

# Maintaining Firm Control: Recent Developments in Nonprofit Law and Regulation in Vietnam

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## Introduction

Vietnam remains committed to controlling the development of a nonprofit sector while gradually, and carefully, enabling some nonpolitical, service-oriented, charitable and research groups to carry out work that serves the interests of both citizens and the state. In recent years, the Vietnamese Party and government have pursued these policy goals through measures taken by government and security authorities, and by key decisions on the regulatory environment for the nonprofit sector.

This commentary outlines the key developments in nonprofit regulation in Vietnam over the past several years, particularly since a major debate on a Law on Associations ended in 2006 with a decision by Party and government officials to block adoption of the Law while continuing strict control and management of the emerging Vietnamese nonprofit community.

In recent years, Vietnam's diversifying voluntary sector has expanded to fulfill social needs from which the Vietnamese state is retreating and to play some research and advocacy roles in Vietnamese society. The emerging voluntary sector, broadly defined, now includes Party-related mass organizations, business, trade and professional associations, policy research groups, social activist and social service groups, religious groups, clans, charities, private and semi-private universities, social and charitable funds, and other institutions.

The state has sought to control and to encourage the growth of social organizations, at least partly to compensate for the inability of the state to keep pace with social needs in the reform period. At the same time, the state retains management and control over the sector at a level more detailed and specific than in many other countries, with special attention to a small number of organizations that are perceived to be potential political challenges or to harbor those who might emerge as potential challengers in political or policy terms. For the vast majority of the thousands of formal and informal organizations now active throughout the country, the Vietnamese state generally acquiesces in and even encourages their day-to-day activities, while retaining a detailed regulatory structure and making clear that the state and Party remain in control of the pace and direction of growth in nonprofit activity.

During Vietnam's reform period that began in 1986, Party and government regulation of social organizations remained governed by regulatory documents enacted in 1957, during a period of strict control by the Party and state. Those 1957 regulations on associations severely limited rights to assemble and the ability of civic organizations to form, and the regulations adopted in the decades that followed continued that policy. Throughout this period the Party and state made special efforts to control groups that were perceived as potential political threats. In the early 1990s one such example was a veterans group called the Club of Former Resistance Fighters, which demanded better conditions for veterans and began to take their demands into the political realm. The key methods of control from the 1950s to the 1990s – and continuing to this day – have been the long and difficult processes of approval to establish a social organization or association, and the continuing control and supervision of organizations that have been approved for establishment.

There were some counter-tendencies as well, toward greater flexibility, generally for groups that the Party and state had to give more flexibility to. In 1992, for example, the then-relatively liberal Ministry of Science, Technology and the Environment was permitted to open a more flexible regulatory window for some research groups to seek a fully legalized, formal, state-recognized, and registered status. A number of urban voluntary organizations, including some of the most important policy research, social service, and social activist organizations then operating, were able to legalize under the 1992 Science and Technology Regulations and their successor, Decree 81 which now provides a protective regulatory umbrella for hundreds of science and technology research NGOs to exist.

Economic and social organizations, social and charitable foundations (funds), and other voluntary groups were also formally recognized as legal entities in the 1995 Civil Code. And in 1999 the government adopted a decree on social and charity funds that cautiously encouraged private charitable funding while maintaining strict state control over their formation and operations, using the traditional mechanism of dual control by a government management agency and by a government ministry or agency working in the particular substantive field of the fund (such as health or education).

Efforts to draft a national Law on Associations – a legislative topic of intense interest both to those who wanted to control the sector and those who wanted to facilitate it – began in the early 1990s, to replace the highly restrictive 1957 regulations on associations. Those efforts continued in various stages for nearly fifteen years, until a major debate erupted over the Law on Associations in 2005 and 2006 that provides the backdrop to recent developments in nonprofit law in Vietnam.

### **I. The 2003 Decree on the Organization, Operation and Management of Associations and Implementing Regulations (Decree 88)**

In 2003, the Vietnamese government promulgated new, detailed regulations governing the formation and operations of associations and related groups. Since 2003, Decree 88 has served as the guiding regulatory document for nonprofits in Vietnam, supplanted only in April 2010 by a revision of Decree 88, now called Decree 45, that maintained firm control over the registration, monitoring, and operation of associational groups while tweaking the regulatory framework and providing some special privileges for a small number of large, state-affiliated umbrella groups. The new Decree 45 is discussed further below.

Decree 88, in force from mid-2003 to July 2010, both restricts and facilitates associational activity with an emphasis on control. Vietnamese associational experience with Decree 88 helped to fuel growing conflict between the control orientation of the Ministry of Home Affairs, which is responsible for management of the sector, and the increasing efforts of national associations to maintain distance from government ministries. The 2003 Decree on Associations, like earlier regulation, explicitly excluded the mass organizations under the Party from its scope. These organizations – the Vietnam Fatherland Front, Labor Confederation, Ho Chi Minh Communist Youth League, Vietnam Peasants Association, Vietnam War Veterans Association, and the Vietnam Women’s Union – have long been governed directly by the Party through their own statutes.

The 2003 Decree provided long and complex processes for organizational formation (thereby discouraging most organizations from forming); broad prohibition clauses barring a wide range of activities and maintaining exceptionally wide Party and government discretion over associations; highly detailed organizational requirements; approvals needed for a wide range of organizational changes, including board and staff; restrictions on branches and on bank accounts; and, in some ways most important, retention of the tradition “dual management” system of associational governance by the state. The 2003 Decree also presaged a controversy over the scope that associations have to comment on Party and state policies, providing that associations may provide “advice and criticism on matters within the association’s scope of activities.”

