Purpose of the Workshop

1. The workshop formed part of a continuing series of institutional strengthening programs for the legal sector under the Danida Legal Reform Project. Prior to the workshop, a senior delegation from the SPP had visited Australia and New Zealand in September 2004 to study aspects of the adversarial system in these countries. The present workshop was therefore a follow up activity to reinforce some of the observations made by the SPP delegation and to place them in a broader theoretical and comparative context.

2. At the commencement of this workshop the Australian facilitator explained that it was not the intention to focus on work skills. SPP is a well-established and powerful institution that has its own staff training programs focusing on improving work skills. Indeed it is the day-to-day focus on work skills and methods that can impede practitioners from focusing on broader issues. The purpose of the seminar was therefore to allow participants to reflect on some of the underlying principles of their work. The method used was by comparative and critical analysis of the concept of the rule of law and how it operates in Australia, Vietnam and other Asian countries. The work methods used in the workshop included PowerPoint presentations, discussions and the viewing of the 1957 film “12 Angry Men” focusing on the jury system.

Presentations

3. There were four major presentations in the course of the workshop, two by Vietnamese participants and two by the Australian facilitator.

4. Dr Khuat Van Nga, Deputy Director General of SPP, opened proceedings by explaining the background and purposes of the workshop and thanking Danida for its continuing support for the Legal Reform Project. In the course of the opening session, Dr Nga also made some important points. He emphasised the Vietnamese nation’s decision to become a law-governed state and thus to allow the Vietnamese people to have mastery over their own affairs. This is an important element in the Vietnamese building of a democratic system of government. A critical feature of a law-governed state is the necessity for state officials to abide by the law. It was not sufficient to think in terms of
rule of law directed only at the people. Rule of law had to apply to the officials as well. He argued that the concept of separation of powers was an idea based on wisdom that transcended its western origins and made sense in complex modern societies. Finally he argued in favour of the independence of the judiciary as an important element of the separation of powers.

5. Mr. Ngo Quang Lien, Director of the Institute for Procuratorial Science of SPP, traced the history of the Vietnamese legal system from 1945 to the present Doi Moi period. He plotted the various changes in the Constitution and the consequent adjustment of legal institutions over the period leading to the Doi Moi era beginning in the 1990s. Mr Lien emphasised the point made by Dr Nga that Vietnam needed to construct a law-governed state - a critical requirement of the current phase of Vietnam’s development. While much progress has been made, Mr Lien outlined some of the important steps that were still required to be taken. Vietnam’s economy is growing fast and Vietnam is integrating itself into the world economy and accordingly Vietnam needs a legal system to accommodate these needs. Of vital importance was the need to improve the legislative process and its enforcement. Among the new laws that are needed Mr Lien listed laws on the market economy, property law, fair competition laws and laws guaranteeing the right to conduct private business. Among the important steps that had been taken was a new law on criminal procedure to help assure the rights of citizens.

6. Roland Rich made a presentation analysing the underlying premises and elements of the concept of ‘rule of law’. After reviewing some historical background that led to the terms ‘Rule of Law’, ‘Rechtstaat’, and ‘Etat de Droit’ he concluded that the term being used by the Vietnamese side – ‘law-governed State’ – best encapsulated the concepts that the European terminology was attempting to summarise. The foundational elements of any system of law-governed state included various legal institutions and written texts as well as concepts of the universal applicability of law and the necessity for a certain level of public comprehensibility of the law. Certain societal elements were also required such as widespread voluntary obedience flowing from legitimacy in the eyes of the people, which was often strengthened by applicability of the law to the powerful in society. Importantly, law had to be seen by the people not just as a means of societal discipline but also as a remedy available to everyone who considers they have been wronged. The key features of a rule of law system included independence of the judiciary and also the police and prosecutors, procedural fairness based on the principles of natural justice, a strong element of predictability in how the law will work in practice, its prospective as opposed to retroactive application and a certain public expectation of effectiveness. Each country had to assess to what degree its legal system met these underlying premises. In Australia, for example, while many aspects of the legal system were strong and effective, serious problems remained in relation to access to justice, weak clear-up rates in some crimes like burglary and rape, troubling recidivism rates and corruption in certain police forces.

