

CALE Discussion Paper No.3

January, 2010

FOUNDATIONS FOR JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: AN ANALYSIS OF VIETNAMESE ADMINISTRATIVE LAW

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Hanoi Law University, Vietnam

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Abstract

To facilitate an understanding of Vietnamese administrative law, this paper aims to provide an introduction to the grounds for judicial review of administrative action in the Vietnamese legal context. This paper also includes an analysis of the inadequacies of Vietnamese law in this regard and offers several suggestions for its improvement given the legal experiences of several foreign countries as well as the current conditions of Vietnam. While emphasizing the need for incorporating provisions that state straightforwardly grounds for judicial review in the law of Vietnam, this paper contends that the role of the Supreme People's Court in legal interpretation needs to be strengthened and calls for the adoption of a doctrine of precedent should be considered. It then argues that the recent publication of the first volumes of cassation decisions of the Justice Council of the Supreme People's Court may be a good beginning for the adoption of elements of a doctrine of precedent relevant to the current Vietnamese legal context.

Introduction

Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, in most administrative law systems, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of “want of legality”. The reality is that most administrative law systems have come to recognize a number of categories of administrative lawfulness, which in turn, sets up various detailed grounds for review.² Such detailed categories of grounds for review can serve not only as the legal basis for judicially challenging administrative action but also as requirements to ensure the making of a valid administrative decision.

Since July 1, 1996, Vietnam’s people’s courts have had the jurisdiction to hear administrative cases. The jurisdiction was introduced by the Law Amending and Revising Some Articles of Law on Organization of People’s Court 1992 [*Luat sua doi, bo sung mot so dieu cua Luat to chuc toa an nhan dan*] 1995³ in parallel with the Ordinance on Procedures for Resolving Administrative Cases [*Phap lenh thu tuc giai quyet cac vu an hanh chinh*] 1996.⁴ This has been recognized as an important step towards establishing a judicial mechanism for controlling public power and the development of the

² See, e.g., ss 5-7 of the Administrative Decisions (Judicial Review) Act 1977 of Australia [hereinafter AD (JR) Act]; article 54 of the Administrative Litigation Law (ALL) [Zhonghua Remin Gongheguo Susong Fa] 1989 of the People’s Republic of China [hereinafter ALL].

³ This Law conferred administrative jurisdiction on people’s courts of Vietnam. However, only since July 1, 1996 when administrative divisions of the people’s courts at the central and provincial levels were established, have the Vietnam’s people’s courts officially exercised their administrative jurisdiction.

⁴ This Ordinance was most recently amended in 2006. It includes 76 articles which mainly determine the scope of judicial review of administrative action, jurisdictions to hear administrative cases and procedures to hear administrative cases.

Rule of Law.⁵ However, while judicial review of administrative action is a long-standing feature of Western legal systems, it is still quite recent in Vietnam. Thus, much work has to be done within both the institutional and legal frameworks to assure the effectiveness of Vietnam's administrative adjudication system.

In Vietnam, the people's courts review the legality of an administrative decision (act)⁶ on the basis of a general legal principle of legality that can be inferred from several legal provisions.⁷ Relying on this general principle, the grounds for review on which Vietnam's courts review the legality of an administrative decision (act) may differ little from those accepted in any legal system where judicial review of administrative action is recognized. However, as long as legal normative documents⁸ are the only legal source to which courts can formally refer, Vietnam's courts, in effect, cannot easily review the legality of an administrative decision (act) due to lack of legal provisions explicitly stating grounds for review.⁹ The lack of such legal provisions also suggests

⁵ For a discussion about the establishment of administrative jurisdiction in Vietnam, see, Uong Chung Luu, *Procedures for Reviewing Administrative Decisions in Vietnam* in J GILLESPIE (ed.) *COMMERCIAL LEGAL DEVELOPMENT IN VIETNAM: VIETNAM AND FOREIGN COMMENTARIES* (1997) pp. 461-75; see, also Nguyen Quang, *The Organization and Operation of Administrative Courts in Vietnam*, in Robert Cribb (ed.) *ASIA EXAMINED: PROCEEDINGS OF THE BIENNIAL CONFERENCE OF THE ASAA, 2004, CANBERRA, AUSTRALIA* (2004), available at <http://coombs.anu.edu.au/ASAA/conference/proceedings/asaa-2004-proceedings.html>.

⁶ For the meaning of the terms 'administrative decision' and 'administrative act' in the Vietnamese legal context, see, *infra*, note 15.

⁷ See, e.g., article 1 of the Ordinance on Procedures for Resolving Administrative Cases (providing that "individuals, state agencies and other institutions in accordance with the legally prescribed procedures have a right to initiate administrative cases requesting courts to protect *their own legitimate rights and interests* (emphasis added)"); s 5 of article 4 of this Ordinance (providing that "a "plaintiff" in an administrative case is an individual(s), or a state agency (ies), or an institution(s) who believes that their own *legitimate rights and interests are conversely affected by an administrative decision (act)* (emphasis added) and, therefore, initiates an administrative case at a court"). To some extent, the above provisions imply the ground on which an administrative decision (act) can be judicially challenged.

⁸ For the meaning of the term 'legal normative document' in the Vietnamese legal context, see, *infra*, note 33.

⁹ See, Nguyen Van Quang, *On determining grounds to review the legality of administrative decisions in resolving administrative cases* [*Ve xac dinh cac can cu danh gia*

that legal requirements to ensure the making of a valid administrative decision by a decision maker are not well-defined under the law of Vietnam. Thus, for those who argue for an effective judicial review mechanism of administrative action, or more broadly, a transparent legal system in Vietnam, the law relating to grounds for review needs to be improved.

This paper is divided into three parts. By analyzing the main features of the grounds for review in the Vietnamese legal context, part I of this paper attempts to provide an overview of the law and legal practice relating to the issue in question. Part II of the paper then provides a close analysis of grounds for review under Vietnamese law. Part II also includes several administrative law cases to illustrate the legal rules of grounds for review and analyzes the inadequacies of Vietnamese law in this regard. Part III then offers several suggestions for improving the law of Vietnam with regard to grounds for judicial review of administrative action. This paper takes a practical approach, comparing selected foreign legal experiences with that of Vietnam.¹⁰ This approach, will hopefully suggest some ways in which Vietnam could improve upon its current administrative law system.

ting hop phap cua quyet dinh hanh chinh trong xet xu cac vu an hanh chinh], JURISPRUDENCE REVIEW [LUAT HOC], (October 2004), pp. 47-49.

¹⁰ For comparative purposes, the law and practice of Australia and China in this regard is mostly referred to in this paper.

I. Grounds for review under the law of Vietnam: an overview

A. Commonly accepted general principles

In response to a challenge to the legality of administrative action, courts generally need to consider the compliance of administrators with both substantive and procedural legal rules. This is because any administrative decision making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures. For example, describing the basic principles defining grounds for review under the law of Australia, Douglas writes the following:

The most basic rules of administrative law are first that decision-makers may exercise only those powers which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe.¹¹

These two rules also are commonly accepted in the legal practice of Vietnam.¹² Being constitutionally recognized, the principle of socialist legality is one of Vietnamese administrative law's fundamental principles and is central to determination of grounds for review. Article 12 of the Constitution 1992 reads as follows:

¹¹ R DOUGLAS, DOUGLAS AND JONES'S ADMINISTRATIVE LAW (2002), p. 426.

¹² See, Nguyen Phuc Thanh, *Administrative Decision [Quyết định hành chính]* in TRAN MINH HUONG (ed.), TEXTBOOK ON THEMES OF VIETNAMESE ADMINISTRATIVE LAW [GIAO TRINH LUAT HANH CHINH VIET NAM] (2004), p.198. In this law textbook, the author points out the criteria based on which the legality of administrative decision are as follows:

- (i) Administrative decisions (acts) must be made by legally conferred administrators and in accordance with the law;
- (ii) Administrative decisions (acts) must be made in accordance with the legally prescribed procedures.

The State exercises the administration of society by means of the law; it shall unceasingly strengthen socialist legality.

All State organs, economics and social bodies, units of the people's armed forces, and all citizens must seriously observe the Constitution and the law, strive to prevent and oppose all criminal behavior and all violations of the Constitution and the law.¹³

From the perspective of administrators, this fundamental principle generally requires that the exercise of powers of administrators must strictly comply with the law both substantively and procedurally.¹⁴ In each area of public administration, these basic requirements of the principle of legality have been detailed by several legal provisions in relation to powers and legal duties of the administrators concerned.¹⁵ It follows, therefore, that the legality of an administrative decision (act)¹⁶ can be judicially challenged on grounds that the administrative decision (act) does not comply with the above mentioned basic requirements of legality. Explicitly, when instructing the inferior courts how to resolve administrative cases, the Administrative Division of the Supreme

¹³ Article 12 of the CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM 1992 [HIEN PHAP NUOC CONG HOA XA HOI CHU NGHIA VIET NAM NAM 1992] (latest amended in 2001).

¹⁴

¹ See, Nguyen Van Quang, *Basic principles in state administration* [*Cac nguyen tac co ban trong quan ly hanh chinh nha nuoc*] in TRAN MINH HUONG (ed.), *TEXTBOOK ON THEMES OF VIETNAMESE ADMINISTRATIVE LAW* [GIAO TRINH LUAT HANH CHINH VIET NAM] (2004), pp 83-84.

¹⁵ See, e.g., articles 28-40 of the Ordinance for Handling Administrative Law Violations [Phap lenh xu ly vi pham hanh chinh] 2002 (determining powers of state officials to impose different administrative penalties on offenders); articles 53-56 of this Ordinance (determining procedures that state officials have to follow in the making of decisions imposing such penalties on offenders).

¹⁶ In accordance with s 1, article 4 of the Ordinance on Procedures for Resolving Administrative Cases, "an administrative decision [under the Ordinance] is a decision of an administrative state agency or its authority which is once applied to a specific person (s) or organization (s) regarding a specific matter"; and s 2 of article 4 of this Ordinance states "act of an administrative state agency or its authority is an act to perform its duties and public services according to the law".

People's Court¹⁷ points out the two following basic legal requirements as to the legality of an administrative decision:

In resolving administrative cases, courts only shall review the legality of administrative decisions. If the decisions in question or part of them are neither substantively nor procedurally legal, the courts will decide that the decisions in question or part of them will be quashed.¹⁸

B. No clear-cut determination of detailed grounds for review

If general legal rules determining grounds for review appear to be relatively clear, their application in practice can be difficult. This is because, as Aronson et al. (2004) point out, “the grounds for review defy precise definition, leading to the charge by many that they are manipulable, even infinitely manipulable”¹⁹ and “they are rarely to be found in the power-conferring Act which they are said to qualify”.²⁰ Nevertheless, those who want to examine detailed grounds for judicial review of administrative action under the law of Australia, for example, can refer to the check list of grounds for review set out by the Administrative Decisions (Judicial Review) (AD (JR)) Act²¹ or to

¹⁷ To exercise administrative jurisdiction, administrative divisions of the people's courts at the central and provincial levels are established. Courts at the district level are also vested with administrative jurisdiction but there are no administrative divisions of people's courts at this level. *See*, articles 23 and 30 of the 1995 Law Amending and Revising Some Articles of Law on Organization of People's Court 1992.

¹⁸ THE ADMINISTRATIVE DIVISION OF THE SUPREME PEOPLE'S COURT [TOA HANH CHINH – TOA AN NHAN DAN TOI CAO], THE MANUAL FOR RESOLVING ADMINISTRATIVE CASES [SO TAY TRAO DOI NGHIEP VU GIAI QUYET AN HANH CHINH] (2001), p. 12 (unpublished material, on file with the author).

¹⁹ M ARONSON, B DYER and M GROVES, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (3rd ed., 2004), p. 87.

