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Constituent Power in Socialist Regimes

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(Received 08 October 2024; accepted 22 January 2025)

Abstract

The twenty-first century has witnessed the global resurgence of constituent power—the power to make a constitution—in both academic debate and the practice of constitutional adjudication and design. Comparative constitutional law scholarship on this power has largely focused on democratic settings. Little academic attention has been paid to the constituent power in socialist regimes. To fill in this gap, this Article explores the design and practice of the constituent power in both former and current socialist regimes. It identifies three paradigms of the socialist constituent power. In the revolutionary paradigm, the power is used at the founding moment after a communist revolution to establish the legal foundation for a socialist state. In the Soviet, post-revolutionary paradigm, constituent power is a power of the ordinary legislature used for the replacement of an existing by another socialist constitution. In the contemporary reformist paradigm, the socialist constituent power is still vested in an ordinary legislature but its design and practice integrate ideals and practices of democratic constituent power, including public engagement in constitutional reforms, as the consequence of the people's struggle for their constituent power and the global diffusion of the idea of the popular constituent power. The reformist paradigm is illustrated by a case-study of Vietnam, using original resources. This study has implications for understanding the Soviet legacies and contemporary dynamics of constituent power in the socialist regimes, and for the comparative study of constituent power.

Keywords: Constituent Power; Soviet; Socialist Regime; Vietnam

A. Introduction

The twenty first century has witnessed the global resurgence of constituent power in both academic debate and the practice of constitutional adjudication and design. In general terms, constituent power refers to the power to establish or make a constitution.¹ In democratic constitutional theories, constituent power normally refers to the people's power to make a constitution, which is differentiated with the constituted powers exercised by ordinary institutions such as the legislature, executive, and judiciary.² In practice, as Cheryl Saunders observes, “people now expect actually to be involved in the constitution-making process and not just symbolically associated with it.”³

Comparative constitutional law scholarship on constituent power has largely focused on democratic settings. Little attention has been paid to how this power is designed and practiced in socialist regimes. In many socialist regimes, the constituent power is not exercised by the people,

¹George Duke, *Can The People Exercise Constituent Power?*, 21 INT'L J. OF CONST. L. 798, 798 (2023).

²Yaniv Roznai, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 106 (2017).

³Cheryl Saunders, *Constitution Making in the 21st Century*, 4 INT'L REV. L. 1, 3 (2012).

but by an ordinary legislature. However, in some cases, ordinary citizens have widely engaged in the process of constitution-making despite political control. To illustrate, in Vietnam's 2013 constitution-making process, the citizens vehemently demanded for the people's practice of constituent power through referendum,⁴ although in Cuba the citizens approved a new constitution in a referendum in 2019.⁵ The socialist practices of constituent power can be hardly captured by the existing comparative scholarship on this power.

To fill in the academic gap, this Article explores the design and practice of the constituent power in both former and current socialist regimes. It identifies three paradigms of the socialist constituent power. In the revolutionary paradigm, the power is used at the founding moment after a communist revolution to establish the legal foundation for a socialist state. In the Soviet, post-revolutionary paradigm, constituent power is a power of the ordinary legislature used for the replacement of an existing by another socialist constitution. In the contemporary reformist paradigm, the socialist constituent power is still vested in an ordinary legislature but its design and practice integrate ideals and practices of democratic constituent power, including public engagement in constitutional reforms, as the consequence of the people's struggle for the people's constituent power and the global diffusion of the idea of the popular constituent power. The reformist paradigm is illustrated by a case-study of Vietnam, using original resources. This study has implications for understanding the Soviet legacies and contemporary dynamics of constituent power in the socialist regimes, and for the comparative study of constituent power generally.

This Article is structured as follows. Part I explores democratic theories of constituent power. Part II turns to consider the design and practice of socialist constituent power and theorize about models of the socialist constituent power. Part III provides a case-study of discursive struggle for this power in contemporary Vietnam. Part IV concludes.

B. Democratic Theories of Constituent Power

1. The People's Constituent Power

In democratic theories, constituent power is the people's power."⁶ This concept is connected to Rousseau's theory,⁷ but has been fully developed by French political writer Emmanuel Joseph Sieyès. Sieyès distinguishes between "constituent power" (*pouvoir constituant*) exercised by the people or "the Nation" in extraordinary moment and "constituted powers" (*pouvoir constitué*) exercised by ordinary institutions—a parliament, an executive, and courts in normal time. In normal time, the people act through ordinary institutions, but in extraordinary time, they repudiate the existing ordinary institutions and execute their original constituent power to directly establish a new constitutional order.⁸ To justify the French Revolution, Sieyès argues that the people exercised their constituent power through the extraordinary representatives—like the Assembly of the Third Estate—as opposed to the constituted powers exercised by ordinary representatives.⁹ Sieyès's theory of constituent power integrates Rousseau's theory of social contract and general will with Montesquieu's theory of separation of powers. The separation of power implied the creator of the separationist scheme, and it is the constituent power as presenting the general will to create separated, constituted powers.¹⁰

⁴See, *infra*, Section D.

⁵Larry Cata Backer, Flora Sapio & James Korman, *Popular Participation in the Constitution of the Illiberal State - An Empirical Study of Popular Engagement and Constitutional Reform in Cuba and the Contours of Cuban Socialist Democracy* 2.0, 34 EMORY INT'L L. REV. 101, 185 (2020).

⁶Martin Loughlin, *The Concept of Constituent Power*, 13 EUR. J. POL. THEORY 218, 219 (2014).

⁷Joel I. Colón-Ríos, *Rousseau, Theorist of Constituent Power*, 36 OXFORD J. LEGAL STUD. 885, 888 (2016).

⁸EMMANUEL J. SIEYÈS, *WHAT IS THE THIRD ESTATE?* 136–39 (Frederick A. Praeger trans., 1963).

⁹Lucia Rubinelli, *How To Think Beyond Sovereignty: On Sieyès And Constituent Power*, 18 EUR. J. POL. THEORY 47, 54 (2019).

¹⁰GARY J. JACOBSON & YANIV ROZNAI, *CONSTITUTIONAL REVOLUTION* 125 (2020).

The theory of constituent power is further articulated by the German constitutional theorist Carl Schmitt. Schmitt defines constitution-making power or constituent power as “the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence.”¹¹ Who makes such a decision? Schmitt recognizes that the authors of constituent power varied over times—they can be the prince or the people. He also accepts the idea that the people can delegate the constituent power to their elected representatives.¹²

II. Democratic Paradigms of Constituent Power

The concept of constituent power was overlooked in English-speaking constitutional scholarship for years but has witnessed a renaissance in the twenty-first century.¹³ Several treatises and other academic writings have extensively explored the concept.¹⁴ This body of scholarship complicates and challenges the conventional accounts of the concept of constituent power. For example, Andrew Arato distinguished the revolutionary from the post-revolutionary or post-sovereign paradigm of constituent power. In the revolutionary paradigm, the people exercise the legally unlimited constituent power, which creates a new democratic constitutional order as a legal rupture from the past constitutional order. This paradigm is evident in eighteenth century constitution-making in the United States and France following two radical political revolutions. In the post-revolutionary paradigm, the constituent power is exercised within a legal framework through multiple stages, which creates a new democratic constitutional order while maintaining legal continuity with the past constitutional order. This paradigm is manifest in constitution-making in Central Eastern Europe and South Africa.¹⁵

Gary Jacobsohn and Yaniv Roznai challenge Sieyès’s binary account of the constituent and constituted powers. Their alternative relational approach conceptualizes the possibility of the practice of the constituent power by the constituted power. Using the case of amending the 1949 Constitution of Hungary, they argued that constituent power can be exercised through the mechanism of constitutional amendments, which lead to constitutional revolution or the fundamental transformation of the constitutional order. Constituent power exercised in this way is not extralegal but under the law—the amendment rules in the existing constitution.¹⁶ This echoes Arato’s concept of post-revolutionary constituent power.

A related view sees the people as the amenders of the constitutions through constitutional referendums.¹⁷ In the last three decades, constitutional referendums, meaning “any direct citizen vote on the specific issue of constitutional change or constitutional creation,” were commonly used in both constitutional amendments and making new constitutions.¹⁸ Xenophon Contiades and Alkmene Fotiadou argue that amendment formula designed to facilitate the direct

¹¹CARL SCHMITT, *CONSTITUTIONAL THEORY* 125 (Jeffrey Seitzer ed. & trans., 2008).

¹²Loughlin, *supra* note 6, at 225–26.

¹³JACOBSON & ROZNAI, *supra* note 10, at 226.

¹⁴See Joel Colón-Ríos, *CONSTITUENT POWER AND THE LAW* (2020); ANDREW ARATO, *THE ADVENTURES OF THE CONSTITUENT POWER: BEYOND REVOLUTIONS?* (2017); MARK WENMAN, *AGONISTIC DEMOCRACY: CONSTITUENT POWER IN THE ERA OF GLOBALIZATION* (2013); *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* (Martin Loughlin & Neil Walker eds., 2007); Kim L. Scheppelle, *Unconstitutional Constituent Power*, in *MODERN CONSTITUTIONS* 154–206 (2020).

¹⁵ARATO, *supra* note 14.

¹⁶Jacobsohn & Roznai, *supra* note 10, at 241–42.

¹⁷XENOPHON CONTIADES & ALKMENE FOTIADOU, *PARTICIPATORY CONSTITUTIONAL CHANGE: THE PEOPLE AS AMENDERS OF THE CONSTITUTION* (2017).

¹⁸STEPHEN TIERNEY, *CONSTITUTIONAL REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION* 11 (2012).

participation of the people in the constitutional amendment process through referendums “replicate the constitutional moment when the *pouvoir constituant* was exercised.”¹⁹

Beyond academic debate, the concept of constituent power has been practically used in both constitutional adjudication and design. On constitutional adjudication, the concept is used in the context of judicial review of unconstitutional constitutional amendments. Richard Albert points out that “courts that have annulled constitutional amendments for exceeding the scope of the amendment power must believe either that they can accurately identify an exercise of constituent power or, more likely, that they can recognize when a constitutional change has been supported by something less than constituent power.”²⁰ Apart from judicial review of amendments, the concept of constituent power has informed twenty-first century constitution-making practice around the world. Although the idea of constituent power was originally introduced as a conceptual normativity, it generates practical consequences today—the public participation in the constitution-making process.²¹

C. The Socialist Constituent Power

In the socialist regimes, there is no a clear distinction between constituent power and constituted power. Rather, the ordinary legislature is considered the highest body of the state power and is vested with both constituent and legislative powers. This part explores the formal design and practice of the socialist constituent power and theorizes about various paradigms of the socialist constituent power.

I. The Design and Practice of the Socialist Constituent Power

1. The Soviet Origin

The constituent power of an ordinary legislature is established in the Soviet constitutional tradition. The Soviet model of constituent power includes two elements. First, the institution of elected representatives—called either Congress of Soviet or Supreme Soviet—is the highest body of state power. This means this institution is above other state institutions—for example executive and courts. Second, the Soviet legislature is an ordinary legislature but enjoys both constituent and legislative powers.

The Soviet Russian Constitution of 1918 was adopted by the All-Russian Congress of Soviets.²² The Constitution establishes that “the All-Russian Congress of Soviets is the supreme power of the Russian Socialist Federated Soviet Republic.”²³ The Constitution then establishes that the All-Russian Congress and the All-Russian Central Executive Committee deal with questions of state, including ratification and amendment of the constitution.²⁴ This means the All-Russian Congress enjoys constituent power: The power to ratify the constitution.

