

*Key Themes in Vietnam's Constitutions
and Constitutional Debates*

INTRODUCTION

THIS BOOK SEEKS to outline and analyse some of the key aspects of Vietnamese constitutional development since the first modern Constitution of 1946 in the Democratic Republic of Vietnam (1945–76) and the Socialist Republic of Vietnam (1976 to the present). In doing so, I recognise and particularly highlight one key aspect of Vietnam's constitutional development here: the rights guaranteed by Vietnam's constitutions since 1946—particularly rights to speech, opinion, religion, the press, protection against arbitrary action by government and political authorities, assembly, forming associations, holding demonstrations and other fundamental rights—have never been consistently and energetically enforced, and at many points in modern Vietnamese history have been regularly and significantly violated. The discussions and debates over Vietnam's constitutions since 1946, and in particular over the past decade or so, have in part focused on strengthening the implementation and enforcement of those rights so that their utility in practice begins to come close to matching the strength of the constitutional terms.

However, Vietnam's debates on constitutional issues since 1946 have also implicated a wide array of other important themes, and they are also discussed throughout this volume. These key ongoing constitutional subjects include the relationship between the Communist Party, the Vietnamese state, and other institutions and social forces; the economic system of Vietnam and the role of state, private and collective economic forces in shaping Vietnam's development; the changing roles, powers and structure of the national legislature (the National Assembly) and the government apparatus; the role of the President of the nation; the roles and powers of local governments and legislatures; the authority, autonomy and structure of Vietnam's courts and

prosecutorial institutions; ways of enforcing the constitution and the problem of constitutional review; the rights and work of associations and social organisations; the government's responsibilities for providing education, health and other social services; and other key problems.

Crucial to many of these questions is the role of the Communist Party and its relationship to the state and the Vietnamese Constitution. This has been an important issue since the 1946 Constitution, and readers will find it reflected in each chapter of this volume. In recent constitutions, the pre-eminent role of the party has been made abundantly clear. This has always been a matter of great contention among Vietnamese people overseas, some of whom have long called for the elimination of any constitutional provision on the leadership of the party, but it has recently come under discussion in Vietnam as well.

The role of the party is also important in the continuing discussions of the roles, powers and structure of the national legislature (the National Assembly), the national government, local governments and legislatures, the role of the courts and prosecutors, and recent debates over methods for enforcing the constitution and constitutional review. At each juncture, whether voiced formally or not, a key problem has been that the party is predominant in all of these institutions, but that the constitution does not spell out the party's full or detailed role, making structural change through constitutional revision an even more complicated matter than it otherwise naturally is. These themes recur throughout the volume.

A related theme is the growing but still limited power of legislative and government institutions and associations and social organisations outside the government and legislative structures. The somewhat more open Constitution of 1946 indicated that such institutions might have a degree of authority and autonomy that was belied by the more inflexible Constitutions of 1959 and 1980, when the formal roles of the legislature and government were broad, but their effective authority was relatively narrow, and associations and social organisations had little significant role in northern Vietnam or, after 1975, in reunified Vietnam.

Beginning with the 1992 Constitution, attempts were made to differentiate the role of the party from the role of these other institutions and to strengthen the work of national and local legislatures and governments, and of associations and social organisations. These attempts to restructure the workings of Vietnamese institutions have been slow and occasionally fitful. However, partly as a result of the institutional strengthening written into the 1992 Constitution, and partly as a result

of decisions taken by the party and demands from below, legislative, governmental and associational actors in Vietnam have a broader role to play now than at any time since the 1940s in the Democratic Republic or Socialist Republic of Vietnam.

The consideration of these key themes in the context of changing constitutions and constitutional development in Vietnam flows through this entire volume and informs the discussion of each constitution and each major issue treated here. The constitution has both reflected and played a role in important decisions on each of these topics—the retention of the leading political role for the Communist Party in Vietnam; the gradually increasing role of the government, the National Assembly, and local governments and legislatures; the shift from a highly statist economic system to a much more diversified economy in which private business now plays a highly significant role; the attempts to build capacity without independence or autonomy into Vietnam's courts and the chafing at that system that is now beginning to be felt in Vietnamese legal and judicial circles; the narrowing of the roles of the procuracy (the state prosecutor's office) and the attempts to transform the procuracy into a state prosecutor's office rather than an overall inspectorate for the government and the legal system; the recent debates about constitutional enforcement and whether constitutional issues should be decided by the party, National Assembly, a special constitutional court or the regular judiciary; the rapid growth of associations and social organisations in practice, but continuing restriction in the legal provisions applicable to them; and other key developments.

In addition to these important topics, which are addressed throughout this volume, two other major themes are important to address in modern Vietnamese constitutional development. The first such area is the role of party constitutions and the relationship between these and national constitutions in the Democratic Republic of Vietnam and the Socialist Republic of Vietnam since the 1940s. The special problem of party constitutions (or charters, as they are sometimes called), in Vietnam and other party-dominated states is rarely raised in discussions of constitution-making in the party-run states and cannot be covered fully here, but demands at least initial treatment in part because of the complex relationship between the party itself, its constitutions and Vietnam's 1946, 1959, 1980 and 1992 Constitutions.

