

Constitutional Rights in Socialist East Asia

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ABSTRACT

China, North Korea, and Viet Nam are three essentially socialist countries that have survived the collapse of the Soviet Union. A salient commonality among them is the homogeneity of their cultural roots and the socialist legal tradition, which have continued to influence every facet of government and society. These lingering cultural and legal affinities have generated a different understanding of constitutional rights in relation to liberal counterparts. For strategic purposes, China and Viet Nam have faced a pressing need to remodel their rights conceptions to a certain universalist degree, while North Korea has remained almost immune to the globalisation of constitutional rights. To overcome historical negligence and cultural insensitivity, this article seeks to probe the interplay of various strands of values in shaping constitutional rights of socialist East Asia. It also demonstrates various implications from the study of socialist constitutional rights that could contribute heuristically and practically to the rights discourse.

KEYWORDS

Constitutional rights; socialist constitutions; cultural relativism; Marxism; China; North Korea; Viet Nam

1. Setting the Scene

In June 1993, the United Nations World Conference on Human Rights in Vienna grabbed the global spotlight with the convention of a substantial number of national delegates on human rights, an age-old issue of international concern. With an increasing sense of confidence and autonomy, leaders of many Asian countries felt an urge to chastise the rigidly monolithic conception of human rights built on the premise of the Western liberal tradition.¹ They called for a flexibility that would be a prerequisite for understanding and interpreting human rights in the local context. For Asia, that context was ‘Asian values’.² After almost three decades, human rights issues in socialist East Asia are still fiercely debated, whether within and among these countries, between them and their Western counterparts, or just between the latter. Many are still perplexed by the fact that governments might use the same term with different substance; evidently, universal consensus is something that needs to be earned, rather than assumed.

Despite the recent growing academic interest in studying constitutions of the Global South, the field of comparative constitutional law has still witnessed an unparalleled

expansion.³ As observed by Dixon and Ginsburg, '[i]t is probably the case that 90% of comparative work in the English language covers the same ten countries, for which materials are easily accessible in English'.⁴ The asymmetric focus on Western Europe and the English-speaking world, dubbed as 'usual suspects',⁵ have effectively marginalised constitutional studies of Asian countries. Meanwhile, the propensity to lump constitutional rights into judicial rulings renders the socialist East Asia unpalatable due to an absence of constitutional review,⁶ not to mention the long-held bias against '... lawless and unindividuated subjects of Oriental Despotism'.⁷ Even when the region is given some heed, as observed by Menski, it '... remains shackled by "white" colonial presuppositions'.⁸

The rejection of socialist constitutions is grounded in Western legal liberalism with its ultimate emphasis on individual liberty. The functionalist approach normally characterises socialist bills of rights as a sham because of the gap between constitutional promises and practice.⁹ Socialist countries are thus depicted as having 'constitutions without constitutionalism', displaying lip service to their own basic law, although this branding should not be limited to socialist regimes – fears simmer that constitutionalism is in peril worldwide.¹⁰ Scholars have cautioned that the constitutional adoption of rights can act as a form of bribe to win over civil society to structural constitutional change, and that abusive borrowing of liberal democratic constitutional designs and concepts to advance authoritarian projects undermines democracy and constitutionalism.¹¹

Nonetheless, constitutions and constitutional rights in the contemporary socialist world are more nuanced than ordinarily portrayed. Ginsburg questions whether the categorisation of socialist constitutions is conducive to the study of comparative constitutional law.¹² If the constitutions do not matter, why would socialist East Asia invest so many resources in constitution-making? This question urges a broader view of the

³Mark Tushnet and Madha Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2014); Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Cambridge University Press 2014).

⁴Rosalind Dixon and Tom Ginsburg, 'Introduction' in Tom Ginsburg and Rosalind Dixon (eds), *Research Handbook on Comparative Constitutional Law* (Edward Elgar 2011) 13.

⁵Hirschl (n 3) 151.

⁶Wen-Chen Chang and David S Law, 'Constitutional Dissonance in China' in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Edward Elgar 2018) 477.

⁷Teemu Ruskola, 'Legal Orientalism' (2002) 101(1) *Michigan Law Review* 228.

⁸Werner Menski, 'Beyond Europe' in Esin Örücü and David Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 191.

⁹David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101(4) *California Law Review* 901. Notably, contrasting the common view, Law and Versteeg's large-N study characterises North Korea's constitution as 'weak' instead of pure 'sham'. For discussion, see Patricia Goedde, 'Beyond Sham: The North Korean Constitution' (2020) 44(1) *Asian Perspective* 2.

¹⁰See generally Mark A Graber, Sanford Levinson, and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018); Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018).

¹¹Rosalind Dixon, 'Constitutional Rights as Bribes' (2018) 50(3) *Connecticut Law Review* 767; Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021).

¹²Tom Ginsburg, 'East Asian Constitutionalism in Comparative Perspective' in Albert HY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press 2014) 32–51. On this issue, the classifications proposed by Karl Loewenstein, Giovanni Sartori, and – more recently – Albert HY Chen might provide a framework for the understanding of such phenomena: Karl Loewenstein, *Political Power and the Governmental Process* (University of Chicago Press 1965); Giovanni Sartori, 'Constitutionalism: A Preliminary Discussion' (1962) 56(4) *The American Political Science Review* 853; Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (Palgrave Macmillan 1994); Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century*.

functional complexity of a constitution beyond 'legal enforceability'. As argued by Dowdle and Wilkinson, US-moulded constitutionalism, which accentuates limits on state power to protect civil liberties, might not be deemed a preferred model for replication in many parts of the world.¹³ Indeed, socialist East Asia consists not of liberal democratic but of socialist systems in the formal sense with their own historical and cultural narratives. An outright repudiation of academic inquiry into their constitutional founding and Indigenous values would be to display a glaring legal imperialism. Ignorance is not only scholarly undesirable but also risks pushing countries over the edge, with global instability in consequence.

For a better understanding of the rights foundation of socialist East Asia, then, an interdisciplinary approach is needed. Choudhry has asserted that '... we must study South Asia on its own terms. To come to grip with South Asian constitutional law and politics requires that we develop our research agendas around the actual practice of constitutional actors', and this applies equally to the rest of the region.¹⁴ In recent years, comparative law scholars have advocated 'sympathetic engagement' and 'contextualized functionalism',¹⁵ beginning with the scrutiny of a constitutional system within its history and culture, followed by political and legal matters. In other words, contextual studies illuminate the need to mix legal and extra-legal approaches to comparative law in non-Western settings.

This article aims to probe the conceptual development of constitutional rights in socialist East Asian countries from a contextual perspective. In so doing, it wishes to overcome historical negligence and cultural insensitivity, which are the biggest impediments to a proper understanding of allegedly shameless deviators. China, North Korea, and Viet Nam are relatively homogenous in terms of cultural roots and political regimes, upholding a Confucian legacy and socialist legal system. It bears noting that although it is situated in Southeast Asia, Viet Nam's legal and cultural traditions are seen as closer to China's than the majority of its bloc partners.¹⁶ With a variety of commonalities, constitutional rights and their philosophical foundations are expected to converge, but there are also diverging elements. China and Viet Nam have experienced economic booms after opening themselves up to the global economy, and achieved a wide array of milestones in terms of poverty alleviation, human development, and social modernisation. Critically, the two countries have shown increasingly receptive attitude toward international human rights, or at least more willingness to engage in multilevel dialogue.

¹³Michael Dowdle and Michael A Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity' in Michael Dowdle and Michael A Wilkinson (eds), *Constitutionalism beyond Liberalism* (Cambridge University Press 2015) 17–37.

¹⁴Sujit Choudhry, 'How to Do Constitutional Law and Politics in South Asia' in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) 19.

¹⁵Domenico Amirante, 'Al di là dell'Occidente. Sfide epistemologiche e spunti euristici nella comparazione "verso Oriente"' (2015) 17(1) *Diritto Pubblico Comparato ed Europeo* 1; Maartje de Visser and Ngoc Son Bui, 'Contemporary Constitution Making in Asia-Pacific' (2019) 7 *Chinese Journal of Comparative Law* 241; See also Pasquale Viola, *Costituzionalismo autoctono* (Bologna University Press 2020); Lucio Pegoraro, *Blows against the Empire*. Contro la iper-Costituzione coloniale dei diritti fondamentali, per la ricerca di un nucleo interculturale, in VVAA, *Annuario di diritto comparato e di studi legislativi*, ESI, 2020, 447; Serena Baldin, 'The Concept of Harmony in the Andean Transformative Constitutionalism: A Subversive Narrative and Its Interpretations' (2015) 17 *Revista General de Derecho Público Comparado* 1.

