

VIET-NAM BULLETIN

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JUSTICE IN VN: SUPREME COURT (6-69)

Toward representative government...

A SUPREME COURT IS ELECTED

South Vietnamese, moving steadily toward full representative government, have passed another major milestone. With the creation of a Supreme Court, the first independent court in its history, the Republic of Vietnam has met the constitutional requirement that the powers of government be shared by three separate and equal branches.

Nations at war usually must decree restricted liberties and centralized authority, but the Saigon government reversed this pattern, acquiring its third branch while Viet Cong insurgents and North Vietnamese invaders continued to shell towns and harass the countryside. Despite wartime conditions, the Vietnamese people already had chosen their village and hamlet officials, President, Senate and Lower House in a series of free, nationwide elections held since the Constitution was promulgated on April 1, 1967. With the court reform of October 1968 the central government became fully constituted in executive, legislative and judicial branches, giving the Vietnamese their first taste of the democratic concept of checks and balances.

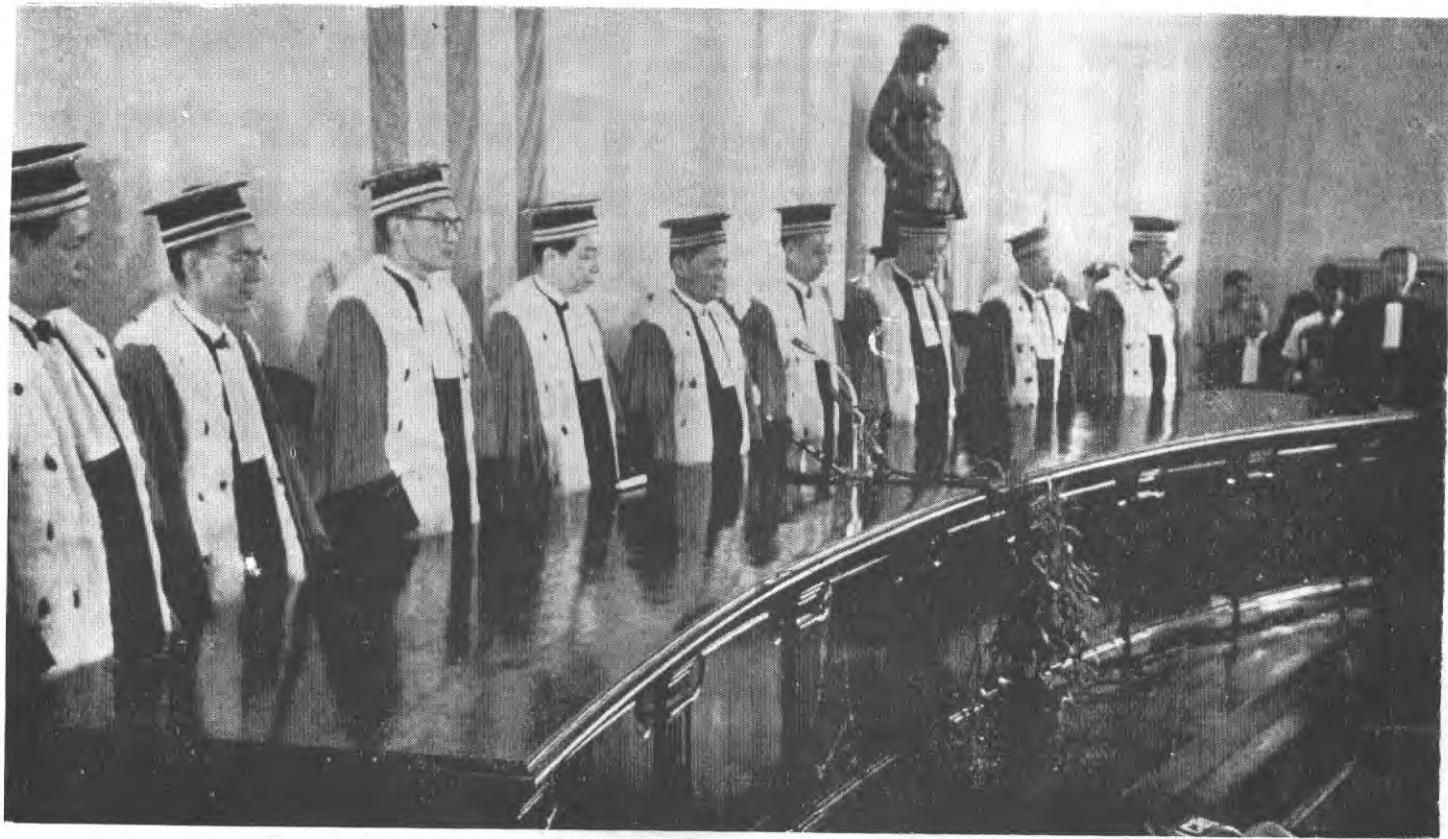
Nine justices now sit on the highest court bench, exercising their functions independently of the administration. Until October 22, 1968, the day the Supreme Court justices were sworn in, the judiciary had been part of the executive branch, with the Ministry of Justice controlling the operation of all non-military courts and appointing all judges and prosecutors. Now the Supreme Court has full jurisdiction and control over all civil, criminal and administrative courts in the country, with the Justice Ministry retaining control only of the prosecutors. Affected little by the reform, at least for the present, are the operations of military courts, which continue to try civilians as well as military men for certain offenses against national security.

