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# Vietnam's Mixed Constitution and Human Rights

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**Abstract:** This article develops a discursive explanation of mixed constitution: mixed constitutional ideas and discourse generate mixed constitutional design and practice. On that base, it explores the nature, factors, and functions of the mixed constitution in Vietnam. The emergence of competing constitutional ideas (Confucian, socialist, liberal, universal) animates a constitutional discourse in which different actors adhere to different ideas. Consequently, the 2013 Constitution of Vietnam embodies a mixture of the ideas in its provisions on political institutions, economy, and especially human rights. The enforcement of the constitution induces competing claims to constitutional meanings. The mixed constitution is shaped by path dependency and global diffusion of constitutional ideas. It functions as the base to constrain ideational monopoly and widen the public discourse on constitutional development.

**Keywords:** Vietnam, socialist state, 2013 constitution, constitutional discourse, constitutional ideas, mixed constitution

## Introduction

The Communist Party of Vietnam (CPV) rules the Socialist Republic of Vietnam whose leading ideology is Marxism-Leninism and Ho Chi Minh Thought. Under the leadership of the Communist Party, Vietnam enacted five constitutions. The Democratic Republic of Vietnam promulgated the first constitution in 1946 after the August Revolution of 1945 which overturned French colonial rule in Vietnam. The Constitution was adopted by a multiparty national assembly and included liberal-democratic elements, such as fundamental rights and separation of powers. After the end of the Anti-French Resistance War, the Democratic Republic of Vietnam in the North enacted the second constitution in 1956 following the Soviet constitutional system, while the Republic of Vietnam in the South adopted its own two constitutions in 1956 and 1963, respectively. After the unification of the

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country following the end of the Vietnam War in 1975, a new nationwide Constitution of the Socialist Republic of Vietnam was promulgated in 1980, modelling after the 1977 Constitution of the Soviet Union. In 1992, Socialist Republic of Vietnam adopted a new constitution to facilitate the transition of the centrally planned economy into a socialist-oriented market economy. The 1992 Constitution was amended the first time in 2001, which includes the idea of the “rule of law state” among other things.<sup>1</sup>

After several years of discussion, in August 2011, the National Assembly, the country's legislature, decided to amend its 1992 Constitution for the second time. Several versions of the draft revised constitution were presented and debated in the National Assembly between 2012 and 2013. A version of the draft revised constitution was released to the public for debate in early 2013. Despite the original plan for constitutional amendments, a new Constitution was adopted by the National Assembly on 28 November 2013, which effectively replaces the 1992 Constitution.

This article explores the dynamics surrounding the 2013 Constitution. Conceptually, it introduces a discursive approach to mixed constitution. The logic is that mixed constitutional ideas and discourse induce mixed constitutional design and practice. This article uses qualitative empirical method. It relies on primary resources available in Vietnamese language, including constitutional petitions, online newspapers, academic books, journal articles.

This article argues that the 2013 Constitution is not purely socialist but mixed. In the 2010s, Vietnam witnessed the emergence of competing constitutional ideas: Confucian, socialist, liberal, and universal. These mixed ideas informed a constitutional discourse in which a wide range of political and social actors exchanged their competing views on major constitutional issues, including human rights. Consequently, the 2013 Constitution embodies different ideas in its provisions on political structure, the economy, and especially human rights. The implementation of that mixed constitution has generated competing constructions of constitutional meanings for both authoritarian and constitutionalist purposes. Vietnam's mixed

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<sup>1</sup> On Vietnamese constitutional history, see generally PHAN ĐĂNG THANH—TRƯƠNG THỊ HÒA, *LƯỢC SỬ LẬP HIẾN VIỆT NAM [A BRIEF HISTORY OF VIETNAM'S CONSTITUTION-MAKING]* (Judicial Publishing House 2013). For English literature, see MARK SIDEL, *THE CONSTITUTION OF VIETNAM* (2009); Bernard B. Fall, *North Vietnam's Constitution and Government*, 34 *PACIFIC AFFAIRS* 284 (1960); J. A. C. Grant, *The Vietnam Constitution of 1956*, 52(2) *AM. POL. SCI. REV.* 437, 444 (1958); Milton Sacks, *Restructuring Government in South Vietnam*, *ASIAN SURV.* 515 (1967); William J. Duiker, *The Constitutional System of the Socialist Republic of Vietnam*, in *CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA* 331, 334 (Lawrence W. Beer ed., 1992); Ngô Bá Thành, *The 1992 Constitution and the Rule of Law*, in *VIETNAM AND THE RULE OF LAW* 81 (Carlyle A. Thayer & David G. Marr eds., 1993); 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 L. & COMP. L.* 42 (2002).

constitution is shaped by internal and external factors: path dependency and global constitutional diffusion, respectively. When the authoritarian constitution in Vietnam becomes mixed, it has two crucial functions: it constrains ideational monopoly and provides a wide space for constitutional discourse.

The structure of the article is as follow. Part I introduces the discursive approach to mixed constitution. Part II describes the mixed Constitution in Vietnam. Part III analyzes the factors and functions of the mixed Constitution. The last section concludes.

## I The Discursive Logic of Mixed Constitution

Scholarship on mixed constitution is institutional or/and ideational. The institutional story focuses on the co-existence of competing institutions and government procedures.<sup>2</sup> The ideational accounts turn to competing ideas and values underlying constitutional institutions. The ideational strand is traced back to Plato, Aristotle, and Polybius's work which juxtaposes different legitimacy principles of government.<sup>3</sup> Graham Walker advocates for a new ideational model of mixed constitution, which seeks to combines liberal and non-liberal principles of modern constitutionalism.<sup>4</sup> His account is normative, articulating political and moral justifications for ideational constitutional mixture. However, Walker also provides descriptive examples of mixed constitution, such as Israel's embodiment of mixed constitutive principles (e.g., rights for all juxtaposed with paramount Jewish values, symbols, and Hebrew language).<sup>5</sup>

While ideational accounts add to a deeper understanding of the foundations of mixed constitution, they present ideas as static, entrenched in constitutional parchments. This article turns to a more dynamic approach to mixed constitution, namely discursive. This approach is informed by discursive institutionalism, "an umbrella concept for the vast range of works in political science that take account of the substantive content of ideas and the interactive processes by which ideas are conveyed and exchanged through discourse."<sup>6</sup> So, the discursive approach to mixed constitution shares with Walker's approach in that it considers the co-existing of competing constitutional ideas in constitutions. However, it is different

2 David Lieberman, Mark Goldie, & Robert Wokler, *The Mixed Constitution and the Common Law*, in *THE CAMBRIDGE HISTORY OF EIGHTEENTH-CENTURY POLITICAL THOUGHT* 317 (2006).

3 James M., Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages 14–29* (1992).

4 Graham Walker, *The Mixed Constitution after Liberalism*, *CARDOZO J. INT'L & COMP. L.* 311 (1996).

5 *Id.* at 323.

6 See Vivien A. Schmidt, *Taking Ideas and Discourse Seriously: Explaining Change Through Discursive Institutionalism as The Fourth 'New Institutionalism'*, 2 *EUR. POL. SCI. REV.* 1, 3 (2010).

from Walker's approach in that it considers the dynamics of the competing constitutional ideas outside the constitutional texts: the public discourse on competing constitutional ideas during the constitution-making process and after the constitution's adoption.

