

# *The Procuracy as a Subject of Constitutional Debate: Controversial and Unresolved Issues*

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## **Abstract**

The people's procuracy is a transplanted Soviet-style institution in Vietnam, which currently exercises the public prosecution function along with the supervision of judicial activities. Debates about the procuracy's role and function started as early as when the 1992 *Constitution of the Democratic Republic of Vietnam* (1992 Constitution) was drafted and they were facilitated by the judicial reform policies. In the process of revising the 1992 Constitution, heated debates on the procuracy continued. The subject of these debates included almost every fundamental aspect of the procuracy such as its institutional location, functions, duties, organization, and operation. This article reviews the constitutional debates concerning the procuracy between 2011 and 2013. It analyzes and compares the developments of the debates in this period with those that had occurred in the past, highlighting, in particular, key issues that remain unresolved. It argues that the controversy surrounding the procuracy reflects the legal and political complexities in Vietnam, especially the lack of agreement on institutional issues such as the rule of law, socialist legality, and control of powers.

The people's procuracy (*vien kiem sat nhan dan*) is a Soviet-style institution that has existed in Vietnam since 1960. When it was first established, the procuracy closely copied the Soviet *prokuratura* model, which exercised supervisory powers over the government machinery as well as society to ensure socialist legality.<sup>1</sup> However, since 2001, the procuracy has been transformed into the prosecuting authority of the state and, at the same time, the supervisor of judicial activities. These roles are understood in a very broad sense, and they include investigation activities, the adjudication of cases by the courts, the enforcement of sentences, and the operation of detention houses and prisons.<sup>2</sup>

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1. 1959 *Constitution of the Democratic Republic of Vietnam* (adopted 31 December 1959) [1959 *Constitution*], art 105; 1960 *Law on the Organization of the People's Procuracy* (adopted 15 July 1960), art 1.
2. Resolution No 51/2001/QH10 on Amending and Supplementing a number of articles of the 1992 Constitution of the Socialist Republic of Vietnam adopted by the National Assembly, dated 25 December 2001, art 1(23).

Like its counterparts in other socialist or former socialist states, the procuracy of Vietnam has always been a subject of intense debate due to its complex functions and duties. The controversy over the procuracy began during the constitutional debates in the 1990s. The most heated topic in that period was the criticism of the procuracy's overly broad general supervisory function and its poor performance.<sup>3</sup> The debates continued with the 2001 amendments to the 1992 *Constitution of the Democratic Republic of Vietnam* (1992 Constitution)<sup>4</sup> and were further encouraged by the judicial reform policies from 2001. In the constitutional reform process between 2011 and 2013, debates about the procuracy covered almost every fundamental aspect of the institution.

This article analyzes the constitutional debates about the procuracy between 2011 and 2013. It examines the developments of the debates in this period, compares them to the earlier constitutional debates, and highlights key issues that remain unresolved: its institutional location, functions, and duties. Adopting Vicki C. Jackson's ideas about the complexity of historical contexts in shaping constitutional arrangements and the interdependence of constitutional provisions,<sup>5</sup> this article argues that the controversies surrounding the procuracy reflect complicated Vietnamese historical contexts and the interdependence of the constitutional provisions on the procuracy and other institutions.

To this end, this article draws on a wide range of sources to examine different individual and institutional views about the procuracy. These sources include books, book chapters, and articles written by academics and different actors in the legal system from the 1990s to 2013.<sup>6</sup> In addition, this article explores the positions of different institutions on the procuracy by assessing their reports, research projects, and commentaries throughout the constitutional revision process.<sup>7</sup> Although the literature on the procuracy is extensive, this article focuses on the most important issues in the recent constitutional debates and refers to the most influential studies on the Vietnamese procuracy.

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3. Mark SIDEL, *The Constitution of Vietnam: A Contextual Analysis* (Oxford and Portland, Oregon: Hart Publishing, 2009), 106 [Sidel, *The Constitution of Vietnam*].
  4. 1992 *Constitution of the Democratic Republic of Vietnam* (adopted 25 April 1992) [1992 Constitution].
  5. Vicki C JACKSON, "Methodological Challenges in Comparative Constitutional Law" (2010) 28(3) Penn State International Law Review 319.
  6. Significant sources include PHAM Van Hung, ed, *Quoc Hoi Va Cac Thiet Che Trong Nha Nuoc Phap Quyen Xa Hoi Chu Nghia Viet Nam* [*The National Assembly and Other Institutions in the Socialist Law-Based State of Vietnam*] (Nha xuất bản Lao động [Labour Publishing House], 2009); CAO Anh Do, Phan Cong, *Phoi Hop Giua Cac Co Quan Trong Thuc Hien Cac Quyen Lap Phap, Hanh Phap Va Tu Phap O Viet Nam* [*Separation of Powers and Cooperation among the Legislative, Executive and Judiciary Bodies in Vietnam*] (Nha xuất bản Chinh tri Quoc gia [National Political Publishing House], 2013); NGUYEN Dang Dung et al, *Vien Kiem Sat Nhan Dan Trong Nha Nuoc Phap Quyen* [*The People's Procuracy in a Law-Based State*] (Nha xuất bản Tu phap [Judicial Publishing House], 2014) [Nguyen et al, *The People's Procuracy*]; DAO Tri Uc and VU Cong Giao, eds, *Binh Luan Khoa Hoc Hien Phap Nuoc Cong Hoa Xa Hoi Chu Nghia Viet Nam Nam 2013* [*Comments on the 2013 Constitution of the Socialist Republic of Vietnam*] (Nha xuất bản Lao động - Xã hội [Labour - Society Publishing House], 2014).
  7. These commentaries are available at National Assembly, *Nghị quyết sửa đổi, bổ sung Hiến pháp năm 1992* [*Resolution on amending and supplementing the 1992 Constitution*], Duthaonline [Draft Online] (2 January 2013), online: Duthaonline <[http://duthaonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_NGHIQUYET/View\\_Detail.aspx?ItemID=32&TabIndex=2&TaiLieuID=886](http://duthaonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/View_Detail.aspx?ItemID=32&TabIndex=2&TaiLieuID=886)>.

This article proceeds as follows. Part I introduces the theoretical framework of this study. This is followed by a brief review of the history and previous debates on the procuracy in Part II, focusing on the debates after the passage of Resolution No. 49 NQ/TW on the Judicial Reform Strategy to 2020 in 2005,<sup>8</sup> in particular, the arguments for narrowing the functions of the procuracy and transforming it into a prosecution office. Part III analyzes the developments of the debates in the constitutional reform process between 2011 and 2013. In Part IV, the article discusses the causes behind the controversies surrounding the procuracy, particularly the lack of agreement on a number of ideological issues, as well as the ongoing institutional struggles. That section also discusses the effects of the constitutional debates on the procuracy. The article concludes in Part V with some predictions about the development of the procuracy in the future.

