

**THE LAW OF THE FAMILY IN VIETNAM:
ASSESSING THE MARRIAGE AND FAMILY
LAW OF VIETNAM**

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“To put the world in order, we must first put the nation in order; to put the nation in order, we must put the family in order; to put the family in order, we must cultivate our personal life; and to cultivate our personal life, we must first set our hearts right.”

*Confucius*¹

I. INTRODUCTION

It is a virtual truism of human history that in war the biggest victims are the weakest segments of society—the children, the widows, the elderly. The war waged between the Vietnamese and the French, and subsequently between the Vietnamese and the Americans, lasted for thirty years.² It started as a struggle of colonialists versus

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1. This quotation is widely attributed to Confucius. See, e.g., Dennis Merritt Jones, *Set Yourself Free: The Weight of Hate Is Too Big a Burden*, Huffington Post (Aug. 22, 2011, 9:36 AM), http://www.huffingtonpost.com/dennis-merritt-jones/fear-into-hate_b_930965.html.

2. JOSEPH BUTTINGER, VIETNAM: A POLITICAL HISTORY 277 (1968). “If war is the use by two or more nations of military means for political ends, then the war began in September, 1945, when the French with British help ousted the Vietnamese administration installed by the Provisional Committee for the South in Saigon.” *Id.* The war ended for the Vietnamese people on April 30, 1975 when the presidential palace in Saigon fell into communist hands and the commanding general of the North announced to the surrendering general of the South that “[y]our power has

anti-colonialists and evolved into a frontline conflict in the worldwide struggle of communist nations versus non-communist nations. Despite Vietnam's ultimate victory in that conflict, such a lengthy struggle impacted countless families and several generations of children by the loss of parents, grandparents, children, siblings, and extended family. In a society so structured around the extended family, such a loss was devastating to a people trying to put their nation in order. In a nation so experienced in the tragedies of war, their ability to "set their hearts right" and secure the well-being of their families must be called into question.

Yet in the face of all this recent tragedy, the country of Vietnam has sought to do just that. Twenty-five years after the end of the conflict with the United States, Vietnam's legislature enacted the Marriage and Family Law of 2000.³ This law is a comprehensive piece of legislation intended to secure the well-being of the Vietnamese family in an ever-changing world. It seeks to deal with virtually every phase of the family experience. This piece of legislation is very much a reflection of Vietnamese society as a whole and is the product of an evolutionary process in the area of family law in Vietnam. The focus of this article is an examination of Vietnam's Marriage and Family Law of 2000. This examination will occur in four parts. First, there will be a brief overview of the traditional family unit in Vietnam. This overview will look at not only the roles of husbands, wives, and children, but the way in which society views the individual human being. Second, this article will provide a discussion of the history of the Marriage and Family Law in Vietnam. This will include a discussion not only of the evolutionary process that led to the Marriage and Family Law of 2000, but also a brief review of Vietnam's constitutional history. This constitutional history is replete with references to the family and the members of the family unit. Third, this article will analyze the current version of Vietnam's Marriage and Family law. This law reflects not only the prior laws

crumbled. You cannot give up what you do not have." STANLEY KARNOW, *VIETNAM: A HISTORY* 683 (1983).

3. Luật Hôn Nhân và Gia Đình, Số 22/2000/QH10 [The Marriage and Family Law of 2000] (Law No. 22/2000/QH10) (Viet.), *available at* http://laws.dongnai.gov.vn/1991_to_2000/2000/200006/200006090007, *translated at* http://laws.dongnai.gov.vn/1991_to_2000/2000/200006/200006090007_en/lawdocument_view.

that it replaced, but also the various societal pressures that the family unit has endured since the first version of the law was enacted in 1959. Finally, this article will provide an American perspective of Vietnam's Marriage and Family Law. This perspective will include a look at three of the more significant differences between the family laws of Vietnam and the United States.

II. THE FAMILY IN VIETNAM

Vietnamese society has been formed in the crucible of war, foreign domination, and a struggle for self-determination over a period of more than two thousand years. Vietnamese kingdoms ruled the country independently for about 2,500 years before Chinese armies invaded in 207 B.C.E.⁴ Vietnam was then controlled by China for more than a thousand years before finally throwing off that yoke in the tenth century C.E.⁵ From the tenth century into the nineteenth century, Vietnam controlled its own fate and its own government through the person of a hereditary monarch.⁶

Finally, European colonialists arrived. While ancient Roman traders briefly visited Vietnam centuries before, several European states established permanent settlements in Vietnam during the 1600s.⁷ Perhaps the most fateful event for the Vietnamese was the

4. BUTTINGER, *supra* note 2, at 19-20. Vietnamese legends tell of an independent kingdom called Van Lang, which was ruled by the Hong Bang Dynasty. *Id.* It was this kingdom, legend says, that started the country now known as Vietnam. *Id.* Van Lang existed from 2879 to 258 B.C.E. *Id.* In 258 B.C.E., the last of the Hong Bang kings was overthrown, thus ending the kingdom of Van Lang. *Id.* A second Vietnamese kingdom was then formed and that kingdom was known as Au Lac. *Id.* Au Lac only lasted for fifty years, until 207 B.C.E., when it was invaded and overthrown by invading Chinese armies. *Id.*

5. *Id.* at 22, 37.

6. *Id.* at 38-39. There was a brief period of Chinese rule from 1407-1427 during which Vietnam's independence was disrupted. *Id.* at 37. In addition, areas which are now part of present day Vietnam were not always controlled by the Kingdom of Vietnam even during that time period. *See id.* at 43. For example, the Kingdom of Champa ruled the central coastal area of present day Vietnam while the Cambodian Kingdom of Angkor ruled the southern and western parts of present day Vietnam. *Id.*

7. KARNOW, *supra* note 2, at 70; BUTTINGER, *supra* note 2, at 59. It was the Portuguese that built the first permanent settlement in Vietnam on the site of the present day Danang. KARNOW, *supra* note 2, at 70. Then came the Dutch with their

arrival of a French trading post in 1680.⁸ From that moment, the history of the French in Indochina was one of continued involvement through a tragic finish at Dien Bien Phu.⁹

In 1857, the French dispatched a military expedition intent on subjugating the people.¹⁰ The presence of foreign military forces in Vietnam continued until 1975.¹¹ That year, Vietnamese forces ended the United States' efforts to prop up a government in the southern half of the country.¹² Through all of these external pressures, the Vietnamese family remained a vital institution in society.¹³

A. Confucianism

While Vietnamese society resisted such foreign domination, it was also open to and admired foreign cultures.¹⁴ From the establishment of a monarchy to the arrival of the communists, the Vietnamese have assimilated and adopted cultural, religious, and artistic practices of other peoples throughout their history.¹⁵ One of the most significant aspects in this assimilation was the introduction of Confucianism into Vietnamese culture during the period of Chinese control. While Confucianism is often referred to as a religion, it is

first trading post being established in southern Vietnam in 1636. BUTTINGER, *supra* note 2, at 59. The British followed with a trading office in Pho Hien in 1672. *Id.*

8. BUTTINGER, *supra* note 2, at 59.

9. The battle of Dien Bien Phu, which resulted in the defeat of the French, has been compared to "Waterloo, Gettysburg and Stalingrad as one of the decisive battles of history." KARNOW, *supra* note 2, at 206.

10. BUTTINGER, *supra* note 2, at 84.

11. After their conquest of Vietnam in the mid to late 1880s, the French continued to control the country until the Second World War. *See generally id.* at 75-183. Japan occupied Vietnam following the French defeat to Nazi Germany. *Id.* at 184. The French reasserted control over Vietnam after the war. *See generally id.* at 211-43. United States military forces were present in Vietnam until April 1975. KARNOW, *supra* note 2, at 682-83.

12. KARNOW, *supra* note 2, at 682-83.

13. Peter Dean, *Focus Study: Family Life in Vietnam*, NSW HSC ONLINE, http://hsc.csu.edu.au/society_culture/change/focus_studies/2501/CCVietnamfamily.html (last visited Sept. 10, 2011).

14. Steven Wisensale, *Family Policy in a Changing Vietnam*, 31 J. OF COMP. FAM. STUD. 79, 79 (2000), available at <http://www.highbeam.com/doc/1G1-61892264.html>.

15. *Id.*

very much a system of values, ethics, and precepts for moral behavior.¹⁶ Confucianists used the “duties and obligations of [the] family” as a guide for establishing societal norms.¹⁷ In the *Analects of Confucius*, the followers of this great thinker set forth his teachings in the form of dialogues with his students.¹⁸ Many of those teachings speak about family and the role of the individual in the family. The central tenet of his philosophy of the family was the concept of filial piety,¹⁹ that is, respect for your parents.²⁰ In speaking of filial piety, Confucius opined that “parents should be served in the proper spirit while living, buried with the proper rites after death, and worshipped thereafter with the proper sacrifices.”²¹ He goes on to note that a filial person could be identified in this fashion: “Observe the bent of man’s will when his father is alive, and his actions after his father is dead. If during the three years of mourning he does not swerve from his father’s principles, he may be pronounced a truly filial son.”²² Confucius also asserted that “[t]here is filial piety when parents are spared all anxiety about their children except when they happen to fall sick.”²³ The obligations of a young man were identified as follows: “At home, a young man should show the qualities of a son; abroad, those of a younger brother.”²⁴

Thus, Confucianist theory of filial piety speaks both to the role of father and child. The father is to be revered and the child is to revere him. This reverence is to continue throughout life and even after it. The father’s attitude toward the child is one in which the parents

16. Susan Orr, *ABC's of Religion: C is for Confucianism*, EVANSVILLE COURIER & PRESS, July 18, 2009, <http://www.courierpress.com/news/2009/jul/18/abcs-of-religion-c-is-for-confucianism>.

17. VIETNAM: A COUNTRY STUDY 112 (Robert J. Cima ed., 1989), available at <http://countrystudies.us/vietnam/41.htm>.

18. See generally THE ANALECTS OF CONFUCIUS (Lionel Giles trans., 1976).

19. *Id.* at xx-xxi. “The Confucian theory of man’s social obligations rests first and foremost on the fact that he forms part of a great social machine—an aggregation of units, each of which is called a family.” *Id.* Furthermore, the smooth running of a family is insured by “the controlling will of the father.” *Id.* at xx.

20. *Id.* at xxi.

21. *Id.* at 20.

22. *Id.* at 73.

23. *Id.* at 21.

24. *Id.* at 19.

should not have to be troubled by a child. If your life is noted by the absence of anxiety about your children, then you are tending appropriately to your fatherly tasks.

The position of women in society did not receive a similar amount of reverence as that of men in the eyes of Confucius. He gave the opinion that “[g]irls and servants are the most difficult people to handle.”²⁵ Granted, it is difficult to be excessively critical of Confucius given that he was also very much a product of an era in which women had little or no power. Yet it is always troubling to find such an admired figure holding positions at odds with modern understanding.

It was this Confucianist value system, with its commitment to family, which came to Vietnam with the Chinese and ingrained itself into the Vietnamese psyche for many years. It still impacts Vietnamese society even today.²⁶ The legal system of Vietnam, as will be seen later, owes a great deal to the Confucianist thought brought to the country by the Chinese. Clearly then, the Vietnamese system of family law would have been greatly impacted by this philosophy. This Confucianist culture took hold in Vietnam and, as will be demonstrated later in this article, many of its tenets persist even to this day.

B. The Family and the Individual in Traditional Vietnam

Contrary to western notions of placing primacy on the interests of the individual, the Confucianist background of Vietnam placed the family unit over the interests of the individual.²⁷ The family, however, was not the nuclear family that so often defines the institution in western cultures. Rather, the Vietnamese family is an extended concept both temporally and spiritually. That is, the family

25. *Id.* at 93; see also *Women and Confucianism*, WOMENIN WORLDHISTORY.COM, <http://www.womeninworldhistory.com/lesson3.html> (last visited Sept. 8, 2011) (“According to the Confucian structure of society, women at every level were to occupy a position lower than men.”).

26. James Crites, *Confucianism and Its Spread to Vietnam*, CHINESE FOOT BINDING & TOPICS IN ASIAN STUDIES, <http://www.angelfire.com/ca/beekeeper/cf.html> (last visited Sept. 8, 2011). “In present times we have seen different political ideologies come and go through China and Vietnam. However, the foundation of Confucianism remains.” *Id.*

27. VIETNAM: A COUNTRY STUDY, *supra* note 17, at 112.

often includes multiple generations, from grandparents to grandchildren, as well as the spiritual participation of deceased ancestors and those not yet born.²⁸

In times of trouble and stress the individual would look to this family for assistance and support.²⁹ In return, the individual was expected to dedicate himself or herself to the protection of the family, placing the family's interests above all else.³⁰ These relationships were cemented by a shared heritage and geographic proximity as many of these family groups lived in the same village over the course of many generations.³¹

Marriage was viewed as a social contract between the two parties and between the families of the two parties.³² Polygamy was also permitted in traditional Vietnam, but only for men, as Vietnamese families were patrilineal.³³ Thus, some of the households would include not only the extended family, but multiple wives and the various children of those multiple wives.³⁴ Although polygamy is not an institution respectful of women, the position of women was not necessarily subservient.³⁵

C. Women in Vietnam

In a patriarchal society, women are clearly vulnerable to control, neglect, and outright abuse. Thus, the manner in which the needs and

28. *Id.* at 112-14. Family members who remained together and venerated their ancestors together found comfort in the fact that their ancestors were being spiritually nourished and they were insuring their own spiritual immortality. *Id.* at 113.

