

**STATE LIABILITY FOR COMPENSATION IN THE DEVELOPMENT  
OF VIETNAM: PROPOSALS FOR FURTHER REFORM**

By

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## **Abstract**

The Law on State Compensation Liability 2009 (SCL) is a turning point in the reform process in Vietnam with its aims of protecting human rights, boosting the development of a state based on the rule of law and a socialist-oriented market economy. This thesis critically examines this legislation and the remedies provided under it relating to wrongful decisions or actions by the executive and judicial branches of government and for specific wrongful enforcement activities. Using mixed methodologies the aims of the study are to consider appropriate reforms to improve the SCL and enhance its implementation. The thesis considers the effectiveness of the SCL and its enforcement. It reviews and analyses theories and policies relating to state liability for wrongful actions. This establishes a platform for the evaluation of the SCL. It critically investigates SCL's appropriateness. It argues that the SCL has many deficiencies and needs further reform. The thesis reviews and analyses the procedures under and for the enforcement of, the SCL. It points out that the procedures and mechanisms for settlement of compensation claims are complex and inappropriate. The enforcement of the SCL is poor and consideration is given to its improvement. The thesis also compares the Chinese SCL with that of Vietnam. It examines the similarities and differences in order to draw on Chinese experiences which may be relevant to Vietnam's legal reforms. Finally, the thesis makes recommendations to improve the SCL and its enforcement in order to support the *Doi moi* (innovation) in Vietnam.

### **Student declaration**

I, Nguyen Minh Oanh, declare that the PhD thesis is no more than 100,000 words in length including quotations and exclusive of tables, figures, appendices, bibliography, references and footnote. This exegesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this exegesis is my own work.

Signed: ... ..  .....

Date: ... .. 12/9/2015 .....

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## **Preface**

I have been teaching Civil law including the law of obligations and civil liability at Hanoi Law University since 2000. The idea for this thesis emerged in 2003 after the promulgation of Resolution 388. As I had to teach my students about the liability of the state for wrongful convictions, I had to research and prepare lectures on this issue. Initially, I found that it was difficult to understand even though I spent time and effort on it. Through that research and comparisons made with ordinary civil liability that I was teaching, I found this Resolution had many shortcomings and was very challenging to apply in practice.

The topic became more obvious after I had written several papers for the Hanoi Law University Project which aimed to strengthen legal reform processes in Vietnam. The more I worked on the issues, the more background I obtained and the more interested I became. I have also attended several conferences on the drafting of the law on state liability for compensation. I observed the process of making the law and the debate between state officials. The draft law was reviewed by many state agencies and citizens before being approved by the NA. After the enactment of the SCL in 2009, I saw that although there had been a relatively long and tidy process of law-making, the previous problems still remained in the new law. Additionally, the longer the law had been in force, the more deficiencies it showed. I also realized that there had been a lack of background in the theories and nature of state liability and the task to promulgate law had impacted on the quantity and quality of law. Moreover, I was interested in many cases relating to state liability for compensation which appear every day in the Vietnamese media. I often asked myself why claimants have found it so difficult to claim for compensation. I decided to examine this topic seriously, and commenced my research for this thesis in 2010.

At the beginning of the research, I thought that the SCL had been established with little if any regard for any basic theories. I intended to examine a legal theory or transplant research which would be expected to enrich the theory of state liability and transplantation of law in Vietnam.

To begin with, I looked at the literature on legal theory and doctrine relating to state liability for compensation as significant issues. It became clear that in legal writings, many writers such as Harlow, Peerenboom, Milhaupt and Pistor conclude that

there is no one theory for the linked phenomena and every government promotes economic and legal growth in its own way based on its context. I continued to read material pertaining to (1) the relationship between the development of the economy and the law studied by Marx, North and Peerenboom; (2) the debate about the priority of developing the economy or protecting human rights described by many authors such as Peerenboom, Gillespie and Chen; (3) the three elements which are required to build the institutional capacity to support economic growth referred by North; (4) the reform process in Vietnam including legal reforms emphasising the importance of the SCL investigated by Pham Quoc Anh, Duong Thanh Mai, Duong Dang Hue, Nguyen Sy Dung, Le Ha Vu. These suggested to me that I should place the SCL in the context of Vietnam and approach the topic by conducting research on law reform rather than on legal theories or theories of the transplantation of laws.

The law reform aim of the thesis informed its design and the qualitative methodology chosen. The first research question is about the quality of SCL. There is also a larger question: why is it that in Vietnam it is difficult to enforce not only the SCL but also the general law? What I read in the relevant literature on the Vietnamese legal system and institutions confirmed my resolve that the thesis should have a law reform orientation. It also established the framework for a review of the law. The literature review revealed weak mechanisms in the enforcement of the general law in Vietnam which emphasised the importance of context for the SCL. It is necessary to investigate the less-than-satisfactory enforcement of the SCL in order to discover its causes and effects and determine ways to improve it.

In many ways, the thesis examines state liability from three perspectives: legal, political and social. It views the SCL in terms of its position within the legal system and in the context of the Vietnamese government's desire for further political and economic development. By conducting the interviews, reading the relevant literature and discussing the various emerging issues with my supervisor, my knowledge has been enriched and the structure of the thesis took form. This included focuses on the shortcomings of the substantive law (Chapter 4), the procedural law (Chapter 5), and its enforcement (Chapter 6). These issues were investigated with consideration given to the development of Vietnam (Chapter 1), the realities of its legal and political system, theories, and the distinctive nature of state liability (Chapter 3). They are consistent with the aims which were stated at the beginning of the research.

The research is significant because it contributes to a more comprehensive understanding of state liability; moreover, it is hoped that the findings will hasten the reform processes in Vietnam by leading to a range of appropriate recommendations, especially those given in Chapter 8.

## Table of abbreviations

The following abbreviations appear in the main text and/or footnotes of this thesis. Most are spelled out in full or otherwise explained when they are first mentioned.

### States and Organisations

CCP: Chinese Communist Party

EAM: East Asian Model

EU: European Union

HREC: Human Research Ethics Committee

MOJ: Ministry of Justice (*Bộ Tư pháp*, Vietnam)

NA: National Assembly (*Quốc hội*, Vietnam)

SPC: Supreme People's Court

SPP: Supreme People's Procuracy (*Viện Kiểm sát nhân dân Tối cao*, Vietnam)

VCCI: Vietnamese Chamber of Commerce and Industry

VCP: Vietnamese Communist Party (*Đảng Cộng sản Việt Nam*)

WTO: World Trade Organisation

### Laws

Decree 16: Decree 16/2010/ND-CP giving guidance on implementing the law on state liability for compensation 2009 on 3/3/2010

Decree 47: Decree No 47/CP on Dealing with Compensation for Damage Caused by State Officials on 3/5/1997

ECJ: Law on Enforcement of Civil Judgments 2008 (Vietnam)

ICCPR: International Covenant on Civil and Political Rights 1966

ICESCR: International Convention on Economic, Social and Cultural Rights

IDHR: Convention of Universal Declaration of Human Rights 1948

Report 114: Report 114/BC-BTP of MOJ on Preliminary assessment of 3-year implementation of the SCL on 31/5/2013

Report 300: Report 300/BC-CP of Government on State Liability Affairs on 23/10/1012

Resolution 388: Resolution 388 NQ/ UBTVQH on Compensation for the Victims of Wrongful Convictions on 17/3/2003

Resolution 48: Resolution 48-NQ/TW on the Strategies for Building and Comprehending the Legal System until 2010, an orientation upward to 2020, adopted on 24/5/2005

Resolution 49: Resolution 49-NQ/TW on strategy of judiciary reform up to 2020, adopted on 2/6/2005

SCL: Law on State Compensation Liability

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- 12- Confirmation of supervision of fieldwork in Vietnam
- 13- Declaration of accurate translation
- 14- Answer sheet
- 15- Email explanation of state official
- 16- Proposal
- 17- Ethics Proposal

## **Some initial ideas in relation to this thesis were published in**

1. Nguyễn Minh Oanh, đồng tác giả, Phần I, Chương II “*Một số nội dung cơ bản trong quy định của pháp luật Việt Nam và một số quốc gia khác về trách nhiệm bồi thường do tài sản gây thiệt hại*”, sách chuyên khảo Tran Thi Hue “*Trách nhiệm bồi thường thiệt hại do tài sản gây ra theo pháp luật Dân sự Việt Nam*”, Nhà xuất bản Chính trị- Hành chính, 2013, trang 33-54.

[Nguyen Minh Oanh, co-author, Part I, Chapter II “*Some fundamental issues on compensation liability for damages caused by property under Vietnamese law and other jurisdictions*” in Tran Thi Hue (editor) “*Compensation liability for damage caused by property under Vietnamese Civil Law*”, Politic and Administrative Publisher, 2013, pp. 33-54.]

2. Nguyen Minh Oanh, Overview of the State Compensation Liability in Vietnam, *Law and Development Journal*, No.5/2013, pp. 30-41.

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Also available at: <http://thongtinphapluatdansu.edu.vn/2010/04/05/4702-2/>

7. Nguyễn Minh Oanh, *Pháp luật một số nước trên thế giới về trách nhiệm bồi thường Nhà nước*, Đề tài cấp Trường “*Trách nhiệm dân sự về thiệt hại do hành vi của cán bộ công chức gây ra- những vấn đề lý luận và thực tiễn*”, 2009.

[Nguyễn Minh Oanh, *The law on State liability for Compensation in some jurisdictions in the world- experience for Vietnam*, Science Project of Hanoi Law University “*Civil liability for compensation for damages caused by state officials- theoretical and practical issues*”, 2009.]

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## Chapter one: Introduction

### 1.1. Context of the Project

Since World War II there has been a tendency to promote laws which create more egalitarian societies and which better protect human rights.<sup>1</sup> There are increasing numbers of provisions in civil, socialist and common law national legal systems on state liability to protect the rights of individuals and their economic interests.<sup>2</sup> There are also increasing numbers of provisions in international law which impose related obligations on states. Liability may be stipulated at an international level, such as in the *Convention of Universal Declaration of Human Rights* (UDHR) 1948, *International Covenant on Civil and Political Rights* (ICCPR) 1966<sup>3</sup>, and *Draft Articles on the Responsibility of States for Internationally Wrongful Acts 2001*<sup>4</sup> or in the European Union.<sup>5</sup> Increasing

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<sup>1</sup> L Morlino, *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Brill 2010). Li Lin (ed), *The China Legal Development Yearbook Vol 2* (Brill, 2008) xix, ch 3, 4, 5.

<sup>2</sup> Giuseppe Dari-Mattiacci et al, 'State liability' (2010) 18 (4) *European Review of Private Law* 773; Lin, above n 1; and also see *Universal Declaration of Human Rights 1948, International Covenant on Civil and Political Rights 1966*.

<sup>3</sup> The *Universal Declaration of Human Rights 1948* requires member states to comply with it in protecting human rights. If the state infringes these provisions, it may have a sanction imposed on it.

*International Covenant on Civil and Political Rights 1966* (United Nation) Art 14 (6) provides that: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him"

<sup>4</sup> *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* ("Draft Articles") by the International Law Commission (ILC) in August 2001.

<sup>5</sup> *Treaty on the European Union* (Europe) Art 228 (2), (3):

"2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

3. When the Commission brings a case before the Court pursuant to Article 226 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or enalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement, it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment."

*Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1984* Art 3; *Andrea Francovich and Others v Italian Republic, Joined Cases C-6/90 and C-9/90*, [1991] ECR I-5357; *Duncan Fairgrieve, Mads Andenas and John Bell, Tort*

globalisation of commerce and the harmonisation of international, regional and national laws has profoundly influenced national laws related to civil wrongs.<sup>6</sup>

Vietnam started its *Doi moi* (renovation) policy in 1986 with its official ratification by the Sixth Congress of the Vietnamese Communist Party (VCP). This policy has led to a comprehensive reform process starting with economic reform and leading to administrative, judicial, legal and political reforms. This has also been an international trend. In Vietnam, as in Russia, China and Brazil, it represents a part of what a number of observers have described as the ‘centralised system’,<sup>7</sup> ‘developmental state’,<sup>8</sup> ‘new mercantilism’,<sup>9</sup> ‘state-directed capitalism’,<sup>10</sup> ‘centrally-managed capitalism’<sup>11</sup>. This trend was previously observed in Germany and France, and after World War II, in Japan, South Korea and Taiwan.

In this process, wider legal reforms are an essential step. The relationship between economic development and law is subject to considerable debate. Weber, for example, saw a rational legal system as essential for economic development. This issue has been extensively discussed since by writers such as North, Peerenboom, Gillespie, Chen, Milhaupt and Pistor.<sup>12</sup> It is also an issue commonly identified in the Vietnamese literature relating to economic and legal development.<sup>13</sup> The importance of law was

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*Liability of Public Authorities in Comparative Perspective*, British Institute of International and Comparative Law (2003) 571.

<sup>6</sup> Carol Harlow, *State liability: Tort law and Beyond* (Oxford University Press, 2004) 44; John Gillespie and Albert HY Chen (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge Law in Asia, 2010) 7.

<sup>7</sup> Milhaupt and Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development around the World* (University of Chicago Press, 2008) 183.

<sup>8</sup> Gordon White ‘Developmental States and Socialist Industrialisation in the Third World’ (1984) 21 *Journal of Development Studies* 97; Gordon White and Robert Wade, ‘Developmental States and Markets in East Asia: An Introduction’ in Gordon White (ed), *Developmental States in East Asia* (Macmillan Press, 1988) 1; Phil Deans, ‘The People’s Republic of China: The Post-Socialist Developmental State’ in Linda Low (ed), *Developmental States: Relevancy, Redundancy or Reconfiguration?* (Nova Science, 2004) 133; Alvin Y So ‘Introduction’ (2002) (35) *The Chinese Economy* 3.

<sup>9</sup> Jonathan Holslag, ‘China’s New Mercantilism in Central Africa’ (2006) 5 *African and Asian Studies* 133.

<sup>10</sup> Stefan Halper, *The Beijing Consensus* (Basic Books, 2010)11; Yasheng Huang, *Capitalism with the Chinese Characteristics* (Cambridge University Press), ix.

<sup>11</sup> Nan Lin, ‘Capitalism in China: A Centrally Managed Capitalism (CMC) and Its Future’ (2010) 7 *Management and Organisation Review* 63.

<sup>12</sup> This will be discussed further in the next sections: 1.2.2 and 1.2.3.

<sup>13</sup> For example, Bui Ngoc Cuong, ‘Vai trò của pháp luật kinh tế trong việc bảo đảm quyền tự do kinh doanh’ [The role of business law in ensuring the rights of freedom to do business] (2002) (7) *Tạp chí Khoa học Pháp lý* [Legal science journal]; Phạm Duy Nghĩa, ‘Tính minh bạch của

especially recognised in the *VCP Politburo Resolution 48-NQ/TW* in 2005 on the strategy of legal reform.<sup>14</sup> As part of implementing these goals, in 2009, the Vietnamese National Assembly (NA) passed the Law on State Compensation Liability (SCL). It gives to those injured by the actions of state officials the right to sue for compensation in some circumstances. It also makes the state liable to compensate for specific actions of the executive and judicial branches of government and for specific enforcement activities. The law came into force on 1<sup>st</sup> January 2010.

The SCL **is expected** to address a number of problems identified in the former law. It was intended to create a uniform legal basis under which claimants would be more easily able to claim damages from the state. This was meant to better protect the interests of individuals and legal persons when state officials have engaged in unlawful actions. The Law also aims to enhance the accountability of state officials by making them liable for reimbursement. This was expected to further promote the development of a state based on the rule of law in Vietnam.<sup>15</sup> On 3 March 2010, the government passed *Decree 16/2010/ND-CP* providing guidelines for the implementation of the SCL

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pháp luật - Một thuộc tính của nhà nước pháp quyền' [the transparency of laws- one feature of the rule of law] (2002) (1) *Tạp chí Dân chủ và pháp luật [Democracy and Law Journal]*; 'Ảnh hưởng của môi trường pháp luật trong kinh doanh quốc tế' [Influence of laws on international business] (2004) (169) *Tạp chí Phát triển kinh tế [Economic Development Journal]*; Nguyễn Quang Thắng, 'Hoàn thiện hệ thống pháp luật góp phần thúc đẩy kinh tế phát triển' [Improving the legal system in order to promote development of the economy] (1998) (10) *Tạp chí Người đại biểu nhân dân [People's Delegate Journal]* 16; Nguyễn Như Nhiên, 'Cần hoàn thiện pháp luật về kinh tế nhằm đảm bảo hiệu quả an ninh kinh tế trong điều kiện hội nhập hiện nay' [The need to reform economic law in order to ensure effectiveness of economic security in the integration] (2009) (15) *Tạp chí Kiểm sát [Procuratorial Journal]* 34; Đỗ Ngọc Thịnh, 'Một số vấn đề về vai trò pháp luật trong quá trình chuyển đổi từ kinh tế kế hoạch hoá tập trung sang kinh tế thị trường ở nước ta' [Some issues relating to the role of law in the process of transferring from a planned economy to a market economy in Vietnam] (1999) (10) *Tạp chí Nhà nước và Pháp luật [State and Law Journal]* 15; Tào Hữu Phùng, 'Pháp luật kinh tế trong thời kỳ đổi mới: Thực trạng và phương hướng hoàn thiện' [Economic law in the reform: the facts and suggestions] (2002) (7) *Tạp chí Nghiên cứu lập pháp [Legislative Research Journal]* 55; Bùi Ngọc Cường, 'Quan niệm về pháp luật kinh tế trong cơ chế thị trường' [Understanding economic law in the market economy] (2004) (1) *Tạp chí Luật học [Jurisprudence Journal]* 3; Trần Thị Nguyệt, 'Tính quyết định xã hội của pháp luật kinh tế: một số vấn đề lý luận cơ bản' [The decisive role of economic law in society: some theoretical issues] (2006) (2) *Tạp chí Nhà nước và Pháp luật [State and Law Journal]* 39.

<sup>14</sup> *VCP Resolution 48-NQ/TW*- The strategies on building a comprehensive legal system to 2010 and an orientation upward to 2020, adopted on 24/5/2005.

<sup>15</sup> Ministry of Justice, Department of Civil and Economic Law, *Document Introducing the Law on State Compensation Liability*

<<http://thongtinphapluatdansu.wordpress.com/2009/08/04/3477-3/>>.

(Decree 16). Then, the other Government agencies issued a series of secondary legislation to guide the implementation of SCL as well as *Decree 16*.<sup>16</sup>

One year after the SCL came into force, according to an evaluation by the Ministry of Justice (MOJ), it had not yet met the expectations of it. A number of factors believed to be responsible for this were identified including:<sup>17</sup>

- (1) the delay in issuing secondary legislation guiding the implementation of SCL, making it difficult for state officials to accept and resolve state compensation claims;
- (2) officials acting slowly and arbitrarily in resolving cases;
- (3) the concepts were new and raised novel issues and were seen to be complex including in requiring the application of a number of other laws;
- (4) the different levels of government, from the central to the local government, from which liability could emerge; and
- (5) the large and increasing number of cases with limited resources to address them and the limited capacity of state officials.

In spite of this claim about the large number of cases, because of ineffective resolution and enforcement processes, there were already in 2010 indications that the number of cases being resolved was lower than expected. According to an investigation by the Supreme People's Procuracy (SPP), relevant agencies had not properly understood their responsibilities and there was a continuing practice of dodging

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<sup>16</sup> They are the *Joint Circular 19/ 2010/ TTLT-BTP-BTC-TTCP* guiding the implementation of the state liability in administrative activities of 26<sup>th</sup> November 2010; the *Joint Circular 24/ 2011/ BTP-BQP* guiding the implementation of state liability in enforcement of civil judgment of 15<sup>th</sup> December 2011; and *Joint Circular 18/2011/TTLT- BTP-BNV* guiding duties, rights, organization and personnel of local government on state liability for compensation of 19<sup>th</sup> October 2011; *Joint Circular 71/2012/TTLT- BTC-BTP* on Defining the estimation, management, use and settlement of funds for implementation of the State liability of 9<sup>th</sup> May 2012; *Joint Circular 01/2012/TTLT/TANDTC-VKSNDTC-BTP* 18/09/2012 guiding the implementation of the State's liability in civil and, administrative proceedings.

<sup>17</sup> *Báo cáo số 57/ BC- BTP* của Bộ Tư pháp về Sơ kết một năm thi hành Luật Trách nhiệm Bồi thường của Nhà nước ngày 04/04/2011 [*Report 57/BC- BTP* of MOJ on Implementation of the Law on State Liability for Compensation in its First Year on 04/04/2011].

liability.<sup>18</sup> The MOJ's report on the first year of the Law's operation confirmed this. It indicated that in the:<sup>19</sup>

(1) procuracy system: 49 claims had been accepted with 18 resolved leading to compensation of 1,200,504,955 VND;

(2) court system: 16 claims had been accepted with 9 cases resolved leading to compensation of 1,633,627,250 VND;

(3) administrative system: 11 claims had been accepted with one resolved with the amount of compensation unknown;

(4) Provincial People's Committees' systems: 36 claims with 27 having been accepted and 16 resolved leading to compensation of 1,081,392,287 VND.

This report indicated additional difficulties in implementing the new Law, including the management of compensation claims, the conduct of administrative officials required to pay compensation, and the difficulty of determining the personal responsibility of state officials.<sup>20</sup>

In the context of protecting human rights, the further development of Vietnamese economy, and the legal system required to support it, it is important to conduct a further, thorough investigation into the law and the practices related to state liability regarding compensation. This has the potential to contribute to the improvement of the SCL and its implementation which are significant for the success of the legal reform process in the development of Vietnam.

## **1.2. Literature review and conceptual framework**

### **1.2.1. State liability: global overview**

It is generally accepted, albeit with limitations, that a person who causes damage to another intentionally or carelessly should compensate for that loss. The damage might

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<sup>18</sup> Viện Kiểm Sát Nhân dân Tối cao, Tập huấn công tác nghiệp vụ về án hình sự, [The Supreme People's Procuracy of Vietnam: Professional Training] 1/11/2010 <<http://www.vksndtc.gov.vn/tintuc/1686.aspx>>

<sup>19</sup> Report 57, above n 17.

<sup>20</sup> Phùng Hương, Vương mắc trong triển khai thi hành Luật Trách nhiệm Bồi thường của Nhà nước, *Dai bieu nhan dan*. [Challenges in Implementing the Law on State Liability for Compensation ] <<http://daibieunhandan.vn/default.aspx?tabid=81&NewsId=204578>>; Huy Hoàng, Triển khai Luật Trách nhiệm bồi thường của Nhà nước: Tổ chức "bí" vì thiếu người, *Website Bo Tu phap* [Lack of Professional Staff to implement the Law on State Liability for Compensation] <[http://moj.gov.vn/ct/tintuc/lists/nghin%20cu%20trao%20i/view\\_detail.aspx?ItemID=2782](http://moj.gov.vn/ct/tintuc/lists/nghin%20cu%20trao%20i/view_detail.aspx?ItemID=2782)>

be caused not only by individuals but also by authorities including governments and their agencies. Therefore, laws protecting individuals and legal persons from damages caused by state officials need to be considered.<sup>21</sup> The law regarding the liability of the state has been evolving throughout three distinct periods: prior to the 19<sup>th</sup> century, during the 19<sup>th</sup> century and early 20<sup>th</sup> century, and the late 20<sup>th</sup> century to the present.

Before the 19<sup>th</sup> century, in Western European states, both common law and civil law traditions had almost complete immunity from claims by individuals, under principles usually referred to as 'sovereign immunity'. This was related to concepts of royal authority. Maxims such as *The King can do no wrong (Le Roi ne peut mal faire)* reflected these principles.<sup>22</sup> The justifications were that there can be no legal right against the authority that makes the law on which the right depends and that no wrong can be done by the state when there is no remedy against the state.<sup>23</sup> Justinian claimed that God had sent the emperor as a "living statute", to whom statutes themselves were subject.<sup>24</sup> Elsewhere, Justinian himself stated that the emperor alone had power to make statutes and to interpret them.<sup>25</sup> The acceptance of Roman law increased royal authority and laid the foundations for absolutism.<sup>26</sup> The law ascribed to the king the attributes of "sovereignty and independence" within his own dominions stating that the king "owes no kind of subjection to any other potentate on earth".<sup>27</sup> Blackstone writing on English law stated that:<sup>28</sup>

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<sup>21</sup> Wolfgang Peschorn, 'Liability for Officer Fault - The Austrian Experience' OECD and European Union *Conference on Organisation of the Legal Services of the Ministry of Finance: The Experience of EU Member States* (Tbilisi, Georgia, 25-26 September 2009) <[www.oecd.org/dataoecd/18/24/44319890.pdf](http://www.oecd.org/dataoecd/18/24/44319890.pdf)>

<sup>22</sup> Dari-Mattiacci et al, above n 2, 8.

<sup>23</sup> Francis Breidenbach, 'Some Recent Trends in State Liability for Tort' (1962) 38 *North Dakota Law Review* 7.

<sup>24</sup> Nov. 105, 2, 4 (536): "[imperator], cui et ipsas deus leges subiecit, legem animatam eum mittens hominibus" cited in Dr Ana Marta González, *Contemporary Perspectives on Natural Law: Natural Law as a Limiting Concept* (Ashgate Publishing, Ltd., 2008) 37.

<sup>25</sup> C. 1, 14, 12, 3-5 (529): "explosis itaque huiusmodi ridiculosis ambiguitatibus tam conditor quam interpres legum solus imperator iuste existimabitur", cited in Jean Bethke Elshtain, *Sovereignty: God, State, and Self* (Basic Books, 2008).

<sup>26</sup> D Johnston, 'The General Influence of Roman Institutions of State and Public Law', in D L Carey Miller and R. Zimmermann, eds., *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays [Schriften zur Europäischen Rechts- und Verfassungsgeschichte, Bd. 20]* (Berlin: Duncker & Humblot, 1997) (ISBN 3-428-09011-X) 87-101.

<sup>27</sup> Edwin M Borchard, 'Government Liability in Tort' (1924) (34) (1) *The Yale Law Journal* 7.

<sup>28</sup> William Blackstone, *Commentaries on the Laws of England in Four Books. Notes selected from the editions of Archibald, Christian, Coleridge, Chitty, Stewart, Kerr, and others, Barron*

...it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who shall command the king?

Chitty added that:<sup>29</sup>

The inviolability of the King is essential to the existence of his powers as supreme magistrate; and therefore his person is sacred. The law supposes it impossible that the King himself can act unlawfully or improperly. It cannot distrust him whom it has invested with the supreme power; and visits on his advisors and ministers the punishment due to the illegal measures of government. Hence the legal apothegm that the King can do no wrong.

However, conflicting statements about the relationship between the emperor or king and the law can be found. In the Code, a constitution of Theodosius and Valentinian stated that it was worthy of the emperor to profess himself to be bound by statutes.<sup>30</sup> In England, the English Revolution saw limits on royal authority emerge in statements of the law. Blackstone, writing in the 1700s, recognised that the king was subject to the law although the remedies against the government conducted in the king's name may be imperfect. He wrote, echoing the statement in the Code:<sup>31</sup>

The King ought not to be subject to man, but to God, and to the law; for the law make the king. Let the king therefore render to the law, what the law has invested in him with regard to others, dominion and power: for he is not truly king, where will and pleasure rules, and not the law.

In *Ashby v White*, Holt CJ indicated that as well as the possible liability of the king or the state, there was also the possible liability of the state officer who had carried out the wrongful act: "If public officers will infringe men's rights they ought to pay

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*Field's Analysis, and Additional Notes, and a Life of the Author by George Sharswood. In Two Volumes.* (Vol. 1) (Philadelphia: J.B. Lippincott Co., 1893).

<sup>29</sup> Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (J. Butterworth and Son, 1820) 5.

<sup>30</sup> C. 1, 14, 4 (429): "digna vox maiestate regnantis legibus alligatum se principem profiteri".

<sup>31</sup> Blackstone, above n 28.

greater damages than other men, to deter and hinder other officers from the like offences”.<sup>32</sup>

Although there was ambiguity in the law regarding the liability of the state, the immunity of the King, in this period, was dominant. Hence, in both common law and civil law, the state was not liable to pay compensation to individuals in respect of wrongs done to them by the state. The state had unlimited immunity against any claims by individuals.<sup>33</sup> However, it was consistent with the honour of sovereigns and states to make act-of-grace payments for wrongs committed.

By the late 19<sup>th</sup> century and early 20<sup>th</sup> century, the principle of absolute immunity of the state had experienced significant erosion.<sup>34</sup> The US history of state liability in tort, for example, “reflects the evolution from the unqualified and almost unquestioned reception of a common law doctrine of sovereign immunity”.<sup>35</sup> The US law on state liability has been largely skeptical of imposing liability on the state, but also aware of the inconsistency in not allowing the exercise of legal rights against the state similar to those outlined by Blackstone.<sup>36</sup>

The growth of western European economies and the emergence of the middle class came to challenge royal authority in the English and French Revolutions and to subsequently place constitutional limits on the exercise of state power. Lord Mansfield LCJ wrote of the representatives of the sovereign in overseas colonies:<sup>37</sup>

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<sup>32</sup> Holt CJ *Ashby v White* (1703) 2 Ld. Raym. 938, 92 E.R. 126 (QB), E.R. at 137.

<sup>33</sup> Dari-Mattiacci et al, above n 2.

<sup>34</sup> *Ibid*, 13-14.

<sup>35</sup> Under common law, the state is traditionally immune from liability for damages without its consent. Most state constitutions in USA impose restriction on suits against the state. Therefore, a court cannot hear a case asking it to force the state pay damages absent legislative authorization for payment; the remedy is itself unconstitutional. Also, the Eleventh Amendment protects states (but not the federal government since it has immunity at common law) from liability in reaction to 1793 decision by the Supreme Court in *Chisholm v Georgia*. With respect to constitutional torts in particular, the immunity doctrines have been devised by the Supreme Court. Lawrence Rosenthal, ‘A Theory of Government Damages Liability: Torts, Constitutional Torts, and Takings’ (2007) (9) *University of Pennsylvania Journal of Constitutional Law* 797.

<sup>36</sup> Helene Goldberg, ‘Tort Liability for Federal Government actions in the United States: An Overview’ in Duncan Fairgrieve, Mads Andenas and John Bell, ‘Tort Liability of public Authorities in Comparative Perspective’, *British Institute of International and Comparative Law* (2003) 521.

<sup>37</sup> Nasser Hussain, *The jurisprudence of Emergency: Colonialism and the Rule of Law* (Michigan Press, 2003) 78.

... to lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained

Also, the understanding of the state after the Treaty of Westphalia of 1648 about separation of state, and John Locke's ideas about human nature and the natural state<sup>38</sup> led to constitutionalism and the rule of law found in liberal capitalist states.<sup>39</sup> Weber's definition of the state as an entity added to this.<sup>40</sup> Constitutionalism entails a commitment that government is limited by law and accountable under law for the protection of fundamental rights. The 'essence of civil liberty' is that the law provides remedies for violations of rights.<sup>41</sup> The English and French revolutions and subsequent developments show what Milhaupt and Pistor describe as the rolling relationship between economic and legal development as well as the individual paths that states have taken to achieve this. All types of changes, especially those in the economy, may create a demand for new laws to address the uncertainties produced by changes. Once the new law has been established by the lawmakers, it is taken up by the stakeholders who use the rules to the limit to maximise their interests. This creates further uncertainty that needs to be addressed by new law.<sup>42</sup> This rolling relationship between law and the economy may be intensified as economic complexity increases and as stakeholders who are not protected by existing laws demand the protection of their interests.<sup>43</sup> Under the

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<sup>38</sup> According to Locke, the state is created by a social contract. In the natural state people were equal and independent, and everyone had a natural right to defend his "Life, health, Liberty, or Possessions". Lee Ward, *John Locke and Modern Life* (Cambridge University Press, 2010) 84; Ernest Barker, *Social Contract - essays by Locke, Hume, and Rousseau* (Oxford University Press, 1971) 1-145; Zuckert, Michael, *The Natural Rights Republic* (Notre Dame University Press, 1996) 73–85.

<sup>39</sup> Blandine Kriegel et al, *The state and the Rule of Law* (Princeton University Press, 2001).

<sup>40</sup> David Owen and Tracy B Strong, "Introduction," Max Weber: The Vocation Lectures, trans. Rodney Livingstone (Indianapolis: Hackett, 2004) xii-xiii: In the late teens of the twentieth century, Max Weber, a sociologist and highly respected intellectual, gave a series of two lectures by invitation at the University of Munich. These lectures cover the topics of, first "Science as a Vocation" (in November 1917) and then "Politics as a Vocation" (in January 1919).

The lecture introduces a definition of the state that has become pivotal to Western social thought that the state is that entity which claims the monopoly of the legitimate use of force.

<sup>41</sup> Peschorn, above n 21, 3.

<sup>42</sup> Milhaupt and Pistor, above n 7, 28.

<sup>43</sup> Ibid, 42- 43.

pressure of globalisation, states and individuals have become increasingly equal, as Harlow argues, as it creates pressure on state to expand the circumstances in which pecuniary compensation is recoverable from states.<sup>44</sup>

The French Revolution which overturned royal absolutism, and ultimately led to a system of constitutionalism and state liability also shows this. French law came to emphasize the distinction found in Roman law between private and public law in reaction to the role of the aristocracy judged to be oppressors of the people before the revolution. Matters of state liability were dealt with as matters of public law in the system of administrative courts under the Conseil d'Etat outside the general court. It was created by Napoleon I to oversee public administration.<sup>45</sup> It was only in the 1870s, after the fall of the second empire, that it emerged as a serious judicial body.<sup>46</sup> In England, as in France, this was not straight forward. Binnie claims that the significant state immunity in tort recognised in English law in the 1860s was the creation of policy-minded judges and not the result of adherence to older principles and precedents.<sup>47</sup> A later generation had to reverse this by legislation.

Accordingly, an effective system of government liability appears to be a requirement in contemporary states. It should regulate both substantive and procedural contents of governmental liability.<sup>48</sup> The concept of the rule of law is that no person is above the law and every person is subject to the law and under the jurisdiction of the courts with the same responsibility for every act done without legal justification as any other citizen or legal person.<sup>49</sup> The development of the rule of law has been seen in many societies as an important value of constitutionalism.<sup>50</sup>

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<sup>44</sup> Harlow, above n 6, 44.

<sup>45</sup> Moreover, France case law created an independent body of rules for state liability (independent from private law rules of liability). French courts very early recognized a claimant right to damages for losses caused by central authorities (*Blanco* 1873) (*TC 8 February 1873 Blanco Case D.1873.3.17*) and later extended this principle to local authorities (*Feutry* 1908) (*TC 29 February 1908, Feutry, D.1908.3.4914.*).

<sup>46</sup> Jean Brissaud, *A History of French Public Law* (Beard Book, 2001).

<sup>47</sup> WIC Binnie, 'Toward state liability in tort: a comparative study' (1964) (22) *Fac. L. Rev* 88; *Tobin v The Queen* (1864), 16 C.B. N.S. 310. 143 E.R. 1148 (C.P.); *Feather v The Queen* (1865), 6B & S 257, 122 E.R. 1191 (QB).

<sup>48</sup> Peschorn, above n 21.

<sup>49</sup> Dicey, A V, *Introduction to the Law of the Constitution* (Lightning Source, 2009) 189.

<sup>50</sup> Vicki C Jackson, 'Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence' (2003) *International Law Review* 521.

The further evolution of the recognition of state liability as a restraint on government can be seen in various civil law systems such as those of Germany<sup>51</sup>, Brazil<sup>52</sup>, Colombia<sup>53</sup>, Uruguay<sup>54</sup> and also in common law jurisdictions of England<sup>55</sup> and Canada<sup>56</sup>.

However, there are continuing justifications for placing limitations on state liability because of other reasons for restricting how governments can allocate public resources. Some of these also derive from constitutionalism and relate to control by the legislature over the executive government and require the legislature to approve both the raising of revenue and its expenditure.<sup>57</sup> New limitations have emerged out of concerns that states reduce government debt and have balanced budgets.<sup>58</sup>

Increasingly, in the 20<sup>th</sup> and 21<sup>st</sup> centuries, international law has recognised human rights which further implicitly and explicitly restrict the power of states and require that citizens be able to seek remedies against the state in independent and impartial tribunals.<sup>59</sup> Chemirinsky in 2001 summed up the results of the logical working out of this principle and concluded that sovereign immunity, for government at all levels,

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<sup>51</sup> *The Civil Code 2002* (Germany) Section 839; *The Basic Law 1949* (Germany) Art 34. F. Ossenbühl, *Staatshaftungsrecht*, 5th edn 1998, 6 [in German]. For German Law, see Gert Brüggemeier, *From Individual Tort for Civil Servants to Quasi-strict Liability of the State: Governmental or State Liability in Germany*, in Duncan Fairgrieve, Mads Andenas and John Bell, 'Tort Liability of Public Authorities in Comparative Perspective' *British Institute of International and Comparative Law* (2003) 571; Martina, K, *Tradition and change in Administrative Law: An Anglo-German Comparison* (Paperback, 2010); Brüggemeier, Gert, Aurelia Colombi Ciacchi and Patrick O'Callaghan, ed., *Personality Rights in European Tort Law* (Cambridge University Press, 2010);

<sup>52</sup> *The Constitution 1988* (Brazil) Art 37; *The Civil Code 2002* (Brazil) Art 43.

<sup>53</sup> *The Constitution 1991* (Colombia) Art 90.

<sup>54</sup> *The Constitution 1967* (Uruguay) Art 24.

<sup>55</sup> Under the *Crown Proceeding Act 1947* of England, the Crown can be held liable under the rules of tort law. Fairgrieve presented that: In England, the courts have applied ordinary tort rules to government liability (the most developed category being negligence) and only one specific public law tort, misfeasance in public office, is consistently applied. Duncan Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford University Press 2003) ch 4; Martina, K, *Tradition and change in Administrative Law*, 2007, ISBN 3540486887; Martina, above n 51.

<sup>56</sup> The *Exchequer Court Act 1887* (Canada) section 16.c; the *Crown Liability Act 1953* (Canada); *Crown Liability and Proceedings Act S.C. 1990* (Canada) c. 8.

The Canadian Crown Liability was significant in that it imposed liability on the Crown in respect of all torts committed by Crown servants.

<sup>57</sup> Vito Tanzi and Ludger Schuknecht, *Public Spending in the 20th Century* (Cambridge University Press, 2000).

<sup>58</sup> Charles C Griffin et al, *Lives in the Balance: Improving Accountability for public spending in Developing Countries* (Brookings Institution Press, 2009) 37.

<sup>59</sup> *Universal Declaration of Human Rights 1948*, Art 10 and *International Covenant on Civil and Political Rights 1966*, Art 14.

should be eliminated.<sup>60</sup> There has also been a turn to alternative forms of dispute resolution rather than formal law. In what Milhaupt and Pistor describe as a highly centralised legal system, the state has great leverage in determining the extent to which law may be contested by private actors.<sup>61</sup> The state may substitute the demand for law from private actors with extra-legal devices such as norms.<sup>62</sup> Such non-legal alternatives may be preferred by both the state and private actors for various reasons. One reason is that these alternatives often offer cheaper and more effective solutions than legal means.<sup>63</sup> However, this gives the state considerable discretionary powers.<sup>64</sup> However, the remedies do not all need to be found in formal judicial adjudication. From the justice perspective, what emerges from the literature is that possibly the sole virtue of state liability is that it guarantees some form of compensation to victims.<sup>65</sup> Although such an objective could be achieved by insurance or other organized compensation, in many circumstances, these may fail or not exist.

Dari-Mattiacci provides an economic justification for state liability independent of any concept of fairness or justice, in that the state can be a significant source of negative externalities, both through the actions of its employees, officials and agents, and through their failure to act in particular ways. States have police forces and prosecutors, for example, who can cause harm by their actions, as well by their omissions.<sup>66</sup> From a political perspective, Lawrence argues that government liability creates an incentive for government to invest in loss prevention to maximize political control over public resources.<sup>67</sup>

Therefore, most legal systems have come to recognize the liability of the state in a separate law when the state's officials have caused loss or injuries to citizens. These are

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<sup>60</sup> Erwin Chemirinsky, 'Against Sovereign Immunity' (2001) (53) *Stanford Law Review* 1201.

<sup>61</sup> Milhaupt and Pistor, above n 7, 7.

<sup>62</sup> Ibid, 38-39.

<sup>63</sup> Ibid, 40.

<sup>64</sup> Pistor and Wellons Katharina Pistor and Philip Wellons, *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995* (Oxford University Press, 1999) 53.

<sup>65</sup> Dari-Mattiacci et al, above n 2, 17.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid; Rosenthal, above n 35.

seen in legal developments in East Asia, in particular in the laws of Japan<sup>68</sup>, China<sup>69</sup>, South Korea<sup>70</sup>, Taiwan<sup>71</sup>, and Vietnam, for example.<sup>72</sup>

### **Common law jurisdiction as an example of contemporary state liability**

The complexity of the issues around state compensation and the difficulties of bringing it into a single concept of the rule of law can be seen in developed common law states. In common law jurisdictions, states have, often sought through legislation to place themselves under the same responsibilities as individuals for wrongdoings. So in the United Kingdom, the United States, Canada, and Australia, at the federal level, national governments have made themselves liable in tort and contract but have resisted liability for all injuries which they may inflict through other breaches of the law.<sup>73</sup> The complexity of the remaining law relating to state immunity in these systems and various principles underlying them are indicated by Seddon. He finds immunities in various fields of doctrinal law and processes including: (i) the separate legal personality of governments and associated agencies; (ii) the separate legal personality of corporations or statutory bodies controlled by governments; (iii) rules of interpretation excluding the state from obligations imposed by statute; (iv) immunity from coercive judicial orders; (v) immunity from execution of judgment; and, (vi) priority of state debts over other creditors.<sup>74</sup>

Without specific legislation for compensation, the main remedies available to those wrongly convicted in common law jurisdiction are to (1) apply for ex gratia awards, (2) file a tort claim against the responsible parties, or, (3) propose an individualized compensation Bill to be enacted Parliament.<sup>75</sup> However, since there are

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<sup>68</sup> *The Constitution 1946* (Japan) Art 17; *The State Compensation Law 1947* (Japan).

<sup>69</sup> *The State Compensation Law 1994* amended in 2010 (China).

<sup>70</sup> *The National Compensation Act 1951* (revised in 1967 and amended six times since then) (South Korea).

<sup>71</sup> *The Sate Compensation Law 1981* (Taiwan).

<sup>72</sup> Dari-Mattiacci et al, above n 2, 13-14; Lin, above n 1, 100.

<sup>73</sup> Peter W Hogg and Patrick J Monahan, *Liability of the Crown* (Carswell, 3<sup>rd</sup> ed, 2000) 108-155.

<sup>74</sup> Nicholas Seddon, *Government Contracts: Federal State and Local* (Sydney, 4<sup>th</sup> ed, 2009) 134-232.

<sup>75</sup> (1) Ex Gratia Payments: In common law jurisdictions especially Australia, one compensation remedy is the application for ex gratia, 'act of grace' payments. As "act of grace" payments, the state may award ex gratia compensation without explanation or obligation and its decisions are final and not reviewable.

currently no guidelines associated with ex gratia payments for wrongful conviction, any consideration of the ex gratia applications are often secret and the factors relevant to the decisions are undisclosed. This has been criticized as unjust, inadequate, and leading to arbitrary awards.<sup>76</sup> These payments are also considered as discretionary with little opportunity to have refusals reviewed.<sup>77</sup> Where there is the possibility of obtaining a review, claims may be difficult to make out and may be time-consuming and expensive. In the absence of statutory provisions, there is little guarantee that such claims will be successful, how much compensation will be awarded, or how long the process may take.<sup>78</sup> Special Bills are criticized as an inadequate compensation solution, since they appear to depend on the political climate and a politician's influence.<sup>79</sup> Given the individualized nature and treatment of each Bill, there is little uniformity between the Bills and the conditions and amount of the awards.<sup>80</sup>

In terms of state liability at common law, Harlow argues for a general principal for compensation that relies on concepts of distributive justice.<sup>81</sup> She notes that some compensation is political and involves distributive justice – ex gratia payment indicates that an award is not justiciable.<sup>82</sup> Hogg also stated that with the steady expansion of the functions of the central government, the immunity of the Crown is a grave defect in the remedial law.<sup>83</sup> Harlow agrees that there should be a principle of compensation to guide those who are handling claims.<sup>84</sup> She analysed mass torts to indicate that the common

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(2) Civil Litigation: Individuals may seek redress from police officials, lawyers, or state officials by a civil Litigation. A tortious claim may have a basis in false imprisonment, malicious prosecution, or misfeasance.

(3) Specialized Bills: Another form of compensation is private bills or special legislation. Private bills are created as a means of directly compensating the individual through state legislature for injustice incurred for the wrongful conviction and incarceration.

See: Susan Kneebone, *Tort liability of Public Authorities* (LBC Information Services, 1998); Harlow, above n 6, 88; Dioso-Villa, Richel, 'Without legal obligation: compensating the wrongfully convicted in Australia' (2012) 75 (3) *Albany Law Review* 1329-1372.

<sup>76</sup> Dioso-Villa, above n 75.

<sup>77</sup> Ibid; Christine E Sheehy, *Compensation for Wrongful Conviction in New Zealand*, 8 *Auckland U. L. Rev.* 979.

<sup>78</sup> Dioso-Villa, above n 75; Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated* (2004) (52) *Drake L. Rev.* 703, 706.

<sup>79</sup> Dioso-Villa, above n 75; Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction* (Pace Law Faculty Publications, 1999) 94.

<sup>80</sup> Dioso-Villa, above n 75; Bernhard, above n 78, 706.

<sup>81</sup> Harlow, above n 6, 116.

<sup>82</sup> Ibid 88.

<sup>83</sup> P Hogg, *Liability of the Crown* (The Law book company Limited, 1971) 13.

<sup>84</sup> Harlow, above n 6, 123.

law system could not cope with models of litigation based on individual actions. Mass tort cases are now processed in much the same way as statutory and administrative schemes.<sup>85</sup>

The debate over the principles of, and the limits to state liability, continue to be debated in common law systems. Dioso-Villa, Richel and Harlow suggest that legislators, lawyers and policy-makers in common law systems need to fashion a new and less aggressive system of state responsibility founded on community values and social solidarity.<sup>86</sup> Harlow, however, argues that there should be a definite line drawn – or a clear distinction made – between liability and compensation, so that liability should not automatically lead to compensation. In particular, she suggests that administrative compensation should only extend to ‘abnormal’ and ‘exceptional’ losses and what she terms ‘botheration payment’. In respect of tort, she sees public liability as a more general problem of tort law which is not to be resolved by special rules of public liability but by a focus on tort law itself and on principles of corrective justice.<sup>87</sup> She recommends benchmarking of the regulatory impact of new laws.<sup>88</sup> Hogg also suggests that there should be an analysis of private losses caused by every new government program which would focus the attention of policy and law makers and make them address issues of compensation.<sup>89</sup>

### **1.2.2. State liability in Vietnamese reform process**

As mentioned above, in Vietnam the development of the laws regarding state liability has been part of the implementation of *Doi moi*. Vietnam initiated this with its official ratification by the Sixth Congress of the Vietnamese Communist Party (VCP) in 1986 which represents a landmark in the reform of Vietnam’s economic, legal and political systems.<sup>90</sup> It has driven significant reform in government administration and the role of the law in regulating the state’s activities.<sup>91</sup> In 1991, at its Seventh Congress, the VCP

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<sup>85</sup> Ibid 48.

<sup>86</sup> Ibid 9; Dioso-Villa, above n 75; Sheehy, above n 77, 979.

<sup>87</sup> Harlow, above n 6, 127.

<sup>88</sup> Ibid 133.

<sup>89</sup> P W Hogg, *Liability of the Crown* (Toronto: Carswell, 2<sup>nd</sup> ed., 1989); P W Hogg, ‘Compensation for Damage Caused by Government’ (1995) (6) N.J.C.L. 7 & 12.

<sup>90</sup> Gillespie and Chen, above n 6, 11.

<sup>91</sup> Mathieu and Ket, *Developing a law-based state in Vietnam* cited in Gillespie, J, Chen, A, (eds), *Legal Reforms in China and Vietnam: A comparison of Asian Community* (Routledge Law in Asia, 2010).

adopted the concept of *nha nuoc phap quyen* [the rule of law].<sup>92</sup> This derived from a similar concept in the Soviet Union, *pravovoe gosudarstvo*.<sup>93</sup> The idea of a state based on the rule of law in Vietnam has several characteristics which distinguish it from its use in other political and legal systems. According to the VCP's Resolution XI, the Vietnamese state based on the rule of law has these features: (1) the state in Vietnam is a socialist state of the people, by the people and for the people, with the power belonging to the people; (2) the structure and operations of the state are based on the Constitution and respect and protect the Constitution; (3) the state monitors society by law and ensures the supremacy of law; (4) the state respects and protects human rights, the freedoms and rights of citizens, and maintains the relationship between the state and citizens; (5) the power of state is unified with the delegation of power to, and co-ordination among, state bodies in exercising legislative, executive and judicial rights; and (6) the VCP is the leading force in the state.

The principle of the rule of law was incorporated into Article 2 of the *Constitution 1992* as amended in 2001 and 2013. The Constitution affirms its own supremacy and the law stating that 'all state agencies and political parties must abide by the Constitution and the law'.<sup>94</sup> Article 50 of the *Constitution 1992*, amended in 2001, and Article 14, amended in 2013, also provide that human rights are respected and protected under Vietnamese law. One of the major objectives of introducing the concept of the rule of law, according to Gillespie, 'is to reform the operation of state executive organs'.<sup>95</sup> Indeed, to succeed in building a state based on the rule of law in parallel with the creation of a comprehensive legal system of law enforcement state officials plays a vital role and their observance of the law is significant. To both increase the responsibility of state officials and to protect human rights, the *Constitution 1992*, as amended in 2001 and 2013, states that a person who has suffered a loss through wrongful acts has the right to claim compensation.<sup>96</sup> Based on that provision, the *Civil Code 1995* and *2005* provided for liability for compensation for damage caused by state

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<sup>92</sup> Many Vietnamese scholars describe the concept of 'nha nuoc phap quyen' as the concept of 'the rule of law' but in the book *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* the authors state that this concept is understood as law-based state.

<sup>93</sup> Gillespie and Chen, above n 6, 11.

<sup>94</sup> *The Constitution 1992 amended 2001* (Vietnam) Art 4, 12, 146; *The Constitution 1992 amended 2013* (Vietnam) Art 4, 8, 9, 10.

<sup>95</sup> Gillespie and Chen, above n 6, 12.

<sup>96</sup> *The Constitution 1992 amended 2001* (Vietnam) Art 72 and 74; *The Constitution 1992 amended 2013* (Vietnam) Art 31(5).

officials.<sup>97</sup> To enforce these provisions, subordinate legislation provided some guidance and interpretation.<sup>98</sup> However, those provisions were insufficient and less than effective. Therefore, the enactment of the SCL 2009 was expected to more effectively promote the *Doi moi* policy, enhancing legal institutions and strengthening the protection of human rights which supports the rule of law in Vietnam.<sup>99</sup>

It is widely accepted that the SCL is a significant development in the rule of law in Vietnam. The SCL, observes Pham Quoc Anh who is Chair of the Vietnam Lawyer Association, reflected further democratization. The Law has elevated the role and position of the individual to be equal with the state as it allows the individual to sue the state for compensation when state officials have taken wrongful actions and caused damage. The Law, in his opinion, is of great significance in the process of judicial and administrative reform.<sup>100</sup> Duong Dang Hue, Director of the Department of Civil-Economic Law (MOJ), noted that the SCL is an effective remedy for the “bureaucratic disease” of state officials. He also believes that the SCL is a major legislative effort to support a state based on the rule of law in Vietnam.<sup>101</sup> Duong Thanh Mai, former Director of the Institution of Legal Science (MOJ), stated that the enactment of SCL and its enforcement represented significant progress in building a state based on the rule of law.<sup>102</sup> She argued that in such a state, the Constitution is the fundamental law that must be implemented. The SCL is one law which supports the provisions regarding human rights and the right to compensation which is provided for in the Constitution. She also

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<sup>97</sup> *The Civil Code 1995* (Vietnam) Art 619 and 620; *The Civil Code 2005* (Vietnam) Art 622 and 623.

<sup>98</sup> *Decree No 47/CP (3/5/1997) On Dealing with Compensation for Damage Caused by State Officials* and the Standing Committee of the National Assembly of Vietnam, *Resolution 388 NQ/UBTVQH (17/3/2003) On Compensation for the Victims of Wrongful Convictions*.

<sup>99</sup> Ministry of Justice, above n 15.

<sup>100</sup> ‘Bắt đầu thực hiện Luật Trách nhiệm Bồi thường của Nhà nước: Nhà nước dễ trở thành con nợ’. [At the early stage of implementation of the SCL: it is easy for state to become a debtor] 04/01/2010 <<http://vietinfo.eu/cung-suy-ngam/bat-dau-thuc-hien-luat-trach-nhiem-boi-thuong-nha-nuoc-nha-nuoc-de-tro-thanh-con-no.html>>

<sup>101</sup> ‘Luật Trách nhiệm Bồi thường của Nhà nước- Không lo Nhà nước bù không xuể’ [The law on State Liability for Compensation: there is no worry that the state would not be able to compensate] *Báo Pháp luật Thành phố Hồ Chí Minh* [Ho Chi Minh Law newspaper] <<http://vnlawfind.com.vn/default.aspx?tabid=170&ID=6278&CateID=>>

<sup>102</sup> Duong Thanh Mai, Ban hành và thực thi Luật Trách nhiệm Bồi thường của Nhà nước- một bước tiến quan trọng trong tiến trình xây dựng Nhà nước pháp quyền XHCN ở Việt Nam, *Tọa đàm ngày 16/3/2010 do VCCI, Dự án Jica tổ chức tại Thành phố Hồ Chí Minh* [promulgation and implementation of SCL- a major step in the process of building the state based on the rule of law in Vietnam, workshop on 16/3/2010 organised by VCCI and Jica project in Ho Chi Minh City] <http://vibonline.com.vn/vi-VN/Forum/TopicDetail.aspx?TopicID=3059>.

stated that the Law represents the legislature's intention to emphasise law reform and a change in the conduct of agencies and officials working in them based on the principle of the rule of law.<sup>103</sup>

While one of the outcomes of *Doi moi* is now intended to be a state based on the rule of law, with the SCL being instrumental in this, many scholars have been critical of the developments. It is claimed that law reform is aimed only at strengthening and legitimizing the VCP and the state, and fails to promote and realize human rights and human development, which, this critique presumes, is the ultimate purpose of the rule of law.<sup>104</sup> It is also claimed that the rule of law is promoted only in the economic domain and that civil and political rights are not protected by law and that the judiciary lack the independence required to effectively review the power exercised by the VCP and the state.<sup>105</sup> These critics of the state often describe the Vietnamese government as 'authoritarian' or 'illiberal'.<sup>106</sup>

As indicated above in section 1.1, there is significant literature on the relationship between economic and legal development. North refers to three elements which are required to build the institutional capacity to support economic growth: (1) formal written rules such as statute law, common law and regulations; (2) informal rules such as conventions, norms of behaviour and voluntary codes of conduct; and, (3) the effectiveness of related enforcement mechanisms.<sup>107</sup>

In his comparison of China and Vietnam, Peerenboom has argued, on the basis of an 'East Asian Model' (EAM), that there can be a sequencing of economic and legal development. This model shows that it may be appropriate, legitimate and pragmatic for economic development to be pursued before liberalisation and democratization. It should be noted that, to a lesser extent than Milhaupt and Pistor, he sees that there are exceptions to the generalisations he makes and that all states have their own variations from any model. His argument is based on both empirical evidence and socio-political analysis. He observes that in Asia there are many countries such as Japan, South Korea, and Taiwan which have successfully developed their economy first and democracy

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<sup>103</sup> Ibid.

<sup>104</sup> Gillespie and Chen, above n 6, 21.

<sup>105</sup> Ibid.

<sup>106</sup> Blandine Kriegel, *The State and The Rule of Law* (translated by Marc A LePain and Jeffrey C Cohen) (Princeton University Press, 1995) 11.

<sup>107</sup> North, Douglass, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990) 3-4.

later. He also points out that countries pursuing democratization with low levels of economic development often experience major problems with social instability and political violence as seen, for example, in Thailand. In his analysis, “authoritarian regimes are better suited to lower levels of development because they can force through tough economic decisions and maintain social stability, albeit by restricting civil and political rights.”<sup>108</sup>

Peerenboom concludes that there are preconditions for the creation of democratic and liberal states, such as particular levels of wealth, specific effective institutions and the development of a civil society.<sup>109</sup> He also states that democratization alone is not enough to lead to the rule of law if institutions are weak or absent, and competent corps of judges, lawyers, and prosecutors are missing.<sup>110</sup> He is critical of a sequential approach which puts the development of human rights first, which he calls the ‘capabilities approach’:<sup>111</sup>

More generally, the experiences of Asian countries suggests that the ‘capabilities’ approach is likely to lead to political instability when ruling parties in lower-income countries are not able to meet the inflated expectations of citizens. The capabilities approach promises citizens more than even traditional socio-economic rights, which have been and still are in most countries considered to be non-justiciable.

He indicates that the focus on economic growth and rights is both complementary and contradictory and needs to be balanced.<sup>112</sup> He also demonstrates that there are obvious differences between a liberal democratic conception of rule of law and statist socialist versions.<sup>113</sup> However, Peerenboom points out there are negative aspects to the EAM which partly support the claim that the rule of law is being mainly pursued in the economic domain:<sup>114</sup>

There is no doubt that the EAM, with its two-track legal system, is not pretty. In many cases, the restrictions on civil and political rights are

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<sup>108</sup> Randall Peerenboom, ‘Rule of law, democracy and sequencing debate: lessons from China and Vietnam’ in John Gillespie and Albert HY Chen (eds), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (Routledge Law in Asia, 2010) 37.

<sup>109</sup> Peerenboom, above n 108, 22.

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid* 42.

<sup>112</sup> *Ibid* 41.

<sup>113</sup> *Ibid* 35.

<sup>114</sup> *Ibid* 36.

egregious. Abuse of power is frequent. Well-intentioned ‘political dissidents,’ human rights activists and corruption-exposing whistle blowers may be harassed and persecuted, causing severe harm to individuals involved and deterring others from pressing for welfare-enhancing reforms. There is also a danger that authoritarian rulers will hang on to power too long, or move too slowly on reforms.

Peerenboom’s observation are also consistent with Marxist views of the development of human society, given greater explanation in the letters of Engels, that the economic structure of society raised is its real foundation. On this base is the political and legal superstructure which corresponds with the social consciousness that dominates the economic base. The mode of production and exchange determines the social, political and intellectual life processes in general.<sup>115</sup> Moreover, it exemplifies Milhaupt’s and Pistor’s thesis that different governments may promote economic growth in different ways.<sup>116</sup>

Although not rejecting Peerenboom’s and other authors’ arguments, Gillespie and Chen warn that the mode of legal development that has contributed to economic growth and the maintenance of VCP domination may be the price Vietnam has to pay. They imply that the increase in material wealth may have been achieved; however, this achievement is attributable in part to heavy-handed repression of civil liberties which is a heavy price to pay.<sup>117</sup>

As mentioned, in the reform process, Vietnam has not only focused on the development of the economy; it has also sought to reform the institutions of the executive government, the courts, and the procuracy. Legal reform has not only been directed to developing the economy through, for example, commercial law, and foreign investment law and competition law, but also to promulgating laws which respect human rights. The SCL is evidence that Vietnam has paid attention to protecting human rights at the same time that it seeks to develop the economy. It also evidences efforts to build institutional capacities to support the development of the rule of law. However,

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<sup>115</sup> Marx, *Capital*, 3:437, 876; *Critique of the Gotha Programme* (New York: International Publishers, 1966); Frederick Engels, *The Housing Question* (Moscow: Progress Publishers, 1979); Marx, *Theories of Surplus Value*, part 1 (Moscow: Progress Publishers, 1963); Marx, *Theories of Surplus Value*, part 3 (Moscow: Progress Publishers, 1971); Frederick Engels: *From a Letter To W Borgius* (London, January 25, 1894); Frederick Engels, *Anti-Dühring* (New York: International Publishers, 1939).

<sup>116</sup> Milhaupt and Pistor, above n 7.

<sup>117</sup> Gillespie and Chen, above n 6, 22.

whether the purposes of the Law have been achieved and the institutional capacities required for it have been developed, remain questionable as stated by North. The next section and the answers to the research questions addressed throughout the thesis are intended to provide a satisfactory conclusion to these issues.

In short, although there is a debate about the manner and direction of Vietnamese reforms, the development of the law on state liability is in line with global trend. It has moved from the absence of any provisions, to including several provisions in the Civil Code and, finally, to separate law. The emergence of the SCL expresses the intention of the VCP and state to develop a state based on the rule of law which protects human rights in Vietnam.<sup>118</sup> It is consistent with some other features of the reforms which have seen strong economic growth over a long period together with the maintenance of greater equality suggesting that available resources are being partly used to ‘effectively promote human well-being.’<sup>119</sup>

### **1.2.3. Framework for the research**

The Vietnamese state has been engaged in the *Doi moi* process since 1986. It should be acknowledged that the legislation on public administration is now clearer and more transparent with more specific accountabilities than it was nearly three decades ago.<sup>120</sup> The procedures for promulgating legislation have been reformed. The legal system is more certain and more protective of citizens’ rights. Many laws have created a legal framework enabling the state to ensure that society is regulated by the law. Mathieu and Ket find it impressive that legislative effort has been made to build a comprehensive regulatory framework for the state and its civil servants to operate within a clear law.<sup>121</sup>

However, scholars and legal experts have revealed a number of problems. One is ‘legislative inflation’ with many poor-quality laws. Another is described as *luat khung*, *luat ong* [law-frame, law-pipe] which means the law states only general principles<sup>122</sup> or *luat treo* [suspended law] which indicates that the law exists in the books but not in

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<sup>118</sup> The VCP’s Resolution 49; Ministry of Justice, above n 15.

<sup>119</sup> Peerenboom, above n 108, 42.

<sup>120</sup> Mathieu and Ket, above n 91, 149.

<sup>121</sup> Ibid.

<sup>122</sup> Bảo Minh, “Tranh tình trạng luật ‘khung’, luật ‘ong’” [The Situations of ‘Law-Frame’ and ‘Law-pipe’ Have to Be Avoided] *Sài Gòn Giải Phóng* <[www.sggp.org.vn/thoisu/2006/8/56501](http://www.sggp.org.vn/thoisu/2006/8/56501)>

practice.<sup>123</sup> As a result, many scholars have doubts about the effectiveness of these legal reforms, including the law on state liability.

Mathieu and Ket, for example, emphasise that despite progress toward a clearer legislative framework governing state activities, there is still complexity, overlap, and inconsistency.<sup>124</sup> They illustrate this by examining the problem of legislative inflation produced by the poor quality of laws. The number and the length of legal texts, including laws, decrees, ordinances, and resolutions have, they claim, created a regulatory labyrinth. They also point out that:<sup>125</sup>

The quality of laws which are only “frames” is not good enough to be directly implemented. ...To implement the law, secondary legislation is then needed, such as decrees and ordinances. This situation contributes to aggravation of legislative inflation but also delays the implementation of laws, as adopting this secondary legislation takes time. Moreover, the decrees and other texts adopted by different institutions sometimes contradict the laws.... [T]here is then plenty of room for inaction, personal interpretation, arbitrariness, and corruption.

As Gillespie observes ‘for most Vietnam’s history laws played a relatively minor role compared with regulation through moral virtue, administrative measures, and self regulation by village officials and families’.<sup>126</sup> Sidel similarly observes that Vietnamese law has played a narrow role in recent national political and legal life dominated by the VCP.<sup>127</sup> Hao concluded in 2007 that while the Vietnamese legal framework on human rights has been positively changed, it is still far from adequate.<sup>128</sup> Sidel, in 2008, stated that the distinctive characteristics of the key principles underlying the post-1986 reform of Vietnamese legal system include a strong role for the state and an instrumentalist concept of law as serving state interest and priorities, and a notion of rights as state-granted rather than emanating from concepts of natural rights.<sup>129</sup>

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<sup>123</sup> Anh Xuan, “Luat ... treo” [Suspended law] *Người Lao Động*, 15 August 2008 <[www.laodong.com.vn/Home/Luat-treo/20088/102192.laodong](http://www.laodong.com.vn/Home/Luat-treo/20088/102192.laodong)>

<sup>124</sup> Mathieu and Ket, above n 91, 141.

<sup>125</sup> Ibid.

<sup>126</sup> Gillespie and Chen, above n 6, 78.

<sup>127</sup> Mark Sidel, *Law and Society in Vietnam: The Transition from Socialism in Comparative Perspective* (Cambridge University Press, 2008) 2-3.

<sup>128</sup> Hao Duy Phan, ‘A review of the legal framework for human rights protection in Vietnam’ (2007) (2) *Asia-Pacific Journal on Human Rights and the Law* 20.

<sup>129</sup> Sidel, above n 127, 197-222.

By pointing to the tools that may be utilised by the state in centralised systems, Milhaupt and Pistor provide useful insights into the role of the state in shaping the pattern of legal change. The authors' analysis shows the tools that may be utilised in both the formulation and enforcement of law. They indicate that a rapid convergence of the law-in-books in state-led economies towards other systems is unlikely to occur and that changes in the law in practice are likely to take place at an even slower pace. Substantial changes to the formal law may be introduced by the state in response to pressures from globalisation and interest group politics.<sup>130</sup> Other devices, such as limitations of norms, may, however, continue to operate in the implementation of changes in the formal law, and mitigate the effect of those changes. This is also consistent with Pistor and Wellons' findings in their earlier study of legal developments in six Asian economies. They found that different parts of those systems took different paths in development ('path differentiation'). While strong signs of convergence towards western models were present along the allocation or contents of the law, the procedural dimension, namely the application and enforcement of law, tended to be more path-dependent.<sup>131</sup>

Uniform application of national laws in Vietnam is also affected by localism, corruption, legal culture and the uncertain overlap of VCP and government activities and responsibilities.<sup>132</sup> Those problems are also seen with the SCL as well as in its enforcement. Consequently, there is some scepticism about the success of the SCL in imposing restraints on state power and officials.

Other challenges have been expressed by Quinn. He indicates that the movement from rule by bureaucracy to rule by law is not necessarily fast or easy. In the case of Vietnam, in an effort to keep pace with other reforms, the NA and the government have developed very broad legal frameworks. The ongoing tension between the future system and the existing system may mean that there are no or unexpected or converse

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<sup>130</sup> David M Trubek, 'The Political Economy of the Rule of Law: The Challenge of the New Developmental State' (2009) (1) *Hague Journal on the Rule of Law*, 28-32; David M Trubek, 'Developmental States and the Legal Order: Towards a New Political Economy of Development and Law' (University of Wisconsin Law School, Legal Studies Research Paper Series, Paper No.1075, October 2010) 10-12 <<http://ssrn.com/abstract=1349163>>; Mark Robinson and Gordon White (eds), *The Democratic Developmental State: Political and Institutional Design* (Oxford University Press, 1998).

<sup>131</sup> Katharina Pistor and Philip Wellons, *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995* (Oxford University Press, 1999) 285.

<sup>132</sup> Đỗ Quốc Sâm, 'Bàn về lãnh đạo và quản lý trong cải cách hành chính' [On Leadership and Administration in the Administrative Reforms] (2007) *Tap chi Cong San* 6.

outcomes.<sup>133</sup> He and other writers have pointed out that in its intention to create a legal system for regulating a market-oriented economy, Vietnam has borrowed western law but without its legal institutions or culture.<sup>134</sup>

In addition, the laws relating to state activities are often considered as tools to protect the state itself rather than individuals or legal persons or other organisations. Jayasuriya, in 1999, argued that the liberal understanding of the use of law and the rule of law in the adjudication of disputes between individuals and individuals and the state and public officials was not observed in Vietnam and several other countries in Asia. The law had been used to entrench state power and as an instrument to pursue the objectives of the state.<sup>135</sup>

One further difficulty impacting on the effectiveness of the legal framework is the lack of an adequate blueprint.<sup>136</sup> The legal reform process has been conducted without an integrated and comprehensive plan. Thus, the overlap and conflict between the laws and other regulations is common in Vietnam. In *Resolution 48*, even the Political Bureau (Politburo) of the central committee of the VCP admitted that:<sup>137</sup>

*Nhìn chung hệ thống pháp luật nước ta vẫn chưa đồng bộ, thiếu thống nhất, tính khả thi thấp, chậm đi vào cuộc sống. Cơ chế xây dựng, sửa đổi pháp luật còn nhiều bất hợp lý và chưa được coi trọng đổi mới, hoàn thiện. Tiến độ xây dựng luật và pháp lệnh còn chậm, chất lượng các văn bản pháp luật chưa cao. Việc nghiên cứu và tổ chức thực hiện các điều ước quốc tế mà Việt Nam là thành viên chưa được quan tâm đầy đủ. Hiệu quả công tác tuyên truyền, phổ biến, giáo dục pháp luật còn hạn chế. Thiết chế bảo đảm thi hành pháp luật còn thiếu và yếu.*

[In general, the Vietnamese legal system is inconsistent and not unified, often ineffective and difficult to apply in practice. The mechanism for making or amending laws is irrational, not comprehensive, and it has not been yet been paid sufficient attention. Making laws and ordinances is slow and the quality of legislation is not high. Research about and implementation of international treaties to which Vietnam is a party have not been paid

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<sup>133</sup> Brian J M Quinn, *Note, Legal Reform and Its Context in Vietnam* (Selected Works, Boston College Law School, January 2002) 221.

<sup>134</sup> *Ibid.*

<sup>135</sup> Kanishka Jayasuriya, *Law, capitalism and power in Asia: the rule of law and legal institutions* (New York : Routledge, 1999).

<sup>136</sup> Gillespie and Chen, above n 6, 96.

<sup>137</sup> *VCP Resolution 48*, above n 14.

enough attention. Effective legal education and awareness of the law is limited. The institutions to ensure implementation of laws are weak and inadequate.]

The quality of drafting and implementation of laws, including the law on state liability for compensation, is very poor. When evaluating the XII NA's operational effectiveness for the period 2007-2011, during which it enacted the SCL, Professor Duong observed that:<sup>138</sup>

*Về chất lượng lập pháp, tuy đã có tiến bộ, nhưng cũng còn một số luật còn chứa đựng những quy định chưa phản ánh đầy đủ nhu cầu của cuộc sống, nên tác dụng điều chỉnh không cao, một số quy định còn thể hiện ý chí chủ quan, tính dự báo không cao, tính khả thi còn thấp, nên sức sống của một số điều luật và đạo luật không dài...*

*Một số luật mới ban hành có những quy định trái với luật hiện hành do chính sách đề ra thiếu nhất quán, nhưng chưa kịp thời sửa đổi, bổ sung những mâu thuẫn đó, làm cho hệ thống pháp luật thiếu thống nhất, lúng túng trong thực hiện, tính khả thi thấp. Việc ban hành văn bản hướng dẫn luật còn chậm làm cho luật chậm đi vào cuộc sống, gây khó khăn cho việc thực hiện luật. Hình thức thể hiện tuy có tiến bộ, nhưng nhiều điều luật vẫn còn quy định dài dòng, thiếu rõ ràng, minh bạch và thiếu chế tài cụ thể.*

[In this period, regarding the quality of legislation, although achieving certain progress, there are some laws containing provisions which have not yet reflected adequately the needs of life so they are difficult to apply in practice; some rules are subjective, with low predictability, limited feasibility, so the viability of such laws does not remain stable. ... Moreover, some new laws have been made contrary to existing provisions due to inconsistent policy proposals that produce inconsistencies in the legal system, with limited effectiveness and difficulties in their implementation. The promulgation of secondary regulations guiding the laws is often slow. This creates difficulties in implementing the law. Many provisions are over long, lacking clarity, transparency and specific sanctions.]

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<sup>138</sup> Prof. Dr. Trần Ngọc Đường who is senior expert of Institute of legislative research, delegate of NA X, XI, he is former Vice Chairman of NA office, former assistant of Head of NA, former Chef Editor of the journal of legislative research, *Legislative activities of NA XII* [Hoạt động lập pháp của Quốc hội nhiệm kỳ XII] <<http://luathoc.cafeluat.com/showthread.php/33229-Hoat-dong-lap-phap-cua-nhiem-ky-Quoc-hoi-khoa-XII#ixzz2TJx6JPH0>>

This research places the SCL in the context of the Vietnamese reform program. It is focussed more on the legal developments than on the economic development. Nevertheless, it touches on a number of issues raised in the literature including: the role of the state in the development state or a centralised system,<sup>139</sup> the state apparatus such as government agencies and the courts, the role of law in protecting human rights and in the legal reform process, and the procedural dimension or the application of the law in practice.

### **1.3. Aims of Project**

As mentioned above, the fundamental objectives of the Vietnamese state are to build a socialist oriented market-economy and a state based on the rule of law which also better protects human rights.<sup>140</sup> The SCL was expected to be a key to achieve those goals. It represents a change in the relationship between the state and its citizens. It is also a tool to promote the more effective enforcement of the law by enhancing the accountability of state officials. However, the Law and its enforcement are problematic and this may prevent the fulfilment of these intentions and subsequently produce a negative impact on the reform process.

The main aim of this research project is to examine the effectiveness of the SCL and its enforcement and to consider appropriate mechanisms which may improve it and enhance its implementation which may strengthen and accelerate the reform process. The specific aims of the study, in that context, are:

- (1) to review and analyse theories and policies relating to the compensation liability of the state for wrongful actions;
- (2) to critically evaluate the appropriateness of present laws on state liability for compensation in Vietnam;
- (3) to review and analyse the procedures and enforcement of the SCL;
- (4) to review and examine the laws relating to state liability in selected comparable jurisdictions, including the People's Republic of China;

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<sup>139</sup> This term mention earlier in 1.1.

<sup>140</sup> These objectives are also highlighted in Communist Party of Vietnam, *Resolution VI, VII, VIII, IX, X* (National Political Publishing House, 1987, 1991, 1996, 2001, 2006); *The Constitution 1992 (amended 2001)* (Vietnam) Art 2, 12, and 15.

(5) to consider appropriate reforms to the Vietnamese law and processes for determining and enforcing state liability.

The study is limited to the SCL, secondary legislation and the remedies provided under it relating to wrongful decisions or actions by the executive and judicial branches of government and for specific wrongful enforcement activities. It does not study the liability of the state in other matters including infringement of international obligations, breaches of contract, negligence in respect of state property (roads, trees, and medicine), or compensation for taking land. The law and cases in this research are as recent as December 2013. It should be noted that in November 2013 Vietnam revised its Constitution which came into force in January 2014. The revised Constitution is referred to as the relevant fundamental parts of the Constitution relating to this thesis have not been changed including the political system, legal system, and the right to compensation.

#### **1.4. Core research questions**

While principles relating to state liability have now been discussed and developed over a long period, there are no common legal standards, principles or policies to be seen in national legal systems. Vietnam, because of its own history and circumstances, is still at a relatively early stage in their development and application. There also has been no previous independent research which has systematically studied state liability in Vietnam including the enforcement processes. The purpose of this thesis is to undertake such a study. It focuses on the following five research questions.

##### **Research question 1: What are the justifications and nature of state liability for compensation?**

Understanding the theories of state liability for compensation is the first important step to establishing the nature as well as the origin of state liability. In this context, law is distinctive in that it is not only the object of study, but also provides the framework and tools through which it studied. According to Hoecke “The legal system itself provides the concepts required in order to study a certain legal or social development. That means that the law is not only the object of research, but also the theoretical perspective from which that object is studied.”<sup>141</sup>

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<sup>141</sup> Mark Van Hoecke (ed), *Methodologies of legal research: Which Kind of Method for, What Kind of discipline?* (Hart Publishing, 2011) 90.

While these theories may relate to wider categories of civil wrongs and criminal actions, they are used here in the narrower context of the SCL and the remedies provided under it relating to wrongful decisions or actions by the executive and judicial branches of government and for specific wrongful enforcement activities. As indicated above, the ideas of justice and the rule of law have been important in developing the concept that there is a relationship based on some form of accountability between the state and citizens. Ideas of justice also play an important role when determining the level of responsibility or liability that there should be between people and people and the state. They bear on the issue of whether the state can be treated as a special subject different from individuals and other legal persons. Or whether the state should be treated equally like other individuals. Considering these question will help to clarify common and distinctive features of state liability in the Vietnamese and other legal systems.

Furthermore, national legal systems and international law, as noted, have developed principles which ensure that the losses resulting from wrongful official acts are compensated by the competent authority.<sup>142</sup> Nevertheless, because of the differences between political and economic backgrounds and in legal traditions, such principles vary and may appear in different fields within national legal systems. State liability may be treated as civil wrongs as in the civil law systems of France and German. It may be considered as breaches of professional standards of care as in Chinese and Japanese law.<sup>143</sup> The law on state liability may be found in private law as in German, Japanese, and Korean. It may be found in public law as a form of administrative liability as in France or China.<sup>144</sup> It may be described as ‘interaction’ or ‘interface’ or ‘inlimbo’ between tort law and administrative law in the common law system.<sup>145</sup> It can be total or partial liability.<sup>146</sup> This raises issues of how it is treated in Vietnamese law. This question is considered in section 3.5.1.

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<sup>142</sup> Peschorn, above n 21, 3.

<sup>143</sup> *The State Compensation Liability Law 1994* (China); *The Law State Compensation 1947* (Japan).

<sup>144</sup> *The State Compensation Liability Law 1994* (China); Martina, above n 51, 187.

<sup>145</sup> A W Bradley, *Administrative Law and the Law of Torts- un Unresolved Boundary Dispute* (the Law teacher, 1989); Peter H Schuck, *Suing Government: Citizen Remedies for Official Wrongs*, (Yale University Press 1984); Carol Harlow, ‘Public and Private law: Definition without distinction’ (2011) *Modern Law Review* 241.

<sup>146</sup> In many countries state liability can be treated as totally but in Japanese Law of criminal wrongful actions, the state only pay apart (grace).

As indicated in section 1.2.1, in common law jurisdictions, the state (crown) has had immunity and there is no separate law on state liability for compensation for wrongs caused by state officials. This raises issues of whether a separate law on state liability for compensation is significant for Vietnamese society. These will be further investigated as part of the research in section 3.5.2.

**Research question 2: What is the Vietnamese law on the liability of the state for compensation?**

The SCL 2009 states the current law regarding the liability of the state to pay compensation for wrongful actions by state officials. This law, as noted, represents a significant development in the legal reform process aimed at building a state based on the rule of law and better protecting human rights. When evaluating this Law, it is important to recognise the changes that it has made.

**The limitation of state liability:** The Law provides, in Article 1, that the state is liable to pay compensation to individuals and legal persons who have suffered damage caused by officials in administrative actions, judicial proceedings and in the enforcement of judgments. The law extends the scope of liability to almost all state sectors including administration, legal proceedings and enforcement of judgments. Under the previous law, the majority of proceedings were for wrongful convictions. It was not possible to bring actions for wrongful judgments in civil proceedings or for the wrongful enforcement of judgments. However, the Law limits liability for the last two by listing the specific wrongful actions falling within their scope. This may restrict any liability for compensation.

In addition, there is no liability in the Law for losses caused by legislation. If a law does not comply with the limitations of the Constitution and harms the individual, it will be suspended or cancelled by the NA but will not give rise to liability for compensation.<sup>147</sup> The justification is that the NA, constituted by the citizens' elected representatives, makes legislation. This is seen in earlier reasoning of how the state as sovereign which made the law could not be held accountable under it.<sup>148</sup> Also there is a constitutional justification in that legislation should have general application and not specifically name individuals or organisations. Consequently, it should not directly affect a particular individual or organization without a decision or judgment by officials

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<sup>147</sup> *Law on the Promulgation of Legislation 2008* (Vietnam); Ministry of Justice, above n 15.

<sup>148</sup> Blackstone, above n 28; Chitty, above n 29.

or judges to apply it. Furthermore, it is also argued that Vietnam's present economic capacity means it is inappropriate to establish such liability. This again may ensure that the Law can be more effectively enforced.<sup>149</sup> This question involves assessing whether this limitation is reasonable.

This liability, and the limitations imposed on it, is examined in the light of the principles of justice, restitution and principles of tort law and obligation referred to in section 1.2.1 above and below in Chapter 3, to determine whether or not they are reasonable in the context of Vietnam in section 4.3.1.

**The grounds for state liability:** General liability for compensation under the *Civil Code 2005* requires (1) actual damage; (2) the act causing the damage to be an unlawful action; (3) a causal relationship between the unlawful act and the actual damage; and, (4) that the defendant committed the act intentionally or negligently, or, in some special cases, that strict liability applies. The SCL provides different grounds for liability. There are two main grounds:

- firstly, there will be liability for executive actions, for civil and administrative proceedings, and in enforcement of judgments if two conditions are met: (1) there is a valid document issued by an authorized office affirming that the officer's act is unlawful and falls within the scope of liability for compensation; and, (2) actual damage occurred.
- secondly, there will be liability in respect of wrongful convictions in criminal proceedings if two conditions are met: (1) there is a valid judgment or decision by a relevant officer affirming that a person falls within the scope of the criminal proceedings provisions; and, (2) actual damage occurred.

Under this second provision relating to criminal proceedings, the person suffering the damage does not need to show that there was an unlawful action. So it appears that this is a provision intended to give more extensive protection to the rights of citizens. This reflects the purpose of the legislation to better protect human rights, specifically, rights to liberty and freedom of movement and association. There is a question of whether the restrictions on the grounds of non-criminal liability are reasonable. The

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<sup>149</sup> Báo cáo 236/BC-UBTVQH12 của Ủy ban Thường vụ Quốc hội giải trình tiếp thu, chỉnh lý dự thảo Luật Trách nhiệm Bồi thường của Nhà nước ngày 13/6/2009 [*Report 236/BC-UBTVQH12 on Justification and Modification of the Draft of the Law on State Liability for Compensation of the National Assembly's Standing Committee on 13/6/2009*].

government may still be able to control its liability by choosing to provide or not provide the documents required. Whether this presents a significant problem in the enforcement of the Law is considered in section 4.3.2.