« The Supreme Court's main role will be to protect the fundamental civil rights of the people, thus helping create a just and democratic society, » said President Nguyen Van Thieu. Swearing in the justices, who were clad in French-type red robes embellished with white ermine, he called for a « vigilant and objective judiciary power » to enforce the law with fairness to one and all so the property, life and freedom of every citizen would be effectively safeguarded.

Far-reaching Powers

The structure and authority of the Supreme Court had been specified in the Constitution (written by a Constituent Assembly whose members were elected in 1967 by popular vote) and reiterated in greater detail in Law No. 007/68, passed by the National Assembly on August 18 and promulgated by President Thieu on September 3, 1968. The two documents give far-reaching powers to the court, including judgment of a law's constitutionality — a major advance, for never before had any Vietnamese body been given the authority to nullify a law of the land. Other prerogatives of the high court include reviewing lower court decisions, assuring the legality of political parties, and screening candidates for the nation's highest offices.

These functions are extensive enough to inspire confidence that an effective checks-and-balances system will prevent any one branch's usurpation of power, especially as the justices now starting their six-year terms owe fealty to no sponsoring faction or appointing body. They are not political appointees, for they were chosen by means of a unique method



Members of the new Supreme Court (from left): Justices Nguyen Van Bien, Tran Van Linh, Nguyen Mong Bich, Trinh Xuan Ngan, Nguyen Van Si, Mai Van An, Tran Minh Tiet, Nguyen An Thong and Tran Van Liem.

prescribed by the Constitution, one of the most democratic methods employed anywhere: candidates were elected in two stages, first by their peers in the profession, then by the legislators in the National Assembly's two houses.

Election Procedure

During the September 9-17 period for receiving applications from prospective high court justices, 27 presiding judges, 21 public prosecutors and six practicing attorneys submitted their names to the Council for Election of Supreme Court Justices, popularly known as the Electoral Commission. The commission's members, none of them seeking high court posts, consisted of the President of the Senate, one other senator, the Chairman of the House of Deputies (i.e. Speaker of the Lower House), one other deputy, a judge, a prosecutor and a lawyer. Of the 54 applicants, the Electoral Commission disqualified four judges, three prosecutors and two lawyers because they did not meet all of the law's rigid criteria for Supreme Court eligibility. While there are no age requirements, justices must be Vietnamese citizens with at least 10 years' experience as judge, prosecutor or lawyer. They must have records free of any serious legal or professional offense and free of any anti-government or pro-communist activity. A male candidate (women are eligible, but none applied last year) must have complied with military draft regulations. The Electoral Commission on September 20

ruled that 45 of the applicants met those criteria and posted their names in public.