7. Roland Rich also made a presentation comparing and contrasting Asian legal systems. Ancient Asian systems had indistinct boundaries between law, religion, ethics and philosophy. The role of the law was often seen as limited to upholding an immutable
view of the cosmos and the unchanging place of humans in it. Early pre-colonial influences on Asian legal thinking included Indian and Buddhist legal concepts in Burma, Cambodia, Java, Bali and Thailand, Chinese legal concepts in Japan, Korea and Vietnam and Islamic law in the Malay peninsula and island southeast Asia. The broad effect of these influences was twofold. First, these laws tended to see litigants in terms of their status based on race, gender, caste, family and religion. Second, laws were implemented as a means of maintaining a fixed social order. Law was seen as revealed rather than drafted, leaving little mechanism for amendment or revision. Colonial and foreign influences were broadly felt throughout Asia:

- British law in Burma, Borneo, Malay peninsula, Straits settlements, Hong Kong
- French law in Vietnam, Cambodia, Laos and, to a certain extent, borrowed by Thailand and Japan
- Dutch law in Indonesia
- Spanish law in the Philippines
- Portuguese law in East Timor and Macau
- Soviet concepts of law in China, Vietnam, Cambodia and Laos
- American concepts of law in the Philippines and Japan as well as influencing others such as South Korea and Taiwan

8. Foreign concepts (except for Soviet law which continued to recognise class membership) were based on the ideal of a litigant whose status was unseen by the courts. This represented a fundamental break from previous practice. Law was no longer seen as fixed and revealed but as malleable in the service of a dynamic society. Further, foreign ideas of law required elaborate and specialised legal bureaucracies. But questions remain about how deeply the populace accepted these new ideas and to what extent ‘rule of law’ is still seen as a fancy term for rule by colonisers. At the present time the process of globalisation is leading to a great convergence in legal thinking and a process of harmonization of law and practice. This is adding to the pressures on Vietnam for reform and renovation.

“12 Angry Men”

9. The delegation that visited Australia in September had the opportunity to witness the operation of the jury system. This was of considerable interest in comparison with the Vietnamese system of civilian assessors sitting with judges. Accordingly the workshop devoted a half-day to the examination of the jury system. The method used was to view the classic movie “12 Angry Men” and then discuss its impact. SPP had helpfully had the movie dubbed into Vietnamese prior to the workshop.

10. The 1957 drama directed by Sydney Lumet and starring Henry Fonda begins as a courtroom drama but takes a unique twist. Instead of following the trial itself, the viewer has the chance to observe the events behind the closed doors of a jury room. The film begins with the end of the trial. The jurors retire to deliberate. A preliminary vote is taken and the result is 11:1 in favour of the guilty verdict. Eleven jurors raise their hands to convict a young man of killing his father. Only Juror No.8 (Henry Fonda) has doubts. At
first even he does not truly believe the young man to be innocent but thoughtfully notes that the case for the defence might have been presented in a more convincing manner and that the boy might be given the benefit of a doubt. Since the boy is to be executed if found guilty, his life is now in the hands of the jury and juror No.8 reasons that the least they should do is talk about the case a bit. As time goes on some of the jurors change their minds and find that there is perhaps enough reasonable doubt not to convict the young man after all. But not everyone is easy to convince.

11. The movie generated much discussion. Part of the discussion concerned technical elements such as the dismissal of the alternate juror at the conclusion of the hearing, the method of appointing the chair of the jury and whether the chair had any additional powers. Considerable interest was shown in the method of empanelling the jury and the method of drawing on the electoral role was explained as the most common practice. Participants noted that in the movie the jury at times voted publicly and at other times by secret ballot leading to different results. The fact that all jury members in the film were men was a point noticed by some participants but this was explained as simply being done for dramatic reasons not because it reflected reality. There was also discussion about time limits for jury decisions, sequestration of juries and how to deal with hung juries.