In short, the 2003 Decree on Associations was a document for retained state control. In response to demands from associations and legal drafters, the 2003 Decree also included provisions for time limits on state discretion in certain stages of the formation process. Since its adoption, Decree 88 has been regarded by the Vietnamese associational sector as overly restrictive to the sector, preventing a range of organizations from registering and expanding their operations through maintenance of a highly detailed and restrictive system of approval (*cho phép*) rather than moving toward a registration system that provides associations with more flexibility. The Ministry of Home Affairs would seek to retain all of these provisions at the next stage, the drafting of the formal Law on Associations; in turn many in the associational sector would seek to weaken some of these management and control mechanisms. And the Ministry would seek to retain and strengthen these controls when the 2003 Decree was redrafted in 2008 and 2009, as discussed below.

### **II. Toward a Law on Associations, and the Aftermath of Debate on the Law**

The drafting of the Law on Associations had begun in the early 1990s, but it gathered steam again beginning in 2003 and 2004. It was a very difficult process. As the National Assembly, Vietnam's national legislature, pointed out,

although [the Law on Associations] had been included in the legislative work programme [in 1995], up until now we have not yet promulgated any law that details the formation of associations – which is one of the fundamental rights of citizens provided in the Constitution. We might say that this is a difficult law .... Moreover, the ... development of associations and social organizations in Vietnam is very complex, [in keeping with] the level of social development. So new factors in the sphere of associations and social organizations continue to appear....

After a lengthy process of drafting by an inter-agency group headed by the control-oriented Ministry of Home Affairs, the draft Law on Associations was released by the Office of the Government in Hanoi in late 2005 for comment, setting off a firestorm of reaction from national associations representing intellectuals and business sectors. A wide range of associations opposed the draft Law because it maintained the most widely criticized elements of Decree 88 (2003) and added some new, negative features. These included

- the “dual management” form of state management and control structure by the Ministry of Home Affairs (as the key registration and supervision agency), and professional line ministries (for professional aspects of associational work);
- a complex, lengthy process for the formation of associations and other social organizations that was now termed “registration” rather than “approval” but retained most of the characteristics of the 1957 and 2003 approval systems, including wide state discretion;
- the exclusion of the six key Party-related mass organizations from the Law, prompting strong calls from other national associations either for preferential treatment for them as well, or for inclusion of the mass organizations in the draft Law;
- Geographic restrictions on associations that provided that only one association in each field could be legally formed in each locality;
- Very broad prohibited purposes and activities for associations;
- A very limited scope for advocacy and participation in public affairs, limited to (depending in part on the translation) “publiciz[ing] the objectives of the association.”<sup>2</sup>

In late 2005 and early 2006, this debate reached a point previously unknown in modern Vietnamese legislative history, when a team of specialists convened and supported by the Vietnamese Union of Science and Technology Associations (VUSTA) wrote their own alternative draft Law on Associations in response to the difficulty in forcing changes in the official draft. This appears to have been the first time in modern Vietnamese history that opposition to a government-drafted law had reached a level that a “rebellious” alternative law was formally drafted and made available for discussion.

The VUSTA alternative draft law, which relied in part on comparative legal provisions from outside Vietnam, provided different approaches on most of the issues under debate. It contained a simplified formation and registration procedure much closer to a registration (*dang ky*) model than an approval model. It further provided for a single system of state management, with specified roles for state management; a reporting mechanism for associations; and some differentiation among associations (registered and unregistered; public benefit and non-public benefit).

The alternative draft also made specific provisions for the legal treatment of “unions” or “federations” of associations (like VUSTA and the Vietnam Union of Literary and Arts Associations); provided for a national register of associations; would have broadened the rights of associations, particularly relating to advocacy and participation in public affairs; introduced the concept of particular privileges for a category of public benefit organizations; and provided at multiple points in the draft for more time limits for administrative action and some greater opportunities to challenge administrative action.

In 2006, the Party and government watched this unfolding and expanding conflict and – particularly in the wake of the “color revolutions” in Europe, which were unfolding at the same time – decided not to allow a Law on Associations to go forward. The Law was shelved in 2006 and is not scheduled to be reconsidered for at least several more years. The recent replacement of Decree 88 (2003) on associations by Decree 45 (2010) on associations, discussed further below, is likely to push this schedule back yet again.

Party and state control of associations and other social organizations tightened after the “color revolutions” and the debate on the Law on Associations. From 2006 to 2010, the Party and government continued to rely on the relatively strict control mechanism of the 2003 Decree on Associations. But developments accelerated in 2009 on several fronts as the Vietnamese social organization sector continued to grow and the Vietnamese Party and state sought to maintain control over the sector. These developments involved further tightening control over advocacy organizations, focusing on a particularly critical and influential research group; on developing new regulations for the registration and operations of foreign NGOs in Vietnam; and on revising the much-maligned 2003 Decree on the Organization, Operation and Management of Associations in the absence of a law on associations.