¹⁶See more Teemu Ruskola, 'The East Asian Legal Tradition' in Mauro Bussani and Ugo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press 2012) 257–77.

Meanwhile, faced with the back of the international community, North Korea has long been in survivalist mode, which informs and guides its notion of human rights.

This article is divided into three sections, preceded by the introduction. Section two lays out dynamic conceptions of individual rights arising through the cultural, legal, and socioeconomic factors underpinning the nation-building of China, North Korea, and Viet Nam. This framework serves as a conduit through which to investigate the interplay of those strands of ideas in shaping constitutional rights in section three. As the article suggests, the Confucian understanding of the individual and the ensuing rights implications pre-existed and still co-exist with the statist ideas of rights in East Asia. The constitutional rights of these countries are an outcome of the superimposition of Confucianism onto socialism. Moreover, China and Viet Nam diverge from North Korea's experience. While North Korea has been considered 'sluggish', the other two have softened the statist nature of constitutional rights in tandem with making economic reforms and exposure to the international community's shared standards, fostering a different approach to human rights. Section four discusses the implications drawn from the study of these countries and submits that the differences between socialist nations and others should merit in-depth academic inquiry for epistemological reasons, in order to avoid overly simplistic analysis of complex and intricate traditions – both political and legal. Section five concludes.

2. The Conception of Individual Rights in Socialist East Asia

2.1. Cultural roots

The East Asian orthodoxy of rights is shaped by the philosophy and social norms of traditional Confucianism. While several schools of thought have influenced the oriental social fabric, such as Buddhism, Daoism, and legalism, the impact of the Confucian virtue has remained profound in East Asia because it thoroughly saturated almost every facet of moral, social, and legal life for several centuries. Confucius and his disciples had little to say about human rights.¹⁷ Yet the doctrine's normative values mainly centre on the role of individuals and duties toward others, and various rights implications might be unveiled from this perspective.

In Confucianism, social harmony is constructed upon a hierarchy through which each individual is assigned certain roles. The concept of the Five Relationships (*wulun*) is a testament to the distinct hierarchical systems in Confucian-influenced countries.¹⁸ In embracing the Confucian ideas of humaneness (*ren*) and rituals (*li*), people conduct themselves in a morally appropriate manner by performing duties that are attached to these roles through a complicated web.¹⁹ The rectification of names (*zheng ming*) warrants that one is confined solely to one's own duties.²⁰ For example, children shall perform filial piety and duty of deference to their parents, and people must pledge their loyalty to their ruler. Parents and rulers likewise have duties: parents must set a

¹⁷Pinghua Sun, 'Chinese Discourse on Human Rights in Global Governance' (2016) 1(2) *The Chinese Journal of Global Governance* 192.

¹⁸Robert Weatherly, *The Discourse of Human Rights in China: Historical and Ideological Perspectives* (MacMillan Press 1999) 38.

¹⁹*Ibid.* 39.

²⁰*Ibid.* 42.

moral and virtuous example for their children, while rulers must rule paternalistically and benevolently. Individuals have limited free space to act outside their circles, and for this reason Confucianism is often seen as hostile to individual freedoms.²¹

The Confucian notion of social harmony has a variety of implications, including the idea that prioritising collective interests is paramount. Confucianism conceptualises the human as a social being, a part of a larger community, bearing duties to the common good of the entire society and state. The stress on role-based relational ethics aims to rally collective unity and drum up a harmonious social atmosphere. As a virtuous and ethical form of behaviour, individuals are thus expected to act selflessly (*wusi*) in exchange for collective gain. As a result, unlike the Western liberal tradition, the Confucian tradition does not regard individuals as subjects with equal moral worth but as ‘... potential resources for the state’s ends’.²² It has been said that ‘Any preoccupation with individual interests is closely associated with egoism, the most acute kind of moral bankruptcy in the Confucian ethical code’.²³

In a Confucian society, the material welfare of the people must lie at the heart of a qualified ruler’s concern. According to the Book of Rites (*Liji*), a ruler is expected to provide subsistence, livelihood means, reasonable taxing, and no overexploitation of people’s labour, among other things.²⁴ It is generally believed that the state must prioritise securing the conditions necessary for people’s basic material welfare over other competing political goods.²⁵ Confucius disciple Mencius’ conception of the benevolent ruler evoked an ultimate obligation to rule in the people’s interests, also known as the doctrine of ‘people as roots’ (*minben*). In Mencius’ view, the legitimacy of the emperor was dependent on his ability to provide food, shelter, and employment.²⁶ In the nineteenth century, these virtues would find an echo in Karl Marx’s ideas of human rights.

2.2. The statist tradition

By coincidence, many Confucian values rhyme with the Soviet rights tradition, especially in terms of individual duties toward society and state and the stress on subsistence rights. This convergence partly helped fortify and transplant those values into constitutional norms of socialist East Asia.

Marx’s thoughts on rights were ambivalent. While early on Marx viewed political rights as ‘man’s natural essence’, he ultimately believed that in the classless society rights would eventually ‘wither away’.²⁷ They would only matter at the pre-communist stages.

²¹For critical comments, see Joseph CW Chan, ‘Confucianism and Human Rights’ in John Witte and M Christian Green (eds), *Religion and Human Rights: An Introduction* (Oxford University Press 2011) 87–102.

²²Song Jiyong, *Human Rights Discourse in North Korea Post-colonial, Marxist and Confucian Perspectives* (Routledge 2011) 59.

²³Robert Weatherley and Song Jiyong, ‘The Evolution of Human Rights Thinking in North Korea’ (2008) 24(2) *Journal of Communist Studies and Transition Politics* 286.

²⁴Wejen Chang, ‘Confucian Theory of Norms and Human Rights’ in W Theodore De Bary and Tu Weiming (eds), *Confucianism and Human Rights* (Columbia University Press 1998) 129; Summer B Twiss, ‘A Constructive Framework for Discussing Confucianism and Human Rights’ in De Bary and Weiming (ibid) 41.

²⁵Daniel A Bell and Chaibong Hahm, ‘Introduction, The Contemporary Relevance of Confucianism’ in Daniel A Bell and Chaibong Hahm (eds), *Confucianism for the Modern World* (Cambridge University Press 2003) 1–28; Andrew Nathan, ‘Political Rights in Chinese Constitutions’ in R Randle Edwards, Louis Henkin, and Andrew Nathan (eds), *Human Rights in Contemporary China* (Columbia University Press 1986) 82–94.

²⁶Weatherley and Jiyong (n 23) 282.

²⁷Karl Marx, ‘Grundrisse’ in David McLellan (ed), *Karl Marx: Selected Writings* (Oxford University Press 1977) 346.

Class-based rights

Soviet practice embraced Marxist ideas by reserving rights exclusively for the proletariat and its allies. For instance, the 1918 Constitution of the Soviet Union provided constitutional rights only for the ‘... toiling and exploited peoples’, not for the ‘exploiting classes’, namely the capitalists.²⁸ Class-based constitutional rights were endorsed with a view to safeguarding the fruits of the proletarian revolution and the newborn communist states.

Collectivism v individualism

In the capitalist social order, individuals play rights against each other to tend their private and selfish interests. For Marx, emphasis should be placed on collective interests. This was grounded in the Marxist idea of the human as ‘a species being’, meaning that people were an intrinsic part of the society into which they were born and upon which their rights were completely contingent for realisation. As observed by Osakwe, socialist rights have a ‘... social content and meaning determined by the social, economic, and political structure of a given society’.²⁹ Socialist constitutions often emphasise the ‘obligations and duties’ to which all citizens shall adhere. To illustrate, the 1977 Constitution of the Soviet Union provided that the ‘... enjoyment by citizens of their rights and freedoms must not be to the detriment of the interests of society or the state’; citizens were obligated to ‘... safeguard the interests of the Soviet state’. As noted by Belov and others, one implication of this thinking is ‘reverse proportionality’.³⁰ While ordinary proportionality postulates that individual rights shall only be limited proportionately for the protection of legitimate aims, reverse proportionality deems that ‘... the individual rights can be recognized and realized only until they do not assault collective public interests’.³¹

Legal positivism

A bill of rights in a socialist constitution is normally lengthy, spanning civil, political rights, and collective rights. Constitutional rights are not seen as natural attributes of individuals but as ‘granted, modified, or eliminated by the state’.³² Therefore, a bill of rights is less a device to constrain state power than one to legitimate the party-state’s power, and thus could be limited by the government.

