The French “État legale” in Vietnam. Between Legal Pluralism and Police State

Detlef Briesen

The following article examines the effects of the French “État legale” in its colonies in Southeast Asia. This question at least implicitly plays an important role in the other contributions collected here. Since French law is an integral part of the continental-European legal tradition, it is also being studied here with the respective categories. Obviously I am not pursuing a Euro-centric perspective, but I am primarily interesting in describing one of the starting points for the contemporary Vietnamese debate on the rule of law: the abolishment of the Confucian system of law and order by virtue, and its replacement by a rather arbitrary French “État légale” from 1858–1954. Other toe-holds, which are not discussed in my article, are developments after 1945, 1954, and 1986 in particular.

France and the Law in its Colonial Empire

A constitutional state is a state in which constitutional powers are legally bound, which is particularly limited in its actions by law to secure the freedom of the individual. Judging from today's prevailing opinion in Germany the state of law (rule of law or more accurately “Rechtsstaat”) includes other elements in addition to the rule of law:

- legal guarantee of fundamental human rights,
- legal guarantee of coexistence of the people in the same personal freedom,
- securing material justice,

- ensuring legal certainty (*certitudo* and *securitas*),
- institutional moderation of government activity by the separation of powers, the prohibition of excess and the principle of proportionality,
- laws binding all government activity by a primacy of law,
- salvo of a legal authorization for all incriminating state acts,
- verifiability of state acts through independent courts, in particular on whether government action which engages the rights of an individual, is legitimate and appropriate.¹

In French law, there is today, under the influence of the German tradition, a similar schema of categories that indicate whether a country is to be regarded as a “*Rechtsstaat*” or not. This has led to the loan translation of the German term into “*État de droit*” in French. Originally, the term “*État légal*” was more common in France. It designated a state in which control had been completely taken over by a civil society and its expression of political will, the parliament. This found its expression in a common understanding that laws are the central tool for the control of the state by the parliament. Consequently, only by means of laws adopted by parliament was it possible to interfere legitimately in society, politics, economy etc. French legal thought focused originally on the creation and enforcement of laws.² The rule of law in an extended interpretation is in contrast a relatively recent historical achievement. In countries like France or Germany it was fully established only in the decades after World War II. When it comes to the specific character of the French rule in Vietnam 1858–1946, so far two factors must always be taken into account.

First: The enforcement of a fully developed “*Rechtsstaat*” beyond the mere binding of governmental activity to laws was also in France itself a protracted process. Much more was required than just the famous Declaration of the Rights of Man and of the Citizen (“*Déclaration des droits de l’Homme et du Citoyen*”), which was announced by the French National Assembly on 26 August 1789. During the 100 years of French colonial rule over Vietnam, the state of law had severe deficits, was controversial and even endangered in France itself. The Second Empire was an authoritarian state, during the Third Republic the state of law was seriously threatened by attempts of restoration, political justice, martial law, first and foremost during the World Wars, and

¹ Zippelius (1999), 296 ff.; Stern (1984), 781 ff.

² Ridder (2010), 179.

by another authoritarian government, the State of Vichy. Even the Fourth and Fifth Republic were shaken to their foundations by the anti-colonial liberation wars in Indochina and Algeria, and the associated substantial violations of human and civil rights.

Second: The fact that the rule of law was a contentious issue in France itself, was in addition to the strong anti-democratic forces caused by the dual character which the country had from the mid-19th to mid-20th century: France was from 1871 until 1940 one of the few democratic republics in Europe, but at the same time it possessed a colonial empire. The latter was actually the largest in the world but for the British, and provided France with resources to compete with the strongest power of continental Europe until 1945, Germany. To keep control over its empire was therefore the fundament of its status as a Great Power. This implied another iron necessity: All colonized people in Asia, Africa, America and Oceania could not be provided with the same human and civil rights and particularly not with full legal equality and freedom as the French from the motherland.

The limited extend of the rule of law in the colonies therefore had a logic that was established on the one hand by the role of France in the system of Great Powers and its capabilities to conquer a country like Vietnam so easily. On the other hand, there were fiscal reasons. Colonization could cause political problems in France, so it had to be at least cost-neutral for the French taxpayer. To achieve this, the colonies and protectorates had in turn to be profitable, that is, they had to yield profits for France. This restricted certain forms of development, especially political participation and a full development of a “Rechtsstaat”. The French empire overseas was therefore characterized by legal pluralism, and inevitably applied to political and economic oppression and exploitation.³

The Law in Vietnam before Colonization

To understand the French encroachment on Vietnam, it is essential to have an idea about the preceding Empire of Vietnam and its law. Seen from the perspective of European constitutional theory, the Empire of Vietnam was a state

³ Brocheux/Hémery (2011), 71.

of law in the limited sense. Its constitutional structure was based on a complex network of multiple actors legitimized by written law, customs and rites. It consisted of the emperor and his mandarins, the village communities and the extended family groups.

The Emperor and his Mandarins

The reign of Emperor and his elite, the mandarins, was ritually-morally legitimized by a “heavenly mandate”. The objective of the latter was to achieve an ideal society which guaranteed peace, order, harmony, social satisfaction and material prosperity. While such socio-political objectives are universal in principle, the means to achieve to them were of pure Confucian origin: “virtue”, “knowledge”, “righteous path”, including the idea of “governing by virtue”.⁴ Virtue was also the central category of political theory, and it was nothing but an expression of a cosmological moral law called “Tao”. It was the common regulator of cosmic and social order and thus extended to the subunits of the latter or the entire hierarchy of the cosmos, society, family and individual.