Methodologically, the discursive approach to mixed constitution is an interdisciplinary approach which combines both constitutional theory and methodology in social science. This approach, therefore, requires exploring qualitative data (such as newspapers, letters, petitions) regarding how local citizens present and discuss constitutional issues in the public fora.<sup>7</sup> In short, the discursive approach explores how mixed constitutional ideas are created, exchanged, institutionalized, and implemented. This article proposes that the discursive logic can be captured by this formula:

### **Mixed Constitutional Ideas → Mixed Constitutional Discourse → Mixed Constitutional Design → Mixed Constitutional Practice**

First, *mixed constitutional ideas* refer to the coexistence of different ideas (e.g., liberal, socialist, and communitarian) about legitimate constitutional principles within a polity. The co-existence of the constitutional ideas is shaped by their competing appeals: instrumental and normative. Some constitutional ideas derive their weight from their instrumental necessity: they are useful to achieve competing political goals, such as international integration and nationalist promotion. The appeal of other constitutional ideas may stem from normative weight: they are connected to human dignity, justice, and fairness, independent from political interests. The same constitutional idea may be justified by competing appeals. For example, the idea of individual rights may be justified on the ground that it is instrumental to the regime's legitimacy, or it is connected to the universal norm of human dignity.

Second, mixed constitutional ideas inform *mixed constitutional discourse*. Constitutional ideas are the substantive content of constitutional discourse. Mixed constitutional ideas are circulated, discussed, and legitimized thanks to mixed constitutional discourse. The constitutional discourse is mixed in two senses. In

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<sup>7</sup> For some relevant qualitative studies that use original resources to explore public constitutional discourse, see ELIZABETH BEAUMONT, *THE CIVIC CONSTITUTION: CIVIC VISIONS AND STRUGGLES IN THE PATH TOWARD CONSTITUTIONAL DEMOCRACY* (2014) (using English materials to explore constitutional discourse in the U.S.); JENNIFER E. ALTEHENDER, *LEGAL LESSONS: POPULARIZING LAWS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949–1989* (2018) (using Chinese materials to explore constitutional discussions in China); SAMANTHA LOMB, *STALIN'S CONSTITUTION: SOVIET PARTICIPATORY POLITICS AND THE DISCUSSION OF THE 1936 DRAFT CONSTITUTION* (2019) (using Russian archival material to explore constitutional discourse in Russia).

one sense, a wide range of actors, such as intellectuals, lawyers, citizens, politicians, and government officials engage in the constitutional discourse. In the other sense, these discursive actors are informed by different constitutional ideas, and therefore advocate for competing constitutional proposals.

Third, mixed constitutional ideas and discourse induce *mixed constitutional design*. Mixed constitutional ideas are institutionalized by designers in the text of constitution. This mixed constitutional design is the consequence of competing appeals of constitutional ideas and of their competing legitimatization through discourse. The mixed ideas may be explicitly expressed in the constitution in places such as the preamble or provisions about fundamental constitutional principles. In other cases, mixed ideas may be implicitly embedded in the constitutional provisions about the institutions, including structural and procedural political bodies and the rights and obligations of citizens.

Fourth, mixed constitutional design generates *mixed constitutional practice*. The implementation of mixed constitutionalization provokes competing claims to meanings of the constitution. Different constitutional actors attach to different ideas embodied in the constitution and use the constitution for different purposes. Consequently, a mixed constitution may be interpreted to facilitate both authoritarian and constitutionalist practices. For example, political leaders may interpret the constitution in the way that is instrumental to authoritarian control, but citizens may construct alternative constitutional meanings for constitutionalist telos: to ensure the use of the public power for public good. So, a mixed constitution can be formally and informally interpreted to facilitate both authoritarianism and constitutionalism. The authoritarian and constitutionalist practices must be significant in that they may generate changes to law, policy, and social and economic systems. However, the authoritarian and constitutionalist are not necessarily equal. In some polities, constitutionalist practices may be hegemonic, while authoritarian practices may be peripheral; in other polities, authoritarian practices may be prevailing, while some constitutionalist practices are partially accommodated.

Among the four stages, a constitution must reach the third stage to be considered mixed. A constitution is mixed if its text embodies competing fundamental constitutional ideas. If mixed discourse fails to translate mixed ideas into the constitutional text, the constitution may entrench a single set of legitimacy ideas, and hence cannot be considered mixed. The presence of the fourth stage involves the distinction of two senses of mixed constitution: formal and functional. In the formal sense, the fourth stage is not present: a mixed constitution textually embodies competing constitutional ideas, but the constitution is not interpreted differently for competing purposes. In the functional sense, the fourth stage is present: different actors practically construct different constitutional meanings for competing purposes.

The discursive approach is explanatory, rather than normative. It focuses on how and why mixed constitutional ideas are created, exchanged, legitimized, embodied, and practiced. This approach does not ask how a mixed constitutional design should be. However, the discursive explanation of mixed constitution may be helpful to predict constitutional trajectory. For example, a constitution adopting competing constitutional principles may provide the wide space for the continued constitutional discourse and development. Within the discursive framework, the next parts explore the mixed constitution in Vietnam.

## II The Nature of Vietnam's Mixed Constitution

### A Mixed Constitutional Ideas

In an interview in 2010 with the *Vietnamnet*, the most popular online media in Vietnam, *Nguyễn Đình Lộc*, former Minister of Justice and a constitutional law scholar, suggested that: “*In order to amend the Constitution, we must change or define clearer our theory of constitution, state power, and people's liberal and democratic rights.*”<sup>8</sup> That means, to amend the constitution, socialist constitutional theory must be changed or alternative constitutional ideas must be incorporated. In fact, Vietnamese constitutional discourse in the 2010s was informed by a mixture of different constitutional ideas: socialist, liberal, universal, Confucian.

The first ideational source of the constitutional discourse is a set of *socialist constitutional ideas* rooted in Soviet constitutional tradition and Marxist-Leninist theory. The socialist constitutional ideas include the ideas about the class nature of the state, concentration of power, and the leadership of a communist party, individual rights regulated by the state, and economy managed by the state. These ideas diffused in Vietnam through both education and institutional design. Most senior constitutional scholars in Vietnam studied in Soviet Russia. Marxist-Leninism has been taught as a compulsory subject in most universities in Vietnam. It was also confirmed in the Constitution as the leading ideology of the ruling Communist Party of Vietnam.<sup>9</sup>

However, in the various fora of constitutional discourse, socialist constitutional ideology has been less influential. In the public constitutional debate, some socialist concepts and principles have virtually disappeared (such as proletariat

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<sup>8</sup> Tuan Viet Nam, *Việc nước mà dân không biết thì không thể dân chủ được*, [The national affairs that the people do not know cannot be democratic], VIETNAMNET (03/09/2010 06:00 GMT+7), <http://www.tuanvietnam.net/2010-09-02-trang-page>.

<sup>9</sup> Hiến pháp nước cộng hòa chủ nghĩa xã hội Việt Nam [CONSTITUTION], 1992 art 4 (Viet.).

dictatorship), others have been deemphasized (such as, democratic centralism and socialist legality), and others have been re-interpreted with new meanings (such as concentration of power). Socialist constitutional ideology has no longer dominated Vietnamese constitutional discourse due to the emergence of alternative constitutional ideas below.

The second source of mixed constitutional ideas in Vietnam is the ideas associated with *liberal constitutionalism*. Liberal constitutionalism underlines “the imposition of limits upon government in the form of negative rights and procedural rights” and “a strong role for the judiciary in making these limitations effective.”<sup>10</sup> Ideas of liberal constitutionalism were introduced in Vietnam in the early 20th century, and widely diffused in the country in the early 21st century. One mechanism of this ideational diffusion is translation. Work by liberal thinkers, such as Jean-Jacques Rousseau, Montesquieu, John Locke, John Stuart Mill have been translated into Vietnamese and more referenced during the 2010s constitutional debate.<sup>11</sup> The reference to these books have generated liberal constitutional ideas such as, popular sovereignty, separation of power, individual rights.

A specific source of liberal constitutional ideas in Vietnam is American constitutionalism. Liberal ideas of American constitutionalism were diffused in Vietnam thanks to the translation into Vietnamese of *Federalist Papers*,<sup>12</sup> Tocqueville’s *Democracy in America*,<sup>13</sup> and James Madison’s *Notes on the Constitutional Convention of 1787*.<sup>14</sup> Due to the influence of influence of American constitutionalism, new liberal ideas emerged in Vietnam, such as constituent power by “we the people,” limited government, checks and balances, and judicial review, and judicial independence.