12. But perhaps the greatest discussion concerned the lack of qualifications of the jurors. The fact that they were ordinary people without any special training or legal knowledge seemed to run counter to Vietnamese ideas of the need for expertise in the running of the legal system. Even the civilian assessors were trained for their task, but the jurors’ only qualification was that they were eligible electors and the key disqualifying feature was whether they had been convicted of a felony. The facilitator explained that the jury system was a difficult and costly system to operate and that it rested on the foundation of the very ‘ordinariness’ of the jurors. They were the ‘peers’ of the accused. The jury system needed an adversarial system in which to operate. Counsel argued the case to the jury and had to have the skill to make the jury understand complicated evidence including forensic evidence. The jury did not decide questions of law and so did not require legal skills. This was the role of the judge who summed up the case for the jury and explained the legal consequences of the findings of fact that the jury had to make. Ultimately cases often turned on a very simple decision whether a certain piece of testimony was or was not to be believed. This sort of decision did not require any special preliminary training.

General Discussion

13. Discussions of the various issues raised were conducted after each presentation. A few themes were of particular interest. One concerned the weakness of the legal profession in Vietnam. It was readily conceded that the current total of 3,500 qualified lawyers was woefully inadequate to run a legal system for 80 million people. The facilitator suggested that one of the reasons behind this might flow from the subservient role of lawyers in Marxist doctrine. Marx saw the law as serving the interests of the ruling class and therefore did not ascribe any particular importance to the role of law or
lawyers in social reform. The Soviet influence on Vietnam perpetuated this view and clearly led to the low popularity of legal studies in the pre Doi Moi era. Now that lawyers were more valued, there was a greater emphasis on training lawyers. The facilitator noted however that the great majority of lawyers were working for government institutions. He estimated that in Australia there were probably 10 private lawyers to every government lawyer while in Vietnam the figures were probably reversed. Ultimately, one could not have a law-governed state until the population had access to lawyers to represent them. In response, participants noted the intention to train a further 18,000 lawyers by 2010.

14. Another issue concerned the effectiveness of the law in the eyes of the population. This could be tested by examining issues of obedience to the law but the reality is that one can also obtain obedience through tough enforcement of some laws. There were police states in the world that well understood this principle. A better way of looking at the issue was to ask whether the people saw the law as one means of resolving their problems. The facilitator listed the various ways in which an Australian citizen could contest what he/she considered to be an unfair decision by the government apparatus. All bureaucracies make mistakes and there needed to be a way of testing a decision. There may be internal tests within the bureaucracy itself but while these may correct a certain number of errors, no internal review would be as rigorous as an external review by an independent body such as an ombudsman or a judge. Ultimately therefore the question to be asked is how readily can a citizen approach a court to review an unfavourable decision by the bureaucracy. Participants noted that Vietnam was still evolving its system in this regard. There were a number of supervisory bodies within the government and party structure that could review decisions. Further, Vietnam, drawing on Chinese legal traditions, had a long history of petitions from the public. These now took a new dimension in the process of interpellation of Ministers by the National Assembly. But ultimately courts were needed to achieve a law-governed state and Vietnam was currently strengthening Administrative Courts to deal with exactly this type of complaint.

15. A final issue of discussion was the particularly high conviction rate in Vietnamese criminal cases. Participants estimated it to be in the upper reaches of the 99th percentile. The facilitator pointed out that in a legal system such as Australia’s there was also a high conviction rate. Over 80 percent of accused plead guilty and of those that do not, the majority are found guilty. But a significant number are not convicted because the case against them is not strong enough, an example of which was seen in “12 Angry Men” or the legal process under which they are tried is flawed in some way. To achieve this result requires a strong legal system with sufficient lawyers and legal aid, a high burden of proof on the prosecution and an independent judiciary overseeing the system. Whenever it is virtually impossible to be acquitted, the decision to prosecute is equivalent to a finding of guilt. This is not consonant with a law-governed state.

Conclusion

16. The facilitator pointed out that the participants were experts in their field. This made them best placed to work out how to deal with the concepts and discussions they had been exposed to over the course of the workshop. Sometimes it was helpful to take
time out from everyday work processes to allow for reflection on broader conceptual frameworks. It is unlikely that any of the discussions held would have an immediate impact. It is to be hoped, however, that participants have a stronger grasp of the concept of a law-governed state and are able to apply this concept in Vietnam’s continuing efforts to work towards this goal.