

Pasquale Viola, Nguyen Tien Duc

# Convergences and divergences in Southeast Asian constitutional systems

## A comparative study of Thailand and Vietnam

The article addresses the constitutional changes of Thailand and Vietnam through a comparative perspective. In doing so, it takes functionalism as the starting point to tackle common issues of constitutional concern, i.e. the protection of rights, the form of government, constitutional supremacy, while being carefully attuned to local particularities as well as political mindsets, cultures, and jurisprudential principles. It aims to display constitutions as «a site for mediating universal values and local particularities», thus contributing to enrich the scholarly discourse on constitutionalism in Southeast Asia and on comparative constitutional law in general.

**Keywords:** comparative constitutional law, constitutionalism, Southeast Asia, Thailand, Vietnam.

### 1. Introduction: beyond legal colonialism

The globalization of constitutional law, as an “inevitable” phenomenon in Mark Tushnet’s words<sup>1</sup>, has gained steam, and yet, certain essential subjects are ubiquitous in virtually every constitution. The term “rights

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<sup>1</sup> The concept “globalization of constitutional law” denotes convergence among national constitutional systems in their structures and in their protections of fundamental and human rights. For a discussion, see M. Tushnet, *The Inevitable Globalization of Constitutional Law*, in 49 *Virginia J. of Int’l L.* 4, 2009, 985. For a critical view: R. Dixon, E. Posner, *The Limits of Constitutional Convergence*, in 11 *Chicago J. of Int’l L.*, 2011, 339. See generally Z. Elkins, T. Ginsburg, J. Melton, *The Endurance of National Constitutions*, Cambridge, 2009; J. Husa, *Advanced Introduction to Law and Globalisation*, Cheltenham, 2018; M. Siems, *Comparative Law*, Cambridge, 2018; R. Masterman, R. Schütze, *The Cambridge Companion to Comparative Constitutional Law*, Cambridge, 2019.

creep” is coined to capture the phenomenon in which almost all national constitutions include a number of rights in common<sup>2</sup>. Currently, only few constitutions do not contain any right provision, while similarly, the form of state and power structure is increasingly visible<sup>3</sup>.

In the past three decades, comparative constitutional law has witnessed “renaissance” with the significant growth of scholarly discourses and publications<sup>4</sup>. Despite the keen interest, the field has continued to progress unevenly. While the existing literature is extensively informed by the constitutional practices of the West, the rest have barely stolen the show. This assumption seems so obvious that it begs little justification. As observed by Sujit Choudhry, comparative constitutional law has been «oriented around a standard and relatively limited set of cases: South Africa, Israel, Germany, Canada, the United Kingdom, New Zealand, the United States, and to a lesser extent, India»<sup>5</sup>, leading constitutional comparatists to lament that little attention has been paid to those within the Global South<sup>6</sup>. Such neglect might incur intellectual and practical losses in studying comparative law and legal pluralism<sup>7</sup>. It goes without saying that the Global South countries are in effect marginalized in many ways, such as overlooking the constitutional experience of particular states and regions; assuming their effective similarity with Western constitutional

<sup>2</sup> D. Law, M. Versteeg, *The Evolution and Ideology of Global Constitutionalism*, in 99 *California Law Review*, 2011, 1163. Cf. M. Rosenfeld, A. Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012; M. Reimann, R. Zimmermann (Eds.), *The Oxford Handbook of Comparative Law*, Oxford, 2nd edn, 2019.

<sup>3</sup> Z. Elkins, T. Ginsburg, J. Melton, *The Endurance of National Constitutions*, cit., 12-35; Z. Elkins, *Comparability and the Analysis of National Constitutions*, in 23 *APSA-CP Newsletter* 1, 2013, 7-8.

<sup>4</sup> To name a few, see generally D. Bonilla Maldonado (Ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia*, Cambridge, 2013; R. Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, Oxford, 2014; D. Amirante (Ed.), *South Asian Constitutional Systems*, The Hague, 2020.

<sup>5</sup> See S. Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in Id. (Ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?*, Oxford, 2008, 8.

<sup>6</sup> We borrow the terms “Global North” and “Global South” as defined by Daniel Bonilla Maldonado to indicate in a less pejorative manner “developed countries” and “developing countries” respectively. On this aspect, Domenico Amirante points out that the terms are useful to conceptualize the differences between two sides of the world (North-South) in spite of their fluidity, which challenges any attempt towards a rigid definition. See more D. Bonilla Maldonado (Ed.), *Constitutionalism of the Global South*, cit.; D. Amirante, *Constitutionalism in South Asia: An Introduction*, in Id. (Ed.), *South Asian Constitutional Systems*, cit., 1; R. Hirschl, *Comparative Matters*, cit. Cfr. L. Pegoraro, A. Rinella, *Sistemi costituzionali comparati*, Torino, 2017.

<sup>7</sup> W. Menski, *Beyond Europe*, in E. Örüçü, D. Nelken (Eds.), *Comparative Law: A Handbook*, Oxford, 2007, 189.

systems; reserving them for specialist study by those with anthropological or sociological interests and skills<sup>8</sup>. The marginalization of Asia's constitutional experience takes a distinctive form. Albeit its enormity and diversity in terms of area, ethnicity, religion, culture, and approaches to law and government, Asia has often been underrepresented in comparative legal and constitutional studies<sup>9</sup>. Even if the continent is given some heed, as cautioned by Werner Menski, it «remains shackled by “white” colonial presuppositions»<sup>10</sup>.

According to the aforementioned theoretical positions, numerous analyses have been conducted on Latin American, Asian and African constitutional experiences, through inter- and trans-disciplinary approaches that emphasised different and peculiar legal ways to cope with the same phenomenon, in some cases even suggesting suitable alternative solutions. Such methodological approach nurtured a two-fold effect: *i*) countries that considered themselves a legal avant-garde, nowadays interact with previously underestimated complex systems, suffering from a sort of «surprise effect»<sup>11</sup>; *ii*) the Eurocentric view has highlighted the fallacy of legal orientalism, which is full of evaluative and voyeuristic characters, but epistemologically “arid”<sup>12</sup>. Such trends are currently leading to the (re) discovery of autochthonous values and principles rooted in non-Western and non-Northern traditions<sup>13</sup>.

<sup>8</sup> C. Saunders, *Towards a Global Constitutional Gene Pool*, in 4 *National Taiwan University Law Review* 3, 2009, 2.

<sup>9</sup> A. Harding, *Comparative Public Law: Some Lessons from South East Asia*, in Id., E. Özücü (Eds.), *Comparative Law in the 21st Century*, Alphen aan den Rijn, 2002, 249; W. Twining, *Globalisation and Legal Theory*, Oxford, 2000, 185. Cfr. R. Hirschl's “World Series’ syndrome”, Id., *Comparative Matters*, cit.

<sup>10</sup> W. Menski, *Beyond Europe*, cit., 191.

<sup>11</sup> Cfr. D. Amirante, *Il caleidoscopio del diritto indiano: percorsi di comparazione*, in VV.AA, *Annuario di diritto comparato e di studi legislativi*, Naples, 2013, 239. See also S. Bagni, *Dallo Stato del benessere allo Stato del buen vivir. Innovazione e tradizione nel costituzionalismo latino-americano*, Bologna, 2013; Id. (Ed.), *El constitucionalismo por encima de la crisis. Propuestas para el cambio en un mundo (des)integrado*, Bologna, 2016; S. Baldin, *Il buen vivir nel costituzionalismo andino. Profili comparativi*, Torino, 2019; R. Orrù, *I Paesi dell'Africa subsahariana*, in P. Carrozza, A. Di Giovine, G.F. Ferrari (Eds.), *Diritto costituzionale comparato*, Roma-Bari, 2014, 551; M. Nicolini, *La giustizia costituzionale in Africa australe. L'eredità europea, il diritto tradizionale*, il Global Judicial Dialogue, Bologna, 2015; Id., *L'altra law of the land. La famiglia giuridica “mista” dell'Africa australe*, Bologna, 2016; S. Mancuso, C.M. Fombad (Eds.), *Comparative Law in Africa: Methodologies and Concepts*, Cape Town, 2015; H. Corder, V. Federico, R. Orrù, *The Quest for Constitutionalism. South Africa since 1994*, Farnham, 2014. On Southeast Asian constitutional systems see M. Mazza (Ed.), *The Constitutional Systems of East Asia*, The Hague, 2019.

