

# Constitutional Debate and Development on Human Rights in Vietnam

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## Abstract

This article analyzes the constitutional debate on and development of human rights in Vietnam throughout five constitutions from 1946 to 2013, as well as the prospects and challenges in promoting human rights in Vietnam during and after the development of its 2013 Constitution. It begins with an investigation and discussion of the human rights provisions from the 1946 Constitution to the 1992 Constitution – a period where the socialist human rights tradition was established in Vietnam. It follows with an analysis of the debates on the new human rights and citizens' rights provisions in the 1992 Constitution, where a new concept of natural human rights emerged. The article continues to explore how the struggle and debates surrounding the competing conception of rights – socialist and positivist on one hand and natural law-based on the other – come into play in shaping the 2013 Constitution. It then proceeds to evaluate the potential challenges involved in the implementation of these rights in the coming years. The authors argue that the development of constitutional human rights in Vietnam is still limited by ideological barriers. It also faces substantial practical challenges owing to, *inter alia*, the absence of provisions for the immediate implementation of such rights as well as legal mechanisms for the protection of constitutional rights, such as a constitutional review system.

Formal discussions on human rights in Vietnam began in the early twentieth century, which led to their inclusion in the *1946 Constitution of the Democratic Republic of Vietnam* (1946 Constitution).<sup>1</sup> Afterwards, the discussions became secondary or even faded away. Recently, they have again become a prevalent topic not only in the local

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1. *1946 Constitution of the Democratic Republic of Vietnam* (adopted 9 November 1946) [1946 Constitution].

media, but also in state forums such as the National Assembly, including at various sessions of the National Assembly. Virtually all aspects of human rights are now freely discussed in Vietnam, with the exception of a few “no-go areas” – these relate to the preservation of Vietnam’s single-party political system.

The liveliest discussion on human rights took place during the amendment of the *1992 Constitution of the Democratic Republic of Vietnam* (1992 Constitution).<sup>2</sup> These debates took place from May 2011 to December 2013, and gave birth to the *2013 Constitution of the Socialist Republic of Vietnam* (2013 Constitution).<sup>3</sup> During this period, substantial attention was paid to human rights and civil rights compared with other aspects of the constitution. Factors such as the history of human rights in Vietnam, together with its cultural dimensions, constitutional characteristics, and compliance with international human rights standards, were extensively analyzed. This debate on human rights exemplified the tension between different theories on natural and legal rights, the universality and particularity of human rights, and even brought into play broader themes of universalism and cultural relativism. This debate also invoked constitutional ideas, such as the distinction between the “rule of law” and “rule by law”, liberal democracy and socialist democracy, Western principles and “Asian values”, etc. In short, the discussion on human rights in the 2013 Constitution demonstrates the diversity of views held by Vietnamese legislators and scholars.

Unfortunately, there is a lack of scholarly attention on human rights in Vietnam in the English-speaking world, especially in the context of the constitution–drafting process. Over the past few decades, there have only been a few English-language studies on or related to this topic by Vietnamese<sup>4</sup> and foreign<sup>5</sup> scholars. While these studies have made substantial contributions to the existing body of scholarship in Vietnam, many critical issues have yet to be explored, especially with regard to the 2013 Constitution.

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2. *1992 Constitution of the Democratic Republic of Vietnam* (adopted 25 April 1992, amended 25 December 2001) [1992 Constitution].

3. *2013 Constitution of the Socialist Republic of Vietnam* (adopted 28 November 2013) [2013 Constitution].

4. See e.g. Thiem H BUI, “Deconstructing the ‘Socialist’ Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam’s Constitutional Reform Process” (2014) 36(1) *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 77 [BUI, “Deconstructing”]; Ngoc Son BUI, “Beyond Judicial Review: the Proposal of the Constitutional Academy” (2014) *The Chinese Journal of Comparative Law* 43; NGUYEN Thi Huong, “Pursuing Constitutional Dialogue within Socialist Vietnam: The 2010 Debate” (2012) 13(1) *Australian Journal of Asian Law* 1; Ngoc Son BUI, “Confucian Constitutionalism: Classical Foundations” (2012) 37 *Australian Journal of Legal Philosophy* 61; Ngoc Son BUI, “The Introduction of Modern Constitutionalism in East Asian Confucian Context: The Case of Vietnam in the Early Twentieth Century” (2012) 7(2) *National Taiwan University Law Review* 423; Ngoc Son BUI, “Confucian Constitutionalism in Imperial Vietnam” (2013) 8(2) *National Taiwan University Law Review* 373.

5. See e.g. John GILLESPIE, “Human Rights as a Larger Loyalty: The Evolution of Religious Freedom in Vietnam” (2014) 47(1) *Harvard Human Rights Journal* 107; John GILLESPIE, “Evolving Concepts of Human Rights in Vietnam”, in Randall PEERENBOOM, Carole J PETERSEN & Albert H Y CHEN, eds, *Human Rights in Asia: A comparative legal study of twelve Asian jurisdictions, France and the USA* (Abingdon, Oxon and New York: Routledge, 2006) 452; John GILLESPIE and Albert H Y CHEN, *Legal Reforms in China and Vietnam: A comparison of Asian Communist Regimes* (Abingdon, Oxon and New York: Routledge, 2010); Albert H Y CHEN, *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014); Penelope NICHOLSON, “Vietnamese Jurisprudence: Informing Court Reform?” (Paper delivered at the Law and Governance: Socialist Transforming Vietnam Conference, University of Melbourne, 12–13 June 2003) [unpublished].

This article seeks to help fill this scholarly gap and proceeds as follows: Part I examines the constitutional development of the socialist human rights framework in Vietnam through a detailed comparison of the relevant constitutional provisions from 1946 until 1992. Part II analyzes the constitutional provisions relating to human rights in the 1992 Constitution, and considers the approach of the Communist Party of Vietnam (CPV) with regard to the amendments leading to the 2013 Constitution, and the political dynamics involved. Part III examines the provisions on human rights in the 2013 Constitution, and assesses their effectiveness. Part IV concludes with an evaluation of the prospects and challenges in implementing the changes made in the 2013 Constitution in Vietnam.

## I. HUMAN RIGHTS IN THE CONSTITUTIONS OF VIETNAM FROM 1946 TO 1992: THE EVOLUTION OF SOCIALIST HUMAN RIGHTS DISCOURSE

Since its independence in 1945, Vietnam has promulgated seven versions of the constitution, as presented in the table below (see Table 1). However, the 1956 Constitution and the 1967 Constitution promulgated by the Republic of Vietnam are not recognized by the present administration of Vietnam. As such, they will not be analyzed in this article. As a starting point, the table below provides a brief overview of the provisions on human rights in the 1946 Constitution,<sup>6</sup> the 1959 *Constitution of the Democratic Republic of Vietnam* (1959 Constitution),<sup>7</sup> the 1980 *Constitution of the Socialist Republic of Vietnam* (1980 Constitution),<sup>8</sup> and the 1992 Constitution.

Let us begin with the 1946 Constitution. Although considered progressive and liberal, the 1946 Constitution is also of great importance to the socialist constitutional framework and human rights in Vietnam, as it provides both the form and substance for subsequent developments on human rights. As for the form, the table below illustrates that the 1946 Constitution was first in adopting human rights provisions – these were placed under the second chapter titled “Rights and Duties of Citizens”. On the one hand, the 1946 Constitution created a constitutional template to regulate human rights and citizens’ rights for the subsequent constitutions. On the other hand, the 1946 Constitution also established a liberal foundation for the recognition, respect, and protection of natural human rights – which is distinct from socialist positive rights – although these were included much later.<sup>9</sup>

6. 1946 Constitution, *supra* note 1.

7. 1959 Constitution of the Democratic Republic of Vietnam (adopted 31 December 1959) [1959 Constitution].

8. 1980 Constitution of the Socialist Republic of Vietnam (adopted 19 December 1980) [1980 Constitution].

9. BUI Xuan Duc, “Chapter on Fundamental Rights and Duties of Citizens in the 1992 Constitution: Shortcomings, Limitations, and Solutions” in NGUYEN Dang Dung et al, eds, *Constitution: Theories and Practices* (Hanoi: Vietnam National University, Hanoi Press 2011) 615 at 617 [Bui, “Shortcomings, Limitations, and Solutions”].

Table 1. Constitutional Provisions on Human Rights in Vietnam

Rights	Constitutions			
	1946 (Chapter II)	1959 (Chapter III)	1980 (Chapter V)	1992 (Chapter V)
1 Right to liberty and security of the person	Article 11	Article 27	Articles 69, 70	Article 71
2 Right to liberty of movement and to right to choose one's residence (including the right to travel abroad)	Article 10	Article 28	Article 71	Article 68
3 Freedom of expression	Article 10	Article 25	Article 67	Article 69
4 Freedom of association and peaceful assembly	Article 10	Article 25	Article 67	Article 69
5 Freedom of belief and religion	Article 10	Article 26	Article 68	Article 70
6 Freedom of the press		Article 25	Article 67	Article 69
7 Right to be informed and (from 2013) the right of access to information		Article 25	Article 67	Article 69
8 Right to a fair trial	Article 67	Article 101	Article 133	Articles 72, 131
9 Right to defence (in criminal proceedings)	Article 67	Article 101	Article 133	Article 132
10 Right to be compensated for miscarriage of justice		Article 29	Article 73	Article 72
11 Right to privacy (family, home, or correspondence)	Article 11	Article 28	Article 71	Article 73
12 Right to complaint, denunciations, lawsuits		Article 29	Article 73	Article 74
13 Right to demonstrate		Article 25	Article 67	Article 69
14 Right to use one's own languages before the court	Article 66	Article 102	Article 134	Article 133
15 Right to take part in the conduct of public affairs	Article 21		Article 56	Article 53
16 Right to referenda	Article 21			
17 Rights to nationality			Article 53	Article 49
18 Rights to election	Articles 17, 18, 20	Articles 5, 23	Article 7, 57	Articles 7, 54
19 Right to asylum (for foreigners)	Article 16	Article 37	Article 81	Article 82
20 Right to property	Article 12	Articles 15, 16, 17, 18, 19, 20	Articles 25, 26, 27, 28	Article 58
21 Right to inherit property		Article 19	Article 27	Article 58
22 Right to housing			Article 62	
23 Right to use land			Article 20	Article 18
24 Right to benefit from scientific, literary, or artistic production of which he is the author			Article 72	Article 60
25 Right to work	Article 13	Articles 21, 30	Article 58	Article 55
26 Right to social security		Articles 31, 32	Article 59	Article 56
27 Freedom of doing business				Article 57
28 Right to education	Articles 14, 15	Article 33	Article 60	Article 59
29 Right to take part in cultural life and to enjoy the benefits of scientific progress		Article 34	Article 72	Article 60

Table 1 (Continued)