Professional groups now entered the picture. At national conventions the Bar Association, the Association of Judges and the Association of Public Prosecutors each chose a 50-man panel of members to evaluate the Supreme Court applicants' qualifications and whittle down the list still further. None of the 150 members of the three panels of electors, of course, were included among those seeking posts in the Supreme Court. Coming from Saigon, Hue and provincial centers throughout the country, these electors assembled in the capital on October 5 for the secret balloting, and all arrived in time except one representative of the Bar Association. The 149 men of the electoral college, as it was called, met in the Senate's grand reception hall at Dien Hong Palace, and they chose 24 of the 45 applicants as candidates — 10 judges, 10 prosecutors and four lawyers. (It had been planned to elect 30 candidates, one-third from each profession, but there were not enough applications from members of the bar to permit the naming of a full quota of 10 qualified lawyers. There are relatively few outstanding lawyers working in Vietnam, and as their services are in great demand, they have such flourishing practices that few are inclined to seek salaried posts on the bench.)

The 24 names went to a joint session of the Senate and Lower House, where the final slate of nine justices was chosen by ballot on October 17 and sent

to President Thieu for formal appointment.

This procedure, by which the selection of names placed before the legislature is made by the applicants' fellow judges, prosecutors and lawyers, is spelled out in 29 of the 89 articles in Law No. 007/68. Drafters of the law specified selection of justices from within the legal fraternity and by the legal fraternity because they wanted to insure that qualifications were weighed by men familiar with each candidate's character, professional competence and ethical standards.

The National Assembly's choice of those to sit on the nation's first high court bench included four judges, four prosecutors and one lawyer. Among the victors were two former Ministers of Justice: Tran Minh Tiet, most recently a judge at the Saigon Lower Court, and Nguyen Van Si, who had been serving as public prosecutor at the Court of Cassation. A Chairman of the Supreme Court — i.e., a Chief Justice — soon will be chosen from among their ranks by vote of the nine justices, but for the moment Justice Si, the oldest at 56, is Dean of the court and is exercising many of the functions of a Chief Justice.

The court will increase its membership to 15 when six new justices are elected to regular six-year terms in 1971, a provision designed to assure continuity and prevent total changeover of justices at any one time.

Like members of the National Assembly, the justices will draft their own budget and decide the amount of their own salaries. (Senators voted themselves 60,000 piasters a month — US\$ 508 — while Deputies voted for salaries of 45,000 plus expenses averaging 35,000 piasters.) While they may teach at universities, no justice may have any other public function while serving on the bench. Justices cannot be removed from office during their terms unless they become mentally ill or commit treason or other high crimes. The removal of any justice will be decided by a Special Court. When called upon to debate the removal of a Supreme Court justice, this court would include five senators and five deputies, and would be headed by the Chief Justice.

Court Functions

Under the Supreme Court, the Constitution provides for an independent system of courts presided over at all levels by judges who «make their decisions according to their consciences and the law.» By law, the Supreme Court replaced the Court of Cassation, heretofore the highest court of appeal in civil and criminal cases, and the Council of State (or Administrative Tribunal), a three-man court which had been the final arbiter in administrative and tax cases. One of the first official acts of the new Supreme Court, sitting at the Saigon home of Justice Si, was to accept transfer of the responsibilities, files and pending cases of these two abolished courts. While searching for a permanent headquarters (the Gia Long Palace in downtown Saigon has been

suggested), the justices also dispatched correspondence formally extending their jurisdiction over the intermediate Appellate Circuit Courts in Saigon and Hue, the provincial and district courts, and other judicial and administrative courts.