<sup>12</sup> T. Ruskola, *Legal Orientalism: China, the United States, and Modern Law*, Cambridge, 2013. E.W. Said, *Orientalism*, New York, 1978.

<sup>13</sup> H.P. Glenn, *Legal Traditions of the World*, 5th edn, Oxford, 2014; Id., *Vers un droit comparé intégré?*, in 51 *Revue internationale de droit comparé* 4, 1999, 841; L. Pegoraro, *Diritto costituzio-*

With that in mind, this article employs the contextualized functionalism to undertake a comparative inquiry into Thailand and Vietnam<sup>14</sup>. Accordingly, it takes functionalism as the starting point to compare common problems of constitutional concern such as the protection of rights, the form of government, safeguarding constitutional supremacy, while being carefully attuned to local particularities as well as political mindsets, culture, and jurisprudential principles in understanding how the two countries cope with internal political and legal concerns. It aims to display constitutions as «a site for mediating universal values and local particularities»<sup>15</sup>, thus contributing to the scholarly discourse on constitutionalism in Southeast Asia and comparative constitutional law in general.

The selection is made pursuant to what Ran Hirschl calls «the prototypical cases» principle. In particular, «a prototypical case serves as a representative exemplar of other cases exhibiting similar pertinent characteristics», making it easier for «reasoning by analogy»<sup>16</sup>. On the common account, both countries are located in Southeast Asia, a vibrant hub to nowadays global migration of constitutional ideas and values. Both countries have consolidated the constitutional footing of human rights, while on the other note, they have retained their own peculiarities in relation to one another. The Thai regime is centered on constitutional monarchy with frequent interventions of the military junta, while Vietnam's constitutionally-entrenched socialist ideology and aspiration are predominant. This holds different implications for each case, especially in terms of constitutional borrowings and migration, with different outcomes when introducing Western liberal constitutional ideas.

*nale comparato. La scienza e il metodo*, Bologna, 2014; L. Pegoraro, *Blows against the empire. Contro la iper-Costituzione coloniale dei diritti fondamentali, per la ricerca di un nucleo interculturale condiviso*, in AA.VV., *Annuario di diritto comparato e di studi legislativi*, Napoli, 2020, 447; D. Amirante, *Al di là dell'Occidente. Sfide epistemologiche e spunti euristici nella comparazione "verso Oriente"*, in DPCE, 1, 2015, 1-36; P. Viola, *Costituzionalismo autoctono. Pluralismo culturale e trapianti giuridici nel subcontinente indiano*, Bologna, 2020.

<sup>14</sup> V. Jackson, *Methodological Challenges in Comparative Constitutional Law*, in 28 *Penn State International Law Review*, 2010, 326. In reference to the methodology, see also M. Nicolini, *Methodologies of Comparative Constitutional Law: Universalist Approach*, in AA.VV., *Max Planck Encyclopedia of Comparative Constitutional Law* [MPECCoL], 2020; I. Spigno, *Methodologies of Comparative Constitutional Law: Contextual Approach*, in AA.VV., *Max Planck Encyclopedia of Comparative Constitutional Law* [MPECCoL], 2017.

<sup>15</sup> W.-C. Chang, L.-a. Thio, K. YL Tan, J.-r. Yeh., *Constitutionalism in Asia: Cases and Materials*, Oxford, 2014, 69.

<sup>16</sup> R. Hirschl, *Comparative Matters*, cit., 256-260.

## 2. May a “Western-inspired” Constitution entirely reflect Thai-ness?

Thai constitutional and democratic pathways are an ongoing process rooted in the 1932 bloodless upheaval that transformed the state structure from absolute to constitutional monarchy. This symbolic novelty was depicted by the change of the name “Siam” into “Thailand”<sup>17</sup>. In almost a decade since the entry into force of the first constitution<sup>18</sup>, nineteen fundamental laws have been approved, with an average lifespan of four years and a half each. The political system and the rule of law were challenged by successful or tentative Coups d’État (ten from 1932) and the establishment of military rule<sup>19</sup>. Nevertheless, the constitutional changes were introduced to merge values borrowed from liberal Western constitutionalism<sup>20</sup> in a democratic system under the legitimation of the monarchy and Buddhist religion<sup>21</sup>. This legal attempt, succeeded with the adoption of the 1997 Constitution, is considered by scholars an evidence of the democratic will. However, the result of 1990s attempts to endorse liberal constitutionalism brewed authoritarian backlashes (Coups d’État of 2006 and 2014). Currently, the country is facing the issues deriving from faction politics<sup>22</sup> in a deeply divided society<sup>23</sup>.

<sup>17</sup> J.A. Stowe, *Siam Becomes Thailand: A Story of Intrigue*, Hawaii, 1991.

<sup>18</sup> Before the first Constitution, the state was administered according to the Temporary Charter for the Administration of Siam Act 1932.

<sup>19</sup> Siamese revolution of 1932; Siamese Coup d’État of 1933; 1933 Boworadet Rebellion; 1939 Songsuradet Rebellion; Siamese Coup d’État of 1947; 1949 Palace Rebellion; 1951 Manhattan Rebellion; Silent Coup of 1951; Coup d’État of 2006; Coup d’État of 2014. On the recent political events: E. Elinoff, *Subjects of Politics: Between Democracy and Dictatorship in Thailand*, in 19 *Anthropological Theory* 1, 2019, 143. On the 2014 Coup d’État: F. Ferrara, *The Logic of Thailand’s Royalist Coups d’État*, in P. Chachavalpongpun (Ed.), *Routledge Handbook of Contemporary Thailand*, London-New York, 2020, 71.

<sup>20</sup> On the Thai “unfinished transition”, see K. Tonsakulrungruang, *Thailand: The State of Liberal Democracy*, in 16 *International Journal of Constitutional Law* 2, 2018, 643; P. Kongkirati, *From Illiberal Democracy to Military Authoritarianism: Intra-Elite Struggle and Mass-Based Conflict in Deeply Polarized Thailand*, in 681 *Annals of the American Academy of Political and Social Science* 1, 2019, 24.

<sup>21</sup> On this aspect see at least E. Mérieau, *Buddhist Constitutionalism in Thailand: When Rājadharmā Supersedes the Constitution*, in 13 *Asian Journal of Comparative Law* 2, 2018, 1.

<sup>22</sup> On faction politics in Thailand: P. Chambers, N. Waitoolkiat, *Faction Politics in an Interrupted Democracy: The Case of Thailand*, in 7 *Journal of Current Southeast Asian Affairs* 2, 2020, 266; J. Ockey, *Political Parties, Factions, and Corruption in Thailand*, in 28 *Modern Asian Studies* 2, 1994, 251.

<sup>23</sup> A. Harding, R. Leelapatana, *Constitution-Making in 21<sup>st</sup>-Century Thailand: The Continuing Search for a Perfect Constitutional Fit*, in 7 *The Chinese Journal of Comparative Law* 2, 2019, 266; H. Lerner, *Making Constitutions in Deeply Divided Societies*, Cambridge, 2011.

## 2.1. *The Bill of Rights*

Since the proliferation of human rights discourse after the Second World War, Thailand has been an active actor within the international human rights regime, through the ratification of eight core human rights treaties in recognition and protection of common-shared liberal rights<sup>24</sup>.

During 1990s, the constitutional vibrancy led to positive attitudes and achievements in the implementation of human rights, especially regarding civil and political rights. Thus, the political system appeared «less prone to coups and authoritarian regimes which characterized their societies previously and have made deliberative efforts in the further democratization of their societies»<sup>25</sup>. However, the 2006 and 2014 Coups d'État under the aegis of the Thai military upended these promises, driving Thailand further into conflict with its international human rights obligations<sup>26</sup>.

The formalistic approach to human rights should be also linked to the cultural substratum of Thai society. Currently we may find traces of religious interpretation/enforcement of secular rights, mainly because the denial of quietly undercurrent influences of centuries-old religious precepts is an unsuccessful methodological approach. On this aspect, Don Selby argues that human rights trajectories in Thailand are the product of legal activism that engage with Buddhism in reference to rule and social structure<sup>27</sup>.

<sup>24</sup> Cf. V. Muntarborn, *The Core Human Rights Treaties and Thailand*, Leiden, 2017.