²⁰ *Ibid.*

²¹ *See*, ss 5-7 of the AD (JR) Act.

common law grounds for review by reference of case law. Similarly, in the case of China, article 54 of the Administrative Litigation Law (ALL) also provides courts with guidance as to grounds for review.²² The above practice is different from the case of Vietnam where the law and legal practice in relation to judicial review of administrative action is still limited.

1. Lack of legal provisions determining detailed grounds for review

Under the law of Vietnam no legal provisions that specifically enumerate grounds for judicial review of administrative action can be found in the Ordinance on Procedures for Resolving Administrative Cases or in any other Vietnamese legal document. This is not surprising. Administrative adjudication is a fairly recent task of Vietnam's court system; thus, it is hard to immediately expect a "perfect" legal framework that meets all requirements of an effective administrative adjudication system.²³ The common view amongst legislators, judges, administrators and the public in general in Vietnam is that

²² Article 54 provides:

After hearing a case, a people's court shall make one of the following judgments according to the conditions:

(1). rule to uphold rule to uphold the specific administrative act if the evidence for taking the specific administrative act is conclusive, the application of the law and regulations is correct, and the legal procedure is complied with.

(2). rule to cancel or cancel partially the specific administrative act, or rule the defendant to make a new administrative act if the specific administrative act has been taken in one of the following circumstances:

1. found to be inadequate in essential evidence;
2. found that the application of the law or regulations is erroneous;
3. found to have violated the legal procedure;
4. found to have acted exceeding authority; or
5. found to have abused the powers.

(3). if a defendant fails to perform or delays the performance of its statutory duty, a fixed time shall be set by judgment for its performance of the duty.

(4). if an administrative penalty is obviously unfair, rule to make amendment.

²³ Comparing this with the case of China. Prior to the passage of the ALL on April 1989, there was an experimental period of about 7 years for administrative adjudication (from 1982 to 1989), which, to some extent, provided Chinese lawmakers with judicial experiences to make the ALL. For more details about the establishment of the administrative litigation system and the construction of the ALL in China *see, e.g.*, Songnian Ying, *Administrative Litigation System in China* in Yong Zhang (ed.), *COMPARATIVE STUDIES ON THE JUDICIAL REVIEW SYSTEM IN EAST AND SOUTHEAST ASIA* (1997) pp. 46-47; Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, 152 *THE CHINA QUARTERLY* 832, pp. 833-35 (1997).

this legal framework will improve step-by-step, based on experiences of Vietnam's courts in the course of their operation.²⁴ This view has become accepted in the context of developing and improving the legal system of a transitional state like that of Vietnam.

Another reason for the lack of legal provisions dealing with grounds for review in the Ordinance on Procedures for Resolving Administrative Cases lies in the philosophy of independent law branches [*'nganh luat doc lap'*]. Being influenced by the Soviet law school, Vietnamese legal scholars tend to perceive that the legal system is divided into independent law branches, each of which has its own object of adjustment [*'doi tuong dieu chinh'*] and method of adjustment [*'phuong phap dieu chinh'*]; one law branch is distinguished from others by its object and method of adjustment.²⁵ It has been argued that there is a distinction between administrative law [*'luat hanh chinh'*] and procedural administrative law [*'luat to tung hanh chinh'*].²⁶ The former consists of substantive administrative law rules which mostly relate to powers of

²⁴ See, THE STATE SUPERVISION [THANH TRA NHA NUOC], THE GENERAL ABSTRACT OF THE PROJECT 'ADMINISTRATIVE COURT -THEORY AND PRACTICE' [BAO CAO TONG THUAT DE TAI NGHIEN CUU KHOA HOC 'TOA AN HANH CHINH- NHUNG VAN DE LY LUAN VA THUC TIEN] (1997) pp. 1-2 (unpublished material, on file with the author).

²⁵ For more details see, Le Minh Tam, *The Socialist Legal System* [*He thong phap luat xa hoi chu nghia*] in LE MINH TAM (ed.), TEXTBOOK ON THEMES OF STATE AND LAW [GIAO TRINH LY LUAN NHA NUOC VA PHAP LUAT] (2004) pp. 391-92. The distinction between Administrative Law and Procedural Administrative Law is based on this categorization philosophy.

²⁶ See, e.g., Tran Minh Huong, *General Issues of Administrative Law* [*Nhung van de chung cua Luat Hanh chinh*] in TRAN MINH HUONG (ed.), TEXTBOOK ON THEMES OF VIETNAMESE ADMINISTRATIVE LAW [GIAO TRINH LUAT HANH CHINH VIET NAM] (2004), p. 27; see, also TRAN THI HIEN, NGUYEN MANH HUNG, and PHAM HONG QUANG, *Administrative Procedural Law Studies and Vietnamese Administrative Procedural Law* [*Khoa hoc Luat To tung Hanh chinh va Luat To tung Hanh chinh Viet Nam*] in HOANG VAN SAO, NGUYEN PHUC THANH (eds.) TEXTBOOK ON THEMES OF VIETNAMESE ADMINISTRATIVE PROCEDURAL LAW [GIAO TRINH LUAT TO TUNG HANH CHINH VIET NAM] (2004), pp. 38-39. The above authors argue for an independent branch of law called 'administrative procedural law' which exists in parallel with administrative law and specifically deals with procedures for resolving administrative cases by courts.

administrators and their exercise of those powers in general or in a particular area of public administration. The latter mainly concerns legal rules in relation to resolution by courts of administrative disputes between governors and the governed. The Ordinance for Procedures Resolving Administrative Cases is classified as a sort of administrative procedural law.²⁷ It has been argued that grounds for review can be inferred from the legal provisions of substantive administrative law that set out powers and duties of administrators.²⁸ Thus, it is not necessary to include legal provisions pointing to grounds for review in the Ordinance for Procedures Resolving Administrative Cases, which is categorized as a type of administrative procedural law.

2. Lack of related judicial interpretations

In terms of legal interpretation, Vietnam has adopted legal provisions which are very similar to those of China.²⁹ Under the law of Vietnam, the Standing Committee of the National Assembly enjoys the power to interpret the Constitution, the Laws of the National Assembly and its Ordinances.³⁰ However, in practice, the Standing Committee of Vietnam's National Assembly rarely exercises this power of legal interpretation.³¹ As a consequence, legal interpretations tend mainly to fall into the categories of 'executive

²⁷ See, TRAN THI HIEN, NGUYEN MANH HUNG, and PHAM HONG QUANG, *supra*, note 25, p. 36.

²⁸ *Ibid.* p. 40.

²⁹ For a discussion about legal interpretation in the Chinese legal context, see, JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT (1999), pp. 106-110.

³⁰ Article 91 of the CONSTITUTION 1992.

³¹ See, Hoang Van Tu, *Legal interpretation: some basic theoretical and practical issues in Vietnam* [*Giai thich phap luat: Mot so van de co ban ve ly luan va thuc tien o Vietnam*] LEGISLATIVE STUDIES [NGHIEN CUU LAP PHAP] (July 2008) available at < <http://www.nclp.org.vn/nghien-cuu-lap-phap/126-thang-7-2008/nha-nuoc-va-phap-luat/giai-thich-phap-luat-mot-van-111e-co-ban-ve-ly-luan-va-thuc-tien-o-viet-nam.>>.

interpretations' made by the executive organs³² and 'judicial interpretations' by the Supreme People's Court.³³ The Court firstly exercises this function by enacting judicial interpretation documents in the form of legal normative documents with the legally prescribed names which are binding within the court system.³⁴ The Court also issues official letters [*'cong van'*] giving general instructions to inferior courts in relation to their legal application.³⁵ In addition, the Court annually issues a summation report [*'bao cao tong ket'*], part of which summarizes adjudicative experience and instructs inferior courts how to apply the law. Besides that, there is also a common pattern of judicial interpretation in which an inferior court asks for instruction from the Supreme People's Court on (usually) legal matters related to its particular cases and the

³² 'Executive interpretations' are performed by 'top-down level' agencies within the executive system. A law passed by the National Assembly or an ordinance passed by its Standing Committee usually includes an article which provides that to execute this law or ordinance, the Government is responsible for enacting legal normative documents detailing this law (or ordinance). To fulfill that task, the Government normally will issue decrees clarifying the law or ordinance in particular areas of public administration. In turn, the Prime Minister or Ministers and the people's committees at the local levels respectively will issue documents detailing documents of the higher level agencies within the scope of powers authorized by law.

³³ One of the powers and duties of the Supreme People's Court of Vietnam is to instruct the court system how to uniformly apply the law and to summate adjudicative experiences of the court system (*see*, article 19 of the Law on Organization of People's Courts 2002. The Council of Judges including the President of the Court, vice Presidents of the Courts and some selected judges of the Court (the number of members of the Council does not exceed 17) is mainly responsible for exercising that power and duty of the Court (articles 21 and 22 of the Law on Organization of People's Courts 2002).

³⁴ *See*, Law on Enacting Legal Normative Documents [Luật ban hành văn bản quy phạm pháp luật] 2008. Article 1 of this Law offers a rather vague definition of legal normative document, according to which, a legal normative document is a document enacted by a competent state body includes general rules of behavior which are enforced by the State in order to regulate social relations. The Supreme People's Court of Vietnam is a body which has power to enact such legal normative documents. In accordance with article 17 of this Law, the Council of Judges of the Supreme People's Court has the power to enact resolutions [*'ngghi quyết'*]. Resolutions of the Council of Judges of the Supreme People's Court, in effect, mainly include its instructions in relation to the application of documents of the National Assembly, the Standing Committee of the National Assembly and the State President in hearing cases.

³⁵ As official letters are not legal normative documents, in principle, they are not legally binding on inferior courts. However, official letters are commonly used due to the procedural flexibility (quick and less formal) in the making of them. In fact, the inferior courts regard official letters as 'de factor' legal normative documents.

Court gives its instructions by issuing official letters.³⁶ By doing so, the Court does not make any new laws but interprets the meanings of original laws and the interpretations must not be in conflict with original laws and general legal principles.

With regard to administrative adjudication, the Court has issued several interpretation documents as an attempt to assist inferior courts in dealing with difficulties in hearing administrative cases.³⁷ However, so far, no official judicial interpretation in relation to grounds for judicial review of administrative action has been given. In recent annual reports of the Court, a section focuses specifically on the difficulties arising in administrative adjudication and suggests solutions to such difficulties. Unfortunately, none of these reports have focused on the issue of grounds for review. In 2001, to assist the inferior people's courts in resolving administrative cases, the Administrative Division of the Supreme People's Court compiled a training manual as an internal document (not legally binding) that provides judges with some basic legal knowledge on administrative law and professional skills to hear administrative cases.³⁸ Except for some very general principles, nothing has been written about grounds for judicial review of administrative action in

³⁶ For example, Official Letter No. 35/2000/KHXX dated 20 March 2000 of the Supreme People's Court instructing how to enforce judgments in relation to imprisonment is a response to a query of the People's Court of Phu Yen province concerning the matter in question.

³⁷ The two important documents are Official Letter No.39/KHXX dated 6 July 1996 of the Supreme People's Court interpreting some provisions of the Ordinance on Procedures for Resolving Administrative Cases and Resolution of the Council of Judges of the Supreme People's Court No. 04/2006/NQ-HDTP dated 04 August 2006 instructing the implementation of some provisions of the Ordinance on Procedures for Resolving Administrative Cases.