Rights	Constitutions			
	1946 (Chapter II)	1959 (Chapter III)	1980 (Chapter V)	1992 (Chapter V)
30 Right to health			Article 61	Article 61
31 Right to marriage	Article 14	Article 24	Article 64	Article 64
32 Right to enjoy the highest attainable standard of life			Article 62	Article 62
33 Right to equality before the law	Articles 1, 6, 7	Article 22	Article 55	Article 52
34 Equal rights between men and women	Article 9	Article 24	Article 63	Article 63
35 Right to maternity of female workers			Article 63	Article 63
36 Rights of children	Article 14	Article 24	Article 65	Article 65
37 Rights of youth		Article 35	Article 66	Article 66
38 Rights of intellectuals	Article 13			
39 Rights of manual workers	Article 13			
40 Rights of vulnerable groups	Article 14		Article 74	Article 67
41 Rights of persons deprived of liberty	Article 68			
42 Equal rights among ethnic groups	Articles 8, 15	Article 3	Article 5	Article 5

From the table above, we may make the following initial observations. First, all four versions of the constitution contained separate chapters on human rights and citizens' rights. The number and scope of these rights were subsequently expanded, demonstrating their importance to Vietnamese legislators. Second, provisions regarding human rights were largely preserved and rarely removed, although several rights that were present in the 1946 Constitution were later removed. The 1946 constitution displayed the greatest respect for human rights: unlike subsequent versions of the constitution, its provisions on human rights are placed in an earlier chapter of the constitution, Chapter II. For example, provisions on human rights were only placed in Chapter III of the 1959 Constitution and in Chapter V of the 1980 Constitution. This demonstrates the comparative importance of human rights in the 1946 Constitution. More importantly, a number of fundamental civil and political rights in the 1946 Constitution, namely the right to private ownership of property (Article 12), the right to open private schools (Article 15), the right to free elections (Article 17), the right to dismiss elected deputies (Article 20), and the right to approve constitutional amendments (Articles 21 and 70) were neglected or omitted in subsequent versions. The 1946 Constitution was also an outlier, in that it provided for powerful mechanisms to prevent potential abuses of individual human rights by the state: it instituted separation of powers and other checks-and-balance mechanisms.<sup>10</sup> The progressive features of the 1946 Constitution stemmed from the pluralistic

10. TRAN Kien, "Building Strong and Wisdom State of the People: Looking back at the 1946 Constitution in order to amend the 1992 Constitution", in NGUYEN Dang Dung et al, eds, *Amending the 1992 Constitution: Theoretical and Practical Issues* (Hanoi: Hong Duc Publisher, 2012) vol 2, 449.

constitutional debate preceding its promulgation, which brought together a wide range of stakeholders and different political groups. Had the 1946 Constitution been fully observed – which unfortunately did not come to pass – it is highly likely that its progressive provisions on human rights would have been meaningfully implemented.

Moreover, the changes in these four versions of the constitution appear to reflect the ideological fluctuations of the Vietnamese legislators. For example, the abolition of the right to private ownership, originally provided in the 1946 Constitution, and the introduction of new economic, social, and cultural rights in the 1959 Constitution and the 1980 Constitution demonstrate Vietnam's growing acceptance of socialism. However, the 1992 Constitution reversed many of these changes and restored the right to private ownership, which in turn reflected the Vietnamese legislators' concerns about enforcement and that some of the rights introduced in the 1980 Constitution, such as the right to free education, were unrealistic.

The stark difference between the human rights provisions in the 1946 Constitution with those in the 1959 and 1980 constitutions, in particular, might owe a great deal to the socio-political circumstances in which these constitutions were devised. Indeed, each of the four constitutions was the product of its own time. While the 1946 Constitution was shaped by a pluralistic political environment, the 1959 Constitution and the 1980 Constitution were determined by the idea of people's democracy and the dictatorship of the proletariat (alongside a centrally-planned economy system imported from the Soviet Union), respectively.

As for the 1946 Constitution, although there has recently been a great deal of opposing opinions in relation to its underlying ideas and the circumstances leading to its adoption, there is strong agreement that it is a pluralistic constitution that accepts and accommodates various, even opposing, ideologies.<sup>11</sup> On the one hand, a number of scholars, both domestic and foreign, disagree about the form of government that the 1946 Constitution envisioned: whether it vested absolute power in the parliament without a check and balance mechanism in place,<sup>12</sup> or whether it was a truly democratic government with a creative form of check-and-balance along with separation of powers, aimed at protecting human rights.<sup>13</sup> On the other hand, it is undeniable that the 1946 Constitution was a product of diverse and competing constitutional schools of thought which had been imported into Vietnam at the time.<sup>14</sup> One of the most significant

11. Stein TONESSION, "Ho Chi Minh's First Constitution (1946)" (Paper delivered at the International Conference on Vietnamese Studies and the Enhancement of International Cooperation, Hanoi, July 1998) [unpublished] at 5; PHAM Khắc Hòe, "Sự Ra Đời Của Nhà Nước Dân Chủ Nhân Dân Việt Nam [The Birth of the Democratic Republic of Vietnam]" in VU Đình Hòe et al, *Some Issues Regarding the State and Laws of Vietnam* (Hanoi: Social Sciences Publishing House, 1972) 5 at 20–39; BUI Ngọc Sơn, "Lại Bàn Về Bài Học Từ Hiến Pháp 1946 [Revisiting Lessons Learnt from the 1946 Constitution]" *Tạp chí Tia sáng [Tiasang Magazine]* (21 September 2011), online: Tap Chi Tia Sang <<http://www.tiasang.com.vn/>>.

12. Tonesion, *supra* note 11.

13. NGUYEN Đăng Dung, "Chính Thể Nhà Nước Việt Nam trong Hiến Pháp 1946, Sự Sáng Tạo Tài Tình của Chủ tịch Hồ Chí Minh [The Institution of the State in the 1946 Constitution, An Innovation of President Ho Chi Minh]" in The National Assembly's Office, *The 1946 Constitution and Its Succession, Development in Subsequent Constitutions of Vietnam* (Hanoi: National Political Publishing House, 1998) at 170; Tran, *supra* note 10.

14. THAI Vinh Thắng, "Tư Tưởng Lập Hiến ở Việt Nam Trước Cách Mạng Tháng Tám Năm 1945 [Constitutional Building Thoughts in Vietnam before the August Revolution of 1945]" (2011) *Tạp Chí Nhà Nước và Pháp Luật [The Journal of State and Law]* 27; BUI Ngọc Sơn, "The Introduction of Modern

influences was actually the natural rights idea inspired by the American Declaration of Independence and its constitution. The natural rights theory advances important propositions that certain human rights are universal and inalienable, not dependent on any laws or government. Therefore, the state and government cannot grant human rights to the people; instead, they must recognize and protect such rights.<sup>15</sup> This theory, along with the natural law tradition, had inspired many important revolutions and legal instruments in modern times, especially the *American Declaration of Independence of 1776* and the *Declaration of the Rights of Man and of the Citizen of 1789*. Ho Chi Minh began his famous Declaration of Independence on 2 September 1945 by quoting his American counterparts on the rights of men. Apart from the influence of natural rights thinking, the pressing need to unify the whole country in order to protect its precarious, newly-gained independence also contributed to the pluralistic nature of the 1946 Constitution. As a result, the government needed to reach out to all groups of peoples with different interests and concerns.<sup>16</sup> This explains why some rights were included, for example the right to private property.<sup>17</sup>

This pluralistic momentum disappeared when the 1959 Constitution and the 1980 Constitution were discussed. Having secured victory in a resistance war against French troops in 1954 by gaining complete control of a large swath of land north of the seventeenth parallel, Vietnam began to introduce socialism and socialist law. Socialism is a set of political ideas promoting the public or state ownership of the means of production within a centrally-planned economy, often under the sole leadership of a communist party.<sup>18</sup> In such a political and social climate, the natural rights idea faded and came to be replaced by a new “citizen’s rights” idea based on positive law where rights, including human rights, were legal rights granted and entertained by the state in accordance with the country’s economic and social development and circumstances. This explains why certain key human rights, such as the right to private property, were removed from the constitution as they were considered contrary to socialist ideas.

Similar observations have been made by foreign commentators. Mark Sidel observed that the theory of constitutional instrumentalism has dominated the constitutional discourse in Vietnam for the better part of the twentieth century.<sup>19</sup> Underpinned by socialist legality theory imported from the Soviet Union, the instrumentalist theory holds that in a socialist state, laws in general and constitutions in particular are tools of the ruling party to impose and implement its political, economic, and social policies. As such,

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Constitutionalism in East Asian Confucian Context: The Case of Vietnam in the Early Twentieth Century” (2012) 7(2) *National Taiwan Law Review* at 423.

15. John FINNIS, “Natural Law Theories”, *The Stanford Encyclopedia of Philosophy* (4 November 2015), online: *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/archives/win2015/entries/natural-law-theories/>>.
16. DO Xuan Sang et al, eds, *An Outline of the Institutions of the Democratic Republic of Vietnam* (Hanoi: Foreign Languages Publishing House, 1974) at 9.
17. *1946 Constitution*, *supra* note 1, art 12.
18. *1980 Constitution*, *supra* note 8, Preamble and arts 2, 4, 17.
19. Mark SIDEL, “Analytical Models for Understanding Constitutions and Constitutional Dialogue in Socialist Transitional States: Re-interpreting Constitutional Dialogue in Vietnam” (2002) 6 *Singapore Journal of International and Comparative Law* 42.

the constitution is subject to adoption, amendment, or even abolition, by a normal legislative national assembly, which enjoys the highest authority or state power of the country because it represents the citizens of Vietnam.<sup>20</sup>

This assertion has its roots in Marx's historical materialism, which theorizes that the state and the law belong to a super-structure based upon an economic foundation determined by the owners means of production.<sup>21</sup> As a result, law is the arbitrary will of the ruling social class which uses it to oppress the ruled.<sup>22</sup> The law, including the constitution, is nothing more than an instrument of the ruling party—the communist party in a socialist state—to express the party's will and policy at a given period of time, and it is therefore subject to change if the party deems it necessary. This is clearly illustrated in the 1946 Constitution and the 1959 Constitution where “the constitutions are explored to see how the state conceives its political culture”.<sup>23</sup> However, commentators have observed that, while the 1945 Constitution attributed its establishment to democratic and republican principles, the 1959 Constitution acknowledged the leadership of the Vietnam Workers Party and committed itself to the so-called “people's democracy” model on its path towards socialism.<sup>24</sup>

Consequently, towards the end of the 1980s, a strong model of socialist citizen's rights had been firmly established through several constitutions of Vietnam. In that model, human rights were equated with citizen's rights via the arrangement of rights and duties of citizens underlined by a socialist theory. Moreover, even within that narrow socialist legality model, cultural and economic rights were emphasized more than individual civil and political rights. According to a legal scholar in the 1980s, the rights and duties of citizens must be placed in a broader context of the collective mastery, and in that arrangement, communitarian or social interests should prevail and the rights and duties of citizens correspond to their position vis-à-vis the state.<sup>25</sup> It clearly implies that within socialist legality, human rights are positive, as opposed to natural, rights and their recognition and realization depend heavily on the state.<sup>26</sup>

However, since the mid-1980s, Vietnam has embarked upon unprecedented reforms to transform its centrally planned economy to a market-based one. Central to the reforming agenda is the recognition and protection of private ownership, especially private ownership over the means of production. Sticking to its ideological logic, the Vietnam CPV reasoned that since the economic foundations of the country had changed, it follows that the superstructure of the state, i.e. its laws and the constitution,

20. *Ibid* at 42; 1992 Constitution, *supra* note 2.

