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Pham Duy Nghia*

“In order to institutionalize the Party program to build Socialism, we the people of Vietnam, make this Constitution”. Preamble 2013 Constitution of Vietnam

I. Introductory Overview

Long synonymous as war, since 1986 transformed from one of the poorest countries into a low middle-income country, Vietnam is now one of the most dynamic emerging countries in the world¹. With 95 million population, reaching the development level compatible to the Philippines or Egypt², Vietnam is home for millions of private business and an attractive destination for foreign direct investment. The life of million Vietnamese was improved, poverty significantly reduced, by 2035 more than half of Vietnamese population are projected to join ranks of global middle class with consumption of \$15 a day or more³. Aggressively integrated into the global economy, Vietnam is party of dozen free trade agreements, including Vietnam-EU, Vietnam-Japan, and CP-TPP⁴. In regard of trade openness, Vietnam ranks globally the fifth among the most open economies in the world, just following Luxembourg, Hongkong, Singapore, and Ireland⁵, with total trade more than double the size of its GDP.

In contrast to rapid changes in dismantling the command economy and embracing market reforms, the political system undergone less visible evolution. Still labelled as communist regime, Vietnam is one of the few socialist countries remaining after the collapse of the Soviet Union and communist block of East Europe. Sharing with China the wholesale reception of Soviet origin, Vietnam’s party-state is characterized by the rule of the single Communist Party (CPV). In line with

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¹ <https://www.worldbank.org/en/country/vietnam/overview>

² http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf

³ WB Vietnam 2035 Report, p 12, at <https://auschamvn.org/wp-content/uploads/2017/06/World-Bank-Vietnam-report-2035.pdf>

⁴ <http://wtocenter.vn/fta>

⁵ https://www.theglobaleconomy.com/rankings/trade_openness/

the Marxist jargon, as provided by 1980 Constitution, the party-state of Vietnam was one defined naked and uncovered as “dictatorship of proletariat”⁶.

This totalitarian approach was then replaced by the populist and vaguer concept of “socialist state of the people, by the people, and for the people”. Despite this shedding, the CPV still firmly controls the political life and entirely the state power at all level. In the political system, the party employs a complex of mass organizations under the umbrella of the Fatherland Front, supposedly to represent the interests of all social classes, ethnics, religions in the whole society⁷. Claiming that this political regime is recognized by Vietnamese people, the CPV rejects the multi-party democracy, rejects to follow the doctrine to tripartite state power into independent branches (check and balance), constraints political oppositional forces which demand pluralism, free election, or otherwise challenge the party leadership. Army, police, and public servants are required by law to be loyal to the party⁸. The CPV also installs a sophisticated system of censorship to ensure that journalism complies with the party lines⁹. Political freedom is only tolerated when not challenging the party’s power. In the lens of liberal democracy, it is an authoritarian regime.

That is in a nutshell the essence of political system in Vietnam, which remains unchanged since the CPV is in power. However, in its struggle for survival, the party-state in Vietnam proves as extremely creative in maintaining public trust, it is adaptive in responding to external or internal threats¹⁰. The party continuedly initiates and pushes for institutional reforms, either of political, legal, or administrative nature to strengthen its legitimacy to rule. The party often pragmatically

⁶ As provided by the first sentence of Article 2 Vietnam Constitution 1980 “the socialist republic of Vietnam is the dictatorship of proletariat”.

⁷ An English Vision of the 1999 Law on Fatherland Front is available at <http://mattran.org.vn/home/gioithieumt/luatmt/lmttqvn1.htm>

⁸ See Session 6.2.a Law on professional soldiers, worker, and servants in army forces, dated 26/11/2015, Session 31.1 Law on People Police adopted 20/11/2018, and Session 8.1 Law on cadres and public servants dated 13/11/2008, all providing that army, police forces and public servants must absolutely loyal to the Party.

⁹ Samantha Libby, THE ART OF CENSORSHIP IN VIETNAM, *Journal of International Affairs*, Vol. 65, No. 1, Inside the Authoritarian State (FALL/WINTER 2011), pp. 209-218

¹⁰ Fragmented communist forces was consolidated in 1932 under name of Communist Party of Indochina. The party came in power in aftermath of the World War II, as nationalist forces leading to the formation of Democratic Republic of Vietnam (DRV). DRV was soon at war with France, which intended to force Indochina under its colonial rule. DRV was also not recognized internationally, particularly not by the allied forces at WWII (USA, England, Soviet Union). In its struggle for national independence, the party, then Communist Party of Indochina, was formally dissolved in 1945 as a tactical move to hide its communist affiliation and was re-founded as the Workers Party of Vietnam in 1951 (after DRV was recognized first by People Republic of China, Soviet Union, then by North Korea). In South Vietnam, the communist party took the name of People’s Revolutionary Party of Vietnam, which was created in 1962. Both parties merged formally in 1976 into a single ruling party, and since then the party takes the name CPV. See for more information: [Honey, P. J., North Vietnam's Workers' Party and South Vietnam's People's Revolutionary Party](#), published in *Pacific Affairs*, Vol. 35, No. 4, (Winter, 1962–1963), pp. 375-383, or Thayer, Carlyle A. (2009), *Political Legitimacy of Vietnam's One Party-State: Challenges and Responses*, in: *Journal of Current Southeast Asian Affairs*, 28, 4, 47-70. ISSN: 1868-4882 (online), ISSN: 1868-1034 (print).

reinvented the Marxist-Leninist doctrine to cope with the new realities. As result of these social changes, the actors, their influences in political life, and the ways how public power is exercised in Vietnam, has changed gradually. In other words, within the umbrella of a socialist regime, changes in governance appears both as feasible and necessary. The party-state in Vietnam is indeed a creative and dynamic authoritarian regime, which is extremely resilient and may endure global political turbulences for decades to come¹¹.