³⁸ *See*, THE ADMINISTRATIVE DIVISION OF THE SUPREME PEOPLE'S COURT [TOA HANH CHINH – TOA AN NHAN DAN TOI CAO], *supra*, note 17.

this document. Similarly, in *Benchbook online* recently published by the Supreme People's Court, the issue in question has also not been addressed.³⁹

3. *Lack of scholarly interest*

Vietnamese legal scholars have not paid much attention to the grounds for judicial review of administrative action under the law of Vietnam. In practice, it is very rare to see discussions or the exchange of opinions about this issue amongst lawyers, legal scholars and judges in Vietnam.⁴⁰ This is in striking contrast to traditional jurisdictions such as criminal and civil jurisdictions where the relevant laws and legal practices have attracted much legal scholarship. The fact that administrative adjudication is still very new to Vietnam's court system and the number of administrative cases heard by courts is very modest may suggest reasons why less legal scholarship focuses on the issue in question.⁴¹ This, again, adds to the difficulties faced by Vietnam's judges in deciding administrative cases.

³⁹ See, Supreme People's Court of Vietnam, *Benchbook online* (2006), available at <<http://www.sotaythamphan.gov.vn/detail.php?indexID=431&hidEvent=View&hidLang=en>>.

⁴⁰ Following up Vietnamese language legal journals, there has been so far only two articles in which the grounds for judicial review of administrative action in the Vietnamese legal context were discussed. For more details see, Dao Kim Cuong, *Some grounds for annulling challenged administrative decisions and paying compensation for citizens in case state agencies issue illegal administrative decisions* [*Mot so can cu huy quyet dinh hanh chinh bi khieu kien, co quan nha nuoc ban hanh quyet dinh hanh chinh trai phap luat boi thuong thiet hai cho cong dan*], PEOPLE'S COURT REVIEW [TAP CHI TOA AN NHAN DAN], (April 2001), p. 18 and Nguyen Van Quang, *supra*, note 7.

⁴¹ For example, in 2003, Vietnam's people's courts heard 786 administrative law cases at first instance against 49,373 criminal law cases and 102,972 civil law cases. See, The Supreme People's Court [Toa an nhan dan toi cao], *Report on the 2003's summation of activities and the 2004's orientation of the court system* [*Bao cao tong ket cong tac nam 2003 va phuong huong nhiem vu cong tac nam 2004 cua nganh Toa an nhan dan*] No. 28/BC-TA (December 25, 2003), p. 2 (unpublished material, on file with the author).

II. Grounds for judicial review of administrative action in the Vietnamese legal context: a close analysis

Notwithstanding that rules in relation to grounds for review are not well-defined under the law of Vietnam, some guidance as to the grounds on which the legality of an administrative decision (act) is judicially reviewed by the people's courts can be drawn from legal practice. In one of the few journal articles discussing grounds for review under the law of Vietnam, Cuong lists a range of circumstances where he claims that the courts are required to quash the decision in question or part of it, or to declare the act conducted by the administrator to be illegal.⁴² Cuong's list is based partly on implications drawn from current legal provisions in relation to the administrative decision making process and is also drawn partly from implications of the practice of administrative adjudication of the courts in Vietnam. Some of the grounds, as Cuong pointed out, can be found by reference to administrative law cases heard by the courts in Vietnam, whereas others are somewhat hypothetical as far as they have almost never been used for challenging the legality of an administrative decision (act). To be sure, the analysis of those grounds for review under the law of Vietnam is somewhat superficial. This is partly due to the lack of scholarly research on the issue. Moreover, in Vietnam, official reports of cases in general and administrative law cases in particular, until the recent publications of the first volumes of cassation decisions by the Justice Committee of the Supreme People's Court appeared, were not published.⁴³ The number of administrative law cases heard by Supreme People's Court of

⁴² Dao Kim Cuong, *supra*, note 39.

⁴³ *See, e.g.*, THE SUPREME PEOPLE'S COURT [TOA AN NHAN DAN TOI CAO], CASSATION DECISIONS OF THE JUSTICE COUNCIL OF THE SUPREME PEOPLE'S COURT 2006 [QUYET DINH GIAM DOC THAM CUA HOI DONG THAM PHAN TOA AN NHAN DAN TOI CAO NAM 2006] (2008). So far, four volumes of cassation decisions of the Justice Council of the Supreme People Court have been published. Volumes 1&2 (for the decisions of years 2003 &2004) were published in 2005 and volumes 3&4 (for the decisions of years 2005 &2006) were published in 2008.

Vietnam is modest and so far only eleven cassation decisions on administrative law cases have been published. In some law journals or newspapers of Vietnam, some authors who are generally judges or court staff sometimes report cases with the exchange of opinions about particular legal matters as their prime purpose.⁴⁴ For research purposes, Vietnam's administrative law cases cited in this paper mostly come from secondary sources.

It is suggested that an administrative decision would be safe if the administrator exercises such powers as have been legally conferred on him (substantive requirement) and complies with procedures required by law (procedural requirement); therefore, grounds for review could be categorized based on these most basic requirements. This categorization of grounds for review could be accepted not only in Vietnam but in many other jurisdictions. For example, in accordance with the principle of legality, courts of China review the legality of a concrete administrative act by looking at whether its substance and the procedures for the undertaking of that act are lawful.⁴⁵ Similarly, under French administrative law, the legality of an administrative decision can be judicially challenged on the basis of any of the four grounds for review including *inexistence*, *incompétence*, *violation de la loi*, and *vice de forme*.⁴⁶

⁴⁴ In Vietnam, summaries of cases usually can be found by reference to a journal published by the Supreme People's Court titled TAP CHI TOA AN NHAN DAN [PEOPLE'S COURT REVIEW]. This monthly legal journal mainly focuses on legal information in relation to the organization and operation of the court system and exchange of opinions amongst judges and court staff about particular legal matters. Other legal journals or newspapers like DAN CHU & PHAP LUAT [DEMOCRACY & LAW] and PHAP LUAT [THE LAW] (both are published by the Ministry of Justice), to some extent, also publish articles which involve reported law cases.

⁴⁵ See, L FENG, ADMINISTRATIVE LAW PROCEDURES AND REMEDIES IN CHINA (1996) p. 162.

⁴⁶ See, generally L N BROWN, J S BELL with assistance of JEAN MICHEL GALABERT, FRENCH ADMINISTRATIVE LAW (4th ed., 1993), pp. 223-35. Under the French law, *inexistence* means failure to perform legal duties; *incompétence* is equivalent to 'ultra vires' under the English law; *violation de la loi* could be interpreted as errors of law; and *vice de forme* is understood as procedural 'ultra vires'.

A. Grounds involving substantive requirements

1. Ultra vires

Cases where the administrative decision (act) in question is judicially challenged on the ground *ultra vires* [*vi pham tham quyen*] appear to be not uncommon in the legal practice of Vietnam. Except for two common circumstances mentioned below, the issue of whether the exercise of discretionary powers is subject to judicial control remains unclear under the law of Vietnam.

a. Two common circumstances

In the Vietnamese legal context, ‘*ultra vires*’ (excess of legal authority) [*ngoai pham vi quyen han*’ or ‘*vuot quyen*’] usually refers to the two following typical circumstances:⁴⁷

- (i) The administrator exercised a power which is not related to his or her functions [*ngoai pham vi quyen han*]:

The case *Nguyen Van Nhat v the People’s Committee of Tien Phuoc District* reported by Linh (2001) can be cited as an example for this ground of review.⁴⁸ In this case, Mr. Nhat, the appellant, had a dispute with a third party, Mr. Thi, in relation to a land use certificate that was issued by the People’s Committee of Tien Phuoc District (the respondent) who made the decision No. 34 dated March 13, 1999 to resolve Mr. Nhat’s complaint regarding Mr. Tien’s land use certificate. Mr. Nhat initiated the case on the ground that the

⁴⁷ Dao Kim Cuong, *supra*, note 39.

⁴⁸ See, Ngoc Linh, *On hearing some administrative cases in relation to land management by procedures of supervision and review* [*Qua xet xu giam doc tham mot so vu an hanh chinh ve dat dai*], DEMOCRACY & LAW [DAN CHU & PHAP LUAT] [Special issue on Administrative Courts and Resolving Complaints of Institutions and Citizens], (December 2001), pp. 79-81. In this article, Linh reported several administrative cases for the purpose of exchange of opinions on hearing administrative cases involving land management. The case *Nguyen Van Nhat v the People’s Committee of Tien Phuoc District* was one amongst cases reported by Linh in this article.

Committee had no power to resolve his complaint and sought an order to quash the decision No 34 dated Mar. 13, 1999. The court of first instance and the court of appeal both dismissed Mr. Nhat's application. The Administrative Division of the Supreme People's Court held that in accordance with the Land Law 1993,⁴⁹ only courts have power to resolve complaints such as that made by Mr. Nhat; therefore, the decision No. 34 dated March 13, 1999 of the Committee was illegal on the ground that the Committee acted outside its authorized area. The decision No. 34 was consequently quashed.

- (ii) The administrator exercised a power which was within the functions of the administrators but exceeded the scope of power that is legally conferred on them ['vuot quyen']:

Put simply, this refers to a circumstance where the administrator who made the administrative decision or conducted the administrative act exercised the power which is legally conferred on other administrators. Cong (2001) reported the case *Nguyen Van Thanh v the People's Committee of Tay Luong Commune*.⁵⁰ In this case, Mr. Thanh, the appellant, initiated the case against the People's Committee of Tay Luong Commune, the respondent, on the ground that the appellant conducted an illegal act to reclaim a land area of 150 m² in his land area for reallocating to Mr. Tuyen. The court of first instance and the court of appeal both dismissed Mr. Thanh's application for review. The Administrative Division of the Supreme People's Court held that in accordance with the Land Law 1993,⁵¹ the people's committees at the commune level have

⁴⁹ S 2, article 38 of the Land Law [Luat Dat dai] 1993.

⁵⁰ See, Le Cong, *The judgment of the administrative court on the illegal act of the People's Committee at Tayluong Commune - Tienhai District- Thaibinh Province* [*Phan quyét của tòa hành chính về hành vi trái pháp luật trong quản lý đất đai của UBND xã Tay Luong - Tien Hai - Thai Binh*], DEMOCRACY & LAW [DAN CHU & PHAP LUAT] [Special issue on Administrative Courts and Resolving Complaints of Institutions and Citizens], (December 2001), 103-08. In this article Cong reported the case *Nguyen Van Thanh v the People's Committee of Tay Luong Commune*.

⁵¹ Articles 23 and 28 of the Land Law [Luat Dat Dai] 1993.

power in relation to land management but are not granted the power to reclaim and reallocate land. This power is conferred on the people's committee at the district level. As a result, the Decision No. 04/ GDT-HC dated June 5, 1999 of the Administrative Division of the Supreme People's Court declared the act conducted by the People's Committee of Tay Luong Commune to be illegal and ceased. The land use right of Mr. Thanh then was recovered.

b. Judicial control of the exercise of discretion under the law of Vietnam

The reviewability of the exercise of discretion of administrators is less straightforward. In Western countries like Australia, it has long been conceived that powers conferred on administrators usually include discretionary elements and the existence of discretionary powers in modern public administration is both inevitable and desirable.⁵² The exercise of discretionary powers, as the rule of law requires, must be consistent with a variety of legal requirements⁵³ and subject to judicial control. Consequently, the legality of an administrative decision (behavior) can be challenged on the grounds that discretion is abused or improperly exercised by administrators. The Australian common law developed a range of legal rules in relation to controlling the exercise of discretion of administrators. The breaches of these rules are generally referred to as "broad ultra vires" on which an administrative decision (behavior) can be judicially challenged.⁵⁴ The AD (JR) Act as a codification of the common law rules provides a ground for review in relation to an improper use of power of a public authority such as 'taking an irrelevant consideration into account in the exercise of a power', 'an exercise of a discretionary power in bad faith' or 'an

⁵² See, generally K HAWKINS, THE USES OF DISCRETION (1992); KC DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

⁵³ For instance, the exercise of discretionary powers must be consistent with the legal requirement of reasonableness. The well-known case that is cited for the principle of reasonableness in the Commonwealth jurisdiction is the *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1K.B. 23(C.A).