21. Karl MARX and Frederick ENGELS, “Manifesto of the Communist Party” in *Marx/Engels: Selected Works*, (Moscow: Progress Publishers, 1969) vol 1 at 98 – 137.

22. *Ibid*.

23. Penelope NICHOLSON, “Vietnamese Legal Institutions in Comparative Perspective: Contemporary Constitutions and Courts Considered” in Kanishka JAYASURIYA, ed, *Law, Capitalism and Power in Asia: The rule of law and legal institutions* (London and New York: Routledge, 1999) 257 at 267.

24. *Ibid* at 268 – 269.

25. Dam Van Hieu, *Các Quyền Và Tự Do Cơ Bản Của Con Người [Fundamental Rights and Duties of Citizens]* (Hanoi: Legal Publishing House, 1981) at 5.

26. *Ibid* at 7-8.

must also be reformed.<sup>27</sup> Further, in relation to human rights issues, the Vietnamese government and the CPV have turned their attention to various international human rights treaties. Such treaties provide the necessary standards for Vietnam's human rights reform, thereby facilitating Vietnam's integration into the international community. In this context, the human rights provisions in the 1992 Constitution and later, in the 2013 Constitution, reflect the extensive theoretical discourse in Vietnam on the protection of human rights.<sup>28</sup>

## II. CONSTITUTIONAL RIGHTS IN THE 1992 CONSTITUTION: THE RE-EMERGENCE OF NATURAL HUMAN RIGHTS?

### A. *Assessment of Constitutional Rights in the 1992 Constitution: Citizen's or Human Rights?*

Vietnamese legislators and scholars alike have taken very different viewpoints on the progressive aspects and the limitations of the human rights provisions in the 1992 Constitution, as compared to the 1980 Constitution. A significant addition to the 1992 Constitution was the explicit recognition of the principle of the respect for human rights in Article 50.<sup>29</sup> Although there has been considerable debate among Vietnamese scholars as to whether Article 50 conflates human rights in general with rights possessed by citizens specifically,<sup>30</sup> Article 50 is still considered a major constitutional development in that it demonstrates a "fuller awareness [of the CPV and the State of Vietnam] about human rights issues".<sup>31</sup> Through Article 50, Vietnamese legislators have moved away from their traditional belief that the constitution should only protect rights possessed by citizens towards an acceptance of international human rights standards, which provide that a constitution must recognize and protect rights not only for citizens, but also for foreigners who are living and working in Vietnam legally.<sup>32</sup>

Another significant development is that the constitutional rights in the 1992 Constitution reflected a shift away from the "socialist-oriented" economic, social, and

27. John GILLESPIE, "Changing Concepts of Socialist Law in Vietnam" in John GILLESPIE & Penelope NICHOLSON, eds, *Asian Socialism and Legal Change: The Dynamics of Vietnamese and Chinese Reform* (Australia: Australian National University Press, 2005) 45 at 45–47.

28. Bui, "Deconstructing", *supra* note 4 at 77.

29. Article 50 of the 1992 Constitution, *supra* note 2, states: "In the Socialist Republic of Vietnam, human rights in all respects, political, civic, economic, cultural and social are respected, find their expression in the rights of citizens and are provided for by the Constitution and the law".

30. See BUI Ngoc Son, BUI Tien Dat & NGUYEN Dang Dung, *Findings Report of the Research on "Human Rights in the Constitutions of Vietnam"* (Hanoi: Vietnam National University Hanoi, 2010) at 149 [Bui, et al, *Findings Report*]. See also VU Cong Giao, *Findings Report of the Research on "Human Rights in Constitutions of Vietnam and Constitutions of Selected Countries"*, (Hanoi: Vietnam National University, 2012) at 98 [Vu, *Findings Report*]; HOANG Xuan Phu, "Decreasing Human Rights in Constitution" *Cùng Viết Hiến Pháp [Writing the Constitution Together]* (1 February 2013), online: Cùng Viết Hiến Pháp <<https://cungviethienphap.wordpress.com/2013/02/01/teo-dan-quyen-con-nguoi-trong-hien-phap/>>.

31. Drafting Committee, *Báo Cáo Tổng Kết Thi Hành Hiến Pháp Năm 1992 [Report on Review of the Implementation of the 1992 Constitution]* (1 October 2012), submitted to the Government (with limited access) at 12, item 2.5.

32. Vu, *Findings Report*, *supra* note 30 at 98.

cultural rights in the 1980 Constitution. Such rights were difficult to enforce in practice, and they were revised accordingly.<sup>33</sup> For example, the right to free education and healthcare in the 1980 Constitution (Articles 60 and 61) were qualified in the 1992 Constitution. Article 59 of the 1992 Constitution provides for the right to education, but such education is only free at the elementary level; Article 61 provides for the right to healthcare, but healthcare is only free for children under 6 years old and in other special circumstances. Further, while the 1980 Constitution originally provided that citizens had the right to be employed and to have state-provided housing and that the state was responsible for creating and managing jobs and for providing housing assistance (Articles 58 and 62), the 1992 Constitution merely provided that citizens have the right to work and that the state only has the responsibility to *attempt* to create as many jobs as possible.

Most importantly, the 1992 Constitution added and strengthened various human rights, including the right to freedom of trade (Article 57), the right to own labour materials, capital, and properties in corporations or other economic organizations (Article 58), the right to legally own the capital, property, and other benefits belonging to foreign individuals and organizations investing in Vietnam (Article 25), the right of foreigners temporarily living in Vietnam to have their lives, properties, and rightful benefits protected by the Vietnamese government (Article 81), the guarantee of the rightful benefits inside the Vietnamese territory for Vietnamese citizens living overseas (Article 75), the right to damages caused by wrongful arrest, detention, prosecution, and conviction (Article 72), the right to lodge complaints against or accuse government bodies, economic organizations, social organizations, the armed forces or any other individual of committing illegal activities (Article 72), and the right to privacy (Article 73). These new rights are crucial to the economic development of Vietnam and its progress towards a more democratic political environment.<sup>34</sup>

This new development owes its introduction to a number of factors. Firstly, the CPV's official endorsement – in 1986 – of a reform program to move the country towards a market-based economy has led to the re-introduction of some key ideas such as private property, competition, and the freedom of movement. As these ideas were taking hold, the need to safeguard them became evident in order to encourage people to continue pursuing the state's reform policies. Therefore, the 1992 Constitution started to recognize rights related to these ideas, for example, the right to private property and the freedom of movement. In addition, Vietnam has also integrated deeper into the international community. In order to qualify for membership in the international community, it vowed to protect and honour universal human rights endorsed in a wide range of international human rights instruments. The 2001 amendments to the 1992 Constitution partly reflects this promise by incorporating a new provision on building

33. *Ibid* at 99; Drafting Committee, *Report on Review of Review of the Implementation of the 1992 Constitution*, *supra* note 31.

34. Vu, *Findings Report*, *supra* note 30 at 8; NGUYEN Van Dong, "Situation, viewpoints and directions for revision and supplement of provisions on human and citizens' rights in the 1992 Constitution" in NGUYEN Dang Dung et al, eds, *Constitution: Theories and Practices* (Hanoi, Vietnam National University, Hanoi Press 2011), 639.

the rule of law along with a loose check-and-balance mechanism between different branches of the government.<sup>35</sup> This new provision obviously aims, among others, to protect the human rights of the people against state abuses of power.

Nevertheless, the 1992 Constitution had many shortcomings. First, although the 1992 Constitution marked the first use of the term “human rights”, it did not distinguish clearly between “human rights” and “citizen rights”. As mentioned earlier, Article 50 of the 1992 Constitution conflated these two rights, as did Chapter V, which is titled “The Basic Rights and Obligations as Citizens” but ostensibly contained provisions on human rights. Consequently, this suggests that the “human rights” provisions in the 1992 Constitution only extended to citizens and they did not protect foreigners who may be resident or working in Vietnam. By contrast, constitutions in most foreign jurisdictions do not draw such a distinction between citizens and foreigners. The Drafting Committee of the 1992 Constitution subsequently recognized that this distinction was a mistake, and Vietnamese scholars also took the view that this distinction is incompatible with international human rights law<sup>36</sup> and with Vietnam’s international commitments.<sup>37</sup>

Further, the 1992 Constitution did not expressly provide that the state has an obligation to protect human rights (as is commonly expected under international human rights law),<sup>38</sup> given that Article 50 merely provided that the state is to “respect” human rights. This limitation on the state’s obligation has been criticized for failing to “illustrate the relationship between the government and citizens in a socialist state governed by the rule of law”.<sup>39</sup> Following this, the mechanisms used to regulate constitutional rights in the 1992 Constitution are inconsistent and inappropriate. While some rights are “provided by law” and are understood to be limited to legislation adopted by the National Assembly, other rights are “provided by by-laws”, which refers to all legal documents adopted and promulgated by state agencies at all levels. This not only allows state bodies to promulgate legal documents that arbitrarily limit constitutional rights,<sup>40</sup> it also creates obstacles to the implementation of constitutional rights because “citizens do not know the

35. Resolution No 59/2001/QH10 on Amending, and Supplementing Some Provisions of the 1992 Constitution, adopted by the National Assembly, dated 25 December 2001.

36. Under international human rights law, only the right to vote and the right to take part in the government of his country are expressly limited to citizens, while the vast majority of human rights are available to both public citizens and foreigners legally living in the territory of a country. See Office of the United Nations High Commissioner for Human Rights, “The Rights of Non-citizens” *United Nations Human Rights, Office of the High Commissioner* (2006), online: United Nations Human Rights, Office of the High Commissioner <<http://www.ohchr.org/Documents/Publications/noncitizensen.pdf>>; David COLE, “Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens?” (2003) 25 *Thomas Jefferson Law Review* 367.

37. Drafting Committee, *Report on Review of Review of the Implementation of the 1992 Constitution*, *supra* note 31 at 13, item 2.5; Vu, *Findings Report*, *supra* note 30 at 120; Bui et al, *Findings Report*, *supra* note 30 at 150.

38. International human rights law lays down obligations to which states are bound, including an obligation to respect, protect, and fulfil human rights. See “International Human Rights Law” *United Nations Human Rights, Office of the High Commissioner*, online: United Nations Human Rights, Office of the High Commissioner <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>>.

39. Drafting Committee, *Report on Review of Review of the Implementation of the 1992 Constitution*, *supra* note 31 at 14, item 2.5.