### **III. New Draft Regulations on Registration and Activities of Foreign NGOs in Vietnam**

In 2008 and 2009, the Vietnamese government drafted a new Decree on the Registration and Operation of Foreign Non-Governmental Organizations in Vietnam. The new Decree – which had not yet been promulgated as of spring 2010 – was intended to revise the much earlier, 1996 regulations governing foreign NGOs in Vietnam, Decision No. 340/TTg and the Regulations on the Operation of Foreign Non-Governmental Organizations in Vietnam (24 May 1996). ICNL provided comments on the draft Decree on the Registration and Operations of Foreign Non-Governmental Organizations to the drafters.<sup>3</sup>

The new draft Decree provoked some concern among foreign NGOs in Vietnam. In addition to some more specificity than the earlier 1996 regulations, it contained broad terms on prohibited activities for foreign NGOs, as well as a number of other vague and general terms that could lead to a substantial lack of clarity and predictability in foreign NGO activities in Vietnam. The draft Decree also broadly prohibited a full range of profit-making activities.

The draft Decree also did not take into account Vietnam’s obligations under the Bilateral Investment Treaties (BIT) that the government has signed with a number of foreign states, which may govern some aspects of its relations with foreign NGOs. ICNL urged the government to look into the specific NGO- and associational-related obligations it has undertaken in connection with those BIT agreements. For example, a number of BITs provide that once foreign organizations have been permitted to enter, they must be accorded specific kinds of treatment. In some cases the terms of these BITs clearly include NGOs or associations.

To cite several examples, the Vietnam-Australia BIT covers “any corporation, association, partnership, trust or other legally recognised entity that is duly incorporated, constituted, set up, or otherwise duly organised” in Australia or Vietnam,<sup>4</sup> thus including, it appears, Australian NGOs within its scope. For such organizations, the BIT regulates treatment of movement of personnel, transparency of law, compensation for losses, transfer of funds, settlement of disputes, and other matters. There are similar provisions in other BITs Vietnam has signed, including with the United Kingdom<sup>5</sup> and other countries.<sup>6</sup> Vietnam, like most countries, has not yet recognized that the BITs it has signed may be applicable to foreign NGOs or associations.

The new draft decree also contained virtually no provisions on importation of goods and commodities by foreign organizations. ICNL recommended that this be clarified, primarily by raising into this new draft Decree the relatively clear and detailed provisions on importation of goods and commodities stipulated in the 1996 Guidelines for the Implementation of the Regulations on the Operation of Foreign Non-Governmental Organizations in Vietnam.

ICNL also noted that although some of the laws and regulations governing the registration and activities of foreign NGOs and their personnel in Vietnam are available on the website of the People’s Aid Coordinating Committee (PACCOM) (Vietnam Union of Friendship Organizations, VUFO),<sup>7</sup> not all are available. ICNL recommended that the government post all laws, regulations, and other legal documents (including all administrative guidance) relating to foreign non-governmental organizations in Vietnam on its own websites, including the VUFO-PACCOM website and that it make available all such legal documents (including administrative guidance) in Vietnamese and in English for web posting by the Hanoi-based NGO Resource Centre. The current haphazard availability of these legal documents is not beneficial

to the functioning of the foreign NGO sector in Vietnam and is not fully transparent.

A number of other problems emerged in the new draft Decree on Registration and Operation of Foreign Non-Governmental Organizations in Vietnam, and some of those were pointed out by ICNL in its comments on the draft. They included:

- *Defining “funds” and “foundations”*: The definition of “social funds” and “private funds” in the Article on the scope of regulation and application (Art. 1(2)) refers to “social funds, private funds” in English, and to “*quỹ xã hội, quỹ tư nhân*” in Vietnamese. Assuming that this Decree applies to foreign foundations and their registration and operations in Vietnam, ICNL noted that it might be best to make clear the extent of the application to foreign foundations.
- *The breadth and generality of prohibited activities*: Article 4 of the draft Decree on prohibited undertakings is very wide and general and would give the authorities very broad discretion to define and punish activities, as they certainly desire. In particular, ICNL noted the dangerous breadth and generality of Article 4(1) (“Activities of religious and/or political nature or detrimental to the national interests, security and defense and/or the national solidarity of Vietnam”), and Article 4(4) (“Activities detrimental to social morals, fine habits and customs, national traditions and identity of Vietnam”). ICNL noted that a number of these terms – such as “detrimental to the national interests,” “security,” “national solidarity,” “social morals,” “fine habits and customs,” and “national traditions and identity” – fail to provide foreign NGOs with the certainty and predictability needed, containing terms whose possible application is not foreseeable or predictable, and it urged the drafters to seek more precision in defining prohibited activities in order to give non-governmental organizations clarity and confidence as to which activities are permitted and which are prohibited.
- *The prohibition on profit-making activities*: The draft Decree also declares (in Article 4(2)) that prohibited activities include “profit-making activities.” That term is not defined in the draft Decree, and can lead to widespread uncertainty among foreign NGOs as to what kinds of revenue-generating activities may be permitted and what are prohibited. A key issue here is how the government wishes to regulate the distribution of profit or revenue amassed by NGOs.

For example, would the sale of local or minority handicrafts or other products, at a price above the cost of production, with the proceeds applied to an NGO’s charitable activities in Vietnam, be considered “profit-making” and thus prohibited? Would the sale of tickets to a benefit concert or dinner, at a price that gives the foreign NGO funds to conduct its activities beyond the costs of the concert, dinner, or other event, be “profit-making” and thus prohibited, even if all such proceeds were used for the organization’s charitable and humanitarian purposes?