The law gives the Supreme Court extensive powers affecting the administration of government. It has the authority to:

* Administer the judicial branch;

* Interpret the Constitution and rule on the legality of all laws, decrees and administrative decisions of the government;

* Rule on appeals from final judgments rendered in any lower court and decide on petitions for retrials or revision of sentences;

* Determine the jurisdictional boundaries of lower courts;

* Replace lower-court judges in cases of questionable competence or ethics;

* Dissolve a political party whose policies, pronouncements or activities are judged to be opposed to the republican form of government;

* Establish the list of presidential and vice-presidential candidates, rule on the validity of their election, announce final election returns, and witness the swearing in of the President of the Republic.

Unprecedented Delegation

Delegation of such authority to an independent branch during wartime is unprecedented, for many of the functions now allocated to the Supreme Court had long been reserved to the highest levels of the executive branch. The right to dissolve a political party, for instance, is now institutionalized as a high court function. Article Four of the Constitution makes pro-communist or «neutralist» parties illegal in Vietnam. Now the right to judge whether or not a party is illegal under the Constitution is exclusively the Supreme Court's right and cannot be exercised by any other agency or branch.

Linked with this authority is the right of judicial review, enabling the Supreme Court to declare null and void an order of the executive branch or a law of the legislative branch, and this is equally new to Vietnam. While certain courts could hear appeals on decisions when lower courts were charged with abusing their powers, the appeals courts' rulings were only on points of law; they could say a law had been applied incorrectly, but they could not say a law was wrong. The Supreme Court can say so; it can examine the substance of cases as well as points of law. (While the right of judicial review once was entrusted to a constitutional court under President Ngo Dinh Diem, the members of that court were appointed by the President and they acted largely as an arm of the Diem administration, which was overthrown in November 1963).

Any person has right to request High Court for judicial review

Where the Vietnamese Supreme Court's right of judicial review differs from that of the United States Supreme Court is the fact that in Washington the high court can declare a law unconstitutional only on reviewing the issues in a specific court case elevated to its jurisdiction. The Supreme Court in Saigon need not have a specific case before it in order to exercise judicial review. The justices can act on a request to interpret the Constitution or dissolve a political party if such a request comes from the President, the Senate President, the Lower House Speaker or one-third of either house of the National Assembly. For that matter, **any** person has the right to request the Supreme Court to rule on a law's constitutionality if enforcement of that law may be harmful to his interests. At any stage of a lawsuit, for instance, the defendant could ask the high court for a constitutional ruling on the law under which he was being tried. To insure that this right does not result in delaying lower-court decisions and clogging calendars interminably, the Supreme Court is required to answer requests for constitutional interpretation within two months. The high court also must give a ruling within two months when a lower-court decision is appealed to it.

Illustrating the checks-and-balances concept now part of the Vietnamese government's philosophy is the law's stipulation that the Supreme Court share with the President and with the National Assembly the right to appoint Inspectorate members. The inspectorate, formally inaugurated October 30 1968 and now being organized, will include 18 members, one-third appointed by each branch of government. The Inspectorate is designed to be a watchdog agency, and is expected to operate much like the ombudsman in the Netherlands. It will be empowered to inspect and investigate the personnel of all public and private agencies suspected of being directly or indirectly engaged in corruption, speculation, influence-peddling or other acts harmful to the national interest. While the Inspectorate is to have authority to audit the property of all members of the executive, legislative and judicial branches, the Supreme Court in turn is empowered to audit the property of all members of the Inspectorate.

The Court System

The court system that the Supreme Court is taking over is based to a considerable extent on French legal theory. Although the French-Vietnamese treaty of March 8, 1949, recognized Vietnam as an independent country, it reserved for the French many judicial privileges. In addition to Vietnamese courts, a number of French-Vietnamese courts were established. But the treaty of September 18, 1954, deactivated

the joint courts and gave the Vietnamese judiciary its independence. Since then Vietnamese has been the official court language.