40. *Ibid* at 15, item 2.5; Vu, *Findings Report*, *supra* note 30 at 119; Bui et al, *Findings Report*, *supra* note 30 at 149.

exact meanings of the rights, their range of power, and which institution to protect them when these rights and freedoms are violated”.<sup>41</sup>

Other shortcomings of the 1992 Constitution include its failure to provide for the limitation<sup>42</sup> and derogation of human rights,<sup>43</sup> which are present in international human rights law and in many foreign constitutions.<sup>44</sup> The absence of such provisions meant that government bodies were able to limit citizens’ constitutional rights quite easily.<sup>45</sup> Various constitutional rights in the 1992 Constitution were also “incomplete” according to international human rights standards. Two examples relate to the right to build houses and to put houses for rent and to rent houses (Article 62) and the right to be informed (Article 69). Under international human rights standards, constitutional provisions on the right to housing would ordinarily imply that the state would provide some form of assistance to citizens in securing such housing,<sup>46</sup> as was stated in the 1980 Constitution. As to the right to be informed in the 1992 Constitution, more expansive information rights are provided under international human rights standards and foreign constitutions, including the right to approach information and three sub-rights: the right to be informed, the right to search for information, and the right to give information.<sup>47</sup>

Furthermore, the arrangement of Chapter V – the section containing provisions relating to human rights – did not accurately reflect its importance according to international standards. Most foreign constitutions situate provisions on human rights in the first or second chapters.<sup>48</sup> While Vietnam’s 1946 Constitution placed human

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41. NGUYEN Nhu Phat, “Một số định hướng và phương pháp ghi nhận quyền cơ bản của công dân, quyền con người trong Hiến pháp sửa đổi [Some orientations and methods of recording fundamental citizen’s rights and human rights in the amending Constitution]”, *Viện Nhà Nước và Pháp Luật [Institute of State and Law]* (21 May 2012), online: Viện Nhà Nước và Pháp Luật <[http://isl.vass.gov.vn/noidung/tintuc/Lists/GopYDuThaoSuaDoiHienPhap/View\\_Detail.aspx?ItemID=5](http://isl.vass.gov.vn/noidung/tintuc/Lists/GopYDuThaoSuaDoiHienPhap/View_Detail.aspx?ItemID=5)>.
42. According to Article 29.2 of the Universal Declaration of Human Rights (UDHR), human rights can be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society. A similar provision can be found at Article 4 of International Covenant on Economic, Social and Cultural Rights (ICESCR).
43. According to Article 4 of the International Covenant on Civil and Political Rights (ICCPR), in times of public emergency, State Parties may take measures derogating from their obligations under the Covenant, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin. However, no derogation from Articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
44. See e.g. 1982 *Constitution of the Republic of China* (adopted 4 December 1982) (amended 14 March 2004), art 51 and 1993 *Constitution of the Russian Federation* (adopted 12 December 1993), arts 17 and 57. See also Markus BÖCKENFÖRDE, Nora HEDLING & Winluck WAHIU, “A Practical Guide to Constitution Building” *International Institute for Democracy and Electoral Assistance* (2011), online: Constitutionnet.org <<http://www.constitutionnet.org/files/cb-handbook-all-chapters-050112.pdf>> at Chapter 3.
45. Vu, *Findings Report*, *supra* note 30 at 123. See also La Khanh Tung, “Individual Rights in Vietnamese Constitutions: Reflection from International Bill of Human Rights”, in NGUYEN Dang Dung et al, eds, *Constitution: Theories and Practices* (Hanoi, Vietnam National University, Hanoi Press 2011) 669 [La, “Individual Rights in Vietnamese Constitutions”].
46. Office of the United Nations High Commissioner for Human Rights and UN Habitat, *The Right to Adequate Housing*, Fact Sheet No 21/Rev 1, 2014, online: United Nations Human Rights, Office of the High Commissioner <[http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf)>.
47. Toby MENDEL, “Freedom of Information as an Internationally Protected Human Right” *Article 19*, online: Article 19 <<https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf>>.
48. Vu, *Findings Report*, *supra* note 30 at 131.

rights in Chapter II, under the influence of other former socialist countries, subsequent versions of the constitution moved human rights into Chapter III (1959 Constitution) and Chapter V (the 1980 Constitution and 1992 Constitution).

Many local observers have also argued that the 1992 Constitution implied that human rights are a “gift” from the state, not as natural rights.<sup>49</sup> Specifically, thirty-three provisions in Chapter V of the 1992 Constitution appeared to position the state as the grantor of rights through phrases such as “the State ensures...”; “the State... plans to...”; “the State regulates...”; “the State requests...”; “the State preserves...”<sup>50</sup>

Why did these conflicts and shortcomings exist in the 1992 Constitution? One possible explanation lies in the differences between Vietnam’s strong belief in a socialist conception of rights and international human rights standards. Due to the influence of socialist ideology, Vietnam took a positivist approach to law for the better part of the twentieth century. The source of law was the will of the state. All rights, constitutional and legal, were dictated by state policy. Human rights were therefore granted by the state, with their enjoyment circumscribed according to the state’s political, economic, and cultural policies. Human rights were intertwined with citizens’ rights, and hence were not absolute. On the other hand, international human rights are founded in natural law and are independent of the political climate of the state. They are often absolute, especially civil and political rights, and instead of being dependent on legal qualifications, they set standards for the laws to be adopted and implemented.<sup>51</sup>

Indeed, many Vietnamese scholars consider the approach used in the 1992 Constitution to be inconsistent with international standards for human rights, as well as many foreign constitutions, where human rights are widely accepted as representing the natural and default values of individuals and are not merely “gifts” from the state.<sup>52</sup>

Again, Vietnam’s approach to human rights in the 1992 Constitution was influenced by Marxist ideology, which emphasizes the hierarchical characteristics of the law<sup>53</sup> and the state.<sup>54</sup> Socialist countries have also traditionally taken the view that

49. Bui et al, *Findings Report*, *supra* note 30 at 153.

50. *Ibid* at 154.

51. *Universal Declaration of Human Rights* (1948); Gordon BROWN, ed, *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Cambridge, UK: Open Book Publishers, 2016) at 29 – 39.

52. “The Declaration of Independence and Natural Rights” Constitutional Rights Foundation (2001), online: *Constitutional Rights Foundation* <<http://www.crf-usa.org/foundations-of-our-constitution/natural-rights.html>>; Richard TUCK, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979). Vietnam’s 1946 Constitution, *supra* note 1, stipulated that human rights were natural and default values of individuals. This is expressly stated in Chapter II: “All Vietnamese citizen are equal in rights...” (Article 6); “All Vietnamese citizen are equal under the laws...” (Article 7); “Women are equal to men in every term” (Article 9); “Vietnamese citizen have the freedom of speech, paper and publishing...” (Article 10) or “Until justice makes a decision, there is no legal arrestment and custody of Vietnamese citizens” (Article 11).

53. In the “Manifesto of the Communist Party”, *supra* note 21, Karl Marx said that “the law is the will of the class which keeps domination of society”.

54. According to Lenin, the State is the institution set up to enable a class to remain dominant over others, and a mechanism for a class to suppress other classes. See V I LENIN, *Collected Works* (Moscow: Progress Publisher, 1981) vol 32 at 303 and vol 37 at 122, online: Marxists Internet Archive <<https://www.marxists.org/archive/lenin/works/cw/index.htm>>.

the state is responsible for managing and providing every possible living necessity for the people. In addition, as suggested by a leading Vietnamese constitutional scholar, Vietnam's approach to human rights has been influenced by Confucian thought, which emphasizes the dependence of citizens on the state.<sup>55</sup> A “wartime mentality”, that is, the outlook that legitimizes human rights restrictions due to wartime exigencies, may also have influenced the Vietnamese approach.<sup>56</sup>

### B. *The CPV's “Orientation” for Human Rights Reform: A New Road Leading to Natural Human Rights in the 2013 Constitution?*

The CPV often issues signals hinting at its “orientation” towards sources of thinking that might influence its drafting of laws, including the constitution. This is a tradition shared among many former socialist countries, where the state is considered the institution that implements the policies of the communist party. Such hints of its “orientation” reflect the consensus reached among senior leaders of the Party on various policy issues and are often issued in the form of a Resolution or Directive issued by the Politburo of the Communist Party. The “orientation” of the CPV is generally translated by the National Assembly into legislation.

The CPV initially issued its “orientation” on the drafting of the 2013 Constitution in a Resolution of the Eleventh Congress, which states, amongst other things, that “there is an urgent need to amend and improve the 1992 Constitution to adapt to the new conditions”.<sup>57</sup> Further details on this “orientation” were subsequently released in the Resolution and Conclusions of the Second and Fifth Conferences of the Twelfth Central Executive Committee. Based on these documents, the Standing Committee of the National Assembly and the Drafting Committee stated that the direction of the 2013 Constitution was as follows:<sup>58</sup>

- Reaffirming the state's viewpoint to respect and guarantee human rights under international treaties that Vietnam is a member of; reasonably handling the relationship between human rights and citizens' rights in the Constitution; reaffirming the relationship between human rights, citizens' rights, and national sovereignty;

55. See Bui et al, *Findings Report*, *supra* note 30 at 149; NGUYEN Dang Dung & BUI Tien Dat, “Cai Cach Che Dinh Quyen va Nghia Vu Co Ban Cua Cong Dan Trong Hien Phap 1992 Theo Cac Nguyen Tac Ton Trong Quyen Con Nguoi [Reforming Provisions on Rights and Duties of Citizens in the 1992 Constitution According Principles of Human Rights Protection]” in NGUYEN Dang Dung et al, eds, *Amending the 1992 Constitution: Theoretical and Practical Issues* (Hanoi: Hong Duc Publisher, 2012) vol 2, 14 at 24.

56. See Bui et al, *Findings Report*, *supra* note 30, at 149; Nguyen and Bui, *supra* note 55.

57. Communist Party of Vietnam, *Văn kiện Đại hội Đại biểu toàn quốc lần thứ XI [Documents for the XI National Congress of the Communist Party of Vietnam]* (Hanoi: Nhà Xuất Bản Chính Trị Quốc Gia [The National Political Publishing House], 2011) 247.

58. See Report No 11/TT-UBTVQH13 on the Implementation of the Policy on Research on Amending and Supplementing the 1992 Constitution by the Standing Committee of the National Assembly, dated 8 February 2011 at items 2.5 and 3; See also Report on the Basic Content for Amendment of the 1992 Constitution by the Drafting Committee, dated 27 February 2012 at s 4; and Report on the Draft Amendment to the 1992 Constitution by the Drafting Committee, dated 1 October 2012.

- Recognizing that everyone has rights, and that human rights are natural rights belonging to everyone; recognizing that citizens' rights belong to persons having Vietnamese citizenship. The Constitution should provide that the State has a duty to enact laws to create the necessary environment for people to enjoy their rights in the best way;
- Citizens' rights are inseparable from citizens' obligations; upholding socialist democracy; improving disciplines and rules; building a national united bloc;
- Amending and supplementing provisions on citizens' rights and duties which are enforceable;
- Specifically regulating obligations of state bodies in respecting, guaranteeing, and improving human and citizens' rights; accurately specifying the relationship between the State and citizens; specifying the tools used to ensure human rights and citizens' rights;
- Consistently recognizing human rights principles; basic rights of citizens as well as restrictions on rights must be regulated by the Constitution and law;
- Clearly recognizing the content of rights regulated in the Constitution, along with supplementing a number of important rights based on the international treaties on human rights that Vietnam is a member of; and
- Renaming the Chapter on human rights "Human Rights, Citizens' Basic Rights and Obligations" and moving it to Chapter II in order to truly represent the importance of human and citizens' rights in the Constitution.

