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GLOBALIZATION OF CONSTITUTIONAL IDENTITY

Bui Ngoc Son*

Abstract: This Article extends Gary J. Jacobsohn's theory of constitutional identity to better understand the dynamics of constitutional identity in the era of globalization. The extended theoretical framework features the relation of constitutional globalization to the change of national constitutional identity. Within that framework, this Article offers an original, empirical examination of the case of Vietnam and compares it with other socialist regimes (China, Laos, North Korea, and Cuba). It argues that globalization induces adaption to the socialist constitutional identity. The socialist constitutional identity is adapted by the pragmatic incorporation of fundamental ideas and principles of global constitutionalism. Consequently, the essence of the socialist constitutional identity remains but is modified and extended in the globalizing context. Although there is convergence in the adaption to socialist constitutional identity among the five socialist countries due to the impact of constitutional globalization, there are four divergent models which these countries adopt to react to the global impact on their constitutional identity, namely constitutional globalism (Vietnam and Laos); constitutional exceptionalism (China); constitutional isolationism (North Korea); and constitutional reservationism (Cuba). This Article contributes to the scholarship on constitutional globalization, comparative theory on constitutional identity, and empirical knowledge on constitutional dynamics in the contemporary socialist world.

INTRODUCTION

The world is globalizing constitutionally. Professor Sarah H. Cleveland describes the U.S. Constitution as an “international constitution” in the sense that the U.S. Supreme Court cites international sources in its constitutional interpretation.¹ In a recent case, *Obergefell v. Hodges*, Justice Anthony Kennedy of the U.S. Supreme Court cited Confucius in his majority decision, interpreting the Fourteenth Amendment to uphold same sex marriage: “The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. . . . Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967).”² Conversely, ideas of American constitutionalism have been diffused into China. In a national

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¹ See generally Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006).

² *Obergefell v. Hodges*, 576 U.S. ___, 3, 135 S. Ct. 2584, 2594 (2015).

constitutional debate in 2013, Chinese pro-constitutionalists advocated for the practice of American-style constitutionalism in China.³ Professor Mark Tushnet argues that globalization of constitutional law is now inevitable.⁴ Constitutional globalization affects not only the design of constitutional rules and institutions. More fundamentally, it induces the changes to constitutional identity. I call this phenomenon “globalization of constitutional identity.”⁵

Constitutional identity refers to constitutional ideas and principles fundamental to a polity. It is a part of what Francis Fukuyama calls the “shared mental models,” which he conceives as “critical in facilitating large-scale collective action.”⁶ Nobel laureate Douglas North also states that: “Ideas and ideologies matter, and institutions play a major role in determining just how much they matter. Ideas and ideologies shape the subjective mental constructs that individuals use to interpret the world around them and make choices.”⁷ Constitutional identity shapes the formulation of constitutional institutions and their practices. Therefore, a study on constitutional identity change is crucial to understand the possibilities and constraints of constitutional institutions and functional changes to those institutions.

This study is connected to the growing scholarship on global constitutional law and comparative constitutional theory.⁸ Several global

³ See Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the “Urgency” of Political Reform*, 11 U. Pa. ASIA L. REV. 337 (2016); Rogier Creemers, *China’s Constitutionalism Debate: Content, Context and Implications*, 74 CHINA J. 91 (2015).

⁴ See generally Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT’L L. 985 (2009).

⁵ Several related terms should be defined. In this study, the term “constitutional globalization” is used to refer to the global expansion or diffusion of global constitutional ideas, norms, and institutions. The term “global constitutionalism” is used interchangeably with the term “generic constitutionalism” to refer to normative constitutional ideals associated with limited government which have informed constitutional design and practice around the world.

⁶ FRANCIS FUKUYAMA, *THE ORIGINS OF POLITICAL ORDER* 442 (2011).

⁷ DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* 111 (1990).

⁸ See generally VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010); David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008); Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 64 (2013); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012); Rosalind Dixon & Eric A. Posner, *The Limits of Constitutional Convergence*, 11 CHINA J. INT’L L. 399 (2011).

For purposes of this Article, I focus on the globalization of domestic constitutional law and put aside the related issue of constitutionalization of the global order. For the latter, see AOIFE O’DONOGHUE, *CONSTITUTIONALISM IN GLOBAL CONSTITUTIONALISATION* (2014); *RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); *TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN*

constitutional studies have been conducted by collecting quantitative data for all available national constitutions during the last six decades and employing methods of econometrics to test the predictions of global constitutional diffusion. This is a significant contribution, given the dearth of empirical and quantitative studies in constitutional scholarship.⁹ However, quantitative studies of global constitutional law must be qualified. Case-studies are necessary to qualitatively understand the causal effect of global constitutional diffusion. In addition, studies on constitutional globalization focus mainly on the global spread of constitutional rules and institutions. More fundamental is the global spread of general ideas and principles of constitutionalism.

Five communist countries survived the collapse of the Soviet bloc, namely China, Cuba, Laos, North Korea, and Vietnam. Identifying themselves as socialist countries, they have maintained distinctive constitutional systems defined by fundamental constitutional principles rooted in Marxist-Leninism and Soviet constitutional tradition. However, during the post-Soviet era, the force of constitutional globalization has compelled the socialist regimes to adapt their constitutional core. Even the communist state which attempts to be a global constitutional outlier by developing constitutional “characteristics”¹⁰ is not immune to the impact of constitutional globalization.¹¹

These socialist regimes have been largely ignored in comparative constitutional inquiry, leading constitutional comparativists to lament that comparative constitutional law focuses mainly on a limited set of established liberal constitutional systems in North America and Europe, as well as a few other states with similar institutional settings.¹² In addition to linguistic and cultural considerations,¹³ the marginalization of socialist constitutional experiences stems from the epistemic assumption

MODELS (Nicholas Tsagourias ed., 2007); Symposium, *Introduction-Global Constitutionalism from an Interdisciplinary Perspective*, 16 IND. J. GLOBAL LEGAL STUD. 385 (2009).

⁹ Sujit Choudhry, *Method in Comparative Constitutional Law: A Comment on Law and Versteeg*, 87 N.Y.U. L. REV. 2078, 2087 (2012).

¹⁰ See generally Larry Catá Backer & Keren Wang, *The Emerging Structures of Socialist Constitutionalism with Chinese Characteristics: Extra Judicial Detention and the Chinese Constitutional Order*, 23 PAC. RIM LAW & POL'Y J. 251 (2014).

¹¹ Haig Patapan, *Towards a Cosmopolitan Constitutionalism: On Universalism and Particularism in Chinese Constitutionalism*, 3 CHINESE J. COMP. L. 78 (2015).

¹² RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* 212 (2014); Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in *CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION?* 8 (Sujit Choudhry ed., 2008); Cheryl Saunders, *Towards a Global Constitutional Gene Pool*, 4 NAT'L TAIWAN U. L. REV. 3 (2009).

¹³ See Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN ST. INT'L L. REV. 323 (2010).

that the socialist countries have strictly adhered to socialist ideology which restricts constitutional dynamics. This may not enrich comparative constitutional inquiry. As this study will illustrate, this assumption is flawed. Constitutional dynamics in the contemporary socialist world illustrate new aspects of constitutional law, especially the globalization of constitutional law, which can enrich global constitutional studies. For example, socialist experiences suggest that formal constitutional change processes operate as the platform for global/local constitutional dialogue.

This study is built upon scholarship on constitutional identity.¹⁴ “‘Constitutional identity’ is an essentially contested concept as there is no agreement over what it means or refers to.”¹⁵ Two different versions of constitutional identity theory are developed by Gary J. Jacobsohn and Michel Rosenfeld. While Jacobsohn—in his book *Constitutional Identity*—is more concerned with the identity of the constitution, Rosenfeld—in his book *The Identity of Constitutional Subject*—focuses more on the identity of the people as the constitutional subject. This Article focuses on the identity of the constitution, and therefore Jacobsohn’s theory is more relevant. Jacobsohn explains constitutional identity change as a dialogical process animated by the element of disharmony. Although this theory provides useful tools to conceptualize constitutional identity change, it is informed by liberal constitutional experiences and must be extended to better understand the experience of different constitutional settings.

The purposes of this article are therefore twofold: (1) to extend Jacobsohn’s theory of constitutional identity; and (2) to apply the extended theoretical framework to examine the causal effect of constitutional globalization on the change of domestic constitutional identity with specific reference to the cases of the contemporary socialist/communist regimes.

Part I establishes the extended theoretical framework featuring the relation of constitutional globalization to the change of national constitutional identity. It defines constitutional identity as constitutional

¹⁴ See generally GARY J. JACOBSON, *CONSTITUTIONAL IDENTITY* (2010); MICHEL ROSENFELD, *THE IDENTITY OF THE CONSTITUTIONAL SUBJECT: SELFHOOD, CITIZENSHIP, CULTURE, AND COMMUNITY* (2010); Michel Troper, *Behind the Constitution? The Principle of Constitutional Identity in France*, in *CONSTITUTIONAL TOPOGRAPHY: VALUES AND CONSTITUTIONS* 187 (András Sajó & Renata Uitz eds., 2010).

¹⁵ Michel Rosenfeld, *Constitutional Identity*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 756, 756 (Michel Rosenfeld & András Sajó eds., 2012).

ideas and principles fundamental to a polity and explains that the change to constitutional identity is the consequence of the dialogical interaction between global and local constitutional identities.

After a brief introduction of the features of socialist constitutional identity in Part II, Parts III and IV apply the above framework to the cases of the five socialist regimes. Globalization induces adaption to the socialist constitutional identity. The socialist constitutional identity is adapted by the pragmatic incorporation of fundamental ideas and principles of global constitutionalism. Consequently, the essence of the socialist constitutional identity remains, but is modified and extended in the globalizing context.

Part III illustrates this argument using the case of Vietnam. This case-study is based on original, empirical work: my interviews with constitutional scholars, constitution-makers, members of the Constitutional Amendment Committee, constitutional advisors for top political leaders, Assembly deputies, and National Assembly officers.¹⁶ This primary work is combined with analysis of Vietnamese materials: documents and statements of constitution-makers and political leaders, and scholarly writings on Vietnamese constitutional issues.

Part IV turns to a comparative context. Although there is convergence in the adaption of socialist constitutional identity among the five socialist countries due to the impact of constitutional globalization, there are four divergent models which these countries adopt to react to the global impact on their constitutional identity, namely constitutional globalism (Vietnam and Laos); constitutional exceptionalism (China); constitutional isolationism (North Korea); and constitutional reservationism (Cuba).

This Article makes three major contributions. First, for scholarship on constitutional globalization, it suggests that not only rules and institutions, but constitutional identity is also globalized. Second, this Article refines and extends the comparative theory of constitutional identity by considering the dynamics of constitutional identity in non-constitutionalist polities influenced by globalization, the disharmony between national and global constitutionalism, and the non-judicial mechanism of local and global constitutional dialogue which animates

¹⁶ Due to sensitive nature of the issue, most interviewees remained anonymous, but other details are specified. When the footnotes are addressed as "Interviews" this indicates that the statements or evidence were drawn over several interviews, which will not be specified.

constitutional identity change. Third, it enriches general knowledge of comparative constitutional law by examining socialist experiences.

I. GLOBALIZATION AND CONSTITUTIONAL IDENTITY CHANGE

A. *Constitutional Identity*

A commentator distinguishes two ideas of constitutional identity: 1) identity of the constitution, and 2) identity of the people as the constitutional subjects.¹⁷ I will characterize the former as the thin approach and the latter as the thick approach. In the American debate, Rosenfeld represents the latter, while Jacobsohn represents the former. Rosenfeld conceptualizes constitutional identity as identity of the constitutional subject of the people, which is “immersed in complex and ambiguous relations with other relevant identities; such as, national, ethnic, religious, or cultural identity.”¹⁸ Rosenfeld offers a philosophically sophisticated theory of constitutional subjects. However, his theory has to grapple with a number of questions: Who constitutes the people? Are the people really the constitutional subject? Who, in particular, are the authors of authoritarian constitutions that are not ordained by “we the people”? How does one distinguish the constitutional identity of the people from their national, cultural, religious, and moral identities? If constitutional identity collapses into one or more of these identities, is it still a distinctive subject for constitutional inquiry? For these confusing questions, this study does not attempt to pursue the identity of the people as the constitutional subject.

Instead, my study adopts a thin approach, which focuses on constitutional identity as presented in Jacobsohn’s work. This approach avoids the confusing conceptual questions, and is useful for empirical analysis. For Jacobsohn, constitutional identity refers to constitutional goals, aspirations, and commitments that a political community pursues which are normally codified in a national constitutional text.¹⁹ Therefore, “[t]o establish the identity of a constitution, it obviously makes sense to scrutinize carefully the text itself. This provides us with a documentary transcript of how a particular group of framers provided for the governance of their polity, and it often includes their aspirations for its subsequent development.”²⁰ Jacobsohn distinguishes generic and

¹⁷ José Luis Martí, *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People*, in NATIONAL CONSTITUTIONAL IDENTITY AND EUROPEAN INTEGRATION 17 (Alejandro Saiz Arnaiz & Carina Alcobarro Llivina eds., 2013).

¹⁸ Michel Rosenfeld, *The Identity of the Constitutional Subject*, 16 CARDOZO L. REV. 1049, 1049 (1995).

¹⁹ See generally JACOBSON, *supra* note 14.

²⁰ *Id.* at 348.

specific constitutional identity: “All constitutional polities represent a blend of characteristics revealing what is particular to the constitutional culture as well as what are widely viewed as common attributes of a universal culture of constitutionalism.”²¹ Jacobsohn, however, focuses more on specific constitutional identity.²²

Jacobsohn argues that “the concept of constitutional identity should be at the center of constitutional theory.”²³ If so, constitutional identity must be a distinctive concept. For this purpose, I submit that the concept of constitutional identity must be *distinctively constitutional* so that it can be distinguished from the concepts of national or cultural identity. Moreover, the concept of constitutional identity must be *distinctively identitarian* so that it can be distinguished from other constitutional concepts like “unwritten constitution” or “living originalism” which also concern deep constitutional principles.²⁴

With that in mind, I define constitutional identity as *constitutional ideas and principles fundamental to a constitutional system*. It is characterized by the following features. First, constitutional identity is about constitutional *ideas and principles* existing at the fundamental level, resonating with what political scientists variably call “the ‘public philosophies’, ‘public sentiments’, ‘deep core’- worldviews or *Weltanschauung* that undergird the policies and programs with organizing ideas, values, and principles of knowledge and society.”²⁵ Second, constitutional identity is *constitutional* in the sense that it refers to deep ideas pertaining to the nature of constitution, constitutional structure, constitutional rights, and socio-economic constitutional principles that underpin quotidian constitutional practices, which are normally codified in a nation’s constitutional text. Third, constitutional identity is *identitarian* in the sense that the constitutional ideas and principles present beliefs on long-term goals, aspirations, and commitments constituting the essence of a constitutional polity.²⁶

²¹ *Id.* at 22.

²² *Id.* at 18.

²³ *Id.* at 3.

²⁴ AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2011). For review of this book and the author’s response, see David A. Strauss, *Not Unwritten, After All*, 126 HARV. L. REV. 1532 (2013); Akhil Reed Amar, *American Constitutionalism — Written, Unwritten, and Living*, 126 HARV. L. REV. F. 195 (2013); JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

²⁵ Vivien A. Schmidt, *Discursive Institutionalism: The Explanatory Power of Ideas and Discourse*, 11 ANN. REV. POLIT. SCI. 303, 306 (2008) (citations omitted).

²⁶ Jacobsohn particularly underlines the aspirational aspect of constitutional identity. For his extensive treatment on this, see GARY J. JACOBSON, *THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* (1986). For other discussions on constitutional aspiration, see

So understood, constitutional identity is a distinctive concept and a distinctive object for comparative constitutional inquiry. The prevailing trend in comparative constitutional studies is the focus on rules and institutions. However, underlying these rules and institutions are deep constitutional ideas. Not only does a constitution provide concrete guidance for political conduct of constitutional actors, but it also implicitly or explicitly includes fundamental ideas which provide a general directive of beliefs, aspirations, and commitments that propel the function of the whole constitutional system. So, a study about constitutional identity is distinctive in that it focuses not on rules and institutions but on essential constitutional ideas and principles. It may refer to rules and institutions as the embodiment of constitutional ideas and principles. Constitutional identity inquiries are also different from studies on unwritten or living constitutionalism in that they take written constitutions seriously as the textual embodiments of constitutional identity.

B. *Constitutional Disharmony*

Constitutional identity is not fixed, but changeable. Jacobsohn draws on Alasdair MacIntyre's theory of tradition to develop a theory on the nature and dynamic of constitutional identity. For MacIntyre, "a living tradition is . . . a historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition."²⁷ He considers tradition as the embodiment of "continuities of conflicts."²⁸ In his understanding, "a tradition becomes mature just insofar as its adherents confront and find a national way through or around these encounters with radical different and incompatible positions."²⁹ Jacobsohn draws on MacIntyre's theory of tradition as a living thing presenting "continuities and conflicts" to support his theory regarding the nature and dynamic of constitutional identity. He argues that constitutional identity "emerges *dialogically* and represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend the past."³⁰

To Jacobsohn, the dynamics of constitutional identity are animated by "the universal constitutional condition, which is that in one way or another all constitutions confront or embody the problem of

Symposium, Constitutional Interpretation and Aspirations to a Good Society: The Natural Rights-Based Justification for Judicial Review, 69 *FORDHAM L. REV.* 2119 (2001).

²⁷ ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 207 (1981).

²⁸ *Id.* at 206.

²⁹ ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 327 (1988).

³⁰ JACOBSON, *supra* note 14, at 7.

disharmony.”³¹ He states that “the ‘disharmonic constitution’ does not refer to the incoherence of constitutions- though that may indeed be the condition of some- but to the dissonance within and around the constitution that is key to understand its identity.”³² There are two aspects of the disharmonic constitution: internal and external. The text of national constitution is itself disharmonic in the sense that it encompasses competing commitments or “contradiction and imbalances.”³³ So, the exploration of constitutional identity requires the understanding of alternative visions and aspirations internal to the constitutional text. The external aspect refers to the gap between the aspirational constitutional commitments or ideals and the reality, or in Jacobsohn’s parlance, “the lack of agreement evident in the sharp discontinuities that frame the constitution’s relationship to the surrounding society.”³⁴ Constitutional disharmony provokes change in constitutional identity. Jacobsohn states that “to apprehend constitutional identity is to see its dynamic quality, which results from the interplay of forces seeking either to introduce greater harmony into the constitutional equation or, contrariwise, to create further disharmony.”³⁵

Jacobsohn’s theory of constitutional disharmony is heuristic to explore constitutional identity change. Other scholars share a common view, although they may use different terms. Hanna Pitkin, for example, contends that: “To understand what a constitution is, one must look not to some crystalline core or essence of unambiguous meaning but precisely at the ambiguities, the specific oppositions that this specific concept helps us to hold in tension.”³⁶ Ideology theory in legal sociology also makes similar claims.³⁷ Alan Hunt argues that: “An ideology is not a unitary entity. It draws its power from its ability to connect and combine diverse mental elements (concepts, ideas, etc.) into combinations that influence and structure the perception and cognition of social agents.”³⁸ The idea of disharmony also resonated with the Marxist dialectic’s thesis

³¹ *Id.* at 86–87.

³² *Id.* at 15.

³³ *Id.* at 87. For example, the commitments to both positive and negative rights. *Id.* at 149.

³⁴ *Id.* at 87. This is due to the fact that the constitutions are committed to “the achievement of things seemingly beyond its immediate reach.” *Id.* at 145. Jacobsohn gives example of Directive Principles of State Policy in India Constitution, which are nonjusticiable. *Id.* at 146. As we will see in the case-studies below, the socialist constitutions also include many aspirations that are disharmonic to the social reality.

³⁵ *Id.* at 88.

³⁶ Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEG. EDU. 167, 167 (1987).

³⁷ NICOS POULANTZAS, *POLITICAL POWER AND SOCIAL CLASSES* (T. O’Hagan trans., 1973); Alan Hunt, *The Ideology of Law: Advances and Problems in Recent Applications of Ideology to the Analysis of Law*, 19 L. SOC. REV. 11 (1985); Maureen Cain, *Gramsci, The State and the Place of Law*, in *LEGALITY, IDEOLOGY AND THE STATE* (David Sugerman ed., 1983). I thank John Gillespie for drawing my attention to this literature.

³⁸ Hunt, *supra* note 37, at 16.

on conflicts as the source of change, which has influenced the political ideology in socialist regimes.

The theory of constitutional disharmony seemingly contradicts the Confucian philosophy of social harmony, which has informed political culture in such countries like China and Vietnam. In fact, Confucianism promotes the idea of “harmony but not sameness” (*Analects*, 13:23). Chenyang Li’s recent comprehensive treatment of the theme suggests that, in Confucian philosophy, harmony exists with creative tension and does not exclude conflicts and differences.³⁹ Particularly, according to the Book of Change or *I Ching*, one of the Confucian Five Classics,⁴⁰ the logics of change essentially lie on the interaction of the two conflicting forces called *Yin* and *Yang*.

However, several points in Jacobsohn’s theory must be qualified and refined. To begin with, constitutional identity dynamics are defined by the dialogical interactions between local (specific) and global (generic) constitutional identity. The universal constitutional condition of disharmony, in one way or another, manifests in all constitutions, not necessarily liberal constitutions. This is evident if we consider the generic and specific contents of constitutional identity. The legal codification of both generic and specific values and principles in a single charter constitutes conflicting aspirations and commitments. Constitutional identity emerges as the consequence of the dialogical interactions between generic and specific aspirations and commitments. Moreover, within a particular constitutional polity, there are pluralized, particularistic values and principles that govern the polity whose dialogical interactions create the dynamics of constitutional identity.

However, although Jacobsohn recognizes that the disharmony between generic and specific aspiration is the condition of change in constitutional identity, he directs most of his attention to disharmony of specific constitutional identity. The explanation for this is that his theory is developed on the experience of constitutionalist states (the United States, India, Israel, and Ireland) whose constitutions already incorporate the generic requirements of constitutionalism. If constitutional identity is understood as the identity of the constitution, not the identity of the people as constitutional authors, even non-constitutionalist polities can also acquire constitutional identity. Authoritarian polities are also committed to fundamental aspirations codified in their constitutions which inform constitutional politics and citizens’ activities. Some

³⁹ CHENYANG LI, *THE CONFUCIAN PHILOSOPHY OF HARMONY* 12–13 (2014).

⁴⁰ This Confucian Classic is extensively explored by a Yale constitutional law professor, see JACK M. BALKIN, *THE LAWS OF CHANGE: I CHING AND THE PHILOSOPHY OF LIFE* (2009).

concrete constitutional rules may be irrelevant to the practice of the authoritarian systems and the daily lives of the citizens. However, the operation of the whole authoritarian polity is inevitably driven by the constitutionally-codified fundamental aspirations, although these aspirations may be imposed by authoritarian leaders. For example, although a Vietnamese citizen may not be aware of a concrete constitutional provision on a certain right, or a Vietnamese political leader may not be aware of a specific constitutional rule on state structure, the whole Vietnamese community is inevitably affected by the fundamental commitment to socialist aspirations codified in the nation's constitution.