⁵⁴ See, C ENRIGHT, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION (1985), p. 557.

exercise of a power that is so unreasonable that no reasonable person could have so exercised the power' (unreasonableness).⁵⁵ This ground for review refers to various circumstances involving the exercise of a discretionary power, which can be well understood by referring to case law.

In China, to some extent, the theory about discretionary powers and their judicial control as seen in Western legal systems has been recognized and applied.⁵⁶ Chinese legal scholars argue that the exercise of discretionary power must comply with certain legal requirements⁵⁷ and it is subject to judicial control.⁵⁸ This is a result of the borrowing of Western legal ideas as Feng (1996) states:

⁵⁵ See, AD (JR) Act, s5 (2) and s 6(2) for detailed rules in relation to this ground for review.

⁵⁶ L Feng, *supra*, note 44, pp. 214-49. It has been acknowledged that for thousands of years of feudal autocracy and many decades of a system based on administrative subsidies, administrators had possessed great discretionary powers while there was little control of the exercise of those powers. Recently, Chinese legal scholars and legislators have paid attention to the issue of controlling the exercise of discretions. On the basis of scholarly interpretations and judicial practice, Feng analyzed a range of specific grounds for reviewing the exercise of discretions set out in the ALL. They include:

- Abuse of powers: unlawful intention, inappropriate consideration, capriciousness or unreasonableness, and lack of legal grounds;
- Obvious unfairness: disproportionality, inappropriate consideration, inconsistency, double penalties, and failure to provide information;
- Failure or delay in performance of statutory duty.

⁵⁷ See, *ibid.* pp. 211-13. Generally, Chinese legal scholars point to the two legal principles that govern the exercise of discretionary powers of administrators: the principle of legality and the principle of reasonableness. The principle of legality requires that discretionary powers should be exercised within the legal framework and be consistent with the legislative objectives or fundamental legal principles. In relation to the principle of reasonableness, Feng cited LU HAI CAO, JUDICIAL REVIEW SYSTEM IN CHINA [ZHONG GOU SI FA SHEN CA ZHI DU] (1993). In an effort to express the requirements of this principles to be somewhat compatible with the concerned legal rules of Western countries, Feng suggests that the principle of reasonableness requires that discretionary powers should be reasonably exercised in the sense that administrators should act for proper purposes, i.e., not for personal purposes or illegitimate purposes, take into account relevant considerations and not to take into account irrelevant considerations, and decisions and decision-making procedures should not be unreasonable.

⁵⁸ See, Hua Yang, *Guang Examination of Judicial Control of Administrative Discretionary Power* [Yu Si Fa Jian Du Kong Zhi Xing Zheng Zi You Cai Liang Quan De Si

[J]udicial control of the exercise of discretionary power is a new concept to the Chinese legal system and most scholars have looked to Western countries to borrow experience and are naturally influenced by both their judicial practice and academic writings.⁵⁹

While legal principles in relation to the exercise of discretionary powers are well-developed both theoretically and practically in Australia, and to some extent are dealt within the legal practice of China, little attention has been paid to the issue in the law and legal practice of Vietnam. Generally, like in other jurisdictions, it has been accepted in Vietnam that administrators enjoy creativity and flexibility in performing their tasks; thus, administrative law does not (and could not) deeply interfere in administration, and leaves administrators to enjoy the freedom to handle their cases within the legal framework setting out the scope of their powers.⁶⁰ In practice, Vietnam's administrators, in accordance with the law, enjoy wide discretionary powers.⁶¹ However, much space has been left in Vietnamese law and legal scholarship for discussion on the question of whether the exercise of these discretionary powers needs to be judicially controlled, and what the grounds are for such judicial control, should this be the case.

Some Vietnamese legal scholars, in fact, initially raised the issue of "reasonableness", and how the reasonableness [*‘tinh hop ly’*] of administrative

Kao] in COLLECTION OF LEGAL ESSAYS (ADMINISTRATIVE LAW) vol.2 (1991) pp. 92-93 (cited by Feng, *supra*, note 44, p. 211).

⁵⁹ L Feng, *supra*, note 44, p. 216.

⁶⁰ Tran Minh Huong, *supra*, note 25, p.14.

⁶¹ *See, e. g.*, articles 28-40 of the Ordinance for Handling Administrative Violations 2002 (providing that state authorities such as customs officers, police officers, chairmen of people's committees, enjoy discretions to impose particular administrative penalties (warning, fine, revoking licenses) on a certain offender within the legally prescribed frame of penalties); articles 39-45 of the Land Law 2003 (providing that several bureaucrats enjoy discretion in reclaiming lands of land users in various circumstances).

decisions (acts) would be controlled.⁶² An attempt was made to put forward several requirements that administrators needed to fulfill to assure the reasonableness of an administrative decision (act). This, indeed, is concerned with the exercise of discretionary powers of administrators. However, these primary discussions have been confined to some theoretical issues and the question of whether Vietnam's people's courts should control the exercise of discretion of administrators is still debated.⁶³

In fact, the list of grounds for review suggested by Cuong (2001) also includes some grounds such as 'abuse of power' [*lam quyen*'], which might possibly be understood as grounds for challenging the exercise of discretionary powers.⁶⁴ However, there are no specified interpretations of these terms in the context of Vietnamese administrative law. Without general rules defining what is entailed in 'abuse of power', it is unclear how the court can assess a challenge to an administrative decision based on these grounds. Moreover, there have been almost no cases in which the legality of an administrative decision has been challenged on such grounds. Thus, what Cuong suggested here is hypothetical, and at most, a possible guide for future practice.

⁶² See, e.g., DINH VAN MAU and PHAM HONG THAI, ADMINISTRATIVE JURISDICTION IN VIETNAM [TAI PHAN HANH CHINH O VIET NAM] (1995), pp. 89-90; Vu Thu, *The legality and the reasonableness of legal documents and solutions to fixing their defects* [*Tinh hop phap va hop ly cua van ban phap luat va cac bien phap xu ly cac khiem khuyet cua no*] STATE AND LAW [NHA NUOC VA PHAP LUAT], (January 2003), p. 8.

⁶³ Vu Thu, *supra*, note 61, p. 15. In an attempt to work out the notion of the reasonableness of legal documents including administrative decisions, Thu analyses several legal provisions under the law of Vietnam which, from his viewpoint, mention the reasonableness of legal documents in general and administrative decisions in particular. In relation to the judicial control of the exercise of discretionary powers, Thu argues that courts should not deeply interfere in administration by reviewing the reasonableness of administrative decisions.

⁶⁴ Dao Kim Cuong, *supra*, note 39. Indeed, in the article, Cuong did not suggest anything in relation to 'abuse of power' and 'unlawful intention'. Therefore, it is very hard to find their equivalents under the law of Australia or China.

The need for judicially controlling the exercise of discretionary powers of administrators is quite obvious in any legal system where the rule of law is respected. In order to accept ideas in relation to judicially controlling discretionary powers in Vietnamese administrative law, it would be helpful to refer to foreign experience. The Chinese experience would suggest that, to improve laws dealing with the judicial review of administrative action, Vietnam may be able to learn from the experience of Western countries such as Australia, where traditional values of the rule of law have been well developed. In regard to the establishment of grounds for judicially controlling discretionary powers, there are several related issues that need to be considered for Vietnamese administrative law. On the one hand, as noted, explicitly defined grounds for review need to be incorporated. On the other hand, it is important to develop a set of general administrative law principles regulating the exercise of discretionary powers, breach of which can constitute grounds for judicial review. More importantly, it would be useful to understand what the problems posed by the grounds for judicially challenging the exercise of discretionary powers in foreign jurisdictions are. Understanding such issues would help Vietnamese law-makers deal properly with similar issues in the Vietnamese context.

2. Failure to perform legal duties

Under the law of Vietnam, both administrative decisions and administrative acts could be subject to judicial review.⁶⁵ As interpreted by the Supreme People's Court of Vietnam, an administrative act refers to an action [*'hanh dong'*] or inaction [*'khong hanh dong'*] of a state officer or state agency

⁶⁵ See, Ordinance on Procedures for Resolving Administrative Cases. Art. 4, s1 of this Ordinance provides that an administrative act could be subjected to judicial review under the Ordinance and Art. 4, s2 of this Ordinance gives a general definition of an administrative act.

in relation to the performance of legal duties.⁶⁶ In other words, inaction in relation to the performance of legal duties which, in nature, is failure to perform legal duties is a ground upon which an applicant can seek judicial review.⁶⁷

There seems to be no difference between this ground for review under the law of Vietnam and that under the laws of Australia and China.⁶⁸ However, legal rules in relation to this ground for review under the law of Vietnam appear not to be explicit. Except for few very general provisions mentioned in the Ordinance on Procedure for Resolving Administrative Cases, no further details can be found in any legal documents.⁶⁹ Therefore, it would be very difficult for any applicant who intends to challenge the legality of an

⁶⁶ See, The Official Letter No. 39/KHXX dated July 6, 1996 of the Supreme People's Court interpreting some provisions of the Ordinance on Procedures for Resolving Administrative Cases], part 1. (b).

⁶⁷ For example, an authority whose duty is to grant building licenses will be challenged on this ground if he or she does not to grant an applicant the license within the legally prescribed time required to grant the license, providing that the applicant completely complies with all legal requirements.

⁶⁸ Under the common law of Australia, the applicant can seek an order of mandamus on the ground of failure to perform legal duties or can seek an order of review on the ground of failure to legal duties in accordance with section 7 of the AD (JR) Act. The same ground for review is also found in the law of China in which "if a defendant fails to perform or delays the performance of its statutory duty, a fixed time shall be set by judgment for its performance of the duty" (article 54, s3 of the ALL).

⁶⁹ For the content of these legal provisions *see, supra*, note 64. It should be noted that the law of Australia contains detailed legal rules in relation to this grounds for review. For instance, section 7 of the AD (JR) Act specifies two circumstances of failure to perform legal duties in relation to whether a period of time within which administrators have to perform their legal duties is defined. In the case of China, although the law does not specify cases falling within this ground for review as seen in the law of Australia, judicially challenging such cases seems to be well guided by legal practice. As Chinese legal scholars suggested if there is no law that sets out the time limit for performing legal duties of administrators, courts, on a case by case basis, will normally determine a reasonable period of time within which the administrator has to perform his or her legal duties. Then the courts will decide whether the applicant can rely on this ground for challenging the administrator. *See, Comments and interpretation of the Administrative Litigation Law of the People Republic China* [Ming Gong He Gou Xing Zhen Su Song Fa Quain She], 184; Cui Zhenjun "Preliminary study of administrative inaction", 81-85; Lu Yanming, "A study of several issues relating to administrative inaction cases", in COLLECTION OF LEGAL ESSAYS, 1992, Vol.2, pp. 120-122. Those authors are cited in Feng, *supra*, note 44, p. 243).

administrative decision (act) on this ground. It also should be noted that, in fact, there has been no case in which Vietnam's courts have reviewed administrative action on this ground so far.⁷⁰ One reason for this practice may lie in the lack of details in relation to this ground for review. Although many people have, in practice, complained about administrators' failure to perform legal duties which adversely affected their legitimate rights and interests, without detailed legal rules they have rarely initiated administrative cases challenging administrative action.⁷¹

3. Error of law

The concept 'error of law' is mainly concerned with the erroneous applications of the law, especially in the case where the law is ambiguous. In the Vietnamese legal context, erroneous applications of the law appear to be a common ground for judicial review of administrative action. There are two main reasons why this ground for review becomes frequently-invoked in the legal practice of Vietnam.

