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**UNDERSTANDING FOREIGN DONOR SUPPORT FOR
LEGAL REFORM IN SOCIALIST TRANSITIONAL STATES:**

**THE CHANGING NATURE AND CONTINUING DILEMMAS OF
LEGAL REFORM ASSISTANCE IN VIETNAM**

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Introduction - Acknowledgements

I am grateful to the Law Department and the School of Oriental and African Studies, and particularly to Professor Andrew Harding, for sponsoring and arranging my lecture today and my visit to SOAS. For decades SOAS has led the way in the study of law in Asia and Africa, with scholarship unmatched in its quality and in its commitment to supporting a role for law that helps to improve the social, economic and political lives of the people of the developing world. I am delighted to be here.

At the outset, as a matter of full disclosure, let me note that I am serving as litigative consultant to the U.S. Department of Justice in the prosecution of the case of labor slavery of Vietnamese workers that I mention in this lecture. I have also served as consultant to a number of the donors supporting legal activities in Vietnam that are also discussed here, including the United Nations Development Programme, the World Bank, the Vietnamese Ministry of Justice, Oxfam and the Ford Foundation. But the views expressed here are my own and not those of the U.S. prosecutors in the Vietnam labor slavery case or any of the donors providing support for Vietnam in the legal arena. In the particular case of the donors, I doubt that many of them, if any at all, would agree with the views that I outline here today.

Introduction – The Problem and the Claim

Let me begin with two episodes from recent Vietnamese law, episodes that come after more than a decade and a half of foreign donor support for the development of law in Vietnam, including the development of labor law and the development of more professionalized courts, prosecutors, police and justice officials:

On February 21, just two weeks ago, the owner and manager of a garment factory located in American Samoa was convicted of multiple criminal civil rights charges involuntary servitude (a modern term for slavery) in connection with the trafficking, beatings, starvings and other mistreatment of over 200 Vietnamese and Chinese workers, including the death of one Vietnamese worker and the gouging out of an eye of another worker from Vietnam. These workers had been sent to his factory in American Samoa by two labor export companies in Vietnam, companies owned and controlled by the Vietnamese Ministry of Trade and the Vietnamese National Administration of Tourism. Those workers were accompanied by Vietnamese “supervisors” (one might term them overseers) from those state-owned labor export companies who participated in or observed the mistreatment of the Vietnamese workers. Loansharks back in Vietnam enabled the workers to go abroad by providing capital for their fees at usurious rates, protected by local police and state authorities acting as local enforcers. In turn local police, security and state authorities enforced this system, threatening families of the Vietnamese workers who complained about their treatment overseas and holding families to their commitments to illegal loansharks, including using threats of violence against them.

These Vietnamese labor export workers and their supervisors were all sent under the Vietnamese legislative and regulatory system for export labor developed in Vietnam over the past ten years under a labor law regime that has included donor support. That Vietnamese export labor legal regime is intended to earn export revenues for Vietnam, in which workers are now an export commodity, help reduce

rampant unemployment, and, at least rhetorically, protect the rights of workers sent abroad.

It is clearly not succeeding in that last, rhetorical protective goal, reflecting broader failures both in Vietnamese law and in donor support for the revamping of Vietnam's economic law system. That modernization and renovation of Vietnam's economic law has, as I shall argue, resulted in a system that is more detailed, more legal, arguably more regulated and, today, largely used by those within Vietnam with greater economic and political power and against those with less power. The conviction of the factory owner in America Samoa should not blind us to the failings of the labor law system in Vietnam, a regime developed with donor support that has served to provide legal protection to rapacious labor export companies, police and loansharks, helping to produce situations like that on Samoa, while giving workers themselves virtually no way to implement the general rights that legislation supposedly grants them.