29. *Id.*

30. *See id.*

31. *Id.* at 114. Family tombs were located in these villages and served as a focal point for extended family. *Id.*

32. *Id.*

33. *See id.* However, “[t]he consent of the first wife was required before” the husband could take additional wives into the same household. *Id.* “Polygamy [sic] was widespread in both northern and central Vietnam.” *Id.*

34. *Id.*

35. *Id.* “Despite the cultural emphasis on obedience in women, women were not regarded as the weaker sex but as resilient and strong-willed. In the village, women assumed a great deal of responsibility cultivation of paddy fields, often working harder than men, and sometimes engaged in retail trade of all kinds.” *Id.*

aspirations of women are addressed demonstrates the success a society is having in nurturing and protecting the family as a whole. The practice of polygamy often placed women in the degrading role of being one wife among several.³⁶ Keeping concubines was also an acceptable practice for Vietnamese men.³⁷ This patriarchal society taught women to be subservient to men and to obey three men in their life: “Firstly their father, secondly their husband and finally their oldest son.”³⁸ Despite this subservient position, women did play a vital role in the success of the traditional family.³⁹ They worked hard in all aspects of family life. They would work in the fields, which brought subsistence and economic stability to the family.⁴⁰ They would care for the children, which helped insure continuation of the family.⁴¹ They also participated in the financial decisions of the household.⁴² Thus, women often faced conflicting roles in the traditional Vietnamese family.

Despite philosophical regard for women in traditional Vietnamese life, the wars for Vietnamese independence brought about new practical roles for women. In an effort to mobilize women against the colonialist powers, the communists sought to stress the importance of the female in Vietnamese society.⁴³ As part of this effort, the Communist Party asserted that the colonialist nations “fostered patriarchal families that guaranteed female oppression.”⁴⁴ In fact, Ho Chi Minh asserted that “[w]omen are half of society, and half of society will not be liberated until women are. If women are not emancipated, socialism is only half established.”⁴⁵ When the

36. *See id.*

37. *Id.*

38. Dean, *supra* note 13.

39. *See* Org. for Econ. Cooperation & Dev., *Gender Equality and Social Institutions in Viet Nam*, SOC. INSTITUTIONS & GENDER INDEX, <http://genderindex.org/country/viet-nam> (last visited Sept. 8, 2011); Dean *supra* note 13.

40. VIETNAM: A COUNTRY STUDY, *supra* note 17, at 114.

41. *Id.*

42. *Id.*

43. Steven K. Wisensale, *Marriage and Family Law in a Changing Vietnam*, 20 J. FAM. ISSUES 602, 605 (1999).

44. Wisensale, *supra* note 14, at 83.

45. *Id.*

Vietnamese Communist Party was founded in February 1930, Ho Chi Minh offered up a program of communism in which he called for the party to dedicate itself, *inter alia*, “[t]o implement equality between man and woman.”⁴⁶ The short term success of this effort was clear. Women participated in many aspects of the liberation movement in Vietnam including on the battle lines.⁴⁷ Hence, expectations grew among women that independence from colonial oppression and the beginning of communist governance would bring about a new and better role for women in Vietnamese society.⁴⁸

This optimism, however, did not measure up to the reality of post-independence.⁴⁹ The war with France and then the United States also brought about some unfortunate consequences for women. After the 1975 reunification, many women were left widowed, and often their children were swept up in the war and unable to simply be children.⁵⁰ Some of these women had children with American service men who left when the American military pulled out.⁵¹ These women had special challenges as their offspring were often shunned by society.⁵² Other women were wives of deceased military men.⁵³ These women

46. HO CHI MINH, *Founding of the Communist Party of Indochina (1930)*, in 2 SELECTED WORKS 145 (1961), reprinted in MARVIN E. GETTLEMAN ET AL., VIETNAM AND AMERICA: A DOCUMENTED HISTORY 22 (1985).

47. *Women in Vietnam Today*, VIETQUOC.COM, (Mar. 2, 2002), <http://www.vietquoc.com/news2002/na030202.htm>.

48. Christine M. Pothier, *Propagandist Representation of Vietnamese Women: A Comparative Study*, 3 REV. VIETNAMESE STUD. 1, 15-16 (2003), <http://hmongstudies.org/PothierPaper2003.pdf> (“Women responded to propagandist images with the goal of securing a position in social and economic life. They felt that doing so would prevent them from having to return to the confines of their homes once peace was declared.”).

49. *Women in Vietnam Today*, *supra* note 47. Just as “stronger medicines produce more side effects, the life of North Vietnamese women was changing to the worse.” *Id.*

50. VIETNAM: A COUNTRY STUDY, *supra* note 17, at 118 (“Few Vietnamese children had the opportunity simply to be children. From birth they were participants in the war as well as its victims. They matured in an environment where death and suffering inflicted by war were commonplace and seemingly unavoidable.”).

51. KARNOW, *supra* note 2, at 43.

52. *Id.*

53. *Women in Vietnam Today*, *supra* note 47. “In the countryside, the war swallowed a great number of young men, leaving hundred thousands of young

were compelled to move forward alone.⁵⁴ They had to both care for their children and earn a living.

Furthermore, while the prevalence of women in the workforce increased after the war, many social ills related to women continued. First, domestic violence towards women is still prevalent in Vietnamese society. According to the U.S. State Department, in 2007, “[a]pproximately two-thirds of divorces reportedly were due in part to domestic violence. The divorce rate continued to rise, but many women remained in abusive marriages rather than confront social and family stigma as well as economic uncertainty.”⁵⁵ Second, despite laws forbidding prostitution, authorities have unevenly enforced the prohibition.⁵⁶ Some nongovernmental organizations estimate that 300,000 prostitutes are in the country.⁵⁷ Many women are “compelled to work as prostitutes because of poverty and lack of other employment opportunities.”⁵⁸ There are continued reports that “some parents coerced [their] daughters into prostitution or made extreme financial demands that compelled them to engage in prostitution.”⁵⁹

Thus, this brief overview shows that the circumstances of women in Vietnam has evolved throughout history. For thousands of years they played an important yet secondary role in society. With the arrival of the communists—who could perhaps be viewed as opportunists in their search for support anywhere they could find it—there was an immediate assertion that equality between men and women was an important issue. This was clearly a departure from Vietnam’s Confucianist past and this departure may be partially responsible for the social ills women currently face in Vietnam. The communists may have seen it as a way to mobilize a large segment of society on their side of the war effort, but the risk they ran was that the tradition-bound Vietnamese people would reject such a radical position for women. Thus, women have gained significant ground in

widows. Widows who lost three consecutive husbands in South Vietnam were not uncommon.” *Id.*

54. *Id.*

55. Bureau of Democracy, Human Rights, & Labor, *Vietnam*, U.S. DEP’T OF STATE (Mar. 11, 2008), <http://www.state.gov/g/drl/rls/hrrpt/2007/100543.htm>.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

the form of laws providing for equal opportunity, yet the practical results of those laws do not match the expectations they carried.

D. Children

Confucianist principles also impacted the way Vietnamese society traditionally viewed children. Confucian culture “made it an imperative to produce a male heir to continue the family line,” encouraging couples to have many children.⁶⁰ Couples with large numbers of children were admired and those with few children were not as highly regarded.⁶¹ Patrilineal society, of course, valued male children more than female because they carried on the family lineage. In addition, men were primarily responsible for maintaining the appropriate observances for the family’s ancestors.⁶² Thus, society also valued male children because they could provide for the spirits of their deceased parents.

The Vietnamese family has traditionally been the primary institution for providing an education to children.⁶³ “The young [were] not taught to develop their individuality,” but rather to focus on the good of the family.⁶⁴ They were taught the rituals of filial piety, “considered to be the most essential virtue in Vietnamese society.”⁶⁵ Parents viewed “their most important responsibility as training their children.”⁶⁶ They taught their children “to think of their parents and family first, to make sacrifices for them and to love and care for their parents in their old age.”⁶⁷ If “[a] Vietnamese person . . . neglect[ed] this responsibility” he or she was “ostracized by both [the] family and the community.”⁶⁸

Thus, children were highly valued in traditional Vietnamese society. Their value was not only temporal, but also spiritual. This

60. VIETNAM: A COUNTRY STUDY, *supra* note 17, at 114.

61. *Id.* at 115.

62. *Id.*

63. Dean, *supra* note 13.

64. *Id.*

65. *Id.* “Children [were] taught that they must be thankful to their parents for the debt of birth, their upbringing and education.” *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

traditional premium placed on children continues even to modern times.⁶⁹ Yet, the Vietnamese family has come under increasing pressure with a move toward a more market-oriented economy.⁷⁰ The children of Vietnam have felt the impact of that modern economic transition.

E. Modern Pressures on the Family

From the late nineteenth century through the twentieth century, three different pressures impacted the traditional Vietnamese family. These three pressures arose out of the colonialism that had been brought to Vietnam by the European powers. All three impacted the institution of the family.

The first was war. The Vietnamese fought one war to free themselves of French colonialism, and then they fought a civil war of north against south which involved the United States on one side and China and the Soviet Union on the other. War brought chaos and havoc to the family structure that can never fully be measured.

The second pressure, which overlapped the first, was the arrival of the communist movement in Vietnam. The Viet Minh were formed in 1941 in China.⁷¹ They eventually gained power in the north and with their arrival came the communist world view. The communists brought to Vietnam the notion that the state should be the primary focus of society. The communists criticized the notion that the loyalty of the individual should be primarily focused on the family.⁷² They saw this focus on the family as a feudal viewpoint.⁷³ The communists campaigned to discourage dowries, lavish weddings, and large families.⁷⁴ In fact, birth control lectures often times took place in the workplace.⁷⁵ As indicated above, the communists also challenged the

69. See VIETNAM: A COUNTRY STUDY, *supra* note 17, at 119. A survey of rural Vietnamese families after the war showed that “[s]eventy-five percent of those interviewed nonetheless continued to believe three or four children per family to be the most desirable number and to prefer a son to a daughter.” *Id.*

70. Dean, *supra* note 13.

71. KARNOW, *supra* note 2, at 138.

72. VIETNAM: A COUNTRY STUDY, *supra* note 17, at 116.

73. *Id.*

74. *Id.*

75. *Id.*

traditional notions regarding the role of women in society.⁷⁶ The traditional notions of the family thus came under attack by the communists.

The third pressure brought to bear against the Vietnamese family in the recent past was the opening of the country to outside influences. This policy, outlined by the government in 1986, has come to be known by the Vietnamese as “*Doi Moi*.”⁷⁷ *Doi Moi* is the government’s policy of “develop[ing] . . . western style capitalism, government family planning policies, modernisation, individualism and westernisation.”⁷⁸ In fact, one commentator has noted that perhaps no greater pressure has been brought to bear on the family than the pressure currently coming from the nation’s policy of *Doi Moi*.⁷⁹

While the country of Vietnam has made a great deal of purely economic progress since *Doi Moi* has been implemented,⁸⁰ the convergence of family loyalty and free market economy has had some dangerous impacts on Vietnamese society. For example, many Vietnamese women seek to marry foreign men, mostly Taiwanese, in order to escape abject poverty.⁸¹ One example that led to tragedy involved a twenty-year-old woman named Thach Thi Hoang Ngoc.⁸² Coming from an impoverished family in the Co Do District on the Mekong Delta, she moved to Ho Chi Minh City as a teenager to try to support her family.⁸³ There, she met and married a 47-year-old Korean man through a marriage agency, “unaware [of] his history of

76. See *supra* notes 43-48 and accompanying text.

77. Spencer Weber Waller & Lan Cao, *Law Reform in Vietnam: The Uneven Legacy of Doi Moi*, 29 N.Y.U. J. INT’L L. & POL. 555, 555 (1997); see also Dean, *supra* note 13.

78. Dean, *supra* note 13.

79. *Id.*

80. KARNOW, *supra* note 2, at 58 (stating that in 1996 the country’s economy had made a phenomenal rebound but that the “gains achieved so far are extremely fragile”).

81. *Women in Vietnam Today*, *supra* note 47.

82. H. Q & Dinh Tuyen, *Another Vietnamese Woman Killed by Korean Husband*, SAI GON GIAI PHONG ENG. EDITION (Kim Khanh trans., July 12, 2010, 5:03 PM), <http://www.Saigon-gpdaily.com.vn/National/Society/2010/7/83848>.

83. *Id.*

mental problems.”⁸⁴ Five months later the man brutally beat and stabbed her to death.⁸⁵ According to a public relations officer for the Co Do District:

The number of Vietnamese women in Co Do District arranged to marry Korean men through matchmaking services is huge. They usually came from poor rural families who hoped to better their lives. I hope the unjust death of Ngoc will disillusion such women from marrying foreign people whom they know nothing about.⁸⁶

Examples like this illustrate how the policies of *Doi Moi* have impacted Vietnamese society and the Vietnamese family.

These three modern pressures on the Vietnamese family have shaped not only the Vietnamese family, but also the development of Vietnam’s family law.⁸⁷ While *Doi Moi* has brought new pressures to the family unit, the government has discovered that the family unit may actually be useful during the transition to a market economy. That is, the family unit itself may be a very useful tool in the efforts of the government to combat other social ills brought on by *Doi Moi*. The Vietnamese government seems to be discovering the important role the family can play in “combating ‘social evils’ such as drugs, prostitution, gambling, [and] commercialism, that have developed as a result of the transition to a market economy.”⁸⁸ Thus, in some respects, *Doi Moi* has assisted the family unit by demonstrating its value to society as a whole.

III. THE HISTORY OF THE LAW OF THE FAMILY IN VIETNAM

As with many cultures and nations that came under the influence of colonialism, the Vietnamese legal system is very much the product of multiple legal traditions.⁸⁹ The initial influence came from China.

84. *Id.*

85. *Id.*

86. *Id.*

87. Wisensale, *supra* note 43, at 602 (“[S]pecific marriage and family laws [of Vietnam] were adopted that reflect . . . historical influences [on the country of Vietnam]”).

88. Dean, *supra* note 13.

89. Penelope Nicholson, *Vietnam, L. & FIN. INSTITUTIONAL PARTNERSHIP*, <http://www.lfip.org/laws827s07/link06-vietnam.htm> (last visited Sept. 11, 2011)

Eventually, the French and then communism influenced Vietnamese law. Treaties and international conventions also impacted the development of Vietnam's legal system and the law of the family. When looked at closely, these influences can still be seen in the Vietnamese legal system of today and especially in the Vietnamese family law.

