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## Constitutional Mobilization

Bui Ngoc Son

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## CONSTITUTIONAL MOBILIZATION

BUI NGOC SON\*

### ABSTRACT

*People around the world are mobilizing for constitutional change. This global phenomenon has been underexplored in comparative constitutional studies. This Article introduces the concept of constitutional mobilization, theorizes about it, and offers an original, empirical case-study.*

*First, it develops a general theoretical framework defined by the following key concepts. Constitutional mobilization is the process by which social actors employ constitutional norms and discourses to advocate for constitutional change. Constitutional opportunity refers to the general political and constitutional environment in which constitutional mobilization operates, and particular political and constitutional processes that provoke constitutional mobilization. Constitutional framing concerns identifying constitutional problems and proposing constitutional solutions, the process of which involves invocation of constitutional language, ideas, norms, or symbols presented in national constitutions, transnational constitutional law, and international law. Constitutional resources take the form of state actors who play the influential role in constitutional change.*

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*And finally, constitutional change is understood as a multiple concept, which includes three types of change, namely revolutionary, reformative, and cultural.*

*Second, this article develops a contextual theory to answer this question: under what conditions, how and why do social actors mobilize for constitutional change in authoritarian regime? The theory holds that, in an authoritarian regime, social actors seize the opportunity presented by constitution-making process to mobilize the public and also political leaders to engage in a popular, national constitutional dialogue, which results in reformative and cultural constitutional changes.*

*Third, on that theoretical ground, this Article offers a case-study of Vietnam. This case-study has implications for China, which, like Vietnam, is also governed by a communist regime. However, as this article will demonstrate, China also presents significant constitutional divergences from Vietnam. More generally, this Article proposes establishing constitutional mobilization as a new area of empirical comparative constitutional inquiry based on case-studies exploration and contextual theorization.*

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## INTRODUCTION

Comparative constitutional scholarship has been dominated by the questions of how courts are structured and how they shape constitutional law. However, constitutional development is also driven by and responds to social mobilization. Several American scholars have accounted for the effects of social movements on constitutional law in the United States.<sup>1</sup> Like in the United States, people around the world are mobilizing for social change, including constitutional change.<sup>2</sup> Unfortunately, the emerging discipline of comparative constitutional law<sup>3</sup> has largely neglected constitutional mobilization. This Article introduces this phenomenon and concept, theorizes about it, and offers an original case-study.

First, this Article develops a general theoretical framework defined by the following key concepts. *Constitutional mobilization* is the process by which social actors employ constitutional norms and discourses to advocate for constitutional change. *Constitutional opportunity* refers to the general political and constitutional environments in which constitutional mobilization operates and to the particular political and constitutional processes that provoke constitutional mobilization. *Constitutional framing* concerns the process of identifying constitutional problems and proposing constitutional solutions and involves invocation of constitutional language, ideas, norms, or symbols presented in national constitutions, transnational constitutional law, and international law. *Constitutional resource* takes the form of state actors who play the influential role in constitutional change. *Constitutional change* is understood as multiple concepts which include three types of change: revolutionary, reformative, and cultural.

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<sup>1</sup> Mark Tushnet, *Social Movements and the Constitution*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 241 (Mark Tushnet, et al eds., 2015); Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, (2013); JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006) [hereinafter Siegel, *Constitutional Culture*]; Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) [hereinafter Siegel, *Text in Context*]; William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001) [hereinafter Eskridge, Jr., *Channeling*]; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) [hereinafter Eskridge, Jr., *Some Effects*].

<sup>2</sup> See PAUL MASON, WHY IT'S KICKING OFF EVERYWHERE: THE NEW GLOBAL REVOLUTIONS (2012); CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

<sup>3</sup> For the revival of comparative constitutional law, see RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW (2014); David Fontana, *The Rise and Fall of Comparative Constitutional Law in the Postwar Era*, 36 YALE J. INT'L L. 1 (2011).

Second, this article develops a contextual theory to answer this question: Under what conditions, how, and why do social actors mobilize for constitutional change in authoritarian regime? The theory holds that, in an authoritarian regime, social actors seize the opportunity presented by the constitution-making process to mobilize the public and political leaders to engage in a popular, national constitutional dialogue, which results in reformative and cultural constitutional changes.

Third, on that theoretical ground, this Article offers an original, empirical case-study of Vietnam. The Vietnamese case is intriguing. Vietnam is ruled by a communist party like China, but in many ways the Vietnamese are experimenting with constitutional law in ways that Chinese citizens cannot. Without necessary constitutional opportunity, despite the dynamics of the *weiquan* (right defence) movement,<sup>4</sup> Chinese citizens cannot initiate a national constitutional dialogue as Vietnamese citizens did, although they have sometimes been able to appropriate other political opportunities to advocate for removing policies deemed to be unconstitutional.<sup>5</sup> For example, constitutional activists, like Liu Xiaobo and the Charter 08 signatories, were able to advocate for their ideas but they were also met with serious punishment, harassment, and even faced detainment by the Chinese government.<sup>6</sup> Also worth noting are the firm steps taken by the Chinese government in 2013 to quell the constitutionalism debate.<sup>7</sup> In contrast, in 2013, Vietnamese citizens successfully seized the opportunity of constitution-making to mobilize a national constitutional dialogue, which resulted in reformative changes reflected in the new 2013 Constitution.<sup>8</sup> These collective efforts were carried out by a coalition: a group of seventy-two intellectuals; law graduates; the “free citizens” group; the *Cùng Viết Hiến pháp* (Let’s Draw up the Constitution) group—an online forum providing constitutional

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4 For descriptions of the *weiquan* movement, see EVA PILS, CHINA’S HUMAN RIGHTS LAWYERS: ADVOCACY AND RESISTANCE (2014); JONATHAN BENNEY, DEFENDING RIGHTS IN CONTEMPORARY CHINA (2012); Hualing Fu & Richard Cullen, *Weiquan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public-Interest Lawyering*, 59 CHINA J. 111 (2008); Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 FORDHAM INT’L L. J. 1209 (2006).

5 See Mark Jia, *China’s Constitutional Entrepreneurs*, 64 AM. J. COMP. L. 619 (2016).

6 On Charter 08 and the punishment of Liu Xiaobo, see LIU XIAOBO, CHARTER 08, AND THE CHALLENGES OF POLITICAL REFORM IN CHINA (Jean-Philippe Béja, et al eds., 2012) [hereinafter LIU XIAOBO].

7 For examples of steps taken by the Chinese government in 2013 to quell the constitutionalism debate see Thomas E. Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the “Urgency” of Political Reform*, 11 U. PA. ASIAN L. REV. 337 (2016); Rogier Creemers, *China’s Constitutionalism Debate: Content, Context and Implications*, 74 CHINA J. 91 (2015).

8 See *infra* Part V and accompanying text.

analysis; the Vietnamese Catholic bishops; and civil society groups and organizations.<sup>9</sup> The Vietnamese government not only tolerated the vehement constitutional mobilization but also engaged in an open (albeit controlled) constitutional dialogue with their citizens.<sup>10</sup> The success of the Vietnamese people in reworking their constitution is notable, especially as Vietnam is a key player in the security and stability of Southeast Asia in general<sup>11</sup> and their domestic constitutional politics may be viewed as an example for the region.

This case-study is conducted on empirical grounds and with primary sources. I directly participated in the process of constitutional debates in Vietnam in early 2013 via several fora, such as official media events, conferences, and workshops, which enabled me to meet and exchange with constitutional intellectuals involved in mobilization, constitution-makers, and National Assembly delegates. Moreover, in January 2017, I interviewed social actors in Hanoi who had engaged in major constitutional mobilizations, members of the Constitutional Amendment Committee, members of the Editorial Board of Constitutional Amendment, Assembly deputies, and National Assembly officers.<sup>12</sup> In addition, this case-study also relies on primary sources: written texts, speeches, and oral records of both social actors and state actors published in Vietnamese.

This case-study has implications for China which shares with Vietnam a communist regime but presents significant constitutional divergence. More generally, this Article proposes establishing constitutional mobilization as a new area of empirical comparative constitutional inquiry based on case-studies, exploration, and contextual theorization.

The remainder of this Article is structured as follows. Part II identifies constitutional mobilization as a global but understudied phenomenon. Part III develops a general theoretical framework. Part IV introduces the dialogical theory of constitutional mobilization under the specific condition of authoritarianism. Part V offers a descriptive exploration of the case of Vietnam and Part VI provides an explanatory analysis. Part VII concludes with general reflections.

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<sup>9</sup> See *infra* Part V and accompanying text.

<sup>10</sup> See *infra* Part V and accompanying text.

<sup>11</sup> See ALAN COLLINS, *THE SECURITY DILEMMAS OF SOUTHEAST ASIA* (2010).

<sup>12</sup> Due to the potential for retribution, interviewees referred to in this paper are kept anonymous, unless otherwise noted.

### I. CONSTITUTIONAL MOBILIZATION: A LACUNA IN COMPARATIVE CONSTITUTIONAL SCHOLARSHIP

On December 26, 2012, a group of seventy-two prominent Chinese scholars published a Reform Consensus Proposal, calling for constitutional change in China, on the grounds of “fundamental consensus on democracy, the rule of law, respect for human rights and other principles of constitutionalism demanded in a modern society.”<sup>13</sup> The Proposal was echoed in the constitutionalism debate in the following year (2013), which “drew hundreds of participants, including academics, public intellectuals, journalists, rights activists, state-affiliated think tank researchers, and government officials.”<sup>14</sup>

Coincidentally, on January 19, 2013, a group of seventy-two prominent Vietnamese intellectuals published a constitutional petition.<sup>15</sup> This petition, however, was more radical and, ultimately, consequential. Now known as Petition 72, it advocated for more fundamental constitutional changes, including democratic and free elections, human rights consistent with the Universal Declaration of Human Rights and other international human rights treaties, private ownership of lands, the separation of powers among branches of the government and other forms of checks and balances, judicial independence, a constitutional court, a civil military, and referendum on the new Constitution.<sup>16</sup> The group submitted the petition to the Constitutional Amendment Commission and then mobilized to obtain the signatures of 14,000 Vietnamese people.<sup>17</sup> This petition was the starting point of the vehement wave of civic activism in Vietnam in 2013, in which thousands of citizens, intellectuals, civil society groups and organizations advocated for constitutional change.

The above stories illustrate a distinctive constitutional phenomenon which I call “constitutional mobilization.” Constitutional mobilization is a global phenomenon which occurs in various institutional settings including well-established democracies, new democracies, and authoritarian

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13 *A Proposal for a Consensus about Reform*, CHINA COPYRIGHT AND MEDIA (Dec 25, 2012, updated May 3, 2014), <https://chinacopyrightandmedia.wordpress.com/2012/12/25/a-proposal-for-a-consensus-about-reform/>.

14 Kellogg, *supra* note 7, at 339-40.

15 *See infra* Part V and accompanying text.

16 *See infra* Part V and accompanying text.

17 *Kiến nghị về Sửa đổi Hiến pháp 1992* [*Petitions on Amending the 1992 Constitution*], BAUXITE VIETNAM (Apr. 14, 2013), <http://boxitvn.blogspot.sg/2013/01/kien-nghi-ve-sua-oi-hien-phap-1992.html>. For detailed examination of this petition, see Bui Ngoc Son & Pip Nicholson, *Activism and Popular Constitutionalism in Contemporary Vietnam*, 42 L. & SOC. INQUIRY 667 (2016).



regimes.<sup>18</sup> In the United States, “Jacksonianism, abolitionism, the labor movement, the second wave of American feminism, the Civil Rights movement, the gay rights movement, and the New Right” deployed constitutional litigation to mobilize for changes in judicial interpretations of the U.S. Constitution.<sup>19</sup> Civic society has also involved in mobilizing constitutional change in Europe, Latin America, Africa, and South Pacific.<sup>20</sup> In Asia, in addition to the above Chinese and Vietnamese stories of constitutional mobilization, other recent stories of constitutional mobilization include Hong Kong’s 2013 Umbrella Movement mobilizing for direct election of the chief executive provided for in the Basic Law (Hong Kong’s mini-Constitution), Taiwan’s 2014 Sunflower Student Movement demanding to hold a citizens’ constitutional conference to amend the Constitution, Japan’s 2015 protests against the new security law as unconstitutional, and South Korea’s 2015 protests which argued that the Anti-Sex Trade Laws were unconstitutional.<sup>21</sup>

Constitutional mobilization is a global phenomenon but it is relatively understudied as a global phenomenon. Several American scholars have accounted for the role of popular constitutional mobilization in bringing about constitutional change in the United States, which reflects their own skepticism of the role of the judiciary in bringing about constitutional change in the United States.<sup>22</sup> Examples of such scholars and their works

18 For examples of global protests constituting what I refer to as constitutional mobilization in countries with forms of government from well-established democracies to new democracies and even authoritarian regimes, see generally MASON, *supra* note 2.

19 Jack M. Balkin, *How Social Movements Change (Or Fail To Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK L. REV. 27, 28 (2005).

20 Paul Blokker, *Constitutional Reform in Europe and Recourse to the People*, in PARTICIPATORY CONSTITUTIONAL CHANGE: THE PEOPLE AS AMENDERS OF THE CONSTITUTION 31 (J. Gerkrath & X. Contiades eds., 2016); CIVIL SOCIETY AND CONSTITUTIONAL REFORMS IN AFRICA 10 (Tyanai Masiya & Charles Mutasa eds., 2014) [hereinafter CIVIL SOCIETY]; CONSTITUTIONAL DEVELOPMENT WITH CIVIL SOCIETY: CASE STUDIES FROM SOUTHERN AND EAST AFRICA (Sylvia T. Panfil ed., 2012) [hereinafter CONSTITUTIONAL DEVELOPMENT]; Juliano Zaiden Benvindo, *The Seeds of Change: Popular Protests as Constitutional Moments*, 99 MARQ. L. REV. 363, 363-64 (2015); Virisila Buadromo, *Fiji - The Constitutional Process: A View from the Fiji Women’s Rights Movement*, 25 ACCORD 65 (2014).

21 LIU XIAOBO, *supra* note 6; Albert H.Y. Chen, *The Law and Politics of the Struggle for Universal Suffrage in Hong Kong, 2013–15*, 3 ASIAN J. L. & SOC’Y 189 (2016); Brian Christopher Jones, Introduction, *Focus: Taiwan’s Sunflower Movement*, 45 H.K. L.J. 189 (2015); Craig Martin, *The Legitimacy of Informal Constitutional Amendment and the “Reinterpretation” of Japan’s War Powers*, 40 FORDHAM INT’L L.J. 427, 485-6 (2017); Jee Heun Kahng, *South Korea Prostitutes Decry Court Ruling, Demand Right to Work*, REUTERS (Mar. 31, 2016, 2:42 PM), <http://in.reuters.com/article/southkorea-prostitution-idINKCN0WX0XD?feedType=RSS&feedName=worldNews>.

22 NeJaime, *supra* note 1, at 885.

include Sanford Levinson's "Protestantism in constitutional interpretation,"<sup>23</sup> Mark Tushnet's<sup>24</sup> and Larry Kramer's<sup>25</sup> theories of popular constitutionalism; Bruce Ackerman's theory of dualist democracy,<sup>26</sup> and Jack Balkin, Reva Siegel, and William Eskridge's theories on social movements and constitutional change.<sup>27</sup> However, these American scholars focus mainly on the domestic context and fail to consider the American experience in a globally comparative framework. This failure to consider the American constitutional experience in a global framework may, in part, be explained by the contention that in the U.S., "no social movement ever really cared about comparative constitutional law."<sup>28</sup>

Other comparative constitutional studies have largely ignored constitutional mobilization as a topic. This is firstly due to disciplinary balkanization: most works on social mobilization are conducted by sociologists and political scientists who deployed conceptual frameworks that are unfamiliar to legal scholars.<sup>29</sup> At the same time, sociologists and political scientists usually do not study phenomena of constitutional law because of "Talcott Parsons's distinction among the political (legal), economic, and social spheres."<sup>30</sup> To be sure, some law and society scholars, drawing on sociological and political science literature, do consider law, but tend to focus on ordinary legal mobilization rather than constitutional mobilization.<sup>31</sup>

Apart from the disciplinary reason, the domination of the institutional,

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23 SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 27 (1988).

24 MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) (arguing against judicial review in favor of the role of the people in constitutional interpretation).

25 LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (making the case for removing the final authority of constitutional review by the Supreme Court in favor of the final review by the people).

26 See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 461-2 (1989).

27 See BALKIN *supra* note 1; Siegel, *Constitutional Culture*, *supra* note 1; and Eskridge, Jr. *Some Effects*, *supra* note 1.

28 Fontana, *supra* note 3, at 44-45.

29 See Howard Stevenson, *Challenging School Reform from Below: Is Leadership the Missing Link in Mobilization Theory?*, 15 *LEADERSHIP & POL'Y IN SCHS.* 67 (2016); Timothy Ingalsbee, *Resource and Action Mobilization Theories: The New Social-Psychological Research Agenda*, 38 *BERKELEY J. SOC.* 139 (1993); Steven M. Buechler, *Beyond Resource Mobilization? Emerging Trends in Social Movement Theory*, 34 *SOC. Q.* 217 (1993). I am indebted to Professor Mark Tushnet for suggesting this disciplinary reason.

30 Eskridge, Jr., *Channeling*, *supra* note 1, at 421.

31 See Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 *EMORY L. J.* 663 (2012); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 *AM. POL. SCI. REV.* 690 (1983).

juricentric approach<sup>32</sup> in comparative constitutional inquiry has resulted in relative neglect of constitutional mobilization. Constitutional juricentrism is epistemologically connected to the assumption of the neutrality of constitutional law, which holds that constitutional law is produced by legal professionals through logical legal reasoning and is therefore neutral to politics and the society.<sup>33</sup> While studies along these lines of thought have their own merits, they narrowly focus on a few jurisdictions which have effective judicial review systems<sup>34</sup> and neglect the role of non-judicial actors in constitutional change.

Moreover, the lack of studies on constitutional mobilization may have some connections to comparative constitutional textualism which focuses on the large-scale examination of national constitutional texts to identify global constitutional convergence.<sup>35</sup> While textualists help introduce quantitative methods into comparative constitutional studies, they have yet to account for texts in socially contested contexts. The language of constitutional texts may look similar but how constitutional language is invoked and contested in social reality may be different.

In addition, the relative neglect of constitutional mobilization in comparative constitutional inquiry is due to practical reasons. Constitutional mobilization both shapes and is shaped by social complexity, the complicated interactions of national culture, politics, intellectual environment, ideology, social structure, and economic conditions. An appropriate understanding of this social complexity requires local knowledge and even necessary engagement into the local society, which may present difficulties to global constitutionalists.