The second theme is the role of constitutions and constitutionalism in the former Republic of Vietnam (South Vietnam)—constitutions long since abrogated after the reunification of Vietnam in 1976, but which have a distinct role in Vietnamese constitutional development

that is now being explored by constitutional drafters and scholars throughout Vietnam. Two constitutions were drafted in South Vietnam in the 1950s and 1960s and an energetic constitutional dialogue went on during part of that era. Today, the South Vietnamese constitutional experience is being put to use once again, this time as scholars and policymakers in Hanoi and Ho Chi Minh City debate issues of 'constitutional protection', the viability of a constitutional court, constitutional review and future revision or redrafting of the 1992 Constitution.

THE SPECIAL PROBLEM OF PARTY CONSTITUTIONS

The constitutions we discuss in this volume—the DRV and SRV state Constitutions of 1946, 1959, 1980 and 1992, revised in 2001—have not been the only constitutions in the Democratic Republic and Socialist Republic of Vietnam. The Vietnamese Communist Party has also promulgated a number of 'Party constitutions' (*Đieu le Dang*) in its nearly eight-decade history, and they demand at least some preliminary discussion of how they—and the party itself—relate to the state constitutions.

Party constitutions (sometimes translated as charters) have a long history in Vietnam. They go back to the first congress of the Indochinese Communist Party in 1935, and were promulgated at the second Party congress in 1951, the third Party congress in 1960, the fourth Party congress in 1976 and the fifth Party congress in 1982. Beginning with the sixth Party congress in 1986, and continuing at the seventh Party Congress in 1991, the eighth congress in 1996, the ninth congress in 2001 and the tenth congress in 2006, the existing party constitution of 1982 was revised, amended and then re-approved. Therefore, the existing Vietnamese party constitution is based on that formulated in 1982 and maintained since with amendments and revisions in the subsequent five party congresses.¹ The same general pattern holds in China: for each country, therefore, the current party constitution is based on a template first adopted in the early 1980s.

What do party constitutions do, and why should we be concerned with them? In general terms, the Vietnamese party constitutions have sought to delineate the structure of the party, define the party's activities, and specify the responsibilities of party members. To take the most

¹ The full text of the current Vietnamese party constitution is at <<http://222.255.31.179:8080/tiengviet/tulieuvankien/vankiendang/?topic=191&subtopic=2>>.

recently approved Vietnamese Communist Party constitution as an example, the party constitution adopted in 2006 includes an introduction on the political role of the party and chapters on the responsibilities, rights and admission of party members; organisational principles and structures of the party; the central leadership of the party; local party organisational structure and leadership; local party units; party organisations in the Vietnamese military and in the public security apparatus; the party's internal inspection functions and the delineation of the responsibilities of party inspection units; awards and discipline; the party's leadership of the state and of political and social organisations, and the Communist Youth League—the party's the youth wing; party finances; and implementation of the party constitution.

From that brief outline of the 2006 Party Constitution, it is clear that much of the document and of earlier party constitutions focuses on the party's internal issues. A good deal of the daily work involving the party constitution means that it, along with implementing documents issued by the party, serves as a kind of organisational charter for the party's activities. As party structures and other issues have evolved, the party constitution has evolved as well. The most recent revisions adopted at Vietnam's ninth party congress in 2001 and at the tenth party congress in 2006 provide a sense for how the document evolves over time to suit the party's needs and govern its activities.

Vietnam's ninth party congress in 2001 revised the party constitution 'to be consistent with the needs of work in party building in the new situation'. The changes included enabling party institutions to be restructured as the state administrative structure changed in the reform era; enabling party organisations to approve personnel transfers more efficiently; establishing and delineating the functions of higher party institutions such as the Party Secretariat and doing away with other central party institutions (such as the Standing Committee of the Political Bureau); adding a provision that the General Secretary of the party may hold his or her office for no more than two terms; dealing with amendments to facilitate party congresses at lower levels; and facilitating party inspection and financial work at the local levels.

The tenth party congress in 2006 revised the party constitution to re-emphasise the party's leading role under conditions of increasing social and economic diversity in Vietnam. It also amended the party constitution to provide for admission of party members from institutions and enterprises where no party youth organisations existed—a recognition that in many foreign-invested enterprises, for example, there are no party youth organisations from which to draw new party

members, and that a means had to be determined to bring people into the party from such organisations.

Other amendments in 2006 re-emphasised the party's leading role in a changing state and society by strengthening the functions of party inspection units to investigate whether party members and officials are violating the 'programme, line, and policies of the party, the resolutions of party committees, and the ethics and way of living based on decisions of the Party Central Committee', expanding the range for disciplinary action against party members and officials at the local, party branch levels, and re-emphasising the party's leading role in managing officials in state, political and social organisations when the number and diversity of such institutions is expanding very quickly. At times, discussions of the party constitution and party policy have sparked controversy at party congresses, as well as within and without the party. Some of these conflicts came to light before and during the tenth party congress in 2006. Among the more controversial issues at the 2006 party congress was a proposal formally to permit party members to engage in private economic activities in the Political Report of the Congress and perhaps in the party constitution itself, a reform already approved in earlier decisions of the Vietnamese Communist Party's Central Committee and by the Chinese party. The debate over party members' economic activity brought together a number of issues, including the scope of the party constitution, the overlap between party and state constitutions and party authority and state law, and the role of party members.

