received public feedback. Some main issues have been discussed exhaustively, such as the court model and state agencies involved the settlement of compensation; the fields of compensation - administrative management, judgment execution and criminal proceedings; the legal foundations, and the degree and method for compensation and so on<sup>206</sup>.

#### **4.4. Judgment and Interim Relief**

##### ***4.4.1. Administrative Judgment – A Legislative Vacancy***

Although OSAC (1996) was revised twice (1998, 2006), errors have been found in the leaving of a legislative vacancy regarding the content and effect of administrative judgments<sup>207</sup>. Some scholars suspect the reason why lawmakers left this vacancy, referring to Article 45 of LOCD that clearly provides what kinds of settlement decisions should be rendered by the administrative agency, while OSAC has no clear provisions<sup>208</sup>. Since the court finds no clear and effective legal provisions in the case of determining an administrative decision illegal, it itself devalues its judicial power by writing in the judgment paper that “suggesting (*kien nghi*) or proposing (*de nghi*) the administrative agency to annul the illegal decision”. This surely is not in accordance with the principle of judicial independence<sup>209</sup>.

The Chief Judge of *Hai Phong* City ADC, *Nguyen thi Mai*, criticized that the administrative judgment is far from completely resolving the people’s claims since she made a comparison with civil judgments<sup>210</sup>. She argued that the ADCs, after considering the illegality of such a decision, only declared void instead of quashing the illegal decision and judging substantively who was granted the land-use right.

Some local administrative judges support the idea that it is truly unreasonable for leaving a

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<sup>206</sup> Ibid, at 176-184. See also Nguyen Binh Chau, *Gop y du thao Luat Boi thuong Nha nuoc*, [Some Suggestion for Draft Law on State Compensation], available at [http://www.bbc.co.uk/vietnamese/forum/story/2008/07/080623\\_compensation\\_draft\\_bill.shtml](http://www.bbc.co.uk/vietnamese/forum/story/2008/07/080623_compensation_draft_bill.shtml)

<sup>207</sup> Article 49 section 2 of OSAC (2006) provides some contents of judgments such as the date and place of court session, the names of trial panel, names and addresses of the parties, representatives, the content of claims, evidences, court fees and court’s decisions and so on. However, what kind of judgment as a result of judicial review is not clearly provided.

<sup>208</sup> See Nguyen Van Thanh & Dinh Van Minh, *Mot so van de Doi moi Co che Khieu kien Hanh chinh o Vietnam*, [Some Issues on Reforming Mechanism of Settlement of Administrative Litigation in Vietnam], 136, (2004)

<sup>209</sup> Ibid, at 166

<sup>210</sup> Nguyen thi Mai, *Ky nang phan dinh Vu an Hanh chinh va Vu an Dan su*, [Skills for the Delimitation between Administrative Cases and Civil Cases], 8 Legal Profession Journal, 12 (2004)

vacancy of the administrative judgment<sup>211</sup>. They referred to the article 12 of the previous Ordinance on Procedures for Resolving Civil Lawsuits, which provided that the court was empowered to annul any illegal decision made by the state agency that infringed upon the legal rights and interests of the concerned parties.

In trial practice, the court often renders some decisions in its judgment as follows:

In the case of acceptance of the plaintiff's claim (*meaning the administrative decisions are concluded illegal*), the judgments often involve: (1) *Accepting X's claims...Declaring the administrative decision Y void (or illegal)...Proposing the administrative agency Y to settle...Suggesting the administrative agency Y to allocate the land...;* (2) *Quashing the administrative decision Z...Imposing the disciplinary liability to officers who granted land illegally...;* (3) *Declaring annulment the illegal decision Z...Requiring the administrative agency to render a new decision*<sup>212</sup>.

The latest Resolution 04 NQ/HDTP (2006) admitted the error of law and made guidance that the court, based on each particular case, can render some judgments as follows: (1) Dismiss the petition if it fails to give any legal basis; (2) Accept one part or the whole petition; Declare annulment (*Tuyen Huy*) of one part or the whole illegal decision; Force the violated agency to perform legal duty; (3) Accept one part or the whole petition; Declare an action illegal; Force the violated agency to end illegal actions; (4) Force the violated agency to make compensation; (5) Declare annulment of disciplinary decision on job dismissal; Force the head of agency to perform legal duty; Force the violated agency to make compensation and to recover legal rights or interests of the concerned public servants.

It should be noted that Vietnamese lawmakers had already realized the mistake of leaving the vacancy of judgment contents under Article 49 of OSAC before they revised it in April, 2006. The SPC also made the same guidance in the former Resolution 03 NQ/HDTP (2003). The question is why they refuse to clearly provide this content in Article 49. It is true that Vietnamese scholars find it embarrassing to determine whether the court is able to encroach upon the administration. They consider that the courts cannot replace the role of administrative agencies. The courts are only able to declare the illegality or declare an annulment of illegal decisions. Due to abstract regulation, the question is whether such a decision is immediately void after declared illegally, or still effective until the administrative agency itself annuls or replaces it by a new one. In addition, others are concerned as to whether the court is able to decide the amount of money for fines, collecting taxes or compensating damages. Further discussion on the defects of administrative judgments will be

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<sup>211</sup> Ngo Ngoc Tinh, *Mot so van de Vuong mac trong Giai quyet Vu an Hanh chinh*, [Some Troublesome in Dealing with Administrative Cases], *The Law and Democracy Journal*, 25 (1999)

<sup>212</sup> See The first trial judgment No 4/HC-ST (August, 14<sup>th</sup> 1998) of Tien Hai District People Court (Thai Binh Province); The appeal trial judgment No 3/HC-PT (June, 5<sup>th</sup> 1999) of Thai Binh Provincial People Court; The first trial administrative judgment No 04/HC-ST (January, 31<sup>st</sup> 2002) of Tuy An District People Court (Phu Yen Province); The first trial administrative judgment No 12/HC-ST (January, 24<sup>th</sup> 1998) of Hanoi City People Court concerning the income tax of Mr KS (Japanese Nationality)...etc.

analyzed further in the next part of this Chapter regarding Vietnamese case studies and practical remains.

#### **4.4.2. Temporary Suspension and Suspension of Settlement of Administrative Cases**

Article 37, section 5 of OSAC reads: “*With two months from the date of receipt of the case, the competent judge shall issue one of the following decisions: (1) To bring the case for trial; (2) To temporarily suspend the settlement of the case; (3) To suspend the settlement of the case*”. In some complicated cases, the time limit shall not exceed to three months.

Article 40 and 41 of OSAC provide some conditions that enable the court to suspend or stop the settlement of lawsuits. These decisions may be appealed or protested against to the appellate court. Regarding the suspension of the settlement of administrative lawsuits, Article 41 stipulates in a case where the plaintiff withdraws his petition, the court will decide to stop the settlement the lawsuit. The problem discussed here is whether the application for withdrawing the claim is voluntary or not. Vietnamese law encourages the state officials and people to negotiate a way of resolution. If a state official, before opening the trial, realizes his mistake and takes some efforts to recover damages to infringed people, the court, according to law, can decide the suspension of settlement. The questions then become: (1) what happens if the decision or action is illegal, but people are intimidated by state officials resulting in the involuntary withdrawal of claims? (2) in cases where people consistently do not withdraw petitions, what should courts do?

**In the first question,** the current OSAC fails to fully protect people by not clearly providing what cases the court may allow or not allow the withdrawal of petition. Here it shares with Chinese experience, as *Yong Zhang* comments, in this case, “*it is up to the court to decide whether withdrawal of a claim should be granted*”<sup>213</sup>.

**In the second question,** the answer is that the court may open the trial either to dismiss the petition or judge the case in favor of the infringed people. In fact, people are put into a disadvantageous position because the state officials concerned sometimes try to make *suitable* reasons for being absent at court. In addition, Article 7 of OSAC allows the court to possibly examine a case without the presence of parties in cases where “*the litigation content and evidence are clearly supplied*” or “*the parties do not demand to participate the trial*”. It is undoubtedly seen as a legal “*gap*” that makes it possible for the state official to intentionally not fulfill the duty of participation and finally cause disadvantages for the infringed people.

#### **4.4.3. Temporary Urgent Measures**

The temporary urgent measures are possibly applied at any period of settlement proceedings from “*initiating administrative cases*” to “*enforcing the court’s judgment*” and consists of two measures, namely: (1) temporarily suspending the enforcement of litigated administrative

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<sup>213</sup> See *Yong Zhang* (1997), p.53



decisions<sup>214</sup>; (2) prohibiting or forcing individuals or organizations concerned to take a certain action in order to ensure the necessity of settlement of administrative cases or the execution of the judgment<sup>215</sup>.

The application of temporary urgent measures is evidently aimed to limit the unrecoverable damages for people caused by implementing the illegal decision, on the contrary, if the wrong application of such measures is made, it surely harms public administration. What would happen if all administrative decisions are obliged to be suspended when a proposal of applying temporary emergency measures is made by people? Since the OSAC had no detailed regulation of what strict condition was required, except that people have to take responsibility for their demand of applying such measures and in case of damage is caused, they must make compensation<sup>216</sup>. Hence, the application of temporary urgent measures breaks the principle of “*acting without delay*”<sup>217</sup> of an administrative decision that makes judges in charge difficulties in the one hand. On the other hand, however, since the OSAC provided that the judge also has to compensate the damages caused by the wrong decision on applying the such measures<sup>218</sup>, the judge cannot avoid their hesitance of reaching such a decision. The judge himself often feels uneasy scoping with administrative officials, along with no regulations of time limit and the effect of the alleged decision all make the application of temporary urgent measures in practice far from well-performed.

#### **4.5. Jurisdiction over Appeal and Supervisory, Review Trial**

The judgment of the *first-instance* does not immediately come into effect. It could be objected by the litigious parties or the chief procurator within in the time limitation of 10 or 20 days<sup>219</sup> (*with some exception*) since the judgment was given in order to require a *second-instance* trial opened for reconsideration and correction of all mistakes.

Since the importance of the *second-instance* trial (Court of Appeal) is to recover the defects of the *first-instance* judgment, protecting efficiently both legal parties from damages, it shall be conducted by three judges, without the participation of people’s assessors. The Court of Appeal is

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<sup>214</sup> OSAC, Art 34, section 1

<sup>215</sup> OSAC, Art 34, section 2

<sup>216</sup> OSAC, Art 33 section 1

<sup>217</sup> Nguyen Manh Hung, *Khoi kien, Khoi to va Thu ly Vu an Hanh chinh*, [Initiating, Prosecuting and Filing an Administrative Lawsuit], in Hoang Van Sao ed (2007), p.201

<sup>218</sup> OSAC, Art 33 section 2

<sup>219</sup> The time limitation to call for opening the second trial is ten days in case of the party concerned or procuratorate agency at the same level with the 1<sup>st</sup> instant court require, or 20 days in case of the procuratorate agency at higher level with the 1<sup>st</sup> instant court require, since the day judgment was given. See OSAC, Art 56, section 1, 2

opened in cases where the *first-instance* judgment that has not come into effect<sup>220</sup>. The judgment of the appeal court, after being given, shall in principle come in to effect at immediately.

Apart from the appeal trial, Vietnamese law provides for two types of review of legally effective judgments by higher courts, namely *Giam doc tham* (supervisory trial) and *Tai tham* (review trial). The above two trials share the following points: (1) the objects of review are the legally effective judgments including both the *first-instance* and *appeal* judgments; (2) the limit time for protest is one year<sup>221</sup>. The main difference between these trials is that the former is aimed at supervising serious defects in litigation procedures and violations in applying the law in settling cases (*or review on an error of law*), while the latter aims to discover unknown circumstances that may fundamentally change the nature of cases (*review on newly discovered facts or review on facts*)<sup>222</sup>.

## II. Vietnamese Case-Study Analyses: Current Controversies and Mistakes of Judgments

### 1. Whether Courts Can Review at Any Period of Administrative Complaints

#### 1.1. Issue of Compulsory Pre-Litigation and Its Obstacles

*Pre-litigation* principle (*Nguyen tac tien to tung*) means, at the administrative level, any individual or organization can make complaints with administrative agencies or authorities who issued decisions or actions taken that might be considered as contravening the law or infringing upon their legal rights and interests. In general, administrative law around the world completely recognizes this principle and regards it as a good opportunity for the administrative agencies to examine themselves and quickly discover and rectify any mistakes. This researcher agrees totally with the positive points of the time period of resolving complaints, since it is not only good for administrative agencies in cases where they do not want to hold the standing of defendant at court, but also for any individual who can save time, and money in lodging a lawsuit. If this period is optional and carried out perfectly, it would be ideal in a ROL society, in which all individual's rights are respected and effectively guaranteed. The biggest issue here is what happens if this period is compulsorily required, but badly implemented by the concerned administrative agency. Apparently, it would make obstacles for the infringed people to access administrative lawsuits.

In line with the implication, by analyzing some major obstacles, this section argues that

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<sup>220</sup> The 1<sup>st</sup> instant judgment comes in to effect if within 10 or 20 days, there has no objections made by litigated parties or Chief Procurator

<sup>221</sup> OSAC (2006), Art 69. The old OSAC (1996) provided the time limit for the supervisory trial is 6 months, while for the review trial is one year from the first-instance and appeal judgment come in to effect

<sup>222</sup> See OSAC, Art 67. These procedures may be influenced by the procedure of the court in France, since in the second-instant trial namely Court of Cassation, *Conseil d'Etat* may be asked to reconsider in some cases such as :the process of "*tierce opposition*" (the party are interested in the original proceedings was not joined in them); the case for revision (very serious defect in procedure was found ) or the case for "*recours en rectification d'erreur materielle*" (the material error of fact which would have had an effect on the judgment was shown). See L.Neville Brown & John S.Bell (1998), pp.118-119

Vietnamese law, instead of providing a compulsory *pre-litigation* period, should grant the infringed people an optional right:

**Firstly**, the nonfeasance of the administrative agency forms the most serious obstacle since it discards the right of administrative litigation access.

Before the OSAC 1998 came in to effect (January, 1<sup>st</sup> 1999), the nonfeasance of the administrative agency completely prevented the infringed people from taking a lawsuit to court. Article 30 of OSAC 1996 allowed the infringed people to take a lawsuit to court within 30 days from receiving “*a written reply*” (the first claim’s settlement decision) by the original administrative agency. Thus, in case of receiving no reply, they completely lost any chance to be protected by a judicial court.

To rectify this defect, Article 30 of the OSAC 1998 allowed them to take a lawsuit to court even if they had not received any reply within 30 days, after the limit time for settlement of complaints expired. This article excluded only cases concerning disciplinary decisions on job dismissal that the infringed public servant was compulsorily required to submit the *first-time* settlement decision made by their supervisors. Thus, this article was progressive and highly appreciated, because it directly imposed pressure on the nonfeasance of the administrative agency and significantly *opened the door* for infringed people to access lawsuits.

However, the latest OSAC 2006 once again narrows the way of initiating a lawsuit by providing more exceptional cases where *the first time settlement decision* must be submitted. These exceptional cases include: (1) a case concerning the disciplinary decision on job dismissal; (2) a lawsuit against decisions on the management; (3) a lawsuit against a decision on the voter list; (4) a case related to the commendation or disciplinary decisions by the Board of Lawyer’s Association; and (5) a lawsuit against decisions on settling competition cases<sup>223</sup>. Vietnamese scholars argue that it is not equal to restrict the above five cases that the infringed people cannot take a lawsuit without receiving settlement decisions. In practice, the nonfeasance of the concerned administrative agency in these above cases cannot be avoided, and in fact quite often happens. They question that whether the above five cases belong to a specific field of the administration that the judicial power should be limited to interfere, or whether these cases seem to be more complicated and may involve a lot of misconduct of administrative agencies. If true, they make a considerable threat to the protection of all people’s legal rights and interests, and thus, the new OSAC is regarded less progressive, even “*step backward*” compared with the revised OSAC 1998.

**Secondly**, in the *pre-litigation* period, the determination on who is in charge of dealing with complaints at first is also a great obstacle. In principle, Article 30 of LOCD 1998 (Revised 2005) regulates: “the complainant shall have to first make complaint with *the persons who have*

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<sup>223</sup> See OSAC(2006), Art 30 section c,d,e,f,g

*issued* the administrative decision...”. However, a variety of specific laws have different provisions depending on who is in charge of dealing with complaints initially. The Ordinance on Resolving Administrative Violations, for example, prescribes: “individuals who are subjected to the forcible measures aiming to prevent the administrative violations, like the temporary detention, the temporary seizure of tools or means used in the violation, the body’s check, have the right to lodge complaints with *the intermediate higher-level officials*”<sup>224</sup>. In the Law on Taxes, the first competence to review is in hand of tax offices, not tax collectors who issued administrative decisions. The same provisions are also found in the Ordinance on Exploitation and Protection of Hydrographic Works, the Law on Army Duties and so on. Thus, not only people but also the competent judges find it embarrassing when required to determine who holds such settlement competency in the first instance and whether the general law (LOCD) or specific laws should be followed. Even when people know exactly to which agency their petition should be sent, *such as to X Local People’s Committee*, they do not know which Chairman or Board of X Committee will be in competence. In cases where the Chairman who issued a decision dies, retires or is removed, it is necessary to be patient and wait for a reply. However, never waits. Thus, in these cases, the disadvantage apparently belongs to people lacking legal knowledge, or without *good* contacts and as a result finally lose their chance for taking a lawsuit.

**Thirdly**, the *pre-litigation* period makes obstacles in terms of the time requirement for accessing lawsuits, wastes time, and even causes “*hot*” disputes and chaos as has in fact happened in some provinces.

Most of the cases that happened prior to December 1998 could not be filed and open trials because the infringed people did not meet the time limit requirement under Article 30 of OSAC. The nonfeasance of administrative agency as above analyzed was condemned as the main factor invalidating legal rights since “*time is never neutral and here it works almost always against the citizens*”<sup>225</sup>. Furthermore, the limited time (30 days, or 45 days as an exception) seems to be very short concerning complicated cases that require the gathering of large amounts of evidence, many concerning people’s ideas, particularly for cases happening in rural areas. Article 30 of OSAC provides a 30 day time limit, (1) since *the date of receiving the settlement decision* or (2) since *the date of expiration of the limited time for settlement of complaints under LOCD*. For the first clause (1), some other legal norms regulate the time for counting *since the date of issuing the settlement decision*. This is of course an error of law, and can be recovered, however, until present, such overlapping regulations for the pre-litigation period are really dangerous for lodging a lawsuit in time. For the second clause (2), the counting time duration for claim settlement by administrative

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<sup>224</sup> See ORAV, Art 87

<sup>225</sup> L.Neville Brown & John.S.Bell (1998), p.299

agency is also abstract. People do not know exactly when their petition is filed and started for review by the administrative agency. Particularly, in the case the administrative agency ignores to review or refuses to review by mouth (*not by legal documents*), it is very difficult to count the time due to lack of evidence.

Another reason that causes a waste of time lies in *the settlement decision at the first time* in the *pre-litigation* period. Under the OSAC, if it is not *the original administrative decision*, it cannot be taken to court. For example, X People's Committee rendered a *decision on land recovery to A*. Then A made a complaint to X People's Committee. X Committee issued *the settlement decision that dismissed A's claim*. In case of disagreement, A cannot take *the settlement decision that dismissed A's claim* to court since it is not the original administrative decision. Another example is that A had a fine imposed by X for his violation of traffic law. A made complaint to Y. Y rendered a settlement decision in which maintained the decision on imposing a fine (1). Y also issued a decision on confiscation of A's motorbike (2). In case of disagreement, A took an action to court. However, the court only accepted to review the decision on imposing a fine by X. The settlement decision (1) made by Y was out of court's review, but (2) is regarded as a new administrative decision<sup>226</sup>. If A wants to sue (2), A must make a complaint to Y again. Thus, A cannot take X and Y to the court at the same time, and in this case, the waste of time is unavoidable.

**Finally yet equally importantly**, the misconducts or wrongdoings of administrative agencies in the *pre-litigation* period are also counted as an obstacle. By nature, the settlement in this period is known as the "*minister-judge*" mechanism in which the administrative agency always holds a superior position. The red tape, the abuse of power, the corruption, the bribery and so on can be named as disadvantages of this period. The complicated settlement proceeding also makes people hesitate and try to have a case resolved by a *close family relationship* rather than by the law. One more point should be added to its criticism. There are no effective regulations related to what kinds of forms and contents of settlement decision should be issued legally. In practice, many of them are rendered in the form of unofficial papers, such as announcements, letters or in case of an official giving a decision without a state legal seal. How can these be seen as legal documents and submitted to the court?

To prove the obstacle of the *pre-litigation* period, the next section will analyze some case-studies:

### **1.2. Revocation of Judgment Regarding Land Dispute in *Dong Nai* Province (1999)**

On January, 1<sup>st</sup> 1999, X District People's Committee (*as referred to X Committee*) issued Decision 47/1999/QD-UB on settlement of a land dispute to A. Although A did not agree with this decision, A had not made any complaint to X Committee.

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<sup>226</sup> See Resolution 04/NQ-HDTP (August, 4<sup>th</sup> 2006), section 2.

On February, 10<sup>th</sup> 1999, A initiated a lawsuit to X District People's Court (*as referred to X Court*). X Court did not regard Article 30 section 1, Article 31 section 3 of OSAC 1998 that required A to have at first to make complaint to X Committee, and opened the trial. In the judgment, X Court declared the legality of Decision 47 and dismissed A's requirement.

A made an appeal to *Dong Nai* Province ADC. *Dong Nai* ADC did not discover the mistake of X Court that failed to require A to make his complaint to X Committee. At appeal trial, *Dong Nai* ADC declared the effect of the X Court's judgment and also dismissed A's requirement. 10 days after the appeal judgment of *Dong Nai* ADC was made, it came in to effect. A had no right to make further appeal. The only way this judgment could be reviewed was through Chief Justice of *Dong Nai* ADC or Chief Procurator of *Dong Nai* People's Procuracy proposing SPC to re-open the trial under the *supervisory* procedure.

On July, 20<sup>th</sup> 1999, SPC issued a supervisory judgment which declared that both X Court and *Dong Nai* ADC seriously violated the law concerning settlement of administrative cases. It pointed out that X court, instead of opening trial, had to return petition of A and require him to first make complaint to X Committee. The way A directly took a lawsuit to the court was a violation of the compulsory principle of *pre-litigation* provided in Article 30 of OSAC. *Dong Nai* ADC also made a mistake by ignoring this requirement. For such a reason, SPC annulled both of *first-instance* and *appeal* judgment, and returned the case to X Committee for resolving A's complaint under administrative procedure<sup>227</sup>.

Thus, in the above case, the compulsory *pre-litigation* principle is really an obstacle for A to initiate a lawsuit. Although the violation of two local people's courts is apparent, under the aspect of convenience for protecting infringed people, this principle inevitably restrains their rights to access a lawsuit and wastes much time.

### **1.3. Lawsuit Regarding Final Reconsideration Decision in *Can Tho* Province (2006)**

A and her husband's family had lived on an area of land of 11.933 m<sup>2</sup> in *Omon* District, *Can Tho* Province since 1976. In 1981, her husband and mother in law transferred this land including a house to B. Since the land policy in this period did not allow people to sell or transfer land, the local government confiscated all this land to common use of agricultural co-operatives<sup>228</sup>.

In 1982, A made a complaint to get back the land because her husband and mother in-law themselves transferred the above land to B without her consent.

On May, 2<sup>nd</sup> 1983, *Omon* District People's Committee (*as referred to Omon P.C*) issued Decision 229/QD-UB that accepted to give back to A 6.345 m<sup>2</sup> that was previously transferred to B. A and B also made a complaint regarding this Decision. After B's death in 1989, C (*B's wife*) continued

<sup>227</sup> This case is quoted from the Report of SPC on the Adjudicative Work of the Courts in 2000 and Direction in 2001, 59 (2001)

<sup>228</sup> This case is quoted from the Collection Book of Supervisory Judgments by Justice Council of SPC in 2006, pp.614-619 (2008)

making this complaint.

On November, 17<sup>th</sup> 1990, *Omon* P.C granted Land-Use Right Certificate of 6.345 m<sup>2</sup> under the Decision 229/QD-UB (1983).

On February, 18<sup>th</sup> 1995, *Can Tho* City People's Committee (*Can Tho* P.C) issued the Settlement Decision 373/QD-UB in which: (1) Dismissed the petition of A; (2) Withdrew the Decision 229 (1983) of *Omon* P.C; (3) Accepted C to use the land of 6.345 m<sup>2</sup> that was granted to A under the Decision 229. Due to the difficult implementation in fact, C did not get back the land, then continuously complained to *Can Tho* P.C.

On December, 17<sup>th</sup> 1999, *Can Tho* P.C issued Settlement Decision 3120/QD-UB in which: (1) Quashed Decision 229 by *Omon* P.C that accepted A to use the land of 6.345 m<sup>2</sup>; (2) Dismissed the petition of A; (3) Reclaimed A's land of 6.345 m<sup>2</sup> and Withdrew the Land Use Right Certificate (1990) granted to her; (4) Granted the above land to C and Required to make compensation for A's labor on land (*if necessary*).

On August, 11<sup>th</sup> 2003, A once again made a complaint, then Office of *Can Tho* PC replied by a Public Letter 458/VPUB that: (1) Decision 3120/QD-UB (1999) was legal and came in to effect; (2) Required A to implement it. On September, 5<sup>th</sup> 2003, A initiated an administrative lawsuit to *Can Tho* ADC.

At the first instance judgment No 01/HCST dated January, 21<sup>st</sup> 2005, *Can Tho* ADC dismissed the demand of taking a lawsuit of A and declared the legality of Decision 3120/QD-UB (1999). On January, 22<sup>nd</sup> 2005, A made appeal to Appeal Division of the SPC located in *HCM* City (*as referred to HCM Appeal Court*).

At the appeal judgment No 12/HCPT dated April, 29<sup>th</sup> 2005, HCM Appeal Court remained the effect of the *first-instance* judgment and dismissed the demands of A.

On July, 1<sup>st</sup> 2005, A made a petition to ask the SPC to review this case under the *supervisory* procedure. The SPC considered that: (1) Decision 229/QD-UB (1983) by *Omon* P.C was regarded as the *first-time* settlement decision on the field of land management; (2) Decision 373/QD-UB (1995) and Decision 3120/QD-UB (1999) by *Can Tho* P.C were the *second and final* settlement decision under Article 23 of LOCD 1998 (Revised 2004). Thus, A had no right to lodge an administrative lawsuit because Section 6 of Article 31 of OSAC (1998) said "*The Court shall return a petition in cases where there has been a decision to settle the complaint by the immediate higher level person*". Both *Can Tho* ADC and HCM Appeal Court made mistakes in application of Article 31 of OSAC (1998). Instead of opening a trial, these courts should have returned the petition to A.

At the *supervisory* judgment No 02 (February, 20<sup>th</sup> 2006), SPC annulled the both *first-instance* judgment and *appeal* judgment and suspended the settlement of this lawsuit.

It should be said that this case took nearly 25 years to reach a decision, since A's complaint to *Omon* P.C in 1982. Based on the existing LOCD 1998 (Revised 2004) and OSAC 1996 (Revised 1998),

it was true that A could not take a lawsuit due to the *final* settlement decisions made by *Can Tho* P.C. The problem is how can one believe the impartiality of such a *final* settlement decision. As analyzed in the last sections, in order to enlarge the court's jurisdiction, the latest revised LOCD (2005) and OSAC (2006) abandoned the *final* settlement decisions and allowed the court (*except the compulsory pre-litigation period*) to review any period of administrative complaint. For this lawsuit, A seems to be very unlucky when the SPC made the *supervisory* judgment on February, 20<sup>th</sup> 2006, while both the latest LOCD (December,2005) and OSAC (April,18<sup>th</sup> 2006) came in to effect from June,1<sup>st</sup> 2006. The question is whether A can continue taking all above "*final*" settlement decisions made by *Can Tho* P.C to the court or will A have to lodge a new lawsuit from the beginning including the compulsory *pre-litigation* period.

## **2. Whether Court Can Apply Retroactive Principle**

### **2.1. Issue of Error of Law**

By and large, the Vietnamese law system remains immature, especially in the field of ALRS. Excluding the LOCD, most other normative documents applied to the settlement of administrative disputes have appeared in the form of *under-law* documents, such as ordinances, decrees, circulars, or instructions of the SPC to guide "*complicated situations*" that emerged in the settlement process. Regarding the settlement of administrative lawsuits, some recent Resolutions made by the SPC's Judge Council, such as Resolution 03 NQ/HDTP (2003), and Resolution 04 NQ/HDTP (2006), are regarded as guidelines of *laws*. Their enactment is likely to supplement any provision where the OSAC leaves a vacancy, such as the SPC's guidance regarding contents of judgment is known as the supplement provision for Article 49 of OSAC. As a result, the effectiveness of normative documents is not high. In addition, Vietnam still lacks many fundamental laws regarding the ALRS. Consequently, it fails to create an effective legal framework that makes judges as well as administrative agencies puzzled while dealing with people's claims.

Some fundamental issues encountered that concerned the error of law are briefly analyzed below:

**The outstanding problem** is the formality of legal provisions. This defect is seen as a main reason that causes difficulties for accessibility of administrative litigation. The regulation of mandatory *pre-litigation* procedure before initiating a court case is a typical example of this. The law requires people to submit the review decision made by the agency that first rendered the litigated administrative decision, however it is in fact difficult to afford due to the "*silence*" and nonfeasance of the original agency or authority. OSAC (2006) still requires the plaintiff to submit the first reconsideration decision made by the original agency or authority when initiating some administrative lawsuits, such as those relative to the land issue under the competence of Local



People's Committees, the list of voters, the disciplinary job dismissal, and the competition case under the jurisdiction of *Competition Settlement Council* attached to Ministry of Trade<sup>229</sup>.

The regulation concerning “*concrete compulsory measures*” applied to a certain administrative agency that intentionally fails to perform their duty was not strictly defined<sup>230</sup> in the OSAC. Vietnamese law and completely lacks effective legal provisions to force the concerned administrative agency or authority to implement courts judgments. In addition, although the OSAC says that the court will render the final judgment toward the case, the kinds of judgments that can be reached are not provided by law, except by SPC instruction. The instruction that “in the case where litigated decision is concluded illegal, the court will *declare annulment*”, is also a formality. Furthermore, the redefinition of the Government Inspectorate's function as “*verifying, making conclusion and proposing the resolution of complaints which fall under the settling competence of Chairman of People's Committee at the same level*”<sup>231</sup> seems to weaken its role as it no longer functions as an independent reviewing agency<sup>232</sup>.

**The second major problem** is the lack of detailed and concise legal provisions. Many legal concepts stipulated in the normative documents do not provide correct meanings puzzling local courts, not unified in the application of law. It also causes difficulties for the SPC to spend much time on providing guidance in *particular emerging circumstances*. For example, the OSAC provided that people could “make a petition against decision on the compulsory dismantlement of the *firmly structured objects*”, but what is meant by the concept of “*the firmly-structured objects*”<sup>233</sup> was not clearly defined. Resolution 04 (2006) gives an abstract explanation that “there is no need to classify the quality of *firmly-structured objects* and measure them by an amount of money. The court will determine whether to file a lawsuit if the *firmly-structured objects* are objects such as water-wells, car-parking, walls or fences, warehouses, or houses of worship”. Vietnamese scholars suggest that such an explanation is not quite concrete and appropriate to Vietnamese current conditions concerning buildings.

Another example is the concept of “*administrative case with complicated circumstances*”<sup>234</sup> which is provided in some articles of the OSAC. Resolution 04 explains this concept further, and includes lawsuits involving many fields, such as foreigners temporarily outside Vietnam, and Vietnamese residing or studying overseas. According to this, the court of Appeal shall

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<sup>229</sup> OSAC(2006), Art 2, section 2, 3, 4, 5, 6

<sup>230</sup> OSAC, Art 74

<sup>231</sup> LOCD, Art 27

<sup>232</sup> Except the General Government Inspectorate is empowered to settle complaints which are further lodged after having been first settled by the Head of Government attached Agencies. See LOCD (2005), Art 26. The Local Inspectorate Agencies now hold the main function as “*consultative*” to the Local People's Committee. See LOCD (2005), Art 27

<sup>233</sup> “*Vat kien truc kien co*” in Vietnamese language. See OSAC, Art 11 section 5

<sup>234</sup> “*Vu an co nhieu tinh tiet phuc tap*” in Vietnamese language. See OSAC, Article 60

be opened within 60 days, however in case of an *administrative lawsuit with complicated circumstances*, the time limit shall be 90 days (Article 60). Nevertheless, Article 30 of OSAC provides the time limit for initiating a lawsuit to be within 30 days, in the case of “*people residing in a remote area*”, this time limit shall not exceed to 45 days. This means that this article does not include *administrative lawsuit with complicated circumstances*. Since the time limit for initiating a lawsuit in Vietnam is too short (*30 or 45 days*), Vietnamese scholars consider that *administrative lawsuit with complicated circumstances*, (such as lawsuits involved foreigners being temporarily outside Vietnam, or Vietnamese residing or studying oversea) should be regarded cases of “*people residing in a remote area*”, and the time limit for initiation should be 45 days. The present OSAC seems to facilitate to the court’s work rather than to the plaintiff’s conditions. It should be compared with some foreign laws, such as the amended ACLL 2004 of Japan, which was made more convenient for the plaintiff by revising the time limit for revocation litigation from 3 months to 6 months.

**Another emerging issue** was that the law did not clearly define which cases the responsibility belongs to the State or to the head of the state agency. This consequently leads to difficulties in defining exactly who is the defendant. If the defendant is a state official, he must fulfill the duty of participation in court and hold legal responsibility. However, in cases where the defendant is the State as a result of an error in law or policy, the question arises “how can the court reach an appropriate judgment?” Parallels can be drawn with the Japanese ACLL in which the administrative litigation is clearly divided into four types: *Kokoku* appeal litigation; party litigation; public litigation and agency litigation<sup>235</sup> which clearly distinguish state responsibility from that of administrative officials. Vietnamese law still leaves a significant gap which allows the imposition of state liability for infringing people’s legal rights and interests.

**Contradiction** also can be identified for the error of laws concerning the ALRS. The OSAC stipulated that people have to make an appeal to state agencies or officials who first rendered the litigated decision or action before initiating administrative cases but in fact, it contradicts many other legal norms. Although the LOCD (1998, 2004, 2005) recovered such contradictions, it still laid down a number of existing specific legal norms, such as: laws on taxes; land laws; laws on military duty; ordinances on resolving administrative violation, ordinances on using and protecting the hydrometeorology works and so on. In legal norms such as these, there exist provisions requiring infringed people to make a grievance to the higher agencies or authority rather than the original ones.

**Finally yet importantly**, non-regulation is one of the biggest errors of laws that makes the competent agencies or courts able to find no way to deal with appeal matters. Since OSAC does not

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<sup>235</sup> See ACLL of Japan 1962 (the latest revised in 2004), Art 3, 4, 5, 6.

allow people to take any illegal administrative matter to courts, it cannot avoid a considerable number of petitions being returned.

Regarding the claims that have appeared much in recent times, such as “*claims for the undue compensation of land to be taken for public purposes*”, in principle, the court may review the legality of decision on land compensation, but most cases, were brought to court for reviewing their irrationality. Most of these were also returned due to being beyond the competence of the court. The only way people can deal with such claims is to make an appeal to administrative agencies according to the LOCD.

Another example that should be mentioned is the lack of effective regulations concerning the foreigners and foreign entities, which makes it difficult for them to make appeals or initiate administrative cases to protect their legitimate rights and interests<sup>236</sup>. Article 73 of OSAC only provides: “*The provisions of this Ordinance shall also apply to the settlement of administrative cases involving the parties that are foreign individuals, agencies or organizations, unless otherwise provided for by treaties to which the Socialist Republic of Vietnam is a contracting party*”. In fact, some lawsuits on competition, intellectual property, foreign trademarks, personal income tax and so on apparently involve many foreigners and foreign entities and have increased dramatically of late. However, both the courts and foreign litigants may be puzzled and confused due to the lack of laws, the slowness of guidance by the ministries, the contradiction among legal norms, particularly the frequent changes of state policy regarding foreign partners over past ten years as well as the implementation of international treaties when Vietnam officially became a WTO member (2006).

The next section will introduce a typical administrative lawsuit regarding personal income tax arrears initiated by a Japanese plaintiff to explain for the issue of error of law in Vietnam.

## **2.2. A Case of Personal Income Tax Decision to Mr.K.S (Japanese) in Hanoi (1998)**

The plaintiff was Mr *Kazuya Sasaki* (hereinafter referred to as *K.S*), the Director of *Thuy Khe Flower Village Ltd.Co* who delegated Ms *Huong Thuy* as the legal representative to initiate the case to *Hanoi ADC*. The defendant was the Taxation Office of *Hanoi* and was represented by the Head of the Foreign Investment Tax Department<sup>237</sup>.

*K.S* litigated the Tax Office of *Hanoi* because this agency failed to correctly apply the existing law to impose personal income tax on him during the period from 1994 to 1996. His income from the said period rose from 990 USD to 2.739 USD per month. Accordingly, the total sum of money he was imposed by the Tax Office of *Hanoi* was 1,030,942,380 VND<sup>238</sup>, equivalent to 68,730

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<sup>236</sup> Tran An Binh, *Vi pham Hanh chinh va Giai quyet vu kien Hanh chinh co Yeu to Nuoc ngoai*, [Administrative Violation and Settlement of Administrative Lawsuits involving Foreign Factors], in *Thanh tra Nha nuoc* (1997), p.177

<sup>237</sup> See Judgment No 112/HCPT dated on November, 7<sup>th</sup> 1998 by Appeal Court of SPC located in Hanoi

<sup>238</sup> Exchange rate between USD and VND (Vietnamese dong): 1USD is about 16.000 VND. The original money is VND quoted from Judgment No 112/ HCPT. The change to USD is under the calculation of the writer

USD for tax arrears. In his opinion, due to the change of Vietnamese Law on Personal Income Tax over the three years of 1994, 1995 and 1996, the imposition on income tax made by *Hanoi* Tax Office had to base on the legal norms corresponding to the changes at each stage, outlined below:

The period from January, 1<sup>st</sup> 1994 to March, 31<sup>st</sup> 1994, the calculation of his income tax was principally based on the Ordinance on Personal High Income Tax<sup>239</sup> (*hereinafter referred to OPHIT*) which came into effect on April, 1<sup>st</sup> 1994. Thus, he had to pay taxes only for general income that originated in Vietnam, a total of 18.506.600 VND, equivalent to 1.234 USD.

In the period from April, 1<sup>st</sup> 1994 to March, 31<sup>st</sup> 1995, he had to pay taxes only for general income originated in Vietnam, not outside Vietnam as provided under OPHIT, because until March 30<sup>th</sup> 1995, the Ministry of Finance enacted Circular No 27 TC/TCT<sup>240</sup> in which it stipulates that general income consists of income that originates from both inside and outside Vietnam. Based on the Law on Enacting Legal Norms (Nov, 1996), the Tax Office cannot apply “*the retroactive*”<sup>241</sup> toward cases that had happened before the law came in to effect. Accordingly, he had to pay taxes for only general income that originated in Vietnam, a total of 33,577,428 VND, equivalent to 2,238 USD.

The period from April, 1<sup>st</sup> 1995 to December, 31<sup>st</sup> 1995, due to the absence of a Trade Agreement on Tax Imposition between Vietnam-Japan, K.S agreed with the tax imposition toward his income that originated in Japan, accordingly he had to pay taxes totaling 261,081,783 VND, equivalent to 17,405 USD.

During the period from January, 1<sup>st</sup> 1996 to December, 31<sup>st</sup> 1996, the Trade Agreement on Tax Imposition between Vietnam-Japan came into effect (January, 1<sup>st</sup> 1996), therefore, he did not have to pay taxes for income originating in Japan, but only in Vietnam in total of 61,440,000 VND, equivalent to 4,096 USD.

According to the above calculations, in fact, he only had to pay taxes for three years totaling of 394,524,773 VND (*equivalent to 26,301 USD*) and not the 1,030,942,380 VND (*equivalent to 68,730 USD*) as calculated by the *Hanoi* Tax Office.

After receiving the settlement decision made by the *Hanoi* Tax Office that withheld the alleged decision, he initiated a case to the *Hanoi* ADC on January 24<sup>th</sup> 1998.

The *Hanoi* ADC, at the *first instance* trial, applied section 6 of Article 11, Article 12, 13, and 49 of the OSAC and reached a judgment as follows: “*Annulment of the decision on tax collect*

<sup>239</sup> Phap lenh ve thue thu nhap cao, [Ordinance on personal high income tax, as referred to OPHIT] came in to effect on April, 1<sup>st</sup> 1994

<sup>240</sup> Thong tu so 27/ TC/TCT Bo tai chinh, [Circular No 27/TC/TCT by Ministry of Finance] enacted on March, 30<sup>th</sup> 1995

<sup>241</sup> The retroactive (*Hieu luc hoi to*) means the effect to matters that have occurred in the past. The retroactive will be not applied in the cases of a past action is defined as illegal in the present time, but at the time it occurred, there had no law to define it as an illegal action, therefore a person who performed such an action are out of the legal responsibility. See Law on Enacting Legal Norms, Art 76

*arrears made by Hanoi Tax Office toward K.S and requiring this office to render a new decision on tax arrears in which it still forced K.S to pay tax arrears for income originated outside of Vietnam in the period from June 1<sup>st</sup> 1994 to March 31<sup>st</sup> 1995”.*

On August 3<sup>rd</sup> 1998, K.S delegated to Ms *Huong Thuy* to make an appeal to the SPC’s ADC for the content of “*Hanoi ADC still allowed Tax Office of Hanoi applied the retroactive of Circular No 27/TC-TCT to impose on tax arrears to him in the said period*”.

The ADC of SPC applied Article 1 of OPHIT in 1994 showing that “*foreigners who work in Vietnam and have the income originating from work are obliged to pay the income tax*”. This ordinance did not clearly define where the income was originated. Therefore, in this case the foreigners have to pay income tax for the total amount of income originating from both inside and outside of Vietnam. The court also applied Article 6 of Decree 05/CP<sup>242</sup> on the guiding implementation of the OPHIT in 1994 and section 1 of Circular 27 TC/TCT defining that: “*foreigners who reside in Vietnam over 183 days are imposed on income tax originated both inside and outside Vietnam that is calculated by dividing into 12 months*”<sup>243</sup>. In the court’s opinion, both the Decree 05/CP and the Circular 27 TC/TCT are the guiding implementation documents of OPHIT of 1994 that cannot contrast or reach out of the scope of this ordinance. The legal effect of both alleged documents bases on the legal effect of OPHIT dated from June 1<sup>st</sup> 1994. Therefore, there was no violation of the *retroactive* prescribed in Article 76 of Law on Enacting Legal Norms as well as no matter of whether or not applying the legal responsibility toward a past action but at that time it was not defined as illegal. The court agreed that the error laid down here was only due to the slowness in the guiding implementation made by administrative agencies (*the Government, or the Ministry of Finance*), but it was unable to change the legal effect of OPHIT made by the delegate legislative organ (*National Assembly’s Standing Committee*).

As a result, the ADC of SPC at the appeal trial did not accept the requirement of K.S for not imposing tax of the total income originating outside of Vietnam in the period from June, 1<sup>st</sup> 1994 to March, 30<sup>th</sup> 1995 and withheld judgment made by *Hanoi ADC*.

**Looking at the administrative case presented above, some comments can be drawn as follows:**

**Firstly**, although K.S lost the case at the Appeal Court of the SPC because of the given reasons concerning the application of the *retroactive* provided in the Law on Enacting Legal Norms as mentioned above, the mistakes can be seen easily due to the slowness of enacting the guiding implementation documents by Vietnamese competent agencies. Since the amendment of OPHIT came into effect on June 1<sup>st</sup> 1994. The Decree 05 until January 1<sup>st</sup> 1995, and Circular No 27 until

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<sup>242</sup> See Nghi dinh 05 /CP Huong dan chi tiet Phap lenh thue thu nhap cao, [The Decree 05/CP on Guiding Implementation of OPHIT] enacted on January, 20<sup>th</sup> 1995

<sup>243</sup> Ibid, Art 6

May 30<sup>th</sup> 1995 however, had only just been enacted. In addition, the regulation laid down in Article 1 of the OPHIT was also not clear. The explanation sounds reasonable, however only based on deductibility. Such a regulation in fact caused difficulties for the competent tax office to correctly impose income tax on a certain subject.

**Secondly**, the judgments of the *first-instance* trial made by Hanoi ADC that “*annulled the administrative decision made by the Hanoi Tax Office*”, and “*required the alleged agency to render another decision*”, in fact, was not a clear settlement and was still seen as a “*formality*”. What other decision should be rendered again by *Hanoi Tax Office* was not clear and what “*compulsory measure*” to force the *Hanoi Tax Office* to perform duties was also not given.

**Finally**, the settlement of administrative cases concerning foreign factors is still new and quite often not suited to the current Vietnamese condition. Some legal provisions involving foreigners as well as foreign entities were not clear and not defined in detail. Most cases are often conducted under delegation and some regulations concerned, such as the court fees, the participation of foreigners, the delegation to lawyers in participation at court who are not compulsory for Vietnamese nationals but may be for foreign lawyers<sup>244</sup>. Issues such as this are not clearly provided by law.

### **3. Whether Court Can Encroach upon Administration**

#### **3.1. Issue of Judgment’s Defect and Discretionary Judgment**

As analyzed in Part I of this Chapter, the greatest defect regarding administrative judgments is the vacancy of legal provisions. Vietnamese scholars wonder why the OSAC, even though having been revised twice (1998, 2006), still leaves a vacancy regarding the real contents of administrative judgment and strict measures for its execution. It is suspected that the judicial independence cannot fully guaranteed if the ADCs themselves still feel inferior to local administration and hesitate to render concrete and strict judgment to its illegal activities. To recover this gap, the SPC is granted to supplement provisions laid down in Resolution 03 (2003) or Resolution 04 (2006). However, it was strongly criticized for two main reasons: (1) the content of administrative judgment is always the most expected result of resolving administrative lawsuits, but it is not found in official laws, except within guidance made by SPC; (2) the SPC is not a legislative body and its guidance can not regarded as a state law.

**In addition, SPC guidance regarding court judgments is still a formality and controversial as identified below:**

**Firstly**, when an administrative decision was concluded to be illegal, as guided by Resolution 04, it would be declared an annulment, being considered a declaratory judgment. This

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<sup>244</sup> Tran An Binh , *supra* note 236, at 189

means that the courts could only conclude that the administrative decision was illegal, but would not directly quash it. Thus, such an illegal decision would immediately become *null and void* or still effective until the administrative agency annuls it or renders a new decision for replacement. Some scholars refer to Germany's experience that the courts, apart from directly quashing illegal administrative decisions, can revise some contents of litigated decisions, deciding the amount of money for subsidy or forcing the concerned agency to perform some other legal duties<sup>245</sup>.

**Secondly**, the local court itself seems to lessen its judicial power towards powerful administrative agencies at the same level. The terms laid down in the judgment, such as "*proposing*" "*suggesting*" or "*handing over administrative agency to reconsider or to act some others*" and so on were blamed for the defective judgments.

**Thirdly**, the court, on the other hand, is sometimes criticized for trespassing on administrative powers, such as the court itself revising an entire illegal administrative decision or part thereof, imposing a tax level for the concerned parties, imposing a disciplinary liability to administrative officers, deciding the amount of money for fining the administrative violation and so forth. *Nguyen Thanh Binh* criticized the courts as sometime exceeding their jurisdiction and causing further damages for the plaintiff, such as proposing the administrative agency to fine the plaintiff money, cutting one part of the disputed land of the plaintiff for a third person concerned, imposing the plaintiff to compensate damages or expenses for compulsory execution<sup>246</sup>

**Looking at foreign experiences, Vietnamese scholars suggest some lessons should be drawn:**

**Firstly**, there should be some mention of the substitutive power of the court. According to the General Report of the VIII Congress of the International Association of Supreme Administrative Jurisdiction (*held in Madrid, 2004*), many States have consolidated well-known typologies, categorizing judgment as declaratory, constitutive or requiring performance. Such judgments will either conclude with the annulment or conformation of an administrative act, a declaration of existence or non-existence of legal relationship or an instruction to take an action. Approximately 50% of the states that submitted reports have recognized the substitutive power of their administrative courts. Some forms of substitution can be seen including: (1) The court may substitute administrative acts which impose sanctions (China, Spain); (2) The court may establish a legal relationship and thereafter impose specific administrative actions. The final decision has been adopted by the court and the court takes care of its implementation. This power is the main feature of France, Greece, Turkey, Netherlands and also available in States where the administrative courts have the power to "*restore the legal situation of the plaintiff*" like Colombia, Germany, Italy and

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<sup>245</sup> Nguyen Van Thanh & Dinh Van Minh (2004), p.167

<sup>246</sup> Nguyen Thanh Binh (2004), pp.180-181

Spain; (3) The court will itself “*instruct the authority to resume the case*” or can substitute the illegal administrative inaction by solving the case *in merito* without the need to return the issue to the administrative authority such as Austrian and German systems<sup>247</sup>; and (4) The court can substitute administrative decisions under special circumstances, only if provided by statutes, such as in Italy and Luxembourg.

**Secondly**, regarding the power of administrative courts to enforce their decisions, in order to avoid administrative inaction, the following measures can be given by courts:

(1) **Preventive measures.** One of the *simplest* mechanisms for prevention of inaction is the publication of judgments including the obligation on the administration deriving from such decisions. Countries such as France, Spain, Turkey adopt this measure. Some instruments are known as “*urgency procedure*” or “*interim measure*” as used in France, Germany, Congo, and Greece. Besides urgency measures, the court may prevent or limit the risk of non compliance by stating in the written judgment in specific and clear terms the duties set upon the authorities;

(2) **Means to reestablish legality.** Courts are able to enforce by their own authority or enforce indirectly either with the aid of other authorities or further mechanisms. The means of enforcement conferred upon the authorities depend on the type of decision taken by the administrative court whether it be the annulment of an administrative act or the imposition of an administrative duty. *For an annulment judgment*, if the administration disregards the judicial decision, it will be considered a trespass. In France, the court’s decision can include specific duties that the administration must follow at the time of execution. *For imposition of an administrative duty to act*, the courts can substitute administrative action through their own means in order to have their judgment enforced (Spain, Germany).

**Thirdly**, regarding other *measures for the effective execution*, the administrative court can also impose on the administration a pecuniary fine (Colombia, Portugal, Germany, Spain, Greece), impose disciplinary measures on civil servants; or the court can grant some additional months to the administration in order to fulfill its obligation. If the authority keeps silent and refuses to enforce the decision, the court will make a decision and take action itself, substituting the authority.

**Turning back the administrative judgments in Vietnam**, in trial practice, many discretionary and illegal judgments by local courts were rendered due to the lack of effective legal provisions as well the formality laid down in the SPC’s instruction. The main mistake was found to be that the court often encroached upon the administration and significantly interfered with the governing works.

**Some evidence can be shown as follows:**

*At the appeal judgment No 04/HCPT* (December, 2004), P Provincial ADC decided: (1)

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<sup>247</sup> See “*The Execution of Decisions of the Administrative Court*”, General Report of VIII Congress of International Association of Supreme Administrative Jurisdiction, 9 (2004)



Declare annulment of Decision 174/QD-UB (2003) by X District People's Committee concerning the settlement of land dispute; (2) Assign the disputed land between the parties to the X District People's Committee and P Provincial People's Committee for the management. Thus, the decision (2) was out of the court's competence because it belonged to the work of the administration<sup>248</sup>.

At the appeal judgment No 06/HCPT (December, 2004), Y Provincial ADC decided to: (1) Declare annulment of Decision 1863/QD-UB (2003) by H District People's Committee regarding the land dispute; (2) Grant to A the rights of using the disputed land; (3) Require A to complete some legal procedures for getting the Land-Use Rights Certificate; (4) Require the H District People's Committee to impose the disciplinary measures to the violating civil servant; (5) Require the H District People's Committee to grant the Certificate on Land-Use Rights to A. Thus, except for decision (1), all decisions were out of the court's competence in which the court significantly encroached upon the local administration<sup>249</sup>.

The next section will analyze some outstanding lawsuits that involved mistakes of court judgments. In these cases, the local ADCs often reach discretionary judgments, encroached upon Administration and caused damages for the litigated parties.

### **3.2. Annulment of Discretionary Judgment on Land in *Thai Binh* Province (1999)**

Although *Tay Luong* Commune People's Committee (as referred to *Tay Luong PC*) had no legal competence of land assignment under the Law on Land (1988), it granted to A 300 m<sup>2</sup> portion of swamp with a land-delivery receipt on December 2<sup>nd</sup> 1989<sup>250</sup>.

On March 10<sup>th</sup> 1990, *Tien Hai* District People's Committee (immediate upper-level of *Tay Luong PC*, as referred to *Tien Hai PC*) granted to A the other 150 m<sup>2</sup> of land by Decision 12/QD-UB. However, this land was already granted to others for housing by *Tay Luong PC*. Since 1990, based on the state policy on land management, the Land Survey Department of *Thai Binh* Province conducted a land survey in *Tay Luong* commune, set up a land map No 1079 including 300 m<sup>2</sup> of the swamp that A had used since 1989.

On January 17<sup>th</sup> 1996, *Tien Hai PC* issued Decision 28/QD-UB that granted 99 m<sup>2</sup> of land to B for housing. However, *Tay Luong PC* did not implement to allocate this land to B under the correct plot of land as decided by *Tien Hai PC*. Instead, *Tay Luong PC* set up a landmark of 150 m<sup>2</sup> for B that was located in the area of land already used by A. B had already built his own house. It should be noted that, at that time, A also encroached on land not his, enlarging his land to 600 m<sup>2</sup>.

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<sup>248</sup> See Bao cao tong ket cong tac xet xu nganh Toa an 2005, [Report on Adjudicating Works of Courts in 2005], 104 (2005)

<sup>249</sup> Ibid, 106

<sup>250</sup> This case is quoted and summarized from Annual Report on Adjudicating Works of the People's Court in 1999 and Direction to 2000, 45 (2000). See also Ly Cong, Phan Quyet cua Toa Hanh chinh ve Hanh vi Trai Phap luat trong Quan ly Dat dai o Uy ban nhan dan xa Tay Luong, Tien Hai, Thai Binh, [The Judgment on Illegal Action concerning the Land Management in Tay Luong district People's Committee in Tien Hai, Thai Binh Province], in So tay Tham Phan, (The Judge's Memorandum), Democratic and Law Journal, pp.12-14 (2001)

Due to a disagreement with *Tay Luong* PC, A took a lawsuit to *Tien Hai* District People's Court (as referred to *Tien Hai* Court).

At the *first-instance* judgment on August 14<sup>th</sup> 1998, *Tien Hai* Court decided to: (1) Accept the reason for taking a lawsuit by A; (2) Keep the effect of the land-delivery note that granted to A 300 m<sup>2</sup> of the swamp in 1989; (3) Propose *Tien Hai* PC to resolve the illegal land assignment of *Tay Luong* PC to B. *Tay Luong* PC made an appeal to *Thai Binh* Province ADC.