Another episode:

For more than a decade, a gang leader named Truong Van Cam has run a considerable part of Saigon, also known as Ho Chi Minh City, Vietnam's commercial and business center. Known as the Godfather Nam Cam, he directed hundreds of gang members, ran scores of hotels, restaurants, casinos and other enterprises, extorted protection money from hundreds more establishments, and had opponents beaten and killed. He also corrupted dozens if not hundreds of Ho Chi Minh City police, prosecutors, city officials as well as national police, prosecutors, and political officials. After years as the informal boss of Ho Chi Minh City, with authority directly rivaling the Party secretary and mayor of the city, Nam Cam was arrested and charged with murder, extortion and a range of other serious crimes in December of 2001. In the months that followed, investigators sent from Hanoi – for the local police and prosecutors could not be trusted – uncovered and

charged or removed an increasingly senior array of officials with close links to the Godfather, Nam Cam.

Among those who took their instructions from this gangster were at least two members of the Central Committee of the Vietnamese Communist Party, a national deputy prosecutor-general, several vice ministers of the interior (the ministry responsible for police and internal security in Vietnam), the nation's leading journalist, a Vietnamese ambassador abroad, and others. Questions were even raised, and then squelched, about the role of a former Prime Minister. It became apparent that Nam Cam had thoroughly corrupted the authority and legitimacy of law in Vietnam, bringing senior officials who are supposed to be both obedient to law and loyal to the Communist Party under a third pole of authority – his own.

Contrast these episodes with close to fifteen years of donor support for legal reform and the strengthening of the Vietnamese legal system, donor support that has provided tens of millions of dollars for legal system development in Vietnam and that is regarded, or at least self-regarded by donors, as highly successful.

There is something of a contradiction in these pictures. In the export labor case, the reform of a particular economic law regime – labor law and the system of sending export labor overseas – has clearly benefited the state, government ministries, the state export labor companies that make profits from sending laborers abroad, and the loansharks, police and local officials who earn profits from the amounts charged or gouged from workers as fees, loans or blackmail for being allowed to go overseas. That economic law regime regulating export labor was also intended, at least rhetorically, to protect Vietnamese workers from exploitation by forces at home and abroad – at home, loansharks, local officials, and labor export companies; abroad, rapacious foreign factory owners and managers. That part of the system is clearly failing, because the legislation embodying it requires implementation by state authorities that have, as their primary duty, the service of government ministries and labor export companies rather than the protection of workers' rights, and

because that legal regime provides not even the hint of permission for any sort of even semi-autonomous advocacy work on behalf of such groups.

In the case of the Godfather Nam Cam, a mockery was made of the authority and legitimacy of law in Vietnam's largest city and primary commercial metropolis. Police, local officials and senior national government and Party officials have always been subject to two masters, to divided authority – to the law, on one hand, and to the Communist Party on the others. But Nam Cam took advantage of that divided loyalty. He took advantage of the Party's fundamental ambivalence about legal authority and legitimacy and its own refusal to allow law's strength to grow, suborning hundreds if not thousands of police, prosecutors and local and national officials, making them subordinate to his authority, to his criminal legitimacy in Saigon. When they had to make a choice, police, prosecutors, judges and officials obeyed him, not the law, and not the Party.

The picture that emerges from the evaluation reports of donors and of the Vietnamese government is of a legal system gradually being strengthened, of the spread of law's legitimacy and authority. This picture is of the building of legal and governance institutions – the training of judges and prosecutors, the training of legislators, better operating procedures, computerized facilities, more detailed drafting of laws, better dissemination and even – a particularly daring claim in recent years – better implementation and enforcement, participation and access. In this picture, the *rechstaat* of law is being built, as the fundamental prerequisite for the building of a strong, autonomous, authoritative and legitimate legal system.

We are left with the conundrum that donor support for Vietnamese law reform has had some success in the building of institutions – but that those institutions, and the law that underlies them, continue to lack the authority to serve and support the weaker in Vietnamese society. Instead, the picture that emerges from these cases and others is of a new Vietnamese law, built at least partly on a donor edifice, that is being used to support exploitative market forces rather than to protect those

harmed by such markets, that builds structures that are suborned by criminals, and that favors economic and bureaucratic elites over ordinary citizens.

The Stages of Law and Development in Asia and in Vietnam

How did we get to this state?

Looking back, we might identify five broad generations of efforts to assist and mold the legal systems of what we now call the developing world or the third world. In the first generation of these efforts, Britain, the United States and other countries sought to shape and mold the legal systems of colonies and quasi-colonies, often finding and supporting local elites in those processes. In Asia, the shaping of colonial and quasi-colonial law took place in India, China, Thailand, the Philippines and elsewhere in a process that has been well documented by scholars and donors.