**The damages to be compensated and how they are calculated:** Under the law, two kinds of damages can be claimed: physical and mental loss. Physical loss includes both direct and indirect damage. Where property is damaged, the remedy is the loss in value of the property. Where there is physical injury, damages include loss of income. Where there is mental loss or suffering, damages are not to exceed 30 months minimum wages in injury cases and 30 years (360 months) in cases of death.

The means used to calculate the amount of the damage is both important and controversial. Damage is a precondition to determining the liability for compensation. It is noted that the Law in Article 46 provides a formula for calculating loss of income, one kind of damage. However, this provision appears not to be appropriate as it uses the salary of the victim before they suffered the injury rather than what it may have been in the future. Moreover, there is a challenge in most cases in determining the amount of damage concerning compensation for officials' wrongful acts as state compensation often includes mental and indirect damage. Thus, there is a question of whether or not the provision on the method for calculating damages is appropriate. This is further investigated in section 4.3.3.

**The reimbursement responsibility of state officials:** One goal of the law is to increase the accountability of state officials. This is why the law provides for the reimbursement by state officials of the state budget funds paid as compensation for their wrongful actions. This is in addition to administrative discipline including dismissal or demotion.<sup>150</sup> *Decree 16* specifies the responsibility of the state by fixing the amount of the repayments. Accordingly, an officer who has intentionally committed a wrongful action may be required to reimburse the state up to a maximum of 36 months wages. Those who have only neglected their duty have their liability limited to compensation not exceeding three months' wages. There is a question of whether these provisions are reasonable or effective in preventing wrongful actions by state officials and strengthening the state's operational effectiveness. This question is dealt with in section 4.3.4.

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<sup>150</sup> *The SCL 2009* (Vietnam) Art 56.

### **Research question 3: Are the procedures and mechanism effective to deal with state liability in Vietnam?**

Theories of justice in the context of law are divided into substantive legal justice and procedural legal justice. Substantive legal justice is primarily concerned with the conduct of individuals, but also places obligations on judges and other officials responsible for the enforcement of the law. Procedural justice refers to fairness in the processes that resolve disputes and allocate resources. Procedural justice reinforces substantive justice which depends to a large extent on procedural justice.<sup>151</sup>

According to Rawls, there are three aspects to procedural justice:<sup>152</sup>

1. *Perfect procedural justice* has two characteristics: an independent criterion for what constitutes a fair or just outcome from the procedure, and a procedure that guarantees that the fair outcome will be achieved.
2. *Imperfect procedural justice* shares the first characteristic of perfect procedural justice, in that there is an independent criterion for a fair outcome, but no method that guarantees that the fair outcome will be achieved.
3. *Pure procedural justice* describes situations for which there is no criterion for what constitutes a just outcome other than the procedure itself.

As mentioned above in the aims of the project, this study also seeks to evaluate the procedures for resolving state liability for compensation in Vietnam. Concepts of procedural justice provide a guide to appropriate and fair processes to resolve disputes over state liability.

The previous Vietnamese law had an uncertain process. *Decree 47* provided for a process of negotiation. Claimants were to negotiate with the relevant government agency to reach agreement. No case was resolved through this procedure.<sup>153</sup> *Resolution*

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<sup>151</sup> Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) 331.

<sup>152</sup> John Rawls, *A Theory of Justice* (Harvard University Press, 1971) Chapter II, Section 14.

<sup>153</sup> *Tờ trình Quốc hội số 161/TTr-CP* của Chính Phủ về Dự án Luật Bồi thường Nhà nước ngày 13/10/2008, Trung tâm thông tin thư viện và nghiên cứu khoa học, Văn phòng Quốc hội [*Justification 161/ TTr- CP of the Government reporting the National Assembly on the draft of the Law on Compensation State Liability*]

388, later adopted, appears to have improved this process of negotiation but it was still inadequate.<sup>154</sup>

Negotiation remains a fundamental principle under the SCL. If the relevant agency does not issue a resolution decision or the claimant does not agree with its contents, the case may be taken to the relevant District People's Court.<sup>155</sup> This is a significant development which strengthens the rights of citizens under the Constitution, and the Civil and Civil Procedure Codes.

However, there are still problems with the procedures. One is when a court committed the wrongful act or is the relevant agency responsible for paying compensation. Where the claim cannot be settled, the court will be the defendant as well as the judge. This creates an unfair conflict of interest.<sup>156</sup> This also affects the negotiation process as the court knows that it may make the final decision in ruling on the dispute. Furthermore, as mentioned in the context of research question 2, all claimants, except in wrongful conviction cases, must have a valid document issued by the relevant authorized office affirming that the officer's act is wrongful.<sup>157</sup> This may be a barrier which restricts the rights of potential claimants as relevant officers may refuse to issue such a document. As the Law also exposes officials to possible action by the state against them to recover amounts paid in compensation, this creates another conflict of interest which may also lead officials to refuse to issue the relevant document. Those procedures and mechanisms need be independently investigated in Chapter 5 to establish whether there are more effective procedures to resolve state compensation cases in Vietnam.

#### **Research question 4: How is the law on state liability for compensation enforced in Vietnam?**

There are many factors which may affect the enforcement of any law. These include legal issues as well as the legal political and social cultures. In the case of Vietnam, as

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<sup>154</sup> Hạ Long, 'Bồi thường oan sai còn nhiều tranh cãi' [Compensation for Wrongful Conviction Remains Subject to Argument] *An ninh Thủ do*, 21/12/2007

<<http://www.anninhthudo.vn/Tianyong/Index.aspx?ArticleID=15302&ChannelID=3>>

<sup>155</sup> *The SCL 2009* (Vietnam) Art 22.

<sup>156</sup> Toa tỉnh mô phạm xu kiện ... chính mình [The Provincial Court judged itself] *Nasco*, 21/9/2010 <<http://www.nasco.com.vn/?u=news&su=d&cid=392&id=1967>>

<sup>157</sup> *The SCL 2009* (Vietnam) Art 6.

indicated above, the turn to constitutionalism and the rule of law is relatively recent compared with other states.

Firstly, Vietnam is a transitional socialist state governed by a single party. The VCP dominates the state. The Constitution itself recognises the VCP's leading position in the state and society.<sup>158</sup> Therefore, state officials' actions may be restricted by its influence. Furthermore, Vietnam has a socialist civil law tradition. It reflects 'the unity of powers' doctrine, which unlike the separation of powers doctrine, concentrates all powers in the NA.<sup>159</sup> There is no constitutional court to rule on the validity of legislation. Courts also do not have the function of interpreting legislation which is vested in the NA, with some limited exceptions vested in the SPC. The judiciary, through a system of relatively short-term appointments, lacks significant independence.<sup>160</sup> This creates a weak regime for the enforcement of the law including the SCL.

Vietnam's unique legal culture also affects legal enforcement processes. 'Legal culture' refers to the attitudes, values and mentality as well as the modes of behaviour of people or actors in government, society and the economy that may be relevant to the operation of law and legal systems.<sup>161</sup> Vietnam's history of Confucian morality, colonialism, a long war of independence and unification and regionalism all impact on the Soviet model of dispute resolution which it adopted.<sup>162</sup> This legal culture has a significant impact on the legal system as the four following examples show. Firstly, the law in the books will only be translated into law in action by a legal culture that supports the implementation of the law. In Vietnam, in practice there is considerable conflict between legal norms, particularly between superior legislation and subordinate rules. Lower-level administrative and judicial institutions and officials involved in local rule-making have not yet developed a culture of respect for, or compliance with, higher legal norms.<sup>163</sup> Secondly, provincial and local authorities in Vietnam may not implement laws enacted by the national legislature, so laws may have been enacted but

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<sup>158</sup> Sidel, above n 127; *The Constitution 1992* (Vietnam) Art 4.

<sup>159</sup> Gillespie and Chen, above n 6, 17.

<sup>160</sup> Adam Day, *Legal Reform and Economic Development in Vietnam and China* (Master thesis, Fletcher School, Tufts University, 2004) <<http://fletcher.tufts.edu>>.

<sup>161</sup> Gillespie and Chen, above n 6, 19.

<sup>162</sup> Lindsey (ed), *Law reform in Developing and Transitional States* (Routledge, 2007) 153.

<sup>163</sup> Gillespie and Chen, above n 6, 19.

the supporting local legal culture to support them does not exist.<sup>164</sup> Thirdly, citizens in Vietnam do not have sufficient belief in the legal system to turn to the law and legal institutions to resolve conflicts. People do not expect to settle their disputes in court as a traditional proverb illustrates: *vo phuc dao tung dinh* [try not to go to court].<sup>165</sup> A number of writers claim that there is a low level of trust in laws, lawyers and courts.<sup>166</sup> Fourthly, Vietnamese generally rely on personal connections and social networks and resolve disputes through mediation, attaching more importance to relationships and sentiment than to law in regulating human behaviour.<sup>167</sup>

In addition, the law itself is also a factor in whether the law can be effectively enforced. Even after a substantial period of legal reforms, laws are often inadequate and unclear.<sup>168</sup> As mentioned in the context of research question 2, the SCL retains some features which caused problems in the enforcement of previous laws. Firstly, the state may control its liability by choosing to provide or not provide the documents required. Even when the document is issued, the contents may be inadequate. The pattern of the enforcement of *Resolution 388* indicates that, faced with a claim of wrongful conviction, the competent agency may not admit the error by ‘keeping silent’<sup>169</sup> or taking other unreasonable actions to avoid paying compensation.<sup>170</sup> Secondly, while the law provides a formula for calculating damages, there is still a challenge in determining the amount of damages in most cases. Many cases have lasted for years making it hard to find and preserve evidence to prove claims. In practice, even when claimants have been able to supply evidence, relevant agencies have still refused to accept it because

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<sup>164</sup> Ibid.

<sup>165</sup> Ibid 20.

<sup>166</sup> Gillespie and Chen above n 6.

<sup>167</sup> Ibid 20-21.

<sup>168</sup> Mathieu and Ket, above n 92.

<sup>169</sup> Gia Khang, ‘Vụ án Mai Than- Cần Thơ’ [Case Mai Than - Can Tho] *Viet Bao*, 21/10/2006.

<<http://vietbao.vn/An-ninh-Phap-luat/Boi-thuong-oan-sai-Im-lang-va-ne-tranh/20625010/218/>>

<sup>170</sup> Văn Đoàn, ‘Đình chỉ lập tờ đề né bồi thường oan’ [Unclear Suspending to avoid Compensation Liability] *Pháp luật Thành phố Hồ Chí Minh* [*Ho Chi Minh newspaper*], 15/10/2010 <<http://phapluattp.vn/20101014101739856p0c1063/dinh-chi-lap-lo-de-ne-boi-thuong-oan.htm>>

Gia Khang, ‘Vụ án Đặng Tấn Hình- Đồng Nai, vụ án Đào Trần Thanh- Thanh pho Ho Chi Minh’ [Case Dang Tan Hinh- Dong Nai, case Dao Tran Thanh- Thanh pho Ho Chi Minh] *Viet Bao*, 21/10/2006

<<http://vietbao.vn/An-ninh-Phap-luat/Boi-thuong-oan-sai-Im-lang-va-ne-tranh/20625010/218/>>

Văn Đoàn, ‘Trách nhiệm bồi thường Nhà nước: né bồi thường oan’ [State Liability for Compensation: avoidance of Compensation] *Pháp luật Thành phố Hồ Chí Minh* [*Ho Chi Minh newspaper*], 01/3/2010 <<http://phapluattp.vn/2010022810355127p1063c1016/ne-boi-thuong-oan.htm>>

“the period of time was too long and it is impossible to investigate”.<sup>171</sup> Therefore, the amount of money offered in settlement as compensation is normally much lower than the actual damage suffered.<sup>172</sup>

In practice, the MOJ’s report on the first year of implementation of the SCL, referred to in the Introduction to this Chapter, revealed that the enforcement of the new law was poorer than expected. There are many outstanding remaining cases not settled because of evasive attitudes and actions, the officials’ lack of professionalism, the absence of adequate regulations and guidance, and other difficulties.

In answering this research question, in Chapter 6 the study further investigates the enforcement of the law to clarify these challenges. This will assist in establishing the appropriate mechanisms relating to the processing of claims for state liability.

**Research question 5: Are there any similarities or differences between the law and enforcement of state liability in Vietnam and other jurisdictions, particularly China?**

Comparative law is used to investigate the similarities and differences between, different legal systems. This indicates that it is a method for the study of law that has two main features: a process of comparison which involves the law of different countries.<sup>173</sup> Comparative law, as Zweigert and Kotz assert, has several aims and functions, one of which is to serve as an aid to law making and legal reform.<sup>174</sup> The role of comparative law as a tool for legal reform is emphasised by De Cruz who states that “good laws cannot be produced without the assistance of comparative law, whether in

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<sup>171</sup> Nguyễn Tuấn Khanh, ‘Gian nan vì cách thương lượng của cơ quan bồi thường’ [Challenges in the ways of negotiating compensation with state agencies], *Diễn đàn các Doanh nghiệp Việt Nam* [Vietnamese Business newspaper], 12/6/2007

<<http://www.vibonline.com.vn/vi-VN/Forum/TopicDetail.aspx?TopicID=1632>>

<sup>172</sup> Đức Minh, ‘Luật Trách nhiệm Bồi thường của Nhà nước: Công chức sai, Nhà nước phải bồi thường’ [The Law on State Liability for Compensation: State Officials have Committed Wrongful Acts, the State Has to Pay Compensation], *Pháp luật Thành phố Hồ Chí Minh* [Ho Chi Minh newspaper], 28/7/2009 <<http://phapluattp.vn/263452p0c1013/luat-trach-nhiem-boi-thuong-cua-nha-nuoc-cong-chuc-sai-nha-nuoc-phai-boi-thuong.htm>>

<sup>173</sup> Peter De Cruz, *Comparative Law in a Changing World* (1995), 14; For a discussion about the history of comparative law, see Konrad Zweigert and Hein Kotz, *An Introduction to Comparative Law* (3rd rev.ed, 1998) 6.

<sup>174</sup> De Cruz, above n 173, 16; Generally, as K Zweigert and H Kotz have pointed out, comparative law can serve as: (1) an academic discipline; (2) an aid to legislation and legal reform; (3) a tool of construction; (4) a means of understanding legal rules; and (4) a contribution to systematic unification and harmonisation of law.

the form of general studies or of reports specially prepared on the topic in question”.<sup>175</sup> This is confirmed by Koopmans’ observation that by learning from others, policy-makers can improve the quality of their own legal system.<sup>176</sup>

In Vietnam, comparative law is a common interest of many legal scholars, especially as the ‘open door’ policy has led to international integration and globalisation. The interest of Vietnamese scholars in comparative law is evidenced by the publication of a number of Vietnamese language analyses of comparative law issues including methodology.<sup>177</sup> The usefulness of studying foreign legal experiences as part of the process of drafting laws has been even more emphasised.<sup>178</sup>

This research question is addressed in Chapter 7 by comparing Vietnamese law with other jurisdictions, especially China’s, regarding the issue of state liability for compensation. It is a jurisdiction which has many similarities to Vietnam. The study has required the researcher to examine the law and its enforcement in both countries on the matter of state liability for compensation, in order to make comparisons, and more importantly, to draw on Chinese experiences which may be relevant to processes for the further reform of the SCL.

### 1.5. Outline of the thesis

The thesis is divided into eight chapters.

Chapter 1 provides the context, the aims of the project, the literature review, and conceptual framework. It also states the core research questions which are answered in

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<sup>175</sup> De Cruz, above n 173, 16.

<sup>176</sup> Tim Koopmans, *Courts and Political Institutions: a Comparative View* (2003) 4.

<sup>177</sup> See, for example, Nguyễn Minh Tuấn, So sánh trách nhiệm bồi thường của Nhà nước theo pháp luật Đức và Việt Nam [A Comparison of Vietnamese Law and German Law on state liability for compensation] *Tham luận tại Hội thảo quốc tế Việt Nam học lần thứ IV "Việt Nam trên đường hội nhập và phát triển bền vững"*, 28/11/2012 tại Trung tâm Hội nghị quốc gia, Hà Nội [the paper of the international conference on ‘Vietnam on the way of intergration and stable development’] (2012) Viện Nhà nước và Pháp luật (Institute for State and Law) *Tìm hiểu Luật so sánh* [Studying Comparative Law] (1993); Nguyễn Ngọc Thạch, ‘Luật so sánh: một số vấn đề về khái niệm’ [“Comparative Law”: Some Conceptual Issues] (1992) (3) *Tạp chí Nhà nước và Pháp luật* [State and Law Journal] 51; Nguyễn Như Phát, ‘Về khái niệm, đối tượng và phương pháp luận nghiên cứu luật so sánh’ [On Concept, Subject and Methodology of Comparative Law] (1992) (2) *Tạp chí Nhà nước và Pháp luật* [State and Law Journal] 37.

<sup>178</sup> Nguyễn Như Phát, ‘Hệ thống pháp luật Việt Nam từ góc nhìn luật so sánh: Mấy vấn đề về phương pháp luận’ [Observation of the Vietnamese legal system from comparative law perspective: some methodological issues] (2000) (2) *Tạp chí Nhà nước và Pháp luật* [State and Law Journal] 52.

the project. This chapter attempts to clarify the purposes, rationale, significance and structure of the thesis.

Chapter 2 offers an investigation of the methodology that has been used in the research in order to understand the phenomenon of state liability for compensation, the method of the data collection, and the method of data analysis. It explains the most appropriate methodology for conducting the research and describes the process of using a qualitative methodology. The data collected is analysed concurrently by theme, comparisons and content analysis to establish the answers to the research questions.

Chapter 3 offers an overview of state liability for compensation. It focuses on the theoretical framework, and the nature and significance of state liability for compensation while answering research question 1; moreover, it provides a foundation for the further research in the thesis. It also examines the historical evolution of state liability which provides an understanding of the development of state liability for compensation and assists in drawing on those experiences that may be meaningful to reforming the Vietnamese SCL.

The three following chapters focus on a closer analysis of the legislation, the literature, the cases and the information obtained in the interviews. These chapters lead to the conclusion that Vietnam needs more and stronger reforms to create better substantive and procedural laws as well as recommendations for the reform of the SCL.

Chapter 4 critically reviews the substantive law on state liability in Vietnam. It discusses the appropriateness of the scope of liability, the grounds for compensation liability, the method of calculating damages and the responsibility of state officials. This analysis illustrates the argument that the Vietnamese SCL has many inappropriate provisions which need to be revised. This chapter also assesses the effect of the SCL in the Vietnamese context and provides recommendations for the reform of the Law.

Chapter 5 studies the procedures and mechanisms for resolving state compensation disputes. It analyses the issues in each stage of the procedure, the agencies liable for compensation, the agencies which resolve compensation claims, and time limitations on claims. It shows that the compensation procedures and mechanism are both too complex and ineffective. Appropriate recommendations for amendments to these provisions are considered.

Chapter 6 studies and analyses the implementation of the SCL. By analysing the literature, several cases, and the information obtained in the interviews, it shows the successes and limitations of the application of the Law and also explores the causes of, and solutions for, more effective enforcement of the provisions.

Chapter 7 compares the similarities and differences between Vietnam and China in terms of the scope of laws, the grounds for compensation, the methods used to calculate damages, and the enforcement procedures. It seeks to determine the weaknesses and strengths in the laws and their enforcement in both jurisdictions. More importantly, it points to effective features that Vietnam can adapt from China and also explains the problems that Vietnam should avoid.

Chapter 8 contains the conclusions and the recommendations suggested for the reform of the SCL in order to create more effective procedures for the settlement of state compensation claims. It also indicates the limitations of this study and provides suggestions for future research.

## Chapter two: Methodology in data collection and analysis

### 2.1. Introduction

Research is a systematic inquiry into, and study of, materials and sources to establish facts and reach new conclusions.<sup>179</sup> It is commonly used in understanding phenomena in an academic area. In researching, the methodology is very significant as it is a means of systematically resolving the problems being researched on specific matters often referred to as the 'research questions'. Research methodologies vary between disciplines and even within disciplines. Different research methods are compatible with different issues. It is important to establish which method is best suited for use with a particular hypothesis or question. This chapter will clarify, and offer justifications for, the methodology, including the qualitative methodology, that has been used in the research, the method of data collection, and the method of data analysis.

### 2.2. The selection of a methodological design

Research designs are the plans and the procedures for research that include decisions ranging from broad assumptions to detailed methods of data collection and analysis.<sup>180</sup> The major methodological designs available for research purposes are qualitative, quantitative and mixed methods, sometimes called triangulation.<sup>181</sup> Often, the distinction between qualitative and quantitative research is framed in terms of using words (qualitative) rather than numbers (quantitative), or using open-ended questions (qualitative interview questions) rather than closed-ended questions (quantitative hypothesis).<sup>182</sup> Mixed methods research is an approach to inquiry that combines both qualitative and quantitative forms.<sup>183</sup> All methodologies have their specific strengths and weaknesses.<sup>184</sup>

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<sup>179</sup> Oxford Dictionary <<http://www.oxforddictionaries.com/definition/english/research>>

<sup>180</sup> John, W Creswell, *Research design: Qualitative, Quantitative and Mixed Method Approaches* (Sage, 2009) 3.

<sup>181</sup> John, above n 180; Neuman, W Lawrence, *Social Research Methods: Qualitative and Quantitative Approaches* (Allyn and Bacon, 2011); Catherine Dawson, *A Practical Guide to Research Methods: A user-friendly manual for mastering research techniques and projects* (Spring Hill House, 3<sup>rd</sup> ed, 2007).

<sup>182</sup> John, above n 180, 3.

<sup>183</sup> Ibid 4.

<sup>184</sup> Dawson, above n 181, 17.

Qualitative research is a situated activity that locates the observer in the world. It consists of a set of interpretive, material practices that make the world visible.<sup>185</sup> It “involves an interpretative, naturalistic approach to the world”.<sup>186</sup> This means that qualitative researchers study things in their natural settings, attempting to make sense of, or interpret, phenomena in terms of the meaning that people bring to them.<sup>187</sup> Qualitative research is based on the premise that social reality is inherently associated with human beings and their social context.<sup>188</sup> As for the research objective, McLeod iterated that “the primary aim of qualitative research is to develop an understanding of how the world is constructed”. Silverman has also stated that researchers who use qualitative methods for their work commonly believe that they can provide a ‘deeper’ comprehension about the social phenomena which is being studied.<sup>189</sup> The ultimate purpose of qualitative research methods is to achieve a greater understanding about a phenomenon or event in real-life, although many writers note that theory and observation are intrinsically joined.<sup>190</sup> Additionally, John shows that one characteristic of qualitative studies is the theoretical lens through which qualitative researchers often view their studies, such as concepts of culture, or the ethnography of the social, political or historical contexts of the problem under study.<sup>191</sup>

The main focus of this research project is to examine the theory and practice of the Vietnamese law relating to state liability for compensation and its enforcement, and to recommend appropriate reforms. To define the problem to be investigated, a comprehensive literature review has been carried out to analyse theories, government policies relevant legislation, and judicial decisions relating to state liability for compensation. Therefore, appropriately, qualitative methods could be used to clarify the nature of state liability for compensation in the Vietnamese context and to highlight the relationship between the law and its enforcement.

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<sup>185</sup> Denzin, N K, & Lincoln, Y, *The Sage Handbook of Qualitative Research* (Sage, 3<sup>rd</sup> ed, 2005) 3.

<sup>186</sup> N K Jha, *Research Methodology* (Global Media, 2008) 46.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> Cited in Mehdi Tavallaei and Mansor Abu Talib, ‘A General Perspective on Role of Theory in Qualitative Research’ (2010) 3 (11) *Journal of International Social Research*, 570.

<sup>190</sup> Drisko et al, ‘Letters to the Editors’ (2001) 37 (3) *Journal of Social Work Education* 585-592.

<sup>191</sup> John, above n 180, 175-176.

Qualitative research also forms part of an interpretative research paradigm.<sup>192</sup> The interpretive research approach to the relationship between theory and practice requires that the researcher never assume a value-neutral stance, but is always implicated in the phenomena being studied.<sup>193</sup> This has been used in respect of the literature, the views and experience of people involved in theorising about and making the policies and the law on state liability as well as its implementation to assist in understanding state liability issues in context.

Inductive processes are typically associated with qualitative research.<sup>194</sup> They involve exploration of a subject to find more information, as less is known about it.<sup>195</sup> These processes involve working back and forth between the themes and the database until a comprehensive set of themes has been established.<sup>196</sup> It initially requires the collection of data, followed by analysis and the generation of theories or the answers to the questions arising from the research. In this research, inductive processes were used to consider the information and data collected in relation to the themes so as to answer the research questions.

Case studies are also used in qualitative research and interpretative inquiries to unveil social phenomena.<sup>197</sup> They are used in circumstances where the researcher “has little control over events, and when the focus is on a contemporary phenomenon within some real-life context”.<sup>198</sup> Typical cases are chosen for study to clarify the phenomenon. In the context of this research, case studies reveal the views and attitudes of state officials and those injured or damaged, in order to assist in understanding the practices and factors that affect the claiming and enforcement processes.

In short, where, due to the diversity of the purposes, the research requires methodologies which provide flexibility in a number of specific areas, the better approach is qualitative. This methodological design is the most appropriate because of

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<sup>192</sup> Ibid 39.

<sup>193</sup> W J Orlikowski & J J Baroudi, ‘Studying Information Technology in Organizations: Research Approaches and Assumptions’ (1991) (2) *Information Systems Research* 1.

<sup>194</sup> Mats Alvesson and Stanley Deetz, *Doing Critical Management Research* (Sage, 2000) 1.

<sup>195</sup> W Lawrence Neuman, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Sage, 2<sup>nd</sup> ed, 2003) 30.

<sup>196</sup> John, above n 180, 175.

<sup>197</sup> W Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Allyn & Bacon, 3<sup>rd</sup> ed, 1997) 331-332; and Gerard Guthrie, *Basic Research Methods: An Entry to Social Science Research* (Sage India, 2010).

<sup>198</sup> Robert K Yin, *Case Study Research: Design and Methods* (Sage, 3<sup>rd</sup> ed, 2003) 1.

its characteristics<sup>199</sup> such as multiple sources of data, inductive data analysis, interpretative approaches and case studies.

### **2.3. Method of data collection**

After selecting a design research for a project, data collection methods have to be determined. In qualitative research, different methods can be used: observation, interviews, and analysis of literature documents and other materials.<sup>200</sup> For the purposes of this research, the qualitative data collection methods selected were an analysis of texts and documents and interviews. The study applied these research methods and techniques in order to collect data from three main sources: primary legal materials, secondary documents including newspapers and websites, and interviews with participants in state compensation processes.

#### **2.3.1. Collecting documents and materials**

Primary and secondary legal materials were collected. Firstly, data has been collected from primary legal materials including legislation and regulations and formal guidance given by courts and government agencies. Secondly, data has been gathered from academic monographs and journals, and from media and other relevant databases. It also includes materials and reports published by government agencies and relevant bodies such as the MOJ, the SPC, and the SPP. Similar sources to these were used in gathering data on other legal systems to be used in any comparative law analysis. In order to collect this data, the researcher often used library searches, internet searches and direct inquiries in Vietnamese government agencies.

#### **Library search**

Library searches are a traditional and common way to look for printed materials. The search started in Victoria University library which has an extensive collection of printed legal materials including books and journals. Moreover, the library provides access to significant electronic data bases such as HEIN online<sup>201</sup>, SSRN<sup>202</sup> and SAGE<sup>203</sup> which

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<sup>199</sup> John, above n 180, 175-176.

<sup>200</sup> Ibid; W Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Allyn & Bacon, 6<sup>th</sup> ed, 2006).

<sup>201</sup> HEIN is the image-based legal research collection and contains legal history available in an online, searchable, image-based format which provides the documents in PDF format as they appear in the original print.

<sup>202</sup> The Social Science Research Network (SSRN) is an open access depository for academic research papers and journals created by Social Science Electronic Publishing, Inc.

offer a variety of options with images of the documents in PDF format as they appear as original printed materials. Through library searches, the researcher found a variety of material relating to the research topics. They are not only on methodology, justice theories, tort and obligation law, and discussions of state liability in western legal systems but also about East Asian socialism, legal reforms in China and Vietnam, Vietnamese politics, economics and society, and about the transition of economies in socialist states. Moreover, Victoria University's library links with other libraries in Australia assisted the researcher to locate a number of more recent materials. With the support of Victoria University's librarians, it was easy to access these materials.

Vietnamese libraries were used to access Vietnamese books, journals and magazines. As the topic of the research is on Vietnam and the researcher is a Vietnamese native speaker, these materials were very valuable sources. In Vietnam, the researcher visited the Vietnamese State Library and the library of the MOJ, the Hanoi Law University's Library which gave access to older laws and materials including political issues, the rule of law, the history of state liability and the development of the socialist- market economy.

### **Internet search**

The internet is more and more ubiquitous with extensive material. It is a social phenomenon, a tool, and also a field site for qualitative research.<sup>204</sup> Because the internet makes possible the decentralized transmission of information, it enlarges the means for creating, displaying and framing the objects of study and the boundaries of the experience. It is also an effective means of reaching out to participants and of obtaining information.<sup>205</sup> The collection, downloading, and storage of data is easier and quicker for researchers looking for legislation, cases, media stories, government reports and inquiries, speeches and opinions involving state liability for compensation. Furthermore, through internet searches, the researcher could access the websites of the VCP, the Vietnamese Government, the NA, the SPC, the SPP, the MOJ and Vietnamese journals and publishers. Some of the VCP's policies, government reports, academic journals and speeches which might not be published in printed versions and are not

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<sup>203</sup> SAGE is a publisher of journals, books, and electronic media for academic, educational, and professional markets. Sage's publishing program includes journals and books, reference works and electronic products.

<sup>204</sup> David Siverman, *Qualitative Research* (Sage, 3<sup>rd</sup> ed., 2011) 111-112.

<sup>205</sup> Siverman, above n 204, 114.

available in libraries were collected through the internet. The most useful websites are included in the bibliography.

### **Direct search**

When in Vietnam, the researcher visited a number of government offices looking for data. These included the Department of State Compensation, MOJ which is the administrative office for state liability for compensation, the Institute of Legal Sciences of the MOJ, the Hanoi Law University where some research projects, partly relating to the rule of law and the law on state liability have been carried out, and the SPC which gives final judgments on state liability cases. The researcher also attended several conferences organised by the Department of State Compensation and Department of Civil and Economic Law (MOJ) to gather updated and most recent information and to share information and opinions.

Through direct searches, the researcher collected relevant “grey literature”. According to Tillett and Newbold, grey literature is hard to find because of its core characteristics. It is not produced for commercial publication, is not available through standard distribution means, is not subject to standard bibliographic controls of cataloguing and indexing, is not peer-reviewed, and is ephemeral.<sup>206</sup> Grey literature can broaden the scope of the research, thereby providing a more comprehensive view of available evidence.<sup>207</sup> The collection of these documents from government offices and conferences was very useful in addressing the research questions.

### **2.3.2. Interview**

The third source of data came from interviews conducted in Vietnam. This is also a primary source of data. An interview is a “way of accessing people’s perceptions, meanings, definitions of situations and construction of realities”.<sup>208</sup> The interview is a formal and guided conversation involving the process of asking questions and

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<sup>206</sup> S Tillett, E Newbold, ‘Grey literature at the British Library: revealing a hidden resource’ (2006) (32) *Interlending & Document Supply* 70.

Examples of grey literature include: study or research reports, scientific and technical reports, government documents, including ministry decisions and statistics, and theses.

<sup>207</sup> Quenby Mahood, Dwayne Van Eerd and Emma Irvin, ‘Searching for grey literature for systematic reviews: challenges and benefits’ Published online in *Wiley Online Library* 2013. <<http://onlinelibrary.wiley.com/doi/10.1002/jrsm.1106/pdf>>

<sup>208</sup> K Punch, *Introduction to Social Research: Quantitative and Qualitative approaches* (Sage, 2<sup>nd</sup> ed, 2005) 168.

listening.<sup>209</sup> The interview enables the researcher to have face-to-face contact with the subjects and this helps to gain an insight into their personal views and experiences to obtain rich information on issues of state liability for compensation. Miller and Glassner argue that in-depth interviews in qualitative research provide a meaningful opportunity to study and theorize about the social world. Moreover, they suggest that “interviews reveal evidence of the nature of the phenomena under investigation, including the contexts and situations in which it emerges, as well as insights into the cultural frames people use to make sense of these experiences and their social worlds.”<sup>210</sup> Data collected from interviews can provide in-depth opinions, attitudes, behaviours and experiences from participants which are very important to an understanding of the research issues. That is why, together with primary and secondary data collection, interviews were chosen as a method of research.

In social research, there are many types of interviews; the most common are unstructured, semi-structure and structured. Unstructured or in-depth interviews are those in which the researcher talks freely and asks as few questions as possible. The participant is free to talk about what he or she deems important with little directional influence from the researcher.<sup>211</sup> Semi-structured interviews are those where the researcher asks the same questions in each interview but also remains flexible so that other important information can still emerge and be collected. In structured interviews, the interviewer asks a series of questions inviting limited responses and the participant ticks boxes or gives a rating according to a limited scale.<sup>212</sup> In this research, the semi-structured interview was chosen so that the data collected could be compared and contrasted with information gained in interviews and other sources. To conduct a semi-structured interview, an interview schedule should be constructed to drive the interview process. This is discussed in section 2.4.2.

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<sup>209</sup> N K Denzin, and Y S Lincoln, (eds), *The SAGE Handbook of Qualitative Research* (Sage, 3<sup>rd</sup> ed, 2005) 643.

<sup>210</sup> Siverman, above n 204, 131.

<sup>211</sup> Catherine Dawson, *Introduction to Research Methods: A Practical Guide for anyone undertaking a research project* (Spring Hill House, 4<sup>th</sup> ed, 2009) 27-29.

<sup>212</sup> Ibid.

## **2.4. Interview process**

### **2.4.1. Sampling for interviews**

Sampling is an important process in data collection. Sampling involves a selection process where subjects are chosen from whom information can be collected.<sup>213</sup> It is important to consider the nature of the research before sampling; this can be assisted by the literature review.

There are two main types of sampling: probability sampling and purposive sampling. In probability sampling, all people within the research population have a specifiable chance of being selected. This type of sample is used if the researcher wishes to explain, predict or generalise to the whole research population. On the other hand, purposive sampling is used if description rather than generalisation is the goal.<sup>214</sup> The qualitative methodology means that the focus of the interviews was to find out specific knowledge, experiences and attitudes of participants about the issues of state liability. Consequently, a purposive sampling method was used to select interviewees. Although there are a large number of individuals and organisations involved with the issues, 38 participants were selected for the sample to be as comprehensive as possible given the resources available. This was also a realistic number for interview purposes. The interviewees were selected from those with knowledge and experience identified from the two categories of public and private sectors described below.

First, the public sector includes participants who are state employees with experience and behaviour relating to the theory, the policies, the law and the practice of state liability for compensation. They include: judges of the local People's Courts and the SPC; procurators from the local People's Procuracy, and the SPP; administrative officers at Ministry and provincial levels; members of the NA; and government policy- and law-makers. Also included are legal experts who work in universities and legal institutions. It should be noted that state officers not only consider state liability as professionals but also as representatives of the state which has to pay compensation. This group had the potential to reflect on their attitudes, experiences and their own behaviours in terms of the policies, the law and the practices pertaining to state liability for compensation.

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<sup>213</sup> Dawson, above n 211, 7 and 48.

<sup>214</sup> Ibid, 53.

Second, the private sector was important in sampling because its members may hold a variety of views that differ from those of the state officials. They are claimants for wrongful action, private lawyers acting for clients and representatives of professional legal associations, and journalists and bloggers.

#### **2.4.2. The interview schedule**

For semi-structured interviews, the researcher had to prepare an interview schedule.<sup>215</sup> In qualitative research, an open-ended interview schedule that has been prepared to capture primary data from interviewees is commonly used. The schedule included lists of questions which have been categorized according to topics. The questions and topics in the schedule relate to the research questions. Several questions sought to obtain information to assist in determining the extent of each interviewee's experience and knowledge. These questions related to the policies and significance of the law on state liability, its enforcement and related procedures. The questions range from the general to the particular. The questions asked in the interview schedule provided some variation to allow for the particular knowledge and experience of interviewees and responses gained from previous interviews. The interview schedule is attached as Appendix 1. The Vietnamese translation of the interview schedule is attached as Appendix 5.

Interview questions were provided with a covering letter instructing participants to provide the answers during the interview. The information given to participants is attached as Appendix 2. The Vietnamese translation of the information to participants is attached as Appendix 6. The interview guide allowed interviewees to answer questions on their own at a time and place most convenient for them.

#### **2.4.3. Conduct of interviews**

In order to conduct the interview, approval needed to be obtained from Victoria University Human Resources Ethics Committee. The interview process had to follow the ethics approval to limit the likelihood of any potential risks. The researcher obtained the required approval as discussed in section 2.4.5.

All of the relevant documents were translated into Vietnamese for ethics approval. They were translated by a Professor of Economics at Hanoi Economics University who is fluent in both English and Vietnamese. He is also a PhD candidate of Law at the College of Law and Justice, Victoria University. A declaration of accuracy of the

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<sup>215</sup> Ibid 29.

translation by him is attached as Appendix 13. The translations appear in the following Appendices:

- 1- Interview Schedule
- 2- Information to Participants
- 3- Consent Form for Participants
- 8- Letter of Invitation
- 9- Information to Lawyers.

The researcher made appointments with potential interviewees by phone or email. In the process, the researcher received significant help from her husband, her friends and her students in identifying the participants, contacting them, and arranging interview times. Her husband works in the MOJ as a researcher in the Institute of Legal Science and has done a lot of fieldwork on economic law and legal reform. She met one friend, who works at the SPC through her work as an academic professional at the conference. Another friend, working at SPP, was a law school classmate. Her former students also assisted. One is working with the Association of Lawyers and one is working in the Department of State Compensation, MOJ. They supported the fieldwork and also collected materials and invited her to conferences.

A letter of invitation was sent to participants before any interview was undertaken. It was also sent to lawyers in cases where the interviewees were their clients. At the beginning of the interviews, the researcher explained the purpose, the benefits and potential adverse effects of the information that could be provided. She further advised informants that they could withdraw at any time. The researcher was aware of the fact that she was dealing with many busy individuals and made herself available at a time and place of their convenience.

The interviews were conducted face-to-face except for three; telephone interviews were held where the researcher could not directly meet participants. With the three telephone interviews, the researcher took notes of the significant points of the conversation. The disadvantage of telephone interviews was the inability to observe the interviewees as they responded to the questions. However, over the phone, the interviewees seemed to be more willing to talk without nervousness and shyness.

All of the interviews, except for the telephone interviews, took place at the offices of the participant or at the claimant's homes. All were conducted in Vietnamese based on the questions in the interview schedule. The interviews took from one to one and a half hours. Before the interview, the researcher confirmed that the interviewee was aware of the nature of the study and ensured that the consent form was signed. This was also done for the telephone interviews. The consent forms had been scanned and sent to the participants by email. The student researcher also indicated that the interviewees would not be asked to reveal specific confidential information including information relating to proposed government policies or to clients. They were again advised that they would not need to answer any question if they did not wish to do so.

The interviewees needed to have trust and confidence in the researcher. Therefore on meeting for interview the researcher reiterated the privacy and confidentiality issues mentioned in the letter sent to them. This was done to enable the interviewee to feel at ease and comfortable, and free to disclose information. Further, the researcher made it clear to the participants that any information provided by them would be kept confidential and not be disclosed to anyone. As a qualitative research exercise, the researcher was gauging people's views and experiences of situations and "those who lives and expressions are portrayed, risk exposure and embarrassment, as well as a loss of standing, employment and self-esteem".<sup>216</sup> Their names are known only to the researcher. Any information they provided has been recorded using codes (see Appendix 2) to protect their identity.

At the beginning of the interview, some claimants appeared to be shy and not particularly talkative. As they became more familiar with the topics and more confident, they were willing to share more of their own experiences and knowledge. During the interview, several participants were reluctant to answer some specific questions. For them, these questions might have been sensitive or not depending on their experience; in particular, the questions were those relating to the impact of VCP or questions referring to other people experience. In such circumstances, the researcher refrained from asking further questions. As the research used not only the answers given by the participants but also other sources including legislation, literature and cases, the omission of some answers in a few interviews did not have an adverse impact on the research. In many cases, the answers were similar. In those cases, in order to save time,

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<sup>216</sup> Denzin and Lincoln, above n 209, 459.

the interviewer did not ask follow up questions and moved on to other questions. If some points made were different or unusual, the researcher invited the interviewee to elaborate on the response in order to establish the individual's reasons and views.

The questions in the interview schedule permitted some variations so as to allow for the particular knowledge and experience of interviewees to emerge. Due to interviews being conducted during the Solar and Vietnamese Lunar New Year, several interviewees were busy with their families and their annual reports. With respect to the length of the interviews, the researcher introduced the questions by acknowledging that the interviewees are busy people. They had been chosen for their expertise and experience. The researcher informed them that short answers which succinctly summarised their experience would be appreciated. It also became apparent that some questions would not be put to some interviewees as it was clear from the outset, or became clear, that the interviewee had no experience or informed opinion on a particular matter. After the interview, the researcher left an extra interview schedule with the answer sheet to give them more time to reflect and provide further information. In most of the cases, the researcher was able to collect these schedules with additional useful details. The answer sheet is attached as Appendix 14.

During some interviews, the researcher faced difficulties. Because the interviews were often conducted at the participants' offices, they were sometimes interrupted by their supervisors, colleagues or clients. In these cases, the researcher had to wait until the interviewees could continue. These circumstances affected the interviewee's engagement in the process. They sometimes forgot the gist of the conversation. In this situation, the researcher joked or asked them about their work before reminding them about the question. In one case, the researcher had arranged an appointment with a well-known private lawyer but when she arrived, he was busy with clients and asked an employee to do the interview. Fortunately, this employee was also experienced with the issues and provided valuable information. Some participants, including state officers and private lawyers, were very enthusiastic. They not only responded to questions, but also asked for other information or materials relating to the topic.

#### **2.4.4. Taking notes**

The method of recording interviews for later analysis included audio recording, video recording, and note-taking.<sup>217</sup> The researcher audio recorded the first interview. However, after finishing it, the researcher recognised that it took a long time to listen to, and transcribe, the content.<sup>218</sup> Furthermore, participants may be less comfortable about answering if the conversation is being recorded. When informants are anxious, researchers might not get the most useful responses. The researcher changed to note-taking. By preparing the answer sheet with the questions provided, the researcher wrote the key responses and short answers during the interview. After finishing the interview, the researcher tried to add as much information as possible while it was still fresh in her memory. To avoid missing recent information and to expand on other information, an extra interview schedule with the answer sheet was given to the interviewees as noted above. Gibbs suggests several reliability procedures for checking transcripts to make sure that they do not contain obvious mistakes made during transcriptions.<sup>219</sup> It is important that information noted in the interviews is from the interviewees and they must authenticate the information. After the interviews, the notes taken were given back to the interviewees for confirmation. Before all interviewees confirmed the information in the notes, the researcher made it clear that they should indicate anything that was inconsistent with what they had meant, and how it should be expressed so that their words and intentions were accurately noted. The advantage of note-taking is that the interviewer can organize the notes easily, and quickly cut and paste into documents any relevant information and quotations about themes.<sup>220</sup>

#### **2.4.5. Ethics issue**

Ethical considerations are paramount in any research that involves human beings as subjects. As a student from Victoria University, the researcher complied with ethical

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<sup>217</sup> Steinar Kvale and Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (Sage, 2009) 178.

<sup>218</sup> The time needed to transcribe interviews depends on the quality of the recording, the typing experience of the transcriber, and the need for detail and precision. According to Kvale and Brinkmann, transcribing large amounts of interview material is often a tiresome and stressing task. An experienced secretary, they report, could take about five hours to type a one hour interview.

See: Steinar Kvale and Svend Brinkmann, *InterViews: Learning the Craft of Qualitative Research Interviewing* (Sage, 2009) 178.

<sup>219</sup> John, above n 180,191.

<sup>220</sup> Dawson, above n 181, 170.

procedures under the Guidelines of *National Statement on Ethical Conduct in Human Research*<sup>221</sup> in conducting this research. The interview schedule focuses on issues of legal policies, legal rules and processes. The questions were designed to reduce any risks by not asking participants to reveal personal or private issues. In particular, the interview questions do not seek to obtain any information about the facts or causes which gave rise to any claims. This also eliminated most psychological and social stress. The questions sought to establish only knowledge and opinions relating to the law and enforcement of state liability for compensation. They did not seek to elicit information which may jeopardise any claims.

The researcher first submitted an ethics application with the proposal to the Human Research Ethics Committee (HREC) for review and approval in 2011. However, the HREC granted the researcher only a conditional approval because it was concerned with risks to participants, particularly claimants, in the process. They asked the researcher to restrict any risk by (1) having a supervisor who would supervise and assist the researcher in Vietnam during the fieldwork, and, (2) provide counselling services in the host country to informants who may require counselling. In order to support the research, the researcher and the Hanoi Law University in Vietnam nominated Dr Nguyen Van Quang, who is the head of Department of International Operations, as a local supervisor for the researcher conducting the research in Vietnam (Appendix 12). However, the second requirement could not be met because such counselling services do not exist in Vietnam.

The fieldwork is significant for the research. The experiences, attitudes and views of the participants in state liability issues potentially had a significant impact on understanding and answering the research questions comprehensively. It was thought that the interview results would reveal the enforcement of the law more effectively than would other resources. It may help the researcher investigate more effectively the gap between the law in the books and the law in practice. The researcher submitted another ethics application in 2012 which included specific techniques to limit any risk. This principally involved contacting claimants through their lawyers who could give them independent advice on participating. (The ethics application form is attached). Ethics

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<sup>221</sup> Commitment of VU's HREC at  
<<http://www.vu.edu.au/research/our-approach/research-conduct-ethics/human-research-ethic>>  
The National Statement: <<http://www.nhmrc.gov.au/guidelines/publications/e72>>

approval was finally given in December, 2012. It took more than one year to receive this approval. As the time for the fieldwork was limited, the interviews were conducted immediately afterwards from January to March 2013.

Before conducting the interviews, the researcher met with Dr Nguyen Van Quang and discussed with him the plans and schedules for the fieldwork to ensure that the interviews were conducted under his supervision. During the interviews, the researcher often contacted him to report the results and to obtain advice.

From the commencement of data collection to the end of the interviews, the researcher ensured that ethical values were upheld. The researcher maintained a respectful attitude to the participants at all times and treated them in accordance with the ethics guide and interview schedule. After the completion of every interview, the researcher reflected on how comfortable the participants had been in providing information. Douglas notes that creative interviewing “involves the use of many strategies and tactics of interaction, largely based on an understanding of friendly feelings and intimacy, to optimize co-operative, mutual disclosure and a creative search for mutual understanding”.<sup>222</sup>

In the pre-interview stage, the interviewer prepared all of the materials required: documents, pens, paper notes and answer sheet. The interviewer wore appropriate clothing depending on the social context of the interview and the participant’s status as a state officer, professor, editor or claimant; the researcher ensured that she was always punctual. Careful preparation shows that a researcher respects interviewees and has given consideration to the best means of encouraging responses from the participants.

Before the interviews the researcher introduced herself to the participants, told them about the purpose of the interviews and the nature of the study. Further, the researcher explained how privacy and confidentiality would be respected. This information generally appeared to make the participants more confident. They thought that they were engaged in a meaningful and valuable task that would contribute to the community.

During the interviews, the researcher assessed the participants to ensure that a friendly atmosphere was created and any tensions were removed. The researcher smiled and maintained composure. The researcher listened attentively and took notes of

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<sup>222</sup> J A Holstein and J F Gubrium, *The Active Interview* (Sage 1995) 13.

important points raised but maintained regular eye contact. If the participant did not understand the question, the researcher explained it more clearly. If they had any questions, the researcher encouraged them to feel free to ask at any time. Also, whenever participants felt uncomfortable with any question, the interviewer moved on to other questions and asked them if they could share any experiences they were more willing to talk about. Most of the participants appeared to feel free to talk about what they knew of state compensation and their experience with procedures and practices relating to it.

Furthermore, the researcher regarded their rights to privacy as important in the research. The researcher was aware of the fact that many state officers are politically appointed and therefore would not want any criticism of the government to be recorded. The researcher was also aware that several participants were fearful that if some issues of state liability were exposed to the public, it would create a negative reaction, so they were unwilling to disclose the information.

#### **2.4.6. Validity and Reliability**

Validity and reliability are the strengths of qualitative research. Qualitative validity means that the researchers check for the accuracy of the findings by employing a variety of procedures.<sup>223</sup> Validity is based on determining whether the findings are accurate from the standpoint of the researcher, the participant, or the readers of an account.<sup>224</sup> In qualitative research, the researcher's need to validate findings means that the researcher applies different strategies to ensure accuracy and credibility of the findings. To ensure the validity, John suggests using several procedures such as triangulation; member checking;<sup>225</sup> rich and in-depth description; clarifying the bias the researcher brings to the study; spending ample time in the field; peer debriefing, or an external auditor to review the entire project.<sup>226</sup> In this research, the researcher used triangulation, spent much time in the field and clarified her bias.

First, triangulation is a strategy often used when the research involves different sources of data. The information from different sources will be used coherently as

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<sup>223</sup> John, above n 180, 190.

<sup>224</sup> Ibid 191.

<sup>225</sup> Member checking involves feeding back research findings to participants and inviting them to comment on the adequacy of the researcher's interpretations and conclusions.

<sup>226</sup> John, above n 180.

evidence to be applied to the research questions.<sup>227</sup> Since the themes of the research are established based on convergence of three main sources, primary and secondary legal sources have been used to consider and analyse the information collected from the interviews. Any contrasting data collected from the interviews has been used to clarify and evaluate the information from other sources.

Second, spending a long time in the field means the researcher develops an in-depth understanding of the phenomenon under study and can convey details which strengthen credibility. The more experience that a researcher has with participants in their actual settings, the more accurate or valid is the findings.<sup>228</sup> As the researcher was a law student for five years and has been teaching at a Law University for 13 years, she has considerable experience in Vietnamese law and legal research. She has also been interested in the research topic and has been researching it for many years. Thus, she had a deeper understanding of the issues of state liability. Furthermore, she is a Vietnamese legal professional who can speak Vietnamese fluently and knows Vietnamese culture well. She could convey and explain the questions in detail and with convincing credibility. While the fieldwork lasted for only about three months for this specific project, the researcher has had an interest in this issue for almost 20 years.

Reliability connotes consistency, dependability or trustworthiness. In the process, the researcher has identified her own biases, experiences, views and knowledge about state liability for compensation. The researcher agrees that the goals of enacting the SCL are desirable but her belief is that the SCL is ineffective in protecting claimants' rights. Also, the enforcement of the Law is ineffective for a number of political and social reasons. The researcher avoided advising any of the participants about those views and opinions and let them talk freely about their own experiences and views. The interview results are thus more reliable because they are focused solely on the issue from the perspective of the participants.

In analysing the data, the researcher also attempted to avoid her own bias by examining and using the information obtained through the resources. She used evidence to support conclusions drawn rather than her own opinion and speculation. For each research question, in addition to analysing legislation, case law and the interview

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<sup>227</sup> Ibid 191.

<sup>228</sup> Ibid.

results, the researcher has attempted to compare and contrast the views of other scholars and experts to arrive at a clear conclusion.

## **2.5. Methods of Data analysis**

The data and information from the review of primary legal sources and secondary literature and the data obtained from and interviews were analysed to consider the effectiveness as well as any deficiencies in the laws relating to state liability. The strengths and weaknesses of Vietnamese procedural laws and the mechanisms for enforcement of the SCL have also been critically assessed to consider whether they are effective. Some comparisons were also made of key issues identified in the law and procedures with some other jurisdictions, particularly China.

The methods used to analyse data in qualitative research depend on the methodological design chosen to conduct the research: qualitative or quantitative. There are many different types of qualitative data analysis: thematic analysis, comparative analysis, discourse analysis (conversational analysis), content analysis, and so on.<sup>229</sup> As indicated in the previous chapter, the aims of research are to (1) review and analyse theories and policies relating to state liability; (2) critically evaluate the appropriateness of present laws on state liability in Vietnam; (3) review and analyse the enforcement of the SCL including procedural law and practices; (4) review and examine the enforcement of laws relating to state liability in some selected comparable jurisdictions, including China, and (5) consider appropriate reforms to the Vietnamese law and processes for determining and enforcing state liability. Hence, the method used for this research is a combination of thematic analysis, content analysis and comparative analysis.

### **2.5.1. Thematic analysis**

The analysis of data by theme or thematic analysis<sup>230</sup> is the most common form of analysis in qualitative research.<sup>231</sup> It emphasizes pinpointing, examining, and recording patterns (or "themes") within data.<sup>232</sup> Themes are patterns across data sets that are important to the description of a phenomenon and are associated with a specific

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<sup>229</sup> Dawson, above n 211, 114-123.

<sup>230</sup> Ibid 119.

<sup>231</sup> Guest, Greg, *Applied thematic analysis* (California: Sage, 2012) 11.

<sup>232</sup> Braun, Virginia; 'Using thematic analysis in psychology'. *Qualitative Research in Psychology* (Victoria Clarke 2006) 83.

research question.<sup>233</sup> Thematic analysis provides a flexible method of data analysis and allows researchers with various methodological backgrounds to engage in this type of analysis.<sup>234</sup> This is also related to phenomenology in that it focuses subjectively on the human experience.<sup>235</sup> In using this method, the researcher categorized the themes including theories, the nature of state liability, the present substantive law on state liability, procedures to resolve compensation claims and the SCL's enforcement. Sub-themes which make meaningful contributions to understanding the research questions were also considered and analysed, such as the scope of state liability, the grounds for state liability, the method of calculating the damages, reimbursement by state officers, agencies liable for compensation, agency responsible to resolving disputes, time limits on claims and so on.

One of the disadvantages of using thematic analysis is that it sometimes leads to difficulties in analysing those issues that are closely related to each other. For example, the ground for state compensation is closely connected with the procedure of having to obtain a valid document confirming the wrongful actions of state officers. If the researcher were to separate it into relevant issues, the analysis may be not comprehensive or complete. However, if the researcher analyses it simultaneously with other issues, it may lead to a repetition when the researcher analyses the remaining issue as a separate theme. In this situation, the researcher tried to analyse one theme first. Then, when analysing the next theme, the researcher referred to previous analyses to avoid repetition.

### **2.5.2. Comparative analysis**

Closely connected to thematic analysis is comparative analysis. Using this method, data from different people is compared and contrasted and the process continues until the researcher is satisfied that no new issues have emerged.<sup>236</sup> Comparative and thematic analyses are often used in the same project, with the researcher moving back and forth between legislation, notes and the research literature. According to Michael, knowledge

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<sup>233</sup> Daly, Kellehear & Glikman, *The public health researcher: A methodological approach* (Melbourne, Australia: Oxford University Press, 1997) 611–618.

<sup>234</sup> Braun, above n 232, 27.

<sup>235</sup> Greg S Guest, Kathleen M Macqueen, Emily E Namey, *Applied Thematic Analysis* (Sage, 2012) 12.

<sup>236</sup> Dawson, above n 211, 120.

arises mostly out of comparison and the discovery of regularities.<sup>237</sup> Yntema notes the importance of the comparative legal research in looking for the ‘cave’<sup>238</sup> which helps to determine the gaps between the law (including the SCL) and practice. Also, Paton argues that it is impossible to conceive the existence of jurisprudence without comparative law.<sup>239</sup> That is why De Cruz emphasizes that some of the functions and purposes of comparative law are a means of understanding legal rules, an aid to legislation and law reform, and a tool of construction.<sup>240</sup> As shown in Chapter 1, Vietnam has been conducting a reform process to further develop the country. In order to quickly and effectively comprehend the legal system including the SCL, comparison is a significant instrument. One way to quickly change the law may be to adopt and adapt laws from other jurisdictions.

In this research, the comparative method has been used to compare and contrast the information derived from the various sources of data. It is also used to compare and contrast the present and previous laws on state liability for compensation. Furthermore, the methodology is important in comparing laws and their implementation in Vietnam with those of other jurisdictions so as to understand the nature of state liability for compensation to discover deficiencies in the laws, and the discrepancy between the law and its enforcement; and to find out the solutions for better reform. This methodology has been important in analysing and articulating the conclusions drawn in this thesis, especially in Chapter 7.

### **2.5.3. Content analysis**

Content analysis (or textual analysis) is “a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use”.<sup>241</sup> In content analysis, the researcher uses *analytical constructs*, or rules of inference, to

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<sup>237</sup> Haas, Michael, ‘Comparative Analysis’ (1962) 15 (2) *The Western Political Quarterly* 296.

<sup>238</sup> De Cruz, above n 173, 19.

Yntema did not express it as such but he was illuminating law not by the light of empirical or doctrinal science, but by the light of humanities.

Pier G Monateri (ed), *Methods of Comparative Law* (Edward Elgar Publishing, 2012) 85.

<sup>239</sup> De Cruz, above n 173, 19.

<sup>240</sup> *Ibid* 18.

<sup>241</sup> K Krippendorff, *Content analysis: An introduction to its methodology* (Thousand Oaks, CA: Sage, 2<sup>nd</sup> ed, 2004) 18.

move from the text to the answers to the research questions.<sup>242</sup> Using this method, the researcher systematically works through each transcript assigning codes, which may be numbers or words, to specific characteristics of the text.<sup>243</sup> By analysing the content of legislation, documents, cases and the text of the interview in which the messages are created or presented, the research questions are also answered. Firstly, the primary legal materials and interview collection have been analysed to clarify the law on state liability for compensation, the procedure and mechanism for settlement of the compensation dispute, implementation of the SCL. Secondly, the secondary literature has been used to further clarify the primary data where there is uncertainty or a lack of depth as well as to develop and critique ideas of state liability for compensation. Some of the secondary sources have been used in a socio-legal analysis to analyse and refine the research questions and the aim of the project. The content analysis is presented in Chapters 4 and 5 and 6 of the thesis.

## **2.6. Conclusion**

Yin suggests that a researcher needs to document as many of the steps in the procedures as possible.<sup>244</sup> The researcher has attempted to do this. This chapter justifies the methodology design, the method of data collection and data analysis. Based on the purposes of the project, a qualitative methodology was chosen as the most suitable research approach. A qualitative methodology using interpretative, inductive and case studies was the most suitable for understanding the nature of state liability for compensation in the context of Vietnam. The data was collected from three main sources: primary legislation, secondary sources, and, interviews. In the interview process, ethics, validity and reliability were considered important and were discussed to illustrate the attempts taken to address them. The data collected was analysed concurrently by theme, comparative and content analysis methods to determine the answers to specific questions.

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<sup>242</sup> Marilyn Domas White and Emily E Marsh, 'Content Analysis: A Flexible Methodology' (2006) 55 (1) *Graduate School of Library and Information Science. University of Illinois at Urbana-Champaign*, 6.

<sup>243</sup> Dawson, above n 211, 122.

<sup>244</sup> John, above n 180, 190.

## Chapter three: Overview of state liability for compensation in Vietnam

*Legal interpretation is not carried out to understanding things but to order matters. However, for such an order, overview is need. That is why Law should be studied from a systematical viewpoint and also should be understood from a historical viewpoint. Interpretation in itself is not enough. It should be coupled with the systematic effort to see law as integrity and with the historical effort to see law as continuity. That is why 'overview' is thought to be a paramount virtue of the legal scholar. It is an expression of the desire to construct the legal system as a whole.<sup>245</sup>*

### 3.1. Introduction

Law is not uniform across the globe. In every country, the general law, especially state liability law, is different and depends on past and present economic, political and social contexts. Before 1986, Vietnam sought to create a socialist society built on a planned and centralized economy. Increasing economic difficulties in Soviet Union and the countries of Eastern Europe after 1986 led in 1989 to the fall of communist governments in the Eastern Bloc and in 1991 to the dissolution of the Soviet Union. In 1986, in the new situation in which Vietnam found itself, the VCP and Vietnamese state initiated the *Doi moi* process which led to subsequent changes in the economic, political and legal systems. In a process of increasing change, Vietnam has adopted interrelated legal reforms including the promulgation of the SCL which recognizes state liability for compensation. Due to its unique history, tradition and context, the justification and the development of state liability is not the same as in other countries. This chapter provides an overview of the Vietnamese political and legal system to facilitate an understanding of state liability. Then, it deals with underlying issues relating to the research including the theory, legal history, nature and significance of state liability in a Vietnamese context.

### 3.2. The Vietnamese political systems

Vietnam is a Socialist Republic which subscribes to Marxist-Leninist doctrine and Ho Chi Minh thought.<sup>246</sup> The Vietnamese political system consists of the Vietnamese state, the VCP and related organizations including the Vietnam Fatherland Front, the Labour Union and other political and social organizations. The Vietnamese Constitution states

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<sup>245</sup> Hoecke, above n 141, 92.

<sup>246</sup> *The Constitution 1992 (amended 2001)* (Vietnam).

that the VCP is the leading force in Vietnamese society and leads the state and all other organizations.<sup>247</sup> Thus, the VCP's and Political Bureau's resolutions have a major influence on shaping law and government policies. The VCP also nominates its qualified members as the leaders in the political system especially in state agencies from the central to the local level.<sup>248</sup> It is difficult to determine where the separation of the VCP and the state occurs.

Under the Constitution, the Vietnamese government is divided into three branches: legislative, executive and judicial.<sup>249</sup> The Constitution and the laws specify the roles of the head of each branch. Although there is a division of functions between these branches as in other socialist political systems, the state is a unitary one and there is no separation of powers.<sup>250</sup> This has an impact on the independence of the courts which affects the enforcement of the SCL and the avoidance attitude of officers which is considered and analysed within the thesis, particularly in Chapters 5 and 6.

The sovereignty of the people is recognised in the role of the NA which is the highest organ of state power.<sup>251</sup> It is composed of deputies elected for five-year terms through direct nationwide elections. It is the only body empowered to make and amend the Constitution and to legislate. Members of the VCP do not automatically have the right to run for office. They must first be screened by appropriate executive committees before they are nominated as candidates in elections. The NA not only makes laws, ordinances, and resolutions but also oversees all spheres of public life. This includes the executive with its need to maintain social order, public safety and national security. It also oversees the judiciary. It elects, and may dismiss the President, Vice President, the NA Chairperson, the Vice Chairperson and members of the NA's Standing Committee, the Prime Minister, the Chief Judge of the SPC, the Chief Procurator of SPP. It approves, on the nomination of the Prime Minister, the appointment and dismissal of

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<sup>247</sup> Ibid Art 4; *The Constitution 1992* (amended 2013) (Vietnam) Art 4.

<sup>248</sup> VCP's Resolution at the Congress XI (National Political- Truth Housing, 2011) 88-89 [Đảng Cộng sản Việt Nam: *Văn kiện Đại hội đại biểu toàn quốc lần thứ XI*, Nxb. Chính trị quốc gia - Sự thật, Hà Nội, 2011, 88-89]

<sup>249</sup> *The Constitution 1992* (amended 2001) (Vietnam) Art 2; *The Constitution 1992* (amended 2013) (Vietnam) Art 2.

<sup>250</sup> Ibid.

<sup>251</sup> *The Constitution 1992* (amended 2001) (Vietnam) Art 93; *The Constitution 1992* (amended 2013) (Vietnam) Art 69.

deputy prime ministers, ministers and other members of government.<sup>252</sup> The President, who is head of the state, commands the armed forces and acts on behalf of Vietnam in domestic and foreign affairs.<sup>253</sup>

The NA meets regularly twice each year for some weeks. While in session, it passes legislation and votes on fundamental foreign and national policies. The NA Standing Committee is the permanent body of the NA able to exercise most of the powers of the NA, including the power to promulgate ordinances and to present draft laws to the NA.<sup>254</sup> The NA body, rather than courts, has the authority to interpret laws.<sup>255</sup> The legislation is often drafted by the MOJ or other agencies of the government. Laws passed by the NA are promulgated by the President.<sup>256</sup>

The executive branch forms the national or central government.<sup>257</sup> The working government consists of the prime minister, the vice premiers, the ministers and other members of the government at the level of minister equivalent (eg the Head of the Government Inspectorate, or the Head of the State Bank).<sup>258</sup> The government is conducted by a cabinet consisting of the ministers led by the prime minister. The cabinet has the power to promulgate resolutions and decrees and is accountable to the NA. The individual ministers of the various ministries are empowered to issue circulars and directives for the application of laws and ordinances.<sup>259</sup> In addition to the central government, Vietnam is divided into administrative units ranging from provinces to districts. There are 58 provinces and five municipalities with provincial status directly under the central government. Each province has a People's Council elected by the residents of the province which appoints a People's Committee to undertake the

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<sup>252</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 84; *The Constitution 1992 (amended 2013)* (Vietnam) Art 70.

<sup>253</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 103; *The Constitution 1992 (amended 2013)* (Vietnam) Art 88.

<sup>254</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 91; *The Constitution 1992 (amended 2013)* (Vietnam) Art 74; *The Law on Organization of National Assembly 2001 (amended 2007)* (Vietnam) Art 6 and 7.

<sup>255</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 91; *The Constitution 1992 (amended 2013)* (Vietnam) Art 74.

<sup>256</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 103; *The Constitution 1992 (amended 2013)* (Vietnam) Art 88.

<sup>257</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 109; *The Constitution 1992 (amended 2013)* (Vietnam) Art 94.

<sup>258</sup> There are now 18 Ministries and 4 equivalent agencies.

<sup>259</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 116; *The Constitution 1992 (amended 2013)* (Vietnam) Art 100.

government of the region.<sup>260</sup> The provincial governments are a simplified version of the structure of the central government. They all have a legal Department. Below the level of the province are districts, provincial cities or county towns. The municipalities with provincial status are divided into urban and rural districts.

The judicial branch includes the People's Courts and People's Procuracy following the model of the Soviet judicial system. The Constitution establishes a three-tiered judicial system comprising:<sup>261</sup>

- (1) the People's Courts of the districts or equivalent units in the provinces or municipalities directly under the central government;
- (2) the People's Court of provinces and cities that are directly under the central government: and
- (3) the SPC led by a Chief Judge.

The SPC consists of a Council of Judges, a Committee of Judges and seven specialized divisional courts.<sup>262</sup> A specialized division consists of three appellate courts in Hanoi (North), Da Nang (Central) and Ho Chi Minh City (South) that retry cases on appeal from the provincial courts. The Chief Judge is elected by the NA on the recommendation of the President. The Deputy Chief Judges and SPC's judges are appointed by the state President for five years.<sup>263</sup> From 1945 to 1959, the judges were appointed by the central government.<sup>264</sup> In 1959, that was changed to appointment by election, believed to be more democratic. However, over 20 years a number of problems became apparent in this process. Subsequently, judges in other courts were appointed by the Chief Judge of the SPC for five years.<sup>265</sup> The judges have been potentially compromised by this. If they are too independent in finding against the government,

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<sup>260</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 118; *The Constitution 1992 (amended 2013)* (Vietnam) Art 111.

<sup>261</sup> *The Law on Organization of the People's Court 2002* (Vietnam) Art 2.

<sup>262</sup> They are the Central Military Court, the Criminal Court, the Civil Court, the Economic Court, the Labour Court, the Administrative Court and the Court of Appeal under *The Law on Organization of the People's Court 2002* (Vietnam) Art 18.

<sup>263</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 84(7), 103(3).

<sup>264</sup> *The Constitution 1946* (Vietnam) Art 64.

<sup>265</sup> *The Law on Organization of the People's Court 2002* (Vietnam) Art 25(7).

they might not be reappointed. This has impacted on the development of a professional and independent judiciary.<sup>266</sup>

The Constitution also provides for the People's Procuracy, led by a Chief Procurator, to oversee the observance by laws by ministries and other state bodies and to prosecute in civil and military courts. As in the Soviet model, the SPP has a similar status; the Chief Judge of the SPC has the right to supervise judicial activities and to ensure the uniform and proper enforcement of the law.<sup>267</sup> The Procuracy has a similar structure to that of the court system below the central to the local level. The Procuracy is independent of the MOJ and the Chief Procurator answers directly to the NA. He or she is appointed for a five-year period.<sup>268</sup> The Deputy Chief and Procurators at the SPP level are appointed by the state President. Provincial and district level procurators are appointed by the Chief Procurator. According to the Constitution and *the Law on Organization of People's Procuracy 2002*, the People's Procuracy is authorized to supervise the judicial but not the executive branch or other state activities. In respect of the accountability of state officials, the Government Inspectorate [*Thanh tra Chinh phu*] is significant. It has the power to inspect all facets of state administration. It receives complaints and denunciations of officials and focuses in particular on combating corruption. It administrates *the Laws on Complaint 2011* and the *Law on Denunciation 2011*. In 2011, 123,905 complaints were received and 104,133 accepted; 23,667 denunciations were received and 16,064 accepted.

### 3.3. The legal system

The Vietnamese Constitution is the supreme and basic law. In 1991, the VCP Congress reinforced the move toward a market economy by introducing a number of major changes to facilitate further reforms. The *Constitution 1992* was approved on April 15, 1992, having been preceded by the three earlier Constitutions of 1946, 1959 and 1980. The *Constitution 1992* was amended and supplemented in 2001 and 2013. It affirms the socialist objectives of the Vietnamese nation, emphasizing the leadership of the VCP in Article 4. As part of the "transition to socialism", it also places economic renewal and

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<sup>266</sup> Dinh Thanh Phuong, 'Nguyên tắc độc lập trong hoạt động của Tòa án nhân dân' (2012) *Tap chi Khoa hoc*, [Principles of independence of People's Court, *Science Journal*] 153.

<sup>267</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 137; *The Constitution 1992 (amended 2013)* (Vietnam) Art 107

<sup>268</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 84(3); *The Constitution 1992 (amended 2013)* (Vietnam) Art 108.

development at the core of state activities and includes guarantees of greater personal and democratic freedoms. In addition to guaranteeing that all citizens are equal before the law,<sup>269</sup> freedom of opinion and speech, the press, association, and religion<sup>270</sup>, the *Constitution* also guarantees that "*citizens shall enjoy inviolability of the person and the protection of the law with regard to his life, health, honour and dignity*".<sup>271</sup>

Under the Constitution, statutes passed by the NA include organic laws such as the Civil Code, the Criminal Code, Civil Procedure Code and the and Criminal Procedure Code and more general laws and other laws on specific issues such as Commercial Law, Land Law, the Law on Complaints and Denunciation. These lay the foundations for government and create basic institutions such as the laws on the NA, the courts, and the procuracy. Besides laws, ordinances drafted by the Standing Committee of NA and promulgated by the President are also legislation. Although the NA is the primary lawmaking body, the government provides a second tier of legislative authority, and most statutes are fleshed out and implemented through ministerial decrees. Decrees as well as circulars from ministries and other government agencies are also legislation. In addition to these resolutions, decisions having the force of law are made by the People's Committees at provincial to district levels.

The Vietnamese legal system has been influenced by Roman-Germanic and Soviet law<sup>272</sup> both in the way legislation is made and interpreted and also in the processes through which it is applied. While the Constitution provides that it is supreme and all law must comply with it, there is no constitutional court to abrogate any law or regulations which are inconsistent with it or with higher level legislation. Problems in the legal framework in Vietnam are made more complex by overlapping and inconsistent legislation and this in turn creates difficulties in implementing laws and controlling behaviour through them.<sup>273</sup> These are real challenges to developing a legal system for a state based on the rule of law, and have had a particular impact on a law

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<sup>269</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 52; *The Constitution 1992 (amended 2013)* (Vietnam) Art 16.

<sup>270</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 69, 70; *The Constitution 1992 (amended 2013)* (Vietnam) Art 24, 25.

<sup>271</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 71; *The Constitution 1992 (amended 2013)* (Vietnam) Art 20.

<sup>272</sup> H T Lien, 'On the legal system of Vietnam' (1994, September) *Vietnam Law and Legal Forum*, 33; Mathieu and Ket, above n 91, 140.

seeking to impose liability on the state to pay compensation for breaching a legal requirement.

### **3.4. State liability in legal history**

The history of the development of state liability helps in understanding both the legal policy and processes in the SCL and its potential development and enforcement. According to Phillips, legal history can teach about the nature of a law including the contingencies which led to it.<sup>274</sup> The historical context can deepen our knowledge and understanding of the legal system.<sup>275</sup> It can enhance our understanding of the practical as well as the theoretical operation of laws.<sup>276</sup> It is also noted that we cannot resolve questions about the future of the law without an adequately understood past.<sup>277</sup>

The political and legal history of Vietnam extends over thousands of years. It was one of the first parts of the world where agriculture was practised. About 5,000 years ago, for example, the first state emerged in the Red River valley through the need to control irrigation and floods as well as to protect trade and provide security from invasion. It is not possible to give a comprehensive account of this historical development here. In this section, only a brief history of some key periods, which may facilitate an understanding of the contemporary of the law on state liability, is given.

#### **3.4.1. Period before 1945**

##### **Chinese and Vietnamese autonomy**

From 111 BC to 938 northern Vietnam was ruled by China with intermittent periods of short rule by Vietnamese leaders who had successfully rebelled. This long period of Chinese influence affected the Vietnamese language, its orthography and the sense of identity. Successful rebellions in the Red River led to the restoration of autonomous rule which lasted until the 1800s. Chinese thought continued to influence Vietnamese society, gaining more prestige during the 15<sup>th</sup> century and reaching its zenith in the mid-19<sup>th</sup> century.<sup>278</sup> In this period, the Vietnamese feudal state was an absolute monarchy. The head of state was the king or emperor. While nominally a tributary state of China,

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<sup>274</sup> Phillips, Jim. 'Why Legal History Matters' (2010) 41 (3) *Victoria University of Wellington Law Review* 293.

<sup>275</sup> David W Raack, 'Some Reflections on the Role of Legal History in Legal Education' (1988) 26 (4) *Duquesne Law Review* 893.

<sup>276</sup> *Ibid.*

<sup>277</sup> Raack, above n 275, 310.

<sup>278</sup> Gillespie and Chen, above n 6, 4.

several kings sought investiture by the Chinese court while others did not. During the later Le dynasty from about 1545 to about 1800, the king ruled in name only with the power being exercised by the Trinh lords in the north and the Nguyen lords in the south. The king had the supreme right to decide on military, political, economic and religious issues. State power was also the power of the king and there was no defined limit to it. However, as in Western European Law, there were countervailing traditions which imposed restraint on kings. Many dynasties use morals or virtues to legitimize their role in governing.<sup>279</sup> For example, Le Thanh Tong, the sixth king of the Le dynasty, was influenced by Confucianism and was deeply concerned with good government and personal morality. The government, in the Confucian tradition, should be run by men of noble character as opposed to men from noble families. He instituted six ministries based on the Chinese pattern of the separation of power of Finance, Rites, Justice, Personnel, Army, and Public Works. Also, a Board of Censors was set up with royal authority to monitor government officers and the power to report directly to the emperor.<sup>280</sup> This division of power and the nominal restraint on government officials continued into the 1900s in Central and North Vietnam.

Two major statutes promulgated under the Le and Nguyen dynasties, the *Hong Duc* and *Gia Long* Codes, respectively followed a pattern of Chinese imperial codes but with distinctive Vietnamese features.<sup>281</sup> This feudal legislation was affected significantly by Confucianism, in which the position of the king was supreme, and Buddhism, in which dharma is supreme. This is the relationship between the cause and the effect and the dynamic and interdependent relationships between natural

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<sup>279</sup> In Vietnam, many historical scholars and books show that the Ly, Le, Tran Dynasty use moral as the rule. See Trần Mai Ước, *Giá trị về văn hóa của triết học Phật giáo thời Lý và ý nghĩa lịch sử* [the cultural value of Buddies philosophy in Ly dynasty and historical significance],

<[http://khoavanhoc-ngonngu.edu.vn/home/index.php?option=com\\_content&view=article&id=1266%3Agia-tr-v-vn-hoa-ca-trit-hc-pht-giao-thi-ly-va-y-ngha-lch-s&catid=113%3Aht-vn-hc-pht-giao-vi-1000-nm-thng-long&Itemid=181&lang=vi](http://khoavanhoc-ngonngu.edu.vn/home/index.php?option=com_content&view=article&id=1266%3Agia-tr-v-vn-hoa-ca-trit-hc-pht-giao-thi-ly-va-y-ngha-lch-s&catid=113%3Aht-vn-hc-pht-giao-vi-1000-nm-thng-long&Itemid=181&lang=vi)>

<sup>280</sup> D R SarDesai, 'Vietnam, Trials and Tribulations of a Nation' (1989) *Long Beach Pubns*, 35.

<sup>281</sup> *Hong Duc Code* [Quốc triều hình luật] passed in 15<sup>th</sup> century under Le dynasty including 6 books and 722 articles.

*Gia Long Code* [Hoàng Việt luật lệ] passed at the beginning of 19<sup>th</sup> century under Nguyen dynasty including 22 books, 398 Articles.

phenomenon and human beings.<sup>282</sup> The laws did not assume any kind of liability for the state itself.

Although there was no provision for the state to pay compensation, the feudal law prohibited officials' unlawful behaviour. This was to ensure a stable social order, to prevent resistance to royal authority, to ensure prosperity, to strengthen the power of the king, to limit corruption, and to protect people. As noted, public officials were subject to punishment by the Board of Censors. The *Hong Duc Code* prohibited officers from making unlawful arrests and detaining innocent people (Article 636); unnecessarily shackling prisoners (Article 658); beatings prisoners without provocation (Article 707); beating prisoners to death (Article 682); torturing elderly and juvenile prisoners (Article 665); not taking care of prisoners (Article 663); or, giving unlawful judgment (Article 679). Violations could lead to fines or other punishment. The idea that everyone should be equally protected by the law is presented in this protection of human dignity and freedom. Article 687 provided a right to appeal against persecution, imprisonment or wrong unjust or unfair sanctions. Articles 206, 326, 335, 336 and 338 provided a right to denounce for wrongful collection of taxes, possession of land or confiscation of money even though money was collected as tax for the king (Article 300).

### **French rule**

French influence in Vietnam commenced in the 1600s through Jesuit missionaries and then through trade in the 1700s. French influence was important in assisting the Nguyen dynasty to reunify the country in the late 1700s. In the middle of the 1800s, under the guise of protecting missionaries from persecution by the emperor's government, the French attacked both Da Nang and Saigon. In 1862, the emperor was forced to cede sovereignty over the South – Cochinchina – to France. In 1883 the emperor was forced to accept a French protectorate in the North – Tonkin – and the centre – Annam. The emperor in Da Nang became a ruler in name only in these protectorates.<sup>283</sup>

During the French colonial period, the French simultaneously applied two systems of laws in the two protectorates - feudal law with an overlay of French law. In the south, French law was in force. Firstly, in Annam and Tonkin, the emperor governed in name

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<sup>282</sup> The *Gia Long Code* was consider basing much on Qing Code of China cited in Gilleppe and Chen, above n 6, 8.

<sup>283</sup> Ha Noi Law University (Trường Đại học Luật Hà Nội), *Giáo trình lịch sử Nhà nước và Pháp Luật Việt Nam* [Textbook of the History of State and Law] (2002) 492.

advised by a secret council or cabinet comprised of the heads of the six departments including the Board of Censors. Secondly, state liability and review of administrative decisions in French law was not part of private law such as the Civil Code but took place in a public law system with the Conseil d'Etat at the apex. These were imposed in the Civil Code of the South (1883) of the North (1931), the Centre (1936).<sup>284</sup> Those laws were significantly influenced by the *Napoleonic Civil Code* in 1804 and reflected French legal ideas.<sup>285</sup>

Indeed, it can be affirmed that the Laws during this period had been influenced by the Confucian, Buddhism, the Chinese and French Laws. These protected the King or state and other dominating classes. However, it recognized and protected the rights of all human beings. Although there was no law which directly expressed state liability, there were some provisions that imposed liability on state officials. These provisions laid the foundation for subsequent generations in legislating to protect human rights including the law on state liability for compensation in Vietnam in the next stages.

#### **3.4.2. Period from 1945 to 1986**

In 1945, after the successful August Revolution, the Democratic Republic of Vietnam was established; the rights of citizens had been established and secured. As there was no capacity to enact new laws, the old laws continued to be applied except for provisions contrary to the independence and freedom of the new Democratic Republic. Following formal independence from France in 1954, revolutionaries in North Vietnam increasingly turned to China and Soviet Union for models of both political and legal systems. Meanwhile, the Republic of Vietnam in the South retained much of the French colonial legal system until reunification in 1975.<sup>286</sup> Thus, from 1955 to 1975, Vietnam's government was split between the Democratic Republic of Vietnam in the North and the Republic of Vietnam in the South. In the North, under the *Constitution 1946*, the state was established as of the people, by the people, for the people. The *Constitution 1946* contains some provisions protecting human rights but does not mention the right to compensation.<sup>287</sup> In the private law, the state had equal rights and obligations and was given the same consideration as other subjects. However, the state's liability had not been defined under the law.

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<sup>284</sup> Vũ Văn Mẫu, *Pháp Luật Diễn Giảng [Lectures of Law] Vol 2, Book 1* (1973).

<sup>285</sup> *Ibid.*

<sup>286</sup> Gillespie and Chen, above n 6, 4.

<sup>287</sup> *The Constitution 1946* (Vietnam) Art 10, 12.

Starting with the *Constitution 1959*, the people's right to claim for compensation against the state was specifically recognized in Article 29:

*Công dân nước Việt Nam dân chủ cộng hoà có quyền khiếu nại và tố cáo với bất cứ cơ quan Nhà nước nào về những hành vi phạm pháp của nhân viên cơ quan Nhà nước. Những việc khiếu nại và tố cáo phải được xét và giải quyết nhanh chóng. Người bị thiệt hại vì hành vi phạm pháp của nhân viên cơ quan Nhà nước có quyền được bồi thường.*

[All citizens of the Democratic Republic of Vietnam have the right to lodge complaints and denunciations with any state agency on the criminal behaviour of the state agency staff. The complaints and denunciations must be reviewed and resolved quickly. The victims of the crimes of state agency staff may be entitled to compensation.]