Objectively, the "orientation" of the CPV is largely progressive and was generally incorporated into the 2013 Constitution. The CPV's orientation also matched the views expressed by Vietnamese citizens and experts in the Survey on People's Opinions on the Amendment of the 1992 Constitution, although many proposals put forward by such citizens and experts were not mentioned, such as the direct application of constitutional rights, enforcement mechanisms for human rights, and the establishment of a national human rights institution.

### III. CONSTITUTIONAL RIGHTS IN THE 2013 CONSTITUTION: HUMAN RIGHTS AT THE CROSSROADS

In 2011, when the CPV and the Vietnamese government decided to launch a review of the 1992 Constitution, a number of important factors had come into play and exerted a significant impact on the understanding and direction of the amendments. In summary, they include: the reforms towards a market-oriented economy endorsed at the Sixth National Congress of the Communist Party in 1986; the change to a law-based state, often coined as a socialist rule of law state, introduced at the Seventh National Congress of the Communist Party in 1991; and the integration of Vietnam into a large number of international organizations and communities dependent on Vietnam's

adherence to international human rights treaties.<sup>59</sup> In this context, as Bui Hai Thiem argues, “[t]he development of socialist law-based state from 1992 onwards has brought the human rights language into the official discourse.”<sup>60</sup> However, this time, the discourse is more dimensional, diverse, and critical, with different strands of thought shaping and reshaping the understanding and provisions on human rights in the constitution.

The debate took place intensively and extensively in many different forums (both formal and informal), including the drafting committee, academic publications, policy reports, public consultations, various websites, blogs, and social media. It involved many stakeholders. For example, according to several official sources there were more than 20 million public consultation memoranda and reports submitted to the Drafting Committee of the 2013 Constitution. There were also nearly 30 thousand official conferences, meetings, or seminars held to discuss and comment on the contents and provisions of the draft constitution. In addition, the Ministry of Justice received 29 out of 30 reports (which amounted to more than five thousand pages) from various governmental departments and ministries.<sup>61</sup> However, the most fascinating development relates to the widespread use of social media and the Internet by informal groups and civil society to make their voices heard. Two important examples of such informal forums are the *Cùng Viết Hiến Pháp* (Writing the Constitution Together) website and an independent, popular recommendation (Petition 72) proposed by seventy-two eminent public figures known as the Group of 72.<sup>62</sup>

While the Group of 72 introduced their own draft constitution with many progressive and liberal human rights provisions which directly opposed the state draft, *Cùng Viết Hiến Pháp* provided an open forum for different, contradictory opinions to be expressed regardless of the authors’ position and status. Thus, it attracted a great number of independent submissions and opinions from ordinary people, including those who did not send their opinions to official state-sponsored forums. The rising importance and influence of informal forums forced the state to make certain concessions on human rights provisions in their final draft of the 2013 Constitution.<sup>63</sup>

At the heart of the heated debate were two main opposing schools of thought. On the one hand, the traditional school of socialist legality argued for retaining the conception of purely positivist rights in the constitution, where rights are seen as grants

59. TRUONG Trong Nghia, “The Rule of Law in Vietnam: Theory and Practice” in The Mansfield Center for Pacific Affairs, *The Rule of Law: Perspectives from the Pacific Rim* (United States: Mansfield Center for Pacific Affairs, 2000) 123 at 123 – 141.

60. Bui, “Deconstructing”, *supra* note 4 at 87.

61. LE Son, “Hơn 15 triệu lượt góp ý kiến cho Dự thảo sửa đổi Hiến pháp 1992 [More than 15 Million Public Consultations to Drafted Constitution Amending the 1992 Constitution]” *Bao Dien Tu Chinh Phu [Online Newspaper of the Government]* (25 March 2013), online: Bao Dien Tu Chinh Phu <<http://baochinhphu.vn/Tieu-diem/Hon-15-trieu-luot-gop-y-kien-cho-Du-thao-sua-doi-Hien-phap-1992/164889.vgp>>; Vietnam News Agency, “Đã có 20 triệu lượt ý kiến góp ý Hiến pháp [There Have Been 20 Million Public Consultations to the Drafted Constitution]” *Tuoi Tre [Youth Newspaper]* (29 March 2013), online: Tuoi Tre <<http://tuoitre.vn/tin/chinh-tri-xa-hoi/20130329/da-co-20-trieu-luot-y-kien-gop-y-hien-phap/540153.html>>.

62. Bui, “Deconstructing,” *supra* note 4 at 93 – 94.

63. *Ibid* at 94.

from the state. On the other hand, the opposing school comprises a growing number of liberal scholars and activists who advocate a natural rights conception both in the text of the constitution and in practice.<sup>64</sup> Both groups' points of view were expressed enthusiastically and, at times, even within the same forum. For example, on the one hand, senior Party leaders and government officials defended their purely positive approach to human rights based on the notions of traditional socialist legality. Secretary-General Nguyen Phu Trong asserted that the constitution's importance is second to that of the Party's political resolution.<sup>65</sup> It implies the instrumental view of law as an expression or tool to realize the Party's policies, including but not limited to human rights. They argued that sovereign rights prevail over human rights and that communitarian rights, be they cultural or social, should be given more weight rather than individual liberties as Vietnam is a developing country steeped in Asian values.<sup>66</sup> Bui Xuan Duc reasserts a long-held position of the socialist approach to human rights by emphasizing the relations between the state and its citizens as the fundamental point of departure to understand and shape human rights provisions in the constitution.<sup>67</sup>

On the other hand, there is a growing number of scholars and activists who advocate a liberal and natural rights conception towards the interpretation of human rights. They directly challenge the state-entrenched view of conflating human rights with citizens' rights and the idea that human rights can only emanate from the laws of the state.<sup>68</sup> They attest that human rights are natural and fundamental, not depending on the whims and fancies of the state, and thus human rights provisions in any new constitution should adhere to international standards rather than the Party's policies.<sup>69</sup>

These different strands of thought were both incorporated into the new constitution. The previous Chapter V on the rights and duties of citizens were brought forward and is now Chapter II in the 2013 Constitution. A closer look at these new provisions is warranted in order to assess and understand any new approaches or changes.

Provisions relating to human rights and citizens' rights constituted the majority of the amendments in the 2013 Constitution. They also received the most public attention and were the subject of 7,383,962 (28%) of a total of 26,091,276 suggestions made to the Amendment Committee.<sup>70</sup> The location and title of the chapter on human rights

64. *Ibid* at 92–93.

65. “Tổng bí thư: ‘Đề phòng thế lực muốn xoá bỏ điều 4 Hiến pháp [General Secretary: Take caution of hostile forces’ attempt to remove Article 4 of the Constitution]”, *VnExpress* (28 September 2013), online: <http://vnexpress.net/tin-tuc/thoi-su/tong-bi-thu-de-phong-the-luc-muon-xoa-bo-dieu-4-hien-phap-2886937.html>.

66. PHAM Binh Minh, “Việt Nam Đối Thoại Với Các Quốc Gia Khác Về Dân Chủ Và Nhân Quyền [Vietnam’s Dialogues with Other Countries on Democracy and Human Rights]” (2010) 7 *Tạp chí lý luận chính trị* [Journal of Political Theory] 18.

67. Bui, “Shortcomings, Limitations, and Solutions”, *supra* note 9 at 615.

68. NGUYEN Dang Dung, “Một Cách Tiếp Cận Hay Là Cách Thức Quy Định Nhân Quyền Trong Hiến Pháp [An Approach to or a Way of Stipulating Human Rights in the Constitution]”, *Tạp chí Nghiên cứu lập pháp* [Journal of Legislative Studies] (2011), online: [http://www.nclp.org.vn/nha\\_nuoc\\_va\\_phap\\_luat/cach-tiep-can-hay-la-cach-thuc-quy-dinh-nhan-quyen-trong-hien-phap](http://www.nclp.org.vn/nha_nuoc_va_phap_luat/cach-tiep-can-hay-la-cach-thuc-quy-dinh-nhan-quyen-trong-hien-phap).

69. La, “Individual Rights in Vietnamese Constitutions”, *supra* note 45.

70. Report on the Collection of People’s Opinions on the Amendment Draft to the 1992 Constitution (from 30/04/2013 to 01/02/2013) by the Drafting Committee, dated 5 September 2013 at Parts I and III [Report on the Collection of People’s Opinions].

and citizens' rights was significantly altered. Chapter V of the 1992 Constitution was originally titled "Rights and Obligations of Citizens". It was moved to form Chapter II of the 2013 Constitution and is now titled "Human Rights, Citizens' Basic Rights and Obligations". Many proposals on the title<sup>71</sup> and location<sup>72</sup> of this chapter in the Constitution were made by the public, and the amendments in the 2013 Constitution were well received.<sup>73</sup> As noted by the National Assembly, this amendment was made "in order to affirm the important value and role of human rights and citizens' rights in the Constitution and to demonstrate that the CPV and the State will consistently respect, preserve, and protect human rights and citizens' rights".<sup>74</sup> In addition, according to local experts, this amendment resolved the problematic title of Chapter V in the 1992 Constitution, which did not expressly state that it covered human rights in addition to citizens' rights.<sup>75</sup>

The 2013 Constitution has also resolved the previous conflation of human rights and citizens' rights in Article 50 of the 1992 Constitution. In particular, many rights which were originally considered as citizens' rights in the 1992 Constitution are now recognized as human rights in the 2013 Constitution. These rights include the freedom to trade, the right of the individual to own property and the means of production, the right to perform science and technology research, the right to create literature and arts and to benefit from those activities, as well as the right to be enjoy healthcare, and the freedom of religion. While these amendments did not receive any public criticism, the 2013 Constitution continues to limit specific rights that would ordinarily be considered human rights for citizens only. Such problematic rights include the right to a legal residence (Article 23), the freedom of movement and residence (Article 23), the freedom of speech, the freedom of the press, the right to access information, the right to assemble, associate and demonstrate (Article 25),