## I. THE PROCURACY IN THE STATE STRUCTURE: THE COMPLEXITY OF HISTORICAL CONTEXTS AND THE INTERDEPENDENCE OF CONSTITUTIONAL PROVISIONS

### *A. Studies of the Procuracy and Possible Approaches*

The procuracy – a unique feature of socialist states – has always been a subject of intense debates. After the collapse of the Soviet Union, the topic of transforming the procuracies in former socialist countries has attracted even more attention. In Russia, during the late and post-Soviet era, academics vigorously demanded for the decrease in the general supervisory function of the procuracy.<sup>9</sup> This was followed by even more forceful calls to abolish the procuracy or to limit its function to the prosecution of criminal cases.<sup>10</sup> While discussing the status of the post-communist procuracies in countries like Bulgaria, Hungary, Poland, Romania, and Russia, Stephen Holmes claimed that “the long-term goal of procuracy reform is everywhere the same: to denude the office of some of its functions and to reassign them to other bodies”.<sup>11</sup> In socialist China, numerous reformers have also challenged the nature of the procuracy as the state organ for legal supervision, including the supervision of the courts. The reformers justified their calls on the basis that procurators are not likely to be neutral and impartial, that there is unequal status between procurators and lawyers in the proceedings, and that there is an inherent risk of undermining judicial independence.<sup>12</sup>

Although the above-mentioned discussion raised many similar issues to those highlighted in the dialogues about the procuracy in Vietnam, they do not offer a

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8. Resolution No 49-NQ/TW on the Judicial Reform Strategy to 2020 adopted by the Politburo of the Communist Party of Vietnam, dated 2 June 2005 Politburo of the Communist Party of Vietnam.
  9. See e.g. Gordon B SMITH, “The Struggle over the Procuracy” in Peter H SOLOMON Jr, ed, *Reforming Justice in Russia, 1864–1996* (New York: M E Sharpe, 1997), 356.
  10. *Ibid.*
  11. Stephen HOLMES, “The Procuracy and Its Problems: Introduction” (1999) 8 *East European Constitutional Review* 76 at 77.
  12. See e.g. Yuwen LI, *The Judicial System and Reform in Post-Mao China: Stumbling Towards Justice* (Farnham and Burlington: Ashgate, 2014) at 60–63.

theoretical framework for an examination of the issues. They are mainly descriptive, and they are not concerned with why the debates occur. Moreover, except in China, such discussions have generally arisen from the different historical context of post-Soviet states, which – unlike Vietnam – no longer endorse the socialist ideology.

This article attempts to analyze how and why the constitutional debates on the procuracy emerged in Vietnam and the effects and implications of those debates. Preliminary research suggests that reform proposals regarding the procuracy result from different understandings and expectations about how the broader legal and judicial system should develop. Ideological disagreements and institutional struggles both shaped the debates surrounding the procuracy.

I contend that there is no single “correct” path for analyzing or conceptualizing these debates. They can be explored from a law and society perspective, where the provisions on the procuracy are placed within the country’s broader historical, political, social, and economic contexts. Another promising framework for analysis is to examine the debates from the perspective of legal reform, for instance, by promoting the rule of law. It is also possible to think about the discourse on the procuracy through a legal transplantation lens, especially if we are keen to explore the Soviet legal legacy in contemporary Vietnam. The choice of an analytical framework, I believe, simply depends on our focus.

### B. *The Complexity of Historical Contexts and the Interdependence of Constitutional Provisions*

This article focuses on examining the discussion about the procuracy during the constitutional revision process and the ways in which they relate to other constitutional provisions discussed in that process.

According to Vicki C. Jackson, constitutions are made and interpreted in a complex and distinctive historical context.<sup>13</sup> An important feature of constitutional provisions is their interdependence – each provision is designed to create and achieve an overall balance in the constitution.<sup>14</sup> For example, Jackson suggests federal bargains are always historically contingent, and they arise out of particular deals struck by particular holders of power in society at any one time.<sup>15</sup> In addition, the features of federalist constitutions are even more interdependent because federal systems place an emphasis on an overall balance of power.<sup>16</sup> Although Jackson discusses these features of constitutional provisions as methodological challenges in comparative constitutional law without an intention to apply them to any specific provisions, this approach is useful for the purposes of our inquiry on the procuracy. It helps contextualize the procuracy as a subject of constitutional debates, and – by extension – facilitates our analysis of the causes behind the debates and its effects.

13. Jackson, *supra* note 5 at 324–325.

14. *Ibid.*, but note that Jackson also suggested that these characteristics may not be distinctive about constitutional law.

15. *Ibid.*

16. *Ibid.*

To be more specific, this paper argues that the debates about the procuracy need to be explored within the Vietnamese legal and political contexts and in relation to other institutional issues such as socialist legality and centralization of powers. These features are the basis for the procuracy's existence as borrowed from the Soviet model. In each particular historical period, however, the procuracy, the court, and other state agencies are (re)designed to implement the party-state's policy of the time. When the ideological system changes, as part of the overall system, the procuracy is inevitably subject to certain reforms. In the current context of Vietnam, it is therefore necessary to take into consideration significant institutional developments such as the party-state's determination to build a state governed by the rule of law (*nha nuoc phap quyen*),<sup>17</sup> and the recognition of the distribution of state powers.<sup>18</sup> Given these recent institutional developments, it is important to examine whether socialist legality (*phap che xa hoi chu nghia*)<sup>19</sup> has remained intact, or has it been modified or even abolished. The debates about the procuracy should also be explored in connection with existing understandings about the judicial system in Vietnam.

## II. HISTORY AND EARLIER DEBATES ON THE PROCURACY

### A. *Establishment*

Up until the 1950s, the procuracy did not exist in Vietnam. At that time, public prosecution was conducted by the prosecution office, which followed the French model introduced in Vietnam during the French colonial period.<sup>20</sup> After the Geneva Accord was signed in 1954, an independent prosecution office belonging to the government was established.<sup>21</sup> Under this system, the prosecution office was endowed with multiple roles: it had the powers to prosecute and to investigate criminal cases; it could take part in important civil cases to protect the interests of the state and the people; it supervised the observance of law in the investigation and adjudication of criminal cases; and it oversaw the enforcement of sentences, detentions, custody, and rehabilitation of prisoners.<sup>22</sup>

In 1959, North Vietnam underwent a socialist revolution. Adopting Lenin's socialist ideology presented in his work "Dual' Subordination and Legality",<sup>23</sup> Ho Chi Minh

17. *Nha nuoc phap quyen* was introduced into Party discourse in the Seventh Party Congress in 1991. However, as shown in Part IV, its true meaning remains controversial.

18. Resolution No 51, *supra* note 2, art 1(2).

19. *Phap che xa hoi chu nghia* is a set of organizational principles imported from the Soviet Union officially endorsed for the first time at the Third Party Congress in 1960.

20. "Phan hieu trung Dao tao boi duong Nghiep vu kiem sat tai thanh pho Ho Chi Minh [Procuratorial Profession Training and Reinforcing School in Ho Chi Minh City]", in *Giao Trinh Nghiep Vu Kiem Sat [Procuratorial Profession Training Textbook]* (Phan hieu trung Dao tao boi duong Nghiep vu kiem sat tai thanh pho Ho Chi Minh [Procuratorial Profession Training and Reinforcing School in Ho Chi Minh City], 2013) at 5.

21. *Decree 256/TTg on Duties and Organization of the Prosecution Office* (adopted 1 July 1959) and *Decree 321/TTg on the Establishment of the Prosecution Office at Appellate level and other levels* (adopted 2 July 1959).

22. *Ibid.*

23. According to Lenin, the law must be uniform and function of procurators is "to see that the law is really uniformly interpreted throughout the Republic, notwithstanding differences in local conditions, and in

established the procuracy system in Vietnam to ensure strict and uniform observance of the law and thereby safeguard socialist legality.<sup>24</sup> Like its *prokuratura* counterpart in Russia,<sup>25</sup> the procuracy in Vietnam was guaranteed independence from other state agencies, but it was also closely controlled by the Communist Party and served as an instrument of the Party in implementing its policy. The procuracy exercised enormous supervisory powers over the observance of the law by all state agencies and their staff, as well as citizens (this is called “general supervision”).<sup>26</sup> To be specific, the functions of the procuracy were:

[i] to supervise the observance of law in the resolutions, decisions, circulars, decrees, and activities of the State Council and local state agencies; supervise the observance of law by their staff and by citizens; (ii) to investigate crimes [although this was not detailed in the 1960 Law] and prosecute criminal offenders in the court; (iii) to supervise the observance of law in investigating activities of the Public Security agencies and other investigating agencies; and (iv) to supervise the observance of law in the adjudication of cases by the courts and in the implementation of court judgments.<sup>27</sup>

In doing so, the procuracies had the power to protest against first-instance judgments, and the Chief Procurator of the SPP could protest against any legally effective judgments where errors were detected.<sup>28</sup> The *1960 Law on the Organization of the People’s Procuracy* (1960 Law) also empowers the procuracy to supervise the observance of law in detention centres and to prosecute or participate in important civil cases which involved the state’s or the citizenry’s interest.<sup>29</sup>

### B. From 1960 to 2001

From 1960 to 2001, the general supervisory powers of the procuracy were maintained. However, in 1980, the public prosecution function was separated from the general supervision powers and recognized as an independent function.<sup>30</sup> It was claimed that this separation signifies the importance of the prosecution function and helps avoid

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spite of all local influences”. V I LENIN, “‘Dual’ Subordination and Legality” (20 May 1922), online: Marxists.org <<https://www.marxists.org/archive/lenin/works/1920/may/20.htm>>.