Fundamental constitutional commitments of authoritarian regimes may have the intention to limit the state power. They may be specific and disharmonic with generic constitutionalist aspirations. Socialist constitutional systems have been constructed on the base of specific kinds of underlying constitutional ideas and principles, and by that, they acquire distinctive constitutional identity. The disharmony between generic and specific aspirations is an important source of constitutional identity change in socialist polities. The gap between socialist and global constitutional aspirations engenders efforts to bridge this gap. Therefore, to understand the dynamics of constitutional identity in socialist states, it is important to explore the disharmony between specific socialist constitutional aspirations and generic constitutionalism. I call this *normative constitutional disharmony*. All in all, constitutional identity change is animated by the universal constitutional condition presented by three elements, namely internal, external, and normative constitutional disharmonies.

C. *Constitutional Globalization*

Tushnet argues that the globalization of constitutional law is inevitable due to top-down pressures (the emergence of global networks of constitutional judges, the involvement of transnational nongovernmental organizations (NGOs) in national constitutional matters, the incorporation of international human rights treaties into national constitutions, and transnational migration of workers) and bottom-up pressures (competitions among nations for investment and human capital).⁴¹ Constitutional globalization is also driven by a bottom-up factor having less to do with material calculation: constitutional disharmony.

⁴¹ Tushnet, *supra* note 4, at 987–95.

Constitutional disharmony is crucial to the inevitable constitutional globalization. Jacobsohn contends that: “This disharmonic jurisprudential context establishes the incentives, opportunities, and costs inhering in the practice of looking abroad for interpretive inspiration.”⁴² Consequently, local actors may engage in transnational and global dialogue in defining constitutional meanings and constitutional identity.⁴³ But this is not necessarily limited to constitutional interpretation. Domestic constitutional disharmony incentivizes social and institutional actors to look into the pool of global ideas and experiences to seek constitutional consistency by formal constitution-making, as the case of South Africa indicates.⁴⁴ Especially in developing countries, the gap between national constitutions and global standards of constitutionalism creates the incentives and opportunities for looking abroad for constitution-making or constitutional amendment.

While the global spread of constitutional ideas is inevitable, these ideas are situated within the local context and balanced with local ideas. Tushnet states, “Every society's law is tied to so many aspects of that society—its politics, its particular history, its intellectual life, the institutional forms in which its activities are conducted, and many more.”⁴⁵ Constitutional law is particularly prominent in this regard. Saunders underlines: “Constitutions are inherently local instruments. They must respond to local needs and they must be ‘owned’ both by the people of the state concerned and by their political leaders from time to time.”⁴⁶ So, global constitutional ideas are balanced in the local context. Jacobsohn argues that global constitutional norms “need to be reconciled with the particularistic commitments of local traditions and practices; the contours of constitutional identity will, to a large extent, reflect how these disharmonies get resolved.”⁴⁷ The consequence is the interaction and balancing of global/local constitutional identities.

D. *Dialogical Change of Constitutional Identity*

For Jacobsohn, constitutional identity is formulated and evolves through “dialogical enterprises” comprising “interpretive and political activity” occurring in public and private domains.⁴⁸ Courts are the

⁴² JACOBSOHN, *supra* note 14, at 142.

⁴³ *Id.* at 112–17.

⁴⁴ *Id.* at 113. Jacobsohn explains that South Africa Constitution of 1996 incorporates the international norm of “equal treatment of individuals under law.”

⁴⁵ Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L. J. 1225, 1265 (1999).

⁴⁶ Saunders, *supra* note 12, at 9–10.

⁴⁷ JACOBSOHN, *supra* note 14, at 113.

⁴⁸ *Id.* at 108.

principal, but not exclusive, shapers and articulators of constitutional identity.⁴⁹ A wide range of actors (the courts, legislature, executive, and the people) engage in constitutional dialogue in the determination and clarification of substantial constitutional meanings and constitutional identities.⁵⁰ This argument is supported by the theories of popular constitutionalism developed by American constitutionalists, such as Tushnet and Larry Kramer.⁵¹ However, as Heinz Klug rightly comments, “judicial decisions remain at the core of Jacobsohn's empirical analysis.”⁵² Jacobsohn's theory is informed by constitutional experience in stable, liberal polities where judicial review operates as the mechanism of constitutional change. Consequently, he has not yet accounted for the possibility of a non-judicial dialogical mechanism of change in constitutional identity.

In the socialist nations where judicial review is absent, constitutional change is normally undertaken through formal constitution-making and constitutional amendment. Especially, the moment of constitution-making creates space for constitutional dialogue among different political actors. The theory of the disharmonic constitution therefore must incorporate constitutional dialogue during the moment of formal constitutional change. Constitutional dialogue in such moments does not feature the way in which the dialogical interaction of judges with other political actors elaborates the meanings of the existing constitution. Rather, it features the way in which the dialogical interaction of the public and the government envisage the meaning of a normative constitution or a desirable constitutional order by taking the existing constitution as a starting foil. The constitutional disharmony operates as the condition of the dynamics of constitutional dialogue.

Furthermore, like Vicki Jackson⁵³ and David Law,⁵⁴ Jacobsohn tends to focus on judicial engagement in transnational dialogue. But there is also transnational engagement in constitution-making. Foreign and global sources are important for developing countries, like socialist countries, creating their constitutional identity by bridging the disharmonic gap between nation-specific constitutional identity and generic constitutional identity. But this need not take place by judicial engagement, as judicial review of constitutional questions is absent in

⁴⁹ *Id.*

⁵⁰ For a recent account of constitutional dialogue in Asian context, see PO JEN YAP, *CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA* (2015).

⁵¹ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURT* (1999); LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

⁵² Heinz Klug, *Constitutional Identity and Change*, 47 *TULSA L. REV.* 41, 45 (2011).

⁵³ JACKSON, *supra* note 4.

⁵⁴ David Law, *Judicial Comparativism and Judicial Diplomacy*, 163 *U. PA. L. REV.* 927 (2015).

contemporary socialist countries. Alternatively, the constitution-making process allows political actors, constitution-makers, and social actors to engage in a transnational constitutional dialogue in which global and local sources disharmoniously interact and balance, provoking change in constitutional identity.

II. SOCIALIST CONSTITUTIONAL IDENTITY

Before considering the change to socialist constitutional identity, it is necessary to briefly introduce its common core.⁵⁵ The specific socialist constitutional identities are sharply disharmonic with the aspirations of global constitutionalism.

A. *Constitutional Instrumentalism*

In global constitutionalism, a constitution is conceived as the document of the people, which establishes written legal limitations on the public power.⁵⁶ This is philosophically underpinned by the social contract theories of the Enlightenment era.⁵⁷ All socialist countries have a document called a constitution, but these socialist documents are self-understood not as the legal limitations upon the governmental power but as an instrument of the party-state to structuralize and aggrandize its power so as to control and direct the society toward achieving the socialist goals. Simply speaking, while constitutionalism conceives of constitutions as a tool for the people to control the state, socialist constitutional instrumentalism uses constitutions as the tool for the state to control the people. All of the contemporary socialist countries have a written constitution that are often amended and replaced to suit the changes in ideology, policy, and leadership of a communist party.

B. *Constitutional Vanguardism*

In generic constitutionalism, “the will of the people is the source of authority and the basis of legitimate government.”⁵⁸ Legitimate power is created through free and equal election. Differently, the use of the public power in the socialist world is constitutionally pre-established as the prerogative of the communist party conceived as the “vanguard” force of

⁵⁵ For extensive elaborations, see Chris Osakwe, *The Common Law of Constitutions of the Communist-Party States*, 3 REV. SOC. L. 155 (1997); John N. Hazard, *The Common Core of Marxian Socialist Constitution*, 19 SAN DIEGO L. REV. 297, 301 (1981–1982).

⁵⁶ Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 CARDOZO L. REV. 533, 535 (1993).

⁵⁷ See generally LARRY ALEXANDER, *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* (2001).

⁵⁸ Henkin, *supra* note 56, at 535.

the working class, the ruling class in the socialist word.⁵⁹ The concept of vanguardism is attributed to V.I. Lenin, according to which “real power lay with the Communist Party.”⁶⁰ Consequently, constitution, law, state, and the society are all under the control of the communist party. The communist party therefore is different from political parties in a liberal democracy. It is not a private political organization created to compete for power through free election because its monopoly of power has been established as a reality and mandated in the constitution. Rather, the communist party is an essential component of the polity, created with the aspiration to control the state and the society, and to direct the polity toward socialism.⁶¹ The leadership of the communist party remains the core of constitutional identity of the five contemporary socialist countries.

C. “Democratic Centralism”

The separation of power and checks and balances are normally conceived as the global identity of constitutionalism.⁶² In the socialist world, there are also three legislative, executive, and judicial powers, practiced by three different state bodies. But, the socialist constitutional structure is created according to a distinctive socialist principle called “democratic centralism,” an antithesis of the Montesquieuan tripartite government. Initially, “democratic centralism” was introduced by V.I. Lenin as the principle of party activity. Simply speaking, it aims to combine “democratic” discussions and centralized actions. After “democratic discussion,” superiors will issue a “conclusion” or order which requires unquestioning obedience from the inferiors.⁶³ “Democratic centralism” was then applied in state organization and actions, rendered as “unity of power” as opposed to the separation of power. It is constitutionally characterized by the idea that state power is centralized in the popularly elected representative body. Within this formal scheme of united power, all other state bodies are subordinate to the supreme legislature. In this socialist constitutional arrangement, labor divisions among the three state organs are possible, but they must work together. This arrangement rejects the separation of power and checks and balances as these will weaken the power and prevent power

⁵⁹ KONSTITUTSIJA SSSR (1936) [KONST. SSSR] [USSR CONSTITUTION] art. 126.

⁶⁰ William Partlett & Eric C. Ip, *Is Socialist Law Really Dead?*, 48 N.Y.U. J. INT'L L. & POL. 463, 481 (2016).

⁶¹ Larry Catá Backer, *Party, People, Government and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30 B.U. INT'L L.J. 331, 370 n.180 (2012).

⁶² Henkin, *supra* note 56, at 535; *see generally* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1998).

⁶³ Alex Nove, *Some Aspects of Soviet Constitutional Theory*, 12 MOD. L. REV. 12, 19 (1949).

cooperation. The constitutional structure in the contemporary socialist world retains this identity of unitary and centralized power.

D. Rights Statism

Constitutionalism conceives of universal human rights as limits of the use of the public power.⁶⁴ Socialist constitutions also include rights provisions, defined by a statist conceptualization of rights.⁶⁵ Statist rights are underpinned by Marxist legal positivism, constitutional instrumentalism, and historical materialism. Marxist legal positivism leads to the idea that rights are positively granted by the state. Marxist constitutional instrumentalism suggests that rights are not the limits on the state but instead can be limited by the state for the state's purposes. Historical materialism justifies the social determination of rights. The Constitutions of the five contemporary socialist countries include rights provisions in the line of statism.

E. Economic Statism

The protection of property rights is now considered an essential element of global constitutionalism.⁶⁶ Moreover, the market economy is the worldwide practice, the condition of a well-functioning constitutional government.⁶⁷ Socialist countries, however, have a distinctive constitutional economy, which rests on the assumption that to achieve socialism, the state needs to centrally plan the working of the economy and control substantial economic resources like lands and other properties. The consequence of this economic statism is the state-owned economy in the socialist world.⁶⁸ This remains as the essential feature of the five contemporary socialist countries.

III. A CASE-STUDY: VIETNAM

A. Constitutional Disharmony

By way of background, Vietnam has enacted five constitutions under the leadership of the Communist Party: the 1946 Constitution after

⁶⁴ Henkin, *supra* note 56, at 535–36; *see generally* Ronald Dworkin, *Constitutionalism and Democracy* 3 EUR. J. OF PHIL. 1 (1995).

⁶⁵ Christopher Osakwe, *The Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 U. PA. L. REV. 1351, 1390–95 (1979).

⁶⁶ Law, *supra* note 4, at 1302.

⁶⁷ William A. Galston, *Pluralist Constitutionalism*, 28 SOC. PHIL. AND POL'Y 228, 236 (2010).

⁶⁸ *See generally* PAUL GREGORY & ROBERT STUART, *SOVIET AND POST SOVIET ECONOMIC STRUCTURE AND PERFORMANCE* (2001).

the August Revolution; the 1959 Constitution in North Vietnam after the Geneva Conference dividing Vietnam into two separate zones; the 1980 Constitution after national unification; the 1992 Constitution after the 1986 *Đổi mới* (Renovation) initiative; and most recently the 2013 Constitution in the context of the nation's active integration into the global economic and political order.⁶⁹ The first constitution was more liberal, while the four later were influenced by socialist constitutional tradition. After the first amendment in 2001, the party-state again introduced a plan to revise the 1992 Constitution in 2011, but eventually replaced it with the new 2013 Constitution. This new Constitution presents important adaptive changes to the core of socialist constitutional identity which is conditioned by the disharmony internal to and surrounding the 1992 Constitution.

The 1992 Constitution was enacted in response to the *Đổi mới* program initiated by the Party in 1986, which was meant to transform the centrally planned economy into the “socialist-oriented market economy.” The Constitution continued but began to modify the essence of socialist constitutional identity. Notably, it introduced competing visions which promoted both economic liberalization and socialist orientation. It recognized the role of private economic sectors, indicative of the adaption of the socialist specific identity, namely, the state-owned economy, by incorporating generic liberal values.⁷⁰ In practice, Vietnam implemented the “socialist-oriented market economy” in nearly three decades on the framework established by the 1992 Constitution. The Constitution also included provisions which facilitated global political and economic integration and at the same time removed the commitment to exclusive diplomatic relationships with socialist nations.⁷¹ In practice, Vietnam has established diplomatic relationships with 186 nations throughout the world⁷² and joined major international economic institutions like the World Trade Organization (2007).⁷³

New Institutional Economics suggests that a market economy (even socialist oriented) requires the rule of law, limited government, and the protection of human rights, especially economic rights.⁷⁴ Hence, new

⁶⁹ See generally MARK SIDEL, *THE CONSTITUTION OF VIETNAM* (2009) (detailing Vietnamese constitutional history).

⁷⁰ HIẾN PHÁP [CONSTITUTION] Apr. 15, 1992, art. 15 (Viet.).

⁷¹ *Id.* at art. 14.

⁷² *Chủ tịch nước Trương Tấn Sang hội kiến Tổng Thư ký LHQ Ban Ki-moon [President of State Trương Tấn Sang Meets with Secretary-General of the United Nations Ban Ki-moon]*, VIETNAM'S MINISTRY OF FOREIGN AFFAIRS, <http://www.mofahcm.gov.vn/mofa/nr040807104143/nr040807105001/ns150925085353>.

⁷³ *Accessions: Viet Nam*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/acc_e/a1_vietnam_e.htm.

⁷⁴ See generally NORTH, *supra* note 7.

constitutional provisions facilitating economic reform were adopted together with the revised institutional setting. The Leninist unitary constitutional structure continued but was modified to make the power less concentrated: the government was vested with more independent administrative authorities; the prime minister had more individual authorities and responsibilities; and the individual presidency was established.⁷⁵ The 1992 Constitution also introduced for the first time the term of “human rights” understood as being expressed in “the right of citizens.”⁷⁶ The constitutional amendments in 2001 introduced the idea of the “socialist rule of law state.” This was an attempt to marry the specific socialist legality, a socialist form of rule by law, with the western concept of the rule of law.

Consequently, the 1992 Constitution was a disharmonic constitution. Internally, it remained a socialist document but included competing understandings of market economy, human rights, and rule of law. Most importantly, the constitutional enshrinement of the idea of the rule of law state has precipitated more substantial reformist discourse. The idea of the socialist rule of law state is an ambiguous one. The ambiguous language of the socialist rule of law state opens the door for alternative interpretations. The concept of “socialist rule of law state” has operated as the epistemic foil for reformist constitutional discourse in early twentieth century Vietnam. A member of the Constitutional Amendment Committee told me that one of the reasons for the enactment of the new 2013 Constitution was the development of the “social cognition of the rule of law state.”⁷⁷

The commitment to the socialist rule of law state has stipulated new visions on law, state power, rights, and public institutional arrangements. Since the introduction of the concept of socialist rule of law state in 2001 in the Constitution, there have been creative efforts among political leaders, officials, and legal scholars, as well as other public intellectuals. These creative efforts have focused on the construction of its substantial meanings and reforming arguments pertaining to party leadership, state institutions, limiting arbitrary power, constitutional review, human rights protection, and judicial independence within that framework.⁷⁸

⁷⁵ Russell Heng Hiang Khng, *The 1992 Revised Constitution of Vietnam: Background and Scope of Changes*, 14 (3) CONTEMP. S.E. ASIA 221 (1992).

⁷⁶ HIẾN PHÁP [CONSTITUTION] Apr. 15, 1992, art. 50 (Viet.).

⁷⁷ Interview with a member of the Constitutional Amendment Committee in Hanoi, Vietnam (Jan. 13, 2017).

⁷⁸ Hà Thị Mai Hiên, *Nhiệm vụ cải cách tư pháp trong điều kiện xây dựng nhà nước pháp quyền ở Việt Nam* [Judicial Reform in the Context of Building the Rule of Law State in Vietnam], 10 NHÀ

Externally, the 1992 Constitution includes many constitutional aspirations (such as human rights protection and construction of the rule of law state) that are disharmonic to the social reality (such as human rights restrictions and corruption). The Constitution also includes several fundamental commitments, such as “*building a prosperous life for its people, a strong country and an equitable, democratic and civilised society, ensuring the well-being, freedom and happiness of all citizens as well as conditions for their all-round development*” (Article 3), which are discordant with the reality in Vietnam of a developing country with many people living in poor conditions, especially the rural population which occupied 66% of the total population by 2015.⁷⁹ These conditions encourage a continuous struggle to close the gap between constitutional commitments and reality.

Normatively, the 1992 Constitution is dissonant with global requirements of constitutionalism in many points (such as the instrumentalist constitution, the leadership of the communist party, centralized power, individual rights, and the economy controlled by the state). These constitutional gaps provide the space for, and incentivize different actors to, struggle for constitutional consistency. To illustrate, constitutional law Professor Nguyễn Đăng Dung at Vietnam National University Law School at Hanoi criticizes the 1992 Constitution for failing to meet the normative requirements of generic constitutionalism. Professor Nguyễn Đăng Dung draws on Louis Henkin to define these requirements as limited government, whose requirements include: constitution-making by a constitutional convention or special procedures, the separation of powers, judicial independence, and the protection of human rights.⁸⁰ He then advocates that: “To have an authentic

NƯỚC VÀ PHÁP LUẬT 27 (2007); Phan Trung Lý, *Tổ chức và hoạt động quốc hội theo yêu cầu nhà nước pháp quyền XHCN* [Organization and Operation of the National Assembly According to the Requirements of Socialist Rule of Law State], 2+3 NGHIÊN CỨU LẬP PHÁP 31 (2009); Phạm Tuấn Khải, *Đổi mới tổ chức và hoạt động chính phủ theo yêu cầu nhà nước pháp quyền XHCN* [Renovating the Organization and Operation of the Government According to the Requirements of Socialist Rule of Law State], 2+3 NGHIÊN CỨU LẬP PHÁP 44 (2009); Vũ Văn Nhiêm, *Một số ý kiến về sự lãnh đạo của Đảng với nhà nước trong điều kiện xây dựng nhà nước pháp quyền ở nước ta hiện nay* [Some Comments on the Leadership of the Party Over the State in the Context of Building the Rule of Law in our Country Today], 1 KHOA HỌC PHÁP LÝ 3 (2009); Đinh Văn Mậu, *Kiểm soát quyền lực nhà nước trong nhà nước pháp quyền ở Việt Nam hiện nay* [Controlling the State Power in The Rule of Law State in Today's Vietnam], 10 QUẢN LÝ LÝ NHÀ NƯỚC 2 (2009); Tường Duy Kiên, *Quyền con người trong nhà nước pháp quyền xã hội chủ nghĩa ở nước ta hiện nay* [Human Rights in the Rule of Law State in Our Country Today], 6 NHÀ NƯỚC VÀ PHÁP LUẬT 70 (2010); Nguyễn Phú Trọng, *Sự phát triển nhận thức của Đảng ta từ cương lĩnh năm 1991 đến nay* [The Development of Our Party's Recognition from The Party Creed 1992 Up to Now], 1 LỊCH SỬ ĐẢNG 3 (2011).

⁷⁹ Vietnam: Rural Population (% of total population), THE WORLD BANK, http://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=VN&year_high_desc=false.

⁸⁰ Minh Cường, *Cần thiết lập 'Chủ nghĩa Hiến pháp'*, BÁO PHÁP LUẬT THÀNH PHỐ HỒ CHÍ MINH [HO CHI MINH CITY LAW NEWSPAPER] (Aug. 7, 2010) <http://phapluattp.vn/thoi-su/chinh-tri/can-thiet-lap-chu-nghia-hien-phap-180706.html>.

constitution, we must have ‘constitutionalism.’ Simply speaking, ‘constitutionalism’ is the necessary theory which serves as the base for constitution-making and amending the authentic constitution.”⁸¹

In short, the adaptive change to the socialist constitutional identity in Vietnam is animated by the universal condition of constitutional disharmony. The 1992 Constitution is a disharmonic constitution, giving rise to a socialist constitutional identity culminating in the adaptations embodied in the new 2013 Constitution.

B. *Constitutional Globalization*

This section considers the impact of constitutional globalization on constitution-making and constitutional discourse in Vietnam in 2013. I met and exchanged with some constitution-makers during this time and further interviewed them Hanoi in January 2017. During my interviews, constitution-makers mentioned to me several global factors that resulted in constitution-making in Vietnam, including international economic integration, Vietnam’s ratification of international human rights treaties, and the globalization of Vietnamese legal scholarship.⁸² They said that Vietnam needs to reform the constitutional system to better integrate into the global community.⁸³ The Party even instructed constitution-makers to reference foreign constitutional experience.⁸⁴ The internal contradiction of the 1992 Constitution, the gap between this socialist constitution and social reality, and especially the gap between this charter and normative requirements of global constitutionalism, creates incentives, spaces, and chances for different actors to turn to global sources for constitution-making inspirations to achieve more constitutional consistency.