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71. Examples of proposed titles include "Human Rights, Citizens' Rights" and "The Rights and Freedoms of Peoples and Citizens". See NGUYEN Dang Dung and VU Cong Giao, "Chapter on Human Rights and Citizens' Rights in the Constitutions in the World and the Implication for Vietnam" in NGUYEN Dang Dung et al, eds, *Constitution: Theories and Practices* (Hanoi, Vietnam National University, Hanoi Press 2011) 1103 at 1120 [Nguyen and Vu, "Chapter on Human Rights"].
72. Examples of such proposals include shifting the Chapter on human rights to before the Chapter on Political Regime, or to separate the Chapter into two: one on Human Rights and another on Citizens' Rights. See Report on the Collection of People's Opinions, *supra* note 70 at Part III.
73. According to the Drafting Committee, there were 4,911,6187,383,962 opinions in favour of the title of that Chapter. Only fifteen opinions objected, and one suggested that the title should remain unchanged. The other titles suggested include: "Human Rights, Basic Rights and Duties of Citizens"; "Human Rights and Duties"; "Basic Human Rights, Basic Citizens' Rights and Duties"; "Human and Citizens' Rights and Duties"; "Human Rights". See Report on the Collection of People's Opinions, *supra* note 70 at Part III.
74. UONG Chu Luu, "Những nội dung cơ bản của Hiến pháp Nước Cộng hòa xã hội chủ nghĩa Việt Nam [Main Contents of the Socialist Republic of Vietnam's Constitution]" (Paper delivered at the National Conference on Implementation of the New Constitution, 8 January 2014) *Quang Tri [Quangtri Department of Natural Resources and Environment]*, online: Quang Tri <[http://stnmt.quangtri.gov.vn/index.php?option=com\\_content&view=article&id=622:nhng-ni-dung-c-bn-ca-hin-phap-nc-cng-hoa-xa-hi-ch-ngha-vit-nam&catid=186:t-chc&Itemid=179](http://stnmt.quangtri.gov.vn/index.php?option=com_content&view=article&id=622:nhng-ni-dung-c-bn-ca-hin-phap-nc-cng-hoa-xa-hi-ch-ngha-vit-nam&catid=186:t-chc&Itemid=179)>.
75. VU Cong Giao and NGUYEN Son Dong, "Những Điểm Mới Tiến Bộ về Quyền Con Người, Quyền Công Dân trong Hiến Pháp 2013 và Việc Thực Thi [The progressive new points in human and citizens' rights in the 2013 Constitution and its implementation]" (2014) 30 *Tạp Chí Khoa Học ĐHQGHN: Luật Học* [Scientific Journal of the National University: Jurisprudence] 41; NGUYEN Nhu Phat, "Human Rights under the 2013 Constitution" in PHAM Van Hung et al, eds, *Constitution of the Socialist Republic of Vietnam - Political and Legal Background for the comprehensive Reform of the Country in the New Period* (Hanoi: Labour and Social Publishing House, 2014) 59-68.

the right to education (Article 39), and the right to determine one's nationality and to use one's mother tongue (Article 42). These limitations demonstrate that Vietnamese legislators remain cautious over expanding the scope of political and civil rights. The such provisions do not appear to fully comply with international human rights standards and arguably discriminate against foreigners living lawfully in Vietnam.<sup>76</sup>

Further, human rights and citizens' rights are no longer deemed as "bestowed" or "gifted" by the state to the people in the 2013 Constitution. Instead, the 2013 Constitution takes the approach that human rights are natural rights and that the state is obligated to recognize, protect, and ensure the implementation of such rights, as provided for in Articles 3 and 14. While this might be perceived as a mere technical amendment, it is in fact a significant change that not only complies with international human rights standards, but also provides the constitutional basis for government bodies to comply with the state's human rights obligations. While this amendment was made under significant public pressure,<sup>77</sup> the CPV's and the government's decision to recognize its human rights obligations in the present political climate is indeed laudable. However, many Vietnamese experts believe that the 2013 Constitution does not represent a complete abandonment of the previous position (i.e. a conception of human rights as gifted by the state).<sup>78</sup> Furthermore, the 2013 Constitution does not provide that all of its rights therein are to have immediate effect. This is regrettable, as some Vietnamese experts have argued that if all of its rights had immediate effect it would provide a strong constitutional basis for the protection of human rights. Practically, it would also prevent government bodies from using the fact that some rights have yet to take effect as an excuse to disregard them.<sup>79</sup>

The 2013 Constitution also recognizes the principle that there must be limits on constitutional rights (Article 14.2), which is consistent with international human rights law<sup>80</sup> and many foreign constitutions. The enumeration of this principle in the 2013 Constitution is crucial in preventing abuses of state power in violation of human rights, as well as abuses of human rights by rights-holders.<sup>81</sup> However, the 2013 Constitution does

76. For example, concerning the freedom of movement and residence, Article 12(1) of ICCPR stipulates that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." Thus, the stipulation that only citizens are entitled to that right is obviously not in accordance with Article 12, ICCPR. Similarly, when stipulating freedom of expression, assembly, association, demonstration, the rights of ethnic minorities to preserve their own culture (Articles 19, 21, 22, 27 ICCPR), the right to an adequate standard of living (including housing); the right to education (Article 11, 13 of ICESCR), the Covenants use the pronoun "everyone" to indicate that these rights are not only applicable to citizens in a country.

77. In addition to suggestions from local experts, many other individuals directly and indirectly proposed to concretize the obligations of the State in the field of human and citizens' rights in the 2013 Constitution. See Report on the Collection of People's Opinions, *supra* note 70 at Part III.

78. For example, the phrase "the State shall ensure the right policy ...", "The State shall create conditions ..." for citizens to exercise their rights in Articles 26 and 28. Or "human rights of children/youth/old persons are protected/facilitated by the state in Article 37. See NGUYEN Ngoc Lanh, "Khẩu khí "ông chủ" trong Hiến Pháp [Mentality of 'Boss' in the Constitution]" *Cùng Viết Hiến Pháp [Writing the Constitution Together]* (11 February 2013), online: Cùng Viết Hiến Pháp <<https://cungviethienphap.wordpress.com/2013/02/11/khau-khi-ong-chu-trong-hien-phap-nguyen-ngoc-lanh/>>.

79. Report on the Collection of People's Opinions, *supra* note 70 at Part III.

80. UDHR, art 29; ICESCR, art 4; and ICCPR.

81. VU Cong Giao, "Institutionalization of Human and Citizens' Rights in the 2013 Constitution" in DAO Tri Uc et al, eds, *Constitution of the Socialist Republic of Vietnam in 2013: Scientific Commentaries* (Hanoi: Labour and Society Publisher, 2014) 176.

not provide that human rights are absolute and non-negotiable rights.<sup>82</sup> The state therefore has the power to restrict all constitutional rights in emergency situations. This falls short of international human rights standards, which provide for certain absolute rights that may not be restricted or suspended in any circumstances.<sup>83</sup> Article 14.2 of the 2013 Constitution also provides that all human rights and citizens' rights may be restricted in the interests of national defence and to protect national interests, social order, social safety, social morals, or the health of the community. Such restrictions also do not comply with international human rights law – specifically, the *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*. The Principles provide that national security grounds may only be invoked to restrict the rights of expression, peaceful assembly and association where necessary, based on the standards of a democratic society.<sup>84</sup> Such restrictions cannot be placed on all forms of human rights.<sup>85</sup> Given that the terms “national defence” and “national interests” are not clearly defined under Vietnamese law, Article 14.2 may potentially be used to arbitrarily limit human rights. Further, Article 15.4 of the 2013 Constitution, which provides that “human rights and citizens' rights must not be misused to infringe national interests, the legal rights of others and legitimate interests”, is too broad and ambiguous. It may potentially be used (or abused) by government bodies to unjustifiably limit human rights.<sup>86</sup>

The 2013 Constitution recognizes a number of new rights, including the right to life (Article 19), a citizens' right not to be expelled or extradited over to another country (Article 17), the right to donate human body parts and the human body (Article 20), the (inviolable) right to privacy (Article 21), the right to legal residence (Article 22), the right to social security (Article 34), the right to marry and divorce (Article 36), the right to experience and approach cultural values, to take part in cultural life, and to use cultural facilities (Article 41), the right to determine one's nationality, to use one's mother language, and to select the language of communication (Article 42), and the right to live in a fresh environment (Article 43). The recognition of these new rights represents the “adoption of obligations in international treaties that Vietnam is a member of to demonstrate Vietnam's

82. According to OHCHR, absolute/non-derogable rights in ICCPR include: the right to life (Article 6); prohibition of torture, cruel, inhuman and degrading treatment (Article 7); prohibition of medical or scientific experimentation without consent (Article 7); prohibition of slavery, slave trade and servitude (Article 8); prohibition of imprisonment because of inability to fulfil contractual obligation (Article 11); principle of legality in criminal law i.e. the requirement that criminal liability and punishment is limited to clear and precise provisions in the law, that was in force at the time the act or omission took place, except in cases where a later law imposes a lighter penalty (Article 15); recognition everywhere as a person before the law (Article 16); freedom of thought, conscience and religion (Article 18). See Office of the United Nations High Commissioner for Human Rights, “Core Human Rights in the Two Covenants” (September 2013), online: Office of the United Nations High Commissioner for Human Rights <<http://nhri.ohchr.org/EN/IHRS/TreatyBodies/Page%20Documents/Core%20Human%20Rights.pdf>>.

83. On absolute/non-derogable rights, see CCPR General Comment No 29: Article 4: Derogations during a State of Emergency, adopted at the Seventy-second Session of the Human Rights Committee (31 August 2001), online: Refworld <<http://www.refworld.org/docid/453883fd1f.html>>.

84. *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, Annex, UN Doc E/CN.4/1984/4 (1984), at B (vi).

85. *Ibid.*

86. See the commentary and recommendations by Article 19 which contends that this rule is against international human rights law at “Vietnam: Proposed Constitutional Amendments Go Against International Law” Article 19 (25 March 2013), online: Article 19 <<http://www.article19.org/resources.php/resource/3680/en/vietnam-proposed-constitutional-amendments-go-against-international-law>>.

developing awareness of human rights and to strongly affirm Vietnam's commitment to protecting human rights".<sup>87</sup> The newly added rights extend the scope of protection afforded under the 2013 Constitution to human rights and citizens' rights in a wide range of fields, including civil and political rights (Articles 21, 17, and 42) and economic, social and cultural rights (Articles 41, 42, 43, 22, and 34). These new rights were also incorporated in recognition of the modernization of Vietnam (Articles 43, 22, and 34), as well as its integration into the international community (Article 17, 42, 42, and 22).

However, the 2013 Constitution does not stipulate a number of important rights and freedoms provided for in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) – the treaties to which Vietnam is party – even though there was pressure from experts<sup>88</sup> and citizens to do so.<sup>89</sup> Such rights include the right not to be held in slavery and servitude (ICCPR, Article 8), the right not to be imprisoned on the grounds of inability to fulfil contractual obligations (ICCPR, Article 11), the right to recognition as a person before the law (ICCPR, Article 16), the right to strike (ICESCR, Article 8.1), the right to form and join trade unions (ICCPR, Article 22; ICESCR, Article 8.2), freedom of thought (ICCPR, Article 18.1), and the right to hold opinions without interference (ICCPR, Article 19.1). The failure to provide such rights in the 2013 Constitution means that Vietnam has yet to fully comply with its obligations under such treaties. Nevertheless, some of these rights may not have been included in the Constitution due to the fact that they are already protected under ordinary legislation such as the Civil Law, the Labour Law, and the Criminal Procedure Code. Other rights, such as the freedom of thought, might be considered too politically sensitive, given that constitutional protection of such rights might threaten the CPV's political and ideological monopoly in Vietnam.