The Vietnam party-state understandably shares extensive similarities with those of China, simply because one cannot understand Vietnam without knowing the deep-rooted influences from its northern neighbor. For centuries, Vietnam's elite had received the Confucian cultural complex. Dynasties for dynasties, Vietnam borrowed from China the Chinese written language, the educational system, the social hierarchy, civil service bureaucracy, law, procedures and other knowledge in state building¹². The communist movement in Vietnam was also deeply rooted and connected with those of China¹³. Continuedly from the formation of DRV in 1945 and of PRC in 1949, until today, Vietnam and China shared the same experiences in institutionalizing the communist rule, had faced the same stagnation of the command economy, and are looking toward to the same goal to modernize their nation respectively¹⁴. At first glance, most paths of economic and political reforms in both countries are therefore very compatible. Sharing compatible cultural, historical, economic and political setting, and facing the compatible fate, China and Vietnam stories are somehow path dependent.

At deeper look, beyond sharing common features of the one party-state regime inherited from the Soviet model and from the Confucian tradition, political reform trajectories in China and Vietnam tend to diverge, rather than converge. This conclusion is made by several authors, who observed and analyzed the vibrant debates at the eve of 2013 constitution revision, the growing space for civil society¹⁵, and the extent to which Vietnam government tolerated public discontents,

¹¹ Nguyen, Hai Hong (2016), Resilience of the Communist Party of Vietnam's Authoritarian Regime since Doi Moi, in: *Journal of Current Southeast Asian Affairs*, 35, 2, 31–55.

¹² See for example: M. Coughlin, Vietnam: In China's Shadow, *Journal of Southeast Asian History*, Vol. 8, No. 2 (Sep., 1967), pp. 240-249.

¹³ HUYNH Kim Khanh, The Vietnamese Communist Movement Revisited, *Southeast Asian Affairs*, (1976), pp. 445-466 (22 pages)

¹⁴ Dosch, Jörn: *The impact of China on governance structures in Vietnam* / Jörn Dosch; Alexander L. Vuving. DIE Research Project "The Impact of Russia, India and China on Governance Structures in their Regional Environment (RICGOV)". – Bonn: DIE, 2008. – (Discussion Paper / Deutsches Institut für Entwicklungspolitik ; 14/2008) ISBN: 978-3-88985-404-9

¹⁵ [http://www.undp.org/content/dam/vietnam/docs/Publications/22110_3202_Civicuc_report_E_%20\(1\).pdf](http://www.undp.org/content/dam/vietnam/docs/Publications/22110_3202_Civicuc_report_E_%20(1).pdf) also at <http://isee.org.vn/wp-content/uploads/2018/11/benchmark-assessment-of-civil-society-space-in-vietnam..pdf>

for example, protests on the Bill on Special Economic Zones in June 2018¹⁶. Based on this analysis, they conclude that the scope for depth of reform appears deeper in Vietnam, it is much more open and receptive toward international norms, the country is more tolerant and permissive toward civil society than its Chinese counterpart¹⁷.

Political reform trajectories are hardly predictable, time will tell. Based on a handful of case analysis, such as the movement “Petition 72” during the constitutional debates in 2013¹⁸, one may just tell a single story, but possibly cannot fully explain the dynamic forces leading to the changes. The fact is, albeit the promulgation of the 2013 constitution, containing a long list of political rights, there is no significant improvement in regards of political freedom and transparency in Vietnam¹⁹. At the same year 2018 as the Bill on Special Economic Zones was postponed under pressure of public protests, Vietnam National Assembly adopted the restrictive Law on Cybersecurity, projecting to tighten the police control over the use of internet and social media²⁰. Compatible to CPC’s practice, the CPV announced a long list prohibiting its members to do activities, which may challenge the party’s legitimacy, for instance the party prohibits behaviors rejecting the foundation of Marxism Leninism, prohibits behaviors calling for tripartite state power, promoting civil society, and so forth. Such behaviors labeled as “peacefully evolution”, if practiced by party members, may lead to severe party discipline consequences, possibly to dismissal from the party²¹. The observation that Vietnam party state is permissive and more tolerant toward civil society proves as not always true.

¹⁶ <https://e.vnexpress.net/news/business/economy/vietnam-parliament-not-to-discuss-sez-bill-in-october-session-3797985.html>

¹⁷ FU Hualing and Jason BUI, “Diverging Trends in the Socialist Constitutionalism of the People’s Republic of China and Socialist Republic of Vietnam” (Paper delivered at the ‘What is Socialist about Socialist Law? Exploring Epistemic and Institutional Change in Socialist Asia’ Conference, University of Hong Kong, 28–29 October 2015), published in SSRN Electronic Journal, January 2017, available at https://www.researchgate.net/publication/319585124_Diverging_Trends_in_the_Socialist_Constitutionalism_of_the_People's_Republic_of_China_and_Socialist_Republic_of_Vietnam. Also refer to additional publications, such as: Pip NICHOLSON, *Vietnamese Constitutionalism: The Reform Possibilities*, Asian Journal of Comparative Law, 11 (2016), pp. 199–207, Ngoc Son BUI, ‘Societal Culture and Constitutions: The case of Vietnam’, Melbourne Forum for Constitution-Building, Bui Son and Pip Nicholson, *Activism and Popular Constitutionalism in Contemporary Vietnam*, Law & Social Inquiry, Volume 42, Issue 3, Summer 2017, pp. 677-710.