Law in the Empire of Vietnam had therefore a cosmological source, and in daily practice it was mainly a product of moral action. This raised the question of how the ruling classes could ensure order in society from their Confucian view, namely through harmonious moral action itself, also known as “Li”.⁵ It went far beyond the right ceremonial-ritual behavior and was a collective formula for harmonious action in the sense of equilibrium in all actions. Emperors and mandarins had thus to act as role models in moral action, in the hope that a positive impact on the people would arise therefrom. They also had to behave in accordance with the three basic social commitments and the five cardinal virtues, and were confronted with specific obligations arising from the respective social position too. Writers, farmers, artisans and merchants each had to follow specific ethical imperatives and to provide full dedication in the service of the community.⁶

At the top of this ethical-ritual-oriented system of rule of law or virtue was the emperor. French observers usually interpreted his role primarily as that of

⁴ Vu The Quyen (1977), 44.

⁵ Wilhelm (1967), Li Gi, 35 ff.

⁶ Wilhelm (1967), Li Gi, 56.

an “*idole sacrée*”,⁷ who would formally remain in power in order not to unnecessarily provoke the population. However, the French missed a crucial component, because the sacral legitimation also implied a political mandate. An emperor who failed could be forced by his subjects to resign or even commit suicide. However, since this meant a considerable effort, it was enough, as a rule, when an Emperor kept the “imperial attitude” and operated its function as a “ritually-sacred object” without mistakes.⁸ This became increasingly impossible under the conditions of the colonial state.

Below the Emperor there was a ruling class in pre-colonial Vietnam, the mandarins, whose authority was based on the success in the imperial examination system and thus acquired Confucian knowledge. Since mandarins lived among the illiterate population, the rise of an education contender to a higher degree was witnessed by the masses. Extensive ceremonies were also held to honor mandarins when reaching a new status.⁹ Their training not only consisted of technical skills such as reading and writing and a general knowledge about Confucian theory, but of acquiring correct thinking as it was understood as a precondition for right action when in office.

The mandarin bureaucracy consisted only of a very limited number of men. Figures from the colonial era-until the 1930s when the mandarins remained under the protectorate treaties in office in Tonkin and Annam confirm such a view: In 1896, a total of 418 mandarins with 858 assistants administered the first and second class managed prefectures in Tonkin, not more than one administrator per 4,000 to 5,000 residents.¹⁰ Mandarins were ordered by a hierarchy of ranks, of certain positions at the imperial court, which corresponded to the respective organizational level of provinces, sub-provinces and cantons.¹¹ Mandarins governed in principle by the ancient Chinese system of undivided state authority, particularly the administrators of lower units were in their prelacies in charge of “everything.”¹² Nevertheless, there was a certain division of public tasks among them: revenue collection, public works, recruitment of

⁷ Harmand (1885), 36.

⁸ Vu The Quyen (1977), 27.

⁹ Texier (1962), 349 ff.

¹⁰ Brocheux/Hémery (2011), 88.

¹¹ Blazy (2012), 58.

¹² Brocheux/Hémery (2011), 88.

soldiers, monitoring of the population, and jurisdiction.¹³ The latter was a main task of mandarins and differed significantly from judicature in contemporary European countries like France.

The entire law was characterized by the fact that the essential elements of contemporary European jurisdiction, especially the division between private, penal, and public law were non-existent as well as that codes of procedure were lacking. The Vietnamese judiciary was dominated by the Confucian principle of morality and harmony, court disputes were seen as an expression of the failure of the peaceful social order, even as immorality. One central attempt was, therefore, to engage as few persons as possible in a court hearing, which all in all rather resembled an administrative act: There was no litigation, no litigant, no lawyers etc. Only few persons were involved even in an important legal dispute, the mandarin, the defendant or his deputy, and sometimes witnesses. The only guarantee against arbitrary justice was the moral integrity of the mandarin judge who had to face severe penalties in case of failures or corruption.¹⁴ In addition, there was no division into public, private and criminal law, because the underlying code, the Gia Long, was written exclusively as a moralizing criminal code. Some other sources of law were characterized by the same idea: the King, a collection of five books on metaphysics, history, ethics and literature, the Statutes of the Emperor, in which, *inter alia*, the administrative structures had been established, and finally the Lê Code. It retained some significance despite the Codification of Gia Long Code. The latter had been introduced in 1812 by the homonymous Emperor and was basically a copy of the penal code of the Chinese Qing Dynasty. Committed to the same legal thinking the Gia Long Code defined standards for criminal law (penalties, definition of crimes, exceptions for the privileged etc.) as well as other legal regulations including management of granaries, commercial law, civil status, sacred position of the Emperor, sacrifices, military, and public works.

Court cases were dealt with at the various stages of mandarins' hierarchy. It consisted of three stages. If a party to the conflict did not want to bow to the verdict of the notables, it could petition to a low-ranking mandarin. His decision was not based necessarily on a court hearing. In the case of a crime or offense mostly local notables who were responsible for law and order at the local

¹³ Blazy (2012), 49 ff.

¹⁴ Blazy (2012), 60.

level addressed directly to the mandarin. He had full authority over all forms of punishment. On the provincial level, there was a sort of Court of Appeal chaired by the provincial judge. It was the last resort for cases in which corporal punishment was imposed. The third stage of case-law was the Court of Appeal in imperial Hue. It was primarily responsible for severe cases of moral failure in which the highest forms of punishment, detention, exile and death penalty, had been imposed. In addition, at Hue special courts met for cases, which involved high-ranking mandarins, infamous rebels or similarly serious cases. Another court dealt with matters which concerned the imperial family. For the military, there was a different jurisdiction anyway.¹⁵

The Village Community

The village community was largely autonomous in imperial Vietnam, and its dual autonomy as an administrative and social unit was a result of a long historical process, which is not reproduced in detail here. Originally the villages were supervised strictly by an imperial mandarin, who was also in charge of tax collection. Since the introduction of population and cadastral registers the payment of taxes came more and more under the control of the local Council of Elders.¹⁶ With general revision of the civil register under the Emperor Le Thanh Tong, the amount to be paid by the respective village became dependent on the number of taxable inhabitants. Since then villages simply gave lower population figures to reduce their tax burden. The revision led consequently to a tedious and permanent conflict between the central government and municipalities about the real population figures. Since the tax reform by Le Huyen Tong (1662–1671) the villages had to apply only a fixed amount that was calculated on the basis of the last census.