It should also be noted that virtually all human rights and citizens' rights enumerated in the 1992 Constitution are clarified in the 2013 Constitution. These rights are extended to all persons and not limited to citizens alone. The amended rights include equality under the law (Article 16), the prohibition on torture, cruel, inhuman, and degrading treatment (Article 20), the right to privacy (Articles 21 and 22), the right to access information (Article 25), the right to participate in the governance of the State and society (Article 28), gender equality (Article 26), the right to vote in a referendum (Article 29), the right to a fair trial (Article 31), the right to own private property (Article 32), the right to social security (Article 34), and the right to employment (Article 35). For example, the provision on equality under the law (Article 16) was extended to all persons and not merely limited to citizens. The scope of this right was

87. Uong, *supra* note 74 at item 3.

88. See e.g. NGUYEN Linh Giang, "Revising and Supplementing Civil Rights in the 1992 Constitution" in PHAM Huu Nghi et al, eds, *Revising and Supplementing Chapter of Human Rights, Basic Rights and Duties of Citizen in the 1992 Constitution* (Hanoi: Social Sciences Publisher, 2012) 67 at 67-87; LA Khanh Tung, "Individual Rights in Vietnamese Constitutions: Reflection on International Bill of Human Rights" in NGUYEN Dang Dung et al, eds, *Amending the 1992 Constitution: Theoretical and Practical Issues* (Hanoi, Hong Duc Publisher, 2012) vol 2, 92; TUONG Duy Kien, "Experiences from some other countries and lessons for Vietnam" in PHAM Huu Nghi et al, eds, *Revising and Supplementing Chapter of Human Rights, Basic Rights and Duties of Citizen in the 1992 Constitution* (Hanoi: Social Sciences Publisher, 2012), 140.

89. Report on the Collection of People's Opinions, *supra* note 70 at Part III.

also clarified, in that it now expressly prohibits discrimination against an individual in her political, civil, economic, social, and cultural life. Similarly, the right to privacy (Articles 21 and 22) has been extended from citizens to all individuals, and it contains two separate sub-regulations. Article 21 provides protection over private residences and Article 22 protects an individual's private life. Article 22, in particular, provides for an individual's right to keep information on one's private life and family life confidential and extends the protection to one's honour and reputation. This provides substantially more protection as compared to Article 73 of the 1992 Constitution, which only extended protection to confidential letters, phone calls, and codes. Article 22 protects other forms of confidential communication as well.

With regard to the right of access to information (Article 25), the only difference here is the change from the "right to be informed" in the 1992 Constitution to the "right of access to information" in the 2013 Constitution. However, this replacement implies a greater meaning because under international law, the right of access to information contains three sub-rights: the right to be informed (as stipulated in the 1992 Constitution), the right to search for/request for information, and the right to share and provide information.<sup>90</sup> That means the new provision of the 2013 Constitution has significantly extended the connotation of this right compared to that of the 1992 Constitution.

Further, the right to participate in the governance of the state and society was originally provided in the 1992 Constitution and later affirmed in Article 28 of the 2013 Constitution. Article 28 further provides that government bodies should provide the necessary conditions for citizens to do so and that such bodies must be clear and transparent in receiving and responding to the complaints and suggestions of the people.

Finally, in the context of socialist Vietnam, it is noteworthy that the right to private ownership in Article 32 of the 2013 Constitution has been extended to all individuals. However, Article 32 also provides that the State has the right to buy or use the property of individuals and organizations at market price in emergency situations for the purposes of national defence, national safety, national interest, and national disasters.<sup>91</sup> While Vietnamese experts have observed that the amendments are not exceptional from an international perspective, they have brought Vietnam a step closer towards full compliance with international human rights standards.<sup>92</sup>

To conclude this section, it is worth discussing the monitoring mechanism to implement the constitution and to protect human rights. This topic was fiercely debated during the constitutional drafting process. In fact, the idea of establishing a constitutional review mechanism to implement constitutional provisions, to settle disputes between different branches of state and between the state and the citizens, and to protect individual rights has been researched extensively since the early 1990s in Vietnam. Different models were tabled and discussed: judicial review by common law courts; the establishment of a Constitutional Court as in Austria and Germany; and a

90. Mendel, *supra* note 47.

91. NGUYEN Van Phuc, "Provisions on economic, social, cultural, educational, scientific, technology and environmental issues in the 2013 Constitutions" in DAO Tri Uc et al, eds, *Constitution of the Socialist Republic of Vietnam in 2013: Scientific Commentaries* (Hanoi: Labour and Society Publisher, 2014), 229.

92. *Ibid* at 237.

French-like Constitutional Council model.<sup>93</sup> At some point, the French model seemed to gain ground as the official drafting group of the 2013 Constitution commissioned a study on the topic.<sup>94</sup> But in the end, none of the proposals were accepted. The 2013 Constitution provides one vague provision prescribing that “[c]onstitutional review is determined by law”.<sup>95</sup> The official explanation for the adoption of this provision is that this is a new topic which is still very controversial and requires more thorough research.<sup>96</sup> As a result, the current mechanism to implement and enforce the constitution, namely by increasing the responsibility of the National Assembly and other state bodies in implementing and respecting the constitution, should continue.<sup>97</sup>

A competing explanation for the rejection of any form of an independent mechanism to protect the constitution and its human rights provisions may be found in a conservative opinion. Espousing a strong socialist point of view, one author argues that all the proposed constitutional review mechanisms are learnt from Western countries, which are fundamentally different from the Vietnamese political, cultural, economic, and historical circumstances. One of the most striking differences, it is argued, is that countries with an independent constitutional review body also pursue a pluralistic political system with competing political parties. On the contrary, there is only one political party leading the society in Vietnam, namely, the Communist Party. As a result, establishing an independent constitutional body to protect the constitution is redundant, as that task would be undertaken by all other state organs.<sup>98</sup>

#### IV. PROSPECTS AND CHALLENGES IN THE IMPLEMENTATION OF CONSTITUTIONAL RIGHTS UNDER THE 2013 CONSTITUTION

##### A. Prospects

In Vietnam, there usually exists a relatively large gap between the law and its implementation, especially for constitutional rights. While many human rights provisions have been enacted in various versions of Vietnam’s constitution, such

93. NGUYEN Nhu Phat, ed, *Tai Phan Hien Phap Mot So Van De Ly Luan Co Ban, Kinh Nghiem Quoc Te va Kha Nang Ap Dung Cho Viet Nam [Judicial Review: Some Theoretical Issues, Foreign Experience and the Possibility of Application in Vietnam]* (Hanoi: Social Sciences Publishing House, 2011); The Drafting Committee, *Mo Hinh To Chuc va Hoat Dong Cua Mot So Hoi Dong Hien Phap o Mot So Nuoc Tren The Gioi [Models and Operation of Some Constitutional Councils in the World]* (Hanoi: National Political Publishing House, 2013).

94. *Ibid.*

95. 2013 Constitution, *supra* note 3, Art 119.

96. THẾ Dũng, “Khong Thanh Lap Hoi Dong Hien Phap [No Constitutional Council Established]”, *Nguoi Lao Dong [Labourer]* (22 October 2013), online: Nguoi Lao Dong <<http://nld.com.vn/thoi-su-trong-nuoc/khong-thanh-lap-hoi-dong-hien-phap-20131022112618832.htm>>.

97. *Ibid.*

98. D.C.N, “Lua Chon Mo Hinh Bao Hien Phu Hop Voi The Che Chinh Tri [Choosing a Model of Constitutional Review in line with the Political System]”, *An Ninh Thu Do [Capital Police]* (07 September 2013), online: An Ninh Thu Do <<http://anninhthudo.vn/chinh-tri-xa-hoi/lua-chon-mo-hinh-bao-hien-phu-hop-voi-the-che-chinh-tri/514699.antd>>.

rights have not always been fully implemented, including the freedom of association, the right to demonstrate, and the right to referendum. The prospects for the implementation of constitutional rights in the 2013 Constitution can be considered from a number of perspectives.

First, the 2013 Constitution generally provides more specific, clear, and concise provisions on human rights and citizens' rights as compared to the 1992 Constitution. This facilitates the implementation of these provisions in practice. The 2013 Constitution also facilitates the protection of human rights by the state, in that it sets out the state's obligations and the applicable principles for limitations on human rights. These also provide that government bodies cannot deny or defer their obligations to respect, protect, and implement constitutional rights. The increased clarity in wording also enables citizens and civil society organizations to better hold the government to account.

Second, the 2013 Constitution demonstrates that the CPV and the state have gained a greater understanding of human rights and are committed to their protection. This commitment has been maintained even after the adoption of the 2013 Constitution through Vietnam's ratification of two core United Nations conventions – namely the *Convention against Torture* and the *Convention on the Rights of People with Disabilities* in early 2015. Vietnam has also set out an ambitious plan to develop and amend 90 laws and 60 ordinances by 2016, which include a number of important laws to enforce constitutional rights such as the Law on Referendum, the Law on Access to Information, the Law on Associations, the Law on Demonstration, the Law on Belief and Religion, the Penal Code, the Criminal Procedure Code, and the Civil Code.<sup>99</sup>

Third, Vietnam's participation in international and regional human rights bodies, such as the United Nations Human Rights Council<sup>100</sup> and the Association of South East Asian Nations Intergovernmental Commission on Human Rights,<sup>101</sup> as well as Vietnam's implementation of the Universal Periodic Review,<sup>102</sup> have all improved Vietnam's enforcement mechanisms for constitutional rights. In its election campaign for the United Nations Human Rights Council, Vietnam voluntarily demonstrated fourteen commitments to promote human rights in the country, including consolidating its national legislation framework for compatibility with international human rights law, striving to achieve the Millennium Development Goals, considering

99. Resolution No 20/2011/QH13 of the National Assembly on the Legislative Agenda of the XIII National Assembly, dated 26 November 2011. At the time of writing this article, a number of laws have been promulgated including new Criminal and Criminal Procedure Codes, a new Civil Code, and a new Law on Access of Information.

100. Vietnam has been a member of the UN Human Rights Council since 2013. Its term will end by 2016. See Office of the High Commissioner, United Nations Human Rights, "Current Membership of the HRC", online: Office of the High Commissioner, United Nations Human Rights <<http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx>>.

101. Vietnam has been a member of the ASEAN Inter-governmental Committee on Human Rights (AICHR) since 2009. See ASEAN Intergovernmental Committee on Human Rights, "About", online: AICHR <<http://aichr.org/about/>>.