**10** David S. Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153, 166. (2016).

**11** See in Vietnamese: CH.S. MONTESQUIEU, *BẢN VỀ TINH THẦN PHÁP LUẬT* [THE SPIRIT OF THE LAWS] (HOÀNG THANH ĐẠM trans., Political Theory Publishing House, 2004); J.J. ROUSSEAU, *BẢN VỀ KHÉ ƯỚC XÃ HỘI* [THE SOCIAL CONTRACT] (HOÀNG THANH ĐẠM trans., Political Theory Publishing House, 2004); JOHN LOCKE, *KHẢO LUẬN THỨ HAI VỀ CHÍNH QUYỀN* [TWO TREATISES OF GOVERNMENT] (LÊ TUẤN HUY trans., Knowledge Publishing House, 2007); JOHN STUART MILL, *BẢN VỀ TỰ DO* [ON LIBERTY] (NGUYỄN VĂN TRỌNG trans., Knowledge Publishing House, 2009); JOHN STUART MILL, *CHÍNH THỂ ĐẠI DIỆN* [CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT] (NGUYỄN VĂN TRỌNG & BUI VĂN NAM SƠN trans., Knowledge Publishing House, 2009).

**12** The Vietnamese selective translation of *Federalist Papers* was first published in Saigon prior to 1975 unification. See NGUYỄN HUNG VƯỢNG, [ON THE U.S. CONSTITUTION] (LUẬN VỀ HIẾN PHÁP HOA KỲ trans., Như Nguyễn Publishing House, 1959).

**13** ALEXIS DE TOCQUEVILLE, *NỀN DÂN TRỊ MỸ* (PHẠM TOÀN Trans, Knowledge Publishing House 2008).

**14** HIẾN PHÁP MỸ ĐƯỢC LÀM RA NHƯ THẾ NÀO [HOW IS THE U.S. CONSTITUTION MADE], (NGUYỄN CẢNH BÌNH trans., World Publishing House 2009).

Apart from external diffusion, the emergence of liberal constitutional ideas in Vietnam is due to the rediscovery of a local source: *Saigon constitutional law scholarship*. Prior to national unification of 1975, a body of constitutional law scholarship had been authorized by Saigon scholars, such as Nguyễn Văn Bông, Lê Đình Chân, and Nguyễn Độ.<sup>15</sup> This body of literature included comparative knowledge (particularly, comparative judicial review addressed as “bảo hiến” and comparative government systems) and local knowledge on institutions and practice of the Saigon government (the Republic of Vietnam in the South). After the unification, this literature is not allowed to be republished for understandably political reasons. Yet, when the *Doi moi* program stipulated new thinking, Vietnamese constitutional intellectuals have searched for new knowledge from different sources, and some began to rummage the former Saigon constitutional law scholarship.<sup>16</sup> As Sidel observes, “they have employed and extended the concepts of judicial review, constitutional protection, individual rights and other ideals discussed there, giving the life’s work of that small band of southern scholars and officials a new use in assisting wide-ranging explorations of constitutional reform in the Socialist Republic of Vietnam.”<sup>17</sup> Especially, the Saigon literature contributes to the awareness of the necessity of bảo hiến or constitutional review by judicial mechanisms. Ho Chi Minh City nomenclature of “bảo hiến” is widely adopted in the Vietnamese contemporary debate on the potential creation of constitutional review in Vietnam.

The third source of mixed constitutional ideas in Vietnam comes from *universal constitutionalism*. Universal constitutionalism features the idea that the legitimacy and authority of the state depends on its adherence to “norms and principles of a universal character that stand over and above the state.”<sup>18</sup> Consequently, the universal model of constitutionalism sees national constitution as the site to implement norms of international law.<sup>19</sup> Ideas of universal constitutionalism also emerged in Vietnam. 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 constitutive to the change of Vietnamese comprehension of human rights from relativist to more cosmopolitan posture. Both constitution-makers and public intellectuals accept the

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<sup>15</sup> NGUYỄN VĂN BÔNG, *LUẬT HIẾN PHÁP VÀ CHÍNH TRỊ HỌC* [CONSTITUTIONAL LAW AND POLITICAL SCIENCE] (1967); LÊ ĐÌNH CHÂN, *LUẬT HIẾN PHÁP VÀ CÁC ĐỊNH CHẾ CHÍNH TRỊ 2 CUỐN* [CONSTITUTIONAL LAW AND POLITICAL INSTITUTIONS], two volumes (1974); NGUYỄN ĐỘ, *LUẬT HIẾN PHÁP, 2 CUỐN* [CONSTITUTIONAL LAW] two volumes (1974).

<sup>16</sup> Sidel, *supra* note 1, at 25.

<sup>17</sup> *Id.*

<sup>18</sup> Law, *supra* note 10, at 174.

<sup>19</sup> *Id.* at 175–6.

idea that constitutional rights in Vietnam must be in consistence with international human rights treaties that Vietnam has signed.

The fourth source of mixed constitutional ideas in Vietnam involves *Confucian communitarianism*. Confucian communitarianism conceives an individual as “a social self” who “is in great harmony with society.”<sup>20</sup> It emphasizes individuals’ moral cultivation and duties in social relations.<sup>21</sup> The role of Confucianism in Vietnamese constitutional discourse is subtle. In the context of growing nationalism particularly triggered by the conflict with China at the East Sea, the explicit reference to Confucianism in the constitutional discourse is unlike. However, some Vietnamese scholars, such as Nguyễn Quốc Việt<sup>22</sup> and Phạm Duy Nghĩa,<sup>23</sup> have discussed the relevance of Confucianism on laws and the rule of law in Vietnam. Some Vietnamese scholars urge “the state to protect not only negative freedoms, such as religious freedoms, but also positive freedoms drawn from neo-Confucian principles of a safe, productive, and ethical society.”<sup>24</sup>

The fifth source of Vietnamese constitutional ideas is *Ho Chi Minh’s constitutional thought*.<sup>25</sup> Given the influential position of Ho Chi Minh in modern Vietnam, this source is the most legitimate and is widely adduced by political leaders, constitution-makers, and public intellectuals. Some called for “Amending the 1992 Constitution under the light of Hồ Chí Minh’s thought.”<sup>26</sup> Chi Minh’s constitutional thought is a mixture of socialist, liberal, and Confucian ideas, and therefore contributes to the emergence of mixed constitutional ideas. First, Ho Chi Minh’s constitutional thought informs socialist constitutional ideas, particularly the ideas about the leadership of the communist party.<sup>27</sup> Second, Ho Chi Minh’s constitutional

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**20** Sungmoon Kim, *The Anatomy of Confucian Communitarianism: The Confucian Social Self and its Discontent*, 42 PHILOSOPHICAL FORUM 111, 113 (2011).

**21** *Id.* at 115.

**22** Nguyễn Quốc Việt, *Explaining the Transition to the Rule of Law in Vietnam: The Role of Informal Institutions and the Delegation of Powers to Independent Courts* (Ph.D. Dissertation., Universität Kassel, 2006).

**23** Phạm Duy Nghĩa, *Confucianism and the Conception of Law in Vietnam*, in *ASIAN SOCIALISM AND LEGAL CHANGE: THE DYNAMICS OF VIETNAMESE AND CHINESE REFORM 76* (John Gillespie & Pip Nicholson eds., 2005).

**24** John Gillespie, *Human Rights as a Larger Loyalty: The Evolution of Religious Freedom in Vietnam*, 47 HARV. HUM. RTS. J. 107, 138 (2014).

