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# Restoration Constitutionalism and Socialist Asia

BUI NGOC SON\*

*Abstract:* In the course of political transformation in post-communist East Europe, many nations chose to return to the constitutional order predating the domination of communism, the phenomenon scholarly characterized as “restoration constitutionalism.” Recently, China and Vietnam – two socialist nations in Asia – have witnessed the relatively similar phenomenon: past liberal constitutional values have been employed to struggle for constitutional reform, which challenges the communist status quo. This phenomenon is particularly striking in Vietnam in the circle of constitutional revision in the 2010s. This paper considers discourse of restoration constitutionalism in contemporary socialist Asia with particular focus on the case of Vietnam. The percept of this paper is that radical rupture is not a necessary condition for the operation of constitutionalism; instead, it is the constitutional continuity that provides the viability of constitutionalism. Discussing the discourse of restoration constitutionalism in China and Vietnam within this framework, the paper argues that restoration constitutionalism presents the new path of the development of constitutionalism in socialist Asia.

*Key words:* Restoration constitutionalism, transitional constitutionalism, China Constitution, Vietnam Constitution.

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## INTRODUCTION

Constitutionalism is a legally limited government.<sup>1</sup> Today, under modern Western liberal form, constitutionalism—consisting of fundamental elements of popular sovereignty, prescriptive constitution, rule of law, separation of powers and other checks and balances, protection of individuals' liberal rights, judicial review, and judicial enforcement<sup>2</sup>—has achieved a global expansion.<sup>3</sup>

After the fall of the Berlin Wall, communist regimes in East Europe have gradually transformed to new democracies committed to fundamental principles of liberal constitutionalism.<sup>4</sup> One of the distinctive transitional modalities in East Europe is the return to the constitutional order predating the domination of communism, the phenomenon scholastically characterized as “restoration constitutionalism.”<sup>5</sup>

Different from post-communist East European states, China and Vietnam, former members of the Soviet bloc, have consistently remained in the Soviet-style polity ruled by a communist party. But the notable phenomenon relatively resonant with transitional constitutionalism in post-communist East Europe is that past liberal constitutional values have now been employed in China and Vietnam to struggle for constitutional reform, which challenges the communist status quo. Before the triumph of communism, there existed liberal sources of constitutional thinking and practices in China and Vietnam.

During the first half of the twentieth century, constitutional experience in the two nations was basically shaped by fundamental concepts of Western liberal constitutionalism, such as a written constitution, popular sovereignty, representative government, liberal rights, and the sepa-

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1. CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 24 (2005) (“Constitutionalism has one essential quality: it is a legal limitation on government.”).

2. Louis Henkin, *A New Birth of Constitutionalism: Generic Influences and Generic Defects*, 14 *CARDOZO L. REV.* 533, 535-36 (1993).

3. Jiunn-Rong Yeh & Wen-Chen Chang, *The Changing Landscape of Modern Constitutionalism: Transitional Perspective*, 4 *NAT'L TAIWAN U.L. REV.* 174 (2009).

4. See generally Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 *U. CHI. L. REV.* 447 (1991).

5. To illustrate, the 1946 Constitution of Hungary was used as a model during the Hungarian roundtable talks of 1989; the former Czechoslovakia relied on the Constitution of 1920 as the basis for drafting the “new” Constitution after the revolution; Latvia restored the effect of the 1922 Constitution since May 1990; the 1938 Constitution was the basis for Estonia’s constitutional draft; and the Constitution of 1921 was the basis for constitutional drafts in Georgia. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L.J.* 2009, 2069-70 (1997); see also Andras Sajó, *Preferred Generations: A PARADOX OF RESTORATION CONSTITUTIONS*, 14 *CARDOZO L. REV.* 847, 854-855 (1993).

ration of powers.<sup>6</sup> Recently, these liberal constitutional values have been summoned in the call for constitutional reforms. Particularly in Vietnam, where the party and the state have initiated the plan to comprehensively revise its 1992 Constitution, culminating in its replacement by the 2013 Constitution, the call for a return to some liberal values of the 1946 Constitution – the first constitution of the nation – has been forceful.<sup>7</sup> In this paper I used the Vietnamese experience to explore the possibility of restoration constitutionalism in the course of constitutional development in socialist Asia.

The focus of this paper is the phenomenon of “restoration constitutionalism,” understood as “a process under which, as part of the liberalizing agenda, the transitional society is sought to be returned to the constitutional order that prevailed before the eclipse or collapse of democracy and/or the rule of law, rather than being faced with the prospect of fashioning a new constitutional order.”<sup>8</sup> The percept of this paper is that radical rupture is not a necessary condition for the operation of constitutionalism; instead, it is constitutional continuity that enables the viability of constitutionalism. Discussing the manifestation of the discourse of restoration constitutionalism in China and Vietnam in that framework, this paper argues that restoration constitutionalism presents the new path of the development of constitutionalism in socialist Asia. This paper is structured as follows: Part I justifies restoration constitutionalism; Part II considers the implicit trend toward restoration constitutionalism in Chinese constitutional discourse; Part III delineates and analyzes the rise of restoration constitutionalism as a form of discourse in contemporary Vietnam; and Part IV concludes.

## I. RESTORATION CONSTITUTIONALISM

A theory of constitutional foundationalism, elaborated by American constitutionalist Bruce Ackerman, has provided a powerful framework for conceptualizing the nature of constitution-making. It holds that constitution-making is the final stage of liberal revolutions, a revolutionary “constitutional moment” of rupture from the past, and foundational for a new constitutional democracy.<sup>9</sup> Therefore, the discontinuity

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6. See Bui Ngoc Son, *The Introduction of Constitutionalism in East Asian Confucian Context: The Case of Vietnam in the Early Twentieth Century*, 7 NAT'L TAIWAN U. L. REV. 429-30.

7. Thu Ha, *Cựu chủ tịch Quốc hội bàn chuyên sửa Hiến pháp* [Ex-President of the National Assembly Commenting on Constitutional Amendment], TUAN VIETNAM.NET (Jun. 16, 2010), <http://www.tuanvietnam.net/2010-06-24-cuu-chu-tich-quoc-hoi-ban-viec-sua-hien-phap>.

8. Venkat Iyer, *Restoration Constitutionalism in the South Pacific*, 15 PAC. RIM L. & POL'Y J. 39, 40 (2006).

9. Bruce Ackerman, *Constitutional Politics/constitutional Law*, 99 YALE L.J. 453, 488

is the quality of revolutionary constitution.<sup>10</sup>

Constitutional foundationalism has been theorized on the data of eighteenth century constitution-making, especially of the United States, and hence may not be valid for understanding constitution-making and constitutionalism generally. In the West, “ancient constitutionalism” largely relied on the power of the past. For instance, the Roman concept of *mos maiorum*, literally “the ways of our ancestors”, among other things, operated as constitutional restraint on the government of the Roman republic.<sup>11</sup> In imperial East Asia (China, Korea, and Vietnam), the discourse and the practice of “Confucian constitutionalism” are equally past-oriented.<sup>12</sup> The *li* (ritual)—a Confucian form of unwritten constitution consisting of traditional norms and institutions—functioned as constitutional restraint on the imperial power.<sup>13</sup>

Even in the modern era, the reference to the past in constitutional discourse is evident. For example, British constitutionalism both in pre-modern and modern times particularly features the existence of “constitutional convention,” which indicates the power of the past or constitutional tradition.<sup>14</sup> Even in the United States, constitutional scholars often summon the authorities of the founding generation to advance their arguments. For example, some scholars invoke the 1776 Declaration of Independence and the Preamble of the 1787 U.S. Constitution so as to develop a new paradigm of constitutional populism.<sup>15</sup> Moreover, American theorists of originalism in constitutional interpretation particularly mobilize for “restoring the lost constitution” or returning to the original meanings of the U.S. Constitution as it was codified in Philadelphia in

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(1989).

10. *See generally id.*

11. For ancient constitutionalism, see Chaihark Hahm, *Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity*, 57 AM. J. COMP. L. 135, 201 (2009) [hereinafter *Ritual and Constitutionalism*].

12. *Id.* 200-01.

13. Chaihark Hahm, *Confucian Constitutionalism* (2000) (unpublished S.J.D dissertation, Harvard Law School) (on file with Harvard Law School Library); Theodore de Bary, *The “Constitutional Tradition” in China*, 9 J. CHINESE L. 7 (1995); Jaeyoon Song, *The Zhou Li and Constitutionalism: A Southern Song Political Theory*, 36 J. of Chinese Phil. 424 (2009); Bui Ngoc Son, *Confucian Constitutionalism in Imperial Vietnam*, 8 Nat'l Taiwan U. L. Rev. 373, 381 (2013); Chaihark Hahm, *Ritual and Constitutionalism: Disputing the Ruler's Legitimacy in a Confucian Polity*, 57 AM. J. COMP. L. 135, 200-01 (2009).

14. ALBERT V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION cxliii (Roger E. Michener ed., LibertyClassics ed. 1982) (1885).

15. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181-82 (1999). *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 36-41 (2004).

1787.<sup>16</sup>

Constitution-making of transitional societies in the late twentieth century provides further counter-evidence to the foundationalist claim of revolutionary constitution. A theory of constitutional constructivism, as opposed to constitutional foundationalism, illuminated in the works of Ruti Teitel at New York Law School, claims that constitution-making in East and Central Europe and South Africa during the substantial political transformation in the late twentieth century serves as not the culmination of the revolution but the actor in construction of the transformation.<sup>17</sup> Teitel argues that the constitutional foundational theory can only best describe the traditional or eighteenth century constitutionalism, but is not suited to explain the emergence of transitional constitutionalism in the periods of substantial political transformations in the late twentieth century.<sup>18</sup>

Political transformations in post-communist East Europe were largely peaceful, and hence best known as “velvet revolution[s].”<sup>19</sup> Teitel demonstrates that: “The velvet revolutions generally lacked clean breaks, and as such did not culminate in constitutional change of a foundational sort. Years after the political changes, and in much of the region, the story is of constitutional continuity.”<sup>20</sup> The implication of constitutional change accompanying the smooth political change is that:

Whereas revolution by violent means implies rupture in the constitutional regime, velvet revolution implies forced continuity instead. The dilemma of the tension between constitutionalism and political change disappears, for there is no discontinuity, only constitutional continuity. As in other negotiated transitions, constitutions play a role in ratifying the agreements constructing the political shift, as well as in restoring the prerevolutionary constitutional order.<sup>21</sup>

Constitutional change through the restoration modality or restoration constitutionalism is part of a broader picture of transitional constitutionalism. Restoration constitutionalism is a project of peaceful political change, presents constitutional continuity, and evades the dilemma of constitutional beginnings. “To the extent that such transitional consti-

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16. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 90-94 (2004).

17. RUTI TEITEL, *TRANSITIONAL JUSTICE* 9 (2000).

18. *Id.* at 2051.

19. *Id.* at 2067.

20. *Id.* at 2068.

21. *Id.*

tutions are restorative, there are seemingly no constitutional beginnings, only returns. Such constitutionalism eliminates the tensions inherent in constitutionalism in periods of political change.”<sup>22</sup>

Constitutional continuity is not exceptional to the phenomenon of restoration constitutionalism. Long ago, German philosopher G.W.F. Hegel developed an “immanent” approach to constitutional law which suggests that constitutionalism is the self-determination of identity of a given people, an ongoing social and historical process.<sup>23</sup> In the same vein, Felix Frankfurter, Associate Justice of the United States Supreme Court, asserted that the US Constitution “is most significantly not a document but a stream of history.”<sup>24</sup> Similarly, Okoth-Ogendo posits: “Constitutionalism is the end product of social, economic, cultural, and political progress; it can become a tradition only if it forms part of the shared history of a people.”<sup>25</sup> Therefore, history constitutes an intrinsic ingredient of constitutionalism, and hence constitutional continuity is the nature of viable constitutionalism.<sup>26</sup>

Robert Lowry Clinton’s differentiation of the written constitution with the “underlying constitution” or the “real constitution” can be helpful in elaborating the logic of constitutional continuity.<sup>27</sup> Based on the more metaphysical concept of Etienne’s “Constitution of Being” as a composite of formal essence and actual existence, Clinton argues that:

The constitution of any polity is a being that reflects the dominant underlying decisional predispositions of that polity’s citizenry. The constitution of a polity is thus a composite of that polity’s formal essence and its actual existence. Since the essence of any being is that which ensures that being’s self-identity and lack of internal contradiction, the essence of a constitution, whether of a polity or of an individual, is that

22. *Id.* at 2070

23. G.W.F. HEGEL, *OUTLINES OF THE PHILOSOPHY OF RIGHT* 256-63 (Stephen Houlgate ed., T. M. Knox trans., 2008). See also Michael Salter & Julia J. A. Shaw, *Towards a Critical Theory of Constitutional Law: Hegel’s Contribution*, 21 J. L. & SOC’Y 464, 466 (1994).

24. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 33 (1988).

25. W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 65, 80 (Douglas Greenberg et al. eds., 1993).

26. See generally J. David Greenstone, *Against Simplicity: The Cultural Dimensions of the Constitution*, 55 U. CHI. L. REV. 428 (1988); for accounts of the relations of history and political tradition to constitutionalism, see *CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES* (Michel Rosenfeld ed., Duke University Press 1994); Ruth Gordon, *Growing Constitutions*, 1 U. PA. J. CONST. L. 528, 530-31 (1999); DONALD S. LUTZ, *PRINCIPLES OF CONSTITUTIONAL DESIGN* 16 (2006).

27. ROBERT LOWRY CLINTON, *GOD AND MAN IN LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM* 58-59 (1997).

which ensures the self-identity and internal coherence of that polity or individual.<sup>28</sup>

Self-identity and internal coherence of a polity are ongoing actual experiences that involve different generations, and a written constitution adopted in a given time cannot provide a panoply of consequential aspects of the polity with the proviso that it is not an authoritarian constitution, an opprobrium to a true constitutionalism. Thus, “any truly viable constitutionalism,” which “presupposes the idea[s] of constitutional being as a composite of formal essence and actual existence,”<sup>29</sup> is involved in cross-generation constitutional evolvement. That is why Jed Rubenfeld argues that a constitutionalist government is comprehensible only when the constitutional being – the people – is conceived as a cross-generation entity: “[A] people consists not of a set of persons here and now, but of the temporally extended sets of persons – past, present, and future – who will have lived under the rule of a particular political and legal order.”<sup>30</sup>

Michael W. Dowdle’s recent theory of “constitutional listening” equally underscores the essential position of history in the development of constitutionalism.<sup>31</sup> He asserts that:

At its heart, a constitutionalism must both identify and distinguish its polity. It must distinguish who it covers from whom it does not, and justify its special claim to govern that polity as opposed to other possible alternatives . . . And in identifying a political identity, history provides the best source material for constitutionalism. It is history that distinguishes the collective “people” of one particular terrain from those of another. It is through reflection on that history from which the seemingly distinctive collection of values and concerns that identify and distinguish one nation from another are derived. By emphasizing these distinctive values and concerns, a constitution can identify itself as uniquely symbiotic with that polity.<sup>32</sup>

With the above understanding in mind, constitutional continuity is not a normative requirement but a sociological reality of viable constitu-

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28. *Id.* at 60.