<sup>25</sup> K. Christie, D. Roy, *The Politics of Human Rights in East Asia*, London, 2001. To some extent, especially after the entering into force of the 1997 Constitution, Thailand was usually considered «the nearest approximation to Western style bourgeois democracy» (B. Anderson, *The Spectre of Comparisons: Nationalism, Southeast Asia, and the World*, New York, 1998, 283). On this regard, the 1997 fundamental law «strengthened mechanisms for checks and balances, improved the efficiency of the executive branch and broadened civil, political and human rights» (P. Busbarat, *Thailand in 2017: Stability without Certainties*, in *Southeast Asian Affairs*, 2018, 343, 233).

<sup>26</sup> S. Srisod, K. Abbott, *The Constitutional and Legal Framework in Thailand since the 22 May 2014 Coup d'État and Thailand's International Human Rights Obligations*, 2017, at [asianjournaloflegalstudies.files.wordpress.com/2017/06/final-the-constitutional-and-legal-framework-in-thailand.pdf](http://asianjournaloflegalstudies.files.wordpress.com/2017/06/final-the-constitutional-and-legal-framework-in-thailand.pdf). See ICJ and TLHR, *Joint Submission to the UN Human Rights Committee*, 2017, available at: [www.icj.org/joint-submission-to-the-un-human-rights-committee-by-the-icj-and-thai-lawyers-for-human-rights/](http://www.icj.org/joint-submission-to-the-un-human-rights-committee-by-the-icj-and-thai-lawyers-for-human-rights/).

<sup>27</sup> The Author suggests other three elements: «what gave emergent human rights in Thailand their shape, force, and trajectories are the ways that advocates engage, contest, or rework a) debates around Buddhism in its relationship to rule and social structure; b) political struggle in relation to a narrative of Thai democracy that disavows egalitarian movements; and c) regimes of social stratification and face-saving practices – are more a negotiation between fluid powers and institutions rather than a global legal transplant», D.F. Selby, *Human Rights in Thailand*, Philadelphia, 2018, 4.

The 2007 constitution encompassed an extensive Bill of Rights, mainly centred on human dignity and liberties. Regarding the potential clashes between rights' endorsement and the exercise of state power, Art. 27 stated that the National Assembly, the Council of Ministers, the Courts, the Constitutional organs and all State bodies must respect the constitutional provisions, and each individual might invoke constitutional rights against the State. A list of first, second and third generation rights embraced equality and liberty provisions, as well as rights related to culture and society. The 2007 Constitution focused on judicial, occupational, community rights, as well as on freedom of expression and the press, freedom of assembly, right to information and freedom of petition.

On such basis, the 2017 Bill of Rights further endorses liberties of the Thai people (Sec. 25), implementing and enforcing such provisions even in the case of no specific clauses. Sec. 26 recalls the compliance with the principles of the rule of law, while Sec. 27 focuses on equality of gender, social and financial status, political view, race, origin, language, religion, age, and disabilities. The following Sections enumerate rights related to criminal proceedings and guarantees from unjustified restraints and the prohibition of cruel treatments and torture. Specifically, Sec. 29 states that «no person shall be subject to a criminal punishment unless he or she has committed an act which the law in force at the time of commission provides to be an offence and prescribe a punishment therefor, and the punishment to be imposed on such person shall not be of greater severity than that provided by law in force at the time of the commission of the offence», in such way guaranteeing individuals from *ex post facto* laws and establishing the principle of no punishment without law. This Section provides also for the presumption of innocence in trials, protection from self-incrimination, and the right to pre-trial release.

The list of liberty rights is particularly wide in reference to the freedom of expression and assembly; economic, social and cultural rights are recognized in the subsequent Sections. In reference to economic rights, Sec. 37 provides for the right of property and succession, as well as for the ownership of natural resources. Sec. 40 is devoted to the right to choose occupation, to the protection of consumers and to the right to competitive market. Sec. 41 establishes rights of information, petition and *ultra vires* administrative actions for individuals and communities, while Sec. 43 makes references to cultural rights related to arts, tradition and good customs to both local and national level.

Many references to the third-generation rights have been included in the 2017 Constitution, specifically regarding group and collective rights,

economic and social development, environmental rights and sustainability, communication.

As a form of limitation clause, the *lèse-majesté* law is currently constitutionally embedded. To this end, the exercise of freedom of expression shall be in accordance with the conditions set out under the Constitution, one of which is the duty of Thai people to protect and uphold the King (as Head of the State). However, as Andrew Harding and Peter Leyland have pointed out, Thailand's *lèse-majesté* law stands in stark contrast to its constitutional commitments<sup>28</sup>.

## 2.2. *The form of government*

Thai political regime has repeatedly seen the oscillation between martial rules and liberal democracy<sup>29</sup>. The post-2006 and -2014 Coups d'État strengthen the tendency towards the military rule, combined with liberal democratic legal tools. The 2007 Constitution designed a parliamentary system of governance, with the King as head of the state; people sovereignty was exercised through representative institutions: the National Assembly, the Council of Ministers, and the Courts (Sec. 3, 2007). In detail, the constitution conferred the legislative power to the National Assembly (House of Representatives and the Senate)<sup>30</sup>. The Council of Ministers (Prime Minister and no more than thirty-five ministers) was collectively accountable for the state administration<sup>31</sup>.

The form of government after the entry into force of the 2017 Constitution is close to the previous one: the King is the head of the State (Sec.

<sup>28</sup> A. Harding, P. Leyland, *The Constitutional System of Thailand: A Contextual Analysis*, Oxford, 2011, 238.

<sup>29</sup> K.Y.L. Tan, *Constitutionalism in Burma, Cambodia and Thailand: Developments in the First Decade of the Twenty-first Century*, in A.H.Y. Chen (Ed.), *Constitutionalism in Asia in the Early Twenty-First Century*, Cambridge, 2014, 219.

<sup>30</sup> The House of Representatives consists of 480 members, elected according to a mixed electoral scheme: 80 on a proportional base, while the remaining 400 on a constituency basis (Sec. 93, 2007). The Senate consists of 150 members «upon the basis of election in each *Changwat*, one elected senator for each *Changwat*, and upon the selection basis in an amount equal to the total number of senators deducted by the number of senators from the election basis» (Sec. 111, 2007). As K.Y.L. Tan reports, «under the 2007 constitution, only half the 150-member Senate would be popularly elected; the other half would be chosen by a Senators Selective Committee comprising the presidents of the Constitutional Court, the Election Commission, the ombudsmen, the National Counter-Corruption Commission, the State Audit Commission, a judge of the Supreme Court and a judge of the Supreme Administrative Court», K.Y.L. Tan, *Constitutionalism in Burma, Cambodia and Thailand: Developments in the First Decade of the Twenty-first Century*, cit., 240.

<sup>31</sup> About the vote of no-confidence see Section 158ff., Constitution of 2007.



3), the National Assembly performs duties related to legislative powers (Sec. 79)<sup>32</sup>, while the executive power is exercised by the Council of Ministers (thirty-five Ministers). The Prime Minister is the head of the executive and also according to the new constitution the Council of Ministers is collectively responsible, along with the cabinet<sup>33</sup>.

According to the previous overlook on the Thai form of Government, solely reflecting on the formal constitutional arrangements of the form of government, the constitutional text draws a parliamentary system within a constitutional monarchy. In this regard, the role of the King is to confer legitimacy on the democratic government, despite carrying out mostly symbolic functions compared to the executive and legislative branches. Furthermore, in terms of legitimation we should recall the central role of religion in Thailand. In fact, the Buddhist legacy «has both influenced and legitimized the exercise of political power in Siam/Thailand», and «in Thailand, Buddhism represents a national ideology of such importance that each successive regime since the establishment of the Chakri dynasty in 1782 has found it of great importance to ensure that its political programme was supported by the *sangha*»<sup>34</sup>.

In recalling Western models of the parliamentary system, the form of government is silent on the role of the military. On this regard, as Kevin Tan has argued, if the military is part of Thai politics, «especially when it has played a significant (not necessarily positive) role in a country's government», there is a necessity of regulating – or, at least, mention – this power in the constitutional scheme<sup>35</sup>.

### 2.3. *The Constitutional Court*

In Thailand, the “constitutional afterlife” – institutional innovations – of the 1997 Constitution has endured through thick and thin ever since<sup>36</sup>. They were novelties at the time of their entrenchment in the hope of dispelling the specter of Thai politics. Nonetheless, abusive constitutional-

<sup>32</sup> The House of Representatives consists of 500 members. 350 members are elected on a constituency base, while the remaining 150 members from political party lists (Sec. 83). The Senate consists of 200 selected members (Sec. 107).

<sup>33</sup> About the votes of confidence and no-confidence see Sec. 151, Constitution of 2017.