ICNL suggested that the draft Decree either define this term more clearly and in more detail or remove it, noting that this provision in an earlier draft of the draft Decree had provided more useful specificity: In that draft, the prohibition was against “*Các hoạt động nhằm mục đích thu lợi nhuận mà không phục vụ mục đích từ thiện, nhân đạo của các dự án tại Việt Nam*” (“Profit-making activities which do not serve the charitable or humanitarian aims of a project in Viet Nam”).

- *The problem of tax avoidance*: Under Article 4(3) of the draft Decree, prohibited activities include those related to “tax avoidance.” This term is not defined in the draft Decree and, in the absence of any detailed provisions on the taxation of foreign non-governmental organizations in the draft, ICNL expressed concern that normal or appropriate attempts by foreign NGOs to access normally accorded tax exemptions could be defined as “tax avoidance” by overly eager administrative authorities through the exercise of too much discretion.

In addition, tax avoidance is in a very different category from “money-laundering” and “terrorism,” the two other prohibited activities listed in Article 4(3). ICNL suggested that “tax avoidance” be dropped from Article 4(3) and that clear tax provisions be added to the draft Decree, particularly with respect to the importation of goods and commodities.

- *Multiple approval processes for foreign NGOs*: In some sections of the draft Decree, there was substantial reference to multiple approval processes for foreign NGOs’ programs and projects (“approved by competent authorities of Vietnam”), at provincial and other local levels, at ministry levels in Hanoi (sometimes multiple ministries), and through the Committee for Foreign NGO Affairs, also in Hanoi. ICNL suggested that a streamlining of these approval processes would be useful.

- *Simplification of time limits for response on application and requirement of written notice of decision:* ICNL noted that the draft Decree simplifies the time limits for response on applications and requires that the competent agency issue a written notice of decision. The 1996 Regulations specified that the competent authority “inform” the NGO “of the result” (*thông báo kết quả*) within 30 days (for an operating permit), 60 days (for a project office), and 90 days (for a representative office), not specifically requiring a written notice to the applicant NGO. The new draft Decree stipulates a time limit of 45 days for all types of applications, requiring the competent authority to “issue a written notice of the result to the applicant organization.”
- *Termination of operations:* The draft Decree provides in Article 17(1) for termination of operations of a foreign NGO “upon receiving a notice and/or decision of the competent authority...” It is not clear from the draft Decree whether Vietnamese law provides foreign organizations with a right to appeal such administrative decisions, or to request an opportunity for the administrative decision maker to remedy an error. If so, ICNL recommended that this Article should be revised to provide for those protections, and, if not, those protections should be considered. And the draft of Article 17(2) provided that upon termination, foreign NGOs shall wind up their affairs within sixty days – too short a period for most NGOs to terminate activities and end significant programs.
- *Importation of goods and commodities:* The draft Decree provided in Article 24 that importation of “necessary office equipment and supplies, vehicles and spare parts, [and] personal belongings” is subject to “current regulations of Vietnam.” ICNL called that provision vague and general and, in particular, noted that it did not reference or include the tax exemption provisions of the Guidelines for the Implementation of the Regulations on the Operation of Foreign Non-Governmental Organizations in Vietnam (7 August 1996) (Implementation Guidelines), which provide implementing guidance for the 1996 Regulations.<sup>8</sup> ICNL recommended that a revised version of the 1996 tax guidance be incorporated into the new Decree.
- *Implementation and execution:* The draft Decree (Article 31) stipulated that Decision No. TTg (May 1996) and the related Regulations on the Operation of Foreign Non-Governmental Organizations in Vietnam would be superseded by the new draft Decree. At the same time a number of other legal and administrative documents have been issued under or related to Decision No. 340/TTg and on the registration and operations of foreign NGOs in Vietnam since 1996. These include the August 1996 Implementation Guidelines referred to above; Decision No. 64/2001/QĐ-TTg on the Issuance of the Regulations on the Management and Utilization of Aid from International Non-Governmental Organizations;<sup>9</sup> and other legal documents. ICNL recommended that the government make clear whether the August 1996 Implementation Guidelines remain in effect, perhaps through direct reference to those and to other implementation guidelines in the draft Decree. Separately, and for the clarity of foreign NGOs and donors, the government may wish to address the continued applicability of Decision No. 64/2001/QĐ-TTg on the Issuance of the Regulations on the Management and Utilization of Aid from International Non-Governmental Organizations, or to clarify whether a revision of Decision No. 64/2001/QĐ-TTg is underway.

As of May 2010 the draft Decree on the Registration and Operation of Foreign Non-Governmental Organizations in Vietnam had not yet been issued, and there appeared to be no clear timetable for its promulgation.

#### **IV. Cracking Down on Particular Organizations, and on Policy Commentary and Criticism by Independent Groups: Decision 97 and the Vietnam Institute of Development Studies (VIDS)**

Since its founding in 2004, the Vietnam Institute of Development Studies (IDS) angered some senior officials in the Party and government for its wide-ranging discussions of development policy and commentary on government policy. But the Institute was difficult to attack directly, since the board was composed of some of Vietnam’s leading intellectuals and technocrats and the Institute operated under the implicit sponsorship of former Prime Minister Vo Van Kiet. The Institute had been formed directly by these individuals under the relatively liberal regulations for forming science and technology research organizations, not under the Vietnam Union of Science and Technology Associations (VUSTA) or another umbrella.

In 2008, Vo Van Kiet died, and later in 2008 and in 2009 the Party and government began moving against

IDS. In July 2009, the Prime Minister issued Decision 97/2009/QĐ-TTg limiting the areas in which individuals (like those who established the Institute of Development Studies) were allowed to form science and technology research, service, and other organizations. Though Decision 97 provided a long list of areas available for organizations to work in, it was most notable for the areas it omitted, making it, in effect, illegal for independent organizations (organizations established by individuals without the umbrella provided by Decree 81 or Decree 88) to work in those spheres.