That said, some constitutional theorists do consider the social context of constitutional law. For example, the theory of “societal constitutionalism” has accounted for social control exercised outside the governmental

32 For recent work discussing the impact of the institutional, juricentric approach to explaining constitutional change, see VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2013); SAMUEL ISSACHAROFF, *FRAGILE DEMOCRACIES: CONTESTED POWER IN THE ERA OF CONSTITUTIONAL COURTS* (2015); *CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA* (Daniel Bonilla Maldonado ed., 2013); and PO JEN YAP, *CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA* (2015).

33 Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

34 See THE U.S. CONSTITUTION AND COMPARATIVE CONSTITUTIONAL LAW: TEXTS, CASES, AND MATERIALS (Steven Calabresi et al. eds., 2016) (focusing on the fifteen constitutional democracies in the G-20 Nations).

35 See David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163 (2011) and David S. Law, *Constitutional Archetypes*, 95 TEX. L. R. 153 (2016).

sphere.<sup>36</sup> However, it largely ignores social mobilization, and focuses mainly on the social control imposed by private organizations and institutions, which reflects the adherence to the conventional institutional approach to constitutionalism.<sup>37</sup> Another example is the theory of “political constitutionalism” drawing from the republican tradition in the United Kingdom.<sup>38</sup> But, political constitutionalists have concentrated on political institutions rather than social mobilization. Some scholars who consider the social and political foundations of the constitutions<sup>39</sup> and constitutionalism<sup>40</sup> have yet to substantively discuss the relation of social mobilization.

## II. A GENERAL THEORETICAL FRAMEWORK

### A. *Constitutional Mobilization.*

I define constitutional mobilization as *the process by which social actors invoke constitutional norms and discourses to advocate for constitutional change*. It is a form of social mobilization which involves social actors, such as human rights activists, intellectuals, constitutional law scholars, lawyers, and civil society groups and organizations. Constitutional mobilization is also a form of legal mobilization as it concerns law, legal institutions, and legal processes. However, it is a distinctive phenomenon, different from other forms of social and legal mobilization. To conceptualize its distinctive features, I extend into the constitutional realm three theories on social mobilization and social movements developed by political scientists and

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36 DAVID SCIULLI, *THEORY OF SOCIETAL CONSTITUTIONALISM: FOUNDATIONS OF A NON-MARXIST CRITICAL THEORY* 16 (1992).

37 Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 3 (Christian Joerges et al. eds., 2004). Some rare work on societal constitutionalism does refer to social movements but focus on transnational settings. See Gavin W. Anderson, *Societal Constitutionalism, Social Movements, and Constitutionalism from Below*, 20 *IND. J. GLOBAL LEGAL STUD.* 881 (2013).

38 RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007).

39 Denis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, in *SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 4 (Denis J. Galligan & Mila Versteeg eds., 2013); CHRIS THORNHILL, *A SOCIOLOGY OF CONSTITUTIONS: CONSTITUTIONS AND STATE LEGITIMACY IN HISTORICAL-SOCIOLOGICAL PERSPECTIVE* 5 (2011).

40 See Wen-Chen Chang, *East Asian Foundations for Constitutionalism: Three Models Reconstructed*, 3 *NAT'L TAIWAN U. L. REV.* 111 (2008).

sociologists, namely political opportunity, framing, and resource mobilization.<sup>41</sup>

### B. *Constitutional Opportunity.*

The *political opportunities* theory focuses on “the broader political system in structuring the opportunities for collective actions and the extent and form of same.”<sup>42</sup> In explaining the emergence of a particular social mobilization or a social movement, this theory accounts for “*changes in the institutional structure or informal power relations of a given national political system.*”<sup>43</sup> Works on political opportunities also “account for *cross-national differences in the structure, extent, and success of comparable movements on the basis of differences in the political characteristics of the nation states in which they are embedded.*”<sup>44</sup> With that base, *constitutional opportunities* refers to the general political and constitutional environment in which constitutional mobilization occurs, and particular political and constitutional processes that provoke constitutional mobilization.

In the United States, constitutional mobilization is shaped by a general environment of liberal constitutional structure characterized by the separation of powers, checks and balances, and a strong guarantee for civil liberty, especially the freedoms of speech, thought, association, and press. This structure is connected to the tradition of enlightenment liberalism, especially its core ideas of limited government and liberal rights protection.<sup>45</sup> This overall American constitutional structure is also culturally and morally associated with the *Christian tradition that values individual freedom.*<sup>46</sup>

American constitutional theorists tend to focus on courts as the particular constitutional environment for the operation of social mobilization.<sup>47</sup>

41 David S. Meyer, *Protest and Political Opportunities*, 30 ANN. REV. SOC. 125 (2004); David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464 (1986); J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527 (1983).

42 Doug McAdam et al., *Introduction: Opportunities, Mobilizing Structures, and Framing Processes – Toward a Synthetic, Comparative Perspective on Social Movements*, in COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS 1, 2 (Doug McAdam et al. eds., 1996).

43 *Id.* at 3 (emphasis in original).

44 *Id.*

45 See ANDREW C. McLAUGHLIN, LL.D., *THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* (2007).

46 See generally H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* (1993).

47 See, e.g., Eskridge, Jr., *Some Effects*, *supra* note 1, at 2066-67.

American courts are the environment conducive to social mobilization because their judicial process is relatively open compared to the political process, judicial independence is guaranteed within that environment, and the political and ideological composition of the federal judiciary is flexible.<sup>48</sup>

The thesis of judicial opportunity resonates in some institutional settings where the judicial review power is relatively effectively exercised by supreme courts or specialist constitutional courts. For example, in Brazil, India, South Africa, South Korea, and Taiwan, actors of social movements also appropriate the process of judicial review to mobilize for constitutional change.<sup>49</sup>

However, in other institutional settings where judicial institution is weak or politically dependent, social actors may seize other important constitutional opportunities. Stephen Ellmann, in discussing activist lawyers in the third world, argues that “courts are not the only governmental forum with which lawyers can work.”<sup>50</sup> Maria Akchurin also indicates that environmentalist lawyers and activists in Ecuador appropriate the process of the constitutional assembly to mobilize the right of nature, which lead to a constitutional adoption of this right.<sup>51</sup> In particular, as constitution-making and constitutional amendments are the prevailing feature in the countries which are struggling to transition into a more constitutionalist regime, they create important constitutional opportunity for constitutional mobilization, as is evident in Kenya, South Africa, Somalia, Zambia, Zanzibar, and Zimbabwe.<sup>52</sup>

### C. *Constitutional Framing.*

The framing theory is directed to the “*conscious strategic efforts by*

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48 NeJaime, *supra* note 1, at 900.

49 See TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA, AND SOUTH AFRICA (Oscar Vilhena et al. eds., 2013) (particularly chapters 22, 23, and 24); Ki-young Shin, *The Politics of the Family Law Reform Movement in Contemporary Korea: A Contentious Space for Gender and the Nation*, 11 J. KOREAN STUD. 93 (2006); Chang-Ling Huang, *Civil Society and the Politics of Engagement*, in TAIWAN'S DEMOCRACY CHALLENGED: THE CHEN SHUI-BIAN YEARS 195, 199 (Yun-han Chu et al. eds., 2016).

50 Stephen Ellmann, *Cause Lawyering in the Third World*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 349, 366 (Austin Sarat & Stuart A. Scheingold eds., 1998).

51 Maria Akchurin, *Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador*, 40 LAW & SOC. INQUIRY 937 (2015).

52 CONSTITUTIONAL DEVELOPMENT, *supra* note 20. See also CIVIL SOCIETY, *supra* note 20.

*groups of people to fashion shared understandings of the world and of themselves that legitimate and motivate collective action.*<sup>53</sup> Frames are conditioned by the circumstances that make people “feel both aggrieved about some aspect of their lives and optimistic that, acting collectively, they can redress the problem.”<sup>54</sup> Framing, therefore, involves identifying problems, exposing responsible actors, and proposing solutions.<sup>55</sup> Scholars also identify several aspects of frames, including ideas, sentiments, identity, culture, and strategies.<sup>56</sup>

On that ground, *constitutional framing* involves identifying constitutional problems and suggesting constitutional solutions. Constitutional frames are conditioned by people’s grievance about the existing constitutional system and their demand for constitutional change. To frame constitutional arguments and demands, social actors refer to distinctive constitutional language, ideas, norms, or symbols, which include: (1) fundamental constitutional principles (such as, the separation of power and judicial independence); (2) constitutional rights (which is to say a social actor’s general understanding of constitutional rights, principles of constitutional rights like proportionality, and specific constitutional rights); (3) constitutional institutions (the legislature, the executive, and the judiciary); (4) and constitutional procedures (such as judicial review and constitutional referendum).<sup>57</sup>

American constitutional theorists argue that, “[The [U.S.] Constitution offers resonant frames for social movement actors.”<sup>58</sup> Such theorists focus exclusively on the domestic frame, which stems from the fact that the Warren Court focused exclusively on domestic law.<sup>59</sup>

The idea that social actors deploy the existing constitution to frame constitutional arguments and mobilize for constitutional change also resonates elsewhere. To illustrate, consider the case in which women movement actors in South Korea relied on the existing constitution to frame constitutional arguments and mobilize to abolish the Korea’s family head system (*hoju chedo*). The practice of *Hoju chedo*, as stipulated in South Korea’s Civil Code, subordinated women’s rights and status to the male

53 McAdam et al., *supra* note 42, at 6 (emphasis in original).

54 *Id.* at 5.

55 Nejaime, *supra* note 1, at 892.

56 McAdam, et al, *supra* note 42, at 5.

57 For general constitutional language and ideas, see DIETER GRIMM, CONSTITUTIONALISM: PAST, PRESENT, AND FUTURE (2016).

58 Nejaime, *supra* note 1, at 892.

59 Fontana, *supra* note 3, at 45-6.

head of the family.<sup>60</sup> In contrast to the conservative calling for “respecting the tradition,” women movement actors mobilized for “respecting the Constitution,” which means to respect the constitutional provisions on equal rights, human dignity, and gender equality.<sup>61</sup> Movement actors instituted litigation challenging the constitutionality of the family head system. With the support of the Alliance and Lawyers for a Democracy Society, some members of The Citizens’ Alliance for the Abolishment of the Family-Head System, which had been founded through the efforts of 113 women’s organizations, filed several appeals to local courts in Seoul in 2001 challenging the constitutionality of relevant articles in the Civil Code.<sup>62</sup> The appeals were transferred to the Constitutional Court for judicial review. In February 2005, the Court decided the family head system was unconstitutional, which effectively led to its abolishment in the revised Civil Code.<sup>63</sup> This case suggests that the women movement actors invoked the existing Constitution to frame their argument, and to demand equal rights and gender equality in South Korea.

In other contexts, mobilizing actors do not merely frame their arguments based on the existing constitution. There is a growing scholarship on the globalization of constitutional law, in which scholars discuss the social forces (such as lawyers and investors) of constitutional globalization.<sup>64</sup> This literature, however, has yet to consider the fact that social actors often employ international law and transnational constitutional law to mobilize for constitutional change. The force of globalization diffuses constitutional ideas embodied in international treaties, especially international human rights laws, and in foreign constitutional texts, to all corners of the globe. Social actors in the developing world are motivated by these global constitutional ideas and mobilize for domestic constitutional change in line with the global values, which contribute to the process of constitutional globalization.<sup>65</sup> In addition, transnational social movements, transnational NGOs<sup>66</sup> and transnational networks focusing on global constitutional issues

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60 Shin, *supra* note 49, at 113.

61 *Id.* at 100.

62 Hyunah Yang, *Colonialism and Patriarchy: Where the Korea Family-Head (Hoju) System had been Located*, in *LAW AND SOCIETY IN KOREA* 51 (Hyunah Yang ed. 2013).

63 *Id.* at 52.

64 David S. Law, *Globalization and the Future of Constitutional Rights*, 102 *NW. U.L. REV.* 1277, 1317 (2008); Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 50 *V.A. J. INT’L L.* 985, 991, 993 (2009).

65 See generally BETH A. SIMMONS, *MOBILIZING HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

66 BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL*



like IDEA,<sup>67</sup> inspire and support domestic social actors to mobilize for realization of global constitutional values in the local context. In addition, the revival of the law and development movement also contributes to the spread of legal knowledge including knowledge about the constitutional experience of established constitutional democracy in the developing world.<sup>68</sup> Together, these various international influential parties, sources of inspiration, and means of sharing ideas about drafting constitutions come together to shape the process of constitutional framing on a global scale.

Consequently, in the developing world, not only existing constitutional text but also international instruments and transnational constitutional sources offer ideas, norms, and symbols for social actors to frame constitutional arguments and mobilize for constitutional change. In particular, when developing nations are struggling for formal constitutional reform, the existing constitution offers the frame for social actors to address internal problems to the existing constitutional order while international instruments and foreign constitutional texts offer sources for social actors to frame constitutional solutions.

Yet, a sense of nationalism, exceptionalism, and community identity may result in frame alignment, frame amplifying, and extending frames.<sup>69</sup> Constitutional alignment, a term which I have created, refers to the connection and integration of transnational and national sources in framing constitutional arguments. In amplifying frame, social actors may present and underline specific constitutional values which may connect to their specific identity. Conversely, in extending frames, social actors connect their identity-base constitutional arguments to the broader national picture to draw wider public support.

#### *D. Constitutional Resources.*

Resource mobilization theory depicts mobilizing actors as rational actors who are able to gain the support of external resources for fixed goals.<sup>70</sup> Scholars identify different types of resources, including financial, rhetorical, institutional, and “human” resources.<sup>71</sup> Social actors mobilizing

MOVEMENTS AND THIRD WORLD RESISTANCE 276 (2003) and Christopher McCrudden, *Transnational Culture Wars*, 13 I.CON 434, 436 (2015).

<sup>67</sup> See IDEA INT’L, <https://www.idea.int/> (last visited Mar. 1, 2017).

<sup>68</sup> See generally PROMOTING THE RULE OF LAW ABROAD : IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., 2006).

<sup>69</sup> Nejaime, *supra* note 1, at 893.

<sup>70</sup> Jenkins, *supra* note 41, at 529.

<sup>71</sup> *Id.* at 533.

for constitutional change also need these resources. However, *constitutional* mobilization requires distinctively *constitutional* resources in the form of state actors who will play an influential role in constitutional change. Constitutional mobilizers need to garner the support from these actors to achieve their constitutional goals.

Constitutional resources refer to what Balkin labels as “nodes of power and influence” who “determine which ideas and positions ascend into plausibility and dominance and which are cast into the dustbin of history.”<sup>72</sup> In American constitutional culture, the “nodes of power and influence” are those who have the judicial review power, namely judges. Consequently, social actors would approach them as mobilization resource.<sup>73</sup>

The idea that judicial elites are the resource for constitutional mobilization is reflected in the institutional settings where judges can influence constitutional change through their judicial review power. For example, in May 2005, civil members of the Taiwan Cabinet Commission on the Promotion of Human Rights requested the cabinet to stop “the soon-to-be-implemented policy of requiring fingerprints for the state ID card.”<sup>74</sup> Civic members argue that “the fingerprint requirement was unconstitutional and a violation of citizen’s rights: it would contribute little to reducing crime rates but would carry great risks of identity theft for citizens.”<sup>75</sup> One of the civic members, Peter Huang, created the activist group called Citizen’s Alliance Against the Fingerprint Requirement, which worked with social movements organizations.<sup>76</sup> Among other strategies, such as threatening to resign, writing pieces to oppose the policy, and holding conferences, Huang managed to prosecute his argument before the constitutional court.<sup>77</sup> He persuaded legislators from the ruling Democratic Progressive Party to request an interpretation from the Taiwan’s Constitutional Court. Then, on June 19, 2005, the Court declared the policy as unconstitutional, effectively striking down the fingerprint requirement.<sup>78</sup>

But, in many other contexts, constitutional judges are not the mobilization resource. For example, actors of the Sunflower Movement approached legislators rather judges to demand for constitutional change. In new democracies where courts have constitutional roles, courts are often

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72 BALKIN, *supra* note 1, at 182-3.

73 Nejaime, *supra* note 1, at 897-9.

74 Huang, *supra* note 49, at 199.

75 *Id.* at 209.

76 *Id.* at 199.

77 *Id.*

78 *Id.*

attacked by political elites.<sup>79</sup> In these cases, social actors will turn to political rather than judicial actors as “nodes of power and influence”<sup>80</sup> to garner support of their constitutional goals. For example, social movement actors in Egypt focused on members of the constituent assembly to demand for change of constitutional process and substance.<sup>81</sup> In the developing world especially, courts are often weak, politically controlled, incompetent, and lack public trust, which prevents them from playing constitutional roles.<sup>82</sup> In such context, social actors will approach political elites as mobilization resources who in turn impact the scope, agenda, and strategies and goal of constitutional mobilization.

#### *E. Constitutional Change.*

In constitutional mobilization, social actors advocate for constitutional change. Constitutional changes must be understood as a concept with multiple incarnations, which include different types of change, namely cultural, reformative, and revolutionary. Cultural changes concern the change in the constitutional understanding, behavior, attitude, and consciousness of different social and state actors. Reformative changes refer to the incremental changes within the existing constitutional order. Revolutionary change concerns the creation of a new constitutional order.<sup>83</sup> Constitutional mobilization does not always result in constitutional change. Such mobilizations may fail or succeed. Also, the degree to which it may succeed will vary, as an episode of constitutional mobilization may create either minor or major changes.

In the United States, due to the extreme difficulty of formal constitutional change,<sup>84</sup> constitutional change primarily means the change in courts’ understanding of the Constitution’s meaning. Siegel calls this the

79 Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 COLUM. J. TRANSNAT’L L. 285 (2015).

80 BALKIN, *supra* note 1, at 182.

81 H. Badr & M. Ghali, *Social Movements, Constitutional Debates and Online Deliberations in the Post-Mubarak Egyptian Public Sphere*, in MEDIA CULTURE IN TRANSFORMATION: POLITICAL COMMUNICATION, SOCIAL NETWORKING AND TRANSITION IN EGYPT (Hanan Badr ed., 2016).

82 See Julius Court, et al., *The Judiciary and Governance in 16 Developing Countries* 1, (United Nations University, World Governance Survey, Working Paper No. 9, 2003).