The judiciary was administered by the Ministry of Justice through its Directorate of Criminal Affairs and its Directorate of Civil Law. The two highest courts, now abolished, had many functions that are being assumed by the Supreme Court. The Court of Cassation in Saigon reviewed cases in which it was alleged that a lower court had abused its power. It ruled on all petitions for quashing final sentences by the lower courts in criminal, commercial and civil cases. The Council of State, or Administrative Tribunal, also in Saigon, judged all tax cases, all petitions for reimbursement of damages relating to administrative entities, and petitions for cancellation of administrative decisions. It ruled on disputes relating to provincial, district and village elections.

Two Courts of Appeal

There were — and still are — two other courts of appeal, the Appellate Circuit Courts in Hue and Saigon. They review appeals from Justice of the Peace Courts, Courts of First Instance, and Justice of the Peace Courts With Extended Jurisdiction. They will continue to review cases on points of law, but only the Supreme Court has judicial review rights extending to the substance of cases. Around the two appeals courts in Saigon and Hue two separate bar associations had grown up, but by provision of the Constitution they were merged into one national association in time to choose a panel of electors for the Supreme Court balloting in the electoral college. The independent growth of the two bar groups reflects not only the regional diversity of Vietnam — the Hue court is in what used to be Annam in earlier Indochinese history, while the Saigon court is in what once was called Cochinchina — but it also reflects the fact that there are two different and often contradictory law codes in effect. Until the Supreme Court's establishment there was no way to resolve the contradictions between the Annamite code and the Cochinchinese code because no one had the right to say any law was illegal.

The lowest court in the judicial system is the Justice of the Peace Court, consisting of a president and a clerk. It tries minor civil and criminal cases, supervises conciliations, and makes investigations into serious criminal cases. There are nearly 90 such courts at district level, in some remote provincial capitals (including Sadec, Go Cong and Bac Lieu in the Mekong Delta), and in Saigon.

Up the next rung of the ladder of judicial au-

thority is the Court of First Instance, just a bit ahead of the Justice of the Peace Court With Extended Jurisdiction in terms of prestige. But both types of courts are at the same judicial level (first instance) and have similar jurisdictions. They are found in the cities, the major towns and in most provincial capitals.

There are nine Courts of First Instance — in Saigon, Dinh Tuong, Vinh Long, Bien Hoa, Phong Dinh, Hue, Khanh Hoa, Quang Nam and Binh Dinh. Each has at least three « judges » with varying functions. In Vietnamese the presiding judges, public prosecutors and examining magistrates all are called Judge. The judge who tries the case and renders judgment is **Tham Phan Xu An**, the judge who prosecutes the case is **Tham Phan Cong To**, and the judge who conducts the investigation into case details is **Tham Phan Tham Van**. The Courts of First Instance hear cases concerning civil, criminal and commercial violations, including felonies and misdemeanors, and they rehear cases elevated from the Justice of the Peace Courts as well as the Justice of the Peace Courts With Extended Jurisdiction.

There are 22 Justice of the Peace Courts With Extended Jurisdiction — in Kien Hoa, Vinh Binh, Ba Xuyen, Kien Giang, Tay Ninh, An Giang, Phuoc Tuy, An Xuyen, Long An, Chau Doc, Binh Duong, Kien Phong, Bac Lieu, Go Cong, Ninh Thuan, Binh Thuan, Phu Yen, Quang Ngai, Quang Tri, Dalat, Ban Me Thuot and Pleiku.

Military and Special Courts

South Vietnam has specialized courts — the Labor Court, the Juvenile Court, the Agrarian Court, and the Rent Court — to handle cases in the fields which give them their titles. Until the Supreme Court has completed organization of the judicial branch, their status remains unclear, for just how much jurisdiction or supervision the high court will exercise over these specialized courts remains to be determined.

With the nation at war, military courts loom large in the judicial picture. While the October court reform had little effect on these courts, there is conjecture that at some future date the Supreme Court may remove civilians from the jurisdiction of military courts. The military justice system includes the Regular Military Courts, the Military Field Courts, the Military Mobile Field Courts, and the Special Military Court.