Subsistence rights v political rights

Socialism places greater emphasis on material and economic well-being than on political rights. Socialist constitutions of the past often began the bill of rights with economic, social, and cultural rights, with civil and political rights appearing afterwards, if at all.³³ The divide intensified during the drafting of the international bill of rights in the mid-twentieth century, as Cold War suspicions and West–East rivalries grew. While the US-led coalition was adamant on the superiority of civil and political rights, the

²⁸Aryeh Unger, *Constitutional Development in the USSR* (Pica Press 1981) 36–37.

²⁹Chris Osakwe, ‘The Common Law of Constitutions of the Communist-Party States’ (1977) 3 *Review of Socialist Law* 158.

³⁰Sergei Belov, William Partlett, and Alexandra Troitskaya, ‘Socialist Constitutional Legacies’ (2021) 9(2) *Russian Law Journal* 8.

³¹*Ibid.*

³²Bui Ngoc Son, ‘Globalization of Constitutional Identity’ (2017) 26(3) *Washington International Law Journal* 505.

³³See e.g. Chapter 7 of the 1977 Constitution of the USSR.

Soviet Union and those like-minded contended that such rights were futile without economic, social, and cultural rights.

2.3. *The development imperative*

The globalisation of constitutional law is now deemed inevitable.³⁴ Certain crucial subjects are ubiquitous in virtually every constitution. Of the 188 constitutions in force in 2006, only three did not contain any rights provisions.³⁵

Several theories aim to explain constitutional convergence on the global scale.³⁶ Among these, competition theories focus on global competition for scarce resources as the incentive for nation-states to drive toward constitutional convergence.³⁷ Globalisation has bolstered the mobility of financial and human capital, which are vital to economic development. Foreign investors are more inclined toward countries with strong protection of property rights, and in some cases basic human rights and civil liberties. Competition for essential resources paves the way for a constitutional ‘race to the top’, in which countries bid for investors and high-skilled workers by offering bundles of rights with the greatest possible appeal to these constituencies.³⁸

Economic and constitutional liberalisation increases space for the exercise of individual freedoms. With technological development, governments are no longer the only players in this regard.³⁹ An interplay among actors, such as states, international, regional, non-governmental organisations, groups, technocrats, or professionals, can influence the constitution-making process and its outcomes.⁴⁰ Non-state actors have gained greater knowledge, competence, and access to all kinds of international gatherings and networks, which helps divulge constitutional knowledge widely across borders. Against the backdrop of higher income and education levels, new social groups with diverse interests have burgeoned and are more assertive in advancing their claims.

3. Shaping Constitutional Rights in Socialist East Asia

3.1. *The People’s Republic of China (PRC)*

China has witnessed a variety of milestones in transforming an impoverished nation into a ‘... moderately well-off society’ since the collapse of the USSR.⁴¹ It is hard to downplay

³⁴Mark Tushnet, ‘The Inevitable Globalization of Constitutional Law’ (2009) 49(4) *Virginia Journal of International Law* 985.

³⁵Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009) 12–35.

³⁶See e.g., Ryan Goodman and Derek Jinks, ‘How to Influence States: Socialization and International Human Rights Law’ (2004) 54 *Duke Law Review* 630; David S Law, ‘Globalization and the Future of Constitutional Rights’ (2008) 102(3) *Northwestern University Law Review* 1311; Thomas Risse, Stephen C Ropp, and Kathryn Sikkink (eds), *The Power of Human Rights International Norms and Domestic Change* (Cambridge University Press 2009); Mark Tushnet (n 34); Benedikt Goderis and Mila Versteeg, ‘The Diffusion of Constitutional Rights’ (2014) 39 *International Review of Law and Economics* 1.

³⁷For a critical view, see more Rosalind Dixon and Eric Posner, ‘The Limits of Constitutional Convergence’ (2011) 11 *Chicago Journal of International Law* 419.

³⁸David S Law, ‘Globalization and the Future of Constitutional Rights’ (2008) 102(3) *Northwestern University Law Review* 1277.

³⁹Wen-chen Chang and Jiunn-Rong Yeh, ‘Internationalization of Constitutional Law’ in Michel Rosenfeld and Andras Sanjo (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1172–73.

⁴⁰Risse, Ropp, and Sikkink (n 36).

⁴¹Robert Lawrence Kuhn, ‘Xi Jinping’s Chinese Dream’ *New York Times* (4 June 2013) <www.nytimes.com/2013/06/05/opinion/global/xi-jinping-chinese-dream.html> accessed 27 December 2021.

the critical role of the Chinese Communist Party (herein the CCP), with its structural reforms and development-driven mentality. Despite the great achievements, rights issues in China are problematic and frequently become the topic of conversation in dialogues with the West.

Four constitutions have been officially declared in China, in 1954, 1975, 1978, and 1982, excluding the 1949 Common Programme (an interim constitution in force for the first five years of the PRC). The current Constitution, of 1982, underwent amendments in 1988, 1993, 1999, 2004, and 2018. Throughout, the conception underlying constitutional rights has seen major changes.

As socialist law reigned in China, the Confucian tradition ebbed and flowed. The Mao Zedong era (1949–1976) is seen as having a hostile stance toward Confucianism, but a deeper reading of Mao’s works unveils his ambivalent attitudes. Though critical of Confucian justifications of slavery and the feudal system, Mao did not reject the tradition wholesale but selectively adopted some of its virtues for communist ends. For example, while he denounced benevolence (*jen*) toward counterrevolutionary elements, he endorsed it among ‘the people’.⁴² Mao sought to accommodate certain Confucian qualities that could fit in the grand narrative of communism, using the language of class struggle, Marxism, and Leninism, rather than the old ethics.⁴³ This partly typifies the Marxist method with Chinese characteristics. During the Cultural Revolution (1966–1976), those embracing Confucianism were labelled reactionary and counterrevolutionary, and severely punished.⁴⁴ These denunciations derived from concerns about ideological monopoly. Confucianism was allegedly used for anti-revolutionary and anti-Mao purposes, upending the party-state’s perpetual class struggle.⁴⁵ Nonetheless, Confucianism as culture and a way of life remained deeply embedded in Chinese society. In 1981 the CCP repudiated the Cultural Revolution for having ‘... brought serious disaster and turmoil to the Communist Party and the Chinese people’.⁴⁶ Since then, Confucianism has been visibly revived; the CCP has embraced it to polish and advance its governance model as an alternative to that of the West.⁴⁷ Article 49 of the 1982 Constitution, for example, is based on the Confucian duty of filial piety, which stipulates reciprocal duties between parents and children; strikingly, ‘... adult children shall have the obligation to support and assist their parents’. The Law of Protection of Rights and Interests of Elderly People was enacted in 2013 to legally enforce this obligation and ensure China’s harmonious familial relationships.⁴⁸

Echoing Confucian ideas of the welfare of the nation and society, the socialist promotion of collective interests at the expense of individual freedoms has solidified in the PRC constitutions. Even after consolidating the triumph of the proletarian revolution, common interests took priority. To illustrate, the 1982 Constitution, echoing its predecessors,

⁴²A James Gregor and Maria Hsia Chang, ‘Anti-Confucianism: Mao’s Last Campaign’ (1979) 19(11) *Asian Survey* 1088.

⁴³GD Deshingkar, ‘Mao Against Confucius?’ (1974) 10(1–2) *China Report* 7.

⁴⁴Andrew G Walder, ‘Rebellion and Repression in China, 1966–1971’ (2014) 38(3–4) *Social Science History* 513.

⁴⁵Gregor and Chang (n 42) 1090.

⁴⁶Resolution on Certain Questions in the History of Our Party Since the Founding of the People’s Republic of China <<https://web.archive.org/web/20121213182749/http://www.marxists.org/subject/china/documents/cpc/history/01.htm>> accessed 6 July 2022.

⁴⁷Randall Nadeau, ‘Confucianism and the Problem of Human Rights’ (2002) 11(2) *Intercultural Communication Studies* 109.