In fact, general ideas of global constitutionalism have been diffused in Vietnam by various channels. One such channel has been the translation of enlightenment thinkers’ work into Vietnamese. Jean-Jacques Rousseau’s *The Social Contract* and Montesquieu’s *The Spirit of The Laws* have been republished and referenced more often in the 2010s.⁸⁵ In addition, the new century features publication for the first time in Vietnamese of works by other western liberal thinkers, such as John Locke’s *Two Treatises of Government*, and John Stuart Mill’s

⁸¹ *Id.*

⁸² Interviews, *supra* note 16.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See CH. S. MONTESQUIEU, BÀN VỀ TINH THẦN PHÁP LUẬT [THE SPIRIT OF THE LAWS] (Hoàng Thanh Đạm trans., 2004); J.J. ROUSSEAU, BÀN VỀ KHÉ ƯỚC XÃ HỘI [THE SOCIAL CONTRACT] (Hoàng Thanh Đạm trans., 2004).

Considerations on Representative Government and *On Liberty*.⁸⁶ The publication of these books in the Vietnamese language is instrumental to Soviet-trained senior constitutional scholars and Vietnamese-trained scholars in gaining access to western liberalist ideas, which inspire them to envisage new ideas on the constitution, rights, and the public power. Consequently, as will be discussed below, the constitutional intellectuals advocate for a contractual constitution, constitutional referendum, natural rights, and the separation of power, which are characteristically predicated on European enlightenment liberalism, which challenges the established socialist constitutional understanding.

Translation work has also resulted in the impact of American liberal constitutionalism on the Vietnamese constitutional intellectual life. The Vietnamese version of the *Federalist Papers* has been increasingly referenced.⁸⁷ Additionally, the twenty-first century witnessed publications in Vietnamese of Tocqueville's *Democracy in America*⁸⁸ and James Madison's *Notes On the Constitutional Convention of 1787*.⁸⁹ The Embassy of the United States in Hanoi also publishes Vietnamese translations of informational work on modern constitutionalism and the American constitutional system.⁹⁰ The particular consequences of the influence of American constitutionalism in Vietnamese constitutional intellectual life are the constitutional proposals of constitutional limitations, constitutional endurance, constituent power and constitutional convention, and judicial review. American constitutionalism is also referenced in other constitutional discourse regarding the separation of power, human rights, and judicial independence.

In addition to legal translation, the development of legal education is another factor conducive to the diffusion of generic constitutional ideas in Vietnam. Young Vietnamese constitutionalists and lawyers trained

⁸⁶ See JOHN LOCKE, KHẢO LUẬN THỨ HAI VỀ CHÍNH QUYỀN [TWO TREATISES OF GOVERNMENT] (Lê Tuấn Huy trans., 2007); JOHN STUART MILL, BÀN VỀ TỰ DO [ON LIBERTY] (Nguyễn Văn Trọng trans., 2009); JOHN STUART MILL, CHÍNH THỂ ĐẠI DIỆN [CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT] (Nguyễn Văn Trọng & Bùi Văn Nam Sơn trans., 2009).

⁸⁷ See LUẬN VỀ HIẾN PHÁP HOA KỲ [ON THE U.S. CONSTITUTION] (Nguyễn Hưng Vượng trans., 1959) (The Vietnamese selective translation of the *Federalist Papers* was first published in Saigon prior to the 1975 unification.).

⁸⁸ ALEXIS DE TOCQUEVILLE, NỀN DÂN TRỊ MỸ [DEMOCRACY IN AMERICA] (Phạm Toàn trans., 2008).

⁸⁹ HIẾN PHÁP MỸ ĐƯỢC LÀM RA NHƯ THẾ NÀO [HOW WAS THE U.S. CONSTITUTION MADE] (Nguyễn Cảnh Bình ed., trans., 2009).

⁹⁰ See, e.g., *Chủ nghĩa Hợp hiến và các Nền Dân chủ đang Nổi lên [Constitutionalism and Emerging Democracies]* 9 (1) TẠP CHÍ ĐIỆN TỬ CỦA BỘ NGOẠI GIAO HOA KỲ (Leslie High ed., 2004); U.S. DEP'T OF ST., HIẾN PHÁP HỢP CHUNG QUỐC HOA KỲ VÀ CHÚ THÍCH [ABOUT AMERICA: THE CONSTITUTION OF THE UNITED STATES WITH EXPLANATORY NOTES] (Bureau of Int'l Info. Program trans., 2004).

either in European universities (such as France, Germany, and the Netherlands) or American law schools play an especially important role in the diffusion of new constitutional ideas in Vietnam.⁹¹ They are competent in foreign languages, particularly English, which is instrumental to their imbibing and disseminating western and global ideas. Their exchanges and publications in Vietnamese buttress senior constitutionalists' support of western and global ideas. As Mark Sidel states, Vietnamese constitutional scholars "have also explored theory and constitutional development in Europe, North America, Asia, and elsewhere."⁹² The publications of constitutionalists and lawyers in Vietnam have helped spread the constitutional government ideas and practices of major western nations.⁹³ Western liberal constitutionalism informs new discourse in Vietnam on popular sovereignty, separation of power, checks and balances, constitutional review, human rights, and judicial independence. Many Vietnamese constitutional intellectuals invoke western liberal constitutional experiences in different ways. Importantly, Vietnamese constitutional intellectuals now no longer work purely within the four walls of academia. They have engaged in constitutional dialogues with local legislators and constitution-makers, which precipitates the pluralization of their constitutional thinking. Workshops and conferences on constitutional issues have not been purely academic: law-makers and constitution-makers have often been invited to attend these fora and exchanged ideas with scholars.⁹⁴

Global constitutional ideas have also been diffused in Vietnam through transnational dialogues, especially the dialogues on human rights. International human rights laws (particularly, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights) are important to the change of Vietnamese comprehension of human rights from a specific to a more cosmopolitan posture. Both constitution-makers and public intellectuals accept the idea that constitutional rights in Vietnam must be consistent with international human rights treaties that Vietnam has signed.⁹⁵ The Vietnamese government has also engaged in transnational human rights dialogues with international bodies like the UN Human Rights Committee and with

⁹¹ I met and conversed with many of them.

⁹² SIDEL, *supra* note 69, at 25.

⁹³ See, e.g., HIẾN PHÁP: NHỮNG VẤN ĐỀ LÝ LUẬN VÀ THỰC TIỄN [CONSTITUTION: THEORY AND PRACTICE] (Nguyễn Đăng Dung ed., 2011) (containing a large collection of constitutional writings by Vietnamese scholars).

⁹⁴ I attended many of such workshops and conferences.

⁹⁵ Interviews, *supra* note 16.

the United States, the European Community, Australia, and Canada.⁹⁶ The dialogical interactions with foreign leaders in transitional fora have further engendered disharmonic visions on human rights: the socialist specific and the universalist understandings of human rights.

International legal aid programs also contribute to the diffusion of global constitutional ideas in Vietnam. As evidence of the new movement of “law and development,”⁹⁷ the United Nations Development Programme in Vietnam and some European governments have supported organizing a number of workshops on constitutional revision issues, which have created the platform for Vietnamese legislators, constitution-makers, domestic scholars, and international scholars to exchange constitutional ideas. Through this dialogical platform, global constitutional ideas have affected the thinking of local legislators, constitution-makers, and intellectuals, facilitating the emergence of alternative constitutional ideas.

Globalization has engendered what social science scholars call “social complexity.”⁹⁸ A social system becomes significantly complex “when there are strong interactions among its elements, so that current events heavily influence the probabilities of many kinds of later events.”⁹⁹ Social scientists point out that: “Social complexity generated by globalization and rapid economic change compels both the state and citizens to step outside pre-existing identities and change their thinking about which groups matter most and which groups matter least.”¹⁰⁰ Turning to the case of Vietnam, Gillespie demonstrates that the implementation of the Renovation program and the country’s integration into the global community have generated social complexity in Vietnam and stimulated the change of legal ideas.¹⁰¹ He concludes:

Economic reforms, socialization, and globalization have brought about rapid changes in most facets of Vietnamese life. New ideas compete with old, creating contradictory and sometimes confusing public discourse. Modernization theory suggests that the party-state might respond to this

⁹⁶ John Gillespie, *Human Rights as a Larger Loyalty: The Evolution of Religious Freedom in Vietnam*, 27 HARV. HUM. RTS. J. 107, 138 (2014).

⁹⁷ See generally Carol V. Rose, *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC’Y REV. 93 (1998).

⁹⁸ Gillespie, *supra* note 96, at 116.

⁹⁹ *Id.* (citing MICHAEL D. COHEN & ROBERT AXELROD, *HARNESSING COMPLEXITY: ORGANIZATIONAL IMPLICATIONS OF A SCIENTIFIC FRONTIER* 7 (1999)).

¹⁰⁰ *Id.* at 117.

¹⁰¹ Gillespie, *supra* note 96, at 131–33.

complexity by expanding its loyalties to encompass new social groups and ideas.¹⁰²

An Assembly deputy who is deeply engaged in the constitution-making process told me that the enactment of the 2013 Constitution is a response to “the development of people’s recognition,” which reflects different understandings.¹⁰³ Although the party-state in Vietnam has persisted in political monism, social complexity has compelled it to respond to pluralist ideas, pluralist interests, and demands of different social forces by accommodating alternative constitutional values. The consequence is the dialogical process of constitutional dynamics in Vietnam. Socialist ideas dialogically interact with global ideas. The party-state and the public have engaged in a constitutional dialogue to redefine and adjust fundamental constitutional aspirations that will guide the future development of the polity. This allows socialist constitutional identity to evolve.

C. *Dialogical Change of Socialist Constitutional Identity*

In Vietnam, judicial review is absent, and constitutional dialogue proceeds in popular and political fora. Even in ordinary politics, despite the state’s management, there are spaces for public discourse in which constitutional meanings and constitutional identity are defined and clarified. But the extraordinary moment of constitution-making offers great space for constitutional dialogue. In 2013, constitution-makers actively discussed substantive constitutional questions, the National Assembly’s members had different views, and they listened to the contentious debates among the public.¹⁰⁴ Disharmonic constitution-making functions as a forum for the party, the state, and the people to debate, contest, define, clarify, and develop the meanings and the contents of the Vietnamese constitutional identity. This dialogical constitution-making allows competing constitutional visions to emerge. In that forum, socialist and global constitutional vision engages in a conversation, although its outcome is decided by the socialist leadership.

The disharmonic nature of the 1992 Constitution creates the condition for continuing constitutional debates, which eventually culminated in a new round of constitution-making in 2013. The three-year (2011–2013) constitution-making process involved a constitutional dialogue in which the party-state, legislators, constitution-makers, intellectuals, lawyers, activists, and others had controversially deliberated

¹⁰² *Id.* at 134.

¹⁰³ Interview with an Assembly deputy in Hanoi, Vietnam (Jan. 2, 2017).

¹⁰⁴ *Id.*

on substantial constitutional issues.¹⁰⁵ Socialist constitutional identity is articulated, modified, and developed through constitutional dialogue in which different actors advocate alternative socialist and global constitutional visions. This is examined in detail below.

1. Constitutional Instrumentalism

The social contract theories were introduced in Vietnam by early Vietnamese constitutionalists.¹⁰⁶ Hồ Chí Minh's 1945 decree on constitution-making also adopted this view.¹⁰⁷ The 1946 Constitution incarnates this conception to some extent: its preamble acknowledges that the Vietnamese people are the author of the Constitution.¹⁰⁸ The contractual concept, however, was repudiated by the subsequent 1959, 1980, and 1992 socialist Constitutions, and class instrumentalism then dominated the Vietnamese understanding of the nature of the constitution.¹⁰⁹ In the 2000s, however, classical social contract theories witnessed a return in Vietnamese legal discourse. Especially around the wave of the constitution-making process in the 2010s, constitutional contractualism was a prevailing model for conceptualizing the nature of the constitution as discussed below.

Contractualism is espoused by not only younger constitutionalists but also senior Soviet-trained constitutional law scholars.¹¹⁰ To illustrate, criticizing the class understanding of constitution as flawed, Professor Đào Trí Úc, a senior legal scholar, opines that the constitution is the “legal contract of different social forces” and “the legal foundation of the entire society which recognizes and embodies the interests of the entire society, [and] the general interests of the people and the nation, although it always counts for the interests and the will of the leading class of the society in different historical periods.”¹¹¹ Professor Nguyễn Đăng Dung presents a more radical shift to contractualism, evident in his numerous writings during the constitution-making process. To cite an example, invoking Rousseau and Thomas Paine, he suggested that the future

¹⁰⁵ The 2013 Constitution-making process is examined in detail elsewhere. See generally Bui Ngoc Son, *Contextualizing the Global Constitution-Making Process: The Case of Vietnam*, 64 AM. J. COMP. L. 931 (2016).

¹⁰⁶ See PHAN CHAU TRINH AND HIS POLITICAL WRITINGS 138 (Vinh Sinh ed., trans., 2009); Bui Ngoc Son, *Huynh Thuc Khang's Struggle for Constitutionalism*, 6 VIET. SOC. SCI. REV. 82 (2012).

¹⁰⁷ Decree No. 14/SL, Sept. 8, 1945.

¹⁰⁸ HIẾN PHÁP [CONSTITUTION] Nov. 9, 1946, pmb. (Viet.).

¹⁰⁹ Mark Sidel, *Analytical Models for Understanding Constitutions and Constitutional Dialogues in Socialist Transitional States: Re-Interpreting Constitutional Dialogues in Vietnam*, 6 SING. J. INT'L & COMP. L. 42, 43–47 (2002).

¹¹⁰ This is based on my many exchanges with them.

¹¹¹ Đào Trí Úc, *Hiến pháp trong Đời sống Xã hội và Quốc gia [Constitution in the Life of Society and Nation]*, in BÀN VỀ LẬP HIẾN [DISCUSSIONS ON CONSTITUTION-MAKING] 12–13 (Phạm Văn Hùng, ed., 2010).

Constitution in Vietnam should be conceived of as a social contract reflecting the general will of the people, and a product of the people, not the government.¹¹² Contractualism also informs the constitutional commentaries of other Soviet-trained legal scholars.¹¹³ The contractual constitution was ardently hailed by the Vietnamese public. Official mass media enlivened the idea of contractual constitution by approvingly disseminating it from the academic to popular fora.¹¹⁴ Furthermore, popular constitutional petitions were strongly influenced by the idea of a contractual constitution.¹¹⁵

As the consequence of the concept of contractual constitution, legal scholars, lawyers, senior officials, legislators, members of the government, and retired politicians as well as members of civil society, activists, and dissidents vehemently called for the people as the constitutional author and popular ratification of a new Constitution.¹¹⁶ According to a reporter, “*despite in different fora and in different time, there is a convergence among many comments on the draft amendments to the 1992 Constitution on vesting the constitution-making power to the people.*”¹¹⁷ To illustrate, in a public meeting, a commentator named Nguyễn Hữu Chót stated:

The nature of our state is the state of the people, by the people, and for the people, confirmed in Article 2 of the [1992] Constitution . . . the practice of constitution-making

¹¹² Nguyễn Đăng Dung, *Hãy tìm cho mình một chỗ đứng trong Dự thảo Hiến pháp* [Find Your Place in the Draft Revised Constitution], BÁO LAO ĐỘNG [LABOR NEWSPAPER] (Mar. 29, 2013), <http://laodong.com.vn/laodong-cuoi-tuan/hay-tim-cho-minh-mot-cho-dung-trong-du-thao-hien-phap-108088.bld>.

¹¹³ Trần Ngọc Đường, *Mô hình Hiến pháp với việc Sửa đổi Hiến pháp 1992* [Model of Constitution and Amending the 1992 Constitution], in DISCUSSIONS ON CONSTITUTION-MAKING 13; Lê Văn Cẩm & Vũ Văn Huân, *Hiến pháp với việc Tổ chức Bộ máy Nhà nước trong Giai đoạn Xây dựng Nhà nước pháp quyền Việt Nam* [The Constitution and the Organization of State Machinery in the Period of Building Vietnam's Socialist Rule of Law State], in DISCUSSIONS ON CONSTITUTION-MAKING 194.

¹¹⁴ Viễn Sự & Mai Hương, *Hiến pháp phải là Khế ước Xã hội* [The Constitution Must be a Social Contract], BÁO TUỔI TRẺ [YOUTH NEWSPAPER] (Feb. 2, 2013), <http://tuoitre.vn/tin/chinh-tri-xa-hoi/20130223/hien-phap-phai-la-ban-khe-uoc-xa-hoi/535009.html>; Hồ Tấn Sáng, *Xây dựng Hiến pháp là tạo ra ‘khế ước xã hội’* [Constitutional Building is to create a Social Contract], BÁO ĐÀ NẴNG [DANANG NEWSPAPER] (Apr. 3, 2013), <http://baodanang.vn/channel/5399/201304/xay-dung-hien-phap-la-tao-ra-khe-uoc-xa-hoi-2231287/>.

¹¹⁵ Interview with Mr. Lê Quang Bình in Hanoi, Vietnam (Jan. 16, 2017). Mr. Bình together with other lead people submitted three constitutional petitions by civil society's organizations and groups to the Constitutional Amendment Committee. See also Bui Ngoc Son & Pip Nicholson, *Activism and Popular Constitutionalism in Contemporary Vietnam*, 41 L. & SOC. INQUIRY 114 (2016).

¹¹⁶ See, e.g., Nguyễn Lê, *Lập hiến là Quyền trực tiếp của Nhân dân* [Constitution-making is the Direct Right of the People], VNECONOMY (Feb. 20, 2013), <http://vneconomy.vn/thoi-su/lap-hien-la-quyen-truc-tiep-cua-nhan-dan-20130219030752355.htm>.

¹¹⁷ Nguyễn Lê, *Quyền Lập hiến phải thuộc về Nhân dân* [The Constituent Power Must Belong to the People], VNECONOMY (Jan. 21, 2013), <http://vneconomy.vn/thoi-su/quyen-lap-hien-phai-thuoc-ve-nhan-dan-2013012111546767.htm>.

through indirect democracy (through the National Assembly) as the current practice somewhat limits the people's power and does not [reflect] the will and the desire of the people. Therefore, the Constitution must be amended to make the constituent power [belong] to the people through referendum.¹¹⁸

It can be seen that the intellectual community and society understood the nature of the Constitution in the new contractual line. Intellectuals do realize that this is a new understanding. To illustrate, a senior intellectual named Phan Hữu Dật comments:

Formerly, there were people who understood that the National Assembly is the supreme organ in our country which possesses all legislative, executive, and judicial powers. Nowadays, there is a deeper and wider understanding that the people are the supreme organ, which stemmed from the recognition of the force of the people and the people as the base of every enterprise. . . . That means the new Constitution must guarantee the people's right to vote in referendum. Actually, this understanding is just a return to the spirit and words of the 1946 Constitution of our country.¹¹⁹

It is reported that: "During the deliberation at the National Assembly in late 2012, some delegates suggested that after being approved by the National Assembly, the Constitution must be voted in a referendum to be valid. Referendum must be determined in the Constitution as a citizen's fundamental rights."¹²⁰ My interviews also indicate that constitution-makers adopted a new understanding that the nature of the constitution is the expression of the popular will, not merely the Party's creed.¹²¹ The Government also agrees: "*It is necessary to determine that the constituent power is the expression of the people's supreme power, including the powers to initiate constitution-making, to participate in the constitutional drafting process, and finally to ratify [the constitution] in a referendum.*"¹²²

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Interviews, *supra* note 16.

¹²² *Chính Phủ Kiến nghị Quyền Lập hiến Thuộc về Nhân dân [The Government Suggests: Constituent Power Belonging to the People]*, VIETNAMNET (Jan. 4, 2013), <http://vietnamnet.vn/vn/thoi-su/116712/ chinh-phu-kien-nghi-quyen-lap-hien-thuoc-ve-nhan-dan.html> (emphasis added).

This new understanding about the nature of the constitution and constitutional authorship is significantly different from the Soviet constitutional instrumentalism. The state has begun to understand the constitution as something belonging to the people and reflecting the public will, rather than merely instrumental to its own interests. This understanding reflects the initial convergence with generic constitutional identity, a modification to the conventional instrumentalist recognition.

The regime's new understanding of the nature of the constitution also informs the reality of constitution-making to a certain extent. As I have illustrated in length elsewhere, the 2013 constitution-making process has encouraged the most participation and has been the most open process in Vietnam.¹²³ The Constitution and its formation is not merely the instrument of the party-state but becomes the base for the constitutional dialogue between the party-state and the people. This constitutional dialogue also involves the exchange of ideas and opinions about the nature of the constitution itself. In addition to practical actors, an open constitutional conversation could happen in Vietnam under the communist rule because there is a new understanding of the democratic nature of constitution among the society and the party-state.

That said, the regime does not abandon the instrumentalist identity of the socialist constitution. The party-state continues to conceive of the constitution as the instrument to express the party's policies in constitutional terms.¹²⁴ In reality, despite the open constitutional dialogue, the party-state rejected most popular constitutional submissions, suggestions, and petitions, including the call for constitutional referendum, and imposed its constitutional references at the last minute.¹²⁵

Consequently, the new 2013 constitution continues to confirm the instrumentalist essence of the socialist constitution, but incorporates new ideas reflecting a commitment to a democratic constitution. This is best expressed in its new preamble: "Institutionalizing the Political Creed of Building the Nation during period of Transition to Socialism, and inheriting the 1946 Constitution, 1959 Constitution, 1980 Constitution, and 1992 Constitution, the Vietnamese People frame, implement, and

¹²³ Bui, *supra* note 105, at 956.

¹²⁴ Interviews, *supra* note 16; *see also* National Assembly's Standing Committee, *Tờ trình số 11/TTr-UBTVQH13 ngày 02/08/2011 của Ủy ban thường vụ Quốc hội về việc triển khai thực hiện chủ trương nghiên cứu, sửa đổi, bổ sung Hiến pháp năm 1992* [The Proposal No. 11/TTr-UBTVQH13 dated Aug. 2, 2011 of the National Assembly's Standing Committee on Studying Amending the 1992 Constitution], http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUT_HAO_NGHIQUYET/View_Detail.aspx?ItemID=32&TabIndex=2&TaiLieuID=65.

¹²⁵ Bui Ngoc Son, *supra* note 105, at 971.

protect this Constitution for the objectives of wealthy people, powerful nation, democracy, justice, and civilization.”¹²⁶ On the one hand, the Constitution expressly acknowledges that it is enacted to institutionalize the Party’s socialist directions. On the other hand, the global language of “we the people” is employed to establish the commitment to popular constituent authorship.¹²⁷ So, the Constitution reflects the dissonant tension between the socialist instrumentalist and the generic understanding of the nature of the Constitution as the document of the people.