**25** VIETNAM’S NATIONAL ASSEMBLY OFFICE, PHÁT HUY NHỮNG GIÁ TRỊ LỊCH SỬ, CHÍNH TRỊ, PHÁP LÝ CỦA HIẾN PHÁP 1946 TRONG SỰ NGHIỆP ĐỔI MỚI HIỆN NAY [THE PROMOTION OF HISTORICAL, POLITICAL, AND LEGAL VALUES OF THE 1946 CONSTITUTION IN THE PRESENT CAUSE OF RENOVATION] (2009).

**26** Lê Cẩm, *Sửa đổi Hiến pháp năm 1992 dưới Ánh sáng Tư tưởng Hồ Chí Minh [Amending the 1992 Constitution under the Light of Hồ Chí Minh’s Thought]*, ĐẠI BIỂU NHÂN DÂN (Sept. 17, 2011), <http://daibieunhandan.vn/default.aspx?tabid=69&ItemId=223598&GroupId=1669>.

**27** *Id.*

thought is vindicated to justify liberal ideas. Particularly, his endorsement of the western liberal institution of constitutional referendum as manifested in his 1946 Constitution are widely vindicated in the liberal constitutional discourse.<sup>28</sup> Third, through Ho Chi Minh, Confucianism indirectly influences on the Vietnamese public discourse. For example, citing Ho Chi Minh, one senior legal scholar suggests that “Amend the Constitution must be based on the people-as-base ideology.”<sup>29</sup> The idea of “people-as-basis” (Vietnamese: *lấy dân làm gốc*; Chinese: *minben*), which emphasizes the government’s responsibility to the happiness of the people, is the main feature of Confucianism generally and Vietnamese Confucianism particularly.<sup>30</sup>

## B Mixed Constitutional Discourse

During the constitution-making process in the 2010s,<sup>31</sup> there emerged in Vietnam a mixed constitutional discourse. It has two aspects. First, a wide range of political and social actors (political leaders, national assembly deputies, government officers, legal scholars, other intellectuals, activists, and citizens) presented and exchanged their competing views and opinions about significant constitutional issues, such as party leadership, state institutions, human rights, the economy, and land ownership. Their views are informed by both socialist constitutional ideas (such as party leadership and democratic centralism) and the competing liberal ideas (such as constitutionalism, contractual constitution, constituent power, the separation of power, constitutional review, judicial independence, and universal human rights, and market economy), and Confucian ideas (such as moral quality of political leaders).

Conservative politicians, legislators, and party scholars’ discourse was mainly informed by socialist constitutional ideas. Reformist politicians, legislators, many legal scholars, intellectuals, activists, and members of civil society tended to adopt ideas of liberal constitutionalism. The influence of Confucian ideas in Vietnamese discourse is not strong as the socialist and liberal ideas, and subtle, but can be traced through the moral and traditionalist discourse on constitutional issues. Given the theme of this Issue, I focus on the mixed constitutional discourse on human rights.

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Tai-Dong Nguyen & Manh-Tung Ho, *People as the Roots (of the State): Democratic Elements in the Politics of Traditional Vietnamese Confucianism*, 13 J. NATIONALISM, MEMORY & LANGUAGE POL. 90 (2019).

<sup>31</sup> Bui Ngoc Son, *Contextualizing the Global Constitution-Making Process: The Case of Vietnam*, 64 (4) AM. J. COMP. L. 931 (2016).

Constitutional protection of fundamental rights is the element of western liberal constitutionalism.<sup>32</sup> This idea has been promoted by Vietnamese constitutionalists in the early 20th century. The 1946 Constitution guaranteed fundamental rights familiar in western constitutions. The subsequent socialist constitutions of 1959, 1980, and 1992 provided even more generous fundamental rights but under the influence of Marxist and Soviet political ideology.

*Christopher Osakwe* identifies several conceptual distinctions of constitutional rights in Soviet constitutional law which are resonant in Vietnamese socialist constitutions. Soviet constitutional rights are not inalienable natural rights but rights granted, modified, or eliminated by the state, have “social content and meaning determined by the social, economic, and political structure of a given society in which the rights in question exist and function,” are inseparable from citizens’ duties obligations, are reconciled and subordinated to “the overriding interests of society at large.”<sup>33</sup> Soviet constitutional rights, which can be epitomized as statist rights, are epistemologically and methodologically underpinned by Marxist legal positivism, constitutional instrumentalism, and historical materialism.

In Vietnam, as Sidel points out, one of “key legal postulates” is “a notion of rights as state-granted rather than emanating from the concepts of natural rights.”<sup>34</sup> Article 50 of 1992 Constitution well illustrates this statist notion of regulatory human rights: “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.”<sup>35</sup> The phrase “in concordance with the law” appeared in most constitutional provisions on citizens’ particular rights. Thus, human rights are reduced to citizen’s rights regulated by the state. The Constitution also stipulated inseparability of rights from duties, and the citizen’s fulfilment of their obligations towards the State and society.<sup>36</sup> The Vietnamese human rights regime established by the 1992 Constitution and previous socialist constitutions was stemmed for the influence of the soviet statist human right tradition and Marxist ideology. In addition, the emphasis on civic duties resonates with the Confucian tradition of communitarianism.

In the Vietnamese constitutional dialogue in the 2010s, the alternative vision of naturalist human rights has emerged, challenging the statist regime of human rights. John Gillespie has demonstrated that the social complexity in Vietnam generated by globalization, urbanization, and economic reform has made Vietnamese government

<sup>32</sup> Ronald Dworkin, *Constitutionalism and Democracy*, 3 EUR. J. PHIL. 1 (1995).

<sup>33</sup> Christopher Osakwe, *Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 U. PA. L. REV. 1350, 1390–95 (1979).

<sup>34</sup> SIDEL, *supra* note 1, at 375.

<sup>35</sup> Hiến pháp nước cộng hoà chủ nghĩa xã hội Việt Nam [CONSTITUTION] 1992, art. 50 (Viet.).

<sup>36</sup> Hiến pháp nước cộng hoà chủ nghĩa xã hội Việt Nam [CONSTITUTION] 1992, art. 51.

and people to adopt more universalist outlook of human rights.<sup>37</sup> The 2013 constitutional debate beautifully illustrates the change in Vietnamese thinking of constitutional rights from statist to liberal and universal perspective.

The draft constitution included new provisions stating that certain citizens' rights may be restricted in the state of emergency to protect national security, public order, and social health and morality.<sup>38</sup> Many legal scholars and lawyers criticized this provision from liberal and universal perspectives. For example, criticizing the chapter on human rights in the draft constitution, Vũ Công Giao, a constitutional law scholar, stated that: "the writing style and content of many provisions in this chapter show that the drafters have not completely escaped the old thinking about a State "above the people," "giving," "controlling" the people's rights and always "fear," "prevent" the people to fight for the respect and guarantee of constitutional rights and freedoms. This is illustrated by the provision on the restriction on rights in the first article of this chapter."<sup>39</sup> This criticism is informed by a liberal idea, which conceives fundamental rights as the limitations on the state, not the opposite.

Civil society organizations also adopted the liberal and universal approaches to constitutional rights. For example, constitutional recommendations by civil society organizations state: "The prevailing provision in Chapter V of the 1992 Constitution (amended in 2001) that the civil rights that need to be "in accordance with the law" remains in Article 26 of the Draft (on the right to freedom of speech, press), and this is not appropriate. All laws must comply with the principles set out in the constitution, but not vice versa. The provision in Article 26 of the Draft is to continue to allow statutory or sub-law documents, even in contravention of the spirit of the constitution and provisions of international human rights conventions, to arbitrarily limit basic freedoms."<sup>40</sup> These constitutional recommendations are informed by a liberal idea of human rights as the legal restraints on the arbitrary power.

Civil society's organizations even called for the creation of a human rights commission:

The Constitution needs to supplement the provision that this body must have a high independent position, by specifying that the composition will include independent members from

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<sup>37</sup> Gillespie, note 24, at 112.