Some party members and congress delegates agreed that party members should be allowed to engage in private economic activities, but asserted that they 'must implement the Party's line in an exemplary fashion'. Others took a different view of the role of party authority, asserting that party members engaged in private economic activity 'need only obey the law (like other citizens)'. Still others called for a special inspection system for party members engaged in business, so as to:

supervise, in a detailed way, to avert the danger that Party members will degenerate or fall into engagement in exploitation (in the relationship of master and employee) and lose the spirit of comradeship. There must be provisions providing detailed restrictions on Party members engaged in private economic activities and supervision by Party organizations.

Still others disagreed altogether with allowing party members to engage in private economic activities as a violation of political principles and 'an encouragement to party members to "exploit"; when that happens these party members will depart from the ideals of the party ideals'.

Eventually, the presiding group drafting the Congress's Political Report recommended that the report contain the following formulation:

Party members who engage in private economic activity must obey state law and policies in an exemplary way, and strictly obey the Party Constitution and the decisions of the Central Committee.²

This joint formulation, reconfirming that party members remain subject to both state law and party constitution and regulations, was adopted by the Party Central Committee with 88.35 per cent voting in favour and indeed appeared in the Political Report. It can reasonably be assumed that at least some of those who failed to raise their hands in support of this provision did so because they thought it was too weak in its provisions for enforcement against party members, or that they did not support party members engaging in private business activities.

Questions of the contents and enforceability of the party constitution, 'party law' and the relationship to the 'state' constitution and state law and regulation have also arisen in other contexts. In May 2005, for example, a group of senior retired party officials in Ho Chi Minh City (Saigon) sent a strongly worded petition to the party, alleging that the party leadership and Central Committee had 'violated Article 3' of the party constitution, which guarantees party members the right to petition and make suggestions to the party leadership, by failing to respond to the petitions and suggestions made by party members. 'The Party Constitution is the basic law with regard to Party members,' they argued. 'If the [Party] Constitution is made light of, then there is no other means for us' to petition the leadership. They lamented that no time limit for responding to party members' petitions and suggestions had been added to article 3 and asked the Congress to address the matter.³

These senior party members were also angered that the provisions of the party constitution on the Central Inspection Commission—which investigates wrongdoing and corruption by party members, an increasing problem in the *doi moi* (renovation) years—were very brief and general, and that the Commission's summary of its work said that 'everything

² This and the previous quotations are from the 'Report of the Presidium on the views expressed in discussion by delegates at the 10th Party Congress' (*Ban trình bày của đoàn Chủ tịch về ý kiến thảo luận của các đại biểu đại hội X của Đảng*), <<http://www.cpv.org.vn>> accessed 25 February 2009.

³ 'Letter of suggestions to the 12th Session of the Central Committee' (*Thư kiến nghị với Hội nghị Trung ương 12 Ban chấp hành Trung ương Đảng*) (31 May 2005) <http://www.doi-thoi.com/baimoi/0605_35.html>.

was achievements ... that they had not found any violations of the [Party] Constitution'. The older cadres asked the Party Congress to address these violations by the Central Inspection Commission and not to avoid these cases of party wrongdoing or sweep them under the rug. Finally, the senior officials claimed that the:

political system specified in the 2001 Party Constitution is not a dictatorship of the proletariat, but has become absolutist, severely lacking in democracy toward the people.

Decrying corruption, failure of party members, cadres and leaders to obey either state law or party rules, the petitioners called on the party to replace earlier and ineffective party resolutions that barred corrupt and other behaviour by party members with stricter regulations and enforcement through a strengthened inspection system that would supervise 'leaders of the Party and the state from the Center down to the base'.

Barely five weeks later, in early July of 2005, the former Prime Minister and very senior party official Vo Van Kiet wrote to the party leadership endorsing the views of the old party members expressed in their May letter. The former Prime Minister also asked for multiple amendments to the party constitution at the upcoming party congress. Furthermore, he also stated a broad view of the party constitution as far more than a party organisational document. That view reflected the opinions of many in Vietnam concerned with malfeasance by party members, but it also re-raised questions of the relationship between national and party constitutions and the overlapping responsibilities of party members to state and party law. The former Prime Minister and Political Bureau member wrote:

We can say that the *Dieu le Dang* is the "law code" (*Bo luat*) of the Party, the "Constitution" (*Hien phap*) of the Party. Citizens and Party members must display exemplary behavior and pioneer in obeying the Constitution and laws of the state. At the same time, Party members ... must obey the Party Constitution because it is the "law code" of the Party, the "constitution" of the Party. Every thought and action of a Party member must be based on that "law code". ... In addition, because our Party is the Party in power, the Party constitution is the fulcrum for the people to inspect and supervise Party members, cadres and Party institutions and to contribute their views to building the Party.⁴

⁴ 'Vo Van Kiet comments on the revision of the Party Constitution' (*Vo Van Kiet doi boi sua doi Dieu le Dang*) (2 July 2005) <<http://www.vnn-news.com/spip.php?article1524>> accessed 25 February 2009.