At the appeal judgment, on October 16<sup>th</sup> 1998, *Thai Binh* ADC annulled the *first instance* judgment. It judged as follows: (1) Dismiss the demand of A; (2) Quash the land-delivery receipt (1989) that *Tay Luong* PC granted to A 300 m<sup>2</sup> of the swamp; (3) Propose *Tien Hai* PC to legalize the 150 m<sup>2</sup> of land assigning to A according to Decision 12/QD-UB dated March, 10<sup>th</sup> 1990; (4) Propose *Tien Hai* PC to impose fines to A due to his encroachment onto land not his (*he was only allowed to use 150 m<sup>2</sup> under Decision 12/QD-UB*); (5) Propose *Tien Hai* PC have the 450 m<sup>2</sup> of land illegally used by A returned and to legalize 99 m<sup>2</sup> assigning it to B under Decision 28/QD-UB; (6) Propose *Tien Hai* PC to impose the disciplinary measure on *Tay Luong* PC's public servant who granted the 300 m<sup>2</sup> of land to A against the Law on Land of 1988.

The above appeal judgment seemed to be disadvantageous for A as well as deeply interfering with the "internal work" of the administration, which included the imposing on fines and disciplinary measures and so on. This judgment was protested by the Vice-Justice of SPC.

At the *Supervisory* Judgment No 04/GDT-HC (1999), ADC of SPC had some considerations such as:

**Firstly**, it was true that since 1989, A was granted illegally 300 m<sup>2</sup> of land and it exceeded the total of 150 m<sup>2</sup> of land as decided by Decision 12/QD-UB (1990). However, this fault did not belong to A, but to *Tay Luong* PC that violated Article 13 of the Law on Land (1988) and Article 23 of Law on Land (1993) regarding the competence on land assignment. In addition, A had been in stable use since 1989 and was also recognized in the land map No 1079 made by the Land Survey Department of *Thai Binh* Province.

**Secondly**, A had an illegal action of land encroachment (exceeded 300 m<sup>2</sup> of land as assigned in 1989), and it should be resolved by *Tien Hai* PC by Law on Land 1993. *Tay Luong* PC itself illegally set up the land mark of 150 m<sup>2</sup> to B for housing.

**Thirdly**, the appeal judgment that "dismissed the demand of A for taking a lawsuit while confirming the illegal action of land assignment of *Tay Luong* PC" was illegal. In addition, since the *land-delivery receipt* (1989) was not an *administrative decision*, not a litigated object, it could not therefore be annulled. The proposals of imposing a fine, imposing disciplinary measures or withdrawing the land of the plaintiff were out of the court's jurisdiction and infringed upon the legal rights of others concerned.

The SPC quashed the appeal judgment of *Thai Binh* ADC and decided the following main

content: (1) Require *Tay Luong* PC to stop setting up a landmark of 150 m<sup>2</sup> within A's land for B and to set up the correct landmark of 99 m<sup>2</sup> for B under Decision 28/QD-UB (1996); (2) Require *Tien Hai* PC to recover the mistake of *Tay Luong* PC in 1989 in the land assignment to A, perform its function on assigning land and resolving violations regarding the land management in accordance with Law on Land 1993.

**In short**, Supervisory Judgment by the SPC pointed out the main mistakes of the *appeal* judgment and agreed with some points of the judgment of the *first-instance* court. However, in order to avoid direct interference in the administrative work, the SPC also included an abstract conclusion related to the responsibility of *Tien Hai* PC under the existing Law on Land 1993. In this case, it is implied that *Tien Hai* PC will decide to recover 300 m<sup>2</sup> of encroached land by A, require B to return 150 m<sup>2</sup> of housing land to A and grant to him 99 m<sup>2</sup> of land for housing. However, it is not always easy to implement because B had already built his own house on the 150 m<sup>2</sup> area of land he had occupied. Furthermore, A also had built on the 300 m<sup>2</sup> area of land he had encroached upon. The problem was making the court's judgment feasible in practice. Right after being declared annulled, there was confusion as to whether the illegal decision become void or was still effective until the administrative agency annulled or replace it with a new one. On November, 14<sup>th</sup> 2008, the XI National Assembly approved the Civil Judgment Execution Law which included the provisions that an illegal administrative decision will be void after being declared annulled. This is a progressive decision in the current legislative process. Nevertheless, the real defect of administrative judgment as well as the low effect of its execution still constitutes the main negatives of contemporary ALRS in Vietnam that should be further discussed as a separate topic.

### **3.3. Annulment of Illegal Judgments Regarding Tax Sanction in *Hai Phong* (2000)**

On July 8<sup>th</sup> 1997, the Tax Department of *Vinh Bao* District (*in Hai Phong City, referred to as V Tax Department*) issued an administrative decision on tax sanction No 45/QD-XL (*referred to as Decision 45*) to A. The administrative decision was to: (1) Collect the import tax arrears in total of 61,268,600 VND equivalent to 4,080 USD; and (2) Impose the double fines for undeclared tax in total of 122,573,200 VND equivalent to 8,172 USD<sup>251</sup>.

A made a complaint to V Tax Department. Since V Tax Department upheld its decision, A took a lawsuit to *Vinh Bao* District People's Court. The *first-instance* judgment on October 14<sup>th</sup> 1997 concluded the legality of Decision 45. The *appeal* judgment by *Hai Phong* ADC also declared the same.

Although two above judgments came in to effect, Vice-Director of Supreme People's Procuracy considered that V Tax Department violated the competence on imposing fines as

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<sup>251</sup> This case is quoted and summarized from the Report of SPC on Adjudicative Works of Courts in 2000 and Direction in 2001, 65 (2001)

prescribed by the Ordinance on Resolving Administrative Violation (ORAV, 1995). According to Article 36 and 14 of ORAV (1995), V Tax Department was only allowed to impose fines not exceeding 10,000,000 VND, equivalent to 660 USD. He protested these judgments and required a review under the supervisory procedure.

At the Supervisory Judgment No 03/HC-GDT(August,5<sup>th</sup> 1998), the SPC agreed with Vice-Director's opinion and quashed the Decision 45. It also required *Hai Phong* Tax Office to impose the fines in accordance with Ordinance on Resolving Administrative Violation (1995).

After the Supervisory Judgment was rendered, the *Hai Phong* Tax Office on September 1<sup>st</sup> 1998 issued Decision 71/QD-CT with the same content as Decision 45 by V Tax Department. At the same time, it issued the Decision 72/QD-CT that delegated to V Tax Department to apply a temporary seizure of violated goods. A took Decision 71 and 72 of *Hai Phong* Tax Office to *Hai Phong* ADC.

At the *first-instance* judgment No 01/HCST (December 30<sup>th</sup> 1998), the *Hai Phong* ADC decided to:

(1) Accept the requirement of A; (2) Quash a part of Decision 71 which imposed the double fines for undeclared tax in total of 122,573,200 VND equivalent to 8,172 USD. It pointed out that under Article 36 and 14 of ORAV (1995), the *Hai Phong* Tax Office was also allowed to impose fines not exceeding 100,000,000 VND equivalent to 6,667 USD; (3) Require the *Hai Phong* Tax Office to impose fines for another violation - lack of sales receipt; (4) Calculate itself the import tax arrears in total of 8,280,000 VND equivalent to 550 USD, the total fines for undeclared tax in total of 16,560,000 VND equivalent to 1.100 USD.

*Hai Phong* Tax Office made an appeal against this judgment. The Appeal Judgment No 48 made by the SPC (April 29<sup>th</sup> 1999) declared the legality of the *first-instance* judgment. However, at the Supervisory Judgment No 2/UBTP-HC (March 28<sup>th</sup> 2000), the Judge Council of the SPC quashed the *first-instance* judgment No 01/HCST by *Hai Phong* ADC and also quashed the appeal judgment No 48/HCPT by the Appeal Division of the SPC. It required *Hai Phong* ADC to re-open trial at the *first-instance* procedure and also to issue immediately the temporary urgent measure on the violated goods. The reason was that the *Hai Phong* ADC itself counted the total of fines and of the import tax arrears. Thus, in this case, SPC concluded that the *Hai phong* ADC violated the court's jurisdiction in dealing with a certain administrative case. The court only declared the legality or illegality of a litigated decision. It could not encroach upon the administration by counting the fines or tax arrears itself.

#### **4. Whether Scope of Accepting Cases Can Be Extended At Maximum**

##### **4.1. Issue of Scope of Judicial Review**

Scope of Judicial Review under Vietnamese administrative law is narrow and fails to fulfill

the expectation of people. Some main arguments can be summarized as below:

**Firstly, regarding the enumerated administrative matters,** Vietnamese scholars argue that there should allow people to take any administrative matter infringing upon their legal rights and interests to the courts. Although the revised OSAC has incrementally expanded the enumerated cases, it seems that it has not kept pace with the rapid changes in society that cause new disputes to arise. The *standby provision* in article 11 of OSAC allows the court to review other matters if they are prescribed by laws or treaties. In fact, “*new matters*” are often regulated in the Decrees of Government in various fields of administrative management. In this case, Vietnamese scholars wonder if it not only creates confusion regarding the legal effect of legal norms (*such as the Government’s Decrees can not be higher than N.A Standing Committee’s Ordinances*), but also threatens judicial independence when the Government itself can decide a new lawsuit. They suggest that the OSAC should only provide the exception of judicial review, such as matters relative to national defense, securities, diplomatic relations rather than the enumerated cases laid down in Article 11. It can avoid either the frequent revision of the OSAC or the encroachment of judicial power by Government regulation.

Even in some enumerated matters prescribed in Article 11, they are not always allowed to be heard by courts. Some specific laws or SPC guidance also limits its accesses to courts, for instance:

(1) Resolution 04, section 7.2 (2006) instructs that the court only deals with lawsuits relative to requisition, acquisition, or confiscation made after the enactment of Decree 297/CT (October, 2<sup>nd</sup> 1991) by the Chairman of Minister Council (*former name of Government*); (2) Resolution 04, section 7.3 takes note in all cases, the reconsideration decisions on settlements of land disputes are not objects of judicial review; (3) the Law on Land, Art 136 regulates that the court only registers land lawsuits when the plaintiff submits the Land-Used Rights Certificate; (4) Resolution 23/2003/QH (January, 26<sup>th</sup> 2003) by National Assembly provides that the State does not reconsider the policies regarding land control in the socialist transitional period enacted before July, 1<sup>st</sup> 1991.

Thus, a land dispute is regarded as a very complicated issue and counts for a great number of lawsuits. However, regulations and guidance such as those above cause people to lose the opportunity to take a lawsuit to the courts. Article 11, section 17 of OSAC (2006) provides 11 more detailed specific land lawsuits, such as land assignment, land lease, land recovery, land requisition, compensation, grant of withdrawal of Land Use-Right Certificates and so forth. However, all land lawsuits relative to land recovery, requisition and so on arising before July 1<sup>st</sup> 1991 cannot be taken to courts. Furthermore, Article 2 of OSAC also requires the plaintiff of a land lawsuit (sec.2) or of lawsuits regarding competition (sec.6), job dismissal (sec.4), lists of voters (sec.3) to submit the reconsideration decision by the original agency that really creates obstacles for direct access to court litigation.

**Secondly, regarding the inquiry of legal norms**, some Vietnamese scholars argue that there is a need to empower courts to review the constitutionality and legality of any law or regulation. If the constitutional court is not established to give final judgments to laws made by the National Assembly as some Constitutional Courts in the world do, it should allow the SPC to review the legality of certain administrative norms. In fact, no small number of local regulations are illegal and possibly infringe upon people's rights and interests<sup>252</sup>, but they cannot be judicially reviewed. Although the Law on Enacting Legal Norms has already provided the mechanism to resolve illegal and contradictory legal norms, if the court can review them, it will make competent agencies more contentious before their enactment and reduce the damages for people.

**Thirdly, regarding the damage compensation issue**, the current OSAC, article 3 only allows people to require the damage compensation attached to litigated decisions or actions. In this case, they have to prove evidence of damages. By contrast, the court will separate the requirement for compensation in a civil lawsuit. Thus, under this article, people cannot take a damage lawsuit separately to ADCs. It is not the same as either the French or the German administrative court in dealing with such compensation issues. Vietnam still lacks legal theory regarding the state compensation. Since Article 11 of OSAC also allows people to take a land compensation lawsuit to the ADCs, it seems to be against the article 3. It is still unclear whether a state compensation lawsuit can be taken to an administrative or civil division court.

**Finally, regarding public interest litigation**, Vietnamese law totally refuses to empower courts to deal with such issues. Currently, it only allows people directly influenced by illegal decision or actions to take a lawsuit. Thus, the question of whether public interest litigations should be taken to court has been recently raised.

**In short**, the scope of judicial review is one of the most controversial issues. In trial practice, a great number of lawsuits, particularly land lawsuits have been taken to courts, but immediately returned at the front door due to them being beyond the court's competence. The number of recorded lawsuits is limited. Some of them were also be resolved by the *first-instance* court, but finally dismissed by the courts of higher level.

The following section will provide evidence on the narrow scope of judicial review by introducing a land recovery case in *Hanoi* (1998) that still involves many arguments up to date.

#### 4.2. Dismissal of Petition Regarding Land Recovery in *Hanoi* (2004)

H and his family reside in 180-47 *Phuong Lien, Dongda (Hanoi)* and possess a pond with

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<sup>252</sup> Such as, those prohibiting students from Music School to perform in Pub or Discotheque, banning each person to possess no more than one motorbike, prohibiting people whose height under 145cm, weight under 40kg, are not allow to drive motorbikes, banning the three-wheel motorbike as a mean of transportation and so on. According to statistic by Department of Checking Legal Norms of MOJ, about 6.300 Legal Documents in 2008 were illegal. See Gan 6.900 Van ban trai Phap luat da duoc ban hanh, [About 6.900 Illegal Norms or Regulations were enacted], <http://vnexpress.net/GL/Phap-luat/2008/11/3BA08CB1/>

an area of of 1,600 m<sup>2</sup> located in land area No 5-57, arranged by the Land Management Agency under the French colony in 1945<sup>253</sup>. After 1954, the *Hanoi Administrative Committee (former name of People's Committee)* granted H and his family a Certificate on possessing that pond on (February 5<sup>th</sup> 1956). From 1956 until 1998, H legally used this pond. Due alleged environmental pollution, H could not use his pond for fishing or growing vegetables. H consequentially filled in this pond and built a factory for producing hand-made goods. On February 28<sup>th</sup> 1998, *Hanoi People's Committee (Hanoi PC)* issued Decision No 849/QD-UB on land recovery, accordingly his pond of 1,600 m<sup>2</sup> was to be return to the state and granted to the *Dongda District People's Committee* for management. H made his first complaint to *Hanoi PC* as prescribed by law and received the decision on dismissal of his demand. He took the lawsuit to Hanoi ADC.

At the *first-instance* judgment, *Hanoi ADC* dismissed H's demand and upheld the Decision No 849/QD-UB. The judges considered that this pond was now out of his possess because under the land policy in the previous socialist transitional period, this pond was allocated to *Trung tu Agriculture Cooperative* for management.

H made appeal to the Appeal Court of SPC located in *Hanoi*. At the *appeal* judgment on June 12<sup>th</sup> 1999, the SPC continued upholding the *first-instance* judgment and dismissed H's demands. The reasons were given as follows: (1) In line with the conclusion by *Hanoi ADC*, in the previous land policy in 1960s-1970s for socialist transformation, like any Vietnamese citizen, H already granted his own pond to the Cooperatives for common use; (2) H changed the purpose of using the pond (*from agricultural purpose to manufacturing*) without the approval of the competent agency. The SPC considered that the land issues relative to former State land policy before July 1<sup>st</sup> 1991 (*the regulations regulative to land control and Socialist transformation policy were made*) could not be solved.

Around this case, many arguments were made, such as: (1) the delimitation of who is the owner of pond - H's Family or the *Trung tu Agriculture Cooperative*. Both courts had only based their decisions on the special circumstances of the country (*the socialist transformation policy*), but did not clearly confirm he had already granted his own pond to *Trung tu Agriculture Cooperative*; (2) Letter Circular No 1657 (1996) by Hanoi Department of Land Control confirmed his estate including the pond under his name for registration, no transfer transaction was done; (3) Investigation Report by *Hanoi Police* (1997) concluded that H did not encroach on public land; (4) *Phuong Lien Ward People's Committee* and *Trung tu Agriculture Cooperative* also found no evidences proving that H had already granted his pond to this Cooperative in 1968. The protestors considered that Decision No 849 QD-UB on land recovery was still wrong because under article 27, 28 of Law on Land (1993), when land recovery is made in case of the wrong purpose, it needs to have a land-use

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<sup>253</sup> This case is quoted from Anh Tuan, *Mot so y kien xung quanh Vu an Hanh chinh da qua 2 cap xet xu*, [Some Views about An Administrative Lawsuit Experiencing Two Trial Proceedings], in *Democracy and Law Journal*, pp.18-19 (2004)

planning project approved by the competent agency. The land policy and laws have involved many changes during over the past ten years. The revised Land Law was made in December 26<sup>th</sup> 2003. Resolution 23 NQ/QH by the National Assembly on the same day confirms State does not resolve any land recovery claim related to land control and socialist transformation policy before July 1<sup>st</sup> 1991.

The Judge's Council of the SPC in 2004 at the Supervisory Judgment continued dismissing H's claims due to the above reasons. Thus, in nature, all land disputes relative to land recovery and other transactions under the former policy are not resolved by courts. Recently, Resolution 75 NQ-QH by the National Assembly on April 18<sup>th</sup> 2005 provides a more detailed explanation of the regulations of Resolution 23 (2003) about this land dispute. From now on, all claims for land recovery, requisition and so on relative to the former land control policy before 1991 are not in settlement competence by both the People's Committee and the Court. Regarding the above cases, some commentators still disagree with the opinion of the Representative of the *Hanoi* PC that in the case of using the land for wrong purposes, it must be returned, after which the plan or project for newly using this land can be made. Thus, it is against with the current Land on Law (2003) and must be replaced soon.

## **5. Whether Sanction Decision Violated Time Limit Can Be Wholly Quashed**

### **5.1. Issue of Time Effect**

Time effect is one of the important requirements toward the issuance of administrative decision by the competent agency or authority. Depending on some particular fields of administrative management, Vietnamese administrative law regulates differently the time effect of issuing such decisions. For example, in the field of administrative sanction, Article 56 of Ordinance on Resolving Administrative Violation (ORAV, 2002) provides that since the date of discovering a violation and making report, the competent agency or authority must render the sanction decision within 10 days, in complicated cases, it shall be increased to 30 days. However, in fact, the competent agency or authority sometimes violates this time limit. If this happens, then the concerned decision is brought to the court, to decide whether the court can quash it.

In principle, when a certain decision is rendered that violates the time effect, it becomes void and needs to be quashed. However, it cannot apply in all cases. Such as, the alleged Article 56, section 1 reads: "in the case of exceeding the time limit, the competent agency or authority cannot render the sanction decision, but can apply some *other compulsory measures for recovering the damages*". Thus, when a lawsuit is taken to court for quashing due to violated of time limit, there is confusion as to whether the court can quash the decision as a whole or only a part relative to the sanction measures.

Similarly, Article 10 of the ORAV regulates that since a certain illegal administrative



violation happens, if the competent agency fails to discover and stop it within one year of time limit, it can no longer be sanctioned, excluding *other compulsory measures for recovering the damages*. Hence, in many cases, if the administrative agency still rendered sanction decision violating the time limit, the court can annul such a decision. However, the part of decision regarding *other compulsory measures for recovering the damages* probably cannot be quashed.

In trial practice, the local court has often made mistakes regarding the time effect of the litigated decisions. Some courts opened both the *first-instance* and *appeal* trial. After that, this mistake was discovered by the SPC through the Supervisory Proceedings. Some other courts discovered this mistake, but quashed entirely the litigated decision. The next section will introduce a lawsuit regarding the sanction on the intellectual property that still leaves behind the controversy relative to the issue of time effect.

## 5.2. Lawsuit Regarding Sanction on Intellectual Property in HCM City (2005)

**On June 26<sup>th</sup> 2003**, the Section of Market Control 5A (*as referred to Section 5A*) belonging to the Ho Chi Minh City Market Control Department (*as referred to HCM Department*) discovered A cosmetic manufactures company (*as referred to A Company*) violated the trademark (*the letter of MISS*) and the industrial design (*the perfume bottle designed as a body of a girl*) that were in possession of Saigon Cosmetic Company. Section 5A made a report in which A Company was determined as violating the intellectual property rights prescribed by Article 50 of Decree 63/CP (*revised by Decree 06/ND-CP dated February, 1<sup>st</sup> 2001*) and Article 805 of Civil Code<sup>254</sup>.

On June 27<sup>th</sup> 2003, Section 5A reported this case to HCM Department. Since both Section 5A and HCM Department had no competency to impose fines that exceed 20,000,000 VND equivalent to 1,300 USD<sup>255</sup>, on June, 31<sup>st</sup> 2003, HCM Department proposed HCM City People's Committee (*as referred to HCM PC*) to impose fines to A Company under Article 9, sec.2 of Decree 12/ND-CP (1999) on the violation of industrial design and Article 10, sec.12 of Decree 01/ND-CP (2002) on the violation of trademarks.

**On August, 11<sup>th</sup> 2003**, Chairman of HCM PC issued Decision No 3271/QD-UB on Administrative Sanction (*as referred to Decision 3271*) to A Company in which: (1) Fines in total of 75,000,000 VND equivalent to 5,000 USD were imposed; (2) The business license of A Company was to be withdrawn within one year; (3) The violated goods were to be confiscated; (4) The sales of violated goods in the market were to be suspended. A Company made a complaint. On October 16<sup>th</sup> 2003, Chairman of HCM PC replied and maintained his Decision 3271.

On October 20<sup>th</sup> 2003, A Company initiated a lawsuit to HCM ADC. At the *first-instance*

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<sup>254</sup> This case is summarized from the Collection Book of Supervisory Judgments by Justice Council of SPC in 2005, pp.371-375 (2008)

<sup>255</sup> See ORAV, Art 37

judgment No 11/HCST, HCM ADC dismissed the A Company's petition. On March 1<sup>st</sup> 2004, A Company made an appeal to the Appeal Division of the SPC located in HCM City (*referred to as the Appeal Court*).

At the Appeal Judgment No 30/HCPT, the Appeal Court considered that the Chairman of HCM PC violated the limited time for issuing Decision on Administrative Sanctions. Article 56 of ORAV (2002) provided that: "*Since the date of making the report, the competent person must issue an administrative sanction decision within 10 days. In case of necessity, the time limit shall not exceed to 30 days*". Thus, the date of making report by Section 5A was June 26<sup>th</sup> 2003, but the date of issuing Decision 3271 by Chairman of HCM PC was August 11<sup>th</sup> 2003, just exceeding 30 days. As a result, Appeal Court quashed Decision 3271.

On January 31<sup>st</sup> 2005, the Chief Justice of the SPC protested the Appeal Judgment. On April 26<sup>th</sup> 2005, at the Supervisory Judgment No 02/HDTP-HC, the Judge Council of the SPC made the following considerations:

(1) Confirm the violation of A Company; (2) Recognize the violation of Chairman of HCM PC in the limited time for issuance of Sanction Decision. However, the Appeal Court cannot apply Article 56 of ORAV (2002) to quash all the contents of Decision 3271, because it fails to meet the requirement of the protection to trademarks and intellectual property. (3) According to Article 56, in the case of expiration of time, the Chairman of HCM PC can not impose fines, but can apply some *other compulsory measures* to recover bad consequences, such as the destruction of violated goods, or the suspension of sales. The SPC required the Appeal Court to re-open a trial under the appeal proceedings.

This administrative judgment is still controversial. Some opinions consider that although a mistake by the Chairman of HCM PC is evident, the judgment seems not to be strict enough to prevent and impose sanctions on a serious violation in the new field of intellectual property. Under Article 12 of ORAV (2002), there are two types of administrative sanctions: (1) Main Sanctions consist of a warning (*Canh cao*) and fines imposition (*Phat tien*); (2) Supplemental Sanctions consist of a withdrawal of license and confiscation of violated goods. In this case, due to the violation of limited time for issuance of Decision under Article 56, all administrative sanctions cannot be applied to A Company, with the exception of some *compulsory measures* mentioned above. Some viewers also suggest that A company should have its business license withdrawn for a certain period of time. However, others support that the court cannot decide anything against the existing laws. Article 56 aims to enhance the responsibility of state agencies and officials in discovering and resolving immediately all violations of the law. The violation in the field of intellectual property is still new in Vietnam and often involves a great amount of money, but the competence for imposing fines provided by ORAV is very low. Such as the Section 5A is allowed to impose fines not exceeding 5,000,000 VND equivalent to 330 USD and the competence of HCM Department is 20,000,000 VND equivalent

to 1,300 USD (Article 37, section 2,3). In most cases, they have to transfer to the Chairman of Provincial People’s Committee who is entitled to impose fines not exceeding 100,000,000 VND. Thus, it makes the time for issuance of sanction decision longer and thus impossible to avoid mistakes, particularly the case in hand of a busy Provincial People Committee.

## 6. Overview of ADCs’s Adjudication Over Past Ten Years and Judgment’s Mistakes

### 6.1. Statistical Data and Analyses

Some statistical data concerning the settlement of administrative lawsuits over the past ten years (*from July, 1996 to 2006*) are summarized in this below table<sup>256</sup>:

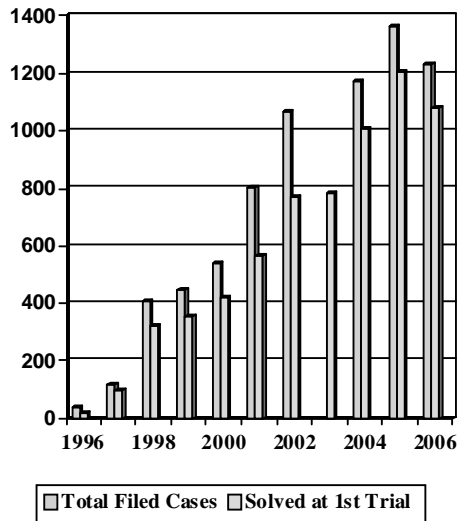
**Table 2: Settlement of Administrative Lawsuits Over Past 10 Years (from July, 1996 to 2006)**

Year	Total Filed Cases	First-Instance Trial	Second-Instance	Percentage
1996 (6 months)	36	17	0	42.2%
1997	117	97	0	82.90%
1998	282	267	12 Appeal	75,3%
1999	319	408	19 Appeal	78.7%
2000	539	419	76/121 Appeal 25/26 Supervisory	77.7%
2001	803	564	172/230 Appeal 19/25 Supervisory	70.2%
2002	1064	770	321/376 Appeal 24/24 Supervisory	72.3%
2003	997	786	439 Appeal 22 Supervisory	86%
2004	1172	1006	498/552 Appeal 20/22 Supervisory	85.8%
2005	1361	1201	470/505 Appeal 21/21 Supervisory	88.2%
2006	1232	1081	354/382 Appeal 10/10 Supervisory	87.7%

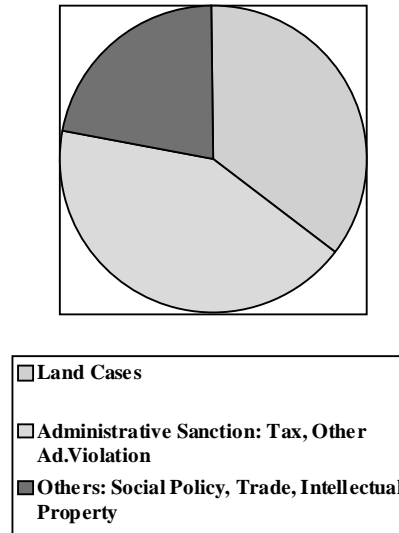
The following chart shows the number of the solved cases at the *first-instance* trials since 1996-2006 and the area of administrative lawsuits arising recently (2006):

<sup>256</sup> These statistical data are quoted from Annual Report on Adjudicating Works of People’s Court System since the birth of Administrative Court (July, 1996) up to 2006 presented by SPC of Vietnam. See Dang Xuan Dao et al, National Research Project on Resolution for Improving the Quality of Settlement of Administrative Lawsuits by SPC, pp.101-102 (2005). See also Report on Assessment of Current Legal and Institutional Framework for Administrative Court by SPC’s Project VIE/02/015, pp 26-29 (2007)

**Chart 2: Resolved Lawsuits at First-Instance Trial Past 10 Years**



**Chart 3: Areas of Administrative Lawsuits**



These above table and charts reflect to a certain extent the situation of administrative lawsuits in Vietnam over past ten years.

Firstly, regarding the total filed cases and the number of the *first-instance* trials, it can be identified that in the second half of this decade, the number of administrative lawsuits rapidly increased, and the percentage of resolved cases is considerably high (*almost 85% on average*). The reasons can be explained as follows: (1) the court’s jurisdiction has been expanded gradually through the revisions of OSAC (1998, 2006), and through some other Government’s Decrees to supplement the *stand-by provision* in the article 11 of OSAC; (2) people are becoming accustomed to the appearance of the ADCs for protecting their rights against the malpractice of the administration; (3) the court, by its performance of adjudicative work under the spirit of judicial reform promoted by Party and State, has more paid attention to the settlement of people’s litigation and gradually improved its capacity. However, Vietnamese scholars still suspect whether this statistic precisely reflects the real situation in Vietnam. In fact, the number of petitions may be higher, but many have been absolutely refused at the front-door due to the failure of court’s jurisdiction or other requirements to initiate lawsuits. In addition, to explain unresolved cases, the following reasons can be given: 1) the overload of filed cases, 2) the lack of detailed guidance, particularly the pressure caused by the litigated administrative agencies, and 3) the Party’s views. The number of

administrative cases in Vietnam is still low in comparison to those in China, for instance in 1993 (*three years after the foundation of the Chinese Administrative Litigation System*), the total of accepted cases by ADCs in China was 27,911<sup>257</sup>. In comparison with the civil lawsuits in Vietnam in 2006 showing 143,580 resolved cases in total of 160,979<sup>258</sup>, the number of highest administrative lawsuits (1,361 cases in 2005) is not considerable.

**Secondly, regarding the *second-instance trial***, the number of appeal trials in the second half of this decade is very high in comparison with 0 Cases in the two early years (1996, 1997) and with 12 and 19 Cases in the following years (1998, 1999). However, this does not mean that in the early years, the judgments were correct and were not appealed. In fact, people were not accustomed to the administrative lawsuit proceedings and some local ADCs were established very late. The high number of appeal trials recently, particularly in 2005, shows that many mistakes of *first-instance* judgments were made due to the rapid changes of laws, policies in the current context, the error of law as well as the limitation of judge's capacity. The SPC has recently made a great effort to supervise the inferior court's judgments through the supervisory proceedings and to publish judgments known as the most effective guidance to local courts. Nevertheless, in comparison with a considerable number of Supreme Court judgments of Japan available on the internet and from other sources, the number of published supervisory judgments in Vietnam is not worthy of mention. Only two or three cases (2005, 2006) were published in the form of a Collected Book<sup>259</sup>.

**Thirdly, regarding the area of recent administrative lawsuits**, the number of land cases accounts for 35.20%, while the number of administrative sanction cases in all administrative fields is about 42.90% and the remaining 21.90% is for new lawsuits arising recently, such as intellectual property, business trade, goods services, and urban construction. The litigations relative to land issues still counts for the most, although it has decreased in comparison with the early 2000's, during which it constituted for up to 60% of the total, of which the number of disputes relative to land compensation for public purposes accounted for 56% of total disputes<sup>260</sup>.

The following table introduces some statistics regarding the result of the *appeal* judgments by the superior courts in Vietnam and some references to China<sup>261</sup>:

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<sup>257</sup> See Yong Zhang (1997), p.64

<sup>258</sup> See SPC, Annual Report on Adjudicative Works in 2006, 3 (2007)

<sup>259</sup> See SPC, Quyét dinh Giam doc tham cua Hoi dong tham phan Toa an Nhan dan Toi cao nam 2005-2006, [Supervisory Judgment made by Judge Council of Supreme Court in 2005-2006]

<sup>260</sup> See "Nam 2002: So luong Kien tung Hanh chinh gia tang", [In the year of 2002, Number of Administrative Litigation is increasing], available at <http://www.vnexpress.net/Phap-luat/2002/3B9B8F2/>

<sup>261</sup> See SPC, Annual Report on Adjudicative Works in 2006, 23-26 (2007). See also Statistics of Second-Instance Administrative Cases of China, Source in Year Book of Chinese Law, cited by Yong Zhang (1997), p. 65

**Table 3: Example of Hearing Appeal Trials in Vietnam (2002)**

Year of 2002	Accepted Appeal Case	Upholding	Annulment	Correction	Dismissal	Suspension
Provincial Court	321	175 (55%)	42 (13%)	75 (23%)	24 (7%)	5 (2%)
Supreme Court	64	42 (66%)	11 (17%)	11 (17%)	0	0

**Table 4: Example of Hearing Appeal Trial in China (1993)**

Year of 1993	Wound up	Accepted	Affirmed	Rescinded	Reversed	Withdraw	Others
Appeal Court	7.584	7.426	4.859 (65%)	1.343 (18%)	555 (7%)	370 (5%)	457 (6%)

Glancing at the above two tables, an interesting point can be identified that the percentage of annulments upheld in *first-instance* judgments in Vietnam and China is nearly the same, although the accepted case number is very different. In general, the mistakes of the *first-instance* judgments accounted for a considerable number of the total, resulting in their annulment or correction. Although there are no updated official statistics, some Vietnamese reports have recently pointed out some fundamental mistakes of the inferior court's judgments that will be further mentioned below.

## 6.2. Some Main Mistakes of Judgments

Some main mistakes of the inferior court's judgments, including both the *first-instance* and *appeal*, can be identified as below:

**Firstly**, the court often violated the substantial laws regarding its jurisdiction over resolving administrative lawsuits. Some examples can be given such as:

- (1) the court filed a lawsuit that was out of its jurisdiction over administrative matters;
- (2) the court did not file a lawsuit within its jurisdiction and returned the petition illegally;
- (3) the court failed to determine the legal status of plaintiffs and defendants;
- (4) the court failed to apply the time effect for issuing administrative decision provided in various substantial laws;
- (5) the court violated the delimitation of jurisdiction over dealing with cases, such as the conflict of the competence between the ADCs and the Civil Division Court, between the ADCs and the Local People's Committees in the settlement of land disputes.

**Secondly**, the court violated the correct settlement proceedings, such as:

- (1) the court filed a lawsuit that was completely resolved by the final reconsideration decision;

- (2) the court failed to gather evidences that led to the wrong judgment;
- (3) the court suspended incorrectly the settlement of lawsuits under the appeal proceedings;
- (4) the court made mistakes in handing over judgments and the lawsuit files to concerned parties;
- (5) the court failed to use correct legal terms laid down in judgment or decision and so on.

**Thirdly**, the court often encroached upon the administration by rendering discretionary judgments, such as:

- (1) imposing the disciplinary measures to violated civil servants;
- (2) imposing the sanctioned fines to the plaintiff;
- (3) calculating the amount of tax collection, of money for compensation;
- (4) assigning to local people's committee some works within the administrative power, such as the allocation and confiscation of land, the grant of Land-Use Right Certificates and so on.

**Finally yet importantly**, the court was often embarrassed and made mistakes when dealing with newly emerged lawsuits. The SPC's Annual Reports in 2005, 2006 summarized and made guidance concerning the two main lawsuits arising recently, such as:

- (1) the lawsuits regarding compensation, resettlement reasoned by land recovery for public purposes;
- (2) the lawsuits regarding intellectual property.

The main mistake of the local courts is the failure to apply the correct legal norms regarding the court's jurisdiction over the enumerated administrative matters in each period<sup>262</sup>. In addition, the court also made mistakes in wrongly applying the time effect required for issuance of administrative sanction decision.

### **Concluding Remarks**

Through two revisions of OSAC (1998, 2006), the ADCs's Jurisdiction has been gradually improved to meet the demands of Vietnam-America BTA and the WTO's Membership Regulations. Nevertheless, it has revealed many defects and controversies that fail to fulfill the expectations of both the people and legal scholars. By analyzing a considerable number of case studies regarding the hot and newly emerged disputes, such as land, tax, intellectual property, this Chapter proves the defects of ADCs jurisdiction, the limited capacity of administrative judges in dealing with such complicated lawsuits. It concludes that such jurisdiction needs to be extended to a maximum for

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<sup>262</sup> For example, Art 27 of Decree 63/CP (1996) and Decree 06/CP (Aug, 2001) allowed people to take a lawsuit in case the Department of Intellectual Property belonging to Ministry of Trade refused to grant *know-how* license or to recognize the well-known trade marks. However, the OSAC 1996, 1998 did not provide in the article 11, except the stand-by provision "*other petitions are prescribed by law*". The latest revised OSAC 2006 has just provided this lawsuits belonging to 22 administrative matters within court's jurisdiction. Similarly, regarding the lawsuits on the compensation, resettlement for land requisition, although it was not enumerated in article 11 of OSAC 1996, 1998, since the enactment of Law on Land 2003 and Decision 181/ND-CP (2004), Decision 197/ND-CP (2004), it can be taken to the court. In above cases, the court often made mistake in defining the time on which it can deal with such a lawsuit or not. See SPC, Annual Report of Adjudicative Works, pp.17-20 (2005), pp.85-89 (2006)

protecting all individual rights and interests including foreign partners in the globalization context. Hence, to such extent jurisdiction will no longer conformed to the existing ADCs Model. To look for and recommend a better model, the next Chapter will explore some foreign experiences and confirm the imperative of improving FLA Projects regarding the reform of ADCs Model and Jurisdiction in Vietnam today.



## CHAPTER III

# LESSONS FROM FOREIGN EXPERIENCES REGARDING ADMINISTRATIVE COURT MODEL AND JURISDICTION

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### Introduction

*“Borrowing other people’s laws is seen as just a method of speeding up the process of finding legal solutions to similar problems – a process being encouraged all the more by the pressures towards convergence brought about by globalization”<sup>263</sup>.*

**(David Nelken, Comparative Law in the 21<sup>st</sup> Century, 2002)**

*“We learned experiences of some countries with high development of administrative jurisdiction such as France, Germany and some of our neighbor countries such as China, and Thailand in both law and organization under the thinking that: Take a look to the neighbors for studying what they have done and try to apply it in your own house”<sup>264</sup>.*

**(Dinh Van Mau, National Administration Institute of Vietnam, 2006)**

Chapter III fulfills the third research question “*why does the reform of Vietnamese ADCs Model and Jurisdiction need to learn foreign experiences and receive the Foreign Legal Assistance (FLA) thereof?*” It also satisfies the curiosity of why three countries, namely France, China and Japan, are chosen for such a study. This Chapter supports the idea of *David Nelken* that “*Borrowing other people’s law is seen as just a method of speeding up the process of finding legal solutions to similar problems*”. Based on its own characters, studying foreign laws and experiences is the best way for Vietnam to save time and enhance the international integration. However, it questions whether Vietnam can borrow all other laws and models without deep consideration, since in the case of a false choice, it does not speed up the development process, but restrains it. For each of the three above mentioned countries, this Chapter explores the main characteristics of the court models and

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<sup>263</sup> See David Nelken, *Legal Transplants and Beyond: Of Disciplines and Metaphors*, in Andrew Harding & Esin Orucu eds, *Comparative Law in 21<sup>st</sup> Century*, 26-27 (2002)

<sup>264</sup> Dinh Van Mau, *Giai quyêt Tranh chap hanh chinh trong thuc tien Quyên hanh phap va Van de Tai phan hanh chinh*, [Settlement of Administrative Disputes in the Practice of Executive Power and Issue of Administrative Jurisdiction], in *Thanh tra Chinh phu, Symposium on Establishment of AJB in Vietnam*, 23 (2006)

jurisdictions as well as introduces some relevant case-studies that are useful for Vietnamese learning. Among them, China shares the most in common with Vietnam in the model of ADCs, the enumerated cases judicially reviewed, and the refusal of inquiry in to legal norms (*with exception recently*). Nevertheless, China’s reform seems to be faster than that of Vietnam and provides some good learning opportunities. Furthermore, Japan with its strong Judicial Reform carried out since the early the 21<sup>st</sup> century, along with its new amendment of Administrative Case Litigation Law 2004 (ACLL) are very worthwhile to study. This Chapter implies that it is time for more planning of FLA’s Projects involving the reform of ADCs’s Model and Jurisdiction, since this field has much potential and directly impacts on the speed of the process of international integration as well as the transplanting of the ROL in Vietnam.

## I. Motivations to Administrative Law Reform and Impacts of Foreign Experiences

### 1. Legal Transplant: Impacts of Foreign Experiences By Means of Foreign Legal Assistance

*Alan Watson* to date with approximately twenty books and one hundred articles proposes a theory of legal change that “*the growth of law is principally to be explained by the transplantation of legal rules*”. Legal Transplant is defined in his famous book entitled “Legal Transplant – An Approach to Comparative Law”– as “*the moving of a rule or a system of law from one country to another, from one people to another – has been common since the earliest recorded history*”<sup>265</sup>. It is generally accepted that borrowing from a different jurisdiction, for most of the time, and in most places, has been the principal way in which law has developed. In focus, *Alan Watson* denies the mirror theory of law that first appeared in the eighteen century by *Montesquieu* in his productive work “*L’esprit des lois*” and regards transplants as the way most countries make their legal evolution.

*Kahn-Freund* advocates the mirror theory and refuses the possibility of legal transplant. He argue that the question of transferability initiated by *Watson* is sometimes confused with another question which demands to exploration: “*whether law can induce or produce social changes*”<sup>266</sup>. A legal comparatist – *Esin Orucu*- also raises the question “*whether law is a producer or a product of change*”<sup>267</sup> and argues that “*we need a precise and suitable functionalist vocabulary pertinent to individual cases*”.

Vietnamese law students are unfamiliar with the theory of legal transplant as well as the Western legal ideology related to the society and legal change. For students of *Marxism*, law is or represents the interest of ruling class and is made for regulating the diversified social relations. Law

<sup>265</sup> Alan Watson, *Legal Transplant - An Approach to Comparative Law*, 21 (1993)

<sup>266</sup> Kahn-Freund, *On Uses and Misuses of Comparative Law*, 1 *The Modern Law Review*, Vol 37, pp.1-9 (1974)

<sup>267</sup> E.Orucu, *A Theoretical Framework for Transfrontier Mobility of Law*, in R.Jagtenberg ed, *Transfrontier Mobility of Law*, 6 (1995). It is quoted by David Nelken. See supra note 263, at 22

belongs to the superstructure, reflects the infrastructure and often changes itself in accordance with the social changes. Law can hold a predictable function to society, but cannot induce or produce social change. By contrast, social change makes the law change and develop.

**For my first idea**, the term “*law*” as used by Western comparatists includes both the “*transplanted and internally produced*” law. It seems to be very interesting to examine whether law (through transplant process) can induce or produce social changes. Vietnam in fact has experienced a quite a long history of legal transplantation, from countries such as China, France, and the Soviet Union through both colonization and revolution. More recently, legal transplantation has occurred from the West and East Asia by means of FLA.

**Secondly**, there should be a distinction made between the “Law and Development Movement” (LDM) of the 1960s-70s and the re-emergence of the “New Law and Development” in the Post-Cold War Era, particularly with the today’s ROL projects. As a result, the contemporary reforms of the Vietnamese legal system in general and for ALRS in particular cannot help but be deeply influenced by such a globally changing process.

**Finally**, as David Nelken said: “*Borrowing other people’s law is seen as just a method of speeding up the process of finding legal solutions to similar problems – a process being encouraged all the more by the pressures towards convergence brought about by globalization*”<sup>268</sup>. In the current context, the legal transplant by means of FLA is strongly welcomed in the developing and transitional countries like Vietnam, and is really a key push factor in the domestic legal reforms. The impacts of foreign experiences as well the demands of transplanting foreign laws and models are regarded as the essential motivation to Vietnamese administrative law reform regarding judicial review.

**Following the main stream of discussion mentioned above, this section addresses some issues:**

**Firstly, LDM (1960s-70s)** was led by US law scholars and activists working in the agency for international development, the Ford Foundation, universities and other private donors in the US and Europe. These individuals and organizations underwrote an ambitious effort to reform the judicial system and substantive laws of developing countries in Latin America, Africa and Asia. There were two main beliefs of this LDM supporting the discussion of whether law can induce or produce social change: (1) law was regarded as an instrument to reform society and lawyers and judges could serve as social engineers; (2) legal education and professional training would advance reform efforts in developing countries. The gap between the law on the books and the law in action in developing countries was clearly recognized and it was only professional lawyers or judges who were properly educated about the role of law in development who could close the gap. However, this

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<sup>268</sup> Ibid, at 26

LDM finally failed due to the following factors: (1) *the most significant reason* was the naïve belief that the American legal system, which *Trubek* referred to as “*liberal legalism*”, could be easily transplanted into developing countries<sup>269</sup>; (2) *The second reason* was the LDM focused on the formal legal system, strengthened the central power of authoritarian states while ignoring customary law and informal methods of conflict resolution; (3) *The third reason* was the LDM involved too few participants in the target countries, who would either carry out the reforms or be directly affected by them.

**Secondly, the re-emergence of New Law and Development** commenced in the early 1990s, after the collapse of communism in the Soviet Union and Eastern Europe and the subsequent shift towards globalization of the world economy. This chain of events led to a new way of thinking about the role of law in society. *Trubek* (1996) – the outstanding criticizer of *LDM* once again began advocating a link between legal reform and economic and social progress, and called it the rise of the “New Law and Development”. He linked it to three factors: (1) Human Rights Discourse; (2) Globalization; and (3) the Washington Consensus, which privileges markets, favors privatization and promotes closer linkages to the global economy<sup>270</sup>. In a recent academic paper, *Trubek* (2003) used a more exact term: “*ROL replaces LDM*”, and divided the ROL era in to two stages<sup>271</sup>. In principle, the fundamental elements of the ROL in the first stage are not immediately changed, nonetheless there is growing new recognition: (1) the broader sphere of development policy; and (2) the complexity of ROL official ideas, such as transplanting formalist ROL to the transitional countries could be counterproductive while informal rules and mechanisms could be more effective.

**Thirdly, the New Law and Development was enhanced in Vietnam** in the early 1990s by the interest of both foreign donors and the Vietnamese government in promoting foreign investment and a market economy. Looking at Vietnam’s experiences on the current FLA, some comparisons between the New Law and Development and *the LDM of the 1960s* can be identified: (1) the US is not the dominant player in the legal assistance arena in Vietnam as it was in Latin America, Asia and Africa during the 1960s. Donors representing distinct political and legal systems compete for their influences over the Vietnamese government. *Pip Nicholson* starkly puts the question “*whether legal reform initiatives extend to assistance to a one-party state with no avowed intention to move a multi-party democracy*”<sup>272</sup>. Vietnam often rejects offers to provide legal assistance in sensitive political fields. Some of the most recent experiences showed that attempts to link legal assistance to

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<sup>269</sup> See David M.Trubek, *The Rule of Law in Development Assistance: Past, Present and Future*, in Y.Matsuura ed, *The Role of Law in Development: Past, Present and Future*, CALE Book 2, 5 (2005).

<sup>270</sup> Trubek. David M, *Law and Development: Then and Now*, Presented to American Society of International Law, pp.5-6 (1996)

<sup>271</sup> *Supra* note 269, at 6

<sup>272</sup> *Pip Nicholson*, *Distinguishing Law and Development: Legal Assistance and Vietnamese Courts*, *International Cooperation in the field of Legal Studies and An Agenda for Comparative Law Studies*, Symposium Papers (CALE), 46 (2005)

political reform would result in donors leaving Vietnam and loss of influences; (2) Many Vietnamese officials and scholars have more interest in studying the legal systems in Asia, particularly Japan, South Korea, China, Taiwan, Singapore and so on rather than in adopting legal reforms based only on Western models<sup>273</sup>; (3) The difference with *the LDM* that adhered to legal realism's instrumental vision of law within the US legal academy and the unique and powerful role of US advisors, the New Law and Development involves more diverse donors based on more diversified theories, and conflicting agendas while recipients have more power to set their own agendas for legal reform.

It is worthwhile concluding that, Vietnam, with its history of strong nationalism and its determination to reform, as *Per Bergling* commented, has proceeded cautiously but pragmatically and through a careful examination of the various models. Consequently, Vietnam has avoided many of the pitfalls which other countries attempting economic reform have experienced<sup>274</sup>. Surely, Vietnam promises to be one of the most dynamic testing grounds for the New Law and Development and its name is still often mentioned in the contemporary ROL agenda and on debates related to whether it may develop an alternative both to communism and liberal legalism.

**In short, the following main remarks should be clearly identified:**

**Firstly**, the notion of “*legal transplant*” or “*law*” used for discussion in this section is a generic term concerning both the “*legal rules*” and “*institutions*”, referring broadly to any influence of foreign laws beyond national boundaries. Accordingly, legal transplantation originated from Watson's theory as “*the moving of legal rules or systems from one country to another*”, the stance most widely advocated. Evidence of this can be seen in most parts of the world from ancient times to the modern. If law is inherently national, does not “*have wings*” and “*does not travel*”<sup>275</sup>, there would be no room for international legal cooperation and legal assistance aiming at codification. However, it does not mean that, law can be transplanted successfully regardless of its historical, social, cultural contexts or in other words any “*obstacle*” factor.

**Secondly**, to further discuss the question whether law is a producer or product of social change as well as to approach theoretically legal transplantation, it is essential to explore the way (*or method*) of transplanting law across cultural borders. Law can be transplanted both voluntarily and involuntarily as is identified by legal ideology (*what to transplant*); legal culture (environment for success); the host country's power structure (*how to set up a transplant network*) and elites (*who directly transplants*). Being different to involuntary transplantation by colonization, in which the legal culture was less considered, with the colonist deciding to conquer, or impose its legal system

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<sup>273</sup> See Lua chon Dong A hay Dong Nam A cho tuong lai cua Vietnam, [The Choice of East Asia or South East Asia for the Future of Vietnam], available at <http://www.vietnamnamreview.com/modules.php?name=News&file=print&sid=7400>

<sup>274</sup> Per Bergling, Theory and Reality in Legal Cooperation – The Case of Vietnam, in Per Sevastik ed, Legal Assistance to Developing Countries: Swedish Perspectives on ROL, 68 (1997)

<sup>275</sup> Pierre Legrand, The Impossibility of Legal Transplants, in Maastricht Journal of European and Comparative Law, pp.111-120 (1999)

on indigenous lands, the tendency of returning the group of laws or the regional values has increased in contemporary voluntary transplant.

**Thirdly**, the study of foreign experiences by means of FLA is known as the most favorable way to speed up the domestic legal reform in recipient countries. It is true that since the collapse of the Socialist Block, Vietnam continues building its own statist socialist model, the dominant legal ideology in Vietnam is multi-faceted and oscillates between strict legal instrumentalism promoted by ROL and the political expediency permitted by *Marxist* legal theories. Voluntary reception in Vietnam currently is carried out in three ways, namely *pure reception*, *adaptation* and *collation* for self-improvement. For such reason, the FLA projects at present play very important roles to provide useful foreign experiences and advice that can orient the better development of Vietnamese legal system in the future.

**Finally yet importantly**, the historical experiences of Chinese and Soviet borrowings provide Vietnamese lawmakers with valuable lessons for legal transplantation beyond the cultural borders and its dependences. On the following days of the Revolution, Vietnamese leaders abolished the colonial-feudal legal system and inaugurated the Soviet system, which they currently face issues such as whether to reconstruct and rehabilitate what was lost. There is a tendency to reestablish the French administrative court model as it used to be in the French colony in Vietnam or upgrading the Government Inspectorate to become a French *Conseil d'Etat*. In addition, since Vietnam has not succeeded in previous legislation and there are many examples of long-standing customary rules in Vietnamese law, there is also a tendency among scholars to recognize and promote the customary and cultural values in the development of the Vietnamese legal system. As such, they wish to return to *so-called* Asian Values by learning from rational experiences from East Asian systems.

## **2. Motivations to Reform of Vietnamese Administrative Law**

As analyzed in Chapter I, Vietnamese administrative law, due to wars and its role in revolutionary and political agendas, has remained under developed in terms of the protection to individual rights from maladministration. Gaps exist in the theory of the distinction between active and adjudicating administration, and of judicial review, an expanding body of administrative law.

At present, Vietnamese scholars cannot help but to follow the mainstream of global administrative law. By adopting foreign theories and experiences regarding judicial review, they want to re-conceptualize Vietnam's own administrative law theories in the modern context. This section will analyze the necessity of the receptivity to foreign laws and experiences in the reform of administrative law by exploring three main factors: 1) self-identity; 2) the necessity of international integration and 3) saving time.

## 2.1. Self-Identity

It is essential to realize properly the “*identity*” of Vietnamese laws in general and Vietnamese administrative law in particular in the context of the integration and the design for future development.

The identity of Vietnamese laws can fall into two main perspectives: 1) what foreigners impose on Vietnamese laws, and 2) the way Vietnamese people view its own identity. *Ugo Mattei* comments that “*Vietnam would first be seen as a traditional legal system*”<sup>276</sup>. *Pip Nicholson* advocates that “*Vietnam, for example, the rule of traditional law will dominate*”, and notes that the rule of traditional law in Vietnam takes many forms, among these “*Confucian-Inspired and Chinese Legalism*”<sup>277</sup>. *John Gillespie* comments “*Vietnam’s contemporary legal system is constructed from legal transplants historically derived from China, France, former Soviet, and more recently East Asia and the West*”<sup>278</sup>.

Some Vietnamese scholars, such as *Nguyen Ngoc Dien*<sup>279</sup> admit that it is not easy to define Vietnamese laws. To be modest, it is better to talk of the originalities or the particularities of the Vietnamese legal system rather than its identity. He points out that the originalities of the legal system, in regards to Vietnamese leaders, are closely connected to what *so-called* political and moral interests. While the former, known as the conservation of socialist political regime, is attached to the vital interest of the country, the later might be tightly linked with the notion of social morality and that of public order. He shows that for Vietnamese public order, it is forbidden to propagate anti-communist ideas, criticizing the socialist ideology, possessing military weapons and individual liberty is organized on the basis of conciliation between individual and social interests.