24. *1960 Law on the Organization of the People’s Procuracy*, *supra* note 1, art 2.

25. The *prokuratura* was a Soviet-style organ which was adopted in all Soviet bloc countries after World War II. In fact, the origin of the Russian *Prokuratura* dates back to the era of Peter the Great, who in 1722 established the *prokuratura* in order to have an efficient control organ, “an eye of the Tsar”, to supervise central and local administrative authorities. The *prokuratura* of this type was replaced in 1864 by a new institution which followed the French model of the time and had prosecutorial tasks only. The Soviet *prokuratura* established in 1922 was a return to the old tradition prior to 1864 with the general supervision of legality resumed. See Harold J BERMAN, *Justice in the U.S.S.R.: An Interpretation of the Soviet Law*, rev ed (Cambridge, MA: Harvard University Press, 1963) 240–241.; Gordon B SMITH, *The Soviet Procuracy and the Supervision of Administration* (Winchester, MA: Sijthoff and Noordhoff, 1978) 4–8.

26. *1959 Constitution*, *supra* note 1, art 105; *1960 Law on the Organization of the People’s Procuracy*, *supra* note 1, art 1.

27. *Ibid*, art 3.

28. *Ibid*, art 18.

29. *Ibid*, art 3.

30. *1980 Constitution of the Socialist Republic of Vietnam* (adopted 19 December 1980), art 138.

overlaps in the functioning of the procuracy.<sup>31</sup> Until 1992, the procuracy performed its functions by supervising the observance of law in the legal documents and behaviours of ministries and other agencies in the Council of Ministers, local governmental agencies, social organizations, armed forces, as well as the conduct of other state employees and citizens.<sup>32</sup> It also supervised the observance of law in the investigation activities of the public security apparatus and other investigative bodies, in the adjudication activities of the court, the enforcement of sentences, and in the detention, custody, and rehabilitation of prisoners.<sup>33</sup> In addition to its prosecution function, under the 1960 Law and 1992 *Law on the Organization of the People's Procuracy* (1992 Law), the procuracy was also empowered to investigate crimes in accordance with the criminal procedure law.<sup>34</sup>

However, the more tasks the procuracy was entrusted with, the more criticism it attracted. Debates about the procuracy intensified as early as when the 1992 Constitution was discussed and adopted.<sup>35</sup> Criticisms at that time centred on its overly powerful role as a kind of “national inspector-general”.<sup>36</sup> The debates continued with the 2001 amendments to the 1992 Constitution. While opponents criticized the low quality of public prosecution and criminal investigation by the procuracy and favoured another set of state institutions to deal with accountability issues, the procuracy and its supporters forcefully tried to beat the proposal to abolish its general supervisory function.<sup>37</sup>

### C. After 2001

The debate culminated in a sharp reduction of the procuracy's functions, including the abolition of its general supervisory function in 2001.<sup>38</sup> This change was intended to allow the procuracy to focus on bringing public prosecutions and on supervising judicial activities. These were deemed as “very pressing” duties which “cannot be entrusted to other agencies”.<sup>39</sup> Indeed, the failure of the procuracy in its tasks was too obvious to deny. Many lawyers and judges pointed out that criminal investigations and public prosecutions were carried out shoddily.<sup>40</sup> Another reason for the removal of

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31. LE Dan Khiet, “Qua Trinh Hinh Thanh, Phat Trien Che Dinh Vien Kiem Sat Nhan Dan Qua Cac Ban Hien Phap Nuoc Ta Va Su Can Thiet Ke Thua Trong Su Nghiep Doi Moi [The Establishment and Development of the People's Procuracy Regulations in the Constitutions of Our Country and the Need to Inherit in the Innovation Process]” (2012) 13 Tap chi Kiem sat [Procuratorial Journal] 54 at 55.
  32. 1981 *Law on the Organization of the People's Procuracy* (adopted 4 July 1981), art 3.
  33. *Ibid.*
  34. 1992 *Law on the Organization of the People's Procuracy* (adopted 8 October 1992), art 3(6).
  35. Sidel, *The Constitution of Vietnam*, *supra* note 3; TRUONG Dac Linh, “Mot So Y Kien Ve Doi Moi to Chuc Vien Kiem Sat Trong Chien Luoc Cai Cach Tu Phap O Nuoc Ta Hien Nay [Some Ideas on Reforming the Procuracy in the Current Judicial Reform in Our Country]” (2008) (14 & 16) Tap chi Kiem sat [Procuratorial Journal] 26 at 35 and 106.
  36. Sidel, *The Constitution of Vietnam*, *supra* note 3 at 106.
  37. Mark SIDEL, *Law and Society in Vietnam* (New York: Cambridge University Press, 2008) 27 [Sidel, *Law and Society in Vietnam*]; Truong, *supra* note 35 at 36.
  38. Resolution No 51, *supra* note 2, art 1(23).
  39. Report No 310/UBTVQH on some amendments to the 1992 Constitution by the Standing Committee of the National Assembly to the National Assembly, dated 18 May 2011, Part V.2.
  40. Sidel, *Law and Society in Vietnam*, *supra* note 37 at 27.

the procuracy's general supervisory function was to redress the overlaps in its functions and duties with other state institutions.<sup>41</sup> The removal of this function would:

[R]educe the inconvenience suffered by agencies and organizations that are subject to the supervision, inspection, and checks by the procuracy, so as to enable these agencies and organizations to be confident in their ability to operate, produce, and carry on business in accordance with the law.<sup>42</sup>

As a result, the areas of responsibility that were removed from the procuracy were taken over by different state agencies including the Ministry of Justice, the national inspectorate, the auditing agency, and the Administrative Court.

In 2005, concerns over a number of wrongful decisions in the procuracy's conduct of investigations, arrests, detentions, prosecutions, and even at trials led to an urgent need for judicial reform, including the need to improve the quality, accuracy, and consistency of public prosecution.<sup>43</sup> The Communist Party's Resolution 49 stipulated that "*in the meantime*, the procuracy maintains its current functions to perform public prosecution and supervise judicial activities", but suggests "considering the possibility of transforming the procuracy into the public prosecution office".<sup>44</sup> It was unclear why the transformation was abruptly suggested in the Resolution. However, it is arguable that the proposed reform was, to certain extent, linked to the emphasis on adversarial court proceedings that would ultimately require equality between lawyers and procurators (i.e. prosecutors).

A number of works were published to support the transformation of the procuracy into a prosecution office. However, the majority of these works simply assumed that the transformation had been decided and they were only concerned with how the prosecution office would be organized and operated.<sup>45</sup> One of the few arguments which directly advocated for the transformation of the procuracy into a prosecution office was by scholar-reformer Bui Ngoc Son. Bui drew on the procuracy's inconsistent co-existence with the system of checks and balances among the legislature, the executive, and the judiciary in a state governed by the rule of law.<sup>46</sup> It was

41. Report No 310/UBTVQH, *supra* note 39, Part V.2.

42. *Ibid*, Part V.2

43. See Resolution No 49, *supra* note 8, Preamble. Note that the UNDP's Report in 2004 shows that the level of people's confidence in the procuracy is quite low. UNDP, *Access to Justice in Vietnam – Survey from a People's Perspective* (2004), online: UNDP <[http://www.vn.undp.org/content/vietnam/en/home/library/democratic\\_governance/access-to-justice-in-viet-nam—survey-from-a-peoples-perspective.html](http://www.vn.undp.org/content/vietnam/en/home/library/democratic_governance/access-to-justice-in-viet-nam—survey-from-a-peoples-perspective.html)>.