Kiet proposed revisions to the party constitution to emphasise the role of democracy in party decision making; force the party to answer party members' petitions and views and distribute those petitions and opinions more widely; strengthen the role of national party congresses in determining rather than merely ratifying policy; move toward direct elections of the highest party leaders from the party congress, rather than elections of those leaders from the Party Central Committee; strengthen the role of Central Committee members in party affairs between party congresses, rather than the current situation in which the Party Political Bureau and Secretariat exercise almost all authority and the Central Committee is relatively uninvolved; and strengthen internal inspectorate functions within the party, when the party inspection commission now functions as an arm of the Central Committee, itself under the Political Bureau. 'Otherwise,' he wrote:

who can inspect the Central Committee, the Political Bureau, and the Secretariat when the national congress of the Party convenes only once a term [five years]?

Inevitably, these issues are much more complicated than revisions to only a party internal organisational charter. The parallel existence of state and party constitutions in Vietnam, as in China and other single-party-dominated states, has long raised broader and larger questions about the roles of these constitutions that sit, at least in the view of some, somewhat uncomfortably side by side. Those issues include:

Since the state constitution continues to specify the leading role of the party in Vietnamese state and society (under article 4), does that mean that the party constitution trumps the state constitution? Or do they work in tandem, or in separate spheres? The current official view in Vietnam appears to be that they work in tandem, in separate if sometimes overlapping spheres (particularly when dealing with party members or officials who have committed criminal acts).

Is the party obligated to obey the state constitution under the article 4 requirement that party organisations 'operate within the framework of the [state] constitution', or merely the party constitution?

Are all state institutions—recognising that all Vietnamese state institutions have party branches or other organisations—subject to both constitutions?

Who enforces a party constitution—only the party itself, or do state institutions have any role in that enforcement, particularly with regard to the criminal or unconstitutional acts of party members or party organisations?

How can party members enforce their rights under a party constitution?

Is there any way for citizens to enforce a party constitution against the party and party members? The party constitution does not currently clearly provide for this.

These issues have been discussed quietly in Vietnam, usually well outside the public eye, as they have also been in China. And they may sometimes appear more important in the Vietnamese diaspora than within the country. One reason for that is because the term for these documents—the state constitution and the party constitution—are different in Vietnamese and hold somewhat different meanings. The state constitution is the *Hien phap*, or ‘constitution’, and holds the traditional meaning that we generally attach to a constitution. However, the party constitution in Vietnamese is referred to by a different term—*Dieu le*, which may be translated as ‘a constitution’, ‘a charter’ or ‘articles’.

In English, we use the same term for these party and state documents, but the difference in the Vietnamese terms implies a difference in meaning. The term *Dieu le* implies an organisational document, a document that governs the internal workings of an organisation (here, the Communist Party). That does not resolve the difficulties or implicit conflicts, but it does help to explain why many Vietnamese, including many Vietnamese legal specialists, regard these two ‘constitutions’ as governing separate spheres and arenas.

Despite that difference in terminology and meaning, the issues of coverage, conflict, enforcement and assertion of rights raised above continue to arise in Vietnam in connection with the party constitution. Enforcement of the Vietnamese party constitution and other party documents against corrupt or other wrongdoing party members, for example, has proven difficult at the same time as party members and institutions are often not subject to national law due to the party’s ‘leading role in state and society’. The unfortunate result can be two constitutions, but little enforcement of either one against errant party members. To cite but one example, at the Ninth Party Congress in 2001, the Party Central Committee reported that:

the implementation of the resolutions, programmes, and policies of the Party is not good; discipline and rules are not yet strict ... Many cadres, Party members, and officials violate the laws and the Party Constitution but are not dealt with resolutely ... In the struggle against corruption and bribery ... we must strictly handle situations in which cadres, Party members and officials at any level and in any sphere of work use their

powers to engage in corruption in accordance with law and the Party Constitution.⁵

The relationship between the state and party constitutions is likely to continue to be discussed, at least quietly, as an issue in Vietnam. Furthermore, it will be affected by a wider debate about whether, and how, to amend article 4 of the 1992 Constitution on the supremacy of the party when that constitution is revised yet again, perhaps in 2011 or 2012. That key issue—as important in Vietnam as it is to the Vietnamese diaspora, some of whom call for its removal—is crucial in recalibrating the relationship between party and state, and between state and party constitutions.

THE DEATH OF SOUTH VIETNAM'S CONSTITUTIONS—AND THE BEGINNINGS OF RE-READING IN VIETNAM TODAY

Coverage and space permit only a brief discussion of constitution-making in South Vietnam (the Republic of Vietnam) before the south was reunified with the north in 1975. The leadership of South Vietnam promulgated two constitutions, in 1956 and 1963, but of course neither of them is now in force. However, their history remains of interest for two important reasons. First, the South Vietnamese constitutions are a partial window into constitutional thought—primarily elite, ruling constitutional thought—in the south in the 1950s and 1960s. Secondly, and of more relevance today, in recent years scholars and policymakers in Hanoi, Ho Chi Minh City and other parts of Vietnam have begun to re-examine some features of South Vietnamese constitution-making in the 1950s and 1960s as Vietnam re-explores concepts and models of constitutional review, the possible formation of a constitutional court, 'constitutional protection' and other difficult issues.

The Constitution of 1956

The South Vietnamese Constitution of 1956 reflected the desire of the then-leader of south Vietnam, Ngo Dinh Diem, for exceptionally strong executive powers. It was drafted quickly by a National Constitutional Assembly under Diem's direction and promulgated on

⁵ Political Report of the Central Committee at the Ninth Party Congress (2001).