⁴⁸Qingxiu Bu, ‘To Legislate Filial Piety: Is the Elderly Rights Law a Panacea?’ (2021) 42(2) *Statute Law Review* 219.

allowed the revocation of any individual right deemed as detrimental to ‘... the interests of the state, society or collectives’ (Article 51). Most notably, the common thread running through all of China’s constitutions consists of the duties owed to the nation, characterised as the ‘sacred’ or ‘lofty’ duty of every citizen. For example, Articles 52–53 of the 1982 Constitution prescribes the duties to ‘... safeguard the unity of the country and the unity of all its nationalities’ and ‘keep state secrets’, while Article 54 mandates every PRC citizen to ‘... safeguard the security, honor and interests of the motherland’. During the Mao era and for some time later, although less frequently, China actively encouraged citizens to voluntarily give up any rights that might have an adverse effect on the welfare of the nation. This stemmed from the Confucian conviction and Marxist idea that the realisation of individual rights was totally dependent upon the community and state.⁴⁹ The duty-based approach in both Confucian and socialist traditions saw individuals as duty-bearers rather than rights-holders. Hence, in Chinese constitutional thought, the prevailing view is that rights are the offspring of duties.⁵⁰

In the 1940s, when the proletarian revolution was gaining momentum, the conception of rights in China was especially shaped by the early Soviet class-based approach. Following in the footsteps of the 1918 Soviet Constitution, the 1949 Common Programme provided ‘the people’ (*renmin*) with rights, but this was limited to those who were ‘toiling and exploited’, namely the working people and their allies, while the rights of the bourgeoisie were to be withheld, at least until they were seen as fully reformed as members of the people. China’s successive constitutions used the term ‘citizen’s rights’ in lieu of ‘human rights’, a concept that some CCP leaders ridiculed as a ‘bourgeois sentiment’.⁵¹ Departing from the Marxist-Leninist focus on the urban proletariat, Mao’s interpretation of ‘the people’ was inclusive of many other social classes and groups at the service of the revolution and nation-building,⁵² such as the petty bourgeoisie (*xiaozhichan jieji*), the national bourgeoisie (*guomin zichan jieji*), and especially impoverished peasants, who were, in Mao’s words, ‘... not afraid of losing anything’.⁵³ As suggested by Elizabeth Perry, this is a view Mao and Mencius shared: peasant poverty was the root cause of uprisings to ‘... change the heavenly mandate’.⁵⁴ However, the 1954 Constitution made a turn, reserving rights exclusively for the proletariat and abandoning the bourgeoisie that had supported the party in the past.

The standing of constitutional rights waxed and waned against the backdrop of class struggle. At the climax of the party cleansing campaign during the Cultural Revolution, rights under the charters of 1975 and 1978 were almost annihilated; social class and class struggle had a new lease of life. As the country descended into perpetual crises in late 1970s, leader Deng Xiaoping determined to put China on a course of major opening-up reforms which produced many positive changes for its human rights record,

⁴⁹Donald Munro, *The Concept of Man in Contemporary China* (University of Michigan Press 1977) 16; Andrew Nathan, *Chinese Democracy: The Individual and the State in Twentieth Century China* (Tauris 1986) 141.

⁵⁰Weatherly, *The Discourse of Human Rights in China* (n 18) 10–64.

⁵¹Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Hart 2012) 57.

⁵²Robert Weatherly, *Making China Strong: The Role of Nationalism in Chinese Thinking on Democracy and Human Rights* (Palgrave Macmillan 2014) 127–28.

⁵³Andrew Nathan, ‘Political Rights in Chinese Constitutions’ (n 25) 97.

⁵⁴Elizabeth J Perry, ‘Chinese Conceptions of “Rights”: From Mencius to Mao – and Now’ (2008) 6(1) *Perspectives on Politics* 40.

though they did not stem from a need to advance human rights as such.⁵⁵ For Chinese leaders, development became the top priority. Western commentators claimed that ‘to get rich is glorious’ became a motto for Chinese citizens under Deng. Since then, China has exposed itself to the international human rights system, as evidenced by multiple ratifications of international human rights treaties and its active role in the UN mechanisms. Rights on the ground have also been animated by the blossoming of transnational human rights networks, domestic social organisations, and others.

In an attempt to break away from the calamitous legacies of the Cultural Revolution, the 1982 Constitution pays greater heed to human rights, with a focus on the economic aspect, in an attempt to spur economic growth and appeal to foreign investments. Despite the limited political space, major reforms made wider room for private business, including the right ‘... to farm private plots, engage in household sideline production, and raise privately owned livestock’.⁵⁶ Also, welfare rights are ubiquitous in the Constitution, though guarantee clauses are absent. These include subsistence rights (*shengcunquan*), the basic rights to food, clothing, and accommodation, ‘... without which all other rights are out of the question’.⁵⁷ The 1988 and 2004 constitutional amendments continued to promote development goals, with an introduction of the right to land use and its commercial features, and ‘multiple forms of economies’, thus facilitating the growth of a market economy with a socialist orientation.

The development-led approach to human rights has yielded great results for China in terms of poverty reduction and improvement in living standards, healthcare, education, and social security.⁵⁸ Pan suggests that as a side effect of the economic boom, personal freedoms of Chinese citizens have expanded.⁵⁹ China’s market-based reform policies have been closely followed by a process of grassroots democratisation as a consequence of emergent social groups, migrant workers, and individuals with heightened rights consciousness and demands for competent protection.⁶⁰ As the market economy gains momentum, Chinese citizens have increasingly called for stronger safeguards for the right to private property, which in turn has aroused popular enthusiasm for wider opening-up market-based reforms.⁶¹ One major landmark was the enshrinement of an explicit provision on the protection of human rights (Article 33) in a response to the Sun Zhigang incident of 2003, in which a migrant worker was detained and beaten to death by the Guangzhou police, which sparked widespread public outrage in China.

The constitutional entrenchment of human rights denotes a partial departure from the class-based idea of rights. The CCP no longer holds the view that rights are associated with class but sees them as inherent to human beings, as natural attributes. This shift

⁵⁵Chengxin Pan, ‘A Development-based Approach to Human Rights: The Case of China and Its Implications for North Korea’ in Baogang He, David Hundt, and Chengxin Pan (eds), *China and Human Rights in North Korea Debating a Developmental Approach in Northeast Asia* (Routledge 2022) 83.

⁵⁶Article 8 of the 1982 Constitution of the PRC.

⁵⁷Weatherly, *Making China Strong* (n 52) 78.

⁵⁸Chengxin Pan, ‘A Development-based Approach’ (n 55) 73–97.

⁵⁹*Ibid.* 86.

⁶⁰Baogang He, ‘Village Elections, Village Power Structure and Rural Governance in Zhejiang’ (2002) 20(3) *American Asian Review* 55; Phil CW Chan, ‘Human Rights and Democracy with Chinese Characteristics?’ (2013) 13(4) *Human Rights Law Review* 645.

⁶¹Chengxin Pan, ‘A Development-based Approach’ (n 55) 87.

necessarily extends legal guarantees to those once characterised as bad elements or counterrevolutionaries in the past. Perhaps, the amendment stemmed from Chinese leaders' thinking that the country was developed and resourceful enough for the fuller realisation and enjoyment of human rights. Some commentators believe that China has adopted a universalist conception of human rights instead of dwelling on Asian or autochthonous values.⁶² The 2004 amendment also involved the Chinese government engaging in dialogue with others. On the one hand, it illustrates the rising rights awareness and consciousness of a populace demanding better rights protection against arbitrary interference, regardless of background. The constitutional entrenchment of the term 'human rights' was the government response signifying that it took this issue seriously. On the other, it was China's rejoinder to the relentless criticism of the West on its human rights record. Chinese leaders wished to show to their counterparts the '... narrow gap of understanding of human rights between China and the West'.⁶³ The dialogical tactic was expected to underscore China's 'peaceful rise' and spread the message that the nation would act like a responsible and rational superpower when speaking of an issue of common concern.

The shift was important but partial. While the Constitution promises the universalist vision on human rights, it retains Marxist class rhetoric in its preamble and does not provide any judicial safeguard for constitutional rights.⁶⁴ The 2001 *Qi Yuling* ruling by the Supreme People's Court, touted by some as the Chinese version of *Marbury v Madison*, judicially enforced a constitutional right to education for the first time ever, but the faint hope it raised quickly perished; a few years later the ruling was scrapped from the Court's dossier without an explanation.⁶⁵ In this vein, President Xi Jinping has openly rejected Western constitutionalism, including judicial review, as an ideal model.⁶⁶ In international fora, China pushed forward the concept of a '... human rights development path with Chinese characteristics' at its third Universal Periodic Report in 2018, where it implicitly discarded the principle of universality it had previously recognised.⁶⁷ Bui suggests that these developments taken together signify China's 'constitutional exceptionalism'.⁶⁸ As noted by Chang and Law, because the constitutional adoption of human rights has no teeth attached it remains modest in effect,⁶⁹ resulting in a constitutional dissonance between the formal constitution and actual practice.⁷⁰

⁶²Qianfan Zhang, 'A Constitution without Constitutionalism? The Paths of Constitutional Development in China' (2010) 8 (4) *International Journal of Constitutional Law* 950; Jianfu Chen, *Chinese Law: Context and Transformation* (Brill 2016) 197; For a discussion, see more Bui Ngoc Son, *Constitutional Change in the Contemporary Socialist World* (Oxford University Press 2020) 298–304.

⁶³Li Li, 'China's Constitutional Amendments and Their Implications' (2005) 41(1) *China Report* 75.