83 Social actors may also seek to defend the existing constitutional values, like the case of Japan in which social actors try to defend the pacifist constitution against the government. *Japan’s Students at Forefront of Protests to Defend Pacifist Constitution*, FRANCE 24 (Sept. 16, 2015), <http://www.france24.com/en/20150916-japan-youth-students-abe-reform-security-bills-army-overseas-pacifist-constitution>.

84 See generally David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

change in constitutional culture or the networks of understandings and practices that structure our constitutional tradition.<sup>85</sup> This practice is also reflected elsewhere. For example, as the case of South Korea described above illustrated, the women's movement actors sought to change courts' understanding of the constitutional meaning of equality and dignity in order to effect constitutional change.<sup>86</sup>

But the practice wherein social actors seek to change the judicial understanding of the constitution as a means of effecting constitutional change is not prevalent in places where constitutional meanings are not defined by the courts either because those courts do not have the constitutional interpretation power (such as in China and Vietnam) or this power is limited. For example, in Japan where judicial review is limited, the power to interpret the Constitution is vested to the Government, particularly its Cabinet Legislation Bureau.<sup>87</sup> On July 1, 2014, the government of Japan issued a decision reinterpreting Article 9 of the Constitution to allow the Japanese use of force overseas "in the event of an armed attack against a foreign country that has a close relationship with Japan."<sup>88</sup> Thousands of people protested, seeking to prevent the Japanese government's constitutional reinterpretation.<sup>89</sup>

Moreover, social actors seek to change not only the understanding of the existing constitution but also the process for conducting formal constitutional changes. Unlike in the U.S., in the last three decades formal constitution-making has been highly dynamic in the developing world as a component of the larger project of state-building.<sup>90</sup> In this case, social actors will focus on mobilizing for formal constitutional change.<sup>91</sup> Particularly during the period of transition from an authoritarian regime into a democracy, the language of a nation's constitution is often fluid and formal constitutional change occurs more often.<sup>92</sup> In such a context, mobilizing

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85 Siegel, *Text in Context*, *supra* note 1, at 303.

86 Yang, *supra* note 62, at 100.

87 Kensuke Ueda, *Reinterpreting Article 9 of the Constitution of Japan*, THE CONSTITUTION UNIT, Aug. 28, 2014, <https://constitution-unit.com/2014/08/28/reinterpreting-article-9-of-the-constitution-of-japan/>.

88 *Id.*

89 Euan McKirdy, *Japan Split as Nation Mulls End of Pacifism*, CNN (July 2, 2014), <http://edition.cnn.com/2014/07/01/world/asia/japan-constitution-protests/>.

90 JOANNE WALLIS, CONSTITUTION MAKING DURING STATE BUILDING (2014). Around 100 new constitutions have been put in place since the fall of the Berlin Wall. See Cheryl Saunders, *Constitution-Making in 21st Century*, 1 INTL. REV. L. 1, 2 (2012).

91 See, e.g., the actions of Egyptian social actors as described in Badr & Ghali, *supra* note 81.

92 On the unstable nature of constitutional transition, see Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997).

actors will often seek to effect formal constitutional change. For example, during the June Democracy Movement in 1987, the South Korean coalition of social movement organizations “agreed upon the importance of constitutional revision as a movement goal and a tool for consensus mobilization.”<sup>93</sup> Even in relatively established democracies, social actors also sometimes struggle for formal constitutional change as a means of strengthening democratic aspects of government. An example of this sort of effort was the Sunflower Movement in Taiwan. One of the Sunflower Movement’s demands was for a formal constitutional change in order to secure “the equivalent of a constitutional Bill of Rights”<sup>94</sup> which would include “detailed provisions to protect basic human and social rights from discrimination or infringement by the state and substantive abrogation by government-business collusion.”<sup>95</sup>

### III. A DIALOGICAL THEORY OF CONSTITUTIONAL MOBILIZATION

Social mobilization as well as constitutional law may have transnational dimensions, but each is deeply shaped by contextual factors: institutional settings, intellectual environment, ideology, political culture, and social-economic conditions. Therefore, there may not be a universal theory about constitutional mobilization. Alternatively, I suggest pluralizing the theorization of this phenomenon with close attention paid to the local context.<sup>96</sup> In particular, the contextual theorization must be sensitive to the difference of social mobilization for constitutional change in different political regimes. With this in mind, in this section I elaborate a dialogical theory of constitutional mobilization under authoritarian regime. Meticulous case-studies can be a method to overcome the challenges in comparative constitutional law concerning the complexity of local context and constitutional interdependence. Therefore, I will offer a Vietnamese case-study to illustrate the dialogical theory in the next part.

Under what conditions, how, and why do social actors mobilize for constitutional change in authoritarian regime? The term “authoritarian

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93 Chulhee Chung, *Mesomobilization and the June Uprising: Strategic and Cultural Integration in Pro-democracy Movements in South Korea*, in *EAST ASIAN SOCIAL MOVEMENT: POWERS, PROTEST, AND CHANGE IN A DYNAMIC REGION* 169 (Jeffrey Broadbent & Vicky Brockman eds., 2011).

94 Deniis Engbarth, *Taiwanese Activists Push for Citizen-Based Constitution*, INTRA PRESS SERVICE (Feb. 5, 2015), <http://www.ipsnews.net/2015/02/taiwanese-activists-push-for-citizen-based-constitution/>.

95 *Id.*

96 Perhaps pluralization is common to comparative constitutional theorization. See Stephen Gardbaum, *How Do and Should We Compare Constitutional Law?*, in *COMPARING COMPARATIVE LAW* 109 (Samantha Besson, et al eds. 2017).

regime” refers to a political regime featuring centralized power (whether by person, military, or party), limited civil liberty, and the suppression of social mobilization.<sup>97</sup> Given the suppressive nature of an authoritarian regime, the normal intuition is that constitutional mobilization cannot happen under such a regime. My theory, however, is that, under an authoritarian regime, the constitution-making process offers a particular constitutional opportunity for social actors to mobilize the public and political leaders to engage in a national, popular constitutional dialogue, which often results in reformative and cultural constitutional changes.

The language of dialogue is prevailing in contemporary constitutional theory. Dialogical constitutional theories have been developed on the grounds of constitutional experience in the United States, Commonwealth nations, and common law Asia.<sup>98</sup> The existing dialogical constitutional theories have a narrow focus on constitutional dialogue triggered by the practice of judicial review power. Constitutional dialogue is manifested in three different forms:<sup>99</sup> (1) national institutional dialogues or the dialogues between courts and political institutions about constitutionality;<sup>100</sup> (2) transnational judicial dialogues or dialogues between supreme courts and constitutional courts in different countries about the content and process of constitutional decision-making;<sup>101</sup> and (3) public, national constitutional dialogues. The existing dialogical constitutional theories fail to appreciate the possibility of a broader, public national constitutional dialogue. Especially, when focusing on dialogical judicial review, scholars have largely ignored the possibility of constitutional dialogue without judicial review. Moreover, constitutional mobilization has virtually disappeared in the existing dialogical constitutional scholarship, which mainly stems from the domination of comparative constitutional juris-centrism. Consequently, scholars fail to recognize the possibility of constitutional mobilization in triggering constitutional dialogue. I suggest an extension to popular, national constitutional dialogue in which the mobilized public engages in a conversation with political leaders to exchange ideas, opinions, and discuss

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97 For a comprehensive study of authoritarianism, see JUAN J. LINZ, *TOTALITARIAN AND AUTHORITARIAN REGIMES* (2000).

98 Mark Tushnet, *Dialogic Judicial Review*, 61 *ARK. L. REV.* 205, 208-10 (2008); ALISON L. YOUNG, *DEMOCRATIC DIALOGUE AND THE CONSTITUTION* 173 (2017); YAP, *supra* note 32.

99 I thank Tom Ginsburg for his suggestion of these three manifestations of constitutional dialogue.

100 On this form, see, e.g., Kent Roach, *Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures*, 80 *CANADIAN BAR REV.* 481 (2001).

101 On this form, see, e.g., David S. Law and Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 *WASHINGTON L. REVIEW* 523 (2011).

constitutional questions.

*A. Dialogical Opportunity.*

Recent scholarship on the role of courts in authoritarian regimes seems optimistic about judicial empowerment, arguing that courts provide an environment for social actors to challenge authoritarian states.<sup>102</sup> But, this argument relies mainly on the role of courts in providing forum for activists to challenge ordinary law or governmental policies. When it comes to the constitutional level, courts are less relevant mainly because the constitutional role of courts in authoritarian regimes is more limited than their role in ordinary legal matters. Although social actors may occasionally deploy the courtroom when there is an opportunity, generally, judicial process is not the main opportunity for social actors to mobilize for constitutional change under authoritarian regimes.

Alternatively, formal constitutional process, especially constitution-making, creates an important opportunity for the operation of constitutional mobilization under authoritarian regimes. This is because constitution-making is normally a critical moment touching on fundamentals of a polity. Moreover, the constitution-making process is usually open and inclusive, which draws the attention and participation of a wide range of social and state actors. But, as this process has multiple steps (including agenda-setting, drafting, state deliberation, public deliberation, ratification) mobilizing actors need to choose the right moment to address their constitutional concerns. For example, it is too early to address constitutional concerns during the initial steps of setting an agenda, when the constitution-makers have just produced a first constitutional draft, or when that draft is discussed within the institutional circle. It is also too late to address constitutional concerns when the constitution-makers are about to approve the new constitution. The most suitable moment to address constitutional concerns is when the regime releases the draft constitution for public deliberation. Social actors ought to seize this moment to mobilize a national constitutional dialogue.

To a certain extent, the particular environment of formal constitutional process must be accompanied by the regime's willingness to permit the political control of civil liberty. The overall constitutional structure and politics of an authoritarian regime is not conducive to social mobilization, but, in response to social and political complexity, an authoritarian regime

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<sup>102</sup> See generally Tamir Moustafa, *Law and Courts in Authoritarian Regimes*, 10 ANNU. REV. LAW SOC. SCI. 281 (2014).

may soften their suppression of civil liberty by, perhaps, allowing the public discussion of constitutional issues which would permit a constitutional environment to exist wherein social actors may be able to mobilize a national constitutional dialogue while a formal constitutional change process is underway.

*B. Dialogical Frame.*

Scholars have pointed out that constitutions in authoritarian states operate as *manuals, billboards, blueprints, and window dressing*.<sup>103</sup> Yet, authoritarian constitutions have another function: they operate as the *mobilizing frame*. It functions as the frame for social actors to identify constitutional problems internal to the existing authoritarian regime and mobilize for constitutional change. To develop arguments for constitutional changes, social actors will turn to alternative sources, including transnational sources. International treaties and foreign constitutions operate as the frames for social actors to formulate arguments for constitutional change. But, a sense of nationalism and community identity contextualize global and transnational frames, which results in the dialogical interaction between global and local frames. This dialogical framing also allows social actors to draw the public support, to avoid political punishment, and to consolidate the legitimacy of their constitutional arguments.

Three dialogical strategies<sup>104</sup> in constitutional framing are also applied. First, social actors *align* transnational constitutional discourse with some unfilled language in the existing constitutional text and in the authoritarian elite's constitutional rhetoric. For example, even authoritarian constitutions and leaders employ language like "democracy," "rule of law," or "human rights" and social actors working for change in such nations use that language to argue that their actions aren't in contrast to the existing constitution but, rather, that they are merely seeking to realize the existing constitution's original language.<sup>105</sup> The framing space is noticeably wider when the existing constitution and constitutional rhetoric embrace ambiguous and contradictory language. Second, social actors *amplify* specific constitutional values. As an example of such amplification in an

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103 Tom Ginsburg & Alberto Simpser, Introduction, *in* CONSTITUTIONS IN AUTHORITARIAN REGIMES 2 (Tom Ginsburg & Alberto Simpser, eds., 2013).

104 NeJaime, *supra* note 1, at 893.

105 See *infra* part VI.B and accompanying text for examples of this behavior.



authoritarian context, social actors may focus on specific features of the authoritarian regime like single-party rule or political ideology. Such identity-based mobilization may also underline specific values. For example, as I will discuss later in this Article, Vietnamese gay activists focused on the constitutional protection of freedom of marriage as a means of advocating for their desired changes.<sup>106</sup> Third, to engage in a national constitutional dialogue, social actors need to *extend* their specific concerns to general, national concerns. For example, social actors may connect their specific grievances against the government to general concerns of the population such as free elections or political competition. As I will discuss later in this Article, an example of this behavior was when Vietnamese gay activists connected their concerns about gay rights to more general human rights in order to gain more popular support and legitimacy for their pursuit of gay rights.<sup>107</sup>

### C. *Dialogical Resource*

The constitutional resources in the authoritarian regimes are political elites rather than judicial elites. They are the forces to have the final say on constitutional issues. Therefore, social actors will approach them as mobilization resource using dialogical strategy.

Law and society scholars have pointed out that activists mobilizing under authoritarian conditions “avoid strategies and tactics common under liberal democratic conditions, such as marches or open and structured association.”<sup>108</sup> They try to avoid “direct confrontation with the state, or being seen as a threat to existing arrangements of power.”<sup>109</sup> To survive, social actors mobilizing constitutional change under authoritarian condition also need to adopt a dialogical rather than confrontational approach. They also try to avoid confrontational methods like demonstrating or organizing oppositional bodies. They instead adopt dialogical means to communicate with the public and with political leaders. But, unlike actors mobilizing ordinary legal reform, actors mobilizing constitutional change inevitably directly challenge the existing constitutional arrangement and those in power. The adherence to the formal constitutional change process initiated by the existing regime and to constitutional rhetoric adopted by those in

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106 See *infra* part VI.B and accompanying text.

107 See *infra* part VI.B and accompanying text.

108 Lynette J. Chua, *Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore*, 46 LAW & SOC’Y REV. 713, 719 (2012).

109 *Id.* at 722.

power is a survival strategy on the part of an applicable authoritarian regime. The government may initiate counter-mobilization against the constitutional mobilization. State actors, however, would not suppress but engage in a dialogue with social actors and the public at large.

*D. Dialogical Constitutional Change.*

The consequence of a constitutional mobilization under an authoritarian regime is determined by the nature of authoritarian institutional settings and the balance of power between authoritarian leaders and social forces. When authoritarian leaders are powerful and social forces are weak, constitutional mobilization would not lead to a revolutionary constitutional change. In this context, social actors as rational actors would not be naïve enough to force authoritarian leaders to give up their power and change the regime in a violent and revolutionary way. The more likely expected consequence is a national constitutional dialogue which leads to reformative and cultural constitutional change.

#### IV. EXPLORATORY DESCRIPTION

*A. Background.*

Under communist rule, Vietnam experienced five constitutions promulgated in 1946, 1959, 1980, 1992, and most recently 2013.<sup>110</sup> Despite its authoritarian conditions, constitutional mobilization is evident in the modern constitutional history of Vietnam. During the authoritarian rule of the French colonists in the early twentieth century, public intellectuals and their organizations actively mobilized for creation of a constitutional government in Vietnam defined by western features such as a written constitution, popular sovereignty, liberal rights, and the separation of powers.<sup>111</sup> When the communist regime dominated North Vietnam, a striking social movement called *Nhân Văn Giai Phẩm* emerged in the late 1950s, mobilizing for democratization and constitutional protection of the

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<sup>110</sup> See MARK SIDEL, *THE CONSTITUTION OF VIETNAM: A CONTEXTUAL ANALYSIS* 27, 45, 67, 83 (2009). For the 2013 Constitution, see Pip Nicholson, *Vietnamese Constitutionalism: The Reform Possibilities*, 11 *ASIAN J. COMP. L.* 199, 200 (2016).

<sup>111</sup> See generally PHAN ĐĂNG THANH, *TU TƯỞNG LẬP HIẾN VIỆT NAM NỬA ĐẦU THẾ KỶ 20 [VIETNAMESE CONSTITUTIONAL THOUGHTS IN THE FIRST HALF OF THE TWENTIETH CENTURY]* (2006).

freedom of speech, which they ultimately successfully enshrined in the 1946 Constitution.<sup>112</sup> After the national unification in 1975, protestors continued to demonstrate against their government's misuse of public power and advocated for the protection of citizens' rights.<sup>113</sup>

Most striking is the recent explosion of constitutional mobilization during the process of making the 2013 Constitution. On August 4, 2011, the National Assembly of Vietnam (NA) decided to comprehensively revise the 1992 constitution in response to domestic "renovation" and international integration.<sup>114</sup> From January 2 to March 31, 2013, the NA released a draft of a new constitution (rather than constitutional amendments) to the public for comment. This draft retained substantial features of the socialist constitutional system, including the leadership of the Communist Party and state ownership of all lands. It also removed the right to free primary education, eliminated the leading role of the state-owned sector, introduced a provision restricting human rights for common goods, pronounced the military's loyalty to the Communist Party, and created an advisory constitutional council.<sup>115</sup>

During the constitutional consultation process, constitutional intellectuals, activists, social groups and organizations vehemently opposed the draft version of the Constitution and started to engage in constitutional mobilization.<sup>116</sup> Below I describe this mobilization on chronological base.

### B. *Petition 72.*

This petition for fundamental constitutional change has been examined in detail elsewhere<sup>117</sup> so a short summary will suffice here. On February 4, 2013, Dr Nguyễn Đình Lộc, a constitutional law scholar and former Minister of Justice, submitted what came to be known as Petition 72 to Vietnam's Constitutional Amendment Committee. Constitution-makers responded to the group with a written statement saying that their petition

112 Peter Zinoman, *Nhân Văn—Giai Phẩm and Vietnamese 'Reform Communism' in the 1950s: A Revisionist Interpretation*, J. COLD WAR STUD., Winter 2011, at 60.

113 This includes in the 1997 Thái Bình protests and the more recent 2012 *Tiên Lãng* and *Văn Giang* protests. For more details, see Toan Le, *Perspectives on Land Grabs in Vietnam*, in LAND GRABS IN ASIA: WHAT ROLE FOR THE LAW? 150 (Connie Carter & Andrew Harding eds., 2015).

114 Interview with a member of the Constitutional Amendment Committee in Hanoi (Jan. 13, 2017) [hereinafter, Constitutional Amendment Committee Interview].

115 See Bui Ngoc Son, *Contextualizing the Global Constitution-Making Process: The Case of Vietnam*, 64 AM. J. COMP. L. 931948-9 (2016).

116 For a short report on this, see Bui Ngoc Son & Pip Nicholson, *Vietnam Moves Cautiously on Constitutional Reform*, ASIAN CURRENTS (Jun. 15, 2015), <http://asaa.asn.au/vietnam-moves-cautiously-on-constitutional-reform/>.