29. *Id.*

30. JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 154 (2001).

31. Michael W. Dowdle, *Constitutional Listening*, 88 *CHI.-KENT L. REV.* 115, 152 (2012).

32. *Id.* at 151-52.



tionalism. Chaihark Hahm is correct in stating that:

It may well be that the emphasis on radical rupture as an indispensable condition for the operation of constitutional government has been exaggerated or misguided . . . A sense of continuity with the past may be a logical necessity for constitutionalism generally.<sup>33</sup>

I venture to conclude that it is the constitutional continuity that enables the viability of constitutionalism. Given that, restoration constitutionalism is not an exceptional phenomenon. The logical necessity of constitutional continuity induces us to the conviction that any viable constitutionalism must be restorative to various degrees, and the particular phenomenon of restoration constitutionalism is just a distinctive embodiment of this logic.

## II. CHINA AND RESTORATION CONSTITUTIONALISM

### *A. China's Past Liberal Constitutional Experience*

According to Albert Chen, “[W]estern ideas of constitutionalism and democracy were introduced into China in the late nineteenth century.”<sup>34</sup> The reason for introducing constitutionalism was to help China “counter more forcefully the encroachments of Western and Japanese powers.”<sup>35</sup> Chinese reformers like Kang Youwei and his prominent disciple, Liang Qichao, adopted in the early stage Western liberal constitutionalist ideas, particularly under the influence of the Meiji Reformation and its concomitant, the Meiji Constitution of 1889, which engendered their petition for institutional reform to the Emperor of the Qing dynasty.<sup>36</sup> The Hundred Days’ Reform (from June 11 to September 21, 1898) was the practical consequence of Chinese early liberal constitutional awareness.<sup>37</sup>

Empress Dowager (Cixi) defeated Kang-Liang’s reformist campaign and later introduced a plan for constitutional reform by enacting the General Principle of the Constitutional Government of 1908.<sup>38</sup> This

33. *Ritual and Constitutionalism*, *supra* note 11, at 202.

34. Albert H. Chen, *Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of Five Major Nations*, 8 INT’L J. OF CONST. L. 849, 873 (2010).

35. Xiaohong Xiao-Planes, *Of Constitution and Constitutionalism: Trying to Build a New Political Order in China, 1908-1949*, in BUILDING CONSTITUTIONALISM IN CHINA 37 (Stéphanie Balme & Michael W. Dowdle eds., 2010).

36. Qianfan Zhang, *The Constitution of China: A Constitutional Analysis*, in CONSTITUTIONAL SYSTEMS OF THE WORLD 2–3 (2012).

37. *Id.* at 3–4.

38. *Id.* at 4.

plan, mirroring the Meiji Constitution, which in turn drew from the German Constitution of 1871, anticipated a constitutional monarchy with an elected parliament and responsible government.<sup>39</sup>

But, the imperial proposal of a constitutional monarchy had no chance to be realized. The 1911 Revolution led by Dr. Sun Yat-sen put an end to the Qing dynasty, and subsequently the new Republic of China (ROC) was established in 1912.<sup>40</sup> Albert Chen points out that: “[i]n the first one and a half decades of the republican era, several constitutions – mainly, Western-style and liberal democratic in orientation – were promulgated or drafted by successive governments in Beijing.”<sup>41</sup> However, these constitutional documents, including the Provisional Constitution of 1912, the Tiantan Draft Constitution of 1913, and the Constitution of 1923, were far from effective due to complications caused by warlords and civil strife.<sup>42</sup>

The warlords were defeated in 1928 by Chiang Kai-Shek, a leader of the Chinese Nationalist Party (Kuomintang or KMT) previously created by Dr. Sun Yat-sen, and the national government of the ROC was established in Nanking.<sup>43</sup> However, the KMT engaged in a civil war with the Chinese Communist Party (created in 1921) until 1936 when the two parties entered into an alliance to confront the Japanese invasion.<sup>44</sup> The KMT sought to materialize Dr. Sun Yat-sen’s three-stage program of Chinese political transformation.<sup>45</sup> The three stages included: military government for ending warlords and unifying the nation, the constitutional democracy under the KMT’s political tutelage, and finally the full liberal constitutional democracy.<sup>46</sup> To implement the second stage, a provisional constitution called the Constitution of the ROC in the Period of Political Tutelage was enacted in 1931.<sup>47</sup> As to the third stage, a new Constitution of the ROC was promulgated in December 1946, which is still effective in Taiwan today.<sup>48</sup> Its original purpose was “to move China from the stage of political tutelage by the KMT to a full liberal constitutional democracy with a government based on the separation of powers, elected by free multiparty elections, and re-

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39. *Id.* at 4, n.4.

40. Chen, *supra* note 34, at 873-74.

41. *Id.* at 874.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*; Ralph N. Clough, *The Enduring Influence of the Republic of China on Taiwan Today*, CHINA Q. 1054, 1057 (1996).

spectful of civil liberties and human rights.”<sup>49</sup>

The KMT government was defeated by the Chinese Communist Party (CCP) on the mainland and retreated to Taiwan in 1949, continuing the effect of the 1946 Constitution of the ROC.<sup>50</sup> Taiwan has incrementally entered into the group of new Asian liberal democracies in the late twentieth century based on the 1946 Constitution and the enactment of the Additional Articles and serial constitutional amendments in 1992, 1994, 1997, 1999, and 2005, with the 1999 amendment voided by the Council of Grand Justice for being unconstitutional.<sup>51</sup>

Xiaohong Xiao-Plannes concludes that: “During the first half of the twentieth century, the Chinese adopted Western constitutionalism in order to reorganize political power and to modernize the state.”<sup>52</sup> Thus, prior to the triumph of communism, constitutional discourse and practice in China was largely shaped by fundamental concepts of Western liberal constitutionalism: written constitution, popular sovereignty, free election, liberal rights, and the separation of power.

### B. China's Communist Constitution

After triumphing over the KMT, the CCP founded the People's Republic of China (PRC) in October 1949.<sup>53</sup> In the early stage, the new communist regime relied on the “Common Program of the Chinese People's Political Consultative Conference” as a provisional constitution.<sup>54</sup> In January 1953, the Committee for Drafting the Constitution of the PRC was created and chaired by Mao Zedong.<sup>55</sup> The first constitution of the PRC was adopted in 1954, mirroring the 1936 Constitution of the Soviet Union. The second constitution of the PRC was passed in 1975 as the embodiment of the “extreme leftist ideology” and the reflection of “the achievements of the Cultural Revolution,” an initiative of Mao Zedong in 1966.<sup>56</sup> Two years after Mao's death, “another extreme

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49. Chen, *supra* note 34, at 874.

50. *Id.* at 877.

51. For Taiwan's liberal constitutional transition, see Wen-Chen Chang, *Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective* (2001) (unpublished J.S.D. dissertation, Yale Law School) (on file with the Lillian Goldman Law Library) (discussing Taiwan's liberal constitutional transition); Jiunn-rong Yeh & Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 AM. J. COMP. L. 805, 805 (2011).

52. XIAO-PLANES, *supra* note 35, at 56.

53. Chen, *supra* note 34, at 877.

54. *Id.*

55. Mo Jihong, *The Constitutional Law of the People's Republic of China and Its Development*, 23 Colum J. Asian L. 137, 160 (2009).

56. *Id.* at 139, n.1.

leftist constitution” was enacted in 1978.<sup>57</sup>

The fourth Constitution, which remains in force today in China, was promulgated in 1982 as the expression of Deng Xiaoping’s reform and opening policy, with several amendments in 1988, 1993, 1999, and 2004.<sup>58</sup> The 1982 Constitution restored many principles of the 1954 Constitution. The constitutional amendments committed to socialism with Chinese characteristics,<sup>59</sup> a socialist market economy, a rule of law state, and the protection of human and private property rights.<sup>60</sup> Fundamental principles – the Four Cardinal Principles – underpinning the Chinese communist constitutional order insisted on socialism, the leadership of the CCP, the people’s democratic dictatorship, and Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, and the important thought of the Three Represents.<sup>61</sup>

### *C. China and Restoration Constitutionalism*

The PRC has remained a state ruled by one party. However, according to Albert Chen’s observation, “since the Dengist era of ‘reform and opening,’ beginning in the late 1970s, China has moved a long way from a totalitarian communist system, in which the party-state controlled all social and economic domains and all aspects of citizens’ lives, to an authoritarian political system that has committed itself to certain standards of legality.”<sup>62</sup> The liberalization of the economy through practicing the “socialist market economy” has resulted in corresponding institutional and constitutional changes in more liberal directions, such as the constitutional commitments to the promotion of the rule of state law and the protection of individual rights.<sup>63</sup> In this new reformist context, the Western-style liberal constitutional discourse in China has more space to develop.<sup>64</sup> It is in this context that past liberal constitutional values may have the chance to return in the constitutional

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57. Jihong, *supra* note 55, at 142.

58. *Id.* at 139

59. XIANFA [Cpmb]. (1982) (China).

60. The narration of Chinese communist constitutions is drawn from Mo Jihong, *The Constitutional Law of the People’s Republic of China and Its Development*, 23 COLUM. J. ASIAN L. 137, 168. (2009).

61. XIANFA [CONSTITUTION] (1982) pmb. (China).

62. Chen, *supra* note 34, at 878.

63. See generally Dingjian Cai, *The Development of Constitutionalism in the Transition of Chinese Society*, 19 COLUM. J. ASIAN L. 1, 6, 8 (2005).

64. Yu Xingzhong, *Western Constitutional Ideas and Constitutional Discourse in China*, in BUILDING CONSTITUTIONALISM IN CHINA 1978–2005, at 111–40 (Stéphanie Balme & Michael W. Dowdle eds., 2010); see generally Albert H.Y. Chen, *Toward A Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125 (2000).

discourse in contemporary China. Let us illustrate by the discussions of Qianfan Zhang and Gao Quangxi.

Consider first the discourse by Qianfan Zhang, a Chinese constitutional law scholar at Peking University Law School, expressed in his book *The Constitution of China*, which is perhaps the most illuminating work on Chinese constitutional law produced in English. He begins the book by discussing the social meaning of a gathering of thousands of Confucian scholars initiated by Kang Youwei, regarded as “China’s most influential constitutional entrepreneur,” to prepare to petition the Emperor against signing the Treaty of Shimonoseki with Japan.<sup>65</sup> Zhang construed the gathering as the first organized popular constitutional movement in China. He ends the book by calling for the “Third Republic” in China with the same popular constitutional thinking.<sup>66</sup>

In Zhang’s treatment, Dr. Sun Yat-sen created the First Republic after the 1911 revolution, and the Second Republic, still in existence, was created after the Communist Revolution of 1949.<sup>67</sup> Zhang is critical of the Second Republic under the single rule of the CCP; he believes “the situation in some ways can be seen as even worse than it was in 1908, when the Empress Dowager promulgated the first Constitutional Outline, since the current ruling Communist Party seems even more resistant to the fundamental changes that are essential to China’s constitutionalism.”<sup>68</sup> He then anticipates the potential of the Third Republic, which will practice constitutionalism.<sup>69</sup> For him, a revolution is by no means a necessary condition for the creation of the Third Republic because the Communist Revolution has failed to bring about constitutionalism to China and it is unlikely that another revolution can lead to a different path.<sup>70</sup> Instead, Zhang proposes: “This Third Republic is not to be forcibly established by any revolutionary vanguards who see themselves as morally and intellectually superior to ordinary Chinese people but rather to be brought about precisely by the common people themselves, through their daily actions in defending rights and giving substance to existing constitutional provisions.”<sup>71</sup> To practice this, “the CCP must somehow ‘return power to the people’ (*huanquan yu min*), a challenge that has perplexed China even since revolutionary National-

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65. Zhang, *supra* note 36, at 1-5.

66. *Id.* at 262-64.

67. *Id.* at 40-43.

68. *Id.*

69. *Id.*

70. *Id.* at 198.

71. Zhang, *supra* note 65, at 263.

ists ‘established tutelage politics.’”<sup>72</sup>

Zhang does not explicitly articulate a model of restoration constitutionalism, but his proposal of the Third Republic implicitly indicates to a certain degree restoration constitutional thinking. He locates China’s future constitutionalism in the old-century stream of Chinese constitutional history. Zhang’s popular constitutionalism as the model for the Third Republic especially resonates to a certain degree with the social meaning of Kang Youwei’s First Civic Constitutional Movement and Sun Yat-sen’s political constitutional thinking.

We now turn to the case of Gao Quangxi, a Chinese scholar of Chinese and Western political philosophy. Gao is well-known for his advocacy of political constitutionalism as opposed to judicial constitutionalism supported by many Chinese legal scholars.<sup>73</sup> Gao is particularly influenced by Bruce Ackerman’s theory of dualistic democracy, which distinguishes between extraordinary politics (constitutional politics) and ordinary politics (constitutional law).<sup>74</sup> Gao’s chief position is that the creation of constitutionalism involves the transition from extraordinary politics to ordinary politics, and from revolution to constitutionalization.<sup>75</sup> He recognizes the dilemma between revolution and constitutionalism: while a revolution is a radical breakup of an existing political order, constitutionalism involves the establishment of an enduring political order and superimposition of limitations upon the revolutionary power.<sup>76</sup> Therefore, according to Gao, the establishment of constitutionalism or the process of constitutionalization “can only be achieved by a counter-revolution of the revolution, and a conservative force that is peaceful and reformist rather than violent and revolutionary.”<sup>77</sup> With this position in mind, Gao extols the Glorious Revolution of seventeenth-century England as the paradigm of constitutionalization.<sup>78</sup>

To apply that theory to the case of China, Gao particularly underscores the significance of an extensive understanding of modern Chinese constitutional history, which must be broad enough to cover at

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72. *Id.*

73. See generally Albert H. Y. Chen, *The Discourse of Political Constitutionalism in Contemporary China*, SOCIAL SCIENCE RESEARCH NETWORK (Aug. 9, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2400385](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400385) (discussing Gao’s political constitutionalism).

74. *Id.* at 15.

75. Chen, *supra* note 34, at 15.

76. See *id.* at 16.

77. *Id.* at 30.

78. *Id.* at 31.

least a one full century.<sup>79</sup> Looking at modern Chinese constitutional history, Gao suggests that there exists three and a half constitutional Chinas: (1) the Republic of China founded in 1921; (2) the Republic of China created by the KMT and controlled by it until its democratization in Taiwan; (3) the PRC under the CCP's leadership; and (3 ½) today's not-yet-unified-China, which will hopefully become a new unified China that is "free, constitutional and democratic."<sup>80</sup> Within the PRC, Gao hypothesizes three stages of constitutional development, which, in the view of Albert Chen, seem resonate with Sun Yat-sen's three-stage political program.<sup>81</sup> Gao's three stages consist of a "Revolutionary Constitution" (the 1975 Constitution), a "Reformist Constitution" (the 1982 Constitution), and "a Constitution of Constitutionalism."<sup>82</sup> Gao believes that in the final stage, the party-state may be transformed into a constitutional democracy.<sup>83</sup>

For Gao, Chinese constitutionalism is in the transitional period.<sup>84</sup> Gao explains that the 1982 Constitution is instrumental in terminating radical ideology and revolution, establishing a stable political order, and restoring the state institutions prior to the Cultural Revolution.<sup>85</sup> In addition, its four amendments introduce liberal concepts of the rule of law, human rights, and private property.<sup>86</sup> With these developments, Gao explains China's Constitution is "a constitution that is undergoing gradualist reform and that embodies of a kind of transitional constitutionalism."<sup>87</sup>

In Gao's theory, the process of constitutionalization in China is not yet complete, and a Constitutionalist Constitution in its final stage is still ahead. He attributes the failure of Chinese constitutionalism to "the overwhelming power of radical force of revolution and the relative absence or weakness of the conservative force of constitutionalization."<sup>88</sup> Seeking the conservative force of constitutional reform, Gao returns to modern Chinese constitutional history at its early stage. In this regard, he idiosyncratically underscores the social meaning of the Qing Abdication Decree of 1912.<sup>89</sup> Abdication presents peaceful political change as

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79. *Id.* at 18-19.