That lengthy first stage of molding the legal systems of Asia entered a new phase, a second generation, after the Second World War, now in the name of development and modernization. Again, this story is well told by British, American, Indian and other scholars. The creation of a Japanese constitution and reshaping of its legal system, and the modernization of the Taiwanese, Korean, Thai, Indonesian, South Vietnamese and other systems all relied heavily on bilateral donor intervention. These efforts were increasingly supported by multilateral aid as the World Bank and the Asian Development Bank were established and began to recognize the importance of law in the creating of modern market economies in Asia. In the United States, this is the period we generally identify with “law and development” - a period focused on developing modern market economies and the state (often liberal in economic terms and authoritarian in political terms) that would support market development.

It is worth noting that economism in law and development was not solely a phenomenon of the western market powers – the Soviet Union too was active in

North Vietnam and elsewhere in support, perhaps ironically, for building the legal structures for socialist economic development as well. Socialist law and development activities in the Soviet period is a story that remains to be told by scholars, far less well-known than its western analogues.

This second generation of donor support for market legal structures in Asia ended rather abruptly in the early to mid 1970s amidst severe criticism of the practices and objectives of what came to be known as “law and development.” This was a period of such intense criticism and political impact that today we can legitimately call the raging criticism of law and development in the early and mid 1970s the third stage of the law and development movement.

This part of the story is well-known. Along with other work, David Trubek and Marc Galanter’s *Scholars in Self-Estrangement*, the iconic law review article from 1974 that today remains one of the most cited pieces of legal scholarship of our era, marked a severe blow to the 1950s and 1960s law and development efforts that were intended to construct liberal law in the developing world. Joined by other progressive critics, the “law and development movement” as practiced by American foreign aid and others in the 1950s and 1960s could not flourish under the onslaught of criticism.

To be entirely truthful, I have never entirely understood how “law and development” could crumble so quickly under the onslaught of a few intellectual critics based in London, Madison and elsewhere. It was only when I began working in the donor world on legal reform activities, as I have with the Ford Foundation as a program staff member in Beijing, Hanoi, Bangkok and New Delhi, and as a consultant with a number of other organizations, that I began to understand how truly skittish the donors can be – how quick to back away from controversial and criticized programs.

After the third stage, the intense criticism of law and development, donor support for “law and development” entered a long period in the wilderness. From the mid-1970s to about 1990, what we might call the fourth generation in our outline of law and development activities, donors shied away from legal reform activities with but few exceptions. In Asia the World Bank and the Asian Development Bank focused on infrastructure development and economic policymaking. Bilateral donors focused on similar activities. Even the private foundations, such as Ford, rapidly moved away from their previously strong support for law and development activities. This does not mean that a number of Asian countries were not themselves active in promoting economic law to develop controlled market economies, including structural improvements to courts and legal education. But those were conducted largely internally, for the most part away from donor support.

It was perhaps only the transformation of the socialist world that could have breathed new life into the corpse of law and development, ushering in the fifth generation of donor activity in law and development and the mushrooming of donor legal support since about 1990. Yet this era did not really begin with the fall of the Soviet Union in 1989, as is commonly assumed. Instead, I would argue that donor support for law and development, thrown into chaos and sharply reduced in the 1970s and early 1980s at least partly as a result of the substantial progressive criticisms of its results in the developing world, came to life once again in the early 1980s with the rise of the Ford Foundation in China. The call for the transformation of socialist law was the donors’ salvation from the law and development critique of the 1960s and early seventies. It was the way in which donors, now multilateral as well as bilateral, could return to the legal fray. China, the first socialist country to decide upon substantial reforms, led the way. At the request of Chinese officials, Ford re-entered the arena of substantial donor support for legal development in the early 1980s with extensive support for Chinese law schools, with an emphasis on elite institutions and on the training of younger faculty abroad. This was at least seven years before donors re-entered the law and

development arena after the collapse of the Soviet Union and the systems of central and eastern Europe.