Due to the long history of colonization and two fierce wars, the historic evolution of the Vietnamese laws is characterized by fragility and discontinuity. The subsequent legislation does not legally succeed the previous one. As for the current legislation, which is quite young, its originality has not practically been sufficiently estimated in various matters, for the purpose of qualification as characteristic elements of a distinguished legal system. *Mai Hong Quy*<sup>280</sup> in her recent paper discusses the weakness of the Vietnamese legal system, namely the uncertainty from objective and

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<sup>276</sup> See Ugo Mattei, Three Patterns of Law: Taxonomy and Change in the World’s Legal System, *American Journal of Comparative Law*, Vol.45, pp.33-34 (1997)

<sup>277</sup> Pip Nicholson, *Roots and Routes-Comparative Law in Post Modern World*, 13 (2001)

<sup>278</sup> John Gillespie, Private Commercial Rights in Vietnam: A Concise Analysis, 30 *Stanford Journal of International Law*, 325 (1994); John Gillespie, Land Law Subsystem: Urban Vietnam as a Case Study, 7 *Pacific Rim Law and Policy Journal*, 555 (1998)

<sup>279</sup> He is the Dean of Faculty of Law, Can Tho City University. See Nguyen Ngoc Dien, *Du an Tro giup Phap ly o Vietnam*, [Legal Technical Assistance Project in Vietnam], 512 (2004)

<sup>280</sup> She is the Dean of Ho Chi Minh City Law University. See Mai Hong Quy, *Legal Reform in Vietnam*, in *International Symposium on State, Social Transformation and Legal Reform* held in December, 2006 at Nagoya University (CALE Papers), pp.34-36

subjective aspects, and demonstrates some drastic changes of social relations and the “*short-life*” of each enacted law.

In contemporary law development attached to the adoption of ROL, there is a tendency of turning back the democratic constitutional ideology to the early 20<sup>th</sup> century in Vietnam and explaining the situation at that time that “*led to the emigration of intellectuals and revolutionaries to other countries, most notably France and Japan, where they hoped to learn from other nations how to eliminate foreign occupation (or gain their support as allies)*” as *Truong Trong Nghia*<sup>281</sup> noted. Most recently, Ex-Prime Minister of the Ministry of Justice *Nguyen Dinh Loc* highly appreciates the Japanese assistance in the codification of the Vietnamese Civil Code and confirms a new trend among Vietnamese scholars to study Japanese legal ideology, legal culture as well as its practical experiences of legal transplant over a considerable period motivated for domestic legal reforms<sup>282</sup>.

*Pham Duy Nghia* in his recent publication emphasizes that Vietnam should not only mechanically receive foreign laws, but understand the concepts hidden behind those laws and *transplant* essential aspects of Western legal culture in to the Vietnamese legal system. Some other scholars look at the implementation of different documents of the WTO, the AFTA, the Vietnam-American BTA and the requirements for the changes in Vietnamese legal thinking in accordance with the ROL’s values and suggest Vietnamese cannot ignore the rules of game in a worldwide playground “*which mainly come from Western legal culture*”<sup>283</sup>.

Thus, like any law field, Vietnamese administrative law shares the common trend that it is moving towards adaptation to the changes of society and is searching for the best model and theory for judicial review. Before the early 1990s, Vietnam almost completely copied Soviet administrative law theory and institutions. Nevertheless, there are also some remnants of Chinese and French influence, such as *Nguyen Censorate*, which came later in comparison with Chinese predecessor. Until 1832, though being primitive and Confucian in style, Vietnam had three independent institutions that could challenge state authority namely *Do Sat Vien* (*Nguyen Censorate*), *Tam Phap Ty* (Inspection and Advisory) and *Dai Ly Tu* (Supreme Court). Furthermore, French influence could be found in the existence of the administrative courts in the early DRV (1945) and in the Republic of Southern Vietnam (before 1975). The long existence of Government Inspectorates (since 1945) that were attached to the executive branch and functioned both in the resolving of people’s claims and the giving of advice to the government, to certain extent, is reminiscent of the French *Conseil d’Etat*. Before the foundation of ADCs (1996) and even today, many scholars still support the idea of

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<sup>281</sup> *Truong Trong Nghia*, *The Rule of Law in Vietnam: Theory and Practice*, in *The Rule of Law: Perspectives from Pacific Rim*, available at [www.mansfieldfdn.org/programs/program\\_pdfs/10nghia.pdf](http://www.mansfieldfdn.org/programs/program_pdfs/10nghia.pdf)

<sup>282</sup> See *Nguyen Dinh Loc*, *Su Giup do cua Nhat Ban doi voi Vietnam ve mat Phap luat*, [The Help of Japan to Vietnam in the Legal Field] in *International Symposium held in Tokyo in October, 2007*

<sup>283</sup> *Nguyen Duc Lam*, *Vietnam Legal Culture in the New Era*, <http://vietnamese-law-consultancy.com/english/content/browse.php.action>



upgrading this inspection system in to something similar to French administrative courts. However, a number of scholars and lawmakers find the necessity to study the experiences of neighbor countries such as China, since they share many common political cultural and social elements. It is cannot be denied that during the process of establishing the ADCs, Vietnam learnt many experiences from China. Recently, with the success of Japanese legal assistance in the codification of Civil Code (1995), Vietnamese lawmakers wanted to obtain more help and experience in some administrative law fields, such as the codification of State Compensation Law, Administrative Procedure Law and Administrative Litigation Law.

In the economy, trade, banking, taxes and civil law fields, Western and Japanese influence can be found in most FLA Projects since the early 1990s. However, the projects related to the administrative law field seem to be very limited. Recently, to meet the demands of the Vietnam-American BTA and WTO membership, some projects were conducted by STAR-Vietnam funded by USAID to revise and codify some administrative law fields. Some influence from American legal ideology and institutions were not avoidable. This may lead to the difficulty of achieving a “proper” identity in the development of Vietnamese administrative law. Some scholars warn that Vietnam should avoid constructing ALRS from a mishmash of borrowed models and theories, as it wastes time, money and undermine its effects.

## **2.2. Necessity of International Integration and Saving Time**

The necessity of international integration and saving time are also regarded as motivation to reform contemporary Vietnamese administrative law due to the following reasons.

**For the first reason,** *Nelken* in his recent research suggests how current globalizing developments are affecting the legal transfer. He suspects whether everything that is currently going on in the way of legal transfers can be captured by the term of *globalization*, whether current trends are best labeled as convergence, integration, or modernization, and raises the question *is there any traditional mechanism for legal adaptation still at work*. For his view, globalization does not mean that the world becomes more homogenous and it is unlikely to impose any one existing pattern of legal culture. He advocates that it is unavoidable that the *so-called* Asian Values and culture finding their way into law is unavoidable.

Because Vietnamese law has been accustomed to receiving foreign contributions through its historical evolution, it is said that the most favorable method of improving Vietnamese laws is to introduce and adapt some selective achievements of foreign legal systems in the national context. It is true that Vietnam has been steadily integrated into the regional and international economy and policy, and Vietnam is consequently obliged to be subject to “*common rules*” of a “*common playground*”. However, the Vietnamese legal thinking during the period of isolation was formed and developed in a different way in regard to traditional legal thinking. Thus, the introduction and

reception of foreign laws, particularly in the field of administrative law, will not mean the imposition of a copy of any foreign version, but will be helpful motivation for Vietnamese lawmakers to reform traditional legal thinking in conformity with the general standard. Regarding the ALRS, there is a need to gradually improve legal theory and to reform the court model to better protect not only Vietnamese individuals and entities but also foreign partners in the context of international integration.

**For the second reason**, as described by *Nelken*, a positive aspect of borrowing laws is the *speeding-up* of legal reform process. It is undeniable that the supremacy and development of law, particularly administrative law in terms of protection to individuals by courts neglected for decades on account of pursuing a centrally planned economic policy. On the day following the adoption of the *open-door* policy and a market economy, Vietnamese laws remained embryonic and insufficient. It would therefore have taken a long time, not only to develop its legal system to that of the more advanced systems, but also to catch up with the common rules of developed countries. Vietnamese leadership has realized the importance of legislative work and finds the best way of saving time is by adopting foreign laws and enhancing legal thinking. Drawing lessons that other systems sharing more or less similar economic and social contexts have been confronted with will prevent Vietnam from spending as much time to achieve the best solution.

However, a negative point that should be seriously considered is the kind of foreign laws, legal ideologies and institutions that should be adopted for speeding up the reform process. It should be kept in mind that a false choice does not save time, rather wastes time, and restrains development.

**To conclude**, this section proposes the following remarks: (1) *Firstly*, the globalization prospective lies in the unity of diversity rather than the unity through uniformity and standardization. Differences between legal systems are an expression of self-identity. As a result, cultural diversity is related to freedom of choice as a part of democracy, the one fundamental value for all nations around the world. There is no perfect overseas model of administrative court that is completely in accordance with the Vietnamese context, unless Vietnam itself finds out a rational mechanism for its existence; (2) *Secondly*, Vietnam should begin with the foundational analysis of civil law thinking adhering to Asian values. The rational reception of the world's legal system is not only typical for Vietnam, and not beneficial only for Vietnam; (3) *Thirdly*, the basic *Friedman's* thesis is advancing, for which there is no lack of evidence, that law changes overtime in response to social development. "*Nothing is historical accident*", and law is "*reshaped by change*", "*by economics and society*". Conversely, law, at any given time, "*does play a part in constituting, filtering and changing the balances of forces in society*". Thus, law may be either a producer or product of change, as *Orucu* argued "*we need a precise and suitable functionalist vocabulary pertinent to individual cases*"<sup>284</sup>.

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<sup>284</sup> See E. Orucu, A Theoretical Framework for Transfrontier Mobility of Law, 6 (1995). It is cited by David Nelken, *supra* note 263, at 22

## II. Lessons from Oversea Experiences

This section selects three countries, namely France, China and Japan and analyses some of their experiences regarding the court models and jurisdiction over resolving administrative lawsuits.

**France** is one of the most influential countries in modern Vietnam due to nearly one century of colonization, ending in 1954. Although the political events after 1954 may have brought further changes to Vietnamese laws, as *David* and *Brierley* described, the socialist codes in Vietnam are in essence civil law documents<sup>285</sup>. Since the early 1990s, the Vietnam-France Legal House (*Maison du droit*), established according to a Bilateral Agreement between the Government of Vietnam and France (*signed in 1993*), has organized nearly one hundred workshops and training courses including those concerning the study of the French administrative court model, and the comments of Vietnamese legislative drafts related to the settlement of administrative lawsuits and so on. In addition, some of the government inspection delegations were sent to France in 1992 to study French experiences<sup>286</sup>. Although the proposal of setting up a model of administrative court attached to the government, like the French *Conseil d'Etat* model, it was not approved by National Assembly at the end of 1995, yet it is still strongly supported by scholars.

**China**, although having no legal assistance projects concerning the foundation of Vietnamese administrative courts, it has had the strongest influence in Vietnam. Inspired by the traditional thinking — “*Take a look to the neighbors to know what they had done, then do it at home in accordance with one’s own conditions*”, Vietnamese lawmakers, while seeking for a court model were undeniably influenced by Chinese experiences that empowered the people’s courts to hand over administrative lawsuits. In addition, one cannot deny the thousand years of being a Chinese colony as well as commonalities in political, cultural and social conditions.

**Japan** was one of the earliest donors that carried out legal assistance projects in Vietnam, beginning in the mid-1990s. Japan, through JICA, actively assisted Vietnam in improving its laws in the civil and economic areas, assisting with the development of the Civil Code, Civil Procedural Code, and a number of legal norms related to civil judgment enforcement, bankruptcy, commercial arbitration, state compensation, and areas of international law. However, legal assistance in the field of administrative law is still limited, yet promising. Recently, the Research and Education Center for Japanese Law, funded by the Japanese Government and promoted by the Center for Asian Legal Exchange (CALE), was established in September 2007. This initiative has established a great opportunity for substantial development in legal cooperation between Vietnam and Japan. Some workshops concerning the WTO accession of Vietnam and the transparency in Administrative

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<sup>285</sup> David Rene & Brierley J.E.C, *Major Legal System in the World Today*, 207 (1968)

<sup>286</sup> See Thanh tra Nha nuoc, Bao cao Khao sat kinh nghiem nuoc ngoai ve Tai phan hanh chinh, [Report on Foreign Experiences on Administrative Jurisdiction], in Project on Drafting Law on Administrative Court submitted to National Assembly IX, 3 (1995)

Procedure were organized with the participation of professors from Nagoya University which have attracted a number of Vietnamese scholars to further study Japanese experiences in some fields of administrative law<sup>287</sup>. Furthermore, under the Justice Reform Strategy of Japan in the 21<sup>st</sup> century, some recent amendments of Japanese ACLL (2004) as well as the reform of training of the legal profession provide some ideal learning opportunities for Vietnam in improving the current ALRS, by codifying this law and training professional judges in the future. For such reason, this section chooses Japan from which to learn court about its model and jurisdiction over the settlement of administrative lawsuits as well as training human resources by means of FLA Projects

## **1. Learning French Experiences**

### **1.1. Structure of French Administrative Court System**

In France, for various historical reasons, public authorities have specific powers and obligations that prevent their actions from being reviewed by ordinary courts. Litigation taking place between public legal persons, such as the State, national agencies or local bodies, has always been brought to specific jurisdictions in France. France has two completely separate orders of jurisdictions, each having its own supreme court at its head: the *Cour de cassation* for ordinary courts, and the *Conseil d'Etat* for administrative courts, which are less numerous and have fewer cases to deal with than ordinary courts, but traditionally have always had precedence over them. The possible conflicts of jurisdiction between civil and administrative courts, which, in practice, are quite exceptional, are arbitrated by a special court, called the "*Tribunal des conflits*" that has functioned consistently since 1872 and is composed of three members from *Conseil d'Etat* and three from *Cour de cassation*. The minister of justice, also a member, presides<sup>288</sup>.

The order of administrative jurisdictions has, as with the civil order, three levels of courts: *Tribunaux Administratifs* (the administrative tribunals), *Cours Administratives D'Appel* (the administrative courts of appeal) and, *Conseil d'Etat* (the Council of State), at the top. (See Appendix 4 & 5).

#### **1.1.1. Conseil d'Etat**

**Conseil d'Etat** is the spinal cord of the whole system of administrative courts. It is one of the oldest institutions of France, as its history goes back as early as the 18<sup>th</sup> century, when it was created by King *Philip the IV* in order to give him advice on government issues and to assist him in his mission to deliver royal justice to his subjects. After having been briefly suppressed during the

<sup>287</sup> This workshop held in March, 2007 in HLU (Vietnam). This involves the project of "*Asia-Africa Scientific Basic Foundation*" of Nagoya University, [アジア。アフリカ学術基盤形成事業] represented by Prof. Ichihashi Katsuya (2005-2007) in which some main activities such as (1) Administrative Law Reform in Transitive Legal System, (2) Settlement of International Disputes and Improvement of Domestic Laws in accordance with WTO's Accession, (3) Constitutionalism and ROL and so on. See Aikyo Masanori, Nagoya University and Legal Assistance Project Study, [名古屋大学と法整備支援事業。研究] in Jurist No.1358 [特集: アジアにおける法整備支援と日本の役割], pp.21-22 (2008)

<sup>288</sup> H.B.Jacobini, French Administrative Law and Dual Court System, An Introduction to Comparative Administrative Law, 103 (1991)

French Revolution, as it was strongly tied to the monarchy, *Conseil d'Etat* was re-established in its modern form, by *Napoleon*, just a few weeks after he came to power, in 1799. The main peculiarity of the *Conseil d'Etat* is that it exercises, through its different sections, a double role. It is not only the supreme court of the administrative jurisdiction, but also acts as a legal adviser to the Government.

**The advisory role of *Conseil d'Etat*** is of the utmost importance in the daily functioning of French institutions. Its role consists of looking into draft bills or decrees that have been prepared within ministries to give advice to Government about their consistency with constitutional law or principles as well as international or national statutory laws. Furthermore, the Government may also request advice from *Conseil d'Etat* on all legal or administrative matters, which it did recently, for example, regarding several issues which had a major impact on the society or the economy. In order to avoid any possible conflict of interests, the advisory work of the Council of State is carried out by five so-called “*administrative sections*”, which are distinct entities from the judicial panel that is exercised by its largest section, the *Section du Contentieux*.

**The judicial role of *Conseil d'Etat*** falls to the *Section du Contentieux* (Litigation Section) which has to decide on cases related to issues previously submitted to the Council. It consists of about one hundred members and is divided in to ten sub-sections, which are in charge of a preliminary review of cases before these are settled in court sessions. Each of these subsections is specialized in certain fields of law, however three among them deal only with fiscal and tax matters which amount to 20 to 25% of cases<sup>289</sup>. While holding the judicial role, the Litigation Section serves in different capacities, including: (1) the *first* and *last instance* judgment for approximately 20 % of the cases settled by the Council each year; (2) a “*juge de cassation*” in which the Council reviews the legal aspects of entire cases but does not look into the facts which have been debated before the previous courts; (3) also as an appeal judge, in some cases, especially for litigation involving local elections, which fall under the jurisdiction of administrative tribunals, on first hearing, but go directly on appeal to *Conseil d'Etat*.

*Conseil d'Etat* acts as the Administrative Supreme Court, issuing between 10,000 and 11,000 judgments each year. It has approximately 300 members that are divided in to three basic grades, namely “*auditeur*”, “*maître des requêtes*” and “*conseiller d'Etat*” (the highest grade). Most members are recruited from the National School of Administration (ENA) which trains all high rank civil servants of the French administration. There is also another way of recruitment, which is appointment by the President, in a limited proportion of the membership, of persons having distinguished themselves in the practice of public administration. Promotion depends, in practice, upon seniority of service. This principle of automatic promotion is regarded by members of *Conseil d'Etat* as the essential guarantee of their independence.

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<sup>289</sup> Ibid, at 75

### ***1.1.2. Tribunaux Administratifs and Cours Administratives D'Appel***

**Administrative Tribunals** consist of 41 throughout country, with 30 in mainland France and 11 in different French overseas territories. Only in 2007, they issued altogether about 183,000 judgments explaining the idea of quantitative importance of administrative litigation in France. The administrative tribunals originated from prefecture councils that were created in 1879 and had limited jurisdiction. In 1953, they became officially established as the courts which had general jurisdiction for administrative litigation.

**Administrative Courts of Appeal** are more recent institutions, as they only date back to 1987. These institutions consists of eight Courts of Appeal throughout the country, the most recent of these located in *Versailles*, which was established in 2004 to cover most of the Paris metropolitan area. In 2007, these eight courts issued, altogether, about 26,000 judgments. It is worth noting that the rate of appeal is significantly lower in administrative cases than in civil cases, which is considered by many observers to be due to administrative justice probably being, for various reasons, better quality.

Before 1987, all *first-instance* judgments of the tribunals could be appealed directly to the *Conseil d'Etat*. However, due to the growing number of cases, resulting in an excessive work load for this Council, it became necessary to establish an intermediate level of courts. Now, judgments of the tribunals can normally be challenged before the administrative courts of appeal, with the main exception of those concerning some minor cases, which, cannot be appealed and are only liable to be submitted to *Conseil d'Etat* acting as "*juge de cassation*".

The organization of the lower courts, as well as the procedural rules that they apply, are basically reproduced from *Conseil d'Etat*. By the Law of December, 31<sup>st</sup> 1987, the members of both administrative tribunals and administrative courts of appeal are under the management, no longer of the Interior Minister, but of the Secretary-General of the *Conseil d'Etat* which is responsible for all aspects of their organization, functioning, staff recruitment or training, and funding. For this purpose, the *Conseil d'Etat*, which is completely separate from the MOJ, enjoys full managerial independence and budgetary autonomy. It is essential to stress that the main guideline of all administrative tribunals and courts of appeal is to comply with the case-law issued by *Conseil d'Etat*. As a matter of fact, though the Council's precedents are not, in theory, legally binding, administrative jurisdictions practically always implement them very strictly, since their judgments could otherwise be successfully challenged.

There are approximately 1,000 judges who are granted the full guarantee of independence by their status. They are, notably, irremovable and, in order to prevent any interference from the executive power, all the main decisions concerning their career, such as promotions or transfers, are made by an independent council which is presided over by the Vice-President of the *Conseil d'Etat*. The judges are recruited, like members of *Conseil d'Etat*, from the ENA, but, due to the recent need

to increase the number of judges, other methods of recruitment, such as special competitions that are held every year to select new judges among civil servants, lawyers or high level law graduates, have been implemented.

## 1.2. Some Experiences on Court's Jurisdiction

### 1.2.1. Objects subject to Judicial Review

The French administrative courts have jurisdiction over all disputes related to decisions or actions of public authorities, from minor decisions made by any local authority to decrees issued by the President, whether the complainant seeks the annulment of an act or financial compensation for damages, and this applies in all fields of public administration. The most common kinds of administrative cases are those related to the application of economic or social regulations, taxation, town-planning, building permits, public works, public service procurement, environmental projects, hospital liability, immigration permits, civil servants' career and pensions, European and local government elections, and so on.

Thus, in comparison with the jurisdiction of Vietnamese ADCs, the French administrative courts have a large jurisdiction over administrative cases as described below:

**Firstly**, the French administrative courts can review the legality of legal norms, from “*tiny decisions*” made by any local authority to decrees issued by President of the Republic, except the so-called “*actes de gouvernement*” (the acts of governments).

It is important here, at first, to explain the doctrine of *actes de gouvernement*, which has played an important role in French administrative law and been the subject of much controversy among French scholars. The distinction between the acts of governments and other acts of the President has long been an established principle of the jurisprudence of the *Conseil d'Etat* and it too rests on the distinction the French make between the President as an administrative agent and as a political authority - between the function of “*administering*” and the function of “*governing*”. The French scholars construed the category of government acts within its scope which was a public necessity or which even served an important public interest, such as the protection against riot, insurrection, floods, epidemics and so on. This theory prescribes that in such cases, although such acts might violate private rights, if necessary to the social or national defense, the government may resort to them. Accordingly they were responsible only to Parliament and not to the *Conseil d'Etat*<sup>290</sup>. The typical case for explaining the evolution of this doctrine was the case of Prince Napoleon (*CE February, 19<sup>th</sup> 1875*)<sup>291</sup> that made important to establish the right of *Conseil d'Etat* to determine for

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<sup>290</sup> Jame W.Garner, French Administrative Law, 6 The Yale Law Journal, Vol 33, 607 (1924)

<sup>291</sup> In this case, since the annual Army List published in 1873 omitted the name of the former Emperor's cousin, Prince Napoleon who had been appointed general by the Emperor in 1853, he then appealed to the *Conseil d'Etat*. This omission was upon the instruction of the Minister of War. The *Conseil d'Etat* rejected the Minister's argument that the plea of *actes de gouvernement* could be raised in any case of a political complexion. It went on to decide that such family appointments were governed by the special statutory provisions under the terms of which they could not appear in the Army List.

itself what matters fall within the doctrine of *actes de gouvernement*<sup>292</sup>

To acquire a larger degree of independence, the *Conseil d'Etat*, hitherto, by a series of decisions, has steadily reduced the large domain of government acts, which had escaped from judicial review. It includes little more than such acts of the President, such as the calling of elections, summoning, adjourning and closing Parliament, the conduct of foreign relations, extraordinary measures in times of war in the interest of the national defense and so on. Thus, in principle, the legal norms can be judicially reviewed by French administrative court's jurisdiction. Nonetheless, the doctrine of *actes de gouvernement* is still important as can be well illustrated by cases such as the case of *Association Greenpeace France (CE September, 29<sup>th</sup> 1995)* in which Greenpeace failed to persuade *Conseil d'Etat* to quash the decision of President *Chirac* or to suspend its implementation regarding the nuclear testing in French Polynesia; or the case of *Prefet de la Gironde vs Mhamedi (CE December, 18<sup>th</sup> 1992)* in which *Conseil d'Etat* decided the suspension of the treaty was not reviewable, being an *acte de gouvernement* taken by the Minister of Foreign Affairs on behalf of the state.

**Secondly**, the French administrative courts are not limited to review administrative matters enumerated in a certain legal provision as is the case in Vietnam. In principle, the courts can review any illegal decision or action made by authorities in any field of administrative management. However, French administrative law gives principal exceptions in which some decisions or actions are always not within the jurisdiction of administrative courts. Such exceptions can be arranged to the following four categories: (1) *the first* covers those matters excluded from review by any court, ordinary or administrative, including the parliamentary proceedings and international relations; (2) *the second category* covers those matters being judicially reviewed by only the ordinary courts, such as: the administration of justice; the administrative activities of a private character; the matters traditionally reserved to the civil courts; and the doctrine of flagrant irregularity (or *voies de fait*)<sup>293</sup>; (3) *the third* consists of those matters which are taken to the ordinary courts by virtue of special statutory exceptions. In recent years, some matters are within the jurisdiction of the ordinary court, such as indirect taxation, employer's liability, running down cases, nuclear accidents, competition and the post<sup>294</sup> and so forth; (4) *the fourth* is the illegality as a defense in the ordinary court (or *exception d'illegalite*) that allows the defendant in the civil or criminal cases can challenge the legality of the administrative act upon which the plaintiff or prosecution rest their cases. This aims to

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<sup>292</sup> L.Neville Brown & John.S.Bell (1998), p.162

<sup>293</sup> This doctrine indicates some irregularity on the part of the administration which is so flagrant and gross that it can not be regarded as an administrative act at all but is treated as if it was the act of private body. Accordingly, it does not fall in the jurisdiction of administrative courts but within the cognizance of the ordinary court. The famous case is *Carlier (CE November, 18<sup>th</sup> 1949)*. See *Ibid*, at 139

<sup>294</sup> See Law of July, 26<sup>th</sup> 1996 on Post and Telecommunication, Law of July, 6<sup>th</sup> 1987 on Competition, Law, Law of August, 2<sup>nd</sup> 1989 on Financial Market, Law of September, 9<sup>th</sup> 1986 on Terrorism, Law of December, 31<sup>st</sup> 1991 on Compensation for victims of AIDS and so on



avoid the *circuity* of procedure, and appears to be something from which Vietnam can learn, since in most similar cases, the Vietnamese courts often require the litigants to return to the *pre-litigation* period and initiate a new administrative lawsuit

**Thirdly**, the French administrative courts can deal with claims for damages caused by an action or a decision of the administration that is fundamentally different with the common law's courts and also the administrative courts of some civil law countries like Germany, Sweden, Austria and so on. German administrative courts are only competent to control the legality of administrative decisions or actions, while claims to compensation for damages caused by the administration are brought before the ordinary courts<sup>295</sup>. In France, the administration may be liable in some situations even without a wrong being done, where harm is caused to an individual for the public goods. It is recently argued by some French scholars, such as *J.Bell* and *A.W.Bradley* that the administrative liability, unlike private law, is not based on the notion of causing harm, but on the principle of equality before public burden as stipulated in Article 4 and 13 of the Declaration of the Rights of Man of 1789<sup>296</sup>. Another point has been argued that there is no difference between the damage caused by an administrative activity and the damage caused by a private person. The damage suffered by a person run over by a private car and by a person run over by a car belonging to the administration is the same, and the faulty driving of a private person or of an administrative employee is the same nature. This may be debatable insofar as the litigation relating to the liability of the administration gives administrative courts the opportunity to control the workings of administration and to define certain standards of correct functions. Nevertheless, the idea that there is no need to take the litigation relative to the liability of the administration before administrative courts is still a hot issue and one worth discussing in the case of Vietnam.

### ***1.2.2. Grounds for Judicial Review***

Regarding the administrative court's jurisdiction, litigation coming before the courts is basically divided into two categories: (1) *the first* is the "*contentieux de l'excès de pouvoir*" (or *ultra vires* litigation) in which the courts will annul some administrative acts or decisions on the ground of its illegality; (2) *the second* is the "*plein contentieux*" (or full litigation) that the court will determine a person's rights or entitlement, which may not only result in quashing an administrative decision but also involves revising it or granting compensation for any damage caused by illegal decisions or actions.

While the litigations in the second category appear in a number of areas, such as local government elections, tax cases and actions for damages on the ground of contractual or non-contractual liability, most litigations taken to the court fall into the first category, the "*excès de*

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<sup>295</sup> See Jean Michel Galabert, *The Influence of the Conseil d'Etat outside France*, 3 *The International and Comparative Law Quarterly*, Vol 49, 706 (2000)

<sup>296</sup> See *J.Bell and A.W.Bradley, Government Liability: A Comparative Study*, 225-7 (1991). It is cited by *L.Neville Brown & John S.Bell*, (1998), p.184

*pouvoir*” (*ultra vires*) in which the court is empowered to annul illegally litigated decisions. This section will focus analyzing some grounds for annulment of impugned decisions.

Vietnamese ADCs, to a certain extent, share some commonalities with French Administrative Courts in insofar as the courts review both the formal validity of decisions and their substantial merits, although such grounds for review are not so clearly regulated in the existing Vietnamese laws.

**Regarding the formal validity, two traditionally admitted grounds for review are as below:**

**The first** is “*incompetence*” (or want of authority). If an official acts completely without authority, it will be declared void for *incompetence*. Thus, in a case where the administration takes a decision in a domain reserved for parliament by the Constitution, or a certain prefecture governor or mayor has made a decision that actually falls under the authority of a minister, such decision will be annulled on this ground.

**The second ground for review** is “*vice de forme*” (or procedural *ultra vires*) which is distinguished from substantial *ultra vires* in English law. Like English law which makes distinction between mandatory and directory requirements, French law also distinguishes between the essential and inessential formalities. The courts will generally not insist on a rigid observance of all procedural formalities. Only failure to observe an essential formality will lead to the voidance of the subsequent decision. An example of such a case is the annulment of the decision due to the lack of the mandatory prior consultation of an advisory committee, such as the *Petalas Case (CE November, 18<sup>th</sup> 1955)* in which an order of extradition of a foreign citizen, which was made without consultation with the appropriate government department, was held void for want of compliance with an essential procedural requirement.

**With Regards to the substantial merits of administrative acts, two traditionally admitted grounds can be named as below:**

**The first and by far most important** is “*violation de la loi*” (or violation of law). The term of “*loi*” (law) is to be discussed in a wider sense, rather than simply used in its usual French meaning of written law. It can be subdivided into several grounds, such as error of law, error of fact and error in the assessment of facts. In its written form, the violation of *loi* (law) includes the violation of the Constitution, of an international treaty, of a statutory law passed by parliament or of a ministerial regulation. It also includes the violation of the *so-called* general principles of law which are various fundamental principles recognized universally by the public law tradition, such as the principle of equality of citizens before the law, the principle of non-retroactivity of administrative acts and so on.

**The second ground related to substantial merits** is the “*détournement de pouvoir*” (or abuse of power). It is essentially subjective, involving the court’s examination of the motives that inspired the administration when making its decision. If an administrative power exercises discretion

for some objects other than that for which power or discretion was conferred by the statute, it will be declared void. Some examples of this ground for judicial review can be taken as the regulations made by the mayor of a commune controlling the holding of dances were quashed, because they were made to encourage people to patronize the mayor's own business; the mayor's order prohibiting dressing and undressing on the beach was annulled since its real purpose was not for public decency, but so as to compel "would-be" bathers to use the municipal bathing establishment<sup>297</sup> and so on.

**Finally yet importantly**, this section finds the necessity to mention the aspect of the administration's discretion known as the extent ground for judicial review. Although relatively uncommon, there are some cases, where the administration is in a situation of *bound authority*, which means that it has no discretion at all. For example, if a citizen applies for a license, after his fulfillment of all requirements, such as the passing of an examination, and the completion of his or her tax duties, according to law, the administration is then bound to issue the license. It has no choice to do otherwise. The judge will exercise a full review on its decision if it happens to reject the application. In other cases, the administration may have full discretionary power, which means that it has absolute discretion to make such decision. Thus the judge would not review at all.

In most cases, the administration has limited discretion. As such, according to different criteria determined by the *Conseil d'Etat* case-law, the court will either exercise a full review of *legal definition of facts*, or confine itself to a review of *manifest error of assessment of facts*. In the former, the court will set aside the impugned decision on the mere ground that its assessment of facts is different from that of the administration. In the latter, it will only check if this decision is not flawed by a gross mistake of assessment and will not quash it where reasonable, even if the judge thinks that it was not necessarily right. For example, if building permission has been refused because the planned construction was deemed by the administration to be harmful to visual perspectives around a nearby historical monument, this assessment will be subject to full review. But, in the case of a civil servant who has been disciplined by his superior, the court, after having checked if the alleged offence could actually give grounds to disciplinary proceedings, will not fully review the proportionality of the imposed sanction to this offence, and will confine itself to checking the absence of *manifest error of assessment*.

Thus, the above theory of discretionary power of the administration and ground for review are completely new in Vietnamese administrative law. The court is often embarrassed to deal with the *so-called* discretionary power of administrative agency, due to a lack of the effective substantial and case-law created by the SPC.

### ***1.2.3. Judgments, Decisions and Effects of Annulment of Administrative Acts***

In the *tribunal administratif* or the *cour administrative d'appel*, the courts usually consist

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<sup>297</sup> *Rault Case*, CE March, 14<sup>th</sup> 1934; *Beauge Case*, CE July, 4<sup>th</sup> 1924. See L.Neville Brown & John.S.Bell (1998), p.247

of three members: the *rapporteur*, the president and one other judge. In more important cases, a full court of up to seven judges may sit. In the *Conseil d'Etat* trials, for the less important cases, it consists of the original sub-section or of two sub-sections combined or the full Litigation Section. For the complex or important matters possibly involving politics, it tends to be heard by a Litigation Assembly consists of 12 members.

**Regarding the administrative judgment**, to be equivalent to four categories of litigation before the courts known as *Le contentieux de l'annulation* (the annulment litigation); *Le contentieux de pleine juridiction* (full litigation); *Le contentieux de l'interprétation*; *Le contentieux de la répression*, the French administrative judges can render the final judgment including the following main contents: (1) Annulment, Uphold or Revision of the litigated decisions; (2) Determination of a person's rights or entitlement; (3) Decision on compensation for damages caused by illegal decisions; (4) Interpretation of some administrative decision in the sense of explaining its legal meaning or significance (*such as in case of reviewing the legislative norms*); (5) Imposition of fines or an additional amount which takes account of the damage done to public property; (6) Imposition of compulsory measures to the offences and so on.

Thus, the jurisdiction of French administrative courts over rendering the judgment is large and clearly provided by law. It can impose strict measures to force the wrongdoing authority or administrative agency, as some French scholars comment, regarding the *le contentieux de la répression*, the administrative court acts as a criminal court that may impose fines (*not imprisonment*), or heavy payment for the interference with public property<sup>298</sup>. Since the Act of 1995, administrative judges have been granted power to issue injunctions ordering the administration to take such measures as the court deems necessary to execute its judgment. These measures may vary from one case to another, depending on the grounds for the annulment of the impugned decision.

**Regarding the effect of annulment of administrative acts**, as an example, the case of a judgment having annulled an administrative decision refusing to grant an immigration permit. If this decision has been set aside because of procedural *ultra vires*, but might be right as to substance, the court will only order the administration to re-examine the immigrant's application in order to make a new decision. But, if the decision has been voided because it violated one of the applicant's substantial rights, for instance, his right to lead a normal family life with a spouse and children already residing in France, the court will order the administration to issue an immigration permit. Thus, when a decision is annulled, it is immediately *voidable* and often attached to other mandatory duties of the administrative agency or authority. In the Vietnamese case, due to a lack of legal provisions as well as the weak power of the court regarding annulment judgments, it raises the question of whether the *annulled declaratory decision* immediately becomes *null and void* or still effective until it is annulled or revised by the concerned agency or authority.

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<sup>298</sup> Ibid, at 180-181. See also *Rognant Case* (CE June, 22<sup>nd</sup> 1987)

**Regarding the court's decision on suspending the implementation of the challenged decisions**, it should be said that in France, it is not an automatic effect when a claim is lodged by any single citizen. Recently, since an important reform was adopted in 2000, administrative courts have developed a full range of *summary proceedings* which allow the judges, under certain conditions, to suspend the enforcement of administrative decisions. For example, in the case of building permits, the implementation of such impugned decision could result in a violation of an individual's rights or cause him irrecoverable damages, the court can render an urgent decision to prevent it. In Vietnam, the article 33 of OSAC (2006) also provides the court's jurisdiction over deciding this suspension. However, the lack of clear guidance on at what extent the court can issue such decision as well as the restraint of the judge's decision in terms of absolute compensation duty for a wrong decision make the judges puzzled in particular cases.

**To conclude**, Vietnam can learn many experiences from France regarding its court models and jurisdiction over administrative cases. Some scholars strongly support the idea that the existing Government Inspection would be the model of *Conseil d'Etat* and the local inspection system would be the French *Tribunaux Administratifs* and *Cours Administratives D'Appel*. In addition, the Vietnamese court's jurisdiction should be expanded and made more effective, in a similar way to what has happened in France. The next section will introduce a new French administrative case concerning the court's jurisdiction regarding the annulment of a school's decision based on a law that is considered illegal and highly infringing upon individual freedom.

### **1.3. Introduction to French Sikh Schoolboys Lose Turban Case (2005)**

In March, 2004, France passed a law that bans *so-called* conspicuous religious symbols and attire in the classroom. Under this law, schoolchildren are banned from wearing the Christian cross, the Jewish skull-cap, the Islamic head scarf and the *Sikh* turban. The three French *Sikh* boys were expelled from school of *Louise-Michel de Bobigny (Seine-Saint-Denis)* in December, 2004 for refusing to remove their *Turbans*. Their request for re-entry into the school with *Turbans* was rejected<sup>299</sup>.

On April, 19<sup>th</sup> 2005, their representatives took this school's decision to the French administrative court in *Melun*, in the outskirts of Paris.

The *Melun* administrative court upheld the expulsion of three *Sikh* schoolchildren for wearing a *Turban* on the grounds that the *Turban* made them instantly recognizable as *Sikhs*. In the content of judgment, the President of *Melun* administrative court, Judge *G Roth*, stated that, according to French law, the administration did not have to consider if the *Turban* had the effect of

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<sup>299</sup> This case is quoted from Internet sources. See United Sikhs Press Release, <http://www.unitedsikhs.org/rtt/>; Sikh schoolboys lose French case, available at <http://news.bbc.co.uk/2/hi/europe/4461905.stm>; or <http://www.unitedsikhs.org/PressReleases/PRSRLS-19-04-2005-00.htm>; <http://www.panthic.org/news/124/ARTICLE/1260/2005-04-24.html>

*proselytizing* or that it led to a breach of public order. It was decided that wearing even a small *kaki* (*very small turban*) was against the “*secular*” school law.

The lawyer representing three *Sikh* schoolboys, Mr *Felix de Bellboy*, said that the court’s decision is regrettable, because it did not pay any regard to the French Constitution and to Article 9 of the European Convention of Human Rights that guarantees the right to practice ones religion. In addition, under the French Constitution and Article 9 of the European Convention, the right to practice one’s religion can only be derogated on grounds of public security and safety.

However, the *Melun* Court gives the idea that the Administration did not have to consider if wearing the Turban would lead to a breach of public order. It only followed a regulated law.

The fathers of these boys grieved that three *Sikh* boys, then aged between 15 and 18, consequently remain without a proper education. They wanted to appeal to the highest court as they believed that the law could not intend them to abandon their religion. For them, a Turban is a part of their body - like hair. Without it, they could not be recognized as the *Sikhs*.

The leader of United *Sikhs* France said that the court was asked to uphold freedom of conscience for the 15 year olds, which is protected under French law. However, the court has not upheld both the letter and spirit of the law. He confirmed that “*with one stroke of the pen, the court today has made the Sikh religion, which has been in existence for more than 500 years, illegal*”.

On April, 21<sup>st</sup> 2005, another case was taken to the court in which a Sikh with French nationality was also fighting in court for the right to have a *turbaned-photo* on his passport and ID-cards. He also made an appeal to the Supreme Court, but following pressure by French politicians, no regular judiciary hearing was to be conducted, and only one commissioner was to decide the outcome. The Sikh considers that the French Judiciary has become a panel of politicians, where they use a political approach. Reasoned by the *so-called “public-security”*, the authorities are breaking basic human rights.

The Leader of French Committee for Action on the *Sikh* Turban objected to the Prime Minister and emphasized that: “*The five children who were expelled from the schools were not allowed to wear turbans, and neither would the next generation of children starting the school. Thus, it is a very serious matter for French Sikh and the Sikh nation at large*”.

The French *Sikhs* consider that the situation for *Sikh* children is very serious. Some reports show that many children between the ages of eight and nineteen have faced bullying at school. After the laws were passed, there was a raise of tension and confusion among *Sikh* children. Their natural religious development faces external hindrances. The law banning the turban will only exacerbate this problem as it isolates the child from an early age instead of helping him to integrate into mainstream society.

**In short**, this above case seems to be very complicated since it does not involve only a decision on expelling from the school but also a law be considered against the Constitution and

European Convention of Human Rights. Although such a decision can be reviewed by the administrative court, the law banning the *turban* may not be reviewed since it falls in to the principal exception concerning the political character or the issue of the international relation. In Vietnam, legal norms are always out of court jurisdiction. However, in fact, some local norms contradict with state laws, even against with the people's legal rights and interests, such as prohibiting students from Music School to perform in a Pub or Discotheque, banning each person to register no more than one motorbike, prohibiting people whose height under is 145cm, or weight under 40kg, from driving motorbikes (these *regulations were eventually cancelled*), banning three-wheel motorbikes as a means of transportation and so on. The Department of Checking Legal Norms, attached to the MOJ has recently just announced that about 12% of the norms (*about 6,900*) enacted by competent agencies throughout the country are illegal<sup>300</sup>. The problems of whether such decisions based on illegal norms that cause damage to people can be taken to the court or require judicial review are still debatable.

## **2. Learning from Chinese Experiences**

### **2.1. Establishment of ADCs and an Administrative Litigation System**

#### **2.1.1. Constitutional Background: From Rule by Man to Socialist Rule of Law State**

The Revolution of 1911 abolished the feudal monarchy and gave birth to the Republic of China but the imperialism and feudalism was not entirely overthrown. The CCP with Chairman *Mao Zedong*, in 1949, overthrew the rule of imperialism, feudalism and bureaucratic-capitalism, and founded the PRC. After founding the PRC, China gradually achieved its transition from a new-democratic to a socialist society, abolished the old nationalist laws and began building a socialist legal system. However, its development did not always share the same common logic with either the Soviet Union or Vietnam.

As *Yu Xingzhong* comments, the frequent revision of the Chinese Constitution reflects the changing “*objective*” determination by the CCP of “*actuality*”. The PRC has promulgated four Constitutions<sup>301</sup>. Each of these Constitutions bears the mark of the political and economic environment in which it was produced<sup>302</sup>.

The traditional Chinese *moralism* was embodied within the ruler, who had responsibility for maintaining harmony. Chinese leaders in the 1950s, like those of Soviet Union during 1930s-40s, promoted a policy of class struggle (*Vyshinsky's model of legal theory was adopted*). Soviet Advisors

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<sup>300</sup> This is quoted from Vnexpress Information on December, 25<sup>th</sup> 2008. See Gan 6.900 Van ban trai Phap luat da duoc ban hanh, [About 6.900 Illegal Norms or Regulations were enacted], available at <http://vnexpress.net/GL/Phap-luat/2008/11/3BA08CB1/>

<sup>301</sup> See Chinese Constitution in 1954, 1975, 1978. The current Constitution was adopted by the 5<sup>th</sup> National People's Congress (1982) with some revisions in 1988, 1993, 1999, and 2004 (the latest revision by the 10<sup>th</sup> National People's Congress on March 14, 2004)

<sup>302</sup> See Yu Xingzhong, Legal Pragmatism in RPC, in Perry Keller ed, Chinese Law Legal Theory, 44 (2001)

helped the PRC Government with the task of building a new “*socialist legality*”. As noted, the Chinese legal system, though deeply influenced by the former Soviet Union, was by no means *slave* to Soviet formulate<sup>303</sup>. CCP was relatively free in formulating its own theory of law within framework of *Marxism-Leninism*.

*Mao Zedong*’s conception of law mixed the legal order and justice in a broader framework of politics and ideology. Law, defined as an instrument of class struggle, was to be implemented not so much by formal judicial organs as by mass participation in political campaigns and mass movements. It was called *Rule by Man* in China. During the *Mao* period: “*the legal system served primarily as a hand-maiden to politics*”. There was little if any separation between law and politics and “*the purpose of law was to serve the state not to protect individual rights*”. Accordingly, there were few legal channels for citizens to challenge government decisions.

*Deng Xiaoping*’s conception of law was much more pragmatic. He did not return to all features of the Soviet model but insisted on searching for a Chinese path to the development of a socialist legal theory<sup>304</sup>. He clearly distinguished between ideology and political practices and saw that what had become known as “*rule by man*” had to be replaced by the “*rule of law*” - undoubtedly, law must be the highest authority. However, as *Yong Zhang* comments, it is possible to say that the Chinese style rule of law was “*rule by law*”<sup>305</sup> and the conception of ROL remained a controversial topic of debate. Following *Deng Xiaoping*’s “Open Policy” that launched the country’s impressive modernization program, the Constitution was changed in 1982. He demanded the completion of legal codes, insisted that “*there must be law for people to follow*”, all were “*equal before the law*” and reminded the party cadres to exercise their leadership role within the boundaries permitted by law. Under Articles 41, the Constitution of 1982 allowed citizens to sue the government or civil servants for unlawful activities and claim damages. However, in the first half of the 1980s, administrative jurisprudence in China was still unpopular. This situation continued until the enactment of ALL on April 4<sup>th</sup> 1989, which marked the establishment of China’s administrative litigation system.

*Jiang Zemin* appears to have continued *Deng*’s insistence on market reform within a context of stability. He has reaffirmed a commitment to the regulative functions of law in a market economy, promoted new economic legislation, renewed emphasis on establishing legal infrastructure, re-enforcing Judicial Independence, improving the quality of legal personnel, training lawyers and promoting popular legal awareness. However, as *Carlos Wing-Hung Lo* comments: “*Jiang still appears to adhere to a repressive view of law rather than to emphasis on human rights*”, and

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<sup>303</sup> Carlos Wing-Hung Lo, *Socialist Legal Theory in Den Xiaoping’s China*, in Perry Keller ed, *Chinese Law & Legal Theory*, 89 (2001)

<sup>304</sup> His insistence in 1979 on the “*four cardinal principles*”: The Socialist Road; Dictatorship of the Proletariat, Leadership of Party; Marxism-Leninism and Mao Zedong Thought

<sup>305</sup> See Yong Zhang ed (1997), p.73



concluded that “*Yet one is always conscious of the fact that Deng always saw rule by law occurring under the party tutelage, and Jiang seems to continue to hold that position*” and “*the socialist rule of law remains limited*”<sup>306</sup>. According to the amendment in 2004 of the PRC Constitution, it emphasizes the constitutional supremacy (art 5), the power belonging to the people (art 2), democratic centralism (art 3), the right to petition to state including state compensation (art 41).

As in the Vietnamese context, although *Jiang Zemin* in 1996 adopted a new official policy of ruling the country in accordance with law and establishing a *Socialist ROL State*, which was subsequently incorporated into the revised Constitution of 1999, the ROL concept continues to be a topic of debate. While China’s leaders have officially endorsed ROL, they have not sanctioned the liberal democratic version (*or thick version of ROL*). *Jiang Zemin* and other *statist* socialists endorse the so-called “*the Socialist Rule of Law State*” that is defined by: (1) A socialist form of economy that promotes the market-based economy in which the public ownership still plays a somewhat large role than others); (2) A non-democratic system in which the sole Communist Party plays a leading role; (3) A mechanism of democratic centralism; (4) An interpretation of the rights that emphasizes stability, collective rights over individual rights and subsistence as the basic rights rather than civil and political rights.

As mentioned, the definition of ROL in China and also Vietnam is still controversial. How one defines ROL will depend on one’s purpose. Many debates in China and Vietnam regarding state reform in general and legal reform in particular have been laid down in terms of the ROL. Nevertheless, one cannot deny that since the end of the 1980s, China has taken strong reforms, particularly in the legal field, at a much faster pace than Vietnam. In the field of administrative law, some evidence clearly shows the inevitable and significant impacts to the reform of Vietnamese administrative law such as the birth of the administrative litigation system (1989), the establishment of the state compensation system (1994) and the codification of several other law fields.

### ***2.1.2. Administrative Litigation System and Model of ADCs***

It should be noted that, unlike the Vietnamese context under French control before 1945, there once existed a model of European administrative court in China until the 1949 Revolution. After Japan made efforts to modernize its legal system by introducing Western-style codes and courts, it succeeded in persuading the Western powers to relinquish their extraterritorial jurisdiction by the beginning of the 20<sup>th</sup> century. This Japanese experience, to some extent, contributed to the introduction of legal reform in China<sup>307</sup>. In the period of the Republic of China, a series of comprehensive codes of law were promulgated partly based on the European continental model (*such as the laws of Germany, Japan and Switzerland*), partly on the Anglo-American model, and

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<sup>306</sup> See Perry Keller ed, *Chinese Law and Legal Theory*, 486 (2001)

<sup>307</sup> See Albert Hung-Yee Chen, *An Introduction to the Legal System of the People’s Republic of China*, 20 (1993)

also on the existing traditional of the late *Qing* and feudal period. The laws were collectively known as the *Collection of the Six Laws* including administrative law that even today forms the basic legal system in Taiwan. Since the foundation of the Chinese Soviet Republic in 1931, a system of people's court was also established which was modeled upon that of the Soviet Union. After 1949, China developed its legal system fully in line with Socialist law and the court model. During this time, China faced, as *Yong Zhang* describes, “*thirty years without administrative law*” and the first textbook of Chinese administrative law (*published in 1983*) “*had a strong socialistic tinge*”<sup>308</sup> that ignored the necessity of any kind of administrative jurisprudence.

Under *Deng Xiaoping's* ruling, from 1982 to 1989, many specific statutory laws laid down provisions<sup>309</sup> to implement the article 41 of the Constitution of 1982 that allowed people to sue the authorities and agencies. According to official statistics, while from 1983 to 1986 less than 100 administrative cases were taken to the courts in the whole country, the number of cases suddenly increased to about 6,000 in 1987<sup>310</sup>. What would account for this sudden increase in such lawsuits? One of the main reasons is the establishment of the ADCs in 1986<sup>311</sup>. Thus, in principle, before its establishment, such administrative lawsuits were lodged by the traditional civil division courts. This situation shares some commonalities with Vietnam in that before the birth of Vietnamese ADCs, some administrative matters, such as those concerning residential registration, voter lists and land administration were taken to the people's courts. At that time, such cases might have been classified as civil lawsuits rather than administrative ones. It is worthy mentioning that Chinese people's courts normally consist of four divisions in which the establishment of economic (1983) and administrative divisions (1986) were more recent developments than that of the traditional criminal and civil divisions.

By the end of 1990, the administrative divisions existed in the SPC and all 31 high courts as well as 90% of all intermediate and basic level courts. Differing from the Vietnamese court system, the design of the PRC court system is based on the principle of “*four levels of courts and at most two trials to conclude a case*”. Two trials are named the *first-instance* and the *appeal* trials. The four levels of courts consist of more than 3,000 basic level people's courts at the county level; 376 intermediate people's courts in cities and prefectures within provinces; 31 high people's courts at the provincial level; and the SPC as the top. Until now, the ADCs appeared at all four levels of the

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<sup>308</sup> See *Yong Zhang* (1998), p.74

<sup>309</sup> Such as, The Civil Procedure Law (1982) makes specific provisions regarding the settlement of administrative lawsuits; The Regulation on Punishment in Public Security Administration (1986) allows the parties to lodge complaints against decisions on administrative punishments and compulsory measures or sue the public security agencies to the court; The Land Administrative Act (1986) permits the parties concerned who are not satisfied with the settlement dispute decisions awarded by the land administration bureaus can make complaints or pursue the case in front of the law court ...etc.

<sup>310</sup> Its statistic is originated from Haocai Luao ed, *The Judicial Review System in China*, 566 (1993), Beijing University Press in Chinese language. It is cited by *Yong Zhang* (1998), p.53

<sup>311</sup> See *Albert Hung-Yee Chen* (1993), p 108

Chinese people's court system while such an administrative division is not set up at the lowest court level (*the district level*) in Vietnam.

Although the ADCs were established in 1986 for handling administrative lawsuits, it still lacked the basic legislation (*such as an effective specific law*) to make it legally binding. The Civil Procedural Law promulgated on March 6<sup>th</sup> 1982 was only the procedural law making some specific provisions regarding the settlement of administrative cases<sup>312</sup>. From 1982 until 1989, it is reported that over 130 laws and regulations had been made that provide for the possibility of administrative lawsuits. Among them was the Regulation on Punishment in Public Security Administration (1986), the Land Administrative Act (1986) and so on. In 1988 in particular, Article 11 of the revised Constitution added that the state allows individuals to do business and their legal rights and interests are protected by the state. Consequently, the protection to private enterprises including private partners becomes necessary. Some Chinese scholars comment that this change not only reflected the positive attitude of Chinese lawmakers towards the establishment of a democratic and law-ruled state but also directly promoted the process toward the codification of the Administrative Litigation Law as well as the foundation of a new Administrative Litigation System in China<sup>313</sup>. The following fundamental reasons can be said to have motivated the enactment of the new law: (1) the trial practices faced with obstacles in the legal theory related to settlement of administrative cases relying on Civil Procedure Law; (2) the dramatic increase of administrative lawsuits taken to the courts; (3) the confusion on determining what kinds of administrative litigation to be resolved and the issue of special judge's experiences. As this implies, the ALL of the PRC was promulgated on May 4<sup>th</sup> 1989 and came in to force on October 1<sup>st</sup> 1990. For many Chinese scholars, this officially marked the foundation of the new administrative litigation in China.

In 1993, the revised Constitution adopted a socialist free market, strengthening the legislation in the economic field and granted more rights to people operating private business and demanding the remedy of the state's mistakes. As a result, the State Compensation Act was promulgated on May 12<sup>th</sup> 1994. Thus, ALL (1989), the Administrative Reconsideration Regulation (1990), the State Compensation Act (1994) are the fundamental legislations providing grounds for people to act against authoritative administrative decisions or take actions for redress in China.

## **2.2. Some Experiences Regarding Jurisdiction of Administrative Division Court**

### **2.2.1. Principle of Legal Inquiry and Scope of Accepting Cases**

Article 5 of China's ALL reads: "*In handling administrative cases, the people's courts*

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<sup>312</sup> The article 3, section 2 of Civil Procedure Law of PRC reads: "*The provisions of this law are applicable to the administrative cases that by law are to be tried by the people's courts*".

<sup>313</sup> See Songnian Ying, Administrative Litigation System in China, in Yong Zhang ed (1997), p.46. Many Chinese scholars also believe that the enactment of Regulation on Punishment in Public Security Administration (1986) represented an important milestone in the development of administrative litigation in China. See also Albert Hung-Yee Chen (1993), p.177

*shall examine the legality of specific administrative acts”.*

**Regarding the principle of legal inquiry, first of all,** Chinese law empowers the court to examine the legality, not the constitutionality and also the rationality of specific acts. However, ALL also provides an exception as laid down in Article 54, sec.4 that “*if an administrative penalty is obviously unfair, it may be amended by judgment of people’s courts*”. This means that in some necessary cases, as stipulated by law, the court enables an examination in to the rationality of a certain administrative decision or action.