<sup>34</sup> A. Harding, *Buddhism, Human Rights and Constitutional Reform in Thailand*, in 2 *Asian Journal of Comparative Law* 1, 2007, 1, 1-3.

<sup>35</sup> K.Y.L. Tan, *Constitutionalism in Burma, Cambodia and Thailand*, cit., 242.

<sup>36</sup> T. Ginsburg, *Constitutional Afterlife: The Continuing Impact of Thailand's Postpolitical Constitution*, in 7 *International Journal of Constitutional Law* 1, 2009, 83.

ism has rendered these bodies, especially the Constitutional Court, to a great extent, ineffective in addressing the roots of the country's crisis<sup>37</sup>. The recent constitutional overhaul has subject the institution to extra constitutional influence, thus driven the faction politics even further<sup>38</sup>. As skeptically suggested by Tom Ginsburg, it risks «politicizing institutions with technocratic bases of legitimacy, overloading them with tasks they are not designed or prepared to handle»<sup>39</sup>.

Albeit initial resistance, the Constitutional Court was formally inaugurated in 1998 under the 1997 Constitution<sup>40</sup>. Since then the composition and jurisdiction of the Court have witnessed drastic changes: from 15 judges, it is reduced to nine. The 2017 Constitution makes a change in the composition of the Court in which, apart from three judges from Supreme Court and two from the Supreme Administrative Court, two career bureaucrats are added, while the number of law expert and political science expert is reduced to one each. This unique characteristic signifies the need for broader wisdom in politics<sup>41</sup>. Further, the 2017 Constitution also reduces the non-renewable term of a judge from nine to seven years. In general, the Court has the powers regarding: *i*) the constitutionality of legal provisions; *ii*) jurisdictional disputes between constitutional bodies; *iii*) disqualification of public office holders; and *iv*) protection of the Constitution and democratic values.

The first few years since its inception, the Constitutional Court appeared to drive Thailand towards democracy by invalidating laws to promote gender equality, the right of property and freedom of occupation<sup>42</sup>. The Court went as far to fulfill its duties in deterring corruption as having convicted and banned from politics high-profile politicians who failed to make their asset disclosures<sup>43</sup>.

<sup>37</sup> Abusive constitutionalism denotes the use of constitutional amendment power to undermine the democratic order. Albeit not fully authoritarian, the resulting regimes have become significantly less democratic than they previously were. For analysis, see D. Landau, *Abusive Constitutionalism*, in *UC Davis Law Review* 47, 2013, 189.

<sup>38</sup> P. Sirivunnabood, *The Rules Change but the Players Don't: Factional Politics and Thailand's March 2019 Elections*, in *41 Contemporary Southeast Asia* 3, 2019, 390.

<sup>39</sup> T. Ginsburg, *Constitutional Afterlife*, cit., 85.

<sup>40</sup> A. Harding, P. Leyland, *The Constitutional System of Thailand*, cit., 161-162.

<sup>41</sup> B. Dressel, *Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand*, in *23 The Pacific Review* 5, 2010, 671.

<sup>42</sup> K. Tonsakulrungruang, *The Constitutional Court of Thailand: From Activism to Arbitrariness*, in A.H.Y. Chen, A. Harding (Eds.), *Constitutional Courts in Asia: A Comparative Perspective*, Cambridge, 2018, 186.

<sup>43</sup> A. Harding, P. Leyland, *The Constitutional System of Thailand*, cit., 180.

A point worth noting is the perplexing relationship between the ruling junta and the Constitutional Court. The old charter was instantaneously discarded while the tribunal remained intact; even its power is broadened. The coup leaders must have quickly gauged that the tribunal is a legitimate device to justify their actions during the insurgency, helping allay the popular unrest<sup>44</sup>. Legal scholars have pointed out a potential divergence of the Court from its previous trend<sup>45</sup>. An empirical study of high-profile political cases shows that the growing ideological ties between the judges and elites have threatened the Court's political neutrality<sup>46</sup>. Hence, Thailand has seen a trend of politicization of the judiciary, deepening the political divide, although the Court is not the root cause of the country's political issues.

### 3. Vietnam's (Socialist) Constitutionalism

Since its independence in 1945, Vietnam has strived to shape a peculiar political and legal system capable of weathering context-related concerns within a Marxist-Leninist framework. One of the main features of the state-society relationship is dynamism in which political and economic issues deal with the constitutional scheme. After the 1986 *Đổi mới* (Renovation) era<sup>47</sup>, Vietnam has tried to strike a balance among its own millenary history, cultural roots, specific social and economic issues, and the pressures of the international community to embrace economic and po-

<sup>44</sup> E. Mériéau, *The Thai Constitutional Court, a Major Threat to Thai Democracy*, 2019, at: [blog-iacl-aidc.org/2019-posts/2019/5/3/the-thai-constitutional-court-a-major-threat-to-thai-democracy](https://blog-iacl-aidc.org/2019-posts/2019/5/3/the-thai-constitutional-court-a-major-threat-to-thai-democracy). As observed by Eugénie Mériéau, the Court is the key to "the Deep State", a network of traditional elites that operated outside the periphery of a democratically elected government. See more: E. Mériéau, *Thailand's Deep State, Royal Power and the Constitutional Court (1997–2015)*, in 46 *Journal of Contemporary Asia* 3, 2016, 445.

<sup>45</sup> See more V. Kanchoochat, *Reign-seeking and the Rise of the Unelected in Thailand*, in 46 *Journal of Contemporary Asia* 3, 2016, 486; K. Tonsakulrungruang, *Thailand: An Abuse of Judicial Review*, in P.J. Yap (Ed.), *Judicial Review of Elections in Asia*, London-New York, 2016; D. McCargo, *Peopling Thailand's 2015 Draft Constitution*, in 37 *Contemporary Southeast Asia* 3 2015, 335-336.

<sup>46</sup> B. Dressel, K. Tonsakulrungruang, *Coloured Judgement? The Work of the Thai Constitutional Court, 1998-2016*, in 49 *Journal of Contemporary Asia* 1, 2019, 1.

<sup>47</sup> The term *Đổi mới* is usually translated with "Renovation", meaning a shift in the political and economic agenda of Vietnam with the aim to introduce a socialist market economy through the blending of autochthonous elements and a global-shared set of legal principles and values. See Q.X. Dinh, *The Political Economy of Vietnam's Transformation Process*, in 22 *Contemporary Southeast Asia* 2, 2000, 360; A. Fjorðe, *From "Constructing Socialism" to a "Socialist-oriented Market Economy" in Contemporary Vietnam: A Critique of Ideologies*, in 71 *Europe-Asia Studies* 4, 2019, 671.

litical liberalization. Thus, Vietnamese polymorphism embarks upon two directions: internal and external. The first direction concerns the role of constitutional bodies according to the specific influence of the Communist Party of Vietnam (CPV); the external one regards the international pressures for liberalization and the acceptance of “required” legal transplants. In other words, the political and legal systems are going towards a functionalist syncretism to combine centralized democracy, socialist rule of law, and exogenous features of liberal constitutionalism.

### 3.1. *The Bill of Rights*

Constitutional provisions dealing with rights are the outcome of a complex and context-related set of issues. The constitution-making debate was underscored by the synthesis between the socialist one-party-dominant state and liberal values to meet the international community’s demands and foster economic growth.

Notwithstanding a supposed and globally shared idea of human rights’ ontological universalism, their interpretation – rather than justification – resides within the cultural and social context, while the recognition and the enforcement vary according to the legal framework<sup>48</sup>. Vietnamese tradition is the result of three major ideological driving forces: Confucianism, Buddhism and Marxism-Leninism. These three theoretical – and to some extent practical – perspectives influence the approach to human rights. The Marxist-Leninist political and economic doctrine merges the Confucian communitarianism with materialism and legal instrumentalism. The constitution is thus regarded as an instrument for the ruling party to translate the political agenda into legal terms<sup>49</sup>. For instance, the 1992 Constitution evidenced the positivistic approach to human rights, which «[must be] provided for by the Constitution and the law». The declaratory expression was bound to the concept of “citizen’s rights” with an emphasis on their corresponding duties and obligations.

<sup>48</sup> D. Amirante, *Al di là dell’Occidente. Sfide epistemologiche e spunti euristici nella comparazione “verso Oriente”*, cit.; L. Pegoraro, *Blows against the empire. Contro la iper-Costituzione coloniale dei diritti fondamentali, per la ricerca di un nucleo interculturale condiviso*, cit.