The provision also adopted the Soviet system of complaint and denunciation which was intended to give citizens an easily available remedy for wrongful decisions by government officials. On 23<sup>rd</sup> March, 1972 the Supreme People's Court issued *Circular No. 173/UBTP* which provided trial guidelines for non-contractual damages. In particular, the Circular stipulated the liability of legal persons as employees, officers or the legal representative of the enterprise. An agency in the performance of tasks that caused damage to another person, agency or enterprises had to pay damages under the civil liability regime. The agency then had the right to require the officials who had committed the wrongful acts to repay the compensation under a labour relationship. However, in cases where the actions were not closely related to the work assigned to them, where officials had apparently acted in pursuit of their own interests, they had personal liability for the damages.

The *Constitution 1980*, continued to assert the citizen's right to compensation in Article 73 "... *All actions infringe the legitimate rights of citizens must be promptly corrected and dealt with severely. The victim has the right to be compensated*". However, there was no law specifying how this was to be done, so in practice there was no state liability.

Confucian and Buddhism have left a moral legacy of right conduct in Vietnamese culture. Chinese and French law provided Vietnam in the past with a legal framework of remedies for wrongful official conduct. Soviet law which underpinned the socialist institutions recognition of state ownership and the planned economy left the state

liability for compensation in the Constitution. In the absence of a separate law, in actual fact there was no compensation liability imposed on the state.

### 3.4.3. Period from 1986 to 2009

As shown above, 1986 represents the beginning of the landmark reform of Vietnam's economic, legal and political systems by the Sixth Congress of the VCP.<sup>288</sup> It has driven significant change in government administration and the role of the law in regulating the state's activities.<sup>289</sup> Vietnam adopted the concept of the state based on the rule of law in both the VCP's Resolution and the state's Constitution.<sup>290</sup> In order to establish a state under the rule of law, and with respect for human rights and the rights of citizens, the *Constitution* of 1992 (amended and supplemented in 2001) in Articles 72 and 74 acknowledged the rights of the claimants who suffered damage caused by unlawful actions of state officials.

Based on the provisions for compensation in the *Constitution 1992*, the *Civil Code 1995* Chapter V provided for civil liability for non-contractual damages. In particular, this Code had two Articles covering the compensation for damages caused by government officials or by officers in judicial agencies.<sup>291</sup> Accordingly, the state agency had to compensate for damage caused by them in the course of conducting official duties. The *Civil Code 2005* inherited fully these provisions of the *Civil Code 1995*. Article 619 of the *Civil Code 2005* provides for compensation for damages caused by the state officers and employees, and Article 620 provides for compensation for wrongful conviction. To implement these provisions, subordinate legislation such as *Decree 47* in 1997 and the NA's *Resolution 388* in 2003 provided some guidance and interpretation.<sup>292</sup>

*Decree 47* was a remarkable step in providing and promulgating detailed instructions which specified the effective implementation of Article 623 and Article 624 of the *Civil Code 1995*. Decree stipulated in Article 1 that:

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<sup>288</sup> Gillespie and Chen, above n 6, 11.

<sup>289</sup> Mathieu and Ket, above n 91.

<sup>290</sup> Gillespie and Chen, above n 6, 11.

<sup>291</sup> *The Civil Code 1995* (Vietnam) Art 623, 624.

<sup>292</sup> They are *Decree No 47/CP (3/5/1997) On Dealing with Compensation for Damage Caused by State Officials* and the Standing Committee of the NA's *Resolution 388 NQ/ UBTVQH (17/3/2003) On Compensation for the Victims of Wrongful Convictions*.

The State, the judicial agency must compensate for damages caused by public officers or competent persons caused while conducting duty or while performing duties of investigation, prosecution, trial, judgment

And Article 3 provided that:

The clients have the right to request the state agency, the agency conducted its legal proceedings to compensate for damages caused by its employees, the competent officers

The Decree also specified the procedures and order for the award of damages and the right to request the Court to determine the compensation when the parties failed to agree to negotiation. After compensating the victim, the state has the right to ask for reimbursement from the state officials who had breached their duties. In 1998, the Governmental Organizing Committee also issued *Circular No. 54/1998/TT-TCCP* to guide the implementation of some parts of *Decree 47*.

*Resolution 388* was also a turning point in the state recognizing its compensation responsibility for damages caused by wrongful conviction and false imprisonment. The Resolution defined more specifically cases for compensation, standard for determining damages and the amount of compensation, and the representative agency which was responsible for damages. Subsequently, there were further subordinate laws enacted to guide the implementation of some provisions of *Resolution 388*<sup>293</sup>. Those had greater significance in enhancing the quality of the decision-making and accountability of the state officials. This was a significant contribution to judicial reform, especially in improving the implementation of the law on compensation. The Resolution represented further attempts by the state to recognize the equal relationship between it and its citizens.

During this period, several other Laws implicitly provided for state liability for compensation in other processes. These included the *Law on Complaints and Denunciations 1998* (as amended and supplemented in 2004, 2005);<sup>294</sup> the *Ordinance*

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<sup>293</sup> They are *Circular No. 01/2004/TTLT-VKSNDTC-BCA-TANDTC-BTP-BQP-BTC* March 25, 2004 of the Supreme People's Procuracy, the Ministry of Public Security, the Supreme People's Court, the Ministry of Justice, Ministry of Defence, the Ministry of Finance; *Circular No. 04/2006/TTLT-VKSNDTC-TANDTC-BCA-BTP-BQP-BTC* November 22, 2006 of the Supreme People's Procuracy, the Supreme People's Court, the Ministry of Public Security, Ministry of Justice, Ministry of Defence, the Ministry of Finance; Joint Circular replaces *Circular number 01/2004/TTLT-VKSNDTC-BCA-TANDTC-BTP-BQP-BTC*.

<sup>294</sup> *The Law on Complaints and Denunciations 1998* (Vietnam) Art 6, 8.

on sanctioning of administrative violations 1989, Ordinance on handling of administrative violations 1995 and the Ordinance on Handling of Administrative Violations 2002 (as amended and supplemented in 2007 and 2008)<sup>295</sup>; the Circular No. 49/2008/TT-BTC June 12, 2008 of the Ministry of Finance giving guidance on the compensation for taxpayers, for unlawful acts by officials including tax and customs officers, in the performance of their duties; *The Environmental Protection Act 1993*<sup>296</sup>; *Environmental Protection Act 2005*<sup>297</sup>; and *Criminal Procedure Code 2003*<sup>298</sup>. However, as mentioned above, during this period, because the *Resolution 388* provided guidelines only for wrongful conviction, in practice, state compensation for other state activities under other laws was not applied.

#### **3.4.4. Period from 2009 to the present**

As a result of the above provisions, Vietnam appeared by the mid-2000s to have had many statutes or regulations stipulating the liability of the state for compensation. However, when these provisions were reviewed by the MOJ, it recognized that they had not been as effective as expected because they were still only principles, too general to be implemented and often found in separate legislation. Some of the subordinate legislations conflicted with the *Civil Code 2005* and other subordinate legislations were inadequate in specifying the further law and procedures required to enforce the provisions. Also, the government agency responsible for compensation could sometimes not be determined, especially where the damage was caused by several agencies.<sup>299</sup> Moreover, in practice, breaches of the law by the state officials were a common occurrence with a large number of incidents of wrongful acts by the state officials. The SPC's former tribunal president stated that in 2006, the Court dealt with nearly 200,000 matters in which 5% (approximately 9,000) of the judgments were set aside or amended.<sup>300</sup> This indicated that there were a large numbers of judicial decisions which were potentially bad in both criminal and other proceedings including administrative

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<sup>295</sup> *The Ordinance on Sanctioning of Administrative Violations 1989* (Vietnam) Art 40; *The Ordinance on Handling of Administrative Violations 1995* (Vietnam) Art 91; *The Ordinance on Handling of Administrative Violations 2002* (Vietnam) Art 121.

<sup>296</sup> *The Environmental Protection Act 1993* (Vietnam) Art 51, 52.

<sup>297</sup> *The Environmental Protection Act 2005* (Vietnam) Art 127.

<sup>298</sup> *The Criminal Procedure Code 2003* (Vietnam) Art 29, 30.

<sup>299</sup> Ministry of Justice, above n 15.

<sup>300</sup> Phan Nam, '388 và hành trình giải oan của các doanh nhân' [388 and the way to find out the right judgment of businesses] *Diễn đàn các doanh nghiệp Việt Nam*, 01/01/2007 <<http://www.vibonline.com.vn/vi-VN/Forum/TopicDetail.aspx?TopicID=1634>>

law cases. This meant that there was considerable potential state liability in respect of wrongful convictions, enforcement of judgments and administrative decisions. The process of researching and drafting the SCL lasted for several years, commencing in 2005 after the enactment of the *Resolution 48 and 49/NQ-TW* on the strategies of legal and judicial reform.<sup>301</sup>

In order to remedy these problems and to implement the goals set by the *Politburo Resolution 48-NQ/TW*<sup>302</sup>, in 2009, the Vietnamese NA passed the SCL which came into force on 1<sup>st</sup> January 2010. This gives to those injured by the state through actions by the national, provincial and local governments the right to sue for compensation. It makes the relevant agency liable to compensate for specific actions of the executive and judicial branches of governments and for specific enforcement activities. This law represents a further change in perceptions of the relationship between the state and citizens. The MOJ states that this is a further significant step in building a more democratic society in Vietnam. It seeks to create a uniform legal basis, to redress the separation of the laws relating to the state's liability for compensation; to create a new, efficient and uniform legal ground which assists people to more easily claim damages from the state; and to enhance the role and responsibility of state officials.<sup>303</sup>

In order to implement the established objectives, a number of subordinate laws guiding the implementation of Law were issued.<sup>304</sup> These documents were considered to be a timely effort to not only help the authorized agency perform compensation tasks effectively, but also to create a better environment that assisted victims of damage to

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<sup>301</sup> *VCP Resolution 48*, above n 14; *Resolution 49-NQ/TW* on strategy of judiciary reform up to 2020, adopted on 2/6/2005.

<sup>302</sup> *VCP Resolution 48* confirms that one of the fundamental objectives of the state are legal reforms which will create a comprehensive legal system for a law-based state which supports a market economy and respects economic and other human rights.

<sup>303</sup> Ministry of Justice, above n 15.

<sup>304</sup> They are *Decree 16/2010/ND-CP* giving guidance to implement the law on state liability On 3 March 2010; the *Joint Circular 19/ 2010/ TTLT-BTP-BTC-TTCP* guiding the implementation of the state liability in administrative activities on 26<sup>th</sup> November 2010; *Joint Circular 24/ 2011/ BTP-BQP* was enacted to guide the implementation of the state liability in enforcement of civil judgment on 15<sup>th</sup> December 2011; and *Joint Circular 18/2011/TTLT- BTP-BNV* guiding duties, rights, organization and personnel of the local government on state liability for compensation on 19<sup>th</sup> October 2011; *Joint Circular 71/2012/TTLT- BTC-BTP* on Defining the estimation, management, use and settlement of funds for implementation of the State liability on 09<sup>th</sup> May 2012; *Joint Circular 01/2012/TTLT/TANDTC-VKSNDTC-BTP* 18/09/2012 guiding the implementation of the State's liability in activities of civil proceedings, administrative proceedings.

better exercise their claim, thereby ensuring the practical and feasible application of the Law.<sup>305</sup>

From this time, it appears that Vietnam had a complete set of laws stipulating the liability of the state for compensation from the Constitution through to subordinate legislation. It can be also said that the provisions for state liability have been developed over a number of periods and reflect the gains that have been made over that time. It has been claimed that it is a good instrument enabling Vietnam to further develop a state based on the rule of law and a mixed market economy, and protecting human rights. Is it as comprehensive and as effective as claimed, and good enough as expected? The next chapters will review the evidence and attempt to address these questions conclusively. The rest of this chapter considers the wider issues regarding what citizens can expect from laws relating to state liability which informs expectations about the comprehensiveness and effectiveness of such laws.

### **3.5. Theories of state liability**

While history can inform us of how things came to be, theories can enhance our understanding of what they could be.<sup>306</sup> According to Leedy and Ormrod, “A theory is an organized body of concepts and principles intended to explain a particular phenomenon”.<sup>307</sup>

Theories can explain why the state should pay compensation to those injured or damaged by wrongful actions of its officials and what the basis for, and limits to, such claims should be. As shown in Chapter 1 in the Introduction, the development of the law on state liability has been marked by three main stages: (1) before the 19<sup>th</sup> century there was no right to state compensation against the state for any damage because of the absolute immunity theory also the state may offer compensation as an act of grace consistent with its honour and dignity; (2) at the end of the 19<sup>th</sup> century and early 20<sup>th</sup> century the immunity of the state was limited and some laws entitled some forms of damages to be claimed as a right; (3) in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries, there has been further recognition of the liability of the state to pay compensation in both international law and domestic law. The literature review in Chapter 1 also shows that

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<sup>305</sup> *Báo cáo số 300/BC-CP về công tác bồi thường nhà nước ngày 23/10/2012* [The Government's *Report 300/BC-CP on State Liability Affairs on 23/10/1012*]

<sup>306</sup> Tavallaei and Talib, above n 189, 570.

<sup>307</sup> *Ibid.*

there are many theories which influenced or later justified the emergence of the law on state liability including liberty and human rights, the development of economy, constitutionism and its concepts of the rule of law, and globalization.

Hence, the development of the law on state liability in Vietnam is a response to both external and internal demands.

Externally, Vietnam has been integrating into global development. In 1977, Vietnam joined the United Nations. It formally recognized the human rights stipulated and solemnly declared in the UDHR of the United Nations in 1948. This was a further development of the recognition of human rights in its various constitutions which were influenced by its earlier participating in international socialism.<sup>308</sup> In 1982, Vietnam officially adopted the ICCPR and *International Convention on Economic, Social and Cultural Rights* (ICESCR). These Covenants require that each State Party ensure that any person whose rights or freedoms are violated has an effective remedy notwithstanding that the violation was committed by persons acting in an official capacity. They also require that any person claiming such a remedy must have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State including judicial remedies.<sup>309</sup> Under these Covenants, anyone who has been the victim of unlawful arrest or detention or unlawful conviction must have an enforceable right to compensation.<sup>310</sup> Accordingly, the Vietnamese government has pledged to respect and protect these rights for the Vietnamese citizens in the Constitution.<sup>311</sup>

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<sup>308</sup> See note 4 and 5

<sup>309</sup> ICCPR 1966 Art 2.

<sup>310</sup> Ibid Art 9 and 14.

<sup>311</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 50, 72, 74. Article 72 provides that “No citizen shall be considered guilty and liable to punishment until a verdict has been reached by the Court and has come into effect. Citizens who are arrested, detained, brought to court and sentenced unlawfully are entitled to damage compensation and to rehabilitation of their honour. Anyone who in arresting, detaining, prosecuting or sentencing someone unlawfully causes damage to others must be sanctioned by law.”

And Article 74 provides “Citizens have the right to lodge with any competent State authority a complaint or denunciation regarding transgressions of the law by any State body, economic or social organisation, people's armed forces unit or any individual. Complaints and denunciations must be examined and dealt with within a period of time stipulated by law. Any violation of interests of the State of legitimate rights and interests of collective and citizens must be promptly and strictly dealt with. Victims are entitled to damage compensation and to the rehabilitation of their honour as provided by law. Retaliation against authors of complaints or denunciations and misuse of the right to lodge complaints and denunciations with the aim of slandering and harming others through false charges are strictly prohibited.”

Also, in 2001, the International Law Commission at its fifty-third session adopted the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. Together with the commentaries it was submitted to the General Assembly as a part of the Commission's report. The General Assembly adopted the Draft.<sup>312</sup> The articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their wrongful acts. The emphasis is on the secondary rules of State responsibility. The articles are divided into four parts. Part One is entitled "The internationally wrongful act of a State". It deals with the requirements for the responsibility of a State to arise in international law. Part Two, "Content of the international responsibility of a State", deals with the legal consequences for the responsible State of its internationally wrongful act, in particular in relation to cessation and reparation. Part Three is entitled "The implementation of the international responsibility of a State". It identifies the State or States which may react to an internationally wrongful act and specifies the modalities by which this may be done, including, in certain circumstances, by the taking of countermeasures as necessary to ensure cessation of the wrongful act and reparation for its consequences. Part Four contains certain general provisions applicable to the Articles as a whole. Although the Articles deal only with the responsibility for conduct which is internationally wrongful, it shows the internationalization or globalization of law and the principles underlying the Vietnamese Law on State Compensation Liability. Also, in further legal reform in Vietnam consideration should be given to the Law implementing and mirroring international law to avoid breaches of Vietnam's international responsibilities, especially in protecting human rights.

Furthermore, to promote economic development, Vietnam officially joined the World Trade Organization (WTO) in 2007. As a member Vietnam must comply with its commitment to improve the law on investment and business and to create a transparent legal system based on equality. This required more legislative solutions to improve the operational efficiency of administration including ensuring greater transparency in public bodies. A major challenge for Vietnam when it joined the WTO was to improve the institutional capacity of its legal system. In accordance with the

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It is also reaffirmed in the *Constitution 1992 (amended 2013)*. However, the SCL based on the *Constitution 1992 (amend 2001)*, the old provisions of the *Constitution 1992 (amended 2001)* should be referred.

<sup>312</sup> United Nations, General Assembly, Resolution 56/83 of 12 December 2001.

legal and administrative reform processes, the law on state liability has sought to enhance the accountability of state officials. These developments to harmonise Vietnamese legislation with international law reflect the respect for human rights in international law including the right to claim for compensation.

Internally, in Vietnam, the right to compensation is not only a human right but also a citizen's right which is affirmed in the *Constitution 1992*, inspired by one of the values found in socialism: respect for human dignity. Article 50 of the Constitution provides that:

In the Socialist Republic of Vietnam, human rights in all respects, political, civic, economic, cultural and social are respected, find their expression in the rights of citizens and are provided for by the Constitution and the law.

Moreover, Article 72 of the Constitution states that:

The person who suffered unlawful arrest, detention, prosecution has the right to compensation for material damage and to restore honour. The illegal arrest, detention, prosecution, trial and cause damage to others must be dealt with severely.

Article 74 also provides that:

All acts violating the states' interests, the collective and individuals' legitimate rights and interests must be promptly dealt with severely. The victims are entitled to claim for compensation for material [sic] and restore the honour.

In Vietnamese law, the relationship between the state and the citizen is governed by both public law and private law. On the one hand, in public law such as administrative law, criminal law and taxation law, the state has greater legal powers than its citizens. On the other hand, in private law including civil law<sup>313</sup> the state is a subject without greater legal powers and has an egalitarian relationship with other subjects including individuals, legal persons and organizations. It continues, however, to be much better resourced to litigate than most individuals. The legal principle, however, exposes the state to the same compensation liability as that which applies to individuals or organizations, if the state has done harm.

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<sup>313</sup> Vietnam has Civil law in which consists tort law, contract law, property law, inheritance law...

As indicated above, the previous legislative provisions for state compensation before 2009 were inappropriate for resolving compensation claims, and failed to meet the goals of building a state based on the rule of law and protecting human rights in Vietnam. The SCL 2009 was a significant step in improving these provisions, and legal reform in the *Doi moi* process in general. Studies of the emergence of the law on state liability in Vietnam indicated that some scholars see that state liability should meet the requirements of the rule of law and other constitutional doctrines.<sup>314</sup> In a state based on the rule of law, every person not excepting the state as a legal person, should be equal before the law. Consequently, if the state causes damage or injuries to others, the state should be liable for compensation. Other studies see it as focussing on the result of administrative reform in order to limit the abuse of power and to enhance government capacity and effectiveness that are relatively low.<sup>315</sup> In addition, some authors argue that the law on state liability is also an important instrument protecting human rights and promoting justice as provided in international law, and is an attempt by the Vietnamese Constitution to build a state based on the rights and legitimate interests of citizens in a more democratic and egalitarian society.<sup>316</sup>

There are, as in common in law, many different ways to view or theorise the same phenomenon. There is no justification for state liability. Harlow claimed that it is ‘problem without solution’, meaning that it is difficult to propound a single theory explaining or justifying it.<sup>317</sup> However, the trend to promote greater state liability for compensation in Vietnam is in line with global trends. It offers the potential for greater justice and social equality, and for the economic development of Vietnam, as alluded to in Chapter 1 section 1.2.1 and explained further in the next section of this chapter.<sup>318</sup>

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<sup>314</sup> Nguyễn Sỹ Dũng, Lê Hà Vũ, *Bồi thường nhà nước với những nguyên tắc của pháp quyền* [State liability with principles of the rule of law] (2008) (7) *Tạp chí Nghiên cứu lập pháp* [Legislative research Journal] 9; Nguyễn Minh Đoan, ‘Bồi thường nhà nước: từ quan điểm đến pháp luật và khả năng thực hiện’ (2008) (129) [State liability: from opinion to law and enforcement], *Tạp chí Nghiên cứu lập pháp* [Legislative research Journal]; Dương Thanh Mai, above n 102.

<sup>315</sup> *Ibid.*

<sup>316</sup> Đinh Dũng Sỹ, ‘Một số vấn đề lý luận trong xây dựng dự án Luật Bồi thường nhà nước và xác định phạm vi điều chỉnh’ [some issues relating to theory of state liability for drafting the law on state liability and the scope of the law] (2008) (134) *Tạp chí Nghiên cứu lập pháp* [Legislative research Journal].

<sup>317</sup> Carol Harlow, ‘State Liability: Problem Without a Solution’ (1996) 40 U.T.L.J. 67; P W Hogg, ‘Compensation for Damage Caused by Government’ (1995) 6 N.J.C.L. 7 & 12; Harlow, above n 6.

<sup>318</sup> This will be shown in the section 3.6.2.

### **3.6. Nature and significance of state liability**

#### **3.6.1. Nature of state liability for compensation**

Understanding the nature of state liability for compensation is essential as it significantly helps to determine the principles for its application.

National legal systems and international law, as noted, have developed principles which ensure that the losses resulting from wrongful official acts are compensated by the competent authority.<sup>319</sup> Nevertheless, because of the differences between political and economic backgrounds and in legal traditions, such principles vary and may appear in different fields within national legal systems.<sup>320</sup>

To determine where the liability of the state should be found in a legal system and how extensive that liability should be, or what its limits should be (if any), theories of justice, of the state, and the goals of the law relating to civil wrong, are important.

#### **Theory of justice**

According to Aristotle, justice is fair or equal.<sup>321</sup> Moreover, ideas of justice are important when considering the level of responsibility or liability that should exist between people. Aristotle divided particular justice into two kinds: distributive and rectificatory or corrective justice. Distributive justice is the fair allocation of assets which are divisible among members of a community. The aim is to bring about and maintain a just distribution of benefits and burdens in society.<sup>322</sup> This has been an important factor in socialism and is reflected in the current Constitution of Vietnam. Rectificatory justice is about wrongs done by one person to another. There are two branches of rectificatory justice, which correspond to voluntary and involuntary transactions, which are, broadly, crimes and civil wrongs or torts. Here the parties are treated as equal and the issue is the redress of wrongs.<sup>323</sup>

A problem arises when the state is a defendant in legal proceedings as it is both government and law maker. It may use its power unfairly to discriminate against plaintiffs, and generally a specific plaintiff. This may impact on concepts of distributive and rectificatory justice. Mattei observes, in the context of state liability, that the law is

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<sup>319</sup> Peschorn, above n 21, 3.

<sup>320</sup> See, for example, *The Law on State Compensation Liability 1994* (China).

<sup>321</sup> Aristotle et al, *The Nicomachean Ethics* (Oxford World's Classics, 2009).

<sup>322</sup> Ratnapala, above n 151, 333.

<sup>323</sup> *Ibid*, 325.

a primary vehicle for ordering society and that it should apply to the state as well as to individuals.<sup>324</sup> Also, looking for common features of state liability across differences between jurisdictions, Harlow has suggested that a corrective or rectificatory justice is significant in satisfactorily resolving a dispute.<sup>325</sup>

State liability involves compensation which comes from the state budget. So it relates to both distributive justice and rectificatory justice. Money paid out in rectificatory justice will not be available for the purposes of distributive justice. Moreover, as justice can be used to evaluate fairness in the allocation of resources, fairness in restitution for, or reparation of, wrongs, and, fairness in respect of processes and procedures, it is appropriate to consider distributive justice in the context of the liability of the state.<sup>326</sup> Also, although acknowledging that there are various interpretations of the concept of corrective justice, Harlow believes that “the corrective justice concept is a helpful analytical tool” to justify state liability.<sup>327</sup> She views corrective justice as not only emphasising the compensatory function of the law of civil wrongs but also stressing the idea that the victim’s right to compensation is dependent on moral fault or blame.<sup>328</sup> Harlow argues that compensation promptly and voluntarily offered is an integral element of social solidarity<sup>329</sup> and states that a system of justice should be restorative rather than about sanctions and deterrence.<sup>330</sup>

### **Theory of the state**

Whatever the original rationale for the immunity of rulers and their governments, changes to the ways in which political bodies were conceptualised in Western Europe began with the appearance of a distinctive concept of the state after the Treaty of Westphalia of 1648. States in international law emerged as separate legal persons with their own rights and sovereignty.<sup>331</sup> The basis for their immunities from legal actions brought by their own citizens for wrongs was undermined by the ideas associated with the liberal revolutions which limited the powers of absolute monarchies. Locke’s philosophy was important in both the English and American Revolution in justifying

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<sup>324</sup> Tim Lindsey (ed), *Law reform in Developing and Transitional States* (Routledge, 2007) 145.

<sup>325</sup> Harlow, above n 6, 43.

<sup>326</sup> Rawls, above n 152; John Rawls, *A Theory of Justice* (Oxford University Press, 1999).

<sup>327</sup> Harlow, above n 6, 11.

<sup>328</sup> *Ibid* 10-41.

<sup>329</sup> *Ibid* 8.

<sup>330</sup> *Ibid* 9.

<sup>331</sup> Stephen J Lee, *Aspects of European History 1494-1789* (Routledge, 1984).

both the revolutions themselves and their outcomes. He saw the state as being the creation of a social contract in which free people agreed to come together to promote their common interests. If the state failed to do so, that contract permitted people to change the state and its government. Implicit in this was the understanding that the state was obliged to respect the pre-existing rights of citizens including their property.<sup>332</sup>

However, this was not a uniform movement globally and later revolutions produced different outcomes. The socialist revolution in Russia in 1917 was based on a very different understanding of the state. The state and its law, according to Marxist philosophy, was an oppressive system in which the property-owning class oppressed other classes. The state, which continued after the revolution, became an instrument in the hands of the proletariat to be used by them in the continuing class struggle.<sup>333</sup> By the 1970s, it was recognised that the class struggle was at an end and the state was now a state of all the people.<sup>334</sup> This reconceptualism of the state permitted a convergence towards the constitutionalism and rule of law found in liberal capitalist states.<sup>335</sup> As indicated above in Chapter 1, this led to the development of the concept of a state based on the rule of law in Soviet law known in Vietnamese as *nha nuoc phap quyen*. Under *Doi moi* and with the rise of constitutionalism and the rule of law, sovereign immunity in Vietnam has also seen contests over the importance of the values of constitutionalism, as it is in other societies.<sup>336</sup>

Moreover, in relation to the definition of ‘state’, the Weberian definition, which has been utilised by developmental state theorists, focuses on non-political party institutions such as bureaucratic, legal and coercive bodies.<sup>337</sup> A state is a legal person, a corporate entity, and as such cannot carry out its functions and activities without the intermediate involvement of others. It can only act by and through its agents, its organs

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<sup>332</sup> Ward, above n 38, 84; Ernest Barker, *Social Contract - essays by Locke, Hume, and Rousseau* (Oxford University Press, 1971) 1-145.

<sup>333</sup> Ernest Madel, *The Marxist Theory of the State* (Pathfinder Press, 1971); and Jerzy Wroblewski, ‘State and Law in Marxist Theory of State and Law’ (1975-1976) (22) *Wayne Law Review* 815.

<sup>334</sup> Bernard A Ramundo, ‘The Soviet State of the Entire People - Non-Marxist “Living Marxism”’ (1963-1964) 32 *George Washington Law Review* 315.

<sup>335</sup> Blandine Kriegel et al, *The state and the Rule of Law* (Princeton University Press, 2001).

<sup>336</sup> Vicki C Jackson, ‘Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence’ (2003) *International Law Review* 521.

<sup>337</sup> Max Weber M, *Economy and Society*, *Bedminster Press*, 1968 Vol 1 cited in Christopher Pierson, *The Modern State* (Routledge, 1996) 7.

and their representatives.<sup>338</sup> The actions of state organs give rise to the responsibility of the state whether the organ exercises legislative, executive, judicial or any other functions. International documents express clearly that there is no excuse for a state to deny liability by virtue of the fact that the wrongful act was performed by an internal political subdivision such as a state, province or territory.<sup>339</sup> It can be seen that although there may be variations in the definitions of a state, essentially they are the same in that the state is an entity and can be an independent subject, and therefore this is considered as the grounds for state liability in domestic law.

### **The law of obligations and state liability**

This is not to say that any single norm including the fundamental idea of justice, can justify every aspect of the law and its application in general. The concept of the state in social contract in the philosophy of Locke, Weber and others<sup>340</sup> affirms that the state should be treated as an individual and state liability for compensation should belong to the civil law of obligations rather than to a field of law in which the state may have power, such as public law and the field of administrative law in particular. As Harlow indicated, public liability should be resolved by a focus on tort law or the law of obligations itself and on principles of corrective justice.<sup>341</sup> She noted that “It is all very for systematizing academics to decide that tort law is the preserve of corrective justice”.<sup>342</sup> Damages are generally a private law remedy. They should be awarded in order to compensate unlawful actions by state officials. As David concludes, the goals of tort law are just compensation for and deterrence of loss<sup>343</sup>, and the recognition of state liability under civil law in the law of obligations will facilitate the application of those provisions to resolve disputes consistently and effectively.

The Vietnamese history of state liability analysed above shows that the liability for compensation of the state has been understood as a civil liability under the general

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<sup>338</sup> Kelsen, *The Pure Theory of Law* (2<sup>nd</sup> edn, 1960; trans. Kinght 1967, 290-321) cited in James Crawford, *State Responsibility* (Cambridge University Press, 2013) 113.

<sup>339</sup> James Crawford, *State Responsibility* (Cambridge University Press, 2013) 123.

<sup>340</sup> Ward, above n 38, 84; Barker, above n 38.

Locke saw the state as a creation of a social contract in which free people agreed to come together to promote their common interests. If the state failed to do so that contract permitted people to change the government of the state.

<sup>341</sup> Harlow, above n 6, 127.

<sup>342</sup> *Ibid* 49.

<sup>343</sup> David G Owen (ed), *Philosophical Foundations of Tort law* (Oxford University Press, 1995) 160.

principles of the Civil Code. The procedure for state compensation in general is that of civil procedure.<sup>344</sup> Under the SCL, state liability matters are inherited from previous laws and reflect the principles of civil liability.

Indeed, state liability for compensation in Vietnamese law is a particular type of civil liability. Thus, state liability also has the general characteristics of ordinary compensation liability. In addition, it has its own distinctive features as shown below.

Firstly, in state compensation liability, the person who causes the damage is a state official. The officials are elected, approved, employed or appointed to a position in state agencies to perform administrative tasks, to conduct proceedings, make judgments or engage in other activities. The state will pay compensation only if the state officials cause the damage in their official capacity. As stated above, the officials are working for the NA, the executive government from the central to the local level or in the judicial branch and not for the VCP or for other organizations. The Civil Code specifies the compensation for damages caused by employees.<sup>345</sup> This may be applied in cases of state liability but because there are no guidelines for implementing these regulations, it is difficult to resolve such a case. Cases in which people work for the VCP's agencies or other political or social organizations do not fall within the provision.

Secondly, in respect of state liability for compensation, the defendant is the state itself and not individual state officials or state agencies. In Vietnam, prior to 2009, the *Constitution 1992* and the *Civil Code 1995* and *2005* and other legislation and regulations affirmed the right of those who had suffered wrongs by state officials to claim compensation for the damage caused. However, it was widely understood to mean that the responsibility lay with the agencies which monitored those officials. Those entities, but not the state generally was responsible for, and liable, to pay compensation. The SCL 2009, in imposing the liability on the state, marks a significant change in the Vietnamese legal system. This reflects principles commonly found in other legal systems. It also now fits with the Vietnamese political and legal context. Unlike previous laws, Article 1 of the Law confirms that the state is liable for the compensation caused by the wrongful actions of its officials instead of those officials or the relevant agency. It reflects the perception that in an egalitarian and just society, the state and citizens are equal and if the state causes damage, it will be held liable like a citizen. At

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<sup>344</sup> *The SCL 2009* (Vietnam) Art 23.

<sup>345</sup> *The Civil Code 2005* (Vietnam) Art 633.

present, Vietnam is pursuing the development of a more democratic society and a market economy so that the state has not only the responsibility for maintaining social order for its citizens but also has the same responsibilities as those of citizens when participating in social or economic activities. The SCL potentially opens a new era of equality between the state and citizens in affirming these principles.

All the interview participants agreed that where state officials cause damage in the work of their official duties, the liability should be that of the state rather than the individual officials. In addition to the justification that the officials are representatives of the state, they stated that the state should pay compensation to acknowledge its accountability. Also, a claimant said that the remedy of loss is quicker because taking compensation from the state budget is easier and more practical than taking money from individual officials. This gives the citizen more confidence in the state. Moreover, the provision can enhance the effectiveness of state officials. If the liability is that of an individual, state officials would be reluctant to make decisions and they might delay resolving issues.<sup>346</sup> That is why all of the interviewees disagreed with the view that any extension of the state liability should be limited by the state's need to use the money to be paid as damages for other purposes such as improving processes so that no-one else is injured (Question number 6, Appendix 1). They believed that using the money to limit damages is ideal but this money should be taken from other resources. The person damaged and injured by a wrongful action should be able to recover damages. It is unjust and unethical if the state is able to transfer its burdens to individuals who have suffered damages.

Thirdly, monetary compensation is paid from the state budget. This is not the same as other civil liabilities where the money is paid by individuals who cause the damage. Such compensation from the state budget represents the taxation contribution of citizens. There are arguments that this is not fair because citizens' taxes are being used for compensation when the citizens are not the wrongdoers.<sup>347</sup> However, there are other reasons that money used for compensation claims for sufferers should come from the state budget. First, once the state treasury receives taxes from its citizens, this

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<sup>346</sup> The response of the officials of Department of State Liability for Compensation

<sup>347</sup> Phuong Nguyen, 'Ứng tiền ngân sách nhà nước bồi thường án oan 10 năm'[money for compensation take from the state budget first] *Dat viet*, 09/11/2013 <<http://www.baodatviet.vn/chinh-tri-xa-hoi/tin-tuc-thoi-su/ung-tien-ngan-sach-nha-nuoc-boi-thuong-an-oan-10-nam-2359329/>>

money is owned by the state; it no longer belongs to the citizens. Second, the state is created by the citizens to govern society so that it is not fair that state officials cause damage or injury to individuals while they undertake official duties and individuals have to suffer uncompensated losses. This is also supported by Locke's view that if people consent to give the state power, they therefore agree with the state's obligations and liabilities when the state has committed wrongful actions in governing society. Third, the state budget may be reimbursed by state officials. Where state officials have intentionally or negligently caused the damage or injury, they have a personal liability for reimbursement. As shown above, the aim of distributive justice is to bring about and maintain a just distribution of benefits and burdens in society.<sup>348</sup> Harlow argues for a general principle of compensation by relying on concepts of distributive justice which are legitimately vested in governments and legislatures and an assumption of the division of power in democratic societies that the government is entitled to use state programs for the redistribution of resources.<sup>349</sup> Also, according to the concept of entitlement used by Cohen and Smith, citizens have positive entitlements to benefits from programs provided they fall within the programs' parameters. If they fail to receive what they are entitled to, they should have recourse to law to obtain their entitlements. Citizens also have negative rights of non-interference in respect of their property. This is different from the legal or illegal distinction. If the person can demonstrate an entitlement, s/he should be given compensation.<sup>350</sup> Therefore, using the state's resources to pay for compensation is appropriate as it is consistent with the theory of distributive justice as well as the concept of entitlement.

Fourth, under the SCL, the state pays for the total loss. Total compensation means that if state officials cause damage when they are undertaking official duties, the state has to pay for all of the loss, not part, if claimants are able to prove such actual loss. As indicated in Chapter 1 section 1.2.1, in some common law systems, particularly in respect of wrongful conviction, the remedies may be ex-representing gratia awards or specialized bills which may be criticized as unjust and inadequate compensation. This recognition, in Vietnamese law, of the obligation to pay total compensation is significantly better than that.

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<sup>348</sup> Ratnapala, above n 151, 333.

<sup>349</sup> Harlow, above n 6, 116.

<sup>350</sup> D Cohen and J Smith, 'Entitlement and the Body Politic: Rethinking Negligence in Public law' (1986) *Can. Bar Rev.* 12.

Fifth, there is also personal liability of state officials in terms of state liability. After paying compensation, the state may ask officials for reimbursement if they have breached their duties. This provision aims to enhance the responsibility of officials which strengthens state agencies' accountability. Regarding this personal responsibility, Schuck identifies six objectives<sup>351</sup>: (1) deterrence of wrong doing; (2) promotion of vigorous decision-making; (3) compensation of victims; (4) exemplification of moral norms; (5) achievement of institutional competency and decision making; and (6) systematic decision-making through the integration of primary goals. However, Harlow considers that the award of damages against individuals is a perverse incentive as agencies rather than the individuals are in the best situation to deter. She points out that liability may not be a deterrent to government agencies because: (1) the state is not like other defendants and findings of liability add to the public tax burden; (2) the deterrence powers of the law of obligations are unconvincing; and, (3) public agencies are likely to fall into a decision trap and respond with inertia because of the threat of adverse publicity and threat of litigation compounded by the lack of resources.<sup>352</sup>

Indeed, it could be argued that Harlow's concerns regarding tax burdens and state budgets are not justified. This issue has been partly addressed under the third point above. This is illustrated and justified by theories of corrective justice, distributive justice and entitlement. Moreover, it should be noted that Harlow writes in the context of a common law tradition of developed states where state agencies have their own budgets and the state has a welfare function. In Vietnam, the agencies' money is not separate from the state budget. If the state agencies have to pay state compensation, they take that money from the state budget; otherwise, they would not be able to undertake the agencies' other activities. In addition, Harlow sees tort law itself in the traditional context of imposing liability only on individuals and therefore lacking in deterrence when applied to the state. However, if seen as a legal instrument imposing liability on state officials, the law on state liability has obvious deterrence functions as indicated in section 4.3.4. It is a warning to state agencies as well as officials. Therefore, both agencies and their officials will be more careful about undertaking their duties to avoid liability by avoiding wrongful actions.

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<sup>351</sup> He analyses French law where state liability is considered as public law. P. Schuck, *Suing Government: Citizen Remedies for Officer Wrongs* (Yale University Press, 1983) 16-25.

<sup>352</sup> Harlow, above n 6, 24-30.

### 3.6.2. Significance of the SCL in Vietnam

As indicated in Chapter 1, increasing legislation extending state liability was enacted in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries. Also, there has been criticism of those countries which do not have a separate law providing for this. A number of scholars have mentioned the need for clear legislation to assist those who are seeking state compensation and to create uniform compensation programs within states.<sup>353</sup>

Civil wrongs committed by state officials are a common problem in Vietnam. They cause damage to organizations and individuals anywhere and anytime across most areas of state activities.<sup>354</sup> There are many reasons for such problems. First, the limited capacity of state officials makes it difficult for them to carry out their duties. They lack many resources enabling them to undertake their duties effectively. Moreover, because of corruption, there are some officials intentionally taking wrongful actions which benefit one person but which harm the other. There is not yet a comprehensive system of law which is capable of reducing or eliminating this problem, causing both anger and disappointment in citizens.<sup>355</sup> Also, as mentioned in the context of the project in Chapter 1, according to an evaluation by the MOJ, the former provisions in Vietnamese law were too general, and inadequate to support applications. Hence, the promulgation of the SCL has been valuable as an important legal resource to resolve cases related to state compensation. It is the first time that Vietnam has had a separate law which acknowledges that claims for state compensation is legitimate. It provides the principles, grounds, methods and procedures for claiming state compensation. Although the SCL has limitations as indicated later in this thesis, it also represents progress as shown in Chapters 4 and 6. The SCL has brought gratification to some citizens when they have received remedies to restore property, and it has encouraged others to affirm their rights as protected people.

Moreover, as outlined above in Chapter 1, Vietnam is building a state based on the rule of law in which the SCL is an important instrument. One of the important principles for a state governed by the rule of law is that while the state may do whatever the law allows, the state cannot be above the law. As with other subjects in society, all activities of the state must comply with the Constitution and the law. The right to claim

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<sup>353</sup> Dioso-Villa, above n 75, 5; Robyn Lincoln, and Carol Morrison, 'Rights of the wrongfully convicted' (2006) (12) (2) *The National Legal Eagle*.

<sup>354</sup> Nguyễn Minh Đoàn, above n 314.

<sup>355</sup> *Ibid.*

compensation in Vietnam is a fundamental right of citizens recognized in the Constitution and law. In addition, in a state based on the rule of law, all subjects are equal before the law; the state cannot be above any citizen or legal people. When the state causes damage, the state must equitably compensate as is the case with other subjects.

The SCL 2009 contributes to the legal enforcement process in Vietnam. It enhances the accountability of state officials, limits the abuse of power and improves the operating efficiency of state agencies. This also helps to prevent corruption and bureaucratic harassment which still exists in some administrative agencies and public servants.<sup>356</sup>

The SCL has real meaning for the Vietnamese people. All of the interviewees, when asked, confirmed that the promulgation of the SCL is necessary, especially in Vietnam where wrongful actions by state officials are commonplace and the Law is significant to them as state officials, lawyers or clients. One officer from the Department of State Compensation said that “besides being a tool to protect the individual’s right, the SCL created a transparency legal tool for state management of state liability for compensation and it also made a change in the perceptions and behaviours by enhancing the accountability of state officials”. Moreover, one officer from the Law Committee of NA stated that “this Law has a great significance in building a more democratic, civil society in which any individual, group or entity are treated equally under the law. It is also a legal foundation for determining the state liability and contributes to the restriction of wrongful actions of the state officials”. As for the claimants, although they are still cautious of the effect of the Law, they see that the Law has meaning for them. They believe that the SCL can be a tool to protect individuals, as an important legal instrument by which to sue the state when they suffer damages or injuries. The Law initially gave them greater confidence in the state. That is why all of the participants ranked the enacting of the Law among the ten significant events in the reform of the legal system. For some, it was the second most important thing only behind the revision and amendment of the Constitution itself.

In short, it can be said that this recognition of state liability in Vietnam marked a significant change in thought and awareness. For many reasons, this potentially creates

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<sup>356</sup> Interview responses

greater fairness and equality, making the whole of society more just. It brings benefits to the people, especially those who have been damaged by a wrongdoer regardless of who he or she is.

### **3.7. Conclusion**

State liability is not a traditional concept in law and therefore does not have a uniform definition. In some countries, it is seen as government responsibility or liability.<sup>357</sup> In others, it is understood as being crown liability<sup>358</sup> or state liability for compensation<sup>359</sup>. With any concept, the state liability (crown or government liability) is essentially the same and has the same significance. In Vietnam, the legal system including state liability law has seen several periods of development based on the country's Buddhist-Confucian, Chinese, French colonial and socialist heritage with a move toward a mixed market economy. State liability under current Vietnamese law can be described as a civil liability to which the general principles of civil liability can be applied. Additionally, it has the following distinctive characteristics: (1) the person who causes the damage is a state official; (2) the defendant is the state itself and not individual state officials or state agencies; (3) monetary compensation is taken from the state budget; (4) the state pays the total loss; (5) there is also personal liability of state officials in terms of state liability. Given her strong understanding of the theory and history of Vietnamese state liability, the researcher is well-placed to understand the reality and significance of this issue within the global context. This provides the basis for the following chapters.

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<sup>357</sup> Mark Aronson, 'Government Liability in Negligence' (2008) 32 (44) *Melbourne University Law Review* 44.

<sup>358</sup> In Commonwealth countries such as England, Canada, Australia, it can be used like Crown liability.

<sup>359</sup> Vietnam, China, Japan, Korea.

## Chapter four: A critical review of the SCL –

### The necessity for its further reform

#### 4.1. Introduction

This chapter reviews the SCL 2009 including the scope of the law, the grounds of state liability, the method used to calculate damages, the responsibility of state officials, and the process for determining compensation liability. It becomes obvious that the SCL 2009 still has significant shortcomings that need to be reformed. In particular, the scope of law is very limited and, to that extent, it is inconsistent with the Constitution. The grounds for liability are inappropriate and they unduly constrain claimants for compensation. Damages are difficult to calculate and awards are often very small. The accountability of the state officials is not sufficiently robust to enhance the quality of administration by state agencies. This chapter also assesses the effect of the SCL in the wider Vietnamese context. It concludes by specifying the features of the law which need to be revised.

#### 4.2. The progressive aspects of the SCL

When enacting the law on state liability, the NA, the VCP, and the state agencies which drafted the law saw it as supporting the more fundamental goals of building a state based on the rule of law, protecting human rights and further developing the mixed-market economy in Vietnam. These goals were affirmed clearly in the references to the VCP's policies, the Constitution and the government's documents.<sup>360</sup>

In its *Resolution 48* in 2005, the VCP affirmed that the promulgation of the SCL was one of the fundamental effective tasks of state agencies in building a comprehensive legal system which is feasible, consistent, unified, and transparent. The main focus was the development of a socialist-oriented market economy, the building of a state based on the rule of law, a state “by the people, of the people, and for the people” with the strong implementation of human rights and citizens' rights. Also, the Resolution stated that Vietnam should understand the mechanisms to protect citizen's rights and legitimate interests including mechanisms for the accountability of state agencies, especially the courts, in protecting these rights with strict handling of every

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<sup>360</sup> VCP Resolution 48, above n 14; *Tờ trình số 37/TTr-BTP* Tờ trình Chính Phủ Dự án Luật Bồi thường Nhà nước ngày 17/7/2008 [*Statement 37/TTr-BTP* of the Government on the Draft of the Law State Liability for Compensation, dated 17/7/2008].

activity which breaches citizen's rights and legitimate interests to enable recovery for wrongful actions.

Then, in 2006 the *VCP's Congress Resolution X* continued to insist on these principles in emphasising that "The competent agencies have to compensate adequately for the mental and physical loss of individuals and enterprises caused by wrongful decisions."<sup>361</sup> Following this, the *Government Justification no 17/ TTr- BTP*, dated 17/7/2008 also emphasized that the SCL as specified in *Resolution 48* and *Resolution X* is focused on protecting human rights, in particular the right to compensation for wrongs done by the state. The Law was expected to create a greater trust between citizens and the VCP and the Vietnamese State.

The overall goals for the Law were clearly set out in both the VCP's policies in the Constitution and in other statutes before promulgation of the SCL. These goals have been expressed in the Law. The ideas are indicated by its title "The State Compensation Liability Law" and also in Article 1. They reflect support for the development of the rule of law and the market economy, and for the protection of human rights.

First, the law is a fundamental instrument that supports the development of the rule of law. The SCL specifies this principle of "building a state based on the rule of law". This is emphasized in the principle of the supremacy of the Constitution, specifically Articles 50, 72, 74 of the *Constitution 1992* on the right to claim compensation for wrongful actions.<sup>362</sup> Article 1 of the SCL provides that:

*Luật này quy định trách nhiệm bồi thường của Nhà nước đối với cá nhân, tổ chức bị thiệt hại do người thi hành công vụ gây ra trong hoạt động quản lý hành chính, tố tụng, thi hành án; thủ tục giải quyết bồi thường thiệt hại;*

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<sup>361</sup> *VCP's Resolution X* (National Political- Truth Housing, 2006).

<sup>362</sup> Article 72 provides that "No citizen shall be considered guilty and liable to punishment until a verdict has been reached by the Court and has come into effect. Citizens who are arrested, detained, brought to court and sentenced unlawfully are entitled to damage compensation and to rehabilitation of their honour. Anyone who in arresting, detaining, prosecuting or sentencing someone unlawfully causes damage to others must be sanctioned by law."

And Article 74 provides "Citizens have the right to lodge with any competent State authority a complaint or denunciation regarding transgressions of the law by any State body, economic or social organisation, people's armed forces unit or any individual. Complaints and denunciations must be examined and dealt with within a period of time stipulated by law. Any violation of interests of the State of legitimate rights and interests of collective and citizens must be promptly and strictly dealt with. Victims are entitled to damage compensation and to the rehabilitation of their honour as provided by law. Retaliation against authors of complaints or denunciations and misuse of the right to lodge complaints and denunciations with the aim of slandering and harming others through false charges are strictly prohibited."

*quyền, nghĩa vụ của cá nhân, tổ chức bị thiệt hại; kinh phí bồi thường và trách nhiệm hoàn trả của người thi hành công vụ đã gây ra thiệt hại*

[This Law provides for the State's liability to pay compensation to individuals and organizations suffering from damage caused by officer-duty performers in administrative management, legal proceedings and judgment enforcement activities; compensation procedures; the rights and obligations of individuals and organizations suffering from damage; compensation funds and the reimbursement liability of officer-duty performers who have caused the damage.<sup>363</sup>]

The Law also reflects the principle of equality before the law in that all state agencies and political parties must abide by the Constitution and the law<sup>364</sup> in recognizing the civil liability of the state. This had already been recognized in previous laws. Prior to 2009, the *Constitution 1992* and the *Civil Code 1995 and 2005* and other legislation and regulations also affirmed the right of those who had suffered wrongs by state officials to claim compensation for the damage caused. However, it was widely understood to mean that the responsibility where state officers had caused damage lay with the offices which monitored those officials. Those agencies, but not the state generally, were responsible for, and liable to pay, the compensation. Unlike previous laws, Article 1 of the SCL confirms that the state is liable for compensation caused by the wrongful actions of its officials instead of those officials or the relevant agency. It reflects the perception that in an egalitarian and just society, the state and citizens are equal, and if the state causes damage, it will be held liable. The provision represents further progress in both the concept of justice, that ensures equality and fairness, and the concept of the rule of law in which every person including the state is subject to the law. Moreover, as mentioned in Chapter 1, according to Peerenboom, in order to build a state based on the rule of law, one of the preconditions is the development of an institutional capacity. This is also shown in the SCL providing for the liability of state officials who have breached their duty to repay for the state. Although Harlow sees this as a problem, the requirement for reimbursement has, at least in theory, the potential to meaningfully

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<sup>363</sup> This is the official translation taken from legal database of Vietnamese MOJ's website: available at [http://www.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10465](http://www.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10465)

<sup>364</sup> *The Constitution 1992* (Vietnam) Art 4, 12.

enhance the accountability of state officials and strengthen the capacity of state institutions. This is discussed in more detail in section 3.5.1.

Secondly, Vietnam has recognized the human rights stipulated in the UDHR, the ICCPR and ICESCR. Article 9 (5) of the ICCPR affirms that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Also, Article 14 (6) provides:<sup>365</sup>

when a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

These Covenants require each State Party to ensure that any person whose rights or freedoms are violated has an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity. They also ensure that any person claiming such a remedy will have the right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state.<sup>366</sup> These conventions require member states to develop remedies for claimants and to ensure that the competent authorities will enforce such remedies when granted.<sup>367</sup>

The Vietnamese Government has pledged to respect and protect human rights and under these conventions is bound by similar rights regarding its own constraints including the right to compensate.<sup>368</sup> The SCL specifically addresses this respect for human rights, especially the right to claim for compensation.

To implement the overall goals, several specific objectives were designed by state agencies. In the document which introduced the new law, the state agency overseeing the law, the Department of Civil and Economic Law of the MOJ, stated that it was considered to be a significant further step in building a more democratic society and

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<sup>365</sup> *ICCPR 1966* Art 9 and 14.

<sup>366</sup> *Ibid* Art 2 (3) (a, b).

<sup>367</sup> *Ibid*.

<sup>368</sup> *The Constitution 1992 (Vietnam)* Art 50, 72, 74.

protecting human rights in Vietnam. It affirmed that it was intended to achieve a number of objectives:<sup>369</sup>

(1) to create a uniform legal basis relating to the state's liability for compensation, by remedying the separation of the laws on state liability in the previous laws.

(2) to create a new comprehensive legal mechanism to be effective in assisting people to more easily claim damages from the state and help the state better deal with its responsibility in terms of building the law-based socialist state of the people, by the people, for the people.

(3) to clearly determine state liability and the responsibility of officials to reimburse the state which, on the one hand, helps claimants to enforce their right to claim compensation and, on the other hand, enhances the responsibility of the state officials and state agencies in performing their duties.

It is clear that the enforceable right to compensation is one of the human rights acknowledged in international law and Vietnamese constitutions. The specification of such a right in the Constitution and in an independent law indicates the Vietnamese Government's effort to protect human rights.

Thirdly, the development of a market economy requires Vietnam to not only improve the laws on investment and business and to create a legal environment based on equality and transparency including in state agencies and for investors, but also to provide more legislative solutions to improve the operational efficiencies of the state officials. In accordance with the legal and administrative reform processes, the law on state liability in recognizing state responsibility for the wrongful actions of its officials seeks to increase the accountability of these officials. To ensure this and to better protect fairness in government processes, the SCL Law inherited a previous provision which requires officials who engaged in wrongful conduct to reimburse the state if they have been at fault.<sup>370</sup> The Law has provisions for determining whether an official behaved wrongfully and the processes to recover the appropriate payment for the state.<sup>371</sup> Duong Dang Hue, the chairman of the Committee which drafted the SCL, and the manager of the Department of Civil and Economic Law, MOJ, affirms that this

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<sup>369</sup> Ministry of Justice, above n 15.

<sup>370</sup> *The SCL 2009* (Vietnam) Art 10, Chapter I.

<sup>371</sup> *Ibid* Chapter VII.

responsibility for reimbursement will be one of the most important keys to enhancing the responsibility of state officials as well as providing a filter when choosing and promoting qualified officials.<sup>372</sup> Also, the cancellation of wrongful confiscations and the recovery and return of damaged property also protects private ownership rights and reassures property owners that their rights will be respected, thereby boosting the development of the market economy.

In summary, the SCL has recognized directly the state's liability to pay compensation. The SCL's imposition of liability on the state rather than on state agencies or state officials marks a significant change in the Vietnamese legal system. It can be seen that there are many micro and macro goals which have been set for it when it was promulgated. These were expressed in its title as well as its underlying principles. However, is the law effective in supporting the overall goals which support the development of the rule of law, protecting human rights and development of economy? The following section investigates this question and evaluates the effectiveness of the law.

#### **4.3. The limitations of the SCL which are inconsistent with its overall goals**

The SCL includes 8 chapters and 67 Articles. As indicated, it affirms the state's liability to pay compensation to individuals and organizations suffering damage caused by state officials in the performance of their duties in administration, legal proceedings and judgment enforcement activities. It provides the grounds for compensation, specifies the damage and the calculation of damages and compensation procedures; upholds the rights and obligations of individuals and organizations suffering damage; determines the compensation to be paid, and the liability for reimbursement of officials who cause damage.

As can be seen from the analysis in this chapter, the law was critically evaluated using legal interpretive methodology, concepts and commentary from secondary literature. The interview schedule was designed to ask the participants about their experiences with the new law and whether amendments need to be made to it (Appendix 1 question 17). Most of the participants including public sector and private sector

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<sup>372</sup> Công Lý, Luật Bồi thường sẽ không làm công chức Nhà nước “run tay” [the *Law on State Compensation Liability* will not make state officials scare], *Vn Economy*, 30/8/2007. <<http://vneconomy.vn/66887P0C5/luat-boi-thuong-se-khong-lam-cong-chuc-nha-nuoc-run-tay.htm>>

lawyers, confirmed that the Law needed further reform because its provisions are “not clear enough” or “it is a challenge to apply in practice” or has a “limited effect” or is “inconsistent with the *Civil Code*”<sup>373</sup>. Some of them added that secondary legislation such as decrees or circulars should further clarify or guide the application of the Law. In particular, one officer working in the Department of State Compensation, MOJ responded that “The provisions of SCL have not been sufficiently enough clear and there are many deficiencies which lead to difficulties in implementing of the law.” He also suggested that the law should be reformed but that an empirical investigation needed to be undertaken using professional assessments and experience to obtain appropriate recommendations for effective amendments.

#### **4.3.1. The scope of liability for compensation is limited and inconsistent with the Constitution and Civil Code**

The SCL provides, in Chapter 1, that the state is liable to pay compensation to individuals and organizations who have suffered damage caused by officials in administrative actions, judicial proceedings and in the enforcement of judgments. As a result, the Law can be applied to all individuals and organisations not only Vietnamese citizens. This is intended to create people’s confidence in the state. Also, it may enhance the development of the economy by attracting foreign investors to Vietnam. Chapter 2 describes the scope of substantive administrative compensation and lists 12 circumstances in which the state will pay it.<sup>374</sup> Chapter 3 defines seven wrongful activities which establish the scope for state compensation in criminal proceedings and four circumstances which fall within the scope of civil and administrative procedure.<sup>375</sup> Chapter 4 establishes 12 limitations in respect of wrongful enforcement of both civil and criminal judgments.<sup>376</sup> It lists activities which would otherwise fall within the scope of state liability, so that any damage caused by acts which are not specified will not be compensated. However, to protect the rights and legitimate interests of individuals and organizations, in administrative actions, the Law provides that the state will pay compensation in other situations as prescribed by law. It is necessary to emphasize here that the state will be liable only if there are other laws affirming that the activities are

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<sup>373</sup> Interview responses

<sup>374</sup> *The SCL 2009* (Vietnam) Art 13.

<sup>375</sup> *Ibid* Art 26, 28.

<sup>376</sup> *Ibid* Art 38, 39.

wrong and fall within the scope of state liability. To date, no further provision of this kind has been made.

It can be seen that the provisions establishing the scope of liability are the most significant in limiting the reach of the Law. However, it can be seen from the analysis of those provisions that the scope is limited, ineffective and stated in redundant and ambiguous language.

Firstly, in criminal proceedings, redundancies or overlapping are evident in Article 26 of the law, seven paragraphs of which provide that:<sup>377</sup>

The State shall compensate for damage in the following cases:

1. *Người bị tạm giữ mà có quyết định của cơ quan có thẩm quyền trong hoạt động tố tụng hình sự hủy bỏ quyết định tạm giữ vì người đó không thực hiện hành vi vi phạm pháp luật;*

[Agencies competent in criminal proceedings[sic] issue decisions annulling the decisions on custody as the persons held in custody do not [sic]commit any illegal act;]

2. *Người bị tạm giam, người đã chấp hành xong hoặc đang chấp hành hình phạt tù có thời hạn, tù chung thân, người đã bị kết án tử hình, người đã thi hành án tử hình mà có bản án, quyết định của cơ quan có thẩm quyền trong hoạt động tố tụng hình sự xác định người đó không thực hiện hành vi phạm tội;*

[Agencies competent in criminal proceedings issue judgments or decisions affirming that detainees or persons who have completely served or are serving their termed [sic]imprisonment, life sentence, persons who are sentenced to death or persons who have been executed under death sentences did not commit any criminal acts;]

3. *Người bị khởi tố, truy tố, xét xử, thi hành án không bị tạm giữ, tạm giam, thi hành hình phạt tù có thời hạn mà có bản án, quyết định của cơ quan có thẩm quyền trong hoạt động tố tụng hình sự xác định người đó không thực hiện hành vi phạm tội;*

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<sup>377</sup> This is an official translation available at:

<[http://www.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10465](http://www.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10465)>

[Agencies competent in criminal proceedings issue judgments or decisions affirming that persons against whom criminal cases were instituted, who were prosecuted and brought to trial or against whom judgments were enforced without being held in custody or detained, or who served their prison terms did not commit any criminal acts:]

*4. Người bị khởi tố, truy tố, xét xử về nhiều tội trong cùng một vụ án, đã chấp hành hình phạt tù mà sau đó có bản án, quyết định của cơ quan có thẩm quyền trong hoạt động tố tụng hình sự xác định người đó không phạm một hoặc một số tội và hình phạt của những tội còn lại ít hơn thời gian đã bị tạm giam, chấp hành hình phạt tù thì được bồi thường thiệt hại tương ứng với thời gian đã bị tạm giam, chấp hành hình phạt tù vượt quá so với mức hình phạt của những tội mà người đó phải chấp hành;*

[Agencies competent in criminal proceedings issue judgments or decisions affirming that persons against whom criminal cases were instituted, who were prosecuted and brought to trial for several offenses in the same case or who have completely served their prison terms did not commit any or some of these offenses and the penalty term imposed for remaining offenses is shorter than the duration they were temporarily detained or served their imprisonment sentences, and these persons are entitled to compensation [sic] for the temporary detention or imprisonment duration in excess of the aggregate term imposed for the offenses which they have committed;]

*5. Người bị khởi tố, truy tố, xét xử về nhiều tội trong cùng một vụ án và bị kết án tử hình nhưng chưa thi hành mà sau đó có bản án, quyết định của cơ quan có thẩm quyền trong hoạt động tố tụng hình sự xác định người đó không phạm tội bị kết án tử hình và tổng hợp hình phạt của những tội còn lại ít hơn thời gian đã bị tạm giam thì được bồi thường thiệt hại tương ứng với thời gian đã bị tạm giam vượt quá so với mức hình phạt chung của những tội mà người đó phải chấp hành;*

[Agencies competent in criminal proceedings issue judgments or decisions affirming that persons against whom criminal cases were instituted or who were prosecuted and brought to trial for various offenses in the same case and sentenced to death but the death penalty has not yet been executed, did not commit the offense subject to the death penalty while the aggregate term for remaining offences is shorter than the duration of their temporary detention: and these persons are entitled to compensation [sic] for their

temporary detention duration in excess of the aggregate term imposed for the offenses they have committed;]

*6. Người bị xét xử bằng nhiều bản án, Toà án đã tổng hợp hình phạt của nhiều bản án đó, mà sau đó có bản án, quyết định của cơ quan có thẩm quyền trong hoạt động tố tụng hình sự xác định người đó không phạm một hoặc một số tội và hình phạt của những tội còn lại ít hơn thời gian đã bị tạm giam, chấp hành hình phạt tù thì được bồi thường thiệt hại tương ứng với thời gian đã bị tạm giam, chấp hành hình phạt tù vượt quá so với mức hình phạt của những tội mà người đó phải chấp hành;*

[Agencies competent in criminal proceedings issue judgments or decisions affirming that persons who were tried for various offenses under different judgments and subject to different penalties already aggregated by the court did commit one or some of these offenses while the term for remaining offenses is shorter than their temporary detention or imprisonment duration; and these persons are entitled to compensation [sic] for their temporary detention or imprisonment duration in excess of the aggregate term imposed for the offenses they have committed:]

*7. Tổ chức, cá nhân có tài sản bị thiệt hại do việc thu giữ, tạm giữ, kê biên, tịch thu, xử lý có liên quan đến các trường hợp quy định tại các khoản 1, 2 và 3 Điều này thì được bồi thường.*

[Organizations or individuals suffering from property damage due to property seizure, custody, distraint, confiscation or handling related to cases defined in Clauses 1. 2 and 3 of this Article are entitled to compensation.]

As can be seen from the Article, paragraphs 2 and 3 cover the same criteria in that they apply to cases of wrongful prosecution, wrongful investigation and wrongful trial of claimants who are innocent of a crime. Similarly, paragraphs 4, 5 and 6 have the same criteria for cases of wrongful prosecution, wrongful investigation and wrongful trial in which the claimants have been in prison custody longer than they should have been. The article demonstrates the poor capacity for legislative drafting referred to by Mathieu and Ket and other author in Chapter 1, section 1.2.3.<sup>378</sup>

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<sup>378</sup> Mathieu and Ket, above n 92, 141.

Moreover, Article 27 stipulated criminal proceedings which are ineligible for compensation. In addition to other circumstances, paragraph 3 grants the state an exemption in the following situation:

*Người bị khởi tố, truy tố, xét xử về nhiều tội trong cùng một vụ án hoặc Tòa án quyết định tổng hợp hình phạt của nhiều bản án, đã bị tạm giữ, bị tạm giam, đã chấp hành hình phạt tù hoặc đã bị kết án tử hình nhưng chưa thi hành án mà sau đó có bản án, quyết định của cơ quan có thẩm quyền trong hoạt động tố tụng hình sự xác định người đó không phạm một hoặc một số tội nhưng không thuộc các trường hợp quy định tại các khoản 4, 5 và 6 Điều 26 của Luật này*

[Persons against whom criminal cases were instituted, who were prosecuted and brought to trial for various offenses in the same case or for whom the court decided to aggregate the penalties under various judgments, who were held in custody, detained, completely served their imprisonment sentences, or who were sentenced to death but the death penalty has not yet been executed, but later agencies competent in criminal proceedings issue judgments or decisions affirming that those persons did not commit one or some of these offenses but they do not fall into cases defined in Clauses 4, 5 and 6, Article 26 of this Law.]

This provision is not necessary because it clearly repeats Article 6.2 and the general statement in Article 26 which states that the scope of criminal proceeding is limited in Article 26. Obviously, Article 27 reaffirms the limited scope of the law as a greater precaution. This is a common strategy of Vietnamese law which reflects that “excess is better than lack of” [*thua con hơn thiếu*]. This is an example of ‘law inflation’ and why Vietnamese legislation contains many unnecessary provisions.<sup>379</sup>

Secondly, in respect of the scope of civil or administrative proceedings, paragraph 4 of Article 28 provides that where a judgment or decision is annulled, the state will pay compensation only if the person who issues judgment or decision knew that it was unlawful or has intentionally falsified the case files. This provision is ineffective because of the two following reasons: (1) according to the Vietnamese Law on Civil

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<sup>379</sup> A personal communication between the researcher and the officer who has been involved in drafting the Law from the beginning. The researcher sought an explanation for what appears to be an unnecessary provision. The officer is now head of the operational office of the Department of State Compensation. See Appendix 15.

Procedure<sup>380</sup> and the Law on Administrative Procedure<sup>381</sup> competent agencies of appeal or review the cases do not have authority to determine the guilt for wrongful action or liability of judicial or administrative officials; (2) it is difficult to determine that a judgment or decision is wrong because of an ‘intention’ or because of the ‘low capacity’ of the judge. In these situations, the claimants certainly would find it almost impossible to obtain decision confirming that “*the person who issues judgment and decision knew that it was unlawful or has intentionally falsified case files*”. They would be deterred from initiating claims for compensation.

This is confirmed by Judge Nguyen Van Cuong, Deputy Director of the Institute of Judicial Sciences:<sup>382</sup>

*việc xác định hành vi của người có thẩm quyền “biết rõ là trái pháp luật” là rất khó khăn, trừ khi hành vi này cấu thành tội phạm theo các điều của Bộ luật Hình sự. Đồng thời yếu tố lỗi của người có thẩm quyền cũng không được quy định rõ ràng, bởi nếu bản án, quyết định bị hủy theo thủ tục giám đốc thẩm hay tái thẩm thì trong các quyết định đó cũng không có nhận định là người ra bản án, quyết định có hành vi trái pháp luật.*

[Determining the wrongful action of the competent state officials that “they must well know their wrongful action is unlawful” is very challenging, unless such wrongful action has been tried as a crime under the Criminal Code. Furthermore, in an appeal or reopening of judgments or decisions, the guilt of judge who issued wrongful judgment is not determined under the law.]

In fact, many decisions are annulled or suspended because of intentionally unlawful actions. However, when the authorised agencies evaluate or report them, they often state that they were annulled or suspended because of lack of knowledge or

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<sup>380</sup> *The Civil Procedure Code 2004 (amended 2011)* (Vietnam) Art 277, 299.

<sup>381</sup> *The Administrative Procedure Code 2011 (Vietnam)* Art 205, 227. Under those Laws the appeal or cassation jurisdiction to review is only for serious procedural violations and serious mistakes in applying the law. The appeal court does not have authority or responsibility to investigate or to consider the merits of the judgment or decision being appealed. Its role is not to determine if the judge intentionally acted wrongfully or lacked capacity.

<sup>382</sup> Hương Nguyen, Bồi thường Nhà nước- cần hành lang pháp lý vững hơn, Nhân dân điện tử, [Huong Nguyen, State liability for compensation- need a better legislation framework, People newspaper online]

<[http://www.nhandan.com.vn/mobile/mobile\\_phapluat/mobile\\_caicachtuphap/item/18778602.html](http://www.nhandan.com.vn/mobile/mobile_phapluat/mobile_caicachtuphap/item/18778602.html)>

limited capacity.<sup>383</sup> Hence, although the law grants claimants the right to claim for compensation for wrongful civil or administrative judgments or decisions, it cannot be applied in practice. If this provision were to be replaced by prescribing the state liability for all wrongful civil or administrative proceedings, it will not only ensure equality and effectiveness in the protection of the legitimate rights of individuals and organizations, but also would increase officers' accountability through judicial proceeding.

Thirdly, in the enforcement of civil judgments, the same problem arises. The law requires the claimants to prove that the state officials intentionally acted wrongly.<sup>384</sup> This provision again restricts the rights of citizen and it is unenforceable.

Furthermore, comparing the SCL with the *Law on Enforcement of Civil Judgments 2008* (ECJ), there is a discrepancy between the SCL and the ECJ involving the scope of liability. Under the ECJ 2008, the scope of required compensation is wide. In principle, all agencies, organizations and individuals that violate the provisions of the ECJ 2008 that cause damage must pay compensation.<sup>385</sup> Accordingly, all wrongful actions in civil enforcements can give rise to liability for damages.

Article 140 of the ECJ 2008 provides that in the process of enforcing civil judgments, the parties have the right to complain against any decision, the behaviour of the heads of agencies and other officials if the decision or behaviour is unlawful, infringes the rights and legitimate interests of the person. The complainant has the right to be compensated for any rights and legitimate interests which have been violated or damaged.<sup>386</sup> In addition, compensation also can arise under the case of denunciation 2011. Point c, Clause 2, Article 156 of the ECJ shows that the person who has been denounced must pay damages caused by illegal acts in accordance with the law. Also, under Article 158, the competent officers who have the authority to resolve denunciation must pay compensation under the law if there is no resolution or if they have made a wrongful settlement decision.

Thus, it can be said that all wrongful decisions or wrongful actions in respect of civil enforcement appear to be subject to compensation including nonfeasance and

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<sup>383</sup> Thái Phạm, Cần giải pháp để thực hiện trách nhiệm bồi thường nhà nước, [It is necessary to give solutions for effective implementation of SCL] *Tư pháp Tam Kỳ*, 03/12/2012 <<http://tuphaptamky.gov.vn/wp/?p=3140?>

<sup>384</sup> *The SCL 2009* (Vietnam) Art 38.

<sup>385</sup> *The Law on Enforcement of Civil Judgment 2008* (Vietnam) Art 10.

<sup>386</sup> *Ibid* Art 143.

malfeasance. However, the scope of the SCL provisions limits the liability of the state in many stages of the process of enforcement of civil judgments. Additionally, these provisions of the ECJ do not require intentionally wrongful actions as in the SCL as indicated above. Therefore, the provisions relevant to compensation in the enforcement of civil judgments need to be revised to ensure consistency with the ECJ, thereby making the SCL easier to enforce.

Generally, the Law extends the scope of liability. In the past, the majority of proceedings were for wrongful convictions. It was not possible to bring actions for wrongful judgments in civil proceedings or for the wrongful enforcement of civil judgments. In addition, failures to take action, or nonfeasance, are also listed as wrongful acts under the Law.<sup>387</sup> A delay in issuing, or a failure to issue, an official document may be unlawful or illegal and may cause damage, so that these provisions are reasonable and protect the legitimate interests of citizens or organizations who suffer damage.<sup>388</sup> However, the SCL limits any liability by listing the specific wrongful actions falling within the scope of the state.<sup>389</sup> This restricts any liability for compensation. The justification given for this provision is the level of Vietnam's economic development. Until now, the poor professional capacities of state officials have not permitted compensation for all wrongful acts. To do so may lead to the bankruptcy of the state by exposing it to excessive liability.<sup>390</sup> The Vice Minister of MOJ, Dinh Trung Tung, explained that in the current circumstances, the areas of state activities are too broad and complex. After implementation, if it appears that the capacity of officials has improved and it would be feasible to do so, the law will be

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<sup>387</sup> *The SCL 2009* (Vietnam) Art 13, 38, 39.

<sup>388</sup> Bắt đầu thực hiện Luật Trách nhiệm bồi thường của Nhà nước: Nhà nước dễ trở thành con nợ. [At the early stage of implementation of the *SCL*: it is easy for state to become a debtor]. <<http://vietinfo.eu/cung-suy-ngam/bat-dau-thuc-hien-luat-trach-nhiem-boi-thuong-nha-nuoc-nha-nuoc-de-tro-thanh-con-no.html>>

<sup>389</sup> *The SCL 2009* (Vietnam) Art 13, 26, 38, 39.

<sup>390</sup> Lê Kiên, Dự án Luật Bồi thường Nhà nước: Đề nghị chỉ bồi thường 11 trường hợp [the draft of the Law on Compensation State Liability - suggest to compensate for 11 wrongful actions], *Phap luat Thanh pho Ho Chi Minh*, [*Ho Chi Minh Law newspaper*]11/3/2009; <<http://phapluattp.vn/245632p0c1013/du-an-luat-boi-thuong-nha-nuoc-de-nghi-chi-boi-thuong-11-truong-hop.htm>>

and also see Tờ trình Quốc hội dự án Luật Bồi thường Nhà nước số 161/TTr-CP, 13/10/2008, Trung tâm thông tin thư viện và nghiên cứu khoa học, Văn phòng Quốc hội [One document of Vietnamese Government reporting the National Assembly on the draft of the *Law on Compensation State Liability*]. <<http://duthaoonline.quochoi.vn/du-thao-luat/du-thao-luat-boi-thuong-nha-nuoc>>

amended to expand the scope of state liability.<sup>391</sup> This view is supported by the literature on state liability, which suggests that lawyers and their clients should be discouraged from always suing the state as it has the most wealth. Other literature sees the need to balance collective and individual interests and to be aware of the need to distinguish between aggregative and distributive justice. Harlow refers to Barry who distinguishes aggregative from distributive justice to make the distinction between collective and individual interests and Cane also makes a similar distinction between private and public interests in his use of distributive justice to describe the balancing of private versus public interests.<sup>392</sup>

Harlow, in this context, believes that many hard choices involved in compensation are best left to the legislature as the legitimate arbiter between collective and individual interests. She stated that administrators are best placed to calculate financial implications and take corrective action under the supervision of courts and the ombudsman.<sup>393</sup>

This supports aspects of state immunity freedom from a limitation on liability, which has been widely criticized as indicated in Chapter 1. Harlow's opinion seems to be coming to this trend. It is inconsistent with theories of corrective justice, referred to in the previous chapter, which require wrongdoers to pay compensation for sufferers. The concept of entitlement argued by Cohen and Smith would allow citizens to claim money from the state budget. The theory of deterrence as Shuck suggests and Dicey's concept of the rule of law are more convincing justifications for state liability to pay compensation for damage caused by state officials.

Several Vietnamese legal professionals also argue that the explanation for the limitation of the scope of state liability is not convincing. Nguyen Van Pha, a member of the Presidium of the Vietnam Fatherland Front, said that if compensation cannot be paid because the economic condition of the state cannot afford to be exposed to the poor capability of state officials, it will take a long time for Vietnam to have effective officials.<sup>394</sup> According to Prof. Nguyen Minh Thuyet, the limitation of the scope of

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<sup>391</sup> Lê Kiên, above n 390.

<sup>392</sup> Harlow, above n 6, 3-4.

<sup>393</sup> Ibid 122.

<sup>394</sup> Lê Kiên, above n 390.

compensation is inconsistent with the Constitution when considering the draft of law. The NA Standing Committee also concluded that:<sup>395</sup>

*Mặc dù điều kiện kinh tế-xã hội nước ta hiện nay còn khó khăn; trình độ, năng lực cũng như ý thức tuân thủ pháp luật của đội ngũ cán bộ, công chức còn hạn chế... nhưng không vì thế mà hạn chế quyền của công dân yêu cầu nhà nước bồi thường thiệt hại.*

[Although the socio-economic condition of our country remains difficult; the qualifications, competence and awareness of legal compliance staff and public are limited ... but they are not reasonable reasons for the state to limit citizens' right for state compensation].<sup>396</sup>

It can be argued that the limitation of scope of liability is unreasonable as the state engages in many activities, but no explanation is given for the state choosing certain specific actions for compensation but not others. Additionally, these provisions are also clearly inconsistent with the Constitution that entitles citizens to have the right to claim for state compensation without any exemption. This also conflicts with concepts of rectification justice<sup>397</sup> requiring that anyone who suffers damage by wrongful action be compensated. Consequently, the state should extend the scope of state liability to all state activities by providing general principles, not listing or limiting the specific cases in which the state should pay compensation. If this were to be done, the Law would strengthen the accountability of the state apparatus and thus, the incidence of wrongful acts would decrease and bankruptcy would not occur.

Furthermore, the SCL may only be used to challenge state actions, not the actions of the VCP. Therefore, actions by CVP members lie outside the reach of the Law. As shown in the previous chapter, the VCP controls government and legal institutions at all levels as the leading force in Vietnamese society. There are parallel structures linking state agencies to the VCP. The VCP makes its directness and priorities known in a variety of ways. The most important of these is the Party Congress that meets every five years to map out general policy directions. On a day-to-day basis, the Politburo of the centre committee and the Central Committee exert influence over the institutions of the government and the legal system as they propose legislation and regulations and carry

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<sup>395</sup> Ibid.

<sup>396</sup> Ibid.

<sup>397</sup> The concepts of rectification justice is analysed in Chapter 3 section 3.4

out their normal duties.<sup>398</sup> State officers often make decisions based on the VCP's resolutions and even speeches of VCP leaders rather than public policy or the law. Hence, Nguyen Huu Vinh observed that:<sup>399</sup>

At all levels of the administrative apparatus and organization, two twin parallel cores coexist: the Party's one and the administration's one. All discussions, important decisions regarding the competency of this apparatus, have to go through these two systems and even sometimes the last word is reserved to the Party. It is possible to describe the way this double apparatus functions as "two in one, one in two".

Although a VCP member as a state official may commit a wrongful act which harms a person, or a VCP resolution may be the cause of the wrongful decision of a state official, any civil liability for any wrong is avoided. Under the Law, the state is liable for the activities of the state officials and agencies, not the VCP's officials or agencies. Although the Civil Code provides for the liability of an organisation for compensation for the wrongful actions of its employee,<sup>400</sup> in practice it is not applied for VCP's agencies even though, under Articles 100 and 102 of the *Civil Code 2005*, the VCP is considered as a legal person.

Law-making, both of legislation and of subordinate legislation, does not fall within the scope of the Law. This is different, for example, from Japanese and South Korean law. The justification is that the NA, constituted by the citizens' elected representatives, makes legislation. It is argued that legislation is general and should not directly affect a particular individual or organization without a decision by officers or judgment by judges to apply it. Furthermore, it is also argued that Vietnam's present economic capacity means it is inappropriate to apply liability for law making. This omission may ensure that the Law can be more effectively enforced in the short term; moreover, it avoids political conflict over the validity of legislation.<sup>401</sup> A wrongful act in lawmaking could harm many people, and reparation could be costly. However, in the future, once the Vietnamese economy develops, this extension of liability to law-making should be considered. In particular, the wrongful action of issuing sub-laws,

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<sup>398</sup> Mathieu and Ket, above n 91.

<sup>399</sup> Nguyễn Hữu Vinh, *Cải cách hành chính* cited in Mathieu and Ket above n 91, 142.

<sup>400</sup> *The Civil Code 2005* (Vietnam) Art 618, 619.

<sup>401</sup> Ủy ban Thường vụ Quốc hội (2009), Báo cáo giải trình tiếp thu, chỉnh lý dự thảo Luật Trách nhiệm Bồi thường của Nhà nước 236/BC-UBTVQH12, [report on justification, modification the draft of the Law on State Compensation Liability of NA's Standing Committee], 13/6/2009.

including Directives, may harm specific individuals and should be included within the scope of state liability.<sup>402</sup>

### **Interview analysis**

The selection process and the range of interviewees were discussed in Chapter 2, section 2.4.1. Regarding the scope of state liability, most of the participants in the public sector and all of those in the private sector said that the scope of SCL has been limited. They believed that the Law too narrowly limits liability for several wrongful actions for which the state should pay compensation. They agree that the state should be liable to pay compensation for all wrongful executive or judicial actions by the state. Some of them suggested that the scope of state liability should cover all state responsibilities including legislation. One private lawyer said that the state should be regarded in the same way as an individual in respect of any activities which caused damage, so the state would be obligated to compensate. In this case, the burden of proof would be on claimants. As claimants in a damages action, they would have to show that the facts fell within civil liability including state liability. If the claimants were to prove that the state had committed a civil wrong and they had suffered damage by such action, the state should pay compensation. As Harlow has pointed out, there is a tendency in Western jurisdictions for lawyers to focus on the ability of the state to pay damages; this is because it is in the financial interests of private lawyers to want to extend the liability of the state.

### **Sub-conclusion**

Vietnam is trying to build a state based on the rule of law in which the Constitution is supreme so that every law must comply with it. Both the Constitution and the Vietnamese Civil Code confirm the principle of state liability without exception for any damage caused by the wrongful actions of state officials. The SCL limits the number of actions falling within the scope of liability for compensation. This is inconsistent with the Constitution and the basic principles to which all laws must conform. The

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<sup>402</sup> For instance, HaNoi province had a document which provided that individuals who use a vehicle to transport poultry to the city shall be fined. This document was dismissed, but not before many people had suffered damage because of it.