A. The Influence of China

As related above, Vietnam was under the influence of China for more than one thousand years starting in 207 B.C.E.⁹⁰ Finally, in 939 C.E., it won its independence by “defeat[ing] the Chinese and driv[ing] them out of the country.”⁹¹ During this ten century period, the principles of Confucianism were introduced into the geographic areas that now make up Vietnam.⁹² Those principles have had an impact on the legal system of Vietnam. One commentator noted that “[a]s a set of social norms, Confucianism not only substitutes for the law in many aspects of life, but also contributes heavily to the conception of the law in Vietnam.”⁹³ Despite its origins in China, however, Confucianism in Vietnam has taken on a form of its own and cannot be seen “simply as being the ideology of the Chinese occupiers.”⁹⁴ Rather, Confucianism took on various forms as it spread through East Asia.⁹⁵ China, Japan, Korea, and Vietnam all had a different experience with the ideology in light of “indigenous beliefs and norms.”⁹⁶ In Vietnam, Confucianism was heavily influenced by its

(“Vietnam’s legal tradition reflects a complex weave of indigenous, Chinese, French, Soviet and Western influences . . .”).

90. See BUTTINGER, *supra* note 2, at 21-22.

91. *Id.* at 37.

92. Pham Duy Nghia, *Confucianism and the Conception of Law in Vietnam*, in *ASIAN SOCIALISM & LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM* 76, 79 (John Gillespie & Pip Nicholson, eds. 2005), available at <http://www.docstoc.com/docs/48551771/Confucianism-and-the-Conception-of-the-law-in-Vietnam>.

93. *Id.* at 76.

94. *Id.* at 79.

95. *Id.*

96. *Id.*

agrarian lifestyle.⁹⁷ Thus, the historical and social experience of the Vietnamese people helped to form their unique brand of “Vietnamese Confucianism.”⁹⁸

As a system of rituals and rules governing relationships among people, Confucianism came to be a sort of unwritten law.⁹⁹ As individuals strive to learn those rituals and rules, they enhance the order of society.¹⁰⁰ The formal, written legal codes then became subordinated to the unwritten Confucianist code.¹⁰¹ Yet the Confucianist code could be viewed as arbitrary because it lacks just what legalism provides, i.e., “clear, systematic and transparent rules.”¹⁰²

The influence of China can be seen not only in the presence of Confucianism, but also in the legal institutions of pre-colonial Vietnam.¹⁰³ Prior to the arrival of the French, disputes in Vietnamese society were resolved in courts modeled on those of China.¹⁰⁴ The emperors of Vietnam did very little to erase this Chinese heritage in their legal system.¹⁰⁵ Chinese influence can also be seen in the legal texts of pre-colonial Vietnam, including the earliest Vietnamese Legal Code.¹⁰⁶

The first compilation of Vietnamese law occurred in the year 1483.¹⁰⁷ This code, known as the *Hong Duc* Code, incorporated earlier Vietnamese concepts, but the influence of earlier Chinese legal

97. *Id.*

98. *Id.* at 80 (noting that in Vietnam the collectivism associated with the family and village “helped promote the convergence of Confucianism with the indigenous beliefs and traditions.”).

99. *See id.* at 82.

100. *Id.*

101. *Id.*

102. *Id.*

103. George F. Westerman & James L. McHugh, Jr., *Reaching for the Rule of Law in South Vietnam*, 53 A.B.A. J. 159, 160 (1967).

104. *See id.* at 160-61.

105. *Id.*

106. M. B. HOOKER, A CONCISE LEGAL HISTORY OF SOUTH-EAST ASIA 73 (1978); Westerman & McHugh, *supra* note 103, at 160.

107. HOOKER, *supra* note 106, at 74.

codes can also be seen.¹⁰⁸ However, a look at the areas of family law reveals the uniquely Vietnamese character of the code.¹⁰⁹

To supplement the *Hong Duc* Code, a collection of assorted laws called the *Thien-nam du ha tap* accompanied the official code.¹¹⁰ The *Thien-nam du ha tap* contained more detailed elements of the family law, specifically the rules on marriage.¹¹¹ The rules on marriage, however, were very specific to the locality of the couple and had very little to do with Chinese influence.¹¹² The regulation of divorce also took place outside of the code. As one commentator noted:

[D]ivorce was recognized on a number of grounds, including jealousy, failure to produce children, contagious sickness (e.g. leprosy), wife's adultery, lack of respect for the parents of either spouse, quarrelling, and theft. Divorce was not permitted where a wife had undertaken three years' mourning for the deceased parents of her husband, or where a couple had been poor when they had married and then become wealthy. It was also forbidden to divorce a wife who would not have a paternal home to go to because her parents were dead.¹¹³

The specific rules on divorce went into effect in 1485 and thereafter regulated both the grounds and procedures for divorce in Vietnam.¹¹⁴

The *Hong Duc* Code and the other legal regulations governing marriage and divorce remained in effect until a new code was adopted in 1812: Emperor Gia-Long's *Hoang Viet* Code, also known as the *Gia-Long* Code.¹¹⁵ This code was different than the earlier *Hong Duc* in that it was heavily influenced by an earlier Chinese legal code

108. *Id.* (noting that the influence of the T'ang Code is clear in the arrangement of various parts of the code).

109. *Id.* at 76. The general features of the Vietnamese family law appeared in Articles 313-374 of the Code. *Id.*

110. *Id.* at 76-77.

111. *Id.* at 77.

112. *Id.*

113. *Id.*

114. *Id.*

115. *See id.* at 80.

known as the *Ta Ching Lu Li*.¹¹⁶ The marriage and divorce provisions of the *Gia-Long* Code were no exception in that they closely mirror the marriage and divorce provisions of the *Ta Ching Lu Li*.¹¹⁷

Thus, Vietnam has a long history of addressing family issues in its legal code. China clearly influenced Vietnamese law from principles of Confucianism to the first legal codes drawn up by the Vietnamese rulers. Yet the influence of the Chinese was not the last foreign culture to impact the development of Vietnamese law.

B. French Colonialism and the Impact of Communism

The arrival of the French in the mid-nineteenth century changed things dramatically for the people of Vietnam. The French not only impacted Vietnamese culture, but their legal system as well.¹¹⁸ The French brought with them their Napoleonic legal code and, eventually, superimposed it on much of the Vietnamese territory it controlled.¹¹⁹ In certain areas they also restructured the court system on the French model.¹²⁰ Yet the presence of the French did not have a tremendous impact on the way the Vietnamese legal system resolved family matters.

During their presence in the country, the French asserted varying levels of control over the different regions of Vietnam.¹²¹ In the

116. *Id.* *Gia-Long's* new code was to be modeled on the earlier *Hong Duc* code only to the extent that the old code was consistent with China's *Ta Ching Lu Li*. *Id.*

117. *Id.* at 81. The marriage and divorce provisions of *Gia-Long's* code were contained in Articles 94-109. *Id.* at 83. These family law provisions covered the requirements for a valid marriage contract including the fact that neither of the parties were "diseased, infirm, or under age, that they were not within the prohibited degrees [of bloodline], and that the contracting families approved of the match." *Id.* A marriage between a government officer and a female musician or comedian was forbidden. *Id.* A wife could be "divorced for barrenness, talkativeness, infidelity, disregard of husband's parents, theft, bad temper, and infirmity." *Id.* at 84.

118. Nicholson, *supra* note 89 (noting that with French occupation "the country experienced a rearrangement of its political and legal structures").

119. HOOKER, *supra* note 106, at 154-155; Westerman & McHugh, *supra* note 103, at 161. The Napoleonic code was created in the wake of the French Revolution during a period of social and cultural "rationalization." JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 27-30 (2d ed. 1985).

120. Westerman & McHugh, *supra* note 103, at 161.

121. *See id.*

southern part of the country, known as Cochinchina, the French exercised direct rule over the country.¹²² Pursuant to a decree of the French on July 25, 1864, a formal judicial organization was set up and the immediate promulgation of the Napoleonic Code was ordered.¹²³ Yet in matters of family law, the Napoleonic Code was not applied in Cochinchina, and local custom remained the dominant method used to resolve family-related legal issues.¹²⁴ In central and northern Vietnam, the areas known as Annam and Tonkin respectively, the administration of justice was more indirect.¹²⁵ The French retained local tribunals “and laws were promulgated in the names of the [local] rulers” rather than the French.¹²⁶ Thus, the family law remained largely a matter for local custom.

Although the legal system in Vietnam remains very much based upon the Napoleonic Code, other influences have affected the legal system of Vietnam as well. The rise of communism in Vietnam brought with it financial aid from the two leading communist governments in the world, China and the Soviet Union.¹²⁷ Additionally, socialist legal influences from those governments also arrived in North Vietnam. China and the Soviet Union, as the leading Vietnamese benefactors, influenced the development of North Vietnamese law just as China had done during its thousand-year occupation.¹²⁸ Vietnamese students interested in practicing law would attend law schools designed on Soviet models.¹²⁹ Thus, the communist era brought with it legal precedent that relied heavily on

122. HOOKER, *supra* note 106, at 154-55.

123. *Id.*

124. *Id.* at 159.

125. *Id.* at 166.

126. *Id.*

127. BUTTINGER, *supra* note 2, at 422. Vietnam concluded an aid agreement with communist China in December 1954 and with the Soviet Union shortly thereafter. *Id.*

128. See Bui Thi Bich Lien, *Legal Education in Transitional Vietnam, in ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM* 135, 137 (John Gillespie & Penelope Nicholson, eds., 2005), available at <http://epress.anu.edu.au/as/pdf/ch07.pdf>.

129. *See id.*

communist doctrine.¹³⁰ Even the constitution of Vietnam, through its various developments, took inspiration from communist doctrines.¹³¹ Yet, not until 1959 did the communist government of Vietnam write a new family code to replace the one that had existed prior to the arrival of the communists.¹³²

C. *The Family and the Vietnamese Constitution*

On September 2, 1945, only weeks after the Japanese surrender in World War II, Ho Chi Minh declared Vietnam's independence in the city of Hanoi.¹³³ In his speech to the nation on that occasion, he quoted from the Declaration of the French Revolution and from the American Declaration of Independence.¹³⁴ He cited these documents because they assert revolutionary themes about the rights of each human being.¹³⁵ He also hoped doing so would garner support from the United States.¹³⁶ The new country was to be known as the Democratic Republic of Vietnam.¹³⁷ The Japanese had driven the French colonialists from Vietnam, and the allied forces had driven the Japanese out by defeating them in the war. While the French would eventually return to gain some measure of control in the country,¹³⁸ on

130. MARK SIDEL, *THE CONSTITUTION OF VIETNAM: A CONTEXTUAL ANALYSIS* 5-6 (2009).

131. *Id.* at 6 (“In recent constitutions, the pre-eminent role of the [communist] party has been made abundantly clear.”).

132. Pham Diem, *Civil Law Making in Vietnam During the 1945-1995 Period* VIETNAM L. & LEGAL F. (Oct. 28, 2004), http://vietnamlaw.vn.net.vn/Service.asp?CATEGORY_ID=7&SUBCATEGORY_ID=12&NEWS_ID=317 (“[O]n October 10, 1945, the provisional government of the Democratic Republic of Vietnam issued an order on temporary use of some of laws and rules of the old regime, including . . . marriage and family [laws] [These laws] continued to be enforced (until 1959 when they were totally abrogated.”).

133. BUTTINGER, *supra* note 2, at 210.

134. *Id.*

135. *See id.*; KARNOW, *supra* note 2, at 146-47.

136. KARNOW, *supra* note 2 at 146-47. “Ho had deliberately borrowed the passage from the American Declaration of Independence. Although he had made a futile appeal to Woodrow Wilson a generation before, he believed that he could try again to persuade the United States to underwrite his cause.” *Id.*

137. BUTTINGER, *supra* note 2, at 210.

138. *Id.* at 215-16.

November 8, 1946, the Vietnamese assembly adopted a new constitution.¹³⁹

The purpose of the new constitution was largely to represent to the world that the Vietnamese government was a democratic institution.¹⁴⁰ Its drafters intended the constitution to assist the new government in gaining support, especially in the United States, for an independent Vietnam.¹⁴¹ Yet despite this underlying purpose, it also had an impact on the well-being of the Vietnamese family unit by virtue of its commitment to the rights of women.

The 1946 Constitution specifically expressed the notion that “[w]omen enjoy full and equal rights with men under the Constitution in every respect.”¹⁴² This constitution was thus committed to many concepts that had been goals of the Vietnamese women’s movement for decades.¹⁴³ With this equality, women might now “exercise some control over their own lives, have a say in their choice of spouse, perhaps even in the number of children they bore—or even choose not to marry.”¹⁴⁴ The Communist Party, trying its best to win the support of the people, was wise to recognize the importance of women to society and to the family unit. The 1946 Constitution was eventually superseded by later versions, but there has developed in Vietnam “a sense of nostalgia for the 1946 Constitution.”¹⁴⁵ The sense of inclusion and democratic accountability outlined in that document rang hollow in future constitutions.

139. *Id.* at 258.

140. *See* SIDEL, *supra* note 130, at 28-29.

141. *See* BERNARD FALL, *THE VIET-MINH REGIME: GOVERNMENT AND ADMINISTRATION IN THE DEMOCRATIC REPUBLIC OF VIETNAM* 13-14 (1954). “The [1946] constitution gives a generally ‘Western democratic’ impression to the reader in that it does not deal in economic theories and does not make use of stereotyped communist phrases, such as the ‘working people’ or the ‘victory of the dictatorship of the proletariat,’ [sic] As a matter of fact, neither does it resemble the French constitution of 1946, with its detailed social provisions Like the Democratic Republic’s Declaration of Independence, it appears designed to provide ‘reader appeal’ in the Anglo-Saxon countries, and particularly the United States.” *Id.*

142. CONST. OF THE DEMOCRATIC REPUBLIC OF VIETNAM (1946), art. 9, *reprinted in* 155 BRIT. & FOREIGN STATE PAPERS 939 (1958).