Those prohibited areas included, for example, economic policy, public policy, political issues, and a range of other sensitive areas. Permitted areas of work included a range of fields and subfields in the natural sciences (including mathematics, computer science and information, physics, chemistry, mechanics, and other scientific fields, including ecology), social sciences (including psychology, economics and business, and sociology, but not including economic policy), the humanities (including history, philosophy, linguistics, literature, cultural studies, arts, cinema, radio, and television, but not political issues or public policy), engineering and other technical fields, health and medicine, agriculture, science and technology services, and information (including intellectual property and technology transfer).

Beyond the prohibition of work in some areas, Decision 97 also sought to limit the rights of such organizations to engage in commentary and criticism of government policy. Such organizations, the Decision provided (Article 2(2)), “may only conduct activities within the areas under the List promulgated with this Decision. If they have feedback (*phản biện*) on the line, guidelines, or policies of the Party or the State those views must be provided to Party or State agencies with jurisdiction over such issues, and may not be released publicly...”

This was part of a broader set of steps to limit the ability of associations and other groups to express commentary or criticism of Party and state policies, a set of restrictions on the right to provide such views or commentary (*phản biện*). Such restrictions and making commentary and criticism dependent on Party and state discretion are also reflected in the revision of Decree 88 on the Organization and Management of Associations, discussed below.

Decision 97 also required national and local government agencies responsible for licensing science and technology groups (like the Institute of Development Studies) to review, revoke or re-register all such organizations, explicitly requiring such authorities to revoke organizations that do not comply with the Decision. The Decision took effect on September 15, 2009.

The Institute of Development Studies was one of the few such individually formed groups undertaking work in areas outside those permitted under Decision 97. It was clear in Hanoi that Decision 97 was directed against the Institute, as well as against the expression of policy views and commentary by other groups as well in its restriction of that right.

Facing this challenge, and knowing that the goal of the Decision was to terminate the Institute, the Institute challenged the validity of the Decision but also chose to go out of business of its own accord in September 2009 rather than have the government declare it invalid.<sup>10</sup> The director of the Institute, the well-known economist Nguyen Quang A, directly challenged the government’s authority to issue the Decision without an opportunity for comments and public notice, and threatened to bring the issue to the National Assembly.

What followed was correspondence on the validity of the Decision between Professor A and the Minister of Justice, who affirmed the legality of the Decision in the view of his Ministry.<sup>11</sup> That dialogue did not change the result – the Institute remained shuttered, and Decision 97 remained in effect – but the sight of a Vietnamese intellectual forcing the government, through the Minister of Justice, into such direct correspondence on a sensitive issue was perhaps unprecedented in modern Vietnamese politics.

The result, however, is unfortunate for the development of more independent policy commentary groups and think tanks in Vietnam. In effect, groups have been barred from work in certain important policy fields, and policy commentary itself has been reduced by Decision 97 to commentary that the Party or government itself requests and that is within the specific ambit of the work of the commenting organization. Decision 97 applies to the independently established research groups, but the Party and state’s policy seems clear,



and broader – to discourage the independent commentary activities of some analytical policy groups.

## **V. Updating and Maintaining Control in Associational Regulation: Decree 45 (2010) on the Organization, Activities and Management of Associations**

In the absence of a Law on Associations, and in response to calls from government regulators for a more detailed regulatory document, from associations, the World Bank and other donors for a firmer regulatory footing, in 2009 the Ministry of Home Affairs completed a draft revision of the 2003 Decree on the Organization, Activities and Management of Associations under which most Vietnamese associations are registered (in addition to Decree 81 on science and technology research groups). The Ministry quietly released the draft revision for comments in the fall of 2009 preparatory to the promulgation of the new Decree, as required by Vietnamese law, and a number of critical commentaries were submitted by Vietnamese groups. The revised Decree 88, now Decree 45 (2010), was promulgated on April 21, 2010, and takes effect on July 1, 2010. The new Decree 45 (2010) continues to govern the registration, operations, activities, and management of a wide range of associational groups at the national, provincial, municipal, and sub-provincial level.<sup>12</sup>

Some of the key points of the new Decree 45 (2010), and the issues with this revision of Decree 88 (2010), are as follows:<sup>13</sup>

- *Establishing a new category of associations, the “associations with special characteristics.”* Decree 45 (2010) establishes a new category of associations, termed associations with “special characteristics” (*Hội có tính chất đặc thù*, in Articles 33-35). These are the major national umbrella organizations of associations that were not clearly stipulated in the earlier Decree 88. These umbrella groups (such as the Vietnam Union of Science and Technology Associations (VUSTA) and others) have long sought privileged legal protection akin to the special status given the mass organizations under the Party, like the Vietnam Women’s Union and the Peasants’ Union. This new category would replace a set of organizations that was defined in the Vietnamese Civil Code and replace it with a term and category of organization that is unrecognized in the Civil Code.<sup>14</sup>

- *Privileges of the “associations with special characteristics.”* Decree 45 (2010) would give these associations with “special characteristics” privileges that include “participation in formulating mechanisms and policies” directly related to their associational work, and participation in “consulting, providing feedback, and examining” various policies, programs, projects, and plans of government agencies “on issues within the sphere of activities of such associations in accordance with regulations of the Prime Minister.” Decree 45 (2010) also provides that the government will continue to provide budget funding to these groups (Arts. 34 and 35).<sup>15</sup>

The issues of the associations with “special characteristics” have provoked more discussion in Vietnam than perhaps any other aspect of the new Decree 45 (2010). In effect, this would satisfy demands by these umbrella groups for special recognition by creating a multi-tiered stratification of associational entities – with Party-related mass organizations (such as the Women’s Union) at the top, outside this Decree; the “special purpose” groups in a special category within Decree 45 (2010); and the rest of the associational sector in a third group with fewer privileges and rights. The problems in this approach have been outlined by Professor Hoang Ngoc Giao, a Vietnamese academic with long experience on these issues.