Source: Phương Thảo, Bắt đầu thực hiện Luật Trách nhiệm bồi thường nhà nước: Nhà nước dễ trở thành... con nợ! *Dân trí*, 04-01-2010

<<http://dantri.com.vn/c20/s20-326605/nha-nuoc-dau-dau-can-bo-run-tay-vi-luat-boi-thuong.htm>>

provisions regarding the scope of liability in the SCL overlap because of poor drafting, making the legislation less clear and, potentially, less effective. In order to build a state based on the rule of law which protects human rights, it is necessary to extend the scope of compensation to all fields of state activity. According to Assistant Prof. Dr Pham Huu Nghia of the Institute of State and Law, Vietnamese Academy of Social Science, in a state based on the rule of law, we cannot rely on the reasons that “the state’s economic conditions do not permit the payment of compensation” or that the “low level capacities of state officers” limits the rights to claim compensation of individuals and legal persons.<sup>403</sup> Also, a cautious or long-term experiment with the existing scope of liability under the SCL may slow down the development of the state in respect of the rule of law and protection of human rights. Thus, the widening of the scope of state compensation will not only compensate for the losses by claimants, but also will more quickly develop the state, reduce suspicion of government agencies and officials, and increase the trust of citizens in the state and the legal system.

#### **4.3.2. The grounds for state compensation liability limit claimants in enforcing their rights**

As mentioned in the introduction to research question 2 in Chapter 1 section 1.4, civil liability for compensation requires: (1) actual damage; (2) the act causing the damage to be unlawful; (3) a causal relationship between the unlawful act and the actual damage; and, (4) that the defendant committed the act intentionally or negligently, except in special cases where strict liability applies.

Despite state liability being recognised as a form of civil liability as indicated in section 3.5, the SCL provides for limited grounds for liability. There are two main grounds:

Firstly, there will be liability for administrative actions, in civil and administrative and civil judicial proceedings, and in enforcement of judgments if two conditions are met: (1) that there is a valid document issued by an authorized office affirming that the officers’ act is unlawful and falls within the scope of liability for compensation; and, (2) that actual damage occurred.

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<sup>403</sup> H.L, Ý kiến chuyên gia, *Tien Phong* online, 29/5/2013[H.L, Legal experts’ suggestions, *Tienphong online newspaper*, 29/5/2013]. <<http://www.tienphong.vn/Phap-Luat/629348/Y-kien-chuyen-gia-tpp.html>>

Secondly, there will be liability in respect of criminal proceedings if two conditions are met: (1) that there is a valid judgment or decision by a relevant officer affirming that a person falls within the scope of the criminal proceedings provisions; and, (2) that actual damage occurred.

One remarkable point is that although the law does require fault to be a condition, it indirectly defines the exemption in which the state will not pay compensation in three cases: (1) due to the claimant's guilt; (2) the claimant concealing evidence, documents or providing inaccurate documents during the settlement of the case; or (3) due to force majeure or an emergency.<sup>404</sup>

Under the SCL, the requirement that a claimant submit a valid document affirming that the officials' act is unlawful and falls within the scope of liability for compensation or a valid judgment or decision by a relevant official affirming that a person falls within the scope of the criminal proceedings provisions, presents an obstacle to citizens exercising their rights. This condition forces claimants to undertake dual processes in order to obtain compensation. In the first one, they have to ask for the document through an administrative or judicial process. When they succeed in obtaining the valid document, they have to undergo a second process for compensation. This provision reflects an intention to protect the interests of the state. Justifying this provision, the state agencies which drafted the SCL said that it would "ensure the balance between protecting the interests of individuals, organizations who suffer damage and the interests of the State" and "the Law must ensure the stable operation and efficiency of the public authorities".<sup>405</sup> However, this does not adequately explain why, if claimants ask for compensation on the same legal basis as in other civil law, this process will cause a "negative impact to the operation stability of the state agencies"? The redress of the claimants' damage or injury is consistent with principles of justice, reason and ethics. Thus, in addition to limiting the scope of state liability, the added condition requiring a valid document has made it more difficult for claimants to exercise their right to claim compensation.

At the MOJ workshop on the preliminary assessment of three years of implementation of the SCL<sup>406</sup>, many participants said that obtaining a valid document

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<sup>404</sup> *The SCL 2009* (Vietnam) Art 6 (3).

<sup>405</sup> Ministry of Justice, above n 15.

<sup>406</sup> This conference was held in Hanoi on May 28<sup>th</sup> 2013.

affirming that the officials' act is unlawful is too challenging because many state agencies avoid issuing any document or they issue a document with a general statement which does not specifically affirm the wrongful action. Lawyer Nguyen Huy Thiep, the Deputy Chairman of the Hanoi Lawyers Association, said:<sup>407</sup>

*Một bên là cán bộ công chức được trang bị đầy đủ các quyền lực, một bên là người dân chẳng có gì, mà bắt dân phải có văn bản công nhận sai phạm của người có quyền lực ban hành.*

*Trong thực tế dân khó lấy được văn bản này, việc này ảnh hưởng trực tiếp đến vị thế làm việc của người ta thì làm sao họ ban hành văn bản cho dân. Đây là điểm đầu tiên và cũng là điểm trọng yếu đã loại trừ đi tất cả các quyền của người yêu cầu bồi thường.*

[This is a relationship between two parties: one is state officers equipped with full power, the other is people having nothing, and it is difficult for the people to obtain a valid document affirming the wrongful action of a powerful officer.

In fact it is difficult for people to obtain this document. Because this document directly affects the position of the state officers, they do not want to issue such documents to people. This is the first and essential point which excludes all rights of claimants.]

In October 2012, at a seminar discussing the implementation of the SCL, representatives of the Chamber of Commerce and Industry in Ho Chi Minh City also said that the condition of having a valid document which affirms that the state official did wrong is a procedure which constrains the enforcement of the law in practice. Lawyer Tran Cong Ly Tao, Deputy Chairman of the Ho Chi Minh City Lawyers Association, also commented that this condition is “not objective, and lacks feasibility” because the state agencies often avoid acknowledging that their action is wrong.<sup>408</sup>

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<sup>407</sup> Tâm Lua, ‘Gian nan đòi bồi thường Nhà nước’ *Tuoi tre online*, 29/5/2013 [Tam lua, it is challenging in claiming state liability for compensation, *Tuoi tre newspaper online*, 29/5/2013] <<http://tuoitre.vn/Chinh-tri-Xa-hoi/550884/gian-nan-doi-nha-nuoc-boi-thuong.html>>

<sup>408</sup> Nguyễn Thi, ‘Rào cản khi đòi Nhà nước bồi thường’ *Pháp luật Thành phố Hồ Chí Minh*, 16/6/2013 [Nguyen Thi, the barrier when claiming for state compensation, *Ho Chi Minh City Law newspaper*, 16/6/2013] <<http://phapluattp.vn/2013061511085670p0c1063/rao-can-khi-doi-nha-nuoc-boi-thuong.htm>>

When researching the policies to be represented in the law, this provision was seen in the *Chinese State Compensation Law*, 1994.<sup>409</sup> However, in April 2010, China removed this condition because of its impact on enforcing the legislation limitations. In the future, this condition should be removed. It represents part of the metaphor that Mr Hue, the chairman of the Committee which drafted the SCL, and the manager of the Department of Civil and Economic Law, MOJ used: that the implementation of state liability for compensation is “a lock needing a lot of keys.”<sup>410</sup> The unusual and important thing is that one key is kept in the hands of the state agency which caused the damage. So how can the claimants open the door to access their right? The provision makes people think that the law allows the state “to give with one hand and to take with another.”<sup>411</sup>

### **Interview analysis**

All participants from the private sector said that the condition requiring a valid document affirming that the officials’ act is unlawful and falls within the scope of liability for compensation or a valid judgment or decision by a relevant office affirming that a person falls within the scope of the criminal proceedings provisions should be removed as contrary to the *Civil Code*. They also pointed out that it also prevents people from enforcing their rights. One private lawyer said that the document could be one of a number ways by which the claimants could prove their claims. It should not be compulsory. There are many ways to prove this issue and that is a burden that claimants bear. He also said that a citizen is in a lower position than the state official so it is difficult to ask for a document affirming that the official is wrong. This condition will lead to a ‘cover up’ and ‘dodging’ by state officers [*bao che va ne tranh*].<sup>412</sup>

Conversely, most of the state officials who were interviewed, including a member of the SPC, responded that this condition is necessary even though they admitted that asking for a valid document can be challenging for potential claimants. They also

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<sup>409</sup> *The State Compensation Law 1994* (China) Art 20; Amended state liability compensation law adopted 30/4/2010 at <[http://www.china.org.cn/china/2010-04/30/content\\_19940077.htm](http://www.china.org.cn/china/2010-04/30/content_19940077.htm)>; China adopts amended state compensation law to better protect human rights, 30/4/2010 at <<http://english.peopledaily.com.cn/90001/90776/90785/6968844.html>>

<sup>410</sup> ‘Luật Trách nhiệm của Nhà nước: Không lo nhà nước “bù” không xuể’ [the Law on State Compensation Liability: no worry about compensation]!, *Pháp luật Thành phố Hồ Chí Minh* [Ho Chi Minh City Law newspaper ], Vinalawfind, 30/7/2009. <<http://vnlawfind.com.vn/default.aspx?tabid=170&ID=6278&CateID=>>

<sup>411</sup> Gillespie and Chen, above n 6, 90.

<sup>412</sup> Interviewee’s response.

admitted that this requirement may not be objectively determined because it allows the state office which caused the damage not to issue a valid document. However, they argued that this provision helps to decrease the burden on agencies that resolve disputes and would help the state save money and time. A few said that controlling exposure to state liability is necessary and that this assists state officials in resolving the cases relating to state liability for compensation by reducing their number. These responses reveal the attitude of state officials. They may care more about their interests in ensuring that officials are not too accountable rather than being concerned with the rights of citizens. On the other hand, senior members of the government and the NA appear to have been concerned about the potential adverse impact on the state if there were a wide scope of liability. If taken seriously, the first explanation may indicate why dodging of responsibility, transfer of responsibility, stagnation and delay, are normal in Vietnam's public administration.

Indeed, it may be that this provision requiring a valid document the state can control its liability by choosing to provide, or not to provide, the document. Where such a document is not issued, there is a right to complain under the *Law on Complaint 2011* and the *Law on Denunciation 2011* or to appeal against such a refusal under the *Criminal Procedure Code 2003* and *Civil Procedure Code 2004* (amended 2011).<sup>413</sup> The responsible office may be compelled to issue the document as a result. It is possible that the claimant may have exhausted his/her rights under the first two laws before resorting to the SCL. Nevertheless, the most important thing is the content of the document. If the state official does not want to pay compensation, in practice there are many ways to avoid liability. The pattern of the enforcement of *Resolution 388*<sup>414</sup> and also the SCL indicates that, faced with a potential wrongful conviction, the competent agency may not admit the wrong by "keeping silent"<sup>415</sup> or taking unreasonable actions such as suspending the case "because the accused is too old"<sup>416</sup>, "because the changes in social contexts and the behaviour of the accused is no longer dangerous"<sup>417</sup>, "because

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<sup>413</sup> *The Criminal Procedure Code 2003* (Vietnam) and *Civil Procedure Code 2004* (Vietnam) give people the right to appeal an invalidity judgment.

<sup>414</sup> *Resolution 388 NQ/ UBTVQH (17/3/2003) On Compensation for the Victims of Wrongful Convictions* (Vietnam).

<sup>415</sup> Gia Khang, case Mai Than, above n 169.

<sup>416</sup> Văn Đoàn, above n 170.

<sup>417</sup> Gia Khang, Case Dang Tan Hinh- Dong Nai, case Dao Tran Thanh- Thanh pho Ho Chi Minh, Viet Bao, 21/10/2006.

the period of imprisonment was enough to educate”<sup>418</sup>, “because the time taken to resolve the issues was too long so it was difficult to collect evidence”<sup>419</sup>, “because of the profile document was missed”<sup>420</sup> and so on. The condition of obtaining a valid document to claim compensation is a significant barrier which restricts citizens’ rights. This condition is not appropriate as Vietnam is developing the state based on the rule of law. If it is not removed or appropriate mechanisms for improving the enforcement process are not instituted, the new Law will be just “old wine in a new bottle” [*binh moi ruou cu*] and, in protecting human rights, it will be a law only in the books and not in practice.

#### ***4.3.3. The method of calculating damages is unclear and inappropriate***

Calculating the amount of the damage for a wrongful state action is an important but controversial issue. Damages are a precondition to determining the liability for compensation. The SCL fixes the categories of damage which should be compensated for, under Articles 45 - 49, as specifically including:

- damage caused by an infringement to property (Article 45);
- damage caused by the loss or reduction of income (Article 46);
- damage caused by mental loss (Article 47);
- physical loss due to the victim’s death (Article 48);
- physical loss due to the victim’s injuries (Article 49);

Under the SCL, two kinds of damages can be claimed: physical and mental suffering. Physical loss includes both direct and indirect damage. Where property is damaged, the remedy is the reduction in the value of the property. It also includes the income lost by not being able to use property or the interest in cases where the property is money. Where there is physical injury, damages include loss of income and mental suffering. Where there is mental suffering, in Article 47 the SCL fixes the amount of monetary compensation, depending on the circumstance.<sup>421</sup> Accordingly, where there is

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<sup>418</sup> Gia Khang, Case Pham Thi Kim Dung- Binh Duong, Viet Bao, 21/10/2006 <<http://vietbao.vn/An-ninh-Phap-luat/Boi-thuong-oan-sai-Im-lang-va-ne-tranh/20625010/218/>>

<sup>419</sup> Văn Đoàn, above n 170.

<sup>420</sup> Hoàng Thu (2011) ‘Khóc cười những vụ yêu cầu bồi thường nhà nước’ [Crying, laughing on the cases of state liability for compensation] *Phap luat Vietnam* <<http://www.phapluatvn.vn>>

<sup>421</sup> Article 47 of SCL provides mental suffering as following: (1) *Damage due to mental suffering during the administrative custody or confinement in a reformatory, rehabilitation*

mental suffering, damages are not to exceed 30 months' minimum wages in injury cases and 360 months in cases of death. However, there are some challenges to calculating the amount of damage in most cases concerning compensation for wrongful acts by state officials.

In respect of mental losses, the Law determines the damages only in the case of criminal proceedings and administrative actions. In the field of civil enforcement, there is no specific provision. Moreover, Circular 24 giving guidance on the state compensation liability in the activities of civil enforcement has no further specific guidance on damages for mental loss.<sup>422</sup> This has led to three different understandings:

- (1) in terms of the enforcement of civil judgments, state officials only implement judgments involving property and therefore no mental damage would occur;
- (2) the SCL has no provisions for mental loss so that where mental loss occurs, the claimant should not be compensated; and
- (3) although the SCL has no specific provision for mental loss, claimants should be compensated if they prove their loss.

As the courts are not the competent agencies to interpret the SCL under the law, this issue should be clarified in the secondary legislation to ensure the uniform application of the law in practice. One suggestion is that any civil wrong can cause a mental loss and the Law should recognize this kind of loss in cases of enforcement of civil judgments. Because the damage is a direct result of violations of rights caused by

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*establishment or medical establishment will be determined as equal to two days' minimum wage for one day in administrative custody or in a reformatory, rehabilitation establishment or medical establishment; (2) Damage due to mental suffering in cases of being held in custody, detained or serving an imprisonment penalty will be determined as equal to three days' minimum wage for one day of being held in custody, detained or serving an imprisonment penalty; (3) Damage due to mental suffering in case of death of sufferers will be determined as equal to three hundred sixty months' minimum wage. (4) Damage due to mental suffering in case of infringement upon health will be determined based on the extent of health damage but must not exceed thirty months' minimum wage. (5) Damage due mental suffering in case of institution of a criminal case, prosecution, trial or judgment enforcement without being held in custody or detained will be determined as equal to one day's minimum wage for one day of institution of a criminal case, prosecution, trial, non-custodial reform or serving of a suspended sentence.*

<sup>422</sup> Circular 24/2011/TTLT-BTP-BQP dated 15/12/2011 of the joint Ministry of Defence and Ministry of Justice guiding the liability of the State in the activities of civil enforcement, Art 7, 8, 9.

state officials, in principle, any damages must be recovered adequately and timely according to the general principles of liability under the provisions of the Civil Code.

In addition, under the SCL, one method of calculating damages is based on minimum wages. The minimum wage is the salary that is fixed by state agencies. In Vietnam, since 2007 the minimum wage has been 40% below the GDP per person, only reaching 40% in 2007 and 2009.<sup>423</sup> According to a recent survey conducted by the Vietnamese Chamber of Commerce and Industry (VCCI), although the minimum wage has increased eight times from January 2003 to May 2013, the current minimum wage meets only about 60% of minimum living needs.<sup>424</sup> This explains why the damage paid to successful claimants is often very low. Moreover, the Law provides a formula for calculating the loss of income which is one kind of indirect damage (Article 46). Accordingly, the loss of earnings during the period of suffering is calculated based on the salary of claimants.<sup>425</sup> This provision is inappropriate as it uses the salary of the victim before s/he suffered the injury. As the injury and consequent damages may endure over a long period of time, the value of the currency may be reduced by inflation or other changes in economic and social conditions. For example, an accused may be wrongfully imprisoned for 10 to 20 years. Even in civil proceedings or proceedings over the wrongful enforcement of judgments in order to achieve a just judgment or decision, claimants sometimes have to wait for decades. Their previous salaries at the time they are finally released or have an assessment made for damages, should be based on the actual rates and the time with some estimates for the future based on the conditions of economic and social development.

The law does not clearly provide for damages in cases where more than one person dies because of one wrongful judgment or decision. There are different understandings of this. For example, if only the father dies because of a wrongful judgment, the children may be awarded 360 months minimum wages for their mental

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<sup>423</sup> Văn Thị Thu Hà, ‘Vấn đề lương tối thiểu ở Việt Nam: Một tiếp cận khác’ [The minimum wage in Vietnam: a different approach] <<http://tuoitre.vn/Tuoi-tre-cuoi-tuan/545372/van-de-luong-toi-thieu-o-viet-nam-mot-tiep-can-khac.html>>

<sup>424</sup> ‘Chết vì lương tối thiểu’, *Vietnamnet* [People die because of minimum wage] <<http://vietnamnet.vn/vn/kinh-te/120326/chet-vi-luong-toi-thieu-.html>>

An Ninh Thủ đô, ‘Doanh nghiệp đau đầu vì lương tối thiểu’, [The heads of companies get headache because of minimum wage] <<http://www.anninhthudo.vn/Thoi-su/Doanh-nghiep-dau-dau-vi-tang-luong-toi-thieu/497871.antd>>

<sup>425</sup> *The SCL 2009* (Vietnam) Art 46(2); *The Circular 24/ 2011/ TTLT-BTP-BTC-TTCP* guiding the implementation of the state liability in enforcement of civil judgment on 15/12/2011 Art 9.

suffering. However, in case where both parents die at the same time as the result of a wrongful judgment, how much will the children be awarded: 360 months or 360 months multiplied by two? Because the law provides only that “Damage due to mental suffering in case of death will be determined as equal to 360 months’ minimum wages” (Article 47, paragraph 3). This leads to confusion when judges calculate loss in state compensation liability cases. According to some judges, the loss should be 360 months because the law provides that “in case of death the mental loss does not exceed 360 months”, whereas other judges consider that the compensation should be doubled because claimants have suffered more pain and mental harm as the result of losing two relatives rather than one.<sup>426</sup> Thus, the suggestion is that the sub-law should clarify this issue to avoid the confusion and to more fairly protect claimants.

### **Interview analysis**

In respect of damages, all of the interviewees, both from the public and private sectors, believed that the damages payments should be for all the sufferers’ losses including physical or mental suffering, and direct or indirect losses. They argued that if the loss is the result of wrongful acts, the claimants should be compensated as completely as possible and not only for direct losses or the loss of property. Moreover, they also agreed that in the calculation of damages provided for in the SCL, lost income should be based on actual earnings rather than on the minimum wage. However, a lawyer and one claimant working in business stated that the SCL has not stipulated anything about loss of income where the sufferer is running a business. However, *Joint Circular 19* of 26<sup>th</sup> November 2010, guiding the implementation of the state liability in administrative activities, does provide for loss incurred by businesses.<sup>427</sup> However, again it is based on the income before the damage occurred and not on the actual potential losses. This provision still has the same limitation as does the case of an individual’s dependent wage. Some interviewees suggested that in these situations, damage should include both the damage to claimants and the potential future damage that the sufferers can prove. The important condition is that the claimant should prove that loss. Those interviewees also said that for businesses, the opportunity to do business is golden and that reputation

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<sup>426</sup> Đinh Văn Quế (2012), ‘Một số vấn đề về khoản tiền bù đắp tổn thất về tinh thần do xâm phạm về tính mạng, sức khỏe, dân dự, nhân phẩm, uy tín trong Bộ luật Dân sự 2005’ [Some issues on mental loss caused by infringement of death, physical health, dignity, honour, reputation under Civil Code 1995] <<http://toaan.gov.vn>> [the website of SPP].

<sup>427</sup> *The Joint Circular 19/ 2010/ TTLT-BTP-BTC-TTCT* guiding the implementation of the state liability in administrative activities on 26<sup>th</sup> November 2010, Art 6.

should be considered as one kind of loss, especially in a case where the head of the enterprise has been the victim of a wrongful criminal judgment.

#### **4.3.4. The responsibility of the officials**

As pointed out above, before the SCL was enacted, the Civil Code required the officials who had engaged in wrongful conduct to reimburse the state. However, because these provisions are too general and provide little guidance in practice, no official has had to reimburse the state.<sup>428</sup> To eliminate that problem, the Law has clearer provisions for determining whether an officer has behaved wrongfully and the process to recover the appropriate payments for the state.

However, there were several different views about the consequences of stipulating personal liability for public officials. As indicated in Chapter 3 section 3.5.1, Harlow states that requiring reimbursement by state officials may be not a good way to deter wrongful actions as it could lead to the avoidance of decision-making. She acknowledges that it is based on a deterrence theory of liability but indicates that it is one in which the deterrence is symbolic.<sup>429</sup> On the other hand, as also indicated in section 3.5.1, Sunk and Dicey, using the rule of law principle, point out the benefits of such deterrence.<sup>430</sup> Dicey, in the context of the rule of law saw tort actions as a way to hold public servants to account. He assumed that the threat of personal liability overseen by the courts deterred public officials from the abuse of power. Also, Wells notes that one of the purposes of compensation is to prevent future tragedies.<sup>431</sup> Dicey's theory of personal liability and Wells' point make an important statement about the need to prevent recurrences of breaches of duties by officials.<sup>432</sup>

While the SCL seeks to impose some personal liability on officials, it appears to partly follow Harlow's idea that personal liability may lead to officials avoiding responsible decision-making by requiring only small amounts of money to be paid for

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<sup>428</sup> According to evaluation of Mr. Hue- the chairman of the Committee which drafted the *Law on State Compensation Liability*, and the manager of the Department of Civil and Economic Law, MOJ cited in Cong Ly, 'Luật Bồi Thường sẽ không làm công chức "run tay"' *Vn Economy*, 30/8/2007. <<http://vneconomy.vn/66887P0C5/luat-boi-thuong-se-khong-lam-cong-chuc-nha-nuoc-run-tay.htm>>

<sup>429</sup> Harlow, above n 6, 45; Shuck, above n 351, 16-25.

<sup>430</sup> Shuck, above n 351; Dicey, *Introduction to the Study of the Law of Constituion*, 10<sup>th</sup> edn, London: Macmillan, 1959, lxxvi-lxxxvi.

<sup>431</sup> C Wells, *Negotiating Tragedy: Law and Disasters* (London: Sweet and Maxwell, 1995) 158.

<sup>432</sup> Harlow, above n 6, 23.

reimbursement.<sup>433</sup> In particular, the limitations imposed on possible compensation payable by officers by *Decree 16* giving guidance on the application of the Law may reduce the concerns of officials about the extent of their potential liability.<sup>434</sup> Accordingly, those who have neglected their duty have their liability limited to compensation not exceeding three months' wages. An officer who intentionally has committed a wrongful action may be required to reimburse the state up to a maximum of 36 months' wages. Officials who are negligent by making a wrongful conviction are not liable for reimbursement. Only the officer who has committed a crime will have to pay to the state the total of amount of compensation for which the state is liable. The possible reimbursement of three or 36 months' wages are still significant practices.

Harlow's argument is clear regarding the enforcement of the law. The discussion in Chapter 6 illustrates that the law is ineffective in securing repayments. On this issue, Mr Hung, the deputy manager of the Department of State Compensation, MOJ, affirmed that:<sup>435</sup>

*Hiện mới có 11 vụ việc cán bộ, công chức vi phạm có trách nhiệm hoàn trả, trong khi đó Nhà nước đã giải quyết bồi thường cho 137 vụ việc với tổng số tiền hơn 23 tỷ đồng. Ở đây có cái khó là xác định lỗi cố ý hay vô ý theo Điều 608 Bộ luật Dân sự.*

*Cái khó thứ hai là vì cùng là công chức với nhau, mối quan hệ nhân viên - thủ trưởng dẫn tới nể nang, có khi là lỗi cố ý nhưng lại đưa vào lỗi vô ý để hoàn trả ít đi. Đúng là quy định về mức hoàn trả và trách nhiệm hoàn trả quá thấp, nên chưa bảo đảm tính răn đe.*

[Currently, there are 11 cases in officials are responsible for repayment while there are 137 cases which have been resolved involving more than 23 billion VND. The first difficulty is in determining the officers' guilt and whether it is intentional or negligent under Article 608 of the Civil Code.

The second difficulty is that they are officials; friendly relationships lead to attitudes of avoidance. The official, who behaved wrongfully, may have

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<sup>433</sup> Công Lý, above n 372.

<sup>434</sup> *The Decree 16/2010/ND-CP* (3/3/2010) giving guidance on implementing the law on state liability for compensation 2009 Art 18.

<sup>435</sup> Hoàn Long, Người dân vẫn bị gây khó khi Nhà nước bồi thường, *Báo Tiền Phong*, 29/5/2013 [Hoang Long, The people still have difficulties when they claim for state compensation, *Tien Phong newspaper*] <<http://www.tienphong.vn/Phap-Luat/629316/Nguoi-dan-van-bi-gay-kho-khi-Nha-nuoc-boi-thuong-tpp.html>>

done so intentionally but his colleague, as a good friend, classifies it as negligent to help him to repay less. Indeed, the level of reimbursement provided under the law is too low so it is not able to deter.]

In fact, according to Mr Tinh, Director of the Department of State Compensation, up until mid-2013, the state had received no reimbursement by state officials.<sup>436</sup> To resolve this difficulty, Mr Hung and also Judge Nguyen Van Cuong suggested that officials who have committed a civil wrong should repay the total amount of compensation. This would reduce demands on the state budget and also ensure a measure of justice.<sup>437</sup> Mr Duong Dang Hue, the chairman of the Committee which drafted the SCL, and the manager of the Department of Civil and Economic Law, MOJ, affirmed that responsibility for reimbursement will be one of the most important keys to increasing the responsibility of state officers and providing a filter when choosing and promoting qualified officials.<sup>438</sup>

However, it appears that the new provision will lead to little reimbursement compared with the damages for which the state is liable. The provisions are supported by the absence of a mechanism for enforcing these provisions and in practice no official has had to pay money to the state.<sup>439</sup> The law may not be sufficiently robust to make officers as responsible as Mr Hue claims.

### **Interview analysis**

Many of the interviewees in the public sector and all of those in the private sector agree with Mr Hue. They indicated that the level of personal liability of officials is too low and inappropriate. They stated that the provision requiring officials who intentionally act wrongfully to pay a maximum of 36 months' wages is unreasonable. In this case, they should repay the total amount of compensation. They believed that if this were revised, it would decrease corruption and increase the accountability of those involved in public administration. However, some officials point out that if the law increases the level of reimbursement, it may lead to state officials avoiding their responsibilities. These responses are identical with Harlow's view. However, those fears lack persuasive

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<sup>436</sup> Khi Nhà nước gây thiệt hại cho dân thì phải bồi thường kịp thời, xác đáng, theo DCSVN, 29/5/2013 [when the state causes the damage, the state should pay compensation in time and properly] <<http://baophutho.vn/thoi-su/201305/Khi-Nha-nuoc-gay-thiet-hai-cho-dan-thi-phai-boi-thuong-kip-thoi-xac-dang-2243979/>>

<sup>437</sup> H. L, above n 403.

<sup>438</sup> Công Lý, above n 372.

<sup>439</sup> Ministry of Justice of Vietnam, above n 15.

foundations for the reasons given in section 3.5.1. Seeking to avoid liability is a common human attitude. It is not so dependent on the amount of the reimbursement. Even where the level of the repayment is very low, as with the current provision, avoidance is still common in Vietnam as indicated in Chapter 6.

#### **4.4. Conclusion**

As indicated, the SCL appears to change the relationship between the state and its citizens. The concepts and the general principles of the law are ideals. They support the development of the rule of law, the market economy, and the protection of human rights in Vietnam. Neither the SCL nor any of the subordinate laws giving guidance indicate which of these goals has priority. The specific provisions reveal many deficiencies and do not match these specific goals. The scope of law is very limited and inconsistent with the *Constitution* and *Civil Code 2005*. The grounds for liability are inappropriate and constrain the claimants seeking compensation. The damages are difficult to calculate and often very low. Ensuring the responsibility of state officials is difficult and ineffective. Already there are suggestions that several unsuitable provisions should be repelled. Any future regulations should clarify the method of calculating damages and the personal responsibility of state officials. The interviews and the statements of others in the public sector such as Mr Nguyen Thanh Tinh, head of the Department of State Compensation, MOJ, have shown that: after three years of implementation, many of the deficiencies of the law have been exposed and there is a need for further reforms.<sup>440</sup> When the SCL is amended and supplemented, a point made by Pham Duy Nghia, a legal expert, should be remembered “If the legal system only assists to manage society this is not enough, it must be associated with the rule of law and ensure justice for anyone regardless of their social status”.<sup>441</sup>

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<sup>440</sup> Hoàng Long, Luật vẫn xa dân, *Tien Phong online* [Law is still far from citizens, *Tien Phong newspaper online*], 15/10/2012 <<http://www.tienphong.vn/Phap-Luat/595475/Luat-van-xa-dan-tpp.html>>

<sup>441</sup> Phạm Duy Nghĩa, Con đường công lý chông gai, *Tạp chí tia sáng điện tử*, 02/8/2011 [the challenging way looking for justice] <<http://tiasang.com.vn/Default.aspx?tabid=116&News=4249&CategoryID=42>>

## **Chapter five: The procedures for claiming compensation –**

### **A complex and ineffective process**

#### **5.1. Introduction**

In addition to the substantive law, the procedural law and processes for resolving claims for state compensation also play a fundamental role in effective dispute settlement. This chapter reviews the procedures and mechanisms for claiming state compensation. It analyses the legislative provisions, the literature, and the interview results in the context of the limitation periods, processes to be allowed in applying to agencies potentially liable for compensation, and the agencies which resolve compensation claims. It indicates that the compensation procedures and mechanisms are both complex and ineffective. They need further reform.

#### **5.2. Vietnamese Compensation Procedure**

As mentioned in the previous chapter, in order to be awarded compensation, claimants usually need to participate in two processes: one to obtain a valid document issued by an authorized office affirming that the officials' act is wrongful and falls within the scope of liability for compensation; and, the other for compensation in one of two alternative processes.<sup>442</sup>

##### **5.2.1. Obtaining a valid document**

Although the SCL requires that claimants must have a valid document confirming the wrongful action by state officers, the law does not provide details of procedures; it refers to the general provisions in laws on complaints and denunciations.<sup>443</sup> In general, in order to obtain such a document, the claimants have to follow procedures under administrative law, except in respect of criminal proceedings.

Before 2010, the settlement of disputes in administrative law was difficult, reflecting many of the shortcomings in the complaint procedures in administrative agencies. This process was mandatory. The scope of matters in respect of which a complaint could be made was very narrow; the time in which a complaint had to be made was short - 30 or 45 days depending on the type of case. Those provisions greatly limited claimants' rights and legitimate interests.

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<sup>442</sup> *The SCL 2009* (Vietnam) Art 15, 22, 23.

<sup>443</sup> *Ibid* Art 15.

In recent years, the Vietnamese government has made efforts to improve legal processes for dispute resolution because of Vietnam's needs for its own social and economic development and for its further international integration. The promulgation of the *Law on Administrative Procedure* in 2010 was a turning point in the improvement of administrative law. The Law broadens the scope of administrative procedures. Most administrative decisions and activities can now be reviewed in litigation.<sup>444</sup> Also, it extends the time in which action may be taken up to one year.<sup>445</sup> The revised Law allows people to choose the method by which to protect their rights by making a complaint to the relevant administrative agency or by filing a case directly to court.<sup>446</sup> Hence, currently, there are two ways to obtain a valid document affirming officials' wrongful acts: one is by a complaint lodged with the state office which issues such documents, and the other is by suing in the Administrative Court of the relevant local People's Court.

With the first process, the complaints process, in order to obtain a valid document, the claimant must submit a formal complaint to the competent state body which issued the administrative document subject to the request for review. The competent state body is to determine within 10 days whether the claim is within its authority to resolve and, within 60 days (up to 90 days in complicated cases) of acceptance of the file, to consider and conclude whether or not the act was unlawful.<sup>447</sup> The competent state body must issue a document indicating its conclusion. The decision becomes effective after 30 days from the date of issuance if the complainant does not appeal it (in some circumstances this period may be extended further but not exceeding 45 days).<sup>448</sup>

If the complainant does not agree with the decision, s/he has the right to make a second complaint to the higher office of the state body that resolved the first complaint or sue in the relevant Administrative Court of the People's Courts under the provisions of the *Law on Administrative Procedure*.<sup>449</sup>

The time limit for the second review is no more than 45 days from the date of acceptance. In some cases, the time limit may be extended but must not exceed 60 days

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<sup>444</sup> *The Law on Administrative Procedure 2010* (Vietnam) Art 28.

<sup>445</sup> *Ibid* Art 104.

<sup>446</sup> *Ibid* Art 31.

<sup>447</sup> *The Law on Complaint 2011* (Vietnam) Art 28.

<sup>448</sup> *Ibid* Art 44.

<sup>449</sup> *Ibid* Art 7.

from the date of acceptance. In regional and remote areas with difficulties of access, the time limit for the second review is not to exceed 60 days from the date of acceptance (the time limit may be extended, but must not exceed 70 days from the date of acceptance).<sup>450</sup>

This decision is legally effective after 30 days from the date of issuance. In regional or remote areas with difficulties of access, the time limit may be extended but not by more than 45 days. If complainants do not agree with the decision, they may file a proceeding against the state body in an Administrative Court under the provisions of the Law on Administrative Procedure.<sup>451</sup>

The second process, according to the Law, for obtaining a valid document affirming the unlawfulness of an officer's actions is to file a proceeding in the Administrative Court. The process is shown in Flow Chart 1.<sup>452</sup>

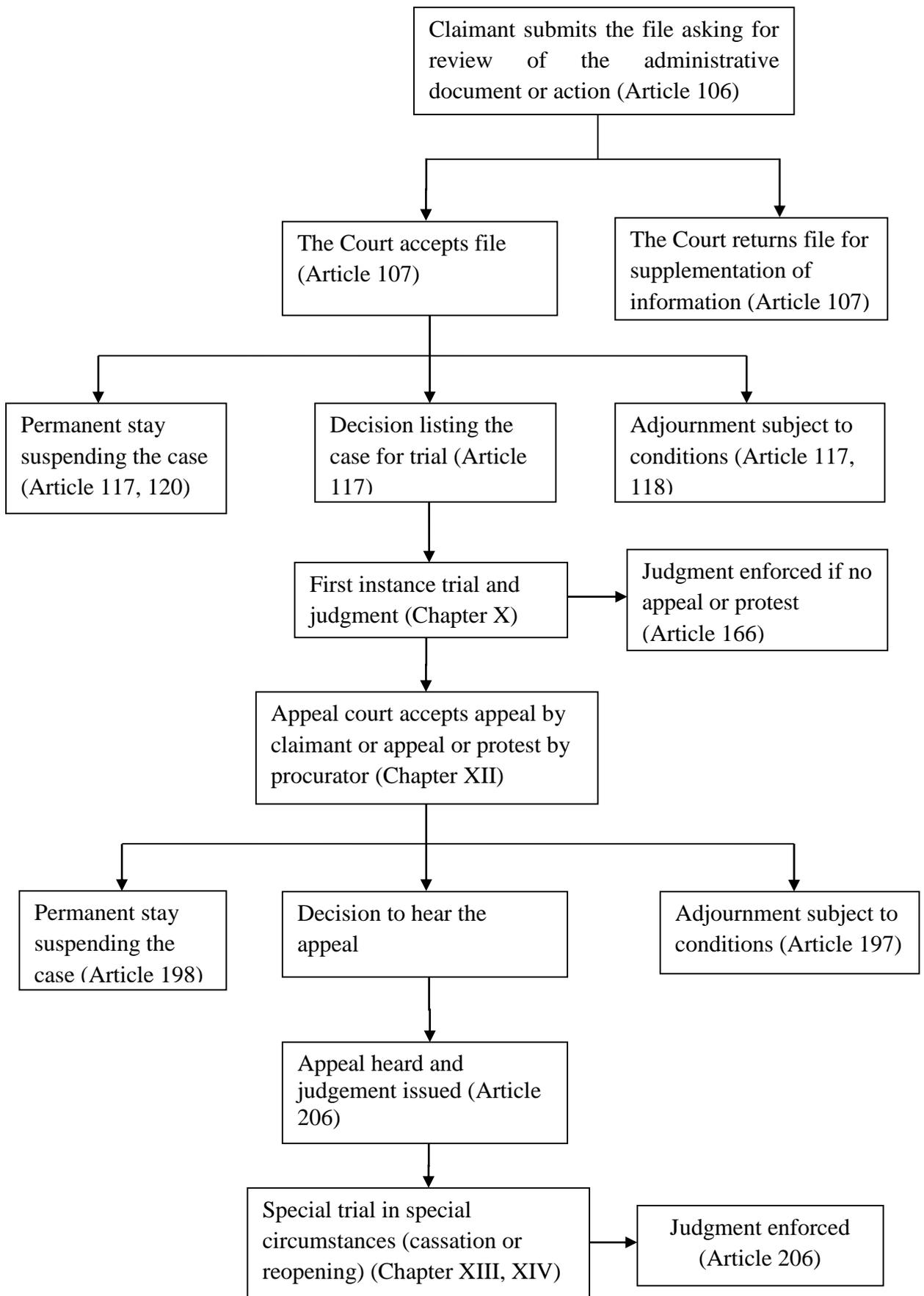
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<sup>450</sup> Ibid Art 37.

<sup>451</sup> Ibid Art 44.

<sup>452</sup> This process is describe under the *Law Administrative Procedure 2011*

**Flow Chart 1: Judicial review in the Administrative Court**



According to Article 24 of the SCL and Article 6 of the *Law on Administrative Procedure 2011*, a claimant who has the right to claim compensation in administrative decisions may also claim damages in an Administrative Court. In this circumstance, claimants must state the compensation sought including the amount and any supporting evidence. If necessary, the court should accept further evidence to ensure that the resolution of the case has been correct. The procedures to be followed are those of the Law on Administrative Procedure but the issue of the state liability for compensation must be determined under the SCL.<sup>453</sup>

## **5.2.2. Procedures for claiming compensation**

### **5.2.2.1. Agency-based compensation procedures**

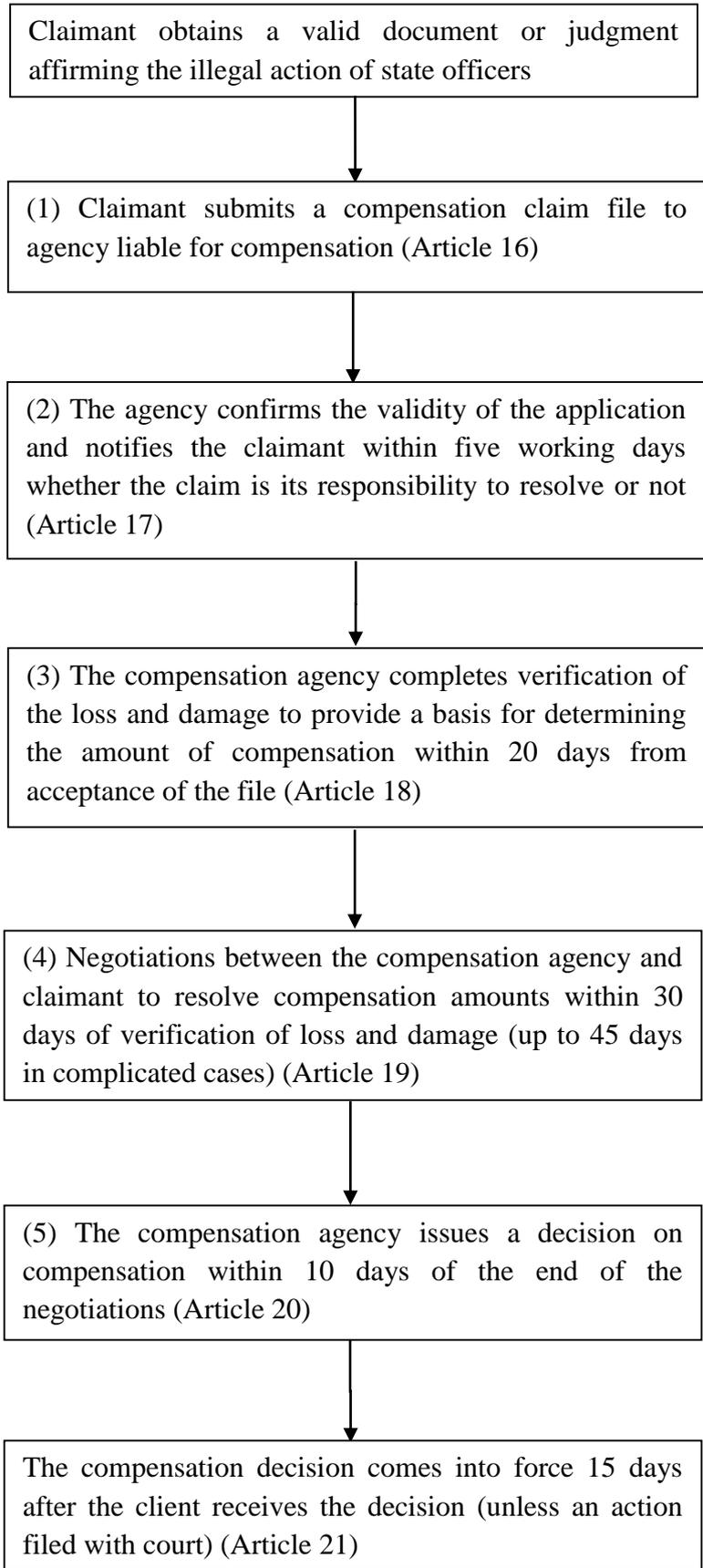
When claimants obtain the valid document affirming that the action of the state officers was unlawful, they have the right to claim compensation from the competent state agency. The SCL provides that negotiation over compensation with the relevant agency is a mandatory procedure. This means that the claimants may not immediately sue the state agency but must first negotiate.

The general procedures for resolving claims with an agency are seen in Flow Chart 2.

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<sup>453</sup> *The SCL 2009* (Vietnam) Art 24, 25.

**Flow Chart 2: Procedures and time limits for claims lodged with agencies**



As can be seen from Flow Chart 2, the procedure for resolving claims with the office which is liable for compensation includes five stages:

(1) Submitting a claim file (Article 16): After receiving a valid document which confirms that the wrongful action of the state officer falls within the scope of state liability for compensation, the applicant must send the file to the relevant state agency asking for compensation. The file must contain a written claim statement by the claimant. It must also contain the document issued by the relevant administrative agency or the court confirming that the action was wrongful and falls within the scope of state liability for compensation. Without this, the claim cannot be submitted. It must also contain evidence supporting the claim, including any losses.

(2) Accepting applications for compensation (Article 17): Agencies receiving the application are responsible for checking the validity of the file. If they determine that the claim is not complete, they will advise the claimant of the need to provide supplementary documents.

If they determine that the claim falls within the scope of state liability and the state agencies' responsibility, the agencies must accept the file and notify claimants in writing within five working days from the date of receipt of a complete and valid file. If they determine that the claim does not fall within the agencies' responsibility, they must return the file and advise claimants to file their claims with the competent agencies.

The important point to be noted here is that there is a time limit for checking the validity of the file and requesting supplementary documents. The time for determining whether the claim falls within the responsibility of the relevant state agency begins only from the time when the claim file is complete and valid. This provision may be a loophole exploited by irresponsible officers seeking to prolong the resolution of claims.

(3) Verifying damages: Article 18 of the SCL provides that:

*1. Trong thời hạn 20 ngày, kể từ ngày thụ lý đơn yêu cầu bồi thường, cơ quan có trách nhiệm bồi thường phải hoàn thành việc xác minh thiệt hại để làm căn cứ xác định mức bồi thường; trường hợp vụ việc có nhiều tình tiết phức tạp hoặc phải xác minh tại nhiều địa điểm thì thời hạn xác minh thiệt hại có thể kéo dài nhưng không quá 40 ngày.*

[1. Within 20 days after accepting compensation claims, compensation-liable agencies shall completely verify the damage for use as a ground for

determination of compensation amounts. For matters involving many complicated circumstances or to be verified at different places, the verification time limit may prolong [sic] but must not exceed 40 days.]

*2. Căn cứ vào tính chất, nội dung của vụ việc, cơ quan có trách nhiệm bồi thường có thể tổ chức việc định giá tài sản, giám định thiệt hại về tài sản, giám định thiệt hại về sức khoẻ hoặc lấy ý kiến của các cơ quan có liên quan về việc giải quyết bồi thường. Chi phí định giá, giám định được bảo đảm từ ngân sách nhà nước.*

[2. Based on the nature and contents of matters, compensation-liable agencies may organize the valuation of property, examination of property damage, examination of health damage or acquire opinions of relevant agencies on the settlement of compensation. Expenses for such valuation and examination shall be covered by the state budget.]

*3. Trường hợp người bị thiệt hại không đồng ý với kết quả định giá, giám định mà yêu cầu định giá, giám định lại và được cơ quan có trách nhiệm bồi thường đồng ý thì chi phí định giá, giám định lại do người bị thiệt hại chi trả, trừ trường hợp kết quả định giá, giám định chứng minh yêu cầu định giá, giám định lại là có căn cứ.*

[3. If sufferers disagree with valuation or examination results and request re-valuation or re-examination, which is agreed upon by compensation-liable agencies, re-valuation or re-examination costs shall be paid by claimants, unless valuation or examination results prove that re-evaluation or re-examination requests are grounded.]<sup>454</sup>

(4) Negotiation compensation: Article 19 (1) provides that:

*Trong thời hạn 30 ngày, kể từ ngày kết thúc việc xác minh thiệt hại, cơ quan có trách nhiệm bồi thường phải tổ chức và chủ trì thương lượng với người bị thiệt hại về việc giải quyết bồi thường; trường hợp vụ việc có nhiều tình tiết phức tạp thì thời hạn thương lượng có thể kéo dài nhưng không quá 45 ngày.*

[Within 30 days after the end of damage verification, compensation-liable agencies shall organize negotiations with sufferers on the settlement of

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<sup>454</sup> This is official translation available at:

<[http://www.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10465](http://www.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10465)>

compensation. If matters or cases involve many complicated circumstances, the negotiation time limit may prolong [sic] but must not exceed 45 days.]

This provision may lead to confusion because the first sentence mentions the time within which negotiations should be started but the second sentence refers to the time within which negotiations must be concluded. The legislation appears to assume that there will be only one negotiation meeting and that negotiations will start and finish on the same day. But in fact, the negotiations may last for some days and there may be a number of meetings.<sup>455</sup> The result is that there is no time limit on the enforcement of the Law; this will be discussed further in Chapter 6.

Participants in these negotiations will be representatives of agencies liable for compensation and claimants or their lawful representatives. Negotiation will be held at the offices of the relevant state agency or the offices of the People's Committees of communes, wards or townships where claimants reside, unless otherwise agreed upon by the concerned parties. Negotiations should be recorded in writing.<sup>456</sup>

This emphasis on negotiation maintains the Confucian and socialist tradition of justice without litigation. It is also a common feature in many contemporary legal systems. This is discussed further in 5.2.3.

(5) Issuing decisions on a compensation settlement: Article 20 provides that the agency responsible for compensation must issue a decision resolving the compensation claims within 10 days of the negotiations. Compensation settlement decisions must be sent to claimants, to the next higher level of the relevant agencies and to the officers responsible for the damage caused.

As Flow Chart 2 shows, the agency actually liable to pay compensation plays a significant role in determining the amount of compensation, raising a potential conflict of interest.

In cases where the claimants are able to agree reach an agreement on compensation and do not litigate, the compensation settlement decision will come into force. The resulting document will also be the basis on which the agency will implement the payment of compensation. If the claimants do not reach an agreement to settle the compensation, or the state agency has not issued any decision after the period

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<sup>455</sup> In case Luong Ngoc Phi, there were six negotiations held to negotiate the compensation.

<sup>456</sup> *The SCL 2009* (Vietnam) Art 19.

provided by the law expires, the claimants have the right to sue to resolve the amount of compensation.

The compensation settlement agreement will take effect 15 days from the date on which the claimant receives the decision, unless the claimant does not agree and takes the case to the court.

#### **5.2.2.2. Court-based compensation procedures**

It can be seen from the above procedures that the claimant has the right to sue a state agency in two circumstances: where the state agency has not issued any decision to settle compensation after the time provided by the law expires or where the agency issued such a document but the claimant does not agree with the decision.

According to Articles 22 and 23 of the SCL, the claimant can initiate legal proceedings within 15 days from the date that the relevant agency issues the compensation settlement decision or, where the agency has not made a decision within 15 days of the expiry of the period, the agency is required to make such a decision. Where claimants prove that because of the obstacles or unforeseen events, they could not sue in time, such period of time is not to count. The claimants, however, have no right to sue after the compensation settlement decision has taken legal effect, which is 15 days. This creates an obvious problem which is considered below in section 5.6.

The courts with jurisdiction are the People's Court of the district where the individual claimant resides, works, or where the organization suffering damage has its head office, or, where the damage occurred at the selection of claimants or other circumstances prescribed by relevant laws on civil procedure.

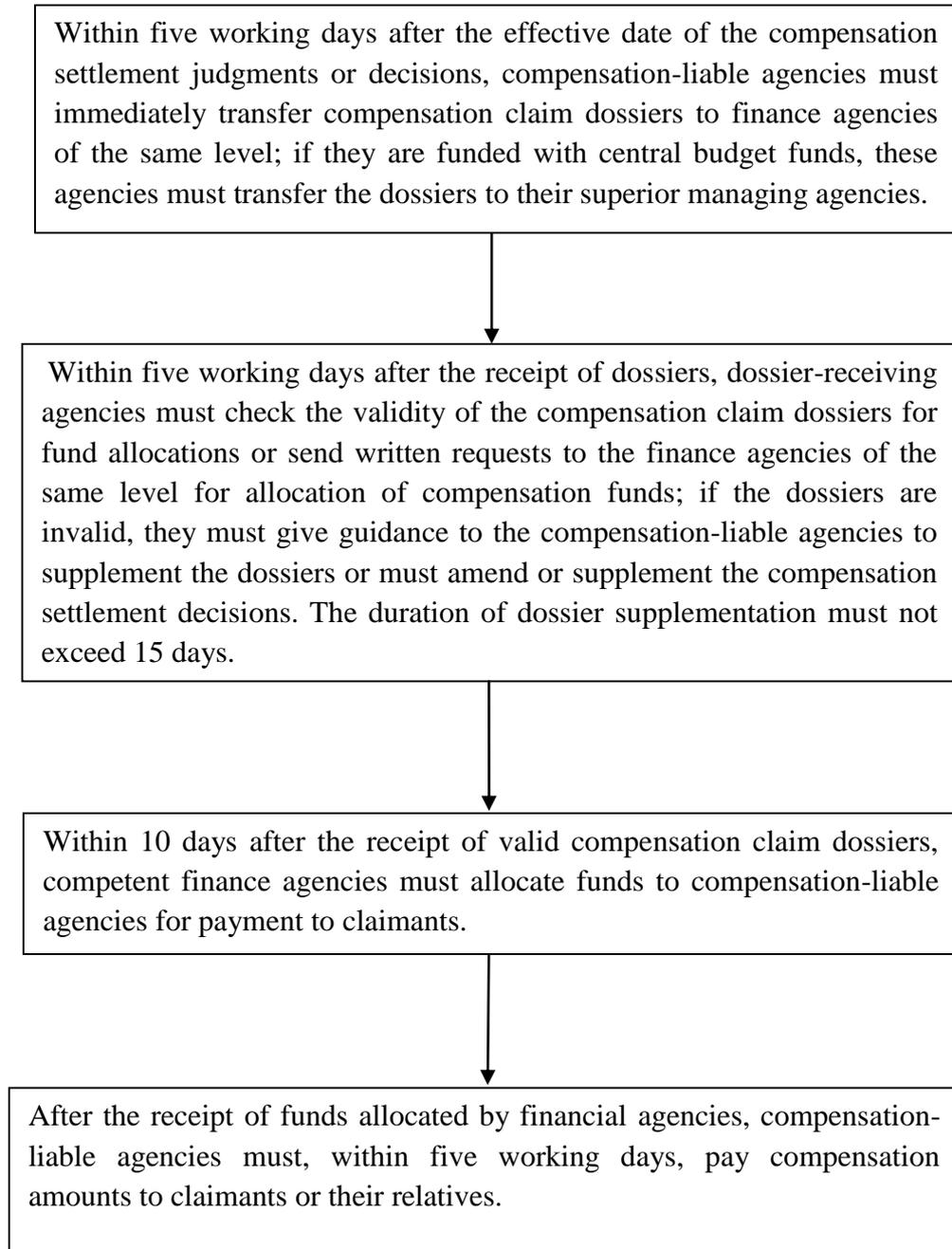
The liability of the state for compensation is a civil liability as shown in Chapter 3. The procedures for settling claims to state compensation made to a court are under the provisions of the Civil Procedure Code 2004. This process is similar to the administrative procedure described in Flow Chart 1 above.

#### **5.2.3. Compensation funds and payment procedures**

The payment is very important for claimants. If the compensation payment is not made, the procedures above are not meaningful. Compensation comes from the state budget and procedures for the allocation of funds and payment of compensation are reflected in

the process in Article 54 of the SCL in Flow chart 3: Funding allocations and payment procedures.

### **Flow Chart 3: Funding allocations and payment procedures**



The SCL also provides in Article 54(5) that:<sup>457</sup>

*Trường hợp bản án, quyết định giải quyết bồi thường của Tòa án có hiệu lực pháp luật mà cơ quan có trách nhiệm bồi thường không tự nguyện thi hành thì người được bồi thường có quyền yêu cầu cơ quan thi hành án dân sự thi hành theo quy định của pháp luật thi hành án dân sự.*

[If compensation-liable agencies decline to voluntarily implement the legally effective compensation settlement judgments of courts, sufferers may request civil judgment enforcement agencies to enforce them under the law on civil judgment enforcement.]

### **5.3. Evaluating the compensation procedures**

As can be seen from the procedures above, and as will be shown below, the procedures for resolving compensation are complex and ineffective.

Firstly, compared with other procedures for resolving disputes, the compensation procedure is more complex. This is the only procedure which includes two sub-procedures (requiring a valid document or judgment and applying for compensation), applying different laws that have a number of stages. For example: complaining under the provisions of the *Law on Complaints 2011* or the *Law on Denunciations 2011*; suing for an administrative document before an Administrative Court under the provisions of administrative procedure to obtain a valid document; submitting files, verifying the damages, negotiations, suing before the court under the provisions of civil procedure, and so on as indicated in section 5.2. Despite having made progress in recognizing the right of people to bring cases directly to the Administrative Court, this process is still time consuming because it may take more than one year to obtain a valid document.<sup>458</sup> In some cases, claimants need to prove that officers intentionally committed a wrongful action as pointed out in Chapter 4 section 4.3.1. These processes are really complex, take a long time, and are not effective.

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<sup>457</sup> This is official translation available at:

<[http://www.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10465](http://www.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10465)>

<sup>458</sup> *The Law on Administrative Procedure 2010* (Vietnam) Art 117, 137, 191, 201.

According to Mr. Nguyen Thanh Tinh, the Director of the Department of State Compensation, MOJ, procedures for resolving state liability for compensation are inconvenient, thereby producing difficulties from the outset. He argued that:<sup>459</sup>

*“Theo Điều 4 luật này thì người bị thiệt hại chỉ có quyền yêu cầu bồi thường khi có văn bản của cơ quan nhà nước có thẩm quyền xác định hành vi trái pháp luật của người thi hành công vụ. Trong khi đó, thực tế để có được văn bản xác định hành vi trái pháp luật, người bị thiệt hại phải thực hiện thủ tục khiếu nại, tố cáo và “con đường gian khó” này mất khá nhiều thời gian.”*

[Article 4 of the SCL requires a valid document which affirms the unlawful action of the state officers. Meanwhile, in order to obtain such a document, the sufferers must conduct the complaint or denunciation procedure but ‘this challenging procedure’ takes a lot of time.]

Also, most of the participants at a workshop agreed with the report that “claiming for state compensation is demanding” and “the procedure for state compensation is too cumbersome; the SCL has a lot of shortcomings and inadequacies”.<sup>460</sup>

Secondly, in compensation resolution processes, negotiation is a first and compulsory stage in resolving any claim under the Law. Claimants are required to negotiate with the relevant government agency in an attempt to reach agreement on compensation. This process is expected to reduce the potential waste of time and money by the parties in litigation and also to reduce the overload in the civil courts; however, it also produces an adverse result. The first reason is that claimants often seek a large amount of compensation but relevant offices usually offer a very low amount. Thus, only a limited number of cases have been successfully resolved by negotiation.<sup>461</sup> According to Binh Minh, a legal journalist, negotiations are an ineffective process.<sup>462</sup> For example, in the case of Do Huu Tri,<sup>463</sup> Mr Tri suffered damages because of the

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<sup>459</sup> Quyền yêu cầu Nhà nước bồi thường khó thực hiện, *Tin mới* [The right to state compensation is difficult to enforce, *News*], 17/5/2013 <<http://www.tinmoi.vn/quyen-yeu-cau-nha-nuoc-boi-thuong-kho-thuc-hien-011265187.html>>

<sup>460</sup> Tam Lua, above n 407.

<sup>461</sup> Ha Long, above n 154.

<sup>462</sup> Binh Minh, Sớm sửa rào cản về bồi thường Nhà nước, *Pháp luật Thành phố Hồ Chí Minh*, [The provision which restricts the right to compensation should be amended soon, *Ho Chi Minh City Law newspaper*], 28/5/2013 <<http://phapluattp.vn/2013052812310845p0c1013/som-sua-rao-can-ve-boi-thuong-nha-nuoc.htm>>

<sup>463</sup> See the fact in 6.3.3.

unlawful coercive actions which seized his land on the basis that he had infringed land use regulations. He asked for 40 billion VND (about 2 million USD) in compensation but the relevant state agency, after negotiations, offered 600 million VND (about 30,000 USD). Mr Tri refused to accept this.

Another reason for negotiations being ineffective is that under Article 19 of the Law, only the parties are able to attend. One is the representative of the relevant agency who has expertise in the area and is the office's director<sup>464</sup> and the other participant is the claimant in person or their legal representative, but not both. No other person is able to attend. Both the claimants and their lawyers should be able to attend. Moreover, the law only provides for parties attending in cases where the claimant is still alive. There is no provision for the personal representative where the claimant has died and has heirs. In this case, one representative of the heirs or all of them should be able to attend the negotiations.

Thirdly, as shown above in respect of the general compensation procedure, the SCL requires that negotiation for compensation with the agency which is liable for compensation is mandatory. However, the Law also provides that the client may claim damages through administrative agencies or in the Administrative Court when they take an action to obtain a valid document affirming the unlawful action of the state officer.<sup>465</sup> If the claimants ask for compensation through the administrative agencies involved in the complaint and denunciation system, this procedure is not uniform with the compensation procedure described above, as the SCL provides that the agency to resolve compensation at first instance is the agency liable for compensation. However, in this case, the agency for compensation settlement may be the higher level to which the first complaint decision has appealed and not the agency liable for compensation. Moreover, if the client claims compensation directly from the administrative agency or court, this procedure may not apply to the negotiation process - a mandatory procedure. Those provisions conflict with each other and lead to inconsistent application in practice.

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Hà Huyền, Cường chế sai, dân đòi 46 tỷ, huyện đền 600 triệu [Wrongful coercion, suffer claims 46 billion, the state compensates 600 million], Songmoi.vn, 25/01/2013<<http://songmoi.vn/xahoi-phap-luat/cuong-che-sai-dan-doi-46-ty-huyen-den-600-trieu>>

Bình Minh, above n 462.

<sup>464</sup> *The Decree 16 2010* (Vietnam) Art 7.

<sup>465</sup> *The SCL 2009* (Vietnam) Art 24, 25.

Furthermore, although the law provides time limits for resolving compensation claims, for the funding allocation, and for payment, there is no penalty for breaching these limits. This leads to a commonly condemned situation in Vietnam: delay or failure to act. At a workshop in 2013<sup>466</sup>, the Minister of Justice, Mr Ha Hung Cuong, stated that “The procedure for claiming state compensation is too slow ... especially the procedure for supplying money for compensation. That is why compensation payments are often delayed”<sup>467</sup>.

According to the Minister of Justice, if state agencies have difficulties in resolving issues of state compensation, they should propose an appropriate amendment to the NA. Regarding the duration of settlements, the Minister has experience with this issue as the Ministry of Justice not only has the role of administering state compensation issues, but also has the authority to determine the state agency liable for compensation as shown in section 5.4 and Chapter 6. The Minister said that:<sup>468</sup>

*Như tôi biết có những vụ việc yêu cầu bồi thường kéo dài 3-4 năm mới có kết luận, bộ phải tổ chức 3-4 phiên họp để giải quyết. Luật áp dụng thế nào, đừng để xã hội rối loạn lên*

[As I know there are many claims lasting from three to four years yet to be concluded, the Ministry of Justice has had three to four meetings to resolve the issue. The Law should be applied appropriately, do not make society disorderly.]

In addition, at the workshop on 28<sup>th</sup> May 2013, the Minister stated that: “the compensation procedure is too slow. The amount of compensation has been calculated by negotiation but the sufferers still have to wait to receive the compensation”<sup>469</sup>.

As noted, the previous laws already provided specific periods for resolving compensation claims.<sup>470</sup> However, as the previous laws did not have any penalty for infringing that time limit, settlements were delayed in practice. For example, in the case of Hoang Minh Tien, the competent agencies took eight years to determine the state

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<sup>466</sup> The workshop on the preliminary assessment of the three years of the implementation of the SCL held in Hanoi on May 28<sup>th</sup> 2013 by the MOJ.

<sup>467</sup> Tin nhanh Viet Nam, ‘Ngại kiện đòi bồi thường Nhà nước’[Be wary of suing for state compensation] theo báo *Pháp luật Thành phố Hồ Chí Minh* [*Ho Chi Minh Law newspaper*], 29/5/2013. <<http://vnexpress.net/tin-tuc/phap-luat/nga-i-kie-n-do-i-nha--nuo-c-bo-i-thuo-ng-2762332.html>>

<sup>468</sup> Tam Lua, above n 407.

<sup>469</sup> Tin nhanh Viet Nam, above n 467.

<sup>470</sup> *Decree 47, Resolution 388, Civil Code 2005 and Civil Procedural Code 2004* (Vietnam).

office that was responsible.<sup>471</sup> In the case of Luu Viet Hong who claimed compensation for wrongful judgment and imprisonment, compensation has not been paid after 17 years.<sup>472</sup> In the case of Pham Ngoc Quynh and Nguyen Ba Diep who suffered injury by wrongful prosecution, Da Nang City only apologized and paid compensation after 26 years because the file was lost.<sup>473</sup>

As the SCL also does not have any provision for penalties for the breach of the time limits, the same delays persist. In the case of Luong Ngoc Phi, found to be innocent in 2003, by mid-2013 he had not yet received compensation.<sup>474</sup> His case had commenced under the previous law. Because it was incomplete, the state agency applied Article 66, a transitional provision, and used the SCL to continue considering the case.<sup>475</sup> By mid-2013, some negotiations had occurred. On 26<sup>th</sup> August 2013, the case was completed with a first instance judgment.<sup>476</sup>

It can be argued that the compensation procedure is frustrating. It tries the patience of complainants and decreases citizens' belief in state agencies and their processes, and in the law. Indeed, for many sufferers, claiming compensation from the state is a "nightmare" or *bac thang len hoi ong gioi* [building stairs to reach the sky] or *cho duoc va, ma da sung* [claiming for damages or juries, claimants get more damages

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<sup>471</sup> Phuong Thao, 'Khô như đòi bồi thường Nhà nước, Kỳ 1: 8 năm mới tìm ra cơ quan có trách nhiệm bồi thường!' [It is challenging to claim state compensation, Chapter 1: It takes 8 years to find out the agency liable for compensation]

<<http://phapluatxahoi.vn/201110270939258p1001c1049/ky1-8-nam-moi-tim-ra-co-quan-co-trach-nhiem-boi-thuong.htm>>

<sup>472</sup> Truc Giang (2007), 'Vụ 17 năm đi tìm công lý ở Bến Tre: Ông Lưu Việt Hồng chỉ được xét bồi thường hơn 215 triệu đồng' [17 years to looking for justice in Ben Tre province: Mr Luu Viet Hong only received 215 million VND], *Viet bao*, 15/5/2007 <<http://vietbao.vn/An-ninh-Phap-luat/Vu-17-nam-di-tim-cong-ly-o-Ben-Tre-Ong-Luu-Viet-Hong-chi-duoc-xet-boi-thuong-hon-215-trieu-dong/45238405/218/>>

<sup>473</sup> Tran Tuan, 'Đà Nẵng: Xin lỗi người bị oan sau 26 năm' [Da Nang city: Apologies to innocent after 26 years] <<http://vietbao.vn/An-ninh-Phap-luat/Da-Nang-Xin-loi-nguoi-bi-oan-sau-26-nam/70035390/218/>>

Huu Tra, 'Hai vụ án bị bỏ quên ở Đà Nẵng: Tất cả hồ sơ đã bị mất?' [Two cases which were forgotten in Da Nang due to loss of all profile documents?] <<http://vietbao.vn/An-ninh-Phap-luat/Hai-vu-an-bi-bo-quen-an-o-Da-Nang-Tat-ca-ho-so-da-bi-mat/45159126/218/>>

<sup>474</sup> Hai Ly, 'Gian nan đòi bồi thường tài sản' [Challenging in asking for compensation for property loss], *Phap luat xa hoi*, 29/10/2011 <<http://www.baomoi.com/Ky-2-Gian-nan-doi-boi-thuong-tai-san/58/7257310.epi>>

<sup>475</sup> *The SCL 2009* (Vietnam) Art 66.

<sup>476</sup> Interview response.

or injuries] or *cuoi ra nuoc mat* [laughing and crying].<sup>477</sup> This illustrates the discrepancy between the goals of the Law and its effective implementation.

### **Interview analysis**

Most of the interviewees, from both the public sector and the private sector, stated that the procedures provided under the present law are inappropriate and complex. They state that people are not happy with the two procedures that have to be followed. The claimants often feel troubled and easily give up claims.

In terms of negotiations, one important and interesting point has been made by legal experts. They noted that negotiations are already a significant principle in civil procedure.<sup>478</sup> When the plaintiff brings a case to the Civil Court, civil procedural law includes negotiations. At any stage in litigation, the court has a responsibility to encourage negotiations and to create favourable conditions for the parties to reach agreement to ensure the most effective settlements. Therefore, they suggest that negotiations as a compulsory procedure should be removed. The Law should encourage negotiation rather than making it mandatory. It is sufficient that civil procedures including negotiations be used to resolve state compensation.

In terms of time taken to settle claims, some of the interviewees, including several officials and private lawyers, suggested that the Law should impose a penalty or fine for breaching time periods. In particular, if state agencies delay paying compensation, they should pay the rate of interest determined by the State Bank.

In short, the procedure for claiming compensation is frustrating, disappointing the claimants and discouraging them from asking for compensation. According to Ha, a legal journalist, simplified procedures and the design of special mechanisms for state

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<sup>477</sup> These words are borrowed from the articles for example:

Phan Chinh, ‘Người được quyền yêu cầu bồi thường vẫn ở thế bị động’ [the people who claim for state compensation are being passive], *Người đưa tin, Hoi Luat gia VN*, 27/12/2012 <<http://www.nguoiduatin.vn/nguoi-duoc-quyen-yeu-cau-boi-thuong-van-o-the-bi-dong-a58245.html>>

and Thuc Quyen, ‘Khóc, cười những vụ yêu cầu Nhà nước bồi thường’ (Kỳ 1, 2, 3) [laughing and crying in the cases of state compensation (chapter 1, 2, 3)], 26/10/2011

<<http://www.phapluatvn.vn/tuphap/201110/Khoc-cuoi-nhung-vu-yeu-cau-Nha-nuoc-boi-thuong-Ky-2-2059798/>>

<sup>478</sup> *The Civil Procedural Code 2011* (Vietnam) Art 10.

compensation are essential to ensure its effective implementation.<sup>479</sup> Also, accepting suggestions by individual and agencies, Mr Nguyen Thanh Tinh, director of the Department of State Compensation, MOJ, proposed that the present compensation procedure using “two doors” (one for a valid document and one for compensation) should be replaced by a “one door” procedure, just for compensation. Accordingly, agencies which have the responsibility for resolving state compensation claims should also have the right to consider and conclude whether or not the action of a state officer was unlawful and also decide whether or not the state should pay compensation.<sup>480</sup>

#### **5.4. The agencies which are liable to pay compensation**

As can be seen from the procedure above, determining the agency liable for compensation is significant because this agency is the first agency authorized to resolve the issue compensation.

Before the promulgation of the SCL, state liability was recognized as the liability of state agencies, not the state. That is why in the former laws (*Civil Code 1995*, *Resolution 388* and *Decree 47*) the liability to pay compensation was the responsibility of the state body for which the official worked. Regarding those provisions, the MOJ, which drafted the Law, pointed out that, in some situations, the government agency responsible for paying compensation could not be determined, especially where damage was caused by several agencies.<sup>481</sup> The MOJ observed that the new Law tries to overcome this limitation.

Under the SCL, the general principle for determining the state agency is provided in paragraph 4 of Article 3 and paragraph 1 of Article 14. Accordingly, the agency which is liable for compensation is the state agency which directly monitors the state officer which committed the wrongful act.

However, to assist in determining the agency liable for compensation in some special cases, the Law provides in Article 14 (2):<sup>482</sup>

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<sup>479</sup> Son Ha, ‘Khóc, cười những vụ yêu cầu Nhà nước bồi thường’ (Kỳ 3) [laughing and crying in the cases of state compensation (chapter 3)] <<http://www.phapluatvn.vn/tuphap/201110/Khoc-cuoi-nhung-vu-yeu-cau-Nha-nuoc-boi-thuong-Ky-3-2059829/>>

<sup>480</sup> ‘Quyền yêu cầu bồi thường Nhà nước khó thực hiện’ [The right to state compensation is difficult to enforce], *Tin moi*, 17/5/2013 <<http://www.tinmoi.vn/quyen-yeu-cau-nha-nuoc-boi-thuong-kho-thuc-hien-011265187.html>>

<sup>481</sup> Ministry of Justice, above n 15.

<sup>482</sup> This is official translation available at:

- Trường hợp cơ quan quản lý người thi hành công vụ đã được chia tách, sáp nhập, hợp nhất hoặc bị giải thể thì cơ quan kế thừa chức năng, nhiệm vụ của cơ quan đó là cơ quan có trách nhiệm bồi thường; trường hợp không có cơ quan nào kế thừa chức năng, nhiệm vụ của cơ quan đã bị giải thể thì cơ quan đã ra quyết định giải thể là cơ quan có trách nhiệm bồi thường;

- Trường hợp tại thời điểm thụ lý đơn yêu cầu bồi thường mà người thi hành công vụ gây ra thiệt hại không còn làm việc tại cơ quan quản lý người đó thì cơ quan có trách nhiệm bồi thường là cơ quan quản lý người thi hành công vụ tại thời điểm gây ra thiệt hại;

Trường hợp có sự ủy quyền hoặc ủy thác thực hiện công vụ thì cơ quan ủy quyền hoặc cơ quan ủy thác là cơ quan có trách nhiệm bồi thường; trường hợp cơ quan được ủy quyền, cơ quan nhận ủy thác thực hiện không đúng nội dung ủy quyền, ủy thác gây thiệt hại thì cơ quan này là cơ quan có trách nhiệm bồi thường;

- Trường hợp có nhiều người thi hành công vụ thuộc nhiều cơ quan cùng gây ra thiệt hại thì cơ quan quản lý ngành, lĩnh vực chịu trách nhiệm chính trong vụ việc là cơ quan có trách nhiệm bồi thường;

- Trường hợp có nhiều người thi hành công vụ thuộc cơ quan trung ương và cơ quan địa phương cùng gây ra thiệt hại thì cơ quan trung ương là cơ quan có trách nhiệm bồi thường.

[- In case the relevant agencies has been split, merger [sic], consolidation or dissolution, the agency which inherited the mandate of the relevant agency is the agency liable for compensation. If there is no agency inherited functions and duties of the agency has been dissolved, the agency which has issued dissolve decision is liable for compensation.[sic]

- At the time of accepting the claim, if the officer causing the damage is no longer working at the agency, the state agency which is liable for compensation is the agency which the officer was working for at the time causing damage.

- In case of authorized or mandated duties: If the authorized or mandated agencies comply with authorized contents, the agency liable for compensation is the agencies which give authority or mandate.

- Where there are many people joining in one duty come from in several agencies, the agency liable for compensation is the agency which is main responsibility in the duty. [sic]

- Where there are many people joining in one duty which include the people in central agencies and local agencies, central agency is liable for compensation.[sic]

If there is difficult in determining the state agency which is liable for compensation, claimants can ask the competent agency provided under *Decree 16* to determine one agency liable for compensation.<sup>483</sup>

The SCL is progressive; it has successfully redressed several limitations of the previous law by specifically providing for the agency liable for compensation. It also provides that in cases where no agency accepts potential liability for compensation there is a competent state body to decide the agency liable for compensation. The new provisions assist victims to claim compensation, especially in situations where the damage has been caused jointly by officials from different agencies.<sup>484</sup> However, those provisions still have limitations which should be considered for further reform.

In particular, although the principle in the law is to impose liability on the state, the body responsible to pay compensation is still the relevant agency. It can be argued that these provisions have made no change in practice in the implementation of the law. According to MOJ, which drafted the Law, one of the shortcomings of the former law was that liability for compensation was placed on specific state agencies. These were the agencies directly monitoring the officer who committed the wrongful act.<sup>485</sup> They sought to overcome this limitation by highlighting the liability of the state itself in the new Law. But this has not happened. The same concealment and avoidance of liability by state agencies still occurs and renders resolution processes ineffective. According to Mrs Ung Thi Xuan Huong, Director of Ho Chi Minh City Department of Justice:<sup>486</sup>

*Trong vụ việc có nhiều cơ quan liên quan thì trách nhiệm bồi thường thuộc về ai, liệu cơ quan thụ lý cuối cùng có phải chịu trách nhiệm? Bộ Tư pháp*

<sup>483</sup> *The SCL 2009* (Vietnam) Art 11; *The Decree 16/2010/NĐ-CP* (Vietnam) Art 22, 23, 24, 26.

<sup>484</sup> *The SCL 2009* (Vietnam) Art 14, 30, 32, 33, 40.

<sup>485</sup> *Báo cáo số 104/BC-BTP* ngày 10/7/2008 của Bộ Tư pháp về Tổng kết thực tiễn thi hành pháp luật về bồi thường thiệt hại do cán bộ, công chức nhà nước gây ra [*Report 104/BC-BTP* of the MOJ on suming up the practical implementation of the legislation on compensation for damage caused by officials, state employees on 10/7/2008].

<sup>486</sup> Tam Lua, above n 407.

đã có văn bản hướng dẫn nếu lỗi của nhiều cơ quan thì phải xác định cơ quan chịu trách nhiệm chính, nhưng cách xác định như thế nào thì chưa có căn cứ nên còn có việc các cơ quan đùn đẩy trách nhiệm bồi thường cho nhau. Trên thực tế, nhiều trường hợp dân bị bắt giữ, đã có kết luận oan sai và được trả tự do nhưng khi yêu cầu bồi thường, dân phải chạy đi chạy lại giữa cơ quan điều tra, viện kiểm sát và tòa án.

[In many cases in which there are many agencies involved, it is difficult to determine who the relevant agencies responsible for compensation is. Whether the agency that is the final agency to carry out the wrongful act is liable to compensate? The Ministry of Justice has guidelines; if there are many agencies that have responsibilities, it must identify which one has the main liability, but there is no basis for determining this. Thus, there is avoidance between such state agencies. In fact, there are many cases in which the sufferer was arrested, and then they were released. But, when they claim for compensation, they have to scurry between investigating authorities, the prosecutor and the court.]

In cases where there are a number of officials from several agencies, the Law provides that the agency liable for compensation is the agency which has the ‘main responsibility’. There is a need for the state agencies and also for claimants to know which one has the ‘main responsibility’. In the government’s operation and in legal proceedings, it is difficult to say which administrative or judicial agency has the main or a lesser role.

Indeed, it can be argued that the determination of the agency which is liable for compensation is a significant barrier preventing people from compensation. Although the Law attempts to provide more criteria in order to identify the relevant agency, it is still not easy to determine who should be the defendant, resulting in the *qua bong trach nhien* [responsibility ball] being kicked between various state agencies.<sup>487</sup>

The following cases, described in more detail in the previous section and the next chapter, are remarkable demonstrations. One of these, the case of Luong Ngoc Phi, is mentioned above. Mr Phi is director of the Thanh Phong Commerce Company Ltd in Thai Binh province. He had been unfairly indicted by the provincial court for corruption and tax evasion in 1999. He was sentenced to eight years and six months in prison and

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<sup>487</sup> Phan Chinh, above n 477.

suffered a loss of nearly 24 billion VND (1.2 million USD). He claimed for compensation in 2003; however, by the middle of 2013, he had not received adequate compensation. The Thai Binh provincial People's Court, which is liable to compensate, has stated that the court has to pay only for mental losses, and the responsibility for the loss of property belongs to the Provincial People's Procuracy.<sup>488</sup> Mr Luu Viet Hong in Ben Tre province was found innocent by the Ben Tre Provincial People's Court and the Supreme People's Court. He has been seeking compensation for almost 20 years because of the passing of liability of property between Ben Tre Province People's Procuracy and Nhon Trach Commune People's Committee.<sup>489</sup> In the case of Nguyen Van Them, referred to in section 6.3.1, Mr Them has spent more than 20 years looking for a judgment and appropriate compensation from the relevant state agency because of the unclear provisions about which state agency is liable for compensation. It led to the Hong Ngu District People's Courts and Procuracy not being able to reach agreement over which agency is liable for compensation.<sup>490</sup> It can be argued that although the general principle of the law recognizes the liability of the state, the specific provision does not specify it; thus the goal of building state based on the rule of law seems to be distant.

### **Interview analysis**

Responding to issues about the liability for compensation, many of the respondents from the public sector, and most of those from private sectors, opposed a compensation process in which the agency responsible for paying compensation is the state office which monitors the officer who acted wrongfully, or the court which gave the wrongful judgment. One of the private lawyers argued that this is unfair because it lacks objectivity. It considerably disadvantages claimants because the office that monitors the officials often looks for ways to 'escape or alleviate its liability'. Many respondents, particularly one officer who works for the Department of State Compensation, proposed that an independent agency should estimate the amount of compensation to be paid in

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<sup>488</sup> Hai Ly, above n 474.

<sup>489</sup> 'Vụ oan sai của ông Lưu Việt Hồng - Bến Tre: 19 năm, 6 phiên tòa và còn... nhiều nữa' [the case of Luu Viet Hong- Ben Tre: 19 years, 6 court hearings and... more], *tintucphapluat*, 05/9/2009 <<http://thuvienphapluat.vn/tintuc/vn/thoi-su-phap-luat/thoi-su/-29471/vu-oan-sai-cua-ong-luu-viet-hong-ben-tre-19-nam-6-phiên-toà-va-con-.nhieu-nua>>

<sup>490</sup> Nguyen Thi, 'Mấy chục năm đi đòi công lý' [There are many years looking for justice] <<http://phapluattp.vn/2013061511085670p0c1063/rao-can-khi-doi-nha-nuoc-boi-thuong.htm>>

order to ensure greater objectivity and more effective implementation of the law. He indicated that in many cases, it was difficult to determine the agency responsible for compensation. Having a specialized agency which is liable for and can resolve state liability, he said, would make the compensation settlement process quicker and more objective. A few officials approved of the present law. They said that such provisions are appropriate in enhancing the accountability of state officials and make them more careful in carrying out their duties. They pointed out that it also fits with the mechanism for resolving complaints and denunciations. However, they also stated that if there were to be an independent office resolving and paying compensation, the effect on settlements of state liability will impose higher costs on the state.

It has been indicated in the previous chapters that one of the purposes of the SCL is to strengthen the accountability of the state officers. However, this purpose is only achieved if the SCL works effectively. It can be argued that in the settlement of compensation, the most important thing is to resolve compensation effectively rather than to strengthen state office efficiency. Also, remove the condition having valid document received consent of most people interviewees. Thus, amendment of this provision should be also considered.

In conclusion, the law providing that the state compensation liability is the liability of the relevant agency is inappropriate. This leads to misunderstandings that the compensation liability is the liability of a state agency and not the state itself. Furthermore, this is also the reason leading to the dodging of liability between state agencies. This causes loss of considerable time, money and energy of both state agencies and people. The simplification of procedures and regulations on state compensation is urgent. To resolve the problems indicated, the state should create an independent agency which can independently investigate, negotiate with and compensate the person who suffers damage or injury through the wrongful actions of state officials. This reform would not only create more favourable mechanisms for the settlement of compensation, but also facilitates the execution of state liability for compensation.