44. Resolution 49, *supra* note 8, s II 2.2.

45. See e.g. TRAN Dai Thang, "Co Nen Chuyen Doi Vien Kiem Sat Thanh Vien Cong To? [Should the Procuracy Be Transformed into the Prosecution Office?]" (2006) Tap chi Nghien cuu lap phap dien tu [Legislative Research Journal], online: Nghiên cứu lập pháp <[http://www.nclp.org.vn/nha\\_nuoc\\_va\\_phap\\_luat/co-nen-chuyen-1110i-vien-kiem-sat-thanh-vien-cong-to/?searchterm=>](http://www.nclp.org.vn/nha_nuoc_va_phap_luat/co-nen-chuyen-1110i-vien-kiem-sat-thanh-vien-cong-to/?searchterm=>)>; DO Van Duong, "Co quan thuc hanh quyen cong to trong cai cach tu phap o nuoc ta hien nay [The Procuratorial Organ in Judicial Reform in Our Nation Today]" (2006) 7 (79) Tap chi Nghien cuu lap phap [Legislative Research Journal] 10.

46. BUI Ngoc Son, "Vien Canh Vien Kiem Sat O Viet Nam [The Future of the Procuracy of Vietnam]" (2009) 20(157) Tap chi Nghien cuu lap phap [Legislative Research Journal] 20. See also Cao, *supra* note 6 at 201–201.

further argued that the protection of socialist legality, which was the primary function of the procuracy, would not be necessary for, and even against, the nature of a state governed by the rule of law.<sup>47</sup> This is because while socialist legality insists on the strict observance of law made by the state at the central level, rule of law requires the state to be governed and restrained by the law.<sup>48</sup> Moreover, the abolition of the procuracy would not harm the unification of state power in Vietnam: the socialist unification of power only emphasized the unification of power between the legislature and the executive, while the procuracy was mainly established with the aim to unify the diversified local executive committees and their subordinate agencies.<sup>49</sup>

Other scholars such as Thai Vinh Thang and Cao Anh Do supported the plan to limit the mandate of the procuracy by focusing on the problems regarding its supervision over judicial activities. They argued that supervising judicial activities and, at the same time, exercising the public prosecution function, meant that the procuracy was playing two incompatible roles – as an actor in the proceedings and as the supervisor of other actors and of itself.<sup>50</sup> By supervising the adjudication of cases by the court, they added, the procuracy undermined the independence of the court system.<sup>51</sup> As lawyers have pointed out, this also created substantial inequality between procurators and lawyers.<sup>52</sup> Such inequality was well illustrated by the difficulties lawyers faced in criminal cases, the alleged judicial bias for the prosecution, and the extremely low acquittal rate.<sup>53</sup>

Unsurprisingly, leaders of the procuracy vigorously fought against the proposed transformation. They criticized the proposed transformation of the procuracy into the prosecution office as an attempt to copy the Western “bourgeois” model without considering Vietnam’s political ideology and reality. Le Huu The, for example, argued for the necessity and efficiency of the procuracy’s supervision over judicial activities.<sup>54</sup> He also argued that the two functions of the procuracy reinforced each other.<sup>55</sup> Some leaders and advocates of the procuracy such as Nguyen Thai Phuc (former procurator

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47. *Ibid.*

48. *Ibid.* See also Hiroshi ODA, “Procuracy and the Regular Courts as Enforcers of the Constitutional Rule of Law: The Experience of East Asian States” (1986) 61 *Tulane Law Review* 1339 at 1355–1362 on the comparison between socialist legality and rule of law.

49. Bui, *supra* note 46.

50. See e.g. THAI Vinh Thang, “Vien Cong to Thay the Vien Kiem Sat Nhan Dan Se Duoc to Chuc Va Hoat Dong Nhu the Nao? [How the Prosecution Office that Replaces the Procuracy Is Organized and Operated?]” (2008) (2) *Tap chi Luat hoc* [Jurisprudence Journal] 37 at 44.

51. Cao, *supra* note 6 at 202.

52. See e.g. NGUYEN Hung Quang, “Lawyers and Prosecutors under Legal Reform in Vietnam: The Problem of Equality” in Stéphanie BALME & Mark SIDEL, eds, *Vietnam’s New Order: International Perspectives on the State and Reform in Vietnam* (New York and Basingstoke: Palgrave Macmillan, 2007) 162.

53. *Ibid.*

54. LE Huu The, “To Chuc Bo May Va Chuc Nang, Nhiem Vu Cua Vien Kiem Sat Trong Tien Trinh Cai Cach Tu Phap [Organization and Functions, Duties of the Procuracy in Judicial Reform Process]” (2008) (14&16) *Tap chi Kiem sat* [Procuratorial Journal] 4 [Le, “Organization and Functions”]. *Contra* Sidel, *The Constitution of Vietnam*, *supra* note 3 at 27.

55. Le, “Organization and Functions”, *supra* note 54 at 4.

and lecturer at the school for procurators) even called for the restoration of the procuracy's general supervisory function.<sup>56</sup>

These debates did not lead to a transformation of the procuracy into the prosecution office, nor did it confirm the procuracy's long-term mandate. In the constitutional reform process between 2011 and 2013, these aspects continued to be explored with some – albeit limited – developments in the discussion about the role and position of the procuracy in the Vietnamese legal order.

### III. REVISING THE 1992 CONSTITUTION: CONTINUING DEBATES (2011–2013)

#### A. Functions

When the constitutional debate about the functions of the procuracy took place during the constitutional reform process between 2011 and 2013, academic discussions in support of transforming the procuracy into the prosecution office were rare. Reformers simply relied on the judicial reform strategy set out by Resolution 49 to suggest transforming the procuracy into the prosecution office so it could supervise criminal investigation and better perform its prosecutorial function.<sup>57</sup> Public discussion about the procuracy was not notable despite the fact that roughly 14 thousand people signed Petition 72, to which a proposed constitution replacing the procuracy with a prosecution office was attached.<sup>58</sup> As Gillespie warned, while the press and the general population may discuss particular concerns, a more thorough constitutional discourse was still within the domain of the Party and the government and this was not available through the mainstream media.<sup>59</sup>

By contrast, a vast number of articles were published in the procuracy's journal to argue for the retention of the procuracy in the legal system and to emphasize the importance of its supervisory function over judicial activities. Leaders and advocates for the procuracy again relied on Vietnamese political ideology and the reality of criminal activities to argue that the procuracy needed to perform its supervisory

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56. See e.g. NGUYEN Minh Duc, "Ve Chuc Nang, Nhiem Vu Cua Vien Kiem Sat Theo Tinh Than Cai Cach Tu Phap [About the Functions and Duties of the Procuracy According to Judicial Reform Strategy]" (2008) (14&16) *Tap chi Kiem sat* [Procuratorial Journal] 50 at 53; NGUYEN Thai Phuc, "Vien Kiem Sat Hay Vien Cong To? [Procuracy or Prosecution Office?]" (11 December 2008), online: *Truong Dai Hoc Luat Tp. Ho Chi Minh* [Ho Chi Minh City Law University] <[http://www.hcmulaw.edu.vn/hcmulaw/index.php?option=com\\_content&view=article&id=284:vkshvct&catid=108:ctc20072&Itemid=110](http://www.hcmulaw.edu.vn/hcmulaw/index.php?option=com_content&view=article&id=284:vkshvct&catid=108:ctc20072&Itemid=110)>.
57. See e.g. DINH Van Que, "Vienkiem sat can chuyen thanh Vien cong to [The procuracy should be transformed into the prosecution office]" *Bao Phap luat thanh pho Ho Chi Minh* [Ho Chi Minh City Law Newspaper] (17 April 2012), online: *Duthaoonline* <[http://duthaoonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_NGHIQUYET/View\\_Detail.aspx?ItemID=32&TabIndex=5&YKienID=232](http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/View_Detail.aspx?ItemID=32&TabIndex=5&YKienID=232)>.
58. Petition 72 was a highly controversial petition regarding the draft new constitution prepared by the Constitutional Amendment Committee introduced by a group of 72 senior scholars of the country from different fields. For more detail about Petition 72 and its effect see e.g. BUI Ngoc Son, "Petition 72: The Struggle for Constitutional Reforms in Vietnam" (28 March 2013), online: *I-CONnect* <<http://www.iconnectblog.com/2013/03/petition-72-the-struggle-for-constitutional-reforms-in-vietnam>>.
59. John GILLESPIE & Albert H Y CHEN, eds, *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes* (New York: Routledge, 2010) 78.