⁶⁴Chang and Law (n 6) 505.

⁶⁵Zhang, 'A Constitution without Constitutionalism?' (n 62) 951.

⁶⁶Charlotte Gao, 'Xi: China Must Never Adopt Constitutionalism, Separation of Powers, or Judicial Independence' *The Diplomat* (19 February 2019) <<https://thediplomat.com/2019/02/xi-china-must-never-adopt-constitutionalism-separation-of-powers-or-judicial-independence/>> accessed 27 December 2021.

⁶⁷Yu-Jie Chen, 'China's Challenge to the International Human Rights Regime' (2019) 51 *NYU Journal of International Law and Politics* 1209.

⁶⁸Bui Ngoc Son, 'Constitutional Mobilisation in China' (2018) 14(3) *International Journal of Law in Context* 335, 347.

⁶⁹Chang and Law (n 6).

⁷⁰*Ibid.*

3.2. The Democratic People's Republic of Korea (DPRK)

Since World War II, two strongholds of opposing ideological values have co-existed in the Korean peninsula. Under US occupation, South Korea adopted liberal constitutionalism. North Korea bore the imprint of the Soviet constitutional tradition, but seems to have developed its own style of human rights over time.

Since the introduction of socialism, the Korean Workers' Party (KWP) in North Korea enacted two constitutions, in 1948 and 1972. The former underwent amendments in 1954, 1955, 1956, and 1962 related to minor institutional issues. The 1972 Constitution effectively sought to harden socialist features. It has since been revised eight times, the latest in 2019. As North Korea's official ideology, Juche (self-reliance) was given constitutional importance in the 1972 Constitution to demonstrate '... the Korean way to socialism'.⁷¹ Juche was owed to the '... underlying historical and cultural conditions' of the country, especially amid the antagonism of the international community. Kim Jong-un amended the Constitution in 2019 to replace Juche with '... the great ideology of *Kimilsung-Kimjongilism*', which would pay tribute to his grandfather and father and serve as a benchmark for nation-building. Juche ideology did not come to an end, but embedded itself in the personal thoughts of the 'immortal leaders'. The amendment highlighted the personal governance model of Kim Jong-un.⁷²

The philosophy underlying North Korea's constitutional rights is multifaceted and involves an interplay of Confucian origins, Marxist orthodoxy, and Juche as an approach to security and an ideology of self-reliance.

Although the North Korean government has denied its allegiance to Confucianism, the culture has deep roots in its social and family structure.⁷³ Accordingly, the late supreme leader Kim Il Sung canonised his parents as saints of the Korean revolution – a move that would perhaps be too Confucian for the Chinese. Likewise, Kim Jong-un's constitutional inclusion of his ancestors' personal thoughts reflects this norm. The Preamble of the Constitution recognises North Korean society as 'a large family' under the rule of benign leaders, which is a prominent feature of Confucianism.

Although it was officially declared as a Marxist state in 1948, North Korea's class-based approach to constitutional rights is formally unclear. The 1948 Constitution did not explicitly state which classes should enjoy rights and which should not. Nor did the 1972 Constitution, enacted to strengthen its socialist legacies, set out class-based thresholds for the enjoyment of rights. Article 6 of the 1972 Constitution affirmed that North Korea saw the end of class struggle. In the Marxist view, since there was no longer class antagonism, human rights would become superfluous.

However, this was quickly proven over-optimistic. At the theoretical level, North Korean scholarly writings continued to emphasise class rights and the incompleteness of the protracted proletarian revolution.⁷⁴ In 1977, responding to foreign condemnation of his incarceration of political rivals, Kim Il-sung stated that those people were 'antagonistic' and 'impure elements' who had sought to subvert the socialist regime;

⁷¹Geir Helgesen, 'Political Revolution in A Cultural Continuum: Preliminary Observations on the North Korean Juche Ideology with Its Intrinsic Cult of Personality' (1991) 15 *Asian Perspective* 187.

⁷²Atsuhito Isozaki, 'North Korea Revamps Its Constitution' *The Diplomat* (26 August 2019) <<https://thediplomat.com/2019/08/north-korea-revamps-its-constitution/>> accessed 27 December 2021.

⁷³Bui Ngoc Son, 'Constitutional Change' (n 62) 125.

⁷⁴Weatherley and Jiyong, (n 23) 278–79.

punishment was essential for safeguarding democracy and human rights against the encroachment of the enemy of the working classes.⁷⁵ This indicated that rights still existed but were exclusive assets of ‘pure elements’.

To detect an individual’s class status, the KWP now uses the barometer of loyalty to the nation’s aims and objectives. In substantial part, this was prompted by the global antagonistic environment and attitude against North Korea during 1990s as the US administration pressed the socialist administration on nuclear matters.⁷⁶ Facing the international community’s back, Kim Jong-il embraced the nationalistic rhetoric of an autarkic and self-sufficient country to resist foreign interference and keep his government from collapse. A wider group of right-holders was needed to bolster it. Weatherly and Song find that compared to Marxist class categorisation, North Korea’s class categorisation is nationalistic and Juche-oriented.⁷⁷

Juche ideology originates in the Confucian philosophy of virtuous politics; Kim Jong-il acted as the benevolent ruler to protect the interests of the populace and the nation. In return, rights were conferred upon those who demonstrate absolute obedience and loyalty. Loyalty-based rights have two aspects. They do not represent a naturalist stance in which rights are morally intrinsic and inherent to every human being, although North Korea has occasionally used the language of universal rights to lambast the international community’s condemnations on its human rights record.⁷⁸ On the other hand, they have widened the group of right-holders compared to the Marxist class-based view. North Korea has thus formulated its own style of human rights, rather than adhering to orthodox Marxist ideology.

Collectivism is the bedrock of North Korea’s constitutional rights. Its post-revolution constitutions have always required citizens to demonstrate the collectivist spirit, and ‘... the state pays great attention to consolidating the family, the basic unit of social life’.⁷⁹ Article 82 of the 1972 Constitution, with amendments through 1992, stipulates collectivism as ‘... the basis of life in a socialist society’ and that citizens must ‘... cherish their organization and collective for the good of society and the people’.

At first glance, collective rights do not seem to overwhelm individual rights because the Constitution has far more of the latter. Further, departing from the constitutional design of China and the Soviet Union, North Korea’s constitutions have not contained a limitation clause to withhold individual rights to protect general welfare.⁸⁰ However, as provided for in the opening of its bill of rights (Article 63), the guiding principle for the ‘large family’ rests on a collectivist maxim: ‘One for all and all for one.’ In case of conflict it is thus reasonable to expect individual rights to be trumped by the collective interest. Like China, North Korea has launched campaigns glorifying the individual selflessness of sacrificing rights in exchange for the general welfare. Kim Young-guk has written that ‘... an individual’s demands set apart from the collective interest would be considered as greediness and selfishness and consequently would infringe other members’ interests and weaken the unity and the co-operation of the group you

⁷⁵Ibid. 279.

⁷⁶Ibid. 280.

⁷⁷Ibid.

⁷⁸Ibid. 282.

⁷⁹Articles 63, 68, 77, and 78 of the 1972 Constitution with amendments through 1998.

⁸⁰Nathan, ‘Political Rights in Chinese Constitutions’ (n 25).

belong to'.⁸¹ The solution, it is suggested, is individual selfless sacrifice for the greater good.

The prioritisation of collectivism in North Korean official thinking is grounded not only in Marxism and Confucianism, with constant reference to man as a 'social' or 'species' being, but also by the philosophy of Juche.⁸² As the nation has continually been under siege, the right to national sovereignty (*jajukweon*) must command utmost attention. The KWP must safeguarding national independence and integrity. The realisation of individual rights is therefore contingent upon the right to national sovereignty. As Kim Jong-il repeatedly claimed, '... human rights cannot be thought of independently of the nation's sovereignty'.⁸³ The right to subsistence (*saengjonkweon*) is not only for individuals but also for the nation. As noted by party theorist Kim Chang-ryul, the right to subsistence should be understood as a national right of survival against the backdrop of international antagonism that, as its leaders assert, aim to isolate and demolish North Korea.⁸⁴ Accordingly, Kim Jong-il cited the right to subsistence and the right to national self-determination, reflecting the individual and collective rights binary.⁸⁵

North Korean resistance against external intervention and its economic fallout shows another aspect of the conception of rights, that is the emphasis on economic rights and the right to subsistence. In rebutting international condemnation of its human rights record, North Korea has accused the West of gross hypocrisy and imperialism, saying that denies its own people the rights to work and to eat.⁸⁶ Each of North Korea's four constitutional texts have provided a broad array of economic and welfare rights, including the rights to work, to rest, to free healthcare and education, and to certain welfare benefits enjoyed by mothers. Their enforcement is questionable, although the constitutional wording seems to indicate a full guarantee of these rights. For example, Article 70 of the 1972 Constitution provides people '... with stable jobs and working conditions'; Article 71 ensures not only fixed working hours, holidays, and paid leave but also '... accommodation at health resorts and holiday homes' at the state's expense. North Korean citizens are entitled to free medical care through '... an expanding network of hospitals, sanatoria and other medical institutions' (Article 72) and to education through '... an advanced educational system' (Article 73).