This compromise had benefits for both sides; especially for the peasantry in the villages. The Council of the Elders now apportioned the lump-sum taxation for the entire municipality to the male patriarchs. This created a significant local autonomy with extensive executive powers. The withdrawal of the state on the issue of taxation was only the first step towards a far-reaching self-government of the municipalities in Vietnam. Finally, it included the independent organization of local government and the autonomous mobilization of

¹⁵ Blazy (2012), 67.

¹⁶ Nguyen Huu Khang (1946), 41 ff.

resources (taxes, fees and charges) for tackling common tasks. Municipalities had their own common law system which was partly oral, partly written down, and deeply influenced by traditional values and local experiences. Local common law was based on general ethical and moral principles and on codified conventions on administrative, judicial, fiscal, police and other matters.¹⁷

The community was nevertheless not completely autonomous, but integrated into the authoritarian and centralist imperial government which controlled military, justice and religion. In addition, village and imperial state were connected by the common, above-described culture of “social harmony”. An important task of the village community was therefore to ensure peace and order internally and externally. This commandment was so strong that it could lead to collective punishment against entire communities in case of subordination.¹⁸ Communities had therefore regulatory functions. They were responsible for protecting their members from external enemies, bandits and robbers. Internally they were supervised by a municipal police. The municipality was also responsible for fending off magical powers that could either produce harmful weather phenomena or bring disorder into the “social harmony” of the village community.¹⁹ In addition villages were providers of mutual solidarity.²⁰ In order to meet the variety of tasks, the village council was also organized by function. There were lower dignitaries for archive, finance, public security, construction and dissemination of news, higher dignitaries for external contacts, and the interpretation of the imperial edicts.²¹ A central position was occupied by the *ly truong* (mayor) of the village, but the entire political and social structure of it was far from being simply hierarchically organized.²²

The Family

The third pillar of the Vietnamese society was the family. It was on one hand a social interaction system, which was structured by the idea of an “order” that

¹⁷ Vu The Quyen (1977), 72.

¹⁸ Nguyen Huu Khang (1946), 92 ff.

¹⁹ Nguyen Tien Huu (1969), 12 ff.

²⁰ Nguyen Huu Khang (1946), 204 ff.

²¹ Nguyen Huu Khang (1946), 96 ff.

²² Papin (2002), 49–52.

produced family roles and a hierarchy of authority. Secondly, the family was based on the absolute nature of the paternal power, which was bound to the general authoritarian structure of the society, based on authority and order (Vu 1977, 110). The family hierarchy was formally determined by Confucian principles, the “three chains” of family role relationships, better subordination and the corresponding values: between father and son (piety), husband and wife (modesty), and older and younger brother (obedience) (Silvestre 1889, 124). Added to this was ritualized role behavior that was based on rules of conduct, which should guarantee the functioning of the role relationships and make them visible.

This family order was also viewed as a prerequisite for the harmonious society. Only those who knew how to perpetuate order in family life were suitable for a state office. At the same time the order inside of the family was not a private but a public affair. Violations of the fundamental value of filial piety, for example, were among the ten most serious crimes and punishable by death.²³ Here it becomes visible how tightly moral and ethical principles were linked to law.²⁴ However, law was only part of a comprehensive strategy to enforce morality within the entire society. Especially the educated men had to set good examples of right conduct, and the Confucian concept of virtue was also spread among the illiterate people by memorized poems and stories. The patriarch was held responsible for morality and order in his family, and in severe cases of misconduct even three generations of a wrongdoer faced execution. In order to fulfill this collective commitment, the family was equipped with great autonomy and substantial rights. The head of the family was allowed to take all major decisions, including the assets, he even had power over the lives of his family members as the kin’s judge. Their main obligation was the submission to the paternal authority. Specifically violations of this duty were severely punished.

On the whole, the legislation in Vietnam’s villages, families and in the entire country at the time prior to colonization was not designed to protect the rights of the individual; it was primarily a system to ensure harmony in family, village and society.²⁵

²³ Deloustal (1908), 97 ff.

²⁴ Huard/Durand (1954), 13.

²⁵ Phan Thi Dac (1966), 47.

France and the Legal Tradition in Vietnam

Below we deal first with the question of which elements of Vietnam's traditional legal system were preserved or altered by the French. In another section, we try to determine which new forms of state power and societal organization were introduced through law by the colonial regime. Generally speaking, for the majority of the Vietnamese population, farmers in villages and family groups, colonial rule only changed their legal status slowly and slightly. In that perspective, the French rule was characterized by a legal pluralism not uncommon in the European overseas empires until their collapse during or as a result of World War II.²⁶ By contrast, the Vietnamese elites were ousted. The sacred position of Emperor became increasingly undermined, and the power of the mandarins was limited by the French administration, or better the mandarins were assimilated into the colonial power structure.

Village and Family Clan during the Colonial Period

Model for the persistence of the regulations for the mass of Vietnamese were those decisions that had been made already in 1864 for Cochinchina²⁷ and for Tonkin after 1890.²⁸ Thus, Annamite civil and commercial law was applied continuously during the colonial period, insofar as it concerned the relations of the Vietnamese among themselves or with other Asians. The French comments specified repeatedly the sources of colonial law for non-Europeans in Indochina, especially the Gia Long Code. In contrast not only the French but all Europeans were subject to France's law; so were the legal relations between them on the one hand and the "indigènes" on the other hand. From this principle, there were only few exceptions. The "code civile" for example could also be applied to cases which concerned "sujets" when French law as "raison écrite" helped to overcome the shortcomings of Annamite, traditional law. This was exercised in the case of legal innovations unknown to the traditional law, for example insurance contracts.²⁹

²⁶ Benda-Beckmann (1992), 307 ff.