Moreover, the Constitution is conceived as an instrument for structuring the public power. On the other hand, constitution-makers tend to subject the state to constitutional constraints: “The State is organized and operates in concordance with the Constitution and the law, governs the society by the Constitution and the law.”¹²⁸ This is further strengthened by the new requirement of constitutional oath taken by senior politicians.¹²⁹

Disharmony internal to, and surrounding, the 1992 Constitution led to the identity adaption of constitutional instrumentalism in Vietnam. First, the move to constitutional contractualism is animated by the gap between the 1992 Constitution and the normative requirement of constitutionalism regarding constitutional authorship. That the Constitution stipulates that the legislature possess the constitution-making power is inconsistent with the ideal of people’s constitution-making power, and this animates the struggle for consistency. Second, the adaption to the instrumentalist identity of the Vietnamese Constitution is animated by the ambiguity and contradiction internal to the 1992 Constitution regarding the nature of the constitution and constituent power. The 1992 Constitution declared that it was the “supreme law” of the state,¹³⁰ but it was in fact enacted by an ordinary legislature (the National Assembly) and provided that this legislature has both law-making and constitution-making power,¹³¹ which is discordant with the provision on constitutional supremacy. This dissonance animated the discourse on contractual constitution and constitutional referendum, which attempts to establish the constitution as the true supreme law of the land because the constituent power is vested in the people. Third, the reemergence of constitutional contractualism is

¹²⁶ HIẾN PHÁP [CONSTITUTION] Nov. 28, 2013, pmb1. (Viet.).

¹²⁷ Tom Ginsburg, Daniel Rockmore & Nick Foti, *We the Peoples: The Global Origins of Constitutional Preambles*, 46 GEORGE WASH. INT’L L. REV. 305, 324 (2014).

¹²⁸ HIẾN PHÁP [CONSTITUTION] Nov. 28, 2013, art. 8 (Viet.).

¹²⁹ *Id.* at art 70.

¹³⁰ *Id.* at art. 146.

¹³¹ *Id.* at art. 83.

animated by the gap between constitution-making power in paper and in reality. In Vietnam, the legislature is the supreme body of constitution-making power in text, but the Party is possessor of the constitution-making power in reality. Constitution-making is initiated, controlled, and concluded by the Party. So, the call for people's ratification of the Constitution implicitly aims to curtail the Party's power in constitution-making and vest it into the hands of the people, or at least demonstrates an unsatisfactory disposition toward instrumentalist identity of the socialist constitution.

These constitutional disharmonies create the incentive for the turn to global sources. The global idea of contractual constitution is diffused in Vietnam and informs the domestic discourse on the nature of the constitution and constituent power. However, this global idea is situated in the local context. The public intellectuals and citizens draw from a wide range of sources to formulate a new understanding of the nature of the constitution: classical theories of social contract, foreign experiences, nationalist sources, and local political ideology. First, the call for contractual constitution in Vietnam is informed by social contract theories. Second, the world practice of constitutional referendum was also invoked to justify its practice in Vietnam.¹³² Third, the legacy of the 1946 Constitution was often summoned to legitimize popular constitution-making, as its provision of constitutional referendum is conceived as the embodiment of the idea of social contract and the principle of popular sovereignty.¹³³ Finally, the Party's rhetoric of "the state of the people, by the people, and for the people," was also vindicated for this purpose. So, there is a balance between global and local source in the formulation of the new understanding of the nature of the constitution and constituent power.

The 2013 constitution-making process operated as the mechanism through which politicians, officials, lawyers, legal scholars, public intellectuals, and citizens engaged in a critical dialogue about the nature of the Constitution. This constitutional dialogue was influential enough to generate the modification of the regime's instrumentalist understanding of the nature of the Constitution. The birth of the new 2013 Constitution is conceived as the "landmark in the development of understanding about the Constitution in Vietnam" and "the base for the

¹³² Conference Proceedings, Viet. Inst. for Legislative Studies, *Quy trình lập hiến của một số nước trên thế giới – Những kinh nghiệm có thể kế thừa và phát triển* [Constitution-Making Process in Some Countries in the World: The Possible Inheritance and Development of Their Experience] (Sept. 16–17, 2010).

¹³³ Interviews, *supra* note 16; see also Bui Ngoc Son, *Restoration Constitutionalism and Socialist Asia*, 37 LOY. L.A. INT'L & COMP. L. REV. 67 (2015).

continuous renovation of the understanding about the constitution.”¹³⁴ Constitution-makers believe Vietnam’s understanding of the Constitution is now closer to “international standard of a modern constitution.”¹³⁵ The language of the new 2013 Constitution indicates a modified understanding on the instrumentalist essence of the socialist constitution in Vietnam. The new commitment to popular constitutional authorship is reflective of the critical dialogue between the public and the party-state on the nature of the Constitution and constituent power.

2. Constitutional Vanguardism

The 1946 Constitution was enacted by a multi-party constituent assembly, albeit under the leadership of the Communist Party, and did not have any provision about this Party. The 1959 Constitution referred to the leadership of the Party in its preamble.¹³⁶ The 1980 Constitution firmly mandated the exclusive leadership of the Party in Article 4.¹³⁷ Article 4 of the 1992 Constitution continued to provide for the party leadership but this leadership was not exclusive, reading as follows: “The Communist Party of Vietnam, the vanguard of the Vietnamese working class and loyal representative of the interests of the working class, the working people and the whole nation, who adheres to Marxism-Leninism and Ho Chi Minh’s thought, is the force assuming leadership of the State and society.”¹³⁸ Article 4 was then described as the sacrosanct gospel and was taboo in constitutional discussion in Vietnam for many years.

However, during the 2013 constitution-making process, the party-state, public intellectuals, dissidents, and the senior members of the Party participated in a critical dialogue to redefine the meaning of party leadership. At the extreme level, radical liberals, dissidents, and even retired Party’s members imputed the shortcoming of the communist party’s leadership to the lack of political competitions and the checks and balances among different political forces.¹³⁹ They, therefore, called for a radical change in constitutional identity by establishing a multi-party

¹³⁴ Đào Trí Úc, *Hiến pháp năm 2013 và việc phát triển nhận thức về Hiến pháp* [The 2013 Constitution and The Development of the Understanding about the Constitution], NGHIÊN CỨU LẬP PHÁP, http://www.nclp.org.vn/nha_nuoc_va_phap_luat/hien-phap-nam-2013-va-viec-phat-trien-nhan-thuc-ve-hien-phap.

¹³⁵ Interview, *supra*, note 77.

¹³⁶ HIẾN PHÁP [CONSTITUTION] Dec. 18, 1959, pmbl. (Viet.).

¹³⁷ *Id.* at art. 4.

¹³⁸ *Id.*

¹³⁹ Hoàng Xuân Phú, *Đảng và Nhân dân – Vị thế bị tráo* [The Party and the People: Fraudulently Substituted Positions], CÙNG VIẾT HIẾN PHÁP (Oct. 21, 2013), <https://hienphap.wordpress.com/2013/10/21/dang-va-nhan-dan-vi-the-bi-trao-hoang-xuan-phu/>; Cù Huy Hà Vũ, *Góp Ý Kiến Về Dự Thảo Sửa Đổi Hiến Pháp Năm 1992* [Comments on the Draft Amendments to the 1992 Constitution], CÙNG VIẾT HIẾN PHÁP (Nov. 18, 2013), <https://hienphap.wordpress.com/2013/11/18/ts-cu-huy-ha-vu-gop-y-cho-du-thao-sua-doi-hien-phap-1992/>.

system. To illustrate, a petition initiated by seventy-two intellectuals, many of whom are party-members, called for free elections and political competition, implying a multi-party system.¹⁴⁰

In a public letter, Lê Hiếu Đằng—a lawyer and party member, who worked for a long time in the Vietnam Father Front (the political organization closely tied to the Communist Party)—eventually called for creation of a “Democratic and Social Party” to compete with the Communist Party, which triggered wide attention.¹⁴¹ He reasoned that economic development would create different social groups who would form different organizations to protect their interests.¹⁴² “This is the natural trend, and therefore a multi-party system is indisputable, and Article 4 of the Constitution is senseless.”¹⁴³ He also commented on the legal base for creating an alternative party: “The policy of no multi-party system is the policy of the Communist Party. There is not any law prohibiting this.”¹⁴⁴ He then suggests that the party members who no longer want to be the party’s members can “declare the abandonment of the [Communist] Party and create a new party, like the Democratic and Social Party.”¹⁴⁵ Lê Hiếu Đằng publicly declared himself to be an apostate in December 2013, shortly before he passed away.¹⁴⁶

The proponents of a multi-party system do not repudiate the role of the Communist Party, but instead insist that if the Party aspires to lead the state and the society on the legitimate base, it must participate in equal political competitions through free elections and be checked and balanced by other parties. An incumbent senior official agreed with the creation of the new party, but stated that the new party will not oppose, but cooperate with, the Communist Party “to build democracy for Vietnam.”¹⁴⁷

However, the mainstream trend is not to radically change the constitutional identity regarding the Communist Party, but to modify it by reconciling the disharmony between party leadership and people’s

¹⁴⁰ *Kiến Nghị Về Sửa Đổi Hiến Pháp 1992* [Petition on Amending the 1992 Constitution], BAUXITE VIỆT NAM (Apr. 14, 2013), <http://boxitvn.blogspot.sg/2013/01/kien-nghi-ve-sua-oi-hien-phap-1992.html>.

¹⁴¹ *Kêu Gọi Thành Lập Chính Đảng Mới Ở VN* [Call for Creation of a New Party in Vietnam], BBC VIETNAMESE (Aug. 16, 2013), http://www.bbc.com/vietnamese/mobile/vietnam/2013/08/130816_vietnam_new_party.shtml.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ An Nguyen & Joshua Lipes, *Two Veteran Members Quit Vietnamese Communist Party*, RADIO FREE ASIA (Dec. 6, 2013), <http://www.rfa.org/english/news/vietnam/party-12062013165627.html>.

¹⁴⁷ Đào Trí Úc, *supra* note 134.

sovereignty. To illustrate, consider the notable comment by former President of the National Assembly, Nguyễn Văn An. He boldly points out that the party has interfered in state governance and even violated the Constitution.¹⁴⁸ He stated that the reality that the General Secretary of the Party heads the Central Military Commission, the highest Party organ on military issues in Vietnam, is unconstitutional because the 1992 Constitution provides that the President of State is the commander of the military force. He then suggested that a law pertaining to the Party should be enacted to separate party leadership from state governance and to ensure the constitutionality and legality in the party's action.¹⁴⁹

Many Party scholars share the view that the new Constitution should mandate the enactment of law pertaining to the Party. This is meant to reconcile the disharmony between the principle of popular sovereignty and the principle of party leadership. The idea is that the leadership of the Communist Party must be constrained by law to avoid party arbitrariness and to make the Party accountable to the people. Consider, for example, the debate on the draft Constitution in a meeting of the Vietnam Father Front.¹⁵⁰ A senior member named Phạm Xuân Hãn agrees on the constitutional mandate of the party leadership, but suggests that this leadership must be “guaranteed by law and defined by law” to ensure that the Party “is under the people’s supervision” and “is accountable to the people in its decisions.”¹⁵¹ He further underlines that: “This is not a new issue. Many cadres and party members have expressed this thought. In the trend of perfecting the socialist rule of law state, we think that this is the fundamental issue of political transparency.”¹⁵² Another senior member, Hoàng Thái, concedes, stating that: “Every organ has a law to regulate it. The Party is the core of the political system but there is no law about it. This is unacceptable. There should be such law so that the Party will operate publicly and transparently, avoiding arbitrariness.”¹⁵³ In an article published in official media, Bùi Đức Lại, who used to work as a senior specialist for the Party, suggests that the class nature and the ideological foundation of the Communist Party should be removed from the Constitution because these issues should be provided in the Party’s constitution rather than the

¹⁴⁸ Nguyen & Lipes, *supra* note 146.

¹⁴⁹ Nguyễn Văn An, *Nguyên Chủ tịch Quốc hội bàn về phương thức cầm quyền của Đảng* [Ex-President of the National Assembly Comments on Party’s Leadership], TUAN VIETNAM (Dec. 6, 2010), <http://tuanvietnam.vietnamnet.vn/2010-12-05-nguyen-chu-tich-quoc-hoi-ban-ve-phuong-thuc-cam-quyen-cua-dang>.

¹⁵⁰ Lê Nhung, *Cần có luật về Đảng* [There Should be a Law on the Party], BÁO VIETNAMNET (Feb. 19, 2013), <http://vietnamnet.vn/vn/chinh-tri/109512/can-co-luat-ve-dang.html>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

State's Constitution.¹⁵⁴ This is actually meant to abolish the constitutional establishment of Marxist ideology as the dominant ideology of the polity.

Constitution-makers did receive radical suggestions, but their debates focused on the accountability of the Party.¹⁵⁵ Consequently, the 2013 Constitution rejects the call for a multi-party system and reaffirms the Party's leadership and vanguard role in Article 4.¹⁵⁶ But, in order to enhance the legitimacy of this controversial Article and assuage the forces which sought to introduce greater disharmonies and challenge the party leadership, it adopts new ambiguous commitments. First, it stipulates the Party's accountability to the public in this way: "The Communist Party of Vietnam maintains a close tie with the People, serves the People, submits to People's supervision and is accountable to the People in its decisions."¹⁵⁷ Second, the Constitution is committed to the constitutionality and legality of the Party's actions, providing that: "All organisations and members of the Communist Party of Vietnam operate within the framework of the Constitution and the law."¹⁵⁸ However, the Constitution does not articulate mechanisms to hold the Party accountable to the public and check the constitutionality and legality of the Party's power. So, the commitments to the Party's accountability and constitutionality, which reflected the public criticism and demand, are ambiguous and discordant with the persistent mandate of the Party's leadership. In particular, the constitutional aspirations of popular and legal checks on the Party's power contradict the constitutional mandate that the Party leadership be subject to the supervision of the people.

Another important development concerns Article 6 of the Constitution, which provides that: "The people practice the state power under the forms of direct democracy and indirect democracy through the National Assembly, the People's Councils and other state agencies."¹⁵⁹ This commitment to democracy is dissonant with the constitutionally established monopolist power of the Party. However, this commitment in theory allows the people to check the Party's policies embodied in the law through their representatives and forms of direct democracy like referendum.

¹⁵⁴ Bùi Đức Lại, *Hiến pháp nên đề cập về Đảng thế nào?* [How should the Constitution Provide for the Party?], BẢO VIỆT NAMNET (Jan. 23, 2013), <http://vietnamnet.vn/vn/chinh-tri/106462/hien-phap-nen-de-cap-ve-dang-the-nao-.html>.

¹⁵⁵ Interview, *supra* note 77.

¹⁵⁶ HIẾN PHÁP [CONSTITUTION] Nov. 28, 2013, art. 4 (Viet.).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at art. 8.

The condition for the modification to the identity of vanguardism is that the 1992 Constitution is a disharmonic constitution. First, the fact that the 1992 Constitution entrenched the leadership of the Communist Party is at odds with the requirement of constitutional government created by democratic process, like free and equal election. Second, the constitutional condition for emergence of dialogue about Article 4 on the leadership of the Communist Party is in disharmony with the preceding Article 2. Article 2 confirms the principle of popular sovereignty: “All power belongs to the people.”¹⁶⁰ Third, the gap between constitutional commitment on party vanguardism and the social reality creates the opportunity for dialogue about the legitimacy and meaning of Article 4. The 1992 Constitution removed the confirmation of the “exclusive leadership” Communist Party, but the single domination of the Communist Party is the living constitutional norm in Vietnam as there are not any new parties that can be established. This has also generated alternative understandings of political competition and multi-party election, which emerged during the constitutional consultation process. Moreover, while the Constitution confirms the Party as a vanguard force, the social reality reveals a discordant picture. In its 2011 XI National Congress, the Party itself realized the gravity of its actual leadership: “Our nation has still confronted with numerous great challenges The risk of further lagging behind economically compared to many nations in the region and in the world is apparent. The situation of degradation in political ideology, morality, and life-style of a negligible part of officials and party members is serious, which is closely related to the evils of authoritativeness, corruption, and extravagance.”¹⁶¹ This opened the door for critical discussion on the legitimacy of Article 4. In reality, the Party does not merely “lead” the state but interferes in the state’s affairs, which engenders rethinking about the meaning of party leadership.¹⁶²

The above constitutional inconsistencies inspire domestic actors to look at global sources. Several global ideas regarding democratic government, political accountability, and free and equal elections have been diffused in Vietnam and have complicated the disharmonic constitutional discussions on the Party. However, these global ideas are

¹⁶⁰ HIẾN PHÁP [CONSTITUTION] Apr. 15, 1992, art. 2 (Viet.).

¹⁶¹ Communist Party of Vietnam Online Newspaper, *Báo cáo chính trị của Ban Chấp hành Trung ương Đảng khoá X tại Đại hội đại biểu toàn quốc lần thứ XI của Đảng* [Political Report of The 10th Party Central Committee at the 11th Party National Congress], VIET NAM GOV'T PORTAL, <http://chinhphu.vn/portal/page/portal/chinhphu/NuocCHXHCNVietNam/ThongTinTongHop/noidungvankiendaihoidang?categoryId=10000716&articleId=10038382>.

¹⁶² Nguyễn Hữu Đông, *Đổi mới mô hình “Đảng lãnh đạo Nhà nước” ở nước ta hiện nay* [Reforming The Model “The Party Leading the State” in Our Country Today], VIỆN NGHIÊN CỨU LẬP PHÁP (Mar. 12, 2012), http://vnclp.gov.vn/ct/cms/tintuc/Lists/NhaNuocVaPhapLuat/View_detail.aspx?ItemID=19.

balanced with local conditions and intellectual sources. For example, domestic corruptions among Party members are important local factors that drive the discourse of constitutional restraints on the Party's power. Moreover, the call for free elections and a multi-party system are justified by both global norms and the local constitutional legacy concerning the 1946 Constitution which embodied these norms.¹⁶³

Constitution-making operates as the mechanism for the party, the state, and the people to engage in a disharmonic constitutional dialogue to redefine the meaning of party leadership. There is a dialogical interaction between the socialist specific principle of party vanguardism and the generic ideas of democracy, free election, and accountability. Consequently, the identity of party vanguardism remains but is modified by new commitments to the Party's accountability and constitutional restraints on the Party. This adaption to the identity of party vanguardism is reflective of the new emerging understanding about the Party's leadership within Party intellectuals and society. Practically, this is instrumental to reinforcing the legitimacy of the Party's leadership. The continued disharmony internal to Article 4 and the continued gap between the commitment to the Party's vanguard and the social reality (especially serious corruption among Party members) creates continually shifting dynamics regarding the identity of constitutional vanguardism in Vietnam.

3. "Democratic Centralism"

The 1946 Constitution established a Montesquiean tripartite government, including the Government, People's Parliament, and an independent judiciary.¹⁶⁴ The socialist Constitutions of 1959, 1980, and 1992 repudiated the western theory of separation of powers in favor of the Leninist theory of "democratic centralism," expressed in the constitutional field as "concentration" or "unity" of power.¹⁶⁵ The Leninist constitutional structure established by the 1992 Constitution included: the National Assembly, the Government, the President of State, the people's courts, and the people's procuracies. These institutions are responsible for, and report to, the National Assembly as the supreme body.¹⁶⁶

During the centrally planned period and the early *Đổi mới* period in the 1980s, the Leninist constitutional structure in Vietnam had been

¹⁶³ See Bui Ngoc Son, *supra* note 133, at 67.

¹⁶⁴ See SIDEL, *supra* note 69, at 30–37.

¹⁶⁵ *Id.* at 51–60, 70–79, 96–107.

¹⁶⁶ *Id.* at 96–107.

construed through the lens of the so-called “socialist concentration of power,” which holds that state power in socialist Vietnam is concentrated in the hands of one institution, namely the National Assembly—the popularly elected legislature—located at the apex of the pyramidal structure of power while the Government (the executive) is subordinate to it.¹⁶⁷ The reformist discourse in the 2010s, however, moved to employ the nomenclatures of “unity of power” and “distribution of power.”¹⁶⁸ Yet, this is not simply the change of habitual use of phraseology, but indicates the change of substantial connotations. The alternative reconstruction of “unity of power” claims that state powers cannot be centralized in any single institution but are “united at the people” in the sense that the powers are legitimately emulated from the people and are exercised for their general interests.¹⁶⁹ So, there has been a conceptual shift from institutional to popular base in legitimatizing unitary power.

The alternative interpretation of unitary power facilitates institutionally decentralized power, giving rise to the debate on “distribution of state power” conceived as “the reasonable element” of the Western theory of the separation of power.¹⁷⁰ Constitutional law scholars call for clearer definition of the National Assembly as the holder of the legislative power, the Government as the holder of the executive power, and the courts as the holders of the judicial power, *à la Montesquieu*.¹⁷¹ This is actually the call for eliminating the concentration of powers (including the executive and judicial powers) in the hands of the National Assembly and ensuring the independence of state institutions in exercising their allocated powers. It bears noting the particular implication of this constitutional proposal for judicial independence,

¹⁶⁷ Nguyễn Xuân Tùng, *Tập quyền XHCN: Một học thuyết đã Lỗi thời?* [Socialist Concentration of Power: An Outdated Theory?] (Mar. 1, 2012), <http://moj.gov.vn/ct/tintuc/Pages/nguyen-cuu-trao-doi.aspx?ItemID=4450>.

¹⁶⁸ See Nguyễn Đăng Dung, *Quyền lực Nhà nước là Thống nhất vào đâu và tại sao đã Thống nhất lại còn Phân công?* [Where is the State Power United at and Why Can Unity and Distribution Co-exist?], 8 TẠP CHÍ NHÀ NƯỚC VÀ PHÁP LUẬT 3 (2010); LÊ QUỐC HÙNG, THỐNG NHẤT PHÂN CÔNG VÀ PHỐI HỢP QUYỀN LỰC NHÀ NƯỚC Ở VIỆT NAM [UNITY, DISTRIBUTION, AND COOPERATION OF STATE POWER IN VIETNAM] (2004).

¹⁶⁹ Đào Trí Úc, *Sửa đổi Hiến pháp năm 1992 và cơ chế kiểm soát quyền lực ở Việt Nam* [Amending the 1992 Constitution and Mechanisms for Controlling the Power in Vietnam], TẠP CHÍ CỘNG SẢN (June 4, 2013), <http://www.tapchicongsan.org.vn/Home/du-thao-sua-doi-nam-1992/2013/21845/Sua-doi-Hien-phap-nam-1992-va-co-che-kiem-soat-quyen.aspx>.

¹⁷⁰ ĐÀO DUY TÙNG, QUÁ TRÌNH HÌNH THÀNH CON ĐƯỜNG ĐI LÊN CHỦ NGHĨA XÃ HỘI Ở VIỆT NAM [THE FORMATION PROCESS OF THE PATH TO SOCIALISM IN VIETNAM] 209 (2004).