**Secondly,** the power of inquiry in to legal norms (*sometimes called the abstract administrative acts*) is vested in the Chinese People’s Congress and its Standing Committee of the same level and the people’s government at a higher level<sup>314</sup>. However, there is also an exception that while reviewing the legality of a specific administrative decision or action, the court, to some certain extent, can hold power of inquiry into the legality of regulations made by the departments at central level or by the local governments. Article 52 of ALL reads: “*Local regulations shall be applicable to the administrative cases within the corresponding administrative areas*”. Nevertheless, it should be noted that in the case of such regulations considered unconstitutional, the court cannot declare void or annul decisions due to its jurisdiction belonging to the National Congress or its Standing Committee. At present, Vietnam shares the same concerns regarding the discussion on whether to review the constitutionality and legality of legal norms or abstract administrative regulations, and whether the constitutional court should be set up, seen as attractive options to many legal researchers.

**Thirdly,** the principle of legal inquiry provides a clear definition on the objects for judicial review, known as “*a specific administrative act*”. Being different with article 4 of the Vietnamese OSAC that gives the definition of administrative actions, decisions or disciplinary decisions on job dismissal as objects of judicial review, China’s ALL has no clear provisions. Upon the opinion of the Chinese SPC, the specific administrative acts refer to “*the unidirectional acts*” given by state administrative agencies or their functionaries empowered by the law or regulations, by the organs or individuals entrusted by the administrative organs in exercising their administrative duties, toward specific citizens, legal persons or other organization on specific concrete matters concerning the rights and duties of citizens, legal persons or other organization<sup>315</sup>. Thus, in principle, the definition of a specific administrative decision in China is the same as “*the individual administrative decision*” (*Quyết định hành chính cá biệt*) in Vietnamese law. However, some main questions should be further

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<sup>314</sup> See Art 67, section 7 of the Constitution of PRC. It reads: “*The Standing Committee of the National People’s Congress exercises the power to annul those administrative rules and regulations, decisions or orders of the State Council that contravene the Constitution or Law*”. Art 89 provides that State Council is empowered “*to alter or annul inappropriate orders, directives and regulations issued by the ministries or commissions*”, and “*to alter or annul inappropriate decisions and orders issued by local administrative organs at various levels*”.

<sup>315</sup> See the Opinion of People’s Supreme Court on Certain Problems Concerning the Implementation of the ALL at the 499<sup>th</sup> Meeting of Trial Commission of the People’s Supreme Court on May, 29<sup>th</sup> 1991. See Yong Zhang (1997), p.48

explained: (1) *the first question* is whose decision can be taken to the court; (2) *the second* is whether the decision has the characteristics of “*internal administration*” like disciplinary measures, appointment or dismissal of the post can be judicially reviewed; (3) *the third* is what is the *first administrative decision* or the *first reconsideration decision*, and whether the latter is objected to review.

*For the first question*, Chinese law also shares some commonalities with the Vietnamese situation in terms of the difficult identification of subjects to review or the *so-called* the standing of defendant. This is due to the complexity of Chinese administrative structure which covers various institutions approved by the government and with elected leaders, institutions appointed by State Council, institutions authorized with a certain administrative powers, *ad hoc* agencies, the party, social organizations and military agencies and so on. However, article 25 of ALL also has some clear explanations that is of use for Vietnam to learn from in terms of determining whose decision it is or who is the legal subject of the court<sup>316</sup>.

*For the second question*, China’s ALL has already provided some specific matters always being out of the court’s jurisdiction involving the matters arising in “*internal administration*” such as the award or punishment, or the appointment or relief of duties of its personnel (*Art 12, sec.3*).

*For the last question*, although Chinese law does not define in as complicated a way, the *first administrative decision* and the *first reconsideration decision* as Vietnam, Article 25 also stipulates that for a reconsidered case, if the organ that conducted the reconsideration sustains the original specific administrative act, the organ that initially undertook the act will be the defendant. In the case where the organ that conducted reconsideration has amended the original specific administrative act, the organ which conducted reconsideration would be the defendant. Thus, such a reconsideration decision including amendment can be reviewed by courts. However, Chinese law retains provisions that the final specific decision (*involving the final reconsideration*) is out of court’s jurisdiction (*Art 12, sec.4*)

**Regarding the scope of judicial review in Chinese ALL**, it seems to be that Vietnamese lawmakers mostly studied Chinese experiences in terms of enumerated administrative matters judicially reviewed<sup>317</sup> and of the *stand-by provision* under article 11 of ALL 1989 (*compared with*

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<sup>316</sup> Such as: (1) if an administrative organ had been abolished (or an authority retired), the administrative organ (or a new one) that carries on the exercise of functions and powers of the alleged organ or authority shall be the defendant; (2) If a specific administrative act has been undertaken by an organization authorized to undertake the act by the law and regulations, the organization shall be the defendant. If a specific administrative act has been undertaken by an organization as entrusted by an administrative organ, the entrusting organ shall be the defendant; (3) If two or more administrative organs have undertaken the same specific administrative act, the administrative organs that have jointly undertaken the act shall be the joint defendant and so on. See Article 25 of Chinese ALL

<sup>317</sup> Article 11 of China’s ALL limited 8 specific administrative acts for judicial review as (1) an administrative sanction, such as detention, fine, rescission of a license or permit, order to suspend production or business or confiscation of property, which one refuses to accept; (2) a compulsory administrative measure such as restricting freedom of the person or the sealing up, seizing or freezing of property which one refuses to accept; (3) an infringement upon one’s managerial decision-making powers which is considered to have been perpetrated by an administrative organ; (4) a refusal by an administrative organ to issue a permit or license, which one considers oneself legally qualified to apply for, or its failure to respond to the application; (5) a refusal by an administrative organ to perform its statutory duty of protecting one’s rights of property, as one has applied for, or its failure to

article 11 of Vietnamese OSAC 1996). The *stand-by provision* of this article reads: “A part from the provisions set forth in the preceding paragraphs, the people’s courts shall accept other administrative cases which may be brought in accordance with the provisions of relevant laws and regulations”. Thus, in order to adapt to social change, some new administrative litigations can be supplemented. For example, Article 3, sec.3 of State Compensation Act (1994) stipulates that the individuals can take administrative compensation lawsuits to courts in cases where the administrative agency or authority while undertaking their duties results in injury of the body or the death by resort of violent acts and the like. Such kinds of legal provisions concerning the state compensation are still unfamiliar to Vietnamese lawmakers in both theory and practice and worthy of noting. Furthermore, the article 12 of ALL also limits the four scopes<sup>318</sup> of matters that are always out of the court’s jurisdiction that to a certain extent make the cases absolutely resolved and reduces the confusion of judges while recording a lawsuit.

Chinese scholars put forward different opinions regarding the above scope for accepting administrative cases as provided by the article 11 of ALL. Like the Vietnamese case, some of the scholars consider that at the time of this law enactment, the scope for review should not be excessively broadened, because in China, both the substantial and procedural administrative laws are still incomplete. In addition, the special judges lack of the quality and experience dealing with new administrative disputes. Consequently, time is needed to gradually broaden the scope of judicial review to guarantee effective implementation of the administrative litigation system in China. However, a larger number of scholars still criticize that the scope is too narrow and must be defined in a more expanded and generalized way.

In a practical trial of China, as the number of administrative lawsuits rose, the scope of the ALL also expanded. However, according to Chinese official statistics, there is an interesting point that, right after the ALL was promulgated, about 80% of administrative matters, such as law enforcement, urban development including land disputes, housing, commercial administration, tax collection, environmental protection were targets of administrative lawsuits. This number declined to 52% in 1995, and has since declined to about 40%. *Minxin Pei* comments that the Chinese sue the government to protect their liberty and property only as a last resort<sup>319</sup>. Sometimes, they refrain from suing not because their rights have not been violated, but their status and stakes are not high enough.

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respond to the application; (6) cases where an administrative organ is considered to have failed to issue a pension according to the law; (7) cases where an administrative organ is considered to have illegally demanded the performance of duties; (8) cases where an administrative organ is considered to have infringed upon rights of the person and of the property.

<sup>318</sup> Article 12 of China’s ALL stipulates four matters always out of court’s jurisdiction as (1) acts of the state in areas like national defense and foreign affairs; (2) administrative rules and regulations, decisions and orders with general binding force formulated and announced by the administrative organs; (3) decisions of an administrative organ on awards or punishments for its personnel or the appointment or relief of duties of its personnel; (4) specific administrative acts that shall, as provided by law be finally decided by administrative organs.

<sup>319</sup> See Minxin Pei, *Citizen v. Mandarins: Administrative Litigation in China*, 152 *The China Quarterly*, 840 (1997)

They filed suits under the ALL because they had no other choice. Apart from the disputes over land-use, lawsuits against the law-enforcement agencies still made up most of the administrative cases, *Minxin Pei* explained why fewer lawsuits were filed against the two agencies (*as the industrial and commercial administration and tax collection offices*), because these agencies were often in a better position to retaliate against plaintiffs if they lost. As a consequence, a private citizen could win once but lose the rest of his life, as he concluded.

### **2.2.2. No Compulsory Requirement of Administrative Reconsideration**

Vietnam can draw from the experience of Chinese law that allows the court to directly register lawsuits without the compulsory requirement of the first reconsideration by original agencies or authorities like the *pre-litigation principle* under Vietnamese OSAC.

In the process of drafting ALL of China, there used to be much debate about whether a general rule should be adopted that a person aggrieved by an administrative act may only lodge a lawsuit after his failure to obtain a remedy by an application for review by the administrative authorities responsible for the act. Before this law's enactment, while some relevant laws made it mandatory for the remedies by administrative review before taking a lawsuit, some other laws allow persons to immediately take the matters to courts. It is recorded that, in practice, about 90% of administrative cases before being lodged by courts had gone through the reconsideration stage by the agencies or authorities. However, a better point that can be drawn from Chinese experience is that under the Regulations on Administrative Review of China (1990), the reviewing authority in respect to an administrative organ's act is normally the administrative organ at the *next-higher* level in the hierarchy, and the organs may establish a unit specializing in administrative review work<sup>320</sup>. In Vietnam, most of the cases require the agency or authority who was first involved with such complaint decision or action to reconsider the matter. Without such a procedure, all petitions must be returned from the door of the courts.

Article 37 of China's ALL provides that except where there exists certain legal norms requiring the compulsory administrative review procedure by administrative organs before lodging a lawsuit, all individuals aggrieved by administrative actions may either apply for review before resorting to litigation or litigate directly to the competent courts. Article 38 also stipulates that a general time limit of two months is required for within which the reconsideration agency must make its decision, and the dissatisfied applicants may litigate the matter within 15 days of the review decision. In the case of a direct litigation to the court, the general rule is that it should be commenced within three months of the administrative actions (Article 39 of the ALL)

### **2.2.3. Judgment and Performance**

**First of all**, there should mention to the ground for judicial review under Chinese law. Although Chinese administrative law has no the substantial theory regarding the grounds for judicial

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<sup>320</sup> See Regulations on Administrative Review of China (1990), Art 11, Art 4

review similar to that of French administrative law, as mentioned in the last section, ALL also provides some grounds to review the legality of litigated administrative decisions or actions. Article 54, sec.2 stipulates that the court will examine and give final judgment based on considerations of whether having (1) an inadequacy of essential evidence; (2) an erroneous application for the law or the regulations; (3) a violation of legal procedure; (4) an exceeding authority; or (5) an abuse of powers. Such a regulation is completely vacant under the Vietnamese OSAC. In a practical trial, the judges often apply the general and abstract regulations regarding the requirement for a legal administrative decision or action that often leads to discretionary judgments.

**Secondly**, the ALL of China also clearly provides the contents of administrative judgments, something that is still a large vacancy in Vietnamese law. As a final judgment during the trial, the court can render four types of decision, namely *upholding judgment*; *annulment judgment*; *enforcing judgment* and *changing judgment*<sup>321</sup>. *The upholding judgment* means the certain litigated act remains in effect because it is in accordance with the law. The condition of the upholding judgment can be seen as having conclusive evidence, concrete applications to laws or regulations, and the complied legal procedure. *The annulment judgment* consists of the whole or partial annulment of the litigated administrative decision as the result of lacking sufficient evidence, of erroneous application of law and regulations or abuse of power and so on. *The enforcing judgment* allows the court to force the mistaken agency to undertake a specific administrative act anew or to forcibly perform its duty within a fixed time. *The changing judgment* implies that an administrative sanction may be changed if it is obviously unfair. For this point, it can be realized that the Chinese law has an exception to review the reasonableness of the concerned decision. In this case, the court can replace the administrative agency to decide a more rational measure, such as an amount of a fine, of tax collection and so on. Thus, it raises the question of whether the court trespasses on administrative power. Some Chinese scholars consider that there should be more specific conditions given for each kind of judgment to avoid overlapping, such as the abstract delimitation between the irrationality and abuse of power and what is standard for such a review, the distinction between the violation of legal procedure when an agency fails to perform legal duty and when they deliberately delay their performance. In addition, due to the appearance of state compensation litigation, a *so-called* “confirming judgment” should also be added because, for example, in the case of compensation for damages caused by beating, the fact that such damage *firstly* must be confirmed before the compensation is made.

**Thirdly**, in order to ensure the effect of the court’s judgment execution, article 65 of China’s ALL provides special compulsory measures that may be taken against the administrative organs in question if they refuse to perform legal duties laid down in the judgment content. Some compulsory measures can be counted as follows: (1) Sending an inquiry to the bank to transfer from

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<sup>321</sup> See Art 54, China’s ALL



administrative organ's account the amount of fine that should be returned or the damages should be paid; (2) Imposing a fine of 50 to 100 *yuan* per day on the administrative agency that fails to perform the judgment or order within the prescribed time limit; (3) Putting forward a judicial proposal to the superior agency of the violated agency for supervision; (4) Proposing a criminal liability to the head of administrative agency or the concerned authority in the so serious circumstances that a crime may be constituted.

Regarding the recent implementation of judgments, in general, as *Songnian Ying* comments, “no cases of brazen refusal”<sup>322</sup> to carry out a court's judgment seem to have appeared and the provision for compulsory performance of the ALL is itself well asserting. Nevertheless, as *Yong Zhang* recognized that, due to the lower awareness of obeying the law among people including authority as well as the less strict punishment, the administrative agencies also have not become accustomed to conducting administration according to law. An example illustrates that administrative agencies do not reply to parties who apply for licenses or properly protect the security of the life and property of citizens and so on. *Yong Zhang* refers to the Japanese experience regarding the remedies for those interests which are characterized as “new or social rights”, such as the right to social welfare benefits, health insurance, education, housing and the like, and considers that Article 54 of China's ALL should give more specific measures to these concerned issues<sup>323</sup>.

## **2.3. Introduction to Some Administrative Lawsuits in China**

### **2.3.1. Hepatitis B Carriers Case (2003)**

In the middle of 2003, the Personnel Affair Bureau of *Wuhu* district, *Anhui* province, the defendant in the case, rejected *Zhang's* application for a public servant's position in the general office of the government of *Wuhu* district, on the ground that he is carrier of the hepatitis B virus, despite his excellent result in the National Entrance Examination for public service employment. (*He ranked number 1 among other 30 applicants*)<sup>324</sup>.

In October 2003, *Zhang* took the case to the *Wuhu* District ADC. This ADC convened on December 19<sup>th</sup> 2003 to hear the case. In backing his claim, it said the report from a local hospital, entrusted by *Wuhu* government to conduct health examinations, which says *Zhang* was not qualified to be a civil servant, violates provincial standards. HBV carriers can be separated into several kinds of groups based on the specific virus and its potential to spread. *Zhang* does not belong to the seven groups mentioned in *Anhui's* provincial health standards that disqualifies applicants from public service. Therefore, the court said, the *Wuhu* government could not deny *Zhang's* application based on the report but should have obeyed provincial standards. It concluded that the decision to stop

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<sup>322</sup> See S.Ying, *Administrative Litigation System in China*, in *Yong Zhang* ed (1997), p.57

<sup>323</sup> *Ibid*, at 80

<sup>324</sup> See *The Court Confirms the Right of Hepatitis B Carriers*, available at [http://en.ce.cn/Life/health/t20040403\\_595013.shtml](http://en.ce.cn/Life/health/t20040403_595013.shtml)

*Zhang's* application for the public service lacked merit, and asked the authorities to withdraw the decision.

Thus, *Wuhu* District People Court gave *Zhang*, a hepatitis B carrier, the victory while saying the local government was wrong to discriminate against him. It is the first case in China involving the rights of a hepatitis B virus (HBV) carrier. Chinese scholarship welcomed this court decision with precaution. Some scholars remarked that this is an indication of the improvement of judicial reform. It reasserts the protection of human rights *via* judicial procedure<sup>325</sup>. However, the problem laid down is that the *Wuhu* government after that finished hiring and the position, *Zhang* applied for, has already been filled. The court backed *Zhang's* discrimination claim, but did not support a second lawsuit to order the government to find him a job. This is regarded as a defect of the court's judgment due to the weak role of the court as well as the ignorance of the administrative agency. How can the court compulsorily require the administrative agency to grant the job to people involved the HBV? Chinese scholars suspect that *Zhang* sees the verdict as a victory, but experts were unsure whether the verdict was a victory for China's millions of HBV carriers who are fighting for equal employment opportunities.

In middle April of 2004, the defendant of this case, the Personnel Affair Bureau of *Wuhu* district appealed to the intermediate court (*Anhui Province ADC*). This case is yet subject to further adjudication of the court of the *second-instance*. The discussion still goes further because in China the number of HBV carriers is still large. It is estimated that there are about 100 million HBV carriers in China. If *Zhang* won a case, it meant that, as a precedent, the following cases must give favor to the plaintiff involving HBV like *Zhang*. While there are no national laws or regulations against HBV carriers joining the public service, many local governments and departments of the central government have issued their own regulations to bar them. Still, the number of appeals is growing and some local governments are beginning to change their views. Some, including *Hunan* province, have allowed its departments to employ HBV carriers whose infectious ability is so weak that common daily contact, such as shaking hands and having dinner together, would pose no risk.

### ***2.3.2. Qiao Zhangxiang vs. Ministry of Railways Case (2001)***

On July 3<sup>rd</sup> 2001, Lawyer *Qiao Zhangxiang* from North China's *Heibei* province took the Ministry of Railways to the Beijing ADC because this Ministry raised the ticket prices during the Spring Festival without the approval of State Council or any public consultation. It is the first time that the ministry, which still monopolizes railway transport across the country, has been brought to court in this way. In this case, the *Beijing* and *Shanghai* railway administrations and the *Guangzhou* Railway Corporation (*Group*) are also the co-defendants with the Ministry

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<sup>325</sup> See XiaoHong Yu, Administrative Litigation as a Function Substitute Revisiting the Constitutional Review System in China, Mini-APSA Paper, 27 (2007)

of Railways<sup>326</sup>.

He claimed that the Ministry of Railways' practice of raising the railway ticket price by 20 to 30 per cent during the Spring Festival peak travel period was illegal, because it did not have the right to raise prices. He considered that such regulation must be approved by State Council. The decision of this ministry violated legitimate rights of the consumers, including his.

At the reconsideration procedure, the ministry said that the decision to raise prices was approved by State Development Planning Commission and State Council. It dismissed *Qiao's* complaint, saying that the ministry had followed the Pricing Law, carried out investigations and listened to public opinion.

The Beijing ADC applied Article 11 and 12 of ALL saying that it did not have jurisdiction over the case, because the decision to raise ticket prices by the Ministry of Railways was an “*abstract administrative act*”. China's ALL does not include cases of abstract administrative acts, which usually refer to the promulgation of administrative regulations that do not have specific people as their target. After a public hearing, the court failed to reach a verdict.

In practice, the Ministry of Railways has often raised prices during the Spring Festival, when Chinese people nationwide travel home. Although other means of transport, such as buses and aircraft, are also available, trains still dominate because of their speed and low price. *Qiao* made appeal to the SPC, however, his demand was once again dismissed.

According to *Qiao*, the judges in the case knew that the Ministry of Railways had circumvented the law, but did not want to enter a judgment against a central government department. After thirteen months of administrative reviews and appeals, the judges ruled against *Qiao* and his clients. *Qiao* realizes that he did not file the lawsuit with the expectation of winning. However, *Qiao* believes that he should have won the case from a purely legal point of view. He describes the judges' decision as like “*the referee in a soccer match pretending not to notice a goal was scored.*” He considers the case as “*tactical,*” because he knows that policy changes would probably occur whether he won or lost. He claims that the litigation and surrounding publicity have indeed proved influential, citing a surge in public hearings convened by government departments. It is true that it is the first time that the ministry, which still monopolizes railway transport across the country, has been brought to court in this way. Since the lawsuit was lodged and tried, the Ministry of Railways has begun to hold public hearings on ticket pricing<sup>327</sup>.

**To conclude**, China shares some commonalities with Vietnam relating to the defects of the current ALRS, such as the abstract administrative regulations made by ministries may be

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<sup>326</sup> See Fair Fare for Rail Passengers, available at [http://en.cnta.gov.cn/gl/2\\_view.asp?id=172](http://en.cnta.gov.cn/gl/2_view.asp?id=172); Railway Ministry Taken to Court for Spring Price Hikes, People's Daily Newspaper, available at [http://english.peopledaily.com.cn/english/200107/04/eng20010704\\_74140.html](http://english.peopledaily.com.cn/english/200107/04/eng20010704_74140.html)

<sup>327</sup> See Public Internet Litigation in China: A New Force for Social Justice, Research Report, 7 (2007), available at <http://www.clb.org.hk>

difficult to be taken for judicial review, the strong discretionary power of administrative agencies in everyday workings, as well as their hesitation to be defendant in court's defendant. Furthermore, the implementation of judgment in fact is also a significant remaining issue, even if the plaintiff can win the case. Nevertheless, the two above cases prove the *step-by-step* development of the new administrative litigation system that to a certain extent can protect people from administrative misconduct. So far, there has been no administrative decision made by central agencies or authorities to be resolved by Vietnamese ADCs. It does not mean that they always correctly perform their work. In addition, the regulations in legislative character made by both central and local agencies, as were mentioned, are sometime illegal, even unconstitutional, but are always out of ADCs's jurisdiction. The above *Qiao Zhangxiang vs. Ministry of Railways Case* can be a good reference for Vietnam in respect of a ministerial level agency, for the first time, acting as a defendant and its norms challenged by a judicial court.

### **3. Learning from Japanese Experiences**

#### **3.1. Change from Model of Administrative Court to Ordinary Court**

##### ***3.1.1. Meiji Constitution and Model of Continental Administrative Court***

The separation of state powers, the ROL, judicial review, democracy and human rights are the basic principles accepted in Japan<sup>328</sup>. The Japanese administrative litigation system is not as well developed as in the real common law and continental law countries but is characterized by a compromise between the two<sup>329</sup>. It is not a new matter like China, Vietnam and some other developing countries in the Asian region, because 120 years have passed since an Administrative Court was established in 1890 under the *Meiji* Constitution of 1889.

Article 61 of *Meiji* Constitution provided:

*“No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance by a court of law”.*

According to this article, people whose rights were infringed by the illegal measure of authorities are allowed to initiate a case to an administrative litigation court established by law. The necessary reason for setting up a separate court for administrative lawsuits was so that the administrative agencies whose official dispositions contravene the law, or who overstep their authority and injure people's rights could not escape from being judged by the administrative litigation court on the one hand, while on the other, to ensure the independence of the judiciary and of the administration, the ordinary court has no power to annul a disposition of an administrative

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<sup>328</sup> See Yong Zhang (1997), p.259

<sup>329</sup> Ibid

official commissioned by the constitution and the law. If the ordinary court was allowed to judge administrative dispositions, the administrative officials would be subordinate to the judiciary which may create obstacles for social management, public welfare may be lost, and the effectiveness of the administration would be paralyzed.

Thus, the drafters of the *Meiji* Constitution incorporated the continental notions of a strict separation of powers, denying the judiciary the competence to adjudicate direct appeals from administrative actions. One of the principal drafters, *Hirobumi Ito*, commented that: “*The proper function of judicial courts is to adjudicate in civil cases, and they have no power to annul measures ordered to be carried out by administrative authorities, who have been charged with their duties by the Constitution and the law*”<sup>330</sup>. It can be said that the Japanese administrative system before 1947 was established on the example of the Prussian system of administrative law. In Japan, much of the prewar administrative doctrine followed inexorably from the institutional separation of a special administrative court from the ordinary judiciary. Under the old administrative system, the concept of ROL or the principle of legality of administrative acts had already been adopted. However, under the *Meiji* Constitution, the Japanese Emperor was sovereign and all executive and administrative power was derived from the Emperor. The Imperial Diet was no more than the organ to support the Emperor in making laws. Regarding the concept that administration had to be conducted according to the law and its activity could be reviewed by the court, the administrative litigation system under the *Meiji* Constitution was set up, but was in fact extremely deficient. The ROL in this period was also called the ROL in form, or formal legalism.

In the *Meiji* period, although more than 1,000 cases<sup>331</sup> were resolved yearly, there was only one administrative litigation court located in Tokyo, as a single instance court, without competence to rehear cases and its decisions were not subject to further review. Its judges, called councilors (*Hyojokan*), could concurrently hold other administrative posts. The jurisdiction of this court was limited in the “*enumerative principle of special laws*”, such as assessment of taxes and their collection, refusal of trade licenses, public work cases and others, meanwhile damage reparation and other pecuniary cases were outside the court’s jurisdiction. These cases were only taken to the court after the administrative appeals (petitions or *sogan*) had been exhausted.

Again, it should be emphasized that the *Meiji* Constitution established a continental type administrative court, and the grounds were prepared for the reception of the continental administrative law in Japan. Due to the implications of this, it is necessary here to further mention foreign influences in the Japanese administrative law in general and the administrative litigation

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<sup>330</sup> See Hirobumi Ito, Commentaries on the Constitution of the Empire of Japan 1889, translated in to English by Miyoji Ito. It is cited by John .O.Haley, Introduction to Japanese Law, in John Owen Haley ed (1986), p.2

<sup>331</sup> See Shuichi Sugai & Itsuo Sonobe, Administrative Law in Japan, 28 (1999)

system in particular. This also is also a potentially good learning experience for Vietnam on studying foreign laws.

**Firstly**, German influences is by far the greatest. It was no coincidence that at that time, many young scholars from Japan staying in Germany, subsidized by the Japanese Government, had an “*irresistible attraction*” to a newly published book of *Otto Mayer* in 1895 entitled “*Deutsches Verwaltungsrecht*” (German Administrative Law). *Tatsukichi Minobe* (1873-1948) then translated the *Mayer’s* book and formed the mainstream-school of Japanese administrative law<sup>332</sup>. *Yatsuka Hozumi* is also well known as the earliest and most fervent Japanese advocate for a dichotomy between public and private law and the concept of “administrative acts” (*Gyosei Koi* or *Verwaltungsakt*) in German theory. Since the Japanese government policy at that time, characterized by the official motto of “*fukoku kyohei*” - a wealthy country equipped with a strong army, it was common sense that the German theory “*went hand-in-glove with the official Japanese trend*”<sup>333</sup>.

Under *Otto Mayer’s* theory, the central and most important concept was the *Rechtsstaat* (statutory state) compared with the *Polizeistaat* (police state), as *Mayer* drew a gloomy picture of the German ancient regime. According to him, the *Rechtsstaat* was “*simply the state with well-ordered administrative law*”, and the administrative law meant the legal order of the relationship between the administering state and its opposites-participants, called “*Untertanen*” (subject). His theory was interpreted favorably in Japan as a general duty of obedience of the subjects to administrative power when it was granted by the enacted law. The *Meiji* Constitution employed the term “*shin-min*” interpreted as “subject”, so that *Mayer’s* theory, as *Sugai* and *Sonobe* comment, could fit all the more easily in to the nation. The *Rechtsstaat* requires not only the utilizing of the means of statute lawmaking, but also making administrative decisions in individual cases. Thus, the above term of administrative decision, referred to as administrative disposition in German law, and later Japanese law, “*has to be inserted between the statute-law and its realization of execution by a practical deed*”. *Mayer* called this *Verwaltungsakt* (*Gyosei Koi* or *administrative act*), corresponding to the original French term of *acte administrative*. It should be noted that, prior to the war , the introduction in Japan of theory and institutions adapted from German models led Japanese scholars to German sources (*dominated by the Rechtsstaat notion*) to learn the doctrine that explained their meaning and function. Out of German theory and concepts, Japanese scholars recreated a body of administrative law doctrine for Japan, among them the principal pillars in this period were a dichotomy between public and private law and the concept of administrative acts.

The other importance of *Mayer’s* theory was his division of the entire field of administration into two categories, namely the “*interference administration*” and the so-called “*service-administration*” in which the former was covered by the principle of “*reservation of*

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<sup>332</sup> Ibid, at 38

<sup>333</sup> Ibid, at 39

*statute-law*” (*Vorbehalt*-principle) and the latter by public-facilities establishment which needed not to be statute laws. He also divided the administrative function of the state into roughly the same two categories of restrictive functions and “*service*” functions in which the former being subject to the *reservation of statute-law*’s principle, or possibly to the administrative court for review and the latter not. It can be compared with the distinction between “*Les actes de puissance public*” (the act of public authority) and “*Les actes de gestion*” (the mere act of management) in French law<sup>334</sup> that also had an indirect influence on Japan through the medium of German scholarship.

**Secondly**, regarding the French influences, *Sugai* commented that French law had only an indirect influence in Japanese administrative law “*which absorbed German theories lock and barrel*”. The most important case to be mentioned by Japanese scholar was the “*Blanco judgment*” on February 8<sup>th</sup> 1873 that provided a theoretical foundation for a sphere of administrative law built around the concept of public service and was finally resolved by the Tribunal of Conflicts in France. The theory of demarcation between the jurisdiction of administrative tribunals and ordinary courts originally consisted of the distinction between *the act of public authority* and *the mere act of management*, just like the American law distinction of governmental and proprietary functions in municipal corporation cases. In the former, when the public authority issued orders or commands toward the people, which could not be reviewed by ordinary law courts, since if such a process were allowed, the ordinary courts would have been left with the same status as individuals. This distinction is still being used in Japan as a delineating theory about administrative lawsuits, such as, in the theory of the exercising of public power in the Japanese ACLL. However, while the concept of “*service public*” became all important in French law, the Japanese concept of administrative law in the *Meiji* period was much narrower. This can be seen in the narrower limit of the *Meiji* administrative court, especially in matters concerning the monetary affairs, damage reparation or the *so-called* administrative contracts.

Japanese scholars at that time were also unfamiliar to the French law’s distinction between the “*adjudicating*” and “*active*” administration, and a famous French legal proverb that “*judging administration is itself a part of administration*” which empowered the *Conseil d’Etat* to hold both the advisory and judging function. As a result, the *Meiji* Constitution of Japan refused the model of French administrative court, as *Sonobe* concluded that: “[t]he administrative power to adjudicate (*Gyosei Saibanken*) is a part of the judiciary and stands in opposition to the executive branch, but it is reserved to administrative courts which are established separately from ordinary courts”<sup>335</sup>.

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<sup>334</sup> This drew a distinction between those actions of the administration which involved its public authority and mere acts of management (*acts de gestion*) which did not. The former were outside the jurisdiction of the ordinary courts, the latter were within it. In other words, disputes arising out of its *gestion publique* (public administration) belonged to the administrative court. See L.Neville Brown & John S.Bell, (1998), p.129

<sup>335</sup> Itsuo Sonobe, *Comparative Administrative Law: Trends and Features* in John Owen Haley ed (1986), p.42

**To conclude**, the creation of the administrative court under the *Meiji* Constitution resolved the debate in Japan whether a separate court was needed or a House of Councilors (*Sanji-in*) should also function as a court, in a fashion similar to the *Conseil d'Etat* in France. However, it was also different with the German model that, whereas there was at least one administrative tribunal in each *Land* (*member-state*) in Germany, only a single court was established in Japan. Furthermore, regarding the issuance of judgment, while the common law countries give five kinds of remedies, such as mandamus, certiorari, prohibition, injunction and declaration, and the German law provides the mandatory injunction, performance and the declaratory judgment, in Japanese law, the only available remedy, namely the annulment (*torikeshi*) of the administrative acts was provided.

### **3.1.2. Japanese Constitution (1947) and Changes to Model of Ordinary Court**

In contrast with the ROL in the *Meiji* period that was criticized as the ROL in form, the ROL under the present Constitution (1947) is called substantial ROL or substantial legalism. According to the present Constitution, the sovereignty of the state is vested in the Japanese people. The Diet is the highest organ of state power and the sole law-making organ of the state. The fundamental rights and freedoms of the people, with exception to inference with public welfare, shall be in the supreme consideration in making legislation, in government affairs and protected by the judicial courts. The constitutionality of laws and administrative regulations or rules has to submit to the judgment of the independent courts. Administrative actions or activities which violate laws and infringe the people's legal rights also have to obey the judgments of the law courts and these issues are comprehensively summarized.

Regarding the court model over resolving the administrative lawsuits, the Japanese Constitution 1947 changed a continental law system with an independent administrative court to an American-type administrative lawsuit proceeding by ordinary courts. Article 76 of the new Constitution provided that: "*the whole judicial power should be vested in law courts*", which meant that the power of adjudicating administrative litigations should be included, so that not only civil and criminal cases but also administrative cases would be in the hands of the "*whole judicial power*". The second paragraph of this article also provided the prohibition of extraordinary tribunals like as the administrative litigation court in the past and prohibited "*any agency of the Executive*" from being given "*final judicial power*". Thus, the Japanese Constitution of 1947 completely abolished the existence of the continental administrative court. Nevertheless, regarding the resolving of administrative lawsuits, Japan never lost its characteristics and completely followed the American administrative law theory and model.

*Jiro Tanaka* was the famous Japanese scholar who played a leading role in the development of Japanese administrative law in the Occupation reforms and the postwar era. In the Occupation period, three significant administrative law reforms were undertaken by the Division of SCAP: (1) The expansion of the state liability to compensate any person injured as a



consequence of official misconduct;

(2) The attempt to deal with the procedural problems inherent in the shift to a system of direct review of administrative actions by the regular courts. Furthermore, the administrative acts doctrine in which review is precluded unless the action is a disposition (*Shobun*) that affects in some concrete fashion the rights and duties of the party seeking review continues to prevail. *Shobunsei* encompasses the questions of what actions are subject to review, who is entitled to seek review and when review is appropriate;

(3) The other concerns include administrative guidance; the consequence role of damage actions and so on.

It is worthy noting that in 1962, some years after the Occupation ended, the *Special Rules Governing Administrative Litigation Law* (1948) came to be superseded by a new law called “*Administrative Case Litigation Law*” (ACLL) which comprised of a self-sufficient and exhaustive code on administrative lawsuits. Thanks to ACLL, Japanese administrative law has reverted to the old theories of the administrative litigation practiced by ordinary courts. In outward appearance, the ordinary courts handle administrative lawsuits as provided by the new Constitution, the procedures followed concerning such lawsuits is virtually the same as that in the old court. Thus, as highly appreciated by *Sugai*, the authors of the new law were thought indifferent to the Constitution’s restraint, “[t]hey blithely went ahead and revived the old court’s theory of the old continental-style administrative lawsuits”<sup>336</sup>. Along with others, he called this the failure of Americanization of Japanese Administrative Law<sup>337</sup>.

The court system in Japan consists of four tiers, including 450 summary courts as the lowest courts, 50 district courts in which there is one for each prefecture with the exception of *Hokkaido* which has four district courts; eight high courts referred to as the *Appellate Courts* located in *Tokyo, Osaka, Nagoya, Hiroshima, Fukuoka, Sendai, Sapporo, and Takematsu*, and the Supreme Court as the top<sup>338</sup>. In general, the ordinary court system deals with administrative lawsuits and there is no existence of administrative courts. However, the reality is that recently there are separate administrative branches in many districts handling administrative cases. Such cases brought to court in *Tokyo*, which accounts for most administrative cases, as well as in *Osaka, Nagoya, Yokohama, Saitama, Chiba, Kyoto and Kobe* are assigned to special administrative divisions and are not heard by civil judges arbitrarily chosen to hear such cases<sup>339</sup>.

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<sup>336</sup> Sugai Suichi, *Administrative Law at the Crossroad*, in Shuichi Sugai & Itsuo Sonobe (1999), p.30

<sup>337</sup> *Ibid*, at 81. He also evidenced the “*substantial evidence rule*” in the Anti-Monopoly Law Art 80 that presupposes the entire structure of Anglo-American type judicial proceedings which in fact are lacked in Japan. Other examples like the existence of jury-system, the overall limitation of appellate jurisdiction to question of laws, the tax-player lawsuits ...etc. Those basic ingredients of Anglo-American legal system were totally absent in the local law. So the Occupation Forces-Inspired Law Reforms were utterly doomed to failure.

<sup>338</sup> See Joseph W.S.Davis, *Dispute Resolution in Japan*, pp.61-73 (1996)

<sup>339</sup> See Carl F.Goodman, *Justice and Civil Procedure in Japan*, pp.460-463 (2004). In Tokyo, there are three special divisions, in

To some extent, there is a kind of administrative division within the normal court system, like the models in China and Vietnam. However, the greatest distinction of the Japanese court system is that the courts are divided throughout the whole country, are not based on the administrative units and are absolutely independent from the local administrative agencies. Article 12 of the old ACLL provides for the court where the administrative agency is located, or where the immovable or specific place is situated, or the court of location of the lower administrative agency shall be in competence to deal with administrative lawsuits that aims to ensure the impartiality and avoid subordination to the administrative agency during litigation process. However, to cater for difficulties faced by parties located far from Tokyo to institute a lawsuit and make more convenient for the plaintiff, the revised ACLL (2004) supplemented two new points, accordingly the court empowered jurisdiction will be: (1) the court where the defendant resides (Art 12, sec.1) or (2) the district court located in the same place where the High Court having authority over the district court of the plaintiff's residence (Art 12, sec.4). For example, a resident of a district in the *Tohoku* (Northeast) could bring an action to the *Tokyo* district court or the district court in *Sendai*. *Sendai* would be permitted because it is the location of the High Court with jurisdiction over the district court in *Tohoku*.

**To conclude**, to paraphrase one foreign commentator<sup>340</sup> the dominance of public law theory (*developed under Meiji Constitution as a result of the separation of administrative and judicial adjudication*) and the failure of the Occupation Reforms (*to provide alternative model*) have prevented the Japanese judiciary from playing a significant role in protecting the citizen from governmental abuse and helped the Japanese bureaucracies to preserve their independence from judicial oversight during the Post-War period. The common sense of Japanese actions over history is described very well by the idiom “*Wakon Yosai*” which can be translated as “Japanese Spirit and Western Technology”<sup>341</sup>. For valuable experiences of transplanting Western legal theory, as Professor Yanase explained: “*[W]e have somehow learned the conclusions arrived at by Western learning, but it seems that we succeeded in absorbing that total personality make-up that gives birth to those conclusions...It is perhaps not surprising that we are able to achieve any solid interpretation of confidence in such theories*”<sup>342</sup>.

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Osaka with 2 special divisions, in Nagoya, Yokohama, Saitama, Chiba, Kyoto and Kobe each with one division that handle administrative cases.

<sup>340</sup> John O.Haley (1986), p.14

<sup>341</sup> See the idiom (四字熟語) of *Wakon Yosai* (和魂洋). It is cited by Takao Tanase, *The Empty Space of the Modern in Japanese Law Discourse*, in David Nelken & Johannes Feest ed, *Adapting Legal Culture in the 21<sup>st</sup> Century*, 195 (2001)

<sup>342</sup> See Y.Yanase, *7 Academic Prospective Administrative Law*, 132 (1951). It is cited by Itsuo Sonobe in John Owen Haley ed (1986), p.57

## 3.2. Some Experiences on Jurisdiction over Settlement of Administrative Cases

### 3.2.1. Scope of Judicial Review

The establishment of the administrative court in the *Meiji* period (1889 – 1946) paved the way for separating judicial courts from administrative sectors, and separating the administrative court from ordinary courts for the recovery of the administration's mistakes. However, its jurisdiction was severely limited by the administrative cases enumerated in the *Act Concerning Administrative Litigation* and its judges were not wholly independent from the administration.

Also, being different from China and Vietnam in terms of retaining the enumerated matters judicially reviewed, the Japanese courts are allowed to review illegal dispositions of any administrative authority and other statutes “*without the limitation of jurisdiction*”<sup>343</sup> over all fields of the administration.

Thus, in order to analyze the scope of judicial review by the Japanese courts, this section will address the following questions: (1) What is the concept of “disposition” (*shobun*) and what are its conditions for reviewing it (*shobunsei*)?; (2) Can the court review the illegality of the administrative guidance?; (3) Is there any exception of the limits of judicial power, although no enumerated administrative lawsuits have been provided by law?; (4) Are legal norms out of the court's jurisdiction such as with the cases of Vietnam and China?; .

**For the first question**, it should be foremost noted that the term of “*disposition*” in Japanese has not been uniform and thus the meaning of the term depends upon its interpretation in the various laws. Generally, however, “*disposition*” has been considered to mean nearly the same thing as “*administrative act*”. Other words that generally carry the same meaning as “*administrative act*” in the various laws and regulations include “*permission*”, “*patent*”, “*approval*” and “*prohibition*”. Article 3, sec.2 of ACLL (2004) provided that: “A suit for revocation of disposition shall mean a litigation seeking the revocation of a disposition of an administrative agency and any other act coming under *the exercise of public power* by an administrative agency”.

Thus, a disposition addressed to the revocation litigation in Japan must hold the nature of exercising public power by the administrative agency or authority. Japanese administrative law gives four characteristics of an administrative disposition: (1) the public power; (2) the legal effectiveness; (3) the direct and concrete impact to the administrated; (4) the external relation between the administrator and the administrated<sup>344</sup>. Thus, like the definition of an administrative decision addressed to judicial review in Vietnam, a disposition can be taken to Japanese courts when it ensures its issuance under the exercise of public power, the time limited by law, and its direct

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<sup>343</sup> Sugai Suichi & Itsuo Sonobe (1999), p.82

<sup>344</sup> See Ishikawa Toshiyuki ed, *The introductory Japanese Administrative Law*, [初めての行政法], pp.67-72 (2006). The characteristics of an administrative disposition consist of (1) 権力性 (*the public power*); 法的効果性 (*the legal effectiveness*); 直接具体性 (*the direct and concrete impact*); 外部性 (*the external relation*).

influence on the infringed people. The discussion here is whether the decision which possesses the characteristics of internal administration (*like those made between the head of the agency and his staff as disciplinary decision and so on*) is regarded as administrative disposition, and consequently can be taken to the courts. Japanese administrative law, in principle, does not recognize the decision made within the internal relations of the administration, for example the order addressed to the inferior (*Buka*) by the head (*Joshi*), as an administrative disposition. However, regarding the decisions addressed to civil servants by administrative organs, such as a disciplinary decision on job dismissal, or a decision on the leave of absence from one's duty, the court can determine whether such decisions are "administrative dispositions"<sup>345</sup> and satisfy the condition of *shobunsei*. Consequently, it can be judicially reviewed.

As mentioned, *shobunsei* encompasses the questions of what actions are subject to review, who is entitled to seek review and when review is appropriate. Along with the requirement of the plaintiff standing, *shobunsei* is the prerequisite for the court to register a lawsuit. Through judgment practice, the Supreme Court instructs two main requirements of the *shobunsei* as:

(1) the exercise of public power; (2) the necessity to directly and concretely spring the legal effectiveness and influence on the people's legal rights and duties<sup>346</sup>. The revised ACLL (2004) has expanded the limited time from three months to six months from the date on which it became known that the disposition was made, in which people can take such an illegal disposition to the court<sup>347</sup>. Vietnam can learn from this experience since, in Vietnam, the limited time for compulsorily taking an administrative complaint is only 90 days, and for lodging a lawsuit, 30 days (*or 45 days as an exception*).

Some scholars criticize that the *shobunsei* restriction limits who may seek review<sup>348</sup>. Excluded under the *shobunsei* test are most, if not all, informal actions by administrative agencies regardless of apparent illegality or actual injury. In the Post-War experience, the landmark case regarding the determination of *shobunsei* was the Supreme Court's *en banc* decision in *Hayashi Ken Zosen K.K vs. Director of the Marine Accidents High Board of Inquiry*<sup>349</sup>. In this case, the Supreme Court reversed the judgment of Tokyo High Court and dismissed the litigation demand of plaintiff *Hayashi*, stating that:

<sup>345</sup> According to the Art 92, section 2 of Law on State Public Servants (国公 9 2 条の 2) and Article 51, section 2 of Law on Local Public Servant (地公 5 1 条の 2), the disciplinary decisions on job dismissal (懲戒免職) or the decision on the leaving absence from one's duty (分限休職) can be determined whether is an administrative disposition. See Ibid, at 72.

<sup>346</sup> See Keiko Sakurai & Hiroyuki Hashimoto, Administrative Law [現代行政法], 238 (2006) There are two main requirements for *shobunsei* as (1) 公権力性 (*the exercise of public power*); (2) 国民の権利義務に対する直接、具体的な法効果の発生 (*it must directly and concretely spring the legal effectiveness and influence on the people's legal rights and duties*)

<sup>347</sup> See Revised ACLL (2004) of Japan, Art 14 section 1

<sup>348</sup> See John O.Haley ed (1986), p.10

<sup>349</sup> See 15 Minshu 467 (Supreme Court, Grand Bench, March, 15<sup>th</sup> 1961)

“[T]he decision by Board of Marine Accident is a decision clarifying the cause of the maritime disaster that does not limit in any duty on the part of the Appellee ...and does not have the effect of a binding determination of the Appellee’s negligence. This being the case, the decision does not have a direct effect on the Appellee’s rights and duties, thus it can not be considered to be an administrative disposition and we must hold that the Appellee is not allowed to file suit”<sup>350</sup>.

Due to the focus on individual rights, the issue of *shobunsei* is closely related to standing. The *shobunsei* restriction can be found in Article 9 and 39 of the ACLL, stating that only persons with “*legal interest*” in the revocation or invalidation of challenged actions may bring suits to court. Some famous cases in the past include *Novo Industri A/S (Danish pharmaceutical firm) vs. Japanese Fair Trade Commission* in which the courts reasoned that *Novo Industri A/S* lacked standing – the requisite legal interest to sue, and thus it was not a party to the Commission’s decision<sup>351</sup>. Recently, the Japanese government’s 2004 initiative to amend the ACLL does not change the wording of the Article 9, but it does add a new Article 9, subdivision 2 whose purpose would appear to loosen the legal interest doctrine. This provision would allow a reviewing court to consider statutes other than the statute under which the agency is acting to determine whether a *legal interest* has been injured. Another issue closely related to the *shobunsei* is the existence of Administrative Guidance in the daily life of Japan. If an agency does not make a disposition, but simply suggests a course of action, there has been no *shobun*, accordingly there is nothing to review. Thus, as most of Japanese agency takes place through administrative guidance rather than disposition, it leaves a big gap in administrative matters subject to review. This consideration will be discussed in the next question.

**For the second question**, in principle, the Japanese courts refuse to review the legality of the administrative guidance since it fails to fulfill the requirement of *shobunsei*. Administrative guidance existed in Japan long before there was any statute that defined this term. The Administrative Procedure Law of Japan in 1994 (revised in 2005) is the first statutory definition<sup>352</sup> that gives some characteristics of administrative guidance as follows: (1) it can not be a disposition because it can not determine and adversely affect legal rights; (2) it must fall within the scope of the agency’s duties or functions; (3) it must be non-compulsory and must seek voluntary compliance; (4) it must have as its objective, the obtaining of a result to further an agency’s goal<sup>353</sup>. Thus, administrative guidance is voluntary, non-compulsory, and has no direct legal influences on

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<sup>350</sup> Ibid, at 470

<sup>351</sup> See Case of *Novo Industri A/S vs. Fair Trade Commission*, 29 Minshu 1592 (SC, the 2<sup>nd</sup> Petty Bench, November, 28<sup>th</sup> 1975)

<sup>352</sup> See Carl F. Goodman (2004), p.336

<sup>353</sup> See Art 2, section 6 of Administrative Procedure Law (APL) 1994, (The latest revised in 2005)

the administered. In other words, it is in essence not a real administrative disposition, therefore cannot be reviewed. However, in practice, the few administrative guidance cases that have been decided by courts throw an interesting light on judicial review of such guidance.

The earliest case dealing with administrative guidance was the judgment of the *Tokyo* Court of Appeal in 1963 which refused a challenge to the administrative guidance issued by the Japanese Foreign Ministry<sup>354</sup>. In this case, the court rejected the demand of 345 plaintiffs in total of 500 Festival group's participants who sued the Foreign Ministry for the refusal to issue passports for their participation in Festival of World Peace held in *Moscow*. Since the plaintiff voluntarily complied with the Ministry's instruction not to submit individual applications, it barred the success of the plaintiff's claim. Another early case was in 1971 where Tokyo District Court permitted a suit challenging a notice (*Tsutatsu*) issued by the Ministry of International Trade and Industry (MITI) and a warning (*Kankoku*) by the prefecture authority. In this case, the court held that the plaintiff could challenge the notice but not the warning, since the court reasoned, in the reality of the administrative affairs the notices played an important role and can strongly affect the concrete rights and duties of individuals. Although the court finally ruled against the plaintiff on the merits of his challenge, this lawsuit also raised a strong debate on whether administrative guidance should be judicially reviewed and whether its real affect was to protect the legal rights of people. Some scholars considered that the administrative guidance is though technically voluntary, Japanese administrators rely on informal pressure and other means of enforcement to persuade the regulated party to comply<sup>355</sup>. Hence, it cannot avoid causing any injury to people and be regarded as a threat to the ROL in Japan<sup>356</sup>.

In fact, taking a revocation litigation regarding the administrative guidance to the court is not an easy task in Japan, due to its dissatisfaction with the requirement of *shobunsei*. Recently, the revised APL (2005) defines guidance as suggestion to policy or practice that the agency wants to carry out which is voluntarily followed by the administrative entity (Article 2). Guidance ceases to be guidance when it becomes compulsory, therefore the local courts can examine whether a notice, warning or instruction has content similar to a *shobun*. To avoid the extraordinary inconvenience that arises thereby, Article 35, section 2 also provides that where an administrative guidance is rendered orally, the person imposing it in question shall provide the matters of the subject party, the purpose, content and the persons responsible and so on in writing. Furthermore, it seems to be expected in the revised ACLL (2004) that litigation is considered regarding the administrative guidance in the form of the party litigation (*Tojisha Soshō*) which may require the government entity issuing the

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<sup>354</sup> See Young M.K, Judicial Review of Administrative Guidance, in Meryll Dean ed, Japanese Legal System, 188 (2002)

<sup>355</sup> Ibid, at 191

<sup>356</sup> See Dean Meryll, Administrative Guidance in Japanese Law: A Threat to the Rule of Law, Journal of Business Law, pp.398-99 (1991).

administrative guidance in the legal relations to be a defendant<sup>357</sup>. In a paper by Professor Nakagawa paper<sup>358</sup>, he suggests that the 2004 amended ACLL points the way towards a new model of judicial review. He calls for a new philosophy that would see the ordinary system of civil litigation as the basic method of challenging administrative power in court, except in cases of administrative disposition, because the ACLL only requires revocation suits for such cases<sup>359</sup>. Some other cases concerning administrative guidance can be cited here, such as the *Hiroshima SMON Case* (1979)<sup>360</sup>, the *Nakatani Case* (1985),<sup>361</sup> the *NHK Censorship Case* (1990)<sup>362</sup>, the *Daiwa Bank Case* (1999)<sup>363</sup> and so on.

**For the third question**, an outstanding point that should be a good lesson for Vietnam is that the Japanese ACLL has no enumerated provisions regarding the administrative matters judicially reviewed. It means that the courts can review the legality of all fields of administrative activities. However, there are also two main limitations of the court's jurisdiction: (1) some governmental actions which are of a highly political nature do not come under the review of the courts, even if they rise to action at law. The Japan-U.S Security Treaty was as an example of not coming under court review due to its highly political nature; (2) Where the law gives an authority discretion, the judicial courts can not override the exercise of such discretion. However, it does not mean that the exercise of discretion by an administrative authority is not always outside the scope of court's review. Article 30 of ACLL provides that: "*as to a discretionary disposition by an administrative authority, a court can revoke the disposition only where the limits of discretion are exceeded or discretion is abused*".

**For the last question**, the Japanese Constitution provides that "*the Supreme Court shall be the final court which determines whether any law, ordinance, rule or decision is constitutional or not*"<sup>364</sup>. Hence, though having no constitutional court, Japan recognizes the constitutional review and the constitutionality of laws, regulations or rules have to submit to the judgment of an independent judicial court<sup>365</sup>. In practice, the initiation toward administrative legal norms is not clearly defined in

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<sup>357</sup> See Keiko Sakurai & Hiroyuki Hashimoto (2006), p.137. See also Art 4 of the revised ACLL (2004)

<sup>358</sup> Prof. Takehisa Nakagawa (Kobe University)'s paper titled: "Judicial Review in the US and Japan: Implications of the 2004 Amendment of Japanese ACLL". It was quoted by Ronald M. Levin (Washington University in St. Louis), Reform of Judicial Review in Japan: An American Perspective, CDAMS Discussion Paper, available at <http://www.law.kobe-u.ac.jp/lawrev/mokuji.htm>.

<sup>359</sup> Ibid, at 6

<sup>360</sup> See Kanazawa Osamu et al, Waseda Bulletin of Comparative Law, 50 (1981)

<sup>361</sup> Nakatani vs. Tokyo-to, 39 Minshu 989 (*Supreme Court, July, 16<sup>th</sup> 1985*). See Takehisa Nakagawa, Administrative Informality in Japan: Governmental Activities Outside Statutory Authorization, 52 Administrative Law Review, 175 (2000).

<sup>362</sup> Case No.800 of 1986 (*Supreme Court, Petty Bench April, 17<sup>th</sup> 1990*), available at the Supreme Court website <http://www.court.go.jp>

<sup>363</sup> See Tsuyoshi Yamada, Daiwa Bank Case, 15 Columbia Journal of Asian Law 193, pp.210-211 (2002). See also <http://www.columbia.edu/cu/asiaweb/v15n2Yamada.htm>

<sup>364</sup> The Constitution of Japan, Art 81

<sup>365</sup> See Yong Zhang (1997), p. 69

ACLL because of opinions stating that “*statutes and orders are universally held not to be subject to judicial review*”. However, the content of some legal norms, such as administrative circulars can be reviewed as extending the *direct influence* over rights and duties of particular citizens<sup>366</sup>, such as the case of “*Application to quash a circular relating to the cemeteries and burials*”<sup>367</sup>. In short, in Japanese law, after a plaintiff has lodged a lawsuit against an administrative act, the judges can decide if the legal norm to which the defendant referred violated the Constitution or other superior ranked legal norms by reviewing the concrete administrative case. The final power to judge the constitutionality of laws and regulations belongs to the Supreme Court, not inferior courts.

### **3.2.2. No Compulsory Administrative Reconsideration**

Before the enactment of ACLL in 1962, the *so-called* “requirement of the primary administrative complaint procedure” was a general rule. According to this, the interested party had to go through an administrative complaints procedure against the action in question before initiating the lawsuit to court<sup>368</sup>. ACLL abolishes this requirement and allows a lawsuit to be filed immediately at court. In cases where some special laws continue to require a primary procedure of reconsideration by a disposed agency or upper level agency, the lawsuits cannot be filed in court<sup>369</sup>. However, ACLL has created good conditions for litigants initiating a case to court in cases where they do not obtain a decision made by reviewing agencies such as where: the review decision is not rendered after the expiration of three months from the date when a complaint was made; or the urgent necessity to avoid serious damages caused by disposition; or there is a justifiable reason for not obtaining a review decision<sup>370</sup>.