functions over judicial activities.<sup>60</sup> They argued that the procuracy has many advantages in supervising judicial activities owing to its participation in every stage of the proceedings and its expertise in such matters, which was developed through its day-to-day operations.<sup>61</sup> According to them, the low quality of the judicial system and the inadequate legal knowledge of Vietnamese citizens necessitated the preservation of the procuracy's supervisory function to prevent violations of human rights by state agencies.<sup>62</sup> In other countries, they added, the prosecution offices not only exercised public prosecutorial functions, but also performed other functions, including supervising judicial activities.<sup>63</sup>

Some officials within the procuracy went further and called for the restoration of the general supervisory function.<sup>64</sup> Nguyen Hoa Binh, the then Chief Procurator of the Supreme People's Procuracy, for example, argued that the mechanisms that had replaced the procuracy's supervisory functions had many "loopholes".<sup>65</sup> He argued that in the fight against corruption in Vietnam, the procuracy offered more advantages than the prosecution office model.<sup>66</sup> Some scholars including Le Van Cam also claimed that in the post-Soviet states, despite heated debates about the functions of the procuracy, their procuracies continued to perform supervisory functions.<sup>67</sup>

The report on the constitutional debates on the procuracy system showed that of the 13,113 comments received by the Supreme People's Procuracy, an overwhelming majority (12,767 comments or over 97%) supported the restoration of the general

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60. See e.g. NGUYEN Thai Phuc, "Chuc Nang, Nhiem Vu Cua Vien Kiem Sat Nhan Dan Va Nhung Van De Dat Ra Doi Voi Viec Sua Doi, Bo Sung Hien Phap Nam 1992 [Functions and Duties of the People's Procuracies and the Issues to Be Considered in the Process of Revising the 1992 Constitution]" (2012) 13 *Tap chi Kiem sat [Procuratorial Journal]* 13 [Nguyen, "Functions and Duties"]; LE Huu The, "Mot So Van De Sua Doi, Bo Sung Cac Quy Dinh Ve Vien Kiem Sat Trong Hien Phap Nam 1992 [Some Issues on Amending the Provisions About the Procuracy in the 1992 Constitution]" (2012) 1 *Tap chi Kiem sat [Procuratorial Journal]* 21; LE Thanh Duong, "Mot So Van De Ve Chuc Nang, Nhiem Vu Cua Vien Kiem Sat Nhan Dan Trong Bo May Nha Nuoc Cong Hoa Xa Hoi Chu Nghia Viet Nam Trong Tien Trinh Sua Doi Hien Phap Nam 1992 [Some Issues About the Functions, Duties of the People's Procuracy in the State Machinery of the Socialist Republic of Vietnam in the Process of Revising the Constitution 1992]" (2012) 13 *Tap chi Kiem sat [Procuratorial Journal]* 34 at 35–36 [Le, "Some Issues"].
61. LE Huu The, "Sua Doi, Bo Sung Che dinh Vien Kiem Sat Trong Hien Phap Nam 1992 [Amending the Provisions About the Procuracy in the 1992 Constitution]" (2012) 5 *Tap chi Kiem sat [Procuratorial Journal]* 15 at 15–16 [Le, "Amending the Provisions"].
62. See e.g. Nguyen, "Functions and Duties", *supra* note 60.
63. Le "Amending the Provisions", *supra* note 61 at 17.
64. See e.g. NGUYEN Hoa Binh, "Hoan thien che dinh Vienkiem sat nhan dan trong Hien phap [Improving the provisions on the procuracy in the Constitution]", online: *Truong Dai Hoc Kiem Sat Ha Noi [Procuratorial University]* <<http://tks.edu.vn/thong-tin-khoa-hoc/chi-tiet/119/462>>.
65. *Ibid.*
66. *Ibid.*
67. LE Van Cam "Cac quy pham hien dinh ve he thong Vienkiem sat nhan dan trong xay dung nha nuoc phap quyen [Constitutional provisions on the people's procuracy in building the state governed by the rule of law]" (2012) *Tan Xuan Tap chi Kiem sat [Procuratorial Journal]* 9 at 12–13; See also NGUYEN Van Quang, "Vien Kiem Sat Voi Hai Chuc Nang Thuc Hanh Quyen Cong to Va Kiem Sat Hoat Dong Tu Phap La Su Lua Chon Thich Hop Trong Qua Trinh Xay Dung Nha Nuoc Phap Quyen Xa Hoi Chu Nghia Viet Nam [The Procuracy with the Functions of Exercising Public Prosecution and Supervising Judicial Activities Is an Appropriate Choice in the Process of Building the Law-Based Socialist Republic of Vietnam]" (2012) 13 *Tap chi Kiem sat [Prosecutorial Journal]* 47.

supervisory function of the procuracy.<sup>68</sup> These comments highlighted that the lack of effective mechanisms to perform this supervisory function had led to the extensive abuse of power and corruption.<sup>69</sup> However, views differed on the precise scope of the general function that should be restored, i.e., whether the procuracy should: (i) exercise its general function over all administrative, economic, and social activities like it did before the 2001 amendments; or (ii) only supervise the observance of law by the agencies tasked with the promulgation of legal documents; or (iii) deal with administrative violations in addition to supervising the observance of law by agencies tasked with promulgating legal documents. The last was the preferred option within the procuracy – as reported – with more than 75% of comments supporting this option.

There was no commonly agreed view within the courts about the functional scope of the procuracy either. While most of the comments received by the Supreme People's Court agreed with retaining the two current functions of the procuracy, some argued against the supervisory function and supported reducing the function of the procuracy to public prosecution only.<sup>70</sup>

Notably, transformation of the procuracy into a prosecution office received significant support from the government, including the Ministry of Justice and the Ministry of Public Security, as well as the local governments of Hanoi and Ho Chi Minh City.<sup>71</sup> The main arguments in support of this transformation were that the dual functions of the procuracy were incompatible with the long-term judicial reform strategy and that such functions undermined the independent adjudication of the court.<sup>72</sup> They argued that by both exercising public prosecutorial functions and supervising judicial activities, the procuracy itself could not act impartially, and it could easily influence investigation activities and the adjudication of cases.<sup>73</sup> Moreover, internal mechanisms within judicial agencies have been put in place to ensure the observance of law, which made supervision by the procuracy redundant.<sup>74</sup> It was also argued that if an agency tasked with supervising judicial activities is ever needed, such an agency should be another independent agency belonging to the National Assembly.<sup>75</sup>

There were also considerable calls for clarifying the public prosecution and supervisory functions of the procuracy. During this period, there was increasing attention on fundamental yet controversial issues. These include defining public prosecution and exercising public prosecution functions, ascertaining the relationship

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68. Report No. 27/Bc-Vkstc-V8 Summarizing the Commentaries on the Draft Amendments to the 1992 Constitution within the Procuracy System, adopted by the Supreme People's Procuracy, dated 22 March 2013, Part III, on Chapter VIII.

69. *Ibid.*

70. Report No. 13/Bc-Tandtc Summarizing the Commentaries on the Draft Amendments to the 1992 Constitution, adopted by the Supreme People's Court, dated 29 March 2013, Part III.9.

71. Report No. 135/Bc-Cp Summarizing the Commentaries on the Draft Amendments to the 1992 Constitution, adopted by the Government of Vietnam, dated 5 April 2012, Part II, on Chapter VIII.