117 Son & Nicholson, *supra* note 17.

would be considered equally as other submissions. Eventually, in late 2013, when a new constitution was adopted without substantive changes, the group released an open statement calling for it to be boycotted.<sup>118</sup>

Petition 72 drew wide public attention.<sup>119</sup> Mr Nguyễn Quang A, a human rights activist and a key member of the 72 group, explained their purpose as constituting the following [translated from the original Vietnamese quotation]: “*In fact, at the beginning of the year, when Petition 72 was initiated, the initiators did not establish a main goal that the delegates of the National Assembly will understand and change or they will make a constitution which is really a constitution... Its chief aim is to initiate a learning movement, a movement among the entire people, especially among the young people, a movement for debating, studying, and discussing the Constitution... If there are some changes among the National Assembly or the authorities, this will be welcomed, but this outcome is only supplementary.*”<sup>120</sup> Thus, the main goal of the 72 group was to trigger a national constitutional dialogue. In fact, Petition 72 had a strong influence on the subsequent constitutional mobilization and debate in Vietnam in 2013.

### C. “*Let’s Draw up the Constitution.*”

The founding members of the group called *Let’s Draw up the Constitution* were Ngô Bảo Châu, a Vietnamese-French mathematician at the University of Chicago, who received the Fields Medal in 2010, Đàm Thanh Sơn, a Vietnamese physicist also at the University of Chicago, and Nguyễn Anh Tuấn, an associate scholar of the John F. Kennedy School of Government at Harvard University and former Editor-in-Chief of *Vietnamnet*, one of the most popular official online media in Vietnam. The group was then joined by Bùi Đức Lại, a retired party-member and scholar, Nguyễn Ái Cần, a lawyer in the United States, and three legal scholars from Vietnam National University-Hanoi School of Law, namely Nguyễn Đăng Dung, Vũ Công Giao, and Trần Kiên. The group widely drew the attention

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118 *Id.* at 692, 696.

119 Thichhoctoan, Thông báo của nhóm soạn thảo và ký kiến nghị 72 về sửa đổi Hiến pháp [Announcement of the Group drafting and signing Petition 72 on Amending the Constitution], CỘNG VIẾT HIẾN PHÁP (April 17, 2013), <https://hienphap.wordpress.com/2013/04/17/thong-bao-cua-nhom-soan-thao-va-ky-kien-nghi-72-ve-sua-doi-hien-phap/>.

120 *Thách báo nhà nước tranh luận về HP* [Daring the State Media to Debate on the Constitution], BBC (Nov. 18, 2013), [http://www.bbc.com/vietnamese/vietnam/2013/11/131117\\_vn\\_constitution\\_petition72\\_aims](http://www.bbc.com/vietnamese/vietnam/2013/11/131117_vn_constitution_petition72_aims).

of the Vietnamese public and intellectuals mainly thanks to the reputation of the founding members.

On February 1, 2013, one day before the state formally realized the draft constitution for public consultation, this group created a website called *Cùng Viết Hiến pháp* (hereinafter, CVHP), for which the group has this name.<sup>121</sup> The group was aware that “the Draft Amendment to the 1992 Constitution has drawn wide attention among the people.”<sup>122</sup> The group therefore seized this opportunity to introduce their activity.<sup>123</sup>

The group’s work included three components: creating a forum for constitutional dialogue, providing a means of digesting public opinion on the draft constitution, and offering constitutional suggestions.

First, CVHP created a forum for a constitutional dialogue, which was their primary goal.<sup>124</sup> The group attempted to create a dialogical space for all those concerned with the constitutional revision to discuss this topic seriously and democratically.<sup>125</sup> The group believed that a democratic dialogue about constitutional revision is the initial step which will facilitate further straightforward dialogue on the building up the rule of law in Vietnam.<sup>126</sup> It is important to point out that no such similar public platform existed in Vietnam, aside from the official government website through which citizens can submit formal comments.

The CVHP published different constitutions in Vietnamese history, different drafts of the revised constitution including the draft officially released by the state and alternative draft proposed by constitutional activists like the 72 group, writings on foreign constitutions, and some writings on constitutional theory, and comments on the draft constitutions prepared by the constitution-makers. The CVHP focused on the most controversial issues of constitutional revision which are divided into seven themes: the party leadership, human rights and citizen rights, control and separation of powers, land ownership and state-owned economic sectors, constitution-making and referendum, constitutional review, and others.

Pursuant to the commitment to create an open forum, the CVHP

121 See the website of the group here: CVHP, <https://cungviethienphap.wordpress.com/> (last visited March 2, 2018). I frequently contributed papers to this forum during the constitution-making process. Through this, I closely observed the activity of the group and maintained connections with the group members. To conduct this study, I further interviewed and had informal conversations with some of them.

122 *Id.*

123 Interview with a member of the CVHP group in Hanoi. (Jan. 15, 2017) [hereinafter CVHP Interview].

124 *Id.*

125 CVHP, *supra* note 121.

126 *Id.*

published writings by a variety of authors, ranging from established legal scholars, especially constitutional law scholars, lawyers, officials, politicians, and journalists to ordinary people and dissidents inside and outside of Vietnam. CVHP's purpose in doing this was to disseminate diverse positions and opinions on contentious constitutional issues.<sup>127</sup> Some writings are extremely liberal, while the others are extremely conservative. Some writings strongly argue for a multi-party system rooted in western liberal ideas, while the others strongly defended the exclusive role of the leadership of the Communist Party grounded in the conventional justifications of historic victory. The CVHP also amassed and published the writings from a wide range of sources, ranging from the party outlets to dissidents' blogs, personal blogs, and foreign websites. It is the only forum of this kind tolerated by the government. Many radical, dissident writings can be freely accessed in this website, but the same writings were blocked in other forums. The regime possibly tolerated this forum because of the reputation of the founding members, and because the CVHP group was balanced and neutral in its publication of a wide range of materials.

Second, CVHP also conducted an online survey on public opinion on the draft constitution.<sup>128</sup> The data of the survey was collected from March 1-20, 2013, with 3122 people responding. 60% of the Internet protocol addresses were from Vietnam, while the others were from forty other nations. This suggests that the Vietnamese diaspora and Vietnam watchers were able to access to the forum, which enabled them to engage in the constitutional dialogue from afar. The result is as follows:

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127 CVHP Interview, *supra* note 123.

128 The result and the group's analysis are available at: *A - Thông tin về người tham gia khảo sát [Information about Participants in the Survey]*, <https://hienphap.files.wordpress.com/2013/03/phantich.pdf> (last visited March 2, 2018).

*Table 1: CVHP's Online Survey on Public Opinion on the Draft Constitution*<sup>129</sup>

Questions	No	Yes	No Opinion	Other Opinions	No Answer	Note
Should Vietnamese be established as the national language?	14.9	76.9	4.2	1.6	2.4	All
	14.6	77.2	3.9	0.9	2.4	Only Vietnam

The survey of the group intentionally focused on the most controversial issues which were bitterly debated during the constitutional consultation process. Several issues had been raised in Petition 72. The CVHP group employed mathematician techniques to analyze the result of their survey, which was meant to reach to objective observations.<sup>130</sup> The group made three observations. First, there is a very high consensus (around 89-95%) on the concepts of rejecting the military's loyalty to the Communist Party, ensuring judicial independence, providing for the separation of powers, creating a body of constitutional review, and holding referendum on the new constitution. Second, there is a less agreement (around 80-86%) on the concepts of removing the provision on the leadership of the Communist Party, removing the provision on collective ownership of lands, and removing the provision on human rights restrictions. Third, there even more divergence regarding non-ideological questions, such as those dealing with the adoption of a constitutional described national language and providing for free and compulsory primary education.<sup>131</sup>

The online survey serves as an empirical base for CVHP to offer constitutional suggestions, their third activity. To prepare for the constitutional proposal, members of the group contentiously discussed before they could reach certain agreements.<sup>132</sup> The group then submitted their constitutional proposal to the Constitutional Amendment Committee

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<sup>129</sup> *Id.* The first line in the Note indicates all answers while the second line indicates only answers from Vietnam. The original questionnaire and results are in Vietnamese. I have provided the translation of the original Vietnamese writing for the results presented here.

<sup>130</sup> CVHP Interview, *supra* note 123.

<sup>131</sup> [*Information about Participants in the Survey*], *supra* note 128.

<sup>132</sup> *Id.*

via regular mail,<sup>133</sup> and published it on the group's website.<sup>134</sup> The group wanted to have dialogue with the constitution-makers, and so they purposely offered "constructive" suggestions<sup>135</sup> to minimize the risk of offending the Constitutional Amendment Committee.

On these grounds, the group's submission rejected the new provision stipulating the military's loyalty to the Communist Party because this provision may cause "mistakes in recognition and actions" and unnecessary contestations, rejected the provision on Vietnamese as the national language because such provision may cause conflicts among nationalities, and rejected the provision on human rights restrictions because this provision may be misused to violate human rights.<sup>136</sup> The group proposed retaining the provision on compulsory and free primary education since this has worked effectively in the past. In addition, the group supported removing the provision on the leading role of the state-owned economic sector and establishing multi-ownership of lands because the state's ownership of all lands is inconsistent with the market rules and is the root of corruption and serious social conflicts. The group also proposed creating a constitutional council with definitive judicial review power rather than having review powers invested in an advisory council.<sup>137</sup> The above suggestions are consistent with the popular opinion indicated in the group's online survey.

The group took a nuanced position on highly the contentious Article 4 of the draft Constitution, which affirmed the leadership of the Communist Party. The group contended that the first incorporation of Article 4 on the leading of the Communist Party in the 1980 Constitution is not necessary, but this constitutional establishment is a historical reality. In the current situation, the group believed, the elimination of Article 4 will result in unanticipated consequences regarding the stable development of the nation.<sup>138</sup> The group did not explicitly support retaining this Article but stated that if Article 4 is retained, it should be amended by recognizing that the leadership of the Communist Party is vested by the people through free elections and therefore subjected to the people's supervision and control. The group proposed that the Constitution should not provide for the class

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<sup>133</sup> *Id.*

<sup>134</sup> CVHP, *Đề xuất sửa đổi, bổ sung một số quy định của Dự thảo Hiến pháp sửa đổi năm 2013* [Suggestions on Amending, and Supplementing some Provisions of the Draft revised Constitution of 2013], <https://hienphap.wordpress.com/de-xuat/>.

<sup>135</sup> CVHP Interview, *supra* note 123.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*



nature and ideology (Marxism-Leninism and Ho Chi Minh's thoughts) of the Party because these areas are outside the scope of the Constitution and properly belong to another document—the charter of the Communist Party.

The CVHP's constitutional suggestions drew the public attention and were subjected to controversial discussions and criticisms in online media, especially its last suggestion regarding the Party's leadership.<sup>139</sup> Some criticize this suggestion as being illogical because free elections cannot coexist with the constitutional confirmation of the leadership of the Party while the others agree that this is a weak solution in the current situation.<sup>140</sup>

After the NA adopted the new constitution on November 28, 2013, the CVHP group released a farewell statement, stating that they completed their mission but that the new constitution was completely different from the suggestions made by the group and from the majority opinion of the audiences.<sup>141</sup> Constitution-makers did not officially respond to the specific constitutional proposals of the CVHP group. Rather, the constitution-makers maintained that they had received, studied, and treated all constitutional submissions equally.<sup>142</sup> However, informal conversations suggest that constitution-makers had a positive response to the CVHP's constitutional submission, mainly because the group's submission was "constructive,"<sup>143</sup> which means that they did not oppose the existing regime by, for example, calling for multi-party system.

Accordingly, the CVHP group successfully seized the opportunity of constitution-making to mobilize a constitutional dialogue. In regard to their main concern of a constitutional dialogue, they were much more successful. The group in fact had an "implicit constitutional dialogue" with the government. They sent their suggestions to the constitution-makers and political leaders who implicitly positively responded. More importantly, the group successfully created a wide space for open constitutional dialogue among the public and intellectuals on controversial and sensitive constitutional questions and, as a consequence of their careful and sensitive approach, their dialogue was ultimately tolerated by the government. In this

139 See, *Nhóm Cùng Viêt Hiến Pháp gửi đề xuất [the CVHP Group Releases the Suggestions]*, BBC TIENG VIET (Apr. 6, 2013), [http://www.bbc.com/vietnamese/vietnam/2013/04/130406\\_cvhp\\_proposal](http://www.bbc.com/vietnamese/vietnam/2013/04/130406_cvhp_proposal).

140 See, e.g., Lê Diễm Đức, *Giáo sư Ngô Bảo Châu đi trật đường rầy? [Professor Ngô Bảo Châu Run off the Rail]*, RFA (Apr. 8, 2013), <https://www.rfa.org/vietnamese/news/ReadersOpinions/ngo-bao-chau-ldd-04082013-04082013121533.html>.

141 Trankien2013, CVHP (Nov. 28, 2013), *Lời Tạm biệt [Farewell Statement]*, <https://hienphap.wordpress.com/2013/11/28/loi-tam-biet-cung-viet-hien-phap/>.

142 Interview with an Assembly deputy in Hanoi. (Jan. 12, 2017).

143 CVHP Interview, *supra* note 123.

sense, the CVHP group was more successful than the Petition 72 group. The reputation of the founding members of the CVHP group and its the focus on creating an impartial space for dialogue rather than taking tough stands on sensitive constitutional issues like question of admitting a multi-party system explains their success.

*D. Petition of The Alumni of the Hanoi Law University*

On February 21, 2013, nine alumni of the Hanoi Law University, one of the largest law schools in Vietnam, published the “Petition for the Amendment of the 1992 Constitution” (hereinafter, Law Alumni Petition).<sup>144</sup> They believed that law graduates play an important role in the development of constitutionalism. They wrote: “*More than ever, Vietnamese law students and graduates, whether they are inside and outside Vietnam, whether they graduated from any law schools in the world, are facing great opportunity and responsibility. Great in building the fundamental foundation of the Vietnamese legal system.*”<sup>145</sup> So, the law graduates appropriated the opportunity of the constitution-making process to mobilize the engagement of law students in constitutional change. The petition was circulated on the Internet, including on the blog of the 72 group. The law alumni also created a website to collect supporting signatures.<sup>146</sup> They mobilized support from law students and law graduates from different law schools throughout Vietnam and law schools located overseas.

Trịnh Hữu Long, one of the initiators of the law graduates’ petition, stated that the purpose of this petition was to make a voice with professional quality to this circle of constitutional revision [paraphrased].<sup>147</sup> The Law Alumni Petition focuses on two points concerning not the substantial but rather the procedural aspects of constitution-making. First, they called for removing the deadline for public constitutional consultation (from January 2 to March 31, 2013). They argued that the deadline assumes that constitutional suggestions and comments beyond this limited period would

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144 Heinphap, *Thư ngỏ và Kiến nghị về Việc Sửa đổi Hiến pháp của Cựu Sinh Viên Luật Hà nội* [Hanoi Law Graduates’ Open Letter and Petition Concerning Constitutional Revision] (Feb. 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/>.

145 *Id.*

146 The website used the following url which has since been deleted: <http://hienphap.kienngghi.net/>.

147 *Sinh viên luật kiến nghị sửa đổi Hiến pháp* [Law Students Petition for Constitutional Revision], BBC (Feb. 25, 2013, 3:57 GMT), [http://www.bbc.com/vietnamese/mobile/vietnam/2013/02/130225\\_law\\_students\\_constitution.shtml](http://www.bbc.com/vietnamese/mobile/vietnam/2013/02/130225_law_students_constitution.shtml).

not be considered, which is contrary to the concept that the constitution-making power belongs to the people. Accordingly, the Law Alumni Petition argued for the people to have the legitimate right to discuss the draft constitution until they believed that the draft met with their will and aspirations.<sup>148</sup>

Second, the Law Alumni Petition called for popular ratification of the new Constitution in a national referendum. To justify this argument, the law alumni cited to the first constitution of Vietnam enacted in 1946, which provided for constitutional referendum. This provision was abolished by the subsequent constitutions. In addition, the Law Alumni also stated that a constitutional referendum was preferable because it would be consistent with the popular practices with regards to promulgating constitutions as practiced by members of the international community.<sup>149</sup> So, both the national constitutional legacy and foreign constitutional experience invoked the call for constitutional referendum. The Law Alumni also invoked social contract theory to consolidate the theoretical underpinning of their petition. They argued that because the constitution is the social contract between the people and the state, the people are the true authors of the constitution and the constitution must be ratified by the people in a national referendum.<sup>150</sup> Importantly, the fact that the existing constitution (the 1992 Constitution) does not provide for popular ratification does not limit the practice of constitutional referendum because this is a “natural right” of the people.<sup>151</sup> They also stressed that the 1992 Constitution’s provisions which allowed the National Assembly to possess the constitution-making power as part of their ordinary legislative powers was inconsistent with the principle of popular sovereignty confirmed in the same document.<sup>152</sup> Accordingly, the law graduates used the existing constitution as the base for articulating the constitutional problems they alleged to be internal to the existing regime.

Ultimately, the Law Alumni Petition did not advance new petitions but consolidated the two points found in the Petition 72 concerning the constitution-making process. The limitation of the petition to these two points indicates that the law graduates were more concerned with mobilization for expanding the space for constitutional dialogue than they were with effecting substantive constitutional change.

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

E. “Declaration of Free Citizens.”

The “Declaration of Free Citizens” released on February 28, 2013 is the consequential impact of Petition 72. In a speech at the meeting with the Vĩnh Phúc Province Party’s Standing Committee on February 25, 2013, General Secretary of the Communist Party Nguyễn Phú Trọng denounced the constitutional petitions for multi-party, depoliticization of the army, and separation of powers, and implicitly referred to the Petition 72 group as “political, ideological, and moral deterioration.”<sup>153</sup> In response, a junior journalist of the state-owned Family & Society Newspaper (*Báo Gia đình & Xã hội*) named Nguyễn Đắc Kiên wrote an article on February 25, 2013 in which he overtly criticized the General Secretary. This article was first published in his personal blog and then disseminated in different blogs, websites, and Facebook.<sup>154</sup>

Kiên stated that the General Secretary has no legitimate status to speak to the people in such a manner. He made three criticisms on the General Secretary’s statement. First, he argued that the provisions of the proposed constitution maintaining the sole leadership of the Communist Party, the loyalty of the armed forces to the Party, and the rejection of the separation of powers of government expressed the will of the Party and of the General Secretary rather than the general will of the Vietnamese people.<sup>155</sup> Second, he argued that communist morality does not necessarily reflect Vietnamese traditional moral values.<sup>156</sup> Third, he argued that communist political ideology is not a truism.<sup>157</sup>

He then “declared” his aspirations for constitutional change, including a constitutional convention like that in Philadelphia to draft a new constitution that would provide for a multi-party system, civil military, separation of powers, the autonomy of local governments, and the abolition of state-owned national conglomerates. These aspirations resonated with fundamental features of liberal constitutionalism, especially American constitutionalism. Kiên eventually emphasized that by declaring his

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153 This statement was reported in a television news broadcast and is available at: *Tổng Bí thư Nguyễn Phú Trọng làm việc tại Vĩnh Phúc*, YOUTUBE (Feb. 25 2013), <https://www.youtube.com/watch?v=jYf64ISHo3k>.