26 October 1956. Its 'central theme,' wrote a contemporary American observer, was:

executive leadership and control. The legislative branch is given important powers and duties, but these are overshadowed, at times even in the field of law making, by those of the President.

In addition, the drafters 'found considerable difficulty' in providing for the independence of the judiciary, so that:

in the end the organization of the courts and the selection and control of the judges was left to be determined by law.⁶

Article 3 set the tone for the entire constitution, with the key passage on executive authority in the last sentence of the paragraph:

The Nation vests the executive functions in a President elected by the people, and the legislative functions in a National Assembly also elected by the people. The separation of powers between the executive and the legislative agencies must be clear. The activities of the executive and the legislative agencies must be brought into harmony. The President is vested with the leadership of the Nation.⁷

The American JAC Grant explained that:

[t]he first [part] of this Article is essentially as it was written by the Assembly, save that at the President's request the order of the two halves of the first sentence was reversed. The [last sentence—'The President is vested with the leadership of the Nation.'] was added in the final revision requested by the President. It gives the key to all that follows.⁸

Another commentator agreed on the importance of the President as defined in the 1956 Constitution, adding a view as to its provenance:

Like the presidential office in contemporary France, the President of Viet-Nam holds a position of strength so that he is unquestionably the dominant figure in political life, holding a position of *arbitrage*, above both government and legislature, as chief of state; yet he *is* the government, as sole executive.⁹

Beyond the power of the President, what follows in the 1956 Constitution are sections that provide for a legislature and a judiciary and other matters of state, but that still leave much to be decided by the executive and

⁶ JAC Grant, 'The Viet Nam Constitution of 1956' (1958) 52:2 *American Political Science Review* 437.

⁷ 1956 Constitution of the Republic of Vietnam (South Vietnam), art 3, re-punctuated.

⁸ Grant, n 6 above.

⁹ FJ Corley, 'The President in the Constitution of the Republic of Viet-Nam' (1961) 34:2 *Pacific Affairs* 165.

an executive-driven law-making process. The Constitutional Assembly had proposed a chapter on the National Assembly followed by the chapter on the Presidency, 'follow[ing] the American practice of putting the legislative branch first'. The two chapters were reversed in the final draft, with the Presidency coming first, 'at the President's request'. The size of the National Assembly itself would be established by law, not in the constitution. Its term of office is:

set at three years, a reduction, at the request of the President, from the four-year term provided in the Assembly draft.

Executive and legislative were kept separate and there was no mention of ministerial service as legislators:

the President had his eye upon the American system of an independent executive, and did not wish to see any semblance of French parliamentary responsibility creeping in.¹⁰

Very broad Presidential emergency powers were adopted by the Assembly and became part of the constitution. In addition, the President was given full foreign relations powers, the power to declare war and make treaties, serve as commander of the military and 'make all military and civil appointments'.¹¹

Under such a system, it is not surprising that the judicial independence could not be secured, despite a broad constitutional provision that '[t]he judiciary shall have a status which guarantees its independent character'.¹²

When it came to implementing this ambition neither the drafting committee nor the Assembly, nor after them the President, was too successful, if indeed they were successful at all. We secure our judicial independence by giving judges security of tenure and guaranteed salaries. Viet Nam was not willing to do this, although there seems to be no other way.¹³

Yet at the same time, a constitutional court was established to 'decide the constitutionality of laws, decrees, and administrative regulations',¹⁴ as President Diem had recommended in his pre-draft message to the Constitutional Assembly. This was clearly noted in Hanoi, decades later, as Vietnam once again began to debate mechanisms for enforcing the

¹⁰ Grant, n 6 above.

¹¹ Corley, n 9 above.

¹² 1956 Constitution of the Republic of Vietnam (South Vietnam), art 4.

¹³ Grant, n 6 above.

¹⁴ 1956 Constitution of the Republic of Vietnam (South Vietnam), art 85.

constitution and deciding upon constitutionality. In the history of the period, there is little to indicate that the Constitutional Court had any real strength, authority or activity, a fact that may also not be lost on Hanoi today.

Fundamental rights such as freedom of expression and freedom of the press were guaranteed in the constitution, but they were significantly limited in their scope.

Every citizen has the right to freedom of expression. This right may not be used for false accusations, slander, outrages against public morals, incitations to public disturbances or for the overthrow of the republican form of government.

Furthermore, any such freedoms were subject to the limitation that:

All activities having as their object the direct or indirect propagation or establishment of Communism in whatever form shall be contrary to the principles embodied [in the Constitution],

and:

Whoever abuses the rights recognized in the Constitution with the object of jeopardizing the republican form of government, the democratic regime, national freedom, independence, and unity shall be deprived of his right.

The President was allowed to suspend rights of travel, residence, speech, press, assembly, association, formation of labour unions and strikes 'to meet the legitimate demands of public security and order and of national defense' during the first term of the National Assembly, until October 1959.¹⁵ In the wake of the promulgation of the constitution, the Diem government continued and accelerated a pattern of censoring and at times closing newspapers with which it disagreed, sometimes using or ignoring the work of thugs in doing so. Diem was pleased with the constitution he had so strongly influenced.