¹⁸ Bui Ngoc Son, Pip Nicholson, *Activism and Popular Constitutionalism in Contemporary Vietnam*, Law & Social Inquiry, Volume 42, Issue 3 Summer 2017, Pages 677-710

¹⁹ For 2018, Freedom House rated Vietnam the score 6/7 (with 1 = most free and 7 = least free), available at <https://freedomhouse.org/report/freedom-world/2018/vietnam> and Transparency International rated Vietnam the score 33/100 (with 0 = highly corrupt and 100 = very clean) <https://www.transparency.org/country/VNM>

²⁰ <https://thediplomat.com/2019/01/vietnams-controversial-cybersecurity-law-spells-tough-times-for-activists/>

²¹ CPV Regulation No 102/QD-TW adopted by the Central Committee on Party Discipline. Interpreting guidelines to party discipline are available at Website of the Central Inspection Committee <http://ubkttw.vn/home>

Albeit all these contradictions and uncertainties, it is certain that Vietnam reform story diverges from the China story in some ways. The size of the country and its economy, the social structure and cultural tradition, all may matter. Vietnam economic, political and social changes emerged from the country's unique context. The similarities, if then, are results of path dependent reform policies, rather than consequences of imitation.

Like any other success stories in Asia (Japan, Korea, Taiwan or China), one prerequisite for economic success in Vietnam is that the party-state must ensure an effective bureaucracy to formulate sound policies and enforce them properly²². Ensuring the government efficiency to facilitate development, creating jobs, maintaining peace and order and otherwise providing necessary public service to the people also reinforce the party legitimacy to rule (performance-based legitimacy)²³. In another word, maintaining a well-functioning of the administrative bureaucracy, efficient in providing public goods and accountable to the party and citizen, is therefore crucially important for regime survival and sustainable development in Vietnam.

In this endeavor, Vietnam party-state rediscovered the usefulness of the law. To facilitate market-oriented policies, the party initiated a comprehensive legal reform, which overhauled entirely the legal system, the legislative process, the judiciary system, and most essentially the administrative bureaucracy²⁴.

Since its 2001 revision, Vietnam constitution contents a notion of socialist state ruled by law *"socialist state, of the people, by the people, for the people, ruled by law"*²⁵. The constitution further explains the state ruled by law by providing that *"state shall be organized and operate according to Constitution and law; the state shall manage the society by means of law and practice the principle of democratic centralism"*²⁶.

²² Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalisation of Democracy* (Profile Books, 2014).

²³ Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalisation of Democracy* (Profile Books, 2014).

²⁴ CPV adopted several legal, judicial, and administrative reform strategies, see for instance Resolution 48/NQ-TW dated 24/05/2005 on legal reform, Resolution 49/NQ-TW dated 02/06/2005 on judicial reform, and Resolution 18/NQ-TW dated 25/10/2017 on further reform of state apparatus.

²⁵ Vietnam had adopted the first constitution in 1946, then replaced by 1959 constitution (after Dien Bien Phu). After reunification, a new constitution was adopted in 1980, heavily borrowed from 1977 Constitution of the Soviet Union. Embraced on reform, the constitution was revised in 1992, 2001, and finally replaced by the 2013 constitution. The notion "rule by law" was introduced by 2001 revision (National Assembly Resolution 51/2001/QH10 dated 25/12/2001).

²⁶ Session 8, Para 1, 2013 Constitution

Theoretician may continue the debate as how to choose the right among different terms, either socialist legality, rule of law, or rule by law²⁷, to describe the concept of party-state ruled by one communist party, which enforces law to control the political system and society as whole. Because of the lack of the right concept, this paper uses the term constitutional government. **Constitutional government is defined by the existence of constitution, law, and other rules, that effectively controls the exercise of political power, ensures a functioning bureaucracy, disciplines public servants and holds them accountable to the party and to the public.**

This paper (chapter) will explore the evolution toward constitutional government in Vietnam. I argue that changes are feasible because of the pragmatic nature of the VCP. In distinction to communist movement in the former Soviet Union and East Europe, VCP deeply roots in the nationalist movement and Confucian tradition of being the elite serving the public with pragmatic goals. Because of leadership crisis during the XIX century, the nationalist elite within Vietnam society, in the fight against the French colonial rule, welcome the idea of communism almost accidentally²⁸. They borrowed the Leninist party as organization model to unite the elite among patriotic forces, and then to mobilize the mass for archiving the independence from the colonial rule. In its struggle for power and survival, the CPV frequently build and changed strategic alliances with different forces, which were supportive toward its leadership. Looking that way, new stage-holders emerge as Vietnam evolves since 1986 renovation policy, the party adjusts its alliance accordingly to affirm its rule.

Further, this chapter attempts to explain the main drivers leading to evolution toward the constitutional government in Vietnam. I argue that the main drivers include: (i) the central party-state apparatus, (ii) provinces, (iii) business sector, and (iv) the changing, demanding public.

II. The notion of constitutional government within the socialist legality tradition

2.1. Origin of Vietnam constitutional government concept

In historical perspective, the notion of constitution “hiến pháp” was borrowed into Vietnamese language only around a century ago²⁹. Likewise, the notion of “*socialist rule by law state*” or

²⁷ Vietnam Constitution uses the phrase “pháp quyền” (“law” and “power/authority”), and not “pháp trị”, (法治 fazhi, “law” and “to govern”), a concept coined in the 2nd or 3rd century B.C. by the founders of the Legalist school of political thinkers who were rivals to the Confucians.

²⁸ Jean Chesneaux, *The Historical Background of Vietnamese Communism, Government and Opposition*, January 1969, Volume 4, Issue 1, Pages 118-140, also in HUYNH Kim Khanh (1976) *Ibid*.