For the first time in North Korea's constitutional history, the 2009 constitutional amendment pledged the protection of 'human rights' (Article 8). But its wording gives the impression that such rights are only reserved to good socialists. Further, the phrase is situated in Chapter I (Politics) rather than in the bill of rights, implying that it is a serious political matter, not intrinsic in human beings.⁸⁷

⁸¹Kim Young-guk, cited in Weatherley and Jiyoun (n 23) 283–84.

⁸²*Ibid.* 286.

⁸³*Ibid.*

⁸⁴*Ibid.* 289–90.

⁸⁵*Ibid.*

⁸⁶*Ibid.* 287.

⁸⁷Bui Ngoc Son, "Constitutional Change" (n 62) 125.

3.3. The Socialist Republic of Viet Nam (SRV)

Viet Nam's bill of rights is the outcome of a complex context-related set of issues, exhibited by three major ideological driving forces: Confucianism, Marxism-Leninism, and universalism. The constitution is thus regarded as an instrument for the ruling party to translate the political agenda into legal terms.⁸⁸ Since the 1986 *Đổi mới* (Renovation) era,⁸⁹ Vietnam has sought to strike a balance between its own millenary history, cultural roots, specific social and economic issues, and the international pressure to embrace economic and political liberalisation.

Among its five constitutions (1946, 1959, 1980, 1992, 2013), the first charter stands out as having birthed the republic democratic regime in Viet Nam. Underlying the document was a structure of liberal ideas and values owed to then President Hồ Chí Minh on his quest for national salvation ideas blended with cultural indigeneity.⁹⁰ While its bill of rights was wide enough to extend protection to minority groups, the elderly, people with disabilities, and children, it was mostly centred upon first-generation rights, rather than second and third generation.

The rationale for the 1946 bill of rights is still debated. Many see it as echoing US constitutionalism with its focus on civil and political rights.⁹¹ Hồ did in fact refer to the US Declaration of Independence and to France in advocating civil liberty.⁹² Yet as shown by Moyn, Hồ's constitutional foundation of individual freedoms differs from the US experience in that he aimed at promoting the collective right to self-determination and independence from the colonial system⁹³: 'Like practically all other anticolonialists, Hồ placed popular liberation first, not individual human rights ... as canonized in international law.'⁹⁴ Hồ did indeed have Confucian influences, and while he was pained to see his fellow Vietnamese being exploited and oppressed, his utmost desire was to lead the nation and its peoples to independence. In his writings, Hồ tenaciously advocated the Confucian principle of *minben* (people as the roots) to denounce the illegitimate colonial regime which did not take care of the people.⁹⁵ Although the Confucian concept of *minben* addresses the ruler's material responsibility to the people, it does not entitle individuals to invoke rights to challenge the ruler's authority.

Class-based rights were a feature of Viet Nam's constitutional history. Yet the 1946 charter did not promote the proletarian revolution, even though Hồ was a communist at the time. This can be explained by the fact that the newborn regime was at war

⁸⁸Duy Nghia Pham, 'From Marx to Market: The Debates on the Economic System in Vietnam's Revised Constitution' (2016) 11(2) *Asian Journal of Comparative Law* 263.

⁸⁹Quan Xuan Dinh, 'The Political Economy of Vietnam's Transformation Process' (2000) 22(2) *Contemporary Southeast Asia* 360; Adam Fforde, 'From "Constructing Socialism" to a "Socialist-oriented Market Economy" in Contemporary Vietnam: A Critique of Ideologies' (2019) 71(4) *Europe-Asia Studies* 671.

⁹⁰Son Ngoc Bui, 'Anticolonial Constitutionalism: The Case of Hồ Chí Minh' (2018) 19(2) *Japanese Journal of Political Science* 197.

⁹¹See e.g. Uông Chu Lưu (ed), *Hiến pháp năm 1946: Những giá trị lịch sử* [*The 1946 Constitution: Historical Values*] (The National Politics and Truth Publishing House 2017); M Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Hart Publishing 2009); Ngoc Son Bui, 'Restoration Constitutionalism and Socialist Asia' (2015) 37 *Loyola of Los Angeles International and Comparative Law Review* 67; Bui Ngoc Son, 'The Global Origins of Vietnam's Constitutions: Text in Context' (2017) 2 *University of Illinois Law Review* 525.

⁹²Nguyen Tien Duc, 'Constitutional Nostalgia: The Contemporary Relevance of Vietnam's 1946 Constitution' (Forthcoming in 2022), 17(4) *Journal of Vietnamese Studies*.

⁹³Samuel Moyn, *The Last Utopia: Human Rights in History* (The Belknap Press of Harvard University Press 2010) 84–85.

⁹⁴*Ibid.*

⁹⁵See Hồ Chí Minh, *Complete Works Volume IV* (National Politics Publishing House 2000) 22, 101.

against the French for national independence; extending the group of right-holders would help boost its legitimacy for the ultimate end. Sidel has written that ‘... many of the rights enumerated [in the 1946 charter] were intended to [not only] indicate the democratic nature of the new government [but also] to reach out to other forces in Vietnamese society’.⁹⁶ As socialism rose, however, a class-based language gained increasing prominence in the constitutions of 1959 and 1980. The 1980 charter, Viet Nam’s best candidate for the socialist constitutional model, promoted ‘... the collective mastery of the working people’ and endorsed the deprivation of property rights of capitalists, who were considered detrimental to national interests.⁹⁷ The document marked the end of the protracted independence struggle, so it was a critical time for the government to solidify the gains of its revolution and redistribute resources based on Marxist tenets. Nonetheless, the class-based language has been restricted to a minimum as Viet Nam has engaged in international socialisation and exposure to international law.

Legal positivism is another characteristic of Viet Nam’s bill of rights. The 1980 constitution recognised the rights of the citizen rather than the human, to be provided for by the state corresponding to the country’s social and economic circumstances. Instead of positioning individuals as the main subject, moreover, the state has the central role as the grantor of rights, with phrases such as ‘the State ensures’, ‘the State ... plans to’, ‘the State regulates’, ‘the State requests’, and ‘the State preserves’.⁹⁸ As noted by Sidel, Vietnamese constitutional law postulates ‘... a notion of rights as state-granted rather than emanating from the concepts of natural rights’.⁹⁹ Constitutional rights are not meant to constrain the state but to be limited and regulated by it. This explains the shrinking formal significance of the bill of rights, moving from the second chapter of the 1946 charter to the third of the 1959 charter, and to the fifth of the 1980 and 1992 charters.

Collectivism is likewise a common constitutional trait. Viet Nam’s 1980 Constitution resembled North Korea’s 1972 Constitution in that the list of individual rights appears extensive, and yet, like the latter, it recognises the principle of ‘one for all, all for one’ (Article 54), which served as a blanket clause for restricting individual liberty for the collective good. Also, in their exercise of democratic rights citizens shall not hamper the interests of the state, the people, or socialist property (Articles 67–79). Betrayal of the nation is considered the most severe offence, punishable by the death penalty (Article 76).

Like the constitutions of the socialist bloc, in Viet Nam’s constitutions welfare rights receive a keen interest. Again, the 1980 Constitution is illustrative, prescribing various second-generation rights before civil and political rights. It has been suggested that for Vietnamese constitution-makers, economic and social rights must take precedence over civil liberty for the sake of stability.¹⁰⁰

The ideological crisis and ensuing collapse of the Soviet Union led Vietnamese leaders to rethink their nation-building scheme. The late 1980s witnessed a wide array of

⁹⁶Sidel, *The Constitution of Vietnam* (n 91) 142–43.

⁹⁷Viet Nam’s 1980 Constitution, art 25.

⁹⁸Viet Nam’s 1992 Constitution, ch 5.

⁹⁹Mark Sidel, *Law and Society in Viet Nam: The Transition from Socialism in Comparative Perspective* (Cambridge University Press 2008) 141.