## 5.5. Agencies which resolve compensation claims

### 5.5.1. The relevant state agency

As analysed above, to claim for compensation, firstly claimants must apply to the relevant state agency which is liable for compensation. As the relevant state body is the state agency which is liable to pay compensation, discussed above in the section 5.4, it allows agencies to dodge and hide from liability. Because of the difficulty in determining the agency liable for compensation, the mere submission of a claim is challenging. The claimants may waste time engaging in a ‘vicious circle’ of state compensation procedures.

Even when the relevant agency responsible for compensation is determined, it can be seen from the above argument about negotiations and agency liability, that the procedure is unfair, lacks objectivity and has little effect. It also takes time, causes delay and is costly. According to Mr Tinh, the Director of the Department of State Compensation, MOJ:<sup>491</sup>

*Quy định hiện hành “cơ quan nào gây thiệt hại cũng chính là đơn vị giải quyết bồi thường ban đầu” có điểm không ổn. Theo kinh nghiệm của Nhật Bản và Mỹ thì họ giao cho Bộ Tư pháp chịu trách nhiệm giải quyết vấn đề này. Chính vì thế, cần có mô hình mới về cơ quan giải quyết bồi thường để giải quyết mối quan hệ bất bình đẳng giữa cơ quan nhà nước làm trái pháp luật, phải bồi thường và người bị thiệt hại.*

[The provision that ‘the state agency resolving compensation at the first stage is also the state agency liable for compensation’ is inappropriate. According to the experience of Japan and the US, the one department of the Ministry of Justice is responsible for resolving this problem. Therefore, there should be a new model of agency compensation settlement to resolve the unequal relationship between state agencies who have committed unlawful action, and the sufferers.]

### 5.5.2. The People’s Court

The second stage in the process is the trial. If there is no settlement or the claimant does not agree with the amount offered by negotiations, the case may be taken to the relevant People’s District Court. This was proposed in order to expand the rights of citizens and

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<sup>491</sup> Nguyen Thi, above n 408.

better reflect the provisions of the *Constitution*, the *Civil Code 2005* and the *Civil Procedural Code 2004*.

There is a general problem discussed before, and also referred to in the next chapter in section 6.5 that the People's Courts lack independence because of controls over the appointment of judges and their supervision by the VCP. Another problem arises when it is the court which is the relevant agency. If the claimants do not agree with the offer made, they may sue that court. However, if the court were to hear and decide a case in which it is also the defendant, the process will not be procedurally fair and any judgment may not be objective, rendering the process meaningless. The state continues to control decision-making.

As analysed above, after negotiations where claimants do not accept the offer, they are able to bring the case to court. The unfairness of this is obvious and indicated by a number of cases. For example, in the case of Nguyen Hong Cau, Mr Cau was the victim of a wrongful conviction. The Hai Phong Provincial People's Court judged itself and required itself to compensate Mr Cau 17.3 million VND (850 USD). This was approximately 2.8% of his claim.<sup>492</sup> Similarly, in the case of Luong Ngoc Phi, referred to in section 5.4 above, the Court which had heard the case at first instance and on appeal was also the defendant. In the case of Truong Hoang Hieu, in 2012, the My Tu District People's Court judged itself and declared that the Court pay Mr Hieu 168.2 million VND (about 8,400 USD) even before the claimant and the court had negotiated. The claimant did not agree with the amount of compensation ordered by the Court.<sup>493</sup> Indeed, in this situation, the negotiating process is meaningless as the state still controls the decision-making. If the claimants do not agree with the offer made to resolving their claim in the negotiations, they are stuck with the judgments of these courts.

### **Interview analysis**

In evaluating the agency which resolves compensation and the role of the People's Court in the settlement of compensation claims, one officer from the Department of

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<sup>492</sup> Nasco (2010) 'Toa tỉnh mở phiên xử kiện... chính mình' [The province Court judged itself], 21/9/2010 <<http://www.nasco.com.vn/?u=nws&su=d&cid=392&id=1967>>

<sup>493</sup> Duy Khang, ngồi tù oan 2 năm, nam sinh đòi bồi thường hơn nửa tỷ [being wrongful imprisonment for 2 years, a student asked for half of billion] *vnexpress.net*, 9/1/2013 <<http://vnexpress.net/tin-tuc/phap-luat/ngoi-tu-oan-2-nam-nam-sinh-doi-boi-thuong-hon-nua-ty-2410977.html>>

State Compensation, MOJ, said that this provision has both advantages and disadvantages. In cases where the state agency resolves compensation, it may help the agency to know about the wrongful act and to learn the lessons from it to better understand its practice. On the other hand, it is not fair where the state agency wants to reduce its compensation liability and imposes an amount of compensation which is less than the real loss. Most of the interviewees proposed that the law should not require that compensation be settled with the state agency because it is unfair and takes time and money.

When asked about the establishment of a new agency for the settlement of state compensation, most of interviewees admitted that it is difficult for the state agencies and the courts to resolve compensation objectively. However, they believed that a special court which could judge state compensation should not be established. They explained that in the present Vietnamese institutional system, there is no state agency which can be completely independent. Thus, most of the participants agreed that the Civil Courts of the People's Courts, which currently have jurisdiction to resolve state compensation disputes under civil procedure are the most appropriate body to do this. State liability for compensation was seen to be primarily a civil liability. The Civil Courts include judges who are experts and experienced in resolving civil cases, especially civil liability. They are familiar with civil proceedings and now they can settle state liability most effectively. Few of the interviewees proposed that in the future, when Vietnam is more developed, a specialist court for resolving such disputes be established.

The agencies and the courts play a vital role in resolving issues of state compensation. The most appropriate course of action is to encourage claimants to go to the state agency to negotiate and, if unsuccessful, to take their case to the Civil Court of the People's Court. However, the reform of the SCL will not be sufficient. The state should improve the accountability of agencies' officials by developing the capacity as well as improving the capacity of courts in mediation and in trials.

## **5.6. Time limitations on claims**

The time limits for claims are stipulated in Article 5 of the SCL. It provides that the claimants must request compensation between two years from the date competent state agencies issue the documents affirming that the officials' acts are unlawful, or from the

date of legally effective judgments affirming that the claimants fall within the scope of compensation liability in respect of criminal proceedings. This is consistent with the provisions of the statute of limitations in civil proceedings (Article 159 *Civil Procedure Code 2004*, Article 607 *Civil Code 2005*). However, because of the limitations in asking for a valid document affirming the unlawful action of the state officers, the provision on time limits claiming for compensation is inappropriate as shown below.

As indicated, if the claimant does not have a valid document, the agency which is liable for settling the claim must refuse to accept the claim. In order to obtain such document, the claimant must make a complaint or denunciation under the *Law on Complaints 2011* and the *Law on Administrative Procedure 2011*. Nevertheless, according to the *Law on Complaints*, the time limit for making a complaint is 90 days from the date of receipt of an administrative decision or notification of an administrative act.<sup>494</sup> According to the *Law on Administrative Procedure*, the time limit for claims before the Administrative Court is: one year from the date of receiving of administrative decisions, administrative acts and disciplinary decisions of dismissal; or 30 days from the date of receipt of the decision to settle complaints about decisions which settle case related to competition law.<sup>495</sup> As a result, after the time for complaint to the government agency (90 days) or to a court (one year), has expired, the claimants cannot claim as they are not able to obtain a valid document from the authorized agencies, a precondition for state liability.

Similarly, regarding the enforcement of civil judgments, under the *Law on Enforcement of Civil Judgments*, the period for complaints or denunciations of the decision and behaviours of the heads or executors of civil enforcement are defined as follows in Article 140:<sup>496</sup>

- For decisions and acts of enforcement before applying security measures, coercive measures is 15 days from the date of receipt of the decision or knowing of the act;
- For the decision to apply freeze the account measures [sic] is three working days from the date of receipt of the decision;

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<sup>494</sup> *The Law on Complaint 2011* (Vietnam) Art 9.

<sup>495</sup> *The Law on Administrative Procedure 2010* (Vietnam) Art 104.

<sup>496</sup> *The Law on Enforcement of Civil Judgment 2008* (Vietnam) Art 140.

- For decisions and act [sic] on the application of other insurance measures is 10 days from the date of receipt of the decision or knowing [sic] act;
- For decisions and act [sic] on the application of coercive measures is 30 days from the date of receipt of the decision or knowing act;
- For decisions and behaviour after the application of coercive measures is 30 days from the date of receipt of the decision or knowing act.

In other laws, but also in the SCL, there is conflict between provisions. Article 22 provides that the claimants have the right to make a claim for compensation to the court within 15 days: (1) after the date of expiration of the time limit for settlement compensation where the relevant agency has not issued any compensation decision, or, (2) from the date the state agency issues the compensation settlement decision with which the claimant does not agree. According to this provision, the claimant cannot bring the case to the court if the decision resolving the compensation claim comes into force. The period is so short that many claimants may be prevented from continuing with their claim, making the law ineffectual. In addition, in cases where the relevant state agency does not make any decision to pay compensation, if the claimants do not bring the case to the court within 15 days from the date that the state agency would have to issue a decision, they can no longer make a claim for compensation to the court. This is obviously an inappropriate provision because in this case the claimants often do not know the date of the decision. They passively wait for the decision. Moreover, 15 days is too short a period for claimants to prepare a claim to take the case to courts, particularly given the documents which must be filed.

The time limitations prescribed are very short. They have a negative effect and in practice nullify the provisions of the Law. Therefore, the suggestion of removing the condition which requires a valid document affirming the wrongful action or judgment of the state officer, will resolve problems associated with the limited time period within which to claim.

Moreover, many legal experts stated that the time limit for claims of two years from the date competent state agencies issue the documents affirming that the officials' acts are unlawful, or from the date of the judgment affirming that the claimants fall within the scope of compensation liability (in case of criminal proceedings) come into force, is inappropriate and inconsistent with the *Civil Code*, *Civil Procedural Code* and

other laws.<sup>497</sup> According to the *Civil Code*, the limitation for damages claim is two years from the date when the legitimate rights and interests of individuals and legal persons have been violated.<sup>498</sup> Moreover, the *Civil Procedural Code* provides that the limitation for claiming compensation is two years from the date of individuals, agencies, and organizations learn that their legitimate rights have been infringed.<sup>499</sup> Therefore, Ms Hoan, from the Supreme People's Court, said that the claimants often do not receive the documents on the day they are issued. She suggested that the limitation should start on the day the claimant receives or should be learned to have received the document.<sup>500</sup> Ngo Van Hiep, attorneys<sup>501</sup> stated "In some cases the state authorized agency has issued the document affirming the unlawful act but because of some reasons sufferers may not have received or have been delayed in receiving the documents and the limitation may have expired".<sup>502</sup>

Dr Nguyen Van Cuong who is Deputy Director of Institute of Trial Science, Supreme People's Court, pointed out that:<sup>503</sup>

*Trong trường hợp văn bản xác định hành vi trái pháp luật của người thi hành công vụ là bản án, quyết định của tòa thì bản án, quyết định của tòa chỉ có giá trị thi hành khi đã có hiệu lực pháp luật. Cụ thể, sau 15 ngày (đối với quyết định sơ thẩm) và sau 30 ngày (đối với bản án sơ thẩm) mà không có kháng cáo, kháng nghị thì mới có hiệu lực pháp luật. Do đó, cần sửa đổi thời hiệu yêu cầu bồi thường thiệt hại trong trường hợp này là hai năm kể từ ngày bản án, quyết định của tòa có hiệu lực pháp luật.*

[In case the valid document affirming the unlawful action of the state officer is a court's judgment or decision, the court's decisions or judgments can only be validly implemented when it has legal effect. In particular, it will have legal effect after 15 days (in terms of the First Instance decision) and after 30 days (in terms of First Instance judgment) which have not been appealed by

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<sup>497</sup> Quyền yêu cầu Nhà nước bồi thường khó thực hiện, Tin moi [It is difficult to enforce the rights to state compensation] 17/05/2013 <<http://www.tinmoi.vn/quyen-yeu-cau-nha-nuoc-boi-thuong-kho-thuc-hien-011265187.html>>

<sup>498</sup> *The Civil Code 2005* (Vietnam) Art 607.

<sup>499</sup> *The Civil Procedure Code 2004* (amended 2011) (Vietnam) Art 159.

<sup>500</sup> She is also an interviewee.

<sup>501</sup> He is working for Hiep and Partnership law firm.

<sup>502</sup> Quyền yêu cầu Nhà nước bồi thường khó thực hiện, Tin moi [It is difficult to enforce the rights to state compensation] 17/05/2013 <<http://www.tinmoi.vn/quyen-yeu-cau-nha-nuoc-boi-thuong-kho-thuc-hien-011265187.html>>

<sup>503</sup> Ibid.

clients or protested by the procurator. Thus, the limitation should be changed in this case to the following: two years since the date of the court's judgments or decisions have legal effect.]

### **Interview analysis**

In respect of the limitations on claims, many researchers from the Legal Science Institute and State and Law Institute and officers working for the Department of State Compensation responded that a limitation of two years for compensation claims is appropriate; it is enough for the sufferers to collect evidence and make claims. Furthermore, it is consistent with the duration provided by the *Civil Code* and *Civil Procedural Code*. Some claimants argued that this time is too short because the procedure for claiming state liability for compensation is complex and time consuming. Thus, it should be longer than for general civil liability for compensation. Many of them discovered the deficiencies of the starting point of the time limit and the conflict between the SCL and other laws as analysed above. They suggested that this provision should be reformed to ensure a synchronous application of the law and make implementation effective and practicable.

### **5.7. Conclusion**

In short, the procedures and mechanisms used to resolve state compensation claims are different from those of other civil liabilities. They are provided for under the SCL and other laws. By analysing the relevant provisions, the literature and interview results, this chapter shows that the procedures for the settlement of compensation claim are complex and frustrating. They are a waste of time, money and effort. Besides, the mechanisms for claiming are ineffective and lack objectivity. Many provisions are obscure and inappropriate. Together with the deficiencies of the substantive law shown in the previous chapter, the limitations of the procedures and mechanisms are significant barriers which prevent the claimants from protecting their rights. Those limitations clearly reflect that the provisions for resolving state compensation are neither just nor fair, and therefore need to be reformed. They also reflect the general problems in Vietnam indicated in Chapter 1 in 1.2.3 which are: poor drafting of legislation, lack of judicial independence, and absence of blueprinting policies.

## **Chapter six: Implementation of the SCL -**

### **Achievements and failings and their causes**

#### **6.1. Introduction**

As indicated in Chapter 4, the promulgation of the SCL 2009 reflects the expectations of the VCP, the Vietnamese Government and the citizens in terms of further reform and development. It is a tool for achieving the objectives of building a rule-based state and protecting the basic rights and interests of citizens and their human rights. It is also considered to be an effective key to improving the capacity of the state apparatus, and the quality of the work of state agencies.

In order to evaluate the legitimacy and effectiveness of the SCL in practice, it is necessary to examine its implementation. The SCL and the other legal instruments implementing it cannot be separated from their context – Vietnamese society including its economy, politics, cultures, traditions and customs. This chapter considers the implementation of the SCL in Vietnamese society by reviewing the literature, government and media reports, and the interview results, especially the experiences of claimants. Two cases involving the previous law<sup>504</sup> are included to demonstrate the typical and ongoing problems with the present law. These cases have not yet been settled and they are to be resolved under the transition provisions of the SCL. The cases have been used to better reveal the reality of the enforcement of the SCL, especially in the delays faced. This chapter shows the achievements of the SCL, and concludes with a reflection on possible solutions to the problems found.

#### **6.2. Achievements obtained in implementation of the SCL**

##### **6.2.1. Secondary legislation guiding the implementation of the Law**

After the SCL was enacted, in order to ensure its implementation in a timely and consistent way, on 6<sup>th</sup> October 2009, the Prime Minister issued *Directive No. 1565/CT-TTg* on its implementation. In this Directive, the Prime Minister required the relevant ministries and agencies to make other necessary and reasonable regulations. Where they did not have the required authority, they must submit the draft of regulations guiding the implementation of the SCL to competent state agencies with the authority to make those

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<sup>504</sup> The case of Luu Viet Hong and the case of Luong Ngoc Phi.

regulations. By December 2013, the time limit for the research, 11 sub-laws had been issued. They are:

	<b>Name</b>	<b>Date</b>	<b>The issued agencies</b>
1	<i>Decree 16/2010/ND- CP</i> guiding on implementation some provisions of the SCL	3 <sup>rd</sup> March 2010	Government
2	<i>Joint Circular 19/2010/TTLT- BTP- BTC- TTCP</i> guidance a the implementation of the state liability in administrative activities	26 <sup>th</sup> November 2010	MOJ, Ministry of Finance, Inspector of Government
3	<i>Joint Circular 18/2011/TTLT- BTP- BNV</i> guidance on duties, rights, organization and personnel of the local government relating to state liability for compensation	19 <sup>th</sup> October 2011	MOJ, Ministry of Home Affairs
4	<i>Joint Circular 24/2011/BTP- BQP</i> guidance on implementation of the state liability in enforcement of civil judgments	15 <sup>th</sup> December 2011	MOJ, Ministry of Defence
5	<i>Joint Circular 05/2012/TTLT- VKSNDTC- TANDTC- BCA- BTP- BQP- BTC- BNNPTNT</i> guidance state liability in criminal activities	11 <sup>th</sup> February 2012	SPP, SPC, Ministry of Police, MOJ, Ministry of Defence, Ministry of Finance, Ministry of Agriculture
6	<i>Joint Circular 71/2012/TTLT- BTC-BTP</i> on the estimation, management, use and audit of funds for implementation of state liability	09 <sup>th</sup> May 2012	MOJ, Ministry of Finance

7	<i>Circular 55/2012/TT-BCA</i> on responsibility for managing the state compensation liability in Police agencies	17 <sup>th</sup> September 2012	Ministry of Police
8	<i>Joint Circular 01/2012/TTLT/TANDTC-VKSNDTC-BTP</i> guidance on the implementation of the state compensation liability on civil proceedings and administrative proceedings	18 <sup>th</sup> September 2012	SPC, SPP, MOJ
9	<i>Joint Circular 04/2013/TTLT-BTP-BQP</i> guidance a management for state compensation in the enforcement of civil judgements	2 <sup>nd</sup> January 2013	MOJ, Ministry of Defence
10	<i>Circular 03/2013/TT-BTP</i> guidance the implementation of state management of compensation in administrative activities	31 <sup>st</sup> January 2013	MOJ
11	<i>Joint Circular 08/2013/TTLT-BTP-BTC-TTCP</i> on amending and supplementing of Joint Circular 19/2010	27 <sup>th</sup> February 2013	MOJ, Ministry of Finance, Government Inspectorate.

In addition, together with other competent state agencies, the Ministry of Justice is establishing several other sub-laws guiding the reimbursement of state officials as well as implementation of the state management of state liability for compensation to ensure the viability of the state compensation mechanisms.<sup>505</sup>

In general, in the early days of implementation of the Law, the promulgation of those regulations played a significant role. In the Vietnamese legal system, as indicated in Chapter 1 at 1.2.3 by Mathieu and Ket, without regulations giving guidance, the Law would not be enforceable. The guidance not only helped claimants to claim

<sup>505</sup> *Report 114/BC-BTP* of MOJ on Preliminary assessment of 3-year implementation of the SCL on 31/5/2013.

compensation; they also assisted the agencies liable for compensation to deal with claims more effectively. Those regulations are also the basis on which state agencies which manage state compensation liability perform their duties relating to state compensation.

### **6.2.2. Building professional institutions to administrate the Law**

Article 11 of the SCL stipulates the state management of state compensation liability. Accordingly, the government manages state compensation through administrative activities and enforcement of judgments. Cooperation between the SPC and SPP assists the government in managing procedural activities.

The Vietnamese government has attempted to build an effective mechanism to implement the law. On 23<sup>rd</sup> May 2011, the Prime Minister issued *Decision 767/QĐ-TTg* on the establishment of the Department of State Compensation, MOJ. Accordingly, on 5<sup>th</sup> July 2011, the Minister of Justice issued *Decision 1128/QĐ-BTP* providing for the functions, tasks, authority and organisation structure at Department. Its role within the MOJ is to manage state liability for the whole country.<sup>506</sup> Under the Decision, its main functions are:<sup>507</sup>

- making policy and drafting laws and reviewing laws relating to state liability for compensation;
- educating officials and the general public about the SCL, and publishing relevant information ;
- providing training in the skills required for state compensation;
- supervising of the implementation of the SCL;
- clarifying for both state officers and claimants any difficulties in state compensation liability;
- determining the agencies liable for compensation in administrative actions and enforcement of judgments;
- providing information and guidance on the procedure for claimants in claiming compensation;

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<sup>506</sup> *Prime Minister's Decision No. 767/QĐ-TTg* on the establishment of the Department of State Compensation under the MOJ, 05/23/2011.

<sup>507</sup> *MOJ Minister's Decision 1128/1128/QĐ-BTP* on 05/7/2011 on function, task, author and structure of the Department of State Compensation]

- resolving complaints and denunciations and carrying out inspections concerning state compensation liability under the relevant laws; and
- assessing, researching, and reporting on international operations and other tasks relating to state compensation under the laws.

At the provincial and district levels, on 19<sup>th</sup> October 2011, the MOJ and Ministry of Home Affairs issued Joint *Circular No. 18/2011/TTLT-BTP-BNV* defining the tasks, powers, organization and staff of the Department of Justice in the relevant People's Committee from provincial to district level on state compensation.

*Report 300*<sup>508</sup>, almost one and a half years after the Minister of Justice's decision in July 2012, recognised the achievement of building a professional institution within the state apparatus working for state compensation and the contribution it made to help ministries, other government agencies and local state bodies to gradually implement effective professional management of state compensation. In particular, *Report 300* recognised that those institutions and officials had identified the agencies responsible for compensation; had given professional guidance on indemnities; had successfully interpreted the Law; had monitored, supervised, and checked claim settlement activities, compensation payments and reimbursement activities. In 2012, the MOJ actively coordinated other ministries, agencies and local state bodies and conducted a joint inspection to assess the implementation of the SCL after three years.<sup>509</sup>

### **6.2.3. Publicising of and educating about the Law**

Disseminating information about law plays a vital role in law enforcement. The more citizens understand the law, the more they will be able to seek its enforcement. The more officials understand the law, the more efficient they will be in administering it.

The Vietnamese Government paid attention to publicising the law and educating about it. Thus, in the *Directive 1565/CT-TTg* on 6<sup>th</sup> October 2009 on the implementation of the SCL, publicising information about it in many different ways is the first important operation identified in implementing it.

In order to implement *Directive 1565*, at the central level, the MOJ, the SPC, the CPP and other ministries published the law on their websites, in magazines and in newspapers, and held conferences and meetings and also directly answered questions

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<sup>508</sup> *Report 300*, above n 305.

<sup>509</sup> *Ibid*; *Report 114*, above n 505.

raised by individuals, organizations and businesses through meetings or by post.<sup>510</sup> In particular, the MOJ organised seminars and released a small booklet *Understanding the SCL*. The Department of State Compensation released fact sheets and leaflets, giving guidance on the rights and procedures for claims by individuals, organizations and businesses. They also held skills training and conferences on managing and resolving claims.<sup>511</sup> At the local level, it actively advised People's Committees issued with programs, plans and directives to raise awareness to the SCL.

Many other departments promoted the contents of the Law to their staff. According to the MOJ's *Report 300* and *Report 114*, the methods of education and publicising have been diverse, given the different characteristics of local areas. The different approaches and the extent of their reach are indicated by the following examples from *Report 300*:

- Organizing numerous competitions in understanding the SCL between officials and people (Ninh Binh Province People's Committee received 15,872 papers, Bac Kan Province People's Committee obtained over 13,000 papers ...);
- Dissemination of information about the SCL through newspapers, local television and radio (this was done mostly in the Da Nang, Yen Bai and Binh Thuan Provinces);
- Organizing campaigns for propaganda for popularising knowledge of the SCL and the secondary regulations on state compensation (An Giang province held 336 meetings with more than 10,650 participants, Son La province 237 held number of conferences with 10,665 participants; Dong Nai province 101 meetings held with about 17, 263 participants)
- Publishing question-and-answer books about the SCL, printing leaflets and flyers on guidance procedures for compensation claims (Hanoi City published and printed 19,000 question and answer books and more than 70,000 leaflets about the state compensation liability, An Giang Provincial Department of Justice released more than 770 books on state compensation, Ba Ria - Vung Tau province released over 6,000 question-and-answer documents).

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<sup>510</sup> *Report 300*, above n 305.

<sup>511</sup> *Ibid.*

According to *Report 300*, the publicising and education strategies for the SCL and sub-laws on state compensation liability have contributed to enhancing perceptions of the significance of the SCL, the functions of the SCL, and the responsibility of settling compensation claims by state officials and individuals. These actions were expected to increase the accountability of state agencies, thereby decreasing the incidence of wrongful acts committed by officials in the course of performing their state duties. However, these activities still had a limited impact for reasons that will be discussed in section 6.4.2 below.

#### **6.2.4. Training in the skills for settling state compensation claims**

Immediately after the SCL came into force, ministries and provincial state branches and local state bodies actively coordinated with the MOJ to organize courses to train staff in the knowledge and skills relating to it. The MOJ held more than 20 training courses for state officials with approximately 2,000 participants. Also, the SPC and SPP held many training courses for judges and procurators and authorised the School of Court's Officials and the School of Procurators to conduct regularly training courses.<sup>512</sup> At the local level, the competent agencies organised training courses with hundreds of participants attending each course.<sup>513</sup> The MOJ, in its evaluation, indicated that those training courses were intended to enrich legal knowledge and the practical skills needed to resolve issues to enable staff to perform their tasks effectively and appropriately.<sup>514</sup> However, this strategy still had limitations which are discussed below in sections 6.3 and 6.4.

#### **6.2.5. Achievements of compensation settlement**

As shown in Chapter 4 section 4.3.1, the SCL recognises state liability in respect of three state activities: administrative and juridical proceedings and the enforcement of judgments. Thus, in September 2012, the Vietnamese Government conducted Report 114 to evaluate the implementation of SCL in these activities. Accordingly, from the date the law came into force on 1<sup>st</sup> January 2010 until 30<sup>th</sup> September 2012, there were 168 cases requiring compensation to be paid. They included 54 cases relating to

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<sup>512</sup> *Report 114*, above n 505.

<sup>513</sup> *Report 300*, above n 305; According to *Report 516/BC-BTNN* of the Department of State Compensation, MOJ, regarding the fieldwork's result on the capacity of state officials relating to state compensation on 05/12/2012 there are 43% of officials trained in the field of enforcement of judgment.

<sup>514</sup> *Report 300*, above n 305; *Report 114*, above n 505.

administrative actions, 90 cases to judicial proceedings and 24 cases to the enforcement of judgments. Of these, 122 were resolved with a total compensation pay-out of 15,945,673,056 VND (about 780,000 USD). The remaining 46 cases were still under consideration.

Furthermore, *Report 300* showed that most of the compensation claims for administrative actions related to the management of land, taxation, customs and administrative violations (for example, infringement of traffic laws or violations of public order). The agencies responsible for compensation for these administrative operations are local and not at the provincial or central governments level. In 18 of the 21 Ministries and 37 of the 63 provinces or cities with provincial status, there were no claims for state compensation. The assessment of the MOJ shows that the absence of claims was not because no injuries or damages had been caused in these areas. In these areas, claimants were still waiting for the conclusion of the process to determine whether the action of the state officials was wrongful, and so were unable to claim.<sup>515</sup> This reflects the provisions that a valid document of admission of wrongdoing must be obtained. This was previously discussed in section 4.3.2 of Chapter 4.

In terms of reimbursement by officials, in 4 of the 122 cases in which the agencies were found liable to pay compensation, the reimbursement responsibilities of the state officials who had engaged in the wrongful acts were considered. However, none has repaid for the state.

After issuing *Report 300*, the MOJ continued to collect statistics about state compensation. At its conference on the preliminary assessment of three years of implementation of SCL, the MOJ published a new figure for total claims:<sup>516</sup>

From the date the law took effect to 31<sup>st</sup> December 2012, the competent agency has accepted 182 claims for state compensation of which 137 cases (75% rate) have been resolved, the remaining 45 cases are continuing resolution, with a total compensation of over 23.2 billion VND (approximate 1.1 million USD).

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<sup>515</sup> *Report 300*, above n 305.

<sup>516</sup> *Report 114*, above n 505.

Hoang Thu, 3 năm thi hành Luật – tiền bồi thường tăng gần 4,2 lần, Baomoi [after 3 year-enforcement of SCL- the compensation payment has increased 3 times], 29/5/2013 <<http://www.baomoi.com/3-nam-thi-hanh-luat-tien-boi-thuong-tang-gan-42-lan/144/11129829.epi>>

According to its assessment published at the conference, compared with the previous law, the number of cases and the amount of compensation has increased significantly. The average number of case is now 46 cases per year with an average compensation payout of 7.5 billion VND (approximate 350,000 USD) compared with 30 cases per year with 1.8 billion (approximate 90,000 USD) compensation before the enactment of the law.<sup>517</sup>

In sum, according to the evaluation of the SPP, its application initially has had a certain impact on society. A number of claimants suffering damage caused by officials have been compensated. The accountability of officials has been increased. The initial results have created a positive change for the organization and the operations of judicial authorities, and laid the foundation for the next stage of strategic reform.<sup>518</sup> The assessment of the SPC also indicated that after three years, the SCL had become an important legal instrument for protecting the rights and legitimate interests of people and organizations affected by the unlawful acts of state officials. The SPC it was also seen as one of the tools contributing to the reduction of corruption and bureaucratic harassment on the part of public servants.<sup>519</sup> It also highlighted that these achievements in implementing the law will form the basis for further reform.<sup>520</sup> However, do these results show that the law is successful and effective? The next section examines and reaches a conclusion.

### **6.3. Limitations in the enforcement of the SCL**

#### **6.3.1. Claimants face difficulties in making claims**

One obvious limitation in applying the SCL is that it is difficult to claim under it. This is clearly indicated in *Report 300*<sup>521</sup> and also from the conference on the three-year preliminary assessment of its implementation.<sup>522</sup> At the conference, Mr Tinh, the Director of the Department of State Compensation, MOJ, concluded that in many local

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<sup>517</sup> *Report 114*, above n 505; Hoang Thu, above n 516.

<sup>518</sup> *Report 300*, above n 305.

<sup>519</sup> *Ibid.*

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.*

<sup>522</sup> Đánh giá 3 năm thực hiện hoạt động bồi thường của Nhà nước, *Chinhphu.vn*, [The evaluation of 3 year - enforcement of state compensation] 13/10/2012 <<http://petrotimes.vn/news/vn/phap-luat/danh-gia-3-nam-thuc-hien-hoat-dong-boi-thuong-cua-nha-nuoc.html>>

communities, situations fall within the scope of the SCL but the claimants have difficulties in making claims.<sup>523</sup>

As shown above, in reference to *Report 300* and the conference, 18 out of 21 Ministries and 37 out of 63 provinces or cities with provincial status have seen no any claims being made for state compensation. Commenting on this, Mr Tịnh stated that the main reason for the small number of cases, and none in many areas, is not because of the absence of cases, but because of ‘the requirement to have a valid document’. He mentioned that in many areas, the people could not claim for compensation because they are waiting for that document.<sup>524</sup> The time for making decisions about these documents seems to be unlimited.<sup>525</sup>

Hanoi municipality is the largest city where there was no state compensation case during the first three years. In explaining this situation, the representative of the Department of Justice of Hanoi admitted that there were wrongful actions by state officials and that damage and injuries had occurred. However, the claimants had not claimed state compensation as the procedure was too cumbersome.<sup>526</sup>

In May 2013, in an interview with a *Ho Chi Minh City Law* newspaper correspondent, the Deputy Minister of Justice, Mr Ty confirmed this:<sup>527</sup>

*Bất cập lớn nhất trong Luật Trách nhiệm bồi thường của Nhà nước là quy định về căn cứ phát sinh trách nhiệm bồi thường. Đó là quy định phải có văn bản xác định hành vi trái pháp luật của người thi hành công vụ do cơ quan có thẩm quyền cấp. Vì điều kiện này mà người bị thiệt hại gặp khó khăn. Nhiều yêu cầu bồi thường chưa được thụ lý vì đang trong quá trình khiếu nại, chờ cơ quan có thẩm quyền ra văn bản xác định hành vi trái pháp luật.*

[The biggest shortcomings of the SCL are the provisions on the ground of state compensation liability. It requires the claimants must have a document confirming the unlawful action of the state officials. Because of this condition sufferers have been facing difficulties. Many compensation claims

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<sup>523</sup> Ibid.

<sup>524</sup> Le Khanh (2012), ‘Sau 3 năm Luật Bồi thường của Nhà nước có hiệu lực: Còn lúng túng’ [After 3 year enforcement of the SCL: remaining confusion], *Dai Doan Ket*, 18/10/2012 <<http://www.baomoi.com>>

<sup>525</sup> Hoang Long, ‘Sau gần 3 năm thi hành Luật Bồi thường Nhà nước: Luật vẫn xa dân!’, [After 3 year enforcement of the SCL: the Law is still far from citizens] *Tien phong online* 15/10/1012 <<http://www.tienphong.vn/Phap-Luat/595475/Luat-van-xa-dan-tpp.html>>

<sup>526</sup> Binh Minh, above n 462.

<sup>527</sup> Ibid.

have not been accepted because the complaints are still in process waiting for the authorities to issue the document identifying the unlawful acts.]

Mr Hung, the Deputy Director of the Department of State Compensation, MOJ, also confirmed that claimants are facing difficulties in obtaining a ‘valid document’ in pursuing state compensation claims in responding to a *Tien Phong* newspaper correspondent.<sup>528</sup>

The cases outlined below illustrate the difficulties claimants have in claiming for compensation.

### **The case of Nguyen Van Them**

In August 1990, Mr. Them was prosecuted by the Hong Ngu District Procuracy and trialled in Court for the crime of “violating the regulations on the management and protection of land” under Article 180 of the *Criminal Code 1985*. He was sentenced to 12 months in jail. He was also forced to hand over 5,000 square metres of agricultural land to the District People’s Committee.<sup>529</sup>

In September 1990, the Dong Thap Provincial People’s Court dismissed the first instance judgment and returned the case for reinvestigation and retrial. Then, the District Police left the case uninvestigated. In early 2010 (20 years later), this agency issued a decision suspending the investigation, effectively suspending the case as the duration of the period for investigation had expired without proof that the defendant had committed the offence.

After receiving the decision suspending the case, Mr Them claimed for state compensation both the District People’s Courts and Procuracy. However, the District People’s Courts and Procuracy could not reach agreement over which agency is liable for compensation. In mid-2011, the leaders of the Dong Thap province People’s Procuracy, Court and Police met and they agreed that the Hong Ngu district Police would conduct negotiations with Mr Them to resolve state compensation.

In February 2013, after unsuccessful negotiations, Mr Them sued the Hong Ngu district Police before the Tan An District People’s Court for compensation. The Court accepted the claim file but then it suspended the case because “there is no valid

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<sup>528</sup> ‘Người dân vẫn bị gây khó khi Nhà nước bồi thường’ [the citizens still face difficulties when state pays compensation], *Tienphong online*, 29/5/2013 <<http://news.go.vn/phap-luat/tin-1338477/nguoi-dan-van-bi-gay-kho-khi-nha-nuoc-boi-thuong.htm>>

<sup>529</sup> Binh Minh, above n 462; Nguyen Thi, above n 408.

document confirming the wrongful action of the state officer thus the claimant does not meet the condition for claiming”.<sup>530</sup>

Not accepting that decision, Mr Them complained to a number of state agencies. Recently, the Department of State Compensation, MOJ responded that Mr Them fell within the scope of state liability and should be paid compensation. The An Giang Provincial People’s Court has also dismissed the decision of the Tan An District People’s Court.<sup>531</sup>

Although the final decision has not been made, the case illustrates clearly that claiming state compensation in Vietnam is very challenging.<sup>532</sup>

### **The case of Huynh Van Sang**

In some circumstances, the claimants have a document but its contents have been expressed in ways which invalidate it. This problem also occurred under the previous laws and continues to be repeated in the implementation of the present law. Huynh Van Sang (Binh Thuan)<sup>533</sup> cites the following example:

In late 2007, the La Gi Town People’s Court convicted Mr Sang of rape and sentenced him to three years in prison at first instance under Article 111 *Criminal Code 1999*. However, Mr Sang appealed and insisted that he had not committed any crime. A few months later, the Binh Thuan Province People's Court quashed his conviction. It directed that the case be reinvestigated because there was insufficient evidence that Mr Sang had committed the crime and there was conflict between the statements of the witnesses.

In September 2008, La Gi Town People's Court retried the case and again convicted Mr Sang. However, in 2009 the Binh Thuan Province People's Court affirmed that the court of first instance had not clarified the conflict and provided more evidence as required in the previous appellate judgment. Hence, the appeal court again quashed the first instance judgment and requested a reinvestigation.

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<sup>530</sup> Ibid.

<sup>531</sup> Ibid.

<sup>532</sup> The first instance judgment made in 26<sup>th</sup> July 2013 has been cancelled by An Giang Province People’s Court in November 2013 for reinvestigation.

<sup>533</sup> Van Doan, above n 170.

In late January 2010, the La Gi People’s Procuracy issued the exemption decision of criminal liability. The reasons given were that:<sup>534</sup>

the case had lasted for a long period of time; the processes for collecting the evidence were inconsistent; the witness withdrawal their testimony; there is conflict between the statements of the victim’s father; the victim is deaf and unable to speak which made the investigation too difficult to decide exactly what had happened. Thus, Mr Sang is the subject of exemption of criminal liability.

In receiving this exemption decision, under Article 27 of the SCL, Mr Sang could not claim for state compensation even though he had been in custody for nearly three years.

The exemption decision of the La Gi People’s Procuracy is inappropriate because it is based on Article 25 (1) of the *Criminal Code 2009* which states that:

The offender is exempted from criminal liability if in the investigation, prosecution or adjudication process, the offender is found to be no longer a danger to society due to changes in the situation and society.

It can be argued that this exemption is intended to avoid liability for compensation. In this case, if the competent state agencies could not prove that the accused had committed the crime, they must declare that the accused did not commit the crime so he could claim compensation from the state.<sup>535</sup>

### **The case of Le Quoc Dzung**

Another example shows other difficulties for claimants because of the provision restricting period the time within which to make claims. This is the case of Le Quoc Dzung from Ho Chi Minh City.<sup>536</sup>

Mr Dzung was arrested in 2008 and charged with the crime of “abuse of trust by appropriating property” under Article 140 *Criminal Code 1999* by the Go Vap District People’s Procuracy. However, the Go Vap District People’s Court stated that there was

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<sup>534</sup> Ibid.

<sup>535</sup> Ibid.

<sup>536</sup> ‘Chết vẫn chưa được bồi thường’ [Not getting compensation even after death], Website van phong Luat su Truong Tin, 31/10/2012 <<http://www.luattruongtin.com.vn/home/Chet-van-chua-duoc-boi-thuong-oan-sai.2964.html>>

insufficient evidence to prove the offence and so returned the file for further investigation.

On 26<sup>th</sup> February 2010, the Go Vap District Police issued a decision to suspend the case. However, it was not until 7<sup>th</sup> June 2010 that this agency invited Mr Dzung to the office to receive the decision. In March 2012, Mr Dzung submitted a file claiming state compensation from the Go Vap District People's Procuracy which was liable for compensation. However, this agency rejected the file as it was lodged too late. In August 2012, Mr Dzung died and his son, Dzuong, has been continuing his claim.

In an interview with *Tuoi Tre* newspaper, Mr. Phan Van Mai, the procurator who was authorised to consider this case, responded that: "Go Vap District People's Procuracy has rejected his file because the duration for claiming has expired under Article 5, paragraph 1 of the SCL".<sup>537</sup> However, Mr Dzuong replied with: "My father received the decision in June 2010. He sent his claim for state compensation in March 2012. The time had not expired."<sup>538</sup> Mr Mai returned with:<sup>539</sup>

Go Vap District People's Procuracy only considered the date of issuing of the document in considering state compensation. The delay in notifying the decision is that of the Go Vap District Police, Go Vap District People's Procuracy is not involved.

The *Tuoi Tre* journalist also contacted Mr Tran Van Lao, who is the Deputy Director of the Go Vap District Police to ask about the reason for the four-month delay in notifying of the decision. He declined to answer. He said only that "the state compensation is the responsibility of the Go Vap District People's Procuracy, if you have any requirements you should contact that agency".<sup>540</sup>

One of the objectives of the SCL is to create a new comprehensive legal mechanism which is effective in assisting people to more easily claim damages from the state.<sup>541</sup> The fact that the claimants have such difficulties in making their claims indicates that this goal has not been achieved.

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<sup>537</sup> Ibid.

<sup>538</sup> Ibid.

<sup>539</sup> Ibid.

<sup>540</sup> Ibid.

<sup>541</sup> *Report 300*, above n 305.

### 6.3.2. The difficulty of determining and calculating damage

As indicated in Chapter 4, damage is a precondition for determining liability for compensation. Calculating the amount of that damage is a significant but controversial issue. However, as the law is unclear, in most cases it is very difficult to determine the amount of damages concerning compensation for officials' wrongful acts.

#### The case of Luu Viet Hong

The case of Luu Viet Hong (Ben Tre Province) was resolved under previous law but it suffices to demonstrate the ineffectiveness of the enforcement of Law because the provisions for damages under the SCL were inherited from the previous law, the *Resolution 388*. This case also shows the delay in the settlement of disputes.<sup>542</sup>

Mr Hong was born in 1931. He used to be wealthy, having constructed many large projects in the Ben Tre Province. On 6<sup>th</sup> December 1990, he was arrested on the charge of "seizing socialist property" under Article 130 of the *Criminal Code 1985*. The reason given by the relevant state agency was that Mr Hong had an "overdue loan from the Credit Collective".

Shortly after his arrest, most of his properties including his land were confiscated. Subsequently, the Nhon Trach People's Committee auctioned all of his property through the Committee's office. This included his agriculture assets including all the fish he was breeding in ponds. The most serious loss was the sale of his 28,000 square metres of land including a house.

After eight months in custody, Mr Hong was released. After his release, he asked for a declaration of innocence but no agency would do so. In June 1999 (nine years after being arrested), the Ben Tre Provincial People's Court heard the matter and concluded that he had not committed the crime. In June 2000, the Supreme People's Court heard the appeal and also declared him innocent of the crime. Ten years after the wrongful

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<sup>542</sup> 'Vụ oan sai của ông Lưu Việt Hồng - Bến Tre: 19 năm, 6 phiên tòa và còn... nhiều nữa' [the case of Luu Viet Hong- Ben Tre: 19 years, 6 court hearings and... more], *tintucphapluat*, 05/9/2009 <<http://thuvienphapluat.vn/tintuc/vn/thoi-su-phap-luat/thoi-su/-29471/vu-oan-sai-cua-ong-luu-viet-hong-ben-tre-19-nam-6-phiên-toà-va-con-.nhieu-nua>>; Gia Khang, 'Hôm nay, xử vụ đòi bồi thường oan sai 8,8 tỷ đồng' [The case of asking for 8.8 billion state compensation is heard today], *Vietbao.vn*, 09/5/2007 <<http://vietbao.vn/Xa-hoi/Hom-nay-xu-vu-doi-boi-thuong-oan-sai-8-8-ty-dong/20693156/157/>>; Truc Giang, above n 471.

prosecution, Mr Hong had been exculpated. Mr Hong sued the Ben Tre Provincial People's Procuracy for compensation of 8 billion VND (approximate 400,000 USD).

The Ben Tre Provincial People's Procuracy agreed on compensation of 84 million (4200 USD) VND for mental suffering (because he had been imprisoned for over 8 months). It found that there was no state agency liability for the loss of the property, about nearly 8 billion VND of direct damages, not including potential losses, as calculated by Mr Hong.

Seventeen years after the wrongful arrestment and prosecution, in May 2007 the Ben Tre Town People's Court did try Mr Hong's claim for state compensation at the first instance. On 14<sup>th</sup> May 2007, it declared that the Ben Tre Provincial People's Procuracy was liable to pay Mr Hong 215 million VND (approximate 10,000 USD). Then, on 5<sup>th</sup> September 2007, Ben Tre Province People's Court on appeal by Mr Hong increased the amount to 350 million VND (17,000 USD).

Based on the view that the property loss should be the liability of the Nhon Trach People's Committee, in another trial on 25<sup>th</sup> August 2008, the Ben Tre Town People's Court declared that the Nhon Trach People's Committee pay compensation of 3.4 billion VND (approximate 170,000 USD) because of its wrongful decision to auction the property. However, the Nhon Trach People's Committee appealed the judgment.

The SPC quashed both the first instance judgment and the appeal judgment because it determined that the amount of compensation was unreasonable. It remitted the case to the Ben Tre Town People's Court to assess the damage. Accordingly, on 26<sup>th</sup> May 2009 the Ben Tre Town People's Court declared that the Ben Tre Provincial People's Procuracy pay Mr Hong 321 million VND (about 16,000 USD). The Ben Tre Provincial People's Procuracy appealed this judgment because it did not agree with calculation of the interest. Then, on 26<sup>th</sup> August 2009, Ben Tre Provincial People's Court heard the appeal and declared that the Ben Tre Provincial People's Procuracy had to compensate Mr Hong 179 million VND (nearly 9,000 USD).

It can be seen clearly from the case that courts found it challenging to calculate the damages. Even in the same case with the same claimant and the same courts, there are different amounts of compensation: at least five different judgments with five different amounts of compensation. This case may show the difficulties inherent in the interpretation of the law. As there are no guidelines for interpreting law in Vietnam, a

consistent understanding and application of the SCL may face the same problem as other laws which are not applied uniformly.

### **The case of Truong Hoang Hieu<sup>543</sup>**

On 8<sup>th</sup> September 2007, Hieu was arrested by the My Tu district police, Soc Trang Province, on the charge of “intentionally causing injury” under Article 104 of the *Criminal Code 1999*. He was a fourth-year university student when he was arrested. More than six months later, the My Tu District People’s Court in the first instance convicted him and sentenced him to five years imprisonment. Hieu appealed and the Soc Trang Provincial People’s Court quashed the judgment and requested the reinvestigation of the evidence.

On 10<sup>th</sup> September 2010, after over two years in prison, Hieu received a notice suspending the case. Nevertheless, Hieu was not released from prison for another three months. After his release, Hieu claimed compensation of 550 million VND (about 22,000 USD) from the My Tu District People’s Court. Following negotiations, the Court decided to compensate him 128.2 million VND (about 6,000 USD). Hieu did not accept this and filed an application with the My Tu District People’s Court, the Court which had made the decision with which he did not agree.

On 30<sup>th</sup> August 2012, the My Tu District People’s Court accepted Hieu’s claim file and determined the case itself. The Court concluded that it was to pay compensation of nearly 170 million VND (nearly 8,000 USD), including mental damage (139.6 million VND), legal services (12 million VND), college fees (nearly 8 million VND), accommodation costs while studying (8.4 million VND) and transport fees.

Regarding the loss caused by the need to obtain legal services, Hieu had paid 75 million VND (about 3,250 USD) but the Court calculated the lawyers’ fees using the Law on Lawyers which provides that the salary of a lawyer is 100,000 VND per hour (5

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<sup>543</sup> Duy Khang, ‘Ngồi tù oan 2 năm, nam sinh đòi bồi thường hơn nửa tỷ’ [Suffering 2 year of wrongful inprison, a student asks for compensation of more than half a billion VND], VN express, 09/1/2013.

<<http://vnexpress.net/tin-tuc/phap-luat/ngoi-tu-oan-2-nam-nam-sinh-doi-boi-thuong-hon-nua-ty-2410977.html>>

Duy Khang, ‘Nam sinh ngồi tù oan bị bác kháng cáo đòi bồi thường’ [The student who was in jail by wrongful imprisonment had his appeal rejected], 06/03/2013

<[http://www.moj.gov.vn/btnn/Lists/TinDiaPhuong/View\\_Detail.aspx?ItemID=27](http://www.moj.gov.vn/btnn/Lists/TinDiaPhuong/View_Detail.aspx?ItemID=27)>

USD). Accordingly, the Court recalculated the amount which could be claimed as 12 million VND (600 USD). It was one fifth of the proven damages.

Hieu's parents had incurred expenses in visiting and feeding him while he was in prison. Hieu claimed that his parents spent 52 million VND (2,500 USD) on transport, food, drink and accommodation. Those claims were rejected totally because Hieu could not produce evidence of them. These expenses would be difficult to prove. It is not normal to have receipts for such small transactions. Moreover, even if receipts were provided, people usually do not retain them and therefore it is unreasonable to ask for such receipts. In these cases, the court should assess the loss based on market prices rather than decline to make an award.

### **The case Nguyen Thanh Trung<sup>544</sup>**

This case is an obvious example of the unreasonable conduct of a court in determining damages.

On 28<sup>th</sup> April 1988, Mr Trung was imprisoned for three months on the charge of "intentionally infringing the state regulation of economic management which caused serious consequences" under Article 174 of the *Criminal Code 1985* when working as a Deputy Director of the Department of District Agriculture. Due to being prosecuted he was dismissed from his job.

After receiving the document in April 2011 affirming that his prosecution was wrongful, Mr Trung claimed 1.6 billion VND (about 80,000 USD) including his loss of income. On appeal, the Hau Giang Provincial People's Court declared that the Vi Thanh's People Procuracy was liable to pay him 416 million VND (about 20,500 USD). The appeal court rejected his claim for loss of income. It justified its decision thus:<sup>545</sup>

*Ông Trung thời điểm bị thiệt hại (bắt tạm giam) đang là công chức, giữ chức vụ Phó phòng Nông nghiệp huyện. Đáng lẽ phải căn cứ vào hệ số lương và*

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<sup>544</sup>Quoc Huy, 'Người đàn ông đấu tranh 23 năm để được giải oan' [the man who has struggled for innocent for 23 years], *VN express*, 04/3/2013 <<http://vietnamnet.vn/vn/xa-hoi/110951/nguoi-dan-ong-dau-tranh-23-nam-de-duoc-giai-oan.html>>

Quoc Huy, 'Vật vã đòi bồi thường sau 23 năm bị oan sai' [Frustrated claiming for compensation after 23 year wrongful conviction], 5/3/2013 <<http://vietnamnet.vn/vn/xa-hoi/110952/vat-va-doi-boi-thuong-sau-23-nam-bi-oan-sai.html>>

Huynh Hai, 'Người cựu chiến binh mang thân phận bị can oan suốt 23 năm' [a veteran has suffered a wrongful accuse for 23 years], *Dan Tri*, 11/3/2013 <<http://dantri.com.vn/xa-hoi/nguoi-cuu-chien-binh-mang-than-phan-bi-can-oan-suot-23-nam-702087.htm>>

<sup>545</sup> Ibid.

*phụ cấp chức vụ thời điểm này để tính thu nhập bị mất. Tuy nhiên, do cơ quan nơi ông công tác trước đây không lưu giữ các văn bản này để cung cấp cho Tòa án, nên tòa không có căn cứ để tính.*

[Mr Trung was a Deputy Director of the District Department of Agriculture when he was arrested. In fact, the Court would calculate his income based on his position and his wages at that time. However, the court rejects the claim as the agency where he had worked did not retain such documents to be provided to the court, so the court does not have the basis on which to make such calculations].

Moreover, despite the appeal Court not having any proof, the appeal judgment stated that:

*Sau khi được cho tại ngoại, mặc dù chưa có cơ quan thẩm quyền xác định ông bị oan, nhưng thực tế ông vẫn đi lao động bằng nghề khác và có thu nhập như bao người lao động bình thường?.*

[After release from detention, although there was no competent agency affirming he was innocent, he was in fact still working in another job and had income as a normal employee.]

It can be seen from this case that it is difficult to calculate damages under the SCL. That is why, in practice, the judges' decisions are arbitrary. In order to avoid ordering compensation, the judges may impose unreasonable requirements or justification. This also shows the difficulties caused by judges who (1) are sensitive to reappointment by the state; (2) demonstrate limited capability as shown by findings based on no evidence; (3) are informed by socialist sensitivities about the responsibility for public assets.

### **6.3.3. The limited amount of compensation**

Not only are there difficulties in calculating damages, the amount of compensation awarded is generally very small and generally much lower than warranted by the actual damages suffered.

### **The case of Do Huu Tri<sup>546</sup>**

In 2003, Mr Tri (Quang Ngai province) and his family purchased over 1.5 hectares of agricultural land from 23 owners. When the transfer was completed, in July 2003, his family planted thousands of ornamental bonsai trees on the land.

By November 2003, Mr Tri had reclaimed up to over two hectares and continued to plant more bonsai trees. In early 2004, his family built a temporary house on the land for employees to rest in. His family used the house and further developed the land until November 2008. By that time, the plants were worth more than 50 billion VND (about 2.5 million USD). However, on 19<sup>th</sup> July 2011, the enforcement branch of the Son Tinh District Committee seized the land on the basis that Mr Tri had infringed land used regulations. Over four days, around 500,000 trees of 124 species were destroyed.

After the competent agency decided that the enforcement decision was wrong, Mr Tri made a claim to the Son Tinh District People's Committee requesting compensation of more than 46.5 billion VND (approximate 2.3 million USD). Following four negotiation sessions, the Son Tinh District People's Committee offered compensation for Mr Tri 616 million VND (approximate 30,000 USD) - barely 1.5% of the damage proven by Mr Tri.<sup>547</sup> Mr Tri did not accept that amount and he complained to a number state agencies. Then, under the guidance of leaders of the Quang Ngai Provincial People's Committee, the SonTinh District People's Committee subsequently offered compensation of more than 4 billion VND (200, 000 USD) - a remarkable increase but still less than 10% of the proven damage.<sup>548</sup>

This case is an example of unreasonable conduct in determining damages. It may also show a reluctance to accept, or a lack of understanding of, a market orientated economic system in which state institutions will have to compensate the owners of private capital.

### **The case of Pham Vu**

Mr Vu, of the Lam Dong Province, had been prosecuted for the crime of “intentionally causing injury” under Article 104 of the *Criminal Code 1999*. As a result of a wrongful decision, the case continued for over 4 years including the 139 days when he was in

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<sup>546</sup> Hạ Huyền, above n 463; Binh Minh, above n 462.

<sup>547</sup> Hạ Huyền, above n 463.

<sup>548</sup> Binh Minh, above n 462.

detention. After receiving the document affirming the wrongful action of the state official, he claimed over 652 million VND (about 22,000 USD) from the Duc Trong District People's Procuracy. However, he was offered only approximately 78 million VND (nearly 3,900 USD). Disagreeing with the compensation offered, he sued the agency in the Duc Trong District People's Court. On August 2011, the court ordered compensation of around 100 million VND (about 5,000 USD), a very small amount given mental suffering and loss of income over such a long period of time.<sup>549</sup>

The case of Luu Viet Hong, Truong Hoang Hieu and Nguyen Thanh Trung discussed in section 6.3.2 above, also illustrate that the amount of compensation is often very small and much lower than the damage proven.

The MOJ's *Report 300* reveals that the monetary compensation in 122 cases resolved from 1<sup>st</sup> January 2010 to 30<sup>th</sup> September 2012 was approximately 16 billion VND (around 800,000 USD). It averages 131 million VND or about 6,500 USD per case. Whereas, in September 2012, a Seoul Court in South Korea granted a fisherman, Cheong, 2.45 billion in compensation (2.16 million USD) for having suffered torture and 15 years imprisonment on false charges.<sup>550</sup> Zhao Zuohai, a villager in Henan Province, China, was awarded 650,000 yuan (96,000 USD) for almost 10 years of wrongful imprisonment.<sup>551</sup> There is the case of a man in south China who received 890,000 yuan (130,720 USD) in compensation for having been wrongly jailed for eight years for a murder he didn't commit.<sup>552</sup> In particular, in 2013, in the US, Daniel Chong, a 25-year old college student received a USD 4.1 million settlement from the federal government after he was abandoned in a windowless Drug Enforcement Administration cell for more than four days without food or water.<sup>553</sup> Admittedly, the GDP and average

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<sup>549</sup> Phuong Thao, 'Bồi thường oan sai trong tố tụng: Đòi một đồng, bồi thường một nêo! [Compensation for wrongful conviction: compensation is so far from claim] *Phapluat xa hoi*, 14/04/2013 <<http://phapluatxahoi.vn/2013041408458162p0c1002/boi-thuong-oan-sai-trong-to-tung-doi-mot-dang-boi-thuong-mot-neo.htm>>

<sup>550</sup> S Korean awarded UDS 2 million for false spy charges, 9News world, 4/9/2012 <<http://news.ninensn.com.au/world/2012/10/08/14/18/s-korean-awarded-2m-for-false-spy-charges>>

<sup>551</sup> Amendments to the State Compensation Law, 28/4/2010 <[http://www.china.org.cn/china/2010-04/28/content\\_19925521.htm](http://www.china.org.cn/china/2010-04/28/content_19925521.htm)>

<sup>552</sup> Wrongly jailed 8 years, man gets USD130, 720 compensation, 01/9/2010 <[http://www.china.org.cn/china/2010-09/01/content\\_20839202.htm](http://www.china.org.cn/china/2010-09/01/content_20839202.htm)>

<sup>553</sup> Elliot Spagat and Alicia Caldwell, *Daniel Chong, Student Left In DEA Cell, To Get \$4 Million From US In Settlement*, 30/7/2013 <[http://www.huffingtonpost.com/2013/07/30/daniel-chong-settlement-dea\\_n\\_3678217.html?utm\\_hp\\_ref=college](http://www.huffingtonpost.com/2013/07/30/daniel-chong-settlement-dea_n_3678217.html?utm_hp_ref=college)>

salaries in Vietnam and these countries are very different. However, they indicate that the amount paid by way of state compensation in Vietnam is inadequate.

#### **6.3.4. Challenges in determining the agency liable for compensation**

As indicated in Chapter 5, under the previous law it was very difficult to determine which state agency was liable for compensation. The SCL was expected to overcome this problem. However, this expectation has not been achieved. It is far from easy to determine the relevant agency under the Law so that ‘responsibility’ continues to be hand-balled between state agencies.<sup>554</sup>

#### **The case of Phung Van Cung<sup>555</sup>**

Mr Cung, Gia Lai Province, was the victim of a wrongful prosecution and conviction over 30 years ago but has never been successful in obtaining compensation. The wrongfulness of the actions finally was acknowledged but the losses have not been remedied because of the transfer of responsibility between state agencies.

In July 1975, Mr Cung bought a house from Mrs Loc. However, in 1977 Mrs Loc sued Cung and said that he had only leased her house, not bought it. Mr Cung produced the purchase contract and receipt for the deposit. The Court of first instance rejected Mrs Loc’s claim. However, in 1982 the Gia Lai – Kon Tum Provincial People’s Court heard an appeal by Mrs Loc and the Court declared that Mr Cung must give possession of the house to Mrs Loc. Because Mr Cung did not comply with the judgment, he was arrested in 1983.

On 22<sup>nd</sup> August 1985, the Gia Lai – Kon Tum Provincial People’s Court sentenced him to three years in prison. His children strongly opposed this judgment and they were arrested without cause.

After many years of complaints, on 29<sup>th</sup> August 1987, a Committee of Judges of the SPC declared that Mr Cung had not committed any crime. As Mr Cung had died, his children, represented by his daughter, Mrs Oanh continued to seek an apology and compensation. It was not until 12<sup>th</sup> January 2011, that the Appeal Court of the SPC, Da

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<sup>554</sup> Phan Chính, above n 477.

<sup>555</sup> Thanh Luan, Hai Duong ‘Gia Lai: Kỳ án ngôi nhà cháy và nỗi oan khuất dài suốt 3 thập kỷ’ [Gia Lai: the case of burned house and wrongful accuse lasted for 3 decades] *Tin Gia Lai*, 13/8/2013 <<http://tingialai.vn/news/Gia-Lai/Gia-Lai-Ky-an-ngoi-nha-chay-va-noi-oan-khuat-dai-suot-3-thap-ky-5134/>>

Nang City, published its apology to Mr Cung and his children in the media of Gia Lai province. It apologised and stated that “we will compensate for Mr Cung and his children when the final result has been determined”.

On 19<sup>th</sup> July 2013, the SPP sent a Directive to Gia Lai Provincial People’s Procuracy stating that "Pursuant to the provisions of paragraph 2, Article 26 of the SCL Mrs Oanh is eligible for state compensation under the settlement procedures in accordance with the SCL".<sup>556</sup>

However, the Gia Lai People’s Committee and other Gia Lai state agencies dodged liability by citing a number of different reasons. The Gia Lai People’s Court stated that the liability for compensation belonged to the Gia Lai Department of Judgment Enforcement. However, the Gia Lai Department of Judgment Enforcement argued that it is the liability of the People’s Court. Then, postponing any decision, the People’s Court said that it was “waiting for a Directive from the central agency”.<sup>557</sup>

Although the wrongful actions of the judicial and state officials have been admitted by the Appeal Court of the SPC at Da Nang, to date there has been no outcome because of the difficulty in determining the agency liable for compensation.<sup>558</sup>

### **The case of Luong Ngoc Phi**

The case of Luong Ngoc Phi is also a remarkable demonstration of this problem. Luong Ngoc Phi was director of the Thanh Phong Commerce Company Ltd, in Thai Binh province. He was wrongfully convicted by the provincial court for corruption and tax evasion in 1999. He was sentenced to eight years and six months in prison. He claimed nearly VND 24 billion (1.5 million USD) in 2006. He stated that had increased to 55 billion VND by 2013. In mid-2013, Mr Phi had still not received compensation as the Thai Binh Provincial People’s Court, which is responsible for the compensation, said that the Court has to pay only for mental harm, not for property loss which is the responsibility of the Procuracy.<sup>559</sup>

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<sup>556</sup> Ibid.

<sup>557</sup> Ibid.

<sup>558</sup> Thanh Luan, Hai Duong above n 555.

<sup>559</sup> Hai Ly, above n 474; Thuc Quyen, ‘Khóc, cười những vụ yêu cầu Nhà nước bồi thường (Kỳ 2)’ [laughing and crying in the cases of state compensation (chapter 2)], 26/10/2011

<<http://www.phapluatvn.vn/tuphap/201110/Khoc-cuoi-nhung-vu-yeu-cau-Nha-nuoc-boi-thuong-Ky-2-2059798/>>

and interview conducted by researcher

In the case of Nguyen Van Them, discussed above in section 6.3.1, Mr. Them also spent more than 20 years seeking justice and appropriate compensation from the state agency because of the uncertainty about the relevant state agency liable for compensation. That was the reason why Mr Them claimed for state compensation in both the District People’s Courts and the Procuracy.<sup>560</sup>

Indeed, it can be argued that the determination of the agency liable for compensation is a significant barrier preventing people from seeking justice by claiming state compensation. Although the general principle of the law recognizes the liability of the state, the specific provisions do not facilitate it; thus, the enforcement of the law is still challenging.

### **6.3.5. Ineffectiveness of compulsory negotiations**

As argued in Chapter 5, the requirement for compulsory negotiations may be unfair and inefficient because these take time and money. The suggestion is also made that the procedure for settling state compensation should be merged with general civil procedure as negotiation is already a feature of civil procedure. Negotiation in respect of state compensation should be optional rather than compulsory. When state agencies determine that they have not acted wrongfully, they should immediately apologise and offer to negotiate for compensation. This section further reveals the ineffectiveness of those compulsory negotiations. It establishes that if the parties are not willing to negotiate, this may have adverse consequences.

#### **The case of Le Van Dzang<sup>561</sup>**

The case Le Van Dzang, who was born in 1927, is an interesting one as it shows clearly that the claimants were not satisfied with the negotiations that they had to undertake. Moreover, claimants may be sceptical about the fairness and objectivity of negotiations, and therefore not be willing to accept the amount of compensation that the agency offers.

Mr Dzang was arrested in October 1983 and convicted and sentenced to 18 months imprisonment for the crime of “intentionally destroying an individual’s property” and “restraint in implementing state policies” as the result of a wrongful

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<sup>560</sup> Nguyen Thi, above n 490.

<sup>561</sup> Hai Ly, ‘Ông lão 86 tuổi vất vả đi đòi “thêm” bồi thường oan sai...’ [86 year- man has been asking for more coompensation], Baomoi, 14/07/2013 <<http://www.baomoi.com/Ong-lao-86-tuoi-vat-va-di-doi-them-boi-thuong-oan-sai/58/11465416.epi>>

judgment by the Hoa Binh Provincial People's Court. In 1986, the Supreme People's Court declared that he had not committed any crime and quashed the conviction.

After many years of negotiations, the Hoa Binh Provincial People's Court, which was the agency responsible for compensation, issued its decision on 6<sup>th</sup> July 2011, and ordered that Mr Dzang be paid 261 million VND (about 13,000 USD).

Despite having signed in the record of successful negotiations, Mr Dzang subsequently submitted files claiming more compensation to other competent authorities immediately after he received this compensation. Explaining this action, he said that a number of actual losses had not been considered and compensated for in the negotiations. However, due to being 86 years old and in poor health, and after so long, he agreed to accept part of the offered amount of compensation, intending to claim more at a later date. He was shocked when he learnt that he could not claim any further compensation because he had already accepted some of the compensation during the negotiations.

The case of Do Huu Tri (Quang Ngai Province),<sup>562</sup> referred to above in section 6.3.3 significantly demonstrates one instance of unsuccessful negotiations. There were four negotiations between Mr Tri and SonTinh District People's Committee but the parties did not reach an agreement. Mr Tri had claimed more than 46.5 billion (approximate 2.3 million USD) but the SonTinh District People's Committee accepted liability for 616 million VND (approximate 30,000 USD) - only 1.5% of the proven damage.<sup>563</sup> Also, in the case of Luong Ngoc Phi, there were six unsuccessful negotiations between Mr Phi and the Thai Binh People's Procuracy from 2006 to 2013.<sup>564</sup>

In short, negotiations prove to be difficult in practice. They may lead to claimants being worn down and disappointed. Luu Ngoc Lan, a private lawyer, stated that:<sup>565</sup>

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<sup>562</sup> Hạ Huyền, above n 463; Binh Minh, above n 462.

<sup>563</sup> Hạ Huyền, above n 463.

<sup>564</sup> Interview conducted by researcher.

<sup>565</sup> Lưu Thị Ngọc Lan - Văn phòng luật sư Hà Lan và Cộng sự, 'Đưa Luật Trách nhiệm bồi thường của Nhà nước vào cuộc sống – Vấn đề còn nan giải' [Applying the SCL in practice: that is challenging], website of Lawyer Association  
<<http://liendoanluatsu.org.vn/index.php/en/news/legal-news/1447-dua-luat-trach-nhiem-boi-thuong-cua-nha-nuoc-vao-cuoc-song-van-de-con-nan-giai.html>>

*Luật Trách nhiệm bồi thường của Nhà nước có đưa ra chế định thương lượng hai bên, việc quy định như vậy tạo lên tâm lý “bất ổn” đối với tổ chức, cá nhân bị thiệt hại vì người bị thiệt hại khó được cơ quan thiệt hại giải quyết việc khiếu nại bồi thường một cách thỏa đáng. Việc giải quyết bồi thường dựa trên cơ sở thương lượng làm cho việc yêu cầu bồi thường bị kéo dài đã đặt cá nhân, tổ chức bị thiệt hại rơi vào thế “tiến thoái lưỡng nan”, nếu chấp nhận thương lượng thì e rằng thiệt hại của mình không được bồi thường toàn bộ mà sẽ “vơi” đi, nhưng nếu thương lượng không thành thì lại ngại việc giải quyết yêu cầu bồi thường của mình gặp khó khăn, cản trở.*

[The SCL provides that negotiation is compulsory. This provision makes individuals and organisations who suffer damage nervous because it is difficult to claim total damages from the agency which caused such damage. Negotiation makes the compensation process longer and puts the claimant in a dilemma. If they accept, they realize that their loss is not totally compensated but if they do not accept, they worry that their claim will be difficult because it is still resolved by state agencies.]

### **6.3.6. Delays in the settlement of compensation claims**

The delay in the resolution of disputes in general is an intractable issue although the laws on legal proceedings and relevant guidance provide clear timelines for the settlement of disputes. Cases of state compensation are no different.

As shown in Chapter 5 section 5.3, because there is no penalty or punishment for the breach of the timeline for the settlement of a case, the time for resolving state compensation claims appears to be unlimited. The Chapter 5 also provided many examples of delays in the enforcement of the Law. The case of Nguyen Van Them cited above in section 6.3.1, is another example of this. Mr Them spent more than 20 years seeking a just outcome and appropriate compensation from the relevant state agency.<sup>566</sup>

This section provides several additional examples to establish the reality for some of the enforcement of the SCL. As shown in the Introduction section in this chapter, the cases may start before the SCL was enacted but it is now the relevant law to be used to resolve the issues. Using those cases to show the delay in settlement of the dispute is more effective than using the case arising after the SCL came into force because they reveal the long delays.

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<sup>566</sup> Nguyen Thi, above n 490.

### **The case of Truong Ba Nhan<sup>567</sup>**

The case of Mr Nhan (Ho Chi Minh City) is also an example of the delays faced as well as the lack of responsibility of state officials in resolving disputes.

In 2002, Mr Nhan was arrested for a murder. Although Mr Nhan claimed that he was innocent and provided an alibi for when the victim was killed, the Ho Chi Minh City's Procuracy continued to prosecute him. In June 2006, the Ho Chi Minh City Police issued a decision suspending the case because "the time limit for investigation has expired and there is insufficient evidence to prove crime". Mr Nhan was then released after more than four years in custody. Three months later, Mr Nhan filed for compensation. He received no response.

On 8<sup>th</sup> June 2012, after six years of waiting, Mr Nhan resent his claim to Ho Chi Minh City People's Procuracy and also to the Department of the State Compensation, MOJ. Two months later, the Department of State Compensation responded that Mr Them's case fell within the scope of state compensation and that the agency liable for compensation was the Ho Chi Minh City's People Procuracy.

After one month from receiving the document from the Department of the State Compensation, Mr Nhan still had not received any response from the Ho Chi Minh City People's Procuracy. No longer willing to wait for a further unreasonable period, Mr Nhan went directly to the office of Ho Chi Minh City People's Procuracy. He was told in response that "the procuracy is checking and investigating". He was not provided with a timeline or deadline for any settlement.<sup>568</sup>

Interviewed by a journalist for the VN Express, the most popular newspaper in Vietnam, Mr Nhan described the impact of the process on himself and his family:<sup>569</sup>

*Đã hơn 11 năm kể từ thời điểm tôi bị vướng vào vòng lao lý, bị bắt, bị cáo buộc phạm một tội mà mình không thực hiện, gia đình tan nát, bạn bè xa*

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<sup>567</sup> Hải Duyên, 'tan sự nghiệp, mất gia đình vì dấu vân tay oan nghiệt' [losing career and family because of finger print], *VNExpress.net*, 05/4/2013 <<http://vn.news.yahoo.com/tan-su-nghie-p-ma-t-gia-di-021056126.html>>

<sup>568</sup> To Tram, 'Vụ dấu vân tay oan nghiệt- chờ bồi thường đến bao giờ?' [the case of finger print-how long have to wait for compensation] *Người lao động newspaper*, 01/04/2013 <<http://nld.com.vn/2013040110073287p0c1019/vu-dau-van-tay-oan-nghiet-cho-boi-thuong-den-bao-gio.htm>>

<sup>569</sup> Ibid.

*lánh; gần 7 năm kể từ ngày có quyết định đình chỉ điều tra của cơ quan có thẩm quyền, tôi đã đấu tranh và chờ đợi một ngày được minh oan, được nhận một lời xin lỗi chân thành, công khai và được khôi phục lại những quyền lợi mình đáng được hưởng nhưng gần như vô vọng.*

*Đã có những lúc tôi mệt mỏi đến mức muốn từ bỏ nhưng những thống khổ của kẻ từng bị gán tội giết người, cướp tài sản vẫn cứ mãi đeo bám, ám ảnh và thôi thúc tôi làm tất cả những gì có thể để đòi lại công bằng. Trả lời của Cục Bồi thường Nhà nước đã thấp thêm cho tôi niềm tin công lý sẽ được thực thi nhưng cơ quan có trách nhiệm giải quyết bồi thường vẫn có điều gì đó không rõ ràng, thiếu minh bạch khi thực hiện các quy định của pháp luật... Tôi phải còn chờ đợi đến bao giờ?*

[It is over 11 years since the time I was detained, arrested, and accused of a crime which I did not commit. My family was broken; my friends were far from me. It is almost seven years since the date the competent agency issuing the suspending decision. I have been struggling and waiting for the day when I am vindicated and receive a sincere public apology and get compensation but it seems to be hopeless.

There have been times when I was tired and wanted to give up but the pain and suffering caused by the conviction of murder has obsessed and inspired me to do everything possible to pursue justice. The response of the Department of State Compensation has given me faith that justice will be done but the agency liable for settlement is still somehow unclear, lacking transparency when enforcing the provisions of law. How long do I have to wait?]

Responding to the interview, an official of the Ho Chi Minh City People's Procuracy explained that the delay was "due to the complexity of the case".<sup>570</sup> It is obviously an unreasonable response because the law provides clear timelines for the settlement of disputes even in complex cases.

### **The case of Luong Ngoc Phi**

The case of Luong Ngoc Phi (Thai Binh province) referred to in section 6.3.4 is a typical illustration of the delays in settlement of state compensation claims. He was arrested in 1998. In 1999, he was convicted and sentenced to 14 years imprisonment for the crime of "tax evasion" under Article 169 the *Criminal Code 1985*. In 2000, an

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<sup>570</sup> Hải Duyên, above n 567.

appeal quashed his conviction. Six years later, in 2006 Thai Binh Provincial People's Court made a public apology. Mr Phi also lodged a claim for 23 billion VND in compensation for both mental suffering and property loss. In August 2013, the Thai Binh Provincial Court heard the claim at first instance and declared that the Thai Binh People's Procuracy was liable to pay him compensation of 23 billion VND.<sup>571</sup> In total, Mr Phi spent eight years waiting for a final criminal judgment and seven years for a compensation judgment.<sup>572</sup>

In short, it can be seen from these and the other cases shown in the previous and following sections that the period of time taken to resolve legal disputes, including state compensation cases in Vietnam is long and inconsistent. There seem to be no rules established for such disputes. The outcomes rely totally on the authority of the state officials. Speaking at the conference in May 2013 on the preliminary assessment of the three year implementation of the SCL, the Minister of Justice, Mr Cuong, said that:<sup>573</sup>

*Một vụ việc mà từ 2007-2010 mới xác định được là cơ quan quản lý nhà nước sai, từ 2010 đến nay mới xác định được mức bồi thường và người dân vẫn chưa nhận được tiền vì còn chờ Bộ Tài chính. Tôi có cảm giác Luật TNBTNN vào cuộc sống quá ít*

[One case has arisen in 2007 but only in 2010 was the state agency liable for compensation determined. It has taken from 2010 up until now to calculate the damage. However, the claimant has not received compensation because he has been waiting for the Ministry of Finance. I suppose that the enforcement of the SCL has low effectiveness]

### **6.3.7. Difficulties and delays in enforcement of judgments**

There are not only no limits in the settlement of compensation cases, even when a case has been settled, the enforcement of any judgment is also difficult and a source of delay. As shown in the previous chapter in section 5.3, speaking at the preliminary assessment of three years implementation of the SCL, the Minister stated that even when compensation has been decided, claimants continue to wait for long periods to receive payment.

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<sup>571</sup> Hai Ly, above n 474; An Interview conducted by researcher by mobile phone.

<sup>572</sup> The Thai Binh province People's Court tried the case in August 2013. (Source: Interview by mobile phone. He also sent the judgment to the researcher via email).

<sup>573</sup> Huong Nguyen, Không thu được tiền hoàn trả từ cơ quan tố tụng [There were no reimbursement paid from the procedural agencies], *People's journal online*, 29/5/2013 <[http://www.nhandan.com.vn/mobile/mobile\\_phapluat/mobile\\_thoisu/item/20441002.html](http://www.nhandan.com.vn/mobile/mobile_phapluat/mobile_thoisu/item/20441002.html)>

The case of Nguyen Thanh Trung <sup>574</sup>, mentioned above in section 6.3.2, is clear evidence of this.

In 1988, Mr Trung was arrested and prosecuted for the crime of “intentionally infringing state regulation of economic management which caused serious consequences” under Article 174 the *Criminal Code 1985*, while he was working as Deputy Director of District Department of Agriculture. After three months of detention, in July 1988, the Vi Thanh People’s Procuracy issued a decision to release him as “it is unnecessary to detain him”. In its decision, the Vi Thanh People’s Procuracy stated that “when the state calls on the accused he must come in good time”. He was never called upon and the case appeared to have been “forgotten”.

Mr Trung approached many state agencies to proclaim his innocence and claim compensation but received no response. In August 2009, the Vi Thanh People’s Procuracy responded but dismissed his claim, stating that he was “convicted of the crime”. Mr Trung continued to complain and in July 2010, he sent a complaint to Hau Giang Provincial People’s Procuracy. Ten months later on 19<sup>th</sup> April 2011, the Hau Giang Provincial People’s Procuracy issued a decision in which it confirmed that Mr Trung was not convicted of any crime and the previous decision of Vi Thanh District People’s Procuracy was not in accordance with the law. This decision also declared that Vi Thanh District People’s Procuracy was liable to pay Mr Trung compensation. When he received the decision of Hau Giang Provincial People’s Procuracy, Mr Trung said “I thought that it was a dream and I felt that I was reborn. I could not sleep for a week”.<sup>575</sup>

Mr Trung then knew further disappointment in the compensation process. After many unsuccessful negotiations with the Vi Thanh District People’s Procuracy, Mr Trung brought the case to the Vi Thanh District People’s Court. At first instance and on appeal to the Hau Giang Provincial People’s Court, the Vi Thanh District People’s Procuracy was ordered to publicly apologise to him and compensate him 416 million VND (about 20,000 USD). The judgment of the Hau Giang Provincial People's Court came into force on 28<sup>th</sup> September 2012. Vi Thanh People’s Procuracy did not pay compensation. Mr Trung said that:<sup>576</sup>

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<sup>574</sup> Huynh Hai, above n 544.

<sup>575</sup> Ibid.

<sup>576</sup> Ibid.

*Tòa đã tuyên có hiệu lực và tôi cũng đã có đơn yêu cầu thi hành án đúng quy định pháp luật nhưng phía làm sai là Viện KSND TP Vi Thanh cho đến lúc này vẫn chưa thực hiện được gì là quá chậm trễ mà không có lời giải thích thỏa đáng nào.*

[The Court's judgment has come into force and I have met the requirement for enforcement of the judgment. However, the Vi Thanh District People's Procuracy has not paid compensation which is a long delay without any reasonable explanation]

Responding to these comments, Mr Nguyen Dong Khoi, Director of Vi Thanh District People's Procuracy, represented that after the judgment came into force, on 21<sup>st</sup> November 2012 Vi Thanh District People's Procuracy invited Mr Trung to continue negotiations. After those negotiations, the Vi Thanh District People's Procuracy sent the document to a higher level to consider the judgment. He also said that "if the Supreme People's Procuracy agree with the Court's judgment, we will pay compensation immediately".<sup>577</sup>

While negotiations are presently a part of the compensation settlement procedure, this case shows that negotiations may continue to be applied to the enforcement. After the compensation judgment came into force, the Vi Thanh District People's Procuracy ought to have complied with it and compensated rather than continuing to negotiate or delay.

Claiming state compensation is a very long and arduous process. It is not necessarily over with a negotiated agreement or a court judgment. Claimants continue to face other difficulties in receiving compensation in the delays and constraints in enforcing agreements and judgment. As indicated in the Introduction in Chapter 1, delays in the enforcement of judgments are a common problem in Vietnam. Some judgments may never be enforced. The case of state compensation liability is no exception.

#### **6.4. Causes of ineffectiveness**

Enforcement of the SCL is affected by many factors: the quality of the Laws, the capability of the officials, and the legal culture. This section attempts to clarify the

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<sup>577</sup> Ibid.

fundamental causes which limit the enforcement of the SCL, and suggests solutions to improve its implementation.

#### **6.4.1. The shortcomings of the SCL and secondary legislation**

There is a consequent relationship between the law and its implementation. The enforcement of the law reflects the quality of the law in application.

As argued in the previous chapters above and in this chapter in section 6.3, despite being progressive, the SCL has many deficiencies which affect its effectiveness.

Firstly, inappropriate provisions about the grounds for state liability have prevented claimants from pursuing their rights. That is why many cases appeared to be eligible under the criteria but the sufferers could not claim state compensation. These provisions justify Gillespie's comment that the state "gives with one hand and takes with another."<sup>578</sup> This is indicated by the statements of the leaders of MOJ and in the case of Nguyen Van Them, in section 6.3.1 above. In these cases, claimants are still waiting for the valid document necessary to pursue their claims.<sup>579</sup>

In addition, unclear provisions regarding the categories of damages and the methods to be used in calculating them lead to difficulties in calculating actual damages and also to very small amounts of compensation. As pointed out in Chapter 4, and also above in section 6.3.2, the SCL provides for calculating the income loss based on the wage of the claimant before the incident. This leads to difficulties in providing evidence and also to the small amount of compensation given in practice as shown in the cases of Truong Hoang Hieu and Nguyen Thanh Trung in section 6.3.2. For example, Truong Hoang Hieu could not provide the receipts for his parents' expenses; Nguyen Thanh Trung could not provide evidence of his wages from 23 years ago because his former employer had destroyed the records.

A complex procedure for settling compensation claims has been established without sufficiently strict penalties for the breach of any time limits. This has created an advantageous environment for delay by state agencies in settling compensation and enforcing of compensation judgments, as shown in sections 6.3.5 and 6.3.6.

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<sup>578</sup> Gillespie and Chen, above n 6, 90.