154 See Nguyễn Đắc Kiên, *Vài lời với TBT ĐCS VN Nguyễn Phú Trọng* [Some Words to General Secretary Nguyễn Phú Trọng], CVHP, <https://hienphap.wordpress.com/2013/02/26/vai-loi-voi-tbt-dcs-vn-nguyen-phu-trong-nguyen-dac-kien/>.

155 *Id.*

156 *Id.*

157 *Id.*

aspirations, he was affirming his natural human rights to freedom of speech and freedom of thoughts.<sup>158</sup>

Kiên was fired the following day for “violating the rules of the Newspaper and labor contract,” which was announced on the website of the Family & Society Newspaper.<sup>159</sup> In an ordinary situation, he might have been arrested or jailed, not merely lost his job, for defamation and subversive actions as he dared to denounce the highest political leader and called for fundamental change of the regime. However, perhaps thanks to the publicized, extraordinary opportunity of constitution-making wherein there was a mass engagement in critical dialogue with Party leadership, he was allowed to retain his freedom.

In an interview with the Vietnamese branch of the *Radio France Internationale*, Kiên further explained his activism.<sup>160</sup> He said that his action was the consequence of his long awareness of civil rights, and the General Secretary’s speech had motivated him to write the article. He said he was not surprised to lose his job and had already prepared for any consequences. He was ultimately more concerned with the public awareness: “*I am ready to receive any consequences, but I hope everyone in our country, from the people to the leaders, will be aware of the openness to accept different opinions.*”<sup>161</sup> When asked about his message to the public, Kiên said: “*Everyone should be patient as everyone knows that democratization is a long process and we should not be hasty...I believe that my action is very normal in a country which has a liberal democracy. Of course, I hope we will be hands in hands to promote a liberal democracy in the country of Vietnam.*”<sup>162</sup> Kiên was, accordingly, realistic in his approach. As he believed that democratization requires long-term effort, his main goal was to express his awareness of liberal rights and therefore to raise the public awareness of rights and political pluralism, rather than to demand for immediate radical constitutional change.

Kiên’s audacious action drew wide public attention. This is firstly because he publicly criticized a top political leader. The fact that a junior

<sup>158</sup> *Id.*

<sup>159</sup> GD&XH, *Anh Nguyễn Đắc Kiên Không Còn Tư Cách Là Phóng Viên Báo Gia đình & Xã hội* [Mr Nguyễn Đắc Kiên has no longer had the Status of Reporter of the Family & Society Newspaper], GIADINH (Feb. 26, 2013, 5:59 PM), <http://giadinh.net.vn/xa-hoi/anh-nguyen-dac-kien-khong-con-tu-cach-la-phong-vien-bao-gia-dinh-xa-hoi-20130226054736172.htm>.

<sup>160</sup> Chân Như, *Nhà báo Nguyễn Đắc Kiên: Tôi Không Bất Ngờ Khi Bị Thôi Việc* [Journalist Nguyễn Đắc Kiên: I Am Not Surprised When Being Dismissed], RADIO FRANCE INTERNATIONALE (Feb. 26, 2013), [http://www.rfa.org/vietnamese/in\\_depth/journ-who-criticiz-party-chief-sacked-02262013154940.html](http://www.rfa.org/vietnamese/in_depth/journ-who-criticiz-party-chief-sacked-02262013154940.html).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

reporter working for state-owned media caustically and publicly denounced and flouted a dignitary like the General Secretary is unusual in an authoritarian environment like that in Vietnam. Secondly, his actions drew attention because his constitutional assertions were even stronger than those made in Petition 72, the release of which touched the most sensitive nerves of the regime. While the 72 group called for free elections, which implied a demand for multi-party elections, Kiên explicitly declared his aspirations for a multi-party system.<sup>163</sup> Finally, his story drew public attention because of his immediate dismissal.

In response to Kiên's publication, the websites of the General Secretary and other political leaders published a number of counter-commentaries to Kiên's article.<sup>164</sup> While the commentaries admitted the wide attention drawn to his action, they focused on criticizing his arguments and, furthermore, denounced him as a "reactionary." These responses by officials suggested that Kiên's action was significant and also provided an example of a constitutional conversation between state actors and a social actor.

The constitutional dialogue sparked by Kiên was later extended to include other social actors. Several figures of the 72 group voiced to support Kiên. In a workshop in Hanoi on the role of media in the state's policymaking process on February 27, 2013, Nguyễn Quang A, the leading figure of the group, urged "journalists as well as the entire society to support and protect by any possible means brave journalists like Nguyễn Đắc Kiên."<sup>165</sup> Võ Thị Hảo, another figure of the 72 group, a writer, who used to work for the Family & Society Newspaper, spoke to the *Radio France Internationale*, that she highly valued Kiên as he was an upright person, which, according to her, was "rare" in contemporary Vietnam. To her, the implication of this case was that Vietnamese leaders should familiarize themselves with public criticism and the practice of tolerating the freedom of speech.<sup>166</sup>

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163 Nguyễn Đắc Kiên, *supra* note 154.

164 See, e.g., *Bộ mặt phản động của Nguyễn Đắc Kiên qua góc nhìn của BEO và bạn đọc [the Reactionary Face of Nguyễn Đắc Kiên through the eyes of BEO and Audiences]*, NGUYỄN PHU TRỌNG (Feb. 27, 2013), <http://nguyenphutrong.org/bo-mat-phan-dong-cua-nguyen-dac-kien-qua-goc-nhin-cua-beo.html>.

165 *Vụ Nguyễn Đắc Kiên gây tiếng vang [The Nguyễn Đắc Kiên Case Creates Echo]*, BBC (Feb. 27, 2013), [http://www.bbc.com/vietnamese/vietnam/2013/02/130227\\_nguyendac\\_kien\\_comments.shtml](http://www.bbc.com/vietnamese/vietnam/2013/02/130227_nguyendac_kien_comments.shtml).

166 *Nhà báo Nguyễn Đắc Kiên bị sa thải vì viết bài phê phán TBT Đảng [Journalist Nguyễn Đắc Kiên's being dismissed for criticizing the General Secretary of the Party]*, RADIO FRANCE INTERNATIONALE TIẾNG VIỆT (Feb. 26, 2013), <http://vi.rfi.fr/viet-nam/20130226-viet-nam-nha-bao-nguyen-dac-kien-bi-sa-thai-sau-mot-bai-viet-phe-phan-tong-bi-thu->.

Kiên's action received more support in online media, resulting in the online movement called the "Declaration of Free Citizens." The Declaration was initiated by bloggers and members of Facebook and by March 29, 2013 the movement was supported by around 10,000 signatures from both inside and outside of Vietnam.<sup>167</sup> The Declaration strictly adhered to and called for support for Kiên's declaration, which was widely disseminated on the Internet. It stated:

We affirm that we have the right to make the above mentioned announcement and every Vietnamese has the same right to make such announcement. We affirm that we are exercising our basic human rights which are freedom of speech, freedom of thought. These rights are inherited to every human being upon their births and they are recognised and respected by Vietnamese people. These rights aren't given by the Vietnamese communist party therefore the communist party doesn't have the right to deny or to make any judgement of their meanings. Therefore we consider any judgment aiming at us as a violation of our rights. We condemn those who are against this right as reactionaries, and it is in contrary to the interest of our people and against the natural progress of human race.<sup>168</sup>

By declaring these aspirations, what were the purposes of the "free citizens"? One of the initiators, Huỳnh Công Thuận, a blogger mobilizing for human rights in Ho Chi Minh City, attempted to explain those purposes in an interview with the Vietnamese branch of the *Radio France Internationale*.<sup>169</sup> First, he asserted that the Declaration was meant to assert natural rights. The purpose of the "free citizens" in supporting the Declaration was to express their aspirations rather than to immediately bring about a constitutional revolution.<sup>170</sup> Thuận stated that the initiators were motivated by Kiên's declaration of his aspiration as a clear and popular

<sup>167</sup> The list of the signatures is available at *Lời Tuyên Bố của các Công Dân Tự Do*, DÂN LÀM BÁO (Feb. 28, 2013), <http://danlambaovn.blogspot.sg/2013/02/loi-tuyen-bo-cua-cac-cong-dan-tu-do.html>.

<sup>168</sup> To further draw the public attention and foster the impact of their declaration, the initiators of the declaration, in addition to the Vietnamese version, also disseminated English, French, Germany, and Chinese translations of the declaration. This quotation is consistent with the English version they produced. See *Declaration of Free Citizens*, DÂN LUẬN (Feb. 28, 2013), <https://www.danluan.org/tin-tuc/20130228/loi-tuyen-bo-cua-cac-cong-dan-tu-do>.

<sup>169</sup> The record of this interview is available at: Thuan Huynh, *RFI phỏng vấn Blogger Huỳnh Công Thuận Công Dân Tự Do*, YOUTUBE (July 20, 2015), [https://www.youtube.com/watch?v=kK\\_ZK\\_-JiJM](https://www.youtube.com/watch?v=kK_ZK_-JiJM).

<sup>170</sup> *Id.*

assertion of freedom of speech and freedom of thought.<sup>171</sup> Thuận argued that every Vietnamese person has the right to declare their aspirations like Kiên. Furthermore, Thuận believed that it was for purposes of declaring their aspirations that the group of free citizens decided to release a declaration rather than a petition like the 72 group.<sup>172</sup> Thuận argued that a declaration is the natural assertion of natural rights of human beings, while a petition merely represents the less passive demanding of something from the government.<sup>173</sup>

Secondly, Thuận asserted that the Declaration was meant to foster the public's awareness of their rights and the public's audacity and capacity to become concerned with and ultimately to participate in discussing public affairs with the ultimate goal of putting some pressure on the government-aligned constitution-makers.<sup>174</sup> Furthermore, Thuận asserted that the numbers of signatures supporting the Declaration indicated that the people had overcome their fear of repression enough to concern themselves with and to discuss public affairs.<sup>175</sup> He and the initiators are aware of the possible consequence of their actions, but they believe that the political environment in Vietnam had become more open than it had been in previous eras and that the government would therefore not arbitrarily punish them. Finally, he believed that the release of the Declaration on the Internet provided the Declaration with a venue which would allow it to sufficiently affect the ordinary people's awareness of their rights and their concern for national issues.<sup>176</sup>

In short, the "free citizens" appropriated their opportunity to play a role in constitution-making to mobilize their fellow citizens to assert their constitutional rights, to raise their awareness of constitutional values, and to participate in public deliberation on constitutional issues.

*F. The Letter of Catholic Bishops' Conference of Vietnam.*

Catholicism has had a contentious relationship with the communist government in Vietnam. As Samuel Gregg observes, "Marxist regimes are invariably hostile to religious belief."<sup>177</sup> One of the reasons for that hostility

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171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

177 Samuel Gregg, *Corruption, Communism, and Catholicism in Vietnam*, ACTON INSTITUTE



is that Marxism is explicitly atheistic. Another reason is “the fact that some religions – such as Christianity – embody the insistence that there are inherent limits to state power,” which is in contrast to the communist government’s principle of providing for a “dictatorship of the proletariat.”<sup>178</sup> There is also historical reason for the Vietnamese communist government’s treatment of Vietnam’s Catholic Church. “Vietnam’s rulers are acutely aware that Catholics were among the most committed anti-Communist Vietnamese during the Vietnam War. Many Vietnamese also identified Catholicism with French colonial rule.”<sup>179</sup> In recent years however, Catholic protests have played increasingly significant roles in society. “Thousands of Catholics have mounted peaceful public protests for almost a year.”<sup>180</sup> Catholic activists have often focused on land rights as they believe that the Vietnamese communist government had confiscated church properties.<sup>181</sup>

In 2013, when the regime undertook constitutional revision, Catholic activism, like other political activism, turned their attention to substantial political and constitutional questions. On March 1, 2013, priest Giuse Duong Hữu Tinh presented a letter concerning constitutional revision by Catholic Bishops' Conference of Vietnam to the Constitutional Amendment Committee (hereinafter CBCV's Letter).<sup>182</sup> The Letter was considered “the most upright, publicized, and bravest” action of the Catholic Bishops as it touches the “mortal points” (such as removing Article 4 and Marxism from the Constitution) of the communist regime in Vietnam.<sup>183</sup> The CBCV's Letter addressed questions not only of freedom of religion, freedom of thought, and other civil freedoms, but also concerning the nature of the communist polity in Vietnam. The Letter included three parts concerning human rights, democracy, and political system. In each part, the Letter presented a conceptual background and then constitutional suggestions. The main points in the Letter can be summarized as follows:

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(Aug. 12, 2009), <http://www.acton.org/pub/commentary/2009/08/12/corruption-communism-and-catholicism-vietnam>.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *Thư của Hội đồng Giám mục Việt Nam gửi Ủy ban Dự thảo sửa đổi Hiến pháp năm 1992 nhận định và góp ý sửa đổi Hiến pháp* [Catholic Bishops' Conference of Vietnam's Letter to the Commission for Amending The 1992 Constitution Concerning Assessments and Comments on Constitutional Amendments], HỘI ĐỒNG GIÁM MỤC VIỆT NAM, <http://hdgmvietnam.org/thu-cua-hoi-dong-giam-muc-viet-nam-nhan-dinh-va-gop-y-sua-doi-hien-phap/4750.116.3.aspx>.

183 Đoàn Xuân Lộc, *Vì Sao Hội đồng Giám mục Góp ý Hiến pháp?* [Why do Catholic Bishops' Conference Comment on the Constitution?] BBC (Mar. 4, 2013), [http://www.bbc.com/vietnamese/forum/2013/03/130304\\_hoidong\\_giammuc\\_hienphap.shtml](http://www.bbc.com/vietnamese/forum/2013/03/130304_hoidong_giammuc_hienphap.shtml).

First, the letter argued that Marxism-Leninism and Ho Chi Minh's thoughts should not be established by the Constitution as the official ideology of the ruling party. The CBCV argues that the constitutional establishment of the communist ideology will limit the freedom of thought, freedom of speech, and other cultural rights. Moreover, as Marxism-Leninism explicitly declares itself as atheistic, its establishment as a ruling ideology will not respect religious freedom. In addition, the letter argues that the practice of previous constitutions to practically cement an exclusive ideology into society has impeded the creative thinking of the Vietnamese people which, the letter argued, has been the cause for the backward circumstances in different aspects in Vietnam like science, technology, culture, and art. As an alternative, the CBCV proposed that the Vietnamese culture with its richness and diversity can be the intellectual foundation of the Vietnamese society.<sup>184</sup>

Second, the letter stated that Constitution should provide a detailed base for protecting religious freedom. Accordingly, the Vietnamese people are not bound by any single religion or doctrine. The state should not denigrate religions and should not interfere in the internal affairs of religions, especially in areas such as education, the determination of which religious figures will be promoted within a religion's hierarchy, and the transfer of religious persons between positions in a religious organization's hierarchy.<sup>185</sup>

Third, the letter held that the Constitution should not establish the leadership of any political parties, which therefore implied that Article 4 of the Constitution, which provides for the leadership of the Communist Party, ought to be removed. The CBCV's argument is rooted in the principle of popular sovereignty. They argue that as the people are the true masters of power in the nation, they should be free to select their representatives and leaders through free and equal elections. Accordingly, the letter argues that assigning a constitutional mandate of leadership to the Communist Party will violate this democratic principle.<sup>186</sup>

Fourth, the letter argued that the Constitution should provide for private ownership of lands consistent with the practices adopted in "most nations in the world." The CBCV contended that the fact that the citizens do not have the right to private possession of lands has engendered serious social

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184 Catholic Bishops' Conference, *supra* note 182.

185 *Id.*

186 *Id.*

inequality.<sup>187</sup>

Finally, the letter posited that the Constitution should stipulate a clear separation of powers and establish the National Assembly as the real body of the supreme power. Accordingly, this suggestion is also related to the role of the Communist Party in a future Vietnamese government. The CBCV proposed that the Party should not interfere with the practice of the state power, and that the mandate of the leadership of the Communist Party should be removed because this mandate makes the National Assembly become a mere instrument of the Party rather the real owner of the supreme power.<sup>188</sup>

It is said that the Letter has wide support among the Catholic community.<sup>189</sup> Speaking to the *Radio France Internationale*, priest Phạm Trung Thành stated that: “Our priests are very happy...The parishioners we meet are also very happy.”<sup>190</sup> He also said that in several churches in Ho Chi Minh City, such as Kỳ Đồng, Công Lý, Mẫu Tâm churches, the Letter was not only posted on the notice-boards but was also printed, distributed, and explained to the parishioners.<sup>191</sup> The regime tolerated this Catholic activism without evident repressive reaction.<sup>192</sup>

According to priest Phạm Trung Thành, the bishops were “careful and deliberate” in their addressing their “formal and publicized voice” concerning “the irrationality and the demands of human’s conscience about human rights.”<sup>193</sup> He added: “The leaders of Vietnam Catholicism believe that this is a suitable moment to voice.”<sup>194</sup> The moment of constitution-making and the vibrant environment of social mobilization begun and developed by other intellectuals and activists inspired the Catholic bishops to express their own constitutional awareness and critical voices. Priest Phạm Trung Thành states that the most important thing about their Letter is that the bishops “speak according to their conscience, and recognize a truism in the regime, in the theory, and in the reality.”<sup>195</sup> Thus, the Catholic bishops may expect some changes in the Constitution but their main concern

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Thanh Phương, *Bản Góp ý Hiến pháp của Hội đồng Giám mục Việt Nam được ủng hộ rộng rãi* [Catholic Bishops’s Constitutional Suggestions Receive Wide Support], RADIO FRANCE INTERNATIONALE (Mar. 18, 2013), <http://vi.rfi.fr/viet-nam/20130318-ban-gop-y-hien-phap-cua-hoi-dong-giam-muc-viet-nam-duoc-su-ung-ho-rong-rai>.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

in speaking out was, together with other social actors, to engage in a national constitutional dialogue so as to express their self-consciousness of and strongly critical attitude towards the perceived problems internal to the existing regime.