¹⁷¹ Nguyễn Như Phát, *Đánh giá về Tổ chức Quyền lực Nhà nước theo Hiến pháp 1992 (Sửa đổi, bổ sung năm 2001)* [Assessments on Organization of State Power According to 1992 Constitution (amended in 2001)], 8 TẠP CHÍ NHÀ NƯỚC VÀ PHÁP LUẬT 5–6 (2012); Bùi Xuân Đức, *Các Quy định về Bộ máy Nhà nước Trung ương Trong Dự thảo Sửa đổi Hiến pháp 1992 Cần Thể hiện Đầy đủ hơn sự Phân công, Phối hợp và Kiểm soát Giữa các Cơ quan Nhà nước* [The Provisions on Central State Machinery in the Draft Amendment to the 1992 Constitution Need More Elaboration of Distribution, Cooperation, and Control Among State Bodies], 4 TẠP CHÍ NHÀ NƯỚC VÀ PHÁP LUẬT 11–13 (2013).

which is motivated by the global discourse and practice of judicial power and judicial review. The mobilization for the real judicial power practiced by the courts implies that the functions of constitutional supervision and constitutional interpretation have been misallocated to the National Assembly and its Standing Committee and should be reallocated to the judicial site.¹⁷²

But the most important thing in the 2013 constitutional dialogue on state power is the call for a new principle of “controlling the state power,” which mirrors the western principle of checks and balances.¹⁷³ In the 2000s, Vietnam saw special concerns of “restraining state powers” or “controlling state power.”¹⁷⁴ As the reflection of the practical and academic demands, the Communist Party in the 11th Convention in 2011 has remarkably introduced the new principle that: “State power is unitary with distribution, co-ordination, and *control* among state organs in exercising legislative, executive and judicial powers.”¹⁷⁵ The Party has accepted the constitutionalist idea of inter-control of the public powers, an intriguing development of constitutional ideology in a single party polity like Vietnam. In reflection of the party’s orientation, the Constitutional Proposal suggests that the future Constitution should clearly define the mechanism of control among state bodies in exercising legislative, executive and judicial powers.¹⁷⁶ During the time of the constitution-making processes, various members of the citizenry were inspired by the endorsement of mechanisms for controlling state bodies by the party and constitution-makers. Particularly when the draft constitution was released for public comments, scholars, National Assembly delegates, and citizens vehemently discussed different mechanisms for mutual control among the three branches of the state.¹⁷⁷

¹⁷² Ngo Duc Manh, *Giai thích pháp luật là bảo đảm tinh tối cao của hiến pháp* [Legal Interpretation and the Supremacy of the Constitution], 11 TẠP CHÍ NGHIÊN CỨU LẬP PHÁP 5 (2008).

¹⁷³ In comparative constitutional law literature the language of “controlling” is also employed to describe the nature of constitutionalism. See, e.g., SCOTT GORDON, CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY (1999).

¹⁷⁴ See NGUYỄN ĐĂNG DUNG, SỰ HẠN CHẾ QUYỀN LỰC NHÀ NƯỚC [RESTRAINING STATE POWER] (2004); TRỊNH THỊ XUYỀN, KIỂM SOÁT QUYỀN LỰC NHÀ NƯỚC - MỘT SỐ VẤN ĐỀ LÝ LUẬN VÀ THỰC TIỄN Ở VIỆT NAM HIỆN NAY [CONTROLLING STATE POWER: SOME THEORETICAL AND PRACTICAL ISSUES] (2008).

¹⁷⁵ See Communist Party of Vietnam Online Newspaper, *supra* note 161.

¹⁷⁶ Nguyễn Sinh Hùng, *Tờ trình Về Dự thảo sửa đổi Hiến pháp năm 1992* [Proposal on The Draft Amendments to the 1992 Constitution], Doc. No. 194/TTr-UBDTSĐHP (Oct. 19, 2012), http://duthaonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/View_Detail.aspx?ItemID=32&TabIndex=2&TaiLieuID=848.

¹⁷⁷ See, e.g., Nguyễn Đăng Dung, *Hiến pháp Phải là Văn bản Kiểm soát quyền lực Nhà nước* [The Constitution Must be the Document to Control the State Power], TẠP CHÍ KIỂM SÁT, <http://vks.hagiang.gov.vn/viewtopic/phap-luat-58/GS-TS-18.html>; Bảo Linh, *Ba câu hỏi về Kiểm soát Quyền lực* [Three Questions on Controlling the State Power], BÁO VIỆT NAM NET (Mar. 6, 2013), <http://vietnamnet.vn/vn/chinh-tri/111469/3-cau-hoi-ve-kiem-soat-quyen-luc.html>; *Dự thảo Hiến pháp*

To justify the controlling of the state power, some liberal constitutionalists, such as Nguyễn Đăng Dung, underlined the imperative to limit arbitrary power and ensure government accountability, generated by concern for the human inclination to abuse power.¹⁷⁸ Other scholars, such as Trần Ngọc Đường, Đinh Xuân Thảo, and Đào Trí Úc, however, explain that controlling the state power stems from both negative and positive impetuses to limit misuse of power, and to promote effective and efficient state functions.¹⁷⁹ This kind of discourse resonated with the international debate on negative and positive constitutionalism.¹⁸⁰

The purpose of controlling state power has been canvassed. Some liberal constitutionalists emphasized the necessity of protecting individuals' rights.¹⁸¹ Others are more concerned with the public interests, rationalizing that to ensure that the state will practice the delegated power for their interests, the state power must be controlled.¹⁸²

Alternative mechanisms for controlling the state power have been discussed. The legal mechanism for controlling the state power by a special body of judicial review has also been hotly debated.¹⁸³ In addition, a number of political mechanisms have been proposed, including internal mutual control among state bodies and external popular controls through election, removal of representatives, referendum, and the press. This Vietnamese discourse on controlling the

sửa đổi: Vẫn chưa rõ cơ chế kiểm soát quyền lực [Draft Revised Constitution: Mechanisms for Controlling the Power are not Clear], DỰ THẢO ONLINE, http://duthaoonline.quochoi.vn/DuThao/Lists/TT_TINLAPPHAP/View_Detail.aspx?ItemID=977.

¹⁷⁸ See Nguyễn Đăng Dung, *Hiến pháp phải là Văn bản Kiểm soát Quyền lực Nhà nước* [The Constitution Must be a Document to Control the State Power] 4 TẠP CHÍ NHÀ NƯỚC VÀ PHÁP LUẬT 10 (2012); Đoàn Loan, *Kiểm soát quyền lực nhà nước để hạn chế lạm quyền* [Controlling the State Power To Limit Misuse of Power], VNEXPRESS (Nov. 5, 2013), <http://vnexpress.net/tin-tuc/thoi-su/kiem-soat-quyen-luc-nha-nuoc-de-han-che-lam-quyen-2905648.html>.

¹⁷⁹ See Đinh Xuân Thảo, *Vấn đề Kiểm soát Quyền lực trong Dự thảo sửa đổi Hiến pháp 1992* [The Issue of Controlling Power in the Draft Amendments to the 1992 Constitution], 6 TẠP CHÍ NHÀ NƯỚC VÀ PHÁP LUẬT 3–4 (2013); Trần Ngọc Đường, *Kiểm soát quyền lực nhà nước trong xây dựng Nhà nước pháp quyền xã hội chủ nghĩa Việt Nam* [Controlling the State Power in the Construction of the Vietnam's Socialist Rule of Law State], 16 TẠP CHÍ NGHIÊN CỨU LẬP PHÁP 5–9 (2011); Đào Trí Úc, *supra* note 169.

¹⁸⁰ For the distinction of negative and positive constitutionalism in general, see STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1995).

¹⁸¹ See Nguyễn Đăng Dung, *supra* note 178, at 13.

¹⁸² See Trần Ngọc Đường, *supra* note 179, at 5–9; Đào Trí Úc, *supra* note 169. See also Lê Văn Cẩm & Vũ Văn Huân, *Cơ chế Kiểm soát Quyền lực Nhà nước và Một số Kiến giải Lập hiến trong Giai đoạn Xây dựng Nhà nước Pháp quyền Việt Nam* [Mechanisms for Controlling the State Power and Some Constitutional Suggestions in the Period of Construction of Vietnam's Rule of Law State], 6 TẠP CHÍ NHÀ NƯỚC VÀ PHÁP LUẬT 14 (2012).

¹⁸³ See Bui Ngọc Sơn, *The Discourse of Constitutional Review in Vietnam*, 9 J. COMP. L. 191 (2014) (examining this debate in detail).

state power aligns with the international debate on political and legal constitutionalism.¹⁸⁴

Members of the National Assembly also strongly supported the new principle of controlling state power but were confused about how to materialize it in the new constitution.¹⁸⁵ A delegate agreed that the incorporation of the new principle of controlling state power is necessary, but he stated “to control whom” and “how to control” are still open questions.¹⁸⁶ On these questions, another delegate distinguishes internal and external controls, “[w]e understand that internal control is the control practiced by state organs and external control is the control practiced by the people and the society. Basically, the contents of the draft Constitution have properly expressed this principle.”¹⁸⁷ But according to another delegate, controlling state power means control among the three state powers: the legislative, executive, and judicial powers.¹⁸⁸

Consequently, the new Constitution continues but modifies the identity of the Leninist centralized constitutional structure. On the one hand, it continues to reject the Montesquieu principle of separation of power. This is due to the ideological practice that the party-state adheres to—using the principle of unity to maintain the socialist identity of the polity. Moreover, that rejection also has a practical purpose. Although the Communist Party can play the leading role in the separationist polity, it rejects the separation of powers because of the practical concern that separation of powers will invite greater political conflicts, which may lead to political maelstrom. This is complicated by rumors about internal conflicts among top political leaders.¹⁸⁹ In addition, the separation of powers may not deprive the Party power as a whole, but may threaten it in some respects. For example, the Party may lose control of the judiciary in a separationist polity.

On the other hand, the Constitution introduces new visions disharmonic with the Leninist unitary constitutional structure. First, although the Constitution rejects the doctrine of the separation of powers, it continues the principle of “distribution of power” established by the

¹⁸⁴ For the distinction between legal and political constitutionalism, see generally RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM* (2007).

¹⁸⁵ Lam Nguyễn, *Đại biểu băn khoăn về kiểm soát quyền lực Nhà nước* [*Delegates Are Confused about Controlling the State Power*], VIETSTOCK (Nov. 18, 2012), <http://vietstock.vn/PrintView.aspx?ArticleID=248571>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Le Hong Hiep, *Power Shifts In Vietnam's Political System*, EAST ASIA FORUM (Mar. 5, 2015), <http://www.eastasiaforum.org/2015/03/05/power-shifts-in-vietnams-political-system/> (noting “the ongoing power struggle within Vietnam’s top political elites”).

1992 Constitution and goes further to employ Montesquieu's language to clearly define the public power. For the first time, the Constitution clearly vests legislative power to the National Assembly, executive power to the Government, and judicial power to the courts.¹⁹⁰ Courts also feature, for the first time, the constitutional function of protecting human rights and justice.¹⁹¹ Moreover, judicial independence is stipulated in the provision that: "The judges and assessors are independent and shall only obey the law; interference with the trials of the judges and assessors by bodies, organisations, and individuals is strictly prohibited."¹⁹² Second, the Constitution introduces the new principle of mutual control among the three branches of power: "The state power is unified and distributed to state agencies which coordinate with and control one another in the exercise of the legislative, executive and judicial powers".¹⁹³ Although constitution-makers could not reach an agreement about the mechanisms of controlling state power, they established this as a constitutional principle and let statutes provide detailed mechanisms.¹⁹⁴

Disharmony in the 1992 Constitution led to modification of the identity of constitutional centralism. First, the principle of unitary power adopted in this Constitution and its lack of institutional checks and balances is discordant with the normative requirement of constitutionalist polity in which power is separated and checked to prevent arbitrariness, which triggers the debate on distributed and controlled power. Second, this Constitution adopted competing organizational principles: the principle of unity of power informed by socialist constitutional thinking and distribution of powers informed by western doctrine of separation of power. Yet, distribution of state power has only been enshrined in the revised 1992 Constitution as a principle and has not yet been reified in concrete institutional designs. This internal disharmony resulted in constitutional dialogue in the 2010s regarding a clearer definition and allocation of the powers of the three state branches. Furthermore, the fact that the Constitution adopted competing commitments both to the rule of law (which implies legal restraint on the public power) and unified state power and party leadership (which conversely implies consolidating power) provides space for dialogue on distributed and controlled power.

Third, the gap between organizational commitment and reality encourages dialogue on distributed and controlled power. To illustrate,

¹⁹⁰ HIẾN PHÁP [CONSTITUTION] Nov. 28, 2013, arts. 69, 94, 102 (Viet.).

¹⁹¹ *Id.* at art. 102.

¹⁹² *Id.* at art. 103.

¹⁹³ *Id.* at art. 2.

¹⁹⁴ Interview, *supra* note 103.

while the 1992 Constitution stipulated to distributed power, in reality, the power is concentrated in the hands of the Party, and the National Assembly is the forum for the Party to centralize power. This reality triggers the debate on distributed power, which is in fact meant to separate the Party power from the state power. The logic is that when the powers of different state branches are clearly defined, the intervention of the Party into state activities will be limited, as state agencies will operate according to their autonomous constitutionally defined spheres. In addition, the increasing number of serious corruption cases and similar public power abuses caused considerable popular dissatisfaction,¹⁹⁵ which is disharmonic with the constitutional commitment to “combating against corruption, misspending and all manifestations of bureaucratism, arrogance, and authoritarianism.”¹⁹⁶ The call for controlled power reflects this social malaise.

Those constitutional disharmonies incentivize different actors to seek inspiration from global sources. The global ideas of separation of powers and limited government have been diffused in Vietnam and induce disharmonic constitutional debates. However, these global ideas are situated in the local context. The ideas of the separation of powers and limited power are balanced with the local ideas of unity of powers and cooperation of powers. Consequently, the public power is both distributed and concentrated. The National Assembly remains the supreme body, and independence among the state bodies, including judicial independence, is not encouraged. The state bodies can mutually check, but they must cooperate with each other, and such aggressive mechanisms of checks and balances, such as the ability to veto, impeachment, and judicial review are not provided.

The constitution-making process allows different actors within the polity to not only discuss detailed issues pertaining to institutional design, but also to critically rethink, redefine, and adapt constitutional postulates fundamental to the overall constitutional structure. The socialist principle of unitary power remains the hegemonic feature of the regime, but it is balanced with generic ideas of separated and limited government. The new Constitution is reflective of the ideational adjustment to constitutional structure and includes disharmonic commitments to unitary, distributed, and controlled power, giving rise to the continuous evolution of the identity of the socialist constitutional structure.

¹⁹⁵ Dien Luong, *Vietnam's Corruption Problem*, THE DIPLOMAT (Feb. 29, 2016), <http://thediplomat.com/2016/02/vietnams-corruption-problem/>.

¹⁹⁶ HIẾN PHÁP [CONSTITUTION] Apr. 25, 1992, art. 8 (Viet.).

4. Rights Statism and Universalism

The generic idea of fundamental rights was diffused in Vietnam during the early twentieth century.¹⁹⁷ The 1946 Constitution guaranteed fundamental rights familiar in Western constitutions.¹⁹⁸ The subsequent socialist constitutions of 1959, 1980, and 1992 provided even more generous fundamental rights but under the influence of Marxist and Soviet rights statism.¹⁹⁹

During the Vietnamese constitutional dialogue in the 2010s, the alternative vision of naturalist human rights emerged, challenging the statist regime of human rights.²⁰⁰ Constitutional law scholars share the universalist position that human rights are natural rights recognized and protected by the state, not rights the state has granted to the citizens.²⁰¹ Social actors also strongly mobilized for a new human rights regime consistent with universal standards.²⁰²

Importantly, political leadership and constitution-makers also adopted a universal outlook on human rights. A member of the Constitutional Amendment Committee told me that the enactment of the new Constitution is necessary to reflect the state's new understanding about human rights, which is that human rights are no longer sensitive issues and that human rights are different from citizen's rights.²⁰³ Political leaders and constitution-makers agreed that constitutional rights provisions must be revised in concordance with international human rights laws.²⁰⁴ The group of constitutional drafters responsible for

¹⁹⁷ Christopher E. Goscha, *The Global Origins of Early Vietnamese Republicanism, Part II*, IMPERIAL & GLOBAL FORUM (Apr. 1, 2014), <https://imperialglobalexeter.com/2014/04/01/the-global-origins-of-early-vietnamese-republicanism-part-ii/> (noting "how the writings of the fathers of modern Republicanism, Montesquieu and Rousseau, entered Vietnamese minds.").

¹⁹⁸ Bui Ngoc Son, *The Global Origins of Vietnam's Constitutions: Text in Context*, 2017 ILL. L. REV. 525, 535 (2017).

¹⁹⁹ *Id.* at 535–44. See also SIDEL, *supra* note 69, at 375.

²⁰⁰ Gillespie, *supra* note 96, at 112; Bui Hai Thiem, *Deconstructing the 'Socialist' Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam's Constitutional Reform Process*, 36 CONTEMP. S.E. ASIA 77 (2014).

²⁰¹ Phạm Hữu Nghị, *Về Định hướng Sửa đổi, Bổ sung các quy định của Hiến pháp năm 1992 về Quyền con người, Quyền và Nghĩa vụ Cơ bản của Công dân* [On the Orientations to Amend the 1992 Constitution's Provisions on Human Rights and Citizen's Fundamental Rights and Duties] 10 TẠP CHÍ NHÀ NƯỚC VÀ PHÁP LUẬT 12 (2012); Nguyễn Như Phát, *Một số Định hướng và Phương pháp ghi nhận Quyền Cơ bản của Công dân, Quyền Con người trong Hiến pháp sửa đổi* [Some Orientations and Methods to Provide for Citizens' Fundamental Rights and Human Rights in the Revised Constitution] 2 TẠP CHÍ NHÀ NƯỚC VÀ PHÁP LUẬT 3 (2012); Thanh Lưu, *Hiến pháp Không phải để Ban on cho Nhân dân* [The Constitution is not Used to Bestow Honor to the People] BÁO PHÁP LUẬT TPHCM (Sept. 3, 2012), <http://phapluattp.vn/thoi-su/chinh-tri/hien-phap-khong-phai-de-ban-on-cho-nhan-dan-39991.html>.

²⁰² Interviews, *supra* note 16. See also Bui & Nicholson, *supra* note 102; Bui Ngoc Son, *Constitutional Mobilization* (forthcoming 2017) (on file with author).

²⁰³ Interview, *supra* note 77.

²⁰⁴ Interviews, *supra* note 16.

drafting the bill of rights even compared word for word to the Vietnamese bill against the various international human rights treaties Vietnam has signed to ensure the bill language is consistent with international obligations.²⁰⁵ When the proposed bill of rights was presented to the Constitutional Amendment Committee, it was quickly adopted.²⁰⁶ On January 1, 2013, during the online dialogue between the Government and the people on the revised draft constitution, which was released to the public for comments, Vietnamese constitution-makers explained the universalist view adopted to write new constitutional rights provisions, stating that: “Sixteen provisions on human rights are supplemented and applied to everybody residing the territory of Vietnam. . . . Previously, to talk about human rights was sensitive. Now, the state considers human rights universal values naturally inherent to human, which the Vietnamese people have the right to enjoy.”²⁰⁷

Consequently, the 2013 Constitution modified the identity of human statism. The Constitution attempts to establish a human rights regime in concordance with universal human rights standards. To illustrate, Article 14 attempts to dispel the image of statist rights by providing that human rights in Vietnam “are acknowledged, respected, and protected in accordance with the Constitution and the law.”²⁰⁸ This provision tries to demonstrate a cosmopolitan vision of human rights as natural rights respected by the state, not the rights “provided for” by the state as in the previous 1992 Constitution.²⁰⁹ Moreover, in a number of provisions concerning specific individual rights, the subjects of rights are referred to as “everyone” rather than “citizens” as in the previous constitutions, indicating that rights are valid not because the subject is a member of the state but because he or she is a member of the *Homo sapien* community. The Constitution also includes new rights in accordance with international human rights laws, such as the right to life, the right to presumption of innocence, and the right to live in a healthy environment.²¹⁰

The 2013 Constitution also established for the first time the principle of balancing, “an inherent part of the near-universal general conception of a constitutional right as an important prima facie claim that

²⁰⁵ Interview with a National Assembly officer in Hanoi, Vietnam (Jan. 13, 2017).

²⁰⁶ Interviews, *supra* note 16.

²⁰⁷ Chung Hoàng, *Quyền Con người Không còn là Chuyện Nhạy cảm [Human Rights Have No Longer Been a Sensitive Issue]*, VIETNAMNET (Jan. 23, 2013), <http://vietnamnet.vn/vn/chinh-tri/106613/quyen-con-nguoi-khong-con-la-chuyen-nhay-cam.html>.

²⁰⁸ HIẾN PHÁP [CONSTITUTION] Nov. 28, 2013, art.14 (Viet.).

²⁰⁹ HIẾN PHÁP [CONSTITUTION] Apr. 25, 1992, art. 50 (Viet.) (“In the Socialist Republic of Vietnam, human rights . . . are provided for by the Constitution and the law.”).

²¹⁰ *Id.* at art. 19, 31, 43 (1992) (Viet.).

nonetheless can, in principle, be limited or overridden by non-constitutional rights claims premised on conflicting public policy objectives.”²¹¹ Article 14 provides that: “Human rights and citizens’ rights shall only be restricted when prescribed by statute in imperative circumstances for the reasons of national defence, national security, social order and security, social morality and community’s well-being.”²¹² The adoption of this near-universal principle of constitutional balancing attempts to limit the arbitrary restrictions of human rights by administrative authorities, which have been subject to domestic and international criticisms, by mandating that only legislative statutes can legitimately establish restrictions on human rights for public interests.²¹³

However, this new view contradicts other provisions that stipulated to a more statist vision of human rights. To illustrate, in contrast to Article 14 mentioned above, Article 15 tries to establish a statist human rights regime which reflects local values, providing that: “(1) Citizens’ rights are inseparable from citizens’ duties; (2) Everyone has the duty to respect the rights of others; (3) Citizens are responsible to practice their duties to the State and society; (4) The practice of human rights and citizens’ rights cannot infringe national interests and legal and legitimate rights and interests of others.”²¹⁴ The Constitution also requires citizens to be responsible to the state and prohibits the abuse of rights to infringe upon the state’s interests.²¹⁵ Provisions on specific rights often stipulate that rights must be in accordance with the law, indicating that the rights are provided and practiced under the state’s regulations.²¹⁶

So, the identity of right statism remains but is modified by the incorporation of more universalist outlook on human rights: human rights of everyone (not only citizens) are acknowledged (not provided) by the state. This dynamic is animated by the disharmonic human rights regime established by the 1992 Constitution. To begin with, normatively, this human rights regime is discordant with international human rights standards. Constitution-makers did realize that this document failed to meet international human rights standards.²¹⁷ This gap is because the document adopted the statist conception of rights and lacked several human rights recognized in international human rights law, such as the right to life. Second, the human rights regime created by the 1992

²¹¹ Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 L. & ETHICS OF HUM. RTS 79 (2010).

²¹² HIẾN PHÁP [CONSTITUTION] Nov. 28, 2013, art.14 (Viet.).

²¹³ Interviews, *supra* note 16.

²¹⁴ HIẾN PHÁP [CONSTITUTION] Apr. 25, 1992, art. 15 (Viet.).