²⁹ Phan Diem, *Constitutional Ideology of Ho Chi Minh*, *Vietnam Law and Legal Forum*, 29/11/2012, <http://vietnamlawmagazine.vn/constitutional-ideology-of-ho-chi-minh-4450.html>

“socialist law-governed state” in Vietnam constitution, depending on how to translate into English the term “*nhà nước pháp quyền xã hội chủ nghĩa*”, just appeared since its 2001 revision³⁰.

However, the idea to restrain public power by rules is not new in Vietnam history. Within the complexity of Confucian values and ethics, there were rules and institutions imposing restriction on the exercise of power of the king and its subordinated bureaucracy system. Mandate of the son of heaven (king) and gentlemen (mandarin) means also to bear several duties and obligations, primarily to serve to the country and subordinated subjects (citizen). Dynasties replaced dynasties, but Vietnam traditional bureaucracy sustains, it inherits from a long tradition in recruitment, training, rotation, promotion, compensation and oversight of public officials, in developing of administrative habits and rituals³¹. Paul Doumer, the French Governor-General of Indochina (1897-1902), once described in astonishing details how efficient the village’s autonomous government and Vietnam traditional mandarin bureaucracy worked when serving the new ruler under French domination³².

If so considered, origin of constitutional government in traditional Vietnam, one may call it Confucian constitutionalism³³, did exist in some form, without existence of any formal written constitution. Obviously, since Confucian values are vague, thus subject to ruler’s interpretation, this kind of so-called “Confucian constitutional government” appears less impersonal, hardly to enforce, and consequently, agreeably inefficient. Nonetheless, the concept to restrain public power under boundary of law and rules rooted deeply in the social norm-based society in Vietnam, a mixture of Confucian rules and Legalist tradition. Not surprisingly, many of CPV’s rhetoric today still recall its roots in Confucian ethics³⁴.

In the aftermath of world war II, Vietnam liberated itself in 1945 from Japanese domination, notably with little support from United States³⁵, and almost no support from the Soviet Union. When Kuomintang troops entered the North and British forces in the South, they found the Democratic Republic of Vietnam under Ho Chi Minh already established. Not recognized by any of

³⁰ Nguyen Viet Thong, Party affirms building of a socialist law-governed state, Vietnam Law and Legal Forum, 30/05/2011, <http://vietnamlawmagazine.vn/party-affirms-building-of-a-socialist-law-governed-state-3263.html>

³¹ Emmanuel Poisson, *Quan và lại ở Miền Bắc Việt Nam*, NXB Trí Thức 2018

³² Paul Doumer, *Xứ Đông Dương*, NXB Thế Giới, 2015, tr. 271

³³ See: Kim Kyong Dong, 2017, *Confucianism & Modernization in East Asia: Critical Reflexions*, Palgrave McMillan, also BUI NGOC SON, *Confucian Constitutionalism in East Asia*, Routledge, 2016

³⁴ See Communist Review, for example: The Current Struggle Against Individualism, <http://english.tapchiconsan.org.vn/Home/Theory-and-Reality/2016/632/The-current-struggle-against-individualism.aspx>

³⁵ United States O.S.S. Deer Team supports Ho Chi Minh guerrillas in Summer 1945, <https://www.nytimes.com/2013/04/18/world/asia/henry-a-prunier-army-operative-who-helped-trained-vietnamese-troops-dies-at-91.html>

these allied forces, particularly later by the French, Ho Chi Minh maneuvered to formally dissolve the CPV and was forced to build an interim coalition government with participation of different non-communist forces. That context explains why non-communists, including the then dedicated emperor Bao Dai, were among the few drafters of Vietnam very first written constitution in 1946³⁶. The 1946 constitution projected to install for Vietnam a multi parties system modeled on a semi-presidential government, with elements of check and balance among the power of the National Assembly, the executive heading by the President, and the judiciary, by recognizing a wide range of political and economic freedoms of individuals. Adopted, but never promulgated, the 1946 Constitution was practically never enforced in Vietnam³⁷. The first Indochina war started at full scale and range only few days later, and Ho Chi Minh government went underground immediately on 19/11/1946. The alliance among communist and non-communist forces ceased to exist at time when CPV gained the absolute rule during the resistance war against French forces.

In contrast to 1946 constitution, all constitutions subsequently adopted in 1959, 1980, 1992, revised 2001, and 2013, are socialist in their nature³⁸. As the country was divided and at war, a government ruled by law was not the primary concern of the CPV during the time from 1959-1980. The society was governed mostly by party directives and resolutions, rather than by formal law³⁹. The party exercised naked political power, with little legal institutions. The 1959 constitution contents only a vague provision requiring “*all officials to be loyal to the regime of people democracy (i.e. DRV) and shall observe Constitution and law*”⁴⁰. During this period, the ministry of justice was dissolved, no law school existed⁴¹. Political cadres replaced professional judges, so-called people defending counselors (bảo chữa viên nhân dân) replaced professional lawyer in court procedures, bar associations as profession of practicing lawyers did not exist⁴².

³⁶ Phan Diem, The 1946 Constituion of Vietnam, Vietnam Law and Legal Forum, 29/11/2012, <http://vietnamlawmagazine.vn/the-1946-constitution-of-vietnam-4443.html>

³⁷ Vu Hong Anh, Ban ve lap hien, Legislative Studies (7/2008), <http://quochoi.vn/tulieuquochoi/anpham/Pages/anpham.aspx?AnPhamItemID=31>

³⁸ Republic of Vietnam (known as South Vietnam) during its existence 1950-1975 adopted two constitutions in 1959 and 1967.