²⁷ Fourniau (2002), 161 ff.

²⁸ Fourniau (2002), 453 ff.

²⁹ Girault (1922 I), 541.

During the colonial period most regulations of striking importance for “indigènes” or “sujets” remained effective which were based on the traditions of family and municipality law, or on written law, the Gia Long Code in particular. These included the ancestral cult, marriage, adoption and inheritance law, and the provisions relating to that part of assets which were scheduled to maintain the ancestral cult. The enormous authority of the family’s patriarch was only touched in so far, as that with a *Précis* of 1883 the “pouvoirs publiques” received a general permission to monitor it.³⁰ Primarily, even the provisions on land ownership, land and civil registers were left untouched, but beginning in Cochinchina in 1871 records were no longer kept in Chinese characters, but in French. A risk for the farmers, however, was the legally unclear situation of their land ownership. The cadastral was not performed correctly to colonization, as mentioned above. Property titles were often based on privileges or on claims to the communal land. As French citizens increasingly acquired land in the context of “mise en valeur” in what now is Vietnam, this led to ambiguity, arbitrary interpretation of law, and to considerable conflicts between colonial administrations, French colonists and natives.³¹

The most important changes in villages and family clans were of a fiscal nature. These reforms were introduced when Paul Doumer reorganized Indochina under the aim to make it finance its colonial status itself.³² France had primarily taken over the Empire’s tax system.³³ It was based on a poll tax for male adults, taxes on land ownership and an obligation to work-called *Corvée*. This system was, as shown above, inefficient because the registers used for this purpose had not been properly maintained since the 17th century. With the Decree of 1/2 June 1897 Doumer introduced a new form of taxation in Tonkin, which was transferred a year later to Annam. New civil registers and cadasters were its fundament.³⁴ Previously unregistered male adults were taxed by 0.40 piastres per year, registered by 2.5 per year. Two thirds of the *Corvée* now could be replaced by additional tax payments. Real estate tax was also reformed by introducing four types of rice fields and six different land classes. To

³⁰ Girault (1922 I), 545.

³¹ Deroche (2004), 95 ff.

³² See Doumer (1905).

³³ Eli (1967), 67 ff.

³⁴ Eli (1967), 69 ff.

fight tax fraud, a personal tax card was introduced in 1884 in Cochinchina, 1897 in Tonkin and 1913 in Annam. All male “sujets” were obliged to carry their tax cards permanently hence they also served as identity cards:

*“The individual, in the modern sense of the term, appeared in Indochina in the form of a taxpayer.”*³⁵

While one should not overestimate individualization on such a basis for the rural population, measures like these joined with other colonial transformations according to the model of “western” lifestyles, especially in the cities of Vietnam. Thus, traditional paternalism was called more and more into question at least in urban contexts, though the actual thrust of the modernization movement in Vietnam became the anti-colonial liberation struggle.³⁶

The Disempowerment of Vietnamese Elites

The colonial rule made great use of the strict paternalism in Vietnam, especially since the French acted hardly less authoritarian than the traditional ruling classes. In recognition of the authoritarian structures only few interventions in the traditional law system took place during the colonial period. Added to this was the experience that the violation of religious feelings and moral values only provoked unnecessary problems (Girault 1922, 488). Therefore, for purposive-rational reasons, it seemed obvious to utilize the traditional authorities to administer the colony. The debate was mainly on what forms of traditional domination colonial rule should primarily rely on, and which of its components should be developed further to the benefit of the colonial power. Again the starting point was experience in Cochinchina. While replacing the old “mandarinat” by a group of French and French trained officials, the colonial administration encountered severe problems. These were to be avoided in Annam and Tonkin.

Since 1874 a treaty between France and the Empire of Vietnam regulated the status of both as French protectorates. The treaty text itself, however, did not include the term protectorate, but the non-binding “protection”. The court in Hue stuck to its narrow interpretation to protect the country’s remaining sovereignty (Vu 1977, 139). The French Government, however, had in 1880 laid the groundwork for a future policy in Vietnam. According to the Frey-

³⁵ Brocheux/Hémery (2011), 91.

³⁶ Vu The Quyen (1977), 127.

cinet-plan, the political goal was to subject it to the direct sovereignty of France. But France was initially hesitant when it came to an early realization of this goal by military intervention. This was less due to the military weakness of the government in Hue, but rather to two other factors: Firstly, until 1880 it was still unclear which value France could gain from colonies in Indochina. Secondly, France initially was not interested in a further military confrontation with China, which also had significant interests in Vietnam.

French policies in Indochina became clearer after the outbreak of the Franco-Chinese War, and a following series of rebellions in Vietnam. Harmand Convention (1883) and Patenôtre Treaty (1884) established three different legal statuses for Cochinchina (direct French possession), Tonkin (control by French resident) and Annam (relative independent administration).³⁷ Since the Patenôtre Treaty in particular France dealt more carefully with the existing institutions, and implemented a strategy which was based on the idea of an intermediate-term co-operation with the traditional elites in securing its colonial interests. In the long-term Emperors and mandarins were to be ousted.³⁸

Colonial rule therefore led to a gradual degradation of imperial authority. France firstly reduced it through rigid interpretation of the protectorate's status, in a second step the Emperor was also damaged as a sacred symbol. Provisions of the Gia Long Code about imperial privileges were simply ignored, and its sanctions were at least mitigated.³⁹ The French were so successful in destroying the power and sacral function of the emperor that already in 1920s that he served as a nation-wide symbol of collaboration, decay and corruption.

