

THE CONSTITUTION OF VIETNAM

This new book examines constitutional debate and development in one of the most dynamic and rapidly changing societies in Asia, and will be of use to scholars and students of comparative law, comparative constitutional law and Asian law, and practitioners interested in Asia or in Vietnam. The book discusses and analyses the historical development, principles, doctrines and debates which comprise and shape Vietnamese constitutional law today, during a time of reform and debate. The chapters are written in sufficient detail for anyone coming to the subject for the first time to develop a clear and informed view of how the constitution is arranged, how it works, and the main points of debate on it in Vietnamese society. It is written in an accessible style, with an emphasis on clarity and concision.

The book discusses and analyses the origins of Vietnamese constitutional thought; the first (1946) Constitution of independent Vietnam; Constitutional dialogue and debate in the late 1940s and 1950s, including the work of dissidents in the 1950s; the 1959 Vietnamese Constitution; constitutional dialogue and debate in the 1960s and 1970s; the 1980 Constitution; the rise of *doi moi* (renovation) and debates over constitutionalism in the 1980s; the 1992 Constitution, including the role of legislative, executive and judicial sectors, constitutional power and enforcement, constitutional rights and obligations, and other issues; constitutional dialogue and debate in the 1990s; the constitutional debate and revision process of 2001 and the current Vietnamese Constitution; the rise of debate over judicial independence and constitutional enforcement and review in Vietnam; comparison to constitutional developments and debates in China; constitutions and constitutional issues in the former South Vietnam; the links and tensions between state and party constitutions; and concluding analysis of 60 years of the development of Vietnam's Constitution and constitutionalism.

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The Constitution of Vietnam

A Contextual Analysis

Mark Sidel



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In memory of Lê Mai (1940–96)

Distinguished Vietnamese patriot and diplomat

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Introduction

THIS VOLUME HAS several purposes. One is to provide detailed information on the evolving Vietnamese Constitution of the earlier Democratic Republic of Vietnam (DRV, 1945–76) and current Socialist Republic of Vietnam (SRV, 1976 to the present), tracing Vietnam’s modern constitutional history from the 1946 Constitution through the Constitutions of 1959, 1980, 1992 and the important revision of the 1992 Constitution completed in 2001. The first six chapters cover that ground. However, they also introduce a second major aim of this book, which is to provide some sense of the constitutional dialogues and debates that have occurred in the DRV and SRV at various points in their existence and that are of particular importance today. So each of the initial six chronological chapters also indicates particular areas of constitutional conflict, and how debates and dialogues—as well as ongoing political, economic, foreign policy, and other challenges—influenced the changing Vietnamese Constitution.

The final three chapters discuss several of the key debates roiling Vietnamese constitutional law today. Chapter 7 analyses a case study in the very difficult—and highly politicised—problem of implementing constitutional guarantees. There are many formal constitutional guarantees in Vietnam’s current Constitution (1992, as amended), and a number could be chosen to illustrate the problems that arise when party and government seek to draft laws and policies that fulfil party and state goals in an environment where a broad constitutional freedom has also been promised. I have chosen one on which there has been extensive debate, controversy and drafting in Vietnam—the guarantee of freedom of association in article 69 of the 1992 Constitution, which has been carried through each successive Vietnamese Constitution since 1946, and the long history of attempts to rule and legislate on associational life in Vietnam.

Chapters 8 and 9 examine important current controversies in Vietnamese constitutionalism. One is the problem of judicial independence, which was always a muted discussion in Hanoi, particularly given the long history of dominated courts in the DRV and

the SRV. However, in recent years, and particularly in the wake of an important case of interference with the judiciary by high-ranking party and state officials in the major port city of Hai Phong, the question of judicial independence has come to academic, political and popular attention in Vietnam. Chapter 8 traces and analyses the new discussions on judicial independence and their roots in the recent Hai Phong case.

Chapter 9 deals with the key issue of constitutional review, and the question of who and which institutions determine whether laws and the acts of official institutions—party and state institutions—are constitutional or unconstitutional, and what to do if they do not pass constitutional muster. This is a difficult problem in any society and societies have come to different methods for determining constitutionality and its implications. Vietnam's political leaders, constitutional and legal drafters, legal scholars, officials, dissidents and others have been engaged in a discussion of the problem of constitutional review (often called 'constitutional protection' in Vietnam) for some years now, quite publicly, and more quietly as far back as the late 1980s and 1990s. There are a number of options available for consideration as Vietnam debates constitutional review, including the possibility of forming a constitutional court, a constitutional commission under the National Assembly (the national legislature) or other models, and Chapter 8 outlines those important and continuing debates.

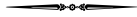
Throughout this volume and any discussion of Vietnamese constitutional debate, certain key issues continue to arise. They include the role of the Vietnamese Communist Party in Vietnam's constitutional system; the roles of the National Assembly and the government in Vietnam's institutional and governmental life; the status and role of the judicial system, and the prospects for strengthening judicial power and judicial capacity; the gradually narrowing role of the Vietnamese procuracy, an institution built on Soviet and Chinese models that was originally responsible not only for state prosecutions, but also as a kind of inspector-general over the entire legal and judicial system; and the crucial roles that legal officials, scholars and, at different points in Vietnam's modern history, dissidents have played in Vietnamese constitutional dialogue.

As in any other country, constitutional law in Vietnam is a process of constant dialogue and debate. In Vietnam (as in China and several other originally socialist countries), much of that debate occurred in earlier decades behind closed doors of party, state, legislative and drafting meetings. But in recent years, particularly since 1992, the dialogue and debate over constitutional issues in Vietnam has begun to come out into

the open, more visible and accessible to domestic and foreign observers alike. This volume seeks to give some sense for how that dialogue and debate over the future of Vietnam's constitutionalism has occurred and the ways in which such national conversations are becoming more prominent today.

The 'Further Reading' sections at the end of each chapter guide the reader to other treatment of issues on that timeframe or theme, primarily in English. The bibliography at the end of the volume provides a more comprehensive listing of Vietnamese and English sources available on constitutional law and constitutionalism in Vietnam.

Key Themes in Vietnam's Constitutions and Constitutional Debates



INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

THE SPECIAL PROBLEM OF PARTY CONSTITUTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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