³⁹ The National Assembly passed only 9 laws during the period 1959-1980, see Nguyen Sinh Hung, 70 Years of National Assembly of Vietnam, Communist Review, 2016, <http://english.tapchiconsan.org.vn/Home/Focus/2016/511/Seventy-years-of-the-National-Assembly-of-Viet-Nam-70-years-of.aspx>

⁴⁰ Session 6 of DRV 1959 Constitution.

⁴¹ THIEM H. BUI, Deconstructing the “Socialist” Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam’s Constitutional Reform Process, Contemporary Southeast Asia Vol. 36, No. 1 (2014), pp. 77–100.

⁴² Hội Luật gia Việt Nam, frequently misleading translated as Vietnam Lawyer Association (VLA), founded in 1955 as a political association representing the jurists under the party leadership. VLA still exists, but it is not the professional association of practising lawyers. Members of VLA include any person involving in police, legal and judicial activities. On the opposite, licensed lawyers are organized in bars at the province where they have registered their law offices

Only after the country unification in 1975, building an efficient legal system gained some more attention. The 1980 constitution contents a provision on socialist legality, provided that *“state shall manage the society by means of law and devote continuedly to improve the socialist legality, all state authorities, social organizations, and citizen shall observe Constitution and the law”*⁴³. The orientation on socialist legality remained substantially unchanged in subsequent constitutional revisions in 1992 and 2001, albeit with minor modification⁴⁴. The current 2013 constitution defines Vietnam as *“socialist state ruled by law”* and provides at session 8 that *“the state is organized and operates in accordance to Constitution and law, the state manages society by means of Constitution and law, practices the principle of democratic centralism”*.

2.2. Hybridity of party internal rules and formal law

The core element of socialist legality is that Constitution and law shall base on CPV politics (strategies, manifest, plans, programs, orientation, directives, guidelines). The CPV politics, if in written form, are adopted by organizations within the party apparatus. Not law shall have the supremacy, but the party rules shall prevail and form foundation and spirit for the law. Law helps to implement the party-internal policies by translating them into normative legal documents, which are binding to the society as whole. The preamble of 2013 constitution, for example, stated that *“in institutionalizing the party program to build socialism, we Vietnamese people make, enforce, and protect this constitution”*. The party program is therefore the foundation for the constitution.

In distinction to pre-1986 period, parallel and corresponding to the hierarchy of CPV’s internal rules, the body of written normative legal documents grows steadily⁴⁵. Sources of law in Vietnam are primarily written law, promulgated in form of normative documents, including laws and resolutions adopted by elective bodies, governmental decrees, ministerial circulars, administrative decisions issued by the central and local administration at all levels, and regulations issued by the Supreme Court, Supreme Inspectorate, and by some political central mass organizations in case they are authorized to do so (for instance Trade Union, Youth Union may adopt inter-circulars in conjunction with state authorities in certain issues concerning its members). Whoever initiates a

respectively, the bars were organized at national level under the umbrella of Vietnam Federation of Bars (VFB). VFB was founded in 2008.

⁴³ Session 12 of 1980 Constitution.

⁴⁴ Compare Session 12 of 1980 Constitution, Session 12 of 1992 Constitution (unchanged in its 2001 revision), and Session 8 of 2013 Constitution. Note, the notion “socialist legality” appears only in 1980 and 1992 Constitution. Since 2001, instead of “socialist legality”, the term “socialist rule by law” is used more frequently. The term socialist legality disappeared entirely in 2013 Constitution, but the name of “department of legality” (vụ pháp chế, phòng pháp chế) still exists in line ministries, central and local state agencies, and in large SOEs.

⁴⁵ Session 4 of Law on Promulgation of Normative Legal Documents 2015.

draft normative legal document, to review, or issue such a document, must base on party's program, orientation and guidelines (đường lối, chủ trương của Đảng), then following government's policy (chính sách của nhà nước)⁴⁶. In many cases, it is hardly to make a clear distinction between the party's program and government's policy, they are mutually inclusive. Whilst party's program focuses more on the goal in general, the government's policy is supposed to explain in more details on strategies how to reach to this goal, for instance: target groups and vulnerable groups which may be impacted negatively by the policy, implementing agencies, timeline, cost, remedies, etc.

This hybrid system of party rules and formal law may exist in another socialist party states as well. However, committed to a government ruled by law, the system of formal law in Vietnam must become transparent and easily accessible, now also available online⁴⁷. Rule of law in Vietnam is primarily understood that law must be public and accessible, generally applicable and largely consistent⁴⁸.

Under this pressure, the legislative process in Vietnam is improved in term of transparency and public participation⁴⁹. Individual or agency initiating a bill or draft administrative regulation must conduct regulatory impact assessment, publish draft for comments, people whom may feel negatively impacted by the draft regulation, may have a chance to make voice and to be heard⁵⁰. This process starts in Vietnam frequently with the formation of party's politics, then the formation of state's policies, usually represented by governmental ministries, followed legislative debate and voting. A system of screening to detect non-compliance is installed by Ministry of Justice. Normative legal documents, which were improperly promulgated in violating of such procedures, can be declared unlawful, and void⁵¹. Overall, law become more predictable. All these improvements in formal law push pressures to the Party and its internal rule making, challenging

⁴⁶ Sesion 32, 39 Law on Promulgation of Normative Legal Documents 2015.