143. SANDRA C. TAYLOR, *VIETNAMESE WOMEN AT WAR* 16 (1999).

144. *Id.*

145. SIDEL, *supra* note 130, at 27.

The 1959 Constitution differed from the 1946 Constitution. This difference reflects the experience of North Vietnam at the time. The country had been split in two sections—North and South.¹⁴⁶ The leaders of the North, ever committed to reunifying the country, received military and economic assistance from the communist bloc.¹⁴⁷ The South, occupied by the French, received increased assistance from the United States.¹⁴⁸ The United States viewed this divided country, similar to the situation in Korea, as a front line in the war with communism.¹⁴⁹ It was in this environment that the North promulgated the Constitution of 1959. In a sense, the preamble of the 1959 Constitution recognized that for the foreseeable future the people of the north would be struggling for reunification of the country as a whole:

Since the restoration of peace, in completely liberated north Vietnam, our people have carried through the national people's democratic revolution. But the South is still under the rule of the imperialists and feudalists; our county is still temporarily divided into two zones.¹⁵⁰

The struggle between western and communist countries seems to have been built into the constitution. Comparing the 1959 and 1946 documents, one commentator has noted the 1959 Constitution was almost a “complete antithesis of the earlier document.”¹⁵¹ The 1959 Constitution dealt “in extreme detail with economic theories and makes abundant use of stereotyped communist phrases and ideas.”¹⁵² With this constitution, the North Vietnamese government “wanted to

146. BUTTINGER, *supra* note 2, at 382.

147. *Id.* at 422-23.

148. *Id.* at 394-95.

149. *Id.* at 360-61.

150. CONST. OF THE DEMOCRATIC REPUBLIC OF VIETNAM (1959), pmbi., para. 8, *reprinted in* 2 CONSTITUTIONS OF NATIONS 1197 (Amos J. Peaslee ed., 3d ed. 1966).

151. Bernhard Fall, *North Viet-Nam's New Draft Constitution*, 32 PAC. AFF. 178, 178 (1959).

152. *Id.* at 178-79.

make it clear to everyone that it was ‘advancing step by step from people’s democracy to socialism.’”¹⁵³

Despite this commitment to communism and the struggle to reunify the country, some of the principles contained in the 1946 Constitution found their way into subsequent constitutions. Commitment to the Vietnamese family unit through commitment to women’s rights was one of those carryover principles. Gender equality was recognized “in all spheres of political, economic, cultural, social and domestic life.”¹⁵⁴ Further, the 1959 Constitution provided protection for mothers and children and for marriage and the family.¹⁵⁵ It also guaranteed the right to education.¹⁵⁶ Thus, while the 1959 Constitution clearly became a more politically motivated document, it continued to assert a commitment to the basic family unit.

On December 18, 1980, the Vietnamese National Assembly adopted a third constitution.¹⁵⁷ Like the two prior constitutions, it was a product of the time in which it was created. Its purpose was “to provide a basic . . . structure for political consolidation and economic development” after the north won the war against the United States.¹⁵⁸ The country had been recently unified under the communist regime and the 1980 Constitution was an effort to stabilize the country under a communist political and economic system. A contemporary commentator emphasized the importance of the 1980 Constitution:

The fact that the country is now unified at the state level has given added urgency to the problem of unifying existing laws and developing new laws to govern both regions. The most important accomplishment of the unified National Assembly has been the

153. *Id.* at 179 (quoting CONST. OF THE DEMOCRATIC REPUBLIC OF VIETNAM (1959), art. 9).

154. CONST. OF THE DEMOCRATIC REPUBLIC OF VIETNAM (1959), art. 24.

155. *Id.*

156. *Id.* art. 33.

157. CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM (1980), *reprinted in* 2 CONSTITUTIONS OF NATIONS 1752 (Amos J. Peaslee ed., 4th ed. 1985).

158. SIDEL, *supra* note 130, at 67.

issuance of a new constitution adopted at its Seventh Session on 18 December 1980.¹⁵⁹

The 1980 Constitution succeeded in preserving a unified Vietnam under a single Vietnamese government.

As with the Constitution of 1959, the Constitution of 1980 may have had political and economic purposes, but the institution of the family still held an important place. The 1980 Constitution granted Vietnamese citizens the right to an education,¹⁶⁰ health care,¹⁶¹ and housing.¹⁶² It again outlined legal recognition of the equality of women.¹⁶³ The constitution recognized that the state, and society as a whole, had an obligation to care for Vietnamese children.¹⁶⁴

Since the adoption of the 1980 Constitution, a major political development has occurred which impacted Vietnamese society: the government implemented the policy known as *Doi Moi*. As referenced above, *Doi Moi* is the policy that seeks to open up the country to foreign investment and move toward a more market-driven economy.¹⁶⁵ It had the effect of making the 1980 Constitution very much outdated. Review and reformulation of the Constitution began in the late 1980s, but from the beginning it was clear that a completely new constitution would be needed.¹⁶⁶

On April 15, 1992, the legislature adopted the new Constitution of the Socialist Republic of Vietnam.¹⁶⁷ It was subsequently amended by the National Assembly on December 25, 2001, and remains, as amended, the current constitution.¹⁶⁸ The Vietnamese government

159. Phuong-Khanh Nguyen, *Introduction to the 1980 Constitution of the Socialist Republic of Vietnam*, 7 REV. SOCIALIST L. 347, 347 (1981).

160. CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM (1980), art. 60 (“The state gradually enforces compulsory general education tuition-free.”).

161. *Id.* art. 61.

162. *Id.* art. 62.

163. *Id.* art. 63.

164. *Id.* art. 65.

165. Waller & Cao, *supra* note 77, at 555; Dean, *supra* note 13.

166. SIDEL, *supra* note 130, at 83.

167. CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM (1992), available at <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan039985.pdf>; SIDEL, *supra* note 130, at 84.

168. SIDEL, *supra* note 130, at 84; *see also* Nghị Quyết của Quốc Hội về việc sửa đổi, bổ sung một số điều của Hiến Pháp nước Cộng Hòa Xã Hội Chủ Nghĩa Việt

drafted and adopted the 1992 Constitution because *Doi Moi* brought too many changes for the old constitution to simply be amended.¹⁶⁹ Recognition of this fact is clearly stated in the preamble of the 1992 Constitution: “Since 1986, our people have carried out a process of all-round reform and renewal initiated by the Sixth Party Congress and achieved very important initial accomplishments. The National Assembly has decided to revise the 1980 Constitution so as to meet the exigencies of the new circumstances and tasks.”¹⁷⁰ While this express motive for overhauling the constitution seems to focus on economic issues, the concept of the family as a central component of Vietnamese life remained.

In the 1992 Constitution, the main provision focusing on the Vietnamese family is Article 64. It outlines the following basic principles:

- [1] The family is the nucleus of society.
- [2] The State protects marriage and the family.
- [3] Male and female citizens have the right to marry on the principle of free consent, progressive orientation, monogamy and equality between husband and wife.

Nam năm 1992, Ngày 25 Tháng 12, 2001 [Resolution on Amendments and Supplements to a Number of Articles of the 1992 Constitution of the Socialist Republic of Vietnam] (Resolution No. 51/2001/QH10) (Viet.), available at http://laws.dongnai.gov.vn/2001_to_2010/2001/200112/200112250004, translated at http://laws.dongnai.gov.vn/2001_to_2010/2001/200112/200112250004_en. The 1992 Constitution, as amended, includes “a preamble, chapters on the political system; the economic system; culture, education, science and technology; national defence; the fundamental rights and duties of citizens; the state President . . . ; the government; people’s councils and people’s committees . . . ; the courts and the procuracy [state prosecutors’ offices]; the national flag, emblem, anthem, capital and national day; and the effect of the constitution and procedures for amending it.” SIDEL, *supra* note 130, at 84. In addition to the 1946, 1959, 1980, and 1992 (as amended) Constitutions of the Democratic Republic of Vietnam and the Socialist Republic of Vietnam, the former South Vietnam also adopted two constitutions, in 1956 and 1967. Sidel, *supra* note 130, at 15. Neither of these constitutional documents is in force with the 1992 Constitution, having been abrogated after Vietnam was unified in 1975. *Id.*

169. *Id.* (“By the late 1980’s, the 1980 Constitution was considered hopelessly out of date in Vietnam. In large part that was because of the major changes that had begun in the mid-1980’s under the policy framework of *doi moi*, or renovation.”).

170. CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM (1992), pmbl.

[4] Parents are duly bound to bring up and educate their children into useful citizens of society. Children have an obligation to respect and care for their grand-parents and parents.

[5] The State and society do not admit any discrimination among children of the same family.¹⁷¹

The 1992 Constitution also reaffirms the rights of women:

[1] All citizens regardless of their sex have equal rights in all respects, political, economic, cultural, social and in family life.

[2] Any discrimination against women and violation of women's dignity are strictly prohibited.

[3] Women and men receive equal pay for equal work. Women workers are entitled to maternity benefits. Women who are public employees or salary-earners are entitled to pre-and post-natal paid leave, as provided by the law.

[4] The State and society create favourable conditions for women to improve their knowledge and competence in all respects and increasingly bring into full play their role in society, ensure the development of maternity homes, pediatric wards, creches, kindergartens and other social welfare facilities in order to lighten women's workload in the family and create favourable conditions for women's production, work, study, medical treatment, rest and discharge of the duties of motherhood.¹⁷²

By reaffirming the centrality of the family and the rights of women, the 1992 Constitution continues the respect for the family illustrated in Vietnam's earlier constitutions. The rights written into Vietnam's various constitutions since 1946 are certainly basic rights by western standards. However, protection of these rights has not always been a government priority. As one commentator noted:

[T]he rights guaranteed by Vietnam's constitutions since 1946—particularly rights to speech, opinion, religion, the press, protection against arbitrary action by government and political authorities, assembly, forming associations, holding demonstrations and other fundamental rights—have never been consistently and energetically

171. *Id.* art. 64.

172. *Id.* art. 63.

enforced, and at many points in modern Vietnamese history have been regularly and significantly violated.¹⁷³

Thus, Vietnam had the words right, but deeds have often missed the mark.

D. International Law and the Vietnamese Family

Beginning in the first half of the twentieth century, the international community made several attempts to improve the human condition through the establishment of various multilateral agreements.¹⁷⁴ Many of those attempts have benefited families throughout the world. In Vietnam, for instance, the current family code makes clear that “[w]here an international agreement which the Socialist Republic of Vietnam has signed or acceded to contains provisions different from this law’s provisions, the provisions of such international agreement shall apply.”¹⁷⁵ This provision is significant. It suggests that international agreements are to be superior to domestic laws as long as those agreements have been acceded to by Vietnam. Thus, international agreements affecting the family have an impact on families in Vietnam. While a discussion of all such international agreements lies beyond the scope of this article, three specific international agreements to which Vietnam is a party are noteworthy in relation to its family law: the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.

173. SIDEL, *supra* note 130, at 5.

174. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Declaration]; Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

175. The Marriage and Family Law of 2000, *supra* note 3, art. 7(2).

1. *Universal Declaration of Human Rights*

At the conclusion of World War II, world leaders met in San Francisco to form the United Nations.¹⁷⁶ The pre-apartheid South African statesman Jan Smuts drafted the preamble to the United Nations charter.¹⁷⁷ That charter clearly announced the organization's commitment to the concept of human rights.¹⁷⁸ In an effort to fulfill that commitment, the United Nations established its Commission on Human Rights in June 1946, with Eleanor Roosevelt appointed as its first chairperson.¹⁷⁹ This commission, comprised of eighteen individuals from around the world, made one of its first tasks the development of an international bill of rights.¹⁸⁰ The Universal Declaration of Human Rights ("Declaration") was passed by the United Nations General Assembly on December 10, 1948.¹⁸¹ For the first time in the history of the world, people from various cultural, religious, and ethnic backgrounds set forth the very fundamental rights possessed by all human beings on this planet.¹⁸²

The Declaration itself is rather short. It contains a preamble and thirty short articles.¹⁸³ Although the Declaration is meant to protect the rights of each member of society, it has a great deal to say about the world's families. The Declaration asserts that "[n]o one shall be

176. *History of the United Nations*, UN.ORG, <http://www.un.org/aboutun/unhistory> (last visited Sept. 20, 2011).

177. JAN SMUTS: BRITISH SOUTH AFRICAN STATESMAN 3-5 (Filiquarian Publ'g 2008). It is ironic that the leader of a government implementing a racist policy such as apartheid would fill such an important role in drafting the preamble of the United Nations, which was meant to express the concept that men and women worldwide should be free from oppression.

178. U.N. Charter pmb. The preamble to the United Nations Charter notes as follows: "[T]he peoples of the United Nations [are] determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small . . ." *Id.*

179. PATRICIA J. CAMPBELL ET AL., AN INTRODUCTION TO GLOBAL STUDIES 95 (2010).

180. *Id.*

181. *Id.*

182. *Universal Declaration of Human Rights*, OFF. HIGH COMMISSIONER HUM. RTS., <http://www.ohchr.org/en/udhr/pages/introduction.aspx> (last visited Sept. 20, 2011).

183. Declaration, *supra* note 174.

subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”¹⁸⁴

Article 16 of the Declaration speaks almost exclusively to issues of the family:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.
3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.¹⁸⁵

The Declaration also indicates that workers have the right to just and favorable payment in order to support their family.¹⁸⁶ Similarly, individuals and families have a right to an adequate standard of living.¹⁸⁷ Also, parents are guaranteed the right to choose the kind of education their children receive.¹⁸⁸ The Declaration also gives mothers and children special recognition with the assertion that “[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”¹⁸⁹

Vietnam was not an independent nation when the United Nations passed the Universal Declaration of Human Rights in 1948. However, on September 20, 1977, the United Nations admitted Vietnam as a member.¹⁹⁰ While the various Versions of the Vietnamese Constitutions since 1946 contain many of the principles outlined in the Declaration, the continued reinforcement of the principles contained in the Declaration can only help strengthen the rights of the families of Vietnam.

184. *Id.* art. 12.

185. *Id.* art. 16.

186. *Id.* art. 23(3).

187. *Id.* art. 25(1).

188. *Id.* art. 26(3).

189. *Id.* art. 25(2).

190. Press Release, Dep’t of Pub. Info., United Nations Member States, U.N. Press Release ORG/1469 (July 3, 2006), available at <http://www.un.org/News/Press/docs/2006/org1469.doc.htm>.