The Regular Military Courts were established in May 1951 with the promulgation of the Code of Military Justice. Each court has a civilian president, with a field-grade military officer from the Military Justice Corps of the Republic of Vietnam Armed Forces acting as alternate president. Four such courts are located in Da Nang, Nha Trang, Can Tho and Saigon. They have jurisdiction over normal military justice cases. They also hear cases involving national security — whether the defendant is a civi-

lian or a military man — if there is no Mobile Field Court in the area of the Regular Court's jurisdiction. If there is such a Mobile Field Court in the area, it handles all national security cases in which the defendant is caught in **flagrante delicto** while the Regular Court tries all such cases when the defendant has not been caught in **flagrante delicto**. (Literally, this means «caught in the act», but in Vietnamese law the definition has been expanded to include all offenses which are in process of being committed, have just been committed, or have caused a public clamor in the vicinity of the crime, as well as offenses in which the suspects have been found in possession of weapons, papers, or other evidence that raises a presumption that they have participated in the crime.) The Regular Courts also hear non-**flagrante delicto** cases concerning economic crimes involving sums under 500,000 piasters (US\$4,237).

The Military Field Courts were established by Decree Law No. 11/62 of May 21, 1962, and now one such court is located in each of the four CTZ (Corps Tactical Zones). The president of the court is a regular line officer, usually a colonel, while the alternate president is a field-grade officer from the Military Justice Corps. These courts were established to speed up trials of defendants in **flagrante delicto** cases. The cases brought before such courts involve desertion and draft-dodging. And on July 19, 1965, Decree Law No. 4/65 extended the jurisdiction of the Military Field Courts while a state of war exists to include **flagrante delicto** crimes of speculation, illegal transfer of money, smuggling, bribery, corruption, embezzlement, treason, disturbance of state security, and «hooliganism». Trials are conducted as simply and expeditiously as possible. There is no appeal except for the death sentence. This may be appealed to the President of the Republic, who must concur in a death sentence in any case.

The Military Mobile Field Courts were established by Decree Law No. 49/67 of October 30, 1967. One sits in Saigon with jurisdiction over the Capital Military Region (Saigon and surrounding suburbs of Gia Dinh province). Another is being established in Can Tho, the Mekong Delta's main town, and will have jurisdiction over the IV CTZ (all Delta provinces). The president of the court is a field-grade line officer, colonel or above, while the alternate president is a Military Justice Corps officer. The two Mobile Courts have jurisdiction over national security cases, with no appeal allowed except for the death sentence.

The Special Court was established by Decree No. 003/66 of February 15, 1966. This court functions as a Military Field Court with headquarters in Saigon but with jurisdiction anywhere in the Republic. It hears cases of economic crimes involving more than 500,000 piasters, a function originally allocated to the Field Courts but removed from them when the Special Court was established. It also has jurisdiction over customs violations and corruption cases involving more than 500,000 piasters. There is no appeal



Among veteran members of Vietnamese judiciary in Supreme Court are (from left): Trinh Xuan Ngan, 55, since 1962 Chief Judge at Saigon Higher Court; Nguyen Van Si, 56, Dean of the new court and former Public Prosecutor at the Court of Cassation who is fulfilling many of the functions of Chief Justice; Mai Van An, 47, former Chief Judge of the Appeals Court of the Saigon Higher Court; and Trinh Minh Tiet, 46, who was formerly a Judge at the Saigon Lower Court. Both Justices Si and Tiet are former Ministers of Justice.

except for the death sentence. Since its inception, the Special Court has been staffed exclusively by officers from the Military Justice Corps, with no regular line officers sitting on the bench.

The Justices

Bringing a greater sense of order to this mixed system of civil, criminal, commercial, administrative, special and military courts is an organizational task that remains to be done, and much of the work will fall on the nine new justices of the Supreme Court. They include:

* Nguyen Van Si, 56, elevated to his post from Public Prosecutor at the Court of Cassation. The National Assembly gave him 77 votes. Justice Si, who was Minister of Justice from 1955 to 1960 under President Diem, said he has only one aspiration, «that I will contribute with impartiality» to Supreme Court decisions. «I will not compete for honors,» he said, «as honors will not last.» The Dean of the high court is a good bet to be chosen Chief Justice when the justices ballot.