72. *Ibid.*

73. *Ibid.*

74. *Ibid.*

75. *Ibid.*

between public prosecution and investigation, determining the role that the procuracy should play in the investigation stage and its relationship with the investigation body, and clarifying the role that procurators should play in criminal trials and their relationship with defence counsel.<sup>76</sup> In their attempts to resolve these questions, discussants drew on their understanding of and expectations from judicial reform. The most frequently discussed issues, therefore, were the distinction between common law and civil law traditions, the question of which model of criminal procedure would be suitable for Vietnam, and which elements should be adopted.<sup>77</sup>

With regard to the supervision of judicial activities, commentators were most concerned with the power of the procuracy to approve the application of deterrent measures such as arrest and detention, arguing that any restriction on human rights must be determined by the courts.<sup>78</sup> Moreover, it was argued that the procuracy should only supervise judicial activities in criminal and administrative cases, rather than in civil cases where the autonomy of the parties should be fully respected.<sup>79</sup>

### B. Institutional Location

The institutional location of the procuracy within the state apparatus was another controversial issue discussed in the 2011–2013 constitutional debate. Some scholars and lawyers argued that the procuracy belonged to the judicial system, as apart from exercising prosecutorial powers, it also performed tasks which were judicial in nature, such as approving search and arrest warrants.<sup>80</sup> Others argued that only the courts should be considered a judicial organ and the procuracy does not fit that characterization because judicial power involves the adjudication of cases.<sup>81</sup> Some lawyers pointed out that neither public prosecution nor investigation activities are judicial activities, as criminal investigation is a function of the executive and the performance of public prosecution by the procuracy is also a function of the executive.<sup>82</sup> While supervising

76. See e.g. LE Huu The, DO Van Duong and NGUYEN Thi Thuy, eds, *Nhung Van De Ly Luan Va Thuc Tien Cap Bach Cua Viec Doi Moi Thu Tuc to Tung Hinh Su Dap Ung Yeu Cau Cai Cach Tu Phap [Urgent Theoretical and Practical Issues in Reforming Criminal Procedure to Meet the Requirements of Judicial Reform]* (Nha xuat ban Chinh tri Quoc gia [National Political Publishing House], 2013), 155–161.

77. *Ibid.*

78. See e.g. Nguyen et al, *The People's Procuracy*, *supra* note 6 at 387.

79. Report No 13, *supra* note 70.

80. See e.g. DAO Tri Uc, “Che Dinh Vien Kiem Sat Nhan Dan Trong Hien Phap Viet Nam [The Procuracy Institution in Vietnam's Constitution]” (2012) 13 Tap chi Kiem sat [Procuratorial Journal] 11; PHAM Hong Hai, “Ban Ve Chuc Nang Kiem Sat Hoat Dong Tu Phap Cua Vien Kiem Sat Nhan Dan [A Discourse on the Supervisory Role over Judicial Activities of the People's Procuracies]” (9 July 2011), online: Pham Hong Hai & Associates <<http://www.phamhonghai.vn/Ban-ve-chuc-nang-kiem-sat-hoat-dong-tu-phap-cua-Vien-Kiem-Sat-Nhan-Dan-newsview.aspx?cate=248&cid=267>>.

81. See e.g. TRAN Dinh Nha, “Mot So Van De Ve Quyen Tu Phap, Hoat Dong Tu Phap, Co Quan Tu Phap, Kiem Sat Hoat Dong Tu Phap [Some Issues on Judicial Power, Judicial Activities, Judicial Organs, Supervision over Judicial Activities]”, online: Truong Dai Hoc Kiem Sat Ha Noi [Procuratorial University] <[http://www.tks.edu.vn/portal/detailtks/6756\\_67\\_61\\_Mot-so-van-de-ve-quyen-tu-phap,-hoat-dong-tu-phap,-co-quan-tu-phap,-kiem-sat-hoat-dong-tu-phap.html](http://www.tks.edu.vn/portal/detailtks/6756_67_61_Mot-so-van-de-ve-quyen-tu-phap,-hoat-dong-tu-phap,-co-quan-tu-phap,-kiem-sat-hoat-dong-tu-phap.html)>.

82. TRAN Dinh Nha, “Mot so van de ve quyen tu phap, hoat dong tu phap, co quan tu phap,kiem sat hoat dong tu phap [Some issues on judicial power, judicial activities, judicial body, supervision over judicial activities]” (2013) 16 Tap chi Nghien cuu lap phap [Journal of Legislative Study] 12; TRAN Quang Huy,

judicial activities, the procuracy is acting on behalf of the National Assembly because only the National Assembly has the power to supervise both the executive and the judiciary.<sup>83</sup>

This issue was controversial even within the procuracy. Some supported the view that the procuracy is a judicial body or at least a body that exercises judicial power because the procuracy, while exercising its public prosecution function, not only acts as a party (i.e., the prosecutor) in the proceedings but also decides on the application of deterrent measures that potentially restricts human rights.<sup>84</sup> Others were still confused about this issue and suggested defining the procuracy as “the body which exercises public prosecution and supervises judicial activities”.<sup>85</sup> The view that the procuracy is not a judicial body and should not be regulated in the same chapter with the court in the constitution was favoured by commentators from the court system and the government.<sup>86</sup>

### C. Duties

Under the 1992 Constitution, the procuracy had the duty to “contribute to ensuring that the law is strictly and uniformly observed”.<sup>87</sup> While drafting the amendments, the Drafting Committee added that “the procuracy has the duties to protect the law, human rights, citizen’s rights, the socialist regime, the interests of the state, and the legal rights and interests of organizations and individuals, thus contributes to ensuring that laws are strictly and uniformly observed”.<sup>88</sup> This reflects the role of the procuracy not only as the state prosecutor, but also as a supervisor to ensure that injustice is not committed against innocent people and violations in judicial activities are detected and dealt with promptly.<sup>89</sup>

Unsurprisingly, this proposed amendment was strongly supported by leaders of the procuracy. They used it as a basis to support their argument for maintaining its supervisory function over judicial activities. They emphasized the need for the procuracy to prevent and detect violations by state agencies, and thereby safeguard the rights and freedom of the citizens.<sup>90</sup> In the criminal process, this supervisory role was claimed to be even more important as violations in this sphere may have extremely

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“Bao Ve Cong Ly, Bao Ve Quyen Con Nguoi, Quyen Cong Dan La Nhiem Vu Hang Dau Cua Toa an [Protecting Justice, Human Rights and Citizens’ Rights Is the First Priority of the Court]” *Công lý [Justice]* (14 March 2014), online: *Công lý* <<http://congly.com.vn/phap-dinh/bao-ve-cong-ly-bao-ve-quyen-con-nguoi-quyen-cong-dan-la-nhiem-vu-hang-dau-cua-toa-an-43118.html>>.

83. *Ibid.*

84. Report No 27, *supra* note 68.

85. *Ibid.*

86. Report No 13, *supra* note 70.

87. 1992 Constitution, *supra* note 4, art 137.

88. Drafting Committee of the Amendments to the 1992 Constitution, “To trình ve Du thao sua doi Hien phap nam 1992 [Report explaining the Draft Amendments to the 1992 Constitution]”, Part II section 6.4 *Duthaoonline [Draft Online]* (5 January 2013), online: Duthaoonline <[http://duthaoonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_NGHIQUYET/View\\_Detail.aspx?ItemID=32](http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_NGHIQUYET/View_Detail.aspx?ItemID=32)>.