### G. *The Civil Society's Three Petitions*

On March 29, 2013, various representatives of various NGOs submitted to the Constitutional Amendment Committee three constitutional petitions. The first was submitted by seventeen social organizations working for the rights of seven vulnerable groups (namely ethnic groups, the disabled, migrant workers, HIV-positive persons, LGBT persons, women, and youth) [hereinafter, the 7G Petition].<sup>196</sup> The second petition was submitted by thirty-five organizations of the Vietnamese civil society (hereinafter, the NGOs' Petition).<sup>197</sup> The third petition was submitted by an LGBT group (hereinafter, the LGBT Petition) known as the ICS Centre (Connection and Sharing).<sup>198</sup>

These major constitutional mobilizations will be examined using details drawn primarily from my extensive interviews with a person, who I will not name here to protect that person from recrimination, who played the lead role in the civil society's constitutional mobilizations and a former Director of the Institute for Studies of Society, Economics and Environment (iSEE), the umbrella under which the initiators of three constitutional petitions mentioned above worked together with him.<sup>199</sup>

He told me that different organizations of the civil society had already expressed concern for legal reforms to better protect human rights

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196 *Góp ý với Dự thảo Sửa đổi Hiến pháp 1992 của 07 nhóm xã hội, Nhóm Yếu thế và Dễ bị Tồn thương* [Comments on the Draft Amendments to the 1992 Constitution of the Seven Social, Disadvantaged, and Vulnerable Groups], (March, 2013), <https://hienphap.files.wordpress.com/2013/03/gop-y-sua-doi-hien-phap-1992-cua-7-nhom-xa-hoi.pdf>.

197 *Kiến nghị của Các tổ chức Xã hội Dân Sự Việt Nam về Dự thảo Sửa đổi Hiến pháp 1992* [Petition of Vietnamese Civil Society's Organizations on the Draft Amendments to the 1992 Constitution], <https://hienphap.files.wordpress.com/2013/03/kien-nghi-sua-doi-hien-phap-1992-cua-cac-to-chuc-xa-hoi-dan-su.pdf> [hereinafter, NGOs' Petition]. Most of these organizations are NGOs, have different names (like center, institute, group, network, forum, committee, and club), and register themselves at the Vietnam Union of Science and Technology Associations (VUSTA).

198 *Góp ý Dự thảo Sửa đổi Hiến pháp: Kiến nghị của Người Đồng tính, Song tính, và Chuyển giới ("LGBT")* [Commenting on the Draft Revised Constitution: Petition of the LGBT People] (March, 2013), <https://hienphap.files.wordpress.com/2013/03/kien-nghi-lgbt-cho-hien-phap.pdf> [hereinafter, LGBT Petition].

199 Interview with former Director of the Institute for Studies of Society, Economics and Environment (iSEE) in Hanoi. (January 16, 2017) [hereinafter, Civil Society Interview].

(especially with regards to the rights of the LGBT community, minority groups' rights to land and cultural rights, and the rights of other vulnerable persons) and to promote the development of civil society in Vietnam.<sup>200</sup>

Particularly important to the expression of concern for civil rights in Vietnam was the emergence of the LGBT movement. Vietnam has 1,600,000 LGBT persons between the ages of 15-59.<sup>201</sup> A recent empirical investigation states that: "the public visibility of LGBT peoples and LGBT civil society organizations has increased in Vietnam during the past five years. Millions of internet and social media users and a dozen large-line LGBT fora operate openly."<sup>202</sup> Despite the government's restriction on peaceful assembly, Vietnam's LGBT groups organized five gay pride parades in 2012, 2013, 2014, 2015, and 2016.

The 1992 Constitution explicitly stipulated male-female marriage, which is the base for the 2000 Marriage and Family Law's rejection of same-sex marriage. But, in 2012, the state initiated an amendment to the Marriage and Family Law which included the consideration of same-sex marriage and, accordingly, "Vietnam became the first country in Asia where the topic has been discussed at the level of a national assembly."<sup>203</sup> LGBT activists participated in the amendment process of this law.<sup>204</sup> In 2013, same-sex marriage became a constitutional question when the state planned to comprehensively revise the 1992 Constitution. LGBT activists sought to establish a constitutional basis for permitting same-sex marriage and extending other rights to LGBT persons. Therefore, in addition to participating in the joint petition of the seven vulnerable groups, the LGBT community released its own constitutional petition.

According to the former iSEE leader, when the state initiated the plan for constitutional revision, different organizations of civil society recognized that the plan for constitutional revision presented a good opportunity for them to cooperate with each other in order to advocate for better constitutional protection of human rights.<sup>205</sup> Those organizations thereby seized the opportunity of constitution-making to engage in constitutional mobilization. To mobilize for constitutional change, different

200 *Id.*

201 Lan Anh, *Việt Nam có khoảng 1,6 triệu người đồng tính* [Vietnam has 1,600,000 LGBT people], TUOI TRE (May 11, 2013, 8:28 GMT+7), <http://tuoitre.vn/tin/chinh-tri-xa-hoi/20130511/vn-co-khoang-16-trieu-nguoi-dong-tinh/547716.html>.

202 P. OOSTERHOFF, T. A. HOANG, & TRANG THU QUACH, NEGOTIATING PUBLIC AND LEGAL SPACES: THE EMERGENCE OF AN LGBT MOVEMENT IN VIETNAM 7 (2014).

203 *Id.* at 4.

204 *Id.* at 6.

205 Civil Society Interview, *supra* note 199.

organizations and social groups decided to work together rather than separately in order to share resources, achieve greater security, and, ultimately, to realize greater impact.<sup>206</sup> Cooperation was particularly important for achieving security for the parties engaging in activism as working together in a larger group made it harder for the government to punish them.

Organizations and social groups worked assiduously from January to March of 2013 to prepare for their constitutional proposals. First, they invited constitutional scholars to talk to them about constitutional issues to gain necessary knowledge. The key invited scholars including Nguyễn Đăng Dung and Vũ Công Giao,<sup>207</sup> who were also the major members of the CVHP group.

Members of the organizations and social groups then held consultation meetings in different areas of Vietnam.<sup>208</sup> They also invited journalists to follow them and report their work.<sup>209</sup> To illustrate, from January 20 to March 7, 2013, social organizations working for the rights of seven vulnerable groups conducted 45 consultation meetings in 13 provinces with 980 people from seven groups being involved. The details are as follows: (1) 132 people from ethnic groups called H'mông, Dao, Giáy, Tày, Nùng, Thái, Xơ Đăng, Mường, Cao Lan participating in 5 consultation meetings held in Hà Nội, Yên Bái, Lào Cai, Lạng Sơn; (2) 203 youths participating in 7 consultation meetings held in Bắc Giang, Đắk Nông, Hanoi, Đà Nẵng, and Hồ Chí Minh City; (3) 294 women coming different places with different backgrounds and situations participated in 11 consultation meetings held in Hà Nội, Hòa Bình, Bắc Ninh, Nam Định, and Đắk Nông; (4) 84 HIV-positive people participating in 6 consultation meetings held in Hà Nội and Hồ Chí Minh City; (5) 114 migrant workers including children participating in 8 consultation meetings held in Hà Nội; (6) 41 LGBT people participating in 3 consultation meetings held in Hanoi and Hồ Chí Minh City; (7) 115 disabled persons participating in 6 consultation meetings held in Hanoi, Thái Nguyên and Lạng Sơn.<sup>210</sup> The ICS Center, which, again, was working for the rights of LGBT people, conducted three deep interviews in Hanoi and Ho Chi Minh City and collected 2,510 online supporting

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206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 CVHP, *supra* note 121.

signatures on the petition from February 27 2013 to March 25, 2013.<sup>211</sup>

To frame constitutional proposals, civil society actors mainly relied on transnational and international sources. These included comparative constitutional knowledge acquired from the invited constitutional law scholars. They also worked with these scholars to produce a basic handbook on constitution entitled *ABC Về Hiến Pháp* (ABC on the Constitution)<sup>212</sup> which they distributed to the members participating in drafting the constitutional proposals.<sup>213</sup> The book introduced general concepts of constitutionalism, Vietnamese constitutions, foreign constitutional experiences, and key constitutional issues during the Vietnamese constitution-making process (such as human rights, a constitutional referendum, and judicial review).<sup>214</sup> In addition, major international human rights treaties were distributed among the participants. Also notable was that one of the participants was a specialist on international human rights who helped train other members with knowledge on this field.<sup>215</sup>

The central concern of the civil society was human rights, although they also considered other related institutional issues, like judicial review and a special body for human rights protection. This was due to their observation that vulnerable people are vulnerable to human rights abuse.<sup>216</sup> The civil society actors focused on mobilizing for a universalist bill of rights consistent with international human rights standards, and they rejected the relativist view about human rights.<sup>217</sup> But, different civil society actors focused on different human rights: the LGBT people were most concerned with the sexual rights; minority persons were most concerned with rights to use their mother language; students were most concerned with academic freedom.<sup>218</sup> There were two main trends in their debates: some advocated for constitutional enumeration of detailed rights while others called for more general constitutional rights provisions that could sufficiently include specific rights. Different civil society actors had to reach to certain compromises and the generalist school was ultimately prevalent.<sup>219</sup>

After consultation meetings and preparing the constitutional proposals,

211 CVHP Interview, *supra* note 123.

212 Nguyễn Đăng Dung, et al., *ABC Về Hiến Pháp: 85 câu Hỏi - Đáp* [ABC on the Constitution: 85 Questions and Answers], <https://hienphap.files.wordpress.com/2013/03/abc-ve-hien-phap-2013-final-version1.pdf> (2013).

213 Civil Society Interview, *supra* note 199.

214 Nguyễn Đăng Dung, *supra* note 212 at 15, 21, and 35 (questions 13, 20, and 33).

215 Civil Society Interview, *supra* note 199.

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.*

the organizations and groups organized two conferences to discuss the proposals. Constitutional law scholars and several members of the National Assembly were also invited to attend these conferences.<sup>220</sup> The meetings were reported by official media.<sup>221</sup>

When the various Vietnamese human rights organizations and civil society groups worked in a large collective platform, they apparently felt more secure, but their unity also invited attempts to control them by the government. Vietnamese public security authorities closely followed the activities of the participating civil society groups.<sup>222</sup> Journalists' videos on the work of those civil society groups were examined by the authorities.<sup>223</sup> Media reporting on the work of the civil society groups were warned.<sup>224</sup> Authorities also made phone calls to the universities where there were students participating in the civil societies' constitutional mobilization.<sup>225</sup> But, civil society actors believed that their actions were just and constructive, and they wanted to have a conversation with, rather than oppose the government.<sup>226</sup> Ultimately, the three constitutional petitions were successfully submitted.

*The 7G Petition* included three components: general aspirations, detailed suggestions on individual provisions in the draft constitution, and an appendix which described the empirical work of the groups. The Petition first articulated the groups' "general aspirations" on the essential "spirit" of the new constitution. It emphasized that the Constitution must be rooted in the pluralist nature of the Vietnamese society which includes a variety of groups, communities, and nationalities. The petition called for the directive principle of the Constitution to consist of respecting the freedom of every individual and for the goal of the Constitution to be equality among citizens, groups, and communities. In addition, the petition called for the Constitution to recognize human rights in such a way as to be consistent with international human rights treaties signed by Vietnam. Moreover, the petition called for the Constitution to clearly define mechanisms to constrain

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220 *Id.*

221 Lý Thanh Hương, *Các tổ chức xã hội dân sự góp ý Dự thảo Hiến pháp* [Organizations of Civil Society Comments on the Draft Constitution], VIETNAMPLUS (Mar. 7, 2013, 13:51 GMT+7), <http://www.vietnamplus.vn/cac-to-chuc-xa-hoi-dan-su-gop-y-du-thao-hien-phap/190466.vnp>.

222 Civil Society Interview, *supra* note 199.

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.*



the state power and to protect vulnerable groups.<sup>227</sup>

On this basis, the 7G Petition suggested incorporating the right to freedom of thought in order to both comply with the International Covenant on Civil and Political Rights (which Vietnam had already signed) and to continue with the pluralist development of different social strata.<sup>228</sup> The 7G Petition also suggested removing the provision allowing restricting human rights for public interests as it argued that such a provision was inconsistent with international human rights standards. To protect human rights, the 7G Petition called for the creation of a national committee of human rights and a constitutional court.<sup>229</sup> Although these bodies would mainly be concerned with constitutional protection of human rights, they would also be able to address more general and related questions. Finally, the 7G Petition called for redefining the nature and role of the Constitution such that its role would instead be to protect human rights, social equality, popular sovereignty, private ownership of land, popular ratification of the new constitution, and to constrain the public power.<sup>230</sup> Several of the requests made by the 7G Petition were echoed in other constitutional petitions.

For example, *The NGOs' Petition* began with the criticism that the draft constitution failed to reflect the will of the people and of civil society, and that the draft could therefore not be a supreme law for a “democratic society” in Vietnam.<sup>231</sup> The authors of the NGOs’ Petition were especially worried that the draft constitution lacked mechanisms to restrain the state power, thereby permitting the state to potentially issue legal instruments impeding the development of individuals and civil society.<sup>232</sup>

On these grounds, the NGOs’ Petition first called for constitution-making power to be granted to the people through a popular referendum on the new constitution.<sup>233</sup> Second, NGOs’ Petition called for the principle of equality and indiscriminate to be applied in the constitution-making process.<sup>234</sup> Specifically, the NGOs’ Petition called for the removal of the existing provision in the Constitution that stipulates that the sovereignty of the Vietnamese government is derived from particular social classes (the working class, the peasantry and the intelligentsia) and the NGOs’ Petition

227 CVHP, *supra* note 121.

228 *Id.*

229 *Id.*

230 *Id.*

231 LGBT Petition, *supra* note 198.

232 *Id.*

233 NGOs’ Petition, *supra* note 197.

234 *Id.*

calls for that provision to be replaced with a popular sovereignty model.<sup>235</sup> Third, the NGOs' Petition called for the Constitution to be free of provisions recognizing the roles of the Vietnam Fatherland Front and the Vietnam General Confederation of Labor (the two pro-party mass organizations) to ensure that there would be equality among different social associations. Fourth, the NGOs' Petition called for the Constitution to be free of the provision permitting human rights restrictions so that the Constitution would comply with international human rights standards. Fifth, the NGOs' Petition called for the Constitution to be free of state regulations that would permit the restriction of the freedom of speech and the freedom of association. Finally, the NGOs' Petition called for the establishment of a national committee of human rights and a constitutional court.<sup>236</sup> Thus, the NGOs' Petition focused particularly on freedom of speech and freedom of association. This focus reflects the identity and values of the NGOs which submitted the NGOs' Petition, but it is notable because it showed that the NGOs' Petition shares many common elements with other petitions submitted by other mobilizing actors within Vietnam's civil society and beyond.

*The LGBT's Petition* included three parts: (1) a general opinion on the "general spirit" of the Constitution; (2) specific petitions on two provisions in the draft constitution which would affect the rights of the LGBT people; and (3) an appendix which included 1,048 opinions from the LGBT community and the list of signatures.<sup>237</sup> In the LGBT petitioners' view, the "general spirit" of the Constitution must be such that the Constitution would be a document in which everybody, including LGBT persons, could find their "figure and rights." The LGBT people persons were not petitioning for their specific rights but general human rights which would be sufficiently inclusive as to incorporate LGBT people's rights.<sup>238</sup> Their general strategy was that the Constitution should neutralize nomenclature regarding sex.

On that ground, the LGBT Petition focused on two provisions of the draft constitution. They focused first on the provision concerning gender equality, which provided for the equal rights of "male and female citizens" and prohibited discrimination on the base of "gender." The LGBT Petition called for equal rights to instead be provided regardless of "gender and sex," and for the Constitution to prohibit discrimination on the base of "gender,

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> LGBT Petition, *supra* note 198.

<sup>238</sup> *Id.*

sex, sexual orientation, and gender identity.”<sup>239</sup> The LGBT Petition criticized the draft Constitution for its narrow protection of equality of “male and female citizens” as providing equal rights protection only on the base of biological status.<sup>240</sup> To support their argument, the LGBT activists referred to General recommendations 28 to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),<sup>241</sup> which Vietnam was a party to and which, according to their explanation, extended the scope of “women” to include the lesbian, bisexual, and transgender women.<sup>242</sup>

The second provision the LGBT Petition criticized was the draft Constitution’s provision that “men and women” have the right to marriage. The LGBT Provision instead called for the constitutional recognition of marriage “between two persons,”<sup>243</sup> which would mean creating a constitutional basis for same-sex marriage. To support its request, the LGBT Petition invoked the general human right to pursue happiness and argued that homosexual persons are human beings and must therefore have the right to live together in the institutional form of marriage to pursue their happiness. The LGBT Petition also referred to international experiences which suggested that, according to their data, eleven nations and territories had legalized same-sex marriage. To further buttress their argument, they invoked “scientific researches” which indicated that same-sex marriage would not destroy social, cultural, and familial values as normal apprehension.<sup>244</sup>

Finally, the LGBT Petition called for a new constitutional provision which would provide for “the freedom to one’s body,” and “the right to change sex, name, and personality inconsistent with the body’s condition”, which was meant to protect transgender persons. LGBT activists argued for this provision along libertarian lines, arguing that an individual knows better than the government how to treat his or her body in the way that is good for his or her life.<sup>245</sup>

Different from other constitutional activists and intellectuals, the LGBT

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010), [http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CEDAW\\_General\\_Recommendation\\_28\\_en.pdf](http://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CEDAW_General_Recommendation_28_en.pdf).

<sup>242</sup> LGBT Petition, *supra* note 198.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

community focused on rights issues relating to their identity rather than radical issues concerning the nature of the regime. However, they connected their identity-based concerns to the general concerns of human rights. In their case, their human rights discourse was consistent with the universalist outlook adopted by other mobilizing actors.

After drafting the petitions, actors of the various civil society groups approached the Constitutional Amendment Committee to submit their petitions. They had difficulties in approaching the Constitutional Amendment Committee, however. Several of their attempts to contact the constitution-makers to submit their petitions failed.<sup>246</sup> The echo of Petition 72 made constitution-makers hostile to additional popular constitutional petitions. But, eventually, the constitution-makers agreed to hold a formal meeting to receive the three constitutional petitions. The former iSEE leader said that this may have been because several members of the National Assembly attended their conferences, knew about their constructive and moderate activities, and persuaded the Constitutional Amendment Committee to meet with the various civil society groups behind the petitions to receive their petitions.<sup>247</sup> Ultimately, because the civil society groups focused mainly on human rights<sup>248</sup> rather than on fundamental institutional issues (especially the party leadership), the constitution-makers agreed to have a direct constitutional dialogue with the civil society groups submitting the various petitions. Unlike the calls for fundamental institutional changes which had previously been issued to challenge the existing regime, the call for a universalist bill of rights was more acceptable to the constitution-makers because the adoption of a universalist bill of rights would be useful for promoting the international legitimacy of the communist regime without immediate deleterious effect on the regime.