<sup>579</sup> Le Khanh (2012), 'Sau 3 năm Luật Bồi thường Nhà nước có hiệu lực: còn lúng túng' [After 3 years of going in force of the Law on State Liability for Compensation: remaining confusion], *Dai Doan Ket*, 18/10/2012 <<http://www.baomoi.com>>

Also, the difficulty of understanding and interpreting provisions determining the agencies liable for compensation have led to avoidance of compensation liability. Annoying and inappropriate mechanisms in negotiations and trials have made the processes ineffective as shown in Chapter 4 and section 6.3.3 above. The inconsistency on time limits also leads to debates and ununiformed application in practice, as argued in Chapter 4 and in the case of Le Quoc Dzung above.<sup>580</sup>

In context of the legal system, secondary legislation in the form of decrees, ordinances and circulars is needed to implement the law. However, the SCL came into force on 1<sup>st</sup> January 2010, but almost two years later, adequate guidelines had not been issued which has led to a delay in the enforcement of the law, leaving the legitimate rights and interests of claimants unprotected. Three years after enacting the law, there was still insufficient secondary legislation guiding the law as promulgated. In *Report 300*, the MOJ suggested that at least three more Circulars for guiding the SCL are required. They are Joint Circulars guiding the implementation of state management for compensation in proceedings; in civil enforcement; in active criminal enforcement and in administration.<sup>581</sup> Also, although some regulations have been enacted, they are not clear and do not adequately specify the provisions of the SCL. As indicated above in section 6.2.1, the regulations give guidance based on the activities which are within the scope of state liability including administrative activities, criminal proceedings and enforcement of civil judgments as the present secondary legislations do.<sup>582</sup> Because of focusing on the activities, the current secondary legislations almost overlap the provisions regarding the grounds for liability, the category of damage, method of calculating the damage, and the procedure.

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<sup>580</sup> See section 6.3.1; Chết vẫn chưa được bồi thường [not receiving state compensation until after death], Website van phong Luật sư Trương Tín, 31/10/2012 <<http://www.luattruongtin.com.vn/home/Chet-van-chua-duoc-boi-thuong-oan-sai.2964.html>>

<sup>581</sup> *Report 300*, above n 305.

<sup>582</sup> The present secondary legislations focus on the activities of the state liability. Therefore, the content of these legislation overlap in all the areas mentioned above. Those are only different from the activities. For example:

- *The Joint Circular 19/2010/TTLT- BTP- BTC- TTCP* guiding the implementation of the state liability in administrative activities on 26<sup>th</sup> November 2010;
- *The Joint Circular 24/2011/BTP- BQP* guiding the implementation of the state liability in enforcement of civil judgment on 15<sup>th</sup> December 2011;
- *The Joint Circular 05/2012/TTLT- VKSNDTC- TANDTC- BCA- BTP- MOD- MOF- BNNPTNT* guiding state liability in criminal activity on 11<sup>th</sup> February 2012;
- *The Joint Circular 01/2012/TTLT/TANDTC-VKSNDTC-BTP* guiding the implementation of the state compensation liability in activities of civil proceedings, administrative proceedings on 18<sup>th</sup> September 2012.

At the conference on the preliminary assessment of three year implementation of the SCL, the Minister of Justice commented that:<sup>583</sup>

*Tuy nhiên công tác xây dựng văn bản vẫn còn mắc “bệnh” Luật chờ nghị định, thông tư. Công tác giải quyết yêu cầu bồi thường còn nhiều vấn đề phải “mổ xẻ”. Con số vụ việc mà chúng ta giải quyết được còn xa với công tác thi hành công vụ thực tế của chúng ta. Thủ tục giải quyết bồi thường quá phiền hà.*

[Law making has a ‘disease’ called ‘Laws have to wait for Decrees and Circulars’. The implementation of the SCL continues to have many problems that need to be considered. The disputes settled were much lower compared with our real situation. The state compensation procedure is too onerous.]

He also suggested that:<sup>584</sup>

*Một khi Nhà nước gây thiệt hại cho người dân, tổ chức, doanh nghiệp cần được giải quyết bồi thường cho người dân một cách đàng hoàng, đầy đủ, kịp thời, xác đáng. Không để người dân yêu cầu bồi thường ở vị thế xin- cho. Không được bỏ sót. Đẩy nhanh việc xây dựng ba thông tư liên tịch, đưa ra các giải pháp thiết thực bảo đảm tốt nhất cho quyền lợi của người dân.*

[If the state causes damages to individuals, organisations, and businesses, the state should pay compensation totally, timely, and accurately. The state should not put citizens into a scheme of ‘asking- giving’. The state should not ignore any claim. The state should accelerate the making of the three joint circulars and giving practical solutions to ensure the best protections of the people’s legitimate rights.

In short, the SCL itself has a lot of deficiencies that make the law difficult to enforce. Therefore, as suggested in the previous chapters and once more in this section, the reform of the law is necessary. This will assist in making the law more effectively enforceable.

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<sup>583</sup> Huong Nguyen, ‘Đưa Luật Trách nhiệm bồi thường của Nhà nước vào cuộc sống – Vấn đề còn nan giải’ [Applying the SCL in practice: there is challenging], *People’s newspaper* <[http://www.nhandan.com.vn/mobile/mobile\\_phapluat/mobile\\_thoisu/item/20441002.html](http://www.nhandan.com.vn/mobile/mobile_phapluat/mobile_thoisu/item/20441002.html)>

<sup>584</sup> Ibid.

#### 6.4.2. Inadequate publication of and education about the SCL

Another reason why the implementation of the Law is less than effective is that the people do not know about the Law and therefore do not seek to protect their rights under it.

According to *Report 300*, the publicising of the SCL and educating people about it have not been totally successful. These activities have focused on state officials and not on individuals or organisations. Therefore, after three years, there were many individuals and businesses organizations unaware of their rights under the SCL, or how to exercise them.

The results of an investigation by the Department of State Compensation in 2012 showed that: in the land sector, 16% of people did not know about the SCL, and in the field of enforcement of civil judgments, this proportion reached 20%.<sup>585</sup>

Moreover, there are not only citizens but also many officials who do not know about the SCL. The Report of the MOJ found that many ministries at the central provincial branch and local levels faced embarrassing realities in dealing with compensation. Remarkably, some agencies were still applying previous laws such as *Decree 47* and *Resolution 388* to resolve compensation issues instead of applying the provisions of the SCL.<sup>586</sup>

The Director of the Department of State Compensation, Mr Nguyen Thanh Tinh, also confirmed that the publicising and education activities associated with the SCL have been limited. In fact, there are many eligible cases for state compensation but the potential claimants do not know about the law. When they hear about it, the time limitations for claiming have expired.<sup>587</sup> The case of Le Quoc Dzung (Ho Chi Minh City)<sup>588</sup>, in section 6.3.1, indicates clearly that the Law is not known by citizen and they

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<sup>585</sup> Binh Minh, above n 462; *Report 300*, above n 305.

*Report 509/BC-BTNN* on 30/11/2012 on the result of investigation on state compensation settlement in enforcement of civil judgments.

<sup>586</sup> *Report 114*, above n 504; Duc Minh, 'Giải quyết bồi thường Nhà nước: nhiều nơi chưa đọc Luật' [Resolving state compensation: many people have not read the law], *Pháp luật Thành phố Hồ Chí Minh* [*Ho Chi Minh City Law newspaper*], 21/08/2011 <<http://phapluattp.vn/2011082010083212p0c1013/giai-quyet-boi-thuong-nha-nuoc-nhieu-noi-chua-doc-luat.htm>>

<sup>587</sup> Binh Minh, above n 462.

<sup>588</sup> Chết vẫn chưa được bồi thường [not receiving state compensation even after death], Website van phong Luat su Truong Tin, 31/10/2012 <<http://www.luattruongtin.com.vn/home/Chet-van-chua-duoc-boi-thuong-oan-sai.2964.html>>

may miss acting in time to protect their rights. The case of Le Van Dzang, described in section 6.3.5, shows that this claimant faced difficulties because the state officials did not explain to him the effect of the provisions on negotiations.

### **6.4.3. The limited capabilities of state officials and judges**

Chapter 5 referred to the vital roles the agency liable for compensation and the civil courts play in resolving compensation claims. However, the effective enforcement of the SCL is significantly affected by the poor capability of the state officials and the limited independence of the courts.

According to the Department of State Compensation, MOJ, in some sectors, the officials who administrate state compensation do not fully understand the provisions for the conditions and grounds for determining state liability or the settlement procedures or provisions for determining the amount of to be compensated. They may, consequently, be confused over settlement of compensation claims which may often delay the cases. In particular, in many cases, the claimants had criminal suspending decisions or administrative review decisions which quashed lower level administrative decisions. According to the Department of State Compensation, MOJ, these documents are considered as valid documents which affirm wrongful actions by state officials as shown in the case of Nguyen Thanh Trung discussed in section 6.3.1. However, the state agencies liable for compensation did not accept it and they refused to resolve many claim files.<sup>589</sup>

According to statistics of the MOJ, there are 840 state officials working on the resolution of state compensation claims but 803 state officials work concurrently on other issues so that there are only 37 officers working full time in the state compensation field.<sup>590</sup>

The Deputy Director Department of State Compensation stated that in 2012 only 24.17% of the officials surveyed said that they knew about the SCL. Of those, most admitted that while they know something about the Law, what they know is not adequate. Only 26.5% of those state officials surveyed stated that they gave adequate

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<sup>589</sup> Phan Chinh, above n 477.

<sup>590</sup> Binh Minh, above n 462.

guidance to people to complete their claim files. The remainder did not respond or they indicated that they gave inadequate guidance.<sup>591</sup>

As can be seen from these statistics, there appear to be only a small number of state officials who understand the SCL (less than 25%). How can they resolve compensation claims appropriately and accurately? This may explain why, in case of Nguyen Thanh Trung<sup>592</sup>, the Vi Thanh People's Procuracy continued to ask the claimant to negotiate even after the judgment had come into force or, in the case of Nguyen Van Them<sup>593</sup>, how the Hong Ngu District People's Courts refused his claim. In this case, Article 22 of the Law provides that, if the period for issuing the compensation decision has expired but the agency liable for compensation has not issued any compensation decision, the claimant has the right to file a case with the Court.

Notably, even in cases where the officials are from the Procurate or are judicial officials with better knowledge of the law than most, they are still not able to resolve claims accurately. Many may be seeking to cover up poor decision-making and to avoid liability. At the seminar on the limited capacity of civil servants, held in the MOJ on 25<sup>th</sup> December 2012, Mr Nguyen Van Thao from Department 1 of the SPP, said:<sup>594</sup>

*Trong quá trình giải quyết bồi thường cho người bị thiệt hại, thái độ của một số CBCC khi làm việc và thương lượng bồi thường chưa đúng mức, gây tâm lý căng thẳng, không đáng có cho người bị oan. Có trường hợp, trong quá trình thương lượng bồi thường thiệt hại vật chất, cán bộ tư pháp có biểu hiện né tránh, sợ trách nhiệm, đưa ra những yêu cầu thiếu căn cứ buộc người bị oan phải chấp nhận mức bồi thường thấp hơn thiệt hại thực tế hoặc xác định không đúng, không đủ thiệt hại được bồi thường, gây phản ứng gay gắt của người bị oan, dẫn đến thương lượng không thành phải đưa ra Tòa án giải quyết, làm kéo dài việc giải quyết vụ việc.*

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<sup>591</sup> Tọa đàm về thực tiễn áp dụng Luật Trách nhiệm bồi thường của Nhà nước [the workshop on the enforcement of the SCL], *Institute of State and law*, 26/12/2012 <[http://isl.vass.gov.vn/noidung/vanban/Lists/NghienCuuTraoDoi/View\\_Detail.aspx?ItemID=47](http://isl.vass.gov.vn/noidung/vanban/Lists/NghienCuuTraoDoi/View_Detail.aspx?ItemID=47)>

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Binh Minh, above n 462.

<sup>592</sup>Huynh Hai, above n 544.

<sup>593</sup> Binh Minh, above n 462; Nguyen Thi, above n 408.

<sup>594</sup> Tọa đàm về thực tiễn áp dụng Luật Trách nhiệm bồi thường của Nhà nước [the workshop on the enforcement of the SCL], *Institute of State and law*, 26/12/2012 <[http://isl.vass.gov.vn/noidung/vanban/Lists/NghienCuuTraoDoi/View\\_Detail.aspx?ItemID=47](http://isl.vass.gov.vn/noidung/vanban/Lists/NghienCuuTraoDoi/View_Detail.aspx?ItemID=47)>

[During the process of the settlement of compensation for the claimants, some civil servants have negative attitudes in negotiating and resolving compensation which cause stress for the claimants. In some cases, in the process of negotiating compensation for property damage, judicial officers have expressed avoidance, fear of responsibility, unreasonable requirements which force the claimants to accept compensation lower than the actual damage. Also because of attempts to cover up or to avoid liability, the judicial officers have determined damages to be compensated incorrectly and inadequately which cause a backlash by the claimants. Thus where the negotiations are unsuccessful; the claimants take the case to the court which leads it being prolonged.]

Dr Nguyen Hai An, from the SPC, also reflected that in the negotiation of settlement of compensation, some officials and civil servants have not yet fulfilled their responsibilities. They have the wrong perception that they have authority to “consider and resolve” [*xem xét, giải quyết*] rather than to “remedy, compensate or reimburse” [*bồi thường, bù đắp, hoàn trả*].<sup>595</sup>

Mr Vu Van Doan, Deputy Director of Department of Complaints and Denunciations Settlement, General Department of Enforcement of Civil Judgments, MOJ agreed with the above comments. Moreover, he added that in the process of the enforcement of judgments, there are some officials and agencies, some leaders, enforcement officials and civil servants who perform poorly and commit many violations of the law. Many officials take advantage of the deficiencies of the legal system and the lack of consistency expected in the performance of tasks.<sup>596</sup>

Moreover, as shown in Chapter 1 in section 1.2.3 and Chapter 3 section 3.2, the VCP controls state bodies including administrative agencies and the People’s Courts; thus, administrative officials and judicial officials make decisions based on the VCP’s resolutions and even speeches made by party leaders rather than on the law. In addition, the period of judicial appointment is five years under current Constitution and the *Law on Organization of the People’s Court 2002*. Consequently, courts lack independence.

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<sup>595</sup> Lan Huong, ‘Phát sinh bồi thường nhà nước vì yếu kém của chấp hành viên’ [state liability arised because of the low capacity of practical officials], 28/12/2012 <<http://www.baomoi.com/Phat-sinh-boi-thuong-nha-nuoc-vi-yeu-kem-cua-chap-hanh-vien/58/10070904.epi>>

<sup>596</sup> Ibid.

This also influences consideration of wrongdoing by the state officials and also the enforcement of the SCL.

Do Quoc Sam said that:<sup>597</sup>

... for many reasons, the activities of leading (of the Party) and administration (of the state) have overlapped or have been incompatible...  
.The division of missions, responsibilities, and competencies has not been clear and consistent, and has not been much institutionalized. This has led to a bulky, inefficient, and insufficient apparatus.

It can be said that the capability and attitudes of the state officials affects much of the enforcement process. As indicated above in section 6.4.3, if state officials do not understand the law, they might delay cases or make inaccurate decisions. Also, if they have poor attitudes and intentionally avoid compensation, they may have a negative influence on the enforcement of the SCL as illustrated in the case of Huynh Van Sang (Binh Thuan)<sup>598</sup> described in section 6.3.1.

Discussion of ways to improve the quality of state officials took place at the seminar on the reality of and the solutions to remedying the limitation and low capacity of civil servants held in the MOJ on 25<sup>th</sup> December 2012. Many participants suggested that the state should increase the morale of judicial officers and civil servants to enhance their accountability and responsibility. Also, the state should focus on training state officers on the provisions of the SCL, and their skills in settling state compensation. Moreover, the state should have stricter penalties to strengthen the career responsibilities of state officials.<sup>599</sup>

#### **6.4.4. The influence of the legal culture**

Legal culture refers to the attitudes, values, and mentality as well as modes of behaviour of people or actors in government, society and the economy that may be relevant to the

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<sup>597</sup> Do Quoc Sam, “Ban ve lanh dao va quan ly trong cai cachs hanh chinh” [On the leadership and administration in the administrative reform]; Tap chi Cong san [Communist review], 6, 2007 cited in Matthieu Salomon and Vu Doan Ket in Gillegie and Chen above n 6, 138.

<sup>598</sup> Van Doan, above n 170.

<sup>599</sup> Lan Huong, above n 595.

Tọa đàm về thực tiễn áp dụng Luật Trách nhiệm bồi thường của Nhà nước [the workshop on the enforcement of the SCL], Institute of State and law, 26/12/2012

<[http://isl.vass.gov.vn/noidung/vanban/Lists/NghienCuuTraoDoi/View\\_Detail.aspx?ItemID=47](http://isl.vass.gov.vn/noidung/vanban/Lists/NghienCuuTraoDoi/View_Detail.aspx?ItemID=47)

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operation of the law and the legal system. In every country, legal culture permeates the process of the legal system and legal enforcement.<sup>600</sup>

Vietnam's history of Confucian morality, colonialism, a long period of war, and regionalism, all impact on the Soviet model of dispute resolution which it has adopted and which is now being adapted under the reform process.<sup>601</sup> This legal culture has a significant impact on the enforcement of the law in general and especially the enforcement of the SCL which impacts on the role of state and judicial officials and on politics.

Firstly, people continue to try to avoid dealing with state officials. This is a last resort because people do not trust the administrative and legal systems. Playing on the sound and meaning of words, Vietnamese people say that: "*hành chính tức là hành dzân là chính*" [administration means maltreating people]. Other popular sayings also are unflattering in describing the relationships between officials and people: "*dzân sợ quan như sợ cọp*" [people are afraid of the mandarin as they are afraid of the tiger], "*cướp đêm là giặc, cướp ngày là quan*" [the night bandits are genuine bandits, the daylight bandits are the court mandarins] and "*đèn trời thấp bằng mỡ dzân*" [the lamp of the mandarin is lit by fat from the body of the citizens].<sup>602</sup> Moreover, citizens do not have sufficient belief in the legal and judicial systems to turn to the law and legal institutions to resolve conflicts. People do not expect to settle their disputes in court as a traditional proverb warns: "*vô phúc đáo tụng đình*" [try not to go to court].<sup>603</sup> These attitudes partly explain why there were no cases in many sections and provinces even though wrongful actions had occurred as conceded in the MOJ in *Report 300*. A number of writers on the contemporary Vietnamese legal system claim that there is a low level of trust in laws, lawyers and courts.<sup>604</sup>

Vietnamese continue to live their lives and do business by relying on personal connections and social networks. They resolve disputes through informal mediation, attaching more importance to sentiment and reason than to law in regulating human relationships.<sup>605</sup> That is another reason why claiming compensation from the state

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<sup>600</sup> Gillespie and Chen, above n 6, 19.

<sup>601</sup> Tim Lindsey (ed), *Law reform in Developing and Transitional States* (Routledge, 2007) 153.

<sup>602</sup> Mathieu and Ket, above n 91, 148.

<sup>603</sup> Ibid 20.

<sup>604</sup> Salamon, Vu and Nicholson cited in Gillespie and Chen above n 6.

<sup>605</sup> Gillespie and Chen, above n 6, 20-21.

seems to be unfamiliar to Vietnamese people. They often think that they will lose if they sue the state agencies or state officials as the proverbs “*lấy trứng chọi đá*” [egg against rock] or “*con kiến mà kiện củ khoai*” [an ant sues a sweet potato] indicate.

In addition, according to Dao Duy Anh, a historian and social scientist, Vietnamese culture is based on morals and relationships rather than on law “*Văn hóa nước ta lấy tình cảm làm bản vị.*”<sup>606</sup> [The moral is the foundation of Vietnamese culture]. Many Vietnamese proverbs show this respect for virtue; for example “*Đã đưa đến trước cửa công/ Ngoài thì là lý nhưng trong là tình*” [Resolving the disputes in the state agencies/ The Law is cited but in fact morals are used] or “*Một trăm cái lý không bằng một tý cái tình*” [One hundred laws and evidence are less than one relationship or emotion]. This ensures that law is not often decisive. They are seen as being flexible state officials trying to bend the law to get results. This explains why Vietnamese law provides time limitations but state officials often do not comply with them. This may also answer the question of why, although the SCL provides for reimbursement by officials, in practice no-one has been required to make a repayment.

Moreover, as a result of thousands of years of living in rural, agricultural communities, two characteristics of Vietnamese culture and morality have been established: localism and familism.<sup>607</sup> Traditional culture lacks a notion of public interest and prevents egalitarian relationships within the state apparatus and between the officials and citizens. People see obtaining services as a fight or as a request for a personal favour, instead of seeing them as a request to respect their “rights”.<sup>608</sup> These practices give the impression that state-citizen interaction functions like a family business.<sup>609</sup> This also influences the consideration of the wrongful actions by state officials. They often have close relationships with their supervisor and often exchange gifts or other benefits. Indeed, this means that the officials protect each other’s evasions and avoidance attitudes.

In short, the influences of Confucianism, colonisation and the adoption of a Soviet style legal system which emphasized a lesser role for law and a greater role for

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<sup>606</sup> Dao Duy Anh, *Việt Nam Văn hóa sử cương*- xuất bản năm 1938 [Vietnamese cultural history] 324.

<sup>607</sup> Ibid 321; *Thực trạng nền Văn hoá pháp lý Việt Nam* [the Vietnamese cultural reality], 24/4/2012

<[http://moj.gov.vn/ct/tintuc/Lists/Nghin%20cu%20trao%20i/View\\_Detail.aspx?ItemID=4483](http://moj.gov.vn/ct/tintuc/Lists/Nghin%20cu%20trao%20i/View_Detail.aspx?ItemID=4483)>

<sup>608</sup> Mathieu and Ket, above n 91, 150.

<sup>609</sup> Ibid.

mediation, for the community and not for the individual, still mould Vietnam's contemporary society. This is certainly reflected in the enforcement of the SCL. There is a need to strengthen the positive values of a legal culture in order to build an environment respectful of the law by educating the people more about the role of law, including the SCL.

### 6.5. Interview analysis

Enforcement of the Law was a significant part of the interviews which asked the interviewees about the effectiveness of the SCL, the main causes of its effectiveness or ineffectiveness, and suggestions for its future development and enforcement.

On the effectiveness of the SCL, most interviewees from both the private sector and public sector responded that the enforcement of the SCL is not yet effective. One officer, from the SPP, said that:

*Cùng với cải cách hành chính và cải cách tư pháp, việc giải quyết khiếu nại tố cáo của cơ quan Nhà nước có thẩm quyền có tiến bộ, tuy nhiên vẫn còn chậm trễ. Sau khi Luật Trách nhiệm Bồi thường của Nhà nước được ban hành, người dân đã quan tâm hơn đến trách nhiệm bồi thường của Nhà nước. Tuy nhiên, việc thực thi luật vẫn chưa đạt kết quả khả quan vì độ ngũ công chức có trách nhiệm giải quyết bồi thường Nhà nước còn thiếu, chất lượng thẩm phán và công chức hành chính ở Việt Nam còn thấp.*

[Because of administrative reform and legal reform, the response of the government to citizens' complains is more effective but is still very slow. After the SCL was enacted, people cared more about state liability and more compensation was paid. However the enforcement of the law is not really positive as the number of officers working on it is very small and the quality of the judges and administrative officers is not high.]

Another officer from the Department of the State Compensation considered that:

*Luật Trách nhiệm bồi thường Nhà nước hiện nay chưa được thực thi một cách có hiệu quả bởi vì một số lý do: Luật mới được ban hành chưa lâu; Cục Bồi thường Nhà nước là cơ quan quản lý Nhà nước về bồi thường mới được thành lập; đội ngũ cán bộ công chức giải quyết bồi thường mới được tập huấn, đào tạo; cơ chế giải quyết bồi thường rất phức tạp; hoạt động giáo dục tuyên truyền pháp luật chưa tiếp cận được tới từng người dân.*

[The SCL had not yet been enforced effectively as it is a relatively new law, the Department of State Compensation has just been established, the officers who work on state compensation matters have just been training, the compensation mechanism has just been widened and is complex, and the education activities have not spread to every citizen]

Also, one researcher responded that:

*Mặc dù Luật Khiếu nại và Luật Tố cáo đã quy định cụ thể về thời hạn giải quyết khiếu nại, tố cáo nhưng trên thực tế việc giải quyết thường chậm trễ. Điều này có ảnh hưởng tới việc thực thi Luật Trách nhiệm Bồi thường của Nhà nước. Bên cạnh đó bản thân quy định của Luật Bồi thường Nhà nước cũng làm khó cho người bị thiệt hại trong việc yêu cầu giải quyết bồi thường. Thủ tục giải quyết yêu cầu bồi thường Nhà nước rất phức tạp. Việc xác định cơ quan chịu trách nhiệm bồi thường cũng không đơn giản. Vì vậy quá trình giải quyết bồi thường Nhà nước thường kéo dài.*

[Although the Law on Complaint and the Law on Denunciation provides clearly for the periods to resolve complaints and denunciations but in fact there is often delays in responding and answering. This has a negative impact on the enforcement of the SCL. Besides, the enforcement of the SCL is ineffective due to its provisions creating difficulties for claimants in pursuing their rights. The procedure for claiming is complex and it is difficult for claimants to determine the agency liable for compensation to which send their claim file. It causes delays in the process].

One private lawyer stated that:

*Luật Trách nhiệm Bồi thường của Nhà nước và các văn bản pháp luật khác ra đời như Luật Khiếu nại và Luật Tố cáo là một bước tiến của pháp luật Việt Nam. Những văn bản này góp phần nâng cao trách nhiệm của cán bộ, công chức Nhà nước. Cơ quan điều tra và Viện Kiểm sát đã thận trọng hơn trong việc bắt, tạm giam và tạm giữ người. Tuy nhiên, việc thực thi những văn bản này nhìn chung vẫn còn nhiều hạn chế. Số lượng các vụ án được giải quyết vẫn còn thấp hơn nhiều so với thực tế. Có nhiều nguyên nhân dẫn tới những hạn chế này ví dụ như cơ chế thực thi pháp luật của Việt Nam còn yếu, tuyên truyền giáo dục pháp luật còn nhiều hạn chế và không mang tính thực tiễn cao, hệ thống pháp luật chồng chéo, phức tạp và không ổn định.*

[The SCL and other new Laws such as the Law on Complaints and the Law on Denunciations are really progressive; they are the tools which boost the

accountability of the state officers. The police and procuracy are more careful in arresting, and detaining people. However, the enforcement of the law generally in Vietnam is not good. The number of case accepted and settled is less than existing cases. There are many reasons for such limitations such as the Vietnamese legal mechanisms are exercised badly, legal education is weak with little practicality, and the legal system is overlapping, complex and unstable.]

Moreover, many interviewees in both the private sector and the public sector agreed that the enforcement of the SCL faces similar problems in its enforcement as do other laws do in Vietnam which are affected by corruption, the lack of independence of the courts, by political issues and the general legal culture. To enhance the effectiveness of enforcement of the SCL, two proposals were suggested by a number of the interviewees:

Firstly, in the immediate future, the secondary legislation should be made comprehensive to guide the application of the SCL in practice. The law should be publicised and both state officials and citizens should be educated about the law and the secondary legislation so that these can be fully understood by all concerned. Furthermore, training in the skills and knowledge about the settlement of compensation files should be conducted regularly to improve understanding and improve the competence of officials working on resolving compensation claims as the issues are complex and difficult across a legal field which consists of numerous laws and procedures.

Secondly, in the future, the SCL should be amended and modified. The inappropriate provisions should be removed and any unclear and inconsistent provisions should be amended. The procedure should be simplified with sufficient penalties in place to prevent their infringement. Moreover, supervision and assessment of the enforcement of the law should be conducted regularly to evaluate its effectiveness in order to promptly adjust it if required. There is also the need for institutional reform to ensure the independence of the courts and the quality of other institutions.

Other suggestions were made by several interviewees. For example, Vietnam should: establish a constitutional court with the authority to annul laws inconsistent with the constitution and to reverse unlawful actions taken under them to ensure a uniform legal system as well as the effective implementation of the laws; enact legislation on

freedom of information; improve the qualification of state officials; educate citizens and public officials to enhance the accountability of public officials; and prevent corruption by improving anti-corruption laws and by increasing the salaries of state officials.

## **6.6. Conclusion**

In conclusion, this chapter answers research question 4. It indicated that after three years of implementation, with some achievements in the enforcement of SCL there are many limitations which need to be improved. The chapter argues that despite a great deal of guidance, the procedure does not appear to be sufficient. Claimants have found it difficult to protect their rights because of the constraints on the grounds of state liability, the time within which claims are to be made, and the frustrating procedures. It is challenging to determine and calculate the damages, and the compensation awarded is often very small due to the inappropriate provisions stipulating the method for calculating damages. Although changes have been made to the previous law, it is still difficult to determine the agency liable for compensation because of the unclear provisions on this matter as well as the tendency by state officials to cover up their actions and avoid liability. The settlement of inadequate compensation claims and poor enforcement of the judgments are the results of the complex procedures and the lack of sufficient strict penalties under the law.

It can be argued that the fundamental reason for the ineffectiveness of the SCL is the poor quality of the SCL itself. In addition, the low capabilities of the state officials and judges, and the lack of independence of the courts have created delays and produced poor settlement decisions and judgments. Last, but not least, Vietnamese culture has also significantly influenced the enforcement of the SCL. All of the above problems can only be resolved gradually in conjunction with other changes and in the reform process (legal reform, administrative reform, judicial reform, educational reform and economic reform) conducted by the VCP and Vietnamese Government.

## **Chapter seven: A comparative perspective - State liability for compensation in Chinese law**

### **7.1. Introduction**

This chapter critically compares the legal framework for state liability for compensation in the Chinese and Vietnamese jurisdictions. Its purpose is to determine the desirability and feasibility of applying Chinese legal experiences to Vietnamese conditions where they may improve the effectiveness of the SCL. It focuses on related themes in the research questions and analysed in the previous chapters, namely: the scope of the laws; the grounds for state liability; the method for calculating damages; the responsibility of state officials; and, procedures and mechanisms for the settlement of compensation claims. This will seek to establish both the weaknesses and strengths of the law and enforcement in both jurisdictions and more importantly establishes the basis for a number of proposals for improvements to the Vietnamese SCL.

### **7.2. Justification for the comparison**

As shown in Chapter 1 in the literature review and conceptual framework section, state liability for compensation is recognised in many countries but in different forms. Provisions imposing liability on the state have developed in civil, socialist and common law systems. These are seen in the laws of many jurisdictions.<sup>610</sup> However, because of the limited resources for this project, China was selected or it appeared to be the most appropriate jurisdiction to compare with Vietnam.

Vietnam and China have many characteristics in common. Firstly, both countries have a tradition of Confucianism, socialist ideology and an ‘anti-colonialist scepticism’ that has led to a different understanding of the role of law in society. These factors make it difficult for them to set clear boundaries which distinguish between law and politics, individual and community interests and to the public and the private.<sup>611</sup> These may influence the relationship between the state and individuals which affects the content of any policies and laws on state liability for compensation. Secondly, both Vietnam and China are single-party states in which the principle of ‘the leadership of the Communist Party’ is still supreme. The introduction of a functional separation between party and

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<sup>610</sup> Dari-Mattiacci et al, above n 2, 13-14; Lin, above n 1.

<sup>611</sup> Day, above n 160.

state organs has not weakened or diminished the parties' authority and influence.<sup>612</sup> Therefore, state officials' activities may be affected by party influence and decisions leading to unequal treatment of citizens.

Both China and Vietnam inherited from the Soviet Union the idea that the constitution coordinates rather than checks or constrains the power of the leading party and the state. They also inherited "the unity of powers" doctrine that justifies the concentration of power in the National People's Natural Congress (in the case of China) and the NA (in the case of Vietnam).<sup>613</sup> At present, China and Vietnam remain socialist countries with socialist civil law infrastructures based on the Soviet model. They have no strong tradition of judicial independence and no constitutional courts.<sup>614</sup> They share similar court structures and a procurate also based on a Soviet model. They experience weakness in enforcing of court judgments. They both struggle with corruption, debt-ridden state enterprises and vast black markets. All of these may cause an impact on judicial decision-making as well as on any enforcement process, especially in implementing a law on state liability.

Both China and Vietnam have actively pursued an agenda of economic and legal reforms in the last three decades. The economic reforms included, as one of their most crucial components, the opening up of the country to foreign trade and investment and seeking integration with the global market economy. Law, including the making of domestic law and the assumption of the treaty obligations under international law, has played an important role even if it has only been a signalling of these major developments. At the same time as encouraging the influx of foreign capital, the two countries have also fostered the growth of domestic business and the private sector of the economy. These economic and legal reforms, started by both governments, have: emphasized the importance of law; led to the enactment of numerous laws and regulations; promoted a socialist law-based state and public administration marked by the rule of law; and, further developed the court systems, legal professions, legal aid and legal education.<sup>615</sup>

The strong resemblance of the political and legal systems can be seen in the similar statements regarding the right to complain, denounce and to compensate in

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<sup>612</sup> Gillespie and Chen, above n 6, 78.

<sup>613</sup> Ibid 17.

<sup>614</sup> Day, above n 160.

<sup>615</sup> Ibid.

Article 41 of the Constitution of the People Republic of China 1982. Article 92 of the Constitution of the People Republic of China 1954 was in similar terms. Vietnam and China have differed in their reform policies and their performance implementing them. China progressed earlier and more rapidly than Vietnam with economic and legal reforms. It adopted a SCL in 1994 when it joined the worldwide legal trend by establishing legal rules for compensating victims of injuries caused by government actions.<sup>616</sup> This was 15 years sooner than Vietnam. The Chinese SCL was intended to guarantee the rights of victims of unlawful government acts by giving them the right to obtain state compensation from the state and to encourage procurators and other officials to carry out their duties lawfully.<sup>617</sup> According to Hand, when the law was passed, it represented a significant step towards curtailing official abuse and protecting human rights. It was claimed to establish clearly defined rights to compensation and a specific process to challenge procuratorial misconduct by a review of procuratorial acts by a state organ other than the procuratorcy.<sup>618</sup> Unlike Vietnam, the Chinese procuracy retains the ombudsman style functions in respect of government agencies and officials of the Soviet model on which it is based.<sup>619</sup>

There were many complaints that the procedures under the new law were too complex. Thus, in 2009 courts dealt with 1,840 cases, in which compensation was paid to less than one third.<sup>620</sup> Since the 16th National Congress of the Communist Party of China in 2002, China had been placing greater emphasis on human rights protection. China first included Article 33 on the State respecting and preserving human right in its Constitution in 2004,<sup>621</sup> marking a milestone in China's human rights development was underpinned by its first action plan for the period 2009- 2010.<sup>622</sup> As a result, in 2010 the Chinese law on state liability for compensation was substantially amended. The amendments of the SCL were intended to improve law to better protect human

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<sup>616</sup> Keith Hand, 'Watching the Watchdog: China's State Compensation Law as a Remedy for Procuratorial Misconduct' (2000) 9 *Pacific Rim Law and Policy Journal* 95.

<sup>617</sup> *Ibid.*

<sup>618</sup> *Ibid.*

<sup>619</sup> *The Organic Law of the People's Procurates 1979* (China) Art 6.

<sup>620</sup> 'China Adopts Amended State Compensation Law to Better Protect Human Rights' <<http://english.peopledaily.com.cn/90001/90776/90785/6968844.html>>

<sup>621</sup> *The Constitution 2004* (China) Art 33.

<sup>622</sup> National Human Rights Action Plan of China (2009-2010) <[http://www.china.org.cn/archive/2009-04/13/content\\_17595407.htm](http://www.china.org.cn/archive/2009-04/13/content_17595407.htm)>

rights,<sup>623</sup> to promote judicial reform<sup>624</sup> and the rule of law<sup>625</sup>. In particular, the amendments of the SCL were intended to set up offices responsible for state compensation; open up the channels for claims; expand the scope of compensation; specify the burden of proof; add compensation for psychological injury; increase compensation levels, and guarantee the timely payment of compensation.<sup>626</sup> This was intended to further improve the system of administrative and criminal compensation.<sup>627</sup> They represent reforms of many problems found with the present Vietnamese SCL. China's 15 years of additional experience both in law and practice provides a valuable comparison with Vietnam and may provide examples of problems to be avoided and positive provisions and practices to be adopted.

### **7.3. Similarities between Vietnamese and Chinese SCL**

#### **7.3.1. The background to state liability**

As China and Vietnam have undertaken economic reforms based on a mixed-market economy within a socialist framework, they have begun to transform the role of law within their political systems, each introducing a constitutional commitment to ruling the country by law and to the establishment of a socialist state based on the rule of law.<sup>628</sup> Although the definition of 'rule of law' is still subject to debate, it is widely agreed that a rule-of-law society is one in which human rights are respected and the law is applied equally to everyone. It appears that the similarities between the legal development in China and Vietnam are substantial. Although the relatively minor differences do not imply different development trajectories, there is a suggestion that in order to pursue reform in both jurisdictions, the focus should be on developing legal institutions as well as protecting human rights.<sup>629</sup> The emergence of specific laws on the

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<sup>623</sup> 'Top legislator says China improves law to protect human rights' Monitoring Asia Pacific, The British Broadcasting Corporation, 8 March 2013; Shen Tong, 'Human rights progress as a matter of fact' *China Daily-Hong Kong Edition*, 16 February 2013.

<sup>624</sup> Judicial reform in China, Information Office of the State Council, The People's Republic of China, *China Daily-US Edition*, 10 October 2012 <<http://0-global.factiva.com.library.vu.edu.au/ha/default.aspx>>

<sup>625</sup> China's Efforts and Achievements in Promoting the Rule of Law (21), Xinhua's China Economic Information Service, 28 February 2008 <<http://0-global.factiva.com.library.vu.edu.au/ha/default.aspx>>

<sup>626</sup> Chinese SCL fixes the level of compensation based on the average annual salary.

<sup>627</sup> China establishes state compensation system: white paper, People's Daily Online, 09/12/2012 <<http://english.people.com.cn/90785/7970531.html>>

Judicial reform in China, above n 625.

<sup>628</sup> Gillespie and Chen, above n 6, 157.

<sup>629</sup> Ibid 19.

issue in both China and Vietnam aims to achieve these goals. The SCL of both jurisdictions recognises the state is liable for compensation when its officials cause damage when conducting official duties. This is expressed in both the title and content of the two laws.

Articles 1 and 2 of the Vietnamese SCL provide that:

*Luật này quy định trách nhiệm bồi thường của Nhà nước đối với cá nhân, tổ chức bị thiệt hại do người thi hành công vụ gây ra trong hoạt động quản lý hành chính, tố tụng, thi hành án; thủ tục giải quyết bồi thường thiệt hại; quyền, nghĩa vụ của cá nhân, tổ chức bị thiệt hại; kinh phí bồi thường và trách nhiệm hoàn trả của người thi hành công vụ đã gây ra thiệt hại.*

*Cá nhân, tổ chức bị thiệt hại về vật chất, tổn thất về tinh thần (sau đây gọi chung là người bị thiệt hại) trong các trường hợp quy định tại Luật này thì được Nhà nước bồi thường.*

[This Law provides for the State's liability to pay compensation to individuals and organizations suffering from damage caused by officer-duty [Sic] performers in administrative management, legal proceedings and judgment enforcement activities; compensation procedures; the rights and obligations of individuals and organizations suffering from damage; compensation funds and the reimbursement liability of officer-duty performers who have caused the damage.

Individuals and organizations suffering from material damage and/or mental sufferings (below collectively referred to as sufferers) in cases provided by this Law are eligible for compensation by the State.]<sup>630</sup>

As indicated above, like Vietnam, the right to compensation including state compensation is acknowledged in the Chinese Constitution, the basic law. Article 41 provides that:

Citizens of the People's Republic of China have the right to criticize and make suggestions regarding any State organ or functionary. Citizens have the right to make to relevant State organs complaints or charges against, or exposures of, any State organ or functionary for violation of law or

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<sup>630</sup> This is an official translation available at: [http://www.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10465](http://www.moj.gov.vn/vbpg/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10465).

dereliction of duty; but fabrication or distortion of facts for purposes of libel or false incrimination is prohibited.

The State organ concerned must, in a responsible manner and by ascertaining the facts, deal with the complaints, charges or exposures made by citizens. No one may suppress such complaints, charges and exposures or retaliate against the citizens making them.

Citizens who have suffered losses as a result of infringement of their civic rights by any State organ or functionary have the right to compensation in accordance with the provisions of law.

The Chinese SCL affirms the liability of the state. The Chinese law reflects a better developed style of drafting legislation which is also easier for both officials and citizens to read. It starts with a statement of its purpose:<sup>631</sup>

The State Compensation Law of the People's Republic of China (the Law) is formulated in accordance with the Constitution with the purposes of safeguarding the rights of citizens, legal persons and other organizations entitled to State compensation in line with law, and promoting the execution by State organs of their functions and powers in line with law.

In terms of pursuing the future development of justice and the rule of law, similarly to Vietnam, many scholars have observed and evaluated China's reforms. Fu Hualing states that:<sup>632</sup>

Law did not only represent the new normative order, but a new way of thinking, a new religion. Through legalization, the Party-State aimed at achieving a framework in which every social problem required, and was provided with, a new legal solution. ... Law was replacing the failed political ideology to legitimate the Party- State.

Gillespie and Chen also conclude that "Indeed, the idea that increasing reliance on legality may be understood at least partly as a device to bolster the communist regime's legitimacy in China and Vietnam".<sup>633</sup> Moreover, some authors argue that in Vietnam

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<sup>631</sup> *The Law on State Compensation 1994 (amended in 2010)* (China) Art 1.

<sup>632</sup> Fu Hualing, "Access to justice in China: Potentials, limits, and alternatives" in Gillespie and Chen above n 6, 12.

<sup>633</sup> Gillespie and Chen, above n 6, 12.

and China the law promotes only economic but not civil or human rights development.<sup>634</sup>

As shown in Chapter 1, according to Peerenboom and other authors, the rules of law in Vietnam and China may develop in their own ways to fit with the countries' context. It is consistent with both Asian models and political theories. The concepts of the rule of law in China and Vietnam have characteristics which distinguish them from Western models.

Therefore, it is possible that Vietnam and China may develop their economy and economic institutions before further developing democracy and protecting human rights.

It can be argued that, in the reform process, Vietnam and China have not only developed their economies, but have also paid close attention to protecting human rights and promoting the state's institutional capacity to ensure this. In addition to their constitutional provisions, the enactment of the legislation on state liability confirms that the purpose of the law is to protect the rights of citizens, legal persons and other organizations. It contradicts claims that the Vietnamese and Chinese legal reform is only intended to legitimise party rule. It is also seen that the SCL imposes liability on officials who engage in wrongful actions and will restrict their abuse of power and improve their overall capabilities.

Indeed, the development of China and Vietnam in recent years and their legislation on state liability strengthens Peerenboom's argument about the reform processes in both China and Vietnam. The initial achievements of legislation and its enforcement are shown in Chapters 4 and 6. In this chapter, the achievements of the Chinese law are considered. They confirm that the overall purpose of the reform process and its continuing development is to support the market economy, establish the rule of law, and better protect human rights.

As indicated in Chapters 3 and 4, theories of deterrence and also psychology show that no government or state wants to experience many wrongs and no-one wants to be condemned as a bad officer. The laws and state liability thus enhance the institutions which can support the further development of the rule of law in the two countries. When assessing the role of the Chinese law in the reform process, Ma Huaide, vice-president

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<sup>634</sup> Ibid 21.

of the Chinese University of Political Science and Law and the Administrative Law Association, confirmed that the Chinese SCL is considered to be a major step towards the rule of law: "One of the most urgent works today is to strengthen the State compensation mechanism to better protect citizens' legal rights and interests as part of China's overall effort to improve the legal system and rule of law."<sup>635</sup> Jiang Bixin, vice-president of the Supreme People's Court of China, also observes that "We can't deny it was a major step in the country's legal system. It has helped better protect many people's rights and interests and get them proper compensated [sic] too".<sup>636</sup>

It can be seen that the Chinese efforts to improve the state compensation mechanisms show the government's desire to adapt itself to changing social and political situations. Ma Huaide states that "It's important that the powers exercised by government agencies and officials are restricted according to law." Only then can a society based on the rule of law be established.<sup>637</sup>

Although both jurisdictions have confirmed the liability of the state for compensation resulting from the actions of state officials, the Chinese law, as noted, states its purpose at the beginning. As shown in the previous chapter, although these purposes are not stated in the Vietnamese SCL, its purpose is to protect the rights of citizens and organizations and to increase the accountability of state officials, thereby developing a state based on the rule of laws. Obviously, to strengthen its aims and ensure their correct understanding, the Vietnamese SCL should provide a clear statement of its purpose as seen in the Chinese SCL.

### **7.3.2. Recognising state liability**

In respect of the liability of the state, Article 2 of the Chinese SCL shows similarities with the Vietnamese law:<sup>638</sup>

Where State organs or State functionaries, in executing their functions and powers, infringe upon the legitimate rights and interests of the citizens, legal persons and other organizations, thereby causing damage to them, the

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<sup>635</sup> Xie Chuanjiao, Justice for those wronged by the judiciary, China Daily, 30 April 2008 <<http://0-global.factiva.com.library.vu.edu.au/ha/default.aspx>>

<sup>636</sup> Ibid.

<sup>637</sup> Ibid.

<sup>638</sup> This is official translation available at:

<[http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content\\_21905705.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content_21905705.htm)>

victims shall have the right to State compensation in accordance with the Law. The organs liable for compensation as stipulated herein shall discharge their duties of compensation in a timely manner in accordance with the Law.

Accordingly, the Chinese legislation establishes both the right to compensation and the obligation of the relevant state body to pay it in a timely way. To execute these aims, China has established a state compensation system to compensate citizens, legal persons or other organizations if their lawful rights and interests are damaged by state organs or their functionaries in the course of enforcing their power in accordance with the law.<sup>639</sup> However, this system may not work successfully as is evident from the ineffective enforcement discussed below.

Although the damage may be caused by the wrongful action of individuals, both jurisdictions recognise that the liability belongs to the state. This acknowledgment obviously limits the power of the state. It influences the perception mentioned above in 7.3.2 – that legislation often gives power to the state without limiting that power. The function of the state is now not only to monitor, but also to serve. These provisions are also evidence of a new approach to the pursuit of justice in Vietnam and China. They change former perceptions of the unequal relationship between the state or the government and the people in their long histories and cultures. These laws imply that the state is on an equal footing with the individual and other organisations; hence, if the state causes damage, the state will be liable to pay compensation just as others are liable.

In short, the acknowledgment of state liability for compensation, at least in the law in the books, is a progressive step in both Vietnam and China which are concerned with developing states based on the rule of law. Although there are limitations on enforcement, as demonstrated above in the case of Vietnam and referred to below in the case of China, these laws indicate the direction that these states intend to take.

### **7.3.3. Limitations in listing the wrongful actions**

As pointed out in Chapter 4, the economic capacity of the Vietnamese government has been used as a reason to limit the scope of the state's liability. The Chinese law is similar. Both Vietnam and China do not recognise compensation for all wrongful actions of state officials. Both Laws limit the scope of the state's liability by listing

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<sup>639</sup> Chinese White paper, Judicial reform, October 9<sup>th</sup> 2012.

specific wrongful actions that warrant compensation. For example, Article 13 of the Vietnamese SCL lists 13 wrongful administrative actions; and Article 26 lists six wrongful actions in criminal proceedings; and, Article 28 lists four wrongful actions in civil and administrative proceedings. In the Chinese SCL, despite having the same method of determining the scope by listing administrative wrongful actions which may fall into the administrative field, China has different activities that the country may want to improve and focus on resolving. In particular, the Chinese SCL, in Article 3 lists the following five administrative wrongful actions:<sup>640</sup>

The victim shall have the right to compensation if an administrative organ or its functionaries, in executing their administrative functions and powers, commit any of the following acts infringing upon the right of the person of a citizen:

1. Detaining a citizen in violation of the law or unlawfully taking compulsory administrative measures in restraint of his personal freedom;
2. Unlawfully taking a citizen into custody or depriving him of his right of the person by other unlawful means;
3. Using or instigating or indulging violence such as beating one up [sic] and abuse, thereby causing bodily injury or death to a citizen;
4. Unlawfully using weapons or police restraint implements [sic], thereby causing bodily injury or death to a citizen; or
5. Other unlawful acts causing bodily injury or death to a citizen.

Similarly, in criminal compensation, according to Article 15 of the Chinese SCL, five criminal wrongful actions fall within the scope of state liability:

The victim shall have the right to compensation if an organ in charge of investigatory, procuratorial, judicial or prison administration work, or its functionaries, infringe upon his right of the person in the exercise of its functions and powers in any of the following circumstances:

- (1) Wrong [sic] detention of a person without incriminating facts or proof substantiating a strong suspicion of the commission of a crime;
- (2) Wrong arrest of a person without incriminating facts;

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<sup>640</sup> This is official translation available at:  
<[http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content\\_21905705.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content_21905705.htm)>

- (3) Innocence is found in a retrial held in accordance with the procedure of trial supervision, but the original sentence has already been executed;
- (4) Extortion of a confession by torture or causing bodily injury or death to a citizen by using or instigating the use of violence such as beating one up [ sic]; or
- (5) Causing bodily injury or death to a citizen by the unlawful use of weapons or police restraint implements.

As can be seen from this text and Chapter 4, the Chinese provisions on the scope of criminal wrongful actions are clearer and better ruled than the Vietnamese SCL. The fourth and fifth grounds may be seen as a very direct acknowledgement of problems in the Chinese criminal justice system. The Vietnamese law has overlapping and unclear provisions, leading to greater difficulties of implementation in practice.

The scope of state liability, although it is still narrow, was expanded in an amendment of the Chinese CSL in 2010 by recognising state negligence. In the previous law, state compensation would be granted only when state organs violated the law. Thus, recovery of damages was not possible if the conduct of state personnel was negligent.<sup>641</sup> Under the amended Law the act which is the subject of complaint need not be unlawful; it can be any act that violates the victim's legitimate rights and interests. At present, according to an administrative law expert, Professor Ma Huaide, under the Chinese SCL, citizens who are harmed through state negligence can claim compensation directly from the state.<sup>642</sup> Professor Xin He of the University of Hong Kong sees this amendment as noteworthy because it extends the possibility of controlling administrative conduct by statute. He stated that the provision strengthens the Law by authorizing suits by citizens alleging violation of their rights by government agencies under certain circumstances. He also notes that stronger administrative laws

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<sup>641</sup> Xinhua writers Cheng Zhuo, Li Huizi, China adopts amended state compensation law to better protect human rights, China News, 30/4/2010  
<[http://news.xinhuanet.com/english2010/china/2010-04/30/c\\_13272969.htm](http://news.xinhuanet.com/english2010/china/2010-04/30/c_13272969.htm)>

<sup>642</sup> Professor Ma Huaide of the China University of Politics and Law. The Wall Street Journal Online's China Real Time Report blog at [blogs.wsj.com/chinarealtime](http://blogs.wsj.com/chinarealtime); Stanley Lubman, a long-time specialist on Chinese law, teaches at the University of California, Berkeley, School of Law and is the author of 'Bird in a Cage: Legal Reform in China After Mao' (Stanford University Press, 1999).

and procedures have also broadened the basis for controlling provincial and local governments.<sup>643</sup>

These efforts to improve the state compensation mechanisms show the Chinese government's desire to adapt itself to changing social and political situations. Ma Huaide writes "It's important that the powers exercised by government agencies and officers are restricted according to law."<sup>644</sup> Compared with Vietnamese Law, the scope of state liability in Chinese law is narrow. In the Vietnamese SCL, three activities fall within the scope of state liability. They are: administrative decisions, legal proceedings and the enforcement of judgments. Legal proceedings include criminal proceedings as well as civil proceedings and administrative proceedings. Nevertheless, in China, there are only two activities, administrative and criminal proceedings, which fall within the scope of SCL. There is no compensation for wrongful activities in civil proceedings, administrative proceedings or in the enforcement of judgments which are provided for in the Vietnamese SCL.

In short, it can be said that both jurisdictions admit state liability in case of wrongful administrative actions and criminal proceedings.<sup>645</sup> This illustrates that both Vietnam and China are each paying attention to strengthen the administrative and judicial systems by remedying the shortcomings of these two systems. In weak administrative environments and those lacking judicial independence, as mentioned above, those provisions are significant. Jiang Bixin, vice-president of the Supreme People's Court of China, stated that:<sup>646</sup>

The draft amendments are aimed at making more people seek and get State compensation in a wider range of cases. Also, they will prompt government departments to adopt a scientific outlook of development and strictly follow the law and accelerate the country's goal to establish a society governed by law. Moreover, they will offer "people an easier, fairer and more reasonable application procedure to get compensation.

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<sup>643</sup> Xin He, 'Administrative Law as a Mechanism for Political Control in Contemporary China' in Stephanie Balme and Michael W Dowdle (eds) *Building Constitutionalism in China* (Palgrave Macmillan, 2009).

<sup>644</sup> Xie Chuanjiao, above n 636.

<sup>645</sup> *The SCL 2009* (Vietnam) Art 1, 13, 26, 28, 38; *The Law on State Compensation 1994 (amended in 2010)* (China) Art 3, 15.

<sup>646</sup> Xie Chuanjiao, above n 635.

As mentioned earlier, in both Vietnam and China, the respective communist Parties have leading roles which are recognised in the two national constitutions. The party's officers operate as state agencies and are considered to be legal persons. Nevertheless, as in Vietnam, the wrongful actions of a member of the Chinese Communist Party (CCP) do not fall within the scope of state liability. This confirms Salomon's and Vu's argument that "in practice the Party's regulations still trump laws" in Vietnam, and "people cannot legally complain about the party's decisions and regulations". This may also be the case in China where administrative litigation may only be used to challenge state administrative actions but not the CCP's decisions or norms. This policy leads to the conclusion that "much political regulations lies outside the reach of the public law system" in China and Vietnam.<sup>647</sup>

These limitations are argued by some scholars to show that the Party's monopoly over political power limits the development of the rule of law.<sup>648</sup> Cohen suggests that in both China and Vietnam "the Soviet-style Party- State structure ... tightly controls the legal profession, monitoring and often squelching independent efforts to promote law reform. The leadership in both countries is determined to prevent the growth of an autonomous legal profession".<sup>649</sup> Thus, both countries should also limit the abuse of power by party members as well. If Vietnam and China do this, it may decrease any unreasonable interference by a Party member in the affairs of a state official. This also promotes the sufficiency of state institutions, a condition for the success of a state based on the rule of law.

These limitations of the scope of the two laws may also indicate that the reform processes of both China and Vietnam are somewhat experimental. According to Peerenboom, in order to have successful economic development, there may need to be widely accepted restrictions on civil and political rights. Abuse of power may be frequent. Well-intentioned political dissidents, human rights activists and corruption-exposing whistle-blowers may be harassed and persecuted. This causes severe harm to the individuals involved and deters others from pressing for welfare-enhancing reforms. In practice, democratization often results in considerable violence and bloodshed, massive human rights violations, and social instability without reducing poverty or the

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<sup>647</sup> Gillespie and Chen, above n 6, 18.

<sup>648</sup> Ibid.

<sup>649</sup> Jerome A. Cohen, *Introduction to Part V: Legal education and legal profession in China* in Gillespie and Chen, above n 6, 271-276.

building of institutions, and higher standards of living.<sup>650</sup> However, as shown above, the larger aim of both the Chinese and Vietnamese SCL is to protect human rights, and to promote judicial reform and the rule of law in particular and the reform process in general. The experiments of limitation on the scope of state liability may be suitable for societies with low incomes and where modest state budgets make it impossible to develop everything at the same time. However, together with the development of the economy, both countries should pay more attention to human rights and civil rights. According to Stanley Lubman,<sup>651</sup> China's expanding of the rights of its citizens to obtain redress for harms caused by intentional or negligent conduct by government agencies is a significant step, albeit a small one. It is a step in the right direction, with still a long way to go.<sup>652</sup> Therefore, in the future, widening the scope of law should be considered by both Vietnam and China. According to Peerenboom, although supporting restrictions on civil and human rights, he still warns that "there is also a danger that authoritarian rulers will hang on to power too long, or move too slowly on reforms".<sup>653</sup>

#### **7.3.4. Compensation for both mental and physical loss**

As shown, damages and the calculation of damages is the central issue of compensation law. According to the Vietnamese SCL, there are two categories of damages: mental loss and physical loss. The mental loss is remedied by apologies and compensation. Mental loss is compensated in cases where the right to freedom, health, life, dignity and reputation is infringed. There is no mental damage in the case of property infringement. In case of mental loss, the law fixes the amount of money based on the minimum wage, set by the state. Physical loss has to be paid in case of death, physical injury or property damage. For property damage, the compensation includes the return, repair, and the income lost from the use of the property. Damage to property must be remedied based on the clients' evidence of the damage done.

Although there was an acknowledgement of compensation for a person who suffered damage caused by state officials, the former Chinese SCL did not pay

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<sup>650</sup> Peerenboom, above n 108, 36.

<sup>651</sup> Stanley Lubman, *a long-time specialist on Chinese law, teaches at the University of California, Berkeley, School of Law and is the author of "Bird in a Cage: Legal Reform in China After Mao,"* (Stanford University Press, 1999)

<<http://blogs.wsj.com/chinarealtime/2011/01/13/a-step-forward-new-law-expands-government-liability/>>

<sup>652</sup> Ibid.

<sup>653</sup> Gillespie and Chen, above n 6, 36.

compensation for mental injury. With the amendment of the Chinese SCL in 2010, it was recognised that this was the first time the law had authorized state compensation for psychological trauma, although the term is not defined.<sup>654</sup> Article 26 of the Chinese SCL affirms that:

If freedom of the person of a citizen is infringed, compensatory payment for each day shall be assessed in accordance with the State average daily pay of staff and workers in the previous year.

The use of this provision has been illustrated in the case of Zhao Zuohai, a farmer who was wrongfully convicted. He was released after he signed an agreement to accept 650,000 yuan (about 108,000 USD) offered by the court and the police. He received an additional 120,000 yuan (about 20,000 USD) after he threatened to sue the local government for mental distress.<sup>655</sup>

Also, this is illustrated in the case of Zhang Gaoping and his nephew Zhang Hui.<sup>656</sup> They were wrongfully convicted of rape and murder and jailed for 10 years in Zhejiang Province. They were acquitted in March 2013. The Zhejiang Provincial People's Court announced that they would each receive compensation of 655,730 yuan (about 109,000 USD) for 3,596 days imprisonment and 450,000 yuan (about 75,000 USD) for mental distress.

Loss also extends to reputation. Article 30 provides that:

If the presence of any one of the circumstances stipulated in Items 1 and 2 of Article 3 and Items 1, 2 and 3 of Article 15 of this Law has been lawfully confirmed and found injurious to the victim's reputation and honour, the organ liable for compensation shall, within the scope of influence of the tortuous act, eliminate the evil effects for the victim, rehabilitate his reputation, and extend an apology.

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<sup>654</sup> Stanley Lubman cited in A Step Forward: New Law Expands Government Liability, *The wall street Journal*, 13/01/2011 <<http://blogs.wsj.com/chinarealtime/2011/01/13/a-step-forward-new-law-expands-government-liability/>>

<sup>655</sup> 'Zhao Zuohai gains 120,000 yuan extra' *Shanghai Daily*, 19/5/ 2010 <[http://www.china.org.cn/china/2010-05/19/content\\_20074842.htm](http://www.china.org.cn/china/2010-05/19/content_20074842.htm)>

Lubman , above n 654.

<sup>656</sup> Liu Sha, 'Wrongful verdicts targeted' *Global Times*, 12 August 2013 <<http://www.globaltimes.cn/content/803168.shtml>>

Zhou Wenting, 'Wrongly jailed want more compensation' *China Daily-US Edition*, 22 May 2013 <<http://0-global.factiva.com.library.vu.edu.au/ha/default.aspx>>

The consequences of wrongful convictions and incarcerations are complex, individualized, and extensive, affecting various physical psychological and social aspects of life.<sup>657</sup> The lasting repercussions may vary. It can be argued that the similarity of both countries in confirming the state redress of mental loss by not only monetary compensation but also public apology is a form of progress. It is derived from the tradition and culture of both countries. The protection of dignity and reputation is the people's priority. Those provisions are also consistent with the theory of corrective justice which gives fair compensation for wrongful actions.

### **7.3.5. The agency liable for compensation**

A state is a corporate entity and as such cannot carry out its functions and activities without the intermediate involvement of others.<sup>658</sup> In other words, a state can only act by and through its agents and representatives. As mentioned above, China and Vietnam have inherited Soviet models of a unified state. Although there is no separation of powers, the structure of the state still contains legislative, judicial and administrative bodies. As in Vietnam, although recognising that the liability to compensate is that of the state, the Chinese jurisdiction determines that the agency liable for compensation is the agency which monitors the officials who have engaged in the wrongful action.<sup>659</sup> This provision may lead to misunderstandings about the liability of the state and not appropriately reflect the purpose of the Law. In addition, as illustrated in examples from Vietnam in the previous chapter, no agency wants to acknowledge its mistake and pay compensation. Consequently, this Chinese provision may lead to the dodging and avoidance of compensation liability as in Vietnam.

Moreover, there are many circumstances in which it is difficult to determine the agency liable for compensation. Thus, similar to Vietnamese law, Article 7 of the Chinese SCL provides that:

Where an administrative organ and its functionaries, in exercising their administrative powers, infringe upon the lawful rights and interests of a citizen, a legal person or other organizations, thereby causing damage to them, the administrative organ shall be the organ liable for compensation.

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<sup>657</sup> Dioso-Villa, Richel, above n 75, 17.

<sup>658</sup> Kelsen, *A Pure Theory of Law* (2edn, 1960, trans. Knight 1967) 290-312; *German settlers in Poland* (1923) PCIJ Ser. B No. 6, 22; James Crawford, *State Responsibility* (Cambridge, 2013) 113.

<sup>659</sup> *The Law on State Compensation 1994 (amended in 2010)* (China) Art 7, 19.

Where two or more than two administrative organs in jointly exercising their administrative functions and powers infringe upon the lawful rights and interests of a citizen or a legal person or other organizations, thereby causing damage to them, the administrative organs jointly exercising their administrative functions and powers shall be the organs jointly liable for compensation.

Where an organization in exercising the administrative powers conferred on it by law, rules and regulations infringe upon the lawful rights and interests of a citizen or a legal person or other organizations, thereby causing damage to them, the empowered organization shall be the organization liable for compensation.

Where an organization or an individual, in exercising the administrative powers entrusted to it or him by an administrative organ, infringes upon the lawful rights and interests of a citizen or a legal person or other organizations, thereby causing damage to them, the administrative organ that did the entrustment shall be the organ liable for compensation.

Where an organ liable for compensation has been abolished, the administrative organ that continues to exercise the former's functions and powers shall be the organ liable for compensation; if there is no administrative organ that continues to exercise the former's functions and powers, the administrative organ that abolished the former organ shall be the organ liable for compensation.<sup>660</sup>

In stipulating the agencies liable for compensation in the case of joint exercise of power, the Chinese law states that compensation is the liability of all the agencies. This is different from Vietnamese law which imposes the liability to pay compensation on the agency which has the main duty. The Chinese provision may make it easier to determine the relevant agencies. However, it does not determine how much each should pay. This may lead to arguments and to agencies ignoring or avoiding the problems.

In addition, in cases where one administration organ has to stop operating, the Chinese law only provides one situation in which such organ has been abolished. It does not provide other cases; for example, one organ may terminate its entity status after it

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<sup>660</sup> This is official translation available at:  
<[http://www.china.org.cn/china/LegislationsForm2001-2010/201102/12/content\\_21905705.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/201102/12/content_21905705.htm)>

has done its duty or the duration for exercising the duty has expired. Therefore, in those situations, no-one is liable for compensation and the claimants would not be compensated as the Chinese SCL intends.

In short, setting up an independent institution representative of the state to be the defendant and to pay compensation to claimants, as recommended in the previous chapter, may also be suggested for the Chinese jurisdiction.

### **7.3.6. The personal liability of officials**

As mentioned above, one objective of the legislation of both Vietnam and China is to strengthen the accountability of state officials. There must be system of accountability in place to hold wrongdoers responsible for their misdemeanours. If the authorities do not reflect on their own mistakes, similar unjust cases will occur again and again, stated the *Southern Metropolis Daily*.<sup>661</sup> Therefore, the reimbursement of compensation by the state by officials is provided for in the law of both countries.

Articles 56 to 63 of the Vietnamese SCL provide for the repayment obligation of officials who committed the wrongful act, the grounds for repayment, the procedures, and their implementation. The Vietnamese SCL also imposes other punishments on the officials.<sup>662</sup> Similarly, Article 14 of the Chinese SCL provides that:

The organ liable for compensation shall, after making the compensation, charge its functionaries, entrusted organizations or individuals who have been intentional or grossly negligent in the matter, to bear part or the whole of the compensatory expenses.

Those who are responsible for the matter and have been intentional or grossly negligent shall be given administrative sanctions by the relevant organ in accordance with law; if a crime has been constituted, they shall, according to law, be investigated for criminal responsibility.

However, as in China, the law does not provide for the amount of money to be repaid and the procedures for reimbursement. Thus, the enforcement of the

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<sup>661</sup> China Daily, 'Avoid wrongful convictions by punishing wrongdoers' 05/7/2013 <[http://usa.chinadaily.com.cn/opinion/2013-07/05/content\\_16739395.htm](http://usa.chinadaily.com.cn/opinion/2013-07/05/content_16739395.htm)>

<sup>662</sup> *The SCL 2009* (Vietnam) Art 56 (3).

reimbursement responsibility in China is as ineffective as it is in Vietnam, as indicated by the following cases.<sup>663</sup>

After spending 17 years in prison for a wrongful conviction, five innocent men in Hangzhou, Zhejiang province were finally set free. A judge apologized to them and admitted that the Public Security Bureau, People's Procuratorcy and People's Court should take responsibility for what had occurred. The local Public Security Bureau also extended its apology to them. However, although there were the apologies, no-one took responsibility for reimbursement.<sup>664</sup> It was reported that 168 people working for the Public Security Bureau, the People's Procuratorcy and People's Court were involved in the case. Most of them had been promoted over the previous of 17 years. None of them took responsibility. Zhang Debao, a former judge in the case, said that the main responsibility belonged to the appellate judicial committee which had heard the case, but not to him.<sup>665</sup>

Another example is the case of Zhang Gaoping and his nephew, Zhang Hui<sup>666</sup>. They were wrongly convicted of rape and murder and jailed for 10 years in Zhejiang Province. They were acquitted in March 2013. The two men received only 2.21 million yuan (about 360,800 USD) although they had asked for 7.02 million yuan (about 1.17 million USD) in compensation.

Nie Haifen, the police official who led the investigation still holds her post in the criminal investigation team of Hangzhou police.<sup>667</sup> Zhang Xingping, a media official at Zhejiang Provincial High People's Court, said that the provincial committee on political and legislative affairs had examined all the staff involved in investigating, prosecuting and deciding the case. Zhejiang police apologized on their website for the wrongful conviction.<sup>668</sup>

Several legal experts believe that the right approach to preventing similar cases is to hold those who had charge of the case responsible and make them pay the compensation. Jiang Ming'an, a law professor at Peking University of China, wrote:<sup>669</sup>

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<sup>663</sup> China daily, above n 661.

<sup>664</sup> Ibid.

<sup>665</sup> Ibid.

<sup>666</sup> Liu Sha, above n 656; Zhou Wenting, above n 656.

<sup>667</sup> Ibid.

<sup>668</sup> Ibid.

<sup>669</sup> Liu Sha, above, n 656.

Although the many corrections of wrongful convictions in such a short time shows the top authority's determination to hear from the public to improve transparency, what the public want to see now is a better compensation system that can let wrongly jailed people have a normal life and harsher punishments for those who wronged them, otherwise the wrongs will never be truly corrected.

Yi Shenghua, director of criminal cases at the Yingke Law Firm in Beijing stated: "The purpose of the State Compensation Law is to reduce wrongful cases, but if those police officers and prosecutors do not pay a price for their mistakes, it won't keep more cases from happening..."<sup>670</sup>

Also, a commentary by the *Procuratorial Daily*, which is affiliated with the Chinese SPP, claimed that "pressure to solve every case was one of the reasons for wrongful convictions, as it presses investigators, procurators and judges to meet certain quotas. As a result, it called for reforms to the judicial evaluation mechanism."<sup>671</sup>

In both Vietnam and China, wrongful convictions show failure at two levels: by the courts in wrongfully convicting by dismissing appeals; and by, the procurate both as prosecution but also as overseers of the judicial process under the organic laws relating to the People's Procurate in both jurisdictions.

In short, it can be said that like many other similar cases in China and also in Vietnam, the collective responsibility of the judicial committee which hears a case or an appeal means that no-one will be punished.<sup>672</sup> Therefore, although the established goals are progressive, they are difficult to achieve. In addition to improving the laws, China and Vietnam should improve their enforcement as Ma Huaide explained: "If our aim is to make the State compensation system more than a mere symbol, then the problems plaguing it, in theory and practice both, have to be treated seriously".<sup>673</sup>

### **7.3.7. Time limitations for claiming compensation**

The limitations on the time in which compensation must be claimed are significant. They ensure the availability of the relevant evidence. They also limit the claimants' compensation rights and ability to pursue them. Hence, the time limits for claims.

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<sup>670</sup> Zhou Wenting, above n 656.

<sup>671</sup> Liu Sha, above n 656.

<sup>672</sup> China daily, above n 661.

<sup>673</sup> Xie Chuanjiao, above n 635.

Article 32 of the Chinese SCL provides that:

The limitation of action for claims for State compensation shall be two years, to be counted from the day the exercise of the functions and powers by a State organ and its functionaries is lawfully confirmed to be in violation of law, but the period of detention of the victim shall not be counted.

The limitation of action for claims for State compensation shall be suspended if during its last six months, the claimant is unable to exercise his rights due to force majeure or other obstacles. The limitation shall resume from the day the grounds for suspension are eliminated.

Similar to the Vietnamese SCL, the duration for claiming compensation is two years. The commencement date is the date of lawful confirmation of the unlawful action of the state officials. Thus, this provision may be as inappropriate as it is in the Vietnamese Law since potential claimants sometimes do not know of that confirmation at the time. This has an impact on their rights. Claimants may lose their rights because of not filing their claim in time. Therefore, both jurisdictions should consider amending this provision.

The Vietnamese SCL does not specifically mention suspending the time limitation due to force majeure or other obstacles, unlike the Chinese legislation. However, the Vietnamese Civil Code already has a general provision regarding time limitations in which some periods of time are not to be included in the time for claiming, including force majeure.<sup>674</sup>

## **7.4. Differences between the Vietnamese SCL and Chinese SCL**

### **7.4.1. Provision about claimants**

Increasing globalization and bilateral agreements between countries requires that domestic laws have provisions pertaining to foreigners. In respect of state liability, they strengthen a country's reputation and further develop positive international relationships. Nevertheless, the Vietnamese SCL has no such provisions. This is different from the Chinese SCL which, in Article 33, provides that:

If a foreigner, a foreign enterprise, or a foreign organization within the territory of the People's Republic of China demands compensation to be made by the People's Republic, this Law shall apply.

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<sup>674</sup> *The Civil Code 2005 (Vietnam)* Art 161, 162.

If a State to which a foreigner, a foreign enterprise, or a foreign organization belongs gives no protection to or limits the right of a citizen, a legal person, or other organizations of the People's Republic of China to claim compensation by that State, the People's Republic of China shall implement the principle of reciprocity with the State to which the foreigner, the foreign enterprise, or the foreign organization belongs.

Article 2 of the Vietnamese SCL states only that: “Individuals and organizations suffering from material damage and/or mental sufferings (referred to as claimants) in cases provided by Law are eligible for compensation by the State”. It can be argued that the Chinese provision ensures the equality and principle of reciprocity which is recognised in international law. This principle “is of vital importance in achieving efficient outcomes in many circumstances”.<sup>675</sup> Parisi and Ghei state that “reciprocity is important enough to be considered a meta-rule of the system of international law”.<sup>676</sup> However, because of its sovereignty, the state may seek a maximum limit reciprocity.<sup>677</sup> Since there is no provision for foreigners in the Vietnamese SCL, it is difficult to determine the scope of Vietnamese law in terms of the claimants. Thus, as a member of IDHR, ICCPR, and ICESCR, Vietnam should express the state’s commitment as the Chinese SCL did.

#### **7.4.2. Grounds for state liability**

As shown in the previous chapter, and as can be seen from Articles 4 and 6 of the Vietnamese SCL, in order to claim for state compensation, the claimants must produce a valid document issued by an authorized office affirming that the officials’ act is unlawful and falls within the scope of liability for compensation; or have a valid judgment or decision by a relevant officer affirming that a person falls within the scope of the criminal proceedings provisions. These legislations are a serious barrier which constrains claimants when making their compensation claims.

In China, the SCL formerly required victims to obtain a written acknowledgement of wrongdoing or violation from that department as under the Vietnamese SCL.<sup>678</sup> However, considering the similarities of the legal cultures of Vietnam and China, this

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<sup>675</sup> Francesco Parisi and Nita Ghei, *The Role of Reciprocity in International Law*, 36 *Cornell Int’l, L J*, 2003.

<sup>676</sup> *Ibid.*

<sup>677</sup> René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002) 132.

<sup>678</sup> Lubman, above n 654.

condition was challenging to meet and significantly limited the enforcement of the law. Ma Huaide stated that, "No one would like to admit mistakes and take responsibilities. Therefore, the confirmation of a tort is like asking a tiger for its skin."<sup>679</sup> Hence, when the Chinese law was amended in 2010, this requirement was removed.<sup>680</sup> The amended law now allows victims to apply directly for compensation either to a higher-level administrative unit or by filing a lawsuit. This, at least formally, prevents government agencies from blocking access to compensation.<sup>681</sup>

China amended its SCL, and according to a 2011 white paper, in 2011, a total of 6,786 cases concerning administrative compensation, criminal compensation and non-criminal judicial compensation were concluded by People's Courts at all levels. Of these, 868 were criminal compensation cases, with the aggregate amount of compensation of 30.67 million yuan (about 5.11 million USD), representing increases of 16.04 percent in the number of cases and 42.9 percent in the amount of compensation respectively compared with the 2009 figure.<sup>682</sup>

The removal of the requirement of the valid document, and the experience of China, enhances the rationality and reliability for the reform of this provision in Vietnamese SCL. China's experience after removing the requirement indicates that it has facilitated the intention behind the legislation. This requirement should be removed from Vietnamese law.

#### **7.4.3. Determining and calculating the damage**

As described in Chapter 4 sub-section 4.3.3 and as can be seen from the Vietnamese SCL,<sup>683</sup> the Law provides in detail the categories of damages and the methods that should be used to calculate physical and mental losses. However, there are still some inappropriate and unclear provisions when it comes to calculating mental and income losses as demonstrated in Chapter 4 sub-section 4.3.3 and Chapter 6 sub-section 6.3.2 and 6.3.4.<sup>684</sup>

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<sup>679</sup> Ma Huaide is Vice president of China University of Political Science & Law  
China's top legislature reviews Law on State Compensation, CCTV, 28/10/2009  
<<http://english.cctv.com/program/chinatoday/20091028/102214.shtml>>

<sup>680</sup> 'Amended State Liability Compensation Law Adopted'  
<[http://www.china.org.cn/china/2010-04/30/content\\_19940077.htm](http://www.china.org.cn/china/2010-04/30/content_19940077.htm)>

<sup>681</sup> Lubman, above n 654.

<sup>682</sup> <http://english.people.com.cn/90785/7970531.html>

<sup>683</sup> *The SCL 2009* (Vietnam) Art 45 to 51.

<sup>684</sup> See Chapter 4, section 4.4.3

In China, the SCL provides that the payment for damages is the main method of state compensation. Where the property can be returned or can be restored to its original state that should be done.<sup>685</sup> In other cases of infringement of property rights, damage can be calculated under the Article 28 of the Chinese SCL.<sup>686</sup>

In terms of compensation standards, Article 26 of Chinese SCL provides that where the personal rights of a citizen are infringed, the amount of money for compensation each day is to be calculated according to the average daily salary of the state workers in the previous year. This was considered very low so that the Chinese Supreme Procuratorate, on 17 May 2013 increased the compensation standard. The new standard is 182.35 yuan (29.7 USD) per day, 9.7 yuan (1.58 USD) more than the 2012 standard. The adjustment of the standard was based on the increase in the average salary of state employees in 2012, which stood at 47,593 yuan (7,753 USD) in 2012.<sup>687</sup>

According to Article 27, where citizens' rights to life and health are infringed, the compensation is to be calculated as follows:

(1) In the case of bodily injury, medical expenses as well as compensation for loss in income due to missed working time shall be paid. Daily compensation for the loss in income shall be assessed in accordance with the State average daily pay of staff and workers in the previous year, the maximum shall be five times the State average yearly pay of staff and workers in the previous year;

(2) In the case of loss of part or the whole of working capability, medical expenses and disability compensation shall be paid, the latter to be determined in accordance with the degree of working capability lost. Maximum amount of compensation for partial loss of working capability shall be ten times the State average yearly pay of staff and workers in the previous year, and that for total loss, twenty times, in which case living expenses shall too be paid to persons who have no working capability and have been supported by the disabled; or

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<sup>685</sup> *The Law on State Compensation 1994 (amended in 2010)* (China) Art 25.

<sup>686</sup> *Ibid* Art 28.

<sup>687</sup> State Compensation , Beijing Review, 30 May 2013

<<http://0-global.factiva.com.library.vu.edu.au/ha/default.aspx>>

China's Supreme Procuratorate increases state compensation standard, *Xinhua's China Economic Information Service*, 18 May 2013

<<http://0-global.factiva.com.library.vu.edu.au/ha/default.aspx>>

(3) If death results, compensation for death and funeral expenses shall be paid, the total amount shall be twenty times the State average yearly pay of staff and workers in the previous year. Living expenses shall to be paid to those who have no working capability and have been supported by the deceased in his lifetime.

The standard for payment of living expenses provided in Items 2 and 3 in the preceding paragraph shall be handled by using for reference relevant provisions for relief of the local departments of civil affairs. If the persons supported by the deceased are minors, their living expenses shall be paid until they reach the age of 18; as to the others who have no working capability, living expenses shall be paid until their death.

The Chinese SCL added compensation for psychological injury as part of the 2010 amendments, which was seen as a significant expansion of the damages covered as discussed at 7.3.4. However, Jiang Min'an, a law professor at Peking University, has observed that China still lacks a standard means of calculating compensation for psychological injury. He said that "Without a standard, some people might get excessive compensation because of intensive media reports".<sup>688</sup> It can be argued that the absence of such provisions for compensation for mental trauma may lead to arbitrary practices.

In the case of Zhang Gaoping and his nephew Zhang Hui<sup>689</sup> cited above at 7.3.4, the Zhejiang Provincial High People's Court awarded them 2.21 million yuan (about 362,000 USD) in compensation although they had asked for 7.02 million yuan (about 1.15 million USD). The two men had also applied for an indemnity for legal fees, medical expenses and a truck they were forced to sell at a low price. The court declined these requests. Their lawyer, Ruan, said "Every penny of their compensation claim should have a legal ground, but not a single word in the State Compensation Law mentions compensation for this item". He went on to state that "The law needs to be modified".<sup>690</sup>

The unclear provisions about the amount of compensation have sparked a significant discussion on how it should be determined. Hu Jinguang, a professor at the

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<sup>688</sup> Lin Meilian, 'Court issues compensation case guidance' *Global Times*, 22 May 2013 <<http://0-global.factiva.com.library.vu.edu.au/ha/default.aspx>>

<sup>689</sup> Liu Sha, above n 656; Zhou Wenting, above n 656.

<sup>690</sup> Zhou Wenting, above n 656.

Law School of the Renmin University of China, told the *Global Times* that the loss of potential profits should be taken into consideration.<sup>691</sup>

Despite these shortcomings, the calculation of compensation in the Chinese SCL on the basis of the average salary of state workers in the previous year is more appropriate than the Vietnamese provision. One method that the Vietnamese SCL uses to determine damages is based on the salary before the damage occurred, as discussed in Chapter 4 section 4.4.3. This may lead to difficulties in providing evidence and to small amounts of compensation being paid as a result, as illustrated in Chapter 6. Therefore, Vietnamese law makers should look at this provision if they use this legislation as a model for amending the Vietnamese SCL.

#### **7.4.4. Compensation procedure**

Chinese law has two separate compensation procedures based on two separate areas of state liability.

Firstly, there is administrative compensation related to administrative and judicial procedures. The claimant must first file a claim for compensation with the organ liable for compensation.<sup>692</sup> It must, within two months from the date of receipt of the application, pay compensation in accordance with the provisions of the compensation law.<sup>693</sup> If payment has not been made within this period or where the claimant is not satisfied with the amount of compensation offered, the claimant may, within three months from the date of expiration of that period, bring an action in a People's Court.<sup>694</sup>

Secondly, in claims for compensation for wrongful conviction, the claim must first be lodged with the organ liable for compensation.<sup>695</sup> This is the same as for administrative compensation.<sup>696</sup> The responsible organ must, within two months from the date of receipt of the application, pay compensation to the claimant in accordance with the provisions of the SCL. In cases of the failure to pay compensation within the period specified or where the claimant is not satisfied with the amount of compensation,

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<sup>691</sup> Lin Meilian, Court issues compensation case guidance , *Global Times*, 22 May 2013 <<http://0-global.factiva.com.library.vu.edu.au/ha/default.aspx>>

<sup>692</sup> *The Law on State Compensation 1994 (amended in 2010)* (China) Art 9.

<sup>693</sup> *Ibid* Art 13.

<sup>694</sup> *Ibid*.

<sup>695</sup> *Ibid* Art 20.

<sup>696</sup> *Ibid*.

the claimant may, within 30 days from the date of expiration of the time limit, apply for reconsideration by an agency at a higher level.<sup>697</sup>

Where the organ under obligation to pay compensation is a People's Court, the claimant for compensation may, pursuant to the provisions of compensation law, apply to the Compensation Commission<sup>698</sup> of the People's Court at the next higher level for a decision on compensation.<sup>699</sup>

The agency for reconsideration must in both the first and second procedure, within two months from the date of receipt of the application, make a decision. Where the claimant for compensation is not satisfied with the decision, he or she may within 30 days from the date of receipt of the reconsideration decision, apply for a decision on compensation to the Compensation Commission of the People's Court at the same level at the place where the organ for reconsideration is located.<sup>700</sup> Where there is a refusal by the organ for reconsideration to make a decision within the period specified, the claimant for compensation may, within 30 days from the date of expiration of the time period, apply for a decision of compensation to the Compensation Commission of the People's Court at the same level at the place where the organ for reconsideration is located.<sup>701</sup> Decisions made by a Compensation Commission are legally effective, and must be implemented.