¹⁰⁰Mark 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.

structural reforms. Along with the opening-up policy, Viet Nam initiated a process of international integration to transform its crippled economy, which had been reliant on its former socialist allies. The country has become a member of most United Nations human rights treaties. With the immigration of myriad foreign ideas, the state has gradually loosened its tight grip on its society and people. Social organisations and movements have flourished as a result.¹⁰¹

The 1992 Constitution marked the (re)emergence of universal rights. The term ‘human rights’, once scorned as fantastical, was constitutionally introduced for the first time (Article 50), despite fierce controversy around the overlapping concepts of ‘human rights’ and ‘citizen’s rights’.¹⁰² Constitutional promises on welfare rights are toned down significantly. Like the 1980 charter, the 1992 Constitution provides the right to free education, but only for primary school pupils. Citizen’s right to work was guaranteed, but the state shall only *attempt* to create as many jobs as possible. Furthermore, several worker’s and economic rights – such as to freedom of trade (Article 57), to own labour materials, capital, and properties in corporations or other economic organisations (Article 58), and to legally own capital, property, and other benefits belonging to foreign individuals and organisations investing in Viet Nam (Article 25) – were constitutionalised. Those were deemed vital for spurring foreign direct investment and economic growth. This reform was major, but it also furthered the socialist legacy with the pragmatic aim of economic development. State control of the economy and personal ownership remained tight in the 1992 Constitution.

A reform mentality was arguably reinforced in the recent constitutional overhaul, evidenced by the open and frank discursive environment during 2010s.¹⁰³ Prevailing scholarly opinion advocated the idea of human rights independent from the political power,¹⁰⁴ yet the establishment held onto the statist aspect of human rights.¹⁰⁵ This clash of ideologies and aspirations led to a compromise: the 2013 bill of rights was renamed ‘Human Rights, Citizens’ Basic Rights and Obligations’ and moved to the second chapter of the constitution, so as to better demonstrate the naturalist significance of human rights and their distinction from citizens’ rights. It was also restructured so that first-generation rights precede second-generation ones. Notably, Article 14 provides state duties to ‘respect, protect and promote’ human and citizen’s rights.

The explicit delineation of human rights and citizen’s rights exhibits a radical change in the mindset of the constitution makers. They were well aware of the disharmony between the constitution and international human rights, and convinced to a certain extent that some rights were inherent to everyone, especially those pertaining to human dignity, life, personal liberty, and a fair trial.¹⁰⁶ Moreover, in line with the global proliferation of the proportionality principle, the 2013 Constitution introduced

¹⁰¹Sidel, *Law and Society in Vietnam* (n 99) 1–17; Bui Ngoc Son, ‘Constitutional Mobilization’ (2018) 17 *Washington University Global Studies Law Review* 117.

¹⁰²Cong Giao Vu and Kien Tran, ‘Constitutional Debate and Development on Human Rights in Vietnam’ (2016) 11(2) *Asian Journal of Comparative Law* 243.

¹⁰³See generally Mark Sidel, ‘A New Generation and New Thinking in Vietnamese Legal Scholarship’ (2016) 11(2) *Asian Journal of Comparative Law* 193; Pip Nicholson, ‘Vietnamese Constitutionalism: The Reform Possibilities’ (2016) 11(2) *Asian Journal of Comparative Law* 199.

¹⁰⁴Cong Giao Vu and Kien Tran (n 102) 249.

¹⁰⁵*Ibid.*

¹⁰⁶Nguyen Tien Duc (n 92).

a limitation clause for restricting rights in certain circumstances (Article 16). This denotes an attempt to bring state actions into the ambit of the law and constrain arbitrariness in law-making at the local level.

Statism was not completely phased out, however, as Article 15 of the 2013 Constitution emphasised the inseparability of citizens' rights and duties, and their responsibilities toward state and society. Despite growing demand, petitions for land privatisation were rejected. The limitation clause was framed so extensively that it could potentially restrict all rights for the sake of state and social interests. The extensively debated failure to adopt constitutional review raised public concerns on the protection of constitutional rights after the enactment of the Constitution.¹⁰⁷ Thus the identity of statist rights, albeit moderated to a lesser extent, persisted.

While the partial departure from the Soviet statist model stemmed from the leaders' need for legitimacy,¹⁰⁸ especially against the backdrop of rising popular discontent about governance and human rights issues, many scholars and constitution-makers considered the adoption of natural rights on its own terms. As acknowledged by Hoàng Thế Liên, a former deputy justice minister who was directly involved in the constitution-making process, '... whilst previously human rights were a sensitive topic for debate, now the state has come to view them as universal values naturally inherent to all human beings, and to be enjoyed by the Vietnamese people'.¹⁰⁹

4. Beyond the Sham: Why Study Socialist Constitutional Rights?

The inquiry into constitutional rights in socialist East Asia has various implications. Theoretically, they are substantially influenced by national and cultural identity, political convictions, development aspirations, international recognition, a sense of (in)security, and external intervention. They might serve different functions from those of liberal constitutionalist countries. Though unenforceable judicially, those rights play a billboard role, advertising the intentions of their makers to those outside the polity, whether international or domestic.¹¹⁰

The denouncement of Confucianism in the past was prompted by a fear of ideological encroachment: the party-state thought it presented a threat to Marxism-Leninism, diverting the historical sequence of progressive stages. Confucianism as an ideology thus faced persecution, but China's Cultural Revolution did not root it out as a way of life, as it was instilled in the thinking of both socialist leaders and the masses. As observed by Deshingkar, 'Confucianism is powerful enough to get superimposed on Marxism-Leninism'.¹¹¹

¹⁰⁷Bui Ngoc Son, 'The Discourse on Constitutional Review in Vietnam' (2014) 9(2) *Journal of Comparative Law* 191; Pasquale Viola and Duc Tien Nguyen, 'Convergences and Divergences in Southeast Asian Constitutional Systems: A Comparative Study of Thailand and Vietnam' (2021) 23(4) *Diritto Pubblico Comparato ed Europeo* 1042.

¹⁰⁸Bui Ngoc Son, 'Contextualizing the Global Constitution-Making Process: The Case of Vietnam' (2016) 64(4) *The American Journal of Comparative Law* 931.

¹⁰⁹H Chung, 'Quyền con người không còn là chuyện nhạy cảm [Human Rights No Longer a Sensitive Issue]' *Vietnamnet* (23 January 2013) <<https://vietnamnet.vn/vn/thoi-su/quyen-con-nguoi-khong-con-la-chuyen-nhay-cam-106613.html>> accessed 27 December 2021.

¹¹⁰David Golove and Daniel Hulsebosch, 'A Civilized Nation: The Early American Constitution, the Law: Of Nations, and the Pursuit of International Recognition' (2010) 85 *New York University Law Review* 932–1066.

¹¹¹GD Deshingkar, 'Mao Against Confucius?' (1974) 10(1-2) *China Report* 4. With the aim of suggesting a 'super partes' dialogues beyond cultural factions: Bui Ngoc Son, *Confucian Constitutionalism in East Asia* (Routledge 2016), 209: 'in

Cultural and legal affinities partly offer clues about the successful transplant of the statist tradition of rights and the resilience of socialist East Asian regimes. Schwartz argues that while the primary source of Maoism was influenced by Marxist-Leninism, ‘... this does not preclude the fact that in some of its aspects it coincides with certain traditional Chinese habits of thought and behavior’.¹¹² Both traditions conceptualise the human as a component of a larger community, denoting the inseparability of individuals within the social context. This entails an emphasis on collective interests and the submission of individuals to the state, so human rights are not natural and inherent to everyone but state-regulated and limited. The unwavering preference for economic over political rights illustrates the cultural and historical foundations of socialist East Asia, maintaining the central role of the ruler in taking material care of the people. After all, Marxist-Leninist conceptions of class struggle and the Soviet legal tradition are central in understanding the confined standing of constitutional rights in socialist East Asia.

The contributory extent of each factor in shaping constitutional rights varies from nation to nation, and occasionally within a nation. Although the socialist zenith was marked by the introduction of statist elements in the constitutions of all three countries, there are divergences. For example, while constitutional rights in China’s interim Constitution of 1949 and the 1954 charter contained densely socialist rhetoric, Viet Nam’s 1946 bill of rights was more inclusive. Two factors explain this departure. First, the genesis of these charters was owed to their founding fathers. Hồ Chí Minh was a progressive intellectual with extensive knowledge of Western constitutionalism,¹¹³ while Mao Zedong’s political life was solely devoted to the socialist cause. Second, historically speaking, while Viet Nam fought anticolonial war, China was embroiled in civil war. This meant dissimilar challenges and implications.¹¹⁴ Vietnamese leaders had to intensify efforts to draw social groups against the foreign aggressors. An extension of right-holders would be a way to drum up popular support for that collective end. This observation is underpinned by a gradual hardening of socialist elements in Viet Nam’s charters of 1959 and 1980, after national reunification. In the absence of foreign antagonism, Vietnamese leaders safeguarded the legacy of the revolution by revoking capitalists’ rights. For China, civil war was an ideological struggle in which the communists challenged the authority of the capitalists. Class-based vision and language in the constitution were thus essential to distinguish its makers from the pre-existing establishment.