²¹⁵ *Id.*

²¹⁶ *Id.* at arts. 22, 23, 25, 27 (1992) (Viet.).

²¹⁷ Interview, *supra* note 77.

Constitution included internal contradictions and ambiguity. The 1992 Constitution introduced the concept of human rights for the first time: “In the Socialist Republic of Vietnam, human rights in all respects, political, civic, economic, cultural and social are respected, find their expression in the rights of citizens and are regulated by the Constitution and the law.”²¹⁸ The ambiguity is that human rights are equated to citizens’ rights regulated by the state.²¹⁹ The phrase “in concordance with the law” appeared in most constitutional provisions on citizens’ particular rights. The Constitution also stipulated inseparability of rights from duties, and the citizen’s fulfilment of their obligations towards the State and society.²²⁰ So the citizens’ statist rights are discordant with the constitutional aspiration of human rights. Third, the constitutional commitment to human rights is discordant with the actual restriction of human rights, which has been strongly criticized by domestic activists, foreign governments, and international organizations.²²¹

The gaps between the national human rights regime and international standards, the ambiguity and contradiction internal to this regime, and the gap between formal human rights commitments and actual human rights practices create the condition for different actors to seek solutions from global sources. Consequently, the globalization of human rights impacts Vietnamese constitutional identity. Constitution-makers and social actors resort to international human rights treaties to redefine the meaning of human rights in Vietnam. However, international human rights are situated within the Vietnamese condition and local specific human rights vision. This generates the continuously ambiguous human rights regime, which mixes both universal and statist human rights commitments.

The constitution-making process operates as the mechanism for different actors in the polity to engage in a dialogue to redefine the rights identity. In this dialogical forum, the socialist statist principle of rights and the universal human rights values are disharmoniously interacting. The consequence is the modification of the statist principle of rights. Public intellectuals and political leaders expressly state that the new Constitution indicates a regime’s new self-understanding and commitment about human rights, which is more universalist.²²² The new

²¹⁸ HIẾN PHÁP [CONSTITUTION] Apr. 25, 1992, art. 50 (Viet.)

²¹⁹ My interviews indicate that constitution-makers did realize this ambiguity.

²²⁰ HIẾN PHÁP [CONSTITUTION] Apr. 25, 1992, art. 51 (Viet.)

²²¹ See, e.g., *World Report 2013: Vietnam*, HUMAN RIGHTS WATCH (Jan. 2013), <https://www.hrw.org/world-report/2013/country-chapters/vietnam>.

²²² Interviews, *supra* note 16. See also Nguyen Sinh Hung, *The Revised Constitution Is The Firm Legal And Political Guarantee For The Entire Party, People And Army To Join Force In The March Toward The New Period*, COMMUNIST REVIEW (May 2014), <http://english.tapchicongsan.org.vn/Home>

Constitution continues to establish a discordant human rights regime, the condition for the continuous evolution of the identity of constitutional rights in Vietnam.

5. Economic Statism and Marketism

Although the 1992 Constitution abandoned the centrally-planned economy, it confirmed the “leading role” of state-owned enterprises (SOEs) in the economy to ensure its “socialist orientation.”²²³ This provision was subjected to critical debate during the constitution-making process.²²⁴

To illustrate, in the National Assembly constitutional debate, some delegates argued that the confirmation of the leading role of the state economic sectors contradicts the provision that every economic sector is equal.²²⁵ While many delegates agreed on the leading role of the SOEs:

Many opinions held that, during the last years, the state economic sectors have received many preferences but have operated ineffectively. Meanwhile, the private and other economic sectors are developing robustly, contributing to the economy, but have been not properly considered. Therefore, the provision that every economic sector is equal with the same legal framework will create better development to the country, create more wealth, jobs, and contribute more to the national budget.²²⁶

A delegate argued that the party’s resolution confirms the leading role of the SOEs is only valid within five years, while the Constitution has a

/Building-the-Law-governed-Socialist-State/2014/408/The-revised-Constitution-is-the-firm-legal-and-political-guarantee-for-the.aspx; Trần Ngọc Đường, *Hiến pháp năm 2013: Nhận Thức Mới Về Quyền Con Người Và Một Bước Tiến Về Kỹ Thuật Lập Hiến* [The 2013 Constitution: New Understanding about Human Rights and A new Progress in constitutional Drafting Methods], TAP CHÍ TÒ CHỨC NHÀ NƯỚC (Sept. 10, 2014), http://tcnn.vn/Plus.aspx/vi/News/125/0/1010067/0/6598/Hien_phap_nam_2013_Nhan_thuc_moi_ve_quyen_con_nguoi_va_mot_buoc_tien_ve_ky_thuat_lap_hien; Nguyễn Phú Hưng, *Sự Thống Nhất Giữa Quyền Con Người Của Hiến pháp năm 2013 với “Bộ luật quốc tế về Quyền con người”* [The Consistence of Human rights Provided in the 2013 Constitution with ‘The International Human Rights Law’], TAP CHÍ QUỐC PHÒNG TOÀN DÂN (Jan. 15, 2016), <http://tapchiqptd.vn/vi/lam-that-bai-chien-luoc-dbbh/su-thong-nhat-giua-quyen-con-nguoi-cua-hien-phap-nam-2013-voi-bo-luat-quoc-te-ve-quyen-con-nguoi/8514.html>.

²²³ HIẾN PHÁP [CONSTITUTION] Apr. 25, 1992, art. 15, 19 (Viet.).

²²⁴ Interviews, *supra* note 16.

²²⁵ Vũ Hạnh, *Hiến pháp: “Kinh tế Nhà nước giữ Vai trò Chủ đạo”* [The Constitution: “State-Owned Enterprises Play the Leading Role], VOV.VN (Nov. 5, 2013), <http://vov.vn/kinh-te/hien-phap-kinh-te-nha-nuoc-giu-vai-tro-chu-dao-289652.vov>.

²²⁶ Nguyễn Thảo, *Sửa Hiến pháp: Kinh tế nhà nước không thể chủ đạo?* [Amending the Constitution: State Economy’s Impossibility of the Leading Role?], VNECONOMY (Nov. 6, 2012), <http://vneconomy.vn/thoi-su/sua-hien-phap-kinh-te-nha-nuoc-khong-the-chu-dao-20121106021629108.htm>.

“higher value.”²²⁷ She then concludes: “Whatever we want, the state economic sectors cannot play the leading role because this is the rule of development and a reality.”²²⁸ Another delegate concurs, stating that the Constitution has durable effect, and hence should provide for the equality of every economic sector.²²⁹

In addition to the SOEs, land ownership is subject to contentious debate in the constitution-making process because of its social, economic, and political consequences.²³⁰ The 1992 Constitution introduced the principle of “the people’s ownership” of land, which actually means the state is the owner of all land.²³¹ This principle was subject to critical debate. The most radical proposal—mobilized by liberal intellectuals, businessmen, and ordinary people—established a multi-form of land ownership, including both state and private ownership. Two other moderate proposals focused on the constraints of the state prerogative powers over land without adopting private property.²³² One proposal called for acquisition with compensation according to the market price.²³³ The other petitioned for eliminating the government’s powers to acquire land for projects of socioeconomic developments so as to extinguish the root of corruption in land management of provincial authorities.

The call for privatization of land radically challenges important instruments of socialist management in Vietnam. It is understandable that the political leaders have denied the proposal of private property of land. However, the party and state’s commitment to the constraint of the state’s authority over land and the enhancement of the quality of the land-use right presents a more liberal movement unconventional to the Soviet thinking. John Gillespie observes: “The debate so far suggests that party thinking about land law has continued its incremental shift from the socialist notion of ‘people’s ownership and state management’ to a more individualized conception of private proprietary rights.”²³⁴

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Interviews, *supra* note 16.

²³¹ Nguyễn Minh Đoan, *Sở hữu Đất đai trong Hiến pháp Việt Nam [Land Ownership in Vietnamese Constitutions]*, 7 ST. AND L. REV. 13 (2012).

²³² John Gillespie, *Vietnam’s Land Law Reforms: Radical Changes or Minor Tinkering?*, E. ASIA FORUM (May 14, 2013), <http://www.eastasiaforum.org/2013/05/14/vietnams-land-law-reforms-radical-changes-or-minor-tinkering/>.

²³³ The price of compensation is around 20% of the market price. In major cities, the number is around 30–60%. Phan Trung Hiền, *Kiến nghị Hoàn thiện Cơ sở Hiến định về Thu hồi đất, Bồi thường, Hỗ trợ và Tái định cư [Recommendations to Perfect the Constitutional Basis for Land Acquisition, Compensation, Support and Resettlement]*, 3 TẠP CHÍ NGHIÊN CỨU LẬP PHÁP 46 (2013).

²³⁴ Gillespie, *supra* note 232.

The 2013 Constitution continues to confirm “socialist-oriented market economy” as a distinctive attribute of socialist Vietnam.²³⁵ To promote the market economy, the Constitution continues to include the commitments to multi-forms of ownership and multi-sectors of economic structure; equality, cooperation, and competition among all economic sectors; the protection of private property; and global economic integration.²³⁶ The Constitution includes new commitments to the encouragement of investment and protection of investors’ capital from nationalization.²³⁷ At the same time, to ensure the “socialist orientation” of the economy, the Constitution continues to confirm the “leading role” of the state economic sector, the state’s coordination of the economy, the state’s ownership of all lands, and the state’s recovery of land used by organizations and individuals for developmental projects.²³⁸

The disharmony concerning the 1992 Constitution animates the economic dynamics of constitutional identity in Vietnam. First, the fact that the Constitution provided for the dominant role of the state over economic resources is discordant with the normative ideals of free market and private ownership. Second, the 1992 Constitution already included competing socialist and market commitments: market economy but under socialist direction, equal competition but under the leading role of the SOEs, private property rights but state ownership of all lands. Particularly, the constitutional provision of the “leading role” of the state’s economic sector is conceived as contradictory to the constitutional commitment of economic equality and fair corporation and competition, and this has triggered the call for its elimination.

Third, there is a significant gap between the constitutional economic commitments and practices. While the Constitution established the SOEs as the leading force of the economy, losses and corruption at state corporations were significant.²³⁹ Besides that, the contribution of the state economic sector has considerably declined. To illustrate, within ten years (2000–2010), the contribution of the state economic sector to the national budget was less than 20%, significantly lower than that of the private sectors. In addition, state enterprises’ contribution to GDP declined to 19% in the period 2006–2009, whereas

²³⁵ HIẾN PHÁP [CONSTITUTION] Apr. 25, 1992, art. 50 (Viet.).

²³⁶ *Id.* at art. 51.

²³⁷ *Id.*

²³⁸ *Id.* at arts. 51, 52, 53.

²³⁹ VIETNAMESE GOVERNMENT, BÁO CÁO THỰC TRẠNG HOẠT ĐỘNG CỦA TẬP ĐOÀN, TỔNG CÔNG TY NHÀ NƯỚC GIAI ĐOẠN 2006 – 2010 VÀ PHƯƠNG HƯỚNG, NHIỆM VỤ, GIẢI PHÁP GIAI ĐOẠN 2011 – 2015 [REPORT ON THE REAL SITUATION OF THE ACTIVITIES OF THE STATE GROUPS AND CORPORATIONS IN THE PERIOD 2006 – 2010 AND THE DIRECTIONS, DUTIES, AND MEASURES IN THE PERIOD 2011 – 2015.]

private sectors contributed at double that rate. Moreover, the rate of creating new jobs in state economic sectors decreased to negative 22%, which means that state enterprises have cut jobs down rather than created new labors.²⁴⁰

Similarly, while the constitutional aspiration of “people’s ownership of lands” is benevolent, to prevent capitalists’ agglomeration of lands and to ensure the use of lands for socialist collective goals, the reality is different. Commentators have pointed out that the state, under the name of public goals, has expropriated people’s fields to benefit individual authorities without offering sufficient compensation.²⁴¹ The corruption in land acquisition and land allocation, other types of mismanagement of land, and the limits of the courts in dealing with land disputes have resulted in mass demonstrations, numerous collective petitions, and violent clashes between the farmers and the authorities.²⁴²

The ambiguity and disharmony of the socialist constitutional economy, both internally and externally, have created the opportunity for solutions through the use of global sources. A member of the Constitutional Amendment Committee and of the group of constitutional drafters responsible for drafting the Constitution’s chapter on economic and social principles told me that their intention is to create a chapter meeting with the (global) “standards of a market economy.”²⁴³ The global ideas of market economy and private property have been diffused in Vietnam and are balanced with the Vietnamese reality and local statist economic vision, which results in the mixture of both market and socialist elements in the constitutional economy. Similarly, the party and state’s thinking about land ownership also presents a shift to a more individualist conception of private proprietary rights but seeks to balance it with the conventional collective conception.

The constitution-making process provides the forum for different actors within the Vietnamese polity to rethink and redefine the ideational foundation of the constitutional economy. The socialist economic statism is balanced with economic marketism. Consequently, the state-owned economy remains essential to the Vietnamese constitutional polity, but is

²⁴⁰ Vũ Thành Tự Anh, *Doanh Nghiệp Nhà nước Không đủ Năng lực đóng Vai trò Chủ đạo* [State Enterprises are not Capable to Play the Leading Role] THE SAIGON TIMES (Oct. 21, 2010), <http://www.thesaigontimes.vn/Home/toisu/sukien/42114/>.

²⁴¹ Tuong Lai, *Vietnam’s Angry Feet*, N.Y. TIMES (Jun. 6, 2013), <http://www.nytimes.com/2013/06/07/opinion/vietnams-angry-feet.html>.

²⁴² DANISH EMBASSY, THE WORLD BANK & THE SWEDISH EMBASSY RECOGNIZING AND REDUCING CORRUPTION RISKS IN LAND MANAGEMENT IN VIETNAM (2011). For limits of courts in land disputes, see John Gillespie, *Exploring the Limits of the Judicialization of Urban Land Disputes in Vietnam*, 45 L. & SOC’Y REV. 241 (2011).

²⁴³ Interview, *supra* note 77.

adapted by adopting new liberal and market ideas. The socialist identity of economic statism is modified by the commitment to “socialist market economy” in which the state still controls the economy, but private property rights are guaranteed, private enterprises can develop, and some limits on the state economic power are possible. Examples include privatization of the state-owned enterprises and the transparent process of acquisition and compensation of lands. Thus, the 2013 Constitution establishes a disharmonic constitutional economy, facilitative to the continuous evolution of the socialist identity of economic statism.

6. Consequence

A member of the Constitutional Amendment Committee told me that in the new Constitution substantial principles remain but are understood with “new ways and new spirit” suitable to the “new context.”²⁴⁴ This captures the adaptations to socialist constitutional identity in Vietnam.

Moreover, the new constitutional commitments have begun to inform constitutional practices. To illustrate, following the commitment to constitutional referendum and direct democracy, the National Assembly enacted the Law on Referendum November 25, 2015, finalizing the restraints on the party-state and amendments to the Constitution.²⁴⁵ But how this law is implemented remains to be seen. In addition, consistent with the commitment to state constitutionality, constitutional oaths have been taken twice in Vietnam since the passage of the new Constitution.²⁴⁶ Constitutional oaths may raise the political leaders’ awareness of the relevance of the constitution to their activities.

In addition, new constitutional commitments to distribute and control power have been realized to some extent. The National Assembly has revised a number of organic laws to make them consistent with the new Constitution, including: Law on Organization of the National Assembly (2014); Law on Organization of the Government (2015); Law on Organization of the People’s Courts (2014); and Law on Organization of the People’s Procuracies (2014). These laws do not merely repeat the constitutional provisions but go on to further clarify the

²⁴⁴ *Id.*

²⁴⁵ *Vietnam Legislature Adopts Law on Referendum, among Others*, TUOI TRE NEWS (Nov. 26, 2015), <http://tuoitrenews.vn/society/31875/vietnams-legislature-adopts-law-on-referendum-among-others>.

²⁴⁶ See Nguyễn Lê, *Các nhà lãnh đạo tuyên thệ đều phải đặt tay lên Hiến pháp* [Political Leaders take oath, Putting Their Hands on the Constitution], VNECONOMY (Mar. 31, 2016), <http://vneconomy.vn/thoi-su/cac-nha-lanh-dao-tuyen-the-deu-phai-dat-tay-len-hien-phap-20160331050257461.htm>.

distribution of power. Moreover, these constitutional laws have had some developments with regards to controlling state power, such as strengthening the deputies' right to interpellation of government members and the role of the National Assembly's Legal Committee in constitutional supervision.²⁴⁷ They have also helped emphasize the independence of the government to practice its executive power and clarified the personal authority and responsibility of the Prime Minister and ministers.²⁴⁸ Furthermore, the laws have strengthened judicial independence by, for example, extending the judges' terms to ten years, stipulating to adversarial trials, and establishing the role of the Supreme Court in developing precedents, which reflects the influence of the common law tradition.²⁴⁹ Finally, the laws have developed mechanism to control state power through stipulating the mutual checks between the courts and the procuracies.²⁵⁰

Similarly, following the new constitutional commitments to human rights, a number of legislative acts regarding human rights have been revised. The Minister of Justice states that there are thirty-six legislative acts needing revision or replacement in concordance with the new Constitution.²⁵¹ The new requirement that human rights can only be limited by statutes puts strong pressure on government regulations.²⁵² This means the government cannot issue decrees that limit human rights. The Constitution also puts pressure on the National Assembly's law-making activities. National Assembly deputies now have a strong concern for how to make sure their legislations are consistent with new constitutional rights provisions.²⁵³

²⁴⁷ *Một số điểm mới của Luật Tổ chức Quốc hội năm 2014* [Some New Points of the 2014 Law on Organization of the National Assembly], BỒ TỬ PHÁP (Dec. 16, 2014), <http://www.moj.gov.vn/ct/tintuc/Pages/van-ban-chinh-sach-moi.aspx?ItemID=5866>.

²⁴⁸ Nguyễn Phước Thọ, *Một số điểm mới của Luật Tổ chức Chính phủ 2015* [Some New Points of the 2015 Law on Organization of the Government], BÁO ĐIỆN TỬ (Aug. 1, 2015), <http://baochinhphu.vn/Hoat-dong-Bo-nganh/Mot-so-diem-moi-cua-Luat-To-chuc-Chinh-phu-2015/233022.vgp>.

²⁴⁹ Nguyễn Hà Thanh, *Một số nội dung cơ bản của Luật Tổ chức tòa án nhân dân năm 2014* [Some Fundamental Points of the 2014 Law on Organization of the People's Courts], TRANG THÔNG TIN ĐIỆN TỬ TỔNG HỢP (Jan. 26, 2015), <http://noichinh.vn/ho-so-tu-lieu/201501/mot-so-noi-dung-co-ban-cua-luat-to-chuc-toa-an-nhan-dan-nam-2014-296789/>.

²⁵⁰ Văn Tĩnh, *Những nội dung mới của Luật tổ chức Viện kiểm sát nhân dân (sửa đổi)* [Some New Points of the Law on Organization of the People's Procuracies (Revised)], http://duthaonline.quochoi.vn/DuThao/Lists/TT_TINLAPPHAP/View_Detail.aspx?ItemID=2223.

²⁵¹ Nguyễn Vũ, *Sửa đổi, bổ sung thay thế 36 luật, pháp lệnh về quyền con người* [Revising and Replacing 36 Laws and Ordinances on Human Rights], VNECONOMY (May 25, 2015), <http://vneconomy.vn/thoi-su/sua-doi-bo-sung-thay-the-36-luat-phap-lenh-ve-quyen-con-nguoi-20150524045653252.htm>.

²⁵² Interviews, *supra* note 16.

²⁵³ Interview, *supra* note 77.

That has some positive impacts. For example, the new Civil Code, Penal Code, and Criminal Procedure Code have been revised with new developments regarding human rights, which helps indicate the universalist vision. To illustrate, the new Civil Code adopted in 2015 recognizes transgender rights, minimizes the intervention of administrative authorities in civil transactions, and forces the courts to hear civil complaints even in case of absence of applicable law.²⁵⁴ The Penal Code excludes the application of death penalty to “under-18 offenders, pregnant women and women who are nursing children under 36 months or those who are more than 75 years old when they commit a crime or are put into trial.”²⁵⁵ The Code also abolishes the death penalty for seven crimes: surrendering to the enemy, opposing order, destruction of projects of national security importance, robbery, drug possession, drug appropriation, and the production and trade of fake food.²⁵⁶ This development is consistent with the Constitution’s new recognition of the right to life. The Criminal Procedure Code recognizes the right to silence, the detainees’ “right to have legal assistance of lawyers before making any statement,” and requires “audio and video recording during interrogation” to prevent “torture and other cruel treatments by police investigators.”²⁵⁷

Yet, the above codes also echo the constitutional disharmony regarding human rights. The Civil Code continues the communitarian-statist vision of rights, evident by its emphasis on its role in protecting not only the interests of the individuals but also the interests of the state and the community. The Penal Code more clearly shows its statist vision when it “maintains controversial articles with severe punishments against government critics and human rights activists.”²⁵⁸ Dissidents had petitioned for removing the offence of “propaganda against the state,” as

²⁵⁴ *Revising Civil Code to better protect citizens’ rights*, VIETNAM BREAKING NEWS (Nov. 1, 2015), <http://www.vietnambreakingnews.com/2015/11/revising-civil-code-to-better-protect-citizens-rights/>.

²⁵⁵ *National Assembly adopts draft revised Penal Code*, VIETNAM BREAKING NEWS (Nov. 27, 2015), <http://www.vietnambreakingnews.com/2015/11/national-assembly-adopts-draft-revised-penal-code/>.

²⁵⁶ *Vietnam abolishes death penalty for 7 crimes*, ALJAZEERA AMERICA (Nov. 27, 2015), <http://america.aljazeera.com/articles/2015/11/27/new-law-in-vietnam-abolishes-death-penalty-for-7-crimes.html>.

²⁵⁷ Vu Quoc Ngu, *Vietnam Adopts Criminal Procedure Code, Human Rights May Be Enhanced*, VIETNAM HUMAN RIGHTS DEFENDERS (Dec. 1, 2015), <http://www.vietnamhumanrightsdefenders.net/2015/12/01/vietnam-adopts-criminal-procedure-code-human-rights-may-enhanced/>.

²⁵⁸ *Id.*

this violates the constitutionally protected right to freedom of speech.²⁵⁹ This offense continues to be a feature in the new Penal Code.