It can be seen from the Chinese SCL that in China, the problem of criminal compensation is not resolved in general judicial proceedings. The decision for compensation is made by the Compensation Commission within the court, under Article 23 of the SCL. According to the compensation law, an intermediate people's court or the People's Court above the intermediate level must establish a Compensation Commission, which consists of three to seven judges. The Compensation Commission must make a decision about compensation based on the majority principle. A decision on compensation made by the Compensation Commission must be executed or implemented.<sup>702</sup>

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<sup>697</sup> Ibid Art 21.

<sup>698</sup> According to the Chinese compensation law, an intermediate people's court or the people's court above the intermediate level must establish a compensation commission, which consist of three to seven judges.

<sup>699</sup> *The Law on State Compensation 1994 (amended in 2010)* (China) Art 21.

<sup>700</sup> Ibid Art 22.

<sup>701</sup> Ibid.

<sup>702</sup> Ibid.

In addition, Fu Hualing observes that in China courts lack independence, are weak, and legal norms are fragile when confronted by the authoritarian party-state. In particular, he considers that Chinese courts have neither the power nor the capacity to handle politically sensitive cases.<sup>703</sup> This may particularly influence the settlement of wrongful conviction cases involving state compensation, and any attempts to enforce any remedies obtained.

The Chinese Supreme People's Court has for the first time specified the procedure for how courts should deal with claims for State compensation for wrongful convictions, in an effort to protect the legal rights of wrongly convicted people and promote justice through the court system in China. It also makes clear that the court should review the entire case, including checking the trial and execution documents as well as investigating state officials related to the case if necessary. The interpretation also indicates that a compensation claimant should be heard by the court when the case is "complicated and controversial."<sup>704</sup> No specific standard for "complicated and controversial" was given. This could lead to hearings not taking place in cases where they should. Procedures before Compensation Commissions where claimants are not heard denies fairness and can lead to wrong decisions. Liu Sha shows that "the problem is that the interpretation failed to make the hearing a necessity in every case, and only 'complicated and controversial' ones and that will become an excuse for many local courts to skip the hearing part".<sup>705</sup> Obviously, consideration of a case without a hearing may lead to an arbitrary ruling, and lack of transparency and objectivity.

Moreover, many Chinese experts believe that the interpretation could ensure the rights of wronged persons to receive compensation and assist in promoting procedural justice in a country which has seen a number of miscarriages of justice partly due to an overemphasis on conviction rates. Hong Daode, a professor at the China University of Political Science and Law, said "Standardizing the procedure for compensation is very important, as local courts had no guidelines to follow and some may skip making payouts".<sup>706</sup> Many local courts and an officer from the Chinese SPC had also suggested having a compensation procedure since the number of such cases has increased greatly

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<sup>703</sup> Fu Hualing, above n 632, 18.

<sup>704</sup> Liu Sha, above n 656.

<sup>705</sup> Ibid.

<sup>706</sup> Ibid.

in recent years.<sup>707</sup> Shen Deyong, vice-president of the Chinese SPC and a delegate to the 18th National Congress of the Communist Party of China stated: "There are possibilities that cases were misjudged, and some judges may turn out to be lacking ethics. It is true in China as it is true worldwide". Additionally, he concluded that "West or East, ancient or modern, there are no judicial systems that can utterly eliminate misjudgement, so it is important to set up a system to rectify any mistakes in time".<sup>708</sup>

Despite the limitations shown above, it can be argued that compared with the compensation procedure provided in the Vietnamese SCL, the compensation procedure in China is much simpler and more effective and objective.

Firstly, the procedure has been simplified with the removal of the condition making it necessary to obtain a valid document which confirms the wrongfulness of the state officials. Moreover, the Chinese Law does not provide for compensation negotiations. Instead of negotiations, the Chinese SCL provides that the agency liable for compensation has to pay compensation within two months from the date of receipt of the claim file. This process may save time and money if adopted in Vietnam.

Secondly, as mentioned in the previous chapter, the Vietnamese compensation procedure lacks objectivity, especially where the court is the relevant agency. In this case, the court can be the agency which can negotiate with the claimant. The court can also trial itself and issue the compensation judgment. In order to avoid this problem, the Chinese SCL provides that: "If the organ liable for compensation is a People's Court, the claimant to compensation may, in accordance with the provisions of the Law, apply to the compensation commission of a People's Court at the next higher level for a decision on compensation."<sup>709</sup>

Vietnam should avoid the situation in which a court judges itself. In this situation, Vietnam can learn from China by providing that a claimant can bring a case to the next higher level court.

Finally, Vietnam should avoid the limitations that exist in Chinese Law as analysed above.

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<sup>707</sup> Ibid.

<sup>708</sup> Zhao Yinan, Judge stresses importance of procedure, China Daily-US Edition, 14 November 2012 <<http://0-global.factiva.com.library.vu.edu.au/ha/default.aspx>>

<sup>709</sup> *The Law on State Compensation 1994 (amended in 2010)* (China) Art 21.

## 7.5. Conclusion

In conclusion, this chapter compares the Vietnamese SCL with its Chinese counterpart. Of the choice of China for the purpose of comparison is consistent with the aim of the research, the research question and the approved proposal. The chapter shows the similarities between the two countries. Both SCLs have the same background in terms of state liability. They confirm the compensation liability of the state. They limit the scope of state liability by listing wrongful actions for which the states are liable. The two jurisdictions pay compensation for both physical and mental losses and damage. Similarly, the agency liable for compensation is also the agency which was engaged in the wrongful actions. Moreover, the different provisions and characteristics are also pointed out and analysed. This paves the way for further reform in Vietnam. Vietnam should remove the provision attached to state liability which includes the condition of having valid documents confirming the wrongful actions (as China has done). Also, it is suggested that Vietnam should make provisions for foreigner claimants. Another recommended amendment to the SCL is to simplify the compensation procedure by removing the negotiation stage and making an objection by giving claimants the right to claim in the higher court if that court is a relevant agency. However, it should be noted that the key to a sensitive and accurate comparative law study is the ‘law in context’ approach,<sup>710</sup> based on which proposals can be made that are feasible and desirable in the Vietnamese environment. The Chinese experience may offer Vietnam some ideas about how to reform its SCL. The similarities between the two jurisdictions and the earlier SCL reform and experience of China indicate that if China has been successful in its reforms, then Vietnam could learn; conversely, if China is unsuccessful, Vietnam can learn a lesson and avoid the pitfalls.

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<sup>710</sup> Nguyen Van Quang, ‘A comparative study of the systems of review of administrative action by courts and tribunals in Australia and Vietnam, What Vietnam can learn from Australia’s experience’ (Phd thesis, Latrobe University, 2007).

## **Chapter eight: Conclusion and recommendation**

### **8.1. Introduction**

Vietnam has been conducting comprehensive reform including legal reform under the *Doi moi* policy since 1986. According to the VCP, the Vietnamese Government and numerous legal experts,<sup>711</sup> the SCL 2009 was expected to be a fundamental law which supported building a state based on the rule of law, protecting human rights and boosting the development of the economy. In order to evaluate the effect of the implementation of these goals, the project has studied the SCL as part of the legal reform process as well as in the context of its goals in the development of Vietnam.

The research commenced with the intention of understanding the theories, significance and development of provisions for state liability in the context of Vietnam. It also proposed to evaluate in detail the quality of the SCL as law as well as its enforcement. The study also at the outset proposed to consider whether provisions in Chinese law could provide lessons for reforming the SCL in Vietnam.

This chapter provides an overview of the conclusions drawn from the research analysis and discussions presented in the previous chapters to answer the research questions. Then it addresses the contribution it has made as well as its limitations and concludes with suggestions for future research.

### **8.2. Conclusions on the research questions**

#### **Research question 1: What are the justifications for and the nature of state liability for compensation?**

This research question was introduced in Chapter 1 section 1.4 following a short account of the history of state liability in western law in section 1.2 and its further evolution in the 20<sup>th</sup> century and the position of the law on state liability in the development of Vietnam. This research question showed the necessity of understanding the theories and nature of state liability which supported the further investigation.

Chapter 3 of the research turned to examining the theory of state liability for compensation in Vietnam. Before considering the justifications for it, it provided the context and background to the political and legal systems of Vietnam as the context of any justifications.

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<sup>711</sup> Peerenboom, Duong Dang Hue, Duong Thanh Mai, Pham Quoc Anh indicated in Chapter 1.

Section 3.5 shows that the justifications for the SCL derive from two fundamental pressures: international and national. International law, especially the UDHR, the ICCPR and the ICESCR, require a State Party to ensure the right to state compensation. State parties are under obligations to ensure that their domestic law complies with and specifies the rights found in international law. Vietnam is a member of the United Nations and has also adopted these conventions. It must harmonise its domestic laws with international laws and recognise in them the right to claim state compensation.<sup>712</sup> This fits with Harlow's view that the expansion of state liability is driven by internationalisation or globalisation as discussed in section 1.2.2.<sup>713</sup>

Internally, the promulgation of the Vietnamese SCL is the result of the *Doi moi* process. The SCL is considered as a tool for the goal of building a state based on the rule of law. It is also consistent with the Vietnamese *Constitution*. The promulgation of the SCL was intended to protect human and citizen's rights in Vietnamese law. Moreover, this Law is intended to be a key to increasing the accountability of state officials and promote the further development of a market economy and the rule of law. These justifications reflect Peerenboom's, Milhaupt's and Pistor's and other authors' analyses of the competing priorities in developing the economy and protecting human rights as discussed in section 1.2.2. These both relate to the rule of law. As Harlow notes "there is not one rule of law but many, judicial orders do not all occupy the same space in governance nor do they all need to operate identically".<sup>714</sup> Vietnam's developing and distinctive rule of law and its different provisions on state liability fit with this observation, as well as Milhaupt's and Pistor's observation that there is no one path taken by all states towards the rule of a law in a developed economy.<sup>715</sup>

It should be noted that in some common law jurisdictions, the immunity of the state or the crown still exists in some contexts, particularly in respect of wrongful convictions as discussed in section 1.2.1. Some jurisdictions including France and China consider state liability to be a matter of administrative law. The evaluation of the nature of the state liability in this research suggests that it should be based on: (1) a theory of justice which entitles those injured or damaged to recover on an equal footing

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<sup>712</sup> *The ICCPR 1966* Art 2, 9; *The Constitution 1992 amended 2001* (Vietnam) Art 50, 72, 74.

<sup>713</sup> Harlow, above n 6, 44.

<sup>714</sup> Harlow, above n 6, 24-30, 44.

<sup>715</sup> Milhaupt and Pistor, above n 7.

with the state, following Harlow who suggests that public liability should focus on tort law – or the law of obligations - and on principles of corrective justice rather than on administrative law;<sup>716</sup> (2) a theory of the state which confirms its status as an independent liability bearing entity; and, (3) on being a civil claim in the civil law of obligations in the civil law tradition or tort law in the common law tradition, following David. Based on this, as well as the unique context of Vietnam, the research in section 3.6 confirms the principle of applying civil liability to state liability for compensation in Vietnam.

In analysing the distinctive characteristics of state liability, the research points out that the liability belongs to the state and not its agencies or its officials, although the damages and injuries were caused by an individual state official. This conclusion fits with the definition and functions of the state since the officials are its representatives or its agents. This is also supported by Locke’s view that if people consent to give the state power, they agree with its obligations and liability when it has acted wrongfully. The research also points out that in state liability: (1) the person who causes the damage is a state official; (2) the defendant is the state itself and not individual state officials or state agencies; (3) monetary compensation is paid from the state budget; (4) the state pays the total loss; and, (5) there is also personal liability of state officials to the state. These conclusions are based on: (1) the concept of distributive justice in general; (2) Harlow’s view of a general principal for compensation relying on concepts of distributive justice which are legitimately vested in governments and legislatures and assumptions on the division of power in democratic societies; (3) Cohen’s and Smith’s concept of entitlement of citizens to benefits from programs provided they fall within the programs’ parameters. The research also demonstrates that a separate law on state liability for compensation is important in the Vietnamese legal context. It raises consciousness of citizens’ rights, it is a helpful legal instrument for civil litigation, and is also a legal key to the further development of Vietnam.

### **Research question 2: What is the Vietnamese law on the liability of the state for compensation?**

This question was also introduced in Chapter 1 section 1.4. The research examined the effectiveness of the SCL and ways to improve it in order to strengthen and accelerate

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<sup>716</sup> Harlow, above n 6, 127.

the reform process as indicated in the aims of the project in section 1.3. As the substantive law includes some of the main features of state liability, the question was divided into four sub-research questions on the scope of the law, the grounds for liability, the calculation of damages, and liability for reimbursement.

By evaluating the Vietnamese SCL in the light of theories of justice, concepts of the rule of law, the international context of protecting human rights and also Vietnam's own conditions the research indicated that the SCL acknowledges the liability of the state for wrongful actions. It creates an equal or horizontal rather than vertical relationship between the state and its citizens within the limitations it stipulates. The concepts and the general principles underlying the law are ideals. They support the development of the rule of law, the market economy, and the protection of human rights in Vietnam. However, the specific provisions reveal many deficiencies and, overall, the law does not meet the general goals set for it.

### **The limitations on state liability**

As indicated in section 4.3.1, the limitations on state liability are subject to considerable debate. Some Vietnamese legal experts and Harlow justify restrictive limitations on state liability. Mr Dinh Trung Tung, Vice Minister of the MOJ, emphasised the need for an experiment with a law on state liability.<sup>717</sup> Harlow suggests that too generous provisions may lead to a further escalation of state responsibility by creating a public law damages culture, that there are other ways to make amends including prompt apologies, and that administrators are in the best position to calculate financial implications and to take corrective action. They also address the distinctions between collective and individual interests and recommend that they be weighed and balanced. However, based on the theories of state liability, which were analysed in section 3.5.1, the restrictive limitation of state liability is argued to be a backward step. It is similar to theories of state immunity which have received significant criticisms in both past and present legal theory and policy. Also, a timid approach or a long period of experimentation may slow the further development of Vietnamese society and economy. The research points out how the scope of state liability in the Vietnamese SCL is limited. It concludes that it needs to be extended.

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<sup>717</sup> Lê Kiên, above n 390.

As the research demonstrates, the limitations on the scope of the Law are unreasonable. The law lists the wrongful actions which fall within it. In some circumstances, it requires claimants to prove that state officials intentionally acted wrongfully in performing official duties. These limitations are inconsistent with the *Constitution* and the *Civil Code 2005*.<sup>718</sup> The limitations also affect the viability of a state based on the rule of law that Vietnam is pursuing. Although in the context of Vietnam, the acceptance of liability for all wrongful actions by the state officials is difficult, the current limitations on the scope of the law are still too narrow.

### **The grounds for state liability**

As indicated in section 4.3.2, the law requires that claimants must have a valid document issued by an authorized office affirming that the officials' acts are wrongful and fall within the scope of liability for compensation. Justifying this provision requires the balancing of the interests of individuals and organizations who suffer damage and the interests of the state. Also, it is intended to ensure the stable and efficient operation of public authorities and their services.<sup>719</sup> From its analysis of the legislation, literature, interview results, and related Chinese law reform and practice and also of the ineffective operation of these provisions, the research demonstrates that there are no reasonable justifications for this requirement. It concludes that the requirement for a valid document is inappropriate and should be removed.

The requirement of having a valid document constrains claimants in pursuing their rights. It is really challenging for claimants to ask state officials to provide a valid document admitting that they acted wrongfully. Even though other provisions in Vietnamese law require the provision of such documents,<sup>720</sup> the responsible officials and agencies may not admit the wrongful act by keeping silent<sup>721</sup> or taking unreasonable actions as indicated in Chapter 4 at 4.3.2 and further demonstrated in practice in Chapter 6 in the cases of Nguyen Van Them and Huynh Van Sang at 6.3.1. This condition is the greatest barrier to the pursuit of state compensation by claimants. Permitting the state to

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<sup>718</sup> *The Constitution 1992 (amended 2001)* (Vietnam) Art 50, 72, 74; *The Civil Code 2005* (Vietnam) Art 604, 619, 620.

<sup>719</sup> Ministry of Justice, above n 15.

<sup>720</sup> *The Law on Complaint 2011; The Law on Denunciation 2011; The Criminal Procedure Code 2003; The Civil Procedure Code 2004 (amended 2011)*.

<sup>721</sup> Gia Khang, case Mai Than, above n 169.

effectively control what claims can be brought by this process indicates that the SCL is at an experimental stage and it now needs to move beyond that.

### **The damages to be compensated and how they are calculated**

Section 4.3.3 investigated the method used to calculate the damages to be paid as compensation. The research shows that the Vietnamese SCL has specific provisions for categories of damages. In case of death, physical injury or infringement of property, the state has to pay compensation including both physical and mental loss. Moreover, by analysing the provisions of the legislation, the literature reviewed, the interview results and issues around Vietnamese economic development, the research indicated that some of the provisions for calculating damages are inappropriate and unclear. This leads to difficulties in practice.

In particular, the method for calculating lost income, one kind of damage, is based on the wages of claimants before the damage occurred. Most cases to date relating to state compensation have lasted for many years. The value of currency, labour and assets, and the development of the economy have changed substantially over the intervening years. Moreover, the method for calculating damages is also based on the minimum wage which is very small. This leads to difficulties in the small amounts of compensation paid and also in providing evidence of any loss.

Moreover, the provisions relating to mental loss in case of death and enforcement of civil judgments are unclear. There are different understandings of these provisions. This leads to challenges in determining damages and to arbitrariness in their implementation. The current provisions are unreasonable and consideration needs to be given to their reform as suggested in section 4.3.3 and summarised below in section 8.3.

### **Reimbursement responsibility of the state officials**

Sections 3.5.1 and 4.3.4 dealt with arguments over the benefits of imposing personal liability on officials in cases of state compensation. The research contradicts Harlow's argument that a requirement for full compensation or total restitution is undesirable as it will create a cautious and risk-averse public service.<sup>722</sup> Based on concepts of corrective justice which support the right to equitable recovery, and also on Shuck's concept of deterrence and Dicey's theory of the rule of law, the research concluded that personal liability is necessary for deterring wrongful actions. Moreover, in the context of

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<sup>722</sup> Harlow, above n 6, 24-30, 126.

Vietnam where wrongful actions are common the SCL may be the one significant tool to strengthen state institutional capacity which is a necessary condition for the development of a state based on the rule of law.

One goal set for the Vietnamese SCL when it was enacted was to increase the accountability of state officials. Provisions for reimbursement by state officials were expected to help achieve this goal. However, the research establishes that these provisions are insufficient to prevent wrongful actions or to strengthen the state apparatus's operational effectiveness. The provisions on reimbursement of the SCL are too general. This has led to no official being required to make reimbursements as indicated in section 4.3.4. The secondary legislation which limits the amount of reimbursement is inappropriate. In cases where officials have intentionally committed a wrongful action, up to a maximum of 36 months wages must be paid. Those who have neglected their duties are limited to reimbursing not more than three months wages. Only officials who have committed a criminal act are obliged to pay the state the total amount of compensation for which the state is liable. These repayments are generally much less than the actual damage for which the state is liable.

### **Research question 3: Are the procedures and mechanisms effective to deal with state liability in Vietnam?**

This research question was introduced in Chapter 1 section 1.4. As theories of justice were used to justify state liability, they have also been used to assess the procedures for resolving compensation claims.

As shown in Chapter 5, the procedures and mechanisms for resolving state compensation claims differ from those for more general civil actions. They are provided for under the SCL and other Laws. By analysing the relevant provisions, the secondary literature, the interview results, and also referring to the enforcement of the SCL, the research demonstrated that the procedures for the settlement of compensation claims are complex and frustrating. They waste time, money and people's energy and give rise to new grievances. Mechanisms for claiming are ineffective and lack objective decision-making. Many provisions are not clear and inappropriate, reflecting the wider issue of the poor drafting of Vietnamese legislation. The procedures also share many of the problems characteristics of civil claims and enforcement procedures.

Referring to the three concepts of procedural justice given in the background to research question 3 in Chapter 1: (1) perfect procedural justice, (2) imperfect procedural justice; and (3) pure procedural justice, Vietnamese procedure is pure procedural justice.<sup>723</sup> The research indicated that in the procedures for resolving state compensation claims there is no criterion for what constitutes a just outcome other than the procedure itself.

Firstly, the research affirms that the procedure for resolving state compensation is very complex; it has two sub-processes with a number of stages applying different types of law. More importantly, it is noted that the pre-trial negotiations and trials themselves lack objectivity and use unfair procedures. In negotiations, the parties have conflicting interests but there is no third party or mediator to help them narrow and resolve the issues in dispute. The knowledge and skills of the two are unfairly matched as the officials have more knowledge and experience of such claims. At the trial stage, the court is not independent. This is especially the case when the court itself is the defendant. This is obviously unfair and unjust. See sections 5.3 and 5.5.

Secondly, the research also concludes that determining the state agencies liable for compensation may be difficult because of the unclear provisions on this. In the case of many state agencies involved in wrongful acts or decisions, the law provides that the agency liable for compensation is the agency which owed the main duty. This provision creates a difficult task of determining which agency has this main duty. Obviously, this impacts on the effectiveness of the process to settle claims because the relevant agency is also the competent agency which first seeks to resolve the state compensation claim. This is a particular problem in wrongful convictions where the police, the People's Procuracy and the People's Courts may all have played significant roles. See section 5.4.

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<sup>723</sup> Rawls gave three concepts of procedural justice:

1. *Perfect procedural justice* has two characteristics: (1) an independent criterion for what constitutes a fair or just outcome of the procedure, and (2) a procedure that guarantees that the fair outcome will be achieved.
2. *Imperfect procedural justice* shares the first characteristic of perfect procedural justice -there is an independent criterion for a fair outcome - but no method that guarantees that the fair outcome will be achieved.
3. *Pure procedural justice* describes situations in which there is no criterion for what constitutes a just outcome other than the procedure itself.

Furthermore, the provisions regarding the time within which to claim state compensation are inappropriate. This period may be rendered meaningless by the provisions relating to negotiations over compensation and the provisions on duration in other laws such as the *Law on Complaint 2011*, the *Law on Administrative Procedure 2010* and the *Law on Enforcement of Civil Judgment 2008* as discussed in 5.6. Also, the limitation on making claims is two years from the date of the competent state agencies issuing the valid documents. This is inappropriate and inconsistent with Art 607 of the *Civil Code 2005*, Art 159 of the *Civil Procedure Code 2004* (amended 2011) and other laws. The claimants often do not receive the documents on the day they are issued and may not receive them for sometimes. Thus, these provisions have adverse impacts on the enforcement of the law.

Finally, the periods within which state compensation is to be settled and compensation judgments enforced are already provided for by the law. However, there is no penalty or fines imposed for infringing these. For other reasons referred to in Chapter 6, covered by the next research question, such as poor knowledge of the law by officials and their lack of capabilities, the settlements of disputes are often delayed. These contribute to making the procedures for resolving and implementing state compensation liability ineffective.

#### **Research question 4: How is the law on state liability for compensation enforced in Vietnam?**

This research question was introduced in Chapter 1 section 1.4 which assumed that many of the reasons which affect the implementation of the law in Vietnam more generally may impact on the enforcement of the SCL. Chapter 6 summarises the investigation of the enforcement of the SCL by reviewing the literature, government and media reports and interview results, particularly the cases reported in the media. The research shows that the enforcement of the SCL has significant limitations.

In practice, as shown in Chapter 6, particularly from the *Report 114* and *Report 300 on State Liability Affairs* the enforcement of the law has been much less than expected. There are many outstanding cases because of dodging or avoidance attitudes, the lack of professionalism of officials and the absence of adequate regulations and guidance as well as other difficulties. Moreover, in the cases resolved, there have been some problems indicated in the SCL's implementation as indicated in section 6.3. They

are: (1) the limitation on the grounds of state liability and on the time within which claims must be made and the ways in which procedures before a claim can be made may be frustrated; (2) the difficulties in calculating damages and the small amount of compensation due to the inappropriate provisions on calculating damages; (3) the challenges in determining the agency liable for compensation because of the unclear provisions on this as well as the attitudes of covering up or avoidance by officers; (4) the delays in the settlement of claims caused by the complex procedures and the lack of penalties for not making timely decisions ; and (5) the slowness and other difficulties in enforcing judgments.

There are many factors which may affect the enforcement of law. The fundamental reasons have been shown in section 6.4. Firstly, the shortcomings of the SCL and the secondary legislation have a significant influence on the enforcement of state liability. The unclear and inappropriate provisions on both substantive and procedural law make its implementation challenging and often ineffective. Secondly, the publicity and education about the SCL are still limited which mean that many people, including state officials and citizens, do not know about it. Another factor is the limited capacity of state officials and judges. The poor quality of the state apparatus leads to ineffective negotiations, delays in settlement of cases, avoidance attitudes and behaviours, as well as inaccurate decisions or judgments. Finally, the influences of a legal culture that includes Confucianism, colonisation and the adoption of a Soviet style legal system which emphasised a lesser role for law and a greater role for mediation and a greater emphasis on the community and not the individual, still persist. These may have adverse consequence for individuals seeking to apply the SCL in practice.

The implementation of the SCL has reaffirmed that both its substantive and procedural provisions are of poor quality. These, together with other factors identified in the research questions, create a poor climate for the enforcement of the law.

**Research question 5: Are there any similarities or differences between the law and enforcement of state liability in Vietnam and China?**

This research question attempts to compare Vietnamese law with other jurisdictions, China in particular, on the issue of state liability for compensation. Comparative law and its methodologies are significant in this part of the research which was introduced in Chapter 1 at 1.4.

As Vietnam and China have undertaken economic reforms based on a mixed-market economy within a socialist framework, they have begun to transform the role of law within their political systems, each introducing a constitutional commitment to governing by law and to the development of a socialist state based on the rule of law. It appears that the similarities in legal developments in China and Vietnam are substantial and significant. Although the relative differences do not imply different development trajectories, there is a suggestion by Peerenboom that in order to pursue reform in both jurisdictions, besides the development of economy, the focus should be on developing legal institutions as well as protecting human rights. The emergence of stand-alone laws on state compensation liability in both China and Vietnam are intended to achieve these goals. Because of the similarities between the political and social contexts, the law and enforcement of the matter suggest that state liability law in the two jurisdictions may have the same consequences.

Chapter 7 compares the legislation of the two jurisdictions. It focuses on related themes set out in the research questions and analysed in the previous chapters, namely, the scope of the laws, the grounds of state liability, methods to calculate damages, the responsibility of state officials, and mechanisms for the settlement of compensation claims. This analysis establishes the weaknesses and strengths of the laws and their enforcement in both jurisdictions and, more importantly, establishes the basis for a number of proposals for improvements of the Vietnamese SCL.

The chapter shows that the Chinese and Vietnamese laws have many provisions in common. Both confirm that liability belongs to the state and not to state agencies or officials. This is an expression of a principle of equality or a horizontal relationship between the state and citizen in respect of liability recognised in the reform processes of Vietnam and China. The legislation of both countries limits the scope of any state liability by listing the wrongful actions subject to compensation. These limitations indicate that the legislation may be a controlled experiment in both jurisdictions. This may fit with both societies' stage of economic development and low incomes. With a modest state budget it is difficult to develop everything at the same time. However, based on the suggestions by Lubman and Peerenboom, and also the context of the two countries, it is argued that together with the development of the economy, both countries should pay more attention to human rights and civil rights including the right to compensation. If this is not done, authoritarian rulers may hang on to power too long,

or move too slowly on reforms. Finally, the research shows that both jurisdictions compensate for both physical and mental loss and the agency liable for compensation is also the agency which committed the wrongful actions. Those provisions are consistent with theories of corrective justice. However, they are still subject to some limitations as indicated in sections 7.3.4 and 7.3.5.

Differences in provisions between the two laws were also pointed out and analysed as ways to improve the Vietnamese SCL. Chinese law has a provision which applies the law to foreign individuals and legal persons. The intention appears to be to increase the effectiveness of international and bilateral agreements, to strengthen China's reputation and to further cultivate international relationships. The Vietnamese SCL has no such provisions. It is suggested that Vietnam should consider adopting this principle of reciprocity from international law when the SCL is reformed. The Chinese legislation has removed the provision for having a valid document confirming the wrongful action, which continues to be a feature of the Vietnamese SCL. The Chinese provisions on the methods for calculating damages are more appropriate because they are based on the average annual salary of the previous year. The Chinese compensation procedure is simpler and more objective with compensation commissions set up at the level of the People's Court but, as they are composed of the judges, there is still a conflict of interest. These are all features that Vietnam should consider when it further reviews and amends the SCL.

### **8.3. Recommendations**

As shown in the previous chapters and in the answers to the research questions, the current law on state liability for compensation in Vietnam is fraught with problems. This section proposes several recommendations to address some fundamental issues.

#### **Amendment of the SCL and other Laws**

The scope of state liability should be extended to cover all activities of the judicial and executive arms of government. Widening the scope of state compensation will ensure a level of fairness which is consistent with theories of justice, concepts of the state and the rule of law, and also the law of obligations or tort law. It will help claimants to recover their losses. It is also consistent with international law, the Vietnamese *Constitution* and Art 604, 619, 620 of the *Civil Code 2005*. In respect of liability for wrongs resulting from the making of legislation, the law should cover the issuing of any

secondary legislation, such as Directives, which are contrary to law and which harm people and their property. This would further limit unlawful actions and create a more uniform and consistent legal system. See section 4.3.1.

The requirement to hold a valid document affirming the unlawful actions of the state officials should be removed. This also requires the removal of the procedures for requesting a valid document from the administrative agency or administrative court. It is essential that this recommendation be acted on. It will make the application of the law more feasible and more effective. See section 4.3.2.

In respect of damages, the method to calculate lost income should be changed so that it is based on the actual income or the average annual income of the previous year. The method for calculating mental loss in cases where more than one person in the one family has died should be clarified. Mental loss in cases of enforcement of civil judgments should be recognised and specified. See section 4.3.3.

The amount to be reimbursed by state officials who have committed wrongful actions should be increased. In cases where the officials intentionally committed wrongful actions in the course of their official duties, they should repay the total amount of the compensation that the state paid to the claimants. This provision will promote justice and enhance the accountability of state officials. See section 4.3.4.

The procedures for requesting a valid document confirming the unlawful action of the state officials, as mentioned above, should be removed. It should be reaffirmed that general civil procedures will be followed. These procedures already provide for negotiations to resolve disputes. In cases where the competent court is also the defendant, the next higher level court should be authorised to hear the case. These changes will ensure a more uniform and objective application of compensation procedures. See sections 4.3.2 and 5.3.

The time limits within which compensation must be claimed should be amended. Time should commence from the date on which the claimant would have known or received information of the wrongful actions by the state officials. The law should also impose penalties for the infringement of time periods by officials. See section 5.6.

Vietnam should follow Chinese law by recognising the principle of reciprocity between states. The provisions should be modified so it is clear that foreigners may be claimants. This will ensure the rights of foreigners under international law and increase

the effectiveness of bilateral agreements to which Vietnam is a party. This provision would also strengthen Vietnam's reputation and also encourage relationships between Vietnam and other countries. It will ensure benefits to Vietnam as well as to foreign citizens. See section 7.4.1.

Other Laws such as the *Law on Complaints 2011*, the *Law on Administrative Procedures 2010*, the *Law on Enforcement of Civil Judgments 2008* and the *Law on Enforcement of Criminal Judgments 2010* also need to be reviewed and amended. The provisions relating to state compensation liability should be amended to complement the reformed provisions of the SCL. Those revisions will ensure greater uniformity across the legal system. See sections 4.3.1 and 5.3 and 5.6.

### **Issuing secondary legislation**

Secondary legislations play a vital role in the implementation of Laws in Vietnam. The competent agencies should issue secondary legislation in time. This legislation should be consistent with the SCL, have a clear purpose, and be expressed clearly and unambiguously. The secondary legislation should focus on the key themes of state compensation liability, for example, by specifying the scope of law, the methods for calculating damages, on reimbursement of the state by officials, or on the procedures for resolving issues of state compensation. They should not focus on activities that are the scope of state liability including administrative activities, criminal proceedings and enforcement of civil judgments as the present secondary legislation does.<sup>724</sup> Because of the focus on these activities, the present secondary legislation overlaps with the provisions of other legislation on the grounds of liability, the categories of damages, methods of calculating damages, and procedures. See section 6.4.1.

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<sup>724</sup> The present secondary legislations focus on the activities of the state liability. Therefore, the contents of these legislation overlap in all the themes mentioned above which differ only in terms of their activities. For example:

- *The Joint Circular 19/2010/TTLT- BTP- BTC- TTCP* guiding the implementation of the state liability in administrative activities on 26<sup>th</sup> November 2010;
- *The Joint Circular 24/2011/BTP- BQP* guiding the implementation of the state liability in enforcement of civil judgment on 15<sup>th</sup> December 2011;
- *The Joint Circular 05/2012/TTLT- VKSNDTC- TANDTC- BCA- BTP- MOD- MOF- BNNPTNT* guiding state liability in criminal activity on 11<sup>th</sup> February 2012;
- *The Joint Circular 01/2012/TTLT/TANDTC-VKSNDTC-BTP* guiding the implementation of the state compensation liability in activities of civil proceedings, administrative proceedings on 18<sup>th</sup> September 2012;

## **Establish an independent agency for the resolution of claims and payment of compensation**

As argued in Chapter 5, section 5.4, establishing a specialised court for resolving compensation disputes is not immediately recommended. However, it is necessary to have a special independent institution for resolving compensation claims and payment of compensation. Establishing such an institution will have some advantages. This agency should be autonomous so that it can independently investigate, negotiate and compensate claims by a person who suffers damages or injuries through the wrongful action of state officials. This will prevent the dodging tactics and avoidance behaviour by state agencies. It will be more professional. It will process state liability claims more quickly. This reform will not only create a favourable mechanism for the settlement of compensation, but will also facilitate the execution of negotiated agreements and judgments on state liability.

## **Other recommendations**

As shown in a number of the chapters, together with the above suggestions, Vietnam should undertake other actions to improve the enforcement of the SCL. Publicising the SCL and educating the public about it and about related secondary legislation should be increased and widened to help both state officials and citizens learn about and understand it more fully. Furthermore, training in the skills and knowledge required to manage the settlement of compensation files should be conducted regularly for the officers working on state compensation issues as these are complex and difficult. See sections 6.4 and 6.5.

Moreover, supervision and assessment of the enforcement of the SCL should be conducted regularly to better evaluate its sufficiency and to modify its application in more timely ways. See section 6.5.

There also needs to be wider institutional reforms to increase the independence of the courts and the capability of other institutions. It would be desirable to establish a Constitutional Court in Vietnam with authority to annul laws which are inconsistent with the Constitution and unlawful actions to ensure a more uniform legal system as well the more effective implementation of laws. See section 6.5. It is desirable to disclose and make more transparent official information, court judgments and government statistics which would help interested citizens, media and researchers more

easily access information. See section 6.5. As indicated, there is also a need to better qualify and educate officials in public administration skills as well as ethics. See sections 6.4 and 6.5. The state also needs more effective anti-corruption measures and to increase the salaries of the state officials which may decrease the number of wrongful actions in public administration and judicial decision-making. See section 6.5.

## **8.4. Research contribution**

### **8.4.1. Academic contribution**

This research critically evaluates the significance and value of the theory of state liability in contemporary social and legal systems. It analyses the nature of the laws on state liability in national legal systems. It assists in supplementing and developing underlying theories and policies. It provides a historical example of the processes involved in the development of doctrines of state liability within a national legal system. It provides a base line for future legal studies on state liability in Vietnam.

It further considers the relationship between economic and legal developments which were the concern of Marx, Milhaupt and Pistor, the competing priority of economic development and protecting human rights described by Peerenboom, and the importance of the institutional capacity to support economic growth suggested by North. The research positions the law on state liability for compensation in the context of the development of the political and legal systems and the economy in Vietnam. This may contribute to an understanding of the role of the SCL which is significant when undertaking research into law and policy making.<sup>725</sup>

The other contribution to academic knowledge is an improved understanding of the law and regulation of state liability in Vietnam. The analysis of the legislation and secondary literature and the field work contributes to existing empirical studies and theoretical debates on a number of academic issues which have emerged around the SCL including the debate on whether or not the SCL needs to be further reformed.

This research is the first comprehensive Vietnamese study which attempts to evaluate the policies, the laws and the enforcement of state liability in that context. As the specific provisions and underlying policies are not uniform across legal systems the study reveals differences and gaps in the characteristics of laws on state liability and their enforcement in a Vietnamese context. This enriches the knowledge base on state

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<sup>725</sup> Peerenboom, above n 108, 42; North, above n 107, 3-4.

liability generally. In addition, through the use of comparative law analysis, the research assists in clarifying the weaknesses and strengths of the Vietnamese Law on state liability. This is significant for future research on comparative law in Vietnam. It also contributes more generally to knowledge of the relationship between states and citizens and related theories of justice and fairness.

#### **8.4.2. Practical contribution**

The research also makes a practical contribution. It provides a better understanding of law and policy on state liability in Vietnam. This will benefit future law reform in Vietnam. Also, one aim of the project has been to look for more effective mechanisms for the enforcement of state liability. This is a significant contribution to understanding law reform and the implementation of legal change processes in Vietnam. It makes a number of specific practical contributions.

Firstly, the research makes recommendations to improve the effectiveness of the law on state liability. This will be increasingly important as Vietnamese society is further impacted on by concepts of the rule of law and human rights, and the Vietnamese economic system is transformed by market principles and the private ownership of property. It will help to better understand the accountability of state officials. Its role in building a comprehensive legal system will contribute to the success of the *Doi moi* process in Vietnam.

Secondly, the research aims to establish more effective procedures to resolve disputes over state liability. Besides recommendations on substantive law, the research also suggests proposals for effective procedures and mechanisms for settling state compensation disputes. This may contribute to producing more efficient legal processes.

Furthermore, by investigating actual practices, this study has provided data showing the discrepancy between the law in the books and the law in practice, and the factors which impact on the enforcement of the law. This will assist law makers, policy makers and others to reform the law to better achieve its objectives.

In addition, by comparing the Vietnamese SCL with the Chinese SCL, the research reveals the distinctions between the Chinese experiences compared with Vietnam. It recommends proposals that Vietnamese law-makers are advised to consider when a further reform of the law is conducted.

## **8.5. Limitations of the research**

This research on the Law on State Liability for Compensation in Vietnam ended three years after the Law had been enacted. Its enforcement is in its first stages. Adequate secondary legislation has not been issued. The law is still not widely known to officials, lawyers and citizens. It may be too soon to understand comprehensively all of the themes investigated.

The research methodology was designed to achieve as complete an understanding as possible of Vietnamese state liability for compensation given the limited scale of this research. The selected interviewees were chosen from a wide range of interest groups and people with experience in state liability for compensation. The professionals were selected on the basis of their reputation for wide experience and were assumed to be representatives of their occupational groups. However, no assumptions on the generalisations of the findings of a particular group are made. Individual interviewees expressed their opinions regarding the questions asked based on their own personal experience. The findings therefore cannot be considered to represent the viewpoints of the organisations to which they belong or to make assumptions about the opinions of others based on their occupations or interest groups.

As indicated in Chapter 2, because of the need to manage the risks which may have occurred in the ethics application, the research questions could not thoroughly investigate the circumstances which led claimants to initiate claims, but only to the processing of those claims and related dispute resolution processes. This may lead to limits on the information and conclusions related to the issues of justice and fairness which were investigated. Citizens who seek to litigate and, in particular, to sue the state, are acting outside the normal leeway of Vietnamese society. Why they are motivated to do so, and their perceptions of justice and fairness which led to their sense of grievance, should be investigated but in ways which appropriately protect their interests. Additionally, due to time constraints, interviews were conducted only in the North and three interviews were by telephone. This may also affect any generalisation which could be drawn from the interview results. The findings might have been different if a broader range of interviews had been conducted in other regions.

Enforcement of the Law is the central part of the research. The statistics collected by the relevant state agencies and the cases reported in the media and analysed in this

research reveal that enforcement is a very important issue. As court judgments are not published in official instruments in Vietnam, the research relied on cases published in the media. The accuracy of the details of the cases may be affected by the difficulty of correlating them with court records and the understanding of the lawyers, public officials and judges involved in them. This may also have an impact on the research findings.

The research compares the SCLs of Vietnam and China. Because the researcher does not read Chinese, she had only limited access to the range of Chinese literature on state liability for compensation. Also, it was not possible to conduct fieldwork in China because of the limited resources available for this project. Although there is a significant amount of literature available in English, the findings and recommendations may have been different if a broad range of Chinese literature had been studied and field work had been undertaken there.

#### **8.6. Suggestions for the future research**

Although this study has made contributions to the legal reform process in Vietnam, a single piece of research on this scale cannot be comprehensive or conclusive. Hence, there are several opportunities for future research.

Firstly, similar research may be conducted with a broader range of interview samples to provide a richer and more in-depth understanding of Vietnamese law on state liability and its enforcement. It should extend the fieldwork to other regions and to more participants to obtain more viewpoints from those affected by legal reform in Vietnam.

Secondly, as state liability is closely related to the *Law on Complaints 2011* and the *Law on Denunciations 2011*, future research could investigate the connection between the SCL and the mechanisms used for resolving complaints and denunciations. It could also examine the state institutions, inherited from the Soviet Union, used in resolving this issue. A comparative study could be made with China which also retains these laws and related processes.

Thirdly, future research may expand the results of the study. The study finds significant deficiencies in the law on state liability and its implementation. It also makes some suggestions for reform. Future research may discover more limitations and make further recommendations to improve the substantive and procedural law.

Finally, future research could investigate other jurisdictions in Asia as well as in other parts of the world. Most have provisions on state liability for compensation. In particular, there are a number of countries belonging to the civil law family, such as South Korea or Taiwan, which have recently had substantial reforms to their law and Vietnam may be able to learn from their experiences.

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## **Appendix 1**

### **Interview schedule**

#### **Concepts and significance**

1. What does state liability for compensation mean to you? Is it important? Why?
2. The Vietnamese government has a number of important issues to deal with in reforming the legal system. Of the top 10 issues, where do you think the government ranks state liability?
3. In your experience, do you think that other people see state liability as being as important as you do? [Prompts: State officials? Law and policy makers? Judges? Legal professionals? Citizens? Business organizations? Non-government organizations interested in human rights?]
4. In your experience, is state liability important in the further development of a socialist market economy? [Prompt: Does it give confidence to owners of property that their rights will be respected?]
5. In your experience, is state liability important in protecting human rights and promoting a sense of fairness and justice?
6. To what extent should liability be limited by the state's need to use money for other purposes? [Prompt: Should the state pay damages to a person injured by its actions or use that money to improve its processes so that no one else is injured?]
7. To what extent should a judge, in finding the state liable, be able to impose a financial burden on the state? [Prompt: Does this interfere with the government's right to control public funds?]
8. In your view, should the state or individual state officials be liable to pay compensation? Why?

## **The Present Law on State Liability for Compensation**

9. Should the law on state liability be included as part of administrative law, civil liability or tort law or in another area of law? Why?
10. Should liability for wrongful convictions be treated separately from other areas of state liability? Why?
11. In your view, does the law cover the appropriate range of state activities? [Prompts: Administrative actions? Judicial actions? All wrongs? Law making? Others?]
12. The law requires – except in wrongful conviction cases – a person claiming compensation to obtain a document, issued by an authorized office, acknowledging that officials acted wrongfully? Is this appropriate? [Prompt: Doesn't it permit officials to continue to control liability rather than the courts?]
13. What injuries and damages should be compensated? [Prompts: Physical injuries? Property damage? Mental harm? Direct losses? Indirect losses?]
14. Do you think that it is appropriate that only actual damages may be recovered? [Prompt: Economic loss including loss of profits and business opportunities?]
15. Do you think that the calculation of damages provided for in the law is appropriate? [Prompts: Should lost income be based on the common minimum wage or actual earnings? Should losses for mental suffering be limited by: two days minimum wages for each day spent in administrative custody? Three days minimum wages for each day spent in criminal custody or imprisonment? Or by 360 months in case of death in criminal custody, imprisonment or execution? In other cases should compensation for mental suffering be based on actual damage but limited to 30 months minimum wages?]
16. Do you think that the level of personal liability for officials is appropriate? [Prompts: Officials who act criminally are liable to pay the full amount of compensation. Officials who intentionally act wrongfully are liable to pay a maximum of 36 months wages. Those who act negligently are liable to pay a

maximum of three months wages. Officials who are negligent in making a wrongful conviction are not liable for reimbursement.]

17. From your experience do you think that amendments need to be made to the Law on State Liability for Compensation? [Prompt: Is it sufficiently comprehensive and clear to apply without further regulations and directions?]

### **The procedure used to resolve disputes over state liability**

18. The law provides that claims must be made within two years. Do you think that this is an appropriate period of time? Why?
19. The law provides that the office responsible for paying compensation is the state body which monitors the official who acted wrongly or the office which made the wrong decision or the court which gave the wrong judgment. Do you think that this is appropriate?
20. The law provides that the authorized court to resolve any dispute is the civil division of the People's Courts, or, in some cases, the administrative division of these courts. Are these appropriate? [Prompt: Administrative Division? Civil Division? Criminal Division? Ministry of Justice?]
21. Do you think that the procedure used to resolve claims is appropriate? [Prompt: Should the People's Procurate play a more significant role?]

### **The enforcement of the law on state liability for compensation**

22. When citizens complain to government offices or to courts about their treatment, how do they respond? [Prompts: Were people treated differently before the new law came into force? Is there a difference between responses by government offices and by the courts?]
23. In your experience, is the law on state liability being effectively enforced?
24. Is it working better in some areas than in others? (Prompts: Wrongful administrative actions? Wrongful convictions? Wrongful civil judgments? Wrongful enforcement of judgments?)

25. In your experience, has the law produced any changes? [Prompts: Greater government accountability? More knowledgeable and skilful officials and judges? More respect for citizens? Greater protection of human rights?]
26. How well is the law known? [Prompts: To citizens? To lawyers? To officials? To judges?]
27. Do you think that citizens bring sufficient legal actions under it? Why?/Why not? [Prompts: Contrary to tradition? Contrary to custom? Contrary to morality? Legal costs are too high?]
28. Is its enforcement affected by legal culture and the knowledge and skills of lawyers and judges? [Prompt: Legal tradition? Skills of practitioners? Judicial opinion?]
29. Are there other significant factors influencing its enforcement? [Prompt: Political system? Lack of judicial independence? Corruption?]
30. In your opinion what changes, if any, need to be made to the processes which are used to enforce the law? [Prompt: In the immediate future? In the longer term?]

## Appendix 2

### INFORMATION TO PARTICIPANTS

#### INVOLVED IN RESEARCH

##### **You are invited to participate**

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You are invited to participate in a research project titled “State liability for compensation in Vietnam”.

This project is being conducted by a student researcher, Minh Oanh Nguyen as part of a PhD study at Victoria University under the supervision of Professor Neil Andrews from the Faculty of Business and Law.

##### **Project explanation**

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The aim of this research is to examine the effectiveness of the laws on state liability for compensation in Vietnam and their enforcement. The purpose is to analyse the existing principles and law, issues impacting on their implementation and to make suggestions for their reforms.

The interview will focus on the implementation of the laws and the policies by the relevant authorities, the viewpoint of those injured or damaged by wrongful actions by officials and their lawyers, and the future directions of changes in the law and related processes.

##### **What will I be asked to do?**

---

You are invited to participate in an interview which takes about one hour. The interview is about your knowledge, experience, and view on state liability for compensation in Vietnam. It relates to both legal and regulatory practices. It seeks to draw on your experience with these. You are, however, not obliged to disclose anything which you are not comfortable with or respond to any question which you do not wish to answer.

##### **What will I gain from participating?**

---

Your comments, based on your knowledge and experience, will contribute to possible solutions in reforming the law on, and mechanisms for, the implementation of state liability for compensation in Vietnam. It will lead to a better understanding by

Vietnamese state officials of legal policies and regulatory practices and may lead to improvements in both of these.

### **How will the information I give be used?**

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The information you provide will be presented in a thesis which will be available in the library of Victoria University. Also, some parts of the information may be published in various academic journals. Your response to questions will remain confidential. You will not be named as having participated in the research project. Your statement or comments may be republished in the thesis or the articles, but not in such a way that you, or your organization, could be identified.

### **What are the potential risks of participating in this project?**

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Minimal risks have been identified from participating in this research. Throughout the interview, if you feel uncomfortable or require some form of explanation, please feel free to raise the issue with the researcher. As indicated, you are free to not answer any question. However, you will not be identified as the maker or author of any statement. Also, the statement or comment will not be used in a way which will enable you to be identified. You may withdraw at any time and for any reason without prejudice.

### **How will this project be conducted?**

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To make appropriate reforms to state liability for compensation in Vietnam, it is necessary to study some selected aspects of relevant laws and their enforcement. Collection of data for this study will involve three sources. Firstly, data will be collected from primary legal materials including legislation and regulations and formal guidance given by courts and government agencies. Secondly, data will be gathered from academic monographs and journals, from media and other relevant data bases. The third source of data will come from interviews conducted in Vietnam. Potential interviewees will be identified from their knowledge of, and experience with, state liability for compensation including judges, procurators, enforcement officials, policy and law makers, lawyers, editors, journalists and those injured by state actions.

### **Who is conducting the study?**

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The project is conducted by

Professor Neil Andrews ([Neil.Andrews@vu.edu.au](mailto:Neil.Andrews@vu.edu.au)) and

Mrs Minh Oanh Nguyen ([minh.nguyen79@live.vu.edu.au](mailto:minh.nguyen79@live.vu.edu.au) )

Any queries about your participation in this project may be directed to the Principal Researcher listed above or to Dr. NGUYEN Van Quang, head of Department of International Cooperation, Hanoi Law University, 87 Nguyen Chi Thanh, Dong Da, Hanoi, Vietnam

Phone: (0084) 38558169

Email: [nguyenvanquang@hlu.edu.vn](mailto:nguyenvanquang@hlu.edu.vn)

If you have any queries or complaints about the way you have been treated, you may contact the Research Ethics and Biosafety Manager, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 or phone (03) 9919 4148.

**Appendix 3**

**CONSENT FORM FOR PARTICIPANTS**

**INVOLVED IN RESEARCH**

**INFORMATION TO PARTICIPANTS:**

We would like to invite you to be a part of a study, “State liability for compensation in Vietnam”, to investigate the laws, policies, practices relating to the issue and to consider possible proposals for their improvement.

**CERTIFICATION BY SUBJECT**

I, \_\_\_\_\_

of \_\_\_\_\_

certify that I am at least 18 years old and that I am voluntarily giving my consent to participate in the study: “State liability for compensation in Vietnam” being conducted at Victoria University by Professor Neil Andrews.

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by Mrs Minh Oanh Nguyen

and that I freely consent to participation involving the procedures mentioned below :

An interview: (please choose an appropriate box)

- In which the answer will be recorded on an audio tape, or
- In which the answers will be recorded in the form of note taking

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardise me in any way.

I have been informed that the information I provide will be kept confidential.

Signed:.....

Date: .....

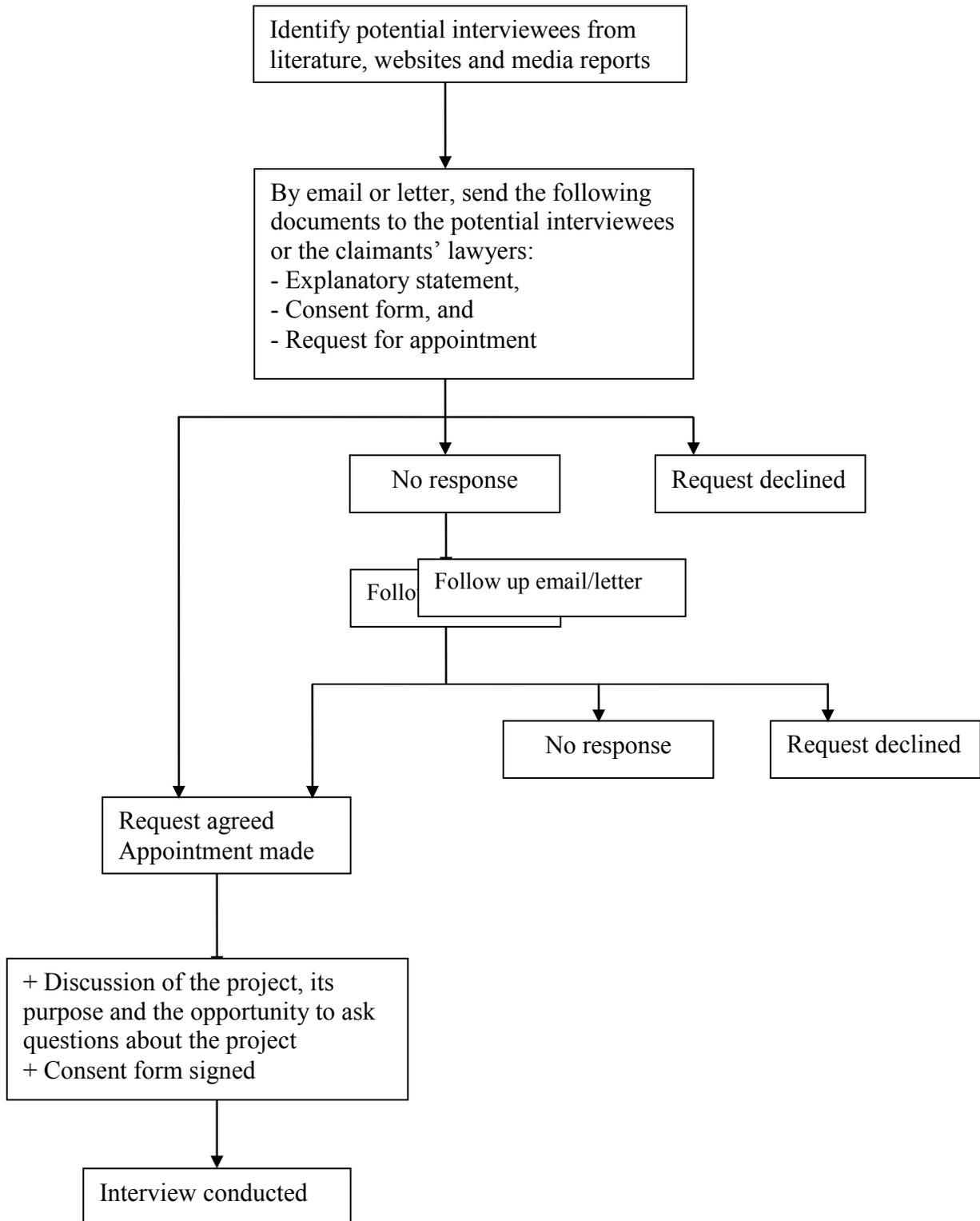
Any queries about your participation in this project may be directed to the researcher Professor Neil Andrews at +61 (0)3 99191826 or [Neil.Andrews@vu.edu.au](mailto:Neil.Andrews@vu.edu.au) or to Dr. NGUYEN Van Quang, head of Department of International Cooperation, Hanoi Law University, 87 Nguyen Chi Thanh, Dong Da, Hanoi, Vietnam

Phone: (0084) 38558169

Email: [nguyenvanquang@hlu.edu.vn](mailto:nguyenvanquang@hlu.edu.vn)

If you have any queries or complaints about the way you have been treated, you may contact the Ethics & Biosafety Coordinator, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4148.

**Appendix 4: Flow chart**



## Appendix 5

### Danh mục phỏng vấn

#### Interview schedule

#### Khái niệm và ý nghĩa

#### Concepts and significance

- 1. Trách nhiệm bồi thường Nhà nước có ý nghĩa như thế nào đối với bạn? Với bạn nó có quan trọng không? Tại sao?**

What does state liability for compensation mean to you? Is it important? Why?

- 2. Chính phủ Việt Nam đã tiến hành một loạt những vấn đề quan trọng để cải cách hệ thống pháp luật. Trong 10 sự kiện nổi bật nhất bạn xếp trách nhiệm bồi thường Nhà nước ở vị trí thứ mấy?**

The Vietnamese government has a number of important issues to deal with in reforming the legal system. Of the top 10 issues, where do you think the government ranks state liability?

- 3. Theo kinh nghiệm của bạn thì những người khác có đánh giá trách nhiệm bồi thường nhà nước là một nội dung quan trọng không? Gợi ý: có gì khác biệt giữa nhân viên nhà nước, nhà làm luật, thẩm phán, chuyên gia pháp lý, tổ chức kinh tế, tổ chức phi chính phủ bảo vệ quyền con người?**

In your experience, do you think that other people see state liability as being as important as you do? [Prompts: State officials? Law and policy makers? Judges? Legal professionals? Citizens? Business organizations? Non-government organizations interested in human rights?]

- 4. Theo bạn thì Luật trách nhiệm bồi thường Nhà nước có ý nghĩa trong việc thúc đẩy sự phát triển của nền kinh tế thị trường xã hội chủ nghĩa không? Gợi ý: Nó có tạo ra sự tự tin cho các chủ sở hữu tài sản khi quyền của họ được tôn trọng và bảo vệ?**

In your experience, is state liability important in the further development of a socialist market economy? [Prompt: Does it give confidence to owners of property that their rights will be respected?]

**5. Theo bạn thì Luật trách nhiệm bồi thường Nhà nước có ý nghĩa trong việc bảo vệ quyền con người và thúc đẩy một xã hội công bằng hay không?**

In your experience, is state liability important in protecting human rights and promoting a sense of fairness and justice?

**6. Theo bạn Nhà nước có nên hạn chế tiền bồi thường để sử dụng cho những mục đích khác không? Gợi ý: Nhà nước có nên dùng tiền để bồi thường cho người bị thiệt hại hay nên sử dụng tiền đó để cải thiện hệ thống nhằm ngăn chặn thiệt hại xảy ra.**

To what extent should liability be limited by the state's need to use money for other purposes? [Prompt: Should the state pay damages to a person injured by its actions or use that money to improve its processes so that no one else is injured?]

**7. Theo bạn có nên mở rộng thẩm quyền cho thẩm phán trong việc áp đặt một nghĩa vụ về tài chính khác đối với Nhà nước hay không? Gợi ý: Điều này có giúp hạn chế quyền của Chính phủ trong việc kiểm soát chi tiêu hay không?**

To what extent should a judge, in finding the state liable, be able to impose a financial burden on the state? [Prompt: Does this interfere with the government's right to control public funds?]

**8. Theo bạn thì trách nhiệm bồi thường thiệt hại nên thuộc về nhà nước hay thuộc về cá nhân cán bộ, công chức làm sai? Tại sao?**

In your view, should the state or individual state officials be liable to pay compensation? Why?

## **Pháp luật về trách nhiệm bồi thường nhà nước hiện hành**

### **The Present Law on State Liability for Compensation**

**9. Trách nhiệm bồi thường nhà nước nên được coi là trách nhiệm hành chính, trách nhiệm dân sự, trách nhiệm bồi thường thiệt hại riêng biệt hay là một loại trách nhiệm khác? Tại sao?**

Should the law on state liability be included as part of administrative law, civil liability or tort law or in another area of law? Why?

**10. Có nên quy định riêng về trách nhiệm bồi thường nhà nước trong hoạt động tố tụng hình sự hay không? Tại sao?**

Should liability for wrongful convictions be treated separately from other areas of state liability? Why?

**11. Theo bạn thì phạm vi Luật bồi thường nhà nước nên điều chỉnh những hoạt động nào của nhà nước? Gợi ý: hoạt động hành chính? hoạt động tư pháp? hoạt động lập pháp? tất cả các hoạt động? hay những hoạt động khác?**

In your view, does the law cover the appropriate range of state activities? [Prompts: Administrative actions? Judicial actions? All wrongs? Law-making? Others?]

**12. Luật quy định điều kiện để yêu cầu bồi thường thiệt hại nói chung là phải có văn bản của cơ quan nhà nước có thẩm quyền xác nhận hành vi của người thi hành công vụ là trái pháp luật. Theo bạn thì quy định này có phù hợp không? Gợi ý: Liệu quy định này có cho phép cán bộ, công chức kiểm soát được trách nhiệm này hay không?**

The law requires – except in wrongful conviction cases – a person claiming compensation to obtain a document, issued by an authorized office, acknowledging that officials acted wrongfully? Is this appropriate? [Prompt: Doesn't it permit officials to continue to control liability rather than the courts?]

**13. Những loại thiệt hại nào cần được bồi thường? Gợi ý: thiệt hại vật chất? thiệt hại tài sản? tổn thất tinh thần? thiệt hại trực tiếp? thiệt hại gián tiếp?**

What injuries and damages should be compensated? [Prompts: Physical injuries? Property damage? Mental harm? Direct losses? Indirect losses?]

**14. Theo bạn có thích hợp không nếu chỉ có thiệt hại trực tiếp được bồi thường?  
Gợi ý: tổn thất gián tiếp về kinh tế như thu nhập bị mất, giảm sút và mất cơ hội kinh doanh?**

Do you think that it is appropriate that only actual damages may be recovered? [Prompt: Economic loss including loss of profits and business opportunities?]

**15. Theo bạn cách tính toán thiệt hại được Luật quy định đã phù hợp chưa? Gợi ý: xác định thu nhập bị mất nên dựa vào mức lương tối thiểu hay tổn thất thực tế? tổn thất về tinh thần trong trường hợp bị bắt giữ hành chính được xác định là một ngày bắt giữ bằng hai ngày lương tối thiểu; trong trường hợp bị tạm giữ, tạm giam hoặc tù hình sự được xác định bằng 3 ngày lương; trường hợp người bị hại chết trong tố tụng hình sự được xác định bằng 360 tháng lương tối thiểu? trong trường hợp khác được xác định dựa vào thiệt hại thực tế nhưng tối đa không qus 30 tháng lương tối thiểu.**

Do you think that the calculation of damages provided for in the law is appropriate? [Prompts: Should lost income be based on the common minimum wage or actual earnings? Should losses for mental suffering be limited by: two days' minimum wages for each day spent in administrative custody? Three days' minimum wages for each day spent in criminal custody or imprisonment? Or 360 months in case of death in criminal custody, imprisonment or execution? In other cases, should compensation for mental suffering be based on actual damage but be limited to 30 months minimum wages?]

**16. Theo bạn mức hoàn trả của người thi hành công vụ đối với nhà nước đã phù hợp chưa? Gợi ý: hiện nay pháp luật quy định người thi hành công vụ chịu trách nhiệm hình sự phải hoàn trả toàn bộ thiệt hại. Người có lỗi cố ý phải hoàn trả tối đa 36 tháng lương. Người có lỗi vô ý hoàn trả tối đa 3 tháng lương. Người vô ý trong việc ra bản án, quyết định oan sai trong tố tụng hình sự không phải chịu trách nhiệm hoàn trả.**

Do you think that the level of personal liability for officials is appropriate? [Prompts: Officials who act criminally are liable to pay the full amount of compensation. Officials who intentionally act wrongfully are liable to pay a maximum of 36 months wages. Those who act negligently are liable to pay a maximum of three months' wages.

Officials who are negligent in making a wrongful conviction are not liable for reimbursement.]

**17. Theo bạn có cần sửa đổi Luật bồi thường nhà nước không? Nếu có thì bạn có kiến nghị gì? Gợi ý: Luật đã đủ hiệu quả và rõ ràng để áp dụng không cần văn bản hướng dẫn không?**

From your experience, do you think that amendments need to be made to the Law on State Liability for Compensation? [Prompt: Is it sufficiently comprehensive and clear to apply without further regulations and directions?]

**Thủ tục giải quyết tranh chấp về bồi thường nhà nước**

**The procedure used to resolve disputes over state liability**

**18. Luật bồi thường nhà nước quy định thời hiệu yêu cầu bồi thường là 2 năm. Theo bạn quy định này có phù hợp không? Tại sao?**

The law provides that claims must be made within two years. Do you think that this is an appropriate period of time? Why?/Why not?

**19. Luật quy định cơ quan bồi thường là cơ quan nhà nước quản lý cán bộ, công chức. Quy định này theo bạn có phù hợp không?**

The law provides that the office responsible for paying compensation is the state body which monitors the official who acted wrongly or the office which made the wrong decision or the court which gave the wrong judgment. Do you think that this is appropriate?

**20. Luật quy định Tòa án có thẩm quyền giải quyết tranh chấp là Tòa Dân sự hoặc trong một số trường hợp là Tòa Hành chính. Theo bạn quy định này có phù hợp không? Gợi ý: Nên là Tòa Hành chính? Tòa Dân sự? Tòa Hình sự? hay Bộ Tư pháp?**

The law provides that the court authorized to resolve any dispute is the civil division of the People's Courts, or, in some cases, the administrative division of these courts. Are these appropriate? [Prompt: Administrative Division? Civil Division? Criminal Division? Ministry of Justice?]

**21. Theo bạn thì các bước giải quyết yêu cầu bồi thường đã phù hợp chưa? Gợi ý: Có nên nâng cao vai trò của Viện Kiểm sát nhân dân không?**

Do you think that the procedure used to resolve claims is appropriate? [Prompt: Should the People's Procurate play a more significant role?]

**Thực thi pháp luật về bồi thường nhà nước**

**The enforcement of the law on state liability for compensation**

**22. Khi công dân khiếu nại tới cơ quan nhà nước hoặc tới Tòa án thì họ được hỏi đáp như thế nào? Gợi ý: Có sự khác nhau trước và sau khi Luật có hiệu lực không? Có sự khác nhau giữa cơ quan của Chính phủ và tòa án không?**

When citizens complain to government offices or to courts about their treatment, how do officials respond? [Prompts: Were people treated differently before the new law came into force? Is there a difference between responses by government offices and by the courts?]

**23. Theo bạn thì Luật bồi thường nhà nước có được thực thi một cách hiệu quả không?**

In your experience, is the law on state liability being effectively enforced?

**24. Theo bạn thì trách nhiệm bồi thường nhà nước trong những lĩnh vực nào thực thi hiệu quả nhất? Gợi ý: bồi thường do vi phạm hoạt động hành chính? Do oan sai trong tố tụng hình sự? trong dân sự? hay trong thi hành án?**

Is it working better in some areas rather than others? (Prompts: Wrongful administrative actions? Wrongful convictions? Wrongful civil judgments? Wrongful enforcement of judgments?)

**25. Theo bạn thì pháp luật về thủ tục giải quyết tranh chấp có cần được sửa đổi không? Gợi ý: nâng cao trách nhiệm của chính phủ? Nâng cao kiến thức và kỹ năng của thẩm phán và cán bộ công chức? tôn trọng hơn các quyền công dân? Bảo vệ tốt hơn quyền con người?**

In your experience, has the law produced any changes? [Prompts: Greater government accountability? More knowledgeable and skilful officials and judges? More respect for citizens? Greater protection of human rights?]

**26. Theo bạn thì luật bồi thường nhà nước hiện nay được biết đến như thế nào? Gợi ý: đối với công dân? Đối với luật sư? Đối với cán bộ công chức? Đối với thẩm phán?**

How well is the law known? [Prompts: To citizens? To lawyers? To officials? To judges?]

**27. Bạn có nghĩ rằng cá nhân công dân tuân thủ việc thực hiện luật một cách tích cực hay không? Gợi ý: Luật có trái với truyền thống đạo đức? chi phí có quá cao không?**

Do you think that citizens bring sufficient legal actions under it? Why? Why not? [Prompts: Contrary to tradition? Contrary to custom? Contrary to morality? Legal costs are too high?]

**28. Bạn có nghĩ rằng việc thực thi pháp luật bị ảnh hưởng bởi văn hóa pháp luật; kiến thức và kỹ năng của thẩm phán và luật sư hay không? Gợi ý: truyền thống pháp lý? Kỹ năng? Quan điểm tư pháp?**

Is its enforcement affected by legal culture and the knowledge and skills of lawyers and judges? [Prompt: Legal tradition? Skills of practitioners? Judicial opinion?]

**29. Theo bạn, có những yếu tố nào khác có tác động đáng kể lên quá trình thực thi pháp luật? Gợi ý: hệ thống chính trị? thiếu tính độc lập xét xử? tham nhũng?**

Are there other significant factors influencing its enforcement? [Prompt: Political system? Lack of judicial independence? Corruption?]

**30. Theo bạn có cần thiết xây dựng một cơ chế đảm bảo thực thi pháp luật hay không? Gợi ý: trong giai đoạn trước mắt? trong giai đoạn lâu dài?**

In your opinion what changes, if any, need to be made to the processes which are used to enforce the law? [Prompt: In the immediate future? In the longer term?]

## Appendix 6

# THÔNG TIN CHO CÁC THÀNH VIÊN LIÊN QUAN ĐẾN NGHIÊN CỨU INFORMATION TO PARTICIPANTS INVOLVED IN RESEARCH

### Mời bạn tham gia

#### **You are invited to participate**

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Mời bạn tham gia vào việc nghiên cứu đề tài “Trách nhiệm bồi thường nhà nước tại Việt Nam”.

Đề tài này đang được nghiên cứu bởi nghiên cứu sinh Minh Oanh Nguyen. Nghiên cứu này là một phần của luận án tiến sĩ tại đại học Victoria dưới sự hướng dẫn của giáo sư Neil Andrews thuộc Khoa Luật và Kinh doanh.

You are invited to participate in a research project titled “State liability for compensation in Vietnam”.

This project is being conducted by a student researcher, Minh Oanh Nguyen as part of a PhD study at Victoria University under the supervision of Professor Neil Andrews from the Faculty of Business and Law.

### Gới thiệu đề tài

#### **Project explanation**

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Mục tiêu của đề tài này là đánh giá hiệu quả pháp luật và việc thực thi pháp luật về bồi thường nhà nước ở Việt Nam. Qua phân tích hệ thống pháp luật, những yếu tố tác động và quá trình thực thi pháp luật đề tài sẽ đưa ra những kiến nghị phù hợp nhằm hoàn thiện pháp luật và cơ chế thực thi trách nhiệm bồi thường nhà nước.

Việc phỏng vấn sẽ tập trung vào việc thực thi pháp luật và chính sách bồi cơ quan nhà nước có thẩm quyền, quan điểm của những người bị thiệt hại và luật sư bào chữa, những định hướng và thay đổi pháp luật và cơ chế thực thi trong tương lai.

The aim of this research is to examine the effectiveness of the laws on state liability for compensation in Vietnam and their enforcement. The purpose is to analyse the existing

principles and law, issues impacting on its implementation and to make suggestions for their reforms.

The interview will focus on the implementation of the laws and the policies by the relevant authorities, the viewpoint of those injured or damaged by wrongful actions by officials and their lawyers, and the future directions of changes in the law and related processes.

### **Bạn được đề nghị làm gì?**

#### **What will you be asked to do?**

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Bạn được đề nghị tham gia cuộc phỏng vấn kéo dài khoảng 1 giờ. Nội dung phỏng vấn là kiến thức, kinh nghiệm và quan điểm của bạn về vấn đề bồi thường nhà nước tại Việt Nam. Nó liên quan đến pháp luật và các quy định thực tiễn. Cuộc phỏng vấn nhằm thu thập kinh nghiệm của bạn về vấn đề này. Bạn có thể không cung cấp thông tin mà bạn thấy không phù hợp hoặc từ chối trả lời câu hỏi mà bạn không muốn.

You are invited to participate in an interview which takes about one hour. The interview is about your knowledge, experience, and view on state liability for compensation in Vietnam. It relates to both legal and regulatory practices. It seeks to draw on your experience with these. You are, however, not obliged to disclose anything which you are not comfortable with or, respond to any question which you do not wish to answer.

### **Tôi sẽ nhận được gì từ sự tham gia của bạn?**

#### **What will I gain from participating?**

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Những thông tin dựa trên kiến thức và kinh nghiệm của bạn sẽ đóng góp vào các giải pháp về hoàn thiện pháp luật và cơ chế thực thi trách nhiệm bồi thường nhà nước ở Việt Nam. Điều đó sẽ mang lại sự hiểu biết tốt hơn cho cán bộ, công chức nhà nước về quy định của pháp luật và thực tiễn. Điều này sẽ mang đến sự cải tiến cho họ trong nhận thức về những vấn đề trên.

Your comments, based on your knowledge and experience, will contribute to possible solutions in reforming the law on and mechanisms for the implementation of state liability for compensation in Vietnam. It will lead to a better understanding by Vietnamese state officials of legal policies and regulatory practices and may lead to improvements in both of these.

## **Thông tin bạn cung cấp sẽ được sử dụng như thế nào**

### **How will the information I give be used?**

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Thông tin mà bạn cung cấp sẽ nằm trong luận án tiến sỹ, được sử dụng ở thư viện của đại học Victoria. Một vài phần của thông tin có thể sẽ được xuất bản dưới dạng các tạp chí chuyên ngành. Các thông tin phản hồi về các câu hỏi của bạn sẽ được giữ bí mật. Tôi sẽ không công khai tên của bất kỳ ai tham gia vào đề tài này. Các tuyên bố và gợi ý của bạn có thể xuất hiện trong luận án, nhưng những thông tin cá nhân và tên công ty bạn sẽ không bị tiết lộ.

The information you provide will be presented in a thesis which will be available in the library of Victoria University. Also, some parts of the information may be published in various academic journals. Your response to questions will remain confidential. You will not be named as having participated in the research project. Your statement or comments may be republished in the thesis or the articles, but not in such a way that you, or your organization, could be identified.

### **Những rủi ro tiềm ẩn khi tham gia nghiên cứu?**

#### **What are the potential risks of participating in this project?**

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Những rủi ro nhỏ nhất cũng được chỉ ra trong việc tham gia vào quá trình nghiên cứu, trong suốt quá trình phỏng vấn, nếu bạn cảm thấy không thoải mái hoặc yêu cầu được giải thích thêm, hãy nêu vấn đề với người nghiên cứu. Như đã đề cập, bạn có quyền từ chối trả lời bất kỳ câu hỏi nào. Bạn sẽ không bị nêu tên như là tác giả của bất kỳ tuyên bố nào. Thêm vào đó, tất cả các lời khẳng định hoặc ý kiến sẽ được sử dụng theo cách không tiết lộ tên của bạn. Bạn cũng có thể dừng tham gia vào bất kỳ thời gian nào với bất kỳ lý do gì.

Minimum risks have been identified from participating in this research. Throughout the interview, if you feel uncomfortable or require some form of explanation; please feel free to raise the issue with the researcher. As indicated, you are free not to answer any question. However, you will not be identified as the maker or author of any statement. Also, the statement or comment will not be used in a way which will enable you to be identified. You may withdraw at any time and for any reason without prejudice.

### **Đề tài nghiên cứu được tiến hành như thế nào?**

#### **How will this project be conducted?**

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Đưa ra các giải pháp cho vấn đề trách nhiệm bồi thường nhà nước ở Việt Nam cần thiết phải nghiên cứu một vài khía cạnh của pháp luật và vấn đề thực thi pháp luật về trách nhiệm bồi thường nhà nước. Thu thập số liệu cho nghiên cứu này bao gồm ba nguồn. Nguồn thứ nhất là từ hệ thống các văn bản pháp luật. Nguồn thứ hai là từ các tạp chí, báo cáo, phương tiện thông tin đại chúng và các cơ sở dữ liệu liên quan. Nguồn thứ ba là từ phỏng vấn những người có sự hiểu biết và các nạn nhân của trách nhiệm bồi thường nhà nước ở Việt Nam.

To make appropriate reforms to state liability for compensation in Vietnam, it is necessary to study some selected aspects of relevant laws and their enforcement. Collection of data for this study will involve three sources. Firstly, data will be collected from primary legal materials including legislation and regulations and formal guidance given by courts and government agencies. Secondly, data will be gathered from academic monographs and journals, from media and other relevant data bases. The third source of data will come from interviews conducted in Vietnam. Potential interviewees will be chosen according to their knowledge of, and experience with, state liability for compensation including judges, procurators, enforcement officials, policy and law makers, lawyers, editors, journalists and those injured by state actions.

### **Ai là người nghiên cứu?**

#### **Who is conducting the study?**

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Đề tài này được nghiên cứu bởi

Giáo sư Neil Andrews ([Neil.Andrews@vu.edu.au](mailto:Neil.Andrews@vu.edu.au)) và

Bà Minh Oanh Nguyen ([minh.nguyen79@live.vu.edu.au](mailto:minh.nguyen79@live.vu.edu.au))

The project is conducted by

Professor Neil Andrews ([Neil.Andrews@vu.edu.au](mailto:Neil.Andrews@vu.edu.au)) and

Mrs Minh Oanh Nguyen ([minh.nguyen79@live.vu.edu.au](mailto:minh.nguyen79@live.vu.edu.au))

Bất kỳ yêu cầu gì về sự tham gia của bạn vào quá trình nghiên cứu có thể liên hệ trực tiếp với các nhà nghiên cứu trên hoặc Nguyễn Văn Quang, Trưởng Phòng Hợp tác Quốc tế, Đại học Luật Hà Nội, 87 Nguyễn Chí Thanh, Đống Đa, Hà Nội, Việt Nam

Số điện thoại: (0084) 38558169

Email: [nguyenvanquang@hlu.edu.vn](mailto:nguyenvanquang@hlu.edu.vn)

Any queries about your participation in this project may be directed to the Principal Researcher listed above or to NGUYEN Van Quang, Head of Department of International Cooperation, Hanoi Law University, 87 Nguyen Chi Thanh, Dong Da, Hanoi, Vietnam

Phone: (0084) 38558169

Email: [nguyenvanquang@hlu.edu.vn](mailto:nguyenvanquang@hlu.edu.vn)

Nếu bạn có bất kỳ yêu cầu và phàn nàn gì về cách ứng xử có thể liên hệ qua địa chỉ:

Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 Hoặc số điện thoại +61(0)399194148

If you have any queries or complaints about the way you have been treated, you may contact the Research Ethics and Biosafety Manager, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 or phone (03) 9919 4148.

**Appendix 7**

**MẪU ĐƠN CHẤP THUẬN THAM GIA NGHIÊN CỨU**

**CONSENT FORM FOR PARTICIPANTS**

**INVOLVED IN RESEARCH**

**Thông tin cho những người tham gia**

**INFORMATION TO PARTICIPANTS:**

Chúng tôi xin trân trọng kính mời bạn tham gia và nghiên cứu vấn đề sau: “Trách nhiệm bồi thường nhà nước ở Việt Nam” để điều tra chính sách, pháp luật và thực tiễn liên quan đến vấn đề này từ đó đưa ra những kiến nghị phù hợp nhằm hoàn thiện pháp luật và thực thi pháp luật về Bồi thường Nhà nước.

We would like to invite you to be a part of a study, “State liability for compensation in Vietnam”, to investigate the laws, policies, practices relating to the issue and to consider possible proposals for their improvement.

**Xác nhận**

**CERTIFICATION BY SUBJECT**

**Tôi là:** \_\_\_\_\_

Địa chỉ: \_\_\_\_\_

I, \_\_\_\_\_

of \_\_\_\_\_

Chứng nhận rằng tôi trên 18 tuổi và tình nguyện tham gia vào nghiên cứu:” trách nhiệm bồi thường nhà nước ở Việt Nam” được tiến hành tại đại học Victoria bởi giáo sư Neil Andrews.

certify that I am at least 18 years old and that I am voluntarily giving my consent to participate in the study: “State liability for compensation in Vietnam” being conducted at Victoria University by Professor Neil Andrews.

Tôi xác nhận rằng mục tiêu nghiên cứu, cùng với các vấn đề khác đã được giải thích đầy đủ bởi bà Minh Oanh Nguyễn.

I certify that the objectives of the study, together with any risks and safeguards associated with the procedures listed hereunder to be carried out in the research, have been fully explained to me by Mrs Minh Oanh Nguyen

Và tôi cũng hoàn toàn chấp thuận tham gia dưới hình thức:

- Phỏng vấn( tích vào hộp phù hợp)
  - Sẽ được ghi âm
  - Sẽ được ghi chép lại

and that I freely consent to participation involving the procedures mentioned below:

An interview: (please choose an appropriate box)

- In which the answer will be recorded on an audio tape, or
- In which the answers will be recorded in the form of note taking

Tôi xác nhận rằng tôi có thể trả lời bất kỳ câu hỏi nào và tôi có thể không tham gia vào quá trình nghiên cứu vào bất kỳ thời điểm nào và điều này không ảnh hưởng gì đến tôi.

I certify that I have had the opportunity to have any questions answered and that I understand that I can withdraw from this study at any time and that this withdrawal will not jeopardize me in any way.

Tôi cũng được thông báo rằng tất cả các thông tin tôi cung cấp sẽ được giữ bí mật

I have been informed that the information I provide will be kept confidential.

Ký tên:

Signed:

Ngày:

Date:

Mọi yêu cầu có thể liên hệ trực tiếp với giáo sư Neil Andrews qua số điện thoại +61 (0)3 99191826 hoặc email [Neil.Andrews@vu.edu.au](mailto:Neil.Andrews@vu.edu.au) Hoặc Nguyen Van Quang, Trưởngngng Phòng Hợp tác Quốc tế, Đại học Luật Hà Nội, 87 Nguyễn Chí Thanh, Đống Đa, Hà Nội, Việt Nam

Số điện thoại: (0084) 38558169

Email: [nguyenvanquang@hlu.edu.vn](mailto:nguyenvanquang@hlu.edu.vn)

Any queries about your participation in this project may be directed to the researcher Professor Neil Andrews at +61 (0)3 99191826 or [Neil.Andrews@vu.edu.au](mailto:Neil.Andrews@vu.edu.au) or to Dr. NGUYEN Van Quang, head of Department of International Cooperation, Hanoi Law University, 87 Nguyen Chi Thanh, Dong Da, Hanoi, Vietnam

Phone: (0084) 38558169

Email: [nguyenvanquang@hlu.edu.vn](mailto:nguyenvanquang@hlu.edu.vn)

Nếu bạn có bất kỳ phàn nàn về thái độ của người phỏng vấn đối với bạn, bạn có thể liên hệ với Ban đạo đức trong nghiên cứu của đại học Victoria theo địa chỉ: Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 hoặc số điện thoại +61(0)3 9919 4148

If you have any queries or complaints about the way you have been treated, you may contact the Ethics & Biosafety Coordinator, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 phone (03) 9919 4148.