What occurred in 1980s China, the re-entry point for donors in law and development, was a truly careful balancing of interests and activities, a well thought out bargain. Determined to avoid both the mistakes and the criticism of early law and development efforts, and in measured but clear response to domestic Chinese policy, Ford sought to support local capacity-building initiatives in legal education and scholarship rather than market economic law reform in the legislative and regulatory sphere. Put in stark terms, China's message to the Ford Foundation and other donors was clear: You may do law but you may not build a liberal democratic state here. But China and Ford were able to work together on broadening the perspectives and capacity of China's new, elite legal intellectuals, a project directly endorsed within China, despite its dangers for the Chinese leadership as Chinese intellectuals began to argue for elements of a liberal state. And, for the Ford Foundation, this was a project considerably less likely to garner scathing attention from the lurking critics of law and development than a direct focus on the legal structures of a market economy would have elicited.

[[About five years later, Ford expanded its work in China to include support for strengthening court and legislative processes, with a focus on training and research. And within a few years other donors, including the United Nations and the World Bank, came into the Chinese picture as significant donors, working on the more traditional subjects of donor legal support: economic law reform in various areas, training of government lawyers – the kind of activities that had perhaps been most criticized in the 1970s, but were now acceptable, at least within a transforming socialist community.]]

By the 1990s this fifth generation of work in law and development had expanded far beyond China and indeed beyond the formerly socialist world. The construction of a liberal legalism in Asia and Latin American market states might have been

criticized in the 1970s, but the transformation of socialist to market states in the legal sphere was considered a legitimate project in the 1990s. In turn that work in the socialist states re-legitimized a return to non-socialist states as well. By the early to mid 1990s law and development activities were flourishing once again in dozens of countries around the world.

Vietnam

Donor legal support in Vietnam was part of this fifth generation of law and development. These activities in Vietnam can themselves be divided into two phases, the first from about 1990 to 2000, and the second beginning in the last several years.

Donor legal support in Vietnam began in the late 1980s, as Vietnam reopened gradually to the world after decades of war and autarkic economic policies. In the late 1980s through the mid 1990s, donor legal support was almost entirely focused on economic law and on the institutions of legal rule in a marketizing economy.

Multilaterals led the way, especially the United Nations, the World Bank, and the Asian Development Bank, with bilateral donors either supporting multilateral efforts and, for a few, supplementing those efforts with similar initiatives of their own. As Carol Rose, John Gillespie and evaluation efforts from the Vietnamese government, UNDP and others have clearly shown, those efforts focused squarely on the institutional arrangements for a market economy – the reform of banking, investment, labor and other economic law, and the building of legal institutions to serve a market economy, such as courts, a national legislature, prosecutors' offices, and bureaus of justice.

By mutual agreement between the government of Vietnam and cautious donors, those efforts did not include work on the authority, legitimacy or, usually, the enforcement of law. Nor did they focus on rights and on those left behind in Vietnam's rapidly developing market economy, both those left behind in poverty,

and those left behind in their ability to assert their rights. Once the donors helped to build the structures of law for a new market economy and national cadre to administer those legislative, regulatory, judicial and related structures, their work was largely done, according to both the Vietnamese authorities and the donors.

There remains, in the minds of many donors and not a few Vietnamese, a fundamental misunderstanding of these years. These are regarded, for example, as the years of positive, effective regulation. But regulation for what? In the labor law field, for example, this was actually a period of effective deregulation of workers' rights (including the rights of export workers). The right to strike was severely restricted in the 1994 labor code, a clear derogation from an earlier, pre-law social compact. Minimum wage guarantees went unenforced, then were eviscerated – reduced – by subsequent legislation and then further eviscerated by the lack of inflation protections. In the series of labor export regulations promulgated throughout the 1990s by the Vietnamese government and its ministries, a rhetoric of protection for export laborers was balanced with a strong rhetoric of labor discipline. The implementers, state ministries that owned labor export companies, chose almost entirely to enforce discipline rather than rights.

So it is, I argue, virtually useless to look upon the first ten to fifteen years of Vietnamese legal reform as a period of new and effective regulation. That, by itself, tells us little. What tells us more is that, at least in certain important fields, the increase in regulation served disciplinary interests but did not serve the interests of rights. Rights, I would submit, have instead been effectively deregulated, a process in which the elaboration of law has served to eliminate rights that were, in fact, more strongly expressed and enforced in a pre-law, non-market social compact rather than under the supposedly sophisticated labor law provisions we note today.