<sup>49</sup> D.N. Pham, *From Marx to Market: The Debates on the Economic System in Vietnam’s Revised Constitution*, in 11 *Asian Journal of Comparative Law* 2, 2016, 263, 264: «Under Marxist-Leninist legal theory, socialist law and constitutions are deemed to be the will of the ruling class, represented by the communist party. This was evidenced by the socialist legal systems adopted by the former Soviet Union and East-European socialist bloc. The applicability of this approach has also been demonstrated through almost 70 years of Vietnam’s constitutional history under the rule of the Communist Party of Vietnam (CPV)».

Vietnam increasingly opened up its door to the world, thus fostering the migration of universal values and principles, predominantly with the aim of securing the rule of law and human rights<sup>50</sup>. Under the advices of the Communist Party of Vietnam (CPV), the approach to human rights was redesigned in the 2013 constitution. The recognition of a natural or pure legal base to human rights was at the centre of important scholarly debates during the constitution-making phase. On the one hand, many scholars proposed a concept of human right entirely free from the establishment and control of political power, on the other hand, a different scholarly perspective fostered the Confucian role of the state and political power in shaping the concept of human rights through the legal system. The clashes in ideologies and aspirations led to a compromise that differentiates human rights from citizens' rights. As a result, the rights' chapter was renamed «Human Rights, Citizens' Basic Rights and Obligations» and moved to the second part of the constitution, in order to better elucidate the rising importance of human rights and their theoretical independence from citizens' rights<sup>51</sup>.

The set of civil and political rights is broad and strictly connected to second generation rights (economic, social and cultural). In fact, the first article of Chapter II states that «political, civic, economic, cultural and social human rights and citizen's rights are recognized, respected, protected, and guaranteed in concordance with the Constitution and the law» (Art. 14). Art. 16 deals with the general principle of equality, in reference to social and financial status, as well as political direction, while Art. 19 and Art. 20 provide for the right to life and prohibit cruel treatment, torture, and recall human dignity as inalienable right. The subsequent provisions expressly distinguish freedom of religion, assembly, expression, information, opinion, thought, conscience, and equality regardless of gender (Art 22ff.)<sup>52</sup>. Articles 27-30 recognize political rights related to eligibility and restrictions on voting, referenda and right of petition.

Special attention was also paid to rights related to criminal proceedings: the presumption of innocence (Art. 31 § 1), the right to public and timely trial (Art. 31 § 2), the recognition of *ne bis in idem* principle (Art.

<sup>50</sup> N.T.M Huong, V.C. Giao, N.M. Tam, *Asian Values and Human Rights: A Vietnamese Perspective*, in 2 *Journal of Southeast Asian Human Rights* 1, 2018, 302.

<sup>51</sup> V.C. Giao, T. Kien, *Constitutional Debate and Development on Human Rights in Vietnam*, in 11 *Asian Journal of Comparative Law* 2, 2016, 235, 249.

<sup>52</sup> Articles 22-27, Constitution of Vietnam 2013.

31 § 3), the right to counsel and the guarantee from wrongful conviction (Art. 31 § 4 and § 5).

Embedded in the cultural and socialist tenet, the second generation rights plays a pivotal role in Vietnam. The 2013 Constitution recognizes cultural identity also to overseas Vietnamese, considered as linked parts to their families and native land (Art. 18). The right and duty to learn (Art. 39) is particularly interesting to understand the role of education, and «everyone has the right to enjoy and access to cultural values, participate in cultural life, and make use of cultural bases» (Art. 41). This approach to cultural matters introduces the right to determine the use of mother-tongue and to select a language as lingua franca (Art. 42). Furthermore, Art. 40 states that «everyone has the right to carry out scientific and industrial research, engage in literary and artistic creation, and enjoy benefits from those activities». Furthermore, the rights of workers focus on equal and safe conditions of work, even salary and break policy (Art. 35); the basic law prohibits discrimination, forced labour, and children employment (Art. 35 § 3).

The “economic constitution” of Vietnam is rooted in Article 32 (related to the right of ownership) and Art. 33 (devoted to freedom of enterprise). Both rights are restricted by law (more specifically, the right to ownership is “protected” and “potentially limited” by law). As per Art. 32, this limitation may occur «in cases made absolutely necessary by reason of national defence, security and the national interest, in case of emergency, and protection against natural calamity, the State can make a forcible purchase of or can requisition pieces of property of individuals or organizations against compensation, taking into account current market prices». Differently, the Constitution provides a generic limit according to law related to freedom of enterprise (Art. 33).

Among the “third generation rights”, Art. 43 details for the right – as well as the duty – to live in a healthy environment. The 2013 Constitution also lists fourth-generation rights, especially in reference to bioethics, as per Art. 20 § 3, that specifies the right to donate organs or a part of the body, but only in accordance with the law; this constitutional provision also prohibits medical, pharmaceutical and scientific experimentations without the individual’s consent. Art. 38 is in between third and fourth generation of rights, providing for equal health care and protection of the citizens, prohibiting «any acts threatening the life and health of other people».

Moreover, the 2013 Constitution of Vietnam introduced a new limitation clause in reference to rights. Article 14(2) allows restrictions

of human rights for reasons of national defense, national security, social order and safety, social morals and public health. Given its generic wording, this is considered as a blanket provision, which is generally applicable to the rights catalogue, and further claw-back clauses can also be found in each rights provision<sup>53</sup>.

### 3.2. *The form of government*

The 2013 Constitution of Vietnam recalls the main features of the form of government already established in the 1992 fundamental text, albeit the introduction of few but remarkable changes. At first, we should evoke that the specific arrangement of the Vietnamese political systems is the result of its communist (Marxist-Leninist) theoretical landscape, revolving around the operational principle of “democratic centralism”. This concept refers to a «free political discussion within the party [in this case the Communist Party of Vietnam, CPV], and free elections to party offices, combined with a one-party state and a strict hierarchical discipline»<sup>54</sup>.

Besides the role of the CPV, the constitutional arrangement formally divides political power among the National Assembly, the President, and

<sup>53</sup> Nonetheless, the application scope of Article 14(2) is somewhat problematic. As a blanket provision, it is far from clear which right can be limited «when prescribed by an act». For instance, the promulgation of the 2015 Criminal Code (amended in 2017) has abolished several crimes. In 2017, the National Assembly enacted the Resolution 41/2017/QH14 to guide the application of the new Code, providing that a number of crimes committed prior to 1<sup>st</sup> January 2018, which had been at the time under investigation, prosecution and trial, shall be carried on in accordance with the provisions of the 1999 Criminal Code. Axiomatically, the Resolution is a normative document with limitation effect on a human right, which is the legal principle *nulla poena sine lege*. The Resolution however raises two legal problems. First, in light of Article 14(2) of the Constitution, the Resolution faces a serious question on constitutionality since it is not an act. Second, the absolute nature of this principle in international human rights law bars states from restricting it under any circumstances. Thus the document circumvents an individual’s right to benefit from the abolition of his/her prior crime may risk a violation of international law. For an analysis, see more N.T. Duc, *Gioi han quyen con nguoi theo Cong uoc Nhan quyen Chau Au va goi mo cho Viet Nam* [Human Rights Limitations under the European Convention on Human Rights and Implications for Vietnam], in 4 *State and Law Review*, 2018, 60.

<sup>54</sup> R. Scruton, *The Palgrave Macmillan Dictionary of Political Thought*, 3rd edn, London, 2007, 171: «“Centralism” means the concentration of all power in the central party organization, which is made responsible for the organization and development of every institution in which political influence may arise, from the school to the factory floor, and from the family to the police force, and which is therefore intolerant of every autonomous body within its sphere of influence. What the word “democratic” could mean in such a context is debatable».

the Government. Chapter V of 2013 Constitution is devoted to the National Assembly, clearly defined as «the highest representative organ of the people and the highest organ of State power of the Socialist Republic of Vietnam» (Art. 69). The term of the office is five years and the representative assembly «exercises constitutional and legislative powers, decides significant national affairs, and exercises supreme control over all activities of the State» (Art. 69). Along with legislative powers, such as «to make and amend the Constitution» and laws (Art. 70), the National Assembly holds control, decision and regulating functions related to legislation, major development agenda and the powers of state bodies (i.e. the National Council of Election, the State Audit, local<sup>55</sup> governments). The role of the highest people's representative body is particularly wide also in reference to other constitutional bodies. In this regard, Art. 70(10) states that the National Assembly has the power «to abrogate all formal written documents issued by the State President, the Standing Committee of the National Assembly, the Government, the Prime Minister, the Supreme People's Court, and the Supreme People's Procuracy, that are inconsistent with the Constitution, the statutes, and resolutions taken by the National Assembly». Moreover, according to the control powers, the Assembly may cast a vote of confidence on persons holding positions elected or approved by the National Assembly itself (Art. 70 [8]).