“Receiving subsidies from the State in this way, this kind of organization may continue to be subservient to and suffer the influence of state agencies.... When civil society is stratified in this way, [this part of the sector] can be increasingly ‘administrativized’ and ‘statified’ in their activities ... making it more difficult for them to play a positive role in the development of the country.”

In addition, the decision as to which groups have this special status, and how they obtain it, is left by the revised Decree to the discretion of the Prime Minister.<sup>16</sup>

- *Continuing, significant obstacles and multiple steps and approvals to establishing associations:* Some Vietnamese commentators perceive few positive changes in Decree 45 (2010) to the complex and bureaucratic requirements for establishing and operating an association that were stipulated in the original Decree 88 (2003). In particular, formation of an association under Decree 45 (2010) requires a certain number of founding members; and the Minister of Home Affairs will continue to provide detailed regulations and thus wield wide discretion over the conditions for establishing associations. According to one prominent Vietnamese commentator, this provision “gives too much discretion to the Minister of Home



Affairs. There is no mechanism to supervise those regulations of the conditions for forming an association ... and additional new regulations making it much more difficult to form associations.”<sup>17</sup>

The new Decree 45 (2010) continues to provide that the process of formation and registration of associations will be highly regulated by the Ministry of Home Affairs, local governments, and other government agencies. Some procedures have changed from Decree 88 (2003), but firm control remains. In general terms, formation and registration of associations will now require a minimum number of individuals to formally seek approval, ranging from one hundred signatories for national associations to fifty individuals at the provincial level, to twenty at the county level and at least ten at the township level (Art. 5). An establishment committee is still required, with minimum numbers for the membership of that committee at the national, provincial, and lower levels (Art. 6(1)-(3)). That establishment committee must then be formally recognized by a national, provincial, or lower level government ministry or bureau, depending on the scope of the association (Art. 6(5)). The extension of authority to provincial and lower levels of government is an attempt to relieve the central government of some burdens for local groups, but also to bolster control of associational formation throughout the vertical networks of the state. The government’s decision on recognizing an establishment committee must be taken within twenty days, and if the committee is rejected then written reasons must be provided (Art. 6(5)). The government’s decision on whether or not to approve the formation of an association, after the establishment committee has submitted the many and detailed required documents (Arts. 7, 8), must be taken within sixty days, and written reasons are to be given if the approval is refused (Art. 9). In addition, the establishment committee must be recognized by the ministry or other agency working in that professional arena, a continuation of the “dual management” system of the past. No standards are provided for that recognition, nor for dealing with groups that cross over various fields of work and whether such groups must seek recognition from all the relevant ministries.<sup>18</sup>

Thus the government has, at the very least, two formal steps in which it can decline to approve the formation and registration of an associational entity, along with other requirements for formation that may discourage some groups from applying. If approval is granted, the association has ninety days from the date of approval to hold its establishment congress (Art. 10) with specified requirements (Art. 11) and reporting to the government (Art. 12) on that meeting. The government retains approval rights over the organizational charter approved at that meeting (Art. 13), and the Decree requires pre-reporting to the government before annual meetings of associations (Art. 24). The over-regulation of associational formation does not end there: After the relevant government agency or agencies have agreed to permit the formation of an association and after the organization of its founding meeting, the bylaws (charter) of the association must also be approved by the relevant agency or agencies. As a prominent Vietnamese commentator points out acerbically, “having had the decision to [permit] the formation of an association, the bylaws must still be reviewed to determine if they violate the law or not! This can only be another means to delay formation, without any standards being provided to government officials to guide their discretion.”<sup>19</sup>

- *Continuing constraints on speech and advocacy.* The new Decree 45 (2010) continues the process of limiting associational speech and advocacy rights. For example the earlier Decree 88 (2003) provided associations with the right to “protect the lawful rights and interests of the association and its members.” Decree 45 (2010) subtly limits that right by providing associations with the right to “protect the lawful rights and interests of the association and its members that are consistent with the guidelines and purposes of the association.” (Art. 23(4)).

The earlier Decree 88 (2003) allowed associations to engage in “consultations and feedback on issues within the association’s scope of activities at the request of organizations and individuals,” itself a limitation of the feedback and commentary role to issues “within the association’s scope of activities.” The new Decree 45 (2010) permits organizations to “participate in programs, projects, research topics, consultations, feedback and social assessment at the request of government agencies...” (Art. 23(7)). This provision is intended to limit the commentary, advocacy, and feedback role to circumstances in which such views have been requested by government agencies.