The Lenin Constitution of 1925, enacted by the Congress of Soviets,²⁵ confirmed the constituent power of the Congress of Soviets. The All-Russian Congress of Soviets is defined as

¹⁹Xenophon Contiades & Alkmene Fotiadou, *Models of Constitutional Change, in* ENGINEERING CONSTITUTIONAL CHANGE: A COMPARATIVE PERSPECTIVE ON EUROPE, CANADA AND THE USA 430 (2017).

²⁰Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT’L L. 1, 21 (2018).

²¹Sujit Choudhry & Mark Tushnet, *Participatory Constitution-Making: Introduction*, 18 INT’L J. CONST. L. 173 (2020).

²²Igor I. Kavass & Gary I. Christian, *The 1977 Soviet Constitution: A Historical Comparison*, 12 VAND. J. TRANSNAT’L L. 533, 543 (1979).

²³KONSTITUTSIYA SFSR (1918) [KONST. SFSR] [RUSSIAN SOCIALIST FEDERATED SOVIET REPUBLIC CONSTITUTION] art. 24 (Russ.).

²⁴KONSTITUTSIYA SFSR (1918) [KONST. SFSR] [RUSSIAN SOCIALIST FEDERATED SOVIET REPUBLIC CONSTITUTION] art. 49 (Russ.).

²⁵Kavass & Christian, *supra* note 22, at 550.

the supreme power in the Russian Socialist Federated Soviet Republic (RSFSR)²⁶ and is vested with the power:

To establish, amend or modify the fundamental principles of the Constitution (Fundamental Law) of the RSFSR and to ratify amendments or modifications of parts of the Constitution (Fundamental Law) of the RSFSR passed by the All-Russian Central Executive Committee of Soviets during the intervals between the All-Russian Congresses of Soviets.²⁷

The power to establish fundamental principles of the constitution is a constituent power. The Congress of Soviets's adoption of the Lenin Constitution of 1925 is the embodiment of its constituent power in practice.

The Congress of Soviets also practiced the constituent power by adopting a new Soviet constitution in 1936 or the Stalin Constitution.²⁸ The Congress of Soviets dissolved following the enactment of the 1936 Constitution, and was replaced by the Supreme Soviet of the Soviet Union. The 1936 Constitution confirms that Supreme Soviet, "the supreme organ of state power of the Union republic,"²⁹ is "the sole legislative organ of the Republic"³⁰ and "adopts the Constitution of the Republic."³¹ Thus it continues the Soviet tradition to vest the constituent and legislative powers in the same body of elected prerepresentatives.

The Supreme Council of the Soviet Union practiced the constituent power by adopting a new Soviet Constitution in 1977.³² According to the 1977 Constitution, the Supreme Soviet of the USSR, "the supreme organ of state power of the USSR," is empowered to adopt the Constitution and laws of the USSR.³³ Thus, the Supreme Soviet is both an ordinary legislature and the permanent body of constituent power.

2. Transnational Diffusion

During the Soviet era, the Soviet model of constituent power was adopted in other socialist constitutions in Europe, Africa, Latin America, and Asia, which were connected to the broader Soviet constitutional diffusion and the transnational spread of communism.

In Europe, many socialist constitutions followed the Soviet model to vest the constituent power in an ordinary legislature. To illustrate, the Constitution of the People's Socialist Republic of Albania, from 1976, provides that the People's Assembly "approves and amends the Constitution and the laws."³⁴ Similarly, the Constitution of the Czechoslovak Socialist Republic, from 1960, states that "[t]he National Assembly shall enact the Constitution and other laws, and shall supervise their implementation."³⁵ The Constitution of the German Democratic Republic, from 1968, also provides that the People's Chamber is, "the supreme organ of state power in the German Democratic Republic," and "is the sole constituent and legislative organ in the German

²⁶KONSTITUTSIIA RSFSR (1925) [KONST. RSFSR] [RUSSIAN SOCIALIST FEDERATED SOVIET REPUBLIC CONSTITUTION] art. 3 (Russ.).

²⁷KONSTITUTSIIA RSFSR (1925) [KONST. RSFSR] [RUSSIAN SOCIALIST FEDERATED SOVIET REPUBLIC CONSTITUTION] art. 16 (Russ.).

²⁸Kavass & Christian, *supra* note 22, at 556.

²⁹KONSTITUTSIIA USSR (1936) [KONST. USSR] [UNION OF SOVIET SOCIALIST REPUBLICS CONSTITUTION] art. 57.

³⁰*Id.* at art. 59.

³¹*Id.* at art. 60.

³²See Christopher Osakwe, *Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 U. Pa. L. Rev. 1350, 1351 (1979).

³³KONSTITUTSIIA SSSR (1977) [KONST. SSSR] [USSR CONSTITUTION] art. 108 (Russ.).

³⁴1976 KUSHTETUTA E REPUBLIKËS POPULLORE SOCIALISTE TË SHQIPËRIË [CONSTITUTION] 67 (Albania).

³⁵Ústavní zákon č. 7/1960 Sb., Československá Socialistická Republika [Constitution of the Czechoslovak Socialist Republic] art. 41(1).

Democratic Republic.³⁶ The Constitution of the Republic of Hungary, from 194 as amended in 1972, empowers the parliament to “enact the constitution of the Hungarian People’s Republic” and “enact laws”.³⁷ The Constitution of the Socialist Republic of Romania, from 1965, stipulates that the Grand National Assembly, “the supreme body of state power,” has the power “to adopt and amend the Constitution of the Socialist Republic of Romania.”³⁸ Thus, these socialist constitutions in Europe do not clearly distinguish between constituent and legislative powers. They vested these two powers in the same body: An ordinary legislature.

In Africa and Latin America, some socialist constitutions followed the Soviet model of constituent power. The Constitution of the People’s Democratic Republic of Ethiopia, from 1987, provides that the National Shengo of the People’s Democratic Republic of Ethiopia has the power to “enact, amend and supervise the observance of the Constitution and Proclamations.”³⁹ The Constitution of the Republic of Cuba, from 1976, confirms that “the National Assembly of the People’s Power is the sole organ with constituent and legislative authority in the Republic.”⁴⁰ These constitutions authorize the ordinary legislature to practice the constituent power.

In Asia, many socialist constitutions adopted the Soviet model to vest the constituent and legislative power in the same ordinary legislature. The Constitution of the People’s Republic of Kampuchea, from 1981, provides that the National Assembly has the power “to adopt or amend the Constitution and the laws.”⁴¹ In the same vein, the Socialist Constitution of the Democratic People’s Republic of Korea, from 1972, confirms that the Supreme People’s Assembly, “the highest organ of power of the Democratic People’s Republic of Korea,” shall exercise the power “to adopt or amend the Constitution, laws and ordinances.”⁴² Similarly, the Constitution of the Lao People’s Democratic Republic, from 1991, establishes that the National Assembly has the power “to draft, endorse, and amend the constitution” and “to consider, endorse, amend, or abrogate laws.”⁴³ The Constitution of the Democratic Republic of Vietnam, from 1959, also provides that the National Assembly, “the highest organ of state authority,” exercises the power “to enact and amend the Constitution” and “to enact laws.”⁴⁴ The second socialist constitution of Vietnam, from 1980, even confirms that “[t]he National Assembly is the only body vested with constituent and legislative power.”⁴⁵ These socialist constitutions in Asia, like their Soviet and European counterparts, empower the ordinary legislature to exercise the constituent power.

3. Contemporary Reform

After the collapse of the Soviet Union, there are only five socialist regimes—China, Cuba, Laos, North Korea, and Vietnam—in the world, and there are some changes to the entrenchment and practice of constituent power in these regimes. China’s socialist constitutions—adopted in 1954, 1975, 1987, and 1982 respectively—do not formally establish the constituent power of the

³⁶CONSTITUTION OF THE GERMAN DEMOCRATIC REPUBLIC Apr. 6, 1968, art. 48 (1).

³⁷A MAGYAR NÉPKÖZTÁRSASÁG ALKOTMÁNYA (1949) [HUNGARIA PEOPLE’S REPUBLIC CONSTITUTION], MAGYAR KÖZLÖNY, art. 19.

³⁸CONSTITUTIA REPUBLICII SOCIALISTE ROMÂNIA (1965) [CONSTITUTION OF THE SOCIALIST REPUBLIC OF ROMANIA], MONITORUL OFICIAL, arts. 42 & 43.

³⁹CONSTITUTION art. 63 (1987) (People’s Democratic Republic of Ethiopia).

⁴⁰Constitución de República de Cuba, art. 69, Gaceta Oficial 02-15-1976.

⁴¹រដ្ឋប្បវេណី ៨ (1981) (Constitution of the People’s Republic of Kampuchea).

⁴²SAHOEJUUI HEONBOB 1976 [SOCIALIST CONSTITUTION LAW OF THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA (1976)] art. 73, 76 (North Korea).

⁴³ສັນຕິພາບຂອງສາທາລະນະລັດປະຊາທິປະໄຕປະຊາຊົນລາວ art. 40 (1991) (Constitution of the Lao People’s Democratic Republic) (Laos).

⁴⁴HIẾN PHÁP NƯỚC VIỆT NAM DÂN CHỦ CỘNG HÒA art. 43 & 50 (1959) (Constitution of the Democratic Republic of Vietnam).

⁴⁵HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM art. 82 (1980) (Constitution of the Socialist Republic of Vietnam).

legislature, although in reality, the national legislature, the National People's Congress, made new constitutions.⁴⁶ North Korea retains but amended the 1972 socialist Constitution, and the current version of the document, as amended in 2023, only empowers the Supreme People's Assembly to amend, not to adopt the constitution.⁴⁷

The Constitution of the Lao People's Democratic Republic, from 2015, continues to confirm that the National Assembly's the national legislature, has the power "to consider and adopt the Constitution and Laws."⁴⁸ In practice, the National Assembly adopted the Laos' 2015 Constitution but with significant public participation.⁴⁹ The current Constitution of Cuba adopted in 2019 continues to establish that National Assembly of the People's Power is the sole organ with constituent and legislative authority.⁵⁰ In practice, the adoption of the constitution involves strong public consultation followed by referendum ("popular affirmation").⁵¹

In Vietnam, the National Assembly adopted the third socialist constitution in 1992, which continues to confirm that "[t]he National Assembly is the only body vested with constituent and legislative power."⁵² The National Assembly adopted the third socialist constitution in 2013, the current constitution in Vietnam. During the process of making this constitution, the public strongly advocated for the practice of constituent power by the people through referendum. Eventually, the Constitution was still adopted by the ordinary legislature and continues to confirm the constituent power of the National Assembly.⁵³ However, in response to the public activism, the Constitution ambiguously recognizes the people's constituent power in the preamble and promises referendum in future constitution-making and amendments.⁵⁴

II. The Socialist Paradigms of Constituent Power

Like the practice of constituent power in democracies, the practice of this power in the socialist regimes present various paradigms in different periods. These paradigms can be characterized as revolutionary, Soviet post-revolutionary, and contemporary reformist.

1. The Revolutionary Paradigm

In the revolutionary paradigm of Soviet Russia, the socialist constituent power is used after a communist revolution to establish the legal foundation for a socialist state. The condition leading to the practice of this power is a communist revolution. The constituent power was used to make a socialist constitution of 1918 immediately after the Russian Revolution in 1917 that overturned the imperial government. By nature, the socialist constituent power in the revolutionary paradigm is an extraordinary power in subjective, procedural and substantive senses. The subject of the

⁴⁶Ryan M. Mitchell, *The Making of China's 1982 Constitution*, in *ASIAN COMPARATIVE CONSTITUTIONAL LAW* 77, 80–85 (Ngoc Son Bui & Mara Malagodi eds., 2023).

⁴⁷SAHOEJUUI HEONBEOB 1976 [SOCIALIST CONSTITUTION LAW OF THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA (1976)] art. 91 (North Korea).