80. *Id.* at 19.

81. Chen, *supra* note 34, at 23.

82. *Id.*

83. *Id.*

84. *Id.* at 27.

85. *Id.* at 24.

86. *Id.* at 26.

87. Chen, *supra* note 34, at 27.

88. *Id.* at 31

89. *Id.* at 32

opposed to radical revolution, constituting the constitutional foundation for the creation of the republic. For Gao, Qing abdication was “the Chinese version of the Glorious Revolution” and the embodiment of “the real conservative spirit of constitutionalism.”<sup>90</sup>

From a macro-historical perspective, Gao argues that the 1911 Revolution and the Qing abdication mark the beginning of China’s century-old search for constitutionalism, which shares universal constitutional values with modern states in the world.<sup>91</sup> According to his treatment, the adoption of the 1982 Constitution and its amendments indicate that fundamental modern constitutionalist values have been incrementally incorporated into China’s Constitution.<sup>92</sup> Viewed from this perspective, the 1982 Constitution and its amendments are a return not merely to the original Socialist Constitution of 1954, but to century-old grand tradition of modern Chinese constitutionalism.<sup>93</sup> Commenting on this point, Albert Chen demonstrates that although Gao has not explicitly pointed out what exactly this grand tradition is, “it is reasonably arguable that it is that inspired by the constitutional thought of the 1911 Revolution and of the Republic of China found in 1912, and which contains the seeds of liberalism and democracy planted by the 1946 Constitution of the Republic of China that have born fruits in Taiwan today.”<sup>94</sup>

While Gao is inspired by Ackerman’s constitutional theory, he, like Qianfan Zhang, believes that a revolution is not necessary for a constitutionalist order, but rather Chinese constitutionalism can be achieved through a peaceful transition.<sup>95</sup> Future constitutionalism in China, in Gao’s imagination, is not a clean break with the past.<sup>96</sup> Instead, Gao is quite supportive of the model of restoration constitutionalism.<sup>97</sup> This support is discernible in his return to past liberal constitutional experience in his search for conservative and peaceful force of Chinese constitutionalization.<sup>98</sup> For him, future Chinese constitutionalism is the continuation of Chinese century-long tradition of modern constitutionalism.<sup>99</sup> Moreover, this grand tradition shares general constitutional values with modern states in the world. It seems Gao believes

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90. *Id.* at 21.

91. *Id.* at 27.

92. Chen, *supra* note 34, at 27.

93. *Id.*

94. *Id.* at 33.

95. *Id.* at 30.

96. *Id.* at 31.

97. *Id.* at 33.

98. Chen, *supra* note 34, at 33.

99. *Id.* 27.



that, by returning to this grand tradition, China's constitutionalism will one day converge with "world constitutionalism" – the term coined by Ackerman.<sup>100</sup>

However, there are some indispensable limits in the restoration constitutional discourse of Gao Quanxi and perhaps of China in general. Chinese past-oriented constitutional discussions tend to be implicit rather than explicit, which is comprehensible. Within the current political environment of the party-rule state, an explicit call for a return to the past liberal constitutional values means a direct attack to the domination of the CCP and Chinese socialism generally; hence is unlikely to be allowed to be expressed publicly. This is also the cause of another limit: Chinese restoration constitutional discourse tends to be metaphysical and has refrained from proposing a concrete constitutional design. In short, modern China has rich liberal constitutional experiences and constitutional restoration discourse is possible implicitly, but it is confronted with considerable obstacles.

### III. VIETNAM AND RESTORATION CONSTITUTIONALISM

Similar to China, Vietnam possessed a liberal constitutional experience before the domination of communism. Importantly, liberal values were embodied in the first constitution of the nation, Hồ Chí Minh's 1946 Constitution, which shares some commonalities with Sun Yat-sen's 1946 Constitution. In contemporary Vietnam, the liberal values of the 1946 Constitution witness a striking return in the discourse on constitutional reform. This section examines Vietnam's past liberal constitutional legacies which include prerevolutionary liberal constitutional discourse, Hồ Chí Minh's liberal constitutional thinking, his 1946 Constitution, and the rise of restoration constitutionalism in the circle of Vietnamese constitutional reform in the 2010s.

#### *A. Vietnam's Past Liberal Constitutional Legacies*

##### 1. Prerevolutionary Liberal Constitutional Discourse

In the first half of the twentieth century, Vietnam was under the colonization of the French and the Nguyễn dynasty was titular at Huế.<sup>101</sup> During this period, Vietnamese nationalists adopted fundamental values of Western liberal constitutionalism so as to counter against the colonial

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100. See generally Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997).

101. See Bui Ngoc Son, *supra* note 6, at 425.

power.<sup>102</sup>

In the early twentieth century, Western ideas of liberal constitutionalism were introduced in Vietnam by Confucian nationalist intellectuals (most notably, Phan Bội Châu, Phan Chu Trinh, and Huỳnh Thúc Kháng) through their revolutionary movements and organizations (such as Eastern Exodus Movement, and Vietnam Restoration League, Restoration Movement, and the Tonkin Free School).<sup>103</sup> They were particularly inspired by the Meiji Constitution, Chinese institutional reform (the Hundred Day's Reform), the 1911 Revolution by Sun Yat-sen, and the writings of Chinese reformists, such as Kang Youwei and Liang Qichao.<sup>104</sup> Consequently, constitutionalism under the Western form has become an inextricable part of their anti-colonialism, as they believed that constitutionalist institutions and values were instrumental to modernization of the nation and could eventually restore sovereignty from their invaders.<sup>105</sup> On the ground of Western liberal constitutional framework, the Confucian patriots criticized the arbitrary power of colonialists and the despotic power of the imperial government.<sup>106</sup> The Confucian patriots then called for national independence and creation of a constitutional government mirroring Western standards, such as written constitution, popular sovereignty, popularly elected parliament, multi-party system, separation of powers, liberal rights, and judicial independence.<sup>107</sup>

During World War I, new Western-style intellectuals emerged in Vietnam that were similar to the traditional intellectuals in the advocacy for Western liberal constitutionalism. They included Nguyễn An Ninh; Phan Văn Trường; the *La cloche fêlée* [1923-1926] and *L'Annam* [1926-1928] newspapers; Phan Anh and the Thanh Nghị group; and Nguyễn Tường Tam and the Self-Reliance Literary Group (*Tự lực Văn đoàn*). The Francophiles, such as Nguyễn Văn Vĩnh and the *Đông Dương Magazine* [1913-1919] group, Phạm Quỳnh and the *Nam Phong Magazine* [1917-1933] group, Bùi Quang Chiêu, and the Constitutional Party, also supported the creation of a Western-style constitution in Vietnam under the tutelage of the French.<sup>108</sup>

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102. *Id.* at 430.

103. *Id.* at 441.

104. *Id.* at 426-37.

105. *Id.* at 428-30.

106. *Id.* at 430.

107. *Id.* at 446-50.

108. PHAN ĐĂNG THANH, *TƯ TƯỞNG LẬP HIẾN VIỆT NAM NỬA ĐẦU THẾ KỶ 20 [VIETNAMESE CONSTITUTIONAL THOUGHTS IN THE FIRST HALF OF THE TWENTIETH CENTURY]* (Hanoi: Jud. Publ'g House 2006).

Despite the forceful call for constitution-making by different actors, no constitutional documents were enacted in Vietnam before the August Revolution of 1945. But the social meaning of the diverse constitutional movements is by no means insignificant. These movements familiarized and inspired the Vietnamese people with novel notions of Western constitutionalism and helped the public gain full access to the ideas and institutions of Western modern constitutionalism.

## 2. Hồ Chí Minh's Constitutionalism

Hồ Chí Minh is best known as a Vietnamese hero, the founder of the Communist Party of Vietnam and the state of Vietnam. He gained a status in Vietnam comparable to Mao Zedong in China, however, Hồ Chí Minh is different from Mao Zedong in substantial ways. While he adopted several ideas of communism such as violent revolution, a revolutionary party, and international connection of the communist community as a means to gain the independence for the nation, in order to envisage a government in an independent Vietnam, he adopted several political schools of thought other than communism, such as classical Confucianism and Western modern constitutionalism.<sup>109</sup>

For purposes of this paper, Hồ Chí Minh's adoption of Western modern constitutionalism is considered. During the prerevolutionary period and early years after the August Revolution of 1945, Hồ Chí Minh adopted fundamental ideas of Western liberal constitutionalism in his vision of government for the independent Vietnam.<sup>110</sup> In this regard, he is more similar to Sun Yat-sen than Mao Zedong. Consequently, his first 1946 Constitution shared some values with Sun Yat-sen's 1946 Constitution and was different from Mao Zedong's 1954 Constitution. It is discernible through the works of Hồ Chí Minh during the given time, such as *The Ballad on the Demands of Vietnam* (1922), *Screams to the League of Nations* (1926), and *Declaration of Independence* (September, 1945), that he advocated for the Western ideas of the rule of law and liberal rights.<sup>111</sup> In addition, he insisted in the enactment of a written constitution as an instrument not for class struggle in a communist sense, but for realization of rule of law and liberal rights in a Western

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109. For more illustrations, see Bui Ngoc Son, *Confucianism and Constitutionalism in Vietnam* 264-77 (June 2013) (unpublished Ph.D dissertation, University of Hong Kong) available at <http://hub.hku.hk/bitst/10722/197124/2/FullText.pdf> [hereinafter *Confucianism and Constitutionalism*].

110. Thiem H. Bui, *Liberal Constitutionalism and the Socialist State in an Era of Globalisation: An Inquiry into Vietnam's Constitutional Discourse and Power Structures*, 5 *THE GLOBAL STUDIES J.* 47 (2013).

111. See generally *Id.*

sense.<sup>112</sup> Hồ Chí Minh also denied the Soviet government—the “workers’, peasants’, and soldiers’ government”—in favor of a popular government.<sup>113</sup> He accepted the Western idea of a free and equal election, and in fact organized such an election after the revolution, which were different from the elections in the Soviet Union.<sup>114</sup>

Several intellectual and practical factors led Hồ Chí Minh to adopt Western liberal constitutional concepts. Two factors should be noted. Firstly, his early study of political works by Enlightenment thinkers, such as Rousseau and Montesquieu, and his thirty-year overseas experience, particularly in Western nations such as the United States, the United Kingdom, and France where constitutionalism had been developed, may have shaped his liberal constitutional thinking.<sup>115</sup> Secondly, the failure of Nghệ-Tĩnh Soviets was the practical factor that may have generated Hồ Chí Minh’s conviction that a Soviet government was unsuitable for Vietnam.<sup>116</sup> Although the practice of the Soviet government was merely at the village level, its failure brought about a more general implication. Thus, the radical proposal of the Soviet government might not be appropriate to the revolutionary context in Vietnam in that it might exclude the involvement of many strata other than the workers, peasants, and soldiers in the revolution. That is why after that abortive experience, Hồ Chí Minh and the League for Independence of Vietnam, or the Việt Minh front, introduced a commitment to create a democratic republic with a popular government in order to rally all forces in the society to revolution.<sup>117</sup>

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112. *See generally Id.*

113. Ngoc Son, *supra* note 109, at 287.

114. *Id.* at 272.

115. *Id.* at 262-65.

116. Two months after its founding, the Communist Party led a peasant insurrection whose paroxysm brought about the abolition of the local machinery of government and the replacement by the Soviet regime in two provinces, Nghệ An and Hà Tĩnh, best known as *Xô viết Nghệ-Tĩnh* (Nghệ-Tĩnh Soviets) (1930-1931). The Nghệ-Tĩnh Soviet revolt lasted many months and then was fiercely suppressed by the colonial authorities. The problem of the regime of Nghệ-Tĩnh Soviets was that, while the members of the Soviets were narrowly limited to the workers and the poor peasants, their enemies were broadly defined to include not only the foreign colonialists but also a number of strata in the Vietnamese society; the intelligentsia, the rich farmers, and the other “haves.” This isolated the Soviets from other forces of the society, which enable the colonialists to quell the movement quickly. *See* Martin Bernal, *The Nghe-Tinh Soviet Movement 1930-1931*, 92 OXFORD JOURNALS: PAST AND PRESENT 148-68 (1981).

117. Ngoc Son, *supra* note 6, at 269-70.

### 3. The 1946 Constitution

#### i. Constitution-making Process

Immediately following the Declaration of National Independence, in the first meeting of the provisional government on September 3, 1945, Hồ Chí Minh proposed creating a constitution, stating, “[p]reviously, because we were ruled by the despotic monarchy and then by the equally despotic colonial regime, our country did not have a constitution. Our people did not enjoy democratic liberal rights. We must have a democratic constitution.”<sup>118</sup> In order to enact a constitution, he then suggested “organizing as soon as possible a general election in concordance with the principle of universal suffrage.”<sup>119</sup>

On September 8, 1946, Hồ Chí Minh, the President of the Provisional Government, issued a decree for general suffrage in Vietnam and for the convocation of the first National Assembly following general election.<sup>120</sup> The decree stated, “[t]he Vietnamese people represented by the National Assembly are the supreme power to ordain for Vietnam a democratic republic constitution;” acknowledging that the people were the possessors of the constitutive power and a representative body established by popular elections was to make the constitution.<sup>121</sup> The decree also provided that in order to draft and propose a constitution to the constituent National Assembly, a constitution drafting committee comprised of seven members would be established.<sup>122</sup> The Constitution Drafting Committee was founded on September 20, 1945, and was presided over by Hồ Chí Minh and six other members.<sup>123</sup> The first constitutional draft was presented at the session of the Provisional Government on October 24, 1945, and then released to the public in the newspaper *Cứu Quốc* (National Salvation) on November 10, 1945 for public deliberation.<sup>124</sup>

The National Assembly was created on January 6, 1946, after the

118. HỒ CHÍ MINH, COMPLETE WORKS VOLUME IV 8 (Hanoi: Nat'l Politics Publ'g House 2000).

119. *Id.*

120. BERNARD B. FALL, THE VIET-MINH REGIME: GOVERNMENT AND ADMINISTRATION IN THE DEMOCRATIC REPUBLIC OF VIETNAM 8 (N.Y.: Inst. of Pac. Relations 1956).

121. Decree No. 14/SL (Sept. 8, 1945) (Viet.).

122. *Id.*

123. They included including Vĩnh Thụy (formerly monarch Bảo Đại), Vũ Trọng Khánh, Lê Văn Hiến, Đặng Thai Mai, Nguyễn Lương Bằng, and Trường Trinh. Decree No. 34/SL (Sept. 20, 1945) (Viet.).