Despite the fact that the majority of the NA's delegates are affiliated with the CPV, increasing assertiveness of the highest representative body is seen recently, a development that contrasts sharply with common depictions of the body as a “rubber stamp” or “voting machine”<sup>56</sup>. The body has grown more active and visible in the legislative process. Its legislative deliberation and interpellations are increasingly transparent and

<sup>55</sup> For central-local relations in Vietnam see B.N. Son, *Central-Local Relations and the Constitutional Discourse on Political Decentralisation in 21<sup>st</sup>-Century Vietnam*, in A. Harding, M. Sidel (Eds.), *Central-local Relations in Asian Constitutional Systems*, Oxford, 2015, 57. In this essay, the author suggests that «Twenty-first-century Vietnam is confronting a dilemma. On one hand it wishes to pursue socialist goals by using conventional socialist notions and institutions; but on the other hand it appeals to modernisation and global integration by employing some notions, institutions and practices shared by the international community, which are sometimes different from, or even conflict with, socialist goals» (82). To some extent, this thesis is close to the one regarding the human rights narrative within the socialist principles. In general terms see C.J. Beck, G.S. Drori, J.W. Meyer, *World Influences on Human Rights Language in Constitutions: A Cross-National Study*, in *27 International Sociology* 4, 2012, 483.

<sup>56</sup> R. Abrami, E. Malesky, Y. Zheng, *Vietnam through Chinese Eyes: Divergent Accountability in Single-Party Regimes*, in M. Dimitrov (Ed.), *Why Communism Did Not Collapse: Understanding Authoritarian Regime Resilience in Asia and Europe*, Cambridge, 2013, 261.



open to media scrutiny<sup>57</sup>. As documented by Bui Ngoc Son, during the constitution-making in 2012-13, on many issues the body engaged in an open dialogue and presented conflicting views<sup>58</sup>. It therefore is no longer a “platform of united interests”, and has more capacity and room to develop its own view<sup>59</sup>.

The President is the head of the state, with symbolic duties related to internal and external representation of the country. The President is elected by the NA and the office lasts as long as the NA’s one. As per Art. 85, the President is responsible before the NA, while Art. 86 provides for duties and powers of the office, mainly related to the proposal for the election, the release or the removal of the Vice-President, the Prime Minister, the President of the Supreme People’s Court and the Head of the Supreme People’s Procuracy. About the legislative powers, the President «promulgate the Constitution, laws and ordinances» and «propose to the National Assembly Standing Committee to revise its ordinances» (Art. 86).

The Prime Minister, the Deputy Prime Minister, Ministers and heads of state ministries constitute the Government as a collegial body. Art. 94 defines the Government as «the highest organ of State administration of the Socialist Republic of Vietnam», that exercises the executive power on a five-year term office. The NA elects the Prime Minister and defines the structure and the composition of the Government (Art. 95). According to Chapter Seven of the Constitution, the Government mainly support the activities of the NA, while gain a relative autonomy in the international negotiation (although delegated by the President) and for the coordination of the Central Committee of the Vietnamese Fatherland Front (Art. 96 [8])<sup>60</sup>.

<sup>57</sup> L.H. Hanh, *Public Participation in the Legislative Process in Vietnam and the Concept of Public Consultation*, in 17 *Australian Journal of Asian Law* 2, 2016.

<sup>58</sup> B.N. Son, *Contextualizing the Global Constitution-Making Process: The Case of Vietnam*, in 64 *The American Journal of Comparative Law* 4, 2016, 975.

<sup>59</sup> Ivi, 976-977.

<sup>60</sup> As per Art. 9 § 1, «The Vietnam Fatherland Front is a political alliance and a voluntary union of political organizations, socio-political organizations, social organizations and individuals representing their social classes and strata, nationalities, religions, and overseas Vietnamese. The Vietnam Fatherland Front constitutes the political base of the people’s government; represents and protects legal and legitimate rights and interests of the people; gathers and promotes the power of great national solidarity, practicing democracy and enhancing social consensus; practices social supervision and critic; participates in the construction of the Party and the State and popular activities of foreign relations, contributing to building and defending the Fatherland».

According to the previous overlook on the Vietnamese form of Government, the interlaces between democratic centralism and a blurry division of legislative and executive powers depicts a political system coherent with the ideological background of the country and in line with the 1992 constitution. To this end, the shift from socialist legality to socialist law-based state<sup>61</sup> may appear the most important feature of the new fundamental text, especially in reference to human rights and the form of government, although this change is more political than legal *per se*. The principles of legitimacy and legality influence the effectiveness of the form of government in a centralized democracy. In this regard, Vietnam has been ruled for long through revolutionary moral principles – or rule by virtue –<sup>62</sup> and a socialist doctrine of legality<sup>63</sup>. On this aspect, the formal design of the basic principle of legality changed from «the State administers society by rule of law and constantly strengthens the socialist legality» (Art. 12, 1992) to the 2013 provision «[t]he Socialist Republic of Vietnam State is a socialist rule of law State of the people, by the people, and for the people» (Art. 2 § 1).

### 3.3. *Constitutional review: a discourse*

Constitutional review discourse in Vietnam has emerged together with the globalization of constitutional law<sup>64</sup>. Since the 1986 *Đổi mới* era, the discussions on constitutional review in Vietnam have shifted from restricted status to endorsement from the Party-State. To be clear, constitu-

<sup>61</sup> T.H. Bui, *Deconstructing the “Socialist” Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam’s Constitutional Reform Process*, in 36 *Contemporary Southeast Asia* 1, 2014, 77, 78.

<sup>62</sup> Ivi, 79. From 1959 to 1980 there was no Ministry of Justice in Vietnam, and as noted by Duy Nghia Pham (*supra* n. 49, 264), «the term “constitutional law” did not exist in the socialist jurisprudence until the late 1980s. Instead, the “law of the state apparatus” (*Staatsrecht*) was taught in socialist legal education institutions, covering political guidelines on the organization of the socialist state and the basic rights and obligations of citizens. The term ‘constitutional law’ only returned to Vietnam in the 1990s».

<sup>63</sup> T.H. Bui, *Deconstructing the “Socialist” Rule of Law in Vietnam*, cit., 80, recalling J. Gillespie: «four fundamental principles underlie the socialist legality doctrine: the Party’s leadership rule; the class-based nature of law (law as expressing the will of the ruling class); the ready substitution of policy for law; and the predominance of the collective interest over individual rights». Cf. J. Gillespie, *The Jurification of State Regulation in Vietnam*, in J. Gillespie, A.H.Y. Chen (Eds.), *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes*, London-New York, 78-102, 2011. See also M. Sidel, *Law and Society in Vietnam*, Cambridge, 2008.

<sup>64</sup> B.N. Son, *The Discourse of Constitutional Review in Vietnam*, in 9 *Journal of Comparative Law* 2, 2014, 191.

tional review is vested in the NA's Standing Committee generally and in the Prime Minister regarding administrative documents<sup>65</sup>, yet the power to strike down an unconstitutional legal document has remained largely dormant ever since.

In response to power abuse concerns, some Vietnamese scholars strongly supported the establishment of an independent review body for ensuring the supremacy of the Constitution<sup>66</sup>. Inspired by the American experience, some proposed authorizing the existing court system to exercise the judicial review power<sup>67</sup>. This proposition however did not garner much support from Vietnamese jurists. As John Gillespie rightly pointed out, «commentators [...] question the willingness and capacity of judges in the existing judicial system to assert themselves against governmental officials, much less against party officials»<sup>68</sup>. The prevailing view has been that a specialist institution of constitutional review, such as constitutional court or council, might fare better in Vietnam's idiosyncratic system<sup>69</sup>. The specialist model was considered a better fit for three reasons. First, the principle of power unity and parliamentary supremacy renders the judiciary unable to invalidate the legislature's statutes be-

<sup>65</sup> The 1992 Constitution of Vietnam, Articles 91, 114(4); The 2013 Constitution of Vietnam, Articles 74, 98(3).