Therefore, delegates of the organizations and social groups had a chance to meet with the constitution-makers and to submit their petitions. In the original plan, those delegates would have merely met with some representatives of the Constitutional Amendment Committee in a separate room. However, when those delegates came to the National Assembly's Office, the delegates were invited to meet with all the members of Constitutional Amendment Committee.<sup>249</sup> The meeting was short, lasting

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<sup>246</sup> *Id.*

<sup>247</sup> Civil Society Interview, *supra* note 199.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

about fifteen minutes.<sup>250</sup> In the meeting, the former iSEE leader underlined the necessity of a human rights committee, a constitutional referendum, equality, and indiscrimination.<sup>251</sup> Mr. Phan Trung Lý, a representative of the Constitutional Amendment Committee thanked the civil society's organizations and groups, and stated that: "The Committee highly values the assistance of the civil society's organizations on collecting the people's opinions [on the draft constitution]. We will consider the petitions and receive the people's opinions."<sup>252</sup>

Why did the actors of civil society engage in constitutional mobilization? My interviews suggest that they had multiple goals, not merely formal constitutional change. First, they wanted to realize better constitutional protection of human rights.<sup>253</sup> This explains why their constitutional petitions focused on constitutional rights provisions and human rights-protecting institutions. Second, they wanted to provide the forums for the citizens to participate in the constitution-making process.<sup>254</sup> This means they were mobilizing the citizens to participate in a national, constitutional dialogue. Fourth, they wanted to disseminate and educate members of the civil society with knowledge about constitution, human rights and the rule of law.<sup>255</sup> This explained many of their activities, including their organization of constitutional lectures, consultant meetings, conferences, their invitations to journalists to follow their work, and their distributions of constitutional materials and international human rights treaties. These activities were meant to raise social awareness of constitutional values. Finally, they wanted to elevate the position of civil society in Vietnam.<sup>256</sup> By working together in a large scale, discussing significant constitutional issues, submitting their petitions to the politicians, and making sure their work reported by mass media, they hoped to enhance their role in the Vietnamese society.

## V. EXPLANATORY ANALYSIS

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<sup>250</sup> *Id.*

<sup>251</sup> Nam Pham, *Ủy ban dự thảo sửa đổi Hiến pháp tiếp nhận bản kiến nghị từ 7 nhóm Xã hội và các tổ chức Xã hội Dân sự*, iSEE (Mar. 29, 2013), <http://isee.org.vn/vi/blog/Article/uy-ban-du-thao-sua-doi-hien-phap-tiep-nhan-ban-kien-nghi-tu-7-nhom-xa-hoi-va-cac-to-chuc-xa-hoi-dan-su>.

<sup>252</sup> *Id.*

<sup>253</sup> Civil Society Interview, *supra* note 199.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

A. *Constitutional Opportunity.*

Vietnamese courts do not provide an environment for effective constitutional mobilization because they are subordinate to political institutions and do not have judicial review power.<sup>257</sup> Instead, it is the constitution-making process that offers the particular constitutional opportunity for social actors to mobilize for constitutional change in Vietnam. The Vietnamese state's commitments to "comprehensive constitutional revision" and "no taboo"<sup>258</sup> constitutional discussions during the constitutional consultation process allowed constitutional activists and intellectuals to launch constitutional proposals and to mobilize public support without apprehension of political sanctions.

That particular constitutional opportunity was underpinned by the general environment. Most importantly, despite international criticisms,<sup>259</sup> commentators on Vietnamese politics noted "the proliferation of non-governmental organizations and associations, the increasing freedom of the press and media due to the declining salience of state ideology, and the loosening of the state's political control over society."<sup>260</sup> In addition, although under political control in paper, civil society in Vietnam proved itself to be vibrant and the space allowed for Vietnamese society to exercise its vibrancy was clearly significantly greater than in previous constitution-making opportunities.<sup>261</sup> This allowed the Vietnamese civil society groups to involve themselves in constitutional mobilization.

Moreover, the rapidly expanded use of the Internet and social media and the state's weak control over the use of those forms of expression also played a key role in creating the environment for constitutional mobilization in Vietnam. As Zachary Abuza documented in 2015: "Forty-four percent of the population, over 39 million people, are now online, making Vietnam the 14th-largest Internet market in the world...It is estimated that over 60

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257 Pip Nicholson, *Renovating Courts: The Role of Courts in Contemporary Vietnam*, in *ASIAN COURTS IN CONTEXT* 528 (Jiunn-Rong Yeh & Wen-Chen Chang eds., 2015).

258 Chung Hồng, *Không có Cẩm kỵ trong Góp ý Sửa Hiến pháp* [There is no Taboo in Commenting on Constitutional Amendment], VIETNAMNET, Dec. 29, 2012, <http://vietnamnet.vn/vn/chinh-tri/103205/khong-co-cam-ky-khi-gop-y-sua-hien-phap.html>.

259 See, e.g., Human Rights Watch, *World Report 2014: Vietnam*, <https://www.hrw.org/world-report/2014/country-chapters/vietnam> (last visited Mar. 2, 2018).

260 Thiem Bui, *Vietnam's Civil Society*, EASTASIAFORUM, Sept. 5, 2015, <http://www.eastasiaforum.org/2013/09/05/vietnams-civil-society-undergoing-vital-changes/>.

261 Andrew Wells-Dang, *The Political Influence of Civil Society in Vietnam*, in *POLITICS IN CONTEMPORARY VIETNAM: PARTY, STATE, AND AUTHORITY RELATIONS* 163 (Jonathan D. London ed., 2014).

percent of urbanites and suburbanites are connected.”<sup>262</sup> Importantly, Mr. Abuza also noted that “the Internet is surprisingly freewheeling in Vietnam,” mainly because its growth “far outpaced the government’s ability to contain it technologically.”<sup>263</sup> Actors involved in the Petition 72, for example, had created a blog only to have it blocked by the authorities. Instead of giving up though, the persons behind Petition 72 quickly created other blogs beyond the technological control of the authorities where Petition 72 was publicized. Accordingly, due to technological reasons, the authorities were unable to put a strong control on the Internet, especially YouTube and social media like Facebook and blogs where the social mobilization operates, during the most recent constitution-making opportunity. Social actors took their opportunities to employ online media to mobilize for social changes in Vietnam,<sup>264</sup> and when the regime undertook constitution-making, they seized this opportunity and utilized cyberspace to mobilize for constitutional change.

At the root of the constitutional environment is economic development in Vietnam. Constitutional Economics suggests that a connection exists between constitutional arrangement and economic performance.<sup>265</sup> Particularly, economic liberalization exerts a pressure in favor of constitutional liberalization. While nearly three decades of *Đổi Mới* (*Renovation*), the name of the program of economic reform introduced by the Communist Party of Vietnam in 1986, have resulted in speedy economic development in Vietnam, the borrowing of constitutional institutions from the former Soviet Union (by the Vietnamese authoritarian regime) has presented an impediment for continued economic development.<sup>266</sup> Consequently, the economy was stagnant around the 2010s, corruption was a worsening problem, and the government’s mismanagement of the economy was made apparent to the people, which challenged the sociological foundation of the legitimacy of communist rule in Vietnam.<sup>267</sup> This compelled Vietnamese political leaders to initiate a project of constitutional reform so that they and the public could engage in a

<sup>262</sup> Zachary Abuza, *Vietnam*, in *STIFLING THE PUBLIC SPHERE: MEDIA AND CIVIL SOCIETY IN EGYPT, RUSSIA, AND VIETNAM* 6 (Report of International Forum for Democratic Studies, 2015).

<sup>263</sup> *Id.* at 42.

<sup>264</sup> Jason Morris-Jung, *Vietnam’s Online Petition Movement*, *SOUTHEAST ASIAN AFFAIRS*, 2015, at 402, 403.

<sup>265</sup> See generally AMES M. BUCHANAN & GORDON TUCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 92 (1962).

<sup>266</sup> Vu Minh Khuong, *The Institutional Root Causes of the Challenges to Vietnam’s Long-Term Economic Growth*, *ASIAN ECONOMICS PAPERS*, Winter 2014, at 159.

<sup>267</sup> See generally Son & Nicholson, *supra* note 17.

constitutional dialogue to exchange ideas and discuss reforming institutions.

Economic development also explains the regime's ability to appease civil society and thereby exert control over it through restrictions on the freedom of speech and the freedom of the press. However, economic growth also facilitated the creation new social groups and, ultimately, diversified social interests in Vietnam. For example, a new middle class emerged in Vietnam as the consequence of urbanization brought about by economic liberalization and industrialization.<sup>268</sup> That middle class is adaptive to globalization, competent in foreign languages (especially English), receptive to global ideas, and skillful in using technological products and the Internet. In response to social dynamics and pluralism, the regime has been compelled to tolerate the autonomy of the civil society and their pluralist voices to a certain extent so that the regime can guarantee that the evolving civil society and their pluralist discourse will not go so far as to destroy the regime. For these purposes, the regime has also accommodated constitutional mobilization to the extent that the regime is confident to put a firm stop when necessary.

### *B. Constitutional Frame.*

In section, I analyzed the actions of the social actors I described in detail above within my concept of constitutional frame. Vietnamese constitutional activists and intellectuals used the 1992 Constitution as a framework for addressing and drawing the public's attention to the problems internal to the existing communist regime. Despite different forms of expression, social actors identified common constitutional problems rooted in the exclusive leadership of communist party, the concentration of state power, and the control of the state over human rights and economic resources, which are embodied in the 1992 Constitution. Accordingly, the first step to addressing the commonly cited issues of the middle class social actors has been to address the issues inherent in Vietnam's intrinsically authoritarian constitution.

To develop arguments for constitutional change, mobilizing actors referred to alternative sources. *First*, they referred to international and transnational ideas, norms, discourses, or symbols. For example, they frequently cited to support for their arguments in international human rights

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<sup>268</sup> See generally CATHERINE EARL, VIETNAM'S NEW MIDDLE CLASSES: GENDER, CAREER, CITY (2014).



law, such as the Universal Declaration of Human Rights, the International *Covenant on Civil and Political Rights*, and The Convention on the Elimination of all Forms of Discrimination Against Women. They also invoked the amorphous pool of global constitutional ideas and institutions like social contract theory, limited government, human rights, and constitutional review. In addition, they referenced foreign constitutional experiences (e.g., constitutional convention, constitutional referendum, and same-sex marriage). To gain wider acceptance and support, *social actors connected their arguments to general values of the civilizing world rather than specify experiences of a particular foreign nation. Second*, the constitutional framing those social actors engage in is further framed within the national cultural richness, the local social diversity, and the popular aspirations of the Vietnamese people. This kind of nationalism helped consolidate the legitimacy of the constitutional arguments and draw public support. Consequently, there was a dialogical interaction between global and local sources in framing constitutional arguments.

Despite different expression, reasoning, and level of concern, mobilizing actors shared common proposals for constitutional changes as a response to their identification of common problems, including: popular sovereignty, democratic elections, constitutional referendum, universalist human rights, specific institutions to protect human rights (such as a constitutional court or council and a human rights committee), a clear distribution of state power, a market economy without the “leading role” of the state-owned enterprises, and multiple forms of land ownership including private ownership.

To engage in a dialogue with authoritarian leaders, mobilizing actors *aligned* their constitutional arguments to the official constitutional language. The 1992 Constitution and the Vietnamese communist party’s constitutional rhetoric included ambiguous and contradictory language which lacked substantive meanings. This allowed social actors to construct substantive constitutional meanings and aligned them to the florid constitutional language, by which they challenged those in power in a dialogical way. To illustrate, the 1992 text included the ambiguous and broad language of “socialist rule of law state.” Social actors aligned to this language and called for its substantive elements, such as human rights and constitutional review. Moreover, they referred to the constitution’s provision that all powers belong to the people to mobilize for constitutional referendum. In addition, they invoked the contradictory constitutional confirmation of both the supreme position of the National Assembly and the leading role of the Party to call for curtailing the party power in favor of parliamentary supremacy. Apart from the existing constitution, social actors

also aligned to constitutional rhetoric expressed in the party's documents and constitution-makers' discourse. For example, the rhetoric of controlling the state power adopted by the Party in the 11th Convention in 2011<sup>269</sup> and repeated by the constitution-makers, allowed social actors to better frame their argument about checks and balances and constitutional review.

Even when framing constitutional arguments based on transnational sources, social actors also aligned to official constitutional language. In fact, Vietnamese leaders and constitution-makers also supported revising the constitutional human rights provision in order to be consistent with international human rights treaties Vietnam had signed.<sup>270</sup> Social actors adjusted to this official commitment in framing their reformist constitutional arguments informed by transnational sources. By that, they engaged in a dialogue with the government to articulate the meaning of international law in a domestic context. This helped to enhance the legitimacy of their arguments and avoid political sanction.

Some groups had specific constitutional concerns and they *amplified* particular constitutional arguments. The CVHP group, for example, included mainly educators, which explains why they are specifically concerned with the constitutional provisions for free schooling or the establishment of an official language. The Catholic bishops focused on freedom of thought and freedom of religion. The various vulnerable, minority groups underlined the importance of constitutional protections for diversity and equality among different social groups. The NGOs' petition featured calls for constitutional protection for freedom of association. The petitions submitted by the various LGBT groups emphasized the constitutional recognition of gender, sex equality, and freedom of marriage. The amplification of the various constitutional frames reflected the collective identity of the mobilizing groups.

On the other hand, mobilizing groups *extended* their own concerns to general national concerns, by which they engaged in the wider national constitutional dialogue. Consequently, social actors shared the same

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269 Báo cáo chính của Ban Chấp hành Trung Ương Đảng Tại Đại hội lần thứ 11 của Đảng Cộng Sản Việt Nam [Political Report of Central Committee of the Party in the 11th Convention of the Vietnamese Communist Party], <http://chinhphu.vn/portal/page/portal/chinhphu/NuocCHXHCNVietNam/ThongTinTongHop/noidungvankiendaihoi dang?categoryId=10000716&articleId=10038382>.

270 Constitutional Amendment Committee Interview, *supra* note 114. See also *Tờ trình về Dự thảo sửa đổi Hiến pháp năm 1992* [Report on The Draft Amendments to the 1992 Constitution], [http://duthaonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_NGHIQUYET/View\\_Detail.aspx?ItemID=32&TabIndex=2&TaiLieuID=848](http://duthaonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/View_Detail.aspx?ItemID=32&TabIndex=2&TaiLieuID=848).

national concerns beyond their individual identities. Even when they underlined specific constitutional arguments reflecting their individual identities, they were not demanding constitutional recognition of their specific identities but, rather, connecting their specific concern to a general concern of constitutional recognition. The LGBT group, for example, did not argue for specific rights for gay persons but, rather, for broader constitutional rights sufficient to protect gay rights and those of other persons.

### *C. Constitutional Resource*

The resources for constitutional mobilization in Vietnam are the communist political elites rather than judges. This stems from both the nature of the communist authoritarian regime in Vietnam and the Confucian tradition of meritocracy which lead to the public conceiving of political elites as the resource of social change.<sup>271</sup> Therefore, social actors approach communist elites as a mobilization resource, most of whom are members of the Constitutional Amendment Committee. Social actors must therefore seek to mobilize the Vietnamese communist elites to engage in a national constitutional dialogue to change the communist constitutional system dialogically. As was demonstrated in the latest constitution-making opportunity, they do not call for violent revolution to overthrow the communist regime and to establish a fundamentally new constitutional system. Even the social actors who mobilize for multi-party system also place the Communist Party in the dialogical process of constitutional change. They suggest that the Communist Party should participate in the free elections to compete for political power. Vietnamese activists and intellectuals have also tried to avoid confrontational approaches to the existing power-holders. They avoid holding demonstrations or marches, as those forms of mobilization can be considered crimes of subversion of the regime, or of attempting to destroy the social order according to the Criminal Code.<sup>272</sup> Instead, they use different dialogical methods to communicate and exchange with the political leaders and constitution-makers, such as writing letters, making suggestions, issuing declarations, and submitting petitions.

To maintain a dialogue with political elites, they Vietnamese social actors have avoided the creation of well-organized oppositional bodies

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271 See DANIEL A. BELL, *THE CHINA MODEL: POLITICAL MERITOCRACY AND THE LIMITS OF DEMOCRACY* (2015).

272 *Luật hình sự* [Vietnam Penal Code], No. 109 (2015).

because this would invite strong political suppression. They instead employ a wide range of dialogical methods to connect with each other and with the public. For example, they have organized conferences, engaged in consultation, conducted and participated in interviews, conducted surveys to gauge public opinion, created online fora for the public to engage in national dialogue on constitutional questions, and they have collected online signatures of support. They have maintained amorphous networks, sometimes online, sometimes offline. Another example of this behavior is the CVHP group which, in addition to providing discursive platforms, created a website to operate as a shared cyberspace in which the works of all social actors could be presented. Although all of the constitutional activists and intellectuals are not connected as a single body, they are mostly aware of the work of their fellows, they know that they are mobilizing for relatively similar things, and they have inspired and cooperated with each other.

#### *D. Dialogical Constitutional Change.*

##### *1. Constitutional Dialogue.*

Constitutional mobilization has successfully facilitated and consolidated a national constitutional dialogue in Vietnam. This is also the expected consequence of mobilizing actors, such as the 72 group and the CVHP group.<sup>273</sup> Why do social actors expect a national constitutional dialogue while the state is undertaking public constitutional consultation? They are aware of that the authorities will channel the public constitutional consultation to certain directions, which may lead to a constitutional monologue with only official voices.<sup>274</sup> Therefore, they create alternative public venues for the public to openly discuss constitutional questions and exchange their pluralist views with each other and with the authorities.

Social actors have successfully broadened the scope of the constitutional discussions beyond the official agenda of constitution-making, drawn considerable public attention, gained the support of thousands of people, and mobilized the public engagement in an unprecedentedly open national constitutional dialogue. The constitutional questions that have been vehemently, controversially, and publicly debated at national level had not been previously anticipated in the constitution-making agenda. Political

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<sup>273</sup> See *supra* sections V.B and V.C.