Let us be clear: the donors would say that these choices – avoiding questions of legal authority, legitimacy, enforcement, participation, access and the assertion of rights, were forced upon them by Vietnamese policy, that the limited option of

working on the structures of law, including economic law, were not their choices. That gives far too much credit to the Vietnamese Party, if it can be called credit. In Vietnam as elsewhere, donors too have clearly seen law as subordinate to the needs of a market, as largely instrumental in the drive to establish a market economy.

This conception of law as subordinate instrument to market development has guided donors programmatic choices in addition to the pressures from the Vietnamese Party, itself also determined to continue subordinating law. My point is that both the Party and the donors have been, at best, ambivalent about the fundamental authority and legitimacy of law in the Vietnamese context, ambivalent about the assertion of rights by those negatively affected by market processes.

Does this affect real life? It most certainly does. When both the Party and the donors are fundamentally ambivalent about the force and authority and legitimacy of law, and when their programs reflect that deep ambivalence, forces ranging from government ministries to labor export companies to the Godfather Nam Cam undermine and overwhelm what little, weak law the Party and donors have permitted. The rhetoric of equality and protection in law and legal provisions gives way to the reality of the exercise of law by dominant economic and political forces. Thus the rhetoric of legal protection to export laborers in regulations of the 1980s and 1990s gives way to raw power in the exploitation of these workers. The rhetoric of strength in donor-supported courts, prosecutors, police and state officials gives way to corruption and cooptation by the Godfather Nam Cam. And it isn't even hard – it happens as an ordinary part of day to day life, and only rarely is it exposed.

In summary, the standard forms of donor legal assistance can only support the types of law and state that the receiving state and the donors want. In Vietnam, the receiving state and Party and donors want market-based structural improvements to Party-dominated institutions without significantly improving the capacity of those institutions to exercise independent authority or to respond to claims of rights

from below. Perhaps even more provocatively, in Vietnam, the receiving state and Party and, arguably, donors, want to see economic law improvements that largely benefit the new holders of capital and their state patrons and clients.

The second phase of donor legal support began in about 2000. After about ten years, by the year 2000, some fissures had begun to develop in the Party/donor legal consensus. Millions of dollars had been put into the structures of economic law and the structures of judicial and legislative administration. Party and donors may have wanted subordinate, instrumental legal structures to serve the development of markets – but there was an increasing recognition of the costs of these policies. And developments within Vietnamese society contributed to this rethinking.

Class and political gaps were continuing to grow in Vietnamese society. Perhaps the first warning signs, developments that began to spark discussion among donors, occurred when Vietnamese peasants initiated small but highly public protests against corruption, bureaucracy and excessive taxation in the late 1990s. In Saigon, this period coincided with the rise of the Godfather Nam Cam – coopting, utilizing, corrupting and commanding the new cadre of trained, supposedly “professionalized” police, prosecutors, legal officials and others to serve his purposes rather than the authority of law or the authority of the Party. In the labor export field, the late 1990s was when the upsurge in labor export began, along with the abuses that have come to plague the field, abuses that Vietnamese workers find largely impossible to address utilizing legal means despite the rhetorical provision of rights and protections in Vietnamese legislation.

For donors, there was a general sense that law was not living up to its expectations; for the Vietnamese authorities, this was a problem of “implementation” and “participation” and perhaps even “access.” This is a complicated period, for this emerging sense among donors coincided with and was strongly affected by other developments in the donor community. One such factor was the emphasis on poverty reduction and the discourse of democratic governance that has emerged

from the World Bank in the era of James Wolfensohn's leadership. Even this rather notion that implementation, participation, access and poverty reduction might be moved toward the center of law and development efforts provoked head-shaking and institutional resistance, not only in certain countries but also in other multilateral institutions, such as the Asian Development Bank. When permeated through a Vietnamese, donor and legal lens, what emerged in Vietnam was a new focus on "implementation" and "participation" and, to some degree, perhaps less in Vietnam than other countries of the region, linking law and poverty reduction.