⁴⁷ Vietnam Law online <http://vbpl.vn/pages/portal.aspx>

⁴⁸ Gillespie and Chen, Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes (New York: Routledge, 2010)

⁴⁹ The National Assembly provides online database on draft laws with detailed background information, bill proposal, regulatory impact assessment, policy reviews and opinion, experts comment, and parliamentary debates, see <http://duthaonline.quochoi.vn/Pages/default.aspx> At governmental and ministerial level, drafts of regulations must be published also online, see <http://chinhphu.vn/portal/page/portal/chinhphu/congdan/DuThaoVanBan>

⁵⁰ See 2015 Law on Promulgation of Normative Legal Documents, overview at <http://vietnamlawmagazine.vn/new-law-on-promulgation-of-legal-documents-5061.html> and Guidelines on Policy Making Process <http://vietnamlawmagazine.vn/new-decree-clarifies-the-policy-making-process-5430.html> also UNDP Research report: Legislative processes and procedures of the National Assembly (2012) http://www.vn.undp.org/content/vietnam/en/home/library/democratic_governance/Research-report-Legislative-processes-and-procedures-of-the-National-Assembly.html

⁵¹ Dealing with unlawful documents 2018: <http://vietnamlawmagazine.vn/thousands-of-unlawful-documents-issued-last-year-justice-ministry-report-6336.html>

its tradition keeping secretly as how politics are formed within the party apparatus. Thus, possibly unintended, improvement in formal law is a momentum, pushing the Party under pressure to be accountable to the public⁵². Recently, the Party begins to systemize and standardize its internal rules. Compatibly to the body of 15 categories of formal written law, the hierarchy of party internal rules begin to take shape, with some 25 different documentary forms adopted by all levels within the party apparatus⁵³. Obviously, in contrast to formal law, party rules are not entirely documented in writing, and if in writing, not all documents are freely accessible to the public. Parts of party rules remain in some secret forms and never disclosed⁵⁴. The ways these Party internal rules were initiated, debated, and adopted are still very unclear, leaving much rooms for rumors and speculations.

Formal state's rules and party's rules differ also significantly in their substance and formulation. In distinction to formal law, which is supposed to be clear, certain, predictable, enforceable, the party rules and politics are not. They are formulated in political, vague, sometime populist terminology, rather than in legal jargon. The ambiguity of party rules, at one hand, creates flexibility, but at another hand, may expose severe risks for policy makers at all level. Terms, such as: socialist oriented market economy, ownership of entire Vietnamese people on land and natural resource, the leading role of SOEs and of state economic sector, equitization of SOEs, socialization of public facilities units (hospitals, schools, theaters, etc.), public private partnership (PPP), decentralization of authority to local level, rotation of cadres, and so forth are rhetoric frequently used in party rules and in formal law in Vietnam during the last three decades. Like Confucian value in the past, these terminologies are ambiguous, thus open chance for interpretation by fractions and forces which gain the upper hand within the party ruling elite.

2.3. The main stakeholders behind constitutional government

Behind the curtain of formal law and party internal politics, changes occurred in Vietnam because alliances emerged among the party ruling elite with dispersed stakeholders who are pushing for institutionalizing of new rules for the game. These include particularly: the central party state

⁵² As result of public debates, Session 4, para 2, of 2013 Constitution contents a new provision, stating that the CPV is accountable before the Vietnamese people for its decisions. However, the Session is silent on how CPV will be hold for accountable.

⁵³ Parallel to the 2015 Law on Promulgation of Normative Legal Documents, applying to formal law, the CPV adopted its own rule making procedures applying to Party documents, compatible to normative legal documents, see Decision 66/QD-TW dated 06/02/2017 on Party documents, and Guideline 36-HD/VPTW dated 03/04/2018 to implement the aforesaid Decision 66/QD-TW. Session 4 of Decision 66/QD-TW provides 25 different forms of Party documents. By far not all party documents are public, but these are some first efforts to systemize these rules at <http://tulieuvankien.dangcongsan.vn/>

⁵⁴ For example, the agreement between CCP and CPV on summit in September 1990 in Chengdu (China) on normalization of China and Vietnam was never disclosed to the public.

apparatus, the provinces, business sector, and the public. This diffuse power and variety of channels forcing for consensus building, that make the Vietnam story different than China. The uncertainty of the game among these stakeholders may also explain why Vietnam is possibly more fertile to receive the ideas of international constitutionalism than China.

Theoretically, within the communist realm, the party congress is supposed to be the highest political organ of any communist party. Held at intervals of every five years, the party congress adopts national strategic politics and elects the country leadership. From 1986 to now, there are seven party congresses. During the legislature between the two successive congresses, the ultimate party power at central level is rested with the following authorities: Politburo, Central Committee (CC), CC Secretariat, and eight Party Commissions. This narrow circle of political elite includes around 180 CC members, sharing all top posts in executive, legislative, judiciary, political associations, and so forth. One may add 500 representatives of the National Assembly to this elite circle, making the amount increase to about 680 people, representing 95 million Vietnamese souls⁵⁵. (This calculation is just an illustration for the political elite in Vietnam, but it is certainly not correct. $\frac{3}{4}$ of NA representatives are part-time deputies, being top leaders in the party apparatus, executive, judiciary, mass organization or in SOEs).

Years	Party Congress	Central Committee	Politburo
1986-1991	6 th	124	13
1991-1996	7 th	226	13
1996-2001	8 th	170	19
2001-2006	9 th	148	15
2006-2011	10 th	160	15
2011-2016	11 th	173	16
2016-2021	12 th	180	18

Note: Size and composition of CPV Central Committee and Politburo from 1986-2016

Without pluralism and multi-party system, however, the internal competition for influences on party congress and for CC membership is fiercely. The formalities and requirements to select delegates attending the congress, to nominate candidates for CC membership, and the voting procedures become the decisive rule of the political game. This rule evolves over time, and just recently become partly accessible to the public⁵⁶. This will certainly be true for the upcoming 13th party congress to be held in January 2021. In retrospect, the last 12th party congress, held in

⁵⁵ Fu Hualing, Jason Buhi (2017)

⁵⁶ See for example: Regulation 105/QD-TW dated 19/12/2017 on human resource management (cadres management) issued by CPV Central Committee.