<sup>274</sup> CVHP Interview, *supra* note 123.

leadership and constitution-makers did not establish the following issues in the formal agenda: the establishment of a multi-party system, the separation of powers between branches of government, the adoption of a constitution through a constitutional referendum, a military loyal to the constitution rather than the Communist party, and private ownership of land. The agenda for constitution-making prepared by the constitution-makers anticipated some possible changes to the technique of constitution-writing, some conceptions, and some institutional details, and it also made clear that there would be no substantial changes concerning the above fundamental issues.<sup>275</sup> Contrary to the wishes of the constitution-makers, these issues became central to the public constitutional debate,<sup>276</sup> mainly due to the impact of constitutional mobilization.

The government controls but accommodates the existence of the vehement constitutional mobilization. The government positively responded to the call for extending the time of public comments on the draft constitution beyond its original established date. In original the plan, the time for public comments on the draft constitution was three months: from January 2 to March 31, 2013. In response to the call for an extension, the constitution-makers allowed public constitutional discussion and suggestions until September 30, 2013.<sup>277</sup>

Consequently, there was an unusual focus on constitutional issues among the Vietnamese people in 2013. In that year, the Vietnamese people experienced a “constitutional moment,” to borrow Ackerman’s phraseology, “a high degree of salience, engagement, mobilization, energy, and concern.”<sup>278</sup> Constitutional mobilization exploded. The national discourse in mass media was unusually focused on constitutional questions.

<sup>275</sup> *Id.* See also DƯ THẢO ONLINE, *Tờ trình ngày 02 tháng 8 năm 2011 của Ủy ban thường vụ Quốc hội về việc triển khai thực hiện chủ trương nghiên cứu, sửa đổi, bổ sung Hiến pháp năm 1992* [Report of the National Assembly’s Standing Committee on Implementation of the Policy to Study the Amending and Supplementing the 1992 Constitution, dated August 2, 2011], [http://duthaonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_NGHIQUYET/View\\_Detail.aspx?ItemID=32&TabIndex=2&TaiLieuID=848](http://duthaonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/View_Detail.aspx?ItemID=32&TabIndex=2&TaiLieuID=848).

<sup>276</sup> For more details, see Thiem Hai Bui, *Constitutionalizing Single Party Leadership in Vietnam: Dilemmas of Reform*, 11 ASIAN J. COMP. LAW 219 (2016) and Toan Le, *Interpreting the Constitutional Debate Over Land Ownership in the Socialist Republic of Vietnam (2012–2013)*, 11 ASIAN J. COMP. LAW 287 (2016).

<sup>277</sup> TTXVN, *Công thư khẩn yêu cầu tạo điều kiện góp ý Hiến pháp* [Urgent Public Letter Requires Providing Condition for Commenting on the Constitution], *TUỔI TRẺ*, Mar. 6, 2013, <http://tuoitre.vn/tin/chinh-tri-xa-hoi/20130306/cong-thu-khan-yeu-cau-tao-dieu-kien-gop-y-hien-phap/536833.html>.

<sup>278</sup> Daniel Taylor Young, Note, *How Do You Measure a Constitutional Moment? Using Algorithmic Topic Modelling To Evaluate Bruce Ackerman’s Theory of Constitutional Change*, 122 YALE L.J. 1990, 2002 (2013).

The social energy and concern for constitutional questions was considerable: within three months, there were 26,091,276 popular constitutional submissions, and 28,149 conferences, workshops, and seminars on the draft Constitution.<sup>279</sup> To be sure, the opportunity of constitution-making and the constitutional consultation process drew the public attention and initiated a constitutional dialogue. However, political control of this process and censorship of public discourse would have limited the dialogue. In this context, constitutional mobilization was instrumental to facilitating the dialogue by extending the public attention, broadening the scope of constitutional debate, and encouraging the public to engage in an open constitutional conversation with institutional actors.

Importantly, based on what happened in Vietnam, constitutional mobilization is forceful enough to compel a government to engage in the national constitutional dialogue with the mobilizing actors and the public at large to discuss and express its critical views on the questions that are not officially anticipated. In Vietnam, top political leaders, like the General Secretary, appeared in the public to express critical positions on the mobilized constitutional proposals. In closed meetings, the Constitutional Amendment Committee also discussed the issues raised by mobilizing actors.<sup>280</sup> In the open sessions of National Assembly, law-makers and constitution-makers concentrated their energy on discussing not only the issues established in the agenda but also the fundamental questions raised and mobilized by social actors.<sup>281</sup> “Party-scholars” appeared often in the television news to criticize the public constitutional petitions. Newspapers controlled by the party or the state like *Quân đội Nhân dân* [People’s Army], *Công an Nhân dân* [People’s Police], *Đại đoàn Kết* [Great Solidarity], *Tạp chí Cộng Sản* [Communist Review], and *Báo Nhân dân* [People Newspaper] published a number of articles criticizing the mobilized constitutional proposals. However, despite the pressure a government hostile to constitutional reform can put on the proponents of constitutional reform, it can only do so after engaging in a critical conversation with the public and the mobilizing actors. Thus, despite resistance from a government hostile to constitutional reform, constitutional mobilization may at least facilitate a

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279 *Báo cáo Tổng hợp ý kiến nhân dân về Dự thảo sửa đổi Hiến pháp năm 1992, từ ngày 02/01/2013 đến ngày 30/4/2013* [Combined Report on People’s Opinions on Draft Amendments to the 1992 Constitution, from January 2, 2013 to April 30, 2013] (on file with author).

280 Constitutional Amendment Committee Interview, *supra* note 114.

281 These discussions were televised. The transcriptions are available at [http://duthaonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_NGHIQUYET/View\\_Detail.aspx?ItemID=32](http://duthaonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/View_Detail.aspx?ItemID=32).

national constitutional dialogue despite this mobilization and dialogue being controlled by the government.

## 2. *The Failure of Revolutionary Change.*

Ultimately, it's important to remember that Vietnam's 2013 Constitution rejected a revolutionary change. Constitution-makers ultimately rejected the call for a constitutional referendum and the Constitution was instead enacted by the National Assembly, the ordinary legislature. Constitution-makers did realize the potential positive effects of popular vote on the Constitution in that they believed it could consolidate social consensus and gain more social acceptance and that it would even have "international value."<sup>282</sup> But, a constitutional referendum was rejected on the basis that it would just allow the people to vote on the final constitution without public deliberation of substantive constitutional questions.<sup>283</sup> In response to the argument that the Constitution must express the popular will and therefore must be ratified by the people, constitution-makers explained that the National Assembly represents the people and has legitimate power to approve the Constitution.<sup>284</sup> There may be some basis to these explanations other than self-interest, but the crucial point was that as the process of constitutional mobilization had already been so forceful, a referendum may have only created a further constitutional opportunity for the social actors to mobilize for a constitutional revolution, the least attractive consequence for the existing political leaders. The Vietnamese government may have reasoned that it could exercise firm control over the public constitutional discourse and mobilization, but that it might have lost control over a constitutional referendum.

With regards to substantive aspects, the constitution rejected the calls for radical changes, including the establishment of a multi-party system, a separated government, and a military loyal to the constitution rather than a particular party. These proposals would have attacked essential cornerstones protecting the establishment of powerful national elites. Vietnamese political leaders may envisage different constitutional visions, but they are unanimous in protecting core values of the socialist regime.<sup>285</sup> Although the state planned to revise the Constitution comprehensively, there was no intention of having a constitutional revolution. Instead,

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282 Constitutional Amendment Committee Interview, *supra* note 114.

283 *Id.*

284 *Id.*

285 *Id.*

political elites wanted to have a new charter for the implementation of socialism in Vietnam to match a new global era.<sup>286</sup> Therefore, political leadership may have tolerated a “no taboo” constitutional discussion to buttress the sociological foundation of the political legitimacy but would not constitutionalize ideas and institutions that had the potential to damage the existing regime.

Another explanation of the failure of revolutionary constitutional change concerns the weakness of the mobilizing actors. In fact, constitutional mobilization in Vietnam was elite-led and lacked the sustaining participation of a public at large. As Vietnamese constitutional revision was not revolutionary, it did not necessarily involve mass mobilization.<sup>287</sup> Moreover, the social mobilization was not sustained by a strong middle class. Classical thinkers like Aristotle and contemporary thinkers like Francis Fukuyama have underlined the importance of the balance between the middle class and other social classes in creating substantial social change.<sup>288</sup> Although the middle class has emerged in Vietnam, with their population of 12 million by 2012 in the nation of 90 million people,<sup>289</sup> they are not a large and powerful enough group to sustain mass mobilization for a revolutionary constitutional change. Given this weakness and the given the power of the political elites, social actors did not expect that their mobilization can result in a revolutionary constitutional change.<sup>290</sup>

### 3. *Reformative Constitutional Change.*

The 2013 Constitution ultimately rejected the calls for revolutionary change but adopted reformative changes. However, partly because of the constitutional mobilization process that occurred during the drafting of the 2013 Constitution, the constitution ultimately recognized in its preamble that the people were the authors of the constitution and stipulated that direct democracy (Article 6) and constitutional referendums would be the avenue for future constitutional amendment (Article 120); required the Communist Party to operate within the framework of the constitution, be accountable to

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<sup>286</sup> *Id.*

<sup>287</sup> I am grateful to Mark Tushnet for this suggestion. E-mail from Mark Tushnet to Professor Bui Ngoc Son (July 28, 2016, 9:21 GMT +7) (on file with author).

<sup>288</sup> FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY* 439 (2014).

<sup>289</sup> Opinion, Huong Le Thu, *Forty Years on, a Middle Class Emerges in Vietnam*, Apr. 30, 2015, JAPANTIMES, <http://www.japantimes.co.jp/opinion/2015/04/30/commentary/world-commentary/forty-years-middle-class-emerges-vietnam/#.VyeJ-ijpZUQ>.

<sup>290</sup> CVHP Interview; and Civil Society Interview.



the public, and be subjected to public oversight (Article 4); established the principle of mutual control among the state branches (Article 2); provided for equality, cooperation, and competition among all economic sectors; and provided for wider rights to use lands.<sup>291</sup> In addition, the Constitution re-expressed existing constitutional rights in a more universalist manner and included eight new human rights (namely, the right to life, right not be expelled from home territory, right to private family life, presumption of innocence, right to appeal to higher court, right to favorable working conditions, prohibition of child labor, and the right to healthy environment). Constitution-makers believed that the new Constitution creates new conditions for reforms in Vietnam.<sup>292</sup>

Because of the extent to which the demands of the mobilizing actors were responded to in the 2013 constitution, some actors of the civil society have had rather positive responses to the new Constitution.<sup>293</sup> But, other social actors were disappointed by the Constitution because other expected reformative constitutional changes were rejected at the last moment, such as the introduction of a constitutional review body, removing the “leading role” of the state-owned enterprises, and recognizing private ownership of land.<sup>294</sup> Although the adoption of these reform proposals would not result in a fundamental change of the regime, they may have challenged traditional socialist values. For example, the creation of a constitutional review body would have contradicted the socialist principle of legislative supremacy.<sup>295</sup> Similarly, the state’s control of economic resources is the guarantee for implementation of socialist policies.

Although the national constitutional dialogue did not result in a constitutional revolution, it operated as the forum for political elites and the people, including mobilizing actors, to negotiate and compromise on constitutional questions. While political elites ultimately refused to implement fundamental changes, they did at least adapt the existing socialist constitutional system to respond to popular demands such as committing to future constitutional referendums, providing for the party’s accountability to the public, and for providing greater protections for universal human rights. Because these reformative constitutional changes exist in tension

<sup>291</sup> I have examined these changes separately in Bui Ngoc Son, *Globalization of Constitutional Identity*, 26 *WASH. INT’L L.J.* 463 (2017).

<sup>292</sup> Constitutional Amendment Committee Interview, *supra* note 114.

<sup>293</sup> Civil Society Interview, *supra* note 199.

<sup>294</sup> Thất vọng về sửa đổi Hiến pháp [*Disappointment About Amending the Constitution*] BBC TIẾNG VIỆT (Oct. 28, 2013), [http://www.bbc.com/vietnamese/vietnam/2013/10/131027\\_vn\\_amended\\_constitution\\_views](http://www.bbc.com/vietnamese/vietnam/2013/10/131027_vn_amended_constitution_views).

<sup>295</sup> Constitutional Amendment Committee Interview, *supra* note 114.

with socialist constitutional values adopted in the same Constitution, the 2013 Constitution provides a wide space for incremental, reformative constitutional change in Vietnam.

#### 4. *Cultural Constitutional Change.*

In addition to reformative changes, the constitutional dialogue realized in 2013 was constructive in that it helped to change the constitutional culture in Vietnam. To begin with, the actual occurrence of a national constitutional dialogue is itself a considerable change in constitutional culture. The authoritarian government in Vietnam had been conventionally suppressive to public criticisms of the regime. Even in the 2001 constitutional debate (which had been relatively open),<sup>296</sup> issues of providing for a multi-party system, the separation of powers, or constitutional courts were still taboos in constitutional discourse. The 2013 constitutional debates demonstrated significant changes compared to the 2001 debates. Political leaders instructed constitution-makers to receive and even consider opposing opinions.<sup>297</sup> Constitution-makers were responsive and respectful to opposing constitutional petitions.<sup>298</sup> Rather than banning the critical discussions and putting the activists into jail for crimes of subversion, Vietnamese political leaders not only allowed constitutional activists and intellectuals to seriously question the constitutional legitimacy of the regime, but also allowed for engagement in dialogue with them and the public. This dialogical culture demonstrates a more civilized way in which a government may treat its citizens and activists in constitutional matters.

Moreover, the constitutional dialogue in 2013 considerably changed the popular constitutional culture, and also the expected consequences of many mobilizing actors.<sup>299</sup> First, the dialogue allowed the social actors to actually realize their constitutional rights to political participation, which also helped to train the public in democratic practices, habits, and culture. Second, the dialogue raised the public's awareness of the role of the Constitution (especially its rights provisions). In Vietnam, as the Constitution is not judicially enforced, it had little place in the public mind. The 2013 mobilized constitutional dialogue changed that picture. Bùi Đức Lại,

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<sup>296</sup> See Mark Sidel, *Analytical Models for Understanding Constitutions and Constitutional Dialogue in Socialist Transitional States: Re-Interpreting Constitutional Dialogue in Vietnam*, 6 SINGAPORE J. INT'L & COMP.L. 42 (2002).

<sup>297</sup> Constitutional Amendment Committee Interview, *supra* note 114.

<sup>298</sup> Interview with an Assembly deputy, *supra* note 142.

<sup>299</sup> *Supra* Note 120 and Note 125.

member of the CVHP group, observed: “In the whole year of constitutional mobilization, social awareness has a new development.”<sup>300</sup> Several members of the National Assembly and the constitution-makers also told me that after the adoption of the new Constitution, the citizens are more aware of the relevance of the Constitution and even began to cite the Constitution to argue against state actions.<sup>301</sup> Third, the dialogue operated as the venue for social actors to raise the popular awareness of the problems internal to the existing constitutional order. Fourth, it helped social actors to envisage and raise the public awareness of normative constitutionalist values. For example, according to the former iSEE leader, the participation of the civil society groups and organizations in the constitution-making process through constitutional petitions helped to increase their human rights awareness.<sup>302</sup>

The public exposition and awareness of the role of the Constitution, constitutional problems and values in the long run may push the people to engage in more constitutional mobilization, which may result in further incremental constitutional change. Social mobilization cannot create constitutional change overnight. Even in the United States it also took decades for social movements to change constitutional norms.<sup>303</sup>

## VI. CONCLUSION

This Article has introduced the phenomenon and concept of constitutional mobilization, offered some theories as to how it works in practice, and offered the case-study of Vietnam’s 2013 constitution drafting as an example of constitutional mobilization. I conclude with further reflections. To begin with, this study has important implications for China. Despite having a similar communist regime, the Chinese citizens’ experiences with constitutional mobilization and particularly the responses of the Chinese government to Chinese attempts at constitutional mobilization have been considerably different. I argue that the lack of an opportunity for constitution-making in China is due in significant part to

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300 Bùi Đức Lại, *2013 và cuộc đấu tiên bộ - bảo thủ* [The Year 2013 and the Progressive-Conservative Battle], VIETNAMNET, Dec. 17, 2013, <http://vietnamnet.vn/vn/thoi-su/154041/2013-va-cuoc-dau-tien-bo-bao-thu.html>.

301 See for example M.Đ - B.T, *CSGT được quyền trưng dụng phương tiện: Vi hiến, xung đột pháp lý?* [Police Officers are allowed to Requisition Instruments: Unconstitutional, Legal Conflict?], TIENPHONG, Feb. 2, 2016, <http://www.tienphong.vn/xa-hoi/csgt-duoc-quyen-trung-dung-phuong-tien-vi-hien-xung-dot-phap-ly-966469.tpo>.

302 Civil Society Interview, *supra* note 199.

303 Eskridge Jr, *Some Effects*, *supra* note 1 at 2066.

Chinese constitutional exceptionalism which has prevented social actors in China from mobilizing a national constitutional dialogue as their Vietnamese counterparts did.<sup>304</sup>

More generally, I proposed that constitutional mobilization can be established as a new area of comparative constitutional inquiry. This is the area of empirical rather than normative inquiry, drawing on the fact that constitutional mobilization is an ubiquitous reality. This area is directive to the epistemology of the social foundation of constitutional government. Accordingly, the dynamics of constitutional law are situated within a more general context of contentious socio-political relations with discursive venues for resistance, contestation, and mobilization.<sup>305</sup> Studies of constitutional mobilization depart from juricentrism and textualism although they should not ignore courts, constitutional litigation, and constitutional texts. Courts and texts are situated within the complex relationship with social dynamics.

Studies of constitutional mobilization are an interdisciplinary area which should consider a variety of complex local and global factors which explain how and why social actors mobilize for constitutional change. Global factors include globalization, international law, transnational social movements, transnational social networks, and others. Local factors concern the economic, social, and political condition, constitutional arrangement, traditional culture, social structure, ideology, community identity, and intellectual environment, among others. In particular, constitutional mobilization must be situated within a particular constitutional arrangement in different political regimes. Due to the institutional and social embeddedness of constitutional mobilization, and the variety of constitutional opportunities, frames, resources, and changes, case-study exploration and contextual theorization are useful for studying constitutional mobilizations.

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<sup>304</sup> Bui Ngoc Son, *Constitutional Mobilisation in China*, INT'L J. LAW CONTEXT, May 2017, at 1-18.

<sup>305</sup> Nejaime, *supra* note 1, at 279.