As constitutional law globalised after 1980s, both China and Viet Nam partially shifted toward rights universalism. Structural reforms have exposed both to the international human rights regime and to distant philosophies underlying universal rights. This gave rise to a more dynamic environment for civil society and popular movements, fuelling changes in elite leaders’ understanding. Through those developments, socialist constitutions could be seen, according to Ginsburg and Simpser, as ‘hallowed

the age of globalization, the line between west and east blurs and mutual learning and respect is always necessary. Communitarians, communitarian constitutionalists, libertarians, liberal constitutionalists, mixed constitutionalists, regardless of their western or Confucian backgrounds, should engage in global dialogues for world constitutional justice.’

¹¹²Benjamin Schwartz, *Communism and China: Ideology in Flux* (Harvard University Press 1968) 172.

¹¹³Nguyen Tien Duc (n 92).

¹¹⁴See generally Duy Trinh, ‘Explaining Factional Sorting in China and Vietnam’ (2021) 68(3) *Problems of Post-Communism* 171.

vessels'.¹¹⁵ Despite the rhetoric, constitutional rights still entertain 'privileged normative status' and public visibility, potentially serving as a source of legitimacy for mobilisation. This function is especially important during moments of regime crisis, social unrest, or constitutional discourse.¹¹⁶ Bui's recent investigations of constitutional mobilisation in China and Viet Nam testify to social actors' increased and ardent use of constitutional rights to bid for major changes in their favour.¹¹⁷ To strike a balance between social dynamics and the survival and sociological legitimacy of the party-state, the socialist governments have been compelled to tolerate an increasing autonomy of non-state actors and their divergent interests. Rights are thus transformed from bourgeois sentiment to a legitimacy matter, where a universalist feature must be recognised. China's judicial branch attempted but failed to enforce the bill of rights in the *Qi Yuling* case. While Viet Nam's judiciary has not seen a ruling of similar magnitude, recent constitutional discourse has displayed a pressing need to adopt constitutional review to give substance to human rights.¹¹⁸

Despite enticement from China and Viet Nam, North Korea's rights catalogue have remained highly statist, and this is attributed to the country's isolated status. Facing the back of the international community, North Korean leaders sought to wage an all-out struggle to ward off collapse, which gave birth to Juche philosophy. Human rights still exist in North Korea, but in such permanent state of emergency that they are a device for the government to cement power by calling for the individual's surrender of liberty for safety. The predominant feature of the North Korean conception of constitutional rights is thus a tension between individual and collective rights. Pyongyang is the epitome of a collectivist culture where individual's interest shall succumb to those of groups. While the international socialisation of China and Viet Nam has produced a growing sense of liberalism and individualism, North Korean sociopolitical structure keeps an undue stress on citizens' duties to the state rather than vice versa. Situated in the volatile environment with the survivalist mentality, North Korea is likely to hold a dire human rights record.

The study of China, North Korea, and Viet Nam may produce practical pointers. The development-led approach suggests that the conception of human rights is not a monolith and is subject to the contestations and (re)interpretations produced by the context. This can change and has changed in the cases of China and Viet Nam. Both Beijing and Hanoi have moved, albeit slowly, from economic rights to nascent political rights in response to growing popular demand and international pressure. Economic boom has produced new groups of citizens with increasing awareness of human rights. Indeed, popular resistance and grassroots movements have led to some critical advances in these nations' human rights records.

Understanding the historical, cultural, and socioeconomic context of constitutional rights in these countries can help in gauging their development trajectories. China's nascent realisation of political rights might not correspond to those of the West; Xi has rejected liberalism as the model for Beijing. China's rise does not mean its

¹¹⁵Tom Ginsburg and Alberto Simpser, *Constitutions in Authoritarian Regimes* (Cambridge University Press 2013) 2–3.

¹¹⁶*ibid.*

¹¹⁷Bui Ngoc Son, 'Constitutional Change' (n 62).

¹¹⁸Bui Ngoc Son, 'The Discourse on Constitutional Review' (n 107).

assimilationism.¹¹⁹ Instead, its increasing assertiveness on the global agenda shows a distinct conception of human rights, defying rather than adhering to commonly recognised standards. Differently, Viet Nam's recent constitutional discourse demonstrates the country standing at the crossroads of globalism and particularism. Vietnamese constitution-makers recognise the natural view of human rights, yet they remain resistant to a complete departure from the socialist identity. Compromise has been made. While universalism can be felt in the new bill of rights, a statist spirit persists. This divergence could be traced to the two nations' self-perceptions. China has spoken of itself as a rising superpower, aiming to resurrect its ancient past as the Middle Kingdom between Heaven and Earth after a century of national humiliation.¹²⁰ Prosperity and autonomy as well as growing ideological hostility toward the West fuel Chinese exceptionalism.¹²¹ Beijing seems to be preparing a distinct conception of human rights, as an alternative to that of the West, to form a ready-for-use model.¹²² It sees no reason to limit itself to rules made by others, and knows it can amplify its ambitions by making rules for others. Meanwhile, Viet Nam tends to see itself as a small nation under frequent threat from the outside.¹²³ International integration are prerequisites for economic development and self-reliance, so the Vietnamese government is compelled to strike a balance between adhering to internationally recognised standards and retaining political power.¹²⁴

The rationale for the structural preference of rights normally lies in the local context in which poverty and hunger render the rights discourse a luxury, even futility.¹²⁵ This model does not completely realise economic and social rights, nor has it led to full-fledged civil or political rights in China and Viet Nam. It is not the intent of this article to advocate the prioritisation of certain rights. But North Korea's dire human rights situation begs an urgent question, because hardline measures have been exhausted to no avail, whether the Chinese model could offer some way out for North Korean citizens to partially redress their grievances, despite the different challenges facing Pyongyang and pre-reform Beijing. That question merits further academic discussion.

5. Conclusion

This article briefly scrutinises constitutional rights in socialist East Asia through several lenses. It suggests that the bills of rights of these countries are the upshot of complex

¹¹⁹As far as Chinese legal tradition vis-à-vis foreign constitutional borrowings is concerned, see Shiping Hua, *Chinese Legal Culture and Constitutional Order* (Routledge 2019) 122: 'In retrospect, China's legal culture has been characterized by pragmatism, instrumentalism, statism, and favoritism, as demonstrated in the country's striving for a constitutional order in the last century. These characteristics had roots in the last several thousand years in the Chinese history.'

¹²⁰Benjamin Ho, 'Understanding Chinese Exceptionalism: China's Rise, Its Goodness, and Greatness' (2014) 39(3) *Alternatives: Global, Local, Political* 164; For a discussion on the invention of China's history, see Bill Hayton, *The Invention of China* (Yale University Press 2020) 7–32.

¹²¹Benjamin Ho, *Ibid* 165. But exceptionalism is not exclusive to China. It is argued that superpower nations have often formulated their own ideas and visions. See Anu Bradford and Eric A Posner, 'Universal Exceptionalism in International Law' (2011) 52(1) *Harvard International Law Journal* 1.

¹²²Chen (n 67) 1214–21.

¹²³Do Thanh Hai, 'Vietnam and China: Ideological Bedfellows, Strange Dreamers' (2021) 10(2) *Journal of Contemporary East Asia Studies* 162.

¹²⁴Bui Ngoc Son, 'Constitutional Change' (n 62).

¹²⁵Baogang He, 'China's Roles in the UN Human Rights Council Regarding North Korea's Human Rights' in He, Hundt, and Pan (n 55) 53. But for a justification of certain types of prioritisation of rights, see Alberto Quintavalla and Klaus Heine, 'Priorities and Human Rights' (2019) 23(4) *The International Journal of Human Rights* 679.

multilayered interactions, influenced by historical, cultural, and aspirational factors. It also notes that judging their constitutional rights by the yardstick of legal liberalism would not be appropriate without an investigating their contextual geneses. Moreover, after decades of international socialisation, the conceptualisation of human right issue has slowly changed. For China and Viet Nam, it is now a matter of legitimacy. Although the statist view has lingered, Beijing and Hanoi are not hostile to universal rights. In contrast, North Korea sees it as a survival battle. From the survivalist perspective, human rights have been conceptualised in Pyongyang as a social and economic welfare programme, not as individual liberties to be protected by the state. In-depth study of socialist East Asia would offer concrete path to rectify human rights wrongdoings in this region.

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No potential conflict of interest was reported by the authors.