First, Vietnam has a complicated system of legal normative documents ranging from legal documents of bodies at the central level to those of bodies at the local level with different legal effects. This system includes:⁷²

⁷⁰ See, Tien Minh, *People can initiate administrative cases if there is delay to perform administrative formalities* [*Cham thu tuc hanh chinh nguoi dan duoc khoi kien*], VIETNAMNET, available at <http://vietnamnet.vn/chinhtri/doinoi/2005/06/463465/>. In this article, the author cited words of Mr. Dang Quang Phuong as the Vice President of the Supreme People's Court who confirms that since the establishment of administrative jurisdiction, there has been no case in which administrators were challenged on this ground.

⁷¹ *Ibid.* The author of this article cited words of Mr. Le Quang Binh as the Head of the Board for People's aspirations [*Ban Dan nguyen*] of the Standing Committee of the National Assembly who claims that the lack of legal details in relation to the ground 'failure to perform legal duties' becomes a barrier preventing people from bringing action against administrators on this ground.

⁷² Article 2 of the Law on Enacting Legal Normative Documents 2008.

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- (i) The Constitution, Laws and Resolutions by the National Assembly;
- (ii) Ordinances and Resolutions by the Standing Committee of the National Assembly;
- (iii) Orders and Decisions by the State President;
- (iv) Decrees by the Government; Decisions by the Prime Minister;
- (v) Circulars by Ministers and Heads of state agencies at the Ministerial Rank;
- (vi) Resolutions by the Council of Judges of the Supreme People's Court; Circulars by the Chief Justice of the Supreme People's Court and the Head of the Supreme People's Procuracy;
- (vii) Decisions by the State Auditor General;
- (viii) Joint Resolutions between the Standing Committee of the National Assembly or the Government and the central level agencies of socio-political organizations and joint Circulars between the Chief Justice of the Supreme People's Court and the Head of the Supreme People's Procuracy; between the Chief Justice of the Supreme People's Court or the Head of the Supreme People's Procuracy and Ministers and Heads of state agencies at the Ministerial Rank competent state agencies; and between Ministers and Heads of state agencies at the Ministerial Rank.;
- (ix) Legal normative documents by local people's councils and people's committees.

In such a complicated system of legal documents, it is understandable that inconsistency amongst legal documents that adjust social relations in the same area, but are enacted by different bodies, occasionally occurs in practice. Without clear interpretations, the application of such legal documents may be erroneous. In addition, administrators sometimes fail to determine whether the legal normative document, on which their decision is made, still remains legally

effective at the time of the decision. This is particularly true in the application of legal normative documents by Ministries, as such documents are likely to be amended or revised or prevailed in correspondence with changes in the socio-economic life.⁷³

Second, during the course of application of the law, Vietnamese administrators always expect to be instructed by relevant statutory interpretation documents by competent bodies, as lawmakers cannot make very detailed legal provisions covering all related issues.⁷⁴ Such interpretation documents, however, are not always available. Therefore, in practice, administrators sometimes have to rely on overly general principles mentioned in the legal normative documents for solving their problems. In those circumstances, it is difficult to avoid erroneous application of the law.

Vietnam's courts, generally, will take any error of law into consideration when reviewing the legality of an administrative decision (act). This is different from the Australian legal practice. Under the law of Australia, not all errors of law can be used for seeking an order of review. An error of law for reviewability under the AD (JR) Act must be material to the impugned decision "in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different".⁷⁵

⁷³ As state bodies are responsible for managing certain areas of public administration, Ministries annually enact a big number of legal normative documents. To assist administrators to avoid applying a legal normative document which no longer is legally effective, recently, many Ministries in Vietnam have passed lists of their legal normative documents which are no longer legally effective. For example, the Ministry of Trade passed the Decision 1107/2005/QD-BTM dated April 20, 2005 stating the list of legal normative documents enacted in the period from 2000 to 2004 that are no longer legally effective.

⁷⁴ For more details about 'legal interpretation' in the Vietnamese legal context, *see, supra*, Part I.B.2.

⁷⁵ *See, Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 353 per Mason CJ.

In the Vietnamese legal practice, administrative decisions are usually challenged on this ground in several circumstances.⁷⁶ Administrative decisions which were based on the application of an insufficient piece of legislation can be challenged on the errors of law ground. ‘An insufficient piece of legislation’ could be that provisions of an enactment that were no longer in force or had not yet come into force at the time of the making of the impugned administrative decision. It also could be provisions of an enactment which was consistent with the one that has a higher legal effect at the time of the making of the impugned administrative decision. In Official Letter No.39/KHXX of the Supreme People’s Court interpreting some provisions of the Ordinance on Procedures for Resolving Administrative Cases,⁷⁷ the Court gave an example instructing inferior courts on how to decide a case in this circumstance. Similarly, the manual for resolving administrative cases of the Administrative Division of the Supreme People’s Court also gave a specific example to illustrate the case as follows:

Supposedly, there is a Tax Law which provides that the maximum tax rate applied in an area of business activities is 2% of the total gained benefit. The decree of the Government and the circular of the Ministry of Finance interpreting this Tax Law both provide the same maximum tax rate. The people’s committee of province X which argued that a higher maximum tax rate should be applied in its local area enacted a regulation that provides the maximum tax rate of 3% of the total gained benefit. Applying the regulation of the local committee, a local tax officer made a decision to impose tax at the rate of 2.5%. This decision was judicially challenged on the ground of application of an insufficient piece of legislation. The decision then would be held as illegal on the ground of application of an

⁷⁶ Dao Kim Cuong, *supra*, note 39, p. 19.

⁷⁷ *See*, Official Letter No.39/KHXX, *supra*, note 65.

insufficient piece of legislation. The court would quash this decision and request the tax office to make a new decision based on provisions of the Tax Law.⁷⁸

The “error of law” ground for review is also used for challenging administrative decisions that were based on the application of legal provisions of the correct legislation that are inconsistent with the facts of the case. Cases where the administrative decision is challenged on the ground of application of wrong legal provisions are quite common in the legal practice of Vietnam. Given the facts of the case, other legal provisions of the legislation should be applied and the decision which was made based on wrong legal provisions would be quashed. The case *Mr. Thai Viet Phuong v Tax Office of Sa Dec Town* reported by Vu Khac (2001) below is an example demonstrating this circumstance.⁷⁹

The tax office of Sa Dec Town made a decision imposing on Mr. Phuong a fine of 1,000,000 VND for his wrong doing in relation to registration of business activities, and a fine of 19, 898, 385 VND for income tax fraud and collecting income tax arrears of 19, 898, 335 VND. The case challenging this decision was first heard by the people’s court of the Sa Dec Town where Mr. Phuong’s application was dismissed. The court of appeal then amended the decision of the court of first instance quashing part of the decision of the tax office of Sa Dec Town in relation to a fine of 1,000, 000 VND imposed on Mr. Phuong. Mr. Phuong then appealed to the Supreme People’s Court. The Court

⁷⁸ THE ADMINISTRATIVE DIVISION OF THE SUPREME PEOPLE’S COURT [TOA HANH CHINH – TOA AN NHAN DAN TOI CAO], *supra*, note 17, p. 11.

⁷⁹ See, Vu Khac, *An administrative case in relation to tax was heard by procedure of review and supervision [Mot vu an hanh chinh ve thue da duoc giam doc tham]*, DEMOCRACY & LAW [DAN CHU & PHAP LUAT] [Special issue on Administrative Courts and Resolving Complaints of Institutions and Citizens], (December 2001), pp. 98-102. In this article the case *Mr. Thai Viet Phuong v Tax Office of Sa Dec Town, Dong Thap Province* was reported.

held that in accordance with the Law on Income Tax,⁸⁰ Mr. Phuong's enterprise fell within the category of newly operated enterprises which are entitled to enjoy an income tax free period of two years, commencing on the first day the enterprise earned an income. This fact did not support the tax office of Sa Dec Town's application of article 27(1) (b) of the Law on Income Tax 1990 and article 3 of the Decree 22/CP dated April 17, 1996. Therefore, the part of the decision of the tax office of Sa Dec Town was quashed on the ground of application of wrong legal provisions.

4. No sufficient reason to justify the making of the decision

In the Vietnamese language, the words like reason, ground [*'ly do'* or *'can cu'*] and evidence [*'chung cu'* or *'bang chung'*] can be used interchangeably. Thus, in the Vietnamese legal context, 'no sufficient reasons' can be understood as 'no evidence'.⁸¹ To determine whether there is sufficient reason to justify the making of the decision, it is necessary for the court to comprehensively assess all the relevant facts of the case that are supported by the evidence.

In resolving administrative cases, the law of Vietnam sets out legal provisions in relation to the responsibility of the burden of proof.⁸² The responsibility for providing evidence and materials to justify an administrative decision belongs to the respondent. The appellant is responsible for providing evidence and other material for protecting their own legitimate rights and interests. Courts, where needed will collect evidence or request parties and

⁸⁰ Article 25 of the Law Amending and Revising Some Articles of Law on Income Tax (July 6, 1993).

⁸¹ Therefore, the difference between this ground for review with the grounds for review "no evidence or other material to justify the making of the decision" (or "no evidence or other material to justify the making of the proposed decision") set out by s 5 (1) (h) and s 6(1) (h) of the AD (JR) Act or by the Australian common law appears to be merely in wording.

⁸² See, article 15 of the Ordinance on Procedures for Resolving Administrative Cases.

concerned bodies to provide evidence for resolving administrative cases. Administrative decisions (acts) will be held as illegal if no sufficient reason to justify the making of the decision is proven. The case *Mr. Nguyen Van Doan v the People's Committee of EaH'leo District, Dac Lak province* reported by Khac Vu (2001) below is an example to illustrate this ground for review.⁸³

Mr. Nguyen Van Doan was allocated two lots of ground in accordance with the decision People's Committee of EaH'leo District. Then, for public interest reasons the Committee issued another decision reclaiming an area of land of 750 m² that had been allocated to Mr. Doan and required him to remove all his properties located on that land. Mr. Doan initiated the case in the People's Court of Dak Lak Province where it was held that the decision of the Committee reclaiming the land area of Mr. Doan was unlawful; this decision was quashed and the right to use the land of Mr. Doan was reaffirmed. The Committee then appealed to the Division of Appeal of the Supreme People's Court. The Court of appeal agreed with the court of first instance on quashing the decision of the Committee on the ground that the Committee did not have adequate reasons to support the making of its decision. First, the Committee did not have sufficient reasons to support that there was the need for using land of individual households for public interests. Second, since the land area was legally used by Mr. Doan, in order to reclaim it, the Committee was required by law to have a plan for using this land area; but no such plan had been made by the Committee. Third, there were no sufficient reasons to support that the land area of Mr. Doan, but not that of other household, had to be reclaimed.

⁸³ See, Khac Vu, *An unlawful decision reclaiming lands was quashed by the court* [*Mot quyết định thu hồi đất trái pháp luật bị Tòa án tuyên hủy*], DEMOCRACY & LAW [DAN CHU & PHAP LUAT] [Special issue on Administrative Courts and Resolving Complaints of Institutions and Citizens], (December 2001), pp. 88-91. In this article, the case *Mr. Nguyen Van Doan v the People's Committee of EaH'leo District, Dac Lak province* was reported.