Last but not least, new economic constitutional commitments have begun to inform the reality. For example, the Government has implemented the policies of equitization or privatization of the state-owned enterprises.²⁶⁰ The new Land Law, effective July 2014, has some developments respecting the larger right to use land and a more transparent process of acquisition and compensation.²⁶¹

New constitutional commitments and principles in the 2013 Constitution shape the scope, potential, and constraints of political, legal, and economic reforms in Vietnam. But, the constraints are not very strict, and there is ample space for the continuing dynamics of socialist constitutional identity in Vietnam. First, this is because the 2013 Constitution is a disharmonic constitution. Many ideas and principles newly introduced in the Constitution are broad and ambiguous, such as constituent power by the people, constitutional referendum, controlling the state power, and legislative constitutional review, thus opening the door for alternative constructions. Moreover, the disharmonic gap between the Constitution and global constitutionalism (for example, party leadership vs. free election, unitary vs. separated power, statist vs. universal rights, the legislative vs. judicial constitutional review) creates the condition for continuous change in the socialist constitutional identity. In addition, the disharmony between the Constitution and the social reality is facilitative of the continuing evolution of the socialist constitutional identity. Most notably, constitutional aspirations to “prosperous people” and “that all people enjoy an abundant, free, and happy life with conditions for comprehensive development,”²⁶² are discordant with the fact that Vietnam is still a middle income country,²⁶³ replete with serious social problems, such as a polluted environment, social inequality, an underdeveloped education system, terrible transportation system, and the like. The aspiration to the “socialist rule of law state” has been discordant with the social reality of corruption,

²⁵⁹ Cu Huy Ha Vu, *Standing up for Human Rights in Vietnam*, WASH. POST (May 16, 2014), https://www.washingtonpost.com/opinions/standing-up-for-human-rights-in-vietnam/2014/05/16/cd040826-d7b6-11e3-8a78-8fe50322a72c_story.html.

²⁶⁰ See a series of papers on equitization of state-owned enterprises at the website of Prime Minister Nguyễn Tấn Dũng at <http://nguyentandung.org/tag/co-phan-hoa-doanh-nghiep-nha-nuoc>.

²⁶¹ Phạm Thị Bích Hào, *Điểm mới trong thu hồi và bồi thường của Luật đất đai* [New Points on Acquisition and Compensation in the Land Law], VIETNAMNET (July 1, 2014), <http://vietnamnet.vn/vn/ban-doc-phap-luat/183557/diem-moi-trong-thu-hoi-va-boi-thuong-cua-luat-dat-dai.html>.

²⁶² HIẾN PHÁP [CONSTITUTION] Nov. 28, 2013, art. 3 (Viet.).

²⁶³ *About Viet Nam*, UNITED NATIONS DEVELOPMENT PROGRAMME IN VIETNAM, <http://www.vn.undp.org/content/vietnam/en/home/countryinfo.html>.

miscarriages of justice, and ineffectiveness of law enforcement.²⁶⁴ Also, the constitutional commitment to protect universal human rights is disharmonic with the functional human rights regime in which rights are constricted for statist purposes. These constitutional disharmonies continue to offer space for, and incentives to looking at global sources and animate the continuing shifts in constitutional identity in Vietnam.

In the near future, as judicial review is absent and the constitution-making process is not available, constitutional dynamics in Vietnam may be limited; however, these dynamics may proceed in popular and political forums. In fact, in these popular and legislative platforms, social and institutional actors have continued to engage in dialogues on the constitutional referendum, the popular checks of the party power, mechanisms to control the state powers, the protection of human rights, and the constraints of the state power over the economy.²⁶⁵ Global constitutional ideas still inform this dialogue and are situated with the local reality and interact with local ideas.

IV. COMPARATIVE CONTEXT

The experience in four other socialist countries (China, Laos, North Korea, and Cuba) also indicates that there are adaptive changes to the socialist constitutional identity. A comprehensive exploration of these changes is beyond the scope of this single article. Instead, I will briefly discuss the important trends with a focus on the post-Soviet era.

A. China

²⁶⁴ Vietnam is ranked 64th in the Rule of Law Index by the World Justice Project. See *The WJP Rule of Law Index 2015 Report*, WORLD JUSTICE PROJECT, http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf.

²⁶⁵ See generally Võ Hải, *Luật Trung cầu Ý Dân gây Nhiều e Ngại* [*The Law on Referendum Causes many Worries*], VNEXPRESS (Feb. 25, 2015), <http://vnexpress.net/tin-tuc/phap-luat/luat-trung-cau-y-dan-gay-nhieu-e-ngai-3150655.html>; Hòa An, *Cần có cơ chế để dân giám sát hoạt động của Đảng* [*There Should be Mechanisms to Supervise the Party*], VOICE OF VIETNAM (Dec. 27, 2013), <http://vov.vn/chinh-tri/can-co-co-che-de-dan-giam-sat-hoat-dong-cua-dang-301892.vov>; Tuần Việt Nam, *Kiểm soát quyền lực bằng cách nào?* [*How to Control the State Power?*] TUẦN VIỆT NAM (Aug. 7, 2015), <http://vietnamnet.vn/vn/tuanvietnam/254919/kiem-soat-quyen-luc-bang-cach-nao-.html>; Vũ Ngọc Hoàng, *Tham vọng quyền lực và Sự tha hóa* [*Desire for and Misuse of Power*], THANH NIÊN (Aug. 11, 2015), <http://www.thanhnien.com.vn/chinh-tri-xa-hoi/tham-vong-quyen-luc-va-su-tha-hoa-595496.html>; Bùi Tiến Đạt, *Hiện pháp hóa Nguyên tắc Giới hạn Quyền con người: Cần nhưng chưa đủ* [*Constitutionalizing the Principle of Human Rights Restrictions: Necessary But Not Enough*] 6 TAP CHI NGHIEN CUL LAP PHAP [J. LEG. STUDIES] 3 (2015); Trần Du Lịch, *Vai trò của Nhà nước và kinh tế nhà nước trong nền kinh tế thị trường ở nước ta* [*The Role of the State and State's Economic Sector in Our Market Economy*] TAP CHI KINH TẾ VÀ ĐU BAO, <http://svect.org.vn/index.php/nghien-cuu/Nghien-cuu-Trao-doi/Vai-tro-cua-Nha-nuoc-va-kinh-te-nha-nuoc-trong-nen-kinh-te-thi-truong-o-nuoc-ta-37/>.

The People's Republic of China (PRC) has enacted five constitutions in 1954, 1975, 1978, and 1982 under the leadership of the Communist Party of China (CPC). The current 1982 Constitution was revised several times in 1988, 1993, 1999, and 2004.²⁶⁶ Jianfu Chen captures the instrumentalist nature of China's Constitution in these words: "The Constitution in China has been in a constant state of flux, reflecting changes in the CPC leadership and in its policies about the kind of the future society envisaged."²⁶⁷ Constitution-making in China is under strict party control and significantly lacks public participation. According to Jianfu Chen, only in the last constitutional revision (2003–2004) was the ongoing revision process officially reported, but even academic discussions on constitutional revision issues were closed down by the Party.²⁶⁸

However, there is initial evidence indicating that this identity has been modified by quasi-constitutionalist understanding. During the post-Soviet period, like in Vietnam, the idea of constitutionalism together with generic elements has played a dominant role in the Chinese constitutional intellectual life.²⁶⁹ Although the political leaders rejected the global ideas of constitutionalism, they adopted a new understanding about the nature and role of the constitution, which somewhat reflects the generic constitutionalist spirit. The constitutional amendment in 2009 incorporated a new principle called "Ruling the Country According to the Law," the Chinese version of socialist rule of law state.²⁷⁰ Following this, in the 18th Party Congress in 2012, the Party suggested a discordant understanding: "As the Constitution and laws are adopted by the Party and the people under its leadership," "the Party must act within the scope prescribed by the Constitution and laws."²⁷¹ As Heike Holbig comments, "On the one hand, this passage seems to signal the willingness of the party to exercise its power only within the confines of the constitutional and legal framework, but on the other, the CCP is also clearly asserting its claim to be the originator of the constitution, and thus implicitly, the authority in control of the constitution."²⁷² On July 1, 2015, the nation's legislature adopted a bill requiring government officials to pledge

²⁶⁶ For China constitutional history in general, see QIANFANG ZHANG, *THE CONSTITUTION OF CHINA: A CONTEXTUAL ANALYSIS* (2012).

²⁶⁷ JIANFU CHEN, *CHINESE LAW: CONTEXT AND TRANSFORMATION* 90 (2016).

²⁶⁸ *Id.* at 107–8.

²⁶⁹ Yu Xingzhong, *Western Constitutional Ideas and Constitutional Discourse in China, 1978–2005* in *BUILDING CONSTITUTIONALISM IN CHINA* 111 (S. Balme & Michael W. Dowdle eds., 2009).

²⁷⁰ XIANFA art. 5 (2009) (China).

²⁷¹ *Full text of Hu Jintao's report at 18th Party Congress*, XINHUA (Nov. 17, 2012), http://news.xinhuanet.com/english/special/18cpcnc/2012-11/17/c_131981259_6.htm; 23:45:56].

²⁷² Heike Holbig, *China's Unwritten Constitution: Ideological Implications of a "Non-ideological" Approach*, 132 *ASIEN* 53, 56 (2014).

allegiance to the nation's Constitution upon taking office.²⁷³ So, China, like Vietnam, has begun to establish a culture of constitutional oath, although this is not a requirement stipulated to in the constitution as is the case in Vietnam.

Although China's Constitution retains its instrumentalist nature, it also operates as the framework for constitutionalism debate and even for Chinese citizens to struggle for realization of their constitutional rights.²⁷⁴ Thus, constitutional instrumentalism remains the dominant feature of the Chinese constitutional order, but is adjusted with new constitutionalist consciousness and practice, indicative of inchoate constitutionalism.

In addition to instrumentalism, party vanguardism is a core of the Chinese constitutional polity, but it is also adaptively changed. The current 1982 Constitution of China refers to the leadership of the CPC in its preamble rather than expressly mandating this in a constitutional provision, as did the 1975 and 1978 Constitutions.²⁷⁵ Although this change does not alter the nature of the party leadership, it moderates this nature and leaves space for multiparty system. In fact, party vanguardism is adapted in the Chinese context by the local specific system called "multi-party cooperation and political consultation system."²⁷⁶ In China, there are eight democratic parties operating under the control of the CPC. They do not oppose the CPC and the regime. The basic principle is that "The CPC is the only party in power in the People's Republic of China while under the precondition of accepting the leadership of the CPC, the eight other political parties participate in the discussion and management of state affairs, in cooperation with the CPC."²⁷⁷ The Constitution's preamble confirms the commitment that: "The system of multi-party cooperation and political consultation led by the Communist Party of China will exist and develop in China for a long time to come."²⁷⁸ This commitment is embodied in practice by the Chinese People's Political Consultative Conferences through which the CPC consults other parties on national affairs.²⁷⁹ Another practical embodiment is the appointment of members of democratic parties to

²⁷³ *China: Government Officials to Take Constitutional Oath*, THE LIBRARY OF CONGRESS (July 27, 2015), <http://www.loc.gov/law/foreign-news/article/china-government-officials-to-take-constitutional-oath/>.

²⁷⁴ See generally, Mark Jia, *China's Constitutional Entrepreneurs*, 64 AM. J. COMP. L. 619 (2016).

²⁷⁵ JIANFU CHEN, *supra* note 267, at 121.

²⁷⁶ *Id.* at 122.

²⁷⁷ *The System of Multi-Party Cooperation and Political Consultation*, CHINA.ORG.CN, <http://www.china.org.cn/english/Political/29034.htm>.

²⁷⁸ XIANFA pmbl. (1982) (China).

²⁷⁹ JIANFU CHEN, *supra* note 267, at 122.

government posts.²⁸⁰ Thus, the essence of the vanguard role of the CPC remains but is adapted by the aspirational principle of multi-party cooperation and political consultation.

Another adaption to the Chinese constitutional vanguardism is related to Jiang Zemin's "three represents" doctrine. One of the three elements is that the Party represents "the development trends of advanced productive forces."²⁸¹ The implication is that capitalists are not enemies of Chinese socialism. The practical embodiment of this "new thinking" is the invitation of "capitalists" to join the CPC.²⁸² So, the party vanguardism remains the dominant feature but is adjusted by "new thinking" that allows the pragmatic incorporation of alternative social forces into the communist party. The constitutional commitment to a multiparty system, but under the exclusive leadership of one communist Party, creates the disharmonic condition for the continuing dynamics of constitutional vanguardism in China.

On constitutional structure, an Article of China's 1982 Constitution confirms that: "The State organs of the People's Republic of China apply the principle of democratic centralism."²⁸³ Democratic centralism is connected with the proletarian dictatorship. The supremacy of the National People's Congress is a political form of "the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."²⁸⁴ The separation of power, judicial review, and judicial independence are rejected in this centralized and dictatorial constitutional arrangement.

But, within the community of Chinese constitutional intellectuals, separatism is the prevailing model of constitutional thought. For example, like the 2013 constitutional debate in Vietnam, the essential spirit of pro-constitutionalist arguments in China's 2013 constitutionalism debate is defined by fundamental aspirations of generic constitutionalism, including the aspiration of a separationist government.²⁸⁵ The party-state, however, rejects the doctrine of the separation of powers. Democratic centralism remains the core value of the Chinese constitutional polity, but is adjusted to the new context. The party-state in China as well as in Vietnam does not reject an understanding of distribution of the public power. But different from

²⁸⁰ *Id.* at 126.

²⁸¹ *What Is "Three Represents" CPC Theory?*, CHINA.ORG.CN, <http://www.china.org.cn/english/zhuanti/3represents/68735.htm>.

²⁸² JIANFU CHEN, *supra* note 267, at 116.

²⁸³ XIANFA art. 3 (1982) (China).

²⁸⁴ *Id.* at art 1.

²⁸⁵ Kellogg, *supra* note 3, at 337.

Vietnam, the idea of distribution of power in China is substantively articulated, not through formal constitution-making, but legislation.²⁸⁶

More prominent adaption to the socialist principle of democratic centralism concerns vertical governmental relations, evidenced by the concepts of regional autonomy, “Special Economic Zones”, and Special “Administrative Region,” or “one country, two systems” (OCTS).²⁸⁷ Such pragmatic adjustment creates discordant concepts and principles. For example, Albert Chen argues that: “The story of the debate on and struggle for universal suffrage in Hong Kong thus reveals such underlying tensions behind, and the contradictions inherent in, the very concept and practice of ‘OCTS.’”²⁸⁸ In other words, constitutional dynamics in Hong Kong are engendered by the disharmony internal to the aspiration of OCTS.

China’s 1982 Constitution also includes rights provisions in the spirit of socialist statism. The Constitution establishes the principle of unity of rights and duties.²⁸⁹ The practice of rights is limited by the state and collective interests.²⁹⁰ Yet, China has adapted its understanding of rights, evident by the incorporation of the idea of “human rights” in the Constitution through the 2004 constitutional amendment. Chen comments: “China has now finally come to accept universal, rather than insisting on an ‘Asian’ or ‘Chinese’ conception of human rights.”²⁹¹ This reconceptualization of human rights has practical implications: “The scope of human rights could be interpreted to include not only the fundamental rights as codified in Chapter 2 of the Constitution, but also those contained in at least the two International Covenants and other international human rights treaties that China has agreed to abide by.”²⁹² Thus, rights statism remains the dominant feature of the Chinese constitutional polity, but is adapted by more universalist understanding.

Finally, economic statism remains at the core of the Chinese constitutional economy, but is also adjusted with new understanding. The ideas of “socialist public ownership of the means of production”, “State-owned economy” as “the leading force in the national economy”,

²⁸⁶ Lin Yan, *Constitutional Evolution Through Legislation: The Quiet Transformation of China’s Constitution*, 13 I. CON. 61 (2015).

²⁸⁷ For more details, see JIANFU CHEN, *supra* note 267, at 142–45.

²⁸⁸ Albert H.Y. Chen, *The Law and Politics of the Struggle for Universal Suffrage in Hong Kong*, 3 ASIAN J. L. & SOC’Y 189, 205 (2016).

²⁸⁹ XIANFA art. 33 (1982) (China).

²⁹⁰ *Id.* at art. 51.

²⁹¹ JIANFU CHEN, *supra* note 267, at 147.

²⁹² *Id.*

and state and collective ownership of land are all constitutionally confirmed.²⁹³ But Dengism has adopted a pragmatic approach to the socialist economy, leading to the practice of the opening and reforming of policy. The fundamental aspiration of the Chinese party-state is to build “socialism with Chinese characteristics” or “Chinese style of socialism.”²⁹⁴ This has resulted in the adjustment to the identity of economic statism by adapting liberal economic principles. Consequently, the Constitution is committed to a “socialist market economy,” “diverse sectors of the economy developing side by side,” the land use right, and inviolable lawful private property.²⁹⁵ These fundamental commitments have actually informed the Chinese constitutional economy, as economic dynamics in the country in the last three decades indicate.²⁹⁶ Thus, the Constitution confirms the socialist economy but at the same time adopts capitalist economic elements, creating the disharmonic condition for the continuing development of the identity of a Chinese constitutional economy.

China’s 1982 Constitution together with its amendments is a disharmonic constitution. It includes internal discordant provisions regarding the party leadership, constitutional supremacy, constitutional structure, rights, and economy. This internal disharmony, together with the gap between the socialist constitutional ideals, the Chinese society and general constitutional ideas, constitutes the condition for the continuing dynamics of socialist constitutional identity. This condition is caused by China’s speed of economic development, the emergence of new social groups and their mobilization, and the impact of globalization.²⁹⁷ Constitutional identity has changed through formal constitution-making and amendment. Chinese constitutional exceptionalism (political elite’s distinctive doctrines) defines the extent to which socialist constitutional identity is modified in China.

B. Laos

The Lao People’s Democratic Republic (LPDR) is another socialist country in the contemporary world. Laos goes even farther than China to amend the core of socialist constitutional identity. The communist Lao

²⁹³ XIANFA arts. 6, 7, 10 (2004) (China).

²⁹⁴ JIANFU CHEN, *supra* note 267, at 117.

²⁹⁵ XIANFA pmbl., arts. 6, 10, 13 (2004) (China).

²⁹⁶ For China’s transition to socialist market economy, see generally JOHN WONG, UNDERSTANDING CHINA’S SOCIALIST MARKET ECONOMY (1993).

²⁹⁷ See Haig Patapan, *Towards a Cosmopolitan Constitutionalism: On Universalism and Particularism in Chinese Constitutionalism*, 3 CHINA J. COMP. L. 78 (2015).

People's Revolutionary Party seized power in 1975, abolishing the royal government's 1947 Constitution, which in turn succeeded the first 1945 Constitution of the Lao Issara (Free Lao) Government.²⁹⁸ The Party Secretary General Kaysone stated that the Lao People's Democratic Republic should "urgently undertake the major task . . . of preparing a socialist constitution at an early date."²⁹⁹ But it was not until 1991 that the Supreme People's Assembly, the nation's legislative body, enacted the socialist constitution.³⁰⁰ This charter "was strongly influenced by the socialist Constitutions of the Soviet Union, Vietnam, and the People's Republic of Kampuchia."³⁰¹ The constitution-making process was under the Party's control.³⁰² The 1991 Constitution was amended in 2013, effectively leading to its replacement by the 2013 Constitution. The Constitution was recently amended in 2015 to "respond to the Party's renovation policies and the country's development vision until 2030."³⁰³

While the instrumentalist nature of Laos' Constitution remains, it is modified by the involvement of the public in the constitution-making process. In this regard, Laos is distant from China and closer to Vietnam. The draft constitution was published in 1990 in a Party journal for public discussion and mobilization, albeit under party control.³⁰⁴ Public participation in the 2015 constitutional amendment process is also striking. "Leaders, senior revolutionary combatants, retired officials, civil servants, technical officials, soldiers, police officers, intellectuals, and ordinary people of all classes" had been encouraged to submit proposals for the constitutional amendment.³⁰⁵ A series of seminars were held in regions across the country where policymakers shared their views "in order to draw up the draft."³⁰⁶ Public participation is the base for the claim in the preamble that: "This Constitution is the fruit of the process of the people's discussions throughout the country."³⁰⁷ Thus, the instrumentalist aspiration is moderated by the public participation in constitution-making.

²⁹⁸ For Laos's constitutional history, see Gerald Leather, *Laos: A Constitution in Search of Constitutionalism*, in 2 CONSTITUTIONALISM IN SOUTHEAST ASIA 125 (Clauspeter Hill & Jorg Menzel eds., 2008).

²⁹⁹ MacAlister Brown & Joseph J. Zasloff, *Chapter 4. Government and Politics*, in LAOS: A COUNTRY STUDY 219 (Andrea Matles Savada & Donald P Whitaker eds., 1995).

³⁰⁰ On this Constitution, see Martin Stuart-Fox, *The Constitution of the Lao People's Democratic Republic*, 17 REV. OF SOCIALIST L. 299 (1991).

³⁰¹ Leather, *supra* note 298, at 136

³⁰² *Id.*

³⁰³ *Laos Issues New Constitution*, VIETNAMPLUS (Dec. 20, 2015), <http://en.vietnamplus.vn/laos-issues-new-constitution/86486.vnp>.

³⁰⁴ Leather, *supra* note 298, at 135.

³⁰⁵ *Public Opinions Sought on Constitutional Amendments*, LIWG (Apr. 21, 2015), <http://www.laolandissues.org/2015/04/21/public-opinions-sought-on-constitutional-amendments/>.

³⁰⁶ *Id.*

³⁰⁷ LPDR CONST. pmb. (Laos).

Laos' Constitution also mandates the Lao People's Revolutionary Party (LPRP) as the "leading nucleus" of political system.³⁰⁸ But, after the collapse of the Soviet Union, the communist ideology of LPRP has been considerably eroded, except the principle of the party's monopoly of political power.³⁰⁹ The erosion of communist ideology has resulted in other constitutional variations in Laos. In regards to structure, the Constitution establishes that: "The National Assembly and other state organizations are established and function in accordance with the principle of democratic centralism."³¹⁰ But the delineation of the three state branches "do not imitate any particular model (neither Vietnamese, nor Russian, nor French), but it pays respect to the idea of a basic blueprint of responsibilities lodged in designed institutions."³¹¹ Perhaps, the most notable adaption to "democratic centralism" is the pragmatic practice of political decentralization which allows local governments to enjoy great autonomy. This is due in part to "the limited resources and poor communication" with the central government and in part to the central government's incentive to "encourage local government to establish direct contacts with the borders with China, Thailand, and Vietnam, and trading agreements with neighboring jurisdictions."³¹²

The Constitution also includes a list of fundamental rights whose practice is "provided by the laws" or "not contrary to the laws."³¹³ Laotian citizens are constitutionally required "to respect the Constitution and the laws, to observe labor discipline, [and to comply with] the regulations relating to social life and public order."³¹⁴ The practice of rights depends on the state's regulatory laws, but there is no institutional mechanism for the citizens to question the constitutionality of the laws regulating their rights. This reserves the core of statist rights. But fundamental rights established in Laos' Constitution are adaptive to the local context and seem more liberal and less statist than those in China and Vietnam. The restriction of rights in the name of state interests is not explicitly established in the Constitution. Moreover, recent constitutional amendments prohibit "all forms of bureaucratic threats and actions that undermine the physical and mental wellbeing or the dignity of the people," and "actions that cause damage to their rightful assets," ensure "solidarity and equal rights among the multiethnic people," protect

³⁰⁸ *Id.* at art. 3.