## Appendix 8

### Letter of invitation

[Date]

Dear [NAME OF LAWYER]

[ADDRESS]

Research project: *State liability for compensation in Vietnam*

You acted for [NAME OF CLIENT] in an action for state compensation in [YEAR].

I am writing to ask if your client would be willing to participate in a project researching state liability in Vietnam. This project is being conducted by a student researcher, Minh Oanh Nguyen as part of a PhD study at Victoria University under the supervision of Professor Neil Andrews from the Faculty of Business and Law.

The attached document explains the project and the involvement of your client in it. Also attached are the documents which will be given to your client should he or she choose to participate.

If your client is willing to participate in the study, I would be grateful if you would contact me at [minh.nguyen79@live.vu.edu.au](mailto:minh.nguyen79@live.vu.edu.au) or by telephone on: (0084) 912622484

Yours sincerely,

Minh Oanh Nguyen

## Appendix 9

### INFORMATION TO LAWYERS FOR CLIENTS INVOLVED IN RESEARCH

#### Your client is invited to participate

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Your client is invited to participate in a research project titled “*State liability for compensation in Vietnam*”.

This project is being conducted by a student researcher, Minh Oanh Nguyen, as part of a PhD study at Victoria University under the supervision of Professor Neil Andrews from the Faculty of Business and Law.

#### Project explanation

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The aim of this research is to examine the effectiveness of the laws on state liability for compensation in Vietnam and their enforcement. The purpose is to analyse the existing principles and law, issues impacting on its implementation and to make suggestions for their reforms.

The interview will focus on the implementation of the laws and the policies by the relevant authorities, the viewpoint of those injured or damaged by wrongful actions by officials and their lawyers, and the future directions of changes in the law and related processes.

#### What will your client be asked to do?

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Your client will be invited to participate in an interview which takes about one hour. The interview is about his/her knowledge, experience, and view on state liability for compensation in Vietnam. It relates to both legal and regulatory practices. It seeks to draw on their experience with these. They are, however, not obliged to disclose anything which they are not comfortable with or, answer any question which they do not wish.

#### What will your client gain from participating?

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Your client’s comments, based on his/her knowledge and experience, will contribute to possible solutions in reforming the law on and mechanisms for the implementing state liability for compensation in Vietnam. It will lead to better understanding by Vietnamese state officials of legal policies and regulatory practices and may lead to improvements in both of them. It may benefit those injured or damaged by the actions of state officers in the future.

### **How will the information be used?**

---

The information your client provides will be presented in a thesis which will be available in the library of Victoria University. Also, some parts of the information may be published in various academic journals. Their responses to questions will remain confidential. They will not be named as having participated in the research project. Their statements or comments may be republished in the thesis or the articles, but not in such a way that your client, and his/her organization, could be identified.

### **What are the potential risks of participating in this project?**

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Minimal risks have been identified from participating in this research. Throughout the interview, if your client feels uncomfortable or require some form of explanation; please feel free to raise the issue with the researcher. As indicated, he/she is free not to answer any question. However, your client will not be identified as the maker or author of any statement. Also, the statement or comment will not be used in a way which will enable your client to be identified. He/she may withdraw at any time and for any reason without prejudice.

### **How will this project be conducted?**

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To make appropriate reforms to state liability for compensation in Vietnam, it is necessary to study some selected aspects of relevant laws and their enforcement. Collection of data for this study will involve three sources. Firstly, data will be collected from primary legal materials including legislation and regulations and formal guidance given by courts and government agencies. Secondly, data will be gathered from academic monographs and journals, from media and other relevant data bases. The third source of data will come from interviews conducted in Vietnam. Potential interviewees will be identified from their knowledge of, and experience with, state liability for compensation including judges, procurators, enforcement officials, policy and law makers, lawyers, editors, journalists and those injured by state actions.

### **Who is conducting the study?**

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The project is conducted by

Professor Neil Andrews ([Neil.Andrews@vu.edu.au](mailto:Neil.Andrews@vu.edu.au)) and

Mrs Minh Oanh Nguyen ([minh.nguyen79@live.vu.edu.au](mailto:minh.nguyen79@live.vu.edu.au))

Any queries about your participation in this project may be directed to the Principal Researcher listed above or to Dr. NGUYEN Van Quang, head of Department of International Cooperation, Hanoi Law University, 87 Nguyen Chi Thanh, Dong Da, Hanoi, Vietnam

Phone: (0084) 38558169

Email: [nguyenvanquang@hlu.edu.vn](mailto:nguyenvanquang@hlu.edu.vn)

If you have any queries or complaints about the way you have been treated, you may contact the Research Ethics and Biosafety Manager, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 or phone (03) 9919 4148.

## Appendix 10

### THÔNG TIN CHO CÁC LUẬT SƯ LIÊN QUAN ĐẾN NGHIÊN CỨU

#### INFORMATION TO LAWYERS FOR CLIENTS INVOLVED IN RESEARCH

**Thân chủ của bạn được mời tham gia**

**Your client is invited to participate**

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Thân chủ của bạn được mời tham gia vào việc nghiên cứu đề tài “Trách nhiệm bồi thường nhà nước tại Việt Nam”.

Đề tài này đang được nghiên cứu bởi nghiên cứu sinh Minh Oanh Nguyen. Nghiên cứu này là một phần của luận án tiến sỹ tại đại học Victoria dưới sự hướng dẫn của giáo sư Neil Andrews thuộc Khoa Luật và Kinh doanh.

Your client is invited to participate in a research project titled “*State liability for compensation in Vietnam*”.

This project is being conducted by a student researcher, Minh Oanh Nguyen as part of a PhD study at Victoria University under the supervision of Professor Neil Andrews from the Faculty of Business and Law.

**Giới thiệu đề tài**

**Project explanation**

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Mục tiêu của đề tài này là đánh giá hiệu quả pháp luật và việc thực thi pháp luật về bồi thường nhà nước ở Việt Nam. Qua phân tích hệ thống pháp luật, những yếu tố tác động và quá trình thực thi pháp luật đề tài sẽ đưa ra những kiến nghị phù hợp nhằm hoàn thiện pháp luật và cơ chế thực thi trách nhiệm bồi thường nhà nước.

Việc phỏng vấn sẽ tập trung vào việc thực thi pháp luật và chính sách bởi cơ quan nhà nước có thẩm quyền, quan điểm của những người bị thiệt hại và luật sư bào chữa, những định hướng và thay đổi pháp luật và cơ chế thực thi trong tương lai.

The aim of this research is to examine the effectiveness of the laws on state liability for compensation in Vietnam and their enforcement. The purpose is to analyse the existing principles and law, issues impacting on its implementation and to make suggestions for their reforms.

The interview will focus on the implementation of the laws and the policies by the relevant authorities, the viewpoint of those injured or damaged by wrongful actions by officials and their lawyers, and the future directions of changes in the law and related processes.

### **Thân chủ của bạn được đề nghị làm gì?**

#### **What will your client be asked to do?**

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Thân chủ của bạn được đề nghị tham gia cuộc phỏng vấn kéo dài khoảng 1 giờ. Nội dung phỏng vấn là kiến thức, kinh nghiệm và quan điểm của họ về vấn đề bồi thường nhà nước tại Việt Nam. Nó liên quan đến cả luật và các quy định thực tiễn. Cuộc phỏng vấn nhằm thu thập kinh nghiệm của thân chủ của bạn về vấn đề này. Họ có thể không cung cấp thông tin mà họ thấy không phù hợp hoặc từ chối trả lời câu hỏi mà họ không muốn.

Your client will be invited to participate in an interview which takes about one hour. The interview is about his/her knowledge, experience, and view on state liability for compensation in Vietnam. It relates to both legal and regulatory practices. It seeks to draw on their experience with these. They are, however, not obliged to disclose anything which they are not comfortable with or, answer any question which they do not wish.

### **Tôi sẽ nhận được gì từ sự tham gia của thân chủ của bạn?**

#### **What will your client gain from participating?**

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Những thông tin dựa trên kiến thức và kinh nghiệm của thân chủ của bạn sẽ đóng góp vào các giải pháp về bảo vệ hoàn thiện pháp luật và cơ chế thực thi trách nhiệm bồi thường nhà nước ở Việt Nam. Điều đó sẽ mang lại sự hiểu biết tốt hơn cho cán bộ, công chức nhà nước, về quy định thực tiễn ở Việt Nam. Nó cũng có ích cho những người bị thiệt hại gây ra bởi cán bộ, công chức nhà nước trong tương lai.

Your client's comments, based on his/her knowledge and experience, will contribute to possible solutions in reforming the law on and mechanisms for the implementing state liability for compensation in Vietnam. It will lead to better understanding by Vietnamese state officials of legal policies and regulatory practices and may lead to improvements in both of them. It may benefit those injured or damaged by the actions of state officers in the future.

## **Thông tin cung cấp sẽ được sử dụng như thế nào**

### **How will the information be used?**

---

Thông tin mà thân chủ bạn cung cấp sẽ nằm trong luận án tiến sỹ, được sử dụng ở thư viện của đại học Victoria. Một vài phần của thông tin có thể sẽ được xuất bản dưới dạng các tạp chí chuyên ngành. Các thông tin phản hồi về các câu hỏi của thân chủ của bạn sẽ được giữ bí mật. Tôi sẽ không công khai tên của bất kỳ ai tham gia vào đề tài này. Các tuyên bố và gợi ý của họ có thể xuất hiện trong luận án, nhưng những thông tin cá nhân và tên công ty của họ sẽ không bị tiết lộ.

The information your client provides will be contained in a thesis which will be available in the library of Victoria University. Also some parts of the information may be published in various academic journals. Their response to questions will remain confidential. They will not be named as having participated in the research project. Their statements or comments may be republished in the thesis or the articles, but not in such a way that your client, and his/her organization, could be identified.

### **Những rủi ro tiềm ẩn khi tham gia nghiên cứu?**

#### **What are the potential risks of participating in this project?**

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Những rủi ro nhỏ nhất cũng được chỉ ra trong việc tham gia vào quá trình nghiên cứu, trong suốt quá trình phỏng vấn, nếu thân chủ của bạn cảm thấy không thoải mái hoặc yêu cầu được giải thích thêm, hãy nêu vấn đề với người nghiên cứu. Như đã đề cập, họ có quyền từ chối trả lời bất kỳ câu hỏi nào. Họ cũng sẽ không bị nêu tên như là tác giả của bất kỳ tuyên bố nào. Thêm vào đó, tất cả các lời khẳng định hoặc ý kiến sẽ được sử dụng theo cách không tiết lộ tên của họ. Họ có thể ngừng tham gia cuộc phỏng vấn vào bất kỳ thời gian nào với bất kỳ lý do gì.

Minimum risks have been identified from participating in this research. Throughout the interview, if your client feels uncomfortable or require some form of explanation; please feel free to raise the issue with the researcher. As indicated, he/she is free not to answer any question. However, your client will not be identified as the maker or author of any statement. Also, the statement or comment will not be used in a way which will enable your client to be identified. He/she may withdraw at any time and for any reason without prejudice.

## **Đề tài nghiên cứu được tiến hành như thế nào?**

### **How will this project be conducted?**

---

Đưa ra các giải pháp cho vấn đề trách nhiệm bồi thường nhà nước ở Việt Nam cần thiết phải nghiên cứu một vài khía cạnh của pháp luật và vấn đề thực thi pháp luật về trách nhiệm bồi thường nhà nước. Thu thập số liệu cho nghiên cứu này bao gồm ba nguồn. Nguồn thứ nhất là từ hệ thống các văn bản pháp luật. Nguồn thứ hai là từ các tạp chí, báo cáo, phương tiện thông tin đại chúng và các cơ sở dữ liệu liên quan. Nguồn thứ ba là từ phỏng vấn những người có sự hiểu biết và các nạn nhân của trách nhiệm bồi thường nhà nước ở Việt Nam.

To make appropriate reforms to state liability for compensation in Vietnam, it is necessary to study some selected aspects of relevant laws and their enforcement. Collection of data for this study will involve three sources. Firstly, data will be collected from primary legal materials including legislation and regulations and formal guidance given by courts and government agencies. Secondly, data will be gathered from academic monographs and journals, from media and other relevant data bases. The third source of data will come from interviews conducted in Vietnam. Potential interviewees will be identified from their knowledge of, and experience with, state liability for compensation including judges, procurators, enforcement officials, policy and law makers, lawyers, editors, journalists and those injured by state actions.

## **Ai là người nghiên cứu?**

### **Who is conducting the study?**

---

Đề tài này được nghiên cứu bởi

Giáo sư Neil Andrews ([Neil.Andrews@vu.edu.au](mailto:Neil.Andrews@vu.edu.au)) và

Bà Minh Oanh Nguyen ([minh.nguyen79@live.vu.edu.au](mailto:minh.nguyen79@live.vu.edu.au))

The project is conducted by

Professor Neil Andrews ([Neil.Andrews@vu.edu.au](mailto:Neil.Andrews@vu.edu.au)) and

Mrs Minh Oanh Nguyen ([minh.nguyen79@live.vu.edu.au](mailto:minh.nguyen79@live.vu.edu.au))

Bất kỳ yêu cầu gì về sự tham gia của bạn vào quá trình nghiên cứu có thể liên hệ trực tiếp với các nhà nghiên cứu trên hoặc Nguyen Van Quang, Trưởng Phòng Hợp tác Quốc tế, Đại học Luật Hà Nội, 87 Nguyễn Chí Thanh, Đống Đa, Hà Nội, Việt Nam

Số điện thoại: (0084) 38558169

Email: [nguyenvanquang@hlu.edu.vn](mailto:nguyenvanquang@hlu.edu.vn)

Any queries about your participation in this project may be directed to the Principal Researcher listed above or to NGUYEN Van Quang, Head of Department of International Cooperation, Hanoi Law University, 87 Nguyen Chi Thanh, Dong Da, Hanoi, Vietnam

Phone: (0084) 38558169

Email: [nguyenvanquang@hlu.edu.vn](mailto:nguyenvanquang@hlu.edu.vn)

Nếu bạn có các yêu cầu và phàn nàn về cách ứng xử có thể liên hệ qua địa chỉ:

Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 Hoặc số điện thoại +61(0)399194148

If you have any queries or complaints about the way you have been treated, you may contact the Research Ethics and Biosafety Manager, Victoria University Human Research Ethics Committee, Victoria University, PO Box 14428, Melbourne, VIC, 8001 or phone (03) 9919 4148.

**Appendix 11**

**THƯ MỜI**

[Ngày]

[TÊN LUẬT SƯ]

[ĐỊA CHỈ]

Đề tài nghiên cứu: Trách nhiệm bồi thường Nhà nước ở Việt Nam

Bạn là luật sư của [Tên của thân chủ] trong vụ án [số, năm]

Tôi viết thư này mời thân chủ của bạn tham gia vào dự án nghiên cứu về trách nhiệm bồi thường Nhà nước ở Việt Nam. Dự án này được thực hiện bởi nghiên cứu sinh Nguyễn Minh Oanh dưới sự hướng dẫn của giáo sư Neil Andrews của Khoa Luật Đại học Tổng hợp Victoria, Australia.

Giải thích về dự án và vai trò của thân chủ của bạn đã được diễn tả trong văn bản đính kèm. Một văn bản về thông tin những việc có thể làm hoặc không làm của thân chủ của bạn cũng được gửi kèm theo.

Nếu thân chủ của bạn có thể tham gia dự án này, xin bạn vui lòng liên lạc với tôi theo địa chỉ

[minh.nguyen79@live.vu.edu.au](mailto:minh.nguyen79@live.vu.edu.au) hoặc số điện thoại (0084)912622484

Trân trọng

Nguyễn Minh Oanh

## Letter of invitation

[Date]

Dear [NAME OF LAWYER]

[ADDRESS]

Research project: *State liability for compensation in Vietnam*

You acted for [NAME OF CLIENT] in an action for state compensation in [YEAR].

I am writing to ask if your client would be willing to participate in a project researching state liability in Vietnam. This project is being conducted by a student researcher, Minh Oanh Nguyen as part of a PhD study at Victoria University under the supervision of Professor Neil Andrews from the Faculty of Business and Law.

The attached document explains the project and the involvement of your client in it.. Also attached are the documents which will be given to your client should he or she choose to participate.

If your client is willing to participate in the study, I would be grateful if you would contact me at [minh.nguyen79@live.vu.edu.au](mailto:minh.nguyen79@live.vu.edu.au) or by telephone on: (0084)912622484

Yours sincerely,

Minh Oanh Nguyen

## Appendix 12

On 17/04/12 8:31 PM, "Nguyen Van Quang" <quanganhbong@yahoo.com> wrote:

Dear Prof. Andrews,

I have read your email and would like to confirm that the arrangement for supervising Ms Minh Oanh Nguyen's field work in Vietnam is fine for me. Please feel free contact me if you have any queries regarding Ms. Nguyen's field work here in Vietnam.

With my best wishes,

Quang

NGUYEN Van Quang, PhD Acting Head of International Cooperation Department Chair of Administrative Law (Postgraduate Studies) Hanoi Law University 87 Nguyen Chi Thanh, Dong Da, Hanoi, Vietnam Tel: +84438358169 (Office) Mobile: +84 976804244

--- On Tue, 4/17/12, Neil Andrews <Neil.Andrews@vu.edu.au> wrote:

From: Neil Andrews <Neil.Andrews@vu.edu.au>

Subject: Supervision of Ms Minh Oanh NGUYEN's field work

To: "Nguyen Van Quang" <quanganhbong@yahoo.com>,

"internationalcooperation@hlu.edu.vn" <internationalcooperation@hlu.edu.vn>, "nguyen minhoanh" <nguyenminhoanh76@yahoo.com>

Date: Tuesday, April 17, 2012, 2:59 PM

Dr Nguyen Van Quang

Acting Head of International Cooperation

Department Chair of Administrative Law (Postgraduate Studies)

Hanoi Law University

87 Nguyen Chi Thanh, Dong Da

Hanoi, Vietnam

Dear Dr Nguyen

I understand that Ms Minh Oanh Nguyen has been in contact with you. I am supervising with my colleague Mr Brendon Stewart Ms Nguyen's research for a PhD thesis on State Liability for Compensation in Vietnam. It is particularly focused on the Law on State Compensation Liability. It is proposed as part of her study that she conduct field work in Vietnam later in 2012. This will involve interviews with adult individuals from the following groups:

Private sector – between 14-18 people – possibly comprising:

1. Two claimants of wrongful administrative acts: one individual, and one entity or legal person.
2. Two claimants of wrongful judicial act: one for a civil wrongful judicial act and one for an administrative wrongful judicial act.
3. Two claimants of wrongful enforcement of judgments.
4. Two or three claimants of wrongful convictions: one directly affected and others affected family members.
5. Two legal practitioners acting for individuals or entities or legal persons.
6. Representatives of professional legal associations
7. Two academic researchers: one from Hanoi Law University and one from the Institute of Legal Science.
8. Two journalist and bloggers: one from the *Jurisprudence Review* and one from the *State and Law Review*.

Public sector – between 16-22 people – possibly comprising:

1. Two judges of Provincial Peoples Courts: one from the Civil Court and one from the Administrative Court.
2. A judge of the Supreme People's Court
3. Two procurators from the Provincial People's Procuracy
4. A procurator from the Supreme People's Procuracy
5. Two administrative officials at Ministry level.
6. Two Administrative officials at Provincial level.
7. Three officials responsible for enforcement in state administration, the procuracy and the judiciary.
8. Two members of the National Assembly
9. Two government policy and law makers

I attach the application made to the Human Research Ethics Committee at Victoria University. It gives an outline of the research project and includes the interview schedule which will be used and the information to be provided to participants.

We would include your name and contact details in addition to mine as a contact point for any interviewees with concerns about the research or the interviews. We would also like you as Ms Nguyen requires from time to time to give her guidance or advice on the conduct of the work although I will also be in regular contact with her from Australia.

I would be grateful if you would indicate that this would be an acceptable arrangement for you.

Best wishes

Neil Andrews

Deputy Chair, Education and Research Board

Professor of Law

Editor, Australian Journal of Corporate Law

Victoria Law School

Victoria University

PO Box 14428

MELBOURNE CITY MC 8001

Old Records Office

295 Queen Street

MELBOURNE 3000 AUSTRALIA

Phone: +61 (0)3 9919 1826 Fax: +61 (0)3 9919 1840

On 17/04/12 1:24 PM, "Nguyen Van Quang" <quanganhbong@yahoo.com> wrote:

Dear Oanh,

I am happy to assist you in conducting the fieldwork. You can reach me by either this email or [nguyenvanquang@hlu.edu.vn](mailto:nguyenvanquang@hlu.edu.vn).

Good lucks with your research!

Quang

[NGUYEN Van Quang,](#)

[Acting Head of International Cooperation DepartmentChair of Administrative Law](#)

[\(Postgraduate Studies\)Hanoi Law University87 Nguyen Chi Thanh, Dong Da, Hanoi, VietnamTel:](#)

+84438358169 (Office) Mobile: +84 976804244

--- On Tue, 4/17/12, nguyen minhoanh <nguyenminhoanh76@yahoo.com> wrote:

From: nguyen minhoanh <nguyenminhoanh76@yahoo.com>

Subject: superive Minh 's fieldwork

To: "QuangNguyen Van" <quanganhbong@yahoo.com>,

"internationalcooperation@hlu.edu.vn" <internationalcooperation@hlu.edu.vn>

Cc: "AndrewsNeil" <Neil.Andrews@vu.edu.au>

Date: Tuesday, April 17, 2012, 8:40 AM

Dear Dr. Quang,

As the University 's nomination, you will be my supervisor when I conduct the fieldwork in Vietnam. It 's great if you can contact my supervisor by his email adress, Neil.Andrews@vu.edu.au

</mc/compose?to=Neil.Andrews@vu.edu.au> , to confirm your consent.

Thank you very much,

Best regards,

Minh

**Appendix 13**

**Declaration of accurate translation**

I, Dam Thai Son, of 21 Club Ave Kingsbury 3083 Vic hereby declare

1. I am native speaker of Vietnamese.
2. I am a professor of economics, Hanoi Economics University, Hanoi, Vietnam and a PhD student at Victoria University.
3. I have accurately translated from English into Vietnamese the following documents relating to the research project “State liability for compensation in Vietnam”:
  - (i) Interview Schedule
  - (ii) Information to Participants
  - (iii) Information to Lawyers
  - (iv) Consent form for Participants.
  - (v) Letter of invitation

Dam Thai Son



23 April 2012

**Appendix 14: Answer sheet****Khái niệm và ý nghĩa****Concepts and significance**

- 1. Trách nhiệm bồi thường Nhà nước có ý nghĩa như thế nào đối với bạn? Với bạn nó có quan trọng không? Tại sao?**

What does state liability for compensation mean to you? Is it important? Why?

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- 2. Chính phủ Việt Nam đã tiến hành một loạt những vấn đề quan trọng để cải cách hệ thống pháp luật. Trong 10 sự kiện nổi bật nhất bạn xếp trách nhiệm bồi thường Nhà nước ở vị trí thứ mấy?**

The Vietnamese government has a number of important issues to deal with in reforming the legal system. Of the top 10 issues where do you think the government ranks state liability?

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**3. Theo kinh nghiệm của bạn thì những người khác có đánh giá trách nhiệm bồi thường nhà nước là một nội dung quan trọng không? Gợi ý: có gì khác biệt giữa nhân viên nhà nước, nhà làm luật, thẩm phán, chuyên gia pháp lý, tổ chức kinh tế, tổ chức phi chính phủ bảo vệ quyền con người?**

In your experience, do you think that other people see state liability as being as important as you do? [Prompts: State officials? Law and policy makers? Judges? Legal professionals? Citizens? Business organizations? Non-government organizations interested in human rights?]

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**4. Theo bạn thì Luật trách nhiệm bồi thường Nhà nước có ý nghĩa trong việc thúc đẩy sự phát triển của nền kinh tế thị trường xã hội chủ nghĩa không? Gợi ý: Nó có tạo ra sự tự tin cho các chủ sở hữu tài sản khi quyền của họ được tôn trọng và bảo vệ?**

In your experience, is state liability important in the further development of a socialist market economy? [Prompt: Does it give confidence to owners of property that their rights will be respected?]

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**Pháp luật về trách nhiệm bồi thường nhà nước hiện hành**

**The Present Law on State Liability for Compensation**

**9. Trách nhiệm bồi thường nhà nước nên được coi là trách nhiệm hành chính, trách nhiệm dân sự, trách nhiệm bồi thường thiệt hại riêng biệt hay là một loại trách nhiệm khác? Tại sao?**

Should the law on state liability be included as part of administrative law, civil liability or tort law or in another area of law? Why?

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**10. Có nên quy định riêng về trách nhiệm bồi thường nhà nước trong hoạt động tố tụng hình sự hay không? Tại sao?**

Should liability for wrongful convictions be treated separately from other areas of state liability? Why?/Why not?

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**11. Theo bạn thì phạm vi Luật bồi thường nhà nước nên điều chỉnh những hoạt động nào của nhà nước? Gợi ý: hoạt động hành chính? hoạt động tư pháp? hoạt động lập pháp? tất cả các hoạt động? hay những hoạt động khác?**

In your view, does the law cover the appropriate range of state activities? [Prompts: Administrative actions? Judicial actions? All wrongs? Law making? Others?]

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**12. Luật quy định điều kiện để yêu cầu bồi thường thiệt hại nói chung là phải có văn bản của cơ quan nhà nước có thẩm quyền xác nhận hành vi của người thi hành công vụ là trái pháp luật. Theo bạn thì quy định này có phù hợp không? Gợi ý: Liệu quy định này có cho phép cán bộ, công chức kiểm soát được trách nhiệm này hay không?**

The law requires – except in wrongful conviction cases – a person claiming compensation to obtain a document, issued by an authorized office, acknowledging that officials acted wrongfully? Is this appropriate? [Prompt: Doesn't it permit officials to continue to control liability rather than the courts?]

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**16. Theo bạn mức hoàn trả của người thi hành công vụ đối với nhà nước đã phù hợp chưa? Gợi ý: hiện nay pháp luật quy định người thi hành công vụ chịu trách nhiệm hình sự phải hoàn trả toàn bộ thiệt hại. Người có lỗi cố ý phải hoàn trả tối đa 36 tháng lương. Người có lỗi vô ý hoàn trả tối đa 3 tháng lương. Người vô ý trong việc ra bản án, quyết định oan sai trong tố tụng hình sự không phải chịu trách nhiệm hoàn trả.**

Do you think that the level of personal liability for officials is appropriate? [Prompts: Officials who act criminally are liable to pay the full amount of compensation. Officials who intentionally act wrongfully are liable to pay a maximum of 36 months wages. Those who act negligently are liable to pay a maximum of three months wages. Officials who are negligent in making a wrongful conviction are not liable for reimbursement.]

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**17. Theo bạn có cần sửa đổi Luật bồi thường nhà nước không? Nếu có thì bạn có kiến nghị gì? Gợi ý: Luật đã đủ hiệu quả và rõ ràng để áp dụng không cần văn bản hướng dẫn không?**

From your experience do you think that amendments need to be made to the Law on State Liability for Compensation? [Prompt: Is it sufficiently comprehensive and clear to apply without further regulations and directions?]

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**Thực thi pháp luật về bồi thường nhà nước**

**The enforcement of the law on state liability for compensation**

**22. Khi công dân khiếu nại tới cơ quan nhà nước hoặc tới Tòa án thì họ được hỏi  
đáp như thế nào? Gợi ý: Có sự khác nhau trước và sau khi Luật có hiệu lực  
không? Có sự khác nhau giữa cơ quan của Chính phủ và tòa án không?**

When citizens complain to government offices or to courts about their treatment, how do officials respond? [Prompts: Were people treated differently before the new law came into force? Is there a difference between responses by government offices and by the courts?]

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**23. Theo bạn thì Luật bồi thường nhà nước có được thực thi một cách hiệu quả  
không?**

In your experience is the law on state liability being effectively enforced?

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## Appendix 15

Chị dùng từ rất chuẩn! Đúng là tình trạng làm luật thà thừa hơn thiếu chị ạ. OK, có gì liên lạc chị nhé.

--

**Le Thai Phuong**  
**Legal expert**  
**Ministry of Justice of Vietnam**

**Email:**

+ [phuonglt@moj.gov.vn](mailto:phuonglt@moj.gov.vn)

+ [lethaiphuong19121982@gmail.com](mailto:lethaiphuong19121982@gmail.com)

**Phone number:**

+ **Office number:** 0084 043 8438836

+ **Cellphone:** 0084 908 05 1616

2013/5/2 nguyen minhoanh <[nguyenminhoanh76@yahoo.com](mailto:nguyenminhoanh76@yahoo.com)>

Hii, chi cam on em nhieu. Chi hieu rat ro, chi chi muon binh luan them mot chut voi tu cach

nguai nghien cuu thoi

Them 1 chut binh luan: Luat phap Vietnam ap dung chien lược thua hơn thiếu và Luat là "cong cu de bao ve giai cap thong tri va thuc hien quyen luc Nha nuoc". Em xay dung Luat nen em biet Luat se khong bao gio dap ung duoc overall goal nhưng Luat van duoc ban hanh. O ben ngoai nhìn vào thì thấy đây là một quá trình rất loang ngoang, sorry em nếu làm em buồn. Và luật BTNN khi so sánh với mục tiêu ban đầu để ra được danh gia là "give with one hand and take with another".

When are the administrative and legal reforms successful in Vietnam?

Nói thật với em, ở ngoài nhìn vào mọi thấy Vietnam không có cái gì là dong bo ca.

Có gang hy vọng một tương lai tươi sáng hơn, hiiiiiiii

Chỉ còn nhiều vấn đề trăn trở, chỉ sẽ liên lạc với em sớm.

Minh Oanh

**Từ:** Phuong Le Thai <[lethaiphuong19121982@gmail.com](mailto:lethaiphuong19121982@gmail.com)>

**Tới:** [nguyenminhoanh76@yahoo.com](mailto:nguyenminhoanh76@yahoo.com)

**Đã gửi** 12:48 Thứ Sáu, 3 tháng 5 2013

**Chủ đề:** Em Phương đây.

Hì, em biết ngay là sẽ khó hiểu mà. Ở thư kia em chưa giải thích ở góc độ xây dựng pháp luật vì nói ra sẽ quá nhiều thông tin sợ ngộp chị ạ.

Về cơ bản, cách làm luật ở Việt Nam bây giờ là rất muốn có sự kín kẽ. Em cũng rất may mắn ngày xưa được tham gia từ đầu làm Luật này nên cũng có điều kiện để được hiểu kỹ hơn lý do vì sao lại quy định như vậy.

Lý do chính của khoản 3 Điều 27 như em đã nêu ở thư trước nhưng lý do cốt lõi thì không phải như vậy. Lý do cốt lõi là để nhằm mục đích khoanh lại một cách trọn vẹn hơn phạm vi trách nhiệm bồi thường của Nhà nước để sau khi đi vào thi hành sẽ không thể có cách hiểu khác về các khoản 4, 5 và 6 Điều 26 của Luật chị ạ.

Lý do chỉ có thể thôi và em cũng không biết giải thích thế nào hơn.

Thú thật là ngày xưa toàn bộ nội dung về bồi thường trong hoạt động tố tụng trong Luật TNBTCNN đều do các cơ quan tố tụng đề xuất chị ạ. Bên Chính phủ (thông qua Bộ Tư

pháp) chỉ chủ yếu tham gia nội dung vào các vấn đề liên quan đến hoạt động quản lý hành chính và thi hành án. Chỉ khi đến sân của Quốc hội (tức là chuyển từ giai đoạn cơ quan chủ trì là Chính phủ sang cơ quan chủ trì là Quốc hội) thì khi đó bên Bộ Tư pháp mới có nhiều ý kiến trực tiếp vào các nội dung về tổ tụng nhiều hơn.

Em viết dài thêm một chút chị nhé.

Nếu chị có theo dõi là hiện nay có TTLT số 05 năm 2012 hướng dẫn thực hiện trách nhiệm bồi thường của Nhà nước trong hoạt động tố tụng hình sự. Thực chất, khi xây dựng dự thảo Luật TNBTCNN và ở giai đoạn chỉnh lý trước khi trình đ/c Chủ tịch Quốc hội ký ban hành thì gần như toàn bộ những nội dung của TTLT số 05 này đã được đưa vào Luật. Tuy nhiên, tại thời điểm đó do liên ngành không thống nhất được với nhau nên mới giữ như Luật TNBTCNN hiện nay và bóc tách các nội dung chi tiết, cụ thể như TTLT số 05 hiện nay đang thể hiện ra để chờ sau này hướng dẫn tại TTLT của liên ngành.

Có gì cứ email cho em nhé.

--

*Le Thai Phuong*  
*Legal expert*  
*Ministry of Justice of Vietnam*

**Email:**

+ [phuonglt@moj.gov.vn](mailto:phuonglt@moj.gov.vn)  
+ [lethaiphuong19121982@gmail.com](mailto:lethaiphuong19121982@gmail.com)

**Phone number :**

+ **Office number:** 0084 043 8438836

+ **Cellphone:** 0084 908 05 1616

Em chào chị, thư chị gửi từ 28.4. mà đến nay em mới trả lời. Chị thông cảm nhé vì đợt vừa rồi nghỉ lễ dài những 6 ngày nên hôm nay em mới check thư chị ạ.

Ý nghĩa của Khoản 3 Điều 27 thực chất là một điều khoản quét nhằm rà lại một lượt và thu về một đầu mối các trường hợp mà nếu như không thuộc các trường hợp được quy định tại các khoản 4, 5 và 6 Điều 26 chị ạ.

Như vậy, với mục đích nêu trên thì nếu có trường hợp nào giống như các trường hợp được quy định tại các khoản 4, 5 và 6 Điều 26 nhưng không thuộc các trường hợp được bồi thường quy định tại các khoản nêu trên thì không được bồi thường.

Em xin lấy ví dụ thế này.

Ví dụ, khoản 4 Điều 26 có quy định: *Người bị khởi tố, truy tố, xét xử về nhiều tội trong cùng một vụ án, đã chấp hành hình phạt tù mà sau đó có bản án, quyết định của cơ quan có thẩm quyền trong hoạt động tố tụng hình sự xác định người đó không phạm một hoặc một số tội và hình phạt của những tội còn lại ít hơn thời gian đã bị tạm giam, chấp hành hình phạt tù thì được bồi thường thiệt hại tương ứng với thời gian đã bị tạm giam, chấp hành hình phạt tù vượt quá so với mức hình phạt của những tội mà người đó phải chấp hành.*

Em giả sử có một trường hợp trên thực tiễn phát sinh như sau: *Người bị khởi tố, truy tố, xét xử về nhiều tội trong cùng một vụ án, đã chấp hành hình phạt tù mà sau đó có bản án, quyết định của cơ quan có thẩm quyền trong hoạt động tố tụng hình sự xác định người đó không phạm một hoặc một số tội nhưng hình phạt của những tội còn lại lại nhiều hơn thời gian đã bị tạm giam, chấp hành hình phạt tù* thì người này sẽ thuộc phạm vi áp dụng của khoản 3 Điều 27 mà không thuộc phạm vi khoản 4 Điều 26 chị ạ. Suy ra họ sẽ không được bồi thường.

Nếu em giải đáp có gì chưa rõ chị cứ mail tiếp cho em nhé.  
Warm Regards!

**Gửi từ:** "nguyen minhoanh" <nguyenminhoanh76@yahoo.com>

**Gửi tới:** "Cục BTNNPhuong" <phuonglt@moj.gov.vn>

**Đã gửi:** Chủ Nhật, 28 Tháng Tư, 2013 8:37:27 CH

**Chủ đề:** Nho giai dap

Phuong oi chi khong hieu ve Khoan 3 Dieu 27 cua Luat TNBTCNN, em  
giai thich giup chi voi.

Cam on em!

Minh Oanh

# VICTORIA UNIVERSITY HUMAN RESEARCH ETHICS COMMITTEE

## APPLICATION FOR ETHICAL REVIEW OF RESEARCH INVOLVING HUMAN PARTICIPANTS

REGISTER NUMBER (office use only): HRETH \_\_\_\_ / H / \_\_\_\_

### Important Information for all applicants:

- Applicants are advised to follow the *Guidelines for Applications* prior to submitting this application
- Applicants should refer to the *Human Research Risk Assessment* form to determine the appropriate Human Research Ethics Committee (HREC) to review the application.
- Ensure all questions are appropriately answered in plain language.
- All applications must be signed and authorised by all relevant parties. Applications will not be reviewed without appropriate authorisation.
- Ethical approval will only be finalised once electronic & hard copy applications and copies of all required documentation have been received by the Secretary of the approving HREC.
- Full submission details, including the number of application copies to submit, are provided in the *Guidelines for Applications*
- To avoid unnecessary delays, please ensure a full application (signed original copy, electronic and hard copies, attachments and supplementary forms) are received by the Ethics Secretary by the submission deadline for the relevant HREC.
- Applications should be written and submitted using font Arial Narrow, size 11.
- Please consider the environment, double sided copying is preferred.

For further information, including The *Guidelines for Applications* and all documents and supplementary forms, refer to the Human Research Ethics website: <http://research.vu.edu.au/hrec.php> or contact staff at the Ethics and Biosafety Administrative Group on 9919 4781 or 9919 4461.

**YOU ARE REMINDED THAT YOUR PROJECT MAY NOT COMMENCE WITHOUT FORMAL WRITTEN APPROVAL FROM THE APPROPRIATE HUMAN RESEARCH ETHICS COMMITTEE.**

### Forwarding Details

All hard copy applications to be delivered to:

Ethics Secretary  
(Insert name of approving HREC)  
Office for Research  
Victoria University  
PO Box 14428  
Melbourne VIC 8001

**Or deliver in person to:**

Electronic applications are to be forwarded to the relevant HREC:

**Victoria University Human Research Ethics Committee:**  
E-mail: [researchethics@vu.edu.au](mailto:researchethics@vu.edu.au)  
**Faculty of Arts Education & Human Development HREC:**  
E-mail: [AEHDEthics@vu.edu.au](mailto:AEHDEthics@vu.edu.au)  
**Faculty of Business & Law HREC:**  
E-mail: [BLEthics@vu.edu.au](mailto:BLEthics@vu.edu.au)  
**Faculty of Health Engineering & Science HREC:**

Ethics & Biosafety Administration Group Office for Research Building C, Room C302 Footscray Park campus Victoria University.	E-mail: HESEthics@vu.edu.au
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## SECTION 1 - PROJECT OVERVIEW

<b>1.1 Project Title</b>
State Liability for Compensation in Vietnam

<b>1.2 Project Summary</b> <i>(Include brief details of aims, methods and significance of the project in plain language. Max of 250 words)</i>
<p>This project seeks to map the major features of the Vietnamese <i>Law on State Liability for Compensation 2009</i> and its application. The aim is to improve the policies underlying the law to make it more effective and to improve mechanisms for its enforcement. The project will review theories and present policies on state liability. It will situate the law in the context of Vietnam's economic, political and social systems including Vietnamese theories of the state. It will investigate practices and factors which impact on the law's implementation. This will assist in developing better policies and legal rules which enhance the responsibilities of state officials to better achieve the law's objectives. In addition, through a comparison with other legal systems, including that of the People 's Republic of China, the research will clarify the weaknesses and strengths of the law. It will make recommendations to improve the law and related procedures used in resolving disputes over state liability. It will seek to improve processes for claimants. Data will be collected and analysed using qualitative methodologies from three main sources. Firstly, from primary and secondary sources of Vietnamese and foreign law; secondly, from academic literature and media and other relevant databases; and, thirdly, from interviews conducted in Vietnam. The project will produce the first comprehensive study of the law. The project will make a contribution to wider studies of legal reforms and their implementation in Vietnam which will help provide a more comprehensive understanding of the transformations taking place in the Vietnamese legal system.</p>

<b>1.3 Project Risk Level</b> <i>(Refer to Human Research Risk Assessment form)</i>		
<input type="checkbox"/> Negligible risk	<input checked="" type="checkbox"/> Low risk	<input type="checkbox"/> High risk

<b>1.4 Period for which ethical approval is sought:</b>	
Requested period for ethical approval (maximum of 2 years):	From: 01/8/2012 To: 01/02/2013
Date that data collection is expected to be completed:	31/12/2012

**1.5 How will the research be funded (tick one)? Indicate source of funding.**

- External grant  
 VU grant or funding (e.g., School, Faculty)  
 Sponsor  
 Other

Source:

Source:

Details:

Details:

*If the research is unfunded, indicate how the project can proceed.*

The research will be done at the student's expense party drawing on funds supporting her student fees and living expenses from the Vietnamese Ministry of Education and Training and funds for postgraduate research students in the Faculty of Business and Law, Victoria University. The student's enrolment in a PhD at Victoria University is sponsored by the Vietnamese Ministry of Education and Training. The fees and living allowances are covered by amounts specified in US currency. Because of the present exchange rate with Australian currency there is a shortfall in both allowances which may ultimately force the student to discontinue her candidature.

**1.6 Is the research a collaborative effort with another organisation?**

Yes  No

*If YES, does the research need to undergo formal ethical review by the collaborating organisation's HREC?*

Yes  No

*If YES, provide details:*

**SECTION 2 - PROJECT INVESTIGATORS**

**2.1 Chief Investigator-A:** *the CI-A is the person responsible for the completion and submission of the ethics application and for ensuring that the research project complies with the 'National Statement on Ethical Conduct in Human Research'.*

Title and Name:	Professor Neil Andrews
School/Department/Centre:	Law
Phone:	Wk: 9919 1826                      Mob:
VU email address:	Neil.Andrews@vu.edu.au

*Qualifications, experience and/or skills relevant to the project.*

Professor Andrews holds the degrees of BA (Hons) LLB and SJD. He has successfully supervised PhD students in comparative legal studies of law in developing countries including Malaysia, Thailand and Vietnam using similar research methodologies to those in this project. He has also successfully

completed an ARC funded socio-legal study of Chinese corporate governance with Professor Roman Tomasic who is one of the pioneers of the use of the methodology in Australia. Previously he worked on indigenous land issues with Indigenous Peoples and social scientists from a variety of disciplines in preparing evidence and reports for land claims, sacred site protection and for government inquiries. His own research interests covers areas of comparative law, Indigenous Peoples and law, and company and securities law. He is a reader for competitive grants in these and other area including the ARC which involve similar methodologies. He is editor of the *Australian Journal of Corporate Law*.

2.2  Chief Investigator  Associate Investigator  Mentor Investigator 1 (select one)

Title and Name:	Mr Brendon Stewart
School/Department/Centre or External organisation:	Law
Phone:	Wk: 9919 6156 Mob:
Email:	Brendon.Stewart@vu.edu.au

*Qualifications, experience and/or skills relevant to the project.*  
 Mr Stewart holds the degrees of BA (Hons) LLB and has been a legal practitioner working in areas related to the research topic. He has interests in the area of tort law which he teaches in Victoria University 's LLB program and has successfully completed consultancies involving significant elements of research relating to tort law and other areas of law and legal processes.

Chief Investigator  Associate Investigator  Mentor Investigator 2

Title and Name:	
School/Department/Centre or External organisation:	
Phone:	Wk: Mob:
Email:	

*Qualifications, experience and/or skills relevant to the project.*

Chief Investigator  Associate Investigator  Mentor Investigator 3

Title and Name:	
School/Department/Centre or External organisation:	
Phone:	Wk: Mob:
Email:	

*Qualifications, experience and/or skills relevant to the project.*

Copy and attach additional page if more investigators are included. Do not include student investigators in this section (see 2.3).

### 2.3 Research Involving Students

#### a) Are any students involved in the research project?

Yes  No

If YES, is the project: (tick one)

A STUDENT PROJECT for the degree in which the student is enrolled?

A STAFF PROJECT that involves a student(s) undertaking some part of the project (e.g. data collection, data analyses)?

Other, provide details:

#### b) If the research is a STUDENT PROJECT, at what level?

PhD\*

Professional Doctorate\*

Masters by research\*

Postgraduate coursework (e.g., GradDip, Masters)

Honours

Undergraduate

#### c) \*If the project is for a PhD, Professional Doctorate or Masters by Research, has this project been approved by the Postgraduate Research Committee?

Yes  No

If No, indicate why ethical approval for the project is being sought prior to gaining approval from the Postgraduate Research Committee (refer to Guidelines for Applications).

#### d) Details of all student investigators involved in the project

##### Student 1

Student ID: Name: Mrs Minh Oanh Nguyen

School/Department/Centre: Law

Phone: 0435 959195

VU email address: Minh.nguyen79@live.vu.edu.au

**Student's experience/qualifications relevant to the procedures and techniques to be used in the research and/or to working with the specific target population:**

Mrs Nguyen holds the degrees of LLB from Hanoi Law University and LLM by research from the University of Lund. The research for the LLM was a comparative study of European Union and Vietnamese law on nullity in contract law. Mrs Nguyen has taught tort and state liability law in LLB programs at Hanoi Law University where she is a lecturer in the Faculty of Civil Law. She is a Vietnamese legal practitioner and advises on civil disputes in tort, contract and property law. She is a native speaker of Vietnamese and a resident of Hanoi. She understands Vietnamese culture, values and standards well and is familiar from the work of colleagues with conducting law reform research in Vietnam.

**Student 2**

Student ID:

Name:

School/Department/Centre:

Phone:

VU email address:

**Student's experience/qualifications relevant to the procedures and techniques to be used in the research and/or to working with the specific target population:**

**Student 3**

Student ID:

Name:

School/Department/Centre:

Phone:

VU email address:

**Student's experience/qualifications relevant to the procedures and techniques to be used in the research and/or to working with the specific target population:**

Student 4	
Student ID:	Name:
School/Department/Centre:	
Phone:	
VU email address:	
<b>Student's experience/qualifications relevant to the procedures and techniques to be used in the research and/or to working with the specific target population:</b>	

*Copy and attach additional page if more student investigators included*

e) What arrangements are in place for the supervision of student(s) when undertaking project activities?
<p>Mrs Nguyen has regularly weekly meetings in Melbourne with Professor Andrews and less regularly with Mr Stewart. While undertaking field work she will be in regular contact with Professor Andrews by email, telephone and Skype. Also Hanoi Law University will provide additional support for the student in conducting the research in Vietnam. This role will be undertaken by Dr Nguyen Van Quang who is Head of the Department of International Cooperation, Hanoi Law University. Further information about Dr Nguyen is below in part 7 1 (c) (v).</p>

2.4 Involvement of OTHER individuals / organisations in the project
<p><b>a) Will any individuals who are not members of the research team be involved in the conduct of this project?</b> (e.g., medical personnel involved in procedures, research contractors, teachers)</p>
<p><input type="checkbox"/> Yes    <input checked="" type="checkbox"/> No</p>
<p><i>If YES, provide details of their involvement and procedures in place to protect confidentiality of participants and data.</i></p>
<p><i>If YES, provide details of any professional indemnity insurance held by those individuals to protect against potential liabilities associated with their involvement in the research?</i></p>

## SECTION 3 - NATURE OF THE PROJECT

<b>3.1 Type of Project</b>		
a) Is the project a pilot study?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
b) Is the project a part of a larger study?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
c) Is the project a quality assurance or evaluation project (e.g., related to teaching, health-care provision)?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
d) Does the research involve a therapeutic intervention/treatment or clinical trial?  <i>If YES, please complete <b>Supplementary Form A</b> and attach to this application</i>	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

<b>3.2 Target Population</b>		
a) Does the research focus on Aboriginal and/or Torres Strait Islander populations?  <i>If YES, please complete <b>Supplementary Form B</b> and attach to this application</i>	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
b) Does the research involve participants under the age of 18 years?  <i>If YES, please complete <b>Supplementary Form C</b> and attach to this application</i>	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
c) Does the research involve participants who are highly dependent on medical care?  <i>If YES, please complete <b>Supplementary Form D</b> and attach to this application</i>	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
d) Does the research involve participants who have a cognitive impairment, intellectual disability, mental illness?  <i>If YES, please complete <b>Supplementary Form E</b> and attach to this application</i>	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
e) Does the research involve participants in other countries?  <i>If YES, please complete <b>Supplementary Form F</b> and attach to this application</i>	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
f) Does the research involve pregnant women (with a research focus on the pregnancy) and /or foetus (in utero or ex utero) or foetal tissue?  <i>If YES, please complete <b>Supplementary Form G</b> and attach to this application</i>	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

<b>3.3 Intrusiveness of Project</b>		
a) Does the research use physically intrusive techniques?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
b) Does the research cause discomfort in participants beyond normal levels of inconvenience?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
c) Does the research collect potentially sensitive data (e.g., related to a sensitive topic or vulnerable group; personal health/medical information; sensitive organisational strategies)?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
d) Does the research involve deception or limited disclosure of information?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

e) Does the research involve covert observation of participants?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
f) Does the research involve disclosure of information which may be prejudicial to participants?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
g) Does the research involve accessing student academic records?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
h) Does the research use ionising radiation?	<input type="checkbox"/> Yes*	<input checked="" type="checkbox"/> No
i) Does the research involve the collection of human tissue or fluids?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
j) Does the research involve any uploading, downloading or publishing on the internet?	<input checked="" type="checkbox"/> Yes	<input type="checkbox"/> No
k) Does the research seek disclosure of information relating to illegal activities or is the research likely to lead to disclosure of information relating to illegal activities?  <i>If YES, please complete <b>Supplementary Form H</b> and attach to this application</i>	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
l) Does the research involve gaining access to medical/health related personal information from records of a Commonwealth or State department/agency or private health service provider?  <i>If YES, the research must meet the Guidelines under Section 95A of the Privacy Act 1988.</i>	<input type="checkbox"/> Yes*	<input checked="" type="checkbox"/> No
m) Does the research involve gaining access to personal information (not medical/health) from the records of a Commonwealth or State department/agency or private organisation?  <i>If YES, the research must meet the Guidelines under Section 95 of the Privacy Act 1988.</i>	<input type="checkbox"/> Yes*	<input checked="" type="checkbox"/> No

\*refer to Ethics & Biosafety Administration Group, as additional documentation is required as per Government regulations.

## SECTION 4 - PROJECT DESCRIPTION

### 4.1 Aims of the project

This project seeks to map the law, and its enforcement, on state liability for compensation in Vietnam. The aim is to improve the policies underlying the law to make it more effective and to improve mechanisms for the enforcement of state liability. This project will analyse theories and present policies of state liability in the context of Vietnam. It will focus on the special characteristics of Vietnam's economic, political and social systems, including an analysis of Vietnamese theories of the state, to enrich that contextual understanding. The project will investigate practices in implementing the law and the factors which impact on its enforcement. This will assist in developing better policies which enhance the responsibilities of state officials in order to better achieve the objectives of the law. In addition, through a comparative legal study including Chinese law, the research will clarify the weaknesses and strengths of Vietnamese law. It will make recommendations to improve the law and related procedures to resolve disputes relating to state liability. It will seek to improve processes for claimants to claim compensation from the state. It aims to answer five related research questions: (i) What are the justifications for state liability to pay compensation? (ii) What is the Vietnamese law on the liability of the state for compensation? (iii) How is the law on state liability for compensation enforced in Vietnam? (iv) Are there any similarities or differences between the law and enforcement of state liability in Vietnam and other jurisdictions, particularly the PRC of China? And, (v) What is the most effective process to deal with state liability in Vietnam?

**4.2 Relevant background and rationale for the project** (maximum 500 words in plain language)

Building a market-economy and a rule-based state which also better protects human rights have become fundamental objectives of the Vietnamese state under the policy of *doi moi* (renovation). As part of implementing these goals, in 2009, the Vietnamese National Assembly passed the *Law on State Compensation Liability* (the Law) which gives to those injured by the state the right to sue the state for compensation. However, the Law reflects policies which may not sufficiently protect those whose interests are damaged. The effectiveness of the procedures to enforce the law are compromised by problems in the law itself which have, in turn, been shaped by the prevailing political and legal cultures. The main rationale for this project is to examine the effectiveness of the Law and of its enforcement and to consider appropriate reforms which may enhance its implementation and enforcement. In order to do this, the project will review and analyse theories and policies relating to state liability to see if there are models which would support changes which would provide a better fit with the present Vietnamese context. It will critically evaluate the appropriateness, and analyse the enforcement, of the Law including procedural law and practices. It will also review laws, including their enforcement, relating to state liability in some selected comparable jurisdictions, including the People's Republic of China, to evaluate further possible reforms to the Vietnamese law and procedures for determining and enforcing state liability. State liability is increasingly important if Vietnam is to be transformed into a society based on the rule of law and on human rights and with an economic system based on markets and private ownership of property. Without appropriate and effective laws on state liability it will be difficult for more comprehensive market and legal systems, required for a successful transformation, to take occur.

**4.3 Research Design**

(e.g., type of qualitative or quantitative research framework, different phases, interventions or participant groups in the research)

To define the problem to be investigated, a comprehensive literature review is being carried out to analyse theories, relevant legislation, judicial decisions, and government policies relating to state liability for compensation. As the research will require methodologies which provide flexibility and diversity in this specific area, an appropriate mix of approaches is adopted including interpretative, qualitative and inductive methods. Firstly, an interpretative approach will be used to analyse the law itself and related legal sources. This will be extended to include the views and opinions of people involved in developing the policies and the law on state liability as well as those involved in its administration, enforcement or affected by it to assist in understanding their roles. Secondly, a qualitative methodology will be used as the project involves an interpretative and naturalistic approach to understanding the phenomena involved. This will be used to clarify the relationship between the law on state liability for compensation and its enforcement, between the law in the books and the law in practice. Thirdly, some selected case studies will be undertaken. These are used in qualitative research and interpretative inquiries to unveil social phenomena. These case studies may reveal the views of the state officials and those injured or damaged by state agencies to assist in understanding the practices and factors that affect enforcement processes. Inductive research is typically associated with qualitative research in this context to find more information about the research questions. Data will be collected for this purpose. It will be analysed to develop generalisations useful in answering the research questions.

**4.4 Methodology and procedures**

*Include specific details relating to any measures, interventions, techniques, and/or equipment used in the research. Provide step-by-step details of the procedures with particular reference to what participants will be asked to do. Provide details separately for different phases or conditions of the research or, where appropriate, different participant groups.*

The study will apply the research methods and techniques indicated in 4.3 to data collected from three

main sources. Firstly, data will be collected from primary legal materials including legislation and regulations and formal guidance given by courts and government agencies. Secondly, data will be gathered from academic monographs and journals, from media and other relevant databases. It will also include materials and reports published by government agencies and other relevant bodies such as Ministry of Justice, the Supreme People's Court, and the Supreme People's Procuracy. Similar sources to these will be used in gathering data on other legal systems to be used in any comparative law analysis. This has already been partly done as part of the literature review.

The third source of data will come from interviews conducted in Vietnam. Potential interviewees will be identified from their knowledge of, and experience with, state liability for compensation including judges, procurators, enforcement officials, policy and law makers, lawyers, editors, journalists and those who have made claims against the state.

The interviews will be conducted in Vietnamese or English depending on the preference of the interviewee. An open-ended interview schedule has been prepared to capture primary data from interviewees. The questions in the schedule relate to the research questions. The questions asked in the interview schedule provide some variation to allow for the particular knowledge and experience of interviewees and responses gained from previous interviews. The length will be about 60 to 90 minutes. With respect to the length of the interview, the student investigator proposes to introduce the questions by acknowledging that the interviewees are busy people. They have been chosen for their expertise and experiences. The student investigator will inform them that short answers which succinctly summarises their experience would be appreciated. It will also be apparent that some questions will not be put to some interviewees as it will be clear from the outset or become clear that the interviewee will have no experience or informed opinion on a particular matter. The student investigator will also indicate that the interviewees will not be asked to reveal specific information which is confidential including information relating to proposed government policies or clients. They will also be advised that they need not answer any question if they do not wish to do so. During the interview, an audio recording will be made with their permission. Where they do not give permission for audio recording, notes will be made during the interview and written up immediately afterwards. The transcripts of the interview will be used to evaluate the information gained in the interviews as well as the credibility of the interviewees. The interview schedule is attached as Appendix 1. The Vietnamese translation of the interview schedule is attached as Appendix 5.

<b>4.5 Type(s) of data to be collected</b>	
a) Provide general details of all types of data to be collected from participants (tick all that apply).	
<input type="checkbox"/> Questionnaire / survey responses*	<input type="checkbox"/> Physiological measures
<input checked="" type="checkbox"/> Individual interview responses*	<input type="checkbox"/> Biomechanical measures
<input type="checkbox"/> Group interview or focus group responses*	<input type="checkbox"/> Accessed health / medical records or data
<input type="checkbox"/> Participant observations	<input type="checkbox"/> Accessed student academic records or data
<input type="checkbox"/> Blood or tissue samples	<input type="checkbox"/> Archival data
<input type="checkbox"/> Other data, <i>give details:</i>	
<p align="center"><b>* Attach copies of questionnaires and/or interview schedules to this application.</b></p> <p>The interview schedule is attached as Appendix 1. The Vietnamese translation of the interview schedule is attached as Appendix 5.</p>	

#### 4.6 Photographing and video recording of participants

a) Does the research involve photographing or video recording of participants?

Yes  No

*If YES, provide details:*

b) Will identifying photographs or video recordings of participants be made available in the public domain at any time during or after the research (e.g., conference or other form of public presentation, publication, and thesis)?

Yes  No

#### 4.7 Who will be collecting the data? (give details for all types of data collected)

The student researcher will be collecting the data from three main sources: primary legal materials including legislation and regulations and formal guidance given by courts and government agencies; secondary legal materials and other material from academic monographs and journals, from media and other relevant databases; and, from interviews conducted in Vietnam.

#### 4.8 Where will the data be collected? (give details for all types of data collected)

As indicated in parts 4.4 and 4.7 above, the researcher will be collecting the data from three main sources. The first and second sources will be collected in libraries and other similar sources including the use of books, journals and on-line data bases. Some will be collected from government departments, courts or professional sources where they are unpublished, which is often the case in Vietnam.

The third source of data will come from interviews conducted in Vietnam. Interviews will be conducted at the office of interviewees where possible. Where the interviewee are claimants and have no office the interview will be conducted at the office of their lawyer where possible.

#### 4.9 How will the data be analysed? (give details for all types of data collected)

The data collected will be arranged and analysed to answer the research questions in the thesis. Firstly, the primary legal materials will be analysed to clarify the law of Vietnam and of the foreign jurisdictions with which comparisons are being made. Secondly, the secondary literature will be used to further clarify the primary legal materials where there is uncertainty or a lack of depth as well as to develop and critique ideas of the state and of state liability. Some of the secondary sources will be used in a socio-legal analysis to analyse and refine the relevant differences and similarities. Finally, the data collected from the interview will be analysed by using Nvivo program to clarify the effectiveness of existing Vietnamese law and its enforcement as well as the viability of proposals for its reform gathered from the opinion of the interviewees and secondary sources. This partly follows a common methodology used in law reform studies in Australia and Vietnam. Part of the comparative law methodology is based on Peter De Cruz, *Comparative Law in a Changing World* (London, Cavendish, 2007).

**4.10 Who will have access to the data collected?**

Access to all data will be only available to the principal investigator and student researcher, for purposes of sorting, analysing, and report writing.

**4.11 Will individuals or organisations external to the research team have access to any data collected ?**

Yes  No

If YES, indicate who will have access to the data. Give reasons and indicate in what form (e.g., identifiable, coded, summary) data will be accessible to them.

## SECTION 5 - PARTICIPANTS

**5.1 Participant Details – Group 1**

Details of specific participant population:	Private sector
Number of participants:	About 14-18
Age range of participants:	Adults
Source of participants:	<ol style="list-style-type: none"> <li>a. Two claimants of wrongful administrative acts: one individual, and one entity or legal person.</li> <li>b. Two claimants of wrongful judicial act: one for a civil wrongful judicial act and one for an administrative wrongful judicial act.</li> <li>c. Two claimant of wrongful enforcement of judgments.</li> <li>d. Two claimants of wrongful convictions: one directly affected and other affected family members.</li> <li>e. Two legal practitioners acting for individuals or entities or legal persons.</li> <li>f. Representatives of professional legal associations</li> <li>g. Two academic researchers: one from Hanoi Law University and one from the Institute of Legal Science.</li> <li>h. Two journalist and bloggers: one from the <i>Jurisprudence Review</i> and one from the <i>State and Law Review</i>.</li> </ol>

**Participant Details – Group 2**

Details of specific participant population:	Public sector
Number of participants:	About 16-22
Age range of participants:	Adults
Source of participants:	<ol style="list-style-type: none"> <li>a. Two judges of Provincial Peoples Courts: one from the Civil Court and one from the Administrative Court.</li> </ol>

	<ul style="list-style-type: none"> <li>b. A judge of the Supreme People’s Court</li> <li>c. Two procurators from the Provincial People’s Procuracy</li> <li>d. A procurator from the Supreme People’s Procuracy</li> <li>e. Two administrative officials at Ministry level.</li> <li>f. Two Administrative officials at Provincial level.</li> <li>g. Three officials responsible for enforcement in state administration, the procuracy and the judiciary.</li> <li>h. Two members of the National Assembly</li> <li>i. Two government policy and law makers</li> </ul>
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Participant Details – Group 3	
Details of specific participant population:	
Number of participants:	
Age range of participants:	
Source of participants:	

Participant Details – Group 4	
Details of specific participant population:	
Number of participants:	
Age range of participants:	
Source of participants:	

5.2 Provide a rationale for the sample size.
<p>To limit the time and resources required for the study a purposive sampling method will be used to select interviewees due to the large number of individuals and organisations involved with the issues. Following Holloway, 30 to 40 participants will be selected to obtain results which are as comprehensive as possible. A sample size generally is between four and 40 participants: I Holloway, <i>Basic Concepts for Qualitative Research</i> (Oxford: Blackwell Science, 1997) The number of samples will be reviewed during the research in order to ensure that it is as comprehensive as possible.</p>

5.3 Does the project include any specific participant selection and/or exclusion criteria beyond those described above in 5.1?
<p><input checked="" type="checkbox"/> Yes    <input type="checkbox"/> No</p>
<p><i>If YES, provide details:</i></p> <p>In respect of the claimants for state liability compensation there is a different selection and exclusion factor, as indicated in 7 1(c) (i), as lawyers will be specifically requested not to refer clients in cases where there are sensitive issues which have psychological or social impacts on interviewees.</p>

**5.4 Will there be a formal screening process for participants in the project (e.g. medical/mental/health screening)?**

Yes  No

*If YES, provide details*

**5.5 Does the research involve participants who have specific cultural needs or sensitivities? (e.g., in relation to the provision of informed consent, procedural details)**

Yes  No

*If YES, provide details of the arrangements in place for managing those needs.*

**5.6 a) Does the research involve a participant population whose principal language is not English?**

Yes  No

*If YES, provide details and comment on the expected level of understanding of written/verbal English by participants.*

The interviews will be conducted in Vietnam. Most of the interviewees will not speak or read English.

**b) Will documentation about the research (e.g., Information to Participants form and Consent form, questionnaire) be translated into a language other than English?**

Yes  No

*If YES, provide details of who will translate the documents and what procedures are in place to ensure the accuracy of the translation.*

All of the relevant documents have been translated into Vietnamese. The translations appear in the following Appendixes:

- 1- Interview Schedule
- 2- Information to Participants
- 3- Consent Form for Participants
- 8- Letter of Invitation
- 9- Information for Lawyers.

The documents have been translated by a Professor of Economics at Hanoi Economics University who is fluent in both English and Vietnamese. A declaration of accuracy of the translation by him is attached as Appendix 13.

## SECTION 6 - RECRUITMENT OF PARTICIPANTS

**6.1. Will individuals other than members of the research team be involved in the recruitment of participants?**

Yes  No

*If YES, provide details including what their involvement entails:*

Potential interviewees who have been claimants for compensation will be recruited through the lawyers who have acted for them. The process is outline in 6.2 below.

**6.2 How will potential participants be approached and informed about the research and how will they notify the investigators of their interest in participating?**

The selection of interviewees will be based on their experience and knowledge of the issues in order to ensure the credibility of the information obtained. The names and contacts of the interviewees will be obtained through domain websites, from academic literature, media reports and from academics and lawyers. Any claimants will be selected based on their identification in the media or by lawyers who have acted for them. Some may be identified by their lawyers in the course of interviewing them. Where they are identified in the media the lawyers who acted for them will be ascertained and contacted and asked to make contact with their clients to establish their willingness to participate in the survey. A sample letter to the relevant lawyer is attached as Appendix 8. The lawyer will be given a separate information sheet, attached as Appendix 9, as well as copies of the Information to Participants and Consent form for Participants in Appendix 2 and Appendix 3. Apart from purposive sampling, the student researcher also will use snowball sampling in order to identify and locate certain prospective interviewees – but not claimants - whose contact information is not available in the public domain. Prospective interviewees will be invited to participate by telephone, email or letter. The sample content of the letter and email is attached and marked as Appendixes 2, 3. Whenever necessary, the email or letter will be in Vietnamese. The Vietnamese translation of the information is attached and marked as Appendixes 6, 7.

***NOTE: Attach copies of the 'Information to Participants Involved in Research' form (on VU template) and any flyers other advertising material to be used in the research.***

**6.3 Will potential participants be given time to consider and discuss their involvement in the project with others (e.g., family) before being requested to provide consent?**

Yes  No

*If NO, give reasons:*

**6.4 How will informed consent be obtained from participants? (tick one)**

<input checked="" type="checkbox"/> Participants will be asked to sign the consent form
<input type="checkbox"/> Consent will be implied e.g., by return of completed questionnaire
<input type="checkbox"/> Verbal consent will be obtained and recorded (audio, visual or electronic)
<input type="checkbox"/> Other, <i>provide details:</i>

<b>6.5 Provide procedural details for obtaining informed consent:</b>
The information sheet, Appendix 2, and the consent form, Appendix 3, will be sent to the potential participant by email before conducting the interview so it can be signed before the interview begins. Where a participant agrees to participate as a result of a telephone call, the consent form will be signed directly before the interview begins.
<b><i>NOTE: Attach copies of Consent Forms (on VU template) to be used in the research.</i></b>
The consent form is attached as Appendix 3 and Vietnamese version is attached as Appendix 7

<b>6.6 Does the research involve participants who are in dependent or unequal relationships with any member(s) of the research team or recruiting organisation/agency (e.g. counsellor/client, teacher/student, employer/employee)?</b>
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
<i>If YES, what is the nature of the dependent or unequal relationship?</i>
<i>What measures will be taken to ensure that participants' voluntary consent is not compromised by the relationship?</i>
<i>What procedures are in place to ensure that the dependent or unequal relationship does not disadvantage or prejudice any participants?</i>

<b>6.7 Will any other dual relationship exist between any researcher and potential or actual participants? (e.g., a member of the research team is also a colleague or friend of potential participants)</b>
<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
<i>What is the nature of the dual relationship?</i>
The student researcher is a lecturer at Hanoi Law University and one or two potential participants are her colleagues. However at the least this is relationship of equality or, the potential participant will hold a higher academic position to that of the student researcher. The potential interviewees in this group are professional lawyers and academics involved in the field of law and policy the subject of the interviews.

They are familiar with law reform activities and know that they may decline to participate in interviews.

*How will ethical issues arising from the dual relationship be addressed?*

This dual relationship in itself raises no ethical issues.

**6.8 Will you be offering reimbursement or any form of incentive to participants (e.g., payment, voucher, free treatment) which are not part of the research procedures?**

Yes  No

*If YES, provide details:*

**6.9 Is approval required from an external organisation (e.g., for recruitment of participants, data collection, use of premises)?**

Yes  No

*If yes, provide information relating to procedures for obtaining approval from the organisation(s) and attach evidence of approval.*

## SECTION 7 - RISKS ASSOCIATED WITH THE RESEARCH

**7.1 a) Are there any PHYSICAL RISKS beyond the normal experience of everyday life, in either the short or long term, from participation in the research? If YES, provide details below**

Yes  No

High probability risks:

Low probability risks:

How will the risk(s) be minimised?

How will these risks be managed if an adverse event were to happen?

<b>7.1 b) Are there any PSYCHOLOGICAL RISKS beyond the normal experience of everyday life, in either the short or long term, from participation in the research? If YES, provide details.</b>	
X Yes <input type="checkbox"/> No	
High probability risks:	
Low probability risks:	The literature identifies two potential kinds of psychological risk. One is stress from a breach of confidentiality and anonymity. Secondly, distress might also be caused by discussions involving sensitive issues especially for participants who might be involved emotionally with the issues. The risk depends on the personal relationship of the participants with the issues and the intensity of their involvement in the issues. See references in 7.1c. The interview schedule has been designed to eliminate these risks by concentrating on individuals' experience of the law and its procedures and not on the events which gave rise to any claim.
How will the risk(s) be minimised? See 7.1c	
How will these risks be managed if an adverse event were to happen?  In the unlikely circumstances that the interview process indicated that there was a potential social or psychological risk, the interview would be stopped and any data would be discarded in a secure way.  Interviewees who have issues which they wish to raise or resolve may do so by contacting either Professor Andrews or Dr Nguyen Van Quang,	

<b>7.1 c) Are there any SOCIAL RISKS beyond the normal experience of everyday life, in either the short or long term, from participation in the research? If YES, provide details.</b>	
X Yes <input type="checkbox"/> No	
High probability risks:	
Low probability risks:	A research topic may be socially sensitive if there are potential social consequences or implications, either directly for the participants in the research or for the class of individuals represented by the research. In relation to this research, the literature on the matter suggests that there two issues that should be considered when sensitive topics are discussed. Firstly, participants may be asked to give their personal opinions on an issue which is considered to be politically controversial. Furthermore, there is possible risk in some interviews where interviewees may make unfavourable comments or criticism of other people. The interview schedule has been designed to eliminate these risks by concentrating on individuals' experience of the law and its procedures and not on the events which gave rise to any claim against the state or on the conduct of individuals involved.  References: Corbin, Juliet and Janice M. Morse, 'The Unstructured Interactive

Interview: Issues of Reciprocity and Risks when Dealing with Sensitive Topics' (2003) 9 *Qualitative Inquiry* 335; Hill, Ronald Paul, 'Researching Sensitive Topics in Marketing: The Special Case of Vulnerable Populations' (Spring, 1995) 14(1) *Journal of Public Policy & Marketing* 143.

How will the risk(s) be minimised?

The procedures employed have sought to eliminate any risk to individuals, either psychological or social. However, it is realized that there is possibility that the interview process may involve some slight social risks, therefore the identity of any interviewees will not be disclosed in the research writing or in any other manner. It will be kept confidential. The interviewees will be informed and assured of this before the interview begins.

It should be noted that the form of investigation follows standard models for investigating legal rules and processes which are more innocuous. It should also be noted that the general topic of law and policy on state compensation is not one of general social or political controversy and the inquiry is being pursued as an academic and scholarly activity in a university research setting.

The steps taken to reduce possible risks are as follows:

**(i) by the attributes of the person selected**

The interviewees are all adults. They can choose to answer questions and decide what they might or might not say. The participants may decline to answer questions at any stage of the interview process if they feel uncomfortable in responding. All interviewees will be advised in the formal documentation and at the interview that they need not answer any question and that they may discontinue their involvement in the interview and the project at any time.

The interviewees fall into two broad classes. One class consists of members of professions or a public office holders or nominated public spokespeople. As professional and well-educated people they are able to limit any risk because of their qualifications, education and position which is equal to or superior to that of the researcher. They are able to determine for themselves what they would like to disclose. The issues for these interviewees are based on their work and professional activities which will be free of sensitivities of a personal kind. The other, and smaller class, consists of interviewees who have been claimants for state compensation who have had lawyers acting for them in the compensation process. Any remaining risk to them will be reduced by contacting them through their lawyers. They will consequently be independently advised on their participation. The lawyers will be specifically requested not to refer clients in cases where there are sensitive psychological or social issues. A number within this group will also be well educated professionals or business people used to dealing with others. All of them have been clients of lawyers who will have referred them to participate in the project and who can give them independent advice on whether to participate or not. Where possible they will be interviewed at their lawyers' offices.

**(ii) the nature of the questions to be asked**

The questions are focussed on issues of legal policies, legal rules and processes. The questions have been designed to reduce any risks by not asking participants to reveal personal or private issues. In particular the interview questions do not seek to obtain any information about the facts or causes which gave rise to any claim. This also eliminates most psychological and social stress. The questions only seek to establish knowledge and opinions relating to the law and enforcement of state liability for compensation. They will not elicit information which may jeopardise any claims. Also such claims will have been finalised.

**(iii) by following a standard process used in both Australia and Vietnam in law reform projects**

The methodology used in respect of interviews is common between Australia and Vietnam. There are no

special or significant legal or cultural differences between Australia and Vietnam in the context of this research. As in socio-legal research in Australian law schools and law reform research in Australia most Vietnamese legal professionals and many of their clients are willing to participate.

Vietnamese people are generally supportive and friendly in cooperating with researchers in such projects. There are no known political, legal or corporate constraints on the selection or on the freewill of possible interviewees in consenting to participate or impact on their responses. If there were to be such restraints it may have a negative impact on the data obtained.

**(iv) local support for the student researcher and interviewees during field work**

Hanoi Law University will provide for the support of the student in conducting the research in Vietnam. This role will be undertaken by Dr Nguyen Van Quang who is Head of the Department of International Cooperation, Hanoi Law University. He holds a Masters of Laws by research from Hanoi Law University. He has seen the documents prepared for this application. He holds a PhD from Latrobe University based on a comparative study of Vietnamese and Australian administrative law. His consent to act as a local supervisor is indicated in Appendix 12. Any issue arising in Vietnam can be responded to by him as indicated in Appendix 1, 2, 9 should an interviewee chose not, or be unable to contact, Professor Andrews.

**(v) Scrupulous attention to record handling and non-identification of interviewees in published material**

The risks from disclosure of an interviewee's identity has been reduced by 7.1(b) above. The risk will be further minimized by the secure storage of the data, as outlined in section 8 below, and its use in such a way that the makers of any statement will not be identified, as also indicated in section 8.

How will these risks be managed if an adverse event were to happen?

In the most improbable circumstance that an interviewee, in an interview, made statements or revealed emotions which indicated some potential social or psychological risk, the interview would be stopped and any data would be discarded in a secure way.

Interviewees who have other issues which they wish to raise or resolve may do so by contacting either Professor Andrews or Dr Nguyen Van Quang,

**7.2 Does the research involve any risks to the researchers?**

Yes  No

*If YES, provide details and describe strategies in place to minimise and manage risks.*

**7.3 Does the research involve any risks to individuals who are not part of the research, such as a participant's family member(s) or social community (e.g., effects of biographical or autobiographical research)?**

Yes  No

*If YES, provide details and describe strategies in place to minimise and manage those risks.*

**7.4 Legal issues and risks associated with the research (refer to Guidelines for Applications)**

**Are there any legal issues or legal risks associated with any aspect of the research that require specific consideration (i.e., are significant or out of the ordinary), including those related to: (1) participation in the research, (2) the aims and nature of the research, (3) research methodology and procedures, and /or (4) the outcomes of the research?**

Yes  No

*If YES, provide details?*

*How will the legal issues and/or risk(s) be managed?*

**7.5 Risk-Benefit Statement: If you consider the participants to be 'at risk', give your assessment of how the potential benefits to the participants or contributions to the general body of knowledge would outweigh the risks.**

As indicated in Appendix 2, the participant's responses, based on their knowledge and experience, will contribute to possible solutions in reforming the law on, and mechanisms for, implementing state liability for compensation in Vietnam. It will lead to better understanding by Vietnamese state officials of legal policies and regulatory practices and may lead to improvements in both of them. It also benefits the participant and other claimants in the future.

## SECTION 8 - DATA PROTECTION, STORAGE AND ACCESS

### 8.1 Indicate how the data will be kept to protect the confidentiality/privacy of the identities of participants and their data, including all hardcopies and electronic forms?

All data will be anonymous. No personally identifying information will be collected from participants.

Data will be coded and non-identifiable. Any personally identifying information collected from participants will not be retained.

Data will be coded and re-identifiable. Personally identifying information will be kept separately to participants' data and can be used to identify participants such as in the case of an adverse event.

Some or all of the retained data will include personally identifying information.

Other, *provide details*:

### 8.2 Who will be responsible for the security of confidential data, including consent forms, collected in the course of the research?

The principal investigator will be responsible for the security of confidential data, including the consent forms

### 8.3 Where will data be stored during and after completion of the project?

During the project:

All data and information obtained in the interviews will be kept strictly confidential. The principal investigator will be responsible for the security of the confidentiality of any data.

In Vietnam, during the course of the fieldwork, the data in the form of an audio record will be transferred to a personal computer belonging to the student researcher after each interview session. The file both in audio form and in transcription from the audio form will be stored in the computer and will be password-protected. There will be no personal identification of the interviewee written in the file of the audio conversation and the written transcript. Only the student researcher has access to the personal computer. Any backup files will also be protected by a password. The identity of the interviewee on the audio and transcribed files will be coded. The student researcher will keep the identifying codes separately from the computer files. It will be kept in a locked cabinet in the researcher's home in Vietnam during the field work and in a locked cabinet located in the postgraduate area on level 2, City Queen Campus, Victoria University in Australia. Where an interviewee declines to have an audio recording made the notes made by the student researcher at the interview will be kept in a locked cabinet in the researcher's home in Vietnam during the field work and in a locked cabinet located in the postgraduate area on level 2, City Queen Campus, Victoria University in Australia. There will be no identifying information on the written record apart from the code identifying the interviewee. The code will be kept in same manner as the other identifying codes.

Upon completion:	After completion of the thesis, hard copies of the consent forms and any data will be retained by the principal investigator in the locked cabinet in his university office. Electronic copies of the interview schedule, the transcript of the interviews, and the conversation recorded in the form of audio files will be stored by the principal investigator in a computer with password protection in his university office.
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<b>8.4 Indicate the period for which data will be held.</b>	
<input checked="" type="checkbox"/> 5 years post publication	
<input type="checkbox"/> 7 years post publication (data from participants < 18 years of age)	
<input type="checkbox"/> 15 years post publication (clinical trials data)	
<input type="checkbox"/> Other, provide details:	

<b>8.5 How will the data be disposed?</b>
Hard copies of data will be destroyed by shredding and discarded in confidential waste bins which are accessible in the law school. Electronic copies will be destroyed by destroying the disk on which they have been stored or by wiping it in a manner which makes it difficult to restore data if the computer is disposed of.

## SECTION 9 - DISSEMINATION/PUBLICATION OF RESEARCH RESULTS

<b>9.1 Indicate how the results of this research will be reported or published.</b>	
<input checked="" type="checkbox"/> Thesis	<input type="checkbox"/> Research report to collaborating organisations
<input checked="" type="checkbox"/> Journal article(s)	<input checked="" type="checkbox"/> Conference presentation(s)
<input type="checkbox"/> Book	<input type="checkbox"/> Recorded performance
<input type="checkbox"/> Other, give details:	

<b>9.2 Are there any restrictions on publications or reports resulting from this project?</b>
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
<i>If yes, provide details:</i>

## SECTION 10 – OTHER DETAILS

### 10.1 In your opinion, are there any other ethical issues involved in the research?

Yes  No

*If yes, provide details:*

### 10.2 Additional information/comments to support this application?

## SECTION 11 - DECLARATIONS AND SIGNATURES

I/ we, the undersigned, declare the following:

- I / we accept responsibility for the conduct of the research project detailed above in accordance with:
  - a) the principles outlined in the National Statement on Ethical Conduct in Human Research and the Australian Code for the Responsible Conduct of Research;
  - b) the protocols and procedures as approved by the HREC;
  - c) relevant legislation and regulations.
- I/we will ensure that HREC approval is sought using the Changes/Amendments to Research Project form, if:
  - a) proposing to implement change to the research project ;
  - b) changes to the research team are required.

I / we have read the National Statement on Ethical Conduct in Human Research prior to completing this form.

I / we certify that all the investigators/student researchers involved the research project have the appropriate qualifications, experience, skills and training necessary to undertake their roles.

I / we will provide Annual / Final reports to the approving HREC within 12 months of approval or upon completion of the project if earlier than 12 months.

I / we understand and agree that research documents and/or records and data may be subject to inspection by the VUHREC, Ethics Officer, or an independent body for audit and monitoring purposes.

I / we understand that information relating to this research, and about the investigators, will be held by the VU Office for Research and on the Human Research Ethics Database. This information will be used for reporting purposes only and managed according to the principles established in the Privacy Act 1988 (Cth) and relevant laws in the States and Territories of Australia.

Signature of Chief Investigator - A		
Name:	Professor Neil Andrews	Date: 7 May 2012
Signature:		

Signature of Chief Investigator/ Associate Investigator / Mentor Investigator 1		
Name:	Mr Brendon Stewart	Date: 7 May 2012
Signature:		

Signature of Chief Investigator/ Associate Investigator / Mentor Investigator 2		
Name:		Date:
Signature:		

Signature of Chief Investigator/ Associate Investigator / Mentor Investigator 3		
Name:		Date:
Signature:		

Signature of Chief Investigator/ Associate Investigator / Mentor Investigator 4		
Name:		Date:
Signature:		

Signature of STUDENT Investigator 1		
Name:	Minh Oanh Nguyen	Date: May 2012
Signature:		

Signature of STUDENT Investigator 2		
Name:		Date:
Signature:		

Signature of STUDENT Investigator 3		
Name:		Date:
Signature:		

Signature of STUDENT Investigator 4		
Name:		Date: May 2012
Signature:		

Approval : Signature of Head of Department/School/Director of Institute/Centre		
<p><b>IMPORTANT:</b> The Head of School/Department cannot sign approval for research where he/she is listed as an investigator.</p> <p>In these circumstances, please seek approving signature from the Associate Dean (Research) or Executive Dean or other appropriate member of staff.</p>		
Name:		Date: May 2012
Signature:		
School/Department/ Institute/Centre:	Professor Andrew Clarke Head, Victoria Law School	

**IMPORTANT:**

Only applications signed by all members of the research team and approved by the Head of School/Department/Institute/Centre will be considered by the HREC.