⁴⁸ວັດຖະທຳມະນູນຂອງສາທາລະນະລັດປະຊາທິປະໄຕປະຊາຊົນລາວ art. 53 (2015) (Constitution of the Lao People's Democratic Republic) (Laos). The National Assembly of Laos adopted a new Constitution in March 2025. The provision on the constituent power remains the same. ວັດຖະທຳມະນູນຂອງສາທາລະນະລັດປະຊາທິປະໄຕປະຊາຊົນລາວ art. 53 (2025) (Constitution of the Lao People's Democratic Republic) (Laos).

⁴⁹Bui Ngoc Son, *Constitutional Amendment in Laos*, 17 INT'L J. CONST. L. 756, 764–65 (2019).

⁵⁰Constitución de República de Cuba, art. 103 & pmbl., Gaceta Oficial 04-10-2019.

⁵¹Larry C. Backer & Flora Sapio, *Popular Consultation and Referendum in the Making of Contemporary Cuban Socialist Democracy Practice and Constitutional Theory*, 27 UNIV. MIAMI INT'L & COMPAR. L. REV. 37, 116 (2019).

⁵²HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM art. 83 (1992) (Constitution of the Socialist Republic of Vietnam).

⁵³HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM art. 69 (2013) (Constitution of the Socialist Republic of Vietnam).

⁵⁴HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM PMBL (2013) (Constitution of the Socialist Republic of Vietnam).

socialist constituent power is a supreme body of the revolutionary government—All-Russian Congress of Soviets. In terms of procedure, the use of the socialist constituent power is extralegal. The power is practiced outside the existing political order and is not limited by pre-established fundamental legal rules. Substantively, the practice of the socialist constituent power seeks to codify the achievements of the communist revolution, overturn the previous political regime, and establish a new socialist constitutional order.⁵⁵

Similar to the revolutionary paradigm of the democratic constituent power, the socialist revolution occurred after a social revolution overturning a political regime. The nature of the revolutions, however, is different, which leads to the different goals in the use of the constituent power. The socialist constituent power is used after a communist revolution and hence aims to create a socialist legal order and political regime, where the democratic constituent power is practiced after a democratic revolution and hence seeks to establish the foundation for a liberal democracy.

The cases of China and Cuba present variations of the revolutionary paradigm of socialist constituent power. In both cases, the communist revolutions did not lead to the immediate use of the constituent power. The Chinese Revolution culminated in the creation of People's Republic of China in 1949, but it was not until 1954 that the China's National People's Congress adopted the first socialist constitution.⁵⁶ In the same vein, the Cuban Revolution overthrew the government of Fulgencio Batista in 1959, but the first socialist constitution was only adopted by the people in a referendum in 1976.⁵⁷ The delayed constitution-making in Cuba and China can be attributed to the communist conception of a constitution as product of capitalist societies. Yet, when the revolutionary governments need to institutionalize their revolutionary achievements and lay down the foundation to build the socialist state and the socialist legal system, they need to resort to the constituent power.

2. The Soviet Post-revolutionary Paradigm

In the Soviet post-revolutionary paradigm, the socialist constituent power is used for the replacement of an existing socialist constitution by another socialist constitution. In this paradigm, the socialist constituent power is an ordinary power in subjective, procedural, and substantive senses. First, the subject of the socialist constituent power is an ordinary legislature constitutionally defined as the supreme power of the state. There is no extraordinary constituent assembly created for the exclusive purpose of practice of the constituent power. The ordinary legislature is also a permanent body of constituent power. The exercise of the constituent power by the legislature created by popular elections does not mean the people is the subject of the power. In functional terms, the socialist legislature is dominated by a communist party, and operates as a platform to institutionalize the party's socialist policy.⁵⁸ Consequently, the communist party is the real subject of socialist constituent power. The ordinary legislature is a formal intermediate body for the party to practice the constituent power. Second, the process to exercise the socialist constituent power is not extra-legal but regulated by the existing constitution. Particularly, the constitution provides for the author of constituent power. Third, substantively, despite formal replacement, the use of the socialist constituent power does not replace the existing

⁵⁵Adam Bosiacki, *On the Way Between Utopia and Totalitarianism. The Bolshevik Constitution of 1918 as a Model of Socialist Constitutionalism*, 6 BRICSLAW JOURNAL 49, 76 (2019) (stating that the 1918 Constitution "was designed to legitimize the principles of the new system").

⁵⁶Albert H. Y. Chen, "Constitutions and Constitutionalism: China, In *Constitutionalism in Context* 61, 71 (David S. Law (ed., 2022)).

⁵⁷Constitución de República de Cuba, art. 69, Gaceta Oficial 02-15-1976.

⁵⁸Wenjia Yan, *Party-Legislation of Legislating-Party in the Chinese Socialist Rule of Law: The Role of the CCP in the Party-State Legislation Revisited* 25 GERMAN L.J. 1545, 1548 (2024).

socialist constitutional order but seeks to codify socialist political elite's new projects for political, social, and economic development.⁵⁹

The socialist constituent power is rested on epistemological foundations different from the democratic theories of the constituent power. These epistemological foundations of the socialist constituent power include the statist conception of constitution, Marxist historical materialism, and the principle of democratic centralism.

First, unlike the Rousseauian constitutional theory, a socialist constitution is not a social contract of the people to create the state.⁶⁰ Rather a socialist constitution is considered a document for the socialist state to project a fundamental program for social, economic, and political development.⁶¹ As the socialist constitution is the document of the state, the power to make it belongs to the state, not the people. The national legislature is the supreme power of the state, hence it presents the state to exercise the constituent power, although in reality it is controlled by the communist party. In addition, as socialist constitutions are an malleable political instrument of the state, they will be amended or replaced when political elites adjust or replace their program for socialist development. Consequently, the elites need to use the constituent power as a normal power in normal times. This explains why the legislature is a permanent body of constituent power.

Second, the socialist constituent power is shaped by Marxist historical materialism. Marxist historical materialism perceives constitutions as the reflection of economic conditions.⁶² Consequently, socialist constitutions can be replaced by new constitutions when the material conditions change. The socialist constitutions, therefore, anticipate their replacements, reflected in the socialist constitutional design of the constituent power.

Third, socialist constitutions reject the Montesquieuan principle of separation of power and establish the principle of democratic centralism.⁶³ According to this socialist principle, the national legislature centralizes all state powers, but for efficiency, it mainly practices the legislative power, delegates executive and judicial powers to other state institutions—the government and the courts—and supervise the practice of the executive and judicial powers.⁶⁴ The legislature delegates state powers through its practice of the constituent power. Therefore, it has both constituent power and legislative power.

The socialist constituent power is entrenched in the existing constitution—for example, the constitutional provision establishing the constituent power of the legislature. The constitutional entrenchment of the socialist constituent power has three functions: Expressive, prescriptive, and preventive. First, the provision on the legislature's constituent power expresses the reality that the existing constitution is made by the legislature. This expression also demonstrates the power of the legislature. Second, the provision prescribes that the legislature has the power to make a new constitution to replace the existing one. The prescriptive entrenchment allows constitutional reform within existing socialist polity. Third, the entrenchment of the constituent power of legislature seeks to prevent constitutional revolution. The entrenchment means only the existing legislature can make a new constitution to ensure that the new constitution, despite formal constitutional replacement, continues the socialist constitutional project. The constitutional mandate of the constituent power of the legislature aims to preclude the exercise of this power by actors outside the socialist constitutional order which may lead to the replacement of the socialist political regime.

⁵⁹NGOC SON BUI, CONSTITUTIONAL CHANGE IN THE CONTEMPORARY SOCIALIST WORLD 47 (2020).

⁶⁰On the idea of constitution as social contract, see Joel I. Colón-Ríos, *Rousseau, Theorist of Constituent Power*, 36 OXFORD J. LEGAL STUD. 885, 891 (2016).

⁶¹BUI, *supra* note 59, at 67.0.

⁶²Marco Goldoni & Michael A. Wilkinson, *The Tradition of the Material Constitution in Western Marxism*, in THE CAMBRIDGE HANDBOOK ON THE MATERIAL CONSTITUTION, 25, 26 (Marco Goldoni & Michael A. Wilkinson eds., 2023).

⁶³Bui, *supra* note 59, at 80.

⁶⁴*Id.*

3. The Contemporary Reformist Paradigm

The design and practice of constituent power in transitional socialist regimes like Cuba, Vietnam, and Laos do not neatly fit with democratic and conventional Soviet models of constituent power. Rather, it occurs in a grey zone in which the constituent power is principally socialist but partially reflect democratic practices and ideals. In the contemporary reformist paradigm, the socialist constituent power is used for constitutional replacement and integrates some practices and ideals of democratic constituent power. The reformist features of the socialist constituent power are manifested in Vietnam in three aspects— subject, process, and substance.⁶⁵

First, the subject of the socialist constituent power is still the ordinary legislature but reflects the ideal of the people's constituent power. On one hand, the subject of the socialist constituent power remains the ordinary legislature due to ideological commitments—to constitutional statism, Marxist historical materialism, and democratic centralism—and political concerns—preventing constitutional revolution. On the other hand, the ideal of the people's constituent power is recognized in the constitution in response to the people's demand for the practice of their constituent power and the global diffusion of the people's constituent power.⁶⁶

Second, the process of the practice of the socialist constituent power involves the people. The people do not enjoy the constituent power but engage in the practice of this power through participation in process of constitution-making. Through public discourse, the people demand for transferring of the constituent power from the national legislature to the people. As the consequence of this discursive, contentious dynamic, the constitution formally recognizes the role of the people in the process of practice of the constituent power, through, for example, the procedure of constitutional referendum.

Third, substantively, the practice of the socialist constituent power seeks to codify the socialist political elite's agenda for political, social, and economic reforms.⁶⁷ The substances of these constitutional reforms may include non-socialist ideals, such human rights and market development. Consequently, the practice of the constituent power continues the socialist constitutional project but introduces new reformist elements to this project to render the project adaptive to domestic social change and the international dynamics, including globalization.⁶⁸

Apart from Vietnam, the reformist model can also capture the dynamic and design of the socialist constituent power in Cuba and Laos. The subject of the constituent power in Cuba is the National Assembly, an ordinary legislature, but the 2019 Constitution formally recognizes the people's constituent power in the preamble as well as in the rule of referendum in constitutional reform.⁶⁹ The process of the practice of the constituent power involves the public participation and referendum, although the referendum is managed by political elites. Substantively, the constituent power is used to codify the Communist Party of Cuba's project for political, social, and economic reforms, including the constitutional recognition of private ownership.⁷⁰ The socialist constitutional project remains but is adapted to the changing society.

In Laos, the 2015 Constitution was adopted by the ordinary legislature, but the process of constitution-making significantly involved public participation, which is the base for the claim in its preamble that “[t]his Constitution is the fruit of the process of the people's discussions throughout the country.”⁷¹ The public participation reflects the democratic ideal of constituent

⁶⁵See, *infra*, Section D.

⁶⁶See, *infra*, Section D.

⁶⁷See, *infra*, Section D.

⁶⁸See, *infra*, Section D.

⁶⁹Constitución de República de Cuba, art. 228, Gaceta Oficial 04-10-2019.

⁷⁰Constitución de República de Cuba, art. 29, Gaceta Oficial 04-10-2019.

⁷¹ລັດຖະທຳມະນູນຂອງສາທາລະນະລັດປະຊາທິປະໄຕປະຊາຊົນລາວ pmbl. (2015) (Constitution of the Lao People's Democratic Republic) (Laos).

power to some extent. The 2015 Constitution replaced the 2003 Constitution, continues the socialist constitutional project but adopts non-socialist ideas, such as human rights.⁷²

Comparatively, like the post-revolutionary paradigm of democratic constituent power in Central Europe and South Africa, the reformist paradigm of socialist constituent power is not extra-legal but under the law. However, different from the democratic paradigm, the socialist paradigm of constituent power continues rather than dismantles the existing constitutional project. The reformist use of the socialist constituent power is not to facilitate democratic transformation but to consolidate and adapt the existing socialist regime to the changing domestic and international environment.

D. Case Study: The Socialist Constituent Power in Vietnam

The global return of constituent power is resonated in Vietnam. In 2013, the national legislature adopted a new constitution.⁷³ During the constitution-making process, sectors of society—civil society organizations, legal scholars, activists, and other intellectuals—called for returning the constituent power to the Vietnamese people, particularly their power to adopt the new constitution in a national referendum.⁷⁴ This section explores the 2013 debate on constituent power. This section employs the method of discourse analysis to understand social meanings behind words and texts. It uses original resources in Vietnamese, including draft and final constitutions, newspaper articles, online posts, letters, and petitions.

I. The Discursive Struggle for The People's Constituent Power

1. Initiation

The public debate on constituent power emerged around 2010 when the state planned to amend the 1992 Constitution for the second time. The starting point is the June 2010 interview of Vietnamnet, one of the most popular online state newspapers in Vietnam, with Mr. Nguyễn Văn An, the former President of the National Assembly.⁷⁵ I Mr. Nguyễn Văn An advocated for the *practice* of the constituent power in Vietnam in two forms—participation and referendum in the constitutional amendment process.⁷⁶ He considered the people's exercise of constituent power necessary for the nation's socialist social and economic development. In addition, he contended that constituent power is connected to the principle of the democratic republic, the founding regime in Vietnam.⁷⁷

Mr. Nguyễn Văn An further justified constituent power on the base of sovereignty. He opined that through constitutional change, sovereign in Vietnam was changed from the people to the legislature.⁷⁸ He argued that Vietnam's first Constitution adopted in 1946 established the constituent power of the people, citing its relevant provisions on constitutional referendum.⁷⁹ When things changed with the adoption of the socialist constitutions of 1959, 1980, and 1992, he

⁷² ວັດຖະທຳມະນູນຂອງສາທາລະນະລັດປະຊາທິປະໄຕປະຊາຊົນລາວ art. 34 (2015) (Constitution of the Lao People's Democratic Republic) (Laos).

⁷³ HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM (2013) (Constitution of the Socialist Republic of Vietnam).

⁷⁴ Bui Ngoc Son, *Contextualizing the Global Constitution-Making Process: The Case of Vietnam*, 64 AM. J. COMP. L. 931, 960 (Winter 2016).

⁷⁵ Nguyễn Văn An, *Cựu chủ tịch Quốc hội bàn chuyện sửa Hiến pháp* [Former National Assembly President Discusses The Constitutional Amendment], HIENPHAP, February 1, 2013, <https://hienphap.wordpress.com/2013/02/01/cuu-chu-tich-quoc-hoi-ban-chuyen-sua-hien-phap/>.

⁷⁶ *Id.*

⁷⁷ Nguyễn Văn An, *Cựu chủ tịch Quốc hội bàn chuyện sửa Hiến pháp* [Former National Assembly President Discusses The Constitutional Amendment], HIENPHAP, February 1, 2013, <https://hienphap.wordpress.com/2013/02/01/cuu-chu-tich-quoc-hoi-ban-chuyen-sua-hien-phap/>.

⁷⁸ *Id.*

⁷⁹ *Id.*

continued. He indicated that these socialist constitutions, adopted by the legislature, transferred the constituent power from the people to the legislature—the National Assembly. He questioned:

Who has the authority to transfer that power? The obvious answer is that only the People have that power. However, there is no document that transfers the constituent power of the People to the National Assembly, but the National Assembly itself decided to delegate the power to make the Constitution [to itself].⁸⁰

This statement questioned the legitimacy of the constituent power enjoyed by the legislature. The transfer of constituent power also means the transfer of sovereign from the people to the legislature. He lamented: “This is a very, very fundamental change, a detachment from the true owner of the country. The National Assembly has both constituent and legislative power, so it is called the one who both plays the football and whistles.”⁸¹

However, he argued that in reality “the National Assembly is very formalistic” because of the dominant role of the Communist Party of Vietnam.⁸² He said:

Currently about 90% of National Assembly deputies are party members. Therefore, many people believe that, in theory, the National Assembly decides, but in reality, the Party decides. The decision of the National Assembly is just an extension of the decision within the Party. Thus, full Democracy changed to partial Democracy through National Assembly, but because both the People and the National Assembly are very symbolic, many people think that the Party is the real power.⁸³

This implies that the constituent power has been actually transferred to the Party. Mr. Nguyễn Văn An then called for returning the constituent power to the people, which also meant restoring popular sovereignty.⁸⁴

Mr. Nguyễn Văn An’s discursive advocacy for the people’s constituent power is informed by democratic ideals: As the people are the master of the country, they must have the power to make the constitution⁸⁵ through which they delegate their power to the state institutions.⁸⁶ In addition, the constitutional discourse is also a critical response to the Vietnamese institutional arrangement and politics. The constitutional transfer of the constituent power from the people to the ordinary legislature has been questioned as illegitimate as the transfer is carried out by legislature itself. However, as the legislature is controlled by the Party, it is critically argued that the Party is the real owner of the constituent power.⁸⁷

2. Expansion

In 2011, when the National Assembly was considering amending the 1992 Constitution, intellectuals and other people expanded the discussion on the people’s constituent power in various forums. For example, the newspaper *Người Lao Động* (Labors) reported the debate on constituent power in workshop on constitutional amendments held in Hanoi on December 7,

⁸⁰Nguyễn Văn An, *Cựu chủ tịch Quốc hội bàn chuyện sửa Hiến pháp* [Former National Assembly President Discusses The Constitutional Amendment], HIENPHAP, February 1, 2013, <https://hienphap.wordpress.com/2013/02/01/cuu-chu-tich-quoc-hoi-ban-chuyen-sua-hien-phap/>.

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷*Id.*

2011 attended by over 200 participants.⁸⁸ In the meeting, Trần Ngọc Đường, a member of National Assembly Office, stated that in a rule of law state, the people, not the National Assembly, is the owner of the constituent power.⁸⁹ In the same vein, Lê Văn Cẩm, a senior law professor from Vietnam National University-Hanoi, lamented that the post-1946 Vietnamese Constitutions failed to recognize the people's constituent power and their right to constitutional referendum.⁹⁰

Intellectuals, activists, and other individuals called for popular constituent power in various forums. Lê Hiếu Đằng, an activist lawyer, stated: "The Constitution must be approved by the people; its adoption by the National Assembly is only indirect, although the National Assembly is the representative institution."⁹¹ Nguyễn Sĩ Phương, a Vietnamese scholar in Germany, also concerned: "If the constitution is not approved in a referendum, this means that the state sets its own legal measures, standards and limits; then that country does not rule out the risk of turning to dictatorship or totalitarianism."⁹² Assembly deputy Trần Du Lịch questioned: "The National Assembly is the highest body of state power, which has constituent and legislative powers. So, what powers do people have in terms of state power?"⁹³ In response to the concern that the people may not have sufficient knowledge to vote on the constitution, Đinh Ngọc Vượng, a legal scholar, explained that "the people themselves are voters who wisely elect the National Assembly and People's Councils at all levels. When voting for the National Assembly and the People's Council, they are wise people, and when discussing important issues of the country, why are they not qualified enough?"⁹⁴ Lê Hiếu Đằng added: "Our intellectual level and economy have been stable, so we have enough conditions to conduct a referendum on the Constitution."⁹⁵ Nguyễn Đình Lộc, a constitutional law scholar and former Minister of Justice, anticipated: "In future, there will definitely be a constitutional referendum. Saying that power belongs to the people, it is appropriate for the people to vote in a referendum."⁹⁶

In 2012 when the government was preparing the draft amendments to the constitution, the public debate turned to constituent power as a design and practice matter: The amended constitution must affirm the people's constituent power, and the charter itself must be promulgated by the people, not the National Assembly.⁹⁷ For example, Nguyễn Cửu Việt, a law professor at Ho Chi Minh City University of Law, argued for the people's the power to adopt the Constitution.⁹⁸ To support this claim, he referred to comparative experience of constitutional referendum:

In recent decades and in the 21st century, the rate of constitutions issued by referendum is much higher than before, especially in advanced states. That proves that the spirit of the people's sovereignty principle is increasingly asserted in the Constitutions around the world. Therefore, it is time for us to stipulate the right to vote – the vote of the people on the

⁸⁸Góp Ý Sửa Đổi Hiến Pháp Năm 1992: Quyền Lập Hiến Thuộc Về Nhân Dân [Comments On Amending The 1992 Constitution: The Constituent Power Belongs To The People], NGƯỜI LAO ĐỘNG (December 7, 2011), <https://nld.com.vn/thoi-su-trong-nuoc/gop-y-sua-doi-hien-phap-nam-1992-quyen-lap-hien-thuoc-ve-nhan-dan-20111207112537804.htm>.

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹Quỳnh Chi, *Quyền Phúc Quyết Hiến Pháp [The Right to Constitutional Referendum]*, RFA (September 2, 2011), https://www.rfa.org/vietnamese/in_depth/consti-ratif-debt-qc-09022011162001.html.

⁹²*Id.*

⁹³*Id.*

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷Nguyễn Cửu Việt, *Bàn Thêm Về Vấn Đề Sửa Đổi Hiến Pháp 1992 Nhìn Từ Nguyên Tắc Chủ Quyền Nhân Dân [Further Discussion On The Issue Of Amending The 1992 Constitution From The Principle Of People's Sovereignty]*, HIENPHAP, February 16, 2013, <https://hienphap.wordpress.com/2013/02/16/ban-them-ve-van-de-sua-doi-hien-phap-1992-nhin-tu-ngu-yen-tac-chu-quyen-nhan-dan-nguyen-cuu-viet/>.

⁹⁸*Id.*

Constitution after the National Assembly has passed it [. . .] Abolish ideas in the Constitution on the power of the National Assembly to make and enact the Constitution.⁹⁹

In addition, Nguyễn Cửu Việt cited Rousseau to argue that “it is very important to use state power directly (through universal voting), because it is the highest expression of sovereignty.”¹⁰⁰ Thus, he invoked comparative experience and Enlightenment theory to advocate for the design and practice of the people’s constituent power.

In November 2012, the first draft of the constitutional amendment was debated in the National Assembly, and the public call for the people’s constituent power was reflected in the legislative platform. To illustrate, Hà Hùng Cường, an assembly deputy and Minister of Justice, argued that: “The promulgation of the Constitution and amendment of the Constitution are among the most important issues of the country. So, the Constitution must be made and decided by the people; in other words, the people must be the owner of the constituent power.”¹⁰¹ He supported his claim on historical, contemporary, practical, and comparative grounds. First, the 1946 Constitution confirms popular sovereignty as the lasting principle of the country, and explicitly provides for the people’s vote on the constitution in a national referendum.¹⁰² Second, the 1992 Constitution also confirmed the principle of popular sovereignty and the people’s right to referendum, which must include constitutional referendum.¹⁰³ Third, the right to referendum was never practiced in Vietnam, because it was not mandated, and its implementation depended on the state’s will.¹⁰⁴ Fourth, “many countries stipulate that it is mandatory to bring a draft constitution to the referendum before and after the approval of a national assembly or parliament.”¹⁰⁵ Hà Hùng Cường’s proposal, however, is ambiguous. He suggested undertaking public consultation on the draft amendment to the Constitution before its approval by the National Assembly.¹⁰⁶ As a design issue, he proposed the amended Constitution should include a new requirement on referendum on constitutional amendments to be applied in future amendments. Many other deputies also agreed that the amended Constitution must empower the citizens to change the Constitution through referendum.¹⁰⁷

3. Explosion

The National Assembly adopted a resolution, which provided that public consultation on Amendments to the 1992 Constitution began on January 2, 2013, and ended on March 31, 2013.¹⁰⁸

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Dân Phải Được Quyền Phúc Quyết Hiến Pháp* [The People Must Have The Right To Vote On The Constitution], VIETNAMNET (November 17, 2012), <https://vietnamnet.vn/vn/thoi-su/dan-phai-duoc-quyen-phuc-quyet-hien-phap-97283.html>.

¹⁰²HIẾN PHÁP NƯỚC VIỆT NAM DÂN CHỦ CỘNG HOÀ arts 1 and 70 (1946) (Constitution of the Democratic Republic of Vietnam).

¹⁰³HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM arts 2 and 53 (1992) (Constitution of the Socialist Republic of Vietnam).

¹⁰⁴*Dân Phải Được Quyền Phúc Quyết Hiến Pháp* [The People Must Have The Right To Vote On The Constitution], VIETNAMNET (November 17, 2012), <https://vietnamnet.vn/vn/thoi-su/dan-phai-duoc-quyen-phuc-quyet-hien-phap-97283.html>.

¹⁰⁵*Dân Phải Được Quyền Phúc Quyết Hiến Pháp* [The People Must Have The Right To Vote On The Constitution], VIETNAMNET (November 17, 2012), <https://vietnamnet.vn/vn/thoi-su/dan-phai-duoc-quyen-phuc-quyet-hien-phap-97283.html>.

¹⁰⁶*Id.*

¹⁰⁷*Dân Phải Được Quyền Phúc Quyết Hiến Pháp* [The People Must Have The Right To Vote On The Constitution], VIETNAMNET (November 17, 2012), <https://vietnamnet.vn/vn/thoi-su/dan-phai-duoc-quyen-phuc-quyet-hien-phap-97283.html>.

¹⁰⁸Nghị quyết 38/2012/QH13 tổ chức lấy ý kiến nhân dân về Dự thảo sửa đổi Hiến pháp năm 1992 [Resolution 38/2012 / QH13 on organizing collecting people’s opinion on the draft amendments to the 1992 Constitution], Resolution 38/2012 / QH13 (Nov. 23, 2012) (Viet.).

The draft includes this provision: “The Draft Constitution is approved when it is voted for by at least two-thirds of the total number of National Assembly deputies. Referendum on the Constitution is decided by the National Assembly.”¹⁰⁹ So, it still confirmed constituent power by the National Assembly. During three months of constitutional consultation, the public call for popular constituent power boomed in both informal and formal platforms. In informal venues—for example, websites, blogs, and Facebook—different social groups and civil society organizations demanded for the popular constituent power and concomitantly constitutional referendum.

Petition 72, a petition of 72 intellectuals,¹¹⁰ considered constituent power a key point.¹¹¹ It defines that “the constituent power (the power to build, enact or amend the constitution) is the power to create other powers (legislative, executive and judicial) that must belong to the entire people, not to any organization or body of the government, including the National Assembly.”¹¹² On that conceptual base, *Petition 72* included two design demands, and a practice demand related to constituent power. On design, it suggests the constitution’s preamble must recognize the people’s constituent power.¹¹³ In addition, the *Petition* also proposed that the body of constitution must include a provision ensuring the people’s right to vote on the Constitution through a transparent and democratic referendum.¹¹⁴ On practice, *Petition 72* demanded that the new amended constitution itself must be ratified by the people in a referendum.

The *Hanoi Law Alumni’s Open Letter* focused on and expanded the practical demands of *Petition 72*.¹¹⁵ The Letter called for people’s constituent power and constitutional referendum. Apart from citing the 1946 Constitution’s recognition of referendum and the 1992 Constitution’s principle on popular sovereignty, the Letter justified constituent power on the base of social contract theory:

The constituent power is a natural power that belongs to the people and therefore the right to vote on the Constitution of the people is also natural. The people are owners of the Constitution, meaning that the Constitution is a contract between the people about the creation of a state and the design of principles of coexistence in society. The Constitution is of the people and aims to serve the interests of the people. Therefore, it is the people who must directly decide the contents of the Constitution. It is indispensable to recognize and organize for people to exercise their power to vote on the Constitution and this is the right time to do this.¹¹⁶

On that basis, the Letter not only suggested the inclusion of a provision on constitutional referendum in the draft amended constitution but also called for “carrying out procedures for the people to approve the Constitution in this amendment in a democratic, fair and transparent manner.”¹¹⁷ The law graduates reasoned the fact that the 1992 Constitution did not require referendum on constitutional amendment does not prevent the practice of referendum on the amended constitution “because the constitutional referendum is natural and inherent power of

¹⁰⁹HIẾN PHÁP VIỆT NAM DÂN CHỦ CỘNG HÒA (1992, amend. 2013) (Constitution of the Democratic Republic of Vietnam).

¹¹⁰For a separate account of this petition, see Bui Ngoc Son & Pip Nicholson, *Activism and Popular Constitutionalism in Contemporary Vietnam*, 42 LAW & SOC. INQUIRY 677, 689-692 (Summer 2017).

¹¹¹Kiến nghị về sửa đổi Hiến pháp 1992 [Petitions on Amending the 1992 Constitution], HIENPHAP, February 2, 2013, <https://hienphap.wordpress.com/2013/02/03/kien-nghi-ve-sua-doi-hien-phap-1992-2/>.

¹¹²*Id.*

¹¹³*Id.*

¹¹⁴*Id.*

¹¹⁵Thư Ngỏ Và Kiến Nghị Về Việc Sửa Đổi Hiến Pháp Của Cựu Sinh Viên Luật Hà Nội [Open Letter and Proposal on the Amendment of the Constitution of Hanoi Law Alumni], HIENPHAP February 24, 2013, <https://hienphap.wordpress.com/2013/02/24/thu-ngo-va-kien-nghi-ve-viec-sua-doi-hien-phap-cua-cuu-sinh-vien-luat-ha-noi/>.

¹¹⁶*Id.*

¹¹⁷*Id.*

the people.”¹¹⁸ This echoes Yale Law Professor Akhil Reed Amar’s argument that the American people “retain an unenumerated, constitutional right” to change the government and the amend the Constitution in the way not explicitly provided in Article V of the US Constitution.¹¹⁹

The *Declaration of Free Citizens* is even more radical.¹²⁰ It completely rejected the draft of the amended constitution and the constituent power by the existing National Assembly, and called for the creation of something like the Philadelphia Convention to make a new constitution as the expression of the popular will: “We want to organize a Constituent Convention, to make a new Constitution really presenting the will of the entire Vietnamese people, not the will of the Communist Party like the current Constitution.”¹²¹

The *Petition of Civil Society Organizations* also called for popular constituent power but was less radical than other petitions.¹²² It contends that the constituent power belongs to the people exercised through the National Assembly. Its proposal focuses on constitutional design, not the practice of constituent power. It suggests the Constitution’s preamble should recognize the people’s constituent power.¹²³ The Petition called for writing in the Constitution a provision stipulating referendum as a required process of constitutional ratification.¹²⁴

The *Suggestion of Seven Vulnerable Groups* also called for the confirmation of people’s constituent power in the constitution’s preamble and a provision on constitutional ratification through referendum.¹²⁵ However, the group did not demand for the practice of referendum on the amended constitution.

In official venues, consultation meetings and state media, voices for constituent power were vehement. Consider the views on some meetings on constitutional consultations. In a workshop held by the Central Committee of Vietnam Fatherland Front on February 19, 2013, Mr. Nguyễn Khánh, former Deputy Prime Minister, proposed that the people must vote on the amended constitution and the constitution itself must confirm constitutional referendum, because constituent power is the people’s direct power, and constitutional referendum is the highest expression the popular sovereignty.¹²⁶ In the same meeting, Mr. Phan Hữu Dật, Vice Chairman of National Ethnic Advisory Council of Central Committee of Vietnam Fatherland Front, emphasized the connection of popular sovereignty with the increasing social awareness of the popular sovereignty:

Due to the broader ideological awareness, stemming from the perception of the power of the people, everything is based on the people, and so some people think that the highest authority of our country is the people. This means that if the National Assembly plans policies that are

¹¹⁸*Id.*

¹¹⁹Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 458-59 (1994).

¹²⁰Lời Tuyên Bố của các Công Dân Tự Do [Declaration of Free Citizens], HIENPHAP (March 8, 2013), <https://hienphap.wordpress.com/2013/03/08/loi-tuyen-bo-cua-cac-cong-dan-tu-do/>.

¹²¹Lời Tuyên Bố của các Công Dân Tự Do [Declaration of Free Citizens], HIENPHAP (March 8, 2013), <https://hienphap.wordpress.com/2013/03/08/loi-tuyen-bo-cua-cac-cong-dan-tu-do/>.

¹²²Kiến nghị Sửa đổi Hiến pháp 1992 của các Tổ chức Xã hội Dân sự [Recommendations of Vietnamese Civil Society Organizations on Draft Amendments to the 1992 Constitution], HIENPHAP (March 30 2013), <https://hienphap.files.wordpress.com/2013/03/kien-nghi-sua-doi-hien-phap-1992-cua-cac-to-chuc-xa-hoi-dan-su.pdf>.

¹²³*Id.*

¹²⁴*Id.*

¹²⁵Góp ý với Dự Thảo Sửa Đổi Hiến Pháp của 7 Nhóm Xã Hội, Nhóm Yếu Thế và Dễ Bị Tổn Thương [Comments on Draft Amendments to the 1992 Constitution of 7 Social Groups, Disadvantaged and Vulnerable Groups] HIENPHAP, March 3, 2013, <https://hienphap.files.wordpress.com/2013/03/gop-y-sua-doi-hien-phap-1992-cua-7-nhom-xa-hoi-dan-su.pdf>.

¹²⁶Nguyễn Lê, *Lập hiến là quyền trực tiếp của dân* [The Constitution-Making is the Direct Power of the People], HIENPHAP, March 5, 2012, <https://hienphap.wordpress.com/2013/03/05/lap-hien-la-quyen-truc-tiep-cua-dan-nguyen-le-ghi/>.

not in line with people's hearts, a referendum must be held. This means that the new Constitution needs to ensure the right of the people to referendum.¹²⁷

On February 22, 2013, the Journal of Legislative Studies of National Assembly Office and Law and Development Magazine of Vietnamese Lawyers Association held a seminar to comment on the amendments to the 1992 Constitution.¹²⁸ In the meeting, Deputy Chairman of the National Assembly Nguyễn Văn Yếu stated: "The people expect the Constitution to express the reality that power belongs to the people as well as better present human rights and citizens' rights in Vietnam."¹²⁹ Nguyễn Minh Đoàn, a law professor at Hanoi Law University, questioned: "Why does the draft Constitution still not recognize the constituent power of the people? [. . .] Don't we have the conditions or we don't believe in the wisdom of the people?"¹³⁰

On February 28, 2013, the Youth Union and the Hanoi Law University jointly hold a conference to collect opinions of young intellectuals, young lecturers and students of universities on amending the 1992 Constitution.¹³¹ The media reported: "Many opinions agree with the view that the Constitution must be approved by the people because this is a widely recognized right in advanced countries in the world."¹³² Law lecturer Phạm Đức Bảo passionately averred: "This constitutional amendment must bring the content of the people's right to vote on the Constitution and on matters related to national destiny. Definitely, the right to referendum, the constituent power must belong to the people."¹³³

Official media reported or interviewed individuals on popular constituent power and constitutional referendum. For example, according to the *Dân trí* online, colonel Nguyễn Huy Viện from Military Medical Academy emphasized that constitutional referendum is the "international standard of constitution-making."¹³⁴ He argued that other Asian countries—for example, South Korea, Singapore, Malaysia, and Thailand—achieved better developments than Vietnam because they have incorporated international experiences not only in education and economic development but also in constitution-making and institution-building. He then suggested that Vietnam's Constitution should incorporate "human constitutional values becoming universal in the world," such as a constitutional referendum, to achieve better development in future.¹³⁵

Similarly, in an interview with the *Đại Đoàn Kết* newspaper, Professor Vũ Hoan, Chairman of Hanoi Union of Science and Technology Associations, insisted it is right for the Party to allow the people to vote on the Constitution:

In civilized countries today, it is true that people have the right to vote on the Constitution. Thus, it is true to the aspirations of the entire people. In fact, our people have a tradition of

¹²⁷*Id.*

¹²⁸Lê Nhung, *Sao Không Thừa Nhận Quyền Lập Hiến Của Dân?* [Why Not Recognize the Constituent Power of the People?], HIENPHAP, February 23, 2013, <https://hienphap.wordpress.com/2013/02/23/sao-khong-thua-nhan-quyen-lap-hien-cua-dan-le-nhung-ghi/>.

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹*Quyền lập hiến phải thuộc về nhân dân* [The Constituent Power Must Belong to the People], VIETNAMNET (February 28, 2013), <https://vietnamnet.vn/vn/thoi-su/quyen-lap-hien-phai-thuoc-ve-nhan-dan-110835.html>.

¹³²*Id.*

¹³³*Id.*

¹³⁴P.Thào, *Quyền Phúc Quyết Thể Hiện Người Dân Là Chủ Sở Hữu Nhà Nước* [The Right To Constitutional Referendum Shows That The People Are The Owners Of The State], HIENPHAP, March 5, 2012, <https://hienphap.wordpress.com/2013/03/05/quyen-phuc-quet-the-hien-nguoi-dan-la-chu-so-huu-nha-nuoc-p-thao-ghi/>.

¹³⁵*Id.*

following the Party. So, do not hesitate to let the people vote on the Constitution. Therefore, it is necessary for the people to approve the Constitution.¹³⁶

In an interview with *Thanh Niên* newspaper, Dr Dương Thị Thanh Mai, Former Director of Institute of Legal Science under the Ministry of Justice, justified that constitutional referendum is consistent with the Party's directions on constitutional amendments—State power belonging to the people and enhancing direct democracy in the process of building the rule of law state.¹³⁷ However, she maintained that the inclusion of a provision on constitutional referendum in the Constitution is not for immediate use but for its use in next amendments.¹³⁸ Differently, Lê Hồng Hạnh, Director of the Institute of Legal Science, insisted on the immediate use of constitutional referendum in his interview with *Tiền Phong* newspaper in February 2013.¹³⁹ He said: “Whether or not referendum is included in the Constitution, it is also the responsibility of state organs to ensure that the people carry out it. I do not see any reason not to stipulate the people's right to vote on this amended Constitution.”¹⁴⁰

Although many individuals and groups conflated referendum with people's constituent power, a dissident in Đà Lạt named Mai Thái Lĩnh penned a long piece distinguishing them.¹⁴¹ Using both English and French terms, he argued that constituent power (*pouvoir constituant*):

[I]s the power of the people - understood as a whole. That power cannot be dispersed or split and divided equally among the people. In a democracy, that power can be delegated to an agency (e.g., the Ordinary National Assembly or the Constituent National Assembly) but that body must be truly elected by the people in accordance with the principles of democratic elections.¹⁴²

He then defined the right to referendum as “the right of every citizen to participate in the vote to approve or reject a constitution, or a constitutional amendment project.”¹⁴³ On that conceptual base, Mai Thái Lĩnh disagreed with the call for constitutional referendum because he believed that this practice could be easily abused to legitimize the existing regime.¹⁴⁴ Rather, like the Declaration of Free Citizens, he supported the democratic creation of a constituent assembly which he considered “the root” of democratization.¹⁴⁵

4. Dialogue

In response to the public discourse, the Government recognized popular constituent power. In a meeting in April 2013, the Government confirmed: “It is necessary to define constituent power as

¹³⁶H. Vũ, GS. Vũ Hoan, *Chủ Tịch Liên Hiệp Các Hội Khoa Học Kỹ Thuật Hà Nội: Người Dân Phải Có Quyền Phúc Quyết Hiến Pháp* [GS. Vũ Hoan, *Chairman of Hanoi Union of Science and Technology Associations: People Must Have the Right to Vote on the Constitution*] HIENPHAP, March 4, 2013, <https://hienphap.wordpress.com/2013/03/04/gs-vu-hoan-chu-tich-lien-hiep-cac-hoi-khoa-hoc-ky-thuat-ha-noi-nguoi-dan-phai-co-quyen-phuc-quyet-hien-phap-h-vu-thuc-hien/>.

¹³⁷Dương Thị Thanh Mai, *Cần Hiến Định Quyền Biểu Quyết Của Dân Về Hiến Pháp* [The People's Right to Vote on the Constitution Should Be Established], HIENPHAP, February 26 2013, <https://hienphap.wordpress.com/2013/02/26/can-hien-dinh-quyen-bieu-quyet-cua-dan-ve-hien-phap-duong-thi-thanh-mai/>.

¹³⁸*Id.*

¹³⁹Lê Hồng Hạnh, *Nhân Dân Là Chủ Thể Tối Cao Của Quyền Lực* [The People Are the Supreme Subject of Power], HIENPHAP February 12, 2013, <https://hienphap.wordpress.com/2013/02/12/nhan-dan-la-chu-the-toi-cao-cua-quyen-luc-le-hong-hanh/>.

¹⁴⁰*Id.*

¹⁴¹Mai Thái Lĩnh, *Quyền lập hiến và Trung cầu dân ý* [Constituent Power and Referendum], HIENPHAP, May 4, 2013, <https://hienphap.wordpress.com/2013/05/04/quyen-lap-hien-va-trung-cau-dan-y-mai-thai-linh/>.

¹⁴²*Id.*

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵*Id.*

the highest expression of people's sovereignty, including the right to constitutional initiatives, the right to participate in the process of drafting the Constitution and finally the right to vote through referendum."¹⁴⁶ Several members of Government agreed to incorporate a provision on referendum in the Constitution this time for future practice after the National Assembly adopted the Law on Referendum.¹⁴⁷ Ten members out of 25 in the Government, voted to include a provision into the Constitution, which stated: "The draft Constitution will be voted in a referendum after it is approved by the National Assembly with at least 2/3 of the total number of the National Assembly delegates voting for it. The referendum process and procedures are determined by law."¹⁴⁸

The constitutional reformers' response to the call for constitutional referendum is ambiguous. On March 2, 2013, in the meeting with the Ho Chi Minh City government on organizing the public constitutional consultation, Mr. Nguyễn Sinh Hùng, President of the National Assembly and President of the Constitutional Amendment Committee, said: "Many people suggested letting the people to vote in a referendum; here the Party is letting the people comment. So, they decide this Constitution."¹⁴⁹ The next day, a citizen named Dương Phi Anh contested in a post on the Website *Lets Draw up the Constitution*:

Mr. Chairman of the National Assembly! In our opinion, 'comments' are not a 'referendum' on the Constitution; 'comments' are not a 'decision' on the Constitution; and the 'referendum' is not the 'decision' on the Constitution! So, seriously, in the statement, did the President of the National Assembly misunderstand the concept [. . .]?¹⁵⁰

In addition, the citizen argued the Chairman's saying that "[t]he Party is letting the people comment" is conceptually wrong because people only authorize the state, not political organizations, to make the constitution.¹⁵¹

In different forums, reformers promised future constitutional referenda. For example, on March 26, 2013, the Vietnamese Communist Party's Online Newspaper organized an online dialogue on constitutional amendment.¹⁵² Speaking at the forum, Mr. Lê Minh Thông, Deputy Head of the Editorial Board of the Drafting Committee for the Amendment of the Constitution, admitted that the call for constitutional referendum is "the people's legitimate demand," but maintained that because the National Assembly is making the Law on Referendum, constitutional referendum can be considered after the law is implemented.¹⁵³ Similarly, Deputy Minister of Justice Hoàng Thế Liên stated that in this round of constitutional amendment, collecting people's comments on the draft amendments was concentrated in three months—January to March—and would continue until September, but referendum would be required in future amendments.¹⁵⁴

¹⁴⁶Nghĩa Nhân, *Chính Phủ Kiến Nghị: Quyền Lập Hiến Thuộc Về Nhân Dân* [The Government Recommends: Constituent Power Belong to the People], HIENPHAP, Apr. 11, 2013, <https://hienphap.wordpress.com/2013/04/11/ chinh-phu-kien-nghi-quyen-lap-hien-thuoc-ve-nhan-dan-nghia-nhan/>.

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹Tá Lâm, *Chủ Tịch QH: Người Dân Quyết Định Hiến Pháp* [President of the National Assembly: The People Decide the Constitution], HIENPHAP, Mar. 2, 2013, <https://hienphap.wordpress.com/2013/03/02/ chu-tich-qh-nguoi-dan-quyet-dinh-hie-n-phap-ta-lam-ghi/>.

¹⁵⁰Dương Phi Anh, *Ngài Chủ Tịch Quốc Hội Có Nhầm?* [Was the Chairman of the National Assembly Wrong?], HIENPHAP, Mar. 3, 2013, <https://hienphap.wordpress.com/2013/03/03/ ngai-chu-tich-quoc-hoi-co-nham-duong-phi-anh/>.

¹⁵¹*Id.*

¹⁵²Mỹ Hằng, *Cần Trưng Cầu Dân Ý Khi Sửa Đổi Hiến Pháp Lần Sau* [A Referendum is Needed When Constitution is Amended Next Time], HIENPHAP, Mar. 27, 2013, <https://hienphap.wordpress.com/2013/03/27/ can-trung-cau-dan-y-khi-sua-doi-hien-phap-lan-sau-my-hang-ghi/>.

¹⁵³*Id.*

¹⁵⁴*Id.*

Suc reformer's response did not appease the public. In both informal and formal venues, the call for constitutional referendum continued. For example, in the meeting of the Central Committee of the Vietnam Fatherland Front on July 4 in Hanoi, Lù Văn Que, Chairman of Ethnic Advisory Council, said that all classes of people want the Constitution to be approved by them to take effect.¹⁵⁵ He added: "I think that if the Party sends the Constitution to the people for their approval, it will increase the trust between the two sides and if you do that, the bad guys will not be able to destroy [the regime]."¹⁵⁶

On July 6, 2013, the Petition 72 group continued to petition for constituent power and constitutional referendum.¹⁵⁷ The group posted a follow-up petition to the National Assembly, the President of State, and the Prime Minister, stating that:

Everyone says the Constitution must belong to the people, to be decided by the people. As everyone knows, with the current organization of elections and personnel structure, the National Assembly is not really the representative of the people. This amendment of the Constitution generated different opinions on the fundamentals of political institutions . . . Therefore, it is imperative to organize a referendum on the amended Constitution. Public opinion welcomes National Assembly delegates, members of the Government and a number of organizations when discussing the amendments of the Constitution with the view that the National Assembly is a legislative body, constituent power belongs to the people, and the Constitution must be approved by referendum.¹⁵⁸

Individuals continued to call for constituent power in unofficial venues. One example is the *Comment on the Draft Amendments to the 1992 Constitution* by Cù Huy Hà Vũ, a prisoned dissident lawyer.¹⁵⁹ He proposed that the amended Constitution should confirm popular constituent power and constitutional referendum. He justified this on the familiar grounds—the principle of popular sovereignty of the republic regime and the right to constitutional referendum in the 1946 Constitution—and added that his father Cù Huy Cận was the General Secretary of the Drafting Committee of the first Constitution.¹⁶⁰

Despite the continued demands for constitutional referendum, the new version of the amended Constitution submitted to the National Assembly did not include a provision on referendum as a mandatory role of amendment procedure. In a report to the National Assembly on October 22, 2013, Mr. Phan Trung Lý, Head of the Editorial Board of the Draft Constitutional Amendments, invoked the Constitution's endurance to justify that it should not specify a provision on constitutional referendum:

The Constitutional Amendment Committee found that the referendum is an important content, demonstrating the people's direct democratic rights. Therefore, the provision on

¹⁵⁵Tiếp Tục Đề Xuất Dân Phức Quyết Hiến Pháp [Continuing to Propose the People to Approve the Constitution], HIENPHAP, July 10 2013, <https://hienphap.wordpress.com/2013/07/10/tiep-tuc-de-xuat-dan-phuc-quyet-hien-phap-cam-quyen/>.

¹⁵⁶*Id.*

¹⁵⁷Góp Ý Tiếp Về Hiến Pháp Và Luật Đất Đai [Further Comments on the Constitution and Land Law], HIENPHAP, July 6, 2013, <https://hienphap.wordpress.com/2013/07/06/gop-y-tiep-ve-hien-phap-va-luat-dat-dai-boxit-viet-nam/>.

¹⁵⁸*Id.*

¹⁵⁹On September 30, 2013, Cu Huy Ha Vu submitted a twenty-page hand-written Comment on the Draft Amendments to the 1992 Constitution to the National Assembly and the Constitution Amendment Committee by Post of Prison No. 5, Ministry of Public Security. However, he has reported that the Prison did not send his Comment out. Vu then authorized his wife, Nguyễn Thị Dương Hà, to type his Comment—dated 30 September 2013—and sent to the above institutions. Cù Huy Hà Vũ, 'Góp Ý Cho Dự Thảo Sửa Đổi Hiến Pháp 1992' ['Comments On The Draft Amendments To The 1992 Constitution'] [CVHP, 18 November 2013], <https://hienphap.wordpress.com/2013/11/18/ts-cu-huy-ha-vu-gop-y-cho-du-thao-sua-doi-hien-phap-1992/>

¹⁶⁰*Id.*

referendum needs to be further affirmed in the Constitution. However, specifying the specific contents and objects of the referendum must be based on the practical situation of each stage of national development. Therefore, in order to ensure the long-term stability of the Constitution, it is not necessary to specify the specific contents and objects of the referendum in the Constitution but let the law stipulate.¹⁶¹

5. Constitutional Design of Constituent Power

On November 28, 2013, the amended Constitution was overwhelmingly approved by a 97.59% vote of the National Assembly deputies in present without subsequent referendum.¹⁶² The congressional consensus and the practice of constitutional consultation served as the base for the reformers' claim that the Constitution expresses the people's will.¹⁶³ In contrast, in informal forums, some individuals condemned that by adopting the Constitution the National Assembly institutionalized the Party's will, not popular will.¹⁶⁴

The 2013 Constitution continued to confirm the constituent power of the National Assembly. Article 69 stipulates that "[t]he National Assembly shall exercise constituent and legislative powers."¹⁶⁵ Article 70 specifies that the National Assembly has the powers to make and amend the Constitution.¹⁶⁶ Article 120 provides the "[t]he Constitution shall be adopted when at least two-thirds of the total number of the National Assembly deputies vote for it."¹⁶⁷ Referendum is not required. However, in response to the public demand, the Constitution ambiguously expresses popular constituent power and institutionalizes constitutional referendum. The Preamble states that "the Vietnamese People create, implement and defend this Constitution."¹⁶⁸ Article 6 stipulates that "[t]he People shall exercise the state power in the form of direct democracy and of representative democracy through the National Assembly, People's Councils and other state agencies."¹⁶⁹ This provision in theory allows for referendum, including constitutional referendum. Article 29 confirms that "citizens who reach the age of eighteen have the right to vote in referenda organized by the State."¹⁷⁰ However, Article 120 does not require referendum as a mandatory rule of constitutional amendments and constitution-making but lets the National assembly decide on the holding of a constitutional referendum.¹⁷¹

¹⁶¹ Anh Phương, *Tiếp Tục Khẳng Định Việc Trưng Cầu Ý Dân Trong Hiến Pháp* [Continuing to Affirm the Referendum in the Constitution], HIENPHAP, Oct. 22, 2013, <https://hienphap.wordpress.com/2013/10/22/tiep-tuc-khang-dinh-viec-trung-cau-y-dan-trong-hien-phap-anh-phuong/>.

¹⁶² B. Long, *Với Việc Thông Qua Hiến Pháp, QH Khóa XIII Đã Hoàn Thành Sứ Mệnh Lịch Sử Của Nhiệm Kỳ Đây* [With the Adoption of the Constitution, The National Assembly Session XIII Has Completed the Historic Mission of this Term], HIENPHAP, Dec. 1, 2013, <https://hienphap.wordpress.com/2013/12/04/voi-viec-thong-qua-hien-phap-qh-khoa-xiii-da-hoan-thanh-su-menh-lich-su-cua-nhiem-ky-nay-b-long-2/>.

¹⁶³ *Id.*

¹⁶⁴ Kami, *Hiến pháp được toàn dân phúc quyết sẽ thực sự là của nhân dân?* [Will the Constitution that the People Decide on It Really Belong to the People?], HIENPHAP (Dec. 5, 2013), <https://hienphap.wordpress.com/2013/12/05/hien-phap-duoc-toan-dan-phuc-quyet-se-thuc-su-la-cua-nhan-dan-kami/>; Thanh Quang, *Hiến Pháp Của Đảng Hay Của Dân?* [Constitution of the Party or of the People?], HIENPHAP (Dec. 5, 2013), <https://hienphap.wordpress.com/2013/12/05/hien-phap-cua-dang-hay-cua-dan-thanh-quang/>.

¹⁶⁵ HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM art. 69 (2013) (Constitution of the Socialist Republic of Vietnam).

¹⁶⁶ *Id.* at art. 70.

¹⁶⁷ *Id.* at art. 120.

¹⁶⁸ *Id.* at pmb.

¹⁶⁹ *Id.* at art. 6.

¹⁷⁰ *Id.* at art. 29.

¹⁷¹ *Id.* at art. 120.

II. Analysis

1. Why People's Constituent Power?

The public call for people's constituent power in Vietnam is animated by the *normative* appeal of the idea of constituent power. The normative weight of popular constituent power is both universal and contextual. The idea of people's constituent power, as well as related ideas, such as popular sovereignty and constitution as an agreement between the state and the people, is intrinsically attractive as they are normatively connected to universal aspirations to human freedom and concomitantly constitutional self-government.¹⁷² In addition, the idea of constituent power is sociologically appealing in the Vietnamese context. The idea that the people as the author of the constitution, the source of the constitutional self-government, is naturally attractive to the Vietnamese people who have struggled for political reforms and democratization under single-party rule.¹⁷³

The justifications of popular constituent power come from national and comparative constitutional sources. One common justification of popular constitutive power is that this power was recognized at the founding moment of the Vietnamese constitutional history.¹⁷⁴ The fact that the first Constitution of 1946 was made by a constituent assembly created by democratic elections and its recognition of constituent power through its provisions on constitutional referendum provide the historical, nationalist foundations for the justification of similar recognition and practice in contemporary Vietnam.¹⁷⁵ The experience and design of constitutional founding provide a powerful base for the justification of popular constituent power because this indicates the sense of national pride. In addition, the historical justification presents reconstituting as continuity, not as a radical break with the past. Due to these weights, the historical justifications of constituent power invited dialogic engagement among the society and the state.¹⁷⁶

Another common justification of constituent power adheres to the contemporary constitutional design. Particularly, provisions on people's sovereignty and the right to referendum in the existing Constitution of 1992 provide the contemporary base for the justification of popular constituent power.¹⁷⁷ Like the historical reasoning, the alignment with the existing constitutional design presents the change to popular constituent power, albeit fundamental, not as a legal rupture but a legal continuity.¹⁷⁸ This adherence renders the arguments for popular constituent power more acceptable to the state and hence invites the state's dialogic response.

Apart from national resources, the justifications of popular constituent power are drawn on comparative constitutional theory, design, and practice. Particularly, theories of social contract by Locke and Rousseau, the foreign design of popular constitution-making, and the foreign practices of constitutional referenda are commonly used to justify the call for popular constituent power and constitutional referendum in Vietnam.¹⁷⁹ The influence of comparative constitutional law and theory in Vietnamese discourse on constituent power is through diffusion. The translation of works by enlightenment thinkers into Vietnamese contributed to the diffusion of ideas of social contract in Vietnam. Furthermore, through popular media and Internet, intellectuals, law professors, retired politicians, and other individuals helped spread the contractual constitutional ideas and foreign design and practice of constituent power among the public.¹⁸⁰ This constitutional diffusion consolidated comparative justifications of popular constituent power.

¹⁷²See text and accompanying citations, *surpa* Section D.II.

¹⁷³See text and accompanying citations, *surpa* Section D.II.

¹⁷⁴See text and accompanying citations, *surpa* Section D.II.

¹⁷⁵See text and accompanying citations, *surpa* Section D.II.

¹⁷⁶See text and accompanying citations, *surpa* Section D.II.

¹⁷⁷See text and accompanying citations, *surpa* Section D.II.

¹⁷⁸See text and accompanying citations, *surpa* Section D.II.

¹⁷⁹See text and accompanying citations, *surpa* Section D.II.

¹⁸⁰See text and accompanying citations, *surpa* Section D.II.

Apart from normativity, the public call for popular constituent power is due to *social necessity*. The Vietnamese debate on the idea of constituent power is not instrumentally political but socially relevant. The idea was not advocated by political leaders. Some politicians, like Nguyễn Văn An, supported the idea only when they retired. Some government members did not initiate the idea, although they accepted the idea as a response to the public discourse.¹⁸¹ Rather, the idea of constituent power was initiated and mobilized by sectors of society to enable the entire people to decide on constitutional solutions to social problems. As indicated in the public discourse, retired politicians, intellectuals, and other citizens were concerned with the practice of the constituent power by the National Assembly because they believed that the institution was dominated by party members and hence failed to represent the public will.¹⁸² The citizens believed the constitutional solutions for the social problems must be publicly debated and then decided by the entire people. Therefore, they created their own platforms to deliberate constitutional questions, mobilized sectors of the society to engage in a public constitutional dialogue, and demanded for practice of popular constituent power through constitutional referendum so that they can decide constitutional solutions to social problems.

The public struggle for popular constituent power in Vietnam is also a public demand for *recognition* of dignity. The public demand for recognition stems from constitutional resentment: The emotional reaction and critique of the unsatisfactory design and practice of constituent power.¹⁸³ The sources of the resentment are varied—the illegitimate transfer of sovereignty from the people to the party, the National Assembly’s formalistic exercise of the constituent power due to party’s control, its failure to present the people’s will, and the inadequate reflection of popular voice in the process of constitutional reforms.¹⁸⁴ Therefore, the call for constituent power and constitutional referendum is the demand for the recognition that people’s will is worthy of respect; their constitutional authorship must be recognized; and their constitutional voices must be heard. The demand for recognition also explained why many, such as thirty organizations of civil society, called for the mere constitutional acknowledgement of the popular constituent power without demanding its immediate practice.¹⁸⁵

2. Approaches to Constituent Power

There are two approaches in the Vietnamese debates on how to practice the popular constituent power—reformist and revolutionary. The reformist approach calls for the design and practice of popular constituent power through constitutional referendum as the base to strengthen institutional renovation of the socialist regime.¹⁸⁶ Actors adopting this approach are mainly retired politicians, legal scholars, and organizations of civil society. Their justifications are drawn mainly on national historical and contemporary constitutional resources, although the comparative sources are also referenced. The reformists are, however, divided into two strands—operational and deferral. The operational approach, as supported by legal scholars and other individuals, demands for the constitutional design and immediate practice of popular constituent power.¹⁸⁷ The deferral approach, as supported by other legal scholars and others, only demands for the design, and agreed with later practice of popular constituent power.¹⁸⁸

¹⁸¹See text and accompanying citations, *surpa* Section D.II.

¹⁸²See text and accompanying citations, *surpa* Section D.II.

¹⁸³For the idea of constitutional resentment, see Ngoc Son Bui, *International Human Rights Law in Asian Constitutions*, 34 DUKE J. COMP. & INT’L L. 207, 256 (Spring 2024).

¹⁸⁴See text and accompanying citations, *surpa* Section D.II.

¹⁸⁵See text and accompanying citations, *surpa* Section D.II.

¹⁸⁶See text and accompanying citations, *surpa* Section D.II.

¹⁸⁷See text and accompanying citations, *surpa* Section D.II.

¹⁸⁸See text and accompanying citations, *surpa* Section D.II.

The revolutionary approach calls for the design and practice of popular constituent power within the existing socialist regime as the base for transformation into a liberal democracy. This approach is adopted by the Petition 72 group and other individual activists.¹⁸⁹ The evolutionary justifications of popular constituent power mainly draw on liberal-democratic constitutional theories, and design and practice of popular constituent power in liberal democracies, although the national resources are also invoked. The revolutionary approach locates the existing National Assembly within the project of fundamental political change.¹⁹⁰ The institution is regarded as the platform to adopt a democratic constitution, followed by people's ratification via referendum.¹⁹¹ Supporters of the evolutionary approach underlined that the referendum must be preceded by equal, open, and frank discussions of different views, because they worry that referendum will be controlled by existing political elites. The revolutionary approach is resonated with the relational theory of constituent power—the existing constituted power may participate in the exercise of the constituent power. In addition, the revolutionary approach aims at fundamental change while maintaining legal continuity. As the approach is radical, the revolutionary call for popular constituent power could only be expressed in unofficial platforms.

3. Consequences

The public debate on constituent power generates institutional and ideational consequences. One institutional effect is procedural. The public call for constituent power puts pressure on the party-state to expand the time for constitutional discussions. The discuss also compels the state to engage in a constitutional dialogue with the society on the constituent power. In fact, in their public speeches, National Assembly deputies, Government's members, and constitutional amenders responded to the call for popular constituent power and referendum.¹⁹²

Another institutional aspect of the influence is substantive. The state's response is a combination of reception, rejection, and resistance. As indicated, many Assembly deputies and several Government's members accepted the idea of popular constituent power and referendum put forward by reformists and revolutionaries.¹⁹³ The amenders also partially adopted the idea as reflected in the new constitutional preamble's recognition of the Vietnamese people as the author of the constitution. The new amendment rule also enables possible holding constitutional referendum.¹⁹⁴ Thus, the state sought to appease the public by recognizing the people's constituent power.

However, the state rejected the call for abolition of constituent power of the National Assembly because this abolition was not suitable to the existing constitutional design in Vietnam.¹⁹⁵ The new Constitution continued to vest constituent and legislative powers in the National Assembly. As “democratic centralism” remained the dominant principle of constitutional design in Vietnam,¹⁹⁶ the state's rejection of popular constituent power is understandable. The institutional entrenchment of the constituent power by the National Assembly seems at odd with the expressive

¹⁸⁹See text and accompanying citations, *surpa* Section D.II.

¹⁹⁰See text and accompanying citations, *surpa* Section D.II.

¹⁹¹See text and accompanying citations, *surpa* Section D.II.

¹⁹²See text and accompanying citations, *surpa* Section D.II.

¹⁹³See text and accompanying citations, *surpa* Section D.II.

¹⁹⁴See text and accompanying citations, *surpa* Section D.II.

¹⁹⁵See text and accompanying citations, *surpa* Section D.II.

¹⁹⁶HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM art. 69 (2013) (Constitution of the Socialist Republic of Vietnam).

recognition of the people's constituent power in the constitutional preamble.¹⁹⁷ One possible explanation comes from a concept of representation: The National Assembly elected by the people may be considered the people's representatives to practice the constituent power.¹⁹⁸ However, in response to the public's concern that the institution failed to represent the people due to Party's domination, the state compromised by including a provision on possible constitutional referendum at the Assembly's discretion.

The fact that the state did not hold a referendum on the amended constitution was not merely because of unsuitability. There must have been a stronger negative sense, which can be captured by the idea of resistance.¹⁹⁹ The state resisted holding a constitutional referendum because the state could have lost the control in the referendum, which may have damaged the existing socialist regime. The constitutional consultation already generated a public constitutional debate and activism beyond the state's agenda for consultation on amendments. The public discussed sensitive issues beyond the state's expectation, such as popular constituent power, change of nation's names, and abolition of party leadership. Constitutional activism among the civil society might have also exceed the state's anticipation. A constitutional referendum could have triggered a social movement mobilizing regime change beyond the state's control. This is more complicated as the democracy movement had already developed before the constitutional reform.²⁰⁰ Actors of democracy movement advocating regime change may have joined constitutional activists to campaign for the public's gainsaying to the constitution in the referendum, which may have been beyond the state's control.

Apart from institutional influence, the public discourse generates important ideational influence. The discourse spreads new ideas about constituent power among the public. The idea that the constitution belongs to the people and should be made by the people was familiar with the Vietnamese constitutional intellectuals but might not have been so for the public before the 2013 debate.²⁰¹ However, the public debate introduces to ordinary people the idea that the constitution belongs to the people, not the mere product of the state. The public awareness of the people's constituent power limits the state's official interpretation of the National Assembly's constitution-making power.

Neither democratic nor conventional Soviet models can capture the dynamic practice and dissonant design of the constituent power in contemporary Vietnam. The Vietnamese experience can be understood as a contemporary reformist paradigm of socialist constituent power. The subject of the constituent power is the National Assembly, an ordinary legislature. However, in response to the public demand, the ideal of the people's constituent power is embodied in the 2013 Constitution to some extent.²⁰² The Vietnamese equivalent of the "we, the people" statement commonly used in constitutional preambles does not authoritatively establish but expresses the people's constituent power.²⁰³ This echoes the democratic ideas of constituent power. In addition, the amendment rules allow for referendum, which reflects the idea of direct democracy.²⁰⁴ The process of the practice of the constituent power in Vietnam involves complicated interactions of both political control and

¹⁹⁷See text and accompanying citations, *surpa* Section D.II.

¹⁹⁸HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM art. 69 (2013) (Constitution of the Socialist Republic of Vietnam).

¹⁹⁹For the idea resistance in comparative constitutional law, see Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 113 (November 2005).

²⁰⁰BENEDICT J. TRIA KERKVLIT, *SPEAKING OUT IN VIETNAM: PUBLIC POLITICAL CRITICISM IN A COMMUNIST PARTY-RULED NATION* 87–92 (2019).

²⁰¹Ngoc Son Bui, *Vietnamese Constitutional Debate in Comparative Perspective*, 11 ASJCL 189, 189 (December 2016).

²⁰²HIẾN PHÁP NƯỚC CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM (2013) (Constitution of the Socialist Republic of Vietnam).

²⁰³See, e.g., U.S. CONST. pmbl.

²⁰⁴On "we, the people" in constitutional preambles, see Tom Ginsburg, Nick Foti & Daniel Rockmore, *We the Peoples: The Global Origins of Constitutional Preambles*, 46 GEO. WASH. INT'L L. REV. 305, 313 (2014).

social contestation, including the public discursive struggle for the people's constituent power. Substantively, the socialist constituent power is used to codify the Party's project for socialist reforms. The socialist constitutional project is continued but integrates new ideas and institutions, such as human rights, and controls of state power, and judicial protection of justice.

As the reflection of the dynamic practice, the formal design of the constituent power in Vietnam, as embodied in the 2013 Constitution, is dissonant, incorporating competing socialist and democratic ideals.²⁰⁵ The dissonant nature of the constituent power widens the space for the continued debate and dialogue on constituent power, and related concepts such as popular sovereignty and referendum in Vietnam. As the constitutional rules and principles on constituent power incorporate competing ideas, it opens the doors for different interpretations and contestations. The rejection of the practice of the people's constituent power and the dissonant constitutional design of this power create the condition for the discursive return of the popular constituent power once the state introduces constitutional reform in future.

E. Conclusion

This Article explores various models of the socialist constituent power. This Article has implications for understanding the Soviet legacies and the contemporary dynamics of the constituent power in the socialist regimes, and comparative study of constituent power generally.

The Soviet Union is dead, but the Soviet constitutional legacies, including the legacy of legislature's constituent power, are still alive in the contemporary socialist world. The legislature's constituent power is explicitly confirmed in the current constitutions of Cuba, Laos, and Vietnam.²⁰⁶ The Soviet, socialist origin shapes the normative and institutional foundations of the constitutional systems in these countries, and resists constitutional reforms. The persistence of Soviet model of legislature's constituent power in the current socialist constitutions illustrates the continued influence of the Soviet constitutional tradition. At the same time, the Soviet legacies interact with democratic ideas, leading to the dynamics of socialist constitutional reforms, including the reform of the constituent power. This Article has illustrated the reformist model by the case of Vietnam. This model also resonates to some extent with the dynamic practice of constituent power in Cuba and Laos.

The socialist experience can enrich the comparative inquiry into the constituent power in general. First, Constitutional revolution does not necessarily involve democratic use of constituent power. Following communist revolutions, socialist elites also used the constituent power to launch a new socialist legal order. The relationship between constituent power and socialist constitutional revolution requires further exploration. Second, constituent power can be used for not only constitutional revolution but also for constitutional reform. To facilitate constitutional reform, constituent power continues the existing constitutional project in general but introduces new fundamental principles, ideas, and institutions. These new constitutional fundamentals may co-exist, compete, but do not negate the existing ones. Finally, an interesting aspect is the constitutional design of the constituent power. Although the idea that constituent power is not extra-legal is resonated in the experience of constitution-making in Central Europe and South Africa, the fact that the constitution itself provides for rules of how the constituent power is used

²⁰⁵For the idea of mixed constitution in Vietnam, see Ngoc Son Bui, *Vietnam's Mixed Constitution and Human Rights* 16 THE LAW & ETHICS OF HUMAN RIGHTS 295-319 (2022)

²⁰⁶Constitución de República de Cuba, Gaceta Oficial 04-10-2019; ລັດຖະທຳມະນູນຂອງສາທາລະນະລັດປະຊາທິປະໄຕປະຊາຊົນລາວ (2015) (Constitution of the Lao People's Democratic Republic) (Laos); HIẾN PHÁP VIỆT NAM DÂN CHỦ CỘNG HÒA art. 43 & 50 (1959) (Constitution of the Democratic Republic of Vietnam).

may be unique to the socialist regimes where constitutional replacements are often necessary to cope up with social and economic change.

Acknowledgments. The author declares none.

Competing Interests. The author declares none.

Funding Statement. No specific funding has been associated with this Article.