89. *Ibid.*

90. DUONG Thanh Bieu “Tien Si Duong Thanh Bieu Tra Loi Phong Van Tap Chi Kiem Sat Ve Mot So Noi Dung Lien Quan Den Che Dinh Vien Kiem Sat Nhan Dan Trong Hien Phap Nam 1992 [Dr Nguyen Thanh Bieu’s Responses to the Interviews by the Procuratorial Journal on Some Issues Relating to the Institution of the People’s Procuracy in the Constitution 1992]” (2012) 5 Tap chi Kiem sat [Prosecutorial Journal] 19 at 23.

serious consequences implicating the most basic human rights, including the right to life.<sup>91</sup> By taking part in every stage of the criminal process, the procuracy apparently has the advantage in protecting human rights promptly and effectively.<sup>92</sup> The then Chief Procurator of the Supreme People's Procuracy even claimed that protecting human rights would be the most important duty of the procuracy in the future.<sup>93</sup> Indeed, with numerous false imprisonments and false convictions reported in the last few years, the degree of public concern over abuses in the criminal process has increased the significance of human rights protection, especially in relation to the rights of suspects and defendants. This explains why the amendment to the duties of the procuracy – particularly the duty to protect human rights – was far less controversial.

The procuracy had in fact been responsible for protecting human rights in the form of “the lives, property, freedom, honour and dignity of the citizens” at least since the promulgation of the 1992 Constitution.<sup>94</sup> However, before the wide-ranging reforms initiated in 2013 to improve the recognition and protection of human rights in Vietnam, serious attention had never been paid to the role of the procuracy in rights protection. The issue has been touched upon in the past few years, but save for general claims about this important aspect of the procuracy's role, no attempts have been made to examine the topic in great detail.<sup>95</sup>

In addition to the most important issues discussed above, there were other questions discussed in this constitution-making period. They included matters pertaining to the organizational structure and operational principles of the procuracy i.e., the leadership of the chief procurator, the independence of procurators, and the existence and discretion of the procuratorial committee (*uy ban kiem sat*). It is, however, beyond the scope of this article to engage in a detailed discussion of such issues.

## IV. DISCUSSION

### A. Causes

The 2010s witnessed some changes in the constitutional debates on the procuracy. More attention was paid to the institutional location, duties, and meaning of each function of the procuracy. In contrast, less attention was paid to the scope of its

91. *Ibid.*

92. *Ibid.*

93. Nguyen, “Improving the provisions”, *supra* note 64.

94. 1992 Constitution, *supra* note 4, art 126.

95. The most significant writings on this topic until now are only some articles written by officials of the procuracy. See e.g. NGUYEN Tien Son, “Quyền Con Người, Quyền Và Nghĩa Vụ Cơ Bản Của Công Dân Theo Hiến Pháp Năm 2013 Và Cơ Chế Thúc Tiến Thông Qua Các Quy Định Về Tố Tụng [Human Rights, Citizens' Rights and Basic Duties According to the Constitution 2013 and the Implementation Mechanisms through the Procedural Regulations]” in *Bộ Tư Pháp, Viện Khoa học pháp lý* [Ministry of Justice, Legal Science Institute], *Quyền Con Người Trong Hiến Pháp Năm 2013 – Quan Điểm Mới, Cách Tiếp Cận Mới Và Các Quy Định Mới [Human Rights in the Constitution 2013 – New View, New Approach, New Provisions]* (Nhà xuất bản Chính trị quốc gia [National Political Publishing House], 2014) 203; PHAM Manh Hung, “Bảo Vệ Quyền Con Người Qua Hoạt Động Thúc Tiến Quyền Công Tố Và Kiểm Sát Tuân Theo Pháp Luật Trong Tố Tụng Hình Sự Của Viện Kiểm Sát [Human Rights Protection through the People's Procuracy's Performance of Prosecutorial Function and Supervision of Law Observance in Criminal Proceedings]” (2011) 21 *Tap chí Kiểm sát [Procuratorial Journal]* 11.

functions. Academic discussion about transforming the procuracy into the state prosecutor was not as active as it had been before. These changes, of course, do not mean that an agreement has been reached on the issue. Quite the contrary, there was no agreement at all. Instead, the changes might be better explained by examining Vietnam's complex legal and political contexts.

Since the start of the constitutional reform process in 2011, the function of the procuracy was not a topic considered by the party-state. This was because in summing up the implementation of judicial reform according to Resolution 08 and Resolution 49, the Politburo concluded in 2010 that "the people's procuracy has the functions of exercising prosecution and supervising judicial activities *as of now*".<sup>96</sup> The option of transforming the procuracy into the prosecution office was raised in Resolution 49, but the procuracy alone was then entrusted with exploring this option by carrying out a research project entitled "Studying the Transformation of the Procuracy into the Prosecution Office". The procuracy was also entrusted with studying the model of criminal justice in Vietnam and other jurisdictions to put forward reform options and it was responsible for drafting the amendments to the 2003 Criminal Procedure Code. This differed significantly from what happened in 2001 when the Party was determined to narrow the functions of the procuracy. Here, the Party displayed considerable trust in the procuracy, at least in criminal matters. The procuracy, of course, fought to retain its powers, and it has in fact been successful thus far.

Individuals and institutions who took part in the constitutional debates about the procuracy attempted to put forward reform proposals that they believed would suit the overall reform process in Vietnam. However, although they had similar goals, there was profound disagreement among academics and different actors in the legal system due to different understandings of the legal system and expectations from the reform process. This is perhaps due in no small part to the amorphous nature of transitions in the Vietnamese legal system. As Nicholson describes it, there is an ongoing ambiguity about the nature of Vietnamese legal "transitions", where different conceptions of the rule of law – liberal, socialist, and hybrid – jostle for dominance.<sup>97</sup> As the provisions on the procuracy and other constitutional provisions are interdependent and must be read within the overall context of the constitution, any agreement on the aspects of the procuracy cannot be reached, unless other important institutional issues regarding the state machinery are resolved.

An instructive example is the controversy about the functional scope of the procuracy, which arises from the fact that there has been no resolution about how to control state agencies. The Soviet procuracy was historically a centralization instrument invoked to regularize the relations between the centre and periphery in order to ensure political stability.<sup>98</sup> In present-day Vietnam, views differ about whether it is necessary for the procuracy to ensure this centralization through its general supervisory function. The staff

96. Conclusion 79-KL/TW on reforming the organisation and operation of the People's Court, People's Procuracy and Investigation Body, adopted by the Politburo of the Communist Party of Vietnam, dated 28 July 2010.

97. Penelope (Pip) NICHOLSON, "Access to justice in Vietnam: State supply – private distrust" in Gillespie & Chen, *Legal Reforms in China and Vietnam*, *supra* note 59 at 188.

98. Holmes, *supra* note 11 at 77–78.

of the procuracy would, of course, agree that it is necessary, given the risks of local non-compliance with central policy, where more freedom is given to local authorities in the context of a market economy.<sup>99</sup> The unclear division of state power has also generated considerable dispute about the institutional location of the procuracy. Although it is suggested that state powers are distributed to state agencies, which coordinate with and “control” one another in the exercise of the legislative, executive, and judicial powers,<sup>100</sup> it is not clear how these powers should be understood. As a result, agreement cannot be reached on where the procuracy stands in the state machinery.

The notion of a state governed by the rule of law is another undecided issue. Although the party-state has formally declared its “determination” to establish the rule of law since the Seventh Party Congress in 1991, to date, there is no consensus on what that means. The rule of law remains a broad and layered concept that is understood from various perspectives.<sup>101</sup> It is, therefore, impossible to decide whether or not Vietnamese rule of law will come into conflict with socialist legality.<sup>102</sup> This is complicated by the fact that socialist legality is no longer mentioned in the 2013 *Constitution of the Socialist Republic of Vietnam* (2013 Constitution) and it is thus unclear if it will still be endorsed by the party-state. If the party-state no longer endorses socialist legality, the procuracy may require a new justification for its supervisory power. When this happens, the procuracy’s earlier emphasis on its role as a protector of human rights might become critical in its self-justification. Without a clear picture of the structure of the overall state machinery and how it will operate, it is inevitable that individuals and institutions will stand by their own views and support different reform options. The power struggles between concerned institutions complicates the situation further: the court may favour reforms that ultimately allows it – as the adjudicator of cases – to have the final say; the police may favour reforms that reduce the supervisory power of the procuracy in the investigation stage; the Bar may favour reforms that place procurators and lawyers on an equal footing; and the Ministry of Justice and other agencies may not actually support the restoration of the procuracy’s general supervisory function as they would lose some of the powers they have assumed since 2001.