Since the Patenôtre Treaty the mandarins' position of power was curtailed systematically. In Annam the "Resident général" took over all functions that had previously been in the hands of the high mandarins: Secret State, Regency and Privy Council. Furthermore, he monitored the content of decrees and edicts, and controlled public works, finance, army and the various ministries.⁴⁰ The competencies of the "Resident supérieur" in Tonkin were even more extended because he also supervised common people and mandarins, and created his own system of indigenous office-holders. Later, under de Lanessan, France

³⁷ Vu The Quyen (1977), 148.

³⁸ Vu The Quyen (1977), 153.

³⁹ Vu The Quyen (1977), 162.

⁴⁰ Brötel (1971), 210 ff.

partly revised its strict control over the administration, and re-strengthened the position of the traditional mandarins in Tonkin.

Nevertheless, there was no going back to the old order any more, which was secured by a deep transformation of the educational system. Classical Confucian thought had been one of the quintessential fundamentals of governance in countries like Vietnam, because its acquisition by imperial exams was directly linked with a career within the imperial mandarinat. The abolition of the traditional civil service exam, and its replacement by the governmental French “*école*” therefore formed a deep, not only educational incision, which was completed in the different parts of Vietnam at a different time. In Cochinchina, there had been no examinations since the withdrawal of the imperial mandarins in 1868; in Tonkin, the exams were abolished in 1906, and in Annam 1919. The transition from a Vietnamese-Chinese to a European-French education system was carried out slowly and in several stages until the 1930s. Especially in an initial stage France was primarily interested in teaching the French language to a limited number of local experts and translators. Educational reform grew in importance when France changed its colonial policies from “assimilation” to various forms of “association”. Since then the French influence in education became even more ambivalent.

Vietnam under the Nguyen Dynasty had been decisively influenced by the model of the Qing dynasty and Chinese culture. Vietnamese was a language that was rarely written even in the Nom script. With the Latin letters of “*Quoc Ngu*” the French therefore presented a medium for the dissemination of the vernacular language, that was for both, the colonial administration and the Vietnamese population, on the one hand of great advantage. The Vietnamese language transformed from a spoken language to a written one. French officials at least could read written Vietnamese without being forced to learn hundreds of Chinese characters. On the other hand the proliferation of “*Quoc Ngu*” posed for the colonial power a serious disadvantage as it hampered the successful dissemination of the colonialists’ language. The educational reform even promoted the emergence of a “national culture”, in particular a literature in Vietnamese.⁴¹ Even though France tried to improve its co-operation with the mandarins after 1890,⁴² in total, the French law of education had adverse ef-

⁴¹ Vu The Quyen (1977), 258 ff.

⁴² De Lanessan (1895), 6.

fects. It produced new academic elite, with European knowledge and equipped with a new means of communication, Vietnamese as a written language.

The Creation of the Colonial State and Its Ambivalences

The starting point for the creation of the colonial state had been military conquest and force, but the latter was transformed more and more by non-military regulations until the end of the colonial era. Compared to the mother country a different law was effective in the French overseas empire, the so-called colonial law.⁴³ All possessions, colonies as well as protectorates, were French territories, and under the same French state power as was the motherland. As such, all the inhabitants of French overseas territories were French nationals. Legally, however, there were four classifications which determined their legal status. French law distinguished between full citizens, called “citoyens”, “étrangers” from other European countries, “indigènes” or “sujets”, indigenous persons from the respective colonies, and “étrangers assimilés à l’indigènes”, in Indochina for example persons from other Asian countries. “Indigènes” or “sujets” had only limited legal rights. Only a “citoyen” was under the Code civile and had therefore full citizenship, particularly the “droits politiques”, especially active and passive suffrage.⁴⁴ “Citoyens” took part in the French parliamentary elections, even if they resided in the colonies. A “sujet”, however, was a citizen in the colonies, for whom not the Code civile but his “statut indigène” was effective.⁴⁵ If we consider the continuing validity of the local laws for the Vietnamese, this meant a serious discrimination for them. A “sujet” could ascend by four stages to “citoyen”; but this status could it be withdrawn again. Amongst other things France tried on the creation of the French Union to reform the personal law after the Second World War, but it was too late already, as the colonial empire disappeared in the following two decades.⁴⁶

Metropolitan France knew four sources of law: the Constitution, laws, decrees and orders of the head of state ministers, prefects or mayors, decrees and

⁴³ See Kley (1920); Durand (2015).

⁴⁴ Girault (1923 II), 418 ff.

⁴⁵ Girault (1923 II), 483 ff.

⁴⁶ Urban (2010), 489 ff.

orders served for implementation of laws, and legislation on the basis of special authorization. In the colonies the entire legislation of the mother country was in force, if not opposed by other regulations (such as provisions of protectorate treaties). Once French authority had been implemented, laws from the motherland were only effective in the possessions if they were explicitly introduced by decree of the governor. This provided the colonial administration with an enormous power over its *sujets*. The latter was even increased by the peculiarities of French administrative law, which guided the proceedings of the “administration publique” in France and in its colonial empire. Even today French administrative law has a praetorian character as it is not codified, and is based on the jurisprudence of the “Conseil d’État”,⁴⁷ and complex discussions about individual decisions. It is more about enabling the proper functioning of the administration in its principal activity of serving the public, rather than the control of the administration or even the protection of citizen’s rights.⁴⁸ Particularly before World War II French administrative law caused considerable legal uncertainty that could be even arbitrary in a colonial context.⁴⁹

The Colonial Ministry had precedence in the control of protectorates and colonies, and it also maintained a “Conseil coloniale” for advice on draft laws and decrees. However, the ministries of justice, home, postal, and foreign affairs possessed important competences too. For the entire colonial administration there was a General Inspectorate and (in 1920) inspections of Health, Public Works and information. The administration in the various French possessions was headed by a governor, whose field of responsibility was defined in the older colonies by a statute. In more recent acquisitionsthe governor was directly subordinated to the authority of the Minister of Colonial Affairs. The governor had extensive competences, which included the right to legislate, to manage the colonial administration, and to supervise jurisdiction. He could communicate diplomatically with neighboring countries. In addition, the governor had the supreme command of the French troops and the right of inspection. In some colonies, there were also colonial entities, such as the advisory “Conseil privé”, and a “Conseil général”, or a “Délégation financières” if

⁴⁷ See Weidenfeld (2010).