<sup>38</sup> *Khi Nào Quyền Con Người Bị Giới Hạn? [When To Limit Human Rights]*, CÔNG AN NHÂN DÂN (June 4, 2013), <http://Cand.Com.Vn/Thoi-Su/Khi-Nao-Quyền-Con-Nguoi-Bi-Gioi-Han-229587/>.

<sup>39</sup> Vũ Công Giao, Vẫn tư duy "đứng trên nhân dân"! [Still thinking "above the people"], CỘNG VIẾT HIẾN PHÁP (Mar. 5, 2013), <https://hienphap.wordpress.com/2013/03/05/van-tu-duy-dung-tren-nhan-dan-vu-cong-giao/>.

<sup>40</sup> *Kiến nghị của các tổ chức xã hội dân sự Việt Nam về sửa đổi hiến pháp 1992 [Recommendations of Civil Society Organizations of Vietnam to Amend the 1992 Constitution]*, CỘNG VIẾT HIẾN PHÁP (Mar. 30, 2013), <https://hienphap.wordpress.com/2013/03/30/ba-kien-nghi-ve-hien-phap-cua-7-nhom-xa-hoi-va-cac-to-chuc-xa-hoi-dan-su/>.

civil society organizations. The addition of the National Human Rights Commission is consistent with international norms (in particular the ‘Principles of the status of national human rights bodies’, also known as Principles. Paris 1993).<sup>41</sup>

This discourse reflects universal constitutionalism. The civil society organizations perceived the national constitution as the site to implement norms and institutions of international human rights law.

Legislative discourse on human rights presented a mixture of liberal and socialist ideas. In a National Assembly session in June 2013 in which deputies discussed the draft constitution, there were competing views about the provision on human rights restriction, which were conversely informed by liberal and socialist constitutional ideas.<sup>42</sup> For example, delegate Trần Hồng Hà proposed that some basic rights and freedom (such as, freedom of movement and residence, right to travel abroad and from abroad, freedoms to expression, press, access to information, assembly and demonstration) cannot be limited by law.<sup>43</sup> This discourse is informed by a liberal idea of constitutional rights: constitutionally protected liberal rights cannot be curtailed by legislations. Conversely, delegate Phạm Đức Châu stated:

In my opinion, the draft provisions that human rights, citizens’ rights can only be limited in the necessary level in case of emergency is not correct. That is because in reality, depending on the political, economic, social, ethical, customs and practices of each country and in certain periods, the state allows or restricts the realization of human rights and citizens’ rights rather than just in emergency as is in draft.<sup>44</sup>

The delegate gave an example that freedom of residence could be restricted under the provisions of the Law on Residence, which does not necessarily require the condition of an emergency. The delegate proposed that exercise of any rights or obligations must comply with the provisions of law.<sup>45</sup> This legislative discourse on rights was informed by the socialist constitutional ideas. The argument that constitutional rights are shaped by material local conditions echoes Marx’s historical materialism. The view of rights as controlled by the state through legal regulations is informed by socialist statism.

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41 *Id.*

42 Thành Chung, *Giới Hạn Quyền Công Dân Cần Quy Định Rõ Trong Luật [Restriction Of Citizens’ Rights Must Be Specified In Law]*, CỘNG VIẾT HIẾN PHÁP (June 4, 2013), <https://hienphap.wordpress.com/2013/06/04/gioi-han-quyen-cong-dan-can-quy-dinh-ro-trong-luat-thanh-chung-ghi/>.

43 *Id.*

44 *Id.*

45 *Id.*

The constitutional discourse on human rights in Vietnam is also resonated with Confucian ideas.<sup>46</sup> For example, delegate Trương Thị Thu Trang stated: “It is the responsibility of the state to recognize, respect, protect and ensure human rights and citizens’ rights, and to clearly provide that citizens’ rights closely linked and commensurate with the citizens’ obligations.”<sup>47</sup> This discourse is a mixture of socialist and Confucian ideas. The emphasis on rights as regulated by the state reflects socialist statism, while the concern of civic obligations echoes Confucian communitarianism.

## C Mixed Constitutional Design

From an official perspective, the 2013 Constitution is enacted as a new charter for the new phase of socialism in Vietnam.<sup>48</sup> Its preamble explicitly acknowledges that it is enacted “to institutionalize the Political Creed of building the nation during the transitional period to socialism.”<sup>49</sup> Understandably, the Constitution continues to entrench principles essential to Vietnamese socialism. Yet, these principles are not fixed but flexible enough to accommodate new understandings. As the reflection of the mixed constitutional discourse, the constitution encompasses competing constitutional ideas associated with socialist constitutional ideology, liberal constitutionalism, universal constitutionalism, and Confucian communitarianism. First, fundamental ideas of constitutional socialism have still dominated the constitution, including legislature’s constituent power, party vanguard, “democratic centralism,” state-controlled economy, and statist rights. These socialist constitutional ideas exist in tension with some ideas of liberal constitutionalism, such as popular constituent power and limited government, which are also reflected in the Constitution. The Constitution also adopts some liberal ideas of market economy. In addition, the constitution is also informed by rights liberalism and universalism which leads to the constitutional commitment to negative liberty, and the protection of human rights consistent with international human rights treaties. Finally, Confucian communitarianism is still resonated in the Constitution, although this is not very

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46 Ngo T. M Huong, Vu Cong Giao, & Nguyen Minh Tam, *Asian Values and Human Rights: A Vietnamese Perspective*, 2 JSEHR 302, 306 (2018).

47 *Supra* note 38.

48 Nguyễn Sinh Hùng, Hiến pháp Sửa đổi là Bảo đảm Chính trị-Pháp lý Vững chắc [The Revised Constitution is the Firm Political-Legal Guaranty], *BAO DIEN TU CHINH PHU* (Dec. 10, 2013), <http://baodientu.chinhphu.vn/Tin-noi-bat/Hien-phap-sua-doi-la-dam-bao-chinh-triphap-ly-vung-chac/188102.vgp>.

49 Hiến pháp nước cộng hoà chủ nghĩa xã hội Việt Nam [CONSTITUTION], 1992, Preamble (Viet).

## Vietnam's Mixed Constitutional Design

Issue	Socialist	Liberal	Universal	Confucian
Constituent power	Legislative constitution-making	We the people; referendum		Vietnamese people's tradition of humanity and righteousness
Party	Vanguard role	Popular supervision of party power		
State	Unity of power	Distribution and mutual control of the three powers		Government responsiveness
Rights	Rights regulated by the state	Negative political rights	Human rights, proportionality	Rights balanced with duties to the communities
Economy	State's control	Private economic sectors, private property, economic competition		

explicit. The influence of Confucian communitarianism leads to the underlining of constitutional duties of citizens to the community.

Given the theme of this Issue, I focus on the provisions in Vietnam's constitution which embody mixed ideas of human rights as the consequence of the mixed human rights discourse. The Constitution attempts to establish a human rights regime in concordance with universal human rights standards. To illustrate, Article 14 provides that "In the Socialist Republic of Vietnam, human rights and citizens' rights in the political, civil, economic, cultural and social fields shall be recognized, respected, protected and guaranteed in accordance with the Constitution and law."<sup>50</sup> This presents "a universalist dialect" of human rights discourse because "the language of international human rights law or the language that international organizations use to address questions of rights."<sup>51</sup> Article 14 explicitly mentions on human rights and two fields of rights corresponding to the two international human rights conventions.

That article also 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

<sup>50</sup> Hiến pháp nước cộng hoà chủ nghĩa xã hội Việt Nam [CONSTITUTION] 1992, art. 14 (Viet).