99. LE Dan Khiết, “Qua Trình Hình Thành, Phát Triển Chế Định Viên Kiem Sát Nhân Dân Qua Các Ban Hiến Pháp Nước Ta Và Sự Cần Thiết Kế Thua Trong Sự Nghiệp Đổi Mới [The Establishment and Development Process of the People’s Procuracy Regulations in the Constitutions of Our Country and the Need to Inherit in the Innovation Process]” (2012) (13) *Tap chi Kiem sat* [Prosecutorial Journal] 54; LE, “Some Issues”, *supra* note 60 at 34–35.

100. 2013 *Constitution of the Socialist Republic of Vietnam* (adopted 28 November 2013), art 2 [2013 Constitution].

101. See different views presented in VU Cong Giao, “Tiep can cong ly va cac nguyen ly cua nha nuoc phap quyen [Access to Justice and Principles of Rule of Law State]” (2009) (25) *Tap chi Khoa hoc Dai hoc Quoc gia Ha Noi, Luat hoc* [Science Journal, Law – National University in Hanoi] 188 at 191–192; LE Van Cam, *He Thong Tu Phap Hinh Su Trong Giai Doan Xay Dung Nha Nuoc Phap Quyen* [Criminal Judicial System in the Process of Building a Law-Based State] (Nha xuất bản Đại học Quốc gia Hà Nội [National University in Hanoi Publishing House], 2009), 32–44; John Stanley GILLESPIE, *Transplanting Commercial Law Reform: Developing A ‘Rule of Law’ in Vietnam* (Aldershot: Ashgate Publishing, 2006), 89.

102. Gillespie once suggested that a compromise has emerged within the party leadership that confines *nha nuoc phap quyen* doctrines to commercial transactions and civil relationships while socialist legality continues to govern civil and human rights. See John GILLESPIE, “The Juridification of Cause Advocacy in Socialist Asia: Vietnam as a Case Study” (2013) 31 *Wisconsin International Law Journal* 672.

## B. *Effects*

Much has been said about the debates and their causes. Now let us turn to the effects of the debates by considering whether they resulted in significant changes in the constitution. Remarkably, although the Drafting Committee acknowledged receipt of various comments on the provisions regarding the procuracy, five drafts of the constitution – dated 18 October 2012, 29 December 2012, 17 May 2013, and 17 October 2013, as well as the final draft – produced similar provisions.<sup>103</sup> This may indicate a lack of attention towards comments in the revision process.

As I have previously mentioned, the functions of the procuracy were not considered by the party-state in this constitutional reform process. The two functions of the procuracy were confirmed at the Eleventh Party Congress in early 2011 and in subsequent Party documents. It is not surprising to see these two functions remain intact in the 2013 Constitution.

Despite intense debates, the procuracy's institutional location remains undecided. The procuracy rests in the same chapter as the court in the new constitution,<sup>104</sup> but only the court is explicitly recognized as the judicial organ of the state.<sup>105</sup> This, again, reflects the party-state's lack of readiness to overhaul the structure of the state machinery and to clearly articulate the appropriate internal functions of each branch of state power.

However, the debates led to some changes in the constitution, the Law on the Organization of the People's Procuracy, and criminal and civil procedural laws. The 2013 Constitution stipulates that “[i]n the Socialist Republic of Vietnam, human rights and citizens' rights in the political, civil, economic, cultural, and social spheres shall be recognized, respected, protected, and guaranteed in accordance with the Constitution and the law”.<sup>106</sup> The proposal of the Drafting Committee about the duties of the procuracy was approved. As a result, under the 2013 Constitution, the procuracy is obligated to protect the law, human rights, citizen's rights, the socialist regime, the interests of the state, and the legal rights and interests of organizations and individuals. It is also duty-bound to ensure that laws are strictly and uniformly observed.<sup>107</sup>

Constitutionally, the procuracy no longer has a duty to protect socialist legality as it did under the 1992 Constitution.<sup>108</sup> Instead, the duty to protect human rights seems to be emphasized as it comes even before the duty to protect the socialist regime and the interests of the state in the list of duties. This constitutional provision alone may reflect an ideological change regarding the role of the procuracy. However, as Peerenboom warns, the party-state may be forced to cede human rights protection in

103. The drafts and reports by the Drafting Committee are available at the website of the National Assembly. See National Assembly, *supra* note 7.

104. 2013 Constitution, *supra* note 100, chapter VIII.

105. *Ibid.*, art 102.

106. *Ibid.*, art 14.

107. *Ibid.*, art 107.3.

108. 1992 Constitution, *supra* note 4, art 126.

exchange for legitimacy.<sup>109</sup> It may be the case that the procuracy is given this duty to legitimize its existence until the Party decides on its future.

In 2014, for the first time, the functions of the procuracy are defined in the *Law on the Organization of the People's Procuracy*. According to this law:

[E]xercising public prosecution is an activity of the procuracy in the criminal process to accuse a criminal suspect of committing a crime on behalf of the state; it starts with the handling of denunciation and information about the crime and continues during the initiation, investigation, prosecution and adjudication of criminal case.<sup>110</sup>

Another provision sets out the meaning and boundaries of its supervisory function over the judiciary:

[S]upervising judicial activities is an activity of the procuracy to supervise the legality of the actions and decisions of state agencies, organisations, and individuals in judicial activities; it starts with the receiving and dealing with denunciation and information about crime, requesting the initiation of case and continues during the criminal process; in the settlement of administrative, civil, marriage and family, business, commercial and labour cases; in the execution of judgments and settlement of complaints and denunciations about judicial activities; and in other judicial activities in accordance with the law.<sup>111</sup>

The criminal and civil procedure codes have also been revised and they go some way to clarifying the procuracy's powers in performing its functions.<sup>112</sup>

## V. CONCLUDING REMARKS

The main thrust of this article is to identify and analyze the similarities and differences in the debates on the procuracy in the constitutional reform process between 2011 and 2013. The heated debates seen throughout this process were driven by different understandings of the context and expectations about the development of the overall state system. The 2013 Constitution, to be sure, is not the product of last-minute decision-making. However, the results of the reforms are limited due to unsettled institutional issues on which the provisions on the procuracy depend. The lack of political will to settle these issues in ways that would ensure both stability and conformity with the rule of law has left many aspects of the problems with the procuracy unresolved.

Given the complex domestic context and the ongoing political constraints in Vietnam, it is difficult to predict the development of the procuracy in the future. The claim by Stephen Holmes that “the long-term goal of procuracy reform is everywhere the same: to denude the office of some of its functions and to reassign them

109. Randall PEERENBOOM, “Varieties of rule of law: an introduction and provisional conclusion” in Randall PEERENBOOM, ed, *Asian Discourses of Rule of Law: Theories and implementation of rule of law in twelve Asian countries, France, and the U.S.* (London: Routledge Curzon, 2004), 15.

110. 2014 *Law on the Organization of the Procuracy* (adopted 24 November 2014), art 3.

111. *Ibid*, art 4.

112. 2015 *Criminal Procedure Code* (adopted 27 November 2015); 2015 *Civil Procedure Code* (adopted 25 November 2015).

to other bodies”,<sup>113</sup> should be taken with a grain of salt in the case of Vietnam. Yet, there are reasons to believe that, in the future, academics, state actors, lawyers, and the public will become more engaged in the debates about the procuracy, especially now that its functions are clarified and that its duty to protect human rights is clearly stipulated in the 2013 Constitution. Whether and how it will perform its duties with regard to human rights protection remains to be seen. Depending on the path it takes, the procuracy’s role vis-à-vis human rights might present itself as an opportunity rather than a challenge. If the procuracy seizes this opportunity, it is likely that its power might remain intact; otherwise, further changes, even if incremental, might take place.

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113. Holmes, *supra* note 11 at 77.