⁴⁸ Bell (2008), 168.

⁴⁹ Hübner/Constantinesco (1988), 57.

French from the motherland controlled the colonies' budget through elected or corporative assemblies.

The administrative organization for the control of Indochina was created in 1887 with the Union Indochinoise. It consisted originally of the colony Cochinchina and the protectorates Annam, Tonkin and the Kingdom of the Khmer. In 1893 Laos was incorporated, and in 1900, finally, Guangzhouwan in southern China. Union Indochinoise was a culturally and economically very inhomogeneous political union. However, the full establishment of an Indochinese state was the work of Paul Doumer.⁵⁰ Doumer reorganized French Indochina as a powerful political-administrative structure with a dual function: "to integrate all the Indochinese political structures into the French state-controlled system and to neutralize the former Vietnamese, Khmer, and Lao states, as well as the political structures of the montagnards, and to convert them into subordinate apparatuses that could be used to control the colonized populations."⁵¹

The political-administrative structures of the Indochinese Union were designed along the lines of British control in India. The concept of association replaced assimilation.⁵² Union Indochinoise was headed by a "Gouverneur général" based in Hanoi,⁵³ but in practice, however, the different parts of the Union were controlled by various, rather independent sub-administrations – the Governor of Cochinchina, and High Residents in Tonkin, Laos, Annam and Cambodia. There was a Governor-General but no General-Government. Therefore, the colonial rule was not homogeneous, but marked by deep conflicts, such as between the Governor of Cochinchina on the one hand and the High Resident in Hanoi on the other. There were also conflicts that involved the motherland, as between the Indochinese merchants, French industrialists and Catholic missionaries. Perhaps precisely because the administration was lacking uniformity there was an enormous presence of French officers in Indochina, at least if we compare it with the model-giving British India. The num-

⁵⁰ Eli (1967), 25.

⁵¹ Brocheux/Hémery (2011), 80.

⁵² Betts (1961), 106 ff.

⁵³ Girault (1923 II), 261 ff.

bers of French made the administration of the Union and its parts a costly affair.⁵⁴

The direct presence of the French in Vietnam contributed to a substantial disempowerment of the traditional ruling elites. We should avoid drawing too dark a picture of French Colonial rule in Indochina,⁵⁵ but we cannot overlook how limited France's attempts were until the 1930s to introduce reforms or even political participation. Several reasons can be cited. The French colonial administration stood from the beginning in the tradition of supposedly insurmountable Indochinese authoritarianism. From this point of view to compromise with the subjects was nothing but weakness in the eyes of the colonialized. The rigidity in which France exercised its power in Indochina was also caused by the enormous competences of the administration, which was not controlled by the colonial "sujets" but from the distant capital Paris, by the French parliament, ministries and the press. Their Indochina policy was not consistent, but mirrored complex political conflicts and constellations of interests that were negotiated by parties and business associations. Aside from these specific interests all the French who were involved in governing Vietnam were influenced by Orientalism: Political left as well as right idealized the Indochinese societies as traditionalist, immobile and dominated by small-scale social structures. Accordingly, the real "mission civilisatrice" of the French in Indochina was primarily to preserve its valuable traditions and cultural treasures,⁵⁶ and only secondly, if even at all, open it up to a cautious modernization.

The French Police State

Modernization mainly was limited to changes in the apparatus for surveillance and in penal law. France not only kept the significant authoritarian structures in Vietnam unchanged, but preserved them by a modernization of Vietnam's police units. A Garde indigène – in Cochinchina Garde civile – was founded and given the task to monitor the villages. Especially to combat the growing anti-colonial movement or other types of unrest since the outbreak of World War I, courthouses, and prisons were built, and police units were created to prevent and combat anti-colonial movements and revolts: the Sûreté générale

⁵⁴ Brocheux/Hémery (2011), 82 ff.

⁵⁵ Brocheux/Hémery (2011), 106 ff.

⁵⁶ See Larcher Gosha (2000).

Indochinoise was established in 1917, the *Police spéciale de Sûreté* in 1922.⁵⁷ In both cases the number of personnel was limited, but infamously effective due to the fact that colonial police forces in general were above the law. French rule in Vietnam was based on violence; brutality and electric torture during interrogations were on the agenda particularly since in the 1930s. During rebellions, squad teams traversed the riot areas and carried out summary executions. Because of colonial racism and the lack of an indigenous tradition of the prison sentence until 1954, no prison in Indochina served the concept to rehabilitate the inmates.⁵⁸ Under often terrible conditions political and “normal” prisoners were detained in provincial jails, penitentiaries and in total 9 penal colonies in Vietnam. Per capita, the rate of the prison population in Indochina was significantly higher than in France. Political prisoners were also deported to French Guyana. Forced labor, which was forbidden by law theoretically, was just as common as corporal punishment; mortality among the prisoners was high. In particular, the penal colonies were notorious for bloody revolts and violent attempts at liberation.

Political participation by elected provincial or municipal assemblies existed only in Cochinchina and in some major cities. Evidently French “citoyens” were overrepresented but even the expression of their political will was increasingly restricted by colonial administration after the turn of the century. At least the limited political participation of missionaries, officials, planters and businessmen could be compensated by a free press. This was not the case for the “indigenous” population of Vietnam: The French press law of 1881 only applied in Cochinchina and for publications in French. In December 1898 the *Gouverneur général* introduced by decree pre-censorship for publications in Vietnamese and Chinese. The censorship of the press was even tightened in the protectorates with the Decree of October 1927: Since then the editors of newspapers had to obtain a license, make a deposit, and to subject their products to pre-censorship. Only periodicals in French and issued by a “citoyen” were exempt from these provisions. Finally, the decree of August 30, 1930 abolished the obligation for press products both in Vietnamese and French to be censored before publication.⁵⁹

⁵⁷ Morlat (1990), 71 ff.