### **3.2.3. Categories of Administrative Litigation**

The Japanese ACLL provides four kinds of litigations, namely *Kokoku* (appeal) litigation, party litigation, public litigation and agency litigation in which the two former are called “*subjective litigation*”. The two former cover the cases of specific injuries to individual rights and interests while the two latter are called “*objective litigation*” characterized as public interest litigations (See Appendix 6). It should be noted that the categories of the administrative litigation in Japan are very broad and the Japanese courts have a wide jurisdiction over determining an administrative lawsuit, for example, litigation regarding public interest has existed in Japan for a considerable period, while it is still a new issue adopted in China, and absolutely unfamiliar to Vietnam.

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<sup>366</sup> Shuichi Sugai & Itsuo Sonobe (1999), p.107

<sup>367</sup> Minshu Vol 22, No 13, Third Petty Bench of Supreme Court, Showa Year 43 (December, 24<sup>th</sup> 1968). See Ibid.

<sup>368</sup> Yong Zhang (1997), p.9

<sup>369</sup> ACLL, Art 8 section 1

<sup>370</sup> ACLL, Art 8 section 2



**Public litigation** (Article 5) means a litigation seeking the correction of acts not conforming to laws and ordinances of the state agencies or public entities, which is instituted in the capacity of a person as a voter or in another capacity that does not involve the plaintiff's personal legal interests but rather his concern as a citizen. Thus, the plaintiff in this litigation is to represent the populace as a guardian of the public interest, and a court's judgment is effective not only to the plaintiff and the defendant but also as to the whole population. Some examples of this litigation include the election litigation (*Senkyo Soshō*) that a voter or a candidate who has an objection against the validity of the election under the article 204 of the Public Officer Election Act; the inhabitant litigation (*Jyumin Soshō*) that an inhabitant may take an ordinary local public body with respect to a financial issue under the article 242 of Local Government Act.

**Agency litigation** (Article 6) concerns a controversy on the existence or exercise of power between agencies of state or a public body. As a general rule, this issue is to be settled inside the administration, however in case of necessity provided by statute, the court can resolve it<sup>371</sup>. An example of this litigation is the *Okinawa Governor Mandamus Case* in which the National Government sued the prefecture governor to require him to sign leases for American air bases on Okinawa<sup>372</sup>.

**Party litigation** (Article 4) means: (1) a litigation relating to a disposition or decision to affirm or constitute legal relations between parties, which make one of the parties in the legal relation a defendant in accordance with the provisions of laws or orders; (2) a litigation relating to the legal relations of public law. For (1), although the usual case would be for a person aggrieved by a disposition to bring an action for revocation of such disposition, a particular statute necessitates that an action be brought against the other party rather than an action for revocation as it is thought to be the best method for settling the dispute. This litigation is generally called a formal party action (*Keishikiteki Tojisha Soshō*). Regarding the administrative guidance mentioned above, since the revised ACLL 2004, there is an expectation that such litigation should be in form of the *Tojisha Soshō* (Party litigation)<sup>373</sup>. An example of this litigation is an action taken by a landowner under Article 133 of the Land Expropriation Act for more compensation than awarded by the expropriation committee. For (2), an example of this would be an action brought by a civil servant dismissed by an

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<sup>371</sup> Such litigations as: the mandamus proceedings brought by a prefecture governor as an agent of the state against a mayor, the head of a town or village before a district court under Article 146 of Local Government Act; Mandamus proceedings brought by a competent minister against a prefecture governor before a high court under the article 15 of National Government Organization Act and the article 146 of Local Government Act in cases where the prefecture governor administers or conducts affairs entrusted to him as an agent of the state in violation of law or instructions from the minister, or fails to administer or conduct such affairs, and does not obey an order issued by the minister...etc

<sup>372</sup> See *Okinawa Governor Mandamus Case*, Case No.90 (*Supreme Court, Grand Bench, August, 28<sup>th</sup> 1996*)

<sup>373</sup> See Keiko Sakurai & Hiroyuki Hashimoto (2006), p137

allegedly void disposition for a confirmation of his status as a civil servant. This litigation is referred to as a substantive party action (*Jisshistuteki Tojisha Soshō*)<sup>374</sup>

**Kokoku (appeal) litigation** (Article 3) is the most important administrative litigation provided in Japanese ACLL. To meet the demands of Justice System Reform in Japan in the 21<sup>st</sup> century, the revised ACLL 2004 expanded the categories of *Kokoku* litigation from four types to six types:

1) the lawsuit for revocation of disposition is the most typical and important among the objects of the administrative litigation that is centrally introduced in the ACLL. It means a litigation seeking the revocation of a disposition of an administrative agency and any other act coming under the exercise of public power by such administrative agency.

2) the lawsuit for revocation of decision that refers to an action by which revocation of a decision or another action of an administrative authority is sought on an application for review, an objection or any other kinds of administrative complaints.

Both above types form the same category of “actions for revocation” (*Torikeshi Soshō*) with the same nature and same procedure for application. Nevertheless, the main difference is that the former may be brought to the court immediately without going through an administrative complaint procedure, even where an administrative complaint may be lodged in order to challenge the disposition. It is also the main distinction with that of Vietnam for the compulsory requirement of the pre-litigation period. In Vietnam, due to the restriction of the concept “the first administrative decision” (*Quyết định hành chính lan đầu*), the decisions resulted from “the application for review” (reconsideration decision) or the so-call “objection” are not addressed to the court’s jurisdiction.

3) the lawsuit for affirmation of nullity means a litigation seeking to confirm the existence or non-existence of a disposition or decision, or of the effectiveness or ineffectiveness of thereof.

4) the lawsuit is taken to confirm the illegality of forbearance (*a failure to take an action*) of an administrative agency or authority.

Among above four litigation types, the suits to overturn a disposition (*the first type*) are the cases of the most interest because they implicate the judicial review power of the courts where the agency action involved. The latest revised ACLL 2004 supplemented two new types of lawsuits under the article 3, section 6 and 7 that categorizes the fifth and the sixth types of litigation as below:

5) the lawsuit is taken to demand the legal obligation attached to the administrative agency (*Gimutsuke no uttae*)<sup>375</sup>. In this litigation, a plaintiff can seek an order compelling the agency to act in a regulatory fashion when it has failed to take action (Sec.6.1). A plaintiff also may seek an order requiring the agency to enter a favorable determination in a situation where the applicant has applied

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<sup>374</sup> Ibid, at 224-225

<sup>375</sup> See ACLL 2004, Art 3 section 6, 義務付けの訴え (*Gimutsuke no uttae*)

for some form of government benefit (*such as social security payment or a license*) and the agency has failed to act (Sec. 6.2). While under the old law, in this situation, the applicant could only seek a declaration that the agency must act in reasonable time, this revised law allows the court to order the agency to grant the relief requested. In other words, both declaratory and active relief must be taken. The court has authority when granting relief to the plaintiff to either order the specific term of the agency action or may order the agency to grant plaintiff relief while permitting the agency to determine the specific of that relief. For example in a social security payment case, the court could order that agency make the payment, but permit the agency to calculate the payment rather than the court make the calculation.

There are two main conditions for asserting an agency failure to act: (1) it must relate to an application for a disposition or an appeal within the agency that is legally bound by statutes; (2) no agency action has been made although the reasonable period of time provided by law had passed. The relief can be only granted if the courts finds that the agency's inaction is unlawful or an abuse of discretion<sup>376</sup>.

6) the lawsuit is brought to demand the suspension of an action from the administrative agency (*Sashitome no uttae*)<sup>377</sup>. This litigation allows the plaintiff to require an injunction to prevent the administrative agency from taking an action when it is asserted that the agency has no legal authority to so act. This is a potentially significant change in the law, as it would permit injunctive relief in situation where previously the court had no power to intervene.

Article 37, sec.4 limits the conditions for taking such a lawsuit in cases where the plaintiff has no other available remedy and the agency is threatening to take an action that will inflict a "grave" loss on the plaintiff. The standard of "grave loss"<sup>378</sup> (*Jyudaina songai*) is not clearly defined in the ACLL. However, in the trial practice, the court must consider such things as the difficulty of recovering damages to compensate for the loss as well as the nature and extent of the loss threatened. One of the latest cases regarding this new litigation is *Beltway Ruling Snubs Land Claim* (2004) in which the Tokyo District Court, presided by Judge *Toshihiko Tsuruoka* stated that "*the metropolitan government's seizure of private property does not bring about irrecoverable damage to the plaintiff*". As a result, the court refused to issue an injunction to prevent building roads and to grant the plaintiff the monetary compensation for their loss<sup>379</sup>.

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<sup>376</sup> See ACLL 2004, Art 37, section 2, 3

<sup>377</sup> See ACLL 2004, Art 3 section 7, 差し止めの訴え(*Sashitome no uttae*).

<sup>378</sup> See ACLL, Art 37, section 4. 重大な損害(*Jyudaina songai*)

<sup>379</sup> See Follow up Beltway Ruling Snubs Land Claim, available at <http://search.japantimes.co.jp/cgi-bin/nn20040427a1.html>

### 3.2.4. Interim Relief, Judgment and Implementation

Firstly, regarding the issuance of interim relief (*Kari shobun* or *provisional disposition*), in principle, the ACLL does not allow a provisional disposition to spoil the effect of the disposition or any action exercised by public power. Article 25, sec.1 reads: “*the institution of a revocation lawsuit shall not preclude the effect of disposition, the execution of disposition or the continuance of procedure*”. However, the ACLL concludes a provision that permits the court to temporarily suspend the applicability of a disposition, where a suit to set aside the disposition is pending. Under the old ACLL, the condition for application is in the case of urgent necessary to avoid “*an irreparable injury*” caused by the disposition. The ACLL 2004 changes the term of “*an irreparable injury*” to “*serious injury*”<sup>380</sup> which seems slightly expand the court’s jurisdiction to grant such relief. In fact, “*serious injury*” is not clearly defined but it would appear a lesser standard than the old “*irreparable injury*”. In other situations however, the court may not issue the temporary suspension if issuance could seriously affect the public welfare. Vietnam seems to have learned from this Japanese experience, since the OSAC (2006) newly provides that in case of emergency and preventing “*serious injury*”, the court can issue the decision on temporary enforcement suspension. Nevertheless, due to the lack of a clear definition of the standard of “serious” as well as the strict imposition on the judge’s liability, it still prevents the judge from courageously granting such relief.

Secondly, regarding the court’s judgment, when dealing with revocation litigation, the court often renders three types of decisions: (1) Dismissal of the petition. The court will give back the petition at the front door since it lacks of the fundamental conditions for taking a lawsuit; (2) Dismissal of the demand. After filing and examining the case, the court finds no relevant reasons for plaintiff’s demand, then dismisses it; (3) Approval of plaintiff’s demand. As a result of examining the case, the court can approve one part or the whole of the plaintiff’s demand<sup>381</sup>.

Under ACLL, where a litigated disposition or a decision is concluded illegal, as a general rule, it will be revoked by a court’s judgment. However, the “*circumstantial judgment*” (*Jijyo Hanketsu*) is an important exception to this general rule<sup>382</sup> which was once criticized for its unconstitutionality. In fact, the application of “*circumstantial judgment*” is not always easy and such cases do not often occur. The application of the free discretion’s doctrine by courts can be discussed for this situation. The question of discretion in many instances is a question of statutory interpretation and as Japanese bureaucrats draft most statute, they do so in a way that gives the

<sup>380</sup> See ACLL 2004, Art 25 section 2. The term of “*irreparable injury*”(回復困難な損害) was replaced by “*serious injury*”(重大な損害)

<sup>381</sup> See the type of judgment. (判決の種類). Keiko Sakurai & Hiroyuki Hashimoto (2006), p.252. Three types of judgment regarding the revocation litigation known as (1) 訴え却下; (2) 請求棄却; (3) 請求認容

<sup>382</sup> See Art 31 of ACLL 2004. This judgment means in an action for revocation, where a disposition or decision on an administrative complaints is illegal but serious damage will be caused to public interest by revoking it, if the court after considering the degree of damage suffered by the plaintiff, indemnity for the damage, ways of preventing the damage and all other circumstance, believes that it is not in accord with public interest to revoke such disposition or decision, the court may dismiss the action

bureaucracy wide discretion. Courts then looking at challenges to the bureaucratic action are confronted with a statute that broadly delegates discretionary authority.

**Finally, regarding the implementation of the judgment,** Article 33, sec.1 of ACLL reads, “A decision of the court which revokes a disposition or a decision on an administrative complaint binds the administrative authority which the party litigant and any other administrative authority concerned with regard the case”. Sec.2 also compulsorily requires the administrative agency, which made the wrong disposition or decision to issue a new one in compliance with the purport of judgment. In comparison with Vietnam’s current OSAC, it still leaves a vacancy on the effect of judgment and its execution. If the litigated agency does not perform its duty or passes a new administrative act that continuously fails to satisfy the infringed people, they have no choice other than initiating another lawsuit against the new one.

### **3.3. Introduction to Some Administrative Lawsuits in Japan**

#### **3.3.1. Revocation of Approval Disposition on Constructing Odakyu Line (2005)**

##### *The summary of the judgment*

This judgment concerns the action to quash the approval disposition about: (1) the building of the consecutive grade separation of railroads as a city planning project; (2) the establishment of the attached street upon making the consecutive grade separation of railroads. Regarding (1), the inhabitants who reside in the related area prescribed in Article 2, sec.5 of Tokyo Environmental Impact Assessment Ordinance No 96 of 1980 (*before its amendment by Ordinance No.107 of 1998*) possess “legal interest” and will have standing to sue for revocation of this approval. However, regarding (2), the inhabitants possessing “legal interest” and “standing” are restricted to those who have an estate on the project-site of an attached street. The inhabitants living in the vicinity of the project-site have no rights to sue.

##### *The legal norms for references*

Articles 1, 2 and 59 of the City Planning Law; Article 2 and 13 of the Tokyo Environment Impact Assessment Ordinance; Article 9 of ACLL.

##### *Following the summary of the facts*

On June 19<sup>th</sup> 1994, the Minister of Construction, based on Article 52, sec.2 of the City Planning Law (*before amendment by Law No.160 of 1999*), made an approval disposition for the city planning projects in Tokyo. The content of this approval disposition consisted of: (1) making the railroad consecutive grade separation of the section from near *Kitami* Station to near *Umeagaoka* Station on the Odakyu Line; (2) establishing the attached street upon making consecutive grade separation of railroads.

Among the plaintiffs, X1 to X33 and X38 to X40 were all those who did not have estates on the project-sites of the city planning project. Only X34 to X37 had estates on the site of the attached street. Furthermore, X1 to X33 resided in the related area prescribed in Article 2, sec.5 of

Tokyo Environmental Impact Assessment Ordinance. According to this provision, this area is specified as an area with a possibility that the enforcement for construction project may have a remarkable influence on environment in the area and its circumference.

All X plaintiffs took the lawsuit to Tokyo District Court for the revocation of the Minister's approval disposition and made Minister of Construction as a defendant (*hereinafter as referred to Y*).

*At the first instance judgment* (2001), Tokyo District Court considered that the approval disposition was made without the deep consideration on the environment impact assessment and lacked cautious examination on the project's expense. As a result, the content of approval was illegal. The court accepted the demands of all plaintiffs Xs.

*At the appeal judgment (Koso shin)*, Tokyo High Court (2003) denied the "standing" of X1 to X37 who *merely resided around* the project area and of X38 to X40 who *resided outside* of the project area, and finally dismissed their appeal (*Dismissed the petition*). The court also acknowledged the "standing" of X34 to X37 concerning only the attached streets to which their estates belong, however as a result of judgment, the court dismissed their demand. The appeal judgment annulled the *first-instance* judgment which approved a part of X's claims.

#### *Opinions of Supreme Court*

*At the final appeal judgment (Jokoku shin)*, (December 7<sup>th</sup> 2005), the Supreme Court's opinions were as follows: Regarding the revocation of the approval disposition about the build of consecutive grade separation of railroads, X1 to X37 have legal standings. Appellants X38 to X40 do not have *standings*. Regarding the revocation of approval disposition about the attached street project, X1 to X33 and X38 to X40 do not have *standings*. X34 to X37 hold *standings* only when they own estates in the project-site.

Supreme Court applied Article 9 of ACLL to determine whether X plaintiffs had legal interests, whether they held *legal standings* or not. Section 1 of this article prescribes "Suits for revocation of a disposition may be filed only by persons having *legally protected interests* for seeking the revocation of the said disposition". Such *legally protected interests* have been infringed or may be infringed inevitably by a particular disposition with the intention that besides the general public interests, individual interests should also be protected. Thus, in the case of being infringed, they must possess "*standing*" in the revocation lawsuit.

Regarding whether there existed *legally protected interests* of a third party, it should take into consideration provisions of the enabling acts of disposition, the purpose of the enabling acts as well as the contents and characters of interests. The Supreme Court also applied the Article 9, sec.2 that was newly established by the revised ACLL (2004) in which, in cases of judging contents and characters of interests, two main points must be taken into consideration: (1) the contents, the character of interests which will be infringed in the situation that the disposition in violation of the

enabling act is carried out; (2) the mode, the grade of the infringement.

From the aim and purpose of City Planning Law, it seems that these legal provisions were intended to protect the local resident's concrete interests in not suffering remarkable damage to health or the living environment by the noise, vibration and so on, resulting from an illegal construction project. In the light of contents, the character and the grade of the infringement, it is difficult to judge whether those concrete interests were absorbed into general public benefit. Judging from provisions of City Planning Law, the Supreme Court found that it intended not only to regulate the construction project with regard to maintenance of city planning institution, but to protect the private interest of not suffering damage to health or living environment.

Hence, the inhabitants who *reside around the site* of the city planning project (X1 to X37) have a possibility of suffering directly remarkable damages caused by the noise, and vibration, therefore they possess *legally protected interests* and have *standing* in this revocation lawsuit.

Regarding the *standing* in an action to quash the approval disposition regarding the attached street project, the court determined to exclude X34 to X37 owning their estates in the project-site, the remaining Xs had no real rights on estates within the project-site, therefore there were no grounds to construe that their rights or legally protected interest had been injured or would likely be injured by reason of project approval.

In rendering the final judgment, the Supreme Court concluded that: (1) Based on the article 61 of City Planning Law such as “*The contents of the project are in conformity to the city plan and the project is appropriate*”, the approval disposition made by Minister of Construction is legal; (2) Regarding the judicial check of the approval disposition, the court finds no the deviation of the discretionary power; (3) Regarding the environment influence, the court also finds the defendant no lacking of the consideration related to the railways noise and having a rational consideration on the environment influences as laid down in Environment Impact Assessment Report (1995); (4) Regarding the check of substitution proposal related to the requirement of plan, land form, circumstances as well as the time duration and expense of the project, the defendant also meets these requirement; (5) The reasonable calculation method of the project expense is also concluded. As such results, the Supreme Court dismissed the X plaintiffs appeals<sup>383</sup>.

**To conclude**, this judgment is the first judgment of the Japanese Supreme Court (Grand Bench) which applied the new Article 9, section 2 of ACLL (2005). It has important implications that, regarding the standing of revocation litigation, changed the judgment of the Supreme Court 1<sup>st</sup> Petty Bench (*Judgment on the Tokyo Circular Road No 6 incident on November 25<sup>th</sup> 1999*)<sup>384</sup>.

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<sup>383</sup> See X v. Minister of Construction. Case No.114 of 2004. 1886 *Hanrei Jiho* 52. Supreme Court GB on December, 7<sup>th</sup> 2005., available at <http://www.court.go.jp>; See High Court Backs Elevated Odakyu Line, <http://search.japantimes.co.jp/cgi-bin/nn20031219a4.html>]; See also The Noise Issue and Judicial Review of City Planning Enterprise (Project)—*Jokoku* Judgment regarding the Odakyu Litigation, [騒音問題と都市計画事業の適法性—小田急訴訟上告審本案判決], *ジュリスト* (Jurist) No.1354, pp.38-39 (2008)

<sup>384</sup> In the Tokyo Circular Road No.6 Incident, except the person who has an estate on the project-site was acknowledged to possess

### 3.3.2. Confirmation of Invalid Permission in Monju Case (2003)

#### *Summary of the judgment*

The Appellate *Nagoya* High Court (January 27<sup>th</sup> 2003) dismissed the judgment of the *Fukui* District Court (2000) and confirmed that the permission for the establishment of the *Monju* (*Nuclear Reactor*) was invalid and reversed it<sup>385</sup>.

#### *The facts of lawsuit*

In 1980, the Power Reactor and Nuclear Fuel Development Corporation (*which was changed to Japan Nuclear Cycle Development Institution since 1998*) applied to the Prime Minister for permission for the corporation to establish *Monju* (*a prototype fast breeder reactor*) in *Tsuruga City, Fukui Prefecture*. In 1983, after taking the review by the Atomic Energy Commission and the Nuclear Safety Commission, the Prime Minister permitted this application.

In 1985, the residents living around *Monju* filed a suit against the Corporation for an injunction against the construction and the operation (*civil action*), and also filed a suit against the Prime Minister, seeking for an invalidity confirmation of the permission to establish *Monju* (*administrative litigation*).

The *Fukui* District Court (1987) denied the plaintiff's standing and dismissed the petition. However, the Appellate *Nagoya* High Court, *Kawazawa* Branch (1989) recognized the plaintiff's standings only for those who lived with the range of radius of 20km from *Monju*.

The Supreme Court (1992) recognized all the plaintiff's standings and remanded the case to the district court.

After the dispute on the standings, discussed above, had settled and the trial concerning the safety of *Monju* had begun, the reactor suffered a sodium leak accident in December 1995. When the sodium used in the cooling system comes into contact with the concrete floor, a hydrogen explosion occurs. In order to prevent such contact, a steel plate covers the floor. Through the verification process of the accident, it was found that the sodium leak undermines this more speedily than had been expected. The Nuclear Safety Commission did not consider this finding in its safety review.

The *Fukui* District Court (2000) reopened the trial, but still dismissed the plaintiff's petition. The court considered that even if the Nuclear Safety Commission had overlooked the finding, as given by *Ikata-ruling* (Supreme Court's judgment in 1992) that the subject of the safety review is only the basic design of the reactor and not detailed design of the reactor, such as the shape and depth of the plate. As a result, the review was rational.

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the *standing*, the local residents were denied their *standings* for the revocation lawsuit of approval disposition. By contrast, this judgment (Odakyu Line 2005) applied the Art 9, section 2 of ACLL (2005) allowed the people residing in the related area specified in Art 2, section 5 of Tokyo Environment Impact Assessment Ordinance (X1 to X37) to possess *standing* concerning the action to quash.

<sup>385</sup> See Case No 12 of 2000, 1818 Hanrei Jiho 3, Isobe v. Prime Minister, Nagoya High Court, Kanazawa Branch (January, 27<sup>th</sup> 2003). See also Appeal Judgment after Sending back the first trial of *Monju* Administrative Litigation, [もんじゅ行政訴訟差戻後控訴審判決], ジュリスト(Jurist) No.1269, 41 (2004)



The Appellate *Nagoya* High Court (2003) vacated the *first-instance* judgment, confirmed that the permission to establish *Monju* by the Prime Minister was invalid and reserved.

*Opinions of Nagoya High Court*

The Nagoya High Court gave its opinions based on the three main following issues:

**Firstly**, it is whether the requirement of the permission to establish the nuclear reactor was invalid. The court follows the *Ikata-ruling* (1992) on “*Administrative Review Process Control Approach*”. Accordingly, the court should review whether the administrative review made before granting permission was rational. This case is not a suit for revocation but for invalidity confirmation. Therefore, the court induced from the general principle that it was needless to review “*clear*” illegality, but was enough to review only the “*material*” illegality when the court recognized that there was an “*extraordinary situation*”. When considering the mistaken administrative agency’s review, it was “*impossible to deny the concrete possibility*” that radioactive material in the nuclear reactor would leak into the atmosphere, known as the “*potential dangers*”. As this implies, the permission to establish the nuclear reactor was materially illegal and the court could confirm it as invalid.

**Secondly**, what subjects must *the safety review to establish a nuclear reactor* contain? The court also follows *Ikata-ruling* which is a distinction between the “*grand design*” and “*detailed design*” in which in the safety review to establish a nuclear reactor, it is inevitable that the subjects of the latter are wider than those of the former.

**Thirdly**, is does the permission to establish the *Monju* satisfy the invalidity requirement? The Court applied the Law for the Regulation of Nuclear Source Materials, Nuclear Fuel Materials and Reactors provides “*technical ability*” (Article 24, sec.1.3) and that the “*nuclear reactor has no deficits to prevent disasters*”. The appellants argued that there were “*material mistakes and deficits*” in the administrative safety review before permission to establish *Monju*. In conclusion, the court confirmed that the permission to establish *Monju* was invalid for the “*material*” illegality.

**To conclude**, this case attracted much attention from mass media because it was the first case where the defendant administrative agency had lost in administrative litigation a dispute on the permission given to establish a nuclear reactor. Japanese scholars find this case interesting from the viewpoint of Japanese administrative law theory because it removed the “*clear*” requirement from the administrative lawsuit to confirm the invalidity of the permission to establish a nuclear reactor, on the ground of the potential danger of a nuclear reactor as an “*extraordinary situation*”<sup>386</sup>. From this case study, Vietnam can learn about a new type of litigation regarding the confirmation of an invalid disposition, particularly of that made by the top of the administrative branch . Influenced from German administrative action theory, Japanese law has also categorically divided the illegality

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<sup>386</sup> See Comment on the Case No.12 of 2000. *Isobe v.Prime Minister*, *Waseda Bulletin of Comparative Law*, Vol 23, 72 (2003)

of administrative disposition between the “*ordinary illegality*” (deficit) and “*clear and material illegality*” which is very necessary to determine whether a disposition should be quashed or its invalidity confirmed. This area is still vacant in Vietnamese administrative law theory.

### III. Necessity of Foreign Legal Assistance Regarding ALRS

As *Bertil Wennergren*, a Swedish Justice of the Supreme Administrative Court, comments: “*Administrative law is a legal discipline which often tends to be neglected*”<sup>387</sup>. It is true that in the context of the international cooperation, while many important topics belonging to administrative law have been regulated in international treaties, for instance, child welfare, gender equality, air and water pollution, the administrative organization and procedure have not attracted much attention. Nevertheless, when foreign investors come to invest in a country, they need to know about the administrative law system of that country. They also expect to know how their legal rights can be well protected by ALRS.

Like any developing and transitional country, Vietnamese administrative law is not well structured and systematized. The ALRS in Vietnam is still immature and criticized for not being run by an effective court model and mechanism. Along with the analyses of some foreign experiences regarding the administrative court model and jurisdiction in the preceding part, this section continues to explore the necessity of an FLA Project towards the improvement of current ALRS as well as training human resource thereof.

#### 1. Administrative Law Review System: A Difficult but Potential Field

##### 1.1. Limitation of FLA Projects

Promoted by the *Open-door* and *Doimoi* Policy (1986), Vietnam began encouraging and mobilizing activities and projects, as well as programs on international cooperation. In this period, there were about fifteen sponsors, including NGOs who funded approximately 100 activities. Such activities focused on reciprocal legal assistance carried out under bilateral agreements. However, from 1992 onwards, the projects of FLA were officially commenced in Vietnam upon Government policies on promoting international cooperation activities in the legal sector. According to the “*Report on Comprehensive Needs Assessment for the Development of Vietnam’s Legal System to the year 2010*” the by Government, until now, about thirty Vietnamese agencies have co-operated with foreign countries on legislation and legal implementation. There have been various foreign partners, including foreign governments ( *France, Sweden, Germany, Japan, Denmark, the Netherlands, Switzerland, Canada and South Korea*); the inter-governmental organizations such as UN, and the EU; the NGOs, such as KAS, and FES, and the international and regional financial organization such

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<sup>387</sup> Bertil Wennergren, *Administrative Law-Setting the Bureaucratic Structures*, in Per Sevastik ed (1997), p.187

as the WB, IMF, and ADB. The Report confirmed clearly that: “After more than fifteen years of implementing the Doimoi Policy, Vietnam has steadily improved its legal system. This improvement has, in turn, made positive contributions to the implementation of the Party’s policies on establishing a socialist-oriented market economy and the Socialist ROL State in Vietnam”<sup>388</sup>.

It is apparent that the international cooperation activities contributed considerably to the realization of these achievements. However, to follow the mainstream of the discussion, apart from mentioning to some achievements, this section mainly focuses on the limitation of the FLA projects regarding ALRS.

**UNDP** started carrying out legal assistance projects with the MOJ of Vietnam in 1994. Together with the progress of legal framework improvement, UNDP has also co-operated with the Vietnamese Government on some projects to strengthen the ROL through sub-projects, such as: strengthening the law-making capacity of the National Assembly; strengthening trial capacity; and strengthening prosecutorial capacity in Vietnam. This project provided officials the comparative law knowledge in drafting some important codes, but none of them were related to the field of administrative law review. On September 4<sup>th</sup> 2003, the MOJ, UNDP, Sida and DANIDA signed on to the Project VIE/02/015 “Assistance for the implementation of Vietnam’s Legal Development Strategy to 2010”. At present, Project VIE/02/015 is considering requests for assistance to draft some legal documents that among others involves some drafts relative to ALRS, such as State Compensation Law, and Administrative Procedure Law. However, the necessity of drafting an Administrative Litigation Law has not seen much interest. In 2007, UNDP started some sub-projects with the Vietnamese Government to carry out a survey on the court system, including the current ADCs. It has been carried out with the participation of some foreign partners including France, Germany, Sweden, Japan, the UK, the US, Russia, and Indonesia to formulate recommendations for Vietnam. Thus, it is a promising project for improving the current ALRS.

**SIDA** (Sweden) was known as the earliest foreign partner officially carrying out legal assistance projects in Vietnam through the first Agreement on “Assistance in Strengthening State Management by Law” signed in October, 1991. To date, four main projects<sup>389</sup> of co-operation with SIDA have been completed, in which the area of lawmaking has always been considered a priority. Among them, the assistance on revising OSAC, the Law on Enacting Legal Norms, LOPC and so on has been provided. By SIDA projects much more focused on improving the ROL, gender equality, and legal education and information, however, the concrete field of administrative law review was not included in its projects.

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<sup>388</sup> See Report on Comprehensive Needs Assessment for the Development of Vietnam’s Legal System to the year 2010 by Government

<sup>389</sup> Such as, The Projects for Support for Construction of the Legal Framework; for Strengthening Capacity of Enforcement Agencies, for Legal Training; and for Legal Information, Legal Dissemination and Legal Aid. See Uong Chung Luu ed, Assessment of Current Status of International Legal Cooperation Activities in Vietnam with Respect to Management and Coordination, 25 (2007)

JICA (Japan) started in the early 1990s and stepped up its efforts in 1996 with the signing of the Minutes of Cooperation in the Legal and Judicial Areas between JICA and Vietnam. JICA actively assisted Vietnam to improve its laws in the civil and trade areas, including the Civil Code of 1995, the Civil Procedure Code, Law on Civil Judgment Enforcement as well as Legal Norms on Intellectual Property, Commercial Arbitration, International Economic Integration for WTO's Accession and so on. With the success and confidence of the past assistance in the field of civil and trade laws, some fields of administrative law such as the State Compensation, Administrative Procedure - particularly Administrative Litigation have recently attracted attention from Vietnamese partners and has proved to be a promising challenge. In the field of assistance for strengthening capacity for institutions of legal implementation, JICA is now assisting the SPC in standardizing and publishing judgments and processes for adopting precedents. The publication of recent Supervisory Judgments by the SPC, although those regarding the administrative lawsuits are still limited, has marked a turning point for the development of legal studies in Vietnam. JICA has actively assisted the Judicial Academy of Vietnam in improving the quality of legal profession training. At present, the Japanese Government is also considering a project to assist the Judicial Academy in building its new campus.

The establishment of the Research and Education Center for Japanese Law in Vietnam (2007), promoted by Center for Assistance of Legal Exchange (CALE, Nagoya University) is seen as an extremely productive initiative for deepening the legal cooperation between the two countries. Furthermore, some recent FLA projects carried out by CALE, and the Legal Information Research Center of Nagoya University show a great deal of promise, marking the substantial development of legal cooperation upon the new policy of Japanese Government and JICA. Among four main missions of the New JICA policy, "*Improving Governance*" is considered to be of vital importance to the stable economic growth, and social security of developing countries like Vietnam in which the four key words *Accountability*, *Transparency*, *Publicity* and *Trust* need to be secured to achieve the success of the contemporary FLA strategy<sup>390</sup>. It is expected that Japan, as a country with a highly developed administrative law system, as well as a country with recent experiences on reforming its Justice System, involving revisions of ACLL (2004), Administrative Procedural Law (2005), the training of professional legal human resources and so on, can provide greater help in the field of ALRS, a field that continues to be controversial in Vietnam today.

**French Legal Assistance, through Maison du Droit** started in 1993, based on a Bilateral Agreement between the two Governments. It can be said that the specific forms of cooperation, such as workshops, seminars, training courses, surveys and so on, have contributed considerably to the process of improving the legal system of Vietnam. Some workshops related to the amendment of

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<sup>390</sup> See Aikyo Masanori, The Goals of Entire Conference on Study of Foreign Legal Assistance Strategy, in "2008 年度、法整備支援戦略の研究" Conference held by CALE (Nagoya University) on December, 13-14, 2008

OSAC, some surveys and study trips to French administrative courts have been conducted in the past. In the field of ALRS, however, the use of such activities have not yet been used to their full potential.

The **STAR Project** promoted by Vietnam-America Commerce started in 2002 with many Vietnamese partners and has recently provided active assistance in the law-making field. To perform the main goal of Reviewing the BTA and Comparing Regulations of the WTO with existing Vietnamese Regulations, apart from the other civil, and commercial law fields, this project directly impacts on the ALRS in Vietnam in regards to protecting all individual's rights, particularly the rights of foreign investors. LOCD and OSAC were immediately revised in 2005, 2006 upon the WTO's requirement. Furthermore, some assistance was provided relating to the draft of Administrative Procedure Law. Furthermore, assistance relating to the introduction of a *quasi-judicial* adjudicating body like the common law Administrative Tribunal, the Claim Settlement Council, support for AJB attached to Government and so on has been provided. Apparently, it is impossible to avoid leaving a great controversy regarding the gap of legal concepts, and institutions between those which have been historically inherited from civil law and those newly transplanted from common law traditions.

The earliest cooperation between Vietnam and **FES** (Germany) commenced in 1989, through the making of drafts relative to the area of social securities, including labor, and insurance, particularly in the field of administrative jurisdiction. Many workshops regarding administrative jurisdiction were held and some Vietnamese officials were sent to study the German administrative law theory and court model. However, this project was completed in early 1990s as a result of the collapse of the *Berlin Wall*. Vietnam also cooperated with KAS, MOJ of NRW, and GTZ since 1994 in the area of law-making, but none of the associated projects related to administrative jurisdiction. Some Vietnamese scholars feel a degree of regret that the German assistance in this field was in fact the earliest, yet did not last long, and had hoped to absorb German administrative law theory regarding the JRAA and the experience of Administrative Court Model.

**In short**, by glancing at some FLA Projects in Vietnam from the early 1990s until present, it is true that those related to ALRS are still few in number and have potential for further development. The next section attempts to find some explanations and suggestions for the future development of ALRS in the new era of ROL.

## **1.2. Potential Development**

This section explores some main reasons that explain why less attention has been paid to the field of ALRS in the past:

**Firstly, to** repeat a comment by a Swedish scholar, administrative law is regarded as a

legal discipline which often tends to be neglected<sup>391</sup>. Administrative law of a country is often not well structured, systematized and tends to have developed in a more or less haphazard and disjointed manner.

**Secondly**, one aspect of administrative law and perhaps the one that most often comes into focus is the ROL through procedural guarantees for an individual or his/her access to judicial review by either the ordinary courts of law or by the administrative courts. It is true that the legal assistance projects regarding this issue must require this in the long run and meet the demands of current conditions of recipient countries. Vietnam historically has a complicated administrative legal system. The change of Vietnam's policies in the early 1990s that aimed to build the *Socialist ROL State* apparently resulted in considerable development of the legal system. However, Vietnam has not attracted many assistance projects for improving the ALRS due to: (1) some defects in the existing mechanism; (2) the defect of the legal system grounded for legal assistance activities<sup>392</sup>; (3) the lack of background in administrative law theory regarding judicial review; (4) the limitation of staff capacity; and (5) the hesitation from foreign partners.

**Thirdly**, the administrative law is not strongly related with procedural guarantees and other ROL matters, rather, it involves complicated material provisions dealing with innumerable subjects to which a state has to pay attention, for example public order, social welfare, planning, taxation, trade and industry, traffic, employment, education, environmental protection and so on. In Vietnam, there are also some very complex fields involved, such as land control, urban construction, transportation, "*street*" businesses and so on. In fact, there are no general advisory guidelines to follow. The Vietnamese government, particularly at the local level, often has its own policies or regulations for governing society. When an administrative dispute or litigation case arises in any field of administrative management, it frequently adjusts laws or regulations to bind it. Thus, due to the diversity and monopoly of the administration, legal assistance is often prevented from pouring much effort in to this field.

The field of ALRS is closely related to the domestic law and policy, and is particularly deeply attached to the state power mechanism and other sensitive political issues. Some foreign partners may be willing to grant assistance, but they are also deeply concerned with the *so-called* the interference with the recipient country's internal workings.

The recent development of international cooperation, however, shows that one country cannot be well developed in total isolation from others. Due to the rising number of foreign investors

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<sup>391</sup> Bertil Wennergren, Administrative Law: Setting the Bureaucratic Structures, in Per Sevastik ed, Legal Assistance to Developing Countries, 189 (1997)

<sup>392</sup> Up to now, Three Key Legal Documents Regarding the Foreign Legal Assistance are Decree 103/1998/ND-CP on the Management of Legal Cooperation with Foreign Countries; Decree 17/2001/ND-CP on Promulgation of Regulation of the Management and Use of ODA; Decision 64/2001/QĐ-TTg. Both two Decrees 103 & 17 are of the same status in the legal hierarchy and thus difficult to apply them if they overlap and conflict. Many provisions of Decree 103 are not suitable to current situation and needs to be revised. See *Ibid*, at 16-18

or cooperative partners doing business in Vietnam, as has been seen recently, Vietnam needs to develop its administrative laws in general as well as the ALRS to properly protect legal rights and interests of all individuals and entities including foreign partners in accordance with international treaties and practices. Consequently, FLA in this field, although relatively insignificant until present, shows a great deal of promise if both Vietnam and its foreign partners can share mutual benefits and meet at the same goals.

## **2. Recommendations**

The activities of legal international cooperation in Vietnam have been varied and numerous, and should be improved in all fields of law. However, in this research, the recommendations focus on the improvement of ALRS in general, and the model of ADCs and its jurisdiction in particular. They will be classified temporarily in three activity groups, namely: (1) support for improving legal framework, (2) support for constructing institution, (3) support for legal training and exchange of legal information.

### **2.1. Support for Improving Legal Framework**

The establishment of a legal framework that meets the requirements of a *socialist-oriented market economy* when starting with something that retains legacies from a *centrally planned economy* is not a simple task. It requires a great change in awareness of those officers responsible for legislation or determination of policy. Up until now, there have been at least 50 legal documents (*from Government Decrees to Codes*) which have been supported on professional avocation and drafting skills. Through the Project on Assessment of Legal Framework, UNDP in cooperation with the MOJ supported the improvement of the legal framework for economic activities and environmental protection in Vietnam. The UNDP recommended the amendment of existing laws as well as enacting new laws and regulations that focused on the following 11 main subjects: (1) Civil Law, (2) Commercial Law, (3) Securities Market Regulation, (4) Bankruptcy Law and Dispute Resolution, (5) Enterprise Law, (6) Law on Competition, (7) Land Law, Law on Environment and Natural Resource Protection, (8) Banking Law, (9) Public Finance, Taxation and State Budget, (10) Legal Information and (11) International Treaties<sup>393</sup>. Thus, the field of ALRS including the reform of ADCs Model and its Jurisdiction has not been paid much attention, except for a few recent projects regarding the revision of OSAC, and the draft of State Compensation Law. Up until now, Vietnam has completely lacked fundamental laws regarding Administrative Remedy.

Regarding the construction of legal framework in general, particularly relative to ALRS, the below main defects and recommendations can be given:

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<sup>393</sup> See Uong Chung Luu ed, *Assessment of Current Status of International Legal Cooperation Activities in Vietnam with Respect to Management and Coordination*, 28 (2007)

**Firstly**, it lacks an overall strategy for reform and development of the legal system of Vietnam. It is easily identified that the civil and economic law fields have been highly prioritized while the field of public law, such as the administrative apparatus, administrative mechanism and ALRS, has been largely overlooked. Some proposals relative to the public law field are laid down in a Reform Strategy promoted by CPV, but they have been submitted to the competent authorities and are still waiting for review and approval. For such reason, it lacks of a firm legal basis for canvassing and attracting sponsorship in the legal sector.

To recover this defect, the Vietnamese government should possess a more specific law-making plan regarding public law, including the improvement of ALRS. In the future, Vietnamese lawmakers will need to enact some fundamental laws regarding the administrative remedy, such as the ALL, APL, Administrative Appeal Law, and the State Compensation Law. The APL should be enacted soon to ensure the transparency and impartiality in all governing activities. The competent authorities should change their awareness regarding the public law sector, clearly separating it from the political issues helping to make legal cooperation projects smooth and effective. CPV nowadays has actively affirmed the need for the constructing of a *State governed by ROL*, protecting all individual rights and interests from the administrations abuses. Thus, the completion of legal framework regarding the ALRS is a vital factor, which directly impacts on the process of transplanting and achieving the ROL in Vietnam.

**Secondly**, Vietnamese competent agencies and authorities still lack the sufficient awareness of the meaning and objectives of legal cooperation projects as well as the initiative in the cooperation process. The problem is that some of them always have in mind that co-operation means fiscal sponsorship. It is one of the legacies of the culture of expectation and dependence of the former *state-subsidy* regime that is regarded as a remarkable obstacle in the contemporary international legal cooperation. Furthermore, many agencies have not actually taken the initiative in attracting sponsorship. Instead, they tend to passively wait for proposals from foreign counterparts.

For the fulfillment of the above defects, Vietnamese partners should be more active in calling for assistance and cooperation. When Vietnam fails to reveal properly what they need to make a concrete plan (*such as time, contents, and finance*), foreign partners, although willing, cannot set up the project agenda in a timely manner. For now, the Vietnamese government should fix the plan of making a new Law on Administrative Litigation, and the amendment of LOPC. In the case where the model of AJB attached to Government is approved, there needs to be clear plans established for enacting laws regarding its organization and personnel. Vietnam should not only wait for FLA projects funded by sponsors, but actively set up cooperative projects in making such laws with their own budget. Such activities can include the organization of international symposiums, the dispatching of delegations for study trips, the receiving of foreign opinions in drafting processes and so forth.



**Thirdly**, there happens to be an overlapping of legal co-operative activities in some fields while other fields are left vacant. This is a major concern of both the Government and foreign donors, since some sectors desperately expect support from donors but no donors provide support. On the other hand, there are some fields that receive support concurrently from many donors. It is true that many donors do not want to sponsor fields that are too sensitive and political, related to politics, and state mechanisms including ALRS. Furthermore, the hesitation as well as the flexibility in administrative procedures from Vietnamese partners, such as the excessive time limit for licensing, the delay in responding by Vietnamese agencies and so on are obstacles for the development of projects. Since many donors come to Vietnam today, the free choice of donors and the high competition among them also make Vietnamese partners deeply consider the kind of projects that would be appropriate with diversified foreign partners and ways to achieve reciprocal benefits.

For such implications, Vietnam should enhance cooperation projects with all donor countries, but *regarding the improvement of ALRS*, it needs to prioritize the setting up of projects with those donors that originated from civil law thinking, and those having mature experiences in adopting foreign laws, such as Japan. This dissertation focuses on recommending projects relative to the ALRS addressed to the following specific countries:

(1) France is one of the countries that has most influenced the foundation of ADCs in Vietnam since 1996. Many scholars have been inspired by French administrative law theory relative to the *double function* of administration - *governing and adjudicating*, and proposed the model of AJB attached to Government. The Government Inspection Delegation was sent to France in 1993 to study the model and jurisdiction of French administrative courts. The *Maison du Droit* established in Hanoi Law University (1993) is the bridge for exchanging experiences and information. Thus, Vietnamese Government should determine the establishment of AJB attached to Government, then set up a cooperation plan with its French partner for studying experiences in making that law and training adjudicators like the model of French National Administration School (ENA).

(2) Japan has been one of the earliest, most durable and enthusiastic donors, commencing in the mid 1990s. Vietnam should actively call for projects on enactment of fundamental laws regarding Administrative Remedy that Japan has already possessed for a quite long history. Furthermore, the new revisions of ACLL (2004), APL (2005) as well as the overall Justice System Reform initiated from 2001 are good lessons for Vietnam to share experiences on legislation, law implementation and legal education. Japan also has rich experiences in absorbing Western administrative laws, coupled with remarkable economic development. It can share what the Vietnamese legal system has to face in the transitional period.

(3) Germany, as mentioned in the last section, was the earliest donor in cooperation with the Vietnamese Government in promoting the establishment of Administrative Jurisdiction. Due to the collapse of the *Berlin Wall*, this cooperation was suspended. However, many Vietnamese scholars

studying and absorbing German administrative law theory prior to this event, expect to re-invigorate this cooperation and develop Vietnamese administrative law in line with the continental administrative law. As such, the improvement of legal cooperation projects with Germany is an imperative for reforming ADCs model and its jurisdiction in Vietnam today.

(4) China is not a donor of FLA projects in Vietnam, but the necessity of studying Chinese experiences is undeniable, due to its strong influence on political and social conditions in Vietnam. Vietnam should actively set up the cooperation projects with China to share some commonalities in enacting ALL, State Compensation Law as well as the obstacles the two countries have faced in reconstructing ALRS in accordance with the principle of *State governed by ROL* and One Party Ruling.

(5) Vietnam should also continue enhancing its cooperation with other donors, such as the US, Australia, and Canada in the improvement of its overall legal framework, particularly in regards to substantive laws relative to various administrative activities in the global context, such as competition, trade business, land control, and intellectual property. To achieve this success, all foreign donors should be more patient and deeply understand the Vietnamese culture and current context. Truly, some past projects were suspended due to a lack of mutual understanding and over eagerness or touching on overly *sensitive* issues.

## **2.2. Support for Constructing Institutions**

A sound legal framework without any practical effect is irrelevant. Up to now, there have been more than ten sponsors in the fields of constructing institutions and law enforcement. In this area, France has carried out projects on the computerization of the public notary, assisting the implementation of Vietnam-France BTA on Adoption. Japan (JICA) has conducted a project on strengthening the capacity of institutions of legal implementation, which focused on the assistance of the SPC in standardizing judgments and processes for adapting precedents. Sweden (SIDA) conducted projects on strengthening the governing capacity of the MOJ and purchased facilities for 10 Provincial Divisions of Civil Judgment Enforcement in Vietnam. Germany (KAS) provided facilities to *Thanh Hoa* Province People's Court, and strengthened the adjudicative capacity of *Hanoi* and *Hatay* Province People Courts. Some other projects were also carried out by various donors, such as Canada (DANIDA), who provided software for the e-library and other assistance to the NA's Office, SPC and Supreme Procuracy.

Regarding the FLA in this field, some issues remain: (1) it is unbalanced in terms of the content of cooperation. Too much attention (*including finance source*) has been paid to this area while sponsorship sources are limited. It reduces the amount of sponsorship available for other fields; (2) it is mostly focused at the central level while local agencies lacked of information and assistance. According to a Survey made by the MOJ International Cooperation Group, 22 of the total

of 27 Provincial People's Committees up until now, (28 in total of 52 Local Justice Departments, see Appendix 8) have not carried out any project with foreign partners; (3) so far, there aren't any projects regarding the reform of the court system including the ADCs. Following the mainstream of this research, the below recommendations on constructing institutions have been made:

**Firstly, in respect of reforming the ADCs Model**, the Vietnamese Government should foremost set up a plan for replacing the current people's court system, divided according to administrative units by the new model of regional courts. To prepare for this change without any shock, this process can be taken gradually. It needs to begin from the study of overseas models in which the model of Japanese courts can be a good reference. Apart from the success of previous FLA projects, the assistance of JICA presently in the publication of SPC judgments, legal professional training and so on, have been highly appreciated. Japanese donors deeply understand Vietnamese mechanisms, culture, as well the obstacles faced in the transitional period. Many projects now are focused on improving the judicial branch's capacity, something that Vietnamese partners see as very attractive. As such, it is really a good chance to enhance projects regarding court's reform. Accordingly, the Government should be more active in planning and financing rather than expecting sponsorship from outside.

**Secondly, in respect to founding the new appellate system**, such as the establishment of AJB attached to the Government, the quasi-judicial tribunals, Vietnamese should enlarge the legal cooperation with various donors for gaining experience and assistance since it is still unfamiliar in Vietnam.

**Thirdly, in respect to enhancing the capacity of the judgment execution body**, the Vietnamese and foreign partners should set up projects that directly impact on the effect of the court's judgments at the local level and obtain more participation and response from the ingredient persons. The Law on Civil Judgment Execution was approved by the National Assembly on November 14<sup>th</sup> 2008, which aims to better guarantee the effect of a court's judgment<sup>394</sup>. This new law seems to bring a significant change for the judgment execution in Vietnam. Nevertheless, the execution of administrative judgment in fact is not an easy task, since it still lacks a strict sanction mechanism towards violated agencies or authorities. Thus, the projects on survey of judgment execution at the local level, improving the capacity of executors, studying overseas experiences and so on deserve to be recommend in the future.

**Finally yet importantly**, the cooperation projects should address local governments, especially at the grassroots for improving the governing capacity. A famous French legal idiom suggests *Prevention is better than a cure*, the improvement of awareness, facilities, and treatment

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<sup>394</sup> Some new changes such as: (1) clearly distinction between the management agency attached to MOJ and execution agency at locality, (2) strengthening the capacity of executors by allowing them to use support measures for preventing the attack of debtors, (3) socialization of judgment's execution at locality by defining a new legal post as Execution Delegator (*Thua Hanh Vien*). See *Luat thi hanh an dan su duoc Quoc hoi thong qua co nhieu dot pha*, [Law on Judgment Execution newly approved by NA have some break changes], available at <http://www.moj.gov.vn/p/render.userLayoutRootNode.uP>

policy can prevent civil servants from misconduct. Some projects regarding the improvement of capacity on resolving land disputes, residence registry, social policy, property acquisition and so on at the local level can be a good reference.

### 2.3. Support for Legal Training and Exchange of Legal Information

Parallel to strengthening the legal framework and institutions, human resource training is invariably identified as one of the priorities in Vietnam and attracts the interest of many donors. Currently, some main types of legal cooperation in this field include: (1) Support for basic legal training; (2) Assistance for training legal officers; (3) Exchange of Legal Information. The establishment of Research and Education Center for Japanese Law in Vietnam (2007) provides a good opportunity for the new development of legal training and exchange of information involving not only Japan and Vietnam, but also others in the Cooperation Network. Some recommendations regarding three above types of cooperation mainly addressed to the Japanese donor are as follows:

**Firstly, regarding the basic legal training,** Australia, Canada, France, Germany, Japan, Sweden, Switzerland and the USA as well as the ADB and the UNDP currently support basic training for Vietnamese human resources. In the future, the cooperation in this field should: (1) set up a co-ordination training course for LL.M and Ph.D in Vietnam. Like the experiences of Sweden and France, HLU should cooperate with GSL (Nagoya University) to open Masters and Doctoral Courses, so that students can have a chance to study Japanese laws. Through a Teleconference Network, students can attend the lectures by Japanese professors and freely discuss related legal issues; (2) organize workshops with the participation of foreign experts, particularly relative to the field of public law; (3) dispatch foreign experts to give lectures or discuss ways of absorbing legal theories through analyzing judgments, of writing academic papers and so on; (4) dispatch graduate students of the Law School (before entering *Legal Training and Research Institute*) to be in charge of Japanese law classes at the Research and Education Centers for Japanese Law in recipient countries<sup>395</sup>; (5) continue sending more students to study overseas in all legal fields in which the public law students should be increased; (6) support more facilities, foreign textbooks and law databases.

**Secondly, regarding the training of the legal profession,** this cooperation is very new and carried out by only two organizations in Vietnam, the Judicial Academy and Procuracy College. JICA is supporting the Judicial Academy in designing programs, compiling training documents, supplying facilities and so on. France has sent experts to give lectures to lawyers and notary public officers. At present, CIDA (Canada), the Faculty of Law of Lyon III University (France) and the

<sup>395</sup> See Aikyo Masanori, Nagoya University and Legal Assistance Project Study, [名古屋大学と法整備支援事業。研究] in Jurist No.1358 [特集: アジアにおける法整備支援と日本の役割], pp.23-25 (2008). See more Program of Training Japanese Experts who can design Legal Assistance [法整備支援をデザインできる専門家の養成プログラム] presented by Prof. Matsuura Y (2007-2009)

Delegation of EU are developing cooperation projects with the Judicial Academy to train court's officers.

Nevertheless, the training of the legal profession in Vietnam is not systematic, nor is it of high-quality or professional. This paper supports the idea of establishing Law Schools in parallel with Law Faculty and that the training of legal professionals must be a *Process, not a Single Point* like the Japanese experiences upon the Justice System Reform since 2001. Further discussion on this topic will be carried out in Chapter IV, Part II.2 regarding *Recommendation on Improving Legal Human Resource*. This section focuses on the following suggestion on improving FLA Projects in this field: Vietnam and Donors should: (1) set up projects aiming to strengthen the capacity of administrative judges, such as the skills in analyzing judgments, supplement courses for international integration, foreign languages and IT; (2) provide more advice to the Judicial Academy to reform its training program, focusing on each specific career; (3) exchange judge's experiences through study trips, international symposiums, and Teleconference Networks; (4) reform current legal professional training to ensure a close connection between Basic Legal Education (Law Faculty), Vocational Training (Law School), the National Bar Examination, and the Judicial Academy.

**Finally, regarding the exchange of legal information,** Vietnam should set up more cooperation projects to directly access the legal information of foreign partners, such as Teleconference Networks, Internet Law Databases (*Translation of Japanese Law in English*), and the e-Legislation Dictionary<sup>396</sup>.

The newly established Research and Education Centre for Japanese Law provides not only Japanese language and law tuition, but also facilitates the exchanging of legal information among scholars and law students. In the future, it should provide some useful courses for exchanging experiences on specific law fields, the skill of analyzing and teaching court's judgments, the skill of writing papers and so on.