2. *The Convention on the Elimination of All Forms of Discrimination Against Women*

As members of the human community, the Universal Declaration of Human Rights certainly protects women. However, many criticized this Declaration for insufficiently addressing the special issues women face.¹⁹¹ Thus, the United Nations took up the issue.¹⁹² On December 18, 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).¹⁹³ It has often been described as an international bill of rights for women.¹⁹⁴ The CEDAW contains a preamble and thirty articles.¹⁹⁵ Not only does it define what constitutes discrimination against women, it also sets forth a plan that nations can implement to end such discrimination.¹⁹⁶ The CEDAW defines discrimination of women as:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁹⁷

Thus, the CEDAW attempts to protect women from a broad range of discriminatory conduct.

191. CEDAW, *supra* note 174, pmbl. The CEDAW recognizes the importance of the Declaration and other conventions on Human Rights, but notes “that despite these various instruments extensive discrimination against women continues to exist.” *Id.*

192. *Id.*

193. CEDAW, *supra* note 174.

194. Div. for the Advancement of Women, Dep’t of Econ. & Soc. Affairs, *Convention on the Elimination of all Forms of Discrimination Against Women*, UN.ORG, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Sept. 21, 2011).

195. CEDAW, *supra* note 174.

196. *Id.* art. 2(a) (noting that the state parties should *inter alia* “embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle”).

197. *Id.* art. 1.

As would be expected, all of the provisions of this act impact the institution of the family, given the important role of women in that institution. However, Article 16 specifically addresses family related issues. In particular, Article 16 requires party states to ensure women have rights equal to men on matters that include marriage, procreation, child custody, choice of occupations, and property.¹⁹⁸ Vietnam signed the CEDAW on July 29, 1980, and ratified it on February 17, 1982.¹⁹⁹ Thus, it has become the law of Vietnam.

198. *Id.* art. 16. The text of the Article reads as follows:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

Id.

199. *Treaty Status: Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=Treaty&mtdsg_no=IV8&chapter=4&lang=en (last visited Sept. 21, 2011).

As mentioned above, the current situation of women in Vietnam leaves much to be desired. Yet Vietnam has enshrined gender equality into its domestic laws by adopting the CEDAW. Such efforts are not new in Vietnam. But the continued reinforcement of those principles through constitutional drafting and by acceding to international agreements can only strengthen the position of Vietnamese women.

3. *The Convention on the Rights of the Child*

International efforts to improve the condition of children have spanned more than eighty-five years since the League of Nations adopted the World Child Welfare Charter in 1924.²⁰⁰ The most recent of these efforts was the Convention on the Rights of the Child (CRC), which was adopted by the United Nations General Assembly on November 20, 1989.²⁰¹ Vietnam ratified that convention in February of 1990.²⁰² On September 2, 1990, the CRC came into full force when the required number of nations ratified it.²⁰³

The convention lays out specific obligations for signatory nations. It requires affirmative efforts by member states to protect the civil, political, economic, and social rights of children.²⁰⁴ The CRC defines a child as “every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.”²⁰⁵ The CRC protects the basic right to life of each child.²⁰⁶ It also protects the right of each child to be raised by his or her parents within a given social or cultural grouping.²⁰⁷ It also recognizes that every

200. *United Nations Children’s Fund (UNICEF)—Company History*, FUNDINGUNIVERSE.COM, <http://www.fundinguniverse.com/company-histories/united-nations-international-childrens-emergency-fund-unicef-company-history.html> (last visited Sept. 21, 2011).

201. CRC, *supra* note 174.

202. *Treaty Status: Convention on the Rights of the Child*, U.N. TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=Treaty&mtdsg_no=IV-11&chapter=4&lang=en (last visited Sept. 21, 2011).

203. *Id.*

204. CRC, *supra* note 174, art. 2.

205. *Id.* art. 1.

206. *Id.* art. 6(1).

207. *See id.* arts. 7(1), 8(1).

child has the right to a relationship with both parents and that parents have the right to exercise their parental responsibilities.²⁰⁸ Under the CRC, all children have the right to be free from abuse and neglect,²⁰⁹ and to have their opinions heard and acted upon when appropriate.²¹⁰ Member states must also provide legal representation to children in any judicial dispute regarding a restriction on the child's liberty.²¹¹ The convention also forbids capital punishment for children.²¹² The CRC protects these rights by mandating that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.²¹³

Perhaps the most significant provision of the CRC is Article Three which indicates that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."²¹⁴ Thus, the CRC requires that the principle of "the best interest of the child" govern acceding states' domestic laws relating to children.

In 2005, a non-governmental organization called "Representing the Children Worldwide" issued a survey comparing the treatment of children in child protective proceedings throughout the world.²¹⁵ The survey contains an independent analysis of how far Vietnam had come in addressing the issues raised by the CRC.²¹⁶ It describes the efforts

208. *Id.* art. 9.

209. *Id.* art. 19(1).

210. *Id.* art. 12.

211. *Id.* art. 37(d).

212. *Id.* art. 37(a).

213. *Id.* art. 2(1).

214. *Id.* art. 3(1).

215. REPRESENTING CHILDREN WORLDWIDE, <http://www.law.yale.edu/rcw/index.htm> (last visited Sept. 21, 2011).

216. *Viet Nam*, REPRESENTING CHILDREN WORLDWIDE, <http://www.law.yale.edu/rcw/rcw/jurisdictions/asse/vietnam/frontpage.htm> (last visited Sept. 21, 2011).

taken by the Vietnamese government to comply with the requirements of the CRC:

Following the ratification, Viet Nam adopted numerous laws and amendments in order to incorporate the CRC in domestic legislation, including the Marriage and Family Law; the 1992 Law on the Protection, Care, and Education of Children, which was replaced by the 2004 Law on the Protection, Care, and Education of Children; and the 1995 Civil Code.²¹⁷

Clearly, Vietnam's ratification of the CRC had an impact on its domestic legislation. In fact, when Vietnam ratified the CRC in February 1990, the Convention "was effectively given legal authority superior to all domestic law."²¹⁸

4. Impact of International Agreements on Vietnam Family Law

A commitment to the concepts contained in international agreements is the first step toward realizing the rights in practice. The impact of international agreements on the development of family law in Vietnam cannot be easily gauged. That is, Vietnamese laws already covered some of the protections that international agreements afforded to women, children, and families in general. Yet, following ratification of those agreements, the Vietnamese legislature adopted several new laws in an effort to comply with its obligations under the treaty. One of those pieces of legislation was the Marriage and Family Law of 2000. As referenced above, the Marriage and Family Law prioritizes the family law in Vietnam by giving supremacy to international agreements.²¹⁹

E. The Evolution of the Vietnamese Family Code

Although Vietnam's various constitutions, adopted throughout its recent history, outline a commitment to the family, the family code itself provides specificity to that commitment. The current family code was enacted in 2000, more than twenty-five years after the

217. *Id.*

218. *Id.*

219. *See supra* note 175 and accompanying text.

conclusion of the war with the United States.²²⁰ Yet this law was not a new phenomenon for Vietnamese society. The Marriage and Family Law of 2000 was very much an evolutionary document based upon changes to prior versions.²²¹ It evolved from prior attempts to protect the family unit as the legislature responded to various modern pressures on Vietnamese society as a whole.

1. *The Marriage and Family Law of 1959*

The first comprehensive piece of family law legislation passed in Vietnam was the Marriage and Family Law of 1959, passed in North Vietnam in 1959 and implemented in 1960.²²² It contained six chapters and 35 articles.²²³ After reunification in 1975, it became the law in the South as well.²²⁴

According to one commentator, the act contained four provisions of significance.²²⁵ First, it abolished the practice of arranged marriages.²²⁶ Traditionally, parents arranged for the marriages between their children and the children of other families.²²⁷ This was very much an accepted part of Vietnamese culture and part of the Confucian notion that parents' wishes were to be respected and their directives followed. Yet, the passage of the Marriage and Family Law of 1959, for the first time, granted the Vietnamese people the absolute right to be free from such marriages and to make their own choices

220. The Marriage and Family Law of 2000, *supra* note 3.

221. *See id.*; Luật Hôn Nhân và Gia Đình 1986, Số LHNGD [The Marriage and Family Law of 1986] (Law No. LHNGD) (Viet.), *available at* http://www.vietlaw.biz/bldisplay/db1/show_doc1OLD.php?doc=957, *translated at* <http://www.unhcr.org/refworld/docid/3ae6b54dc.html>; Luật Hôn Nhân và Gia Đình 1959 [The Marriage and Family Law of 1959] (Viet.), *available at* http://vbqpp.l.moj.gov.vn/vbpq/_layouts/print.aspx?id=888.

222. Wisensale, *supra* note 43, at 604 (noting that the first major piece of family law legislation passed in Vietnam was the 1959 law passed thirteen years after the first North Vietnamese Constitution was promulgated).

223. *See generally* The Marriage and Family Law of 1959, *supra* note 221.

224. VIETNAM: A COUNTRY STUDY, *supra* note 17, at 119 (noting that Hanoi made a “decision in 1977 to apply its own 1959 family law to the South”).

225. Wisensale, *supra* note 43, at 604.

226. *Id.*; *see also* The Marriage and Family Law of 1959, *supra* note 221, art. 4.

227. VIETNAM: A COUNTRY STUDY, *supra* note 17, at 114.

about marriage.²²⁸ Second, the Marriage and Family Law of 1959 declared polygamy illegal.²²⁹ This practice had also become a part of Vietnamese culture and fit perfectly with the Confucian notion of a male-centered society.²³⁰ Nevertheless, with the passage of this act, the age-old practice of polygamy would no longer be permitted in the country.²³¹ Third, the 1959 law declared that equality between men and women was to be practiced both at home and in society in general.²³² This provision merely reasserted the right that had been granted to women under the communist constitution as far back as 1946. Finally, the 1959 law recognized the basic rights of women and children to be free from abuse and neglect.²³³

The provisions outlawing arranged marriages and polygamy proved very successful in changing those cultural practices.²³⁴ Such practices dramatically dropped in the years following the ratification of the 1959 law.²³⁵ The third and fourth goals, while worthy of praise, were not as successful in practice.²³⁶ Reducing the incidence of mistreatment of women and children remained a challenge to the Vietnamese government.²³⁷

2. *The Marriage and Family Law of 1986*

The 1959 version of the Marriage and Family Law attempted to focus on some very important issues from a societal standpoint, yet a number of family-related issues were simply not addressed. It did not

228. Wisensale, *supra* note 43, at 604 (noting that, with the passage of the Marriage and Family Law of 1959, for the first time in history Vietnamese men and women were granted the freedom to make their own choices regarding a spouse); The Marriage and Family Law of 1959, *supra* note 221, art. 4.

229. Wisensale, *supra* note 43, at 604; The Marriage and Family Law of 1959, *supra* note 221, art. 5.

230. See VIETNAM: A COUNTRY STUDY, *supra* note 17, at 114.

231. The Marriage and Family Law of 1959, *supra* note 221, arts. 1, 5.

232. Wisensale, *supra* note 43, at 604; *see also* The Marriage and Family Law of 1959, *supra* note 221, art. 12.

233. The Marriage and Family Law of 1959, *supra* note 221, arts. 3, 18.

234. Wisensale, *supra* note 43, at 604.

235. *Id.*

236. *Id.*

237. *Id.*

address the age requirements for marriage,²³⁸ nor did it discuss issues surrounding cohabitation and paternity. The 1959 law also lacked provisions related to divorce procedures. As society changed, however, the need to address these issues increased. The next revision occurred 27 years later with the passage of the Marriage and Family Law of 1986.²³⁹ This new family code attempted to address some of the issues then arising in Vietnamese society as a whole.²⁴⁰ Thus, one commentator has noted that the reforms enacted in the Marriage and Family Law of 1986 were “a direct response to” Vietnam’s transition to a free-market economy.²⁴¹

The 1986 law consisted of 57 articles divided into a total of ten different chapters.²⁴² The first chapter was entitled “General Provisions” and contained overall policy statements regarding family law.²⁴³ The 1986 law clearly retained the traditional Vietnamese commitment to the family, but it expressed that commitment in terms typically seen in communist documents, i.e., terms emphasizing the importance of the state: “The State guarantees the implementation of the regime of voluntary, progressive, and monogamous marriage in which husband and wife are equal, with a view to nurturing a democratic, united, happy and lasting family.”²⁴⁴ The 1986 law went on to indicate that parents have “the duty to make their children useful to society.”²⁴⁵ On women’s issues, the General Provisions of the 1986

238. Compare The Marriage and Family Law of 1959, *supra* note 221, with The Marriage and Family Law of 1986, *supra* note 221, art. 5. Article 5 of The Marriage and Family Law of 1986 simply notes that “[m]en reaching the age of twenty and women at eighteen shall be *eligible* to marry.” The Marriage and Family Law of 1986, *supra* note 221, art. 5 (emphasis added).

239. The Marriage and Family Law of 1986, *supra* note 221.

240. See Dean, *supra* note 13 (noting the social issues of “drugs, prostitution, gambling, [and] commercialism” that arose after the implementation of free market policies).

241. *Vietnam—The 1986 Law on Marriage, Parental Responsibility, and Divorce*, MARRIAGE & FAM. ENCYC., <http://family.jrank.org/pages/1742/Vietnam-1986-Law-on-Marriage-Parental-Responsibility-Divorce.html> (last visited Aug. 11, 2011).

242. The Marriage and Family Law of 1986, *supra* note 221; see also Wisensale, *supra* note 43, at 607.

243. The Marriage and Family Law of 1986, *supra* note 221, ch. 1.

244. *Id.* art. 1.

245. *Id.* art. 2.

law noted that, within the institution of marriage, the husband and wife are equal.²⁴⁶ Further, the 1986 law indicated that “[t]he State and society shall protect the mothers as well as their children, and shall assist the mothers in fulfilling their noble tasks of motherhood.”²⁴⁷ Clearly, communist thought and terminology had an impact on this version of the marriage and family law.

Aside from the “General Provisions,” one commentator has noted that the remaining provisions of the 1986 law can be divided into three broad categories: (1) the marriage relationship, (2) parenting, and (3) divorce.²⁴⁸ This is a useful division when discussing the 1986 law.