⁵⁸ Zinoman (2001), 63.

⁵⁹ See Huynh Van Tong (1971).

The character of a French police state becomes more obvious if we take a closer look at criminal justice. During the conquest, martial law had been applied by the French army in Cochinchina. Thereafter, by the decree of July 1864, two different systems of penal law were established; “citoyens” and “sujets” were treated separately. For the former, the “Code pénale” was introduced, for latter the indigenous criminal code, Gia Long, was reinstated. It extended – with a few exceptions when sujets” had to appear before the French courts – in principle over all “indigènes” and other Asians in the colony.⁶⁰ The validity of indigenous law was abolished again by the decree of March 16, 1880. Since then, with few exceptions, the “code pénale” was in effect for Cochinchina, and French judges also conducted the proceedings of Annamites’ and other Asians’ cases according to it. But some provisions of the criminal law of the Empire of Vietnam remained in force. For this, the Code pénale was supplemented by certain provisions and became a penal code particularly for Cochinchina. Since the 1880s, the entire organization of jurisdiction in the extreme south of Vietnam followed the model of the mother country. It established a court of appeal at Saigon and in total seven first-instance criminal courts in Cochinchina. While this system suffered from staff shortages, it nevertheless improved jurisdiction for the French “sujets”, since many cases now were excluded from the traditional moralism and strict punitive approach of the Gia Long code. It also had provisions of criminal procedural law. Only since then was a due process guaranteed to all defendants in Cochinchina.⁶¹

The reforms in Cochinchina laid the fundament for a growing influence of the French criminal law and penal system in all three parts of Vietnam until 1954. French laws and prisons became the rule for French or other non-Asians in Indochina. This influence was slowly extended over the “sujets” and Asian nationals from Cochinchina over Tonkin to Annam. Penitentiaries, prisons, and juvenile detention centers under the supervision of the French authorities were established, where also for political reasons convicted “indigènes” did their time. The traditional penal system in Vietnam had known no prison sentences, but only lighter and heavier forms of corporal punishment, forced

⁶⁰ Girault (1922 I), 553 ff.

⁶¹ Blazy (2012), 328.

labor, exile and various forms of capital punishment. Therefore imprisonment was an innovation in Vietnam.⁶²

In Tonkin and Annam a tripartite judicial system had been created by an agreement from March 15, 1874. Originally cases in which only Europeans were involved were treated by the French High Residents, cases which concerned Europeans and Annamites were processed by common French and Annamite courts, acts which concerned only Vietnamese, only by the mandarins. Since that time, the jurisdiction was extended more and more by the French authorities.⁶³

Labor Law

Thus, different legal areas show that France not only used law in a repressive way to defend its power in Indochina. Sometimes it also tried – but at the same time always in its own interest – to eliminate internationally indicted grievances. This was the case for labor law which was an important issue in all European colonies because it was directly linked with the problem whether a possession was profitable for the colonial power or not.⁶⁴ Theoretically in Vietnam a sufficient indigenous workforce was available for its “mise en valeur”.⁶⁵ The general problem in Indochina was rather that those areas that should be developed economically for the benefit of the colonial power were not congruent with the traditional economic and settlement areas of the Vietnamese majority population.⁶⁶ While Kinh were predominantly farmers and lived mainly in the Tonkin Delta and on the coast of Annam, the colonial interests targeted rather the development/exploitation of the highlands of Tonkin, Cochinchina, Southern Annam and the southern Mekong Delta. The recruitment of workers in these areas faced mainly three difficulties: the work in mines and on plantations meant for the Kinh farmers a significant change. They were also linked with their farmland or their place of residence for religious and economic reasons. Only the locals could operate ancestor worship

⁶² Girault (1922 I), 554 ff.

⁶³ Girault (1922 I), 555 ff.

⁶⁴ Chanock (1992), 293 ff.

⁶⁵ Girault (1923 II), 201.

⁶⁶ Nguyen Van Vinh (1961), 12 ff.

and had access to a share of the common lands.⁶⁷ The Kinh population had not without reason shunned the highlands and the Mekong Delta as settlement areas for centuries, because living there was in fact a substantial health risk. However, high morbidity and mortality were explained by the presence of evil supernatural causes. In fact, both were alarmingly high on the plantations and in the mines.⁶⁸

All this meant that by the end of the 19th century only people from the rural underclasses volunteered to work on plantations and in coal mines. The recruitment was carried out by private companies, and for those who signed contracts with them significant protection by labor law existed. In order to prevent social unrest and problems (and to make taking up work for larger masses of Vietnamese more attractive), the colonial power passed two decrees in March 1910 and in November 1918. Since then labor contracts had to be registered with the authorities, the contract duration was set at maximum three years, working, living and conditions for returning home had to be determined by the contract. In theory, the colonial authorities had since that time the right to control whether the promised conditions had actually been complied with or not.⁶⁹ However, these tentative steps to regulate labor stood in conflict with a massive interest of the colonial power – the smooth operation of the plantations in particular. Therefore, in colonial Indochina even labor law remained penalized. Since 1899 breaching workers had to expect up to five days in prison and fines between 1 and 15 francs. These penalties were even increased in 1918. Since then absence from the workplace was punished with prison terms of between six days and three months, and fines between 16 and 20 francs.⁷⁰ Nevertheless, these measures proved inadequate; they protected neither the rights of workers, because the colonial administration did not succeed in actually enforcing its control rights, nor did it really satisfy the interests of the employers, as the high absence rate did not decrease significantly.⁷¹

Especially after the First World War a practice of recruiting labor spread that hardly could be called voluntary: Employment agencies negotiated direct-

⁶⁷ Nguyen Van Vinh (1961), 14.