124. PHAN ĐĂNG THANH, TƯ TƯỞNG LẬP HIẾN VIỆT NAM NỬA ĐẦU THẾ KỶ 20 [VIETNAMESE CONSTITUTIONAL THOUGHTS IN THE FIRST HALF OF THE TWENTIETH CENTURY] (Hanoi: Jud. Publ'g House 2006).

general election.<sup>125</sup> It was a pluralist constituent assembly, consisting of 120 delegates of Vietminh (communists), 46 delegates of Democratic Party of Vietnam, 24 delegates of Social Party of Vietnam, 143 non-party delegates, and 70 non-elected delegates of the League of Vietnam Revolution (or Việt Cách), and Nationalist Party of Vietnam (or Việt Quốc).<sup>126</sup> Two months after its founding, the National Assembly, in its first session on March 2, 1946, decided to establish its own constitution drafting body named “*Tiểu ban Hiến pháp*” (Select Committee for the Constitution), which consisted of 11 members from various political parties and a completely different entity from the Provisional Government’s Constitution Drafting Committee.<sup>127</sup> At the same time, a body of the government called the *Ủy ban Kiến quốc* (Nation Construction Committee) introduced another constitutional draft. The Select Committee for the Constitution, after examining the two drafts by the government, referencing foreign constitutions, and taking into account public opinion, produced its own draft and presented it in the second session of the National Assembly on October 29, 1946.<sup>128</sup> This constitutional draft was deliberated in the National Assembly for more than one week and was eventually approved on November 9, 1946, by a vote of 140 pros against 2 cons.<sup>129</sup>

## ii. Contents of the 1946 Constitution

The 1946 Constitution was not a Soviet-style constitution. Rather, it adopted several values of Western liberal constitutionalism. Its preamble recognizes the idea of constituent power held by the people.

Article 1 defines the polity as a “Democratic Republic” and declares the principle of popular sovereignty: “All powers in the nation belong to all Vietnamese people, irrespective of race, gender, prosperity, class, and religion.”<sup>130</sup>

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125. Ngoc Son, *supra* note 109, at 272.

126. *See generally id.* The election was held in hard conditions when internal struggles happened between communist force and anti-communist forces like Việt Quốc and Việt Cách, and the French were returning to Indochina. The Communist Party self-dissolved and transformed to the Association of Marxist-Leninist Studies. The communists participated in the election as members of Vietminh. Việt Quốc and Việt Cách, anti-communist parties, boycotted the election. To appease the internal tension and unify internal force against the returning French, before the election, a compromise between Vietminh and Việt Quốc-Việt Cách forces had been reached which allowed the later to participate in the National Assembly without election.

127. Ngoc Son, *supra* note 109, at 276.

128. *Id.* at 277.

129. *Id.*

130. CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF VIET-NAM Nov. 9, 1946, art. I. (Author’s Translation of 1946 Vietnamese Constitution and hereafter).

Next, Chapter II is dedicated to fundamental rights. The Constitution guaranteed: equal rights in all fields; equality before the law; the right to participate in government; gender equality in all domains; rights to freedoms of speech, of the press, of association and meeting, of belief, and of movement; and the right to own property.<sup>131</sup> In addition, the Constitution provided a separate section on political rights concerning popular participation (“election, recall and referendum”).<sup>132</sup> The Constitution was committed to universal suffrage; free, direct, and secret voting; the right to recall their representatives; and the right to referendum on the Constitution and on important issues concerning the destiny of the country.<sup>133</sup>

Chapters III through VI of the Constitution deal with the structure of the state. The Constitution established a tripartite political system: the People’s Parliament, the unicameral legislature elected every three years; the Government created by the Parliament, including the President of State, the Vice-President, and the Cabinet with the latter consisting of the Prime Minister, the Ministers, and the Vice-Ministers; and the judiciary comprising the supreme court, the courts of appeal, and the courts of second and first instance.<sup>134</sup> The local governments included the People’s Councils and the Administrative Committees.

In structuring the central government, the principle of concentration rather than separation of power was accepted due to the war condition.<sup>135</sup> It is understood that a concentrated power is more suitable to rally an entire national force for fighting against the invaders, and to deliver political decision quickly in the war context. This leads to the connection between the People’s Parliament and the government.

But, the form of government established by the Constitution was more likely a semi-presidential system with the adoption of several features of American presidentialism and European parliamentarism, which made it distinctive from Soviet-style concentrated government. The President of State, albeit selected by the Parliament rather than by popular election, had a dual role similar to the President of the United States, namely as the head of both the state and the executive branch.<sup>136</sup>

131. *HIẾN PHÁP VIỆT NAM DAN CHỦ CỘNG HÒA* [CONSTITUTION], arts. 6-14 (1946) (Viet.)

132. *HIẾN PHÁP VIỆT NAM DAN CHỦ CỘNG HÒA* [CONSTITUTION], arts. 17-21 (1946) (Viet.)

133. *HIẾN PHÁP VIỆT NAM DAN CHỦ CỘNG HÒA* [CONSTITUTION], arts. 17-21 (1946) (Viet.).

134. *HIẾN PHÁP VIỆT NAM DAN CHỦ CỘNG HÒA* [CONSTITUTION], arts. 22-70 (1946) (Viet.).

135. NAT'L ASSEMBLY OFFICE, *LỊCH SỬ QUỐC HỘI VIỆT NAM (1946-1960)* [HISTORY OF VIETNAM'S NATIONAL ASSEMBLY (1946-1960)] 104 (Hanoi: Nat'l Politics Publ'g House 1994)

136. *Compare HIẾN PHÁP VIỆT NAM DAN CHỦ CỘNG HÒA* [CONSTITUTION], art. 31 (1946) (Viet.) (Laws approved by the People’s Parliament must be promulgated by the President of the Democratic Republic of Vietnam no later than 10 days after he receives notification. But within

In addition, the president was vested with powerful and independent power: to represent the country; to assume the function of Commander-in-chief of the National Army, nominate or dismiss generals and high-ranking officers of the Infantry, the Navy, and the Air Force; to sign decrees to nominate the Prime Minister, the members of the Cabinet, and the high-ranking officials of governmental agencies; to preside over the Government Council; to promulgate the laws voted by the People's Parliament; award medals and diplomas of honor; to promulgate special amnesties; to sign treaties with other countries; to accredit Vietnamese diplomatic representatives abroad and receive diplomatic representatives from other countries; and to declare war and the end of war. The President also had the relative veto power – a distinctive form of check and balance in the United States presidential system.<sup>137</sup> Besides the presidential features, the 1946 Constitution also adopts several features of European parliamentarism. A clear example was the parliament-based process of government formation. Another parliamentary indicator was the institution of vote of no confidence. The distinctive feature of the 1946 Constitution was that it adopted two separate forms of vote of no confidence: the vote on individual ministers and the vote on the collective Cabinet. This mechanism allows the Parliament to remove both individual ministers and the Cabinet as a whole.<sup>138</sup>

The judiciary is relatively closed to the idea of separation of powers which underlines the importance of its independence. The Court system includes the Supreme Court, the Courts of Appeal, and the Courts of Second and First Instance, organized separately from the central government and local government. Judicial independence was guaranteed by the provision that: “The judges must always carry out their judicial duties in conformity with the law. No other authority is allowed to interfere with the functions of the Judiciary.”<sup>139</sup>

Apart from civil liberties and the semi-presidential government, the Constitution also adopts the Western mechanism of the popular constitutional amendment. The final chapter (VII) prescribes the constitutional amendment process as follows: 2/3 majority of the Parliament could propose the amendments; a special constitutional amendment committee would be established; and the constitutional amendments, af-

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that term the President shall be entitled to request the People's Parliament to proceed to a new discussion. If the laws are maintained by the People's Parliament after further discussion, the President shall be compelled to promulgate them.), with U.S. CONST. art. 1, § 7.

137. *Id.*

138. *HIẾN PHÁP VIỆT NAM DAN CHỦ CỘNG HÒA* [CONSTITUTION], art. 54 (1946) (Viet.).

139. *HIẾN PHÁP VIỆT NAM DAN CHỦ CỘNG HÒA* [CONSTITUTION], art. 69 (1946) (Viet.).



ter being approved by the Parliament, would be ratified by the people in a popular referendum.<sup>140</sup>

With the above contents, some Western experts in Vietnamese modern history and particularly Vietnamese constitutional history have concluded that the Western democratic features of the 1946 Constitution differ from the Soviet constitution. According to David G. Marr, “[t]here were a few borrowing from the Soviet constitutional model in the [Democratic Republic of Vietnam] text, notably people’s councils and administrative committees meant both to serve their constituency and to obey directives from above.”<sup>141</sup> Instead, the Constitution adopts several liberal and democratic values common in Western constitutional government. In Mark Sidel’s assessment, “many of the rights enumerated were intended to indicate the democratic nature of the new government and to reach out to other forces in Vietnamese society”<sup>142</sup> and the provisions on “election, recall and referendum” are “the best evidence of the more democratic and participatory nature of the 1946 Constitution.”<sup>143</sup> Bernard B. Fall, an American journalist and analyst, remarks that: “The Constitution gives a generally ‘Western democratic’ impression to the readers in that it does not deal in economics theories and does not make use of stereotyped communist phases, such as the ‘working people’ or the ‘victory of the dictatorship of the proletariat.’ As a matter of fact, neither does it resemble the new French Constitution of 1946, with its detailed social provisions (right to strike, collective bargaining, and creation of an Economic Council). Like the Democratic Republic’s Declaration of Independence, it appears designed to provide ‘reader appeal’ in the Anglo-Saxon countries, and particularly the United States.”<sup>144</sup> Inside Vietnam, it is popular to view the 1946 Constitution as “a constitution not less democratic and progressive than any constitution in the world. It is a paradigmatic constitution in many aspects.”<sup>145</sup>

In my point of view, the 1946 Constitution reflects fundamental ideas and institutions of Western constitutionalism: political pluralism, popular sovereignty, constitutional referendum, civil liberties, governmental accountability, some forms of checks and balances, and judicial independence.

140. *HIẾN PHÁP VIỆT NAM DAN CHỦ CỘNG HÒA* [CONSTITUTION], art. 70 (1946) (Viet.).

141. DAVID G. MARR, *VIETNAM: STATE, WAR, AND REVOLUTION (1945-146)* 106 (California: University of California Press, 2013).

142. MARK SIDEL, *THE CONSTITUTION OF VIETNAM* 29 (Hart Pub., 2009).

143. *Id.* at 29-30.

144. Fall, *supra* note 120, at 159.

145. GIÁO TRÌNH LUẬT HIẾN PHÁP VIỆT NAM [TEXTBOOK ON VIETNAMESE CONSTITUTIONAL LAW] 82 (Hanoi: People’s Polices Publ’g House 1998).

The 1946 Constitution's liberal features may have some connections with Ho Chi Minh's liberal constitutional thinking. Inside Vietnam, Ho Chi Minh is normally regarded as the author of the 1946 Constitution. The world-renowned military commander Võ Nguyên Giáp who served in Hồ Chí Minh's Government, asserts that: "History verifies that Hồ Chí Minh is the founder of our Party, our Nation, and our National Assembly, and the author of the immortal Declaration of Independence and the first Constitution of Vietnam's Democratic Republic."<sup>146</sup>

Hồ Chí Minh in fact played an important role in the birth of the 1946 Constitution. He suggested constitution-making immediately after the national liberation, proposed electing the National Assembly to make the constitution, and established the Constitutional Drafting Committee under his leadership, which did produce a draft constitution. It is very hard to gauge exactly to what extent Hồ Chí Minh's constitutional ideology actually influenced the drafting of the 1946 Constitution. However, at least, it can be postulated that Hồ Chí Minh might insert his constitutional ideas in the constitution-making process, particularly during the time he served as the leader of the Constitution Drafting Committee of the Provisional Government. As the leader of the Committee, he might have sketched the basic framework for the future constitution of Vietnam. Later, the draft constitution by Hồ Chí Minh's Constitution Drafting Committee became the basis for the work of the Collective Committee for Constitution under the National Assembly.

As a result, the fundamental contents of the 1946 Constitution were basically in accordance with Hồ Chí Minh's constitutional vision. The 1946 Constitution was genuinely, to use Hồ Chí Minh's terminologies, a "democratic constitution" created in the line with "popular rights ideals."<sup>147</sup> The document was the basis to pursue democracy and liberal rights rather than the instrument for class struggles. Furthermore, the rights provisions in the Constitution were basically in accordance with the rights petitions and statements in the 1919 Demands of the Annamite People, the 1926 The Screams to the League of Nations, and the September 2, 1945 Declaration of Independence. Finally, the political system established by the Constitution meshes well with Hồ Chí Minh's

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146. VIETNAM'S NATIONAL ASSEMBLY OFFICE, HIẾN PHÁP NĂM 1946 VÀ SỰ KẾ THỪA, PHÁT TRIỂN TRONG CÁC HIẾN PHÁP VIỆT NAM [THE 1946 CONSTITUTION AND ITS ENDOWMENT AND DEVELOPMENT IN THE VIETNAM'S CONSTITUTIONS] (Hanoi: National Politics Vietnam Publishing House 1998).

147. Hội Luật Gia [Bar Association], *Pháp lý Phục vụ Cách Mạng (Legislations Severing Revolution)* (Hanoi: Bar Association, 1975), 278.

project of a democratic republic with a popular government. That government, instead of a “workers’, peasants’, and soldiers’ government,” was the government of the entire people, constituted and removable by the people through their representatives. Therefore, it can be concluded that the 1946 Constitution reflects a certain degree Hồ Chí Minh’s liberal constitutional thinking.

However, the liberal features of the 1946 Constitution are also closely related to the domestic context in which constitution-making was taken place. Although the 1946 Constitution was adopted after a communist revolution, it was drafted, deliberated, and adopted by a pluralist national assembly – a constituent assembly. In the words of David G. Marr, “the second session of the National Assembly has proved to be the most wide-ranging, substantive public deliberation by an official body ever to take place in Vietnam to date.”<sup>148</sup> The public deliberation reflected the views and the choices of political forces other than communism, which advocated more Western-style liberal and democratic values.<sup>149</sup> The communists constituted only 36% members of the National Assembly. Even for the communists, with the experience of the Nghệ-Tĩnh Soviets, it is unlikely that the Soviet government model was a choice congenial to Vietnam at that time. Before and after the 1945 revolution, the central concern of Vietnam was national liberation. Therefore, Vietnam needed to rally the resultant force of people for the complete liberation of the nation. A communist constitution as an instrument for class struggle might have resulted in social division and hence was not likely appropriate to the mission of national liberation. A democratic constitution which affirmed the power of the entire people, established a government of the entire people, and guaranteed basic rights for an entire people was more likely to serve as the infrastructure for rallying an entire people for national liberation.

### B. Vietnam’s Socialist Constitutions

The influence of Hồ Chí Minh’s constitutionalism and the constitutionalist spirit of the 1946 Constitution declined from the 1954 liberation to the late twentieth century.<sup>150</sup> After the 1946 Constitution, the successive socialist constitutions of Vietnam enacted in 1959, 1980,

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148. MARR, *supra* note 141, at 106-07.

149. *Id.* at 107.

150. Tom Ginsburg, Nick Foti & Daniel Rockmore, “*We the People*”: *The Global Origins of Constitutional Preambles* 126 (The University of Chicago Law School Coase-Sandor Institute for Law and Economics Working Paper No. 664 (2nd Series), 2013), available at <http://www.law.uchicago.edu/files/file/664-447-tg-nf-dr-peoples.pdf>.