Working on implementation, working on participation, working on access and working on poverty reduction are key elements of what we might, perhaps overly provocatively, call Wolfensohnism in the legal arena. The theory was straightforward: Building structures was not enough – now Vietnam and the donors had to work on making sure that the system was effective in its operations, and provided enough opportunity for participation by a broader range of actors in the formulation of policy. This second stage, at least in Vietnam, does not go so far as to explicitly program for the assertion of rights, and that may be a fatal flaw.

We are now in the midst of that second stage of law and development activities in Vietnam now, and only initial comments can be made about it. There have been some successes in this new donor programming, particularly in smaller, bilateral programs that have sought to serve and build capacity in areas of law and gender, legal aid, corruption, rural economic issues, democratization, and the strengthening of a voluntary sector. At the same time, particularly in the mainstream of donor legal support in Vietnam that now includes elements of "implementation" and "participation," there are strong and disturbing parallels with the early stage of legal development to serve a market economy. To put it again bluntly, this new mainstream donor approach to legal reform, Wolfensohnism in the legal arena, may well also be failing to prevent the exploitation and cooptation of donor-supported and –created legal structures from being used for exploitation or being coopted by

powerful actors who overwhelm the little legitimacy and authority that law currently has.

First, the stress continues to be on creation and support of a competent legal elite rather than on developing programs that serve the exercise of law by those most negatively affected by it in Vietnamese society. To put it bluntly, donors continue to train legislative officials and provide computers to ministries and parliamentarians and prosecutors and police – now with an additional emphasis on implementation and broader elite participation. Rights and justice and the exercise of rights by affected groups continue to remain the largely unmentioned and unaddressed elements of donor support.

Second, no donors have effectively targeted those left behind in Vietnam's rush to the market – either exploited export labor workers, or citizens of Saigon watching as Nam Cam systematically and methodically coopted virtually an entire city's legal apparatus. Some may argue that donor support for legal aid programs, a new development since the late 1990s that reflects the new emphasis on implementation, participation and access, derogates from the picture I am painting. It does not. Legal aid in Vietnam, controlled by the state, serves to ameliorate legal problems in some individual cases without in any significant way challenging the new structures of power that have emerged, and donor support for it is a patchwork that cannot begin to address the issues of inequity and legitimacy that truly envelope the Vietnamese legal system.

Nor do the new donor programs that seek to broaden participation in the drafting of legislation and legal instruments effectively assist those left behind or exploited in the nexus between market and law in Vietnam. Those projects to increase participation are aimed at elite legislators and at other officials, seeking to replace narrow Party fiat with a somewhat broader consensus-building cadre – but not including ordinary citizens oppressed by the cooptation of the legal system created since the late 1980s.

Thus we have come to a state in which donor legal support has played a major role in creating structures of law that just did not exist in Vietnam, except as shells, some fifteen years ago. That is an accomplishment. Yet at the same time we are witnessing, in the cases I have mentioned and in others, exceptional failures in that project, and failures in the more recent Wolfensohnian project of supplementing legal construction with legal implementation and participation. These are the three intertwined failures of legal authority and legitimacy, the failure of law to address the rapidly growing problem of social equity, and a failure of the strengthening of groups that are able to criticize, analyze and produce policy alternatives and to struggle for the authority and legitimacy of law.

The Road Ahead for Donor Legal Support in Vietnam

Today law in Vietnam is not protecting the unprotected, of which labor export workers are one small example. And the structures of law are regularly corrupted and coopted by cadres and criminals, the result of the inherent weakness of law in a Party-dominated political structure and the Party's intentional failure to confer upon law autonomous respect and authority. These fundamental problems – law does not serve social justice and social equity; law's authority and legitimacy is eviscerated because political authority has declined to give law real authority, enabling gangsters like Nam Cam to illuminate and destroy the superficial authority law has; and there is no critical base for new thinking in the legal policy arena – each of these remain largely unaddressed by current efforts by the major donors.