Japan (JICA) cooperated with Vietnam since 1993. Up until present it has provided ongoing legal assistance to Vietnam as a "*pivotal means of assistance and part of JICA key policies*"<sup>397</sup>. In its strategy, it aims to "*extend support to developing countries to develop their laws which encompasses support for drafting of specific bills, creation of various legal systems for the implementation of laws and the capacity building of legal experts and practitioners*"<sup>398</sup>. The legal assistance cannot succeed by merely assisting the draft of bills, but requires actual law implementation and training of human resources. Upon the New JICA policy, it will provide creative, highly effective support towards the *inclusive and dynamic development* process which focuses on

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<sup>396</sup> These Projects are led by Prof. Matsuura Y., Director of Legal Information Research Center of Nagoya University established in April, 2008. See *Ibid*, at 23-24

<sup>397</sup> See "*Basic Policy for Legal Assistance of Japan*" issued by Japan International Cooperation Agency (JICA) on July, 11<sup>th</sup> 2001

<sup>398</sup> *Ibid*

four missions: 1) *addressing the global agenda*, 2) *reducing poverty*, 3) *improving governance*, 4) *and achieving human security*. Among recipient countries, Vietnam cannot help being involved in JICA's *long-term* perspectives since it is a complicated yet dynamic transitional country and its success in reforming legal system will prove the success of New JICA projects.

Nagoya University has recently been carrying out some active FLA projects that focuses on the improvement of legal human resources, particularly for the younger generation (*as one of the priority areas in the strategy*), the legal information facilities, the foundation of legal basic sciences in Asia and Africa, the responding to what the recipient countries need<sup>399</sup> and so on. To reform the administrative law system in transitional developing countries such as Vietnam, Japanese professors find a necessity in approaching the basic theory and *paradigms*, particularly those relative to the mechanism of institutional change under the view of economic study<sup>400</sup>. It is an extremely useful suggestion for this dissertation, to approach institutional change theory for recommending reform of the current ADCs Model which will be discussed in Chapter IV. In February 2008, Japanese MOFA held an International Symposium regarding the philosophy and the way of promotion to FLA relative to *Democratism* and *Human Rights* which attracted many scholarly interests. It lead to the imperatives of researching and promoting such a field in recipient countries<sup>401</sup>.

Thus, Vietnam, as a promising recipient country, should, based on its own actual conditions, set up appropriate cooperation programs that satisfy its actual needs. This dissertation, *apart from emphasizing the necessity of legal cooperation with diversified countries*, mainly supports a close, confident legal cooperative relationship with Japan.

### Concluding Remarks

Borrowing foreign laws and legal theories by means of FLA is a *voluntary* transplant and more preferable in the contemporary context. To reform the existing ADCs Model and Jurisdiction, Vietnamese lawmakers need to follow the mainstream of civil law thinking, and Asian legal traditions in accordance with the domestic facts. France, China and Japan have been chosen for the studying of experiences due to the historical colonial influence (*China, France*), Asian values (*China, Japan*), the earliest and most enthusiastic donors who carried out FLA projects (*France, Japan*), and a mature experience in importing foreign laws (Japan). This Chapter considers that Vietnam can learn from the experiences of each of the above countries, but cannot totally follow any model. Concurrently, the creation of a new model for ALRS needs to avoid a mishmash of borrowed things.

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<sup>399</sup> The Project of Promotion on Research Correspondence with the Need of Regions of Japanese MEXT, [ニューズ対応型地域研究推進事業] represented by Prof.Aikyo Masanori (2006-2009).

<sup>400</sup> See Ichihashi Katsuya, Basic Theory for Administrative Law Reform and Legal Assistance thereof in Market Economy Transitive Countries, [市場経済移行国における行政法改革及びその支援のための基礎理論] in Symposium on Legal Assistance Strategy Study held by CALE on December, 13-14, 2008

<sup>401</sup> See Aikyo Masanori (2008), pp.22-25

To achieve success, Vietnam needs vigorous support from foreign donors regarding the constructing of a legal framework, institutions and training legal human resources. Based on given foreign experiences and FLA projects, the next Chapter will further discuss the new challenge to the existence of ADCs Model and suggest academic views of this author for reforming it.

## CHAPTER IV

# NEW CHALLENGES TO EXISTENCE OF CURRENT ADCs IN VIETNAM

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### Introduction

*“As one looks at policy developments and the burgeoning law and development literature, it looks as if we are entering a new stage in ROL era...Official ideas about the ROL become complexified. Attempts to transplant formalist ROL to developing/or democratizing countries could actually be counter-productive for economic, institutional, and political development, especially when informal mechanisms would be more effective and efficient...”<sup>402</sup>.*

**(David M. Trubek, *The Role of Law in Development: Past, Present, Future*, 2005)**

*“The change of taking administrative lawsuits to independent administrative jurisdiction body rather than to courts is in accordance with the new trend of the world that entrust the adjudication to a special body with high quality and familiar with its usual work...We respectfully propose to establish the Administrative Jurisdiction Body (AJB) where can independently and impartially review all administrative decisions and actions protested by any organization and individual including foreigners”<sup>403</sup>.*

**(Vietnam-STAR Project, *Recommendation on Establishment of AJB*, 2006)**

Chapter IV takes considers deeper *whether the existing ADCs Model can survive from facing with the strict criticism and the current strong supports for other prevailed models*. The reform of ADCs Model, like the reform of any economic or political institution, is always a complicated issue and closely related to the transplanting of the ROL for the time being in Vietnam. This Chapter is inspired by *David M. Trubek’s* above suggestion and questions whether in order to reform the current Vietnamese administrative court system, is approaching the informal institution of ROL relevant to Vietnam? It analyzes four main models vigorously supported recently among scholars, particularly the model of AJB attached to Government. It mainly argues that the current ADCs Model is failing to meet current demands. It needs to be changed by creating a Regional Court

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<sup>402</sup> David M. Trubek, *The ROL in Development Assistance: Past, Present and Future*, in Y.Matsuura ed, *The Role of Law in Development: Past, Present and Future*, pp.13-16 (2005)

<sup>403</sup> Vietnam-Star Project, *Bao cao va Khuyen nghi ve viec thanh lap Co quan Tai phan Hanh chinh o Vietnam*, [Report and Recommendation on Establishment of AJB in Vietnam], in *Thanh tra Chinh phu* (2006), p.127-129 (2006)



Model (*Judicial Review System*) in parallel with the Model of AJB attached to Government (*Appellate Review System*) so that it can better guarantee Judicial Independence and more effectively protect all individual's legal rights and interests in the new era of ROL.

## I. Contemporary Legal Debates on Setting up Models Other than the Existing Model

### 1. Transplanting Rule of Law and Judicial Reform Regarding the Administrative Court Model

#### 1.1. Informal Institutional Approach to Rule of Law

It is common sense that the judicial reforms have been vigorously carried out in both the developed and developing countries recently, particularly in those countries who have just emerged from the collapse of the Soviet Socialist Block. In this process, the transplant and interpretation of the ROL in each country is always regarded as the *spring-board* for any domestic reform. Regarding the current reform of the Vietnamese court system including the ADCs model, some foreign scholars have argued that it “*can not be read as indicating a shift to ROL*”<sup>404</sup>. It seems to be a *rather* strict criticism, and to a certain extent denies all efforts of Vietnamese leadership. As a grounding for the contemporary legal debate regarding the existing court model, it is necessary here to discuss what best approaches to the ROL exist in the current context.

Alan Watson defined comparative law as a *distinct academic discipline*<sup>405</sup> that should be concerned with “*the study of the relationship of one legal system and its rules with another*”. He pointed out the main type of such relationship between systems known as one borrowed from the other or both borrowed from the third<sup>406</sup>. Vietnam, for the best way to improve its own system and *speed up* the reform process, should take advantage of studying overseas experiences of legal transplant by means of the FLA. The question is where should Vietnam study and what kind of model should be followed? It is always necessary to remember that the Vietnamese legal system is closely attached to the Asian legal culture including the Confucian influence. Furthermore, the civil law legacy from the French is also important to remember. Thus, it is inappropriate to import wholesale, a Western model of the ROL as well as judicial review in Vietnam. In the *Comparative Law Workshop* held in London (2000), which was also the centenary of the *First International Congress of Comparative Law*, the comparatists commented that while the 20<sup>th</sup> century looked at similarities between legal systems from the perspective of exportation, in the 21<sup>st</sup> century, “*we*

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<sup>404</sup> See Pip Nicholson, *Distinguishing Law and Development: Legal Assistance and the Vietnamese Courts*, in *International Cooperation in the Field of Legal Studies and Agenda for Comparative Law Studies*, CALE Papers on International Symposium, 53 (2005)

<sup>405</sup> Alan Watson (1993), pp.1-9

<sup>406</sup> *Ibid*, at 7

should look for differences from the importation perspective”<sup>407</sup>. David Trubek, the famous comparatist supporting for the ROL’s importation in the era of *New Law and Development*, recently suggested that there should be an opening for the introduction of new ideas of ROL. It can avoid both the idea of “one size fits all” and the “sure faith in legal transplant”<sup>408</sup>. He quoted the World Bank’s points of view that: “attempts to transplant formalist ROL to developing countries could actually be counterproductive for economic, institutional and political development, especially when informal mechanisms would be more effective and efficient”<sup>409</sup>.

This dissertation supports the informal institution approach to the ROL in the current Vietnamese context. As evidence, the following two main theoretical questions should be clearly provided: (1) How do institutional factors change society? (2) Why is an informal institution approach appropriate for transplanting ROL in a country deeply derived from *Asian values* like Vietnam?

**For the first question**, Douglass North firstly defines institutions in to formal and informal constraints<sup>410</sup>. Masahiko Aoki also added some elements, such as formal rules including political rules such as constitutions, state laws and regulations, economic rules and contracts, and informal rules attached to social norms, ethical rules and conventions and so on<sup>411</sup>. The biggest concern here is how institutions change in developing countries undergoing economic transition.

**Firstly**, it is necessary to trace back to the *Marxist* theory on “the Base and Superstructure Model” and “Rules in the Relations of Production”<sup>412</sup> to compare and explain institutional change. Under *Marxist* theory, the superstructure is derived from its relationship with production, which is produced in practices associated with the later. Laws which belong to superstructure in origin, then serve as rules to govern the material base. More particularly, *Marxist* historical materialism taught its students that, due to the economic change and growth, the relationship with production fails to fulfill the requirement of development of forces of production. As a consequence, a social revolution occurs to make the relationship of production as well as the social superstructure, including law, compatible with forces of production’s growth. Such social revolutions lead to the establishment of a new social order in which the dominant institution benefits the ruling class.

**Secondly**, it is necessary to approach the traditional theory of *New Institutional Economic*

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<sup>407</sup> Andrew Harding & Esin Orucu ed, *Comparative Law in the 21<sup>st</sup> Century*, 9 (2002)

<sup>408</sup> See David M. Trubek (2005), p.15

<sup>409</sup> See Legal Institution of a Market Economy, World Bank Web, available at <http://www1.worldbank.org/publicsector/legal/index.html>

<sup>410</sup> See Douglass C.North, *Institution, Institutional Change and Economic Performance*, 4 (1990)

<sup>411</sup> Masahiko Aoki, *Toward A Comparative Institutional Analysis*, 5 (2001)

<sup>412</sup> See Hugh Collin, *Marxism and Law*, pp.77-85 (1982)

that was rooted in *Ronald Coase's* fundamental insights about the critical role of institutional frameworks and transaction costs for economic performance. Institutions as “*the rules of game*” and under this game, economic growth and its efficiency are principal factors causing an institutional change. *Douglass North* agrees fully with *Ronald Coase* who made the crucial connection between institutions, transaction costs and neo-classical theory in terms of the existing institutions reflecting economic efficiency. However, he argues that “*the neo-classical result of efficient markets only obtains when it is costless to transact, when it is costly to transact, institutions matter*”<sup>413</sup>. Thus, as a new approach, he sees changes in *relative prices* as a major force inducing change in institution, and affirms the main function of institution is to *reduce transaction costs* in the economy. In addition, he argues that the institutional change is possibly affected by cultural, and environmental factors. Another approach to the institutional change can be found in *Knight's* view that social conflicts and the way of settlements may result in the change of institution<sup>414</sup>.

Thus, regarding the institutional change, *Marxist* theory, to a certain extent, may share some commonalities with *New Institutional Economics*, such as the factor of economic growth and social conflict inducing institutional change. Both of these also share the view that institutional change is not easy work, nor is it a smooth path. However, the fundamental distinction lies on what *Marxists* “*emphasize [as] the tensions created by class struggle*” found in the Communist Manifesto (1848) and “*social order was seen as a problem of political stability*”<sup>415</sup>. *New Institutional Economics* is purely an economic and institutional theory that is distinguished with the *revolutionary violence* theory initiated in *Marxist-Leninism*.

**For the second question**, it first should be noted that, to fulfill the requirements of the market economy, many former socialist and Asian countries have imported the ROL, as a set of formal institutions originating from the West. However, it is undeniable that many of these attempts have failed. Speedy privatization and rapid political reforms do not mean the ROL can be quickly achieved. It is supposed that when the formal contents of the ROL are not compatible with the informal institutions in a transitional society, failure is unavoidable. Incompatibilities include, the absence of core elements of ROL, the overlapping in the legal system, and the defect of enforcement mechanisms. Particularly where the formal institution of ROL fails to correspond with real practice, people are inclined to seek social norms and informal practices to secure their rights. This tends to become grounds for corruption, bribes, or other bad conduct of the administration. As a result, it cannot avoid creating burden on the judicial court in general and the administrative court in particular.

In Vietnam, like some East Asian countries with deeply rooted Confucian values,

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<sup>413</sup> Douglass C.North, *The New Institutional Economics and Development*, <http://www.econ.iastate.edu/tesfatsi/NewInstE.North.pdf>

<sup>414</sup> See Jack Knight, *Institutions and Social Conflict*, pp.4-12 (1992)

<sup>415</sup> Hugh Collin (1982), p.129

transplanting the ROL has apparently faced the restraints of informal institutions. Furthermore, political reform is always a pre-condition and pressure for such requirement of ROL. An interesting point for discussion is whether to maintain informal institutions while adding some appropriate elements or immediately introduce a new formal institution.

**This paper supports the former because of the following reasons:**

**Firstly**, in the famous book, namely “*Comparative Institution Analysis*” (2001), Aoki distributes a wide-ranging discussion on how institutions evolve and introduce typical types of institutional evolution, particularly regarding the demise of the market communist state. Among them, Type 2 - “*Transfer of Social Capital Across Different Transaction Domain*” (See Appendix 7) implies that, in response to a shock or crisis, the old institution can gradually evolve in harmonization with newly emerged ones<sup>416</sup>. Thus, in the current situation, to adapt to the requirement of ROL, without any shock or obstacle, new institutions should be gradually transplanted and harmonized with existing informal ones.

**Secondly**, as North already argues, the reduction of transaction costs is the main function of institutions. As a result, maintaining informal institutions with some added elements can benefit from such cost reductions rather than absolutely establishing new institutions. As such, to fulfill a formal version of ROL, Vietnam surely lacks many institutions resulting in the requirement of a great deal of money and time.

**Thirdly**, some recent scholars also argue that the tendency for institutional refinement shows the advantages of changing a particular institutional element or adding new elements to existing institutions rather than completely creating an entirely new set of institutional elements<sup>417</sup>. The West has experienced approximately one hundred years of ROL, therefore, it cannot be immediately developed in Vietnam with many traditional legacies remaining. Careless transplantation leads to failure.

My judgment is that, as any transitional country, Vietnam cannot adopt all elements of ROL or copy a Western model in its entirety. Instead, Vietnam should adopt elements based on existing informal institutions. If any informal institution is not against the core ROL, it should be maintained and harmonized with the newly imported elements. In cases where some contrast is evident but does not harm social orders and people rights, it can be gradually adjusted.

## **1.2. Judicial Reform and Vietnamese Communist Party’s Points of View**

The world has witnessed Vietnam’s *Doimoi* (Renovation) since the VI Party Congress (1986). However, from the perspective of judicial reform regarding the court model for impartially

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<sup>416</sup> See Masahiko Aoki (2001), pp.250-253

<sup>417</sup> See Douglass C.North, *New Institutional Economics and Development*. See also Greif Avner, *Institutions: Theory and History*, 38 (2003)

protecting people's legal rights and interests, Vietnam really emerged in the second half of the 1990s.

It is commonly recognized that the CPV is the sole ruling party and “*the force leading the State and society*”<sup>418</sup>. For most Vietnamese, this recognition is due to historical development and objective reality. Since its birth in 1930, the CPV led the Vietnamese people to escape nearly one century of French colonialist rule, liberating the entire country through two bloody wars that undeniably draws the belief in the CPV and consolidates its leading role. Furthermore, Vietnam is influenced by Confucian culture in which loyalty to Rulers is regarded as the most morally required for all people. As a result, what the CPV had done for the country and its people in the past and what it its current efforts in reform, has lead people to respect it and recognize its mandate to govern society. This point is important to understand for foreign observers who may be surprised and feel curious as to why any reform in Vietnam including the establishment of an administrative court model has already found its origins in official Party documents. This section analyzes some requirements of judicial reform regarding the ALRS including the administrative court model based on the development of some fundamental CPV's documents:

**Firstly**, it must evidence the Resolution 08 of the VII CPV Congress (January, 23<sup>rd</sup> 1995) on “*Further Improving the Socialist Rule of Law State of Vietnam with the Focus on Public Administration Reform*”<sup>419</sup>. This Resolution underlines the need of building the *Socialist ROL State* that fully protects the democratic rights of people and preserves the social order. Regarding the ALRS, it clearly emphasized that “*there should enhance the settlement of the people's complaints, promoting the establishment of the administrative courts handling out the lawsuits against the illegal administrative decision or action*”.

In respect to reforming the judicial body, this Resolution points out the necessity of expanding local court's jurisdiction, clearly delimiting jurisdiction between the supreme and local courts, restricting to the *first-instance* and *final* judgment procedure<sup>420</sup>, and requiring particularly the study and creation of specific courts dealing with economic, administrative matters and so on. The result was the promulgation of the revised LOPC (October, 28<sup>th</sup> 1995), which empowered the people's court system to handle administrative lawsuits, and the birth of the ADCs in July, 1996. Thus, this Resolution was highly appreciated as a *break-through* in forming the administrative litigation system in Vietnam.

**Secondly**, Resolution No 8 NQ/TW by the CPV Politburo (January, 2<sup>nd</sup> 2002) needs addressing. This Resolution is regarded as a critical review of five years of administrative lawsuit experiences on settlement. The first issue laid down in this document was that “*the adjudicative*

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<sup>418</sup> See Vietnamese Constitution (2002), Art 4

<sup>419</sup> See Nghi quyết 8 Hoi nghi Ban chap hanh Trung uong Dang Cong San Vietnam Khoa VII, The Resolution No 8 of the VII Party's Congress (January, 23<sup>rd</sup> 1995), available at [http://www.cpv.org.vn/print\\_preview.asp?id=BT2660737535](http://www.cpv.org.vn/print_preview.asp?id=BT2660737535)

<sup>420</sup> *So tham dong thoi la chung tham*. This judgment procedure was abandoned since the promulgation of the Revised LOPC (2002)

*works must be met with the Party's strategy and policy*", and *"it needs to closely obey to and serve suitable political tasks that set up in each period"*. This guidance may be criticized by foreign observers since they consider that the Party deeply interferes with the judicial workings. In fact, it is a constitutional principle binding the organization and operation of all Vietnamese state mechanisms and public servants. Nevertheless, this Resolution strictly requires the liability of the judicial bodies and authorities. Particularly, based on the theoretical controversy and practical legacy regarding the administrative court model and jurisdiction, this Resolution provides the following main points of guidance: (1) Expanding the local court's jurisdiction, especially the jurisdiction of the district court to recover the stagnation in settlement of administrative lawsuits at locality; (2) Reforming the organization of SPC to improve performance of the supervisory trial and of making guidance on adjudicating works to local courts; (3) Facilitating the infrastructure of judicial bodies as well as the reasonable payment policy for judicial officers.

**Thirdly**, Resolution No 48 NQ/TQ by the CPV Politburo (May, 24<sup>th</sup> 2005) on *"Strategy for Building and Improving Vietnamese Legal System up to 2010"*<sup>421</sup> will have a profound significance in setting up some important legislative works in coming times. This Resolution comprehensively assesses the defect of the whole legal document system in Vietnam, including overlapping, low-effectiveness and unfeasibility. It recognizes the contradiction of legal norms related to the settlement of administrative claims and litigation that fails to fulfill people's expectations, particularly the requirements for Vietnam's Accession to the WTO. Regarding the settlement of administrative lawsuits, the following fundamental guidance should be noted: (1) Guarantee that any illegal administrative decision or action be discovered and resolved in a timely fashion by the court. This means that in the future, people may take any administrative lawsuit to courts without the restriction of enumerated matters; (2) Establish a legal mechanism that allows the Government to require or make objection to any serious violation in the field of administration upon the judicial litigation procedure. It seems that Vietnam, to some extent, has learned from the Japanese experience regarding the right of objection of Prime Minister, laid down in the article 27 of ACLL of Japan; (3) Revise and codify parts of ALRS, such as the ALL, APL, Appeal Law, State Compensation Law, LOCD and so on; (4) In respect to internal integration, this Resolution points out the imperativeness of re-checking all domestic legal norms to discover any provision against international customs and treaties that Vietnam stands as a member. The areas of most concern are the settlement of administrative lawsuits involving foreign subjects and the issue of guaranteeing equal status of foreign standings and the resolving of law conflict issues.

**Fourthly**, along with Resolution No 48 NQ/TQ mentioned above, Resolution No 49

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<sup>421</sup> See *Cac Van kien cua Dang va Nha nuoc ve Cai cach Bo may Nha nuoc*, [Official Documents of Party and State Regarding State Mechanism Reform], in Ho Chi Minh National Political Institution, pp.2-15 (2005)

NQ/TQ by the CPV Politburo (June, 2<sup>nd</sup> 2005) on “*Strategy on Judicial Reform up to 2020*”<sup>422</sup> forms the most important Party documents for coming times. It definitely emphasizes the task of judicial reform as being to extend the adjudicative jurisdiction of courts over settlement of administrative lawsuits, particularly to renovate judicial proceedings that make it simpler and more convenient for people assessing lawsuits. It must ensure equality between citizens and state agencies or authorities before courts. This Resolution does not mention “*the adjudicative works must be met with Party’s strategy*” and “*serve suitable political tasks*”, but it still confirms the Party Ruling over reform of the whole judiciary to ensure political stability and orientation of building *the Socialist ROL State*. The following issues concerning the effect of ADCs should be identified: (1) the continued enlarging the court’s jurisdiction over administrative matters and the preparation for the establishment of regional courts; (2) the reform of some legal proceedings for assessing and resolving administrative lawsuits; (3) The gradual publication of judgments through Collection Books or Internet, excluding those involving national security or causing negative influence on society; (4) the guarantee of the effect of court’s judgment and execution; (5) the consideration of the project of replacing the existing Procuracy System by a Prosecution Institute (*Vien Cong to*). Thus, whether the Procuracy still holds a supervisory function over judicial activities or to what extent it can participate in administrative lawsuits are being deeply considered.

Truly, some recent reforms regarding the ALRS have resulted from the above Party Resolutions. Apart from some fundamental revisions of LOCD (2005), OSAC (2006), a new Law on Civil Judgment Execution (2008) has been made, some other fundamental laws related to this have also been released for public opinion and are in the drafting process.

**To conclude**, some recent Party’s Resolutions have had a profound impact on setting up the overall strategy and policy for judicial reform including ALRS. These Resolutions have emphasized the renovation of proceedings that have created more favorable conditions for people to access justice and participate in court proceedings on an equal status with state agencies and authorities. Undoubtedly, this trend aims to reinforce public confidence in to the entire court system in general and ADCs in particular. However, to what extent it can ensure judicial independence and how best to guarantee people from administrative misconduct are still topics of controversy. In the strategy of judicial reform, the CPV provides a general framework and the promise of reforms relative to the court’s jurisdiction. It still, however, leaves behind real debates among Vietnamese scholars regarding an effective model for JRAA. In fact, the defects of the existing model once again result in hot debates among scholars as to whether courageously set up new models or preserve the existing one. The next section will analyze this controversy under the scholarship’s points of views.

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<sup>422</sup> Ibid, at 16-25

## 2. Constant Debate on Looking for the Best Model

### 2.1. Whether to Form an Administrative Jurisdiction Body Attached to Government

As analyzed in Chapter I, this model was once strongly supported by Vietnamese scholars influenced by the French administrative court system and those working in the state inspection agencies during the first half of the 1990s. As a matter of unconstitutionality and some inconveniences concerned, this model was finally refused before the revision of LOPC in October 1995.

However, due to the defects in existing ADCs as well as criticism for its low effectiveness over the past ten years, this model once again has been vigorously supported by a considerable number of scholars. In early 2006, the Government Inspectorate, under the implementation of the Government Mission Agenda of the year 2006, cooperated with other relative state agencies, along with the grant-help of Vietnam-STAR Project, to set up a research project on “*Establishment of the Administrative Jurisdiction Body in Vietnam*”, in which this model was centrally discussed and approved.

Deputy General Inspector, *Vu Pham Quyet Thang* as a leader of this project, presented some main reasons for establishing the new AJB attached to Government, such as the defectiveness of the self-reconsideration mechanism within the internal administration, the low impact of ADCs, the lack of an effective mechanism for judgment execution and the requirement of international integration.

**Firstly, regarding the administrative law theoretical issue,** *Dinh Van Mau* repeated what he used to suggest ten years prior about this model, based on the French administrative law theory as well as the practical experiences of France and Thailand regarding the model of Council of State. His theory was to clearly distinguish between the administrative jurisdiction and the judicial jurisdiction. He also gave three main types of litigation concerning state agencies: the legislative litigation, the judicial litigation and the administrative litigation in which the last must be in hands of a state agency independent from other administrative agencies, but belonging to the government, like the French *Conseil d’Etat*. *Dinh Van Minh* has been a very enthusiastic supporter of the French model since the early 1990s. Passionately inspired by French law theory regarding “*the active and adjudicating administration*”, he evidences the article 13 of French Law of 16-24 August 1790 stating that: “*Judicial functions are distinct and will always remain separate from administrative function. It shall be a criminal offense for judges in the civil courts to concern themselves in any manner whatsoever with the operation of the administrators, nor shall they call administrators to account before them in respect of the exercise of their official functions*”<sup>423</sup>. He vigorously supports the idea that administrative matters should not be handled by current judicial (people) courts, but by

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<sup>423</sup> See *Dinh Van Minh*, Model and Experiences of Establishing AJB in the World, in 9 Review of Inspection Science & of Anti-Corruption, 53 (2006). See also *L.Neville Brown & John S.Bell* (1998), p.127



a *special body* holding adjudicative function within the administration, and thus the Government Inspectorate should be upgraded to such an agency.

**Secondly, regarding the organization of this model,** Vietnamese scholars propose this AJB would be independent from the system of administrative organs and attached to Government under the direct control of the Prime Minister. It should be named “Administrative Jurisdiction Institute” (*Vien Tai Phan Hanh Chinh, herein after referred as to AJI*) and divided into the below three levels:

*At the central level,* the central AJI is formed by the National Assembly and holds three main tasks: (1) Resolving administrative lawsuits relative to the central state agencies and those concerning claims that have been settled by the ministers, the head of equal-ministerial agencies or of agencies belonging to the government, but are still being protested; (2) Consulting with the Government and Prime Minister as to what concerns the administrative fields including specific urgent cases; (3) Making guidance to the local AJI. One scholar suggests that it is not necessary for the Head of the central AJI to be the Prime Minister because he already holds a very busy and complex governing function<sup>424</sup>. Instead, the Head should be approved by the National Assembly under the recommendation of the Prime Minister.

*At the local level,* the AJI should be divided into the regional (*vung*) and area (*khu vuc*) bodies.

The regional AJI should be compounded by some provinces that are empowered to deal with lawsuits relative to both central and local agencies, such as claims that have been reconsidered by the Chairman of Provincial People’s Committee but are out of the consent and claims relative to a certain Minister’s decision.

As for the above regional AJI, the area AJI shall comprise of districts or cities belonging to provinces that handle lawsuits relative to district agencies and those concerning the claims that have been reconsidered by the Chairman of District People’s Committee but are still in disagreement.

The personnel working in the AJI at all levels can be called adjudicator (*Tai phan vien*), being categorized in to three levels: the *adjudicator*, the *middle-rank adjudicator* and *senior adjudicator*. Except the top of AJI, all other adjudicators will be appointed and dismissed by the Prime Minister based on the recommendation of the *Advice Council* formed by him.

It should be said that in general, this model resembles that which was proposed ten years prior. However, in order to avoid the existence of two Supreme Courts, which would be regarded as unconstitutional, some scholars suggest that at the central level, there Vietnam should also set up the administrative division within the SPC. This division court would conduct supervisory trials (*Giam doc tham*) on all administrative judgments made by AJI system. Thus, it would conform with Article 18 of the Constitution stating that “*The SPC is the highest adjudicatory body of the Socialist*

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<sup>424</sup> This is given by Nguyen Van Thuan, The Deputy Chairman of NA’s Legislative Committee. See Thanh tra Chinh phu (2006), p.88

*Republic of Vietnam*".

**To follow this model, there are two main opinions among scholars:**

*Some scholars propose the establishment of AJI, but still keep the model of ADCs for judicial review.* Following this opinion, they divide the process of resolving administrative disputes into three periods: (1) *Firstly*, it is the mediation or “*self-control*” period carried out by the administrative agency or authority who renders the complained decision or action; (2) *Secondly*, in case of disagreement, it will be followed by review period conducted by the system of AJI. Such AJI will examine both the legality and rationality of the litigated decision or action; (3) *Thirdly*, the ADCs will conduct the judicial review to only the legality of the litigated decision or action and the judgment made by AJI being protested. They believe that this model avoids unconstitutionality that would require the revision of the existing constitution. Concurrently, it fulfills the requirement of WTO regulations that guarantee all administrative litigations be finally reviewed by independent judicial courts, even any final reconsideration decision that has been made<sup>425</sup>.

*Some scholars propose the establishment of AJI by merging the current Government Inspectorate System and the existing ADCs.* Following this opinion, the AJI is regarded as a *real* administrative court like the *tribunaux administratif* and *cours administratives d’Appel* in France. The existing ADCs within the Local People’s Court System will be cancelled, except the Administrative Division within the SPC that holds the final judicial review toward all judgments made by the AJI system through the Supervisory Proceedings. Thus, some scholars want to study French model, but cannot introduce a dual court system like France because of the current Constitution’s restraints. For this reason, the preservation of the Administrative Division within the SPC for final judicial review is the best way to guarantee its supremacy in the whole adjudicating works prescribed by the Vietnamese Constitution. However this proposal seems to reveal an unclear distinction between the *appellate* system and the *judicial review* system and the immature theory thereof in Vietnam.

**Finally, regarding the jurisdiction of AJB attached to the Government (AJI),** some main issues related to the scope for review, judgments and proceedings need to be figured out:

Since the AJI can review both the legality and rationality, the scope for review should be expanded to any administrative law field. The scholars suggest that it should be allowed for people to bring any administrative matter to AJI, excluding some matters that would be out of jurisdiction such as: (1) those relative to national defense, security, diplomacy, or secrete; (2) those arising in the internal administration, such as the decisions on appointment, dismissal or removing from posts and so on. However, regarding the decision on disciplinary measures including job dismissals, the people concerned would be able to bring it to AJI if the reconsideration decision by the administrative

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<sup>425</sup> See Tran Van Son, Model of AJB in the Context of Building the State governed by ROL in Vietnam, in 9 Review of Inspection Science and of Anti-Corruption, pp.41-45 (2006)

agency was protested. The AJI would also be empowered to examine the legality and rationality of the legal norms, but its jurisdiction would be limited to only propose to the competent agency for annulment or revision. Furthermore, the AJI would be able to deal with compensation matters taken by people who are infringed by any illegal decision or action. It was also questioned whether the AJI could review matters relative to the public interest and require the state compensation liability. It can be realized that the scope for review is very large, but this AJI system can not be regarded as a very powerful court, therefore its effect is still doubted.

The AJI, during the handling of lawsuits, can give some kinds of “*judgment*” such as: (1) Confirming the legality or rationality of litigated decision or action; (2) Quashing the whole or parts of the illegal decision or action; (3) Revising some irrational parts of the litigated decision; (4) Requiring the administrative agency or authority to perform legal duties; (5) Determining and Requiring the compensation liability of the administrative agency to the infringed people; (6) Proposing the competent agency to impose the disciplinary measures to the violated public servants; (7) Proposing the competent agency to annul or revise the illegal or irrational legal norms grounded for the litigated decision.

*Concerning the proceedings*, Vietnamese scholars consider AJI can interfere and review at any period of the self-reconsideration by governing agencies. This means that people can directly bring the case to the AJI without the first compulsory grievance to the original agency or authority. At the same time, they can take a case to AJI, even where the first or second reconsideration decisions by administrative agencies have been made. The trial proceedings can be easy to access with the participants of three to seven adjudicators depending on the nature of each lawsuit. Since the adjudicating work of the AJI is different from that of the judicial court, consequently, excluding lawyer participation, the participation of procurators is unnecessary. In principle, the judgments by the AJI strictly bind to all concerned agencies, authorities and people. Immediately after being declared illegal, the alleged decision must be *null and void*. Some scholars propose to study Chinese experience in respect that the AJI can impose fines or demand the bank to deduct from the account of agencies or authorities who fail to fulfill the legal duties concluded by judgment. The AJI also has the right to inform the failure of the judgment’s execution by mass media. Moreover, the AJI may require a police investigation agency to initiate a criminal liability to those who fail to execute judgment resulting serious damages<sup>426</sup>.

**To conclude**, the model of AJB attached to Government but independent of the administrative agency system, has become recently strongly supported among scholars who are influenced by the French system and mainly those working in current government inspection agencies. It can be realized that this idea is derived from the low effectiveness of the existing ADCs

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<sup>426</sup> See Vu Pham Quyet Thang, *Dan de Hoi thao Khoa hoc ve thanh lap Co quan Tai phan Hanh chinh o Vietnam*, [Introductory Speech on Symposium on Establishment of AJB], in *Thanh tra Chinh phu* (2006), pp14-15 (2006)

and the less important role of inspection agencies in the settlement of people's claims. Some scholars want to upgrade this system to become a French administrative court type model, in which the top Government Inspection Agency should become the Council of State. However, the proposed model in fact does not much resemble the French model and holds some very Vietnamese characteristics, such as: (i) the AJI only plays an intermediate role in the settlement process, (ii) it reviews both rationality and legality of litigated decisions or actions, (iii) its "*judgments*" will be finally reviewed by local people court system and SPC that makes the AJI not act as a *real* independent administrative court.

The establishment of the AJB attached to Government in fact is the introduction of a new appellate system, which is totally unfamiliar in Vietnam. This dissertation supports its establishment for the time being and agrees with the Vietnam-STAR Project stating that: "*The change of taking administrative lawsuits to independent AJB rather than courts is in accordance with the new trend of the world that entrust the adjudication to a special body with high quality and familiar with its usual works*"<sup>427</sup>. Some foreign participants in the *Symposium on Establishment of AJB in Vietnam* held by the Government Inspection (2006) also supported the given AJB model. *John Bently*, a senior official of STAR project, suggests Vietnam should establish the AJB in parallel with the existing ADCs<sup>428</sup>. *Edwin Felter*, the judge of *Colorado State* (US) introduced the system of AJB that was adopted in 26 states in America that is located within the Executive Branch but is quite independent from other executive bodies. He suggests that Vietnamese experts should not to be concerned about the establishment of the new AJB leading to an increased expense for Government and also making the mechanism more bulky. He provided evidence of the American experience that it may initially increase expenses, but in the long term, its expense will be reduced because an effective model will be conveniently operated<sup>429</sup>. Thus, in principal, this AJB model is strongly supported currently among scholars. Nevertheless, how the AJB attached to Government is organized and how to distinguish it from the courts of judicial review is still strongly debated. Further discussion will be presented as personal views in the Recommendation Section of this Chapter.

## **2.2. Whether to Set Up Administrative Court Model like Current Military Courts**

This model is proposed by scholars who do not support for the establishment of an AJB attached to Government. The existing model should be maintained and located in the system of the people's court. It would be the same model of the current military courts that consists of three levels: the central military court, the regional military courts and equivalents, and the area military courts<sup>430</sup>.

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<sup>427</sup> Vietnam-Star Project (2006), p.127

<sup>428</sup> See Thanh tra Chinh phu (2006), p.96

<sup>429</sup> Ibid, at 87

<sup>430</sup> See Dang Xuan Dao, Mot so van de Vai tro cua Toa Hanh chinh trong Giam sat Quyen luc Nha nuoc, [Some Issues Regarding

Thus, the Central Administrative Court is the branch within the SPC, and the Chief Justice of this court will be a SPC's Deputy Chief Justice<sup>431</sup>.

According to this model, *Dang Xuan Dao*<sup>432</sup> considers that it can avoid making the existing system more bulky and still guarantees the quality of settlement of administrative lawsuits by means of judicial courts. His point of view is faithful to Article 127 of the Constitution (revised 2002) and the Article 1 of LOPC (2002) stating that “*The supreme people's court, the local people's courts, the military courts as provided by laws are the adjudicative agencies of the Socialist Republic of Vietnam*”. Accordingly, in Vietnam, only the court holds the adjudicative function. This means that if any other model is established, it must be under the name of the judicial court and located within the people's court system. The only difference with other civil or criminal people's court divisions is that the administrative court would be divided into the region and area to avoid the strong influence from local administration.

In nature, the scholars supporting this model do not want to change the current ADCs as well as any provision of Constitution. It seems to be in line with Party's points of views regarding Judicial Reform Strategy analyzed in the last section, such as: (1) Re-organizing the local ADCs and the Central Administrative Court as a more separated branch within SPC; (2) Enlarging step-by-step the administrative court's jurisdiction to avoid the overload of administrative lawsuits as well as to conform with the judge's capacity at the current time; (3) Improving the judge's capacity.

**In short**, this proposed model is in nature the same as that proposed before 1996. Some scholars criticize that this model seems not serve the infringed people but only the convenience of state governance. It also does not conform with the contemporary administrative law theory and restrains infringed people from other effective channels for impartial review. Since there are many diversified opinions regarding what kind of model should be set up, it is really a challenge for the existence of the ADCs model. The next section will further discuss whether the regional administrative courts should be set up.

### **2.3. Whether to Establish a Model of Regional Administrative Courts**

The idea of establishing regional administrative courts emerged in the early 2000s due to the dependence of the local courts on the governing agencies at the same level, during the settlement of administrative lawsuits. Some scholars considered the choice of this model as the best way to guarantee judicial independence.<sup>433</sup>

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Role of ADCs in Supervising the State Power], in *Thanh tra Chinh phu* (2006), p.50

<sup>431</sup> See LOPC, Art 34, 35

<sup>432</sup> He was a SPC's Administrative Judge, a Chief of Secretary Board of SPC of Vietnam

<sup>433</sup> See Le Thi Nga, *To Chuc Toa an Nhan dan Khu vuc – Nhung Van de Ly luan va Thuc tien*, [Reorganizing the People's Regional Courts: Theoretical and Practical Issues], in 4 *Legislative Study Journal*, pp.51-57 (2003)

According to this model, at the local level, some provinces would share the same *one Regional Administrative Court*. In the same way, some districts within one or more provinces would share the same *one Area Administrative Court*. However, at the central level, the administrative court would be either: (1) subordinated to the SPC as same as model of a central military court or (2) subordinated to the National Assembly and absolutely independent from the People's Court System.

It is apparently realized that while the former (1) is a compromise between the ideas of setting up an independent administrative court and that of subordination to the SPC at the top, the latter (2) is completely inspired from the German model. Scholars supporting the latter consider that this court system should be absolutely separated from the judicial courts and review only the legality of the litigated decision or action. If the system of Government Inspection were upgraded to become an independent administrative court, it would hold only the adjudicative function without an advisory function to the government. Thus, at the central level, the Administrative Court and the Chief Justice would be formed and appointed by the National Assembly. At the locality, the personnel of the *regional* and *area* courts would be under the direct control of the Chief Justice of the Central Administrative Court and would be required to hold independent status from the local administrative agency.

To organize the model of the regional courts, Vietnamese scholars suggest that it should not be based on the geographical (*administrative*) unit, but rather on the court's adjudicating jurisdiction. Deputy Chief Justice of the SPC, *Dang Quang Phuong*, based on the Strategy on Judicial Reform initiated by the CPV's Politburo, suggests that Vietnam should establish High Courts (*Toa thuong tham*)<sup>434</sup>. Accordingly, the regional administrative court system would consist of four levels as follows:

(1) Area Courts of the First-Instance (*Toa so tham khu vuc*). Each Area Court would include some districts in one or more provinces and empowered to hear the case at the *first-instance*;

(2) Regional Courts of Appeals (*Toa phuc tham vung*). Each Regional Court would include one or some provinces that hear the appeal from area courts of the *first-instance*. Besides, this court would also hear the case of the *first-instance* regarding the plaintiff as a central agency or complicated cases involving foreign factors;

(3) Administrative High Court (*Toa thuong tham*) would number five upon the territorial division of Vietnam, such as the North, the Middle, the South, the Central High-Lands and the *Mekong Delta*. Each High Court would hear the *appeal* of the *first-instance* judgment of the Regional Court;

(4) The SPC would hear the supervisory or review trials. Furthermore, the main important task of the SPC would be to make guidance to inferior courts in resolving the encountered issues,

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<sup>434</sup> See *Dang Quang Phuong*, *Se Thanh lap Toa an Khu vuc*, [Whether Regional Court Should be Set up], available at <http://vietbao.vn/An-ninh-Phap-luat/Se-thanh-lap-toa-an-khu-vuc/40108555/218/>

publishing *supervisory* judgments.

This model seems to avoid the impact of local governments in the appointment and dismissal of judges. Under the present law, the judge's term is five years from the date of appointment. The appointment of local judges depends on the decision of the *Provincial Judge Selection Committee* that consists of members of Provincial People's Council, Local Government Organizational Board, Fatherland Front and so on<sup>435</sup>. In practice, the limited term (5 years), the pressure of local government on the judge's appointment as well as the dependence on the budget and infrastructure are the main obstacles for administrative judges to act in an unbiased way towards local governments as the defendants in a lawsuit. The Deputy Chief Justice suggests that judges in the future should be appointed for a *lifetime* to make them more confident in their work. Thus, the idea of setting up regional courts along with the *lifetime* appointment of judges is a promising reform. Nevertheless, some scholars still question whether it is feasible, because it may fail to fulfill the principle of the Party Ruling, the Democratic Centralism compulsorily binding for all state mechanisms. Surely, it may involve other issues, such as the budget, the infrastructure, contradicting legal norms and so on.

**To conclude**, although still controversial, the establishment of regional administrative courts is a worthy proposal. Excluding the establishment of a central administrative court that is independent from the SPC like the German model, as it may be hard to consult, the setting up of regional courts within the people's court system in principle is in accordance with the current context. In this case, the existing court model should be reconstructed to ensure its independence from local governments. However, whether it becomes really independent from the Government and Party's Ruling is still likely to be a controversial topic for the long-termed process of state and judicial reform in Vietnam.

#### **2.4. Whether to Introduce a Model of Administrative Tribunals**

Recently, some scholars who have studied in America, Britain, Australia and some other common law countries have introduced this model to Vietnam. Furthermore, some foreign experts from the US, Singapore and so on are undertaking FLA projects and also suggest this model through symposiums and individual research.

The administrative tribunal is known as a hybrid between a court and administrative agency. The term "*tribunal*" in English has diverse meaning. Tribunals are the creation of statutes and they deal with various disputes and claims. In England, most functions of the welfare state, such as health services, industrial insurance and national assistance, have led to a proliferation of tribunals. According to the *Report of the Committee of Administrative Tribunals and Enquiries* (1957), the

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<sup>435</sup> See Ordinance on Judges and People Assessors of the People's Court, Art 24, Art 27 section 1

administrative tribunal is best regarded as a supplement to the ordinary court structure.<sup>436</sup> This report also considered that the tribunal should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration.

In Australia, under the *Administrative Appeals Tribunal Act 1975*, the most significant underlying changes introduced with the administrative tribunal are the availability of review on the merits, and a right to obtain reasons for decisions. In greater detail, the Australian administrative tribunal refers to the institution that belongs to the executive branch but is independent from other administrative agencies. It is not a court of law, but empowered to review the legality and rationality of the litigated administrative acts. It is designed for review of merits, and consequently can be often called “*the merit review tribunal*” for its distinction to the courts of law. In principle, the procedures for access to administrative tribunals is less formal and less difficult than that of the courts of law. It does not review only the legality as the court and is often regarded as the best choice for the decision-making agency to recover its mistakes. The courts of law can give the final judgment to the decisions made by administrative tribunals<sup>437</sup>.

In America, the model of administrative tribunals has been adopted in 26 of the 53 states. Like any common law country, this tribunal is located within the executive branch but independent from the other administrative agencies. *Edwin Felter*, a justice of *Colorado*, mentioned that this kind of tribunal was recently established in each state of the US<sup>438</sup>. In *Colorado*, it was created in 1976 and various tribunals have been established to redress people’s claims, such as the tribunals regarding the control of land use, personal welfare, transportation, industry and employment, immigration of aliens and so forth. Regarding in particular the public servant, there is also the appearance of the so-called *Merit System Protection Board*<sup>439</sup>.

Administrative tribunals are apparently welcomed in common law countries due to some advantages, such as their ability to review both the legality and rationality of any litigated decision or action; its proceedings are often simple and timely and it also provides a good opportunity for the speedy completion of disputes. Another reason is that these countries lack mature administrative courts which have historically existed in the civil law system. The establishment of administrative tribunals in common law countries does not preclude the role of courts by means of judicial review to any legal act. Thus, the advantage of these tribunals does not mean that it will be the same when it is imported to a civil law system as well as to any transitional country like Vietnam. Some

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<sup>436</sup> See Report of the Committee of Administrative Tribunals and Enquiries, 218 (1957). It is cited by North Holland, *English and Continental System of Administrative Law*, 23 (1978)

<sup>437</sup> See Nguyen Van Quang (2006), pp.292-295

<sup>438</sup> See Edwin L.Felter, *Binh luan ve De an thanh lap Co quan Tai phan Hanh chinh*, [Comments on the Project of Establishment of AJB], in *Thanh tra Chinh phu* (2006), pp.150-155

<sup>439</sup> See Dinh Van Minh, *Co quan Tai phan Hanh chinh o Hoa ky va Suy ngam ve Co quan Tai phan Hanh chinh o Vietnam*, [The AJB in US and Some Consideration on this Model in Vietnam], in *Thanh tra Chinh phu* (2006), p.190



Vietnamese scholars introduce this model, but they still preserve other existing systems regarding the settlement of administrative disputes. Supposing that administrative tribunals were adopted in Vietnam, the ALRS in Vietnam would be in the hands of a wide range of state agencies, such as: (1) the first reconsideration by the original agency or authority and their superiors; (2) the advice and inspection by the government inspectorate agency; (3) the supreme supervision of the National Assembly and the supervision of the Local People's Councils toward all administrative activities; (4) the judicial review conducted by the ADCs; (5) the supreme control of Procuracy through its participation in the administrative lawsuits or in case of its standing as a prosecutor (6) the quasi-judicial review by administrative tribunals. Thus, this mechanism seems to make the state apparatus more complicated, bulky and people would not know which the state agency could best guarantee their infringed legal rights and interests.

Let us examine the two promising administrative tribunals as suggested by scholars most in favor of each. The models are as follows: (1) the Model of Land Tribunals and (2) the Claim Settlement Council within Ministry.

**Firstly, regarding Land Tribunals**, the Vice Minister of Ministry of Natural Resources and Environment recently proposed to the National Assembly to set up this kind of tribunal for effective and complete settlement of lawsuits regarding land<sup>440</sup>. In fact, land lawsuits counted for about 50 % of the total number lawsuits, however many petitions were returned due to them being beyond the court's competence or violating the legal time limits. The Vice Minister suggested that this tribunal should possess the following traits:

(1) it should be attached to either the National Assembly or Government, but absolutely independent from the administrative agency system;

(2) It should hold a quasi-judicial function and render its judgment to any dispute relative to the issue of land management;

(3) It should consist of one central tribunal and several regional or area tribunals. There would no need to set up land tribunals throughout the country, rather they should be located in regions involved with "hot" land issues;

(4) the adjudicators would have to equip themselves not only in legal knowledge relative to litigation skill, but also regarding land administration and policy;

(5) its judgments could be either annulment, upholding or revision and would have to be respectfully executed.

Vietnamese scholars consider that the establishment of such land tribunals would have the following advantages:

(1) It would share the burden of land lawsuits on local ADCs, of which, as mentioned in

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<sup>440</sup> See Thanh Ngoc, *Se co Co quan tai phan chuyen phan xu ve dat dai*, [Whether the Land Tribunal Should be Set up], available at <http://vietbao.vn/Nha-dat/Se-co-co-quan-tai-phan-chuyen-phan-xu-ve-dat-dai/45170790/511/>

the above statistics, is about 50 % of its total number of cases every year;

(2) Land lawsuits often involve land confiscation for various purposes as prescribed by law, land policy during the wars, dispute resolution on land-use rights and land compensation in the urbanization process. However, most of these lawsuits not addressed because existing laws limit the court's jurisdiction and disputes such as those without Land-Used Right Certificates are always out of court's jurisdiction. Furthermore, reconsideration decisions by administrative agencies must always be submitted before assessing lawsuits also hamper this process. In addition land disputes mostly involve the factual matters, such as the calculation of land price for compensation, the measure of land area for granting or acquisition, dispute settlements concerning inheritance, grants or transfer during the wars and so on. In these cases, the administrative tribunal seems to be more favorable than the court of law, since it can review both the legality and reasonableness of disputes. In particular, it would also be possible to act as a good mediator for faster completion of disputes;

(3) Following this tribunal, as *Le Quang Binh*, a senior expert of the National Assembly, considers that it would not only end the exclusive rights of the administrative agency handling these disputes under non-transparent proceedings, but also create a good opportunity for lawyers to follow such disputes from their outset. However, he also hesitates that this land tribunal is quite unfamiliar to Vietnam and cannot avoid running into obstacles. He suggests that, instead of the establishment of independent land tribunals, a Council for Settlement of Land Claims and Denunciation attached to Government should be established<sup>441</sup>.

**Secondly, regarding the Claim Settlement Council**, Vietnamese scholars point out that this model already exists in the Department of Intellectual Property of the Ministry of Science and Technology, namely *Advisory Council on Claim Settlement*. This Council is headed by the Deputy Chief of the Department of Intellectual Property and consists of three members. In nature, the claims regarding the grant of license, the registration or revocation of trademarks and so on are brought to the Chief of the Department of Intellectual Property for reconsideration, but this Council takes a preliminary examination of such a cases and consults with the Chief on the most appropriate solution. Vietnamese scholars suggest that this Council should be strengthened further by expanding its jurisdiction to become a real independent AJB. It should not merely give advice but also render effective judgments. The members of this Council should be appointed as *lifetime* members by the Minister and receive payment directly from the Ministry of Finance<sup>442</sup>. It is emphasized that in Vietnam this model is only a preliminary model and is absolutely subordinated to the administrative agency (*Department of Intellectual Property*). In comparison with the model of the AJB attached to Government, introduced in the last section, some foreign experts (such as *Edwin Felter*, a senior

<sup>441</sup> See Viet Phong, *Can thiet thanh lap CQTPHC ve Dat dai*, [The Necessity of Establishment of AJB Regarding Land], available at <http://vietbao.vn/Kinh-te/Can-thiet-thanh-lap-co-quan-tai-phan-dat-dai/10931559/87/>

<sup>442</sup> STAR-Vietnam, *Bao cao va Khuyen khich ve viec Thanh lap Co quan Tai phan Hanh chinh Vietnam*, [The Report and Proposal on Establishment of AJB in Vietnam], in *Thanh tra Chinh phu* (2006), pp.131-133

justice of *Colorado*) consider that it seems to be less attractive because the members of this Council still belong to the governing agency<sup>443</sup>. They are likely to be a member of a litigated agency for its reconsideration rather than an independent adjudicator as in the case of America. Some Vietnamese scholars also refer to the case of China for evidence that such kind of common law model of administrative tribunals. A tribunal system was at one stage suggested immediately after China became a member of the WTO (2001). However, it was finally discarded due to its unfamiliar theory, inconvenience in terms of access and the existence of various channels for supervising administrative activities.

**In short**, the importation of common law administrative tribunals is not easy in the current context of Vietnam. Reasons for this are as follows:

(1) Common law legal theory, as well as the practice of administrative tribunals is quite new to most Vietnamese scholars and law-makers;

(2) The reviewing of administrative activities in Vietnam is conducted by various agencies. Therefore, the establishment of this tribunal apparently makes this mechanism more complicated and bulky. It may give people more choice, but it does not provide the most effective model for their protection;

(3) This establishment leads to obstacles regarding the budget, infrastructure and human resources.

(4) The administrators do not appear to warmly welcome this tribunal.. It cannot avoid the forbearance and non-cooperation from the authority;

(5) Vietnamese lawmakers traditionally have a tendency to learn from the experiences of their neighbors, particularly from China, and some Asian countries, based on the principle “*Take a look to the neighbor to know what they had done, then do it at home in accordance with its own condition*”<sup>444</sup>. If it is adopted and successful in China, it may be a good reference for Vietnam since these countries also share many commonalities. However, why certain items were refused and what obstacles were faced in the adoption of such items in China also constitute a significant and beneficial research topic for Vietnam.

Although a number of models for the ALRS have been proposed recently, each of them also reveals both advantages and disadvantages. It is true that Vietnamese administrative law theory lacks a fundamental background for the development of a judicial review system as well as an appellate system. The reform of the existing ADCs Model is not only essential to find a practical solution, but to improve the contemporary administrative law theory regarding ALRS in Vietnam. The next part will analyze this important theoretical implication as well as give some

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<sup>443</sup> Thanh tra Chinh phu (2006), p. 87

<sup>444</sup> See Dinh Van Mau, *Giai quyét tranh chấp hành chính trong thực hiện Quyền hành pháp và Vấn đề Tai phán hành chính*, [Settlement of Administrative Dispute in Performing Executive Power and Issues of JRAA. See Ibid, at 23

recommendations for the reforming of ADCs Model, Jurisdiction and training legal human resources known as *key factors* to achieve success.

## II. Theoretical Implications and Recommendations

### 1. Theoretical Implication for Future Development of Vietnamese Administrative Law

Vietnamese administrative law theory from the birth of DRV in 1945 until the end of 1980s was absolutely influenced by its Soviet mentor. Its influence peaked after the importation of the *Procuratura (Procuracy)* system in 1960. Particularly, after the country's unification in 1975, Vietnam fully copied Soviet administrative law theory and institutions that served the task of building socialism throughout the whole country. Like its Soviet mentor, Vietnam's administrative law is always a reflection of "*the cultural ethos of the polity in which it develops*"<sup>445</sup> and tends to emphasize the *governing* function rather than the *adjudicating* function which protects individual rights through a judicial body.