1992, and 2013, respectively, follow the Marxist-Leninist constitutional ideology to differing levels.<sup>151</sup>

The 1959 Constitution, effective in North Vietnam, was promulgated after the Điện Biên Phủ victory which put an end to the war against the French in 1954.<sup>152</sup> After the Điện Biên Phủ victory, the Geneva Conference divided Vietnam into two separate zones, North and South, with the Democratic Republic of Vietnam ruling in the North from Hanoi, and the Republic of Vietnam, under the support of the United States, ruling in the South from Sài Gòn (presently, Hồ Chí Minh City).<sup>153</sup> The Democratic Republic of Vietnam in the North enacted the second constitution, a charter for implementing socialism in the North modeled after the Soviet constitutional system, in December 1959;<sup>154</sup> whereas the Republic of Vietnam in the South enacted its own two constitutions in 1956 and 1963 respectively.<sup>155</sup> Hồ Chí Minh was formally the president of the drafting committee of the 1959 Constitution, but the document was drafted with the predominant direction by the socialists of the Party of Labor (the renamed communist party), particularly under the influence of the Secretary-General of the Party Trường Chinh.<sup>156</sup> This explains the radical differences between the 1946 Constitution and the 1959 Constitution.

The end of the Vietnam War in 1975 led the nation to unification and a new nationwide Constitution of the Socialist Republic of Vietnam, the charter for enforcing socialism in all of Vietnam, which was promulgated in December 1980.<sup>157</sup> The 1980 Constitution faithfully followed the 1977 Constitution of the Soviet Union.<sup>158</sup>

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151. See Clauspeter Hill, *Vietnam Constitutional Development in a Reunited Country*, in 2 CONSTITUTIONALISM IN SOUTHEAST ASIA 327, (Clauspeter Hill & Jörg Menzel eds., Singapore: Konrad-Adenauer-Stiftung 2008).

152. *Id.* at 333-34.

153. *Id.* at 330-31, 335.

154. On the 1959 Constitution, see Bernard B. Fall, *North Vietnam's Constitution and Government*, 34 PACIFIC AFFAIRS 284 (1960).

155. For more details, see Robert Devereux, *South Vietnam's New Constitutional Structure*, 8 ASIAN SURV. 627, 628-45 (1968); J. A. C. Grant, *The Vietnam Constitution of 1956*, 52(2) AM. POL. SCI. REV. 437, 444-62 (1958); Milton Sacks, *Restructuring Government in South Vietnam*, 7 ASIAN SURV. 515 (1967).

156. Trường Chinh was the Secretary-General of the prewar Indochina Communist Party and became the Secretary-General of the Party of Labor when it was formed in 1951. After the Geneva Conference, Trường Chinh resolved to follow Stalin's example and build socialism in the North Vietnam. See WILLIAM WARBEBY, *HO CHI MINH AND THE STRUGGLE FOR AN INDEPENDENT VIETNAM* 117-18 (London: Merlin Press 1972).

157. 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).

158. *Id.* at 336.

In 1986, the Communist Party of Vietnam initiated an important economic reform program known as *Đổi mới* (Renovation), which was meant to transform the centrally planned economy into the socialist-oriented market economy.<sup>159</sup> To meet the new demands of renovating the nation, the Constitution of Socialist Republic of Vietnam was adopted in April 1992. The 1992 Constitution continuously followed the socialist constitutional tradition, but in a more moderate manner, and introduced novel provisions that promoted economic liberalization.<sup>160</sup>

The 2013 Constitution was enacted in an attempt to recognize the achievements of nearly three decades of renovation and to establish a new fundamental framework for future renovation. It further strengthened the commitment to human rights protection, but reconfirmed fundamental principles of the socialist constitutional order, such as the leadership of the Communist Party, the unity of power, and the state's control of the national economy and land, despite the popular call for reform during the process of constitution-making.<sup>161</sup>

### C. *The Rise of Restoration Constitutionalism in Vietnam*

The eulogy of Ho Chi Minh's constitutional thinking and his first constitution arose in Vietnam around the late twentieth century.<sup>162</sup> It was not until the 2010s, however, that the party and state in Vietnam initiated the comprehensive plan for constitutional reform with more liberal and democratic directions and the eulogy shifted to a more practical

159. Hill, *supra* note 151, at 338; Tran Thanh Huong & Duong Anh Son, *Economic Development and Constitutional Reform in Vietnam*, in 3 CONSTITUTIONALISM IN SOUTHEAST ASIA 311, 312 (Clauspeter Hill & Jörg Menzel eds., Singapore: Konrad-Adenauer-Stiftung, 2009).

160. Hill, *supra* note 149, at 338-54; Huong, *supra* note 151, at 311-320; Ngô Bá Thành, *The 1992 Constitution and the Rule of Law*, in VIETNAM AND THE RULE OF LAW 81-115 (Carlyle A. Thayer & David G. Marr eds., Canberra: Department of Political and Social Change, Research School of Pacific Studies, The Australian National University 1993); Russell Heng Giang Khng, *The 1992 Revised Constitution of Vietnam: Background and Scope of Changes*, 14 CONTEMPORARY SOUTHEAST ASIA 221, 223-24 (1992).

161. See Bui Ngoc Son, *Vietnam's New Constitution: A Charter for Comprehensive Renovation?*, CONSTITUTIONNET, (Dec. 12, 2013), <http://www.constitutionnet.org/news/vietnams-new-constitution-charter-comprehensive-renovation/>; Bui Ngoc Son, *Petition 72: The Struggle for Constitutional Reforms in Vietnam*, INT'L J. CONST. L. BLOG (Mar. 28, 2013), <http://www.icconnectblog.com/2013/03/petition-72-the-struggle-for-constitutional-reforms-in-vietnam/>.

162. VIETNAM'S NATIONAL ASSEMBLY OFFICE, HIẾN PHÁP NĂM 1946 VÀ SỰ KẾ THỪA, PHÁT TRIỂN TRONG CÁC HIẾN PHÁP VIỆT NAM [THE 1946 CONSTITUTION AND ITS ENDOWMENT AND DEVELOPMENT IN THE VIETNAM'S CONSTITUTIONS] (Hanoi: National Politics Vietnam Publishing House 1998); 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] (Hanoi: National Politics Publishing House 2009).

demand.<sup>163</sup> Vietnamese restoration constitutionalists have now no longer merely enthusiastically extolled the founding constitutional values. Much more than that, they have demanded for the meaningful reification of the liberal and democratic values of Ho Chi Minh's constitutional thinking and his 1946 Constitution in the new constitution.<sup>164</sup>

Actors in the constitutional restoration movement are varied. Most notable among them are retired political leaders and other retired senior officials, including Nguyễn Văn An, former President of the National Assembly; Nguyễn Đình Lộc, former Minister of Justice; Vũ Mão, former Chairman of the National Assembly's Office; and Vũ Đức Khiển, former Chairman of the National Assembly's Legal Committee.<sup>165</sup> They may have realized the limits of communist leadership and desired more liberal reforms during their incumbency, but the party's discipline might have constricted their discourse. Their retirement provides them with more space to promote liberal values on the restoration-oriented grounds. Other actors include incumbent senior officials like Hà Hùng Cường, Minister of Justice; Nguyễn Sỹ Dũng, Vice-Chairman of the National Assembly's Office; and Nguyễn Văn Phúc, Vice-Chairman of the National Assembly's Economic Committee. Some liberal assembly delegates, such as Dương Trung Quốc and Nguyễn Minh Thuyết, have also joined the restoration movement. Notably, the restoration constitutionalists include a number of distinguished legal scholars, such as Lê Cẩm, Nguyễn Đăng Dung, Phạm Duy Nghĩa, Nguyễn Như Phát, Nguyễn Cửu Việt, and Đào Trí Úc;<sup>166</sup> intellectuals in different fields; ordinary people; and even dissidents. The main venues for expressing the restoration proposals consist of the congressional forum, popular forums (state-owned popular medias, unofficial websites, and Facebook), and scholarly forums (national law journals and conferences, workshops, and seminars).

The restoration movement has been vehement since the *Vietnam-net* – the most popular state-owned online media company in Vietnam – published an interview with Nguyễn Văn An in June 16, 2010. In the interview, An passionately called for return to fundamental principles of the 1946 Constitution.<sup>167</sup> After identifying the limits of recent constitutional amendments in Vietnam, An states that: “I believe that recent

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163. Ha, *supra* note 7.

164. *Id.*

165. Nguyen Thi Huong, *Pursuing Constitutional Dialogue within Socialist Vietnam: The 2010 Debate*, 13 *Austl. J.L.* 1, 8-11 (2012).

166. *Id.* at 11.

167. Ha, *supra* note 7.

constitutional amendments have some points which depart from or are less transparent compared with the 1946 Constitution – the first Constitution of Democratic Republic of Vietnam. I believe that recent constitutional amendments have some points which depart from or less transparent compared with the 1946 Constitution – the first constitution of Democratic Republic of Vietnam.”<sup>168</sup> He then argues for constitutional reforms on the grounds of the 1946 charter.<sup>169</sup> In fact, Nguyễn Văn An’s restorationism, more than the expression of his personal constitutional wisdom, reflected and popularized the restoration movement, which had been promoted by legal scholars and intellectuals, thanks to An’s former legislative leadership and the publication in the most popular online media company in the nation.<sup>170</sup>

In addition to Nguyễn Văn An’s interview, *Vietnamnet* conducted another interview with Nguyễn Đình Lộc in late 2010.<sup>171</sup> Quite similar to An, Lộc followed the same restoration trend. He believes that the 1946 Constitution is paradigmatic in the sense that it includes all necessary fundamental rights.<sup>172</sup> However, Lộc’s concern was conceptual rather than institutional, and hence he is more interested in Ho Chi Minh’s constitutionalism than the 1946 charter. He stated, “In order to amend the Constitution, we have to change or determine more clearly our doctrine of constitution, state power, and liberal rights of the people. On the ground of that doctrine, we can design institutions.”<sup>173</sup> He proposed a return to Ho Chi Minh’s “constitutional doctrine:”

Uncle Hồ’s aspiration is very clear. He also publicly declared his aspiration as follows: ‘We must have a democratic constitution’ . . . The meaning of the word ‘democratic’ is very rich. It is expressed in the 1946 Constitution. Certainly, we should not extol the 1946 Constitution unilaterally. It is not simple to apply the 1946 Constitution in the current situation. Uncle Hồ’s constitutional doctrine is very clear. We have to follow Hồ Chí Minh ‘s thought, and the case is how to apply

168. *Id.*

169. *Id.*

170. *See generally id.*

171. The interview includes two parts. Tuần Việt Nam, *Đã đến lúc không thể tránh né những vấn đề cốt tử* [It is now Impossible to Avoid Essential Issues], TUAN VIETNAM.NET (Sept. 9, 2010, 7:00), <http://tuanvietnam.net/2010-09-02-da-den-luc-khong-the-tranh-ne-nhung-van-de-cot-tu->; Tuần Việt Nam, *Việc nước mà dân không biết thì không thể dân chủ được* [If the People are not Aware of National Affairs, It will be Undemocratic], TUAN VIETNAM.NET (Sept. 3, 2010), <http://tuanvietnam.net/2010-09-02-trang-page>.

172. Tuần Việt Nam, *supra* 171.

173. *Id.*

them.<sup>174</sup>

Nguyễn Văn An and Nguyễn Đình Lộc's interviews have particularly contributed to the development of Vietnamese restoration constitutionalism. After these interviews, Vietnamese legal scholars, intellectuals, officials, and others are more confident in their struggle for restoring the values of the 1946 Constitution and Hồ Chí Minh's constitutional thought. It is useful to illustrate this by some restoration statements. Lê Cẩm, a distinguished law professor at Vietnam National University at Hanoi, in an article published in *Người đại biểu nhân dân* (*People's Representatives*), a popular newspaper of the National Assembly, ardently calls for "amending the 1992 Constitution under the light of Hồ Chí Minh's thought."<sup>175</sup> He proposes that three features, namely "people," "democracy," and "rule of law," which in his belief, are the essential components of Hồ Chí Minh's constitutional thought and are embodied in the 1946 Constitution, must be followed in course of constitutional revision.<sup>176</sup> In the same vein, Đinh Dũng Sỹ, a scholar-official of the Government's Office, in an article published by the National Assembly's *Journal of Legislative Studies*, suggests that Vietnam "can completely reform the 1992 Constitution by developing the notions of the 1946 Constitution suitable to the current situation."<sup>177</sup> Nguyễn Sĩ Dũng holds the same view, stating in the *Tia Sáng Newspaper* that: "to amend the 1992 Constitution pertaining the rule of law state and the methods of constitutional writing, we need not learn from elsewhere but learn from the 1946 Constitution."<sup>178</sup> Let us consider in detail the restoration constitutional proposals.

### 1. Popular Sovereignty

The restoration constitutionalists call for redefinition of the principle of popular sovereignty on the grounds of Hồ Chí Minh's thought

174. *Id.*

175. Lê Văn 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* (Sep. 17, 2011), <http://daibieunhandan.vn/default.aspx?tabid=69&ItemId=223598&GroupId=1669><http://daibieunhandan.vn/default.aspx?tabid=69&ItemId=223598&GroupId=1669>

176. *Id.*

177. Đinh Dũng Sỹ, *Một số đề xuất sửa đổi, bổ sung phần liên quan đến chương I - Hiến pháp năm 1992* [*Some Suggestions for Amending the Chapter I of the 1992 Constitution*], *VIBONLINE* (Mar. 5, 2012), <http://tintuc.vibonline.com.vn/Home/Xay-dung-phap-luat/8695/Mot-so-de-xuat-sua-doi-bo-sung-phan-lien-quan-den-chuong-I-Hien-phap-nam-1992>.

178. Nguyễn Sĩ Dũng, *Học ở Hiến pháp năm 1946* [*Learning from the 1946 Constitution*], *TIASÁNG* (Sep. 16, 2011, 9:40), <http://tiasang.com.vn/Default.aspx?tabid=116&CategoryId=42&News=4377>.



and the 1946 Constitution. They challenge the Marxist class definition of “the people” in the Article 2 of the 1992 Constitution which defines the foundation of the people as “the alliance between the working class and the peasantry and the intelligentsia.”<sup>179</sup> For example, Vũ Đức Khiển summons Hồ Chí Minh’s concept of “great national solidarity” (*đại đoàn kết dân tộc*) to argue against the class foundation of the people.<sup>180</sup> He states that the Vietnamese people are all patriots irrespective of class.<sup>181</sup> Moreover, he believes the nation is stable and perennial while the components of classes are changeable.<sup>182</sup> In addition, he criticizes that the class definition of the people fails to recognize the emerging role of the rising entrepreneurs in contemporary Vietnam.<sup>183</sup> On these grounds, Vũ Đức Khiển calls for reestablishing the “great national solidarity” as the foundation of the people.<sup>184</sup> Meanwhile, other restoration constitutionalists, such as Đào Trí Úc – a well-known legal scholar in Vietnam – invoke Article 1 of the 1946 Constitution to propose redefining popular sovereignty as that all state powers belong to the entire people regardless of class.<sup>185</sup>

## 2. Constitutional Referendum

Another corollary of the restoration-orientated reconceptualization of the meaning of popular sovereignty pertains to constituent power. The restoration constitutionalists argue that to truly practice the principle of popular sovereignty, the constituent power must belong to the people, and the provisions of the 1946 Constitution regarding constitutional referendum are invoked to justify that argument.<sup>186</sup>

In this concern, the most vehement voice perhaps comes from Nguyễn Văn An expressed in the aforementioned interview. After re-

179. 1992 CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM Apr. 25, 1992, art. 2.