The provisions that define the marriage relationship clearly outline marriage as an institution between one man and one woman.²⁴⁹ Gay marriage was obviously not contemplated. Polygamy was specifically outlawed.²⁵⁰ In addition to gender requirements, for the first time the Vietnamese legislature set forth age requirements for people desiring to get married. Men could marry at age twenty while women were able to marry at age eighteen.²⁵¹ The law continued to outlaw arranged marriages by noting that “[m]arriage shall be decided on by the man and woman who are seeking it; neither of them shall be forced by any other party into marriage; [i]mpediments to marriage shall not be admitted.”²⁵² Certain prohibitions existed for those with mental illness and blood relatives.²⁵³ Finally, the presence of a venereal disease was listed as a reason that the state would prohibit a person from marriage.²⁵⁴ There does not appear to have been an exception for informed consent in such circumstances.

246. *Id.* art. 1.

247. *Id.* art. 3.

248. Wisensale, *supra* note 43, at 607.

249. The Marriage and Family Law of 1986, *supra* note 221, art. 6 (“Marriage shall be decided on by the man and woman who are seeking it . . .”).

250. *Id.* art. 7(1).

251. *Id.* art. 5. Clearly, the equality between men and women professed in the Vietnamese Constitution did not find its way into this provision. For some reason, the Vietnamese legislature believed the sexes needed to be treated differently in this context.

252. *Id.* art. 6.

253. *Id.* arts. 7(2)-7(3).

254. *Id.* art. 7(2).

The marriage relationship came with certain specific rights and responsibilities for the Vietnamese citizen.²⁵⁵ For example, “husband and wife [were] obliged to be loyal, to care for and respect each other and to assist each other in all social aspects, and to practise family planning.”²⁵⁶ In a provision that reflects marital property laws in many jurisdictions in the United States, the 1986 law asserted that “[c]ommon property of a married couple shall be deemed to comprise all the property acquired by each of the marriage partners, including professional and other legitimate income gained by the couple during their marriage, and the property bequeathed or given to the couple.”²⁵⁷ Both parties were granted equal rights and duties in preserving and managing such common property.²⁵⁸

The next category addressed by the 1986 law was parenting. As to children, parents were required to “care for and bring up their children, and to ensure their education and healthy development in all aspects, physically, intellectually and morally.”²⁵⁹ In a provision that seems very much a product of Vietnamese tradition and cultural commitment to extended family, the law required that “[g]randparents shall be bound to support and educate under-age grandchildren if they become orphans. Vice versa, grandchildren who have grown-up shall have a duty to support their grandparents, if the latter have no surviving children. Brothers and sisters whose parents have died shall be obliged to assist one another.”²⁶⁰ This provision placed significant responsibility upon grandparents, especially in a society where war-time orphans were a common problem.

The Marriage and Family Law of 1986 also contained some provisions relating to the issue of co-habitation.²⁶¹ One commentator has asserted that this law made co-habitation illegal in Vietnam.²⁶² However, the law itself did not say that. Rather, the law indicated that

255. *See id.* ch. III.

256. *Id.* art. 11.

257. *Id.* art. 14.

258. *Id.* art. 15.

259. *Id.* art. 19.

260. *Id.* art. 27.

261. *Id.* arts. 4, 28-30.

262. Wisensale, *supra* note 43, at 607 (noting that under the 1986 law, “[c]o-habitation is illegal”).

it was prohibited for a person who was married to co-habitate with someone to whom they were not married.²⁶³ It did not prohibit co-habitation between two people that were not married. Thus, the 1986 law prohibited infidelity, but not co-habitation. For those that chose to co-habitate and had offspring, the 1986 law had provisions for establishing paternity.²⁶⁴

The third broad category addressed by the Marriage and Family Law of 1986 was the issue of divorce. With a total of six short articles, the 1986 law addressed all of the issues surrounding divorce.²⁶⁵ If either or both parties applied to the People's Court²⁶⁶ for a divorce, the 1986 law required the court to assist the couple in attempting to reconcile their differences.²⁶⁷ If reconciliation was not possible and both parties wanted the divorce, then the court would simply grant the divorce.²⁶⁸ However, if reconciliation failed, the court could grant a divorce only "[i]f it is found that the situation is serious, that the couple can no longer live together and the purpose of the marriage cannot be achieved."²⁶⁹ The 1986 law provided no guidance on how to define these grounds. In contrast, the divorce law clearly prohibited the husband, if the wife was pregnant, from filing a petition for divorce until the child the wife was carrying reached the age of one year old.²⁷⁰ The wife, however, was not prohibited from doing so.²⁷¹ Thus, a pregnant woman could file for divorce without impediment.

In a divorce situation, the 1986 law empowered the People's Court to resolve all issues between the parties—although the law did not provide guidance for resolving every issue. With regard to property division, the court would approve any agreement between the

263. The Marriage and Family Law of 1986, *supra* note 221, art. 4.

264. *Id.* arts. 28-33.

265. *Id.* ch. VII.

266. The "People's Court" is the lowest court in the Vietnamese judicial system and (under the 1980 Constitution) consisted of elected judges and elected people's assessors. *See* CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM (1980), arts. 128-132.

267. The Marriage and Family Law of 1986, *supra* note 221, art. 40.

268. *Id.*

269. *Id.*

270. *Id.* art. 41.

271. *Id.*

parties regarding the division of their property.²⁷² In situations where the parties could not agree, the People's Court was given ultimate authority, but little direction.²⁷³

The 1986 law also addressed care and custody of children.²⁷⁴ The standard for determining where the children should live in a divorce situation was that “[i]n consigning the couple's child or children to the care of either of the divorcees for guardianship, the children's interests in every aspect shall be taken into account. In principle, nursing infants shall be consigned to the care of their mothers.”²⁷⁵ No further guidance was provided for how the People's Court should determine what type of physical custody was in the child's interests. The 1986 law addressed spousal support as well, but in the most vague terms.²⁷⁶ The law stated “[w]hen divorced, if either party is needy and asks for support, the other party shall give support according to his or her abilities.”²⁷⁷

Overall, the Marriage and Family Law of 1986 was a significant improvement over the 1959 version. This improvement largely resulted from the more detailed provisions of the 1986 law. It addressed more issues and, although still seriously lacking in detail,

272. *Id.* art. 42.

273. *Id.* Article 42 provides for the People's Court to divide property as follows:

If the two parties cannot come to an agreement, the People's Court will decide. The division of property of the divorcees shall be in accordance with the following:

a-Personal property shall be kept by the owner;

b-Common property of the couple shall be divided into two parts, taking into consideration the situation of the property, the specific situation of the family and contributions by each party;

c-Where a couple is still living with the whole family and their own property cannot be determined, the husband or wife shall receive part of the family property, in proportion to his or her contributions to the preservation and enlargement of the common property and to the family's livelihood. Work in the family is regarded as production work;

d-The rights of the wife and under-age children, and production and professional interests shall be protected in the division of property.

Id.

274. *Id.* arts. 44-45.

275. *Id.* art. 45.

276. *See id.* art. 43.

277. *Id.*

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gave better guidance for courts and citizens than the prior versions had done. However, in the years following enactment of the 1986 law, Vietnam entered a period of rapid modernization and the opening of its doors to the outside world—changes brought by the policy of *Doi Moi*.²⁷⁸ In such a circumstance, society is bound to start changing. Circumstances started to present themselves to the people of Vietnam that they simply did not expect at the beginning of *Doi Moi*.²⁷⁹ Thus, within eight years of passing the Marriage and Family Law of 1986, the government of Vietnam expressed its view that the existing law was not sufficient.

3. *The 1994 Decree on Marriage and the Family*

In 1994, the Prime Minister of Vietnam called for a review of the 1986 legislation indicating that it had not lived up to some of its expectations.²⁸⁰ The Prime Minister noted that:

During the last eight years of implementation, the Law on Marriage and the Family has contributed very positively to the building and consolidation of Vietnamese families, promoted the fine national traditions, abolished the backward practices of the feudalist regime of marriage and the family, and prevented the bad influence of the bourgeois regime of marriage and the family.²⁸¹

Despite these accolades, the Prime Minister criticized the way the law was carried out. In particular, the Prime Minister pointed to ongoing violations of the existing Marriage and Family Law, including unregistered marriages, polygamy, spousal and child abuse, and neglect of dependants.²⁸² He then invoked the important role family

278. Waller & Cao, *supra* note 77, at 555.

279. *See supra* note 240 and accompanying text.

280. Chi Thị của Thủ Tướng Chính Phủ về việc Tổng Kết 8 Năm Thi Hành Luật Hôn Nhân và Gia Đình [The Review of Eight Years of Implementing the Law on Marriage and the Family] (Instruction No. 482/TTg) (Viet.), available at http://laws.dongnai.gov.vn/1991_to_2000/1994/199409/199409080002, translated at http://laws.dongnai.gov.vn/1991_to_2000/1994/199409/199409080002_en.

281. *Id.*

282. *Id.* (“However, practices in violation of the provisions of the Law on Marriage and the Family, including serious violations, have still taken place in many places (such as precocious marriages, unregistered marriages, violations of the

more extensive review of the family code. That review resulted in the next version of Vietnam's family law, i.e., the Marriage and Family Law of 2000.

F. The Impact of History on the Law of the Family

The law of the family in Vietnam, as demonstrated above, has been influenced by many sources.²⁸⁸ Those influences can, in varying degrees, be seen in the family law of today. Confucianism from China was the first principle impacting the overall legal development of the country. Continued Chinese influence on the law can be seen in the first Vietnamese legal codes. These codes outlined some very basic family law principles. While the French civil code had less impact on the Vietnamese family law than it did upon other areas of Vietnamese law, the communist influence can be seen in the various constitutions of Vietnam. Those constitutions are demonstrably family-oriented. International agreements and conventions also impacted the Vietnamese nation and, hence, the development of the Vietnamese family law. The Universal Declaration of Human Rights, the CEDAW, and the CRC take precedence over the Vietnamese family code. The impact of these international accords cannot be overlooked in the development of the law of the family in Vietnam. Together, these influences formed what is the current version of the Marriage and Family Law in Vietnam.

IV. THE CURRENT MARRIAGE AND FAMILY LAW

As is the case generally with independent nations, the laws they implement reflect the historical and cultural experience of their people; Vietnam is no different. It has the historical experience of centuries of Confucianist thought overlaid by and often at conflict with the ideology of twentieth century communism. Indigenous practices existing for centuries as well as the more recent phenomenon of European colonialism have also impacted the historical and cultural experience of the Vietnamese people and, hence, the legal tradition of Vietnam. Throughout this experience, the Vietnamese people have continued their commitment to the family institution. This commitment is not simply to the immediate family as that term is

288. *See supra* Part II.

defined in western societies, but also to the extended family. As was demonstrated above, the evolution of Vietnamese legal thought from the Constitution of 1946, and subsequent revisions, through the Marriage and Family Law of 1959, and its subsequent revisions, has continued this commitment to the family. The Marriage and Family Law of 2000 carried on this tradition with its expressed commitment to the family.

On June 9, 2000, the Vietnamese National Assembly adopted a new family law code known as The Marriage and Family Law of 2000, which replaced the 1986 version.²⁸⁹ It took effect on January 1, 2001.²⁹⁰ This new code is still in effect today.

The 2000 law consists of thirteen chapters and 110 articles and addresses all aspects of the Vietnamese family.²⁹¹ In all respects, this evolutionary step in the development of the law of the family in Vietnam is superior to the prior version. It is more detailed and provides significantly more guidance to the family and to the courts interpreting it.

Unlike the 1986 version, the Marriage and Family Law of 2000 contains a preamble. The preamble expresses sentiments that harkened back to the original Vietnamese Constitution of 1946: "Families constitute cells of the society, cradles where men are brought up, and an important environment for personality formation and education, contributing to the construction and defense of the Fatherland. Good families make good society, good society makes better families."²⁹² The notion that the Vietnamese family is the "cell" of society was present in the ancient constructs of Confucian thought. The notion that good families make a good society is strikingly similar to the Confucian notion that to put the nation in order requires that the family be in order.²⁹³ This initial attempt at a family code preamble seems to have successfully captured some important and traditional themes of Vietnamese society.

289. The Marriage and Family Law of 2000, *supra* note 3, art. 109.

290. *Id.*

291. *See* The Marriage and Family Law of 2000, *supra* note 3.

292. *Id.* pmbl.

293. *See supra* note 1 and accompanying text.

As with the 1986 version of the Marriage and Family Law, the 2000 version has its first chapter labeled “General Provisions.”²⁹⁴ The general provisions of both versions are very similar, although the current version offers much more detail. Specifically, it contains a definitions section not present in the 1986 version.²⁹⁵ This section defines the Vietnamese family as “a group of persons closely bound together by marriage, blood ties, or rearing relations, thus creating obligations and rights among these persons according to the provisions of this Law.”²⁹⁶ Further, the General Provisions set forth the general mission of the Marriage and Family Law:

The Marriage and Family Law has the missions to contribute to building, perfecting and protecting the progressive marriage and family regime, formulate legal standards for the conducts of family members; protect the legitimate rights and interests of family members; inherit and promote the fine ethical traditions of the Vietnamese family in order to build prosperous, equal, progressive, happy and lasting families.²⁹⁷

Clearly, this mission statement is designed to call attention to the Vietnamese family tradition in an effort to promote a solid family unit in the twenty-first century. The remainder of the chapters can be divided into the same broad categories identified in the 1986 version: (1) the marriage relationship, (2) parenting, and (3) divorce.

A. Marriage Relationship

The Vietnamese Marriage and Family Law of 2000 sets forth, with specificity, those who are eligible to marry. The 1986 law contains similar requirements, but the new code provides a clearer structure:

A man and a woman wishing to marry each other must satisfy the following conditions:

294. The Marriage and Family Law of 1986, *supra* note 221, ch. I.

295. *Compare* The Marriage and Family Law of 2000, *supra* note 3, art. 8, *with* The Marriage and Family Law of 1986, *supra* note 221, ch. I.

296. The Marriage and Family Law of 2000, *supra* note 3, art. 8.

297. *Id.* art. 1.