- *Continuation but perhaps also some blurring of the much-maligned “dual management” of associations by multiple government agencies.* One possible improvement in the new Decree 45 (2010) – though how this will develop in practice is not at all clear – is that the new Decree fails to clarify to what degree full “dual management” of associations by the Ministry of Home Affairs and the relevant professional ministry

at the national or local levels continues or not under the new regulations. Government control remains very strong, to be sure, including over formation, approval of charters, activities, leadership, merger, dissolution, changes of names, and other issues. And “dual management” certainly persists in some ways, for example in the requirement that the professional line ministry or agency is required to approve the establishment committee for an association seeking permission to form and register (Art. 6(5)).

But particularly in the post-establishment, post-registration phases of organizations, the lines of authority between the Ministry of Home Affairs (as registration and supervision agency) and professional line ministries or lower-level government agencies remain somewhat unclear in Decree 45 (Arts. 14, 37). The continuing strength of “dual management” will need to be assessed in the months and years ahead. Dual management of associations has long been criticized by the Vietnamese associational sector as imposing significant burdens on associations and keeping them highly dependent on the state, and on professional line ministries and local bureaux unprepared to undertake such supervision. Vietnamese organizations will be watching the possible evolution of dual management very carefully indeed.

As noted above, Decree 45 (2010) on the Organization, Activities and Management of Associations was just released in late April 2010. Only some of its key provisions are discussed above, and further judgement on Decree 45’s impact will need to await further analysis and the practice of government management and control in Vietnam.

#### **New Regulations on the Management and Use of Foreign Non-Governmental Aid: Decree 93 (2009) and Circular 7 (2010)**

The government promulgated the Regulations on the Management and Use of Foreign Non-Governmental Aid in October 2009, officially known as Decree 93/ND-CP, followed by a detailed Circular providing implementing rules on this topic at the end of March 2010. The new Regulations on the Management and Use of Foreign Non-Governmental Aid replace simpler regulations first promulgated in 2001 (Decision 64). The new Regulations and implementing rules maintain and enhance state control over foreign non-governmental aid to Vietnam in expected ways, with more detailed provisions than in the past. The process of implementation will be crucial to understanding the full force and implications of these new Regulations, and that process is just beginning.

The new Regulations cover “non-refundable aid provided for not-for-profit purposes by donors for Vietnam to achieve development and humanitarian objectives.” (Art. 1(1)) “Donors” whose work is covered by these Regulations include “foreign non-governmental organizations and other foreign organizations and individual, including foreign investment groups and companies and overseas Vietnamese community that respect and observe Vietnamese law and have goodwill and directly provide non-refundable aid to support Vietnam’s socio-economic development and humanitarian objectives.” (Art. 1(2))

Eligible recipients include Vietnamese government, Party, legislative and other state agencies, mass organizations under the Party and government, officially recognized associations and other non-state actors, and organizations established under Decree 88, Decree 81, and other documents governing the burgeoning non-governmental (or “less-governmental) community in Vietnam, as well as businesses “providing public products and services” as defined by government regulation (Art. 1(4)).

The Regulations reassert government management and control over foreign non-governmental aid; require that such aid “comply with Vietnamese law and commitments with donors which have been approved by competent authorities”; notes that where “donors’ aid regulations or conditions differ from Vietnamese law,” Vietnamese law prevails; requires the government and Vietnamese institutions to refuse aid that “affect[s] political security and social order and safety or infring[es] upon interests of the State or lawful rights and benefits of organizations or individuals.” (Art. 2)

The Regulations go on to prescribe approval mechanisms for programs, projects and other forms of aid in Vietnam, generally restricting approval agencies to central Party and government units and provincial people’s committees (Art. 4) and not permitting the conclusion of program or project aid documents until the designated government agencies have approved such activities (Art. 6). Tasks are set for approval agencies and aid management agencies (Art. 8), as well as requirements for approval (Art. 9). Appraisal and approval mechanisms are stipulated (Arts. 10-12), with the Ministry of Planning and Investment playing a key role in this area. Approval levels are set for different amounts and types of aid at the levels of the Prime Minister; ministries and other government agencies; provincial people’s committees; and the Fatherland Front (for some forms of emergency aid) (Art. 13).

Additional provisions govern the administration of foreign non-governmental aid, also with an emphasis on state overall control over the process (Arts. 17-19). No detailed provisions are made for the tax treatment of

donor aid, only a stipulation that “taxes on FNG aid amounts comply with current law regarding taxes on aid...” (Art. 20). Several articles government monitoring and evaluation of aid implementation (Arts. 24-28), with an emphasis on reporting to state agencies, particularly the Ministry of Planning and Investment, Ministry of Finance, and the interagency Committee on Foreign Non-Governmental Organizations (Arts. 29-41).

## Conclusion

The Vietnamese Party and government are intent on establishing a differentiated regime of nonprofit regulation that encourages the growth of some service-oriented and some other groups that are viewed as contributory, while always under government observation and supervision. At the same time, the government has focused particular attention and stricter regulation on organizations that it views as a threat in one way or another – organizations that carry out independent and public commentary and criticism of Party and state policies, for example, and of course dissident organizations. The state also strictly regulates the religious sector, an arena outside the scope of this article.

Recent developments in Vietnam indicate clearly that the Party and state are working to implement this differentiated regime of nonprofit regulation. The Party and state decided not to proceed with a Law on Associations, in part because of concern for the flexibility and autonomy the law might provide to nonprofit groups. The government has revised the primary regulatory document governing the nonprofit sector through the issuance of Decree 45 (2010) on associations, and through that process has made some control provisions more strict. The Party and state have sought to limit commentary and criticism of policy, for example, both through regulation on the commentary process and by closing a key policy think tank. And the government has sought to provide new regulation of the foreign NGO sector as well. On the ground, the numbers and the range of activities of associations, science and technology research groups, other social organizations, clubs, and other entities continues to grow. These developments, and the Party and government’s implementation of its mandate to control and manage this rapidly expanding sector, will bear close watching in the months and years ahead.