180. Vũ Đức Khiển, *Sửa đổi, Bổ sung Điều 2 và Điều 6 Hiến pháp Hiện hành để Bảo đảm Nguyên tắc Tất cả Quyền lực Nhà nước Thuộc về Nhân dân* [Amending Article 2 and Article 6 of the current Constitution to ensure the Principle that All State Powers Belong to the People], 7 J. OF LEGIS. STUDIES 13-14 (2012), available at [http://www.saigonminhluat.com/index.php?option=com\\_content&view=article&id=12707:sa-i-b-sung-iu-2-va-iu-6-hin-phap-hin-hanh-bo-m-nguyen-tc-tt-c-quyn-lc-nha-nc-u-thuc-v-nhan-dan-&catid=331:hien-phap-hanh-chinh&Itemid=517](http://www.saigonminhluat.com/index.php?option=com_content&view=article&id=12707:sa-i-b-sung-iu-2-va-iu-6-hin-phap-hin-hanh-bo-m-nguyen-tc-tt-c-quyn-lc-nha-nc-u-thuc-v-nhan-dan-&catid=331:hien-phap-hanh-chinh&Itemid=517)

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Đào Trí Úc & Đinh Phương Quỳnh, “Chế định Chủ quyền Nhân dân và Việc Sửa đổi Hiến pháp 1992” [The Institution of Popular Sovereignty and Amending the 1992 Constitution], *Journal of Legislative Studies* 17 (2012): 3-6. For the same view, see Đinh Dũng Sỹ, [Some Suggestions for Amending the Chapter I of the 1992 Constitution], 6.

186. *Id.*

viewing articles 21, 32, and 70 of the 1946 Constitution which affirm the people's right to ratify the constitution through national referendum, An argues that the 1946 Constitution recognizes that the people are the author of the constituent power.<sup>187</sup> He then demonstrates that three later constitutions transfer the constituent power from the people to the National Assembly.<sup>188</sup>

Notably, An critically questions: "Who has the right to decide on that transferring? The explicit answer is that only the people can have that right. But there is not any document indicating that the people have transferred the constituent power to the National Assembly, but it is the National Assembly who self-decides to transfer the constituent power to it."<sup>189</sup> He reasons that only when the people possess the constituent power by which they decide the political system of the nation and authorize powers to political institutions to rule the nation on behalf of the people - the authentic sovereign of the nation.<sup>190</sup> He states that the transferring of the constituent power from the people to the National Assembly by the self-decision of the National Assembly has substantially changed the authentic sovereign from the people to the National Assembly.<sup>191</sup> The actual implication is that the Vietnamese people are no longer the authentic sovereign of the nation, and the National Assembly appropriates the constituent power from the people and becomes an illegitimate sovereign. More seriously, this calls into question the constitutional legitimacy of political leadership in Vietnam generally. To resolve the legitimacy problem, Nguyễn Văn An mobilizes for returning sovereignty to the people by restoring the 1946 Constitution's provisions of constitutional referendum.<sup>192</sup> He proposes that the revised Constitution must restore the people's right to referendum in accordance with the provisions of the 1946 Constitution in the sense that the right must be recognized in the new constitution, and more importantly, the new constitution itself must be ratified by the people in a national plebiscite before it can enter into effect.<sup>193</sup>

Inspired by Nguyễn Văn An's interview, numerous intellectuals have argued for popular authorship of the constituent power and consti-

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187. Tuấn Việt Nam, *supra* note 171.

188. *Id.*

189. Thu Hà, *Cựu chủ tịch Quốc hội bàn chuyện sửa Hiến pháp* [Ex-president of the National Assembly Commenting on Constitutional Amendment], TuanVietnam.net, (June 16, 2010), <http://community.tuanvietnam.net/2010-06-24-cuu-chu-tich-quoc-hoi-ban-viec-sua-hien-phap>.

190. Hà, *supra*, note 7.

191. *Id.*

192. *Id.* at 8.

193. *Id.*

tutional referendum on the grounds of the 1946 Constitution. Invoking the founding generation, they have strongly suggested that the new constitution must recognize in its preamble the people as the author to ordain the Constitution, eliminate the constitution making power of the National Assembly, establish referendum as mandatory in the constitution making procedure, and the new constitution itself must be popularly ratified.<sup>194</sup>

A more moderate approach agrees on the restoration of the provision of constitutional referendum in the new constitution but suggests that this provision will be applied to the next constitutional amendment. In this regard, consider the discussion by Hà Hùng Cường at the meeting of the National Assembly when the body debated on the draft revised constitution on November 16, 2012. Equally summoning Hồ Chí Minh and the 1946 Constitution, Cường agreed on the idea of popular authorship of the constituent power and the reinsertion of the people's right to referendum in the new Constitution.<sup>195</sup> He further underlined that only when the people possess the definitive power to make and amend the constitution is the constitution truly the expression of "the spirit of rule of law" according to Hồ Chí Minh's aspiration.<sup>196</sup> But, in the concern that sufficient time is necessary to prepare for constitutional referendum and especially to counter against the possible subversive actions of the dissidents, Cường submitted that the referendum should be practiced in the next turn of constitutional amendment.<sup>197</sup>

### 3. Change of the Nation's Name

As a serious consequence of the more democratic reconceptualization of the sovereignty and the constitution, the restoration constitutionalists even invoke Hồ Chí Minh and the 1946 Constitution to propose restoring the nation's name, Democratic Republic of Vietnam, in re-

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194. Đào Trí Úc & Đinh Phương Quỳnh, *supra* note 185; Nguyễn Minh Đoàn, *Việc Thể hiện Chủ quyền nhân dân trong Hiến pháp* [The Expression of Popular Sovereignty in the Constitution], 22 Journal of Legislative Studies, 3-8 (2012).; Nguyễn Cửu Việt, *Bàn thêm về Vấn đề Sửa đổi Hiến pháp 1992 nhìn từ Nguyên tắc Chủ quyền Nhân dân* [Further Discussion on Amending the 1992 Constitution From the Perspective of the Principle of Popular Sovereignty], 18 Journal of Legislative Studies 3-13 (2012). Lê Văn Cẩm & Vũ Văn Huân, *Hiến pháp với việc Tổ chức Bộ máy Quyền lực Nhà nước Trong Giai đoạn Xây dựng Nhà nước Pháp quyền Việt Nam* [The Constitution and the Organization of State Power in the Period of Building the Rule of Law State in Vietnam] 1-2 Journal of Legislative Studies 26-33 (2012).

195. *Dân phải được Quyền Phúc quyết Hiến pháp* [The People Must Have the Right to Vote on the Constitution], VIETNAM NET (Nov. 17, 2012), <http://vietnamnet.vn/vn/ chinh-tri/97283/dan-phai-duoc-quyen-phuc-quyet-hien-phap.html>

196. *Id.*

197. *Id.*

placement of the current name, Socialist Republic of Vietnam. To illustrate, Lê Cẩm calls for “returning the deeply meaningful name of our nation on which Uncle Hồ has ruminated before using it in the 1946 Constitution.”<sup>198</sup> Others turn to Hồ Chí Minh’s Declaration of Independence to hold the same view.<sup>199</sup>

The movement of restoring the founding name, the Democratic Republic of Vietnam, was particularly vehement during the period of public consultation of the draft revised Constitution from January to March 2013, which was mobilized by numerous intellectuals in different fields and ordinary people.<sup>200</sup> As a consequence, the Constitutional Amendment Committee had planned to submit to the National Assembly’s Standing Committee the alternative of renaming the nation as Democratic Republic of Vietnam according to the public suggestion,<sup>201</sup> but the plan was soon abandoned by the political leadership.

This notwithstanding, the restoration constitutionalists persisted in calling for a return to the founding nation’s name. Consider first the discourse of Dương Trung Quốc. He reveals that Hồ Chí Minh was a communist and experienced in the Soviet regimes, but chose the regime of a democratic republic for understandable reasons.<sup>202</sup> Quốc explains that Hồ Chí Minh’s rational opinion of a democratic republic stems from his internalization of Easternized American political thoughts and Sun Yat Sen’s Three People’s Principles or San-min Doctrine.<sup>203</sup> Quốc underlines: “These are the great political achievements of the mankind and Uncle chose the most progressive [political] model at that time.”<sup>204</sup> He then demonstrates that the political model of a democratic republic

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198. Lê Cẩm, *Các Quy phạm Hiến định về Hệ thống Viện kiểm sát Nhân dân trong Giai đoạn Xây dựng Nhà nước Pháp quyền* [The Constitutional Provisions on the System of People’s Procuracies in the Period of Building the Rule of Law State], 2 TẠP CHÍ KIỂM SÁT [JOURNAL OF PROCURACY] 21 (2011).

199. See, e.g., Lê Quốc Hùng, *Hiến pháp Cần Gắn Hôn nữa với Tuyên ngôn Độc lập* [The Constitution Should further Adhere to the Declaration of Independence], 17 J. OF LEGIS. STUDIES 7-10 (2012).

200. *Timeline of the Constitutional Amendment in Vietnam*, VIETNAMESE REDEMPTORISTS’ NEWS (May 2, 2013), <http://www.vnnews.org/2013/05/timeline-of-constitutional-amendment-in.html>.

201. See generally Constitutional Amendment Committee, BÁO CÁO VỀ VIỆC GIẢI TRÌNH, TIẾP THU, CHÍNH LÝ DỰ THẢO SỬA ĐỔI HIẾN PHÁP NĂM 1992 TRÊN CƠ SỞ Ý KIẾN NHÂN DÂN [REPORT, AND EXPLAINING, RECEIVING, EDITING THE DRAFT REVISED 1992 CONSTITUTION ON THE GROUND OF PEOPLE’S OPINIONS] (May. 17, 2013).

202. Dương Trung Quốc, *Đổi lại tên Nước không phải là một Bước Thụt lùi*, [Renaming the Nation is not a Back-looking Step], TINNGAN (Apr. 25, 2013), [http://tinngan.vn/Doi-lai-ten-nuoc-khong-phai-la-buoc-lui\\_1-0-398567.html](http://tinngan.vn/Doi-lai-ten-nuoc-khong-phai-la-buoc-lui_1-0-398567.html)

203. *Id.*

204. *Id.*

was embodied in Hồ Chí Minh's Declaration of Independence and the 1946 Constitution.<sup>205</sup> Quốc eventually advocates the restoration of the name Democratic Republic of Vietnam as a return to "a stable foundation constructed on the ground of a political doctrine which has been experienced and verified."<sup>206</sup> Such a return to Quốc is not back-looking, but "a chance to change."<sup>207</sup>

In quite a similar vein, Vũ Mão highly concurs with a return to the name Democratic Republic of Vietnam, and particularly underlines that such a return is truly accordant with the popular aspiration.<sup>208</sup> He offers five rationales for that return. First, the name Democratic Republic of Vietnam truly reflects the reality of Vietnam at the present time in the sense that socialism has not yet been achieved in Vietnam.<sup>209</sup> Second, the Party always holds a practical point of view.<sup>210</sup> Third, Hồ Chí Minh created the name which was affirmed by the 1946 Constitution and 1959 Constitution, and the return to it means a profound respect to Hồ Chí Minh's perspective.<sup>211</sup> Fourth, the return to the name will gain the support of the Vietnamese expatriates, which is instrumental to consolidating the "great national solidarity."<sup>212</sup> Fifth, there is virtually no nation in the world whose name is given with the "socialist" component, including China.<sup>213</sup>

#### 4. Multi-Party System

One of the most controversial issues in Vietnamese constitutional debate is the constitutional confirmation of the predominant leadership of the Communist Party. Some restoration constitutionalists have invoked Ho Chi Minh and the 1946 Constitution to attack that confirmation, implicitly or explicitly calling for pluralist politics in Vietnam. Consider, for example, the discussion in early 2013 by Dương Trung Quốc in his article published by Báo Lao Động (Labor Newspaper) in the midst of a popular consultation on the draft new constitution in.<sup>214</sup>

205. *Id.*

206. *Id.*

207. *Id.*

208. Vũ Mão, *Tên nước Việt Nam Dân chủ Cộng hòa sẽ Tạo thế Đi lên*, [The Nation's Name Democratic Republic of Vietnam will Create the Proceeding Movement], DAN TRI (Apr. 16, 2013), <http://dantri.com.vn/xa-hoi/ten-nuoc-viet-nam-dan-chu-cong-hoa-se-tao-the-di-len-719932.htm>.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. Dương Trung Quốc, *Nghĩ vào lúc đang Sửa đổi* [Reflections in the midst of Constitu-

Quốc restates that during the period of creation of the first National Assembly – the constituent assembly and drafting of the first Constitution – there was no single-party system in Vietnam, the Indochina Communist Party had self-dissolved, and Communist representatives in the Assembly were just members of “[t]he Association of Marxist-Leninist Studies.”<sup>215</sup> Quốc underlines that Ho Chi Minh initiated a form of “pluralism and multi-party” (*đa nguyên, đa đảng*) by inviting 70 members from *Việt Quốc* and *Việt Cách* to participate in the National Assembly who had boycotted the election.<sup>216</sup> Restating the fact that the 1946 Constitution was drafted by a multi-party constituent assembly, Quốc has implicitly challenged the entrenchment of leadership of the Communist Party in the Constitution.

The challenge to the Party’s leadership is more explicit in the restoration discourse by the dissidents in unofficial venues. To illustrate, in an article titled “The Communist Party of Vietnam must return the 1946 Constitution for the nation” published in his personal blog and then disseminated in other unofficial websites, Lê Quốc Quân – a Vietnamese dissident lawyer – explicitly calls for pluralism and a multi-party system, stating that “[t]he basic spirit of the first pluralist constitution (1946) must be respected and entirely restored. The Communist Party who has taken hostage it and kept it in captivity now must release and return it to the nation.”<sup>217</sup>

## 5. Semi-Presidentialism

The 1992 Constitution establishes a socialist version of parliamentarianism in which the National Assembly is the supreme body vested with formal powerful authorities, and the State President and the Government are subordinate to it.<sup>218</sup> The State President is accorded symbolic authorities.<sup>219</sup> The restoration constitutionalists have summoned the 1946 Constitution to propose the change of the form of government, especially in the lines of semi-presidentialism.<sup>220</sup> Nguyễn Văn An’s

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*tional Revision*], LAO DONG (Jan. 20, 2013), <http://laodong.com.vn/lao-dong-cuoi-tuan/nghi-vao-luc-hien-phap-dang-sua-doi-99644.bld>.

215. *Id.*

216. *Id.*

217. Lê Quốc Quân, *Đảng CSVN hãy trả lại Hiến Pháp 1946 cho dân tộc!* [*The Communist Party of Vietnam Must Return the 1946 Constitution to the Nation*], DAN LUAN (Oct 2, 2011), <http://www.danluan.org/tin-tuc/20111001/le-quoc-quan-dang-csvn-hay-tra-lai-hien-phap-1946-cho-dan-toc>.