The vital issue is to establish an effective state apparatus ... A weak and powerless Executive will bring about discontent and indignation ... This might pave the way for revolution ... A strong and efficient executive organization capable of rapidly solving the complex and urgent problems, is a guarantee for the democratic regime.¹⁶

The hope of some Vietnamese and foreign observers was that Diem would use the executive-focused constitution in the enlightened interests of his

¹⁵ 1956 Constitution of the Republic of Vietnam (South Vietnam), art 16.

¹⁶ Diem, quoted in Grant, n 6 above.

nation. Diem, of course, turned out not to be the 'accountable magistrate' many wanted. Instead, as a commentator wrote in *Foreign Affairs* in 1957:

From the beginning Diem ... ruled virtually as a dictator. South Viet Nam is today a quasi-police state characterized by arbitrary arrests and imprisonment, strict censorship of the press and the absence of an effective political opposition.

Even *Life* magazine, quoted by Grant, found that:

Behind the façade of photographs, flags and slogans there is a grim structure of decrees, political prisons, concentration camps, milder 'reeducation centers', secret police.¹⁷

Another American observer summarised the constitutional scene in South Vietnam:

Despite the constitutional trappings, the real constitution of South Vietnam was the personal family rule of the Ngo [Dinh Diem] family.¹⁸

Furthermore, an American legal adviser to the South Vietnamese Government, Albert Blaustein, wrote that:

the Constitution, indeed, had left the door open to dictatorship. In fact, the Ngo Dinh Diem regime, in its last years in power, was engaged deeper and deeper into a regime of individual power and a dictatorial interior policy.¹⁹

The 1956 Constitution had significant American influences, what Bernard Fall called 'cultural transference' in a constitution that 'borrows largely from the American example, but which also contains some elements of the French Constitution of 1946'. Fall wrote dryly and with considerable understatement that 'more could have been done to give the system a more effective, if not more representative, character'. In addition, he was among the first foreign observers to point out that major portions of the constitution were not being implemented: 'Although the Constitution now has been operative for nearly two years', Fall wrote in 1958, the Constitutional Court:

has never been appointed—thus depriving the country of any check on the constitutionality of government actions ... One other defect which must be

¹⁷ Grant, n 6 above.

¹⁸ IM Sacks, 'Restructuring Government in South Vietnam' (1967) 7:8 *Asian Survey* 515; and USAID/Vietnam Program Office, 'A Summary of Vietnam's New Constitution' (Background Paper No 2-67, 1967).

¹⁹ AP Blaustein, *Blaustein on 1967 GVN Constitution* (c. 1972) (manuscript by Professor Blaustein, on file at the Vietnam Archive, Texas Tech University, retrieved 24 February 2008).

remedied soon is the obvious powerlessness of the National Assembly ... The most important issues of government business are simply never submitted to it for discussion but—like the land reform, for example—simply promulgated by Presidential decree.²⁰

These issues came to the fore in a particularly poignant way—and in comparison to the situation in the north—at the late 1950s trial of *Thoi Luan* (*Chronicle of the Times*), the most prominent southern opposition newspaper. *Thoi Luan's* publisher engaged in a notable colloquy with the court, including one of the few open comparisons of southern and northern constitutions in 1950s Vietnam:

President [of the tribunal]: 'Why did you make pro-Communist propaganda, outrage the nation, and say that our Constitution was not as good as that of the Communists?'

Whereupon Mr. Thien [the publisher] speaks of Article 93 of the Constitution which permits the President of the Republic [Dien] to suspend the exercise of civic freedoms, thus putting the Constitution of Viet-Nam in a state of inferiority.

The President [of the tribunal] reproaches Mr. Thien with having written that persons had been arrested and their trace never found. He invites him to cite names. Mr. Thien seems embarrassed but as he is pressed by the President, he replies: 'The *doc-phu* [mandarin of governor's rank] has been arrested a few days ago, and there are other names which I would not like to cite, but here is a letter which may be illuminating.' Mr. Thien hands a letter to the President, who reads it and no longer insists.²¹

Southern Constitutional Politics in the 1960s

Perhaps not surprisingly, Diem's Constitution of 1956 fell into disuse in the early 1960s. Diem was then overthrown in November 1963, and unstable military and civilian governments ensued. One of the military governments that followed, led by General Nguyen Khanh, promulgated a Charter in 1964 that in formal terms promised separation of powers and respect for fundamental liberties. However, in the view of the American adviser Albert Blaustein, it merely:

provided for a militaristic dictatorship ... [T]he Armed Forces Council ... was the supreme body vested with national leadership. Elected by the Armed Forces Council, the Chairman of the Republic of Vietnam was the Chief of

²⁰ B Fall, 'South Viet-Nam's Internal Problems' (1958) 31:3 *Pacific Affairs* 241.

²¹ Ngon-Luan, 14 March 1958, quoted in Fall, n 20 above.

State. The power of the RVN Chairman was even more extensive than that vested in the President [under the 1956 Constitution]. He held sway over the whole governmental structure.