## Notes

<sup>1</sup> Professor of Law, Faculty Scholar, and Lauridsen Family Fellow, University of Iowa; President, International Society for Third Sector Research (ISTR). I welcome comments on this paper and can be reached at mark-sidel@uiowa.edu. My thanks to a number of friends and colleagues in Vietnam for discussions on the themes addressed here, and to ICNL for commissioning the paper on which this commentary is based. While writing this I have served as consultant to the United Nations Development Programme (Vietnam) and the Vietnamese Ministry of Justice, but this paper reflects only my own views and not those of any institution or individual other than myself.

<sup>2</sup> See Sidel and Vasavakul, *Report to the Vietnam Union of Science and Technology Associations (VUSTA) on the Draft Law on Associations* (2006).

<sup>3</sup> An English translation of the draft Decree is available at [http://www.eurochamvn.org/News/EuroCham\\_& Member\\_news/Request for Comment on Draft Decree on International NGOS.html](http://www.eurochamvn.org/News/EuroCham_& Member_news/Request for Comment on Draft Decree on International NGOS.html) and <http://www.amchamvietnam.com/2865>.

<sup>4</sup> [http://www.unctad.org/sections/dite/ia/docs/bits/australia\\_vietnam.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/australia_vietnam.pdf), Article 1(1)(d).

<sup>5</sup> [http://www.unctad.org/sections/dite/ia/docs/bits/uk\\_vietnam.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/uk_vietnam.pdf).

<sup>6</sup> For a full list and text of all of the bilateral investment treaties signed by Vietnam, see <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>.

<sup>7</sup> See [http://www.vietpeace.org.vn/express/express\\_para\\_v.aspx?id1=18&id2=134](http://www.vietpeace.org.vn/express/express_para_v.aspx?id1=18&id2=134), on the VUFO [www.vietpeace.org.vn](http://www.vietpeace.org.vn) website, under the PACCOM tab, in the “Văn bản” sub-tab.

<sup>8</sup> An English text of the Implementation Guidelines may be found at <http://www.ngocentre.org.vn/node/69> (under Legal Documents). The Vietnamese text is at [http://www.vietpeace.org.vn/express/express\\_detail\\_v.aspx?id1=18&id2=134&id3=309](http://www.vietpeace.org.vn/express/express_detail_v.aspx?id1=18&id2=134&id3=309).

<sup>9</sup> Decision No. 64/2001/QĐ-TTg is available in English at <http://www.ngocentre.org.vn/node/69> (under Legal Documents), and in Vietnamese at <http://www.isgmard.org.vn/Information%20Service/Legal%20docs/General/Decision-64-2001-QD-TTg-NGO%20ODA-v.pdf>.

<sup>10</sup> For news reports on the closure of IDS, see <http://news.bbc.co.uk/2/hi/asia-pacific/8257061.stm>; <http://abcnews.go.com/International/wireStory?id=8576667>; <http://www.forbes.com/feeds/afx/2009/09/15/afx6885790.html>.

[11](#) For this correspondence and much more on the Decision 97 controversy, see <http://boxitvn.blogspot.com/> and <http://bauxitevietnam.info/>. The description of these events in this paper is an abbreviated version of a longer discussion by the author.

[12](#) For the Vietnamese text of Decree 45 (2010), see <http://legal.khaitri.vn/Index.asp?n=74655>, and other sites.

[13](#) There are numerous other differences between the new Decree 45 (2010) and the original Decree 88 (2003), but space permits only a discussion of some of the key issues here. The author is preparing a longer paper outlining virtually all the significant differences.

[14](#) See Một số góp ý cho Nghị định mới về Hội (Some suggestions for the new Decree on Associations) (10 November 2009). The author of this commentary has not been publicly identified. The associations with special characteristics include the Vietnam Union of Science and Technology Associations (VUSTA), Vietnam Lawyers Association (VLA), Vietnam Union of Literary and Arts Organizations (VULAA), and a number of others. The mass organizations (to which Decree 45 (2010) does not apply), including the Vietnam Fatherland Front, Vietnam Confederation of Trade Unions, Ho Chi Minh Communist Youth League, Vietnam Peasants Union, Vietnam Veterans Association, and Vietnam Women's Union. Decree 45 (2010) also does not apply to religious groups.

[15](#) Professor Hoàng Ngọc Giao, Một số nhận xét về Dự thảo Nghị định thay thế Nghị định 88/2003/NĐ-CP Quy định về tổ chức, hoạt động và quản lý hội (Some considerations on the Draft Decree to substitute for Decree 88/2003/ND-CP on the organization, activities, and management of associations) (11 November 2009).

[16](#) Hoang Ngoc Giao, supra note 15. See also Some suggestions for the new Decree on Associations, supra note 14, which reflects the view that the associations with special characteristics would, for most purposes, have no additional real powers beyond ordinary associations, though the Decree stratifies organizations and could create major differences among them.

[17](#) Hoang Ngoc Giao, supra note 15.

[18](#) Hoang Ngoc Giao, supra note 15.

[19](#) Hoang Ngoc Giao, supra note 15.