218. Vietnam Const. of 1992, art. 6.

219. *Id.*

220. Nguyễn Thị Hương, *Học ở Hiến pháp 1946: Cần Nhìn nhận cả Ưu điểm và Hạn chế*, [*Learning From the 1946 Constitution: It is Necessary To Realize its Strong Points and Weak*

constitutional commentary should be examined again.<sup>221</sup> He insisted that a head of state must possess three powers, namely, to act on behalf of the state in domestic and foreign affairs, to assume command of the armed forces, and to preside over the executive.<sup>222</sup> He demonstrated that in contemporary Vietnam these powers are diffused into three different institutions, namely the State President, the General Secretary of the Party, and the Prime Minister, respectively.<sup>223</sup> He explicitly expressed his worry about the peril of this diffusion but did not explain in details, perhaps because of politically sensitive reasons.<sup>224</sup> He then invoked the relevant provisions of the 1946 Constitution pertaining to the powers of the State President<sup>225</sup> to propose a semi-presidential paradigm with the concentration of the three powers in a single president.<sup>226</sup>

The suggestions of a more powerful presidency on the grounds of the 1946 Constitution were also evident during the time of public debate on the draft revised Constitution in early 2013. Citing relevant provisions of the 1946 charter, the restoration constitutionalists submitted different proposals to enhance the powers of the State President, such as the powers to preside over the meetings of the Government and to veto the laws made by the legislature.<sup>227</sup> Some also invoke the reality that Ho Chi Minh used to be the head of both the State and the Party to suggest integrating the presidency with the position of General Secretary of the Party.<sup>228</sup> By the time these contentious discussions occurred, rumor had it that there was an internal strife between the State President and the Prime Minister. Yet, it would be a risk to rely on that anecdotal evidence. Whether the restoration-oriented proposal of a more powerful

Points], TiaSang (Dec. 12, 2011, 3:41 AM), [http://tiasang.com.vn/Default.aspx?tabid=116&CategoryID=42&News=4708](http://tiasang.com.vn/Default.aspx?tabid=116&CategoryID=42&News=4708;);

Mai Thái Linh, *Những Khuyết điểm Nghiêm trọng của Hiến pháp 1946* [Serious Deflects of the 1946 Constitution], PRO ARTNOC (July 13, 2012), <http://www.procontra.asia/?p=743>.

221. *Id.*

222. Thu Hà, *Cựu chủ tịch Quốc hội bàn chuyện sửa Hiến pháp* [Ex-president of the National Assembly Commenting on Constitutional Amendment], TUANVIETNAM.NET, (June 16, 2010), <http://community.tuanvietnam.net/2010-06-24-cuu-chu-tich-quoc-hoi-ban-viec-sua-hien-phap>.

223. *Id.*

224. *Id.*

225. CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF VIETNAM Nov. 9, 1946, arts. 45, 49.

226. Hà, *supra* note 7.

227. Thứ Bảy, *Bàn luận sôi nổi về Tăng Quyền hạn của Chủ tịch nước* [Forceful Discussions on Strengthening the Powers of The President of the State], DAN TRI, (Jan. 12, 2013), <http://dantri.com.vn/chinh-tri/ban-luan-soi-noi-ve-tang-quyen-han-cua-chu-tich-nuoc-684275.htm>

228. Thứ Bảy, *Bàn luận sôi nổi về Tăng Quyền hạn của Chủ tịch nước* [Forceful Discussions on Strengthening the Powers of The President of the State], DAN TRI, (Jan. 12, 2013), <http://dantri.com.vn/chinh-tri/ban-luan-soi-noi-ve-tang-quyen-han-cua-chu-tich-nuoc-684275.htm>.

presidency means to react to the reality of a political battle remains a mystery.

## 6. Liberal Rights

The restoration constitutionalists also propose a redefinition of liberal rights on the grounds of the 1946 Constitution. They criticize citizens' rights provided in the 1992 Constitution as the statist rights, the rights paternally bestowed to the citizens by the state and subject to arbitrary withdrawal, citing the phrase "in accordance to the law" appearing in most constitutional right provisions.<sup>229</sup> Invoking the rights provisions in the 1946 Constitution, which excludes such expression, they then suggest a redefinition of human rights as natural rights in the manner similar to the 1946 charter, which shall establish limitations on the state power.<sup>230</sup>

Some restoration constitutionalists invoke particular provisions in the 1946 Constitution to petition for particular rights. Some focus on the restoration of several political rights, such as the people's right to remove their representatives from office.<sup>231</sup> But more attention has been given to the restoration of the 1946 Constitution's provisions on economic rights. During public debate on the constitutional revision, the call for restraint of the state's powers over land, the economy, the recognition of private ownership of land, and the protection of private economic sector has been vehement, and the 1946 Constitution has been normally cited for justification. Vũ Mão, for example, extols the 1946

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229. Nguyễn Sĩ Dũng, ["Learning from the 1946 Constitution"]; Thanh Lưu, *Hiến pháp không phải để Ban ơn cho Nhân dân* [The Constitution is not Designed to Bestow to the People], PHÁP LUẬT (Mar. 9, 2012, 12:50 AM), <http://phapluattp.vn/20120902111641122p0c1013/hien-phap-khong-phai-de-ban-on-cho-nhan-dan.htm> (Law Newspaper's Interview with Nguyễn Như Phát, Director of the State and Law Institute).

230. *Id.*; Nguyễn Đăng Dung & Bùi Tiên Đạt, *Cải cách Chế định Quyền và Nghĩa vụ Cơ bản của Công dân trong Hiến pháp 1992 Theo Nguyên Tắc Tôn trọng Quyền Con người* [Reforming the Provisions Concerning Fundamental Rights and Duties of Citizens in the 1992 Constitution in Accordance with the Principle of Respecting Human Rights] in SỬA ĐỔI BỔ SUNG HIẾN PHÁP 1992: NHỮNG VẤN ĐỀ LÝ LUẬN VÀ THỰC TIỄN, TẬP II [AMENDING THE 1992 CONSTITUTION: PRACTICAL AND THEORETICAL ISSUES, VOLUME II] 14-25 (Hanoi: Hồng Đức Publishing House 2012); Vũ Công Giao, *Quyền con người, Quyền công dân Trong Hiến pháp trên Thế giới và Hiến pháp Việt Nam: Sơ bộ Phân tích So sánh* [Human Rights and Citizen's Rights in the Constitutions of the World and in the Constitutions of Vietnam: Comparative Analysis] in SỬA ĐỔI BỔ SUNG HIẾN PHÁP 1992: NHỮNG VẤN ĐỀ LÝ LUẬN VÀ THỰC TIỄN, TẬP II [AMENDING THE 1992 CONSTITUTION: PRACTICAL AND THEORETICAL ISSUES, VOLUME II] 26-57 (Hanoi: Hồng Đức Publishing House 2012).

231. Ngọc Quang, *Kiến Nghị Bổ sung Một số Vấn đề trong Bài miễn Đại biểu Quốc hội* [Recommendations on the Removal from Office the Assembly Delegates], GIAO DỤC VIỆT NAM, (Mar. 2, 2013), <http://giaoduc.net.vn/Xa-hoi/Kien-nghi-bo-sung-mot-so-van-de-trong-viec-bai-nhiem-Dai-bieu-Quoc-hoi-post111866.gd>.



Constitution's support of multi-ownership of land, implicitly challenging the current land ownership system which includes the state's prerogative powers over land and excludes private land ownership.<sup>232</sup> A more explicit petition for private land ownership on the grounds of the 1946 Constitution can be found in a popular article by Đặng Hùng Võ – an expert in land issues and former Vice-Minister of Natural Resources and the Environment.<sup>233</sup> Others cite the 1946 Constitution's guarantee of the right to private property, which shall not be nationalized, and the right to do business to argue for more constitutional protection of private economic sectors.<sup>234</sup>

### 7. Independent Judiciary

Closely related to human rights protection is an independent judiciary. In this regard, the restoration constitutionalists call for a return to the court system established by the 1946 Constitution and several decrees of President Ho Chi Minh,<sup>235</sup> which consisted of the Supreme Court, the courts of appeal, and primary and secondary courts organized independently from the administrative units and local governments.<sup>236</sup> Note that the name of these courts did not include a reference of “people” as latter.<sup>237</sup>

The court system established by the 1992 Constitution consists of the People's Supreme Court, the local people's courts in each administrative level, and the military courts.<sup>238</sup> The problem is that the local courts are organized parallel to the local administrative levels, giving rise to the interference of the local governors and local party leaders in judicial adjudications.<sup>239</sup> To handle this problem, the restoration constitutionalists have mobilized for a return to the past judicial experience.

232. Vũ Mão, *Cần trở lại Tinh thần Hiến pháp 1946 [It is Necessary to return to the Spirit of the 1946 Constitution]*, VIETNAM.NET, (Feb. 6, 2013), <http://vietnamnet.vn/vn/chinh-tri/108600/can-tro-lai-tinh-than-hien-phap-1946.html>.

233. Đặng Hùng Võ, *Sở hữu Tư nhân về Đất đai là Tất yếu [Private Land Property is Natural]*, BAUXITE VIET NAM, (Mar. 22, 2011), <http://boxitvn.blogspot.com/2011/03/so-huu-tu-nhan-ve-at-ai-la-tat-yeu.html>.

234. Vũ Xuân Tiến, *Hiến pháp Bảo vệ Quyền Tự do Kinh Doanh [The Constitution Protects the Right to do Business]*, BAO DAU TU (Mar. 9, 2013, 7:20), <http://baodautu.vn/news/vn/doanh-nghiep/dien-dan/hien-phap-bao-ve-quyen-tu-do-kinh-doanh.html>.

235. Đinh Văn Quế, *Toà án Tối cáo lào Cơ quan Tư pháp Cao nhất [The Supreme Court is the Highest Judicial Body]*, PHAPLUAT (Jan. 29, 2012, 12:17 AM), <http://phapluattp.vn/20120128111746784p1063c1016/toa-toi-cao-phai-la-co-quan-tu-phap-cao-nhat.htm>.

236. Vietnam Const. of 1946, art. 63.

237. *Id.*

238. Vietnam Const. of 1992, art. 2

239. See MARK SIDEL, *THE CONSTITUTION OF VIETNAM 177-78* (2009).

For instance, making reference to the court system of the founding period, Đinh Văn Quế, a legal scholar and a judge of the Supreme People's Court, suggests that: "The structure and names of these courts still remain its values, profoundly expressing Ho Chi Minh's thought of rule of law state. Therefore, in reforming its organization and activity, the judiciary should retain this wise thought of the Man."<sup>240</sup>

#### *D. Factors, Limited Effects, and Prospects of Vietnamese Restoration Constitutionalism*

##### 1. Factors

The discourse of restoration constitutionalism has emerged as an intellectual resistance to Vietnamese socialism. Restoration-oriented constitutional discourse sharply contradicts the socialist constitutional dogmas which have dominated Vietnam for many decades: popular vs. class-based sovereignty, popular vs. legislative constitution-making, democratic vs. socialist republic, multi-party vs. single party system, semi-presidentialism vs. socialist parliamentarism, natural vs. statist rights, and independent vs. controlled judiciary, respectively.<sup>241</sup>

The limits of the socialist constitutional order are the cause of the emergence of the rivaling restoration constitutional thinking. Several decades of implementation of the renovation program initiated in 1986 have resulted in economic and social transitions in Vietnam, which has in turn demanded corresponding institutional changes.<sup>242</sup> Meanwhile, the authoritarian institutions that Vietnam borrowed from the Soviet tradition proved to be inappropriate to the new context of development of the market economy in an era of globalization.<sup>243</sup> Hence, Vietnam has been urged to reform the constitutional institutions in line with international standards of a constitutionalist state, to a certain extent, to make the institutions fit with the new transitional context of the nation, and to make them not look like a "fish out of water" in the world.<sup>244</sup> This resulted in the plan to comprehensively revise the nation's constitution in

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240. Đinh Văn Quế, *Toà án Tối cáo lào Cơ quan Tư pháp Cao nhất [The Supreme Court is the Highest Judicial Body]*, PHAPLUAT (Jan. 29, 2012, 12:17 AM), <http://phapluattp.vn/20120128111746784p1063c1016/toa-toi-cao-phai-la-co-quan-tu-phap-cao-nhat.htm>.

241. Iyer, *supra* note 8, at 40; See William J. Duiker, *The Constitutional System of the Socialist Republic of Vietnam*, in CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA 331 (Lawrence W. Beer ed., 1992).

242. Hill, *supra* note 151, at 338-39.

243. *Id.* at 136.

244. *Id.* at 136-40.

the 2010s.

What is the intellectual base for constitutional revision? In this regard, consider the discussion by Nguyễn Đình Lộc: “in order to amend the Constitution, we have to change or determine more clearly our doctrine of constitution, state power, and liberal rights of the people. On the ground of that doctrine, we can design institutions.”<sup>245</sup> The call for new constitutional thinking in the course of constitutional revision implies the failure of the current socialist constitutional ideology. It is unlikely that solutions for topical constitutional questions like, a democratic and accountable government, the rule of law, separation of powers, and judicial independence,<sup>246</sup> which are generated by the internal social and economic renovation and the external impact of globalization, can be found in the conventional Marxist-Leninist dogmas like the “class nature” of state and constitution, “democratic centralism,” and “socialist legalism.”<sup>247</sup> Instead, more liberal constitutional experience prior to the triumph of socialist constitutions provides compelling intellectual sources.

In addition, the social attraction to restoration constitutionalism in Vietnam is motivated by the aspiration of past-oriented transition to universalistic constitutionalism as opposed to exclusive socialist constitutional order. The Vietnamese restoration constitutionalists conceive the 1946 Constitution as a great achievement of the nation in that it includes universal constitutionalist values discovered and contextualized in Vietnam by the founding generation. To illustrate, Nguyễn Như Phát – Director of the Institute of State and Law – proudly states: “This first Constitution presents very progressive values, logical thinking, and progressive notions of modern constitutionalism.”<sup>248</sup> Similarly, Nguyễn Sĩ Dũng concludes that: “The 1946 Constitution is a great heritage of constitutional intellectual and culture of our nation. This heritage will forever illuminate our heart and brain in the process of building a rule of law state and an equal, democratic, and civilized society.”<sup>249</sup> Some attribute the universal merit of the 1946 Constitution to Ho Chi Minh’s

245. [“When the People Do not Know about National Affairs, There cannot be Democracy.”]

246. Hill, *supra* note 151 at 50.

247. *Id.* at 341-42.

248. Nguyễn Sĩ Dũng, [“Learning from the 1946 Constitution”] Thanh Lưu, *Hiến pháp không phải để Ban on cho Nhân dân [The Constitution is not Designed to Bestow to the People]*, PHÁP LUẬT (Mar. 9, 2012, 12:50 AM), <http://phapluattp.vn/20120902111641122p0c1013/hien-phap-khong-phai-de-ban-on-cho-nhan-dan.htm> (Law Newspaper’s Interview with Nguyễn Như Phát, Director of the State and Law Institute).

249. Nguyễn Sĩ Dũng, *Học ở Hiến pháp năm 1946 [Learning from the 1946 Constitution]*, TIASANG (Sep. 16, 2011, 9:40 A.M.), <http://tiasang.com.vn/Default.aspx?tabid=116&CategoryID=42&News=4377>.

perspicacity.<sup>250</sup> For instance, Vũ Mão, in his petition to return to the 1946 Constitution, explains that Ho Chi Minh has studied the “East and West, now and then” using thoughts and knowledge to create a constitution presenting “convergence” with the general trend of civilization, different from the later 1959 Constitution that was influenced by the “old-style socialist movement.”<sup>251</sup> The 1946 Constitution in fact contains some universal norms of standard constitutionalism, namely popular sovereignty, popular authorship of the constituent power, separation of powers and some forms of checks and balances, liberal rights, and judicial independence. The Vietnamese constitutional reformers seek to re-apply these universal norms as alternative to the dominant socialist constitutional dogmas.<sup>252</sup> Past constitutional thought and design has served as legitimation and justification for the call for universalistic constitutionalism.