102. Vietnam completed its UPR in 2009 and 2014. See Office of the High Commissioner, United Nations Human Rights, "Universal Periodic Review – Viet Nam" (8 May 2009), online: Office of the High Commissioner, United Nations Human Rights <<http://www.ohchr.org/EN/HRBodies/UPR/PAGES/VNSession5.aspx>>; Office of the High Commissioner, United Nations Human Rights, "Universal Periodic Review Second Cycle – Viet Nam" (5 February 2014), online: Office of the High Commissioner, United Nations Human Rights <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/VNSession18.aspx>>.

the establishment of national human rights institutions, acceding to more international human rights treaties, promoting human rights education, implementing the recommendations in two Universal Periodic Review rounds, and further participating in the international and regional human rights mechanisms.<sup>103</sup> These commitments not only bind government agencies, but also enable the civil society to exert pressure on the state with regard to the implementation of international, regional, and national commitments on human rights.<sup>104</sup>

Fourth, human rights education has rapidly improved in Vietnam, thereby raising awareness among government agencies, civil society organizations, and citizens in promoting the implementation of constitutional rights. Human rights are included in the curricula of almost every law school in Vietnam,<sup>105</sup> and Masters programmes in Human Rights Law are offered as well. The number of foreign and domestic institutions carrying out research on human rights in Vietnam is growing; among them is the Human Rights Research Institution under the Ho Chi Minh National Academy of Politics.<sup>106</sup>

Fifth, the civil society in Vietnam has experienced rapid growth, despite many legal difficulties and obstacles.<sup>107</sup> In recent years, civil society has given substantial attention to human rights, and the number of civil society organizations working in the field of human rights is increasing.<sup>108</sup> Indeed, there are many organizations working in various areas involving human rights, such as women's rights, children's rights, LGBT rights, and minority rights.<sup>109</sup> Although these organizations are still subject to tight state control, they have significantly influenced the implementation of human rights in Vietnam.

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103. United Nations, "Viet Nam's candidacy to the United Nations Human Rights Council for the term 2014-2016: voluntary pledges under resolution 60/251", online: United Nations <[http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/68/312](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/68/312)>.
104. In practice, a group for UPR was set up by many local activists who are active in campaigning for the implementation of recommendations from other countries to the Vietnamese government during the UPR process. "Vietnam UPR", online: Vietnam UPR <<http://vietnamupr.com/>>.
105. For details on human rights education in Vietnam, see Office of the High Commissioner, United Nations Human Rights, "Universal Periodic Review Second Cycle – Viet Nam" (5 February 2014), online: Office of the High Commissioner, United Nations Human Rights <<http://www.ohchr.org/EN/HRBodies/UPR/Pages/VNSession18.aspx>>; NGUYEN Huu Chi, "Human Rights Education in Law Schools of Vietnam" (2015) *Journal of Legislative Studies* 54.
106. These Masters programs in human rights are run by the School of Law under Vietnam National University Hanoi, the Graduate Academy of Social Sciences under Vietnam National Academy of Social Sciences, and the Research Institute of Human Rights under Ho Chi Minh National Political Academy.
107. For details about civil society in Vietnam, see Asian Development Bank, "Civil Society Briefs: Viet Nam", online: Asian Development Bank <<http://www.adb.org/publications/civil-society-briefs-viet-nam>>; Irene NØRLUND, "Civil Society in Vietnam: Social Organisations and Approaches to New Concepts" (2007) 105 *ASIEN* 68; NGUYEN Thi Bich Diep, "Overall on Legal Framework for Civil Society Organizations [in Vietnam]", online: NGO Centre <[www.ngocentre.org.vn/files/docs/2\\_ppt\\_paper\\_cso\\_law\\_vie\\_final.ppt+&cd=39&hl=en&ct=clnk](http://www.ngocentre.org.vn/files/docs/2_ppt_paper_cso_law_vie_final.ppt+&cd=39&hl=en&ct=clnk)>.
108. Irene NØRLUND et al, eds, "The Emerging Civil Society: An Initial Assessment of Civil Society in Vietnam" (March 2006), online: Vietnam Institute of Development Studies <[http://www.vids.org.vn/vn/Attach/20065222515\\_CSI\\_VN\\_Final\\_report.pdf](http://www.vids.org.vn/vn/Attach/20065222515_CSI_VN_Final_report.pdf)>; Irene NØRLUND, "Filling the Gap: The Emerging Civil Society in Vietnam" (2007), online: United Nations <[http://www.un.org.vn/vi/publications/doc\\_details/3-kha-lp-s-cach-bit-xa-hi-dan-s-mi-ni-ti-vit-nam.html](http://www.un.org.vn/vi/publications/doc_details/3-kha-lp-s-cach-bit-xa-hi-dan-s-mi-ni-ti-vit-nam.html)>.
109. There are many local NGOs networks set up in the form of working groups, such as the Administrators Working Group, the Corporate Engagement Working Group, the Agent Orange Working Group, the Capacity Development Working Group, the Child Rights Working Group, the Climate Change Working Group, the Disability Working Group, the Ethnic Minorities Working Group, the Microfinance Working Group, the Sustainable Agriculture and Natural Resources Management Working Group, and the Water

## B. Challenges

The greatest challenge in the implementation of the 2013 Constitution, as we have alluded to above, rests in the fact that the constitution does not provide that the rights protection are to take immediate effect. Many important rights, particularly civil and political rights such as the freedom of association, the freedom of assembly, the right to demonstrate, and the right to vote in a referendum, have been delayed until the National Assembly enacts laws, or until the government enacts decrees to guide their implementation. The process of making and amending laws to enforce the 2013 Constitution has been slower than scheduled.<sup>110</sup> More importantly, many local experts have noted that drafters of significant laws, such as the Law on Access to Information, the Law on Referendum, the Law on Associations, and the Law on Demonstration, have taken a “conservative” approach that significantly limits constitutional rights.<sup>111</sup> Without significant changes, these laws may fail to effectively implement the relevant constitutional rights.

Secondly, there is no clear and effective legal mechanism to protect constitutional rights. Given that the CPV did not accept the establishment of the Constitutional Council in the 2013 Constitution, there is no clear legal mechanism to prevent and overrule laws and by-laws issued by legislative, executive, and judicial bodies which violate constitutional rights. Similarly, the absence of a national human rights institution has made it more difficult to defend individuals who have had their constitutional human rights violated. The existing mechanisms for addressing complaints against state bodies are – paradoxically – those very bodies which are complained of. This effectively violates the principle of “*nemo iudex in causa sua*”. To complicate matters further, Vietnam’s judicial system is arguably flawed – judicial independence is questionable, as is the availability of a fair trial and fair compensation in cases of human rights violations.<sup>112</sup>

Finally, the 2013 Constitution limits human rights in ways that are unreasonable. Article 14 provides that national security interests can be invoked to restrict protection of human rights, while Article 15 provides an overly expansive and vague prohibition against the use of human rights and citizens’ rights to infringe on the national interests, or the rights and lawful interests of others. These provisions continue to be abused by government agencies in ways that are detrimental to constitutional rights. In this context, the propaganda apparatus of the CPV still considers human rights as “a tool used by hostile and reactionary forces to undermine the socialist regime” and the judicial system as a tool to protect the political regime instead of an institution to

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Supply, Sanitation and Hygiene Working Group. See “VUFO-NGO Resource Center”, online: NGO Centre <<http://www.ngocentre.org.vn/workinggroups>>.

110. For example, in its Resolution No 89/2015/QH13 on Adjustment of the Program on Building Laws and Ordinances in 2015 and on the Program on Building Laws and Ordinances in 2016 adopted by the National Assembly of Vietnam, dated 9 June 2015, the National Assembly decided to delay the time for development of the Law on Demonstration from the Ninth Session until the Eleventh Session.

111. Nguyen and Vu, “Chapter on Human Rights”, *supra* note 71.

112. Penelope NICHOLSON, “Renovating Courts: The Role of Courts in Contemporary Vietnam” in Jiunn-Rong YEH & Wen-Cheng CHANG, eds, *Asian Courts in Context* (Cambridge: Cambridge University Press 2014), 528.

protect justice. In the absence of independent constitutional human rights institutions such as a National Human Rights Institution, it is very difficult to prevent state abuses against human rights.

## V. CONCLUDING REMARKS

The 2013 Constitution marks an important milestone in the constitutional history of Vietnam. The significance of this constitution is not only demonstrated by its progressive amendments, but also through Vietnam's vigorous national dialogue on human rights, even though some of these rights were not adopted. Both the drafting process and the substantive content of the 2013 Constitution have not been adequately studied in Vietnam, and these issues demand the attention of Vietnamese and international scholars.

The drafting of the 2013 Constitution demonstrates greater human rights awareness on the part of the CPV and the state. Thus, the 2013 Constitution clearly recognizes and affirms the inherent nature of human rights and the obligations of the state to respect, protect, and fulfil human rights. The 2013 Constitution also respects the many international agreements of which Vietnam is a signatory. The CPV and the state have also expressed fresh insights through distinguishing and striving for a harmonious relationship between human rights and citizens' rights and between the state and citizens, as well as determining an appropriate position for the provisions on human rights and citizens' rights in the constitution. Many of the flaws in the 1992 Constitution with respect to human rights and citizens' rights have been overcome. This change, to some extent, shows that the CPV and the state does respect academic opinion, which had previously received little attention.

There are many reasons for the changes mentioned above, of which the most important was the CPV's awareness and recognition of the importance of human rights for Vietnam's national development. The severe socio-economic crisis since reunification until the mid-1990s helped the CPV learn an important lesson: restricting rights will delay Vietnam's development, which in turn will damage the CPV's legitimacy and political monopoly. The CPV has expressly stated in a number of important documents that "[the] people are both the center of development strategies and the key subjects of development",<sup>113</sup> and that "the State respects and ensures human rights and citizens' rights and cares for the happiness and the free development of each person".<sup>114</sup> In particular, a key factor in the CPV's "orientation" towards the 2013 Constitution was that "amendments and supplements of the provisions on fundamental rights and obligations of the People ... [are] to maximize the promotion of the human factor, and consider the people as subjects, a key source, and objectives of development".<sup>115</sup>

113. Communist Party of Vietnam, *Văn Kiện Đại Hội Đảng Lần Thứ XI [Documents of the CPV's Congress XI]* (Hanoi: The National Political Publisher, 2011) at 76.

114. *Ibid* at 85.

115. Report No 11/TT-UBTVQH13 on the Implementation of the Policy on Research on Amending and Supplementing the 1992 Constitution by the Standing Committee of the National Assembly, dated 8 February 2011 at item 3.

Along with this new awareness, it is obvious the CPV's affirmation of human rights and citizens' rights had to "...be implemented under the close supervision of the CPV", and that the Constitution must contribute to "... further elaborate the content, understanding of human rights as well as rights and obligations of citizens as expressed in the Platform for Nation-building in the Transitional Period to Socialism and other documents of the CPV."<sup>116</sup> While allowing experts to participate in the amendments, the CPV reminded the state to "[f]ocus on activities of distributing information and propagandizing, ensuring that people follow instructions rightly (from the CPV), do not let nefarious people, hostile forces to vandalize and distort the process of constitution making."<sup>117</sup> This is aimed to ensure that the 2013 Constitution would not damage the CPV's political monopoly. It is this dominant ideology that has significantly limited the reforms of human rights and citizens' rights provisions in the 1992 Constitution and has continued to create obstacles to the effective implementation of the 2013 Constitution.

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116. Report on Basic Issues for Amendment in the 1992 Constitution by the Drafting Committee, dated 27 February 2012 at para 2.

117. See Resolutions of the CPV Central Committee Sessions 2 and 5, 2012, on amending the 1992 Constitution, online: Communist Party of Vietnam Online Newspaper <<http://dangcongsan.vn/tu-lieu-van-kien/van-kien-dang/ngghi-quyet-bch-trung-uong.html>>.