1. The man has reached the age of twenty or over, the woman has reached the age of eighteen or over;
2. The marriage is voluntarily decided by the man and the woman; neither partner is allowed to force or deceive the other; nobody is allowed to force or obstruct their marriage;
3. The marriage does not fall into one of the circumstances where marriage is forbidden as prescribed in Article 10 of this Law.²⁹⁸

Clearly, the 2000 law makes the age requirements mandatory, as opposed to the “eligibility” language in the 1986 version of the statute.²⁹⁹ The law then goes on to describe those circumstances under which two people are not allowed to get married:

Marriage is forbidden in the following circumstances:

1. Married people;
2. People who have lost their civil act capacity;
3. Between people of the same direct blood line; between relatives within three generations;
4. Between adoptive parents and adopted children; between former adoptive parents and former adopted children; between fathers-in-law and daughters-in-law, mothers-in-law and sons-in-law, stepfathers and stepchildren, stepmothers and stepchildren;
5. Between people of the same sex.³⁰⁰

Again, the 2000 law is very similar to the 1986 version of the Marriage and Family Law.³⁰¹ Yet, there are two important differences. First, the 2000 law strengthens the prohibition of marriage between “in-law” relatives. That is, the 2000 law added prohibitions against marriage for former adoptive parents and relatives, between fathers-in-law and daughters-in-law, between mothers-in-law and sons-in-law, and between “step” relatives. This prohibition clearly indicates that these “legally created relationships” need to be respected rather than simply disregarded. Further, the 2000 law expresses a very straightforward prohibition against same sex marriage. While it could be inferred from the language of the prior

298. *Id.* art. 9.

299. *See* The Marriage and Family Law of 1986, *supra* note 221, art. 5.

300. *Id.* art. 10.

301. *See id.* art. 7.

law that marriage was defined as a relationship between one man and one women,³⁰² the 2000 law leaves no room for doubt.

The Marriage and Family Law of 2000 also outlines the specific rights and duties of each party in the marital relationship.³⁰³ One theme that has appeared continuously throughout the modern legal history of Vietnam is the equality of husband and wife in the marriage. That theme is again reiterated in the 2000 law.³⁰⁴ The 2000 law expanded on the 1986 version's provisions related to the property owned by the spouses.³⁰⁵ In light of *Doi Moi* and the increased prevalence of divorce, this increased emphasis on marital property issues should not be surprising. The 2000 law outlines the property rights of each spouse as follows:

Common property of husband and wife includes property created by husband and wife, incomes generated from labor, production and business activities and other lawful incomes of husband and wife during the marriage period; property jointly inherited or given to both, and other property agreed upon by husband and wife as common property.³⁰⁶

The property provisions also contemplate the ownership of individual property by husband and wife: "Husband and wife have the right to possess, use and dispose [of] their personal property, except for cases prescribed in Clause 15 of this Article."³⁰⁷ This provision goes on to state that "[e]ach partner's own property obligations are performed with his/her personal property."³⁰⁸ The provisions of Clause 5 of this article are interesting in that they require that "[w]here either spouse's personal property has been put to common use and the profits or

302. *See id.* art. 6.

303. *See* The Marriage and Family Law of 2000, *supra* note 3, art. 18-33.

304. *Id.* art. 19. The 2000 law reiterated that "[h]usband and wife are equal to each other, having equal obligations and rights in all aspects of their family." *Id.*

305. *Id.* arts. 27-33. The family law in Vietnam is silent as to prenuptial agreements. It is unclear whether a Vietnamese court would enforce such agreements. Claire Lieberman & Phong Nguyen, Presentation on Vietnamese Family Law at the American Bar Association—People to People Delegation (Oct. 7, 2010).

306. The Marriage and Family Law of 2000, *supra* note 3, art. 27.

307. *Id.* art. 33.

308. *Id.*

yields from such personal property constitute the family's sole means of livelihood, the disposition of such personal property must be agreed upon by both husband and wife."³⁰⁹

Clearly, Vietnamese property law recognizes the concept of marital property between husband and wife. Yet, it leaves many things in a state of uncertainty. Those things, in most circumstances, would require court resolution if there are no agreements. Thus, the notion that the division of individual property used as the family's sole means of livelihood "must be agreed upon by both husband and wife," seems rather naive.³¹⁰ If no agreement is reached, there is no direction for the parties or the court.³¹¹

B. Divorce

There are two types of divorce in Vietnam: the mutual divorce and the unilateral divorce.³¹² The former is significantly easier to obtain than the latter.³¹³ As a basic first step to getting a divorce, the Marriage and Family Law of 2000 carries over the requirement from the 1986 law requiring that the court help facilitate reconciliation.³¹⁴ If that reconciliation attempt fails and the parties have agreed on all issues, then "the Court shall recognize the divorce by consent and the agreement on property and children on the basis of ensuring the legitimate interests of the wife and children."³¹⁵ Interestingly, this provision suggests that the court will pay special attention, in cases of divorce by consent, to the situation of women and children.³¹⁶ Traditionally the most vulnerable members of the family, the interests of women and children receive special scrutiny under the 2000 law. This provision will hopefully have the effect of eliminating

309. *Id.*

310. *See id.*

311. *See id.*

312. *Id.* arts. 90-91.

313. *See id.*

314. *Id.* art. 86.

315. *Id.* art. 90.

316. *Id.*

agreements made by coercion or duress as the court will look at those agreements to ensure that vulnerable participants are protected.³¹⁷

Divorce at the request of one party only will be granted upon the same bases as the 1986 version of the family code.³¹⁸ That is, the court will grant a divorce if “the situation is serious, the couple can no longer live together and the marriage purposes cannot be achieved.”³¹⁹ The 2000 law gives little to no guidance to the court about the method for determining the presence of these factors. Certainly, references to domestic abuse or failing to live up to the basic principles of husband and wife (as outlined in Chapter III of the 2000 law) might serve as some gauge when deciding if the “situation is serious.”

The two other main issues outlined in the section on divorce relate to custody of children and division of property. The former will be discussed below while the latter was briefly discussed above. However, it is clear from the property division provisions that the rights of women, children, and other vulnerable members of the family will be given special attention under the 2000 law. The law indicates that “[t]he legitimate rights and interests of wife, minor children or adult children who are disabled, have lost their civil act capacity, have no working capacity and no property to support themselves, are protected.”³²⁰

C. Parents and Children

The provisions of the Vietnamese Marriage and Family Law of 2000 regarding the parent and child relationship can best be described by the concept of mutuality of obligation. That is, the law sets forth the basic principles governing a parent’s obligations to his or her

317. As mentioned above, however, two-thirds of divorce cases in Vietnam are linked to domestic violence. Domestic violence situations often result in marital settlements where the wife’s ability to reach a fair settlement is seriously undermined by her lack of power in the relationship. Another problem is the issue of corruption in the Vietnamese court system. See PENELOPE (PIP) NICHOLSON, BORROWING COURT SYSTEMS: THE EXPERIENCE OF SOCIALIST VIETNAM 272-73 (2007). When the court system is corrupt, serious concerns need to be raised about whether court oversight has any effect.

318. See The Marriage and Family Law of 2000, *supra* note 3, art. 89; The Marriage and Family Law of 1986, *supra* note 221, art. 40.

319. The Marriage and Family Law of 2000, *supra* note 3, art. 89.

320. *Id.* art. 95(2)(b).

children and a child's obligations to his or her parents.³²¹ These overarching principles, while certainly difficult to apply in a practical sense, very much embody the Confucian principles running through Vietnamese society. Moreover, these principles go even further than the Western notion of the nuclear family and extend to cover rights and obligations on behalf of the extended family. Thus, the law states:

Parents have the obligations and rights to love, look after, rear, care for, and protect the legitimate rights and interests of, their children; respect their children's opinions; attend to the study and education of their children so as to ensure their healthy development in all physical, intellectual and moral aspects to become pious children of the family and useful citizens of the society.³²²

Conversely, children have the duty to "love, respect, show gratitude and piety to their parents, pay heed to the good advices of their parents, preserve the good traditions and prestige of their family."³²³

Under the Marriage and Family Law of 2000, there is no discrimination between children. The General Provisions indicate that "[t]he State and society shall not accept the discrimination among children, between sons and daughters, between biological and adopted children, between in-wedlock and out-of-wedlock children."³²⁴ These commitments to mutual obligations between family members and filial piety are not unusual in light of Vietnam's Confucian past.

1. Family Planning

Government policy asks married couples to follow the national family planning policy of two children per couple.³²⁵ The Marriage and Family Law of 2000 states: "Husband and wife are obliged to implement the population and family planning policy."³²⁶ Clearly, this will create a general tendency to have a stable population when

321. *See id.* ch. IV.

322. *Id.* art. 34(1).

323. *Id.* art. 34(2).

324. *Id.* art. 2(5).

325. Wisensale, *supra* note 14, at 82.

326. The Marriage and Family Law 2000, *supra* note 3, art. 2(3).

each person is simply replaced by another person. The policy has met been with mixed results.³²⁷

Vietnam lost a large number of its citizens through the years of war with the French and with the United States. Such a loss was certainly a drain on Vietnam's human capital. That is, Vietnam will never have the benefits of generations of people who would have grown up to have families of their own and who may have become doctors or engineers or other enterprising members of society. That can have a devastating effect on a society. Nevertheless, Vietnam has expressed concern about its population growth since the 1960s.³²⁸ Thus, Vietnam currently has in place a family planning policy designed to limit the number of newborn children in the country.³²⁹ In this fashion, Vietnam hopes to improve the life of all Vietnamese citizens and manage the countries development.³³⁰ Yet limiting the number of children each family can have is more consistent with Vietnam's communist past than with its underlying Confucianist principles that encourage large families.

2. *Physical Custody of Children Upon Divorce*

In matters relating to custody of children upon divorce, the Marriage and Family Law of 2000 sets forth the basic principle that divorcees shall have rights and duties vis-à-vis their common children.³³¹ The 2000 law makes clear that a divorce does not eliminate the obligations of parents to their children:

327. See VIETNAM: A COUNTRY STUDY, *supra* note 17, at 119.

328. Wisensale, *supra* note 14, at 81.

329. Nghị Quyết Số 04-NQ/HNTW của Hội Nghị lần Thứ Tư Ban Chấp Hành Trung Ương Đảng (khóa VII) về Chính Sách Dân Số và Kế Hoạch Hóa Gia Đình, Ngày 14 Tháng 1, 1993 [Resolution on Policy Concerning the Population and Family Planning Work] (Resolution No. 04/NQ/HNTW) (Viet.), available at http://www.cpv.org.vn/cpv/Modules/News/NewsDetail.aspx?co_id=30578&cn_id=36868, translated at <http://www.hsph.harvard.edu/population/policies/VIETNAM2.htm>.

330. *Id.* According to this resolution, “[p]opulation activity and family planning is an important part of our country’s development strategy. It is one of our primary socioeconomic issues and a fundamental element to improve the living conditions of each person, each family, and the whole society.” *Id.*

331. The Marriage and Family Law of 2000, *supra* note 3, arts. 92-94.

1. After their divorce, the husband and wife are still obligated to look after, care for, educate and rear their minor children or adult children who are disabled, have lost their civil act capacity, have no working capacity and no property to support themselves.

The person who does not directly rear children is obligated to provide support for the children.

2. Husband and wife agree upon who shall directly rear their children, the rights and obligations of each party toward their children after divorce; if they fail to reach an agreement thereon, the Court shall decide to assign one party to directly rear the children, on the basis of the children's interests in every aspect, if the children are aged full nine years or older, their aspirations must be taken into consideration.

In principle, all children under three years of age shall be assigned to their mothers for direct rearing, unless otherwise agreed upon by the two parties.³³²

Not only does this provision set forth the obligations of divorcing parents, but it also outlines the standard the court is to use when deciding physical custody.³³³ The obligation of parents to continue taking care of adult children under certain circumstances demonstrates the expectations placed upon the traditional Vietnamese family unit. In a country where political philosophy would generally suggest that the state structure would take care of society, the notion that the family is still expected to fulfill that role suggests that, notwithstanding a given political philosophy, society remains the same.

The standard outlined for courts to follow in physical custody disputes is a combination of the "best interest of the child" standard and the "tender years" standard.³³⁴ Courts are to assess the best interest of the child when determining the physical custody

332. *Id.* art. 92.

333. *See id.* arts. 92-93.

334. *See id.* The tender years doctrine in the United States was succinctly stated by the Supreme Court of New York, Appellate Division when it noted "[t]he child at tender age is entitled to have such care, love, and discipline as only a good and devoted mother can usually give." *Ullman v. Ullman*, 135 N.Y.S. 1080, 1083 (N.Y. App. Div. 1912). For a complete discussion of these two standards, see generally Thomas J. Walsh, *In the Interest of a Child: A Comparative Look at the Treatment of Children Under Wisconsin and Minnesota Custody Statutes*, 85 MARQ. L. REV. 929 (2002).

arrangement for a child of divorcing parents, unless the child is three years old or younger.³³⁵ In such cases, the Vietnamese believe the mother is a more appropriate caregiver.³³⁶ In addition, it is unclear whether a court can order equal custody after divorce. The statute clearly says the court “shall decide to assign one party to directly rear the children.”³³⁷ Input from a child must be considered, but only if the child is nine years of age or older.³³⁸ The 2000 law gives no guidance to the court regarding when it should follow the directives of a child and when it should not.

In conjunction with selecting a parent that will primarily be responsible for caring for the children after a divorce, the 2000 law requires courts to award the other party visitation rights.³³⁹ The court is permitted to change the physical custody of a child after the final divorce if either or both parents make such a request.³⁴⁰ In such circumstances, the 2000 law mandates that the court consider the best interests of the child and the wishes of the child.³⁴¹ The law also permits the court to restrict visitation if the visiting parent abuses those visitation rights or adversely affects the child.³⁴²

While the Marriage and Family Law of 2000 addresses the issue of out-of-wedlock children,³⁴³ it does not specifically address the issue of custodial responsibilities and visitation rights in such

335. *Id.* art. 92(2).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* art. 94. Visitation rights are stated as follows: “After divorce, the person who does not directly rear children has the right to visit the children; nobody is allowed to impede such person to exercise this right.” *Id.*

340. *Id.* art. 93. Changing the physical custody arrangements occurs as follows:

In the interests of children, at the request of one or both parties, the Court may decide to change the person directly raising the children.