It may be argued that the call for a return to Ho Chi Minh’s constitutional thinking and the 1946 Constitution is strategic rather than substantial: the constitutional reformers have simply appropriated Ho Chi Minh and his constitution as an umbrella to avoid political sanction as their proposals have considerably challenged the dominant socialist political system. This assertion may be partially true, particularly with respect to the dissidents. The dissidents have appropriated the 1946 Constitution as the strategy to replace the current monist socialist constitutional system with a pluralist liberal constitutional democracy.<sup>253</sup> Particularly, the idea of constitutional referendum derived from the 1946 charter has been vehemently mobilized by the dissidents as a peaceful means for substantial political change.<sup>254</sup> The dissidents seem to believe that the majority of the Vietnamese people are now unhappy with the current domination of the communist regime and desire for a liberal constitutional democracy.<sup>255</sup> The dissidents seemingly hope that

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250. *Id.*

251. Vũ Mão, *Cần trở lại Tinh thần Hiến pháp 1946* [It is Necessary to Return to the Spirit of the 1946 Constitution], VIETNAM NET (Feb. 6, 2013, 12:03 AM) <http://vietnamnet.vn/vn/chinh-tri/108600/can-tro-lai-tinh-than-hien-phap-1946.html>.

252. Bui Ngoc Son, *Petition 72: The Struggle for Constitutional Reforms in Vietnam*, INT’L J. CONST. L. BLOG (Mar. 28, 2013), <http://www.iconnectblog.com/2013/03/petition-72-the-struggle-for-constitutional-reforms-in-vietnam/>.

253. See generally Tuấn Việt Nam, *supra*, note 171.

254. *Dân phải được Quyền Phúc quyết Hiến pháp* [The People Must Have the Right to Vote on the Constitution], VIETNAM NET (Nov. 17, 2012, 12:06 AM), <http://vietnamnet.vn/vn/chinh-tri/97283/dan-phai-duoc-quyen-phuc-quyet-hien-phap.html>.

255. Lê Quốc Quân, *Đảng CSVN hãy trả lại Hiến Pháp 1946 cho dân tộc!* [The Communist Party of Vietnam Must Return the 1946 Constitution to the Nation], DAN LUAN (Oct 2, 2011), <http://www.danluan.org/tin-tuc/201111001/le-quoc-quan-dang-csvn-hay-tra-lai-hien-phap-1946-cho-dan-toc>.

through a referendum, the Vietnamese people may vote against the revised constitution drafted under the communist leadership, which is the legitimate base for a change to a liberal democracy.<sup>256</sup> In addition, the dissidents' instrumental approach also leads to some criticisms of the deficiencies of the 1946 Constitution, for example, an undemocratically elected powerful presidency and the absence of a constitutional review system.<sup>257</sup>

But, the approach to the constitutional values of the founding generation supported by the Vietnamese establishment restoration constitutionalists is more substantial rather than merely strategic. Iyer notes that: "In societies where the prior constitution is associated with strong unifying sentiments which have not been dimmed by the passage of time, a return to it is often compelling."<sup>258</sup> Inside Vietnam, the sanctity of Ho Chi Minh and his first constitution has been firmly established and has received popular sentimental acceptance, and this makes the possible restoration oriented change substantially attractive. The restoration constitutionalists in Vietnam conceive the founding constitutional values as the embodiment of universal constitutional standards and Ho Chi Minh's perspicacity, and publicly present the pride of the nation's constitutional history.<sup>259</sup> Accordingly, they have continuously utilized Hồ Chí Minh's constitutionalism and the 1946 Constitution to justify their proposals for incremental renovation of the constitutional system by re-applying some liberal constitutional concepts and institutions without calling for a radical political change to Western liberal democracy.<sup>260</sup>

But that does not mean that the Vietnamese discourse of restoration constitutionalism presents a fear of modernization and Westernization as it did in the cases of some Eastern European societies.<sup>261</sup> In fact, twenty-first century Vietnam presents a clear trend toward modernization, industrialization, and globalization. Hence, the Vietnamese discourse of restoration constitutionalism emerges not as hostile to, but quite conversely, as amicable to modernization and Westernization. The

256. *Dân phải được Quyền Phúc quyết Hiến pháp*, *supra* note 254.

257. Nguyễn Thị Hương, *Học ở Hiến pháp 1946: Cần Nhìn nhận cả Ưu điểm và Hạn chế*, [Learning From the 1946 Constitution: It is Necessary To Realize its Strong Points and Weak Points], TIASANG (Dec. 12, 2011, 3:41 AM), <http://tiasang.com.vn/Default.aspx?tabid=116&CategoryID=42&News=4708>.

Mai Thái Lĩnh, *Những Khuyết điểm Nghiêm trọng của Hiến pháp 1946* [Serious Deflects of the 1946 Constitution], PRO ARTNO (July 13, 2012).

258. Iyer, *supra* note 8, at 47.

259. Vũ Mão, *supra* note 208.

260. *Id.*

261. See Sajo, *supra* note 5, at 853-54.

founding constitutional values are rendered as comparable to universal constitutional standards practiced in the West, and they are forcefully referred to so as to legitimize and justify the reformations of the Vietnamese socialist constitutional system in line with the zeitgeist of the modern and Western world.

## 2. Limited Effects

In the context of Vietnam, the party and the state control the ground rules determining the actors and contents of the fora of constitutional debates in general and the discourse of restoration constitutionalism in particular. Since the restoration, constitutionalists' proposals substantially conflict with the current orthodox constitutional ideology and considerably challenge the current socialist political regime. The political leadership is relatively skeptical about the restoration movement. Consequently, incumbent political leaders and constitution-makers under their strict control may present their pride of and respect to Ho Chi Minh's constitutional thought and the 1946 Constitution, but they have refrained from discussions on their possible restoration. To illustrate, on November 19, 2013, Prime Minister Nguyễn Tấn Dũng officially announced the adoption date of the 1946 Constitution – November 19 as the “Law Day of Socialist Republic of Vietnam.” In his address that day, he stated:

The 1946 Constitution was imbued with Ho Chi Minh's thought of democracy and the rule of law, respecting the values of human rights and citizen's rights . . . At its historical era, the 1946 Constitution was a democratic and progressive constitution of Democratic Republic of Vietnam to be in no way inferior to any constitutions in the world . . . Ho Chi Minh's constitutional thought and the values of democracy, human rights, citizen's rights, and the notion and model of a state of the people, by the people, and for the people established by the 1946 Constitution have been a leitmotif penetrating throughout the amended constitutions and entire legal system of our country.<sup>262</sup>

Despite the challenging nature of the restoration discourse, the po-

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262. *Phát biểu của Thủ tướng Nguyễn Tấn Dũng tại Lễ công bố Ngày Pháp luật Việt Nam [Prime Minister Nguyễn Tấn Dũng's Statement in the Ceremony Announcing the Law Day of Vietnam]*, BÁO ĐIỆN TỬ (Nov. 11, 2013), <http://baodientu.chinhphu.vn/Cac-bai-phat-bieu-cua-Thu-tuong/Phat-bieu-cua-Thu-tuong-Nguyen-Tan-Dung-tai-Le-cong-bo-Ngay-Phap-luat-Viet-Nam/185352.vgp>.

litical leadership is compelled to allow them to enter into the array of national constitutional dialogues, as these discourses have been advanced on a highly powerful base – namely Hồ Chí Minh. Particularly, a large-scale campaign called “*Campaign to Study and Follow Hồ Chí Minh’s Moral Example*” initiated on November 7, 2006 by the Politburo (term X) of the Communist Party of Vietnam, reconfirmed by the Politburo (term XI)’s decree on May 14, 2011, provides a relatively safe base for the constitutional restoration movement.<sup>263</sup> While the party’s campaign focuses mainly on the restoration of Ho Chi Minh’s morality, the restoration constitutionalists have taken advantage of the campaign to expand to another movement of restoration of his constitutionalism and his first Constitution. To the party, a return to Hồ Chí Minh’s morality is more acceptable, as this does not threaten the institutional essence of the political system as the restoration movement does. Therefore, a divergence between the party’s endorsement of Ho Chi Minh’s morality and the social endorsement of his constitutionalism is overt. The political leadership may tolerate some restoration arguments that do not substantially challenge the current regime, like the ones about human rights protection and judicial independence, but would limit and even exclude from the official fora the restoration arguments which are highly threatening to the regime, like the calls for change of the nation’s name and multi-party system.

Consequently, the influence of the discourse of restoration constitutionalism on the new constitution of Vietnam enacted in late 2013 is considerably limited. The new Constitution explicitly rejects a number of the restoration proposals, like popular sovereignty, popular ratification of the constitution, a multi-party system, and any change of the nation’s name.<sup>264</sup> A rare reaction to the substantial rejections of the restoration proposals in official media is the case of Dương Trung Quốc – a vehement advocate of the restoration movement and one of the two National delegates who did not vote on the new Constitution. One of the reasons for his choice, according to his explanation, is the new Constitution’s continuing confirmation of the leadership of the Communist Party which goes against the founding experience. In the interview with *Tuổi trẻ* Newspaper, he stated:

We should repeatedly read the former constitutions, especially the constitutions enacted under the leadership of Ho Chi Minh, from which we can realize that the Party has always

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263. *Id.*

264. 2013 CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM Nov. 28, 2013, art. 3-4, 120.

played the definitive role, but the art of its leadership was different in that [the party's leadership] was not directly expressed in the constitutions, because the nation and the people are supreme. With these reasons, I have chosen not to vote.<sup>265</sup>

However, the restoration constitutional movement does not completely fail. In fact, the new Constitution includes several rhetoric and institutional changes seemingly less vulnerable to the socialist regime, which, to a certain degree, can be attributed to the contribution of the restoration constitutional discourse. First, although the new Constitution rejected the call for referendum, it recognizes in the preamble that the Vietnamese people are authorized to make the Constitution, despite a rhetoric rather than significantly meaningful recognition.<sup>266</sup> Second, although the petition to change the nation's name to "Socialist Republic of Vietnam" was ignored, specific references to "socialism" have been considerably reduced in the new Constitution.<sup>267</sup> Notably, the principle of socialist legality featuring the 1992 Constitution was removed in the new charter. Third, although the new Constitution rejected the proposal of a powerful presidency, it strengthens the power of the State President vis-à-vis the Government to a certain degree, by, for instance, allowing the State President to request for the meeting of the Government in necessary cases.<sup>268</sup> Fourth, a number of right provisions have been rewritten to reduce the impression of statist rights by, for example, removing the phrase "in accordance to the law" in several provisions, although the substantial meaning of the rights remains intact.<sup>269</sup> Fifth, the commitment to judicial independence is strengthened in the new Constitution, through explicit recognition of the role of the courts in protecting justice and human rights and the prohibition of interference by other State bodies in judicial adjudications. For future practice, the new Constitution has not specified the organization of courts at the local level, opening the door for realization of the 2005 Party project to re-organize local courts in a way that separates them from local governments. In short, the discourse of restoration constitutionalism has resulted in some lim-

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265. *Tại sao Đại biểu Dương Trung Quốc Không Bám Nut???* [Why Didn't Delegate Dương Trung Quốc Vote?], TUỔI TRẺ ONLINE (Nov. 30, 2013 9:09 AM), <http://tuoitre.vn/Chinh-tri-Xa-hoi/582847/tai-sao-dai-bieu-duong-trung-quoc-khong-bam-nut.html>.

266. 2013 CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM Nov. 28, 2013, Pmbl.

267. *See generally* 2013 CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM Nov. 28, 2013.

268. *Id.* art 90.

269. *Compare* 2013 CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM Nov. 28, 2013, arts. 30-31 *with* 1992 CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM Apr. 25, 1992, arts. 16, 57, 58, 68, 69, 71, 73, 127.



ited technical and rhetorical resonance in the new Constitution.

### 3. Prospects

Vietnamese restoration constitutionalism may continue to increase in the future albeit still under the control of the political leadership. The 2013 Constitution rejects a number of constitutional proposals introduced during the period of public constitutional consultation including the restoration proposals. Several liberal and democratic features in Ho Chi Minh's constitutional statements of the pre-revolutionary era and in the 1946 Constitution may continue to be invoked in future debates over institutional and constitutional reforms. The tremendously influential position of Hồ Chí Minh in modern Vietnam constitutes a firm base for the continuing development of Vietnamese restoration constitutional movement. The party and state leaders may continue to afford the restorationist discourse, although they would not allow them to be comprehensively implemented.

Despite the limited practice, the social meaning of the restorationist discourse is by no means insignificant. In fact, the discourse of Vietnamese restoration constitutionalism has moved beyond the academic fora and reached widely to the public thanks to its dissemination on mass media, especially on the Internet. The public restorationist discourse is consequential in that it arouses the popular consciousness on the lost liberal constitutional values and envisages these values as a preferred option for political change in future Vietnam.

In practical dimension, the Vietnamese political leadership may endorse selective and conditioned restoration of some institutions of the 1946 Constitution which they deem do not substantially challenge the current regime. In the 2001 constitutional amendments, the 1946 Constitution's institution of vote of no confidence was restored and revised as vote of confidence.<sup>270</sup> The independent court system established by the 1946 Constitution may be also restored in a similar manner.

## IV. CONCLUSION

The percept of this paper is that radical rupture is not a necessity for the operation of constitutionalism. Recent experiences indicate that restoration constitutionalism presents a new path of constitutional development in socialist East Asia.

Restoration constitutionalism has its own advantages. The restoration modality of constitutionalism has potential to accrue more legiti-

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270. 1992 CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM Apr. 25, 1992, art. 2.

macy than efforts to establish a new constitutional beginning as a clean-break with the past, since the modality of restoration is consistent with the general logics of constitutional continuity and presents change as in keeping with the nation's proud constitutional history, helping to reduce the risk of social and political chaos, and hence making it easier to gain consensus for political change.

Critics of restoration constitutionalism may argue that past constitutional experiences may be mistaken. In fact, retrospective constitutional law does not mean a haphazard loyalty to past facts. As Dowdle argues, "The flaws of that actual experience are not obstacles to its capacity to serve as a foundation for constructing a new constitutionalism. The seeds for future constitutional emergence and development and the ideals and values it is used to reference are found in the social meaning of that experience and not in its factual history per se."<sup>271</sup> Restoration constitutionalism means a return not to *constitutional facts* but *constitutional norms* or constitutional ideals and values attached to "the social meaning" of past constitutional discourse and practice.<sup>272</sup>

Another criticism of restoration constitutionalism may be that there is no fixed set of past values, and this is the cause for their potential arbitrary interpretations. This may be true, but there is way to avoid such a scenario, that is through well-institutionalized popular restoration constitutional discourse. The people themselves, rather than merely selective elites, should engage in fair, transparent, and public discourse to interpret and determine the meanings of the past constitutional values. This is a long-term process. It would take years and even decades for public discourse to give meaning to the past constitutional values.

Finally, it may be also criticized that because the discourse of restoration constitutionalism is an antagonism to socialism, its development is unlikely in the current status of China and Vietnam. This is partially true. But, it is possible in the two nations to conduct public discourse so as to give meaning to the past liberal constitutional conceptions and social movements without explicitly calling for their return. Compared to China, the discourse of restoration constitutionalism has more space to develop in Vietnam because of the influential position of Ho Chi Minh. Vietnamese legal scholars and other intellectuals may continuously discuss the meaning of the past liberal constitutional values and their relevance to the current constitutional issues in the nation. In addition, it can be anticipated that in a long run, the discourse of restoration constitutionalism in Vietnam may move beyond Ho Chi Minh

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271. Dowdle, *supra* note 31, at 153-54.

272. *Id.* at 154-55.

and his 1946 Constitution to elucidate the meaning of conceptions and social movements by other early Vietnamese constitutionalists.