What followed were 'waves of demonstrations against the Charter'.²² The military government's Constitutional Act No 1 (4 November 1964):

provided for a militaristic centralization of powers with both the Executive and Legislative powers in the hands of the military junta ... Judicial power ... was never recognized. In other words, under the military junta's ruling system, the Judicial power continued to be a staff arm of the Executive power ... Commission of such extensive powers to the provisional government indeed aroused great astonishment among politicians and jurists.²³

The 1964 Charter, the failed attempts to implement it and the widespread protests that ensued were, in the words of one foreign observer:

General Nguyen Khanh's attempt to become the de Gaulle of South Vietnam through the promulgation of the Vung Tau Charter ... General Khanh was forced to beat ignominious retreat when the students took to the streets in protest, and that marked the beginning of the end for him.²⁴

After continuing disorder in 1964 and 1965, a committee of military figures headed by Nguyen Van Thieu took power in June 1965, quickly promulgating yet a new Constitutional Charter (19 June 1965, also known as a provisional constitution), which remained in force until the 1967 Constitution was promulgated. The 1965 Constitutional Charter institutionalised the military's National Leadership Council (earlier known as the National Directory) and named its Chairman as Chief of State. Professor Blaustein called this the establishment of:

[a] centralized military government ... [N]ational sovereignty resided in the Armed Forces Council and the National Directory was designated to exercise such powers. [It] grasped all the three powers: the legislative, the executive and the judicial power together.

There was no recognition of separate judicial power, and '[t]he provisional Constitution failed to deal with fundamental liberties of the Vietnamese citizens'. The provisional constitution was used, for example, to justify the establishment of special courts to:

render sentences without possibility of appeal against speculation, black marketing, laying in of stock, illegal transfer of funds, bribery and embezzlement

²² Blaustein, n 19 above.

²³ Ibid.

²⁴ Sacks, n 18 above.

of public funds...[This] added to strengthening the absolute power of the National Directory and deprived the Vietnamese citizens of minimum guarantees for individual liberties and the right to legal counsel and defense.²⁵

In short, political disorder and military factions vying for power bred constitutional absolutism.

The 1967 Constitution

A Constituent Assembly was formed in September 1966 and spent six months drafting a new constitution, which was approved by the Assembly in March 1967 and promulgated the next month. Executive authority was once again at the core of this constitutional drafting effort. Professor Blaustein describes the goals of the drafters of the 1967 Constitution as:

establish[ing] a strong and stable executive power so that it can be in a position to pacify the country and put into application a large program of national reconstruction and ... to discard all possibilities of a return to dictatorship in any form whatsoever.²⁶

The United States was considerably more involved in the preparation of the 1967 Constitution than it had been in 1956. To assist in the drafting of the 1967 Constitution, the US Government dispatched advisers and supported translation into Vietnamese of American constitutional texts and earlier commentaries such as the *Federalist Papers*. There was resistance to this constitutional process from at least 'a strong faction' in the South Vietnamese military, which did 'not favor the entire constitutional process because it strengthen[ed] the political position of the civilian element in decision-making'.²⁷

In the constitutional drafting process that resulted, both military and civilian officials sought to legitimise their leadership. The Constituent Assembly elected to write the new constitution was:

united in their determination ... to hasten the process by which the military government would be replaced by an elected government, hopefully with civilian leadership ... In all events, the new constitution was to restructure government in South Vietnam on a democratic basis and avoid a repetition of the descent into the authoritarian abyss that was the hallmark of the Diem experience.

²⁵ Blaustein, n 19 above.

²⁶ Ibid.

²⁷ Sacks, n 18 above.

The results were a compromise in which the Constituent Assembly 'did take into consideration the wishes of the military leadership but clearly showed its independence'. The 1967 Constitution sought to ameliorate presidential power by dividing executive authority between a president and a prime minister, and to increase the authority of the national legislature as well as the courts, and to decentralise village administration. The national legislature was changed from unicameral in 1956 to bicameral in the 1967 Constitution, and its powers were strengthened 'to afford more control over the executive'.²⁸ The military was also intended to play less of a role under the new constitution; for example, the Armed Forces Council now advised the President rather than, as in the 1956 Constitution, serving as highest legislative authority.

However, as Sacks and others point out:

despite all the efforts to circumscribe the position of the President in the new system, he still remains a dominant and centrally strong figure.

The 'ingredients that produced a Ngo Dinh Diem' found their way into the new constitution.

The members of the Constituent Assembly [were] caught between their desire for stability, which they know is not likely on the basis of improvised coalitions, and the need to ensure the rights of opposition which failed to survive the onslaught of the autocratic President Ngo Dinh Diem ... It is this same underlying need for stability that led the Assembly to create in the institution of the Presidency a force for unity, yet try to safeguard the rights of the people by institutionalising the right of opposition.²⁹

The 1956 Constitution's promise of an independent judiciary had turned out to be hollow, and the civilian drafters of the 1967 document sought to strengthen the judiciary's role and autonomy. One way in which they did so was not to continue the role of a separate constitutional court in deciding on the constitutionality of laws and regulations, as in the 1956 Constitution, but to give that role to the Supreme Court itself. The constitution also sought to shield Supreme Court appointments from some of the politicisation of executive and legislative appointments by giving the judges', prosecutors', and lawyers' associations a direct role in listing judges from which the National Assembly would choose and the President appoint. However, the terms remained limited to six years.

For US officials, the shifts in constitutional treatment of the judiciary were a point of pride in the new constitution. 'The Constitution

²⁸ Ibid. See also Blaustein, n 19 above.

²⁹ Sacks, n 18 above.

of April 1, 1967 effected radical changes in the organization and administration of justice', the American legal adviser (funded by the US Agency for International Development (USAID)) to the Vietnamese Supreme Court's Chief Justice told the Vietnam Council on Foreign Relations two years after the constitution was promulgated.