January 2016, consists of 1510 delegates, such adding more than 1300 new delegates to the existing Central Committee body. The 12th congress was divided into 68 delegations (63 delegations from provinces, 5 delegations from the army, public security, SOEs, central state agencies and the party organization for oversea activities)⁵⁷. This diffuse environment, called inner-party pluralism, nurtures competition and critical debates within the party.

Since the demise of paramount leader generation⁵⁸, party strategies and leadership can only be agreed based on broad consensus and alliances among diverse forces within the party structure. Although power balance within the party apparatus evolves over time, some tendencies can be observed:

- First, the provinces become the inevitable forces in shaping the party politics. From the generation of “fence breaker” to now, state power has been decentralized largely to provinces. Majority of party congress delegates is nominated from provincial party organizations. Provinces also dominate the National Assembly (NA) with 63 delegations. All party chiefs from provinces are also member of the Central Committee and most of them also act as leader of their provincial NA delegations respectively.
- Second, the Party Central Committee (CC) increasingly becomes a relevant decision-maker, if not the most relevant, within the party apparatus. As manifested in several cases at the eve to 12th party congress, the Central Committee may reverse Politburo’s decision or reject its recommendations⁵⁹. Albeit there are facts suggest that the current Politburo attempts to reinforce leadership on the Central Committee⁶⁰, but the outcome of this party-internal power struggle is hardly predictable. The power base at the Central Committee is extremely diffuse; its members represent diverse fractions representing the military, police, SOEs, top executive officials, forces rested with party agencies at the national level, and at the provincial level. Over the time, this diffuse power structure is firmly institutionalized within the party rules and apparatus.
- Thirst, at ultimate level, the Politburo operates as supreme collective leader of the country. The four positions General Secretary, Prime Minister, President of the State, and Chairman of National Assembly are separate and held by individuals with origins carefully balanced

⁵⁷ <http://tulieuvankien.dangcongsan.vn/ban-chap-hanh-trung-uong-dang/dai-hoi-dang/lan-thu-xii/dai-hoi-dai-bieu-toan-quoc-lan-thu-xii-cua-dang-cong-san-viet-nam-3>

⁵⁸ Notably with the death of General Secretary Le Duan in 1986.

⁵⁹ <https://www.eastasiaforum.org/2015/03/05/power-shifts-in-vietnams-political-system/>

⁶⁰ <https://www.eastasiaforum.org/2019/01/20/vietnams-politburo-clamps-down/>

to represent all parts of the country (North, Middle, and South Vietnam)⁶¹. Albeit the current General Secretary has assumed the office of President of the State since Oct 2018, and there are voices within the Party supporting the unifying these two posts under a stronger leadership⁶², it is uncertain that practice of power concentration will continue in the next legislature.

From grassroot perspective, the provinces with their growing power are certainly the most relevant stakeholder, influencing considerably politics of Vietnam party state⁶³. That makes the state power in Vietnam continuedly fragmented, as it always has been throughout the country's history. In retrospect, Vietnam central state was under permanent threat of splitting among local rulers and lords. After long period of civil wars between Trinh and Nguyen lords (from XV to XVII centuries), the Nguyen dynasty emerged in 1802, unifying conflicting Dai-Viet lords under the country present name. However, the central state under Nguyen dynasty was also quickly deteriorated, following by colonial policy divide and rule, and the wars.

From 1986 to present, the propensity of splitting and fragmentation continues at all level: number of sub-national, local units have been increased from 38 to 63 provinces, from 522 to 713 districts, and from 9,901 to 11,142 wards or communes⁶⁴. As result of the ongoing decentralization, particularly since 2006, government at these levels enjoy increasing budget autonomy, they are authorized to adopt regulation implementing the national law.

At central government level, from 1990s to now, the executive branch in Vietnam is undergoing the difficult shedding from the collective ministers committee, once modeled on the Soviet origin, comprising the chairman, 17 vice chairmen, and 44 ministers. Currently, albeit being much slimmer, Vietnam cabinet is still a collective with 28 voting members, leading by the Prime Minister, 5 deputy prime ministers and 22 ministers (6 Politburo members, and except the Minister of Health, all other ministers are members of Central Committee)⁶⁵.

<i>Years</i>	<i>Head of Government</i>	<i>Deputies</i>	<i>Ministers</i>
1976	Prime Minister	10	48
1981	Chairman of Ministers Committee	17	44
2016	Prime Minister	5	18

⁶¹ For legislation 2016-2021, General Secretary Nguyen Phu Trong (Northern), Prime Minister Nguyen Xuan Phuc (Middle), and Chairman of National Assembly Nguyen Thi Kim Ngan (Southern).