The change of the person directly raising the children after divorce shall be effected in cases where such person fails to ensure the children’s interests in all aspects, with the aspirations of children aged full nine years or older taken into consideration.

Id.

341. *Id.*

342. *Id.* art. 94.

343. *See, e.g., id.* art. 2(5).

circumstances. Thus, if a father seeks to establish his legal rights to paternity of an out-of-wedlock child, the question of whether he can obtain rights to visitation or custody remains. The 2000 law does not address that issue, nor does it give guidance to the court regarding the standards to be applied in such circumstances. Presumably, it would be the same standards applied in the divorce context, but this is not clear.

D. Support

The issue of support is also addressed by the Marriage and Family Law of 2000. It is addressed in the provisions of Chapter VI, consisting of thirteen separate articles.³⁴⁴ Yet, the obligations addressed by these provisions far exceed those traditionally seen in the United States. That is, the support obligation extends to people outside the nuclear family. The following are the types of relationships for which support may be ordered: “The supporting obligation is effected between fathers, mothers and children, among siblings, between grandparents and grandchildren, between husband and wife according to the provisions of this Law.”³⁴⁵

The 2000 law does not delineate the level at which support should be ordered. As with many of the other provisions of the Marriage and Family Law of 2000, the law clearly expresses a preference to have the parties work out an agreement.³⁴⁶ However, if an agreement cannot be reached, then the court is to decide.³⁴⁷ The 2000 law gives no clear guidance to the court regarding how it should set the support amount. Rather, Chapter VI simply references support based upon “the actual income and capability of the person(s) with the supporting obligation and the essential needs of the person(s) enjoying support.”³⁴⁸ Thus, the court must be charged with the responsibility of reviewing the budgets and net incomes of both payers and recipients.

344. *See id.* arts. 50-62.

345. *Id.* art. 50.

346. *Id.* art. 53. The nature of the agreement is that “[t]he support level shall be agreed upon by the person(s) with the supporting obligation and the person(s) enjoying the support or the latter’s guardian.” *Id.*

347. *Id.*

348. *Id.* art. 53(1).

While the provisions of Chapter VI cover the more conventional circumstances of support such as child support and spousal support in divided family situations, they also govern the more expansive extended family responsibilities. Adult children have a legal obligation to financially support their parents when their parents “have no working capacity and no property to support themselves.”³⁴⁹ The 2000 law requires adult children to support their siblings in the following circumstances:

In cases where their parents are no longer alive or have no working capacity and no property to support their children, adult elder brothers and/or sisters who no longer live with their younger brothers and/or sisters are obliged to support their minor brothers or sisters who have no property to support themselves or adult younger brothers and/or sisters who have no working capacity and no property to support themselves.³⁵⁰

These support provisions extend further into the family by requiring that “[g]randparents who do not live with their grandchildren are obliged to support their grandchildren if the latter are minor or grown up but have no working capacity, no property to support themselves and have no one to support as prescribed in Article 58 of this Law.”³⁵¹ Conversely, grandchildren also have a similar obligation to their grandparents. Thus, “[g]randchildren who do not live with their grandparents are obliged to support their grandparents if the latter have no working capacity, no property to support themselves and have no one else to support as prescribed by this Law.”³⁵²

Finally, Vietnam’s Marriage and Family Law of 2000 puts forth a call for assistance. It indicates that “[t]he State and society encourage organizations and individuals to provide support in cash or other property to families and individuals in extremely difficult and needy circumstances.”³⁵³ For a country so committed to the communist philosophy of the state insuring the needs of society as a whole, this is

349. *Id.* art. 57.

350. *Id.* art. 58.

351. *Id.* art. 59(1).

352. *Id.* art. 59(2).

353. *Id.* art. 62.

a very surprising call for assistance from the members of society with financial resources, i.e., the bourgeoisie.

E. The Extended Family

Other provisions of the Vietnamese Marriage and Family Law of 2000 recognize the existence and importance of extended families. Chapter V clarifies relations between grandparents, nieces and nephews, brothers and sisters, and other family members.³⁵⁴ While that chapter only contains three articles, those articles have a great deal of significance for Vietnamese society because they create legal obligations to care for extended family. For example:

Paternal and maternal grandparents have the obligations and rights to look after, care for and educate their grandchildren, lead an exemplary life and set good examples for their grandchildren. Where the grandchildren are minor or adult but are disabled, have lost their civil act capacity, have no working capacity and no property to support themselves while having no one to support them as prescribed in Article 48 of this Law, their paternal and maternal grandparents shall be obliged to rear them.³⁵⁵

This clearly demonstrates the commitments that families are to make to each other and makes them legally binding.

Further impacting the extended family are the provisions contained in Chapter IX. The six articles in this chapter spell out the responsibilities of guardianship within intergenerational households.³⁵⁶ That is, certain members of the extended family are obligated to assume the role of guardian for another member of the extended family if the need for a guardian arises.³⁵⁷ The provisions go so far as to require that stepchildren must act as guardians for a stepparent if they are living with that stepparent and that stepparent needs a guardian.³⁵⁸

While some of the obligations for care and support imposed by the Marriage and Family Law of 2000 seem to stretch the bounds of

354. *See id.* arts. 47-49.

355. *Id.* art. 47.

356. *Id.* arts. 79-84.

357. *Id.*

358. *Id.* art. 82.

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reasonableness to the eyes of a westerner, they also have the effect of avoiding some the social welfare problems that exist in western countries. For example, the social security system in the United States may not be under the kind of pressure currently existing if extended family were obliged to care for elder members of their own family. The Vietnamese solution to this issue may not be perfect, but it is a solution.

V. THE VIETNAM MARRIAGE AND FAMILY LAW—AN
AMERICAN PERSPECTIVE

The country of Vietnam is a rising star in the world community. Its cities are bustling with people going to and from work. The need for qualified professionals continues to grow.³⁵⁹ The economy continues to grow.³⁶⁰ Its people continue to look outward by adopting cultural aspects of other countries and trading with other countries.³⁶¹ As this country continues to modernize, the institution of the family will continue to change. With those changes will come a growing need for a more developed family law. Divorce, custody of children, support of children and former spouses, as well as property division are all issues that arise in modern societies and a fair way to resolve such disputes is always needed. Although the United States and Vietnam have many differences in the way they approach these issues, three are most notable: (1) the extent of constitutional provisions dealing with the family, (2) the nationwide character of the laws dealing with the family as opposed to the state-to-state method in the United States, and (3) the need for further reform.

A. *Constitutional Protection*

One of the most significant differences between the United States and Vietnam in the realm of family law is the recognition of the family unit and protection of the institution in their respective

359. *Asian HR eNewsletter*, PACIFIC BRIDGE (Mar. 1, 2007), available at <http://www.pacificbridge.com/newslettervol.asp?vol=7&no=3>.

360. *Id.*

361. Wisensale, *supra* note 14, at 79 (“[Vietnam’s] ‘closed,’ defensiveness stance was balanced by a genuine openness to, and admiration for, foreign cultures, including China, India, France, and the United States.”).

constitutions. The Vietnamese Constitution recognizes the family unit as a significant institution in the existence and preservation of the country as a whole.³⁶² It also recognizes the value of women to society including the fact that they must be treated equally with men.³⁶³ The Vietnamese Constitution also speaks of children's rights and obligations as well as the rights and obligations of parents.³⁶⁴

The United States Constitution, of course, does not have such direct reference to protection of the family. It addresses certain basic rights that are "inalienable," but it does not mention the family unit or the rights of women and children.³⁶⁵ Clearly, at the time the United States Constitution was written, the authors were concerned about different issues than those with which mid-twentieth century Vietnamese political leaders were concerned. The United States Founding Fathers were more concerned about the formation of a government and insuring the protection of the basic rights they had fought for in the revolutionary war against Britain.³⁶⁶ They were not so concerned about rights of women, children and families as colonial America did not have problems in these areas. Of course, this does not mean the family is an unimportant aspect of American society—quite to the contrary. However, the United States simply does not address these issues constitutionally. In fact, a recent effort to address the equal rights of women with a constitutional amendment proved unsuccessful.³⁶⁷

362. CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM (1992), art. 64.

363. CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM (1992), art. 63.

364. CONST. OF THE SOCIALIST REPUBLIC OF VIETNAM (1992), art. 64.

365. Rebecca L. Corrow, *Shaping the American Family by Inaction: The United State Constitution and "The Family," 1788-1920*, 14 J. CONTEMP. LEGAL ISSUES 7, 7 (2004).

366. See generally *id.*; Nancy G. Maxwell, *Unification and Harmonization of Family Law Principles: The United States Experience*, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 249 (Katharina Boele-Woelki ed., 2003) available at <http://washburnlaw.edu/faculty/maxwell-n-fulltext/2003-4cefl249.pdf> (discussing the reservation of family law issues to the states and the resulting conflicts of law).

367. *The Equal Rights Amendment*, EQUALRIGHTSAMENDMENT.ORG, <http://equalrightsamendment.org/> (last visited Sept. 24, 2011) (noting that the Equal Rights Amendment ("ERA") was passed out of Congress in 1972, but has yet to be ratified by the requisite number of states).

American politicians continue to express their commitment to family values yet the Vietnamese Constitution enshrines those values in the law. Neither approach is necessarily better than the other. They are, however, quite different. Raising the family to such an important position may not necessarily provide better protection to the family unit in Vietnam than in the United States, but it may help mold societal values and the expectations of the people.

B. National Family Law

In Vietnam, the family law code is applicable nationwide. Vietnam consists of 58 provinces,³⁶⁸ while the United States has fifty states. In the United States, we have fifty separate family law codes, while in Vietnam there is one. There are some advantages to one unified system of family law. There would not be an expenditure of resources on intra-province conflicts of laws issues. The need for attorneys and judges to have a separate license for each province would not be needed. Certain efficiencies would exist regarding child support and custody of children across state lines.

Like Vietnam, the United States was almost split in two by civil war. It was a war fought over several issues, not the least of which was whether each individual state actually had the power to separate from our union. Vietnam's war of the North against the South was in many ways more complex than the American Civil War. That is, it had foreign powers on both sides fighting what they believed to be a war of ideology. When the United States was reunified after the civil war, the concept of states' rights continued in many facets of society. The law of the family is one of those areas. The law of the family is generally considered to be within the purview of the states. Not so in Vietnam. It is a country that has been divided, reunified, controlled, and split up by foreign powers for over two thousand years. Yet, the law of the family is still nationwide. The efficiencies of one nationwide family law are clear, yet the historical experience of each country has provided a different result.

368. Bureau of E. Asian & Pac. Affairs, *Background Note: Vietnam*, U.S. DEP'T STATE (June 3, 2011), <http://www.state.gov/r/pa/ei/bgn/4130.htm>.

C. *Need for Further Reform*

One of the more striking characteristics of Vietnam's current Marriage and Family Law is its need for further reform. As was referenced above, the people of Vietnam are prospering. As their economy grows and as influences from outside increase, new pressures are unleashed. The experience with *Doi Moi* is a perfect example. Vietnamese family law is very much undeveloped. Free market forces can certainly cause a shift in priorities for a society and the families that make up that society. In so doing, those forces create added pressure in the family and, hence, upon the system of laws dealing with the family. The Vietnamese Marriage and Family Law is not up to the task.

In most divorce issues, the 2000 law places great emphasis upon agreement of the parties. Failure to agree leaves the parties to a divorce action at the mercy of a court system that is given no guidance. Without guidance, the litigants cannot expect any uniformity of results. It also permits the possibility of fraud. The paternity provisions in the Marriage and Family Law of 2000 are also lacking. There is no guidance for physical custody orders if the parties do not agree. The child support provisions also need to be more specifically delineated.

While these areas of the family law are in dire need of revision, there is much cause for optimism. Since Vietnam first declared its independence in 1946, there have been three revisions to the family code. Further, in 1994, Vietnam's prime minister delivered a sobering message to the country regarding the country's family law. These events lead to the conclusion that Vietnam has the will to examine what works and what does not and to make appropriate changes. As their economy continues to grow through *Doi Moi*, that ability to self-examine will be very useful.

VI. CONCLUSION

Throughout Vietnam's historical experience, the family unit has remained a pillar of Vietnamese society and culture.³⁶⁹ The important role of the family was recognized by the Vietnamese communist leader, Ho Chi Minh, when he stated:

369. Wisensale, *supra* note 14, at 80.

It is correct to pay great attention to the family, because many families added together make up a society. The interests and happiness of the family totally depend on the interests and happiness of the society. And the happiness of the society is manifest in the happiness of each member of the society, of each family.³⁷⁰

The family unit has maintained this preeminent status through the many years of outside influence in Vietnam. It maintained its vital role through years of Chinese domination, French colonialism, the war with the United States, and communism. The only question for the Vietnamese people is how the institution of the family will hold up against the pressures of social, political, and economic reform brought about by *Doi Moi*.³⁷¹ The answer to that question is far from clear. It is unclear whether or not the institution of the family in Vietnam is sufficiently strong to deal with the complex issues brought on by a modern market economy.³⁷² Yet, Vietnam's economic modernization and cultural transformation shows no sign of letting up.³⁷³ Thus, it is within the context of this transformation that the traditional family structure must develop and change to meet the needs of the changing Vietnamese way of life.³⁷⁴

Clearly, Vietnam has displayed a willingness to adapt its family policies to a rapidly changing social landscape. After being subjected to centuries of colonial rule, thirty years of civil conflict, two wars against modern Western powers, and a complex process of reunification, the Vietnamese are dealing with an economy that is shifting from state-sponsored socialism to free-market capitalism. Clearly, Vietnam's families were affected by all of these changes, and specific marriage and family laws were adopted to reflect these historical influences as they occurred. It is likely that more reforms will follow. The extent to which the Vietnamese have "set their hearts right" will only be measured by how well these reforms put the institution of the family in order and meet the needs of the Vietnamese family.

370. *Id.*

371. *See* Waller & Cao, *supra* note 77.

372. *See id.*

373. *See id.* at 575-76.

374. *See id.*