The introduction of the ideology of *Socialist ROL State* since the early of 1990s, along with the birth of ADCs in 1996 marked an *epoch-making step* for the development of Vietnamese administrative law. The previous mechanism for the settlement of administrative disputes known as the "*minister-judge*" mechanism was replaced by *Judicial Review* in which people, for the first time, were able to take powerful authorities as defendants to courts for better protection of their infringed legal rights and interests.

Nevertheless, the administrative law theory regarding the JRAA in Vietnam is still under developed causing embarrassment for scholars and lawmakers when it comes to choosing the best model and promulgating effective legal norms grounded for settlement of recently arising disputes. Some reasons can be identified as:

**Firstly**, like any country deeply influenced by the Soviet legal system, Vietnam lacks not only the contemporary administrative law theory but also the legal scholars who conduct detailed research in judicial review, which is known as an interlocked part of administrative law. Let us take an overview of the development of administrative law jurisprudence in Japan. Although its development is not the same as its German or French counterparts, Japan has experienced more than one century of achievements, especially in the Post-War Era. *Tatsukichi Minobe* and *Soichi Sasaki* were known as the *founding* scholars who strove to set the course for *post-war* administrative law in Japan<sup>446</sup>. The generations of Japanese administrative law scholars have been divided into a number

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<sup>445</sup> See H.B.Jacobini (1991), p.143

<sup>446</sup> Dr. Tatsukichi Minobe was very famous with his *Gyosei Joron* (Introduction to Administrative Law- 1948), and Dr. Soichi Sasaki was famous in his *Nippon Koku Gyosei Ippan Horon* (General Treatise on Japanese Administrative Law - 1952). See Itsuo Sonobe, *Comparative Administrative Law: Trends and Features in Administrative Law Studies*, in John Owen Haley ed (1986), pp.53-54

of schools, including the Prewar School, Prewar/Wartime School, Wartime/Postwar School, Three Generations of Postwar School and the Beyond Postwar School. Prof. *Itsuo Sonobe* comments “*the administrative law of Japan will continue to derive nourishment from the study of the foreign administrative law*”, and he quotes Prof. *Yanase*’s explanation that: “*We have somehow learned the conclusions arrived at by Western learning, but it seems that we succeeded in absorbing that total personality make-up that gives birth to those conclusions*”<sup>447</sup>.

**Secondly**, Vietnamese scholars, excluding the compulsory study of Soviet laws and ideology over the past 50 years, have gradually moved towards Western and some East Asian laws since the early 1990s. Vietnamese scholars today still lack the skills for analyzing and selecting the best theory or model in accordance with current contexts. A good experience from Japan is that although it does not *possess* theories, it attempts a showing of consistency to be able “*to achieve any solid interpretation of confidence in such theories*”<sup>448</sup>. Regarding the JRAA, Vietnamese scholars are often embarrassed with the theory of adjudicative and active administration because the powerful administration was traditionally out of any adjudication by an impartial body, and was subject only to reconsideration by itself. Under French colonialist rule, the administrative court and its theory once appeared in Vietnam. Nevertheless, it was apparently not to serve Vietnamese people, and was finally overthrown in the early years of DRV (1945). The judicial review theory absorbed by *French-influenced* scholars was not strong enough to further develop until present due to historical issues. Recently, French legal assistance, through the French *Droit Mason*, has had great influence on the revival of French administrative law theory regarding the operation of administrative courts. However, Vietnam has failed to study the French administrative court model and jurisdiction and created the ADCs model with limited jurisdiction in 1996. Evidence suggests that Vietnam studies foreign experiences, however tries to follow its own theories and models. For such reason, Vietnamese scholars cannot avoid facing difficulties in adopting contemporary theories relative to judicial review, such as the theory of administrative acts, the discretion, state compensation, public interest litigation and so on. Since diversified foreign administrative law theories and models have recently been imported in to Vietnam, including those from unfamiliar common law countries, it has become a great challenge for Vietnamese scholars to cautiously analyze, classify, and follow the best models and build a system that is in line with the development of contemporary administrative law around the world.

**Thirdly**, a reasonable state mechanism for the development of administrative law is also has also come under considerable attention. It is undeniable that the study of JRAA, to a certain extent, is facing obstacles from state mechanisms and the non-support from the administration.

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<sup>447</sup> Ibid, at 56-57

<sup>448</sup> See Y.Yanase, Gakkai Tembo “Gyoseihou” (Academic Prospective Administrative Law), 7 Kohou (Public Law), 132 (1951). It is cited by Itsuo Sonobe, See Ibid, at 57

Recently, the CPV through the Judicial Reform Strategy up to 2020 has already established a good policy for binding the powerful administration by ROL and Judicial Review. Nowadays, it is not *strange* to see a chairman of a local people's committee as a defendant at court for his illegal decisions or actions. Also, scholars are able to presenting their points of view relative to the democratic mechanisms for protecting people's legal rights and interests. Owing to FLA projects, some selected SPC Supervisory Judgments (*from 2004 to 2008*) have just been published through Collection Books. Nevertheless, the judgments regarding the administrative lawsuits in comparison with those of criminal and civil are still limited. To improve the development of Vietnamese administrative law, the best way is to allow all researchers to freely access court judgments and find out what mistakes have been made and what needs to be improved. The idea of how to improve the skills of Vietnamese researchers in making analyses and criticisms on court's judgments attached to theoretical issues is an urgent requirement for the future development of Vietnamese administrative law.

**Finally**, Vietnamese administrative law cannot develop out of the orbit of the contemporary administrative law around the world. As *Tom Ginsburg* comments, for transitional countries like Vietnam, the administrative jurisprudence has grown in recent years and the growth of domestic judicial review has been shown by an expanding body of administrative law<sup>449</sup>. How to make Vietnamese administrative law develop in line with the rest of the world, but still retain its identity, as in the case of Japan is a great challenge for Vietnam's future development.

## **2. Recommendations on Improving the Court Model and Jurisdiction in Vietnam**

### **2.1. The Ruling Party's Role and the State Mechanism**

In the Report to UNDP regarding the reform of ALRS in Vietnam, Prof. *John Reitz* said: "*Vietnamese ALRS needs to be much more independent from the government and the ruling Communist Party in order to have credibility and legitimacy*"<sup>450</sup>.

**Regarding the Ruling Party's Role**, it is true that the ruling CPV has played an important role in leading the whole country from its founding until now. Its leadership is one of the fundamental Constitutional principles (*Article 4 of Constitution*). Any state reform can be found to have originated from the Official Party Documents, including the establishment of ADCs model and the gradual expansion of its jurisdiction over the past ten years. The Resolution No 49 NQ/TW

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<sup>449</sup> See Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 4 (2003)

<sup>450</sup> John Reitz is a Comparative Law Professor of Law Faculty of Iowa University and also has taught at law schools and judicial training centers in Germany, New Zealand, China, Poland, Russia, Ukraine and Vietnam. He currently studies comparative administrative law with special interests in the development of the ROL Ideology in Eastern Europe and Asia, how new democracies are influenced by foreign legal models and how the development of administrative law is related to the democratization. He studied 9 countries's ALRS at the request of UN Development Project (France, German, Sweden, the U.K, the U.S, Japan, Russia, Indonesia and Vietnam) in formulating his recommendation for Vietnam. See Law Professor Reitz advising Vietnam on Reforming its Court System, University of Iowa News Release, available at [http://news-releases.uiowa.edu/2007/november/110207reitz\\_reform.html](http://news-releases.uiowa.edu/2007/november/110207reitz_reform.html)

(2005) marked a turning point for reforming the current ADCs model<sup>451</sup>. Based on this guidance, some recent reforms relative to the court's jurisdiction and proceedings have been made, including the promulgation of the revised LOCD (2005), OSAC (2006), Law on Civil Judgment Execution (2008) and the drafts of a number of other laws.

However, one of the main issues criticized recently is the relationship between the Executive Committee of the CPV and the local ADCs. The report made by the SPC frankly recognizes that the leadership of the Party in many courts, in fact, has not promoted its roles and thus ADCs do not match the characteristics required of judicial bodies. This can be seen in cases such as: (1) In some localities, the Executive Committee of Party treats lightly the role of the court in resolving administrative lawsuits; (2) Some of them deeply intervened in to professional performance of courts which violates the principle of legality and the principle of judge's independence in the adjudication; (3) the Executive Committee in some localities considers that, in order to strengthen the court's capacity, they prefer appointing those who are members of CPV Executive Committee from other agencies rather than paying attention to the training of court's human resources. Furthermore, the relationship of the courts towards the Executive Committee has some negative points. For example, many courts are too dependent on the Executive Committee and fear undertaking responsibility. As a result they often wait for the Party's opinions for many matters that are even under their jurisdiction. Some local courts absolutely rely on the opinions of the CPV Executive Committee toward complicated lawsuits regarding *sensitive* situations in localities<sup>452</sup>.

*Dinh Van Mau*, Deputy Director of the National Administrative Institution, comments that Reform (*Cai cach*) is not Revolution (*Cach mang*)<sup>453</sup>. He emphasizes the imperative of the vigorous reform of the existing ALRS based on reviewing its experiences over the past ten years and proposes the setting up of a new AJB. For the achievement of the credibility and legitimacy of the ALRS, some suggestions for reforming the Ruling Party are given as follows: (1) Guarantee the independence of local judges during their dealing with lawsuits. The judges are forcibly made to follow the CPV's policy prescribed by law, but they can not be forced to follow any *individual* party power; (2) Guarantee the independent status of the judges from the local governments upon the party leadership principle. The problem is how to ensure impartially and objectivity in the appointment of judges or how to grant the judges *lifetime* tenure, at least up to a mandatory retirement age; (3) Guarantee the independence of the courts in relation to the party organizations and other agencies

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<sup>451</sup> Some remarkable issues can be emphasized such as: (1) Preparation for the establishment of the administrative regional courts; (2) Enlargement of the court's jurisdiction; (3) Step by step publication of the court's judgments through the mass media; (4) Establishment of an effective mechanism for the judgment's execution; (5) Improvement of the substantive laws and the procedural litigation laws for guarantee the transparency, publicity, democracy and human right protection. See Resolution No 49 (2005) by Politburo of CPV on Judicial Reform Strategy up to 2020, in Official Documents by Party and State on Reform of State Apparatus], pp.19-25 (2005)

<sup>452</sup> See SPC of Vietnam, Report on Assessment of Current Legal and Institutional Framework for ADCs, pp.37-38 (2007)

<sup>453</sup> See *Dinh Van Mau*, supra note 444, at 40

within the state apparatus, such as the mechanism of making reports.

**Regarding the State Mechanism**, as Prof. *John Reitz* also comments, Vietnam is opening its economy up *more and more* for international investment and it knows that to attract further foreign investment, it needs to strengthen the legitimacy of its legal system and adopt stronger versions of the ROL. As analyzed in the last sections, the CPV and the State have already welcomed to the ROL ideology in Vietnam. However, in the current Vietnamese context, it would better to approach the informal institution of the ROL. Any informal institution that is not against the basic ROL's components should be maintained and harmonized with the new imported elements. The principle of Power Concentration and the principle of Democratic Centralism are also two fundamental Constitutional principles governing all state apparatus's activities. It cannot be denied the advantages of ensuring the integration of the whole country for the development. However, in respect of protection to individual rights, it cannot avoid being criticized for less independence of the judiciary. Vietnam, since the revision of Constitution in 2001, although retaining the principle of Power Concentration, clearly divides power into legislative, executive and judicial branches, in which judicial independence has gradually been improved. Nevertheless, much more independence from other branches needs to be attained, so that in the future, the court will be able to review the constitutionality and legality of any legislative norm and administrative activity. To avoid the subordination of local courts to local governments, the solution of setting up regional administrative courts is very reasonable. Furthermore, regarding the appointment of local judges, the legal provisions relative to the *Local Judges Selection Committees*<sup>454</sup> should be replaced by those allowing the SPC to directly select and control its judges throughout the whole country with a strict National Bar Examination System. When the local court is not dependent on the local government for infrastructure, appointment, budget, administrative management, report duty and so on, it can achieve a truly independent status.

## 2.2. Legal Framework and Expansion of Jurisdiction

One of the goals of *Vietnamese Socialist ROL State* is for the supremacy of laws to be absolutely respected by all organizations and individuals. To achieve this goal, the prerequisite condition is that the State must have a perfect legal system to bind all fields of society. As a result, of foremost the importance of improving ADCs Model and Jurisdiction is the perfection of the legal framework, recovering all errors of law, such as the overlapping and contradictions among legal regulations, ensuring the superiority of Constitution, law and the legal effect of other norms stipulated by Law on Enacting Legal Norms. To be more concrete, the below issues should be

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<sup>454</sup> See Article 27 of Ordinance on Judges and Assessors of the People's Court (2002). According this article, the Judicial Selection Committees for Judges of the provincial and district level People's Courts shall include the Chairman or Vice Chairman of the provincial People's Council as the Chairperson, and the Chief Judge of the provincial level People's Court and Representatives of the Committee on the Personnel Government Organization, of the Committee of Vietnam Fatherland Front and the Executive Committee of the Lawyers Association as Members.



improved:

**Firstly**, the court's jurisdiction over administrative matters (*with exception*) should be expanded to its maximum. LOCD (2005) allows people to make appeals to the competence state agencies toward all administrative decisions or actions, whereas, the initiation of administrative lawsuits is limited in enumerated matters. Although the OSAC (2006) has added up to 21 matters, it has still left a considerable number of petitions to be returned because they were out of court's competence. Some examples of this include, land disputes arising before the enactment of the Land Law (1991), land disputes without Land-Use Right Certificates, land disputes without the first reconsideration made by the administrative agency and so on. Some others disputes include those applying social policies during the wars, the war allowance for families of invalids and martyr's, and veteran and other welfare policies refused by courts. The revised OSAC 2005 allows the disputes related to the list of voters to be resolved by the administrative division rather than civil division (*Article 11, sec.18*), however, some others that not only violate the civil rights but freedom and democratic rights are also beyond judicial review, such as the refusal of the competent agency to register inhabitation, the disclosure or supply of the wrong information to *mass media* that offends certain individual's honor and so on. Vietnamese law only allows people to bring to courts administrative decisions made by the ministerial level downwards, whereas the decisions made by the top level of central agencies, including Party decisions cannot be addressed. The French experience shows that even decisions made by President can be judicially reviewed.

Regarding disciplinary decisions towards public servants, there should not be a limit only on the decision on job dismissal but also others relative to the demotion of their status, the removal from one post and so on. To better protect people from any injury caused by the administration, the OSAC should provide what administrative matters are out of judicial review, such as those concerning the state security, national defense or public interest, diplomatic policy or some "*internal control*" activities and so forth<sup>455</sup>. Excluding those, people should be able to take any administrative matter to courts. If such a provision were made, it would end the controversy regarding the *stand-by provision* (*Article 11, sec.22*) that Government in some cases probably violate the judicial independence by supplementing itself with a new lawsuit.

Regarding the inquiry in to legal norms, many Vietnamese scholars support the model of an independent administrative court that is empowered to review both the constitutionality and the legality of legal norms. In trial practice, the court has been faced with many difficulties when dealing with cases that the litigated decisions were wrong or irrational, but based on the normative documents made by competent agencies. In comparison with that of Japan, if the decision was based on normative documents that violated statute laws, it was concluded illegal by the court. In Vietnam,

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<sup>455</sup> Nguyen Van Kim, Ban ve tham quyen cua Toa Hanh chinh ,[ Discussing on the ADCs's Jurisdiction] in Thanh tra Nha nuoc (1997), p.154

the courts are often embarrassed to give final judgment to such illegal decisions or norms. According to the Vice Chief Justice of the SPC *Dang Quang Phuong*, the court in this case should declare the litigated decision illegal, then “*make proposals to the administrative agency who issued the normative document or to the upper agency to correct or annul such document*”<sup>456</sup>. Article 9 of Law on Enactment of Legal Norms says that “*a certain normative document is only corrected, replaced or annulled by an agency that issued it or the upper competent agency*”. The court is only allowed to make a proposal to the competent agency to review such norms, not directly change or annul it. Thus, to guarantee judicial independence, courts should be allowed to review the legality of legal norms relative to a particular administrative lawsuit. In the case of such legal norm being found illegal, the decision based on it is also determined to be illegal, consequently both must be annulled by the competent court.

**Secondly**, the content of court’s judgment should be clearly defined in a concrete legal provision of the OSAC. Glancing at countries with different legal systems, largely, the law empowers the court during the trial to either preserve or annul partly or entirely the litigated decisions; to require litigated agencies to perform the mandatory duties in the limited time provided by law. However, the regulation of remedies made by the court is different from country to country. The ALL of China also divided the court’s remedies into four types: “*upholding judgment*”, “*abrogating judgment*”, “*enforcing judgment*”, and “*changing judgment*”. Chinese administrative law thus allows the court to make another decision to change the illegal litigated decision, such as the decision on penalizing administrative violation<sup>457</sup>. The law in Germany also allows the court to change the litigated administrative decision apart from allowing the court to annul an illegal one<sup>458</sup>. The revised ACLL (2004) of Japan supplements some new types of litigations requiring the administrative agency to better perform their legal duties and some measures to force the administrative agency to implement court’s judgments. The question emerges as to whether the court, while reaching a final judgment to protect infringed people, encroaches upon the administration. In the Vietnamese situation, when the court declares a decision on a fine sanction as illegal, or concludes the amount of fine-money was not reasonable, the question remains as to whether the court can revise it. In tax cases, whether the total amount of tax collection should be calculated by the court or by the tax agency is also undecided. Vietnam should follow the Japanese experience that the courts have the authority when granting relief to the plaintiff to either order the specific terms of the agency action or order the agency to grant plaintiff relief, while permitting it to determine the specifics of that relief. For example, in a social security payment, the court could order the agency

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<sup>456</sup> Dang Quang Phuong, *Mot so van de ve Tham quyen cua Toa Hanh chinh*, [Some Issues concerning on the Competence of ADCs], in *Thanh tra Nha nuoc* (1997), p.158

<sup>457</sup> Chinese ALL, Art 54

<sup>458</sup> Dinh Van Minh, *Tai phan Hanh chinh So sanh*, [Comparative Administrative Jurisdiction], 45 (1995)

make payment, but permit it to calculate the payment rather than the court itself make the calculation.

**Thirdly**, provisions concerning the compulsory *pre-litigation* period should be abandoned. This means that people can freely take the option of either complaining to the original administrative agency or taking a lawsuit. In nature, the reconsideration of original agencies or officials is inevitably necessary, however, the existing regulation seems not to make administrative agencies actively perform their duties to deal with complaints. Allowing people to have a choice may achieve some advantages such as: (i) ensuring the people's rights to initiate the cases without being delayed by impatiently waiting for reply from such competent agencies; (ii) forcing administrative agencies to perform well their duties at the first step of making decisions or actions if they do not want to be taken as defendants to court. If people choose administrative agencies as the first step, it means they believe in them and hope that the settlement will be faster and simple. It also provides incentive for administrative agencies to become more active and responsible to resolve the issue as well.

**Fourthly**, the time for initiating a lawsuit should be extended to be more than 30 days<sup>459</sup>, especially for “*complicated cases*” or the cases happening in the “*rural areas*”. The revised ACLL of Japan (2004), which extends the time for initiating lawsuits from three months to six months, is a good lesson to protect infringed people from the time restraints. In addition, the regulation concerning the participation of litigated agencies in court proceedings must be compulsory. Some enforceable measures should be provided to impose obligations to such agencies that they cannot be absent for any reason.

**Finally**, legal norms regarding the ALRS should urgently be systemized and codified. Vietnam has a great number of normative documents originating in all fields of administrative management, but the number of laws is limited. Most of them are enacted as *under law*<sup>460</sup> documents, such as ordinances<sup>461</sup>, decrees<sup>462</sup>, resolution<sup>463</sup>, circulars<sup>464</sup>, directives<sup>465</sup> or regulatory decisions<sup>466</sup>. The legal provisions concerning settlement of administrative disputes, apart from the LOCD, and OSAC are mostly scattered amongst various legal norms, even overlapping and contradicting each other. As a result, there needs to be a systematization of existing normative documents that creates a

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<sup>459</sup> OSAC, Art 30

<sup>460</sup> This document named “*Van ban duoi luat*” (Under law documents) and has legal effect lower than law. See Giao trinh Luat Hanh chinh Vietnam, [Textbook of Vietnamese Administrative Law] by Hanoi Law University, pp 41-51 (2000)

<sup>461</sup> “Phap lenh” is made by National Assembly’s Standing Committee. See Law on Enacting Legal Norms, Art 21

<sup>462</sup> “Nghì dinh ” is made by Government. See Law on Enacting Legal Norms, Art 56

<sup>463</sup> “Nghì quyêt” is made by National Assembly, National Assembly Standing Committee, Government. See Law on Enacting Legal Norms, Art 20, 21, 56

<sup>464</sup> “Thong tu” is made by Ministry. See Law on Enacting Legal Norms, Art 58

<sup>465</sup> “Chi thi” is made by Prime Minister, Ministry, Local People Committee. See Law on Enacting Legal Norms, Art 57, 58

<sup>466</sup> “Quyêt dinh ” is made by Prime Minister, Ministry, Local People Committee, Ibid

legal framework for administrative agencies to better perform their functions as well as to make judges to deal with the cases precisely and effectively. During the systematizing process, errors of law such as overlapping, contradiction or formality will be recovered. The fields that have not been regulated will be supplemented in a timely fashion, such as the central fields where disputes commonly arise, newly emerge in the international integration context, or those relative to foreign partners.

In addition, the codification regarding administrative remedy should be made soon since Vietnam lacks the fundamental laws relative to this field. There should be a continuous revision of the present LOCD as well as an upgrading of the OSAC (2006) in to an ALL to ensure the legal effect of law documents higher than that of *under-law* documents.

### **2.3. Court Model and Institutions**

The reform of the court model and institutions for ALRS in Vietnam should be in line with civil law thinking and focus the on French theory on the distinction between active and adjudicating administration. Consequently, Vietnam needs to have an independent AJB attached to Government to hold an adjudicative function. Furthermore, it also necessary to improve the ADCs to guarantee the effect of the judicial review system toward all administrative activities.

#### **2.3.1. AJB attached to Government and New Appellate System**

**Under the academic points of view, this dissertation supports the establishment of the Independent AJB attached to Government due to the following main reasons:**

**Firstly**, would ensure the French administrative law theory on the distinction between active and adjudicating administration to be well applied in Vietnam. Although being attached to the Executive Branch (*Government*), this AJB must be independent with other governing agencies and hold *quasi-judicial power* to impartially review the legality of any administrative decision or action including any legal norm made by administrative agencies. Apart from the judicial review conducted by courts, the administration itself needs to have an appropriate institution, like a *quasi-judicial* independent body for judging and recovering the mistakes through people's appeals toward its governing activities.

**Secondly**, Vietnam already possesses a Government Inspectorate System since the birth of DRV in 1945. It cannot be denied that this system has had significant experience in dealing with administrative disputes and providing consultation to the government. The inspectorate officers are also well equipped with legal capacity not only in the field of legal disputes resolution but also in governing policy. This is a characteristic and imperative for administrative judges. Under the present LOCD, excluding the General Inspectorate holding the function of settlement of complaints in a limited case<sup>467</sup>, most of the inspectorate agencies hold only the function of making inspection,

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<sup>467</sup> See LOCD, Art 26. According to this article, the General Inspectorate has competence to settle the complaint that has been

consulting, and proposing to administrative agencies of the same level. Thus, the role of this system regarding settlement of administrative disputes has recently becomes less appreciated in spite of its long experience over history. Consequently, there should be a reorganization of the system of government inspectorate and strengthen its jurisdiction to become a *quasi-judicial* organ handling administrative lawsuits. Thus, it aims to *specialize* and *professionalize* the claim settlement within administration and make the administrative agencies centrally perform their governing functions better.

**Thirdly**, it ensures the requirement of transplanting the ROL in Vietnam. One of the core requirements of the ROL is to guarantee the independence of judiciary and the social democratization in which all people's legal rights and interests must be well protected. As analyzed in the Chapter I, the existing ADCs model fails to fulfill the requirement of Judicial Independence as it depends too much on local governments and the CPV Executive Committees within the same territory. This can be recovered by organizing an AJB system that is totally separated from governing agencies at the local level and dividing it into the regions and areas rather than according to the administrative units. Furthermore, as analyzed in Part I of this Chapter, to be in accordance with the current context, Vietnam should approach an informal institution of the ROL that is not against the core ROL, which should remain and be supplemented with some new elements. The advantage is to avoid any shock or obstacle, to reduce *transaction costs* as a major force inducing change in institution, and to guarantee the gradual harmonization of existing informal institutions with newly imported ones. Thus, the establishment of an independent AJB attached to Government based on the existing Inspectorate System is the best way to achieve these goals. Another *key factor* is the human resource or the quality and standard of adjudicators will be discussed further in the next recommendation.

**Finally yet importantly**, the establishment of an AJB attached to Government by nature is the proposal of setting up an appellate system, which is still unfamiliar in Vietnam. However, this system is seen as being appropriate with the contemporary development throughout the world. This idea is also supported by many foreign donors including the Vietnam-STAR project who shares the necessity of establishing an AJB that can independently and impartially review all administrative decisions and actions protested by *any* individual and entity including foreign partners. Nevertheless, the ideal of the foundation of the independent AJB has faced some difficulties, including: (1) what kind of AJB's organization should be set up, (2) whether the existing ADCs model is completely abandoned or hopefully re-organized for improving the judicial review by courts, (3) how should the new appellate system be made to conform with the Constitution, the fundamental principles of State Power Concentration, of Democratic Centralism and the CPV's Ruling.

**Firstly, this section answers question (1) and gives the recommendation on the**

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already resolved by the Head of the Agency belonging to Government at the *first-instance* but still protested.

**organization of AJB attached to Government:**

This dissertation principally supports the idea of setting up parallel systems known as the governing and adjudicating directly controlled by Prime Minister. There is no need to name such adjudicating system “Administrative Jurisdiction Institute” (*Vien Tai phan Hanh chinh*), since in Vietnamese language, the term of Institute (*Vien*) is easily confused with the *Research Center* as opposed to an adjudicative body. It can be arranged into three levels throughout the country under the names of Central AJB (*Co quan Tai Phan Trung uong*), Regional AJB (*Co quan Tai phan Vung*) and Area AJB (*Co quan Tai phan Khu vuc*). This classification is consistent with the recommendation of restructuring the people’s court system laid down in the Judicial Reform Strategy up to 2010.

The Central AJB would be led by the Prime Minister, but he would not be the Head of this agency. The Head would be recommended by him, but approved by the National Assembly. There needs to be a guarantee of the independent status of the Head in his adjudicating works.

The Head of the Regional and Area AJB would be designated by Prime Minister and also approved by the National Assembly. The tenure of office would the same as the tenure of the National Assembly (*five years*). The Adjudicators would be appointed and dismissed by the Prime Minister upon the promotion of the *Adjudicator Selection Advice Council* formed by him with a five-year tenure. The Regional AJB amalgamates some provinces and cities belonging to the centre and would be divided according to the natural geographical units, such as the North, the Middle, the South, the Central High-Lands and the *Mekong* Delta and so on. It could give *judgment* toward the litigated decisions or actions by the Chairman of Provincial People’s Committee or by the central agency or authority, such as the minister, the head of the equal-ministerial agencies and so on. The Area AJB amalgamates some districts and cities belonging to the provinces and gives its *judgments* toward all the governing activities from district level downward.

Except for the Central AJB, which holds a consultative function to Government, all the Local AJB would be real adjudicating bodies at the localities and would be established independently from the local people’s committees and people’s councils. It aims to guarantee the independence of the AJB in relation to the local government as well as the local Party Executive Committees. In cases where people do not agree with the settlement of the Chairman of Provincial People’s Committee, they can take their claims to the Regional AJB without hesitation that this Chairman or the Provincial Party Executive Committee can apply any pressure or obstacle, since the Regional AJB would be quite an independent and upper-level body, a major difference to the current dependent status of the existing provincial ADCs.

**2.3.2. ADCs and Judicial Review System**

**This section continues to answer two remaining questions** (i) whether the existing ADCs model should be completely abandoned or re-organized to improve the judicial review system; (ii)

how to make the new system conform with the current Constitution:

**Regarding the improvement of judicial review by courts**, this dissertation supports the idea of replacing existing ADCs by a model of regional courts in line with the Judicial Reform Strategy up to 2020. This means that the establishment of the AJB attached to Government cannot replace the role of courts for judicial review. Taking an administrative lawsuit to courts is the final step for protecting all people's legal rights and interests. It is also in conformity with the requirement of judicial independence – known as a *key* element of the ROL.

To be equivalent to the Regional and Area AJB, the Regional and Area ADCs should be set up within the People's Court System to perform judicial review. The Administrative Division within SPC will hold supreme supervision toward all judgments made by the AJB system and the lower ADCs. If the new system of AJB and the model of regional courts are set up, the mechanism for settlement of administrative disputes in Vietnam would follow the below three periods:

**Firstly**, is the *mediation* or *self-reconsideration* period carried out by the original or upper-level administrative agency or authority. This is known as the *pre-litigation* period as fully analyzed in Chapter II and regarded as an obstacle for accessing a lawsuit. This period is necessary for the competent agency or authority to self-determine and rectify its mistakes. Nevertheless, it should not be compulsory, but optional for the infringed people to take their claims either to the independent AJB (*the new appellate system*) or to the court (*judicial review*). In principle, if the claim were completely resolved during this period, it would reduce the burden of cases on AJB or courts as well as save time and money for the litigated parties. In the case of the settlement being disagreed, the claim can be taken to the Area or Regional AJB.

**Secondly**, is the *quasi-judicial proceedings* carried out by the system of AJB. The Area or Regional AJB would review both the legality and rationality of litigated decisions or actions, even consider the compensation of damages caused by state agency or authority. To protect people from any malpractice by the administration, the AJB would be able to review all fields of administrative activities. The central AJB would hold the *quasi-judicial* power to inquiry in to legal norms made by governing agencies and propose the Prime Minister to annul or revise it. As a result of *judgment*, the AJB could uphold, annul or revise the litigated decisions, determine the level or the amount of money for compensation of damages and propose the competent agency to annul or correct illegal or irrational norms. The settlement by the AJB system would hold the distinct feature with that of *self-reconsideration* by administrative agency as well as the judicial review by courts, such as its professionalism, convenience and simplicity. If the litigation is completed within this period, it also would reduce the burden to the court and complete the *long and complex* disputes regarding the land, or compensation policy in the urbanization process. If the settlement is still protested, people would have a final chance to take a lawsuit to the Area or Regional ADCs.

**Finally**, is the *judicial litigation proceedings* performed by the people's court system that is

restructured into the Area or Regional ADCs. These ADCs would review only the legality of litigated decisions or actions and review whether the AJB fails to apply the correct laws in its settlement proceedings. The ADCs could confirm the legality or revoke the illegal decisions by the litigated agency or the *judgments* by AJB at the same level. However, to avoid its encroachment upon the administrative functions, as with the Japanese experience, the court should require the competent agency to revise or calculate the amount of money within a specific time. The SPC has the final judgment toward all judgments made by the lower courts. In the future, the SPC should be allowed to review the legality and constitutionality of any norm including those made by the government system (*the delegate legislation*) and the National Assembly (*the highest legislative body*). Thus, the adjudicative period by courts guarantee the most important requirement of the WTO that all administrative claims must be reviewed by an independent judicial body regardless of whether the final settlement has been made by a certain governing agency or AJB.

**Regarding the fundamental Constitutional principle**, it should be emphasized that the establishment of AJB attached to Government is not against the Constitutional principles or the principle of State Apparatus Organization at present. Article 127 of the Vietnamese Constitution states that: “*The SPC, the Local People’s Courts, the Military Tribunals and Other Tribunals provided by the law are the judicial bodies of the SRV. Under special circumstances, the National Assembly may decide to set up Special Tribunals*”. Thus, the establishment of an AJB attached to Government can be regarded as the establishment of the *other tribunal* or *special tribunal* under the majority determination by National Assembly. It has clearly been predicted within the current Constitution. In addition, since the SPC can review the legality of all judgments, including *judgments* made by the Central AJB through the supervisory proceedings, it guarantees Article 134 of the Constitution and the Article 18 of LOPC providing that “*The SPC is the highest adjudicatory body of the SRV. It shall supervise the proceedings of local people’s court, military courts and other tribunals*”.

The establishment of the AJB and the reconstruction of ADCs also would not contradict the principle of Party’s Ruling. Resolution 49 by CPV Politburo (2005) on *Judicial Reform Strategy up to 2020* has already confirmed the preparation for establishment of the Regional Courts. Resolution 48 (2005) also emphasizes the necessity of improving the legal system in accordance with the requirement of WTO’s accession and the international integration.

**In short**, the establishment of an AJB and the model of Regional ADCs may require some appropriate revisions of the Constitution, but it is not totally against it. The greatest advantage to be gained would be the avoidance of being dependant on the local governments and the CPV Executive Committees within the same territory, achieving judicial independence in line with the requirement of post-WTO Accession. Regarding the theoretical perspective, it also makes Vietnamese ALRS develop towards the international mainstream of today, that apart from the necessity of improving



judicial review by the courts, there it is essential to *entrust the adjudication to a special body (an independent AJB) with high quality and familiar with its usual works*. For this system to perform well, Vietnam needs skillful and highly-educated administrative judges (*and adjudicators*), which is known to be a *key factor* in achieving success. The next section will provide recommendations on the issue of legal human resources that mainly focus on training administrative judges.

## **2.4. Legal Human Resources**

### **2.4.1. Appointment and Training Administrative Judges**

Legal human resources regarding the settlement of administrative lawsuits currently consist of administrative judges, people assessors, court's clerks, procurators and lawyers. This section first focuses on the appointment and training of administrative judges, the treatment policy and so on. Other legal posts, particularly the adjudicators serving at the new proposed AJB attached to Government will be mentioned in the next section.

**Firstly, regarding the appointment of administrative judges**, there should be a development of human resources for judge's appointment. As prescribed by the Ordinance on People's Judges and Assessors (OPJA), apart from the court's clerks, inspectors are a human resource for judge's appointment. There are also lawyers, persons working in other legal protection agencies and so on<sup>468</sup>. However, judges appointments come, in fact, mainly from the court staff instead of being extended to other sources. As a result, the current judge's appointment has displayed certain inadequacies, such as failure to attract talented and skillful individuals, the a lowering in social status and competitiveness for potential candidates of positions traditionally high, important and very honorable within society. It is highly desirable that the selection of judges be extended to include those in the circle of lawyers, legal and administration experts as well as law teachers who have been trained in adjudicative skills.

Judges are currently appointed and dismissed by the Chief Justice of the SPC (*except SPC's Judges by State President*) and limited to five years<sup>469</sup>, but the proposal of lifetime appointment of judges with some stricter requirements to assure that they devote their whole lives to this service remains open for discussion.

According to the current OPJA, the conditions for judge's appointment are: (1) General Criteria, such as morality, health, having high spirit of safeguarding socialist legality (*Art 5.1 of OPJA*), (2) Having LL.B Degree, (3) Experiences (*Having four years or more serving in legal sector as District Judges, ten years as Provincial Judges, 15 years as SPC's Judges, five years for those who used to be a judge of District or Provincial Level*). In selecting judges, the *Judge Selection Committee* is set up at each level in which at the localities, the participation of a local representative

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<sup>468</sup> See OPJA, Art 5

<sup>469</sup> OPJA, Art 26 & Art 27

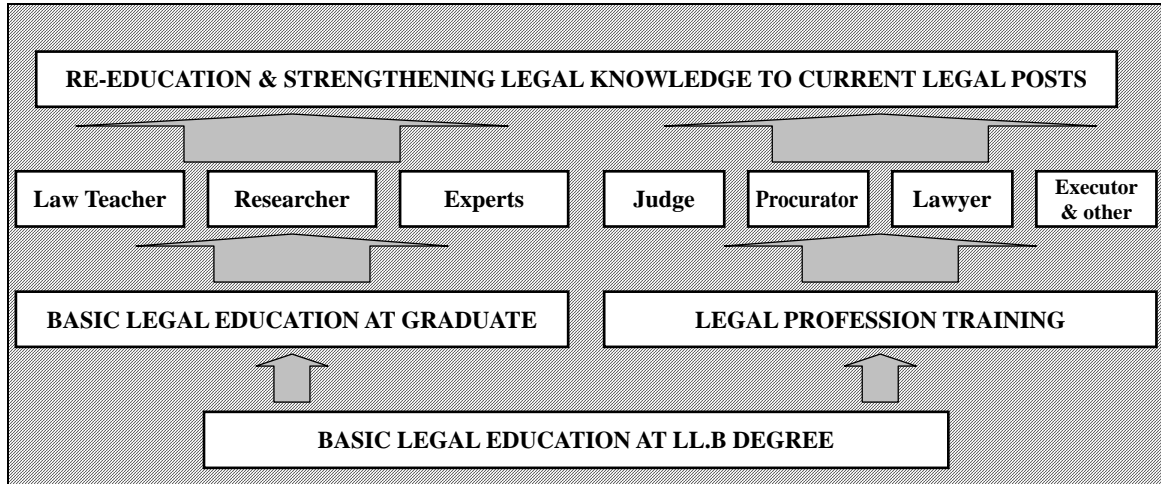
body, made up of the local government organization representatives and the personnel committee, the Fatherland Front Committee and so on is regarded as the main obstacle for the independence of administrative judges in their judgments toward local government decisions. In addition, although the judges in their adjudicative role are *independent and subject only to the law* (Constitution, Art 130), they are also expected to follow Party regulations. In fact, most judges are members of CPV, trained at *Ho Chi Minh* Political Institute and strictly follow the local CPV's Executive Committees. Thus, in the case of the model of Regional Administrative Courts being set up, it may help to avoid the extreme dependence of judges on local government or CPV *at the same level*.

If the proposed model of *quasi-judicial* AJB attached to Government is set up at three levels (*Area, Regional and Center*), it also can avoid this dependence. Accordingly, all adjudicators will be appointed and dismissed by the Prime Minister based on the recommendation of the *Adjudicator Selection Committee* formed by the Prime Minister. To be appointed, the adjudicators should be strictly required to possess a deep knowledge and practical experience on adjudicating and various administrative fields rather than only fulfilling a political requirement.

**Secondly, regarding the training administrative judges**, the judges of different court levels should be strictly standardized upon the OPJA and their quality should be continuously improved through the effective training courses.

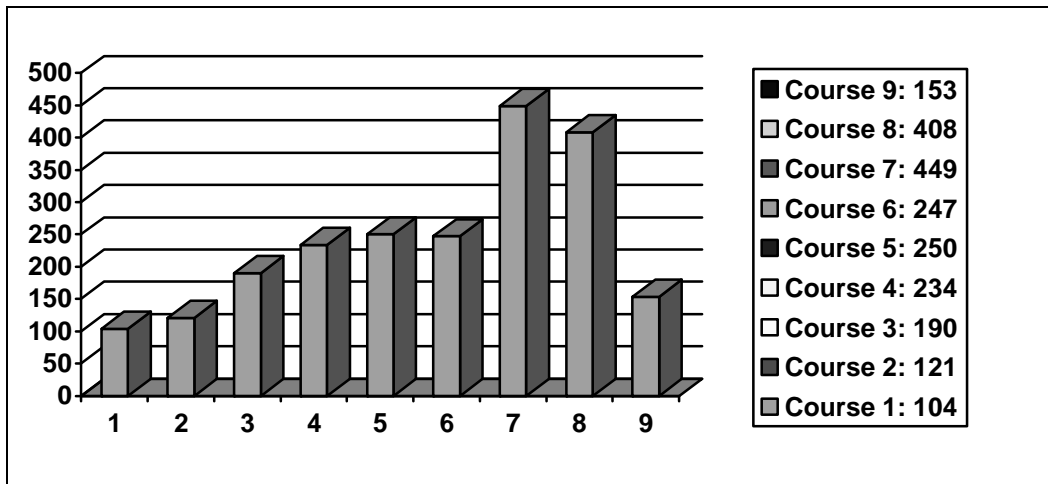
Training the legal profession in general and administrative judges in particular is one main task for improving human resources, regarded as a *key factor* to bring about the success of the overall judicial reform as well as the reform of the ALRS in Vietnam. To fully understand training administrative judges, firstly, it is essential to identify the structure of current legal education and training involving the three below types:

**Chart 4: Types of Current Legal Education and Training in Vietnam**



Legal profession training (including training judges) is mainly designated to the Judicial Academy founded by the Prime Minister in 2004, and attached to Ministry of Justice<sup>470</sup>. Up until now, the Judicial Academy has conducted nine training courses with a total of 2.156 graduates (the 10<sup>th</sup> course has been updated). The number of students enrolled in the judges training course is shown below<sup>471</sup>:

**Chart 5: Number of Students of Judge Training Course (From 1998-2007)**



To be a candidate for this course, they must be civil servants with LL.B degrees,

<sup>470</sup> Its former name is The School of Legal Posts (Truong Dao tao cac chuc danh Tu phap), established in 1998, attached to MOJ. See Introduction to Judicial Academy and the Legal Profession Training Program, Judicial Academy, 9 (2005)

<sup>471</sup> See Pham Hong Quang, The Current Legal Education and Legal Profession Training in Vietnam, in Sugiura ed, Foreign Legal Assistance and Judicial Reform, [法整備支援と司法改革], Vol 7, 205 (2007). Some update data, see <http://www.judaca.edu.vn>

experience of at least four years serving in any local people courts, and in the list of judge appointments approved by the Chief Justice of the SPC. The Judicial Academy applies both an Entrance Examination, which is held every July and a nomination<sup>472</sup> process to select the candidates. There is no discrimination between the course for administrative judges and others, and the entrance exams consists of two subjects, namely *Civil and Civil Procedure Law, and Criminal and Criminal Procedure Law*. The successful candidates are enrolled in a course lasting 12 months in which the first six months consists of study in basic courses at the Judicial Academy, the following three months they are sent to various local courts to act as a probationer officer, and the final three months they attend specialized course and sit graduation exams.

*Regarding the quantity of judges*, it is estimated that by 2010, there needs 4,100 judge candidates to be trained at Judicial Academy. However, according to above statistics, the number of graduates is still limited. To achieve this goal, Judicial Academy needs to train at least 500 judge candidates per year. Therefore, the SPC must expand their goal of judge appointments and increase the candidate number for training at the Judicial Academy in the coming years.

*In respect to the quality of judges*, the Judicial Academy, from 2007, aside from setting up a common training program for all judges, prosecutors and lawyers, they have continuously improved the training program for each legal profession. Nevertheless, this program should focus much more on legal professional skills and morality. There should be an improvement in the methods, so that a theoretical lecturer and a practical instructor can simultaneously control the class in order to avoid formality. The quality of practitioners in a variety of local judicial organs needs to be reported frequently to the Judicial Academy and they must be fully informed about the real activities of judges. The content of the judge training program consists of four main elements: (1) the special subjects consisting of six parts, including general substantive and procedural law (*for both civil and criminal law*), skills of judges, and special topics; (2) Five types of skill sets for dealing with a specific lawsuit - criminal, civil, economic, labor and administrative lawsuits; (3) Performance in a model court; (4) Secondary subjects such as English, IT...etc.

Looking at the training program, the training of administrative judges is quite similar to other judges while the contents regarding the ALRS as well the skill requirements of administrative judges seem to be less catered for than the civil or criminal law fields. For this reason, it is necessary to establish more subjects for training administrative judges, such as those related to administrative management, emerging disputes such tax, land, intellectual property, and competition as a requirement of Vietnam's WTO's Accession. It is also essential to train particularly in skill of studying and exchanging legal views through SPC and local ADCs's judgments. Strict National Bar Examinations should also be organized to select judge candidates, including strict requirements for

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<sup>472</sup> The candidates are nominated from the local judicial organs and approved by Supreme Courts. They do not need to take entrance exam.

foreign languages, IT, and the expansion of some other subjects for entrance and graduation exams appropriate for administrative judges. To develop better quality judges, it requires not only the good education in the adjudicative field, but also experience in state management, economy, technology, and importantly the morality and strong sense of honesty to avoid pressures from local governments and CPV during adjudicative works.

Apart from training judges at the Judicial Academy as a professional course, the re-education and strengthening of legal knowledge of judges is also undertaken by the National Administration Institution, the *Ho Chi Minh* Political Institute or the Court Staff Training School subordinated to the SPC which offers a *short-term* course and grants certificates of participation. Hanoi Law University also holds this task under the commission of the MOJ, and opens *service-training* courses for those lacking LL.B Degrees in some provinces or runs courses for updating participants in new fields of legal disputes. To fulfill the requirement of developing quality administrative judges who possess the ability to deal with all lawsuits including those newly emerging, it is essential that both a *short-term* and *long-term* training strategy be established. *For a short-term strategy*, the court should continuously develop a plan to train *on-service* judges who still lack LL.B Degrees and other certificates, so that these judges may improve their professional capacity and meet the full requirements set for them. Judges are expected to be trained in some *short-training* courses on some necessary and urgent issues emerging in the new context of the country<sup>473</sup>. *In the long run*, the courts at all levels should set up a tentative personnel scheme, from which the court's clerks or inspectors are selected and sent for training at the Judicial Academy. As mentioned above, the judge-training program of the Judicial Academy should be improved to meet the demands of training professional administrative judges. Despite the fact that there are about 400 judges per training course, which has doubled in comparison to the initial courses (from 1998 to 2000), there remains a lack of judges at all levels, especially judges in district courts. The training program for judges of each court level should be different since the OPJA provides different requirements relative to the quality and professional skills for judges of each court level.

**Thirdly, regarding the treatment policy**, it is essential to improve the payment policy and other security conditions for judges. For the time being, subject to the Inter-Circular No 04/2005 with the SPC, the Ministry of Home Affairs, Ministry of Finance guiding the Decision No 171/2005 by the Prime Minister on regulating the duty allowance policy for judges, court's clerks and inspectors, the allowance is between 20% and 30% of the existing salary, plus an allowance of leadership and work duration (*if any*). As such, there has been some progress in salary for judges. Nevertheless, to encourage and enhance the judge's responsibilities at work and independence, the

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<sup>473</sup> Such as the courses relative to the open-door policy and international economic integration, civil transaction and co-operation, trading and commercial relations between a party with nationality, headquarter or property in Vietnam and a party who is foreigner or foreign-involved and so on. These courses also aim to improve the judge's knowledge in the field of foreign laws, international law, custom and international practices and so on.

following measures should be further promoted: (1) the implementation of a new salary policy which better reflects the nature of the judge's work; (2) there is a need to set up a preferential treatment policy to encourage people to take positions at courts in remote and mountainous areas and islands. At present, the Official Document No 152/2003 by the SPC establishes the policy on selecting full-time law university graduates who volunteer to work in far and remote areas with a condition of seven years working in the indicated locations from the recruitment decision coming into effect. However, to attract more young and talent graduates to work in such places, the government should render more attractive payment packages, for example, the first allowance which is equivalent to at least three months of salary. Work duration in remote areas should be regulated and judges shifted after a set period. A policy of training human resources for the courts in the remote areas should also be established. Other treatment policies for judges, court clerks and inspectors must be to be transparent and fair. Allowance for the indicated court staff is to be allocated depending on the number of cases they have settled rather than on the number of regular staff involved. And finally, it is suggested that the policy of “*public housing*” for judges should be made in line with the mechanism of rotating court staff as guided by the CPV's Resolutions.

**To improve the quality of administrative judges in Vietnam, this section finds necessity to draw some lessons from foreign experiences:**

**Regarding French experiences,** Vietnam should learn from their model of training professional administrative judges and their way of appointment and recruitment. For example, students who graduate with perfect results from the National School of Administration<sup>474</sup> are designated as administrative judges and can take a job in the *Conseil d'Etat*. Each year, the ENA trains and produces 90 graduates who have completed an 18- month course, passed the very strict competitive Entrance Exams (*held every September*) with two main parts, namely Written and Oral, in which the later is only taken by those with the highest marks in the former. The applicants can take the entrance exams for ENA only three times and the age for admittance is 27 years or younger. The number of applicants is around 200 each year, and the success rate is only about 10%<sup>475</sup>. This school was created in a move to make the recruitment for various high administrative bodies more rational and democratic. By having a system solely based on academic proficiency and competitive examinations, its recruitment to top positions was successfully made more transparent, without suspicion of political or personal preference. Under French law, civil servants who are elected or appointed to a political position do not have to resign their position in the civil service. Thus, there is a clear distinction between those who pursue administrative or adjudicating careers and those who pursue a political career. The recruitment of administrative judges in France, is traditionally of those

<sup>474</sup> L'ecole Nationale d'Administration (ENA) was founded by the Provisional Government of General de Gaulle in 1945 that aims to train all high rank civil servants of the French administration. See L.Neville Brown & John S. Bell (1998), p.82

<sup>475</sup> See Reform of Legal Training System , available at [http://www.unafei.or.jp/english/pdf/PDF\\_indonesia/session3.pdf](http://www.unafei.or.jp/english/pdf/PDF_indonesia/session3.pdf)

graduated from ENA, however, cope with the demand of an increasing need for judges recently, another means of recruitment through a Special Competition held once a year to select new judges among lawyers, high-quality civil servants has been implemented. This is a good reference to enlarge the human resource base for the appointment of judges in Vietnam that is not only limited in the court clerks and those in the CPV's membership. In addition, to guarantee the independent status of judges in France, any promotion or transfer of judges is presided by an Independent Council formed by the Vice-President of *Conseil d'Etat* and their judge career is notably irremovable.

**Regarding Japanese experiences**, it should first be emphasized that there is no discrimination between administrative judges and other judges. However, with respect to the appointment of judges, training as well as the treatment policy, Vietnam can learn a great deal from Japan's practices:

In Japan, since the courts are vested with authority and assume heavier responsibilities under the Constitution, it is required that a judge must possess "*broad insights as well as extensive knowledge of law*"<sup>476</sup>. The Japanese Constitution is specific in granting judges independence. According to Article 76, judges are bound only by their conscience, the Constitution and Laws. Article 78 says "*No disciplinary action can be taken against judges by the Executive Branch*". To guarantee their independence, the Executive Branch is prohibited from dismissing judges who may only be removed by impeachment or a judicial finding of mental or physical inability to perform their duties. Article 64 also provides that in the case of impeachment, the Diet must establish a special impeachment court consisting of members of both Houses and these proceedings must be public.

**In respect to the appointment of Judges**, unlike France, judges are not appointed for a *life-time* and have a limited appointment tenure. The Chief Judge of the Supreme Court is appointed by the Emperor as designated by Cabinet. All judges of the Supreme Court are appointed by Cabinet, however this appointment is reviewed by the people<sup>477</sup> at the first general election of the members of House of Representative following their appointment<sup>478</sup>. The judges of inferior courts are appointed by the Cabinet from a list of candidates prepared by Supreme Court, and the term for which the judges of inferior courts hold office is limited to ten years, with eligibility for reappointment for an additional ten-year term. Mandatory retirement is required at the ages of 70 for Supreme Court Justices and 65 for other judges<sup>479</sup>. It can be compared with the retirement age of 60

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<sup>476</sup> Supreme Court of Japan, Justice in Japan, 37 (1995)

<sup>477</sup> See Law on the Court Organization of Japan, Art 39

<sup>478</sup> In addition, the judges of Supreme Court are also subject to review at decennial plebiscites at the time of general election of the members of House of Representatives. A justice of Supreme Court shall be removed if the majority of voters favor his dismissal

<sup>479</sup> Randall Peerenboom (2004), p.464

for men and 55 for women under Vietnamese Laws<sup>480</sup>.

Like France, the judiciary in Japan is *career or civil service*. Judges are required not to become parts of a local community, or represent a distinct set of religious, political or social beliefs or a particular constituency. Nevertheless, as commented by Carl F. Goodman, the judge's appointment by Cabinet, a popularly elected political branch of government, with a ten-year tenure makes the courts less independent and requires it to be insulated from *politics*<sup>481</sup>. The *lifetime* tenure of judges would be recommendable.

For a justice system to support Japan in the 21<sup>st</sup> Century, upon the *Recommendations of the Justice System Reform Council* since 2001, Japan has diversified the sources of supply for professional judges. Accordingly, judges are drawn not just from among assistant judges, but also from a variety of sources including lawyers and prosecutors. Regarding the promotion and appointment of lawyers, the Supreme Court and the Japan Federation of Bar Associations build a constant and close cooperative framework. Furthermore, the process of judge appointment by which the Supreme Court nominates candidates, is required to be transparent and the people can penetrate that process<sup>482</sup>.

In Japan, the *Supreme Court Judicial Secretariat* administers the Judicial Branch on behalf of the Supreme Court and under the authority of the Chief Justice. It can decide the transfer of judges to different local courts (*every three years*) to avoid any bureaucratic behavior, corruption, close or relative relationship as well as to guarantee the judge's independence. This is an area from which Vietnam can learn, since the local judges are deeply influenced by local relationships, particularly by pressure from local authorities. Carl F. Goodman, however, still wonders about whether it can guarantee independent judgments of individual judges since the *Supreme Court Secretariat's* authority sets salaries and transfers judges and he strongly calls for no interference.

**In respect to the training of judges**, the legal training for candidates of judgeships in Japan is professional and systematic. The requirement of being a *full-fledged* judge is very strict. In order to be appointed, it is necessary for a candidate to have practical experience of not less than ten years as an assistant judge. Assistant judges are appointed from among those who have first passed the very strict National Bar Examination (*Shiho Siken*), then completed a one-year course of training at the *Legal Training and Research Institute* as an affiliate of the Supreme Court and passed the final qualifying examination. Based on the reformation of the legal professional training system, the Law School system started in 2004 and a new National Bar Examination is to be implemented from 2006.

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<sup>480</sup> See Law on Cadres and Public Servants (Newly Approved by National Assembly on Nov, 13<sup>th</sup> 2008), Art 31; Vietnamese Labor Code (June, 23<sup>rd</sup> 1994, Latest Amendment in 2007), Art 145

<sup>481</sup> Carl F. Goodman (2003), p.114

<sup>482</sup> See Recommendations of Justice system Reform Council: For A Justice System to Support Japan in 21<sup>st</sup> century, available at [http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612\\_e.html](http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html)



New judicial training at the *Legal Training and Research Institute* will be conducted for those who pass that examination. Initiated by the *Justice System Reform Council* (2001), the system now, rather than focusing only on a “*single point*” of selection through the National Bar Examination, organically connects legal education, the National Bar Examination and legal profession training as a *Process*.