<sup>51</sup> David Law, *The Global Language of Human Rights: A Computational Linguistic Analysis*, 12 L.& ETHICS HUM. RTS. 111, 135 (2018).

and community's well-being."<sup>52</sup> Although this provision was criticized as the tool to legitimize human rights restriction in Vietnam, it echoes the principle of balancing in constitutional rights.<sup>53</sup> Article 14 in fact only allows restrictions of human rights by statutes, not administrative regulations. This provision aims to limit the arbitrary limitations of human rights and administrative instruments. The problem is Vietnam does not have judicial mechanism to ensure proportionality: the national courts do not have the power of judicial review to make sure that rights can only be limited by the legislature for public purposes.

The Constitution also includes new rights in concordance with international human rights laws, such as the right to life, the right to innocence, and the right to live in healthy environment.<sup>54</sup> Particularly, the wording is like those of international human rights instruments. For example, the new Article 19 of the 2013 Constitution provides that "Everyone has the right to life,"<sup>55</sup> which replicates Article 3 of the Universal Declaration of Human Rights. Such rights provisions in the 2013 Constitution reflect the universal aspirations of rights. The Constitution also includes many political rights and freedoms, such as freedom of speech and freedom of the press, the right of access to information, the right to assembly, the right to association, and the right to demonstrate.<sup>56</sup> This constitutional protection of political freedom resonates with the idea of liberal constitutionalism, which conceives negative political rights as the limitations on the state power.

However, the universal and liberal constitutional rights provisions coexist with other provisions that embody the socialist-statist and Confucian-communitarian vision of human rights. To illustrate, in contrast to Article 14 mentioned above, Article 15 tries to establish a statist-communitarian human rights regime, 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."<sup>57</sup> The emphasis on the citizens' duties to the state and society respectively reflects socialist-statist and Confucian-communitarian ideas.

The Constitution also includes provisions that express socialist statism. To illustrate, it requires citizens to be responsible to the state and prohibits the

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<sup>52</sup> Hiến pháp nước cộng hoà chủ nghĩa xã hội Việt Nam [CONSTITUTION] 1992, art. 14 (Viet).

<sup>53</sup> Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 L. & ETHICS HUM. RTS. 77, 79 (2010).

<sup>54</sup> Hiến pháp nước cộng hoà chủ nghĩa xã hội Việt Nam [CONSTITUTION] 1992, arts. 19, 31, & 43 (Viet).

<sup>55</sup> *Id.* art 19.

<sup>56</sup> *Id.* art 25.

<sup>57</sup> *Id.* art 15.

abuse of rights to infringe the state's interests.<sup>58</sup> The provisions on specific rights often end with a statement that “the exercise of those rights shall be prescribed by law.”<sup>59</sup> Law in Vietnam includes statutes and numerous administrative regulations. Therefore, not only the legislature but many administrative authorities can enact law to regulate the exercise of rights. The socialist-statist provisions on specific rights coexist in tension with the universalist provisions on general recognition of human rights and their possible restriction by statute.

The emphasis on the citizen's duties to their fellows and the society is in part associated with the long history of Confucian communitarianism in Vietnam. Some provisions on specific duties, such as the duty to learning and the duty to observe rules of community's activities also resonate with Confucian communitarian values.<sup>60</sup> Moreover, some particular provisions concerning particular groups also reflect communitarian ideas. To illustrate, Article 37 underlines the responsibility of the state, family, and society in educating young people on “morality, national tradition and civic consciousness.”<sup>61</sup> This article also underlines that: “The State, family and society shall respect and take care of the elders.”<sup>62</sup> This provision echoes the Confucian traditionalism and experientialism which highly value the role of the elders in the society.

## D Mixed Constitutional Practice

In Vietnam, judicial review is absent, and courts do not have the power to interpret the constitution and enforce constitutional rights. Instead, constitutional rights are secured through legislation.<sup>63</sup> By 2019, Vietnam's National Assembly enacted eleven legislations to detail the implementation of constitutional rights. Political rights are legislated in the new Law on Promulgation of Legal Documents, Law on Access to Information, Law on Press, Law on Belief and Religion. Social, economic, and cultural rights are detailed in the revised legislations, such as the revised Law on Enterprises, Law on Investment, Law on Civil Status, Law on Citizen Identification, Law on Health Insurance, Law on Social Insurance, Law on Marriage and

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<sup>58</sup> *Id.* art 15.

<sup>59</sup> For example, *id.* art 29 (“Citizens have the right to freedom of speech and freedom of the press, and have the right of access to information, the right to assembly, the right to association, and the right to demonstrate. The exercise of those rights shall be prescribed by law.”).

<sup>60</sup> Hiến pháp nước cộng hoà chủ nghĩa xã hội Việt Nam [CONSTITUTION] 1992, art. 46 (Viet.).

<sup>61</sup> *Id.* art 37.

<sup>62</sup> *Id.* art 37.

<sup>63</sup> Legislating rights is not unique to Vietnam. See GRÉGOIRE WEBBER ET AL., LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION (2018).

Family. Other rights, such as the right to life, the right to innocence, the right to protect property have been detailed in other laws, such as the Penal Code and Law on Execution of Criminal Judgements.<sup>64</sup>

As the consequence of mixed constitutional ideas, discourse, and design, different institutions have different claims to constitutional meanings. Although the legal order is formally declared as hierarchical with the constitution locating at the top, followed by legislations, and administrative regulations,<sup>65</sup> there is no effective mechanism to control a uniform and finalized understanding of constitutional norms, which creates competing constitutional claims. The centralized constitutional court is absent in Vietnam. Ordinary courts are also not allowed to interpret the constitution. The National Assembly's Standing Committee is vested with the power of constitutional interpretation, which it has never used. In such context, different state institutions, by issuing legislations and regulations, would develop their own constitutional claims. To illustrate, the Ministry of Justice claimed that 9.017 administrative regulations enacted within the first 10 months of 2014 have signs of violating the constitution and law.<sup>66</sup> This in fact means that different administrative agencies have developed their own constitutional claims, which are not necessarily consistent with each other and with the Ministry of Justice.

Let us illustrate by an example regarding the competing claims (between the National Assembly and the Government) to the meaning of the constitutional right to religious freedom. The 2013 Constitution provides that: "Everyone shall enjoy freedom of belief and of religion. . . . No one has the right to infringe on the freedom of belief and religion or to take advantage of belief and religion to violate the law" (Article 24).<sup>67</sup> This provision expresses competing constitutional ideas: On the one hand, it tends to express a commitment to a universalist and liberal outlook toward religious freedom of everyone; on the other hand, it continues the statist, socialist, regulatory vision that this right cannot be misused to violate the law. The regime enacted Law on Belief and Religion on 18 November 2016. During the law-making process, the mixed constitutional ideas on religious freedom engendered competing constitutional claims between the Government and the National Assembly. The

<sup>64</sup> H.Thư, *Quan Tâm Hoàn Thiện Thể Chế Bảo Vệ Quyền Con Người, Quyền Công Dân [Paying Attention To Perfecting Institutions To Protect Human Rights And Citizens' Rights]*, PHÁP LUẬT (July 23, 2019), <https://baophapluat.vn/quan-tam-hoan-thien-the-che-bao-ve-quyen-con-nguoi-quyen-cong-dan-post312819.html>.

<sup>65</sup> Law on Enactment of Normative Legal Documents ch. XV (2015) (Viet).

<sup>66</sup> Tâm Lụa, *10 tháng, 9.017 văn bản pháp luật vi hiến, trái luật [Within 10 Months, 9.017 regulations violate the Constitution and the Law]*, 9 TUỔI TRẺ ONLINE (Jan. 15, 2015), <http://tuoitre.vn/tin/phap-luat/20150115/van-con-ne-nang-trong-xu-ly-van-ban/699345.html>.

<sup>67</sup> The previous 1992 Constitution had a similar provision. See Hiến pháp nước cộng hoà chủ nghĩa xã hội Việt Nam [CONSTITUTION] 1992, art. 70 (Viet).