⁶² <http://en.nhandan.com.vn/politics/domestic/item/6753902-general-secretary-as-president-is-an-objective-requirement.html>

⁶³ Thaveeporn Vasavakul, *VIETNAM: A Pathway from State Socialism*, Cambridge University Press, 2019

⁶⁴ Vietnam Government Statistics Office: <https://www.gso.gov.vn/dmhc2015/>

⁶⁵ <http://chinhphu.vn/portal/page/portal/English/CentralGovernment/MembersOfGovernment>

A slimmer cabinet: Vietnam Government 1976-2016

If “party politics-đường lối của Đảng” is adopted mostly by the majority among 180 Central Committee members by the way of consensus, “government policy-chính sách của Nhà nước” frequently will be discussed and agreed by majority of 28 cabinet members⁶⁶. The Prime Minister is authorized by the Party to lead the Government, but the Party also set the boundary of his power. The Prime Minister, for example, can only discipline vice-ministers and ministers, after those individuals have been disciplined by Party CC Secretariat or by the Politburo. Or, he can only approve business strategies of state-owned groups (SOEs groups), after consulting all relevant stakeholders, most importantly the CC Secretariat.

Emerging from this political context, policy proposals and law drafts are frequently initiated by one specific ministry in charge. Each ministry tends to focus on, and prefer its own interests, hopefully to defend its regulatory power as much as possible⁶⁷. A ministry also supervises numerous SOEs and their related business associations. By the absence of transparency, lobbying and vested interests will influence decisively the policy formation process initiated by the ministries. Considered at this perspective, the central government in Vietnam is also fragmented, as being split into diverse regulating bodies. As result, there are lot of policies reflecting specific sector management, but few nationwide coordinated industrial policies⁶⁸.

The business sector is undisputable one driving force demanding for a state governed by law in Vietnam. There are diverse channels how the business sector can make voice and exercise its influence during policy formation process. SOEs, for instance, may influence the policy process through their supervised ministries or provincial governments. They also may articulate their concerns directly within the party apparatus. At central level, there is a central party organization representing SOEs⁶⁹. Similar party organization in charge for sub-national SOEs exists in almost every province. Although not having such direct party-internal channels, private business may be represented by VCCI (Vietnam Chamber of Industry and Commerce), by numerous business

⁶⁶ Sessions 2.1, 3.3 Decree 138/2016/ND-CP dated 01/10/2016 on Government operation proceedings.

⁶⁷ This phenomenon is frequently observed and criticized by Vietnam public, known as “cài cắm lợi ích”, i.e. hiding its own interest and benefit whilst drafting law and policy. See for instance comments of the Vice Chairman of the National Assembly Phung Quoc Hien at 27 Meeting of the NA Standing Committee in September 2018, <http://daibieunhandan.vn/default.aspx?tabid=69&ItemId=410666&GroupId=2475>

⁶⁸ The governance of land use is an example for the overlapping power and splitting of regulation among government ministries: for zoning and planning is Ministry of Planning & Investment, for granting land use right and land lease is Ministry of Natural Resource and Environment, for land evaluation is Ministry of Finance, for construction permit is Ministry of Construction, for registration of land use as collateral (mortgage) is Ministry of Justice. As result of specific sector oriented regulation, the legal regime governing land use in Vietnam is extremely complicated, uncertain, self-contradictory.

⁶⁹ Đảng ủy khối doanh nghiệp trung ương, <http://doanhnghieptrunguoc.vn/>

associations (hiệp hội doanh nghiệp) and private clubs of entrepreneurs (câu lạc bộ doanh nhân) mushroomed across the country. Likewise, foreign invested enterprises (FIEs) are represented by business associations of their origin, such as Amcham, Eurocham, Jetro, Korcham, by private business associations, informals clubs and the like⁷⁰.

Finally, Vietnam society has changed rapidly since 1986. Thank to affordable internet access, rapid technological development, and the country's aggressive integration politic toward the globalized world, the public in Vietnam becomes much more well informed, well connected, and demanding. A certain space for civil society has been emerged and is tolerated by the party state, particularly in the areas of policy dialogs, supervision of policy implementation, and to some extents as watchdogs against abuse of power and corruption⁷¹.

In considering these diverse stakeholders and forces, unleashed alongside the economic transition, the political power in Vietnam becomes diffuse and pluralistic, driven by competing interests and ideologies. The constitutional government, or a socialist state ruled by law, therefore, seems to be a necessity emerged from this social-political changing context, rather than a foreign concept borrowed into Vietnam under external pressures. It institutionalized the new rule of the game among existing political, economic and social forces within Vietnam party state.

III. Conclusion

Government efficiency is the primarily concern of the CPV. To rule, the party badly needs a functioning party-state apparatus. To this end, the party rediscovers the role of the law, and since 2001 embraces the government ruled by law, or called it constitutional government.

Certainly, Vietnam constitutional government is by far not the same concept rule of law as understood in liberal democracy. It is not primarily for protecting individual freedoms against abuse of power by the state. In Vietnam, building a government ruled by law is a means to translating party politics into transparent, reliable, easily accessible, general applicable normative rules and institutions. Party's politics still are the spirits, the souls of Vietnam socialist legal system.

The CPV is quite pragmatic and successfully in reinventing the Leninist state and Soviet legality for building the constitutional government. Albeit hybridity of party rules and formal state law continues, achievements in formal legal reform may push for more transparency, soundness and reasonability of party rules, such reinforcing the party's legitimacy to rule.

⁷⁰ For an overview, see <http://www.incham.vn/en/information/useful-links/foreign-business-groups-in-vietnam/>

⁷¹ <http://isee.org.vn/wp-content/uploads/2018/11/benchmark-assessment-of-civil-society-space-in-vietnam..pdf>

In socio-political perspective, Vietnam constitutional government emerged from the country context, rather than a concept adopted under international constitutionalism. It roots deeply in the country's traditional bureaucracy, it continues the socialist legality tradition under the changing environment. Provinces, business sector, the public, and competing forces within the party state make the power structure in Vietnam extremely diffuse. All these old and new stakeholders are driving forces toward to constitutional government as the rule of the game.