⁶⁸ Nguyen Huu Khang (1946), 207.

⁶⁹ Bureau International du Travail (1937), 96 ff.

⁷⁰ Bureau International du Travail (1937), 19.

⁷¹ Bureau International du Travail (1937), 3.

ly with the village councils. They were even bribed for an opportunity the recruitment agencies offered to them: to get rid of unwanted or poor community members, and send these “en masse” (Montaigut 1929, 40 ff.) to the plantations, and coal mines. Basically, this kind of “voluntary” recruitment hardly differed from forced labor. The option to work in the plantations and mining areas remained unattractive. Workers, who had been dismissed from the contracts and returned to their homeland, came back in a worse health condition and just as poor as before. When the abuses became increasingly evident, the French authorities undertook in 1927 a new attempt to ensure by legal measures occupational health and safety. This time, however, specific provisions were taken: “Inspection général du travail” was created, and rules for the recruitment of workers and their taxation adopted. Especially “pécule” was introduced, a system of compulsory saving by means of “Livret du travail” to which equally employees and employers had to contribute.⁷² Nevertheless, the late 1920s saw such severe collective action that further (unsuccessful) reforms were introduced by the colonial authorities in 1929, 1930 and 1932.⁷³

Summing up these decrees, it cannot be denied that the colonial administration’s will existed to remedy the social ills and to abolish the de facto forced labor. In the 1930s, however, the differences between what the colonial administration was willing and able to realize and an emerging labor movement were already so large that the deficiencies created a powerful strike movement. It formed an important part of the anti-colonial resistance.⁷⁴

Summary

It is possible to point out that the main character of France’s colonial rule in Vietnam and other parts of Indochina was that of a “rule of law“. Since the military subjugation of the Indochinese territories and the separation of military and civilian administration, the French apparatus had always tried to base its decrees, regulations and thus actions on law from the motherland. This rather formal interpretation must not obscure our view of how limited this

⁷² Bureau International du Travail (1937), 53 ff.

⁷³ Bureau International du Travail (1937), 21 ff.

⁷⁴ Vu The Quyen (1977), 215 ff.

approach was, however, and how deeply it was linked with the deficiencies of the constitutional state in France itself, and with the general lack of political participation in the French colonial empire. We also have to take into account that the societal order prior to colonization was rather influenced by the concept of Confucian morality and not of Roman law.

Colonies are states in the making. The colonial power abolished an ancient law system, that of the Empire of Vietnam and attempted to replace it by the French one. The plan was to implement a political-legal system in Vietnam, which should meet the standards defined by France (and its interests). The main dispute among the colonialists was how long this process should take, and whether it was to be guided by the principles of assimilation or association. Anyhow, colonization was connected with a significant transformation of law, first and foremost the disempowerment and de-privileging of the ancient elites, the imperial family and the mandarins. To a far lesser extent the legal traditions of the Vietnamese village were severed. France applied a top-down approach to change the society of its possession. All intrusions were blatant breaches of law as it was understood in the Confucian interpretation: as a moral all-encompassing cosmological order. Vietnam therefore lost more than only a couple of legal regulations. By the abolishment of its moral-legal tradition it was deprived of its idea of a harmonious society, whatever it may have looked like in reality.

France replaced Confucian morality by a contemporary interpretation of the constitutional state, which, as mentioned above, was characterized by severe deficits and rather arbitrary. Though French rule in Indochina was liberal compared with other colonial regimes (in India for example neither the provisions of habeas corpus nor the freedom of the press were contemporarily secured) it was based primarily on military conquest and strict police control. France established a police state, which would not have been possible to such an extent in the mother country. Like in most other European colonies in general, central provisions of the constitutional state were not guaranteed to the majority of Vietnam's population, not in the present-day interpretation of "Rechtsstaat" but even not in the contemporary, rather progressive peculiarities of the French "État légal". Like other colonies the different parts of Indochina therefore were subjected to a hybrid legal framework, which in the view of the colonizers compromised with their backwardness. In addition, interventions in the originally existing legal-moral order were based on purpose. Colo-

nies are not only states in the making but they are colonies, areas where the freedom of the individual is not always the most important dictum the state is acting on.

Regarding the overall balance of the French *État de droit* in Vietnam, it was mainly an uncompleted attempt at nation-building following the European model, and deeply influenced by French global ambitions of power and economic interests. This process changed the Vietnamese society greatly, but rather in terms of the destruction of an old order than in establishing a new legal order. The Confucian unity of morals, ethics, law and order was delegitimized especially at the top of society. Therefore the legal changes regarding the sacred position of the Emperor and the educational reforms were of utmost importance as the latter led to the gradual replacement of mandarins by new elites, which were westernized. Below this level, a colonial vacuum was created; the lower social strata were in theory at the colonial administration's disposition, though in practice the real impact of French governance was limited. The same was true for the substance of change France actually reached by 1954 in Indochina. France destroyed more than it created, and the main changes occurred in areas which were essential for the colonial regime to maintain its control over Vietnam: labor and educational law and criminal justice.

The outcome of the "*État légal*" in Vietnam, Indochina, and generally in the French overseas empire was modest at best, and deeply influenced by a legal pluralism which left written and unwritten law, customs, and moral-legal provisions of Vietnamese families and villages generally untouched. But the consequences for the development after 1954 must be seriously taken into consideration – combined with other central elements of historical development of rule of law since 1945, 1954, and 1986. Today Vietnam is confronted with the question whether to further develop its constitutional state following the European or German model of "*Rechtsstaat*". Another option of growing importance is the modernization of the Confucian tradition which is intensively debated on an international level today. Perhaps Vietnam like other South East and East Asian countries can reach similar success in further developing its rule of law by adopting concepts of moral virtue again.⁷⁵

⁷⁵ See Bell/Chaibong (2003); Holz/Wegmann (2005).

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