B. Grounds for review involving compliance with procedural requirements

There have been many criticisms of a bureaucratic system of administrative procedures as normally seen in any system based on administrative subsidies like Vietnam's.⁸⁴ On the one hand, there was a lack of detailed procedural provisions in many areas of public administration. On the other hand, in some other areas, there were prescribed procedures which overlapped with, and contradicted other procedures. The compliance with administrative procedures heavily relied on the exercise of discretion of administrators and there was no effective legal mechanism to assure the compliance with administrative procedures. In recent years, there has been extensive Vietnamese legal literature devoted to the importance of a system of transparent and just administrative procedures and compliance with such a system of procedures. This is specially emphasized in the context of the ongoing Public Administration Master Program 2001-2010 for the purposes of socio-economic developments, cooperation and integration.⁸⁵

In the process of making administrative decisions or conducting administrative acts, Vietnamese administrative law generally requires administrators to comply with legally prescribed administrative procedures. This can be inferred from both the constitutional principle of legality, as noted in the previous section, which requires the administrator to comply with legal rules both substantively and procedurally and specific provisions set out by the law of Vietnam. Failure to comply with administrative procedures,

⁸⁴ See, generally, Dinh Van Mau and Pham Hong Thai, *Administrative Procedures [Thu tuc hanh chinh]* in TRAN MINH HUONG (ed.), TEXTBOOK ON THEMES OF VIETNAMESE ADMINISTRATIVE LAW [GIAO TRINH LUAT HANH CHINH VIET NAM] (2004), *supra*, note 25, pp. 177- 81.

⁸⁵ For more details, see, generally MINISTRY OF HOME AFFAIR AND UNDP VIETNAM, PAR MASTER PROGRAMME, RESULT & LEARNING: 2001-2002 FROM STEP BY STEP TO A LEAP FORWARD, available at <<http://www.undp.org.vn/undp/docs/2002/parmp/index.htm>>.

consequently, is one amongst many grounds for review under the law of Vietnam. This common view can be seen in most administrative law systems.⁸⁶

In regard to procedural requirements for administrative decision making, it is noted that rules for ‘natural justice’ (or ‘procedural fairness’ or ‘due process’) are set out in the law of developed countries and ‘denial of procedural fairness’ is treated as separate ground for review. In the case of Vietnam, the issue that whether rules for ‘procedural fairness’ have been incorporated in the law as a common procedural standard for administrative decision making remains unclear. Procedural requirements for administrative decision making under Vietnamese administrative law mainly fall within some certain categories such as ‘standard time periods for making decision’, ‘legally prescribed forms of administrative decisions’ or ‘inter-departmental administrative formalities’. In fact, Vietnam has not passed a general law (or code) of administrative procedures setting out procedural requirements for administrative decision making. This, in many cases, causes difficulties for courts to judicially challenge administrative actions which affect legitimate rights and interests of citizens due to the failure to procedural requirements.

1. Failure to comply with administrative procedures

Essentially, Vietnam’s courts strictly follow the rule that an administrative decision will be held invalid if it does not comply with any procedural requirement regardless whether it is a minor or substantial or insubstantial error.⁸⁷ The case *Lan Huong and Thanh Nam Enterprises v the*

⁸⁶ See, e.g., s 5(1) (a) and s 6(1) (a) of the AD (JR) Act (providing that a person may challenge the legality of a decision or conduct (to which the Act applies) on the ground “that procedures that were required by law to be observed in connection with the making were not observed” or “ that procedures that are required by law to be observed in respect of the conduct have not been, are not being, or are likely not to be, observed”); article 54, s 2.3 of the ALL (providing that a concrete administrative act may be quashed if there is violation of legal procedures).

⁸⁷ See, ADMINISTRATIVE DIVISION – THE SUPREME PEOPLE’S COURT [TOA HANH CHINH -TOA AN NHAN DAN TOI CAO], *supra*, note 17.

People's Committee of Hochiminh City below is an example illustrating the above strict rule.⁸⁸

Lan Huong and Thanh Nam enterprises were granted licenses to produce cosmetics. However, these enterprises used the legally registered trade mark "Miss" of the Saigon Cosmetics Company for labeling their cosmetics products. On August 11, 2003, the People's Committee of Hochiminh City passed Decision No. 3272 imposing a fine of 150,000,000 VND on the two enterprises on the ground that they committed an administrative wrong in relation to intellectual property. Lan Huong and Thanh Nam enterprises initiated the case at the Administrative Division of the People's Court of Hochiminh City challenging Decision No. 3272 of the People's Committee of Hochiminh City on the ground that the Committee failed to comply with the requirement of time limit.⁸⁹ The court of first instance held that as all substantive issues of the administrative decision were totally legal despite it having been made late, the administrative decision was upheld. Thanh Huong and Thanh Nam then appealed the Appeals Division of the Supreme People's Court based on the view that compliance with time limit is required by the law and administrators must strictly follow them and held that the impugned decision was invalid.⁹⁰

⁸⁸ See, H. Thanh, *Hearing the case in which the People's Council of Hochiminh City is challenged by the two enterprises* [*Xet xu vu UBND TP HCM bi hai doanh nghiep kien*], VNEXPRESS (July 21, 2005) available at <<http://vnexpress.net/Vietnam/Phap-luat/2005/07/3B9E054E/>>.

⁸⁹ Article 56 of the Ordinance for Handling Administrative Violations 2002 sets out the time limit for the making of an administrative decision imposing administrative penalties as "within 10 days or 30 days in cases of complication since the day a report of administrative offence is made, the competent officer has a duty to make an administrative decision imposing administrative penalties on the offender". This Ordinance also states that in cases of need the competent officer may ask for a permission to extend the time to make decision provided that the extended time is not over 30days; the competent officer is not allow to make decisions imposing fines if he or she fails to comply with time limit requirements. , however, is silent in relation to the validity of decisions which fail to comply with the time limit requirement in particular and all procedural requirements in general.

⁹⁰ See, H.Thanh, *supra*, note 8 7.

Admittedly, the strict compliance with administrative procedures needs to be emphasized and one may argue that the decision of the Supreme People's Court in *Lan Huong and Thanh Nam Enterprises v the People's Committee of Hochiminh City* is convincing as the law applicable to the case clearly determines the validity of the decision in case of failure to comply with procedural rules. However, a rigid opinion about the validity of administrative decisions (acts) that fail to observe procedural requirements, especially when the law is silent to the validity of such decisions (acts) are fairly debatable.⁹¹ In fact, breaches of administrative procedures vary from case to case; some may be substantial, whereas others may be minor and insubstantial to the quality of an administrative decision (act). For example, one of the procedural requirements the Supreme People's Court of Vietnam construed as an administrative decision must be shown in a legally prescribed written form.⁹² However, the question of whether the court should quash a decision of wrongly written form whose substantive contents are legal is arguable. It seems to be somewhat impractical if the Supreme People's Court of Vietnam opined that any breach of procedures in relation to the making of an administrative decision could make the administrative decision in question fatal. This viewpoint is strongly supported by reference to the law and legal practice of Australia and China.

In Australia, the validity of a judicially challenged administrative decision (behavior) failing to comply with prescribed procedures is treated differently depending on whether or not there is a legislative intention that to

⁹¹ See, Le Xuan Than, *Some viewpoints regarding the organisation and functioning of administrative courts* [Mot so y kien ve to chuc va hoat dong cua Toa hanh chinh, STATE & LAW [NHA NUOC VA PHAP LUAT], (July 2002), p. 33; see, also Nguyen Thanh Binh, *Concept of the People's Courts' Jurisdiction to Resolve Administrative Law Complaints* [Khai niem tham quyen cua toa an nhan dan trong giai quyet cac khieu kien hanh chinh cua cong dan], JURISPRUDENCE REVIEW [LUAT HOC], (October 2001), pp. 25-27.

⁹² See, ADMINISTRATIVE DIVISION – THE SUPREME PEOPLE'S COURT [TOA HANH CHINH-TOA AN NHAN DAN TOI CAO], *supra*, note 17.

comply with prescribed administrative procedures is a legal precondition to the exercise of a power. Generally speaking, if the breach of procedural requirements clearly affected the quality of the decision in question, those requirements should be mandatory, and therefore, the impugned decision should be held invalid; where the breach is minor and insubstantial, the validity of the decision in question should not be affected.⁹³

China's courts also have the same approach to that of Australia regarding the issue of the validity of an administrative decision that does not comply with procedural requirements. Although it has been suggested as a "long-term" goal that courts will treat all administrative decisions that do not comply with legal procedural requirements as invalid ones, the validity of those decisions is currently assessed by Chinese people's courts based on the nature of procedural errors.⁹⁴ Basically, Chinese legal scholars divide administrative procedures into non-legal administrative procedures (or customary administrative procedures) and legal administrative procedures. The former refers to the administrative procedures formulated by administrative organs themselves as long as they are not contradictory to general legal principles. Compliance with non-legal administrative procedures is non-compulsory; therefore, the breach of these procedures does not affect the validity of administrative decisions. The latter refers to the administrative procedures set out by legislation and compliance with them is compulsory. However, minor breaches of legal administrative procedures, which are usually construed as the ones that do not cause any harm to the substantive rights and interests, are not fatal to the impugned administrative decisions. Administrative decisions which violate compulsory legal procedures will otherwise be held invalid.

⁹³ See, *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490 at CLR 390, [93] per McHugh, Gummow, Kirby and Hayne JJ.

⁹⁴ Feng, *supra*, note 44, p. 190. Feng mainly cited LUO HAO CAI, JUDICIAL REVIEW SYSTEM IN CHINA [ZHONG GOU SI FA SHEN CA ZHI DU] (1993) for his discussions about procedural errors in relation to the making of administrative decisions.

2. Rules of ‘procedural fairness’ (‘natural justice’) under Vietnam’s law?

In developed legal systems, denial of ‘procedural fairness’ or ‘natural justice’ is set out as a ground for judicial review of administrative action.⁹⁵ The term “natural justice” which stemmed from the Romans refers to situations where *audi alteram partem* (the right to be heard) and *nemo iudex in parte sua* (no person may judge their own case) apply”.⁹⁶ The principles of natural justice primarily govern all judicial making processes by judges and then quasi-judicial decision processes by tribunals for guaranteeing that those processes must be just and fair. More recently, the rule of natural justice has extended its scope of application to the administrative decision making process due to the growth of administrative decisions in both quantity and their importance.

In principle, one can establish denial of natural justice as a ground for judicial review of administrative action by demonstrating the breach of either or both of the two fundamental rules: (i) in the decision-making process, the decision-maker must hold a hearing for a person whose legitimate rights and interests will be affected by the decision; (ii) in the course of making the decision, the decision-maker must not be or appear to be biased. An administrative decision that fails to comply with the ‘natural justice’ (or ‘procedural fairness’) principle will be quashed.

Under the law of Vietnam, as noted above, what are called rules of ‘procedural fairness’ or ‘natural justice’ in the making of administrative

⁹⁵ In the US law, the term that is analogous to ‘natural justice’ or ‘procedural fairness’ is ‘due process’. In Australia, ‘natural justice’ and ‘procedural fairness’ are now interchangeably used in administrative law. Mason J pointed out in *Kioa v West* (1985) 159 CLR 550; 62 ALR 321 at 346 that as ‘natural justice’ is mostly used in the context of procedures of the courts of law, many judges prefer using the term ‘procedural fairness’ in relation to the making of administrative decisions. It is noted that in Australian jurisdictions, the duties to observe natural justice and the rules of natural justice generally come from common law. Rules of natural justice, therefore, are flexibly applied on a case by case basis. Although this common law ground for review was subsequently codified by the AD (JR) Act, understanding rules of natural justice requires a great deal of detail that only can be found by reference to case law.

⁹⁶ See, DUHAIME’S ONLINE LEGAL DICTIONARY, available at <http://www.duhaime.org/dictionary/dict-no.aspx> ac.

decisions have not been comprehensively developed. This practice is easily understandable in the context of a transitional legal system. In many fields of administration, procedural rules for protection of individuals and organizations whose legitimate rights and interests may be affected by the administrative decision making process such as ‘fair hearing’, ‘right to reasons’ or ‘information disclosure’ have been almost all absent in Vietnamese administrative law. For example, although the making of an administrative decision imposing administrative penalties on administrative law offenders directly involves restrictions on the rights, interests, freedom, property, and money of offenders, no rules in relation to procedural fairness can be seen in the current Ordinance for handling administrative offences of Vietnam. That is to say, almost all administrative law offenders do not have opportunities for explanation and rebuttal, or opportunities to know reasons for decision making before administrative decisions imposing penalties on them are made.