Government, the tool for managing the society, proposed the bill with strong socialist, statist vision which aims to control the practice of the religious freedom. Several members of the National Assembly, the institution more responsive to the public, attached to more universalist and liberal view to articulate alternative constitutional claims.<sup>68</sup> Deputy Nguyễn Kim Khoa, for example, claimed that: “The bill focused on management, creates such conditions that fail to meet with the requirements of protecting religious freedom established by the Constitution.”<sup>69</sup> In the same universal view as opposed to the statist vision, another deputy Võ Thị Dung suggested that as belief is the need of the people protected by the Constitution, “there should not be extensive regulations; there should not be too many administrative resolutions.”<sup>70</sup>

The Law on Belief and Religion is the consequence of competing statist and universal claims. On one hand, it presents the state’s stringent regulations of various aspects of religions. On the other hand, the law considerably expands the institutional space for religions, including the recognition of the right to religious freedom as a human right of ‘everyone’ and easier and quicker procedures for the state’s recognition of religious organizations, fuller recognition of the right to religious freedom of foreigners legally residing in Vietnam, some legal limits on state interference in the internal affairs of religious organizations.<sup>71</sup> John Gillespie argued that the expansion of religious freedom in Vietnam is due to the “changing [of] the Vietnamese government’s inward-looking, relativist views of human rights into cosmopolitan, universal perspectives.”<sup>72</sup> The Law on Belief and Religion illustrates mixed constitutional practice. It serves both authoritarian control of religions as the consequence of the statist perception of rights and civic empowering of religious freedom as the reflection of the universalist conception of rights.

Religious freedom is not the only area of mixed constitutional practice in Vietnam. Generally speaking, the 2013 Constitution has both authoritarian, instrumental functions and social functions. In the instrumental functions, to borrow Tom Ginsburg and Alberto Simpser’s theory, the Constitution is not merely a sham document, but operate as manuals for government to coordinate its power,

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68 Chung Hoàng, *Lần đầu bàn luật Tín ngưỡng, tôn giáo* [The First Discussion on the Law on Belief and Religion] VIETNAMNET (Aug. 14, 2015), <http://vietnamnet.vn/vn/thoi-su/lan-dau-ban-luat-ti-ngo-ng-ton-gia-o-256499.html>.

69 *Id.*

70 Thu Hằng, *Không can thiệp hành chính vào nhân sự tôn giáo* (Nov. 20, 2015), <http://vietnamnet.vn/vn/thoi-su/khong-can-thiep-hanh-chinh-vao-nhan-su-ton-giao-274469.html>.

71 For detailed treatment, see Bui Ngoc Son, *Legal Regulation of Religion in Vietnam*, in REGULATING RELIGION IN ASIA: NORMS, MODES, & CHALLENGES 146, 155 (Jaclyn L. Neo, Arif A. Jamal, & Daniel P. S. Goh eds., 2019).

72 Gillespie, *supra* note 24, at 112.

billboards for government to signal its intention, blueprints for government to express its aspiration, a window addressing for government to hide actual political practices.<sup>73</sup> At the same time, the Constitution also has social functions: it is socially used by citizens for constitutionalist purposes. In fact, Vietnamese citizens have already used the constitution claim their rights, as the case of motorbike constitutionalism in which the public discourse influenced the abolition of the one person one motorbike regulation which was conceived as violating the constitutional right to property.<sup>74</sup> After 2013, as the public engaged in debating constitutional change, the public constitutional awareness has been increased, and hence constitutional claims have been greater.

Elsewhere, I have provided several examples, which can be briefly restated here. In 2014, in public forums, Vietnamese lawyers argued that Vietnam Television (VTV), violated a constitutional right to privacy, as the national television broadcaster published a birth certificate of a famous footballer. The Ministry of Information and Communications ordered the VTV to issue a public correction for broadcasting wrongful information. In another case in 2015, the draft revision of the Civil Code included a provision limiting Vietnamese names to 25 characters, which triggered a public debate in which by some legislators and lawyers considered this restriction as violating personal rights protected in the constitution. The new Civil Code of 2015 then excluded the restriction.<sup>75</sup> Other examples include the public debate on the constitutionality of the Hanoi Government's cutting trees, and the 2020 Cybersecurity Law in the context of environmental right and freedom of speech, respectively.

The outcomes of the above two cases are not exclusively due to constitutional claims. However, the cases indicate that the constitutional argumentations are used in public discourse to consolidate the protection of rights. The fact that the Constitution is invoked to strengthen arguments for protecting rights demonstrates that the Constitution is socially relevant, not merely an instrumental for political control. To be sure, this does not mean the social use of the constitution is as powerful as the instrumental deployment. The instrumental functions of the constitution remain prevailing, but its social functions are not insignificant despite peripheral. The social deployment of the Constitution in the public discourse can contribute to the halt of certain policies and

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<sup>73</sup> Tom Ginsburg & Alberto Simpser, *Introduction: Constitutions in Authoritarian Regimes*, in *CONSTITUTIONS IN AUTHORITARIAN REGIMES 2* (Tom Ginsburg & Alberto Simpser eds., 2014).

<sup>74</sup> Mark Sidel, *Motorbike Constitutionalism: The Emergence of Constitutional Claims in Vietnam*, in *LAW AND SOCIETY IN VIETNAM: THE TRANSITION FROM SOCIALISM IN COMPARATIVE PERSPECTIVE 74* (2008).

<sup>75</sup> *SOCIALIST LAW IN SOCIALIST ASIA* (Hualing Fu et al. eds., 2018).

government actions arguably unconstitutional and to the increase in the public awareness of constitutional rights.

### III Factors and Functions of Vietnam's Mixed Constitution

#### A Factors: Path Dependency and Global Diffusion

Vietnam's mixed constitution is shaped by two major factors: path dependency and global diffusion. First, path dependency accounts for the continuity of the Confucian and socialist constitutional ideas, discourse, institutions, and practice. Confucianism was propagated to Vietnam exceedingly early, but not until the Le Dynasty in the 15th century did it find its position and come to influence all aspects of Vietnamese society.<sup>76</sup> The August 1945 Revolution in Vietnam engendered the dethronement of the domination of Confucian political ideology and concomitantly Confucian monarch succumbed to the republic government. Although the socialist republic has expunged the position of Confucianism as formal political ideology, it certainly did not, nor could it, stultify the effects of Confucian values in Vietnamese society. How the people live, how they think, their customs, practices, and landscapes, remain permeated with Confucian culture.

Vietnamese scholars of historical cultural studies underline and explain the continuing influence of Confucianism in contemporary Vietnam. Phan Ngoc state that “there are no traces of Vietnamese culture without a far-reaching Confucian influence, including literature, politics, customs, rituals, arts, and belief. There are no Vietnamese people who are against Confucianism without being affected by it.”<sup>77</sup> In the same vein, Vũ Khiêu opines:

[I]t is impossible to eliminate the heritage of Confucianism and its effects on the minds of Vietnamese people today, though there are but a few who recognize that their thought and acts are authentically Confucian.<sup>78</sup>

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**76** See NHO GIAO O VIET NAM [CONFUCIANISM IN VIETNAM] (The Institute of Han-Nom Studies & The Harvard-Yenching eds., 2006).

**77** PHAN NGOC, BAN SAC VAN HOA VIET NAM (THE CHARACTER OF VIETNAMESE CULTURE) (Literature Publishing House, 2002).

**78** VU KHIU, NHO GIAO VA PHAT TRIEN O VIET NAM 98 (CONFUCIANISM AND DEVELOPMENT IN VIETNAM) (Social Science Publishing House, 1997).