**Firstly**, it is worthy mentioning the new establishment of Law Schools providing education, especially for training legal professionals in 2004. Law Schools are established as Post-Graduate Schools under the School Education Law where practical education, especially for fostering legal professionals will be provided. The applicants are not limited to students from law faculties but others, such as economics, science, mathematics, medicine and also working people are selected under the principle of securing fairness and diversity through both entrance exam results, university grades achieved and actual performances. After two or three years of training, if successful in passing the new National Bar Examination, they officially follow their own legal professions as judges, lawyers, prosecutors or police. It should be considered whether Vietnam should follow Japan to establish a Law School System for preparing the legal human resources including the administrative judges in the future. The Judicial Academy in Vietnam is a legal professional school, but not like the model of Law School in Japan since the applicants are not from diverse backgrounds. As for the judge training course, candidates must be on the list of judge’s appointment and approved by the SPC. In the future, Vietnam should set up this kind of Law School attached to Law Universities or reorganize the current Judicial Academy to fill the gap between legal education and actual legal practice and prepare quality personnel through a strict and transparent process of education, training and appointment. Up until now, JICA has been the most active donor to cooperate with the Judicial Academy to set up a *long-term* project for improving the training programs and contents for all legal posts including judges, as well as teaching methods such as replacing the *one-way lectures* by *bi-directional* and *multi-directional* lectures with parallel instruction by both Practitioners and Teachers. However, there should more focus on improving the program, documents and methods for training administrative judges, including the way of accessing and analyzing judgments, legal knowledge relative to governing policy, new disputes emerging, and other specific skills, since the objects of these are always powerful authorities who can apply pressure or obstacles to their adjudicative works.

**Secondly**, Vietnam should study the way Japan has organized its National Bar Examination. The current National Bar Examination began in 1949<sup>483</sup>. The new National Bar Examination has been held since 2006 upon the *Justice System Reform* in the 21<sup>st</sup> century of Japan<sup>484</sup>. It abolished the

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<sup>483</sup> Historically, the First Public Examination called *Daigen-nin* Examination started in 1876, the First National Examination in regard to Judges held in 1884 in Meiji Period

<sup>484</sup> Law concerning Promotion of Justice System Reform came in to effect on December, 1<sup>st</sup> 2001

priority system for determining successful candidates and those who complete the course at the above mentioned Law School can be awarded a qualification of candidacy for the new National Bar Examination. From the standpoint of switching from the selection system based only on a *single point* in to a new legal training system based on a *process*, the National Bar Examination takes into account the educational program at Law Schools. It is held once a year, aims at the candidates to first complete the courses at Law Schools and when the system was first designed expected a pass-rate of 70-80%. In 2006, of the 6,261 people who took the New Bar Exams having completed programs at the nation's 74 Law Schools, 2,065 passed (33%), fewer than the 2,100-2,500 originally projected. In 2007, 1,851 passed, accounting for 40.2% of the 5,401 total<sup>485</sup>. The Japanese National Bar Examination is public, transparent, and very strict. Under the revamped legal education system, those who complete programs at the Law Schools are entitled to take bar exams but can only take them three times within five years of completion. If they are unsuccessful, they are no longer entitled to take the exam.

**Thirdly**, the *Legal Training and Research Institute* established in 1947 and attached to the Supreme Court is a good reference for Vietnam in Apprenticeship Training. Based on the reformation of the legal professional training system<sup>486</sup>, the new judicial training will be conducted here for those who pass strict Bar Exams and aims to improve the cooperative relationship among the *three branches* of training the legal profession, including judges in Japan. It carries out training for judges, assistant judges, and Summary Court Judges throughout the year. In recent years, a total of more than 1,000 judges have participated in the training annually. The Supreme Court appoints legal apprentices out of those who have passed the National Bar Examination. Under the new judicial training system, from 2006, a one-year course (*instead of previous the 18 month-course*) consists of an eight-month field-specific training, a two-month optional field training, and a two-month collective training. *For first eight months*, the legal apprentices are sent to district courts, district public prosecutors offices, and bar associations nationwide, where legal apprentices learn about actual cases through practical experience. During this time, they spend two months training in the four areas of civil litigation, criminal litigation, public prosecution, and advocacy. In litigation training, legal apprentices attend the court to closely observe the directions of judges, exchange opinions on judgments with judges by reviewing records of pending cases, and create drafts of trial documents to ask for comments from judges. *For the following two months* at optional field training, it has been introduced in the new judicial training system that individual legal apprentices can make voluntarily selections according to their own future career plans, interests, and concerns. Thus, to become a judge, especially those handling administrative lawsuits, the legal apprentices have an

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<sup>485</sup> According to the statistic data of 2007, Law School of Nagoya University is on the top five with the final pass rate of 63.1% in which the thesis pass rate accounted for 82% stand at the top. See Pass Rate of New National Bar Examination 2007, available at [http://homepage.mac.com/gen\\_0404/blog/shinshiho\\_h19\\_passrate.pdf](http://homepage.mac.com/gen_0404/blog/shinshiho_h19_passrate.pdf)

<sup>486</sup> The Law School system started in 2004 and the New National Bar Examination is to be implemented from 2006

opportunity to experience field training in areas not covered by the last field-specific training. *For the last collective training*, the legal apprentices mainly focus on guidance on making drafts through using case records for training made from actual case records and are required to take a Final Qualifying Examination.

Thus, regarding the training judges, Vietnam should learn from this systematic, professional and transparent training course, particularly focusing on the apprentice's skills and specific career field. In Japan, in most District Courts, judges in ordinary civil divisions handle cases brought under ACLL seeking review of administrative dispositions. However, as required by the specialty of ACLL cases, presently three divisions of District Courts in Tokyo, two in Osaka, and one in each District Court in Nagoya, Yokohama, Saitama, Chiba, Kyoto and Kobe are established to handle administrative cases. Thus, the judges specializing administrative lawsuits are required to be much more standard. As a general rule, the Court Organization Law provides that the District Court sits a single-judge court except when the court itself decides that a collegial court of three judges should hear the case or when statute requires a collegial court. Assistant judges with less than five years experience may not try cases on their own. Recently, due to the shortage of judges, assistant judges with more than five years experience may try cases assigned as single judge court. According to *Judicial Reform Initiative* since 2004, the assistant judge may work for two years in a Bar Association to gain experience and this time is possibly counted as part of judicial training and considered as a condition for handling a case.

**Regarding the treatment policy**, to guarantee judge independence, under Article 80.2 of the Constitution, their salary is *adequate compensation* and well protected, it shall not be decreased during their term of office and judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. Japanese judges generally live together in apartment buildings that in effect form judicial compounds. The Chief Justice of Supreme Court has an official residence but is quite separate in an inconspicuous residential precinct.

As mentioned above, Vietnamese judges are the civil servants and receive a salary upon the standard prescribed by law with a small duty allowance. However, to further promote their responsibility for work and independence, the salary policy should continue to be improved as laid down in Resolution 08/NQ-TW (January, 2<sup>nd</sup> 2002) of the Central Committee of CPV on Judicial Reform: "*There should develop an appropriate policy on salary and allowance and other appropriate treatment for judges*".

**Finally yet importantly**, lessons regarding material and technical facilities including the development of IT for judge's activities can be learned from Japan to improve the judge's adjudicative function in Vietnam. It is essential to reconstruct the court buildings in some provinces, especially in rural areas. Like other professional activities, the application of IT needs to be carried

out on the base of relating data and information, such as receiving the cases, making case dossiers, reviewing facts and evidence, studying legal provisions (*law database*), organizing trials and pronouncing judgment, accessing all SPC's judgments through Internet and so on. Some recent projects carried out by Japan Legal Information Institute (*Nagoya University*), such as A Common Translation Dictionary, Translation Memory and e-Legislation including a Japanese-English-Vietnamese Legal Dictionary<sup>487</sup>, and a Japanese Law Database in English are really useful experiences for Vietnam to improve IT in adjudicative works in the new period of post-WTO Accession.

#### **2.4.2. Other Legal Posts**

This section gives some recommendations regarding some other legal posts:

**Regarding the people's assessors**, it is important to improve the quality of people's assessors during litigation proceedings. To this end, people's assessors should be chosen from among the experienced persons in both the state management and other legal fields. People's assessors should be allowed to take reasonable time to examine cases, and when dealing with complicated litigations, they should be able to propose to the judge to suspend opening the trial in order to fully research the issues. In particular, they should perform the rights as well as the duties in court to ensure the equality with judges in giving a vote for judgment as provided by the Constitution.

**Regarding the procurators**, the participation of procurators during the administrative trials in Vietnam, like the people's assessors, is a compulsory Constitutional principle<sup>488</sup>. Under the amended Constitution (2002), the "*general supervision function*" of procurators has been abolished<sup>489</sup> in order to avoid confusing it with the supervision of the National Assembly, the inspection of the Government Inspectorate and some other entities. Deriving from the characteristics of administrative litigation, the discussion of whether the participation of procurators in this proceeding should be cancelled, excluding it from performing as a litigant to initiate the case on behalf of the minor or the disable persons, has emerged. In cases where the participation of procurators is necessary to perform the function of "*supervising the judicial activities*"<sup>490</sup>, its participation must be more objective to supervise the legality of litigation proceedings, not in favor of the court as well as the litigated administrative agencies. The way of putting the question in the "*interrogative step*"<sup>491</sup> in litigation proceedings should be redefined. It cannot be the same with that of civil or criminal cases and the procurator cannot be regarded as a "*third judge*".

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<sup>487</sup> See Y.Matsuura, Beyond the Global Sharing of the Statutory Text, ALIN International Academic Conference, (October, 2008)

<sup>488</sup> Vietnamese Constitution 1992, Art 129, 130

<sup>489</sup> See Amended Constitution (2002), Art 137

<sup>490</sup> Ibid

<sup>491</sup> See OSAC, Art 46

**Regarding lawyers**, Article 6 of OSAC provides that: “*The parties may authorize in writing their lawyers or other persons to participate on their behalf in the proceedings*”. In fact, the role of lawyers in administrative lawsuits is still weak since written evidence is the most required while the lawyers find difficulty in cooperating with litigated agencies or authorities. The Vietnamese Lawyers Association is a professional social organization, but it is not completely independent in contrast to the status of Japanese Federation of Bar Association. To become a lawyer in Vietnam, a candidate must obtain a LL.B Degree, then be trained for six months in the Judicial Academy, and then taking a legal apprenticeship for at least 18 months at any Local Lawyer Association. Finally they may achieve the Lawyer Certificate issued by Minister of MOJ based on the promotion by that association<sup>492</sup>. This mechanism seems to ensure the independence of lawyers toward the powerful administration after they are granted the Certificate as well as there is no such a so-called *re-appointment* like judges. Nevertheless, it does mean that they can achieve an absolute independent status because Lawyer Association where they work has a *close* and *influential* relationship with local governments and MOJ as prescribed by the principle of Democratic Centralism and Party Ruling in the current Vietnamese Political System. Furthermore, the obstacles in finding the written evidence from the litigated authorities also limits their independence. Thus, it is essential to improve the independent status of Vietnamese lawyers as well as the cooperation of administrative agencies. In addition, the lawyers themselves need to improve their quality to well protect infringed people and entities including foreign partners in the context of international integration. Since foreign lawyers are not allowed to participate in the litigation process with the exception of consultative services, as is similar with Japanese experiences in protecting their *monopoly* position within the Japanese law market. However, according to *Recommendation of the Justice System Reform Council* in Japan (2001), it suggested that cooperation and coordination between Japanese lawyers and foreign law solicitors should be promoted. Japan presently allows foreign lawyers, under conditions, to practice as foreign law specialist in Japan, provided reciprocity is given to Japanese lawyers in the foreign lawyer’s licensing jurisdiction. It is a good experience for Vietnam to improve the quality of lawyers in cooperation with foreign partners to succeed in case defense relative to the growing fields of intellectual property, technology transfer, and competition.

**Regarding the adjudicators** who serve for the proposed AJB attached to Government, they should be appointed and dismissed by the Prime Minister based on the promotion of an *Independent Adjudicator Selection Committee* formed by him. To be appointed, the adjudicators should be strictly required to possess a deep knowledge and practical experience on adjudicating and various administrative law fields rather than only a political requirement. Like administrative judges, they need to experience the strict National Bar Examination, to be well-trained in the professional school, and appointed as a *lifetime* member with *adequate* payment.

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<sup>492</sup> See Law on Lawyers (June, 29<sup>th</sup> 2006), Art. 10, 11, 12

*For short-term measures*, some current government inspectors, lawyers, law teachers or judge candidates should be retrained at the National Administration Institute. This Institute is now attached to the Government and needs to add the functions of training adjudicators. The Prime Minister will appoint the candidates as adjudicators upon three levels. They would be sent to perform their adjudicating function within the AJB system at the Area, Regional or Central Level.

*For the long-term measures*, the National Administration Institute should be upgraded like the French ENA which trains all *high-ranking* civil servants including administrative adjudicators. A long with the system of Judicial Academy and Law School supplying human resources for the judicial branch, this Institute should organize the National Examination for selecting adjudicator candidates. The number of applicants can be expanded for not only those graduating from Law Universities, but also from this Institute and universities of economy, trade, banking and so on. Like both the French and Japanese experiences, the applicants should be allowed to take the exam up to three times within an age limit. Due to the characteristic of administrative disputes, to be member of the CPV should not be a prerequisite condition for appointment. Salaries and expenses of AJB system should be directed from the state budget to avoid any impact of central or local governing agencies. The *lifetime* tenure, appropriate salaries and public housing are also worthy recommendations for its absolute independence to effectively guarantee the infringed people from the malpractice of a powerful administration.

### **Concluding Remarks**

The reform of the ADCs Model needs to be in line with the transplantation of the ROL in the 21<sup>st</sup> century, the contemporary administrative law development as well as the Judicial Reform Strategy promoted by the CPV. To achieve this goal, Vietnam needs to set up in parallel the appellate system (*AJB attached to Government*) and judicial review system (*the reconstruction of Regional ADCs*). Apart from the improvement of the legal framework regarding the jurisdiction, legal human resources are regarded as a *key factor* to determine the success or failure of the overall ALRS reform. Training legal professions including administrative judges should follow some valuable overseas experiences, such as the Japanese model upon Justice System Reform in the New Century which is *systematic, professional* and defined as a *Process* rather than *Single Point* of Selection or Appointment.

## CONCLUSION

*“[W]hile human rights is a universal term for all human beings, it is at the same time a term for the whole of Vietnamese nationals in their long structure for independence, freedom and happiness... Things really began to change with the advent of China and Vietnam calling for “reforms and openness” and their adoption of the policy of “developmentalism” after 1989. At this time, the need to maintain socialism and the occurrence of various problems thereof became obvious in Asian socialist countries”<sup>493</sup>*

**(Aikyo Masanori, Human Rights and Democracy in Vietnam:  
Some Thoughts on Philosophy of Legal Assistance, 2005)**

*“Building and Improving the legal system regarding the guarantee of human rights, freedom and democracy; Improving Administrative Law Review System that guarantees all illegal decisions and actions are timely discovered and absolutely take to the courts”<sup>494</sup>.*

**(Resolution No 48 NQ/TW (2005) of the CPV Politburo  
on Improving Vietnamese Legal System up to 2020)**

Although the Vietnamese ADCs Model and Jurisdiction has revealed many defects and been involved in many legal controversies as have been outlined and analyzed in this dissertation, it cannot be denied that over the past ten years, the CPV and the State have poured a great deal of effort into improving the mechanisms for settlement of people’s claims. This can be said to be one of the most important missions of a *Socialist Law-Based State* – a State of the People, working for and serving the People<sup>495</sup>.

The reform of ADCs and its jurisdiction is nowadays, related closely to the process of transplanting the elements of the ROL in Vietnam – a socialist country with an emerging, dynamic market economy. As a result, the difficulties and obstacles during the reform process are obviously unavoidable. The success of reforming the ADCs Model surely has a direct impact on the speed of the process of transplanting the core ROL with some Vietnamese characteristics.

The Vietnamese contemporary legal system has been constructed by legal

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<sup>493</sup> Aikyo Masanori, Human Rights and Democracy in Vietnam: Some Thoughts on the Philosophy of Legal Assistance, in Y.Matsuura ed, *The Role of Law in Development: Past, Present and Future*, pp.72-74 (2005)

<sup>494</sup> Resolution No 48 NQ/TW dated on May, 24<sup>th</sup> 2005 by Politburo of CPV on Strategy on Improving Vietnamese Legal System to 2010, orientation up to 2020, in *Official Documents of Party and State on Reform of State Apparatus*, pp. 5-7 (2005)

<sup>495</sup> Vietnamese Constitution, Art 2

transplantation historically derived from China, France, the Former Soviet Union and more recently East Asia and Western countries. Mainly after the 1990s, the assistance received from the West had complicated influences that led to many conflicts between traditional thinking and the new perceptions. The introduction of the ADCs Model in 1996 and the strict criticisms associated with it are clearly demonstrate this. During the conducting of this critical research, the following conclusions have been drawn:

**Firstly**, the existing ADCs Model is not an ideal model for protecting individuals and entities including foreign partners residing in Vietnam in the new period of post WTO's Accession.

This model is strongly criticized among scholars and people due to the following reasons:

(1) It fails to fulfill the requirement of a clear distinction between the adjudicative and governing functions within the administration, between the administrative jurisdiction and judicial jurisdiction as well as the appellate system and judicial review system recognized in contemporary administrative law theory.

(2) It does not guarantee the requirement of Judicial Independence known as one of the core elements of the ROL. As such, this model makes the local ADCs heavily dependent on the local governments as well as the CPV Executive Committees at the same level.

(3) It does not meet the recent demands of the Judicial Reform Strategy promoted by the Party and State, such as the requirement of international integration after Vietnam's Accession to the WTO, of the Vietnam-America BTA, which requires an independent model that can guarantee all people's legal rights and interests with transparent and impartial proceedings.

This dissertation supports the idea that the existing model is only an interim solution in the transitional period and is no longer appropriate in the current context.

**Secondly**, the current ADCs Jurisdiction is very limited and harshly criticized, although it has been gradually improved through two revisions of OSAC (1998, 2006).

This jurisdiction is criticized because of the below reasons:

(1) People cannot take any administrative matter to the ADCs except for those enumerated in Article 11 of OSAC (2006). The *standby* provision that allows people to take other lawsuits provided by other laws and treaties is considered as a threat to Judicial Independence since in many practical cases, the National Assembly's Standing Committee or Government can decide what kinds of administrative matters could be handled by courts.

(2) People are not allowed to sue an illegal, even unconstitutional norm or regulation. In fact, there have been a number of such norms and regulations enacted against people's legal rights and interests. Furthermore, public interest lawsuits are also unfamiliar and always out of the court's jurisdiction.

(3) To be resolved by ADCs, the claims must be experienced the compulsory



*pre-litigation* period taken by the original agency or authority creating obstacles for accessing lawsuits.

(4) Many errors of law, such as contradictions, overlapping, the lack or the slowness of issuing detailed guidance regulations by ministries or other agencies are major factors infringing people's legal rights and interests.

(5) Due to the lack of concrete provisions regarding the content of judgment, the local ADCs often make mistakes in issuance of extreme discretionary judgments. In some cases, they also encroach upon the administration and create damages for people concerned.

For such above criticism, this dissertation supports for the necessity of expanding the court's jurisdiction to its maximum (*with exception, such as those relative to national defense, diplomatic relations and so on*). This dissertation assumes that the effectiveness of judgment what is most required since whatever model is adopted, it will be meaningless if its judgments fail to be strictly performed.

**Thirdly**, to reform the ADCs Model and Jurisdiction in the context of international integration, Vietnam needs to learn from foreign experiences by means of FLA. This dissertation supports the idea that borrowing other foreign laws and institutions can be regarded as a good method of *speeding up* the process of finding legal solutions to similar problems. Nevertheless, the borrowing without deep consideration into its own condition may have the opposite effect on the reform process.

Some remarks should be given as below:

(1) The reform of the ADCs Model in Vietnam needs to be in line with civil law thinking and in accordance with some Asian legal traditions and domestic factors.

(2) Vietnam can study some valuable experiences from France, China and Japan since these three countries have already significantly influenced Vietnam, such as long periods of colonial rule (*China, France*), Asian values (*China, Japan*), early and enthusiastic FLA donors (*France, Japan*), political, cultural and social commonalities (*China*), and a mature experience of importing foreign laws with "*total personality make-up that give births to those conclusions arrived at by Western learning*"<sup>496</sup>(Japan)

(3) Vietnam can study some relevant experiences from each of the above countries, particularly those related to the expanded *jurisdiction* (France, Japan), controversies regarding limited jurisdiction (China), contemporary reform regarding ALRS and training legal human resources (Japan, China). Nevertheless, Vietnam cannot totally follow any single model, due to: (i) the differences in political structure and State Power (France, Japan); (ii) the defect similar ADCs (China); and (iii) the immaturity of contemporary Vietnamese administrative law theory.

(4) To avoid constructing Vietnamese ALRS from a mishmash of borrowed theories

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<sup>496</sup> Itsuo Sonobe, Comparative Administrative Law: Trends and Features in Administrative Law Studies in Japan, in John O.Haley ed, 19 Law in Japan, p.56 (1986)

and models, Vietnamese lawmakers need to cautiously analyze and find out the best solutions that are compatible with the current context of Vietnam. For the above requirements, it is high time to receive FLA regarding ALRS. In addition, to avoid political pressure, Vietnam needs to be more active in FLA Projects and gradually promote the Projects of Legal Cooperation, guaranteeing equal status and mutual benefits among partners.

**Fourthly**, to reform the ADCs Model, its Jurisdiction as well as the whole ALRS, Vietnam needs to improve in parallel both the appellate system and judicial review system to effectively protect all individuals and entities from any misconduct of the powerful administration. The improvement of legal human resources, particularly the role, appointment and training administrative judges in the time being is regarded as a *key factor* to achieve the success of the overall reform.

This dissertation gives the below main recommendations:

(1) *Regarding the new appellate system*, this dissertation supports the idea of setting up an independent AJB attached to Government that is organized upon the three levels of Area, Regional and Central. Such kind of organization can avoid its dependence on local governments and CPV Executive Committees at the same level as the existing ADCs. This AJB should review both the legality and rationality of litigious administrative decisions or actions. It should deal with the cases related to State Compensation. In some cases, it should also decide whether a legal norm or regulation is illegal and propose to the competent agencies for annulment. People resolving the cases can be called Adjudicators (*Tai Phan Vien*) and trained at the current National Administration Institute belonging to the Government.

(2) *Regarding the judicial review system*, this dissertation supports the idea of replacing the existing ADCs Model by the Model of Regional Courts in line with the Judicial Reform Strategy up to 2020 promoted by CPV recently.

According to above models, the settlement of administrative disputes in Vietnam would possibly go through three periods as follows: (i) *the mediation or self-reconsideration* period, carried out by the original or upper administrative agency or authority; (ii) *the quasi-judicial proceedings* performed by Regional Model of AJB attached to Government; (iii) *the judicial litigation proceedings* performed by Regional Model of ADCs. The main difference of the (iii) with (i) and (ii) is that the Regional ADCs will review only the legality of litigious decisions or actions and review whether the AJB fails to apply the correct laws in its settlement proceedings. The SPC has the final judgment toward all judgments made by the lower courts and *quasi-judicial* AJB system.

Thus, for these proposed models, it can ensure the theory of distinction between adjudicative and active administration, the new trend of the world that *entrust the adjudication to a special body with high quality and familiar with its usual work*. Furthermore, it is also in conformity with the requirements of improving the judicial review system to guarantee the

independence of the judiciary as well as the current Vietnamese Constitution stating that “*SPC is the highest judicial body in SRV*”<sup>497</sup>.

(3) *In respect to jurisdiction*, the courts and AJB’s jurisdiction should be extended to their maximum to ensure: (i) any claim to be impartially and transparently reviewed; (ii) any final settlement to be reviewed by judicial courts (*upon the requirement of Vietnam-America BTA and WTO membership regulation*). In addition, the legal framework, codifying some fundamental laws regarding the Administrative Remedy needs to be improved, such as Administrative Litigation Law, Appellate Law, State Compensation Law, Administrative Procedural Law and so on.

(4) *In respect to human resources*, Vietnam should reform the mechanism of judge appointment to ensure its independent status. In addition, Vietnam should follow Japanese experiences on the *Justice System Reform* initiated in 2001, that not only focuses on a *Single Point* of selecting legal human resources through National Bar Examination but also closely connects the Legal Education, the National Bar Examination and Legal Training as a *Process*. Accordingly, a Law School for preparing legal human resources needs to be established, a strict National Bar Examination for selecting career candidates needs to be organized and the training program for legal professions including administrative judges in the current Judicial Academy needs to be reformed. The improvement of Legal Human Resources must be regarded as a *long-term* strategy and is a *key factor* to determine the success or failure of the overall contemporary judicial reforms.

(5) *In respect to FLA*, Vietnam should be more active to set up plans, budgets and personnel (*not always in mind that co-operation means sponsorship in money*) in FLA and Legal Cooperation Projects regarding ALRS: (i) improving the legal framework (*the codification of fundamental administrative remedy laws, the revision of some substantial and procedural laws concerned*); (ii) constructing institutions (*the reconstruction of Regional Court Model, the establishment of AJB, the publication of more administrative judgments*); (iii) legal training and exchange of legal information (*training judge program, training skills of studying judgments, Camera Network Conference and Lecture, Japanese law database in English, e-dictionary Projects, dispatch graduate students of Law Faculty to Research and Education Center for Japanese Law in recipient countries and so on*)

**Finally**, since Vietnam cannot immediately adopt all substantive elements of ROL, the reform of ADCs Model should be conducted concurrently with the transplanting of the *Informal Institution of ROL* to avoid any shock through sudden change and gradually achieve democratic values set forth by *State governed by ROL*. The sole ruling of CPV is a historical and Confucian’s inheritance, and a Constitutional principle recognized by the Vietnamese people. It has actively changed policies recently to pursue the goals of ROL and democracy. However, regarding the

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<sup>497</sup> Vietnamese Constitution, Art 134

ALRS, it needs to make the courts and other institutions (*like the proposed AJB attached to Government*) more independent and eliminate those who abuse the Party leadership to interfere the adjudicative functions.

To reform the administrative law system in transitional developing countries like Vietnam, it is essential to approach the basic theory and *paradigm*, particularly those relative to the mechanisms of institutional change in respect to economic study. All political obstacles need to be overcome, as do complex administrative procedures to achieve the success of FLA and Cooperation projects and to build up a *real State governed by ROL*. This reform should be *gradualism* and definitely a *continuous learning process*.

## SURVEY QUESTIONS & RESULT

**Number of Survey:** 70

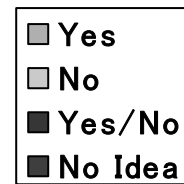
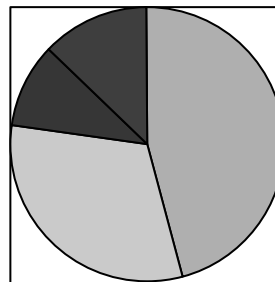
**Objects:** Graduate Students of Nagoya University, Graduate School of Law, Graduate School of International Development, Law Teachers in HLU, Judicial Academy, Legal Experts in SPC, MOJ, Government Office, NA's Office, Government Inspection, State and Law Institution...etc.

### Question 1:

**Administrative Court has been already established in Vietnam (*one choice*)**

- |        |            |
|--------|------------|
| a. Yes | c. Yes/No  |
| b. No  | d. No Idea |

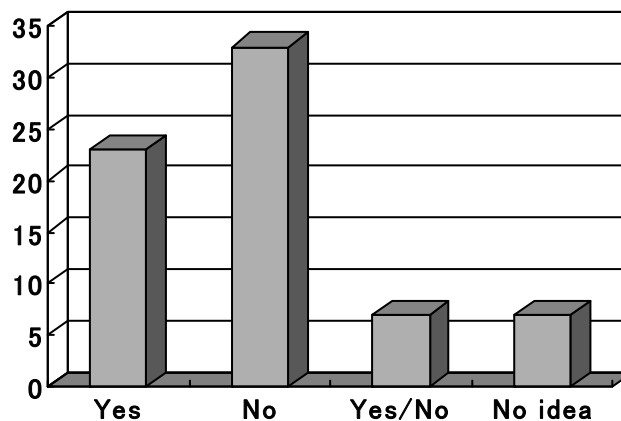
Yes: 32 – 46%  
 No: 22 – 31%  
 Yes/No: 7 – 10%  
 No Idea: 9 – 13%



### Question 2:

**People can take any administrative decision or action considered illegal to Administrative Division Courts in Vietnam (*one choice*)**

- |        |            |
|--------|------------|
| a. Yes | c. Yes/No  |
| b. No  | d. No Idea |

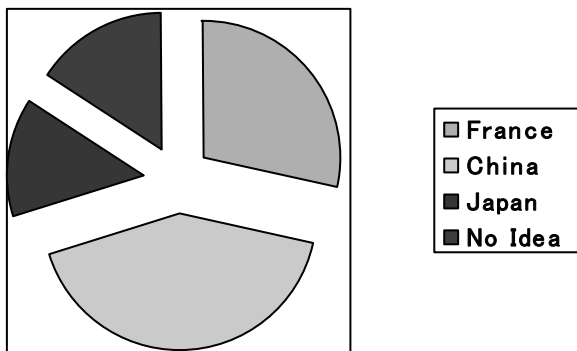


**Question 3:**

**Which country below shares the most common with Vietnamese Court Model for Judicial Review of Administrative Action (*one choice*)**

a. France                      c. Japan  
b. China                        d. No Idea

France:        20 – 29%  
Japan:         10 – 14%  
China:        29 – 41%  
No Idea:      11 – 16%

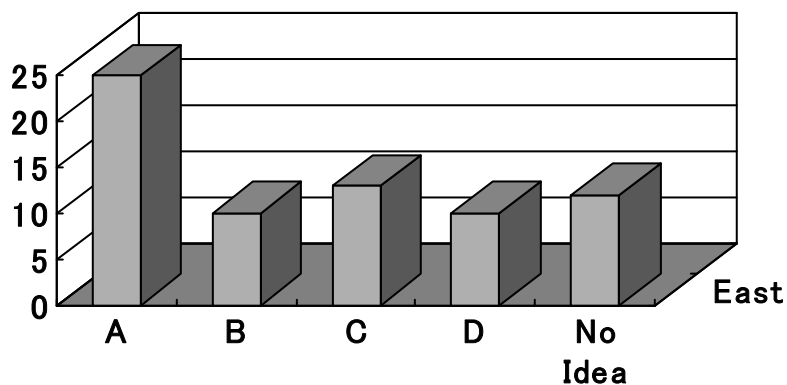


**Question 4:**

**Which below model is the best consulted for Vietnam in the time being (*any choice*)**

a. Administrative Jurisdiction Body Attached to Government  
b. Semi-Independent Administrative Courts like the current Military Courts  
c. Independent Administrative Court Formed by National Assembly  
d. Maintaining Administrative Division Court Model  
e. No Idea

■ A = AJB Attached to Government	25 = 36%
■ B= Semi-Independent Administrative Courts	10 = 14%
■ C= Independent Administrative Court Formed by N.A	13 = 19%
■ D= Maintaining ADCs	10 = 14%
■ E= No Idea	12 = 17%



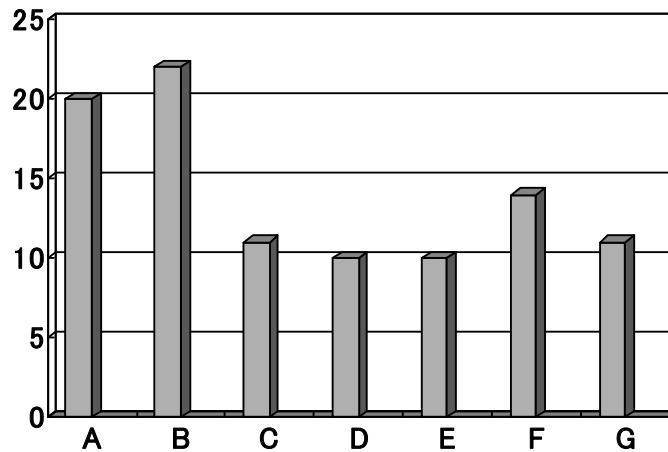
**Question 5:**

**So far which Foreign Legal Assistance Project has involved Reform of Administrative Law**

**Review System (*any choice*)**

- a. Publishing Supervisory Judgments of Supreme People Court's Judges Council
- b. Drafting Administrative Procedure Law
- c. Drafting Administrative Litigation Law
- d. Drafting State Compensation Law
- e. Drafting Judgment Execution Code
- f. Reforming Administrative Division Court's Organization
- g. No Idea

- A = Publishing Supervisory Judgments of SPC's Judge Council (20)
- B = Drafting Ad. Procedure Law (22)
- C = Drafting Ad. Litigation Law (11)
- D = Drafting State Compensation Law (10)
- E = Drafting Judgment Execution Code (10)
- F = Reforming ADCs's Organization (14)
- G = No Idea (11)



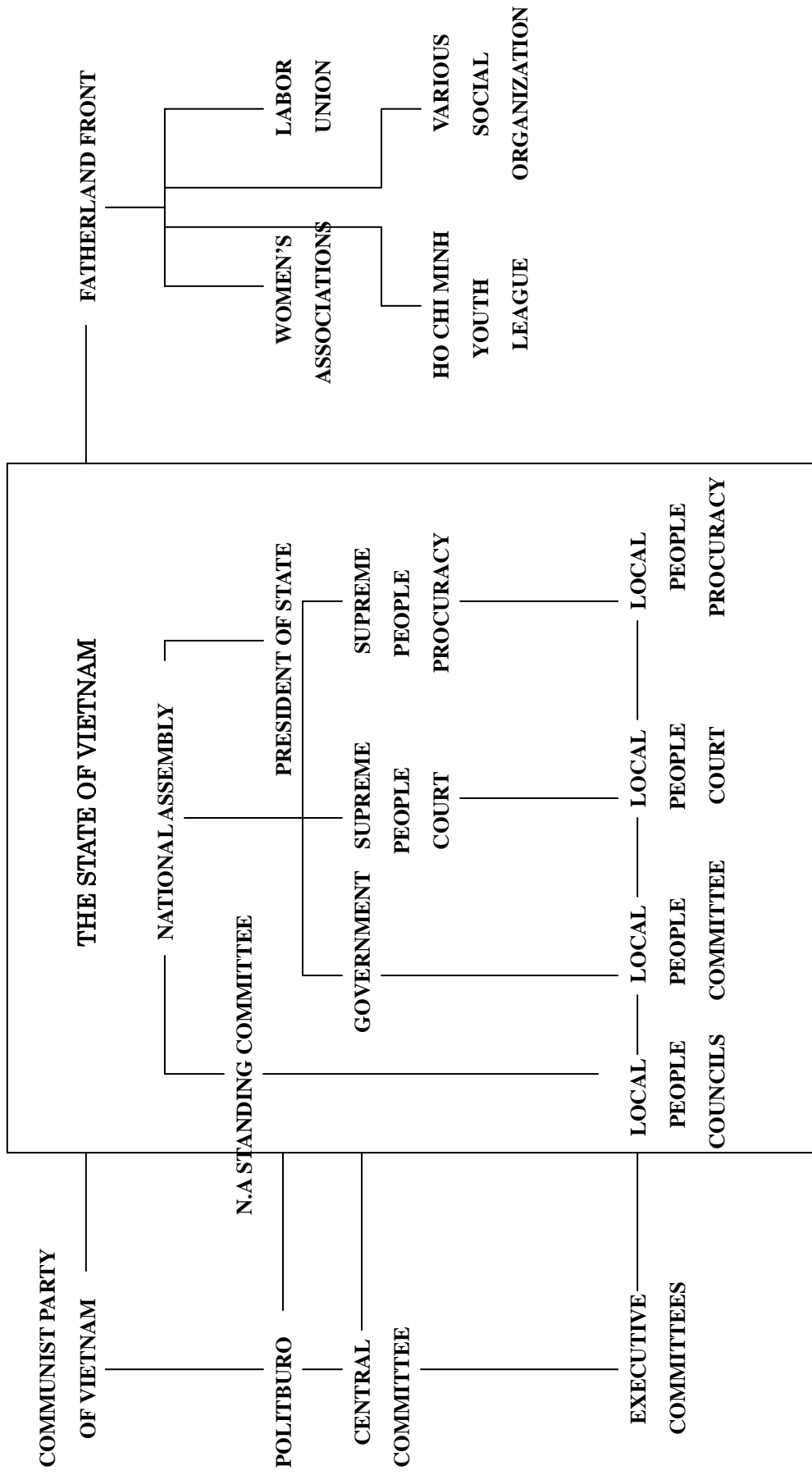
**Thank you very much for your kind help! Nagoya, October, 2008**



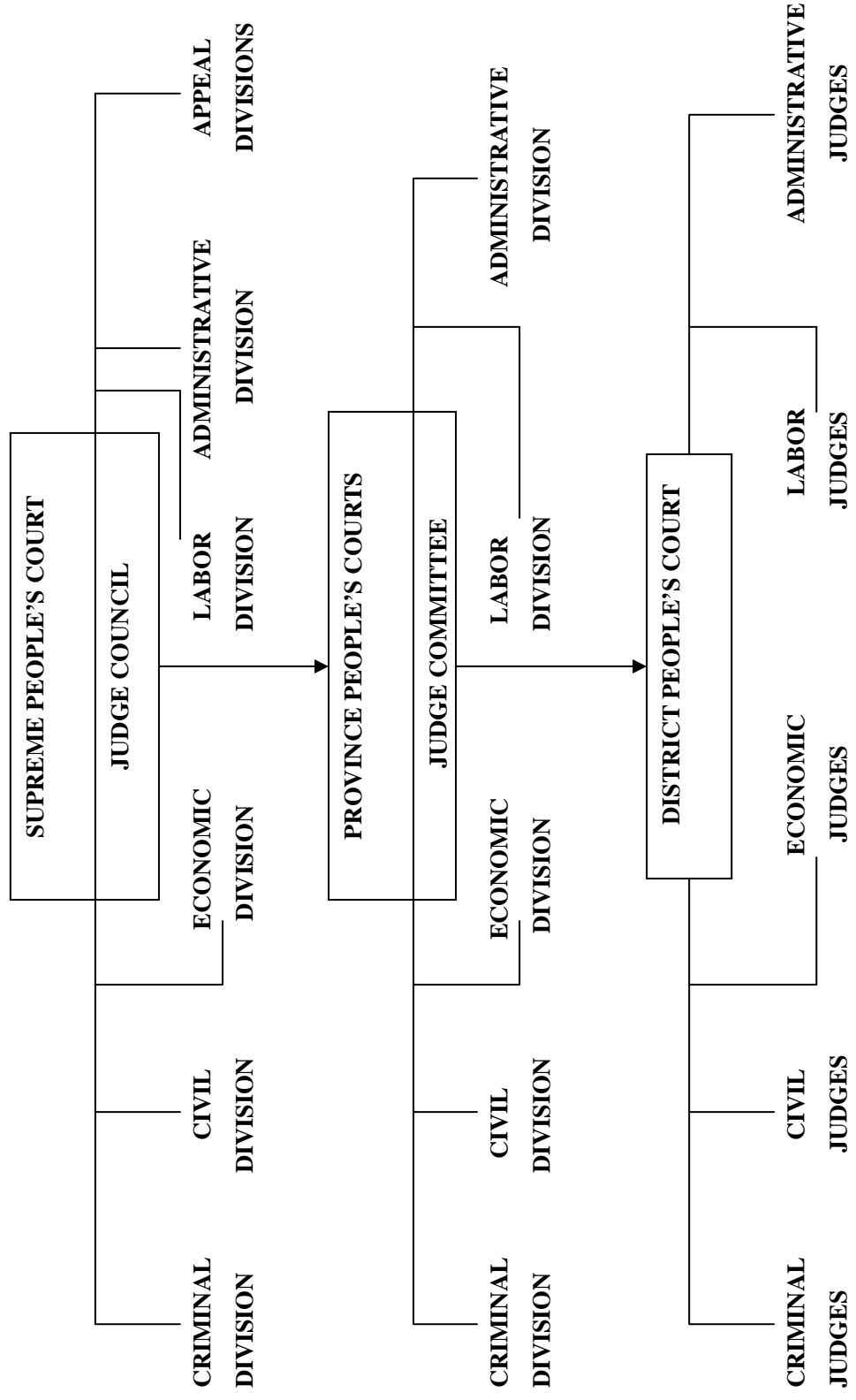




**APPENDIX 2: POLITICAL AND ADMINISTRATIVE STRUCTURE OF VIETNAM**

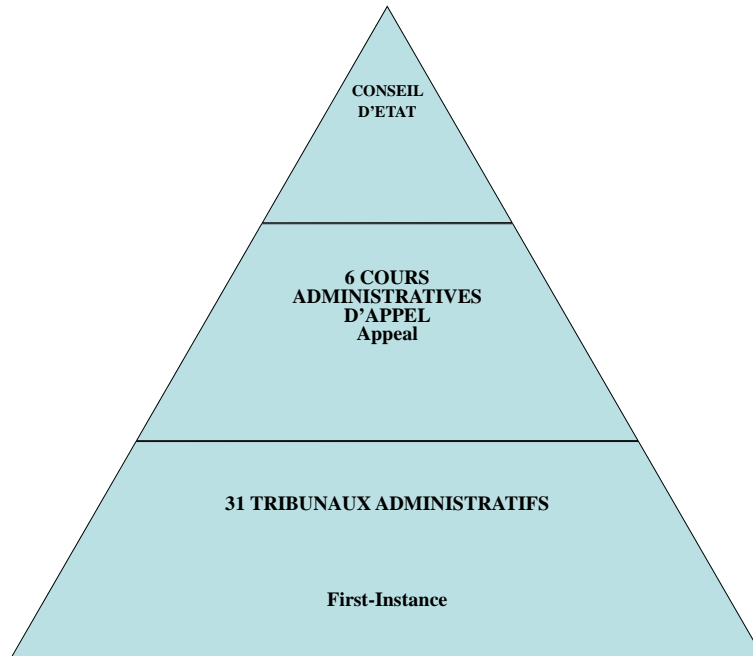


**APPENDIX 3 : STRUCTURE OF VIETNAMESE PEOPLE'S COURT SYSTEM**

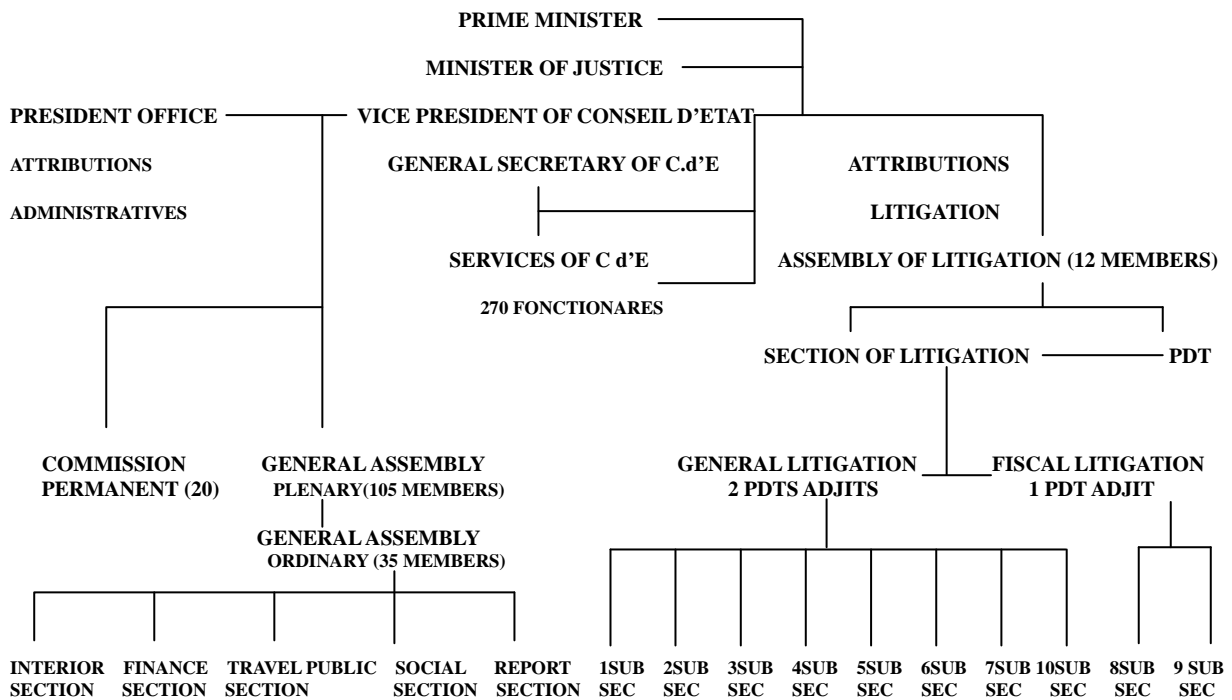


**APPENDIX 4:**

**THE DIVISION OF ADMINISTRATIVE COURT IN FRANCE<sup>497</sup>**

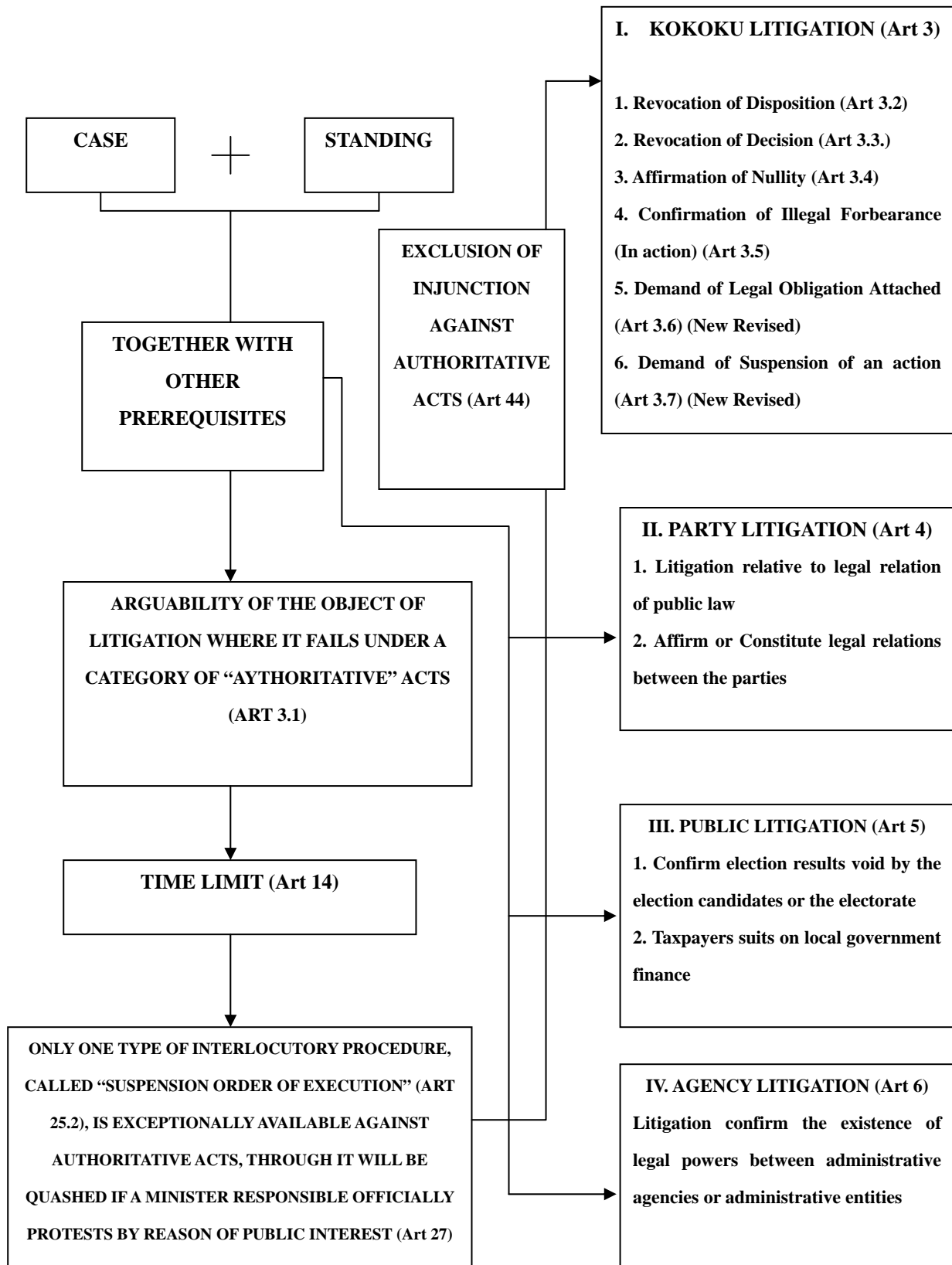


**APPENDIX 5: ORGANIZATION OF CONSEIL D'ETAT**



<sup>497</sup> Sources from L.Neville Brown & J.Bell, French Administrative Law, pp.306-308 (1998)

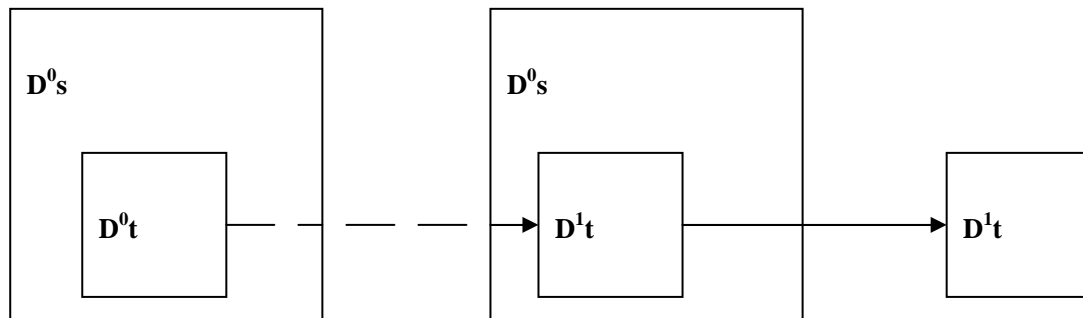
APPENDIX 6: ADMINISTRATIVE CASE LITIGATION LAW (JAPAN)<sup>498</sup>



<sup>498</sup> This source is cited from Toshiro Fuke, *Judicial Review in England and Japan*, in Yong Zhang ed, *Comparative Studies on Judicial Review System in East and South East Asia*, 42 (1997). The author supplements the type 5 and 6 of *Kokoku* Litigation upon the New Revised ACLL 2004, Art 3, sec.6 & 7

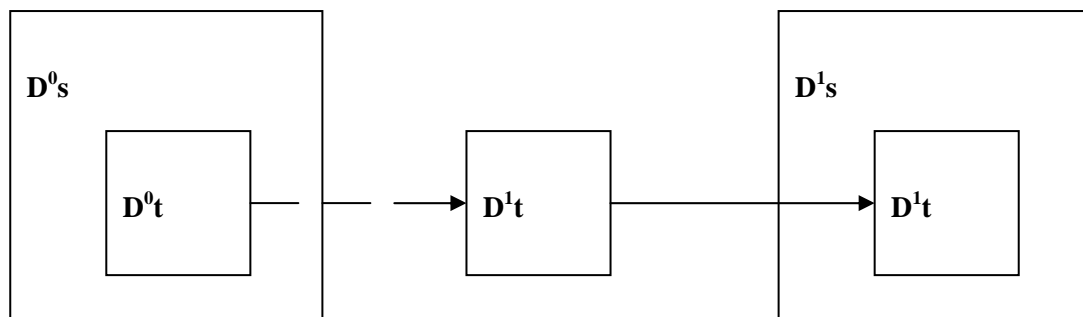
## APPENDIX 7: REFERENCE ON HOW INSTITUTIONS EVOLVE<sup>499</sup>

### TYPE 1: COMMUNITY EMBEDDEDNESS THAT FACILITATES ADAPTATION TO A NEW OUTSIDE OPPORTUNITY



$D^0s$  denotes the domain of social exchange,  $D^0t$ ,  $D^1t$  denote the domains of economic transactions with different game-form characteristics whose sets of agents are partially overlapped with that of  $D^0s$ . It is supposed  $D^0s$  embedded  $D^0t$  in the beginning,  $D^0t$  subsequently incorporates “new action-choice opportunities” and transforms itself in to  $D^1t$ .  $D^1t$  though continuously embedded by  $D^0s$  as the old, but it may evolve and become emancipated from  $D^0s$  by generating a new institution that autonomously governs transactions in that domain.

### TYPE 2: TRANSFER OF SOCIAL CAPITAL ACROSS DIFFERENT TRANSACTION DOMAINS



Being contrast with Type 1, the agent of  $D^1t$ , after emerging outside  $D^0t$  (with the partial immigration of agents from  $D^0t$ ), continuously participates in a new social exchange domain  $D^1s$ . In response to the shock or crisis, a mechanism to regulate agent’s choice in  $D^1t$  may eventually evolve in  $D^1s$  as the same (“isomorphic”) manner as  $D^0t$  was embedded by  $D^0s$ , though the set of agents of  $D^1s$  and those of  $D^0s$  are not identical (albeit partially overlapped). This type emphasizes the harmonization of the new institution and the avoidance of any shock or crisis by sudden changes.

<sup>499</sup> This source is cited from Aoki Masahiko, *Toward A Comparative Institutional Analysis*, pp. 250-253 (2001)

## APPENDIX 8

### SUMMARY OF OPINIONS FROM PROVINCIAL PEOPLE'S COMMITTEES<sup>500</sup>

Number of Questionnaires sent: **64**; Number of Questionnaires received: **27**

#### Question 1:

**Has your agency had a legal co-operation programme, plan or project with a foreign counterpart?**

Number of Received Questionnaires	Number of "Yes" Answers	Number of "No" Answers	Main Contents of the Programme/Plant/Project	Name of Foreign Counterparts	Name of Vietnamese Counterpart
27	5	22	Activities relating to legal aid and birth registration: Yen Bai, Binh Phuoc, Dong Thap, Quang Tri, Khanh Hoa Province	Sida, Novib (Netherlands)	Legal Aid Agency (MOJ)

### SUMMARY OF OPINIONS FROM PROVINCIAL DEPARTMENTS OF JUSTICE

#### Question 1:

**Has your agency had a legal co-operation programme, plan or project with a foreign counterpart?**

Number of Received Questionnaires	Number of "Yes" Answers	Number of "No" Answers	Main Contents of the Programme/Plant/Project	Name of Foreign Counterparts	Name of Vietnamese Counterpart
52	24	28	Strengthening capacity of legal aids (21) Assistance for legal information activities (3) Assistance for the implementation of birth registration (1) Computerization of the public notary (1) Assistance for implementation of Treaty between VN-France on Adoption	Sida, Novib (Netherlands), France, SDC, UNDP	Legal Aid Agency (MOJ) Project VIE/02/015 Department of Administrative and Criminal Law

<sup>500</sup> This is cited from Uong Chung Luu ed, Assessment of the Current Status of International Legal Cooperation Activities in Vietnam with Respect to Management and Coordination, pp.254-260 (2007)

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#### **Personal Communication and Survey**

While conducting this research, some information is gathered by personal communications with a number of Vietnamese experts when the author had study-trips in Vietnamese SPC, Ministry of Justice, Government Inspectorate, State and Law Institution as well as the Vietnamese delegation had a business trip in Nagoya, Japan. Besides, Survey Questions delivered to Vietnamese collages and legal experts in HLU, SPC, MOJ, NA'Office, Government Office, Judicial Academy, State and Law Institute, and Graduate Students in GSL, GSID (Nagoya University) are also useful for gathering information relative to discussed issues.







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