The reshaped focus of the major donors on implementation, participation and access in Vietnam shows little signs of any significant capacity to affect these intertwined problems of social justice, law's authority, and the absence of critical and analytical policy thinking. Too often the work of the major donors produces an ability to draft legislation that is used to harm the victims of Vietnam's

marketization process – such as export workers – or that strengthens structures that remain highly susceptible to Party and to gangster cooptation – such as Nam Cam’s takeover of the legal and judicial structures of Ho Chi Minh City. The broadening of donor legal support from the creation of legal structures for a market to include work on implementation, participation and access has occurred elsewhere as well. But at least in Vietnam – and probably elsewhere as well -- there is a clear need for a new paradigm in donor legal support in Vietnam that clearly addresses law and authority, law and social justice, and law and the creation of critical, analytical groups with the capacity to initiate dialogues and further reforms.

[[This is not to say that all donor efforts are unduly tainted by these problems. For example, DFID, Ausaid, Swedish SIDA, Canadian CIDA and other bilateral donors continue to support domestic NGOs that are seeking to use law on behalf of victimized groups, be they women or poor farmers or other sectors. This focus, exemplary but all too rare, on the victims of marketization and bureaucratic corruption and on their legal capacity and strategies, should certainly be continued. And even major donor support for increasing implementation, participation and elite access in the central structures of law – the Supreme Court and higher local courts, the national prosecutors’ office and the chain of public prosecutors down to the provincial and local levels, the National Assembly – while too limited, has its utility in seeking modest reforms in a system riven by internal contradictions. But the major donors should seek to do considerably more.]]

What might a new paradigm in law and development donor support for Vietnam look like, in a system in which the Party has imposed key limits on the scope of law’s authority and legitimacy, and in which weak law serves the bureaucratic and financial interests of state officials and the holders of economic power alike?

Bearing in mind the very real limitations imposed by the Vietnamese system, a system in which the Party continues to dominate law and in which weak law is used for bureaucratic and personal gain by state officials and the holders of capital to

oppress others, there are two key directions for donor legal support that might yield some positive influence:

The first is explicitly working to build long-term capacity, including the capacity for new and broader thinking, among legal intellectuals. This is an ironic return to very traditional donor programming that has been sharply neglected since the Chinese experience of the 1980s. We have failed to do this in Vietnam. True, we have worked with the law colleges on economic legislation; we have sent law teachers and court officials and ministry cadres abroad to study foreign investment law and banking law and taxation. But, with the possible exception of the French, we have never done what the Ford Foundation did in China in the 1980s and 1990s: intentionally sought to build a new corps of legal scholars and teachers whose vision for the possibility of law, for the application of law, for the authority of law is wider than Party-dominated law and – let us be clear – wider than the technical aspects of economic law, wider than the next draft of a foreign investment law, wider than donors' vision for law.

In China those younger and mid-level legal scholars trained in England and America came back with a broadened vision for the aspirations of law and its authority. They have worked in numerous fields – economic and civil law, criminal law and jurisprudence. But they have set a new tone for the role of law in China, pushing the boundaries of debate at key moments – such as in 1989 – while staffing and rising to leadership in the key intellectual centers of Chinese law. Donors have failed to do this in Vietnam. It is indeed possible that most multilateral and bilateral donors even prefer, like their Vietnamese Party and state counterparts, to work with relatively narrowly focused and relatively compliant economic law officials, not with legal intellectuals. Many donors prefer those who draft to those who challenge.

Second, the donor community should seek to expand work with those most directly and negatively affected by the expansion of the market economy in Vietnam and the

interests of officials and criminals in that market system. There are many such affected groups: peasants over-taxed and over-regulated by cadres; export workers exploited by loansharks, local police, local officials and labor export companies; women in a variety of workplaces; industrial workers subject to fewer protections under a supposed system of market regulation, a system that has, in reality, deregulated the protections afforded by a pre-law social compact.