³⁰⁹ Brown & Zasloff, *supra* note 299, at 214.

³¹⁰ LPDR CONST. art. 5 (Laos).

³¹¹ Brown & Zasloff, *supra* note 299, at 224.

³¹² *Id.* at 226.

³¹³ LPDR CONST. arts. 34, 39, 42, 44, 45 (Laos).

³¹⁴ *Id.* at art. 47.

intellectual property rights and the rights of foreign nationals in Laos and of those who have no nationality.³¹⁵

On the economy, the Constitution also provides for the state's centralized management of the economy and land as "a national heritage," which citizens are granted to use by the state.³¹⁶ But, the Constitution is committed to a "market economy," albeit "regulated by the state in the direction of socialism."³¹⁷ Commentators indicate that "the chapter on the socioeconomic system does not mention the establishment of socialism, a principal goal of earlier dogma."³¹⁸ Instead, the main goal of the national economy is to "transform the natural economy into a trading and manufacturing economy."³¹⁹ On this base, the Constitution underlines the commitments to the promotion of domestic and foreign investment, protection of "lawful assets and capital of investors" from state confiscation, seizure, or nationalization, and protection and promotion of "all forms of property rights."³²⁰

Socialist constitutional identity in Laos is unique. It is determined by the complex history of communism in the country, domestic ethnic diversity, the undeveloped economy, and the country's international relationship with its neighbors—China, Vietnam, and Thailand—and the western world.³²¹ The current trend seems to indicate that Laos does not strictly adhere to the socialist constitutional ideology, except the idea of party leadership. Ideological relaxation allows Laos to freely amend the socialist constitutional identity without abandoning its core. The fall of the Soviet Union was an important external factor that created the erosion of communist ideology in Laos. But, the erosion is, perhaps principally, determined by the local condition. Specifically, poverty and economic difficulty make socioeconomic transformation, rather than ideological commitments, the political elites' preoccupation. Consequently, there is a significant disharmony between the adherence to socialist ideals and the real imperative of socioeconomic development, and the Laos constitutional polity tends to favor reality over ideals.

The national goal established in the constitutional preamble is generic rather than specifically socialist, namely "the objective of

³¹⁵ *Amended Constitution Creates Provincial Assemblies, Gives President Two Terms*, VIENTIANE TIMES (Dec. 29, 2015), http://www.vientianetimes.org.la/FreeContent/FreeContent_Amended%20constitution.htm.

³¹⁶ LPDR CONST. arts. 16, 17 (Laos).

³¹⁷ *Id.* at art. 13.

³¹⁸ Brown & Zasloff, *supra* note 299, at 225.

³¹⁹ LPDR CONST. art. 13 (Laos).

³²⁰ *Id.* at arts. 14, 15, 16.

³²¹ See generally KHAM VORAPHETH, *CONTEMPORARY LAOS: DEVELOPMENT PATH AND OUTLOOK OF A NATION* (2015).

building Laos into a country of peace, independence, democracy, unity and prosperity.”³²² This objective is considered “the long-standing aspirations and strong determination of the national community.”³²³ The commitment to a community’s self-determination allows the people to participate in the constitution-making process as moderators of socialist constitutional instrumentalism. The justification of party vanguardism in Laos is “to defend the national interest or fight for the interests and aspiration of the people,”³²⁴ which is more nationalist and populist and less relevant to the socialist objectives. But, most importantly, the paramount concern of the Constitution is economic development, which is less meant to idealistically transform into socialism than to realistically “improve the material and spiritual living conditions of the multi-ethnic people.”³²⁵ The Constitution attempts to realize this through a strong commitment to the promotion of investment and protection of investors’ property and rights. Laos offers an example of how national constitutions are used to attract foreign investments in the globalizing era.³²⁶ But, social and economic improvement and the aspiration to attract foreign investment seem to be the dominant spirit of the whole Constitution of Laos, not merely the chapter on socioeconomic system. The Constitution seemingly tries to distance itself from specific socialist language and adopts more generic constitutional norms, especially fundamental rights, to communicate with the rest of the world where socialist polity is a minority.

Consequently, Laos’ Constitution is a disharmonic constitution. The internal disharmony concerns: the generic aspiration and the principle of the communist party as the core of the polity; “democratic centralism” and political decentralization; the market economy and the state’s direction to socialism; and rights granted and controlled by the state but also limiting authority’s arbitrariness. Externally, there is a considerable gap between the constitutional commitment to socioeconomic improvement, and even prosperity, and the real poverty and economic difficulty. Moreover, the Constitution is also discordant with many generic constitutional aspirations like free elections, universal rights, and constitutional review. These constitutional disharmonies are created by several factors, including: the post-Soviet experience and the continuing aspirations of socioeconomic transition; and the incentive to engage in the global market. These constitutional disharmonies are the

³²² LPDR CONST. pmb. (Laos).

³²³ *Id.*

³²⁴ Brown & Zasloff, *supra* note 299, at 214.

³²⁵ LPDR CONST. art. 13 (Laos).

³²⁶ Law, *supra* note 8, at 1277.

conditions for the continuing transition of the constitutional identity in Laos.

C. North Korea

Democratic People's Republic of Korea (DPRK), or North Korea, is a socialist country, but an aberrant case. Under the rule of the communist Workers' Party of Korea (WPK), North Korea has six constitutions enacted in 1948, 1972, 1992, 1998, 2009, and 2012.³²⁷ The instrumentalist nature of the constitution is embodied strongly in North Korea. Darren C. Zook remarks: "Each of the Constitutions of North Korea has emerged out of transformative moments when cumulative political change necessitated a corresponding legal expression to legitimate and articulate the new orientation and outlook of the state."³²⁸ But the unique manifestation of socialist constitutional instrumentalism in North Korea is the fact that the Constitution is instrumental to personal communist rule. Successive constitutions were adopted to legitimize the authority of successive leaders: Kim Il Sung, Kim Jong Il, and Kim Jong Un. The recent constitutional amendment in 2016 enabled Kim Jong Un to become an absolutist national leader. According to *Rodong Sinmun*, a North Korean newspaper, "[In] order to arrange the strong legal groundwork for the path towards the socialist powerhouse, to be lead [sic] by Kim Jong Un's monolithic leadership, we are to review and adopt the amendment of DPRK's socialist constitution."³²⁹

North Korea's Constitution confirms the core of the socialist constitutional identity, namely the leadership of the communist party, centralized power, statist rights, and statist economy.³³⁰ These constitutional principles do inform constitutional politics in North Korea.³³¹ But the fall of communism in the post-Soviet era led North Korea to abandon any reference to the Soviet constitutional values and Marxism-Leninism, and to develop its own modus operandi of socialism. The ideological principle called *juche* (self-reliance) was constitutionally confirmed as the guiding principle of the regime.³³² This principle, which stresses economic, political, and military independence and self-

³²⁷ See generally Dae-kyu Yoon, *Constitutional Change in North Korea*, in CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY 101 (Albert Chen ed., 2014).

³²⁸ Darren C. Zook, *Reforming North Korea: Law, Politics and the Market Economy*, 48 STAN. J. INT'L. 131, 135 (2012).

³²⁹ J. H. Ahn, *N. Korea Updates Constitution Expanding Kim Jong Un's Position*, NK NEWS (June 30, 2016), <https://www.nknews.org/2016/06/n-korea-updates-constitution-expanding-kim-jong-uns-position/>.

³³⁰ DPRK CONST. arts 5, 20, 11, 63, 64 (N. Korea).

³³¹ See, e.g., Changyong Choi, "Everyday Politics" in North Korea, 72 J. ASIAN STUD. 655 (2013).

³³² DPRK CONST. art. 3 (N. Korea).

reliance, has resulted in North Korea's constitutional isolationism. A related ideological principle is *seongun sasang* (military first ideology), which aspires to create combination of political and military rule.³³³ The 2016 constitutional amendment, which creates a new body called Commission on State Affairs headed by Kim Jong Un and enables him to enjoy leadership roles in the military, party, and government, is the embodiment of the constitutional *seongun* principle.³³⁴

North Korea is a negative example of the dynamics of socialist constitutional identity. The fundamental aspiration underpinning constitutional isolationism and domestic military ideology—the purity of socialism—inhibits the emergence of competing constitutional understandings. Therefore, the condition for the development of socialist constitutional identity in North Korea is limited. This limitation of the disharmonic condition is due to economic difficulty, which inhibits the emergence of a pluralist society, and the isolationism, which limits the diffusion of global constitutional ideas in North Korea.

However, North Korea has been confronted with economic difficulty, which necessarily prompts constitutional change. The disharmony between the constitutional isolationist aspiration and the aspiration of economic development and foreign investment has created the opportunity for growth of North Korea's constitutional economy. To be sure, North Korea does not have a systematic vision of market reforms like those of China and Vietnam. But, a moderate modification of the state-owned economy was undertaken through the Joint Venture Act of 1984, effectively a constitutional law that allowed economic cooperation between North Korean industry and foreign enterprises. The 1992 Constitution then legitimized foreign trade and foreign investment and joint venture enterprises.³³⁵

The current Constitution continues the commitment that: “The State shall encourage institutions, enterprises and organizations in our country to joint ventures and cooperation of enterprise with foreign corporations and individuals as well as the establishment and operation of a variety of enterprise in special economic zones.”³³⁶ The Constitution is also committed to “guarantee the legal rights and interests of foreigners in its region.”³³⁷ In addition, there are also constitutional commitments to the protection of private property, and even copyrights, inventions, and

³³³ Zook, *supra* note 328, at 146.

³³⁴ Choe Sang-Hun, *Kim Jong-un Takes an Additional Title in North Korea*, N.Y. TIMES (June 29, 2016), http://www.nytimes.com/2016/06/30/world/asia/north-korea-new-agency.html?_r=0.

³³⁵ Zook, *supra* note 328, at 141.

³³⁶ DPRK CONST. art. 37 (N. Korea).

³³⁷ *Id.* at art. 16.

patents.³³⁸ North Korean citizens “could now earn money from private economic activities, and the fruits of their economic activities.”³³⁹ The economic constitutional commitments have been initially implemented.³⁴⁰ Particularly, “under Kim Jong Un, Chinese-style private farming has been encouraged and large numbers of North Koreans have been sent to China to study its reform experience.”³⁴¹ This adoption of new constitutional economic commitments enables the identity of constitutional economy in North Korea to evolve albeit under the tight control of the state.

The constitutional disharmony between the constitutional principal of *juche* (self-reliance) and commitment to foreign investment, as well as economic development, present an opportunity for the evolution of constitutional identity in North Korea. Dae-kyu Yoon comments: “If an open-door policy is the inevitable option to overcome the country’s current economic difficulty, the rule of law will be one of the most important vehicles to persuade foreigners to trust the system and economic co-operation.”³⁴² Moreover, the imperative of economic development and foreign investment necessarily leads to the impact of globalization on the constitutional identity in North Korea, which is discordant with the aspiration to constitutional isolationism.³⁴³ This may create the potential condition for North Korea’s transnational constitutional engagement, which would engender the continuing dynamics of constitutional identity.

D. Cuba

After the fall of the Soviet Union, the Republic of Cuba has continued the communist regime but has also needed to acclimate itself to a new context. The Communist Party of Cuba (Partido Comunista de Cuba, PCC) met in October 1991 to consider the consequence of the collapse of the communist world to Cuba.³⁴⁴ In the meeting, the Party decided to revise the nation’s 1976 Constitution to adapt. “The leadership closely controlled the process of constitutional revision, and

³³⁸ *Id.* at arts. 24, 74.

³³⁹ Zook, *supra* note 328, at 144.

³⁴⁰ See PHILLIP HOOKON PARK, *THE DYNAMICS OF CHANGE IN NORTH KOREA: AN INSTITUTIONALIST PERSPECTIVE* (2009).

³⁴¹ Martin K. Dimitrov, *Understanding Communist Collapse and Resilience*, in *WHY COMMUNIST DID NOT COLLAPSE: UNDERSTANDING AUTHORITARIAN REGIME RESILIENCE IN ASIA AND EUROPE* 21–22 (Martin K. Dimitrov ed. 2013).

³⁴² Dae-kyu Yoon, *supra* note 327, at 117.

³⁴³ See Charles K. Armstrong, *Juche and North Korea’s Global Aspirations*, *NORTH KOREA INTERNATIONAL DOCUMENTATION PROJECT* (July 7, 2011), <https://www.wilsoncenter.org/publication/juche-and-north-koreas-global-aspirations>.

³⁴⁴ Jorge I. Dominguez, *Government and Politics*, in *CUBA: A COUNTRY STUDY* 230 (Rex A. Hudson ed., 2002).

the PCC and the National Assembly committees carried out the task.”³⁴⁵ The constitutional amendments were approved in July 1992 by the Party and the National Assembly.³⁴⁶ The Constitution was amended again in 2002 to confirm that socialism is irrevocable.³⁴⁷ Thus, instrumentalism remains the core feature in Cuban constitutional polity.

The Constitution also confirms the common core of the socialist constitutional identity. Article 5 mandates: “The Communist Party of Cuba, Marxist and of Marxist-Leninist, the organized vanguard of the Cuban nation, is the superior leading force of the society and the State.”³⁴⁸ The principle of “democratic centralism” is modified as “socialist democracy,” but the substantial meaning remains the same. The constitutional structure includes the National Assembly as “the supreme organ of State power”³⁴⁹ and other institutions (the Council of State, the Council of Ministers, and courts) subordinate to the former.³⁵⁰ Constitutional rights are provided,³⁵¹ but its practice must conform to “the goals of a socialist society.”³⁵² The centrally planned economy and state’s ownership of land are constitutionally confirmed.³⁵³

However, the Constitution adopts some adaptive changes as a response to the fall of the communist bloc. Fundamental national goals are redefined to be more inclusive rather than exclusively socialist. The constitutional preamble established “sociopolitical ideas of Marx, Engels, and Lenin” as the guiding principles, but now also follows “ideology of José Martí.”³⁵⁴ Consequently, the Constitution established a commitment to achieve José Martí’s strong desire: “I want the fundamental law of our republic to be the tribute of Cubans to the full dignity of man.”³⁵⁵ Article 1 then establishes the regime’s constitutional commitment to serving “the good of all.”³⁵⁶ Moreover, the new Article 55 eliminated the Marxist idea of “scientific materialism” and incorporates a new commitment to respecting and guaranteeing freedom of conscience and religion.³⁵⁷

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ CRISTINA VENEGAS, DIGITAL DILEMMAS: THE STATE, THE INDIVIDUAL, AND DIGITAL MEDIA IN CUBA 27 (2010).

³⁴⁸ Constitución de la República de Cuba, art. 5 (1992) (Cuba).

³⁴⁹ *Id.* at art. 69.

³⁵⁰ For more details, see DOMINGUEZ, *supra* note 344, at 233–9.

³⁵¹ Constitución de la República de Cuba, ch. VII (1992) (Cuba).

³⁵² DOMINGUEZ, *supra* note 344, at 231.

³⁵³ Constitución de la República de Cuba, arts. 14, 15, 16 (1992) (Cuba).

³⁵⁴ *Id.* at pmb1.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at art. 1.

³⁵⁷ *Id.* at art. 55.

But, like North Korea, Cuba is a negative example of socialist constitutional identity change. Larry Catá Backer argues that the PCC is the center of political and economic reform in Cuba.³⁵⁸ While the communist parties in China, Vietnam, and Laos have tried to become the ruling party looking forward to attain developmental goals, the communist party in Cuba has remained a revolutionary party looking retrospectively “to reserve the communist society achieved at the moment of revolutionary triumph.”³⁵⁹ Reservationism and “ossification of Cuban Marxism-Castroism” inhibit the emergence of discordant constitutional visions, which in turn limits the dynamics of constitutional identity.³⁶⁰ The ossified ideological foundation makes the constitutional polity in Cuba remain deeply Leninist.

However, like North Korea, Cuba has to deal with economic difficulties and hence the constitutional economy has been adapted for this purpose. Unlike China, Vietnam, and Laos, Cuba has rejected the marketization of the economy and has maintained the centrally planned economy dominated by state-owned enterprises.³⁶¹ While private enterprises are not allowed, the Constitution allows the establishment of “mixed enterprises, and by economic partnerships and associations” and is committed to protect their property,³⁶² which, like North Korea, is meant to attract foreign investments.³⁶³ Following the constitutional aspiration of foreign investment, a new law on foreign investment was adopted in 2014, but its implementation regulations depended on the state actors’ multi-level review and approval due to the ideological constraints of economic statism.³⁶⁴ Thus, revolutionary reservationism is discordant with the constitutional aspiration to foreign investment and the actual need of socioeconomic transition. This moderate disharmonic constitutional condition, the imperative of social and economic transition,³⁶⁵ and the possible global engagement³⁶⁶ (particularly

³⁵⁸ Larry Catá Backer, *The Cuban Communist Party at The Center of Political and Economic Reform: Current Status and Future Reform*, 7 NW. INTERDISC. L. REV. 71 (2015).

³⁵⁹ *Id.* at 110.

³⁶⁰ *Id.* at 121.

³⁶¹ DOMINGUEZ, *supra* note 344, at 231.

³⁶² Constitución de la República de Cuba, art. 23 (1992) (Cuba).

³⁶³ MATIAS F. TRAVIESO-DIAZ, *THE LAWS AND LEGAL SYSTEM OF A FREE-MARKET CUBA: A PROSPECTUS FOR BUSINESS* 106 (1997).

³⁶⁴ For more details, see Backer, *supra* note 358, at 94–100.

³⁶⁵ Olga Fernández Ríos, *Cuba’s Socialist Transition Economic Adjustment and Sociopolitical Challenges*, 197 LATIN AM. PERSP 48 (2014).

³⁶⁶ See generally CUBA IN A GLOBAL CONTEXT: INTERNATIONAL RELATIONS, INTERNATIONALISM, AND TRANSNATIONALISM (Catherine Krull ed., 2014).

transnational dialogue with China),³⁶⁷ constitute potential elements of the dynamics of socialist constitutional identity in Cuba.

B. Comparative Reflections

The general trend shared among the five socialist countries is that core elements of socialist constitutional identity have remained, but adapted to acclimate to the globalizing world. After the collapse of the Soviet bloc, all five countries had to address economic and institutional reform. This necessarily required adjustment to constitutional ideas and principles foundational to the polity. Constitution-making is the main mechanism through which socialist constitutional identity change takes place. The change involves the dialogical interaction between socialist constitutional identity and global constitutional identity. All five countries have pragmatically referenced, incorporated, and redefined some ideas and principles of generic constitutionalism, albeit with different levels. Consequently, all five operating socialist constitutions are disharmonic to varying degrees allowing for the continuous development of socialist constitutionalist identity.

There are at least two factors explaining that convergence. First, globalization compels socialist countries to adapt their constitutional identity. Constitutional globalization is inevitable, and the Vietnamese story has indicated how this affects the dynamics of socialist constitutional identity.³⁶⁸ Laos is more willing to engage in global constitutional dialogue, mainly due to the national economy's heavy reliance on foreign investment. Despite constitutional exceptionalism which contributes to China's resistance to global constitutionalism, China has also signed major international human rights treaties and incorporated the ideas of human rights and property rights into the nation's constitution. Despite North Korea's isolationism and Cuba's reservationism, the imperative of economic development and foreign investment are the driving forces of at least modest global constitutional engagement.

The second factor concerns transnational engagement within the five socialist countries. There are actual signs that they have engaged in dialogue to share their experiences and visions of change. To illustrate, Dwight H. Perkins indicates that: "The leaders of Vietnam certainly knew about and learned from the reform experiences of China that

³⁶⁷ *Chinese premier meets Cuba's first vice-president*, XINHUA (June 19, 2013), <http://english.cpc.people.com.cn/206972/206976/8290188.html>.

³⁶⁸ Tushnet, *supra* note 4.

preceded their reform effort.”³⁶⁹ Laos’s dialogical engagement with Vietnam is also one of the reasons for its adoption of the idea of socialist market economy.³⁷⁰ As mentioned above, North Korea and Cuba have also engaged in dialogue with China on reforming issues.

Yet, there is divergence in socialist constitutional identity adaption among the five countries. The constitutional identity adaption in Vietnam is perhaps the most far-reaching among the five countries, evident by the bold constitutional commitments to popular constituent power, constitutional referendum, the party under the Constitution, distributed and controlled power, and universal human rights. Vietnam, China, and Laos have adapted to all five elements of socialist constitutional identity, while North Korea and Cuba only have moderate adaption to the constitutional economy. Consequently, the socialist countries have different models in their reactions to global impact on their constitutional identity, which can be characterized as *constitutional globalism* (Vietnam and Laos); *constitutional exceptionalism* (China); *constitutional isolationism* (North Korea); and *constitutional reservationism* (Cuba). These variations are defined by the history of communism, intellectual environment, the economic condition, the social structure, the size and population of the respective countries, and the role of the respective countries in the global economic and political order.

CONCLUSION

This study focuses on the impact of globalization to local constitutional identity. As the Vietnamese case indicates, socialist constitutional identity is retained through modification and extension due to the impact of globalization. I conclude with some general reflections.

The studies on constitutional globalization should go beyond the consideration of the convergence of rules, institutions, or constitutional jurisprudence. More fundamental is the globalization of constitutional ideas and principles. The studies of the causal effects require the balance between quantitative and qualitative research.

Moreover, this study suggests implications for further studies of constitutional identity. To begin with, the inquiry into constitutional identity cannot be limited to constitutionalist polities. If “the concept of constitutional identity should be at the center of constitutional theory,”³⁷¹ and the inquiry into constitutional identity is just limited to

³⁶⁹ DWIGHT H. PERKINS, EAST ASIAN DEVELOPMENT 147 (2013).

³⁷⁰ SUJIAN GUO, THE POLITICAL ECONOMY OF ASIAN TRANSITION FROM COMMUNISM 48 (2006).

³⁷¹ JACOBSON, *supra* note 14, at 9.

constitutionalist systems, it follows that constitutional theory will be centralized around a limited set of American, European, and a few other institutional settings that have met basic requirements of constitutionalism. If this is the case, constitutional theory will ignore a number of non-constitutionalist constitutional experiences in different corners of the globe. A polity need not be constitutionalist to acquire constitutional identity. Every constitutional system has ideas and principles fundamental to its existence, which are not simply ignored by autocrats at will. Moreover, if the condition of constitutional disharmony is universal, the potential of constitutional identity change is internal to every constitutional order. In addition, formal amendments to constitutional identity should be taken into account. In polities where judicial review is absent or weak, the evolution of constitutional identity may be taking place through formal mechanisms like formal constitutional amendments. Last but not least, global spread of constitutionalism is an important factor that animates the dynamics of constitutional identity in non-constitutionalist countries. Therefore, it is important to study the connection between constitutional globalization and domestic constitutional identity dynamics.