* Tran Minh Tiet, 46, Judge at the Saigon Lower Court (first instance). He won 101 votes. Justice Tiet was appointed Minister of the Interior in 1965, then took over the post of Minister of Justice the following year and held it until November 1967. He sees in the establishment of a Supreme Court the launching of a judicial revolution. «Whether or not this revolution will succeed in bringing about a demo-

cratic, progressive administration of justice,» he said, «will depend on the spirit the nine justices bring to the work of the Supreme Court and on the attitude of collaboration and support the legislative and executive branches will take toward it.»

* Tran Van Linh, 44, Chief Judge of the Saigon Lower Court. With 113 votes, he received the most number of ballots of all the justices. «We lack all sorts of means,» he said as the Supreme Court began organizing. «We need money, but as first priority we need an office.» Justice Linh has five children, the eldest a law student.

* Trinh Xuan Ngan, 55, Chief Judge of the Saigon Higher Court since 1962. He won 75 votes. Justice Ngan, one of the two justices born in North Vietnam (Bac Ninh), also is a professor in the Faculty of Law at Saigon University. A graduate of the Hanoi University Faculty of Law, he is the father of three, the two oldest are studying in the United States and Switzerland. While paying «scant attention» to politics, Justice Ngan said he has «always been preoccupied with the independence of the judiciary, for without it the rights of the individual citizen who appears before a court would not be fully guaranteed and protected.» He also holds a doctorate in economics.

* Mai Van An, 47, Chief Judge of the Appeals Office of the Saigon Higher Court. He won 92 votes. A farmer until 17 years ago and a bachelor until a year ago, Justice An said he is a firm believer in the independence of the judiciary. «I have been offered

positions with much better material benefits in the other branches of government,» he said, «but I have refused. I have chosen to be a judge, so I have to endure the 'grandeur and servitudes' of this profession.»

* Nguyen Van Bien, 43, Saigon prosecuting magistrate. He won 103 votes. Twenty-two years in the legal profession, Justice Bien joined the Association of Judges in 1950, was Director of Cabinet in the Ministry of Justice, and secretary of the Institute for the Protection of the Constitution. Father of five children, he studies ancient Vietnamese and Chinese history for pleasure. «As a judge,» he said, «I have to limit to a minimum my social relations. This represents a great loss in life, but I have to accept it in order to fulfill my duties impartially.»

* Nguyen An Thong, 43, Assistant Prosecutor at the Saigon Higher Court. He won 72 votes. Justice Thong also served as Assistant Prosecutor at the Saigon Lower Court and Appeals Judge at the Saigon Higher Court. «I am against the notion,» he said. «that a judge should live in his ivory tower and limit his social relations. According to this notion, the more people a judge knows the more difficult it will

be for him to pass judgment impartially and fairly. On the contrary, I think that judges should mix with all classes of people so that they may understand the psychology and the circumstances of people of each class. This will make him aware of all aspects of a case and render it possible for him to judge with justice and humanity.»

* Nguyen Mong Bich, 49, judicial expert at the Presidential Palace. He won 73 votes. Justice Bich, the second of the nine justices to be born in North Vietnam and a graduate of the Hanoi University Faculty of Law, was director of the Military Justice Directorate from 1963 to 1966. He was a member of the Association of Public Prosecutors.

* Tran Van Liem, 43, attorney in civil law. He won 82 votes. Justice Liem, the only one of the nine justices selected from among the ranks of practicing lawyers, has removed his counselor's plate from in front of his Saigon office for the duration of his term. Active in the Junior Chamber of Commerce and the Boy Scouts, the justice is father of three. He said he wants to contribute in any way possible to endowing his country «with a democratic, progressive legal system.»

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