<sup>66</sup> See generally D. Tri Uc, *Tai phan hien phap va xay dung tai phan hien phap o Viet Nam* [Constitutional Adjudication and Building Constitutional Adjudication in Vietnam], in *State and Law Review* 10, 2006; T.D. Linh, *Co che Giam sat Hien phap theo cac Hien phap Viet Nam va Van de Xay dung tai phan hien phap o nuoc ta* [The Mechanism of Constitutional Supervision in Vietnamese Constitutions and the Matter of Building Constitutional Adjudication in Our Country in Present], in *State and Law Review* 1, 2007; D.T. Uc, N.N. Phat (Eds.), *Tai phan hien phap va Van de xay dung Mo hinh Tai phan hien phap o Viet Nam* [Constitutional Adjudication and the Issue of Building a Model of Constitutional Adjudication in Vietnam], Hanoi, 2007; N.N. Phat (Ed.), *Tai phan hien phap: Mot so van de ly luan co ban, Kinh nghiem quoc te va Kha nang ap dung cho Viet Nam* [Constitutional Review: Some Fundamental Theoretical Issues, International Experiences, and the Possible Application in Vietnam], Hanoi, 2011.

<sup>67</sup> N.H. Ninh, *Thiet lap co che phan quyet nhung vi pham hien phap trong hoat dong lap phap, hanh phap, va tu phap o Viet Nam* [The Creation of a Mechanism for Adjudicating the Constitutionality in the Legislative, Executive, and Judicial Actions], 2009, cited in B.N. Son, *The Discourse of Constitutional Review in Vietnam*, cit., 202.

<sup>68</sup> J. Gillespie, *Juridification of State Regulation in Vietnam*, in J. Gillespie, A. Chen (Eds.), *Legal Reforms in China and Vietnam*, cit.

<sup>69</sup> L.D. Dang, *Da den luc Thanh lap Toa an Hien phap* [It is time to Establish a Constitutional Court] at [tuoitre.vn/da-den-luc-lap-toa-an-hien-phap-204912.htm](http://tuoitre.vn/da-den-luc-lap-toa-an-hien-phap-204912.htm); *Toa An Hien phap phai Doc lap* [The Constitutional Court Must be Independent], at [plo.vn/thoi-su/chinh-tri/toa-an-hien-phap-phai-doc-lap-88854.html](http://plo.vn/thoi-su/chinh-tri/toa-an-hien-phap-phai-doc-lap-88854.html); *Góp ý Dự thảo sửa đổi Hiến pháp năm 1992: Đề xuất thành lập Tòa án Hiến pháp* [Comments on the Draft Constitution of 1992: A Proposal for the Establishment of a Constitutional Court], at [www.baodongnai.com.vn/chinhtri/201303/Gop-y-du-thao-sua-doi-Hien-phap-nam-1992-de-xuat-thanh-lap-Toa-an-Hien-phap-2223178/](http://www.baodongnai.com.vn/chinhtri/201303/Gop-y-du-thao-sua-doi-Hien-phap-nam-1992-de-xuat-thanh-lap-Toa-an-Hien-phap-2223178/).

cause it is subordinate to the NA<sup>70</sup>. Second, as observed by Bui Ngoc Son, the confidence in judges' competence and willingness, including those of the SPC, is questionable due to corruption allegations, qualifications, overloading backlog of cases as well as their political affiliation<sup>71</sup>. Third, since its independence Vietnamese people actually hold the Constitution in high regard<sup>72</sup>, thus, the contention is that lower courts should defer on constitutional questions.

In terms of its power, the constitution-makers envisaged a constitutional council with advisory function to appropriate authorities for the revision or removal of laws on constitutional grounds. In this sense, the body would operate as the supplement to rather than the substitution of the existing political system of constitutional protection<sup>73</sup>. In contrast, the majority of legal scholars, lawyers, and other intellectuals argued that another body with the advisory power is superfluous and overlapping with that of the NA's Standing Committee and specialized committees. Debates resulted in a compromise that a relatively stronger constitutional council made its way into the constitutional draft with the power to suspend the validity of unconstitutional documents.

Unfortunately, this proposal was ruled out at the very last minute, in part because of the political elites' concerns about its undetermined impacts<sup>74</sup>. Opponents of constitutional review successfully framed their arguments based on ideological Marxist historical materialism: constitutional review is considered a foreign institution of pluralist and divided

<sup>70</sup> The 2013 Constitution, Art. 105(2); N.N. Dien, *Mo hình tai phan Hien phap nao cho Viet Nam?* [Which Model of Constitutional Review Suitable for Vietnam?], in *Journal of Legislative Studies* 22, 2011, 62.

<sup>71</sup> UNDP Vietnam (2013), *Justice Index: Assessment of Distributive Justice and Equality from a Citizen-based Survey in 2012*, at [www.vn.undp.org/content/vietnam/en/home/library/democratic\\_governance/justice\\_index\\_report.html](http://www.vn.undp.org/content/vietnam/en/home/library/democratic_governance/justice_index_report.html), 55.

<sup>72</sup> *Hien phap 1992: Vuong nhieu nhung kho sua ngay* [The 1992 Constitution: Bottlenecks Difficult to be Addressed Immediately], PLO, at [plo.vn/thoi-su/chinh-tri/hien-phap-1992-vuong-nhieu-nhung-kho-sua-ngay-181464.html](http://plo.vn/thoi-su/chinh-tri/hien-phap-1992-vuong-nhieu-nhung-kho-sua-ngay-181464.html).

<sup>73</sup> *Hoi dong Hien phap khong the chi kien nghi* [The Constitutional Council Should not Merely Make Recommendations], VNN, at [vietnamnet.vn/vn/thoi-su/hoi-dong-hien-phap-khong-the-chi-kien-nghi-109577.html](http://vietnamnet.vn/vn/thoi-su/hoi-dong-hien-phap-khong-the-chi-kien-nghi-109577.html); T.N. Dinh, *Hoi dong Hien phap phai co thuc quyen* [The Constitutional Council Must Have Definitive Power], TPO, at [www.tienphong.vn/xa-hoi/hoi-dong-hien-phap-phai-co-thuc-quyen-617059.tpo](http://www.tienphong.vn/xa-hoi/hoi-dong-hien-phap-phai-co-thuc-quyen-617059.tpo); V.T. Hao, *Hoi dong Hien phap: De dat chua dung rui ro* [The Constitutional Council: Circumspection Entails Risks], VNN, at [vietnamnet.vn/vn/tuanvietnam/hoi-dong-hien-phap-de-dat-chua-dung-rui-ro-107711.html](http://vietnamnet.vn/vn/tuanvietnam/hoi-dong-hien-phap-de-dat-chua-dung-rui-ro-107711.html).

<sup>74</sup> B.N. Son, *Why Do Countries Decide not to Adopt Constitutional Review? The Case of Vietnam*, in A.H.Y. Chen, A. Harding (Eds.), *Constitutional Courts in Asia: A Comparative Perspective*, cit., 363.

politics that is unsuitable to Vietnam's monist and unitary context<sup>75</sup>. Also, they advanced that the law-making process is already stringent enough to screen out unconstitutional statutes, and the political constitutionalism is functioning relatively well to accomplish such a task<sup>76</sup>.

#### 4. Conclusion. Assimilation of foreign models? Convergence and divergence

The cases of Thailand and Vietnam are a suitable example of the influence of global constitutionalism in the new millennial era. Albeit distinct legal history and regimes, both legal systems are not immune to universal ideas and values. The two bills of rights are extensive, ranging from individual to collective rights. While Thailand has long adopted limitation clauses, Vietnam has recently introduced the general principles and objectives for the restriction of rights. Unsurprisingly, the two cases also illustrate global-local interplay where the constitution-makers attempted to harness the disruptive and rowdy elements of global constitutionalism, whisk them altogether to fit in the autochthonous cultural and religious environment. Thai morals, religion and *lèse-majesté* constitutional provisions, as well as Vietnam's statist view of citizens' rights are examples of such attempt.

Moreover, Vietnam's discourse on constitutional review sheds light on the global influences in constitutional design. Constitutional review has the allure that inspires Vietnamese scholars to mobilize for constitutionalism, the rule of law, and the protection of human rights. As Mark Sidel already noted, the 2001 constitutional amending process showed the increasing openness in constitutional dialogue than in earlier periods, which cleared some way for novelties<sup>77</sup>. His cautious optimism was ar-

<sup>75</sup> D.C.N., *Lua chon mo hinh bao hien phu hop voi the che chinh tri* [In Choosing a Constitutional Review Model Suitable to the Political System], in *Capital Security Newspaper*, 2013, at <http://anninhthudo.vn/chinh-tri-xahoi/lua-chon-mo-hinh-bao-hien-phu-hop-voi-the-che-chinh-tri/514699.antd>.