Nguyễn Kim Sơn explains that when the August 1945 Revolution stopped the political dominance of Confucianism in Vietnam, it transformed itself into finding a place in public consciousness, in the needs of culture and values that its traditions helped create.<sup>79</sup> From this, Confucianism has had a chance to regenerate in the country. We see the new influences of Confucianism in modern Vietnamese society: it has spread freely and widely among the people. Today Confucianism follows a process roughly opposite to its previous role: as an element of the basic stratum of culture, Confucianism affects the superstructure through politics, ethics, and ideology.<sup>80</sup>

In such context, Vietnamese constitutionalization cannot escape the long tradition of Confucianism in the country. As indicated above, several statements and provisions in the 2013 Constitution are resonated with the Confucian communitarian values. The adherence to Confucian communitarianism derives from the normative power of the values such as humaneness, righteousness, and filial piety deeply rooted in the Vietnamese culture.

Vietnam has also adopted socialist constitutional ideas, institutions, and practices for many decades.<sup>81</sup> The 2013 constitutional development occurred within the existing socialist regime, and therefore its continuity of extensive history of socialist constitutional history is understandable. The adherence to the socialist constitutional history is due to necessity: this is instrumental to the continuity and consolidation of the socialist regime in Vietnam.

The past Confucian and socialist constitutional ideas, discourse, institutions, and practices coexist with the emerging liberal and universal ones. The emergence of new liberal and universal constitutional attributes is shaped by global constitutional diffusion. Since the Renovation (*Đổi mới*) program introduced in 1986, the Vietnamese socialist state has deeply engaged in the international legal regimes, including the accession to the WTO (World Trade Organization) and the ratification of major international human rights treaties, such as the International Covenant on Civil and Political Rights<sup>82</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>83</sup> Vietnam's transnational legal engagement enabled the diffusion of liberal and universal legal and constitutional ideas into the country.

A wide range of actors have contributed to the dissemination of liberal and universal constitutional ideas in Vietnam through different mechanisms. These include external actors such as: international bodies like UNDP through programs

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<sup>79</sup> Nguyễn Kim Sơn, *Nho giáo trong Tương lai Văn hóa Việt Nam [Confucianism in the Future of Vietnamese Culture]*, available at <http://www.scribd.com/doc/18660098/Nho-giao-trong-tng-lai-vn-hoa-VN> (last visited Sept. 2, 2022).

<sup>80</sup> *Id.*

<sup>81</sup> See generally SIDEL, *supra* note 1.

<sup>82</sup> International Covenant on Civil and Political Rights, Dec. 6, 1966, 99 U.N.T.S. 171.

<sup>83</sup> International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

supporting legal and constitutional reforms; international NGOs, such as Human Watch and Article 19 through critical comments on the draft constitutional amendments; and foreign governments through transnational human rights dialogues with the Vietnamese government.

Internal actors, such as local legal scholars and other intellectuals, also contributed to the global constitutional diffusion in Vietnam. Particularly, young Vietnamese constitutionalists and lawyers trained in European universities (such as France, Germany, and Netherlands) and American law schools play a key role in diffusion of new constitutional ideas in Vietnam. They are competent in foreign languages, particularly English, which is instrumental to their imbibing and disseminating liberal and universal constitutional ideas. Their exchanges and publications in the Vietnamese buttress senior constitutionalists' support of liberal and universal ideas.

Vietnamese constitutional intellectuals have not merely worked in academic four walls. Workshops on constitutional issues have not been purely academic. Law-makers and constitution-makers have been often invited to attend in these fora and exchanged ideas with scholars. Constitution-makers have even created forum to engage in dialogue with scholars. The engagement in constitutional dialogues prompted local legislators and constitution-makers to adopt socialist, liberal, and universal ideas in their discourse.

Finally, global constitutional diffusion in Vietnam was also facilitated by members of civil society and local activists. Internet and social media played an important instrument for activists and other citizens to diffuse global ideas into Vietnam. A group of 72 intellectuals appropriated the Internet to gather public support and disseminate their liberal constitutional proposals. The website of the *Cung Viet Hien Phap* group (Lets Draw up the Constitution) also amassed and disseminated diverse constitutional ideas and materials. A movement called "Declaration of Free Citizens," which mobilized for liberal constitutionalism in Vietnam, was created on the Facebook.<sup>84</sup>

In short, the adherence to constitutional history and the influence of global constitutional diffusion have resulted in the concurrent existence, exchange, institutionalization, and practice of old and new constitutional ideas in Vietnam, rendering the national constitution mixed.

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<sup>84</sup> See Bui Ngoc Son, *Constitutional Mobilization*, 17 WASH. U. GLOBAL STUD. L. REV. 113 (2018).

## B Functions: Ideational Constraints and Enlightenment

When the authoritarian constitution of Vietnam becomes mixed, it has ideational and discursive functions. First, it restrains ideational domination, an important aspect of constitutionalism. The emergence of mixed constitution restrains the ideational monopoly of the socialist ideology. Due to the effect of mixed constitutional ideas, socialist constitutional ideology has now no longer the exclusive mode of thinking in Vietnam. Moreover, the emergence of mixed constitutional ideas has result in the modification of socialist constitutional ideas. Although socialist constitutional ideology has still played its leading role, it has experience transformation by incorporating alternative constitutional ideas, which make it updated and survive in the changing and pluralist context. Consequently, the socialist concepts of constitution, constitution-making power, human rights, and state power has been modified and or reinterpreted. For example, due to the influence of liberal and universal ideas, human rights in Vietnam are now conceived not merely the gifts the state paternalistically bestows to the citizens but the limitations on the state power and universal values the state must respect and protect.

Second, the mixed constitution in Vietnam has a discursive function. Mixed ideas in the constitution provide substantive contents for the public discourse on constitutional development in Vietnam. As the constitution includes competing ideas, it provides a wide space for various actors (such as politicians, government officials, intellectuals, lawyers, and ordinary citizens) to exchange their views and define the constitutional meanings. Particularly, after the adoption of the 2013 Constitution, its new provisions on human rights have animated numerous scholarly, political, and social discourses.<sup>85</sup> The discursive dynamics is mainly due to the mixture of Confucian, socialist, liberal, and universal ideas about human rights embodied in the same constitution.

## Conclusion

This article has introduced the discursive approach to mixed constitution and illustrated it with the case of socialist Vietnam. The discursive approach explores the logic whereby mixed constitutional ideas and discourse generate mixed constitutional design and practice. This article argues as the consequence of mixed constitutional ideas and discourse, Vietnam's Constitution is not merely socialist/

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<sup>85</sup> See, e.g., many essays collected in THỰC HIỆN CÁC QUYỀN HIẾN ĐỊNH TRONG HIẾN PHÁP 2013 [IMPLEMENTATION OF CONSTITUTIONAL RIGHTS IN THE 2013 CONSTITUTION] (Trịnh Quốc Toàn & Vũ Công Giao eds., 2017).

authoritarian; it also embodies liberal and universal ideas, and it is also used by the citizens for constitutionalist purposes, particularly for protecting fundamental rights. I conclude with some general reflections on the implications of the socialist experience for the comparative inquiry into mixed constitution.

To begin with, the familiar view of socialist regime as hierarchal and monist due to the domination of the communist party and communist ideology must be revised. The domestic social economic reforms and the impact of constitutional globalization complicates the constitutional design and practice in the transforming socialist regimes, which pluralizes constitutional ideas. This observation has predictive power: interaction of competing constitutional ideas animate constitutional development in socialist regime, although the development is complex and uncertain. This observation has implications for other transforming socialist regimes in China, Cuba, and Laos.

In addition, the socialist story has implication for comparative study of constitutional design in plural societies. Scholarship in this area has focused mainly on divided societies animated by factors such ethnicity and religion. Mixed constitutions may exist even in ethnically homogenous societies. In such societies, the emergence of competing constitutional ideas and discourse due to global constitutional diffusion creates the condition and facilitates the dynamics of mixed or plural constitutional design.