The donor community, particularly smaller NGOs and some bilaterals, already work relatively directly and at the grassroots with a variety of these affected groups. To the degree possible, such work should now include legal protection and legal advocacy that is as autonomous as possible, a difficult task but one well worth undertaking. There are a number of possible ways to do this: (1) seeking to help establish semi-autonomous or even relatively autonomous legal support centers that can help in the assertion of rights; (2) seeking to strengthen and, just as important, help make more autonomous the legal aid centers now in formation; (3) assisting law schools in establishing legal clinics for the assertion of rights, not merely the drafting of laws, which can have the added benefits of contributing to the formation of an innovative, challenging group of legal intellectuals and might allow law colleges and departments to play a role in protecting clinics that assert rights; and (4) strengthening the role and capacity of the media in exposing abuses of legal rights and demanding both redress and structural change.

There are those in the Vietnamese Party, government and in the donor community who do believe that the second phase of law and development activities in Vietnam, marked by an added emphasis on implementation, participation and access, may well signify the limits of what can and should be accomplished in a socialist transitional state like Vietnam. Those efforts may be applauded, but they are not sufficient.

The Godfather Nam Cam's long and successful challenge to the legitimacy and authority of law in Vietnam, and Vietnamese government ministries' and labor

export companies' roles in the denial of rights to Vietnamese export laborers are but two examples of failures in the Vietnamese legal system. Donors must reflect carefully on these failures – for they send a clear signal to donors that their legal support in Vietnam is insufficient, and may be in fact helping to produce the structures that are both illegitimate and oppressive. Within the limits of the possible in Vietnam and other socialist transitional societies, new paradigms for donor support will constantly need to be sought so that neither new Godfathers Nam Cam or other dead and beaten export laborers do not continue to result from the process of legal reform in Vietnam.

In the labor law arena, including the labor export process that I shall come to shortly, the *doi moi* era, Party and government policies, and donor support marked an era not of regulation, not of structural strengthening, but of the marketization and of effective deregulation of traditional powers and rights held by subordinate groups. Take labor law as an example. In the labor arena, trade unions were weak under the old state fiat system, just as they remain weak today. But there appears to have been a social understanding, a political compact that limited the economic profit that could be extracted from Vietnamese workers. And there was an understanding that workers could complain, even resist, the imposition of unfair work rules. A certain respect for workers and their role, even a respect for their rights, may well have counter-balanced the strong power of the state during that era. That may have

The new marketization, strongly supported by donor activities, marked an end to that relative balance. The Vietnamese dictatorship of the proletariat certainly meant an exceptionally strong Party and strong state, but it also embodied a social understanding that workers had a voice. In the new regime of marketized legislation, regulatory words workers only had the voice that legislation allowed, unsupported by a social compact. And that legislation granted very little.

For wage workers in Vietnam, for example, it provided for minimum wages that at times have been honored more in the breach than with regularity – leaving workers pondering legislative language and few or no opportunities to enforce it. For export laborers, the new regulations enacted in the late 1980s and early 1990s provided a rhetorical guarantee that their contracts would be honored, that they would not be charged usurious loan rates to go overseas, that the Vietnamese government would

protect them, that labor export companies, most either owned or closely related to state agencies, would not exploit them. Those regulations, promulgated and even expanded in the late 1980s and the 1990s, also provided that export labor companies would have the right to control workers, and that disobedient workers could be sent home or punished under criminal provisions.

But who controlled implementation? Who controlled the power of the state? Under the new economic law regime, it was easy to enforce the duties of workers and very difficult for them to enforce their rights. The new legislation served ministries that wanted to increase export earnings for Vietnam and reduce domestic unemployment, labor export companies that sought profits for themselves and their ministry owners, procurers of labor in Vietnamese villages and cities, who sought individual profits, and the police and officials who worked with all of them, often also for a fee. That legislative regime replaced – in effect, it deregulated – a social compact that gave workers some voice and some role, but it did not serve the workers and their rights, for they had no access to the means of enforcement.

This is all clear in the case of the Vietnamese workers exported to American Samoa. When they are beaten and starved and one is killed, the labor export company representatives who are on site at the factory do not rise to protect them; instead, they work with the factory owner to discipline the workers. The labor export company managers threaten the workers with the force of Vietnamese law back at home, both against them for insubordination and non-repayment of loans given to bring them to Samoa, but also against their families as well. They cite the 1980s regulations, they cite the 1990s regulations, and they cite the contracts. This is one example, and it is perhaps one egregious example, of the uses of economic law reform to support one side rather than another in Vietnam's marketizing economy.