<sup>76</sup> See e.g., L. Minh, *Mot so van de ve Hoi dong Hien phap* [Some problems on the Constitutional Council], in *Capital's Security Newspaper*, 2013, at [anninhthudo.vn/chinh-tri-xa-hoi/mot-so-van-de-ve-hoi-dong-hien-phap/513106.antd](http://anninhthudo.vn/chinh-tri-xa-hoi/mot-so-van-de-ve-hoi-dong-hien-phap/513106.antd); L.K. Dinh, *Mot so van de ly luan va thuc tien ve viec khong thanh lap Hoi dong Hien phap o Viet Nam* [Some theoretical and practical issues on not to create the constitutional council in Vietnam], in *Capital Security Newspaper*, 2013, at [anninhthudo.vn/chinh-tri-xa-hoi/mot-so-van-de-ly-luan-va-thuc-tien-ve-viec-khong-thanh-lap-hoi-dong-hien-phap-o-vietnam/517937.antd](http://anninhthudo.vn/chinh-tri-xa-hoi/mot-so-van-de-ly-luan-va-thuc-tien-ve-viec-khong-thanh-lap-hoi-dong-hien-phap-o-vietnam/517937.antd).

<sup>77</sup> M. Sidel, *Analytical Models for Understanding Constitutions and Constitutional Dialogues in Socialist Transitional States: Re-Interpreting Constitutional Dialogues in Vietnam*, in 6 *Singapore Journal of International and Comparative Law* 1, 42, 2002.

guably consolidated by the 2013 constitutional discourse. Various actors, including law-makers, scholars, intellectuals, and the people, inspired by constitutionalist ideas and principles, dialogically engaged in an open and frank spirit to carve out their understandings and assessments<sup>78</sup>, which then led to a compromise in the constitutional draft. Also, it shows a gradual, yet progressive, change in the mind-set of many political elites towards this mechanism. Bui Ngoc Son opines that the proposal on constitutional review in Vietnam was motivated by the Party-State's impulse for «international acceptance and legitimacy»<sup>79</sup>. The establishment of a constitutional review body provides an additional avenue for reaffirming the Party-State's commitment to the rule of law and human rights, and thus bolstering the domestic legitimacy of its leadership. At the international level, this in turn will bolster the country's standing within the international community, because it denotes a convergence between the country's development path and the global trend.

At the other end of the spectrum, the constitutional gaps between Thailand and Vietnam are considerably deep. Over the last decade, the military – the extra-constitutional force – has repeatedly sought ways to redesign the new constitutional order and relocate the sovereignty. For this reason, «the technique of constitution [re]making appears to have become an essential weapon for legitimating and stabilizing the regime [...] insulating the coup leaders from any legal challenges by pro-democracy forces»<sup>80</sup>. Another peculiar element of Thai constitutional system is the King's blessing as prerequisite for every coup, in order to secure popular legitimacy<sup>81</sup>. This approach could be considered as a Thai way of politics to legitimate the military's actions in restoring law and order.

On the other hand, Vietnam's constitutional order has been relatively stable. The 2013 Constitution retains the basic elements of its

<sup>78</sup> On Vietnam's recent constitutional dialogue, see generally P. Nicholson, *Vietnamese Constitutionalism: The Reform Possibilities*, in 11 *Asian Journal of Comparative Law* 2, 2016, 199; J. Gillespie, *Public Discourse and Constitutional Change: A Comparison of Vietnam and Indonesia*, in 11 *Asian Journal of Comparative Law* 2, 2016, 209; N.S. Bui, *Contextualizing the Global Constitution-Making Process: The Case of Vietnam*, in 64 *American Journal of Comparative Law* 4, 2016, 931; B.H. Thiem, *Liberal Constitutionalism and the Socialist State in an Era of Globalization: An Inquiry into Vietnam's Constitutional Discourse and Power Structures*, in 5 *The Global Studies Journal* 2, 2013, 43.

<sup>79</sup> B.N. Son, *The Discourse of Constitutional Review in Vietnam*, cit., 216-219.

<sup>80</sup> A. Harding, P. Leelapatana, *Constitution-Making in 21<sup>st</sup>-Century Thailand*, cit.

<sup>81</sup> K. Tonsakulrungruang, *Chaos, Kings, and Thailand's 20<sup>th</sup> Constitution*, in *International Journal of Comparative Law Blog*, 11 Apr 2017, at [www.icconnectblog.com/2017/04/chaos-kings-and-thailands-20th-constitution](http://www.icconnectblog.com/2017/04/chaos-kings-and-thailands-20th-constitution).

previous constitution with the legislative supremacy. The government and the judiciary are subordinate to the National Assembly in every aspect. Although the leading role of the Communist Party of Vietnam is modestly, yet consistently, mentioned in the Constitution, its role should never be understated in Vietnam's political system. It is the preponderant actor behind every Vietnam's constitutional overhaul. Most probably, this is the reason for the stable constitutional order of Vietnam.

Regarding the constitutional review, the Thai Constitutional Court were empowered in the 2007 Constitution and even expanded in the 2017 text. Differently, Vietnamese constitutional review bears the experiences of the former members of the Soviet bloc, which painted a negative image of constitutional review in the eyes of the contemporary socialist regimes. The failure to adopt constitutional review in Vietnam represents the resistance model identified by Vicki Jackson in terms of transnational constitutional influences<sup>82</sup>. Vietnamese constitution drafters resisted transnational influences by locating their constitutional identity as autochthonous from foreign ones.

«Ideas have wings. No legal system of significance has been able to claim freedom from foreign inspiration»<sup>83</sup>. Constitutional settings are not rigidly fixed: constitution-makers, judges, scholars seek inspiration from or are influenced in one way or another by foreign countries' constitutional structure. This has led to the inevitability of some forms of constitutional convergence<sup>84</sup>. While external influence is salient, the foreign ideas are – and should be – situated within the local context and balanced with local ideas. As Saunders underscores, «constitutions are inherently local instruments. They must respond to local needs and they must be “owned” both by the people of the State concerned and by their political leaders from time to time»<sup>85</sup>. Hence, the globalization

<sup>82</sup> V. Jackson, *Constitutional Engagement in a Transnational Era*, Oxford, 2010, 19-30; L.-a. Thio, *Reception and Resistance: Globalization, International Law and the Singapore Constitution*, in *National Taiwan University Law Review* 4, 2009, 335.

<sup>83</sup> H. Hahlo, E. Kahn, *The South African Legal System and its Background*, Cape Town, 1973, 484.

<sup>84</sup> See T. Groppi, M.-C. Ponthoreau (Eds.), *The Use of Foreign Precedents by Constitutional Judges*, Oxford, 2013; G.F. Ferrari (Ed.), *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems*, Leiden-Boston, 2019; J.-R. Yeh, W.-C. Chang (Ed.), *Asian Courts in Context*, Cambridge, 2014; W.-C. Chang, L.-a. Thio, K. YL Tan, J.-r. Yeh., *Constitutionalism in Asia: Cases and Materials*, cit.; A. Chen, A. Harding (Eds.), *Constitutional Courts in Asia: A Comparative Perspective*, cit.

<sup>85</sup> C. Saunders, *Towards a Global Constitutional Gene Pool*, cit.

of constitutional law inevitably creates disharmonies between local and global values. The constitutional convergence is thus «constrained by, and filtered through, local political culture, the composition and power held by political elites, ideologies, and other factors that speak to the polity's identity»<sup>86</sup>.

Pasquale Viola  
Dipartimento di Scienze politiche e sociali  
Università di Bologna  
Strada Maggiore 45  
40125 Bologna  
pasquale.viola2@unibo.it

Nguyen Tien Duc  
University of Campania "Luigi Vanvitelli"  
and  
Department of International Law  
Institute of State and Law (ISL)  
Vietnam Academy of Social Sciences (VASS)  
Tran Xuan Soan 27, Hai Ba Trung  
Ha Noi, Vietnam  
ng.tien.duc@gmail.com

<sup>86</sup> M. de Visser, N.S. Bui, *Contemporary Constitution Making in Asia-Pacific*, in 7 *The Chinese Journal of Comparative Law* 2, 2019, 241, 244.