

Vietnamese Constitutional Debate in Comparative Perspective

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The young and dynamic discipline of comparative constitutional law has been dominated by juricentrism.¹ Scholars have concentrated their energy on exploring the impact of court structures and judicial decisions on constitutional law. While these endeavours are meaningful in their own right, one of the consequences is the neglect or marginalization of many other substantive constitutional issues, including the issue of constitutional debate. Even the recent scholarship on constitutional dialogue has focused on the institutional dialogue between courts and other political institutions.² This special issue attempts to contribute to the breadth and depth of the comparative constitutional law scholarship in Asia and beyond by focusing on the national constitutional debates among different social and institutional actors in Vietnam. This brief Introduction locates Vietnamese constitutional debate within a comparative context and discusses how this story can inform comparative constitutional inquiry.

By way of background, on 28 November 2013, the National Assembly of Vietnam adopted a new constitution, despite the initial plan for a constitutional amendment in 2011. Now referred to as the 2013 Constitution, this document is the fifth constitution in Vietnam enacted under the leadership of the Communist Party of Vietnam. Remarkably, this Constitution reflects the culmination of an unprecedented degree of participatory constitution-making process. Different social and institutional actors actively engaged in relatively open constitutional dialogues in which they debated on sensitive, substantive, and controversial constitutional questions pertaining to fundamental features of the socialist polity in Vietnam. These include questions on the leadership of the Communist Party, the human rights regime, the economic regime, and distinctively socialist institutions like the procuracy. These debates, which are unusual in Vietnam and worthy of special scholarly attention, have yet to be covered in the existing Vietnamese constitutional

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1. Ran HIRSCHL, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: Oxford University Press, 2014).

2. See e.g. Po Jen YAP, *Constitutional Dialogue in Common Law Asia* (Oxford: Oxford University Press, 2015).

law scholarship.³ This Special Issue, therefore, makes an important contribution to Vietnamese legal scholarship.

Beyond that, the active national constitutional debate in Vietnam bears important implications for comparative inquiry. The first implication concerns constitutional dynamics within socialist Asia (which includes countries like China and Laos). More specifically, while there is growing scholarship on the constitutional dynamics in China,⁴ scholars have yet to integrate the Chinese story with the Vietnamese story (or with other stories in socialist Asia, for that matter) to provide comparative insights on constitutional development in socialist Asia. For instance, during the post-Soviet period, the participatory constitution-making process and relatively open constitutional dialogue that Vietnam experienced have not occurred in China.⁵ This suggests the existence of competing models of constitutional convergence and divergence in socialist Asia.

The second implication concerns the field of Asian comparative constitutional law. Even in the more well-established constitutionalist systems (such as Japan, South Korea, and Taiwan),⁶ constitutional meanings are not entirely determined by courts; rather, they involve constitutional dialogues among social and institutional actors.⁷ Moreover, recently, the pacifist constitutional movement in Japan and the Sunflower Movement in Taiwan indicate that national constitutional dialogues in established East Asian constitutionalist regimes are related not only to constitutional adjudication but also to constitutional design.⁸ In other parts of Asia – especially Southeast Asia – constitutionalism is the subject of debate through both constitutional adjudication and constitutional design exercises.⁹ We are witnessing this in countries such as Myanmar and Thailand, both of which are in the process of constitutional design (including constitution-making and constitutional amendment). The Vietnamese constitutional debate, therefore, is a part of the larger picture of Asian constitutional dynamics.

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3. Mark SIDEL, *The Constitution of Vietnam: A Contextual Analysis* (Oxford and Portland, Oregon: Hart Publishing, 2009); John GILLESPIE, “Human Rights as a Larger Loyalty: The Evolution of Religious Freedom in Vietnam” (2015) 47 (1) *Harvard Human Rights Journal* 107; Penelope (Pip) NICHOLSON, *Borrowing Court Systems: the Experience of Socialist Vietnam* (Leiden and Boston: Martinus Nijhoff Publishers, 2007).
 4. See e.g. Lin YAN, “Constitutional Evolution Through Legislation: The Quiet Transformation Of China’s Constitution” (2015) 13(1) *International Journal of Constitutional Law* 61; Mark JIA, “China’s Constitutional Entrepreneurs” (2016) 64 *American Journal of Comparative Law* [forthcoming], online: SSRN <<http://ssrn.com/abstract=2726989>> .
 5. On the limited constitutionalism debate in China in 2013, see Rogier CREEMERS, “China’s Constitutionalism Debate: Content, Context and Implications” (2015) 74 *The China Journal* 91.
 6. Chaihark HAHM & Sung Ho KIM, *Making We the People: Democratic Constitutional Founding in Postwar Japan & South Korea* (Cambridge: Cambridge University Press, 2015); Jiunn-Rong YEH & Wen-Chen CHENG, “The Emergence of East Asian Constitutionalism: Features in Comparison” (2011) 59 *American Journal of Comparative Law* 805.
 7. See for e.g. Ki-young SHIN, “The Politics of the Family Law Reform Movement in Contemporary Korea: A Contentious Space for Gender and the Nation” (2006) 11 *Journal of Korean Studies* 93.
 8. Rosalind DIXON & Juliano Zaiden BENVINDO, “Conference Report – ‘Democracy, Pacifism & Constitutional Change in Japan: Amending Art. 9?’ University of New South Wales” *I-CONnect* (26 August 2016), online: Blog of the International Journal of Constitutional Law <<http://www.icconnectblog.com/2016/08/conference-report-democracy-pacifism-constitutional-change-in-japan-amending-art-9-university-of-new-south-wales/>>; Ming-Sho HO, “Occupy Congress in Taiwan: Political Opportunity, Threat, and the Sunflower Movement” (2015) 15 *Journal of East Asian Studies* 69.
 9. See generally, Marco BÜNTE & Björn DRESSEL, eds, *Politics and Constitutions in Southeast Asia* (Abingdon, Oxon: Routledge, 2016).

The growth of constitutionalism in the region must be situated within the socio-political complexities and contentious contexts of constitutional debate involving a range of social and institutional actors.

Last but not least, this Special Issue on “Constitutional Debate in Vietnam” may raise important questions for the field of comparative constitutional law, more generally. First, the Vietnamese story poses a crucial question for constitutional comparativists: why and how can constitutional debates emerge under authoritarian conditions? The study of this issue may challenge established assumptions on authoritarian constitutions as symbolic documents or on authoritarian constitution-making as an instrumental process controlled by political elites.¹⁰ Second, there may be a new area of “comparative constitutional dialogue”, ranging from juricentric dialogue to national and popular dialogue, which deserves further comparative inquiry.

This Special Issue has been developed with a “dialogical” approach. The contributors are primarily Vietnamese legal scholars who have been able to draw on rich local knowledge of the constitutional debates and offer fresh perspectives on the most important constitutional issues. Without attempting to cover all the constitutional questions, this Issue features five articles which empirically explore the Vietnamese constitutional debates on five important issues, namely party leadership (Bùi Hải Thiêm), human rights (Vũ Công Giao and Trần Kiên), the economic regime (Phạm Duy Nghĩa), land ownership (Lê Toàn), and the procuracy (Phạm Lan Phương). International scholars, including John Gillespie, Pip Nicholson, and Mark Sidel, were invited to comment on the articles and contribute commentaries for the Issue. A workshop was organized by the Centre for Asian Legal Studies (CALS) at the National University of Singapore (NUS), Faculty of Law on the 19th and 20th of February 2016. The Vietnamese and international scholars engaged in a “constitutional dialogue” where they discussed and exchanged their views on Vietnamese constitutional issues. The articles were then revised and developed before their publication in this Issue.

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Finally, I hope that this Issue on Vietnamese constitutional debate can contribute to the continuous scholarly constitutional debates and dialogues in Asia and beyond.

10. On authoritarian constitutions, see Tom GINSBURG & Alberto SIMPSON, eds, *Constitutions in Authoritarian Regimes* (New York: Cambridge University Press, 2014).