It should, however, be noted that rules of procedural fairness, though limited, are able to be found in some recent laws of Vietnam. These laws require decision makers to comply with some particular procedural requirements in order to ensure that their decisions will not adversely affect legitimate rights and interests of individuals and institutions. For example, to make a decision to reclaim land for public interest, before reaching the final decisions, decision makers are required by Land Law 2003 to inform users of the reasons for reclaiming, as well as the time and plan to execute the decision and their possible compensation.⁹⁷ In a similar vein, the Law on Complaints and Denunciations 1998 (amended in 2005) requires that in the course of decision making, decision makers must directly communicate with the

⁹⁷ See, article 39 of the Land Law [Luật Đất đai] 2003.

respondent and the appellant in order to clarify the case and to propose possible resolutions to the case.⁹⁸

To some extent, those kinds of procedural requirements also express the ideas of natural justice or procedural fairness under Vietnamese administrative law. An administrative decision or act that fails to comply with those requirements can be challenged on the ground of failure to comply with procedural requirements. However, given the importance of rules for procedural fairness, serious consideration should be given to the issue in question by Vietnamese lawmakers. On the one hand, rules for procedural fairness need to be fully incorporated in Vietnamese administrative law. On the other hand, if Vietnamese administrative law were to adopt a flexible approach to the effects of procedural errors as above suggested, the procedural errors which adversely affect legitimate rights and interests of individuals and institutions (denial of procedural fairness) would need to be treated as fatal to administrative decisions.

⁹⁸ See, article 37 of the Law on Complaints and Denunciations [Luat Khieu nai, To cao] 1998 (amended in 2005).

III. Improving the law of Vietnam in relation to grounds for judicial review

After more than ten years since the people's courts officially exercised their administrative jurisdiction, judicial review of administrative action in Vietnam has graduated from the 'experimental' period. In practice, a great deal of inadequacy of legal bases for a well-functioning judicial mechanism controlling public power in Vietnam has been revealed.⁹⁹ This requires an improvement of legal rules with regard to the exercise of administrative jurisdiction of Vietnam's people's courts. The task seems to be more urgent in the context of the process of judicial reform and Vietnam's pursuit of building a rule-of-law state.¹⁰⁰ Amongst many legal issues in relation to administrative adjudication is the need to build up and improve legal grounds for judicial review of administrative action. The above analysis of grounds for review under the law of Vietnam suggests practical reasons why Vietnam needs to do so. It also helps to map out some solutions to building up and improving legal grounds for judicial review of administrative action in the legal context of Vietnam, in which learning from legal experiences of foreign countries appears to be a practical suggestion.

⁹⁹ The inadequacy of legal bases for administrative adjudication in Vietnam has been generally or specifically discussed in various articles by Vietnamese legal scholars. See, e.g., Nguyen Anh Tuan, Resolving Administrative Cases - Difficulties and Solutions [*Giai quyét khieu kien hanh chinh - Nhung vuong mac va giai phap*], STATE MANAGEMENT JOURNAL [TAP CHI QUAN LY NHA NUOC], (August 2001), pp. 15-18 ; Vu Thu, Some issues on the enhancement of the efficiency of administrative courts in hearing administrative cases [Mot so khia canh nang cao hieu suat hoat dong cua toa hanh chinh trong viec giai quyét cac khieu kien hanh chinh], STATE AND LAW [NHA NUOC VA PHAP LUAT, (August 2003), pp. 25-31; Le Xuan Than, *supra*, note 90; Nguyen Van Quang, *supra*, note 7.

¹⁰⁰ Judicial reform is one amongst many important current goals set by the Communist Party of Vietnam (the CPV), in which reforming the court system is a central task. Recently, the Political Bureau of the Communist Party of Vietnam issued the Resolution of the Political Bureau No 49-NQ/TW dated June 02, 2005 on "Strategy on for Judicial Reform by the Year 2020" [*Nghi quyét so 49-NQ/TW ngay 02-6-2005 cua Bo Chinh tri ve "Chien luoc cai cach tu phap den nam 2020"*] which confirms that the reform of the Vietnamese court system is a central task.

A. Framework legal provisions for grounds for review

Framework legal provisions determining all grounds for reviewing the legality of an administrative decision (act) need to be incorporated in the Ordinance on Procedures for Resolving Administrative Cases. Such legal provisions, on the one hand, provide judges with a common legal base to review the legality of administrative decisions (acts). On the other hand, they set out criteria which guide decision makers in order to improve the quality of their decision making process. They also suggest grounds on which anyone who is adversely affected by an administrative decision (act) will feel more confident to initiate an administrative case to protect his or her legitimate rights and interests.

To fulfill that task, learning from the legislative experience of foreign countries like Australia or China is worthwhile. Sections 5, 6, and 7 of the AD (JR) Act of Australia or article 54 (2) (3) (4) of the ALL of China may suggest to Vietnamese legislators some useful ideas to build up their own legal provisions. Obviously, borrowing legislative experience from other countries requires Vietnamese legislators to have a critical view for selecting relevant factors that will apply in the legal context of Vietnam. However, while some aspects of administrative jurisdiction (such as models of administrative adjudication bodies) seem to be strongly influenced by socio-political factors, legal requirements regarding the legality of administrative decisions appear to be commonly accepted by laws of different countries. Determination of detailed categories of grounds for review is a matter of legal techniques that do not require taking fully into consideration socio-political factors. Consequently, there seems to be a strong ground to support the idea that Vietnamese legislators should learn from the legislative experiences of foreign countries to build up and improve legal provisions in this area.

It is noted that amending the current legislation of Vietnam by simply adding legal provisions that define grounds for judicial review of administrative action as seen in administrative law of other foreign countries would not seem to be a difficult task. However, a desired result would be achieved only if administrative law reformers seriously considered what sort of grounds for review should or should not be incorporated in the law of Vietnam in its current condition. Given that judicial control of the exercise of discretionary powers of administrative decision-makers is a complicated task for courts, adoption of the ground of unreasonableness, one of grounds for challenging the legality of exercising discretionary powers of administrators, would require careful analysis in the current Vietnamese legal context.

There are some reasons for the above suggestion. Since it can be difficult to clearly define what is entailed in ‘unreasonableness’ in statutes, in order to effectively use this ground to challenge the validity of administrative action, courts could take full advantage of this broad ground to challenge the validity of administrative actions and they could do this by interpreting what amounts to unreasonableness in each particular case. However, this is not the case of Vietnamese courts. Traditionally, Vietnamese courts are rather passive in exercising their discretionary powers to resolve their cases. Particularly, in a jurisdiction where courts have a rather weak role, where judicial professionalism is under-developed, and where judges have a ‘close relationship’ with bureaucrats,¹⁰¹ it would be difficult to expect Vietnamese courts to be active in developing a broad ground for review like ‘unreasonableness’ for challenging the exercise of discretion of administrative decision-makers. When the law is ambiguously or broadly stated, interpretations of the Supreme People’s Court of Vietnam is usually expected,

¹⁰¹ For a discussion of these issues, see, Nguyen Van Quang, A model of administrative tribunals for Vietnam? in Clauspeter Hill/Jochen Hoerth (eds.), *Administrative Law and Practice from South to East Asia*, Singapore: Konrad Adenauer Foundation 2008, pp. 277-83.

which are presented in the form of legal normative documents. Even using this form to interpret ‘unreasonableness’, it would be hardly successful because those legal normative documents could not fully cover what is entailed in ‘unreasonableness’. Moreover, if the Court would not have clear and precise interpretations of ‘unreasonableness’, courts could easily interfere deeply in the exercise of the executive powers in cases where they ought not to. Challenging the validity of administrative action on this ground, therefore, would cost time, money and seem to be too expensive to the Vietnamese conditions. For these reasons, it would be desirable to suggest that a ground of unreasonableness should not be included in Vietnamese administrative law.

B. Enhancing the role of the People’s Supreme Court in making judicial interpretations

As a body that has an important role in instructing inferior courts how to apply the law and summarizing adjudicative experience, the Supreme People’s Court should be more active in enacting legal documents interpreting grounds for reviewing the legality of administrative decisions (acts). It should be noted that in the context of the judicial reform process including the reform of the court system, there is a call from reformers for enhancing the role of the Supreme People’s Court in instructing inferior courts on how to apply the law.¹⁰² This is because the Court for a long time has concentrated heavily on the task of adjudication while spending insufficient time on fulfilling the task of a body that has functions to instruct inferior courts how to apply the law and summarize adjudication experience.¹⁰³ Suggesting that the Court issues more

¹⁰² See, Nguyen Dinh Quyen, *Some opinions about judicial reform* [*Mot so quan diem ve cai cach tu phap*], LEGISLATIVE STUDIES SPECIAL ISSUE NO. 4 [TAP CHI NGHIEN CUU LAP PHAP DAC SAN SO 4], (March 2003), p.17.

¹⁰³ See, *ibid.* p. 15; see, also Le Thi Nga, *Organizing regional people’s courts – theory and practice* [*To chuc Toa an Nhan dan khu vuc – nhung van de ly luan va thuc tien*], LEGISLATIVE STUDIES SPECIAL ISSUE NO. 4 [TAP CHI NGHIEN CUU LAP PHAP DAC SAN SO 4] (March 2003), p. 54.

legal documents interpreting the law in relation to administrative adjudication, therefore, seems to be quite reasonable in the current context.

Unlike framework legal provisions, judicial interpretations with regard to grounds for review need to specify detailed grounds and their implications in certain circumstances. The more specific those judicial interpretations are, the more precisely and uniformly the law will be applied in administrative adjudication. To successfully issue such judicial interpretations, the Court needs to take into account all adjudicative experience and exchanged opinions of judges and legal scholars about grounds for review.

C. Call for the adoption of a doctrine of precedent

Although statutory law can easily enumerate a list of grounds, finding what is exactly entailed in each ground is not an easy task and usually needs reference to cases in which legal rules in this regard are specifically interpreted and consistently applied. Thus, the issue of adopting a case law system ought to be raised.

It should be noted that there are various doctrines of precedent, ranging from the 'strict' doctrine which governed England and Australia until the 1960s through to 'de facto' doctrines which treat precedents as illustrative and persuasive in the absence of reasons for disregarding them.¹⁰⁴ It is particularly necessary to distinguish between 'binding' precedent and 'guiding' precedent here. Adopting a 'binding' precedent system means that inferior courts should take account of decisions of superior courts when hearing similar cases. This form of precedent has governed courts in common law jurisdictions deciding legal issues. Meanwhile, 'guiding' precedent implies that decisions of superior

¹⁰⁴ For a discussion of a 'strong' doctrine of precedent and a 'relaxed' doctrine of precedent, see, R Dworkin, *Law's Empire* (1986), 24-6.

courts are regarded only as ‘a source of reference’ which could suggest ways to resolve similar cases to inferior courts. Nevertheless, ‘guiding’ precedent plays a role in ensuring the consistent application of laws in the course of resolving cases.

Being strongly influenced by the Soviet legal school, the law of Vietnam has not accepted a doctrine of precedent.¹⁰⁵ This means that legal normative documents are the only source of law that Vietnam’s courts can formally refer to in their decisions. While no detailed legal provisions and judicial interpretations explicitly state grounds for review, Vietnam’s judges cannot cite previous judgments as a source of law for making their decisions. This tension leads to a great deal of difficulty in reviewing the legality of administrative decisions (acts) in Vietnam’s judicial practice.

In the climate of judicial reform, the question whether or not Vietnam accepts the doctrine of precedent is being currently debated in several legal forums. Professor Le Minh Tam (2004) argues that case law is not regarded as a typical source of socialist law as its application very likely leads to arbitrariness and this, in turn, is inconsistent with the principle of socialist legality. He admits, however, to some extent, this doctrine has been applied in Vietnam through the role of the Supreme People’s Court in instructing inferior courts how to apply the law in special cases by issuing guidelines in different forms as mentioned above.¹⁰⁶

On the contrary, some argue that accepting the doctrine of precedent will assist judges to precisely and uniformly apply the law as they can formally refer to previous court decisions that deal with similar cases for making their own

¹⁰⁵ See, Le Minh Tam, *Nature, characteristics, roles, types and sources of law* [*Ban chat, dac trung, vai tro, cac kieu va hinh thuc phap luat*] in LE MINH TAM (ed.), *TEXT BOOK ON THEMES OF STATE AND LAW* [*GIAO TRINH LY LUAN NHA NUOC VA PHAP LUAT*], p. 84.

¹⁰⁶ See, Le Minh Tam, *supra*, note 24, p. 394. For the forms of guideline issued by the Supreme People’s Court, *see, supra*, Part I.B.2.

decisions.¹⁰⁷ They also stress that although guidelines issued by the Supreme People's Court are a good source for reference, they still are in the nature of general rules and do not include legal reasoning of judges relating to each particular case. Therefore, it cannot be concluded that to some extent, the doctrine of precedent has been applied in Vietnam.¹⁰⁸ Analyzing advantages of case law, some Vietnamese legal scholars and lawyers have made a call for considering the application of the doctrine of precedent or at least its relevant elements in the legal context of Vietnam.¹⁰⁹ They particularly emphasize that the adoption of the doctrine of precedent is an important task that Vietnam needs to fulfill in the course of the judicial reform and international integration.¹¹⁰

As a country in transition whose legal system is strongly influenced by the Soviet law school, Vietnam would obviously face many difficulties in regards to both theoretical and practical aspects in adopting a doctrine of precedent. This requires much discussion within the Vietnamese jurist circles and Chinese experience in this regard would be worthwhile considering. In China where the legal tradition is almost identical to that of Vietnam, some elements of the doctrine of precedent have been applied. In recent years,

¹⁰⁷ See, Pham Duy Nghia, *Confucianism in the future of Vietnam's law* [*Nho giao trong tuong lai phap luat Viet Nam*], SCIENCE JOURNAL [TAP CHI KHOA HOC], SPECIAL ISSUE ON LAW AND ECONOMICS [CHUYEN SAN LUAT-KINH TE] (2004) available at <<http://www.vnu.edu.vn/dhqg/contents/index.php?ID=769#bai1>>. Looking back at the Vietnamese legal history, Nghia pointed out that the relevant elements of the doctrine of precedent used to be applied in Vietnam during the French colonialism and ended in the 1950s due to the import of the Soviet legal school.

¹⁰⁸ *Ibid.* See, also, Vo Tri Hao, *The role of courts in legal interpretation* [*Vai tro giai thich phap luat cua toa an*], JOURNAL OF LEGAL SCIENCE [TAP CHI KHOA HOC PHAP LY], No. 3, 2003, available at http://www.hcmulaw.edu.vn/hcmulaw/index.php?option=com_content&view=article&id=237:tc2003so3vttagt&

¹⁰⁹ See, Pham Duy Nghia, *supra*, note 106; Vo Tri Hao, *supra*, note 106. Hao and Nghia argue for the application of a doctrine of precedent in the Vietnamese legal context.

¹¹⁰ See, Dinh, *supra*, note 106.

Chinese legal scholars have been attracted by the debate about whether or to what degree the doctrine of precedent should be adopted in China.¹¹¹ Since 1985, the Supreme People's Court of China has in fact published 'selected cases' including administrative cases in its official gazette as a source of reference for the whole Chinese court system.¹¹² Those 'selected cases' are not legally binding on the Chinese courts but play an important role in legal education not only for judges, but for the public in general. In fact, they are regarded as 'de facto precedents' of China.¹¹³ To follow the Chinese experience, it seems to be premature to suggest the adoption of a case law system as seen in common law countries in the current conditions of Vietnam. What Vietnam should do is to adopt elements of the doctrine of precedent relevant to its current legal context. In other words, a 'guiding' precedent system, as above mentioned, would be desirable for Vietnam.

The publication of the first volumes of court judgments of the Supreme People's Court in Vietnam is a good point to support those who argue for the adoption of relevant elements of a case law system in Vietnam.¹¹⁴ It should be

¹¹¹ For detailed current discussions about the adoption of the doctrine of precedent in China, see, Chris X. Lin, 'A Quiet Revolution: An Overview of China's Judicial Reform' (2003) 4 *Asian-Pacific Law & Policy Journal* 256 <<http://www.hawaii.edu/aplpj/pdfs/v4-lin.pdf>>, 299-312. In this article, Lin introduced the decision to adopt the precedent system of Zhongyuan District and analyzed the recent opposing views of scholars on the issue of whether China should apply the doctrine of precedent as it has been applied in countries of common law tradition. He concluded that '[a]ll the controversies notwithstanding, some kind of precedent system will eventually take root in China because it serves the important function of promoting uniformity of litigation outcome - a critical [sic] to China's judicial reform'.

¹¹² See, N Liu, *Opinions of the Supreme People's Court Judicial Interpretation in China* (1997), 38-44.

¹¹³ *Ibid.* p. 44.

¹¹⁴ See, THE SUPREME PEOPLE'S COURT [TOA AN NHAN DAN TOI CAO], *supra*, note 42. To publish the first volumes of cases, the Supreme People's Court of Vietnam has received the technical assistance of many foreign organizations, in which significant contribution to this technical assistance belongs to the STAR Project funded by USAID. In other efforts, Japan also has assisted Vietnam in developing the system of judicial precedents, see, Supreme People's Court [Toa An Nhan Dan Toi Cao], Vietnam-

noted that publishing cases has become very common in many civil law tradition countries such as Germany,¹¹⁵ France,¹¹⁶ Japan¹¹⁷ and China¹¹⁸ as a feature of a transparent legal system. The first publication of selected cases of Vietnam has been marked as a special event of its current judicial reform process. The Supreme People's Court of Vietnam expects that this publication will become a good source of reference for judges in the course of resolving cases which are similar to published cases.¹¹⁹ The Court also hopes that published cases will play an important role in legal education and more broadly assist Vietnam to build up a transparent legal system.¹²⁰

Publishing cases, however, is only a primary attempt to apply relevant elements of the doctrine of precedent in the legal context of Vietnam. Towards a successful adoption of relevant elements of the case law system, much work is required to be performed, firstly within the Vietnamese court system. One of obvious concerns is the content and the form of published judgments that are expected to be 'pattern judgments' for reference in the course of hearing cases. Essentially, the content of published judgments of the Supreme People's Court of Vietnam appears to be simple, especially in comparison with cases published in Law Reports of common law jurisdictions like Australia. Despite a brief

Japan joint research on the development of judicial precedent in Vietnam (available in Vietnamese, English and Japanese languages) (2008).

¹¹⁵ See, <<http://www.llrx.com/features/germanlaw.htm#court> > for further information about the case law in Germany.

¹¹⁶ See, <<http://www.llrx.com/features/french.htm#Case>> for further information about the case law in France.

¹¹⁷ See, < <http://www.worldlii.org/catalog/2574.html>> for further information about the case law in Japan.

¹¹⁸ See, Zhai Jianxiong, *Judicial Information of the People's Republic of China: a Survey* (2002) <<http://www.llrx.com/features/chinajudicial.htm> - Official Publication >.

¹¹⁹ See, THE SUPREME PEOPLE'S COURT [TOA AN NHAN DAN TOI CAO], *supra*, note 42, pp.19-20.

¹²⁰ *Ibid.*

description of facts and court rulings, a typical judgment of Vietnam provides little legal reasoning. Typically, a court judgment of Vietnam's courts includes three parts: Part 1 titled '*Nhan thay*' (literally, perceiving) gives a brief prescription of facts relating to the case; Part 2 titled '*Xet thay*' (literally, considering) states rather simple legal reasoning which mainly points to legal provisions applicable to the case; Part 3 titled '*Quyết định*' (literally, deciding) states the court's rulings.¹²¹ Without sufficient legal reasoning to justify the court rulings, it would be very hard for other courts which intend to refer to the published judgment for their decisions. Therefore, detailed requirements of a court judgment need to be worked out for improving the quality of published judgments, which, in turn, promotes advantages of the publication of selected cases.

¹²¹ For a typical content of judgment of an administrative case *see*, Supreme People's Court of Vietnam, *supra*, note 38.

Conclusion

The establishment of an administrative law jurisdiction of the court system has been marked as a major objective of Vietnam to create a set of tools protecting the legitimate rights and interests of individuals and organizations. For the purposes of building up a socialist rule-of-law state and international integration, this objective has great worth. However, there still is much work to be done to improve the relatively new judicial mechanism controlling public power in Vietnam. Amongst a range of much needed tasks is the need to build up and improve transparent legal rules for the administrative adjudication system of which are rules of grounds for review. Although several basis rules of grounds for review have been adopted in the Vietnamese administrative law system, applicants have still confronted many difficulties during the course of establishing grounds for challenging an administrative decision (action) in question. All the limitations in the law relating to grounds for review which affect the effectiveness and quality of administrative adjudication as revealed in this paper provide examples that indicate the need for improving the Vietnamese administrative law system.

To fulfill the above task, studying foreign experiences is one practical suggestion. Given this approach, this paper suggests that Vietnam needs to incorporate in its laws several rules that state grounds for review in a straightforward manner. To be sure, making these rules is not sufficient for effectively reviewing an administrative decision (action) in question. What is more important, as this paper has noted, is to strengthen the role of the Supreme People's Court of Vietnam in legal interpretation. Furthermore, this paper, to some extent, also raises the issue of adopting case law in the Vietnamese legal context. However, each country, regardless of its legal tradition, adapts the legal system to suit its own local conditions. Therefore, to achieve desired results in regard to application of any foreign experiences in Vietnam, all its specific political, socio-economic, and legal conditions need to be taken into

consideration. Given this concern, this paper, to some extent, puts forward several challenges, both theoretical and practical during the course of applying foreign experiences in this field.

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Nguyen Van Quang

Nguyen Van Quang obtained his PhD in Law from La Trobe University, Melbourne, Australia in 2007 and currently is Deputy Head of International Cooperation Department and Chair of Administrative Law (Postgraduate Studies) at Hanoi Law University, Vietnam. Dr. Nguyen Van Quang's research interests include Vietnamese administrative law and comparative administrative law and his various works have been published in Vietnam and abroad. From May to August 2009 Dr. Nguyen Van Quang was invited to Center for Asian Legal Exchange (CALE), Nagoya University as a Visiting Research Fellow to collaborate with Professor Aikyo Masanori in conducting research on "Comparing Japanese and Vietnamese Administrative Procedural Law".

CALE Discussion Paper No.3

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Author *Dr. Nguyen Van Quang*

Published by Center for Asian Legal Exchange (CALE)
Nagoya University
464-8601 Furo-cho, Chikusa-ku, Nagoya, JAPAN
Tel: +81 (0)52-789-2325 Fax: +81 (0)52-789-4902
<http://cale.law.nagoya-u.ac.jp/>

Issue date 15, January, 2010

Printed by Nagoya University Co-operative Association

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CALE Discussion Paper No.3

January, 2010

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CALE Discussion Paper No.3 (January, 2010)

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