Prior to that date, the Judiciary lacked independent status and functioned under the administrative control of the Executive branch of government through the Ministry of Justice. The new Constitution provides that the Judiciary shall be organized as a separate branch of government, with an autonomous budget. In this respect, it follows the US concept in contrast to France where the constitution merely guarantees the independence of the Judiciary but leaves its administration to the Executive ... Supreme Court justices in Viet Nam are nominated by their associates, the Prosecutors and the Lawyers, elected by the National Assembly and appointed by the President ... Thus the role of the Executive in Viet Nam in composing the Supreme Court is very nominal compared to the US.

Despite these improvements, he did not point out that the Vietnamese judges had a six-year tenure versus lifetime tenure in the United States, an important contributor to judicial independence.³⁰

At the local government level, and over the objections of the military accustomed to determining local appointments, elections were mandated for villages, provinces, autonomous cities and Saigon, both for local councils and, except for the village level, local executive officers. In a compromise with the military, the constitution provided for government appointment of civil servants to work on security and local administration, to allow local council members and officials to be dismissed by the President and, specially, to allow the President to appoint province chiefs during the first presidential term under the new constitution.³¹ This compromise—more local autonomy, local elections, but also continuing powerful central and military roles—helped to provoke continuing conflict involving the Constituent Assembly and the military.

[T]he military leaders strongly disliked the idea that these officials, who wield extensive powers in their respective areas, should be elected rather than appointed.³²

³⁰ FG O'Neill, 'The Legal System of Viet Nam' (Vietnam Council on Foreign Relations, address delivered on 22 September 1969).

³¹ See, eg United States Military Assistance Command, Vietnam Office of the Judge Advocate, *The Constitution of Vietnam: Analysis and Comparison* (Saigon, 1967).

³² R Devereux, 'South Vietnam's New Constitutional Structure' (1968) 8:8 *Asian Survey* 627 (originally published by American-Asian Educational Exchange, Inc, 1968).

This complex history of southern constitution making, the uses of constitutions by strong civilian and military leaders, the difficulty in achieving autonomy for the courts, the hollow promise of citizens' rights and other issues ended in May 1975 when north Vietnamese and Viet Cong forces took Saigon. However, while the southern constitutions of 1956 and 1967 and the efforts in between may have had little legalising effect on southern society, they did spark significant academic work by southern Vietnamese legal scholars and officials. From the mid-1950s to the early 1970s, the scholars and officials Le Van Binh, Nguyen Van Bong, Nguyen Dinh Chan, Truong Tien Dat, Tran Thuc Linh, Vu Van Mau, Nguyen Quang Quynh and others produced sophisticated constitutional commentaries, constitutional law texts and other volumes seeking to describe, explain and analyse these ultimately unsuccessful but still important processes in the south.³³

One might think that South Vietnam's constitutions and the rich commentaries and texts on what is now dead constitutional law would be themselves consigned to the dustbin of history. However, in recent years, northern scholars and officials—including such important commentators as Professors Nguyen Dang Dung, Nguyen Van Thao and Bui Ngoc Son—have disinterred this important body of constitutional scholarship that was produced under difficult political and work conditions in the south. They have employed and extended the concepts of judicial review, constitutional protection, individual rights and other ideals discussed there, giving the life's work of that small band of southern scholars and officials a new use in assisting wide-ranging explorations of constitutional reform in the Socialist Republic of Vietnam.

These northern scholars and commentators have not only relied on southern work from an earlier era: they have also explored theory and constitutional developments in Europe, North America, Asia and elsewhere. However, they have not ignored the initial, if often failed,

³³ See, eg Le Van Binh, *Luat Hien-Phap (Constitutional Law)* (Saigon, 1961); Nguyen Van Bong, *Luat Hien-phap va Chinh-tri-hoc (Constitutional Law and Political Science)* (Saigon, 1971); Le Dinh Chan, *Luat Hien-phap va cac tinh-che chinh-tri Viet-Nam (Constitutional Law and Political Institutions in Vietnam)* (Saigon, 1971); Truong Tien Dat, *Hien-phap chu-thich (Comments on the Constitution)* (Saigon, 1967); Vu Van Hien, *Nen biet qua ve phap-luat Viet-Nam (Outline of Vietnamese Law)* (Ha-Noi, 1949); Vu Van Mau, *Co-luat Viet-Nam (The Vietnamese Legal System)* (Saigon, 1971, 2 vols); and Quoc Thong Vu (Government Office), *Mot vai nhan xet ve vien Bao Hien (Observations on the Constitutional Court)* (Saigon, 1956). Other Western materials on constitutional developments in South Vietnam (in addition to those cited in the text) include C Frederick, *The South Vietnamese Constitution of April 1, 1967: The Institutionalization of Politics in the Second Republic* (PhD thesis, University of London, 1969).

explorations of these core concepts in their own country in a different era and under very different political circumstances. At a time when the reception of constitutional concepts such as individual rights and constitutional review from American or French sources may remain somewhat fraught in Hanoi—and may be regarded as attempts to export the ‘separation of powers’ to Vietnam—the fact that southern intellectuals, judges and officials were discussing many of these same concepts in the same country merely two decades ago